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Attorneys for Defendants Deutsche Bank National Trust Company, as Trustee for Indymac INDX Mortgage Loan Trust 2005-AR12, Mortgage Pass-Through Certificates, Series 2005-AR12, Under the Pooling and Servicing Agreement Dated as of June 1, 2005 and OneWest Bank, FSB

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA, SANTA ANA DIVISION

In re TRUDY KALUSH, Debtor.	Case No. 8:11-bk-19563-ES Chapter 11 Adv. No.: 08:12-ap-01206
TRUDY KALUSH, Plaintiff, vs. DEUTSCHE BANK NATIONAL TRUST COMPANY AS TRUSTEE OF THE INDYMAC INDX DEED OF TRUST LOAN TRUST 2005-AR12, DEED OF TRUST PASS-THROUGH CERTIFICATES, SERIES 2005-AR12, UNDER THE POOLING AND SERVICING AGREEMENT DATED JUNE 1, 2005; ONEWEST BANK, FSB; and DOES 1-100, Inclusive, Defendants.	**DEFENDANTS' NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, MOTION FOR PARTIAL SUMMARY ADJUDICATION** **[Proposed Statement of Uncontroverted Facts And Conclusions of Law; Declaration of Charles Boyle; Declaration of Ronaldo Reyes; Declaration of J. Alexandra Rhim; Request for Judicial Notice filed separately and concurrently]** Hearing Date: November 5, 2013 Time: 2:00 p.m. Place: Courtroom 5A 411 W. Fourth Street Santa Ana, CA

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TO THE COURT, ALL PARTIES, AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on November 5, 2013, at 2:00 p.m., or as soon thereafter as counsel may be heard on this matter, before the Honorable Erithe A. Smith in Courtroom 5A located at 411 W. Fourth Street, Santa Ana, California, 92701, Defendants Deutsche Bank National Trust Company as Trustee for the IndyMac INDX Mortgage Loan Trust 2005-AR12, Mortgage Pass-Through Certificates, Series 2005-AR12 ("Loan Trust"), under the Pooling and Servicing Agreement Dated June 1, 2005 ("DBNTC") through OneWest Bank, FSB in its capacity as servicer and attorney-in-fact ("OneWest") (collectively, "Defendants") will and hereby move this Court for an order granting summary judgment in their favor and an order dismissing all of the claims brought by plaintiff Trudy Kalush ("Plaintiff") in this Adversary Proceeding with prejudice, together with an order for costs and fees incurred by Defendants for their defense against Plaintiff's wrongful claims.

This Motion is made pursuant to Federal Rule of Bankruptcy Procedure 7056 on the grounds that the uncontroverted facts and supporting evidence conclusively establish that each and every claim for relief alleged against Defendants by Plaintiff fails as a matter of law for the following reasons:

- Plaintiff's First Claim for Relief for Declaratory Relief/Invalidate Lien (Fed. R. Bank. Proc. 7001) against DBNTC fails because the evidence demonstrates conclusively that DBNTC is the owner and holder of the January 20, 2005 loan (the "Subject Loan") on real property located at 16625 South Pacific Coast Highway, Sunset Beach, California 90742 (the "Subject Property") pursuant to a June 1, 2005 conveyance to DBNTC as Trustee of the IndyMac INDX Mortgage Loan Trust 2005-AR12, and therefore DBNTC has valid and sole ownership interest in the Subject Loan and the right to enforce the note and deed of trust. The evidence further conclusively shows that OneWest owns servicing rights to the Subject Loan and, therefore, has the right to enforce the note and deed of trust.
- Plaintiff's Second Claim for Relief for Cancellation of Deed of Trust Instruments [Penal Code § 470] against Defendants relies on a criminal statute that contains no

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private cause of action or relief and for which Defendants have never been charged. In addition, even under Penal Code § 470, Plaintiff cannot prove Defendants are guilty of forgery or that Plaintiff was harmed by Defendants' recording of an Assignment of the Deed of Trust.

- Plaintiff's Third Claim for Relief for Slander of Title against Defendants fails as a matter of law because Plaintiff has not tendered the outstanding debt or proven that any slander occurred.
- Plaintiff's Fourth Claim for Relief for Quasi Contract against DBNTC fails because an express contract exists between the parties, so a claim under a quasi-contract theory is inapplicable, and there is no evidence of unjust enrichment because DBNTC, as owner and holder of the Subject Loan, was entitled to collect mortgage payments or have OneWest, the servicer, collect mortgage payments on its behalf.
- Plaintiff's Fifth Claim for Relief for a violation of the Truth in Lending Act ("TILA") against DBNTC is time-barred and alleges a violation that is statutorily inapplicable to DBNTC.
- Plaintiff's Sixth Claim for Relief for Quiet Title against Defendants fails because she does not own the Subject Property free and clear and DBNTC, not Plaintiff, owns the Subject Loan and OneWest is DBNTC's servicer on the Subject Loan.
- Plaintiff's Seventh Claim for Relief for a violation of California Business and Professions Code § 17200 against Defendants is preempted by the Home Owners' Loan Act of 1933 ("HOLA"), relies on a TILA violation that statutorily could not have occurred and, in addition, Plaintiff cannot show that Defendants committed any unfair or fraudulent acts. DBNTC and OneWest are legally entitled to collect payments on the Subject Loan and have properly exercised their rights accordingly.

This Motion is made based upon this Notice of Motion, the attached Memorandum of Points and Authorities, the Proposed Statement of Uncontroverted Facts and Conclusions of Law, the Declaration of Charles Boyle (with Exhibits), the Declaration of J. Alexandra Rhim, and the

Affidavit of Ronaldo Reyes (with Exhibits), filed concurrently herewith, and on such other oral or written evidence as the Court elects to consider prior to, or at, the hearing on this matter.

Dated: September 24, 2013

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By: */s/ J. Alexandra Rhim*
J. Alexandra Rhim
Walead Esmail
ATTORNEYS FOR ONEWEST BANK, FSB AS SERVICER AND ATTORNEY IN FACT FOR DEUTSCHE BANK NATIONAL TRUST COMPANY AS TRUSTEE FOR INDYMAC INDX MORTGAGE LOAN TRUST 2005-AR12, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2005-AR12, UNDER THE POOLING AND SERVICING AGREEMENT DATED AS OF JUNE 1, 2005

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This action stems from Trudy Kalush's ("Plaintiff") improper efforts to delay foreclosure following a default under a mortgage loan (the "Subject Loan") secured by real property located at 16625 South Pacific Coast Highway, Sunset Beach, California 90742 (the "Subject Property").

Plaintiff's first step was commence a chapter 11 case on July 7, 2011 to prevent foreclosure by Deutsche Bank National Trust Company as Trustee of the IndyMac INDX Mortgage Loan Trust 2005-AR12 (the "Loan Trust"), under the Pooling and Servicing Agreement Dated June 1, 2005 ("DBNTC")[1] and OneWest Bank, FSB ("OneWest"), the servicer on the loan (collectively, "Defendants").

