NO. S218973

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

TSVETANA YVANOVA,
Plaintiff/Petitioner,

v.

NEW CENTURY MORTGAGE CORPORATION et al.,
Defendants/Respondents.

Petition for Review of a Published Decision
of the Court of Appeal, Second Appellate District, Division One
Case No. B247188

RESPONDENTS' ANSWER BRIEF ON THE MERITS

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Attorneys for *Defendants/Respondents* **OCWEN LOAN SERVICING, LLC; WESTERN PROGRESSIVE, LLC; AND DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR REGISTERED HOLDERS OF MORGAN STANLEY ABS CAPITAL I INC. TRUST 2007-HE1 MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2007-HE1**

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ISSUE ON APPEAL

"In an action for wrongful foreclosure on a deed of trust securing a home loan, does the borrower have standing to challenge an assignment of the note and deed of trust on the basis of defects allegedly rendering the assignment void?" (No. S218973, August 27, 2014).

ANSWER TO ISSUE ON APPEAL

No. A borrower does not have standing to bring a wrongful foreclosure action when, as here, she challenges an assignment of a note or deed of trust based on the alleged breach or defective performance of a private contract to which she is not a party or intended beneficiary.

This borrower, Tsvetana Yvanova, lacks standing for three independently sufficient reasons:

First, Yvanova is not a party to, or intended beneficiary of, the Pooling and Servicing Agreement she seeks to enforce.

Second, Yvanova's allegation that the timing of the assignment of her Deed of Trust breached the Pooling and Servicing Agreement would not render the assignment void.

Third, Yvanova cannot show the allegedly belated assignment caused her actual prejudice or harm.

In addition, Yvanova submitted documents with her complaints that refute her central allegation of a defective assignment of her Deed of Trust and reveal the misconception that has flooded the lower courts with lawsuits challenging assignments based on alleged violations of pooling and servicing agreements for residential mortgage-backed securitization trusts.

In unspoken confirmation of these realities, Yvanova's Opening Brief abandons the sole argument presented by the Petition for Review: that this Court should "end the conflict in the lower courts by applying the *Glaski* rules [*sic*] statewide" (Pet. 1, *citing Glaski v. Bank of America*, 218 Cal. App. 4th 1079 (2013)). Although the Opening Brief does not explain this abrupt shift in tactics, the U.S. Court of Appeals for the Second Circuit recently rebuked *Glaski* for its errant interpretation of New York law and held that borrowers have no standing to challenge assignments as violative of pooling and servicing agreements governed – like the one at issue here – by New York law. *Rajamin v. Deutsche Bank Nat'l Trust Co.*, 757 F.3d 79, 91 (2d Cir. 2014).

The Opening Brief thus champions two new arguments not raised in the lower courts or the Petition for Review, and which conflict with all known precedent: (1) that Yvanova's Deed of Trust "implies" and somehow creates an otherwise non-existent right to sue for breach of an agreement to which she is not a party or intended beneficiary; and (2) that a borrower may bring a negligence action based on a lender's breach of a supposed duty of care to the borrower when securitizing her debt.

These arguments, even if not waived, fail to answer the Issue on Appeal as articulated by this Court and also fail as a matter of law.

The Court of Appeal properly held that there is no reasonable possibility of amending the Second Amended Complaint to add a wrongful foreclosure claim.

This Court should affirm.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

The Second Amended Complaint (Respondents' Appendix ("RA") 1-21) is the operative pleading. Yvanova also filed documents, including her Promissory Note and Deed of Trust; excerpts from the relevant Pooling and Servicing Agreement; correspondence about her loan; and the recorded Assignment of the Deed of Trust. As will become clear, these documents conflict with the allegations essential to Yvanova's theory on appeal.[1/]

To assist the Court in understanding the context of the Issue Presented, we review these documents in detail.