On August 2, 2011, Defendants filed Proof of Claim No. 6-1 in the bankruptcy case, asserting a secured claim in the amount of not less than $1,944,856.06 (the "Claim"). Lacking the financial ability to satisfy the Claim, Plaintiff then objected to the Claim and commenced this meritless Adversary Proceeding, alleging seven causes of action based on Plaintiff's primary albeit erroneous assertion that Defendants do not possess an interest in the Subject Loan and, therefore, their lien rights are invalid.

Plaintiff asserts a number of incomprehensible and invalid arguments to dispute the Claim. The uncontroverted evidence shows simply and conclusively that DBNTC is the sole owner and holder of the Subject Loan and that OneWest owns sole servicing rights to the Subject Loan. Pursuant to an assignment from the originator Commercial Capital Bank, FSB to IndyMac Bank, F.S.B., and a subsequent conveyance from an IndyMac Bank, F.S.B. Depositor to DBNTC as Trustee of the Loan Trust, DBNTC is the owner and holder of the Subject Loan and, therefore, properly commenced foreclosure proceedings through OneWest, its agent and the servicer on the Subject Loan.

Tellingly, Plaintiff has not offered any legitimate evidence disputing DBNTC's ownership of the Subject Loan or its status as note holder, or, indeed, any evidence that another entity is the rightful owner of the Subject Loan. The instant litigation is simply a tactic to extract concessions

[1] All references to DBNTC made in this motion shall be to its sole capacity as trustee under the Loan Trust.

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and delay foreclosure. Plaintiff's meritless claims, however, do not negate the simple fact that Plaintiff defaulted on her mortgage payments and, in fact, not made a single mortgage payment in over two years and yet continues to enjoy living and collecting rent on the Subject Property, which is a multi-unit apartment building. Recognizing her untenable situation, the Debtor opted to treat the Subject Loan as "unimpaired" under her confirmed chapter 11 plan subject to this action. Because she is unable to cure the arrears owed, she acquiesced and the Defendants were granted relief from the automatic stay to exercise rights and remedies against the Subject Property. The Defendants are proceeding with the exercise of their rights and remedies as soon as possible.

Plaintiff asserts a number of additional baseless claims, including a claim for violation of TILA, 15 U.S.C. § 1641(g), slander of title and quasi contract. Each of these other claims are also facially invalid and fail as a matter of law.

In short, the uncontroverted evidence and the law confirm Defendants' interests in the Subject Loan, and, therefore, Defendants' Claim should be fully allowed over Plaintiff's meritless objections. Accordingly, Defendants are entitled to summary judgment on all of Plaintiff's claims. In fact, most if not all of Plaintiff's claims will be rendered moot because DBNTC expects to foreclose on the Subject Property pursuant to this Court's order granting relief from stay.

II. STATEMENT OF FACTS

On January 20, 2005, Plaintiff executed a note ("Note") in the original principal amount of $1,725,500.00, made payable to Commercial Capital Bank, FSB ("Commercial"). Affidavit of Ronaldo Reyes ("Reyes Affidavit"), ¶ 4, Ex. C; Adversary Complaint ("Adv. Compl."), ¶ 21. To secure the obligations due under the Note, on January 20, 2005, Plaintiff executed a deed of trust ("Deed of Trust") encumbering the Subject Property. Adv. Compl. ¶ 22; Declaration of Robert P. Goe Regarding Joint Pre-Trial Order and Continuance of Pre-Trial Conference (the "Goe Decl."), Ex. 1,[2] § A.2; Reyes Affidavit, ¶ 5, Ex. D.

On March 16, 2005, Commercial executed an Endorsement to Promissory Note, assigning all right, title, and interest to the Note and Deed of Trust to IndyMac Bank, F.S.B. ("IMB"). Reyes

[2] Ex. 1 to the Goe Declaration consists of Plaintiff's proposed joint pre-trial order, which was not filed in advance of the February 21, 2013 pretrial hearing despite the requirements of the Local Bankruptcy Rules.

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Affidavit, ¶ 3, Ex. C. The Endorsement to Promissory Note specifically states that it "is attached to that certain Promissory Note in the face amount of $1,725,500.00 dated January 20, 2005, made by Trudy A. Kalush, A Single Woman, payable to the order of Commercial Capital Bank, FSB, a federally chartered savings bank," references the loan number, is dated, and was physically stapled to the Note. Boyle Decl., ¶ 7.

On the same attached Endorsement to Promissory Note, IMB executed an endorsement payable in blank and, on June 1, 2005, entered into a Pooling and Servicing Agreement ("PSA"). Reyes Affidavit, ¶¶ 2 and 5, Ex. A and C. Through the terms of the PSA, IMB sold its ownership rights, but not its servicing rights, to the Subject Loan to IndyMac MBS, Inc., as Depositor ("IMMBS"). *Id.* By the terms of the PSA, IMMBS' ownership rights to the Subject Loan were expressly conveyed to DBNTC as Trustee of the Loan Trust. *Id.*

Pursuant to the PSA, DBNTC received the original Note endorsed in blank and the original Deed of Trust. Reyes Affidavit, ¶¶ 3 and 4. As owner and holder of the Subject Loan, DBNTC maintains the original Note and Deed of Trust in its custody file. *Id.*, ¶¶ 6-13.

When IMB transferred its ownership interest in the Subject Loan to DBNTC, it retained servicing rights to the Subject Loan as "Master Servicer" of the conveyed loans and continued servicing the Subject Loan on behalf of the Trustee, DBNTC. Reyes Affidavit, Ex. A (PSA), Section 3.01 ("[t]he Master Servicer shall service and administer the Mortgage Loans…"). On July 11, 2008, the Office of Thrift Supervision closed IMB and appointed the Federal Deposit Insurance Corporation ("FDIC") as receiver. Goe Decl., Ex. 1, §§ A.2 and A.6; *see also* Adv. Compl. ¶ 10. The FDIC transferred the assets of IMB, including its servicing rights to various loans, to IndyMac Federal Bank, F.S.B. ("IMFB"). Adv. Compl. ¶ 12; Goe Decl., Ex. 1, § A.4.

On March 19, 2009, pursuant to the Servicing Business Asset Purchase Agreement By And Between The FDIC As Receiver For IndyMac Federal Bank, FSB And OneWest Bank, FSB (the "SBAPA"), OneWest acquired the servicing rights to several IMFB loans, including the Subject Loan.[3] Adv. Compl. ¶ 15; Goe Decl., Ex. 1, § A.9. Since March 19, 2009, OneWest has been the

[3] The SBAPA is appended as Exhibit 1 to the Request for Judicial Notice filed separately and concurrently herewith.

servicer on the Subject Loan on behalf of the owner of the Subject Loan, DBNTC. Reyes Decl., ¶ 3; *see also* Adv. Compl. ¶ 26.