The Loan. On July 8, 2006, Yvanova bought a house in Woodland Hills, California. She obtained a $483,000 loan from New Century Mortgage Corporation. She agreed, in her Promissory Note, to repay the loan with interest at an adjustable rate (Appellant's Appendix ("AA") Vol. 1-2 p. 400). She also agreed that:

- "Lender may transfer this Note";
- "Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the 'Note Holder'";
- "The Note Holder will determine my new interest rate," "the amount of the monthly payment," and the time and location of payments;
- "If I am in default, the Note Holder may send me a written notice telling me that if I do not pay the overdue amount by a certain date,

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1/ Because the PSA involves a public offering of the sale of securities, its full text is available from the Securities and Exchange Commission at http://www.sec.gov/Archives/edgar/data/1385840/000091412107000322/ms7263661-ex4.txt (as of Jan. 28, 2015). Yvanova's excerpts provide a sufficient factual background and negate her theory on appeal.

the Note Holder may require me to pay immediately the full amount of Principal that has not been paid and all the interest that I owe on that amount"; and

- "In addition to the protections given to the Note Holder under this Note, a Mortgage, Deed of Trust, or Security Deed ... protects the Note Holder from possible losses that might result if I do not keep the promises that I make in this Note" (AA Vol. 1-2 p. 400-03).

In a Deed of Trust signed the same day, Yvanova agreed that the property secured her debt and that the "Lender is the beneficiary" of the Deed of Trust (RA 44, 46, 47). She also agreed that:

> The Note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times without prior notice to the Borrower. A sale might result in a change in the entity (known as the "Loan Servicer") that collects Periodic Payments due under the Note and this Security Instrument and performs other mortgage loan servicing obligations under the Note, this Security Instrument, and Applicable Law.

(RA 55 §20). Finally, she agreed that: "The covenants and agreements of this Security Instrument shall bind ... and benefit the successors and assigns of Lender" (RA 54-55, DOT §§13, 20).[2/]

[2/] A Promissory Note and Deed of Trust have discrete functions. The Note "is a promise the debtor/trustor makes to the lender/beneficiary to repay the loan on the terms indicated...." *State ex rel. Bowen v. Bank of America Corp.*, 126 Cal.App.4th 225, 231 (2005). As a negotiable instrument governed by Cal. Comm. Code Division 3, the Note may be transferred "without notice to the primary debtor." *Creative Ventures, LLC v. Jim Ward & Assoc.*, 195 Cal.App.4th 1430, 1446 (2011). A Deed of Trust secures the debt. *Alliance Mortg. Co. v. Rothwell*, 10 Cal.4th 1226, 1235 (1995). "Legal title to the property is held by a trustee until the loan is repaid in full." *Bartold v. Glendale Fed. Bank,*, 81 Cal.App.4th 820, 821 (2000). If the debtor fails to repay the loan, the Deed of Trust authorizes the trustee to declare default and sell the property by foreclosure. *Alliance Mortg.*, 10 Cal.4th at 1236.

New Century Appoints Ocwen as Attorney-in-Fact and Loan Servicer. On December 12, 2006, New Century executed a Limited Power of Attorney appointing Ocwen Loan Servicing, LLC, as its attorney-in-fact and servicer of its loans (AA Vol. 2-7 p. 36-38). Loan servicers collect principal, interest, and escrow payments from borrowers; remit principal and interest payments to the lender or to investors holding residential mortgage-backed securities; pay taxes and insurance from escrow accounts; and take action (including foreclosure) if a borrower defaults. *See* 12 U.S.C. § 2605(i)(2)-(3); Cal. Civ. Code § 2920.5(a).

The Power of Attorney thus appointed Ocwen "to act in [New Century's] name, place and stead" to, among other things, "execute, acknowledge, seal and deliver … assignments of deed of trust/ mortgage and other usual and customary recorded documents" and "[t]o pursue any deficiency, debt or other obligation, secured or unsecured" (AA Vol. 2-7 p. 38).

Sale and Securitization of the Loan. Originating lenders often pool residential loans and sell them to residential mortgage-backed securitization trusts, directly or through a facilitating seller or depositor. The trustee, typically a bank, owns and holds the loans for the benefit of investors in the securitization trust. It parcels the right to receive borrowers' principal and interest payments into interests represented by certificates, then sells these "mortgage backed securities" to investors ("Certificateholders"). The trustee retains a loan servicer to administer the loans. A trust agreement, typically called a Pooling and Servicing Agreement ("PSA"), creates the trust and governs the rights, duties, and obligations of the seller, depositor, trustee, and servicer. *See, e.g., Rajamin*, 757 F.3d at 81-82.

According to the PSA excerpts Yvanova filed below, New Century conveyed and assigned her loan, with many others, through Morgan Stanley ABS Capital I, Inc. (the "Depositor"), to Deutsche Bank National Trust Company solely in the capacity of Trustee for the Holders of the Morgan Stanley ABC Capital I Inc. Trust 2007-HE1 Mortgage Pass-Through Certificates 2007-HE1 ("Morgan 2007-HE1" or "the Trust") (AA Vol. 1-2 p. 336-37). For brevity and clarity, Respondents will use "Deutsche Bank" as shorthand for "Deutsche Bank solely in the capacity of Trustee."

The PSA transferred and assigned to Morgan 2007-HE1, as of January 1, 2007, all right, title, and interest in the loan pool, which included the delivery of the Notes and Deeds of Trust for those loans. Under Section 2.01(a): "The Depositor, concurrently with the execution and delivery hereof, hereby sells, transfers, assigns, sets over and otherwise conveys to the Trustee for the benefit of the Certificateholders, without recourse, all the right, title and interest of the Depositor in and to the Trust Fund, and the Trustee, on behalf of the Trust, hereby accepts the Trust Fund" (AA Vol. 1-2 p. 337 § 2.01(a)). The "Trust Fund" included "the transfer and assignment of each Mortgage Loan" and the delivery of "the original Mortgage Note bearing all intervening endorsements" and "the original Mortgage [*i.e.*, Deed of Trust] with evidence of recording thereon" (*Id.* §§ 2.01(b)(i)-b(ii)). (The PSA defines "Mortgage" to include "Deed of Trust.")

The PSA further provides: **"The transfer of the Mortgage Note and the Mortgage** as and in the manner contemplated by this Agreement is sufficient either (i) fully to transfer to the Trustee, for the benefit of the Certificateholders, all right, title, and interest thereto as note holder and mortgagee or (ii) to grant to the Trustee, for the benefit of the

Certificateholders, the security interest...." (AA Vol. 1-2 p. 355 § 2.06(h); emphasis original).

Section 2.01(b) of the PSA required New Century to deliver "Assignments of Mortgages, in blank, for each Mortgage Loan ... [and] cause the Assignments of Mortgages [*i.e.*, Deeds of Trust] and complete recording information to be provided to the applicable Servicer" (AA Vol. 1-2 p. 339-40). Section 2.01(b) then required the Servicer to record the assignments, *except* in California and other jurisdictions where "recordation ... is not necessary **to protect the Trustee's interest in the related Mortgage Note**" (*Id.* at p. 340; emphasis original). In those jurisdictions, the PSA required the Servicer to record the assignment only "**if foreclosure proceedings occur against a Mortgaged Property**" (*Id.*; emphasis original).

The PSA appointed Saxon Mortgage Services, Inc., as one of the Trust's loan servicers (AA Vol. 1-2 p. 357-58)). Saxon advised Yvanova by letter of its role and directed that future payments should be made to Saxon (AA Vol. 1-1 p. 33-34, ¶¶ 14, 15(B)).

The Trust was created under, and is governed by, New York law (AA Vol. 1-2 p. 341-42 §2.01(c)).

Yvanova is not a party to the PSA. She does not contend she is a beneficiary.

New Century's Bankruptcy. On April 2, 2007, three months after conveying Yvanova's Note and Deed of Trust to Morgan 2007-HE1, New Century filed for Chapter 11 bankruptcy (RA 9 ¶ 4); *see In re New Century TRS Holdings, Inc.*, 407 B.R. 576, 579-80 (Bankr. D. Del. 2009).

Yvanova's Opening Brief suggests that New Century's bankruptcy casts doubt on Morgan 2007-HE1's ownership of her debt (*see* OB 5, 12).

But the public record and Yvanova's documents show that she knew the bankruptcy was irrelevant before she filed the Second Amended Complaint.

On August 1, 2008, the bankruptcy court approved the transfer of New Century's remaining assets to the New Century Liquidating Trust ("NCLT") (RA 9 ¶ 5). *See In re New Century TRS Holdings, Inc.*, 465 B.R. 38, 42 (Bankr. D. Del. 2012). The Asset Purchase Agreement, which is a public document, lists the 235 loans involved in that transaction. *See In re New Century TRS Holdings, Inc.* (Bankr. D. Del. No. 07-10416, Doc # 2824 Ex. A, p. 25). Yvanova's loan was not among those assets (*Id.*).