On July 1, 2010, the FDIC as receiver for IndyMac Federal Bank, FSB executed a Limited Power of Attorney ("LPOA") designating certain individuals as having authority to execute certain documents as necessary pertaining to the transfer of assets pursuant to the Servicing Business Asset Purchase Agreement. The LPOA was recorded on July 29, 2010. Boyle Decl., ¶ 6, Ex. A.

By July 1, 2010, Plaintiff defaulted on the Subject Loan. Boyle Decl., ¶ 8. Plaintiff has not made any payment on the Subject Loan since her default. Kalush Deposition, 8/3/12, [57:11-58:20]; Boyle Decl., ¶ 8. OneWest, as servicer, caused to be recorded a Notice of Default and Election to Sell Under Deed of Trust on February 11, 2011, reflecting arrears of $112,701.69. Boyle Decl., ¶ 8. Although it was unnecessary because the transfer of the Note from IMMBS to DBNTC as a matter of law also conveyed the underlying Deed of Trust, on March 29, 2011, OneWest as servicer executed the Assignment of DOT from the FDIC to DBNTC and recorded it for recordkeeping purposes. [OWB], Decl., ¶ 8. On May 18, 2011, OneWest, as servicer cuased to be recorded a Notice of Trustee's Sale for a scheduled trustee's sale on June 7, 2011. Boyle Decl., ¶ 8.

III. PROCEDURAL POSTURE

On July 7, 2011, Plaintiff commenced the instant Chapter 11 case to enjoin the foreclosure sale. On August 2, 2011, DBNTC filed the Claim (Claim No. 6-1) in the amount of $1,944,856.06, which includes an arrearage amount of $207,431.80.

On November 23, 2011, Plaintiff filed an objection to the Claim. On April 26, 2012, Plaintiff commenced the instant Adversary Proceeding by filing a complaint seeking: (1) Declaratory Relief under FRBP 7001, 28 U.S.C. § 2201 and (2) Cancelation of Deed of Trust Instruments (Penal Code 470), and alleging (3) Slander of Title, (4) Quasi Contract, (5) Truth In Lending Act, 15 U.S.C. § 1641(g) violation, (6) Quiet Title, and (7) as Unfair Business Practices violation. Defendants filed their Answer on June 1, 2012. The Claim objection was consolidated into the Adversary Proceeding.

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On June 29, 2012, Plaintiff propounded discovery on DBNTC, requesting interrogatories, admissions, and production of documents. DBNTC, through OneWest, acting as attorney-in-fact to DBNTC, responded to Plaintiff's requests and produced documents by August 3, 2012. Soon thereafter, Plaintiff conducted depositions of Defendants' representatives and Defendants also supplemented their document production. On February 14, 2013, the Court held a hearing on Plaintiff's motion to compel discovery, which was denied in part and granted in part.[4] On February 27, 2013, Plaintiff together with one of her consultants conducted a physical inspection of the original loan file relating to the Subject Loan. See Declaration of J. Alexandra Rhim, at ¶ 3, filed separately and concurrently herewith.

On March 29, 2013, this Court held hearings to consider Plaintiff's chapter 11 plan, Defendants' motion for relief from the automatic stay and other related proceedings. At the hearing, Plaintiff made the election to treat Defendants as "unimpaired" under the plan and, on that basis, was able to confirm the plan. Defendants rights under the loan documents remain intact. Because Plaintiff was unable to cure arrears owed under the Subject Loan, on April 12, 2013, this Court entered an order granting relief from the automatic stay in favor of Defendants. [Docket No. 372.] DBNTC intends to exercise its rights and remedies in the near future with respect to the Subject Loan.

IV. ARGUMENT

A. The Standard for Summary Judgment.

Summary judgment is appropriate when the moving party demonstrates that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Thus, when addressing a motion for summary judgment, the Court must decide whether there exists "any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 447 U.S. 242, 250 (1986). Once Defendants meet their initial burden of demonstrating the absence of a genuine issue of material fact as to a claim or issue, Plaintiff bears

[4] Defendants have produced additional documents pursuant to the Court's rulings made in connection with Plaintiff's motion to compel further discovery. Plaintiff did not lodge an order following the hearing.

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the burden of establishing – through competent evidence – that there is a genuine issue of material fact for trial. *See* Fed. R. Civ. P. 56(e). Where there is no evidence demonstrating the existence of a genuine issue of material fact, the moving party may prevail simply by "pointing out to the district court . . . that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

The undisputed facts demonstrate that DBNTC is the owner and holder of the Subject Loan and that OneWest is the servicer on the Subject Loan. The undisputed evidence also shows that Plaintiff defaulted on the Subject Loan in July 2010, which default remains uncured. Accordingly, as this Court recently granted relief from the automatic stay, Defendants are authorized to proceed with foreclosure proceedings. Therefore, as a matter of law, Defendants' Claim should be allowed and the Adversary Proceeding should be dismissed in its entirety.

B. The Uncontroverted Evidence Shows That DBNTC Is Both Owner And Holder Of The Note, That OneWest Is The Servicer, And That Both Defendants Are Entitled to Enforce The Note.

Plaintiff requests that the Court, pursuant to Fed. R. Bankr. P. 7001, determine the extent, validity and priority of the Defendants' interests in the Subject Loan. Plaintiff challenges DBNTC's ownership of the Subject Loan based on conjectural theories, having no basis in law or fact. Rather, the evidence and applicable law conclusively show that: (a) DBNTC is the lawful owner and holder of the Note, and therefore entitled to enforce it; (b) OneWest owns servicing rights to the Note and is entitled to enforce it; and that (c) Plaintiff is only the mortgagor on the Subject Loan and owes nearly two million dollars on the Note and admittedly remains in default since July 1, 2010.

Article 3 of the California Commercial Code ("CCC") at § 3301 provides, in pertinent part, that a note may be enforced by:

(1) **a holder of the instrument** (CCC §§ 3301, 1201(b)(21)); or

(2) **a person who is in possession of the instrument who has the rights of a holder by subrogation or transfer** (CCC §§ 3301, 3302(a)).

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CCC § 3301 goes as far as to provide that: "a person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument."

In re Zulueta, 2011 WL 4485621, *4 (BAP 9th Cir. Aug. 23, 2011) (emphasis added). To qualify as a "holder," a party "must be in possession of the instrument that is either properly endorsed or payable to the person in possession of it." *Id.*; CCC § 1201(b)(21), (b)(5). To qualify as a "person who is in possession of the instrument who has the rights of a holder by subrogation or transfer," a party needs to show that it has the note in its possession on behalf of the "holder." *In re Zulueta*, 2011 WL 4485621, at *5. Both the "holder" of a note and a "person who is in possession of the [note] who has the rights of a holder by subrogation or transfer" are entitled to enforce the note. *Id.*, at *4; CCC § 3301.