Yvanova wrote to NCLT in 2012 to inquire about her loan. Her pleadings included NCLT's response: A letter dated June 14, 2012, advising her that New Century had sold her loan to Morgan 2007-HE1 *before* entering bankruptcy: "your loan was sold to Morgan Stanley ('Morgan') in September 2006" (AA Vol. 1-2 p. 421-22).[3/]

Yvanova's Default. Yvanova stopped making payments on her loan in 2008. On August 29, 2008, and December 9, 2008, respectively, Old Republic Default Management Services sent Yvanova a Notice of Default and a Notice of Trustee's Sale (RA 67-69, 71-73). The Notices did not identify the current Deed of Trust beneficiary by name. The sale did not take place.

The HAMP Trial Modification Plan. The record shows that, as early as July 2009, Yvanova knew that Morgan 2007-HE1 owned her debt.

3/ The letter recounted the PSA's provision for recording assignments of Deeds of Trust: "It was New Century's practice to prepare an Assignment of Deed of Trust, endorsed in blank, for each loan that was sold. The Assignment of Deed of Trust for your loan was part of the collateral file that was sent to Morgan or their document custodian when your loan was sold. It was then Morgan's responsibility to complete their portion of the Assignment and have it recorded" (AA Vol. 1-2 p. 421).

That month, Yvanova and Deutsche Bank entered into a Home Affordable Modification Program ("HAMP") Trial Period Plan to reduce her monthly payments (AA Vol. 1-2 p. 408-12). Yvanova's pleadings attached the HAMP Agreement, which identified "the Lender" as "Deutsche Bank National Trust Company, as Trustee for Morgan Stanley ABS Capital I Inc. Trust 2007-HE1" (*Id.*). Although Yvanova signed the HAMP Agreement, her default continued (RA 79-82).

Yvanova's Bankruptcy. In 2010, Yvanova declared Chapter 13 bankruptcy (AA Vol. 1-2 p. 304 ¶ 9). During those proceedings, Deutsche Bank appointed Ocwen as servicer for loans in the Trust, including Yvanova's loan (RA 132-33; AA Vol. 1-2 p. 405). In August 2011, Ocwen filed notice in the bankruptcy court that the former servicer, Saxon, had assigned its claims against Yvanova to Morgan 2007-HE1, again confirming the Trust's status as noteholder and owner of her debt (AA Vol. 1-2 p. 406).

Foreclosure Proceedings. On December 30, 2011, Ocwen – acting as attorney in fact for New Century under the 2006 Power of Attorney – recorded an Assignment of Yvanova's Deed of Trust from New Century to Morgan 2007-HE1 (RA 75-77). This recordation fulfilled Section 2.01(b) of the PSA, which required the servicer to record an assignment of a Deed of Trust in California only "**if foreclosure proceedings occur against a Mortgaged Property**" (AA Vol. 1-2 p. 340; emphasis original). (The Opening Brief's statement that this confirmation that Morgan 2007-HE1 owned and held her debt was "news to Yvanova and raised legitimate questions" (OB 6) ignores her HAMP Agreement with Deutsche Bank and

the notice of Morgan 2007-HE1's claims filed in her bankruptcy proceeding.)[4/]

On January 31, 2012, Western Progressive, LLC, "acting as agent for [the Deed of Trust] beneficiary," recorded a Notice of Default indicating that Yvanova was past due more than $63,000 on her loan (RA 79-82). On February 28, 2012, Western Progressive was substituted as trustee under the Deed of Trust (RA 84-86). (The Deed of Trust trustee traditionally conducts nonjudicial foreclosures.)

On August 20, 2012, Western Progressive, acting as trustee, recorded a Notice of Trustee's Sale (RA 88-90). On September 14, 2012, a third party purchased the property for $355,000.01, extinguishing Yvanova's debt, which exceeded $572,000 (RA 92-94). The Trustee's Deed Upon Sale was recorded on September 27, 2012 (RA 92). Although Yvanova has made no loan payments for over six years, she continues to live in the property (OB 8).

This Lawsuit. On May 14, 2012, Yvanova brought suit against Ocwen, Western Progressive, Deutsche Bank, and three Ocwen employees. On November 5, 2012, after two demurrers, Yvanova filed her Second Amended Complaint, alleging a single cause of action for quiet title (RA 6-25, 141-46). Although offering conclusory and occasionally conflicting allegations of notary fraud, "robo-signing," and forgery, the Second Amended Complaint's central contention, as revised and clarified on

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4/ As NCLT's June 14, 2012, letter advised Yvanova: "It was common practice for New Century to provide the purchasers of its loans and their designated servicers with an LPOA [Limited Power of Attorney], which authorized them to execute certain documents on New Century's behalf should the need arise. The LPOA attached to your June 1st letter [*see* AA Vol. 2-7 p. 36-38] was, in fact, provided to Ocwen by New Century in 2006" (AA Vol. 1-2 p. 421).

appeal, is that New Century sold her Note, but not the Deed of Trust, to Morgan 2007-HE1 prior to New Century's bankruptcy (RA 10 ¶¶1-2; *see* Pet. 5-7); that the Deed of Trust was assigned to Morgan 2007-HE1 in 2011, after the PSA's closing date (Pet. 6-7); and that, as a result of the belated assignment, "neither the original beneficiary of the Deed of Trust nor any purported assignees ... have the legal right to claim interest in the title" (RA 14 ¶12).

The Trial Court's Order. Defendants demurred. On February 8, 2013, the Trial Court sustained the demurrer without leave to amend, holding that Yvanova had failed to allege tender of the funds to discharge her debt, which is a precondition to a quiet title action (RA 137-39). Yvanova filed a timely notice of appeal limited to the three corporate defendants.

THE ORDER AT ISSUE

The Court of Appeal affirmed the Trial Court's decision, and then considered whether Yvanova could amend her complaint to state a cause of action for wrongful foreclosure based on the allegedly defective assignment of her Deed of Trust (Op. 6). The Court of Appeal concluded that amendment would be futile: "Plaintiff alleges nothing unlawful about the foreclosure process beyond the argument that an allegedly deficient assignment and securitization deprived Deutsche Bank of an interest in the property. She has no standing to make such a claim" (*Id.* at 8).

The Court of Appeal based its conclusion on two grounds:

First, "[a]s an unrelated third party to the alleged securitization ... [Yvanova] lacks standing to enforce any agreements, including the investment trust's pooling and servicing agreement, relating to such transaction...." (Op. 7; quotation and citation omitted).

Second, even if Yvanova could pursue this claim, "Plaintiff would not be the victim of such invalid transfers because her obligations under the note remained unchanged. 'Instead, the true victim may be an individual or entity that believes it has a present beneficial interest in the promissory note and may suffer the unauthorized loss of its interest in the note'" (Op. 7-8, *quoting Jenkins v. JPMorgan Chase Bank, N.A.*, 216 Cal.App.4th 497, 515 (2013).

The Court of Appeal found that "no California court has followed" *Glaski v. Bank of America*, 218 Cal.App.4th 1079 (2013), for the notion that a borrower can challenge a foreclosure based on allegations that defects in an assignment of a Deed of Trust rendered the assignment void – "and many have pointedly rejected it" (Op. 8, citing cases).

THE PETITION FOR REVIEW

Yvanova sought this Court's review on a single ground: "Should this Court end the conflict in the lower California courts by applying the *Glaski* rules [*sic*] statewide and disapproving the court of appeal opinions in *Yvanova* and *Jenkins*?" (Pet. 1). Neither the Petition for Review nor the Opening Brief challenges the Court of Appeal's holding that Yvanova could not show prejudice from the allegedly defective assignment.

THE SECOND CIRCUIT'S REBUKE OF *GLASKI*

The Petition for Review and Opening Brief also fail to advise the Court of the recent decision of the U.S. Court of Appeals for the Second Circuit in *Rajamin v. Deutsche Bank Nat'l Trust Co.*, 757 F.3d 79 (2d Cir. 2014). That decision held that, as a third party, a borrower has no standing to challenge an assignment said to violate a pooling and servicing agreement governed – like the one at issue here – by New York law:

"[U]nder New York law, only the intended beneficiary of a private trust may enforce the terms of the trust." 757 F.3d at 88 (citing cases).