In asserting the various inconsistent and incomprehensible claims for relief, Plaintiff ignores CCC § 3301. Defendants are lawfully entitled to enforce the Note and Deed of Trust based on the following: (1) DBNTC is the holder of and in possession of the Note; (2) DBNTC is also the unassailable owner of the Note pursuant to the PSA (and related agreements) which Plaintiff lacks standing to challenge, as a matter of law; and (3) OneWest is the servicer with respect to the Subject Loan pursuant to the PSA (and related agreements) which Plaintiff lacks standing to challenge. Each of these bases is discussed below.

1. <u>DBNTC Is The Holder And Possesses The Note And Therefore Entitled To Enforce It Under CCC § 3301.</u>

DBNTC became the owner and holder of the Note, that originated with Commercial on January 20, 2005, through two separate transfers. Reyes Affidavit, ¶ 4; Adv. Compl., ¶ 21. The first transfer took place on March 16, 2005, two months after the Note was originated, when Commercial executed an allonge, titled an "Endorsement to Promissory Note," assigning its entire interest in the Subject Loan to IMB. Reyes Affidavit, ¶ 4, Ex. C. The second transfer took place a few months later on June 1, 2005 through the PSA. Reyes Affidavit, ¶ 2, Ex. A. IMB executed an endorsement payable in blank on the Endorsement to Promissory Note and entered into the PSA to sell its ownership rights to the Subject Loan to IMMBS. *Id.* The PSA also expressly conveyed

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IMMBS' ownership rights to the Subject Loan to DBNTC as Trustee of the Loan Trust. *Id.* Accordingly, IMB/IMMBS transferred their ownership interest in the Note to DBNTC by June 1, 2005, making DBNTC the owner of Plaintiff's Subject Loan. IMMBS then physically transferred Plaintiff's original Note on April 5, 2005 to DBNTC, also making DBNTC the physical holder of the Subject Loan. *Id.*, ¶ 4. Despite the indisputable validity of both transfers, as discussed in greater detail below, Plaintiff challenges both transactions on a number of frivolous grounds.

a. <u>The first transfer of the Note from Commercial to IMB was valid</u>.

On March 16, 2005, two months after the Note was originated, Commercial executed an allonge, titled an "Endorsement to Promissory Note," assigning its entire interest in the Subject Loan to IMB. Reyes Affidavit, ¶ 4, Ex. C. Plaintiff's Opposition to OneWest's Motion for Relief from Stay in the Chapter 11 proceeding[5] challenges the validity of the allonge for being "unrecorded" and for having an endorsement on a separate sheet of paper rather than on the third page of the Note, "where room exists." *See* Opposition, p.11.

First, "there is nothing in the UCC or the California Commercial Code requiring that an allonge be dated or recorded with the country recorder." *In re Tovar*, 2012 WL 3205252, *6 (BAP 9th Cir. Aug. 3, 2012). Nor is it relevant whether there is space on a promissory note for additional endorsements. *Id.*; *see also, In re Zulueta*, 2011 WL 4485621, at *6. To be valid, an allonge need only (a) sufficiently identify the note, including referencing the loan number; (b) contain language showing that it "Without Recourse, Pay[s] to the Order of" a payee or in blank; and (c) is affixed or attached to the note. *Id.*

Here, the allonge, titled the "Endorsement to Promissory Note," is dated, signed, and specifically identifies the Note, stating that it "is attached to that certain Promissory Note in the face amount of $1,725,500.00 dated January 20, 2005, made by Trudy A. Kalush, A Single Woman, payable to the order of Commercial Capital Bank, FSB, a federally chartered savings bank." Reyes Affidavit, ¶ 4, Ex. C. In addition, the Endorsement to Promissory Note also specifically references the loan number in the upper left corner, and contains the language "Pay to the Order of IndyMac Bank, F.S.B. ('Assignee') Without Recourse…" *Id.*

[5] Docket No. 310.

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Further, Plaintiff conjectures that the Endorsement to Promissory Note is not physically attached to the Note. Plaintiff, however, has inspected the original loan file and must necessarily have determined that the *original* Note and Endorsement to Promissory Note are clearly affixed and stapled together. Indeed, even an examination of the *copies* already in Plaintiff's possession reveal corresponding staple holes in the upper left of the documents, obscuring the word "installment" in the line that begins with "First Installment Adjustment Date…" on the second page of the Note, the word "immediately" in the line that begins with "immediately due and payable…" on the third page of the Note, and the "Loan No. 0910718-6" on the Endorsement to Promissory Note. *See id.*

It is therefore undisputable that the Endorsement to Promissory Note satisfies every requirement to be a valid allonge and to have properly conveyed a note endorsed in blank. *See In re Tovar*, 2012 WL 3205252, at *6; *In re Zulueta*, 2011 WL 4485621, at *6. Plaintiff has not offered any legitimate contrary evidence, and, indeed, has engaged in mere speculation and conjecture instead in an attempt to prejudice Defendants.

b. <u>The second transfer of the Note from IMB/IMMBS to DBNTC was valid</u>.

The second transfer of the Note, from IMB/IMMBS to DBNTC, took place on June 1, 2005 through the PSA. Reyes Affidavit, ¶ 2, Ex. A. IMB executed an endorsement payable in blank on the Endorsement to Promissory Note and entered into the PSA to sell its ownership rights to the Subject Loan to IMMBS. *Id.* The PSA also expressly conveyed IMMBS' ownership rights to the Subject Loan to DBNTC as Trustee of the IndyMac INDX Mortgage Loan Trust 2005-AR12. *Id.* Accordingly, IMMBS transferred the original Note on April 5, 2005 to DBNTC. *Id.*, ¶ 4. As discussed below, Plaintiff's attempts to attack the validity of the transfer or rights pursuant to the PSA must be disregarded as she lacks standing to do so.

Although a formal assignment of the Deed of Trust was not executed at the same time as the transfer of the Note, it is black letter law, codified in the UCC, that the deed of trust, or "mortgage," follows the note. Uniform Commercial Code § 9-203 cmt. 9; CCC § 2936; *Carpenter v. Longan*, 83 US 271, 274 (1872) ("The note and mortgage are inseparable; the former as essential, the latter as an incident. An assignment of the note carries the mortgage with it, while an assignment of the latter alone is a nullity."). Indeed, "this has long been the law throughout the United States: when a note secured by a mortgage is transferred, transfer of the note carries with it the security, without any formal assignment or delivery, or even mention of the latter." *In re Vargas*, 396 B.R. 511, 516-17 (Bankr. C.D. Cal. 2008) (internal quotations and citations omitted).

Accordingly, the executed Endorsement to Promissory Note, as a separate allonge to the Note, assigned the entire Subject Loan from Commercial to IMB, and the PSA assigned the entire Subject Loan from IMB/IMMBS to DBNTC. While the formal Assignment of Deed of Trust from IMB/IMMBS to DBNTC was not executed until 2011 and the delivery of the Deed of Trust was not made until 2012, these were merely recordkeeping steps OneWest took that had no legal effect on Plaintiff's Subject Loan. As a matter of law, Plaintiff's endorsed-in-blank Note was transferred to DBNTC in 2005, and with it the underlying Deed of Trust security also transferred. *Vargas*, 396 B.R. at 516-17.