The Second Circuit then rejected *Glaski*'s interpretation of Section 7-2.4 of New York's Estates, Powers and Trusts Law to hold that a failure to comply with the provisions of a PSA would render an assignment void: "[W]e are not aware of any New York appellate decision that has endorsed this interpretation of § 7-2.4." 737 F.3d at 90. Instead, "the weight of New York authority is contrary to plaintiffs' contention that any failure to comply with the terms of the PSAs rendered defendants' acquisition of plaintiffs' loans and mortgages void as a matter of trust law." *Id.* at 88. "[U]nder New York law such acts are voidable only at the instance of a trust beneficiary or a person acting in his behalf." *Id.* at 90.

STANDARD OF REVIEW

Denial of Leave to Amend. The burden of proving there is a reasonable possibility of amending the complaint "is squarely on the plaintiff." *Blank v. Kirwan*, 39 Cal.3d 311, 318 (1985). In assessing this burden, the Court treats "the demurrer as admitting all facts properly pleaded, but [does] not assume the truth of contentions, deductions or conclusions of law." *Id.* at 318. The Court also considers documents attached to the complaint and matters subject to judicial notice. *Serrano v. Priest*, 5 Cal.3d 584, 591 (1971).

""[A] complaint otherwise good on its face is subject to demurrer when facts judicially noticed render it defective." *Evans v. City of Berkeley*, 38 Cal.4th 1, 6 (2006) (citation omitted). The Court thus rejects allegations that "contradict or are inconsistent with [the documents]." *Blatty v. N.Y. Times Co.*, 42 Cal.3d 1033, 1040 (1986).

Waiver. "As a policy matter, on petition for review the Supreme Court normally will not consider an issue that the petitioner failed to timely raise in the Court of Appeal." Cal. R. Ct. 8.500(c)(1).

SUMMARY OF ARGUMENT

Yvanova's Opening Brief begins by quoting, in violation of Cal. R. Ct. 8.1115, an unpublished Court of Appeal dissent said to frame the issue as involving a "stranger" who "knocked on her door" (OB 1, *quoting Peng v. Chase Home Finance, LLC*, 2014 Cal.App.Unpub.LEXIS 2451, *11 (2014)). But Deutsche Bank is no stranger. Yvanova does not and cannot dispute that Morgan 2007-HE1 owned and held her Note and Deed of Trust. She does not and cannot dispute that she entered into a HAMP Agreement with Deutsche Bank three years before she brought suit. She does not and cannot contend that anyone but Respondents sought loan payments or sought to foreclose. She does not and cannot say she is willing or able to cure her default. She does not and cannot contend that the assignment at issue impaired her ability to contest or avert foreclosure. She does not and cannot point to any irregularity in the foreclosure. She disputes only that Deutsche Bank – the Deed of Trust beneficiary of record and the party with whom she entered into a loan modification agreement – had the authority to foreclose. Her theory is that, because parties to a private trust agreement to which she is neither a party nor an intended beneficiary allegedly did not observe a contractual deadline, "the security interest in Plaintiff's property known as the Deed of Trust was terminated" (RA 10 ¶2) – and, as a result, she can forego repaying more than $572,000 in debt; take ownership, free and clear, of a residential property; and deny the true beneficiaries of the trust any right of recourse.

Yvanova lacks standing to pursue a viable wrongful foreclosure claim for several independently sufficient reasons:

First, Yvanova is not a party to, or intended third-party beneficiary of, the Pooling and Servicing Agreement.

Second, Yvanova cannot show that an assignment in violation of the provisions of that Agreement is void, rather than (at most) voidable.

Third, Yvanova cannot show actual prejudice from the allegedly defective assignment of the Deed of Trust.

In addition, Yvanova's documents show that New Century transferred ownership of the Note and Deed of Trust to Morgan 2007-HE1 on or before the Trust's closing date of January 1, 2007; that Ocwen recorded, as the PSA required, a confirmatory Assignment of the Deed of Trust in 2011 in anticipation of foreclosure; and that Deutsche Bank and Western Progressive had authority to foreclose.

Yvanova's two new theories of "standing," which were not presented below or in the Petition for Review, do not answer the Issue on Appeal and fail as a matter of law. The Deed of Trust does not create an otherwise non-existent right to challenge a separate agreement to which the borrower is not a party or intended beneficiary. There is no cause of action for "negligent securitization"; public policy does not and should not impose an unprecedented duty of care on parties to a securitization transaction.

Yvanova cannot show any reasonable possibility of amending the Second Amended Complaint to state a cause of action for wrongful foreclosure. This Court should affirm.