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c. <u>DBNTC is in physical possession of the original Note and entitled to enforce it as the holder</u>.

In addition to DBNTC's rights described above, DBNTC has in its possession the *original* Deed of Trust and Note, endorsed in blank, making it the holder of both. Reyes Affidavit, ¶ 6-13. Since receiving the original Note in 2005 and the Deed of Trust in 2012, DBNTC has maintained its ownership of the Subject Loan and has not assigned its interest to any other entity. Reyes Affidavit, ¶ 6-13. "A party in physical possession of an endorsed-in-blank note qualifies as a holder of a note under CCC § 1201(b)" and is thereby entitled to enforce it. *In re Zulueta*, 2011 WL 4485621, at *6. Indeed, even if the party is in "*wrongful possession*" of the note, it is *still* entitled to enforce it. CCC § 3301 (emphasis added); *see also In re Gallagher*, 2012 WL 2900477, *3 (Bankr. C.D. Cal. July 12, 2012).

Defendants have made the original loan file available for inspection to enable Plaintiff to confirm that DBNTC maintains possession and ownership. Plaintiff has conducted such inspection and, thus, her initial concerns should be alleviated since DBNTC has physical possession of the Note endorsed in blank, is the holder of the Note under the CCC, and is legally entitled to enforce it. *See In re Zulueta*, 2011 WL 4485621, at *6.

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In sum, the evidence confirms that the chain of transfers from Commercial to IMB/IMMBS to DBNTC are valid beyond a genuine dispute and that DBNTC is the current owner and holder of the Subject Loan. Notably, no other lender has claimed rights to the Subject Loan, nor has Plaintiff provided any evidence to show that another lender has rights to the Subject Loan. Indeed, Plaintiff can point to no evidence contradicting the incontrovertible evidence that shows that DBNTC is the owner and holder of her Subject Loan. Accordingly, DBNTC is entitled to summary judgment on Plaintiff's first claim for declaratory relief with a determination that DBNTC is the owner and holder of the Subject Loan.

2. <u>DBNTC Is Also The Owner Of The Note And Entitled To Enforce It</u>.

As discussed in detail above, DBNTC is not only the holder and in possession of the Note, but the legal owner of the Note pursuant to the PSA and related agreements. Although not entirely clear, Plaintiff appears to dispute DBNTC's status as owner by arguing that the Subject Loan was not included in the Loan Trust and that the transfer was invalid due to non-compliance with the PSA and other applicable laws. These assertions relating to the PSA are not only specious but wholly irrelevant because Plaintiff is not a party to the PSA that governs the securitization of the Subject Loan. Nor can Plaintiff even allege that she holds any interest in the securitization.

In other similar cases, courts have universally held that a "Plaintiff has no standing to challenge the validity of the securitization of the loan as he is not an investor of the loan trust." *Bascos v. Fed. Home Loan Mortg. Corp.*, 2011 WL 3157063, at *6 (C.D. Cal. July 22, 2011); *see also Shkolnikov v. JPMorgan Chase Bank, 2012* WL 6553988 (N.D. Cal. 2012) (holding that the majority position in California is that plaintiffs lack standing to challenge noncompliance with a PSA in securitization unless they are parties to the PSA or third party beneficiaries of the PSA.); *see Anderson v. Countrywide Home Loans*, Civ. No. 10-2685 (MJD/JJG), 2011 WL 1627945, at *4 (D. Minn. Apr. 8, 2011); *Wittenberg v. First Indep. Mortg. Co*., No. 3:10-CV-58, 2011 WL 1357483, at *21-22 (N.D. W. Va. Apr. 11, 2011) (rejecting theory that assignment after closing date was invalid because borrowers, as non-parties, lacked standing to enforce PSA, nor could borrowers be intended third-party beneficiaries); *Ware v. Deutsche Bank Nat'l Trust Co.*, --- So.3d ----, 2011 WL 2420031, at *5-7 (Ala. June 17, 2011) (rejecting theory that assignment after closing date was invalid because

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borrower would not have standing to challenge PSA compliance); *In re Macklin*, 2011 WL 2015520, *7 (Bkrtcy. E.D. Cal. May 19, 2011) ("[Borrower] also misses the mark in this argument since he is attempting to assert compliance with contractual provisions for which he has no right or interest. He has not asserted that he is a party to the Master Sale and Servicing Agreement or a third-party beneficiary of that Agreement. He does not assert any basis for claiming rights under those agreements to which he is not a party."). Thus, it is now well established that Plaintiff cannot challenge the DBNTC's lien based on any alleged deficiency in the securitization process.

CCC § 3301 further expressly recognizes that a party who is the holder or in possession of an instrument (having the rights of a holder) can enforce such instrument regardless of whether the party is an owner. Hence, even if Plaintiff were correct that DBNTC is not the lawful owner, which it is, it nonetheless has enforcement rights as a note holder and party in possession pursuant to CCC § 3301. The Court, however, need not reach this issue when Plaintiff is entirely precluded from challenging DBNTC's owner status based on the PSA. For these additional reasons, her Complaint fails as a matter of law.

3. <u>OneWest Is The Servicer On The Note And Entitled To Enforce It On Behalf Of Holder DBNTC</u>.

OneWest's interest in the Subject Loan as the servicer is likewise undisputable and defeats Plaintiff's allegations that OneWest has no interest in or right to enforce the Subject Loan.

The PSA reflects that when IMB sold its ownership to the Subject Loan, IMB retained servicing rights as "Master Servicer" with the right to "service and administer the Mortgage Loans…" Reyes Affidavit, ¶ 2, Ex. A, Section 3.01. Accordingly, on July 11, 2008, when the Office of Thrift Supervision closed IMB and appointed the FDIC as receiver, IMB held servicing rights to the Subject Loan as an asset. After closing IMB, the FDIC transferred all of IMB's assets to IMFB. As discussed above, Plaintiff lacks the right to challenge the PSA that preserved such servicing rights.

On March 19, 2009, pursuant to the SBAPA, OneWest acquired the servicing rights to the Subject Loan from IMFB. Goe Decl., Ex. 1, § A.9; Adv. Compl. ¶ 15. Since March 19, 2009,

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OneWest has continued to act as servicer on the Subject Loan on behalf of DBNTC, the owner of the Subject Loan. Goe Decl., Ex. 1, § A.9; *see also* Adv. Compl. ¶ 26; Boyle Decl., ¶ 3.

The affidavit from DBNTC further confirms beyond dispute OneWest's role as the current servicer on the Subject Loan. Reyes Affidavit, ¶ 8; *see In re Zulueta*, 2011 WL 4485621, at *5. In addition, as Plaintiff is aware, OneWest through its counsel had, at times, physical possession of the original Note and Deed of Trust on behalf of DBNTC, the holder. Reyes Affidavit, ¶ 6-13; Rhim Decl., ¶ 3. OneWest, therefore, qualifies as a "person who is in possession of the instrument who has the rights of a holder by subrogation or transfer," and is therefore entitled to enforce the Note on behalf of DBNTC. *See In re Zulueta*, 2011 WL 4485621, at *5.

In sum, Plaintiff's Complaint rests almost entirely on vague allegations that Defendants do not have any rights pertaining to the Subject Loan. The evidence clearly confirms, however, DBNTC's and OneWest's rights in the Subject Loan, their standing to file and assert the Claim, and their rights to enforce the Note under California law. As explained in further detail below, Plaintiff cannot satisfy her burden on any of her claims based on other purported theories, and Defendants are therefore entitled to summary judgment.

C. **Plaintiff Is Not Entitled to Cancel the Assignment of DOT Pursuant to the Penal Code.**

In her Second Claim for Relief, Plaintiff seeks a cancellation of the Assignment of DOT based on the Penal Code. This claim for relief is not only far-fetched but rests entirely on Plaintiff's misunderstanding that the Assignment of DOT is an operative document that assigns the Plaintiff's Deed of Trust from the FDIC to DBNTC.

It is important to note that Plaintiff's focus on the Assignment of DOT is entirely misplaced as it was executed for recordkeeping purposes. Instead, the undisputed facts, detailed above, show that DBNTC became the sole owner of the Note and Deed of Trust through the PSA, which transferred IMB/IMMBS' ownership interest in the Subject Loan to DBNTC. On April 5, 2005, DBNTC became the holder of the Note and since June 1, 2005, DBNTC has been the sole owner of the Subject Loan. Reyes Affidavit, ¶¶ 3-4, 6. The transfer of the Note, as a matter of black letter law, is a transfer of the entire Subject Loan, necessarily including transfer of the Deed of Trust. *See*

Carpenter, 83 U.S. at 274; *In re Vargas,* 396 B.R. at 516-17; UCC § 9-203 cmt. 9; CCC § 2936. Therefore, the transactions preceding execution of the Assignment of DOT legally effectuated a transfer of rights.

Therefore, the Assignment of DOT from the FDIC to DBNTC did not have legal effect but was completed for recordkeeping purposes to formally record the transfer the Deed of Trust, which was in the FDIC's possession after IMB closed, to DBNTC. The entire Subject Loan, however, including the Deed of Trust, had already been transferred to DBNTC in 2005 through the transfer of the Note, and so the Assignment of DOT had no legal effect that could have, in any way, affected Plaintiff or altered the rights of any parties. Accordingly, the Assignment of DOT could not have caused Plaintiff any harm.

Plaintiff also mistakenly argues that the Assignment of DOT is infirm because it was executed by (Roger Stotts) a OneWest representative in his capacity as "Attorney in Fact for the FDIC" pursuant to an expired Limited Power of Attorney. This contention is incorrect as Mr. Stotts was duly authorized to execute the Assignment of DOT. See Boyle Decl., ¶ 6; Ex. A (LPOA). Defendants have provided to Plaintiff in the course of discovery the applicable recorded LPOA, which she chooses to ignore.[6] Rhim Decl,. ¶ 3. But as explained above, whether Mr. Stotts had due authority to execute the Assignment of DOT is entirely irrelevant as a matter of law.

Plaintiff erroneously asserts that Defendants violated California Penal Code § 470, which makes forgery a crime, as a basis to cancel the Assignment of DOT. Adv. Compl., ¶¶ 61-68. Penal Code § 470, however, is a criminal statute having no bearing in this case. No criminal charges have ever been brought against Defendants relating to the Assignment of DOT. Further, Penal Code § 470 offers no private cause of action on which Plaintiff could base her claim for cancellation. Even if such a private cause of action existed, Plaintiff is unable to show that Defendants violated that provision. Penal Code § 470(c) specifically requires the falsifying of a record "with intent to defraud." Plaintiff's Complaint, however, *does not even allege fraud*. Plaintiff cannot point to any evidence of fraud or that Defendants had an "intent to defraud." In fact, by recording the Assignment of DOT, Defendants could not have "defrauded" Plaintiff in any way, or had an intent

[6] See Rhim Decl., ¶ 3.

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to defraud Plaintiff, because the Assignment of DOT only formalized a transfer that had taken place as a matter of law years earlier. Therefore, it was *factually true* that DBNTC was the owner of the Deed of Trust at the time of the recording and the Assignment of DOT was validly executed.

Even if Plaintiff could obtain cancellation of the Assignment of DOT, it would provide her no relief. DBNTC is the owner of the Subject Loan by virtue of the PSA, which transferred the Note to DBNTC – not through the Assignment of DOT. *See In re Vargas*, 396 B.R. at 516-17. Again, Plaintiff has no ability to challenge the PSA. Hence, a cancellation of the Assignment of DOT would, therefore, have no effect on the rights of the parties, and would therefore offer Plaintiff no relief.

For several reasons, Plaintiff's claim is baseless in law and in fact. Plaintiff cannot make out a civil claim under this criminal statute, and the facts do not support a finding of either intent to defraud or of any actual fraud. Defendants are therefore entitled to summary judgment on Plaintiff's Second Claim for Relief.

D. <u>Plaintiff Cannot Establish A Claim For Slander of Title Because There Is No Falsity Or Direct Injury To Plaintiff</u>.

Plaintiff's third claim for relief is for slander of title, which is also mistakenly based on the Assignment of DOT. "To establish a claim for slander of title, a plaintiff must establish: (1) publication, (2) absence of justification, (3) falsity, and (4) direct pecuniary loss." *In re Cedano*, 470 B.R. 522, 522 (B.A.P. 9th Cir. 2012). The "falsity" must be *malicious* and must *lead to damage*. *Southcott v. Pioneer Title Co.*, 203 Cal. App. 2d 673, 676 (1962); *see also Ryan v. Editions Ltd. W., Inc.*, 417 F. App'x 699, 701 (9th Cir. 2011) (granting summary judgment where plaintiff failed to provide evidence showing she incurred attorneys' fees to clear her title or suffered any other pecuniary loss resulting directly from the alleged slander). "Malice" requires an "intent to defame." *Cyr v. McGovran*, 206 Cal. App. 4th 645, 651 (2012).

There is no evidence that Defendants recorded the Assignment of DOT maliciously with the intent to defame Plaintiff, that Plaintiff has suffered any injury, or that the publication was false. Indeed, the recordation of the Assignment of the DOT was only a recordkeeping step that published

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the true *fact* that DBNTC is the current owner of the Subject Loan. The recordation was not only not malicious – it was not even false.