ARGUMENT

"In general terms, in order to have standing, the plaintiff must be able to allege injury – that is, some 'invasion of the plaintiff's legally protected interests.'" *Angelucci v. Century Supper Club*, 41 Cal.4th 160, 175 (2007). "To have standing, a party must be beneficially interested in the controversy; that is, he or she must have 'some special interest to be served or some particular right to be preserved or protected over and above the interest held in common with the public at large.'" *Teal v. Superior Court*, 60 Cal. 4th 595, 599 (2014). That beneficial interest must be "concrete and actual, and not conjectural or hypothetical." *Id.* "It is elementary that a plaintiff who lacks standing cannot state a valid cause of action." *McKinny v. Board of Trustees*, 31 Cal.3d 79, 90 (1982).

I. YVANOVA'S DOCUMENTS EXPLAIN THE FLOOD OF SECURITIZATION LITIGATION AND CONFIRM RESPONDENTS' AUTHORITY TO FORECLOSE.

This appeal is part of a flood of litigation in which borrowers, by alleging the defective securitization of their residential loans, seek to avoid or undo foreclosure. The theory in these cases typically hinges on a single undisputed fact: A loan servicer (here, Ocwen) recorded an Assignment of the Deed of Trust from the originating lender (New Century) to the trustee of a securitization trust (Deutsche Bank) years after the closing date of the applicable pooling and servicing agreement (OB 6). From that fact, plaintiffs speculate that the lender did not transfer her debt to the trust until after the PSA's closing date. And many plaintiffs argue that this lapse would violate the PSA, which would render the assignment void, which would deprive the foreclosing entities of any authority to foreclose.

Every link in this chain of speculation is wrong.

Assignment and recording are different things. California does not require the recording of assignments of Deeds of Trust. *See* Cal. Civ. Code § 2934. "[T]he trustee may initiate foreclosure irrespective of whether an assignment of the beneficial interest is recorded." *Haynes v. EMC Mortg. Corp.*, 205 Cal.App.4th 329, 336 (2012). "[A]n assignment of a deed of trust is complete on its effective date rather than on the date it is recorded." 7 Cal.Jur.3d *Assignments* § 118 (2012). As a result, "post-closing recordation does not in itself suggest that the assignments were made at the time of the recordation...." *Rajamin*, 757 F.3d at 91.

The documents Yvanova submitted show that New Century transferred her debt, including her Note and Deed of Trust, to Morgan 2007-HE1 in 2007; that Morgan 2007-HE1's rights vested in 2007; that she entered into a loan modification agreement with Deutsche Bank in 2009; and that Morgan 2007-HE1 was the Deed of Trust beneficiary in 2011, when her default triggered foreclosure. The documents show that, because foreclosure proceedings were imminent, the PSA required Ocwen, as loan servicer for the Trust and New Century's attorney in fact for this purpose, to record an Assignment of the Deed of Trust from New Century to Morgan 2007-HE1 in 2011. "The subsequent recording of mortgage assignments does not imply that the promissory notes and security interests had not been effectively assigned under the PSAs." *Rajamin*, 757 F.3d at 91. Instead, the 2011 recording confirmed the 2007 assignment and gave public notice as of the recording date that Morgan 2007-HE1 was the Deed of Trust beneficiary.

A review of Yvanova's documents will assist this Court's understanding of the facts here, as well as those underlying the incomplete and conclusory allegations in *Glaski* and other "post-closing assignment"

cases. The documents show the authority of Morgan 2007-HE1 and Western Progressive, as Deed of Trust beneficiary and trustee, respectively, to foreclose.

(A) 2006: The Promissory Note and Deed of Trust

Yvanova knew and agreed on the day she obtained her residential loan that New Century had authority to assign her Promissory Note and Deed of Trust (RA 54 § 13, 55 § 20). She agreed in the Note that "Lender may transfer this Note" (AA Vol. 1-2 p. 400 § 1). She also agreed that "Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the 'Note Holder'," and that the Note Holder could enforce the Note and Deed of Trust (*Id.* at §§ 1, 9, 11).