As shown above, DBNTC has been the sole owner of the Subject Loan since June 1, 2005. The recording of the Assignment of the DOT did not alter any of the parties' rights and could not have caused Plaintiff any harm because the Deed of Trust was transferred to DBNTC in 2005 pursuant to the PSA. *See In re Vargas*, 396 B.R. at 516-17. Plaintiff claims she was injured in the form of "attorneys' fees and costs incurred in cancelling the instrument." Adv. Compl., ¶ 75. Plaintiff's attempt to characterize the Assignment of DOT as a document having legal import and causing damages is disingenuous at best. In fact, Plaintiff defaulted on the Subject Loan *nine months* before the Assignment of the DOT was recorded. Boyle Decl., ¶8 (evidencing that Plaintiff defaulted on the Subject Loan on July 1, 2010, considerably before the April 5, 2011 recording of the Assignment of DOT).

In short, the recording of the Assignment of DOT did not and could have caused any harm, nor could it have disparaged Plaintiff's title because the Assignment of DOT correctly named DBNTC as the owner of the Subject Loan. Accordingly, Plaintiff has failed to satisfy the four required elements for slander of title. Her Claim for Relief therefore fails, and Defendants are entitled to summary judgment.

E. Plaintiff's Quasi Contract Claim Fails Because An Express Agreement Exists Between The Parties And There Was No Unjust Enrichment.

Plaintiff's fourth claim for relief for quasi contract, seeking restitution for mortgage payments made to Defendants, is wholly inapplicable. First and foremost, a quasi-contract claim only exists where there are not "express binding agreements [that] define the parties' rights." *California Medical Ass'n, Inc. v. Aetna U.S. Healthcare of California, Inc.*, 94 Cal. App. 4th 151, 172 (2001). Here, there is no dispute that Plaintiff executed the Note and Deed of Trust, the originals of which are now in DBNTC's possession. Reyes Affidavit, ¶¶ 2, 4, 6-13. The Note and Deed of Trust constitute express binding agreements between Plaintiff and the owner and holder of the Note and Deed of Trust, which is DBNTC. Where a contract exists that Plaintiff can claim

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under, she cannot bring an alternative claim under a quasi contract theory. *California Medical*, 94 Cal. App. 4th at 172.

In addition, the remedy of restitution is premised on a finding of *unjust enrichment*, which Plaintiff cannot prove occurred here. It is black letter law that restitution is only available where a person receives a benefit that would be "*unjust* for the person to retain." *McBride v. Boughton*, 123 Cal. App. 4th 379, 389 (2004) (internal quotes and citations omitted) (emphasis in original). Because the evidence shows that DBNTC is the owner and holder of the Subject Loan and that OneWest is the servicer on the Subject Loan, Defendants were entitled to collect the mortgage payments Plaintiff made to them on the Subject Loan. Moreover, Plaintiff received valuable consideration and is obligated to repay the debt. Plaintiff cannot prove that Defendants were the wrong parties to make mortgage payments to, or that the payments she made were not properly accounted for by Defendants.

Under these facts, a quasi contract claim seeking restitution is facially invalid. DBNTC is entitled to summary judgment on this claim.

F. <u>Plaintiff's TILA Claim Fails As A Matter Of Law Because It Is Time-Barred And Does Not Apply To DBNTC</u>.

Plaintiff's fifth claim for relief based on TILA claim fails on its face as it was brought *nearly six years* too late. An action for damages under TILA must be brought "within one year from the date of the occurrence of the violation." 15 U.S.C. § 1640(e). The limitations period begins to run upon the date of consummation of the transaction. *Meyer v. Ameriquest Mortg. Co.*, 342 F.3d 899, 902 (9th Cir. 2003).

Here, the relevant time period is when DBNTC acquired the Subject Loan on June 1, 2005 through the PSA. Even assuming that Plaintiff is correct that, pursuant to 15 U.S.C. § 1641(g), DBNTC was required to notify her within thirty days of the transfer of the ownership interest in the Subject Loan, Plaintiff did not file her Complaint until April 26, 2012 – *nearly seven years after the transfer of ownership*. Under 15 U.S.C. § 1641(g), Plaintiff had until a year after the PSA transfer, on June 1, 2005, to bring a TILA claim. Nearly six years after the statute of limitations ran, Plaintiff cannot now complain of any purported violation.

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Even if Plaintiff had timely asserted a TILA claim against DBNTC, it would *still* fail because 15 U.S.C. § 1641(g) does not apply to DBNTC. 15 U.S.C. § 1641(g) provides that a "*creditor* that is the new owner or assignee of the debt" must notify the borrower of a transfer to a new creditor. (emphasis added). TILA defines "creditor" as a person who (1) regularly extends consumer credit; and (2) "*is the person to whom the debt arising from the consumer credit transition is initially payable on the face of the evidence of indebtedness*…" 15 U.S.C. § 1602(g) (emphasis added). Because trustees are not creditors and not the "person to whom the debt . . . is initially payable," "[c]ourts in the Ninth Circuit have uniformly found that a *trustee is not a creditor as defined by TILA*." *Salmo v. PHH Mortg. Corp.*, 2011 WL 2682151, *2 (C.D. Ca. July 11, 2011) (granting trustee U.S. Bank's Motion for Judgment on the Pleadings) (emphasis added); *see also Wilson v. Wells Fargo Bank*, 2011 WL 3443635, *2 (N.D. Ca. Aug. 5, 2011) ("The Ninth Circuit has repeatedly found that a trustee is not a creditor as defined by TILA."). As a trustee, DBNTC is not a "creditor" within the TILA definition, and thus 15 U.S.C. § 1641(g) statutorily does not apply to DBNTC, and DBNTC therefore could not have violated TILA. Moreover, OneWest as servicer also does not qualify as a "creditor" within the TILA definition and, thus, similarly could not have violated TILA.

Although Plaintiff has not raised the defense of equitable tolling,[7] such a defense is in any event inapplicable. Without evidence of fraud (which Plaintiff has not even alleged, let alone proven), Plaintiff cannot show the statute of limitations was tolled. *Hubbard v. Fidelity Federal Bank*, 91 F.3d 75, 79-80 (9th Cir. 1996). Accordingly, Plaintiff's TILA claim is barred by the statute of limitations.

Accordingly, Plaintiff's Fifth Claim for Relief is both untimely and fails to state a claim upon which relief can be granted. Under either theory, DBNTC is entitled to summary judgment.

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[7] To the extent that Plaintiff sought to raise the defense of equitable tolling through the allegation in the Adversary Complaint that she "could not have with reasonable diligence" discovered the Assignment of DOT to DBNTC because she did not receive notice of it, Adversary Compl., ¶ 97, this allegation is insufficient to show fraud for the purpose of equitable tolling. It is axiomatic that the failure of an allegedly required disclosure cannot be the only evidence of fraud. *Garcia v. Wachovia Mortgage Corp.*, 676 F.Supp.2d 895, 906 (C.D. Cal. 2009). "[A] contrary rule would render the one-year statute of limitations meaningless, as it would be tolled whenever there were improper disclosures." *Id.*

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G. Plaintiff's Quiet Title Claim Fails Because She Has Not Tendered The Debt.

Plaintiff's sixth claim for relief seeks a "judicial declaration quieting title" in her name is preposterous when *she admittedly does not own the Subject Property free and clear*. *See* Adv. Compl., ¶ 107. "A basic requirement of an action to quiet title is an allegation that plaintiffs are the rightful owners of the property, i.e., that they have satisfied their obligations under the Deed of Trust." *Newman v. OneWest Bank, FSB*, 2010 WL 797188, *3 (C.D. Ca. March 5, 2010) (internal quotations and citations omitted). "[A] mortgagor cannot quiet his title against the mortgagee without paying the debt secured." *Id.* (internal quotations and citations omitted); *see also Rabago v. Deutsche Bank. Nat. Trust Co.*, 2011 WL 2173811, *4 (C.D. Ca. June 1, 2011) ("Plaintiff's quiet title claim fails as a matter of law because Plaintiff's property is mortgaged.").

Here, as set forth in her confirmed plan, there is no dispute that Plaintiff remains obligated under a mortgage that encumbers the Subject Property and that obligations under the Subject Loan. Plaintiff has confirmed these very facts by choosing to "unimpair" Defendants' rights under the existing loan documents. Simply put, where Plaintiff cannot show she owns the Subject Property free and clear of any mortgage, she cannot ask this Court to make a "judicial declaration" that she is the owner.

In addition, as explained above, Plaintiff has no basis for a quiet title claim because *Defendants* have ownership and servicing rights to the Subject Loan. Plaintiff, meanwhile, has not paid off her mortgage or even made a mortgage payment in over two years. As a matter of law, Plaintiff's quiet claim title fails, and Defendants are entitled to summary judgment.

H. Plaintiff's Unfair Business Practices Claim Fails Because It Is Preempted and Because Defendants Did Not Commit Fraud Or Misrepresent Their Interests In The Subject Loan.

Plaintiff's seventh claim for relief is based on California Business & Professions Code § 17200 ("UCL § 17200") that Defendants have "falsely, fraudulently and deceitfully represented to the [Plaintiff] that they were the correct holders of her Note . . ." Adv. Compl., ¶ 111. The Ninth Circuit has already held that UCL § 17200 claims are preempted by the Home Owners' Loan Act of 1933 ("HOLA") when they fall within the scope of 12 C.F.R. § 560.2(b). *Silvas v. E*Trade Mortg.*

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Corp., 514 F.3d 1001, 1006 (9th Cir. 2008). Specifically, the Ninth Circuit has held that UCL § 17200 was preempted by HOLA and 12 C.F.R. § 560.2(b)(9) where the claims related to alleged misrepresentations in advertising and disclosure documents. *Id.* Further, 12 C.F.R. § 560.2(b)(10) specifically preempts state law claims relating to "[p]rocessing, origination, servicing, sale or purchase of, or investment or participation in, mortgages."

The UCL § 17200 claim amounts to an allegation that Defendants misrepresented their ownership status to Plaintiff (citing to TILA) and fraudulently collected mortgage payments in the servicing of the Subject Loan. Both these allegations fall squarely within 12 C.F.R. § 560.2(b)(9) and (10) and, therefore, "the preemption analysis ends." *Silvas*, 514 F.3d at 1006. Such claims are expressly preempted. *Id.*; *see also Garcia v. Wachovia Mortg. Corp.*, 676 F.Supp.2d 895, 913 (C.D. Ca. 2009) (UCL § 17200 claims preempted by, *inter alia*, 12 C.F.R. § 560.2(b)(9) and (10)).

In addition, even if HOLA does not preempt Plaintiff's claim, the undisputable evidence shows that, in fact, Defendants did *not* "falsely, fraudulently and deceitfully" represent that they were the correct holders of the Note – Defendants *are* the correct holders of her Note. In short, Plaintiff cannot show that Defendants have engaged in any "unlawful, unfair or fraudulent" business practices, and therefore no violation or cause of action exists. *See* UCL § 17200.

Plaintiff also relies on her TILA claim as a basis for her UCL § 17200 claim. Adv. Compl., ¶ 113. Where, as above, Plaintiff's TILA claim fails as being time barred and for failing to show direct injury, her UCL § 17200 claim must likewise fail. *See Che v. Aurora Loan Services, LLC*, 2012 WL 899629, *4 (C.D. Ca. March 15, 2012) (granting summary judgment).

Based on multiple independent bases, Plaintiff's UCL § 17200 claim cannot stand, and Defendants are therefore entitled to summary judgment.

V. <u>CONCLUSION</u>

The incontrovertible evidence shows that DBNTC is the current and proper owner and holder of the Subject Loan and that OneWest is the servicer. Plaintiff defaulted on the Subject Loan, failing to make mortgage payments for *over two years* while she enjoys living and collecting rent on the Subject Property, all to Defendants' detriment. The facts and law confirm that Plaintiff cannot maintain this action, and that Defendants' Proof of Claim 6-1 should be allowed.

Accordingly, Defendants are entitled to summary judgment on all claims, or, in the alternative, partial summary judgment on the claims, and the Adversary Complaint should be dismissed in its entirety with prejudice.

Dated: September 24, 2013

DYKEMA GOSSETT LLP

By: */s/ J. Alexandra Rhim*
J. Alexandra Rhim
ATTORNEYS FOR ONEWEST BANK, FSB AS SERVICER AND ATTORNEY IN FACT FOR DEUTSCHE BANK NATIONAL TRUST COMPANY AS TRUSTEE FOR INDYMAC INDX MORTGAGE LOAN TRUST 2005-AR12, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2005-AR12, UNDER THE POOLING AND SERVICING AGREEMENT DATED AS OF JUNE 1, 2005

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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:

333 S. Grand Avenue, Suite 2100, Los Angeles, CA 90071

A true and correct copy of the foregoing document entitled (*specify*): DEFENDANTS' NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, MOTION FOR PARTIAL SUMMARY ADJUDICATION

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*) 09/24/2013, 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;
- United States Trustee (SA) ustpregion16.sa.ecf@usdoj.gov
- Sharon Z Weiss sharon.weiss@hro.com, raul.morales@hro.com

* J Alexandra Rhim arhim@dykema.com; cperez@dykema.com

☐ Service information continued on attached page

2. **SERVED BY UNITED STATES MAIL**:
On (*date*) 09/24/2013, 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.

Debtor: Trudy Kalush, P. O. Box 702, Sunset Beach, CA 90742

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3. **SERVED BY PERSONAL DELIVERY, OVERNIGHT MAIL, FACSIMILE TRANSMISSION OR EMAIL** (state method for each person or entity served): Pursuant to F.R.Civ.P. 5 and/or controlling LBR, on (*date*) 09/24/2013, 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.

Honorable Erithe A. Smith
United States Bankruptcy Court - Central District of CA
411 West Fourth Street, Suite 5040 / Courtroom 5A
Santa Ana, CA 92701-4593

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

09/24/2013	Cathy Perez	/s/ Cathy Perez
Date	*Printed Name*	*Signature*