Yvanova agreed in the Deed of Trust that "[t]he Note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times without prior notice to the Borrower" (RA 55 § 20). And because the Note is a negotiable instrument, a borrower must anticipate its transfer to another creditor. *See* Cal. Comm. Code Div. 3.[5/]

Ignoring the plain language of the Note, Yvanova suggests that the equally plain language of the Deed of Trust is "confusing" because the next sentence says "[a] sale might result in a change in the [loan servicer]" (OB 23). According to Yvanova: "The average borrower, reading this language, will think a sale of the loan changes only the servicer" (*Id.* 24). But a sale, as any dictionary tells us, is "the transfer of ownership of and title to property from one person to another for a price." *Merriam-Webster's Collegiate Dictionary* (11th ed. 2008). The word "might"

5/ The Opening Brief's repeated insistence that only the "Lender" could foreclose thus fails in the face of the plain text of the Note and Deed of Trust, as well as Cal. Civ. Code § 2924(a)(1).

indicates that the change of ownership could, but need not, result in a change of servicer.

(B) 2007: The Pooling and Servicing Agreement

The Second Amended Complaint concedes that "the Note was sold to Morgan" in 2007 (RA 10 ¶1). Under long-standing California and New York law, a deed of trust (or mortgage) "is a mere incident to the debt which it secures, and follows the transfer of a note with the full effect of a regular assignment." *Ord v. McKee*, 5 Cal. 515, 516 (1855). As codified in Cal. Civ. Code § 2936, "the assignment of the note carrie[s] with it the security of the deed of trust." *Seidell v. Tuxedo Land Co.*, 216 Cal. 165, 170 (1932); *see* N.Y. Jur.2d, *Mortgages* § 277 ("the mortgage follows the note so that when the note changes hands, the mortgage interest automatically follows"); *see also Carpenter v. Longan*, 83 U.S. 271, 275 (1873) ("The transfer of the note carries with it the security, without any formal assignment or delivery, or even mention of the latter").

As a matter of law, then, Morgan 2007-HE1 acquired Yvanova's Deed of Trust along with the Note in 2007. "[H]aving the right to the note," Deutsche Bank "had undoubtedly a right to foreclose...." *Ord*, 5 Cal. at 516. The Second Amended Complaint alleges nothing factual to the contrary. Ocwen's execution and recording of a subsequent confirmatory Assignment of the Deed of Trust in 2011 – which the PSA, not California law, required – changes nothing.[6/]

[6/] California courts have consistently rejected Yvanova's conclusory allegation that "[a] bifurcation of the Note from the Deed of Trust has occurred" (RA 10 ¶ 1). *See, e.g., Debrunner v. Deutsche Bank Nat'l Trust Co.*, 204 Cal.App.4th 433, 437, 442 (2012); *Kramer v. Bank of America, N.A.*, 2014 WL 1577671, *8 (E.D. Cal. 2014) (collecting cases).

In any event, the plain language of the PSA, which Yvanova submitted, contradicts her speculative allegation that New Century did not assign her Deed of Trust to Morgan 2007-HE1 until 2011. The PSA shows that New Century sold and assigned all right, title, and interest in her debt, including the beneficial interest in the Deed of Trust, to Morgan 2007-HE1 in 2007, and that the Trust's ownership vested on that date (AA Vol. 1-2 p. 336-37).

Under Section 2.01(a) of the PSA, "[t]he Depositor, concurrently with the execution and delivery hereof, hereby sells, transfers, assigns, sets over and otherwise conveys to the Trustee for the benefit of the Certificateholders, without recourse, all the right, title and interest of the Depositor in and to the Trust Fund, and the Trustee, on behalf of the Trust, hereby accepts the Trust Fund" (AA Vol. 1-2 p. 337 § 2.01(a)). The "Trust Fund" included "the transfer and assignment of each Mortgage Loan" and the delivery of "the original Mortgage Note bearing all intervening endorsements" and "the original Mortgage [Deed of Trust] with evidence of recording thereon" (*Id.* § 2.01(b)(i)-(ii)).

The U.S. Court of Appeals for the Second Circuit considered a PSA with these same terms in *Rajamin*, and held: "The PSAs themselves were sufficient to assign plaintiffs' obligations to" the trust. 757 F.3d at 91.

(C) <u>2009: The HAMP Trial Period Plan</u>

Yvanova's documents show that she knew, as early as 2009, that Deutsche Bank had succeeded to New Century's rights as Lender under her Note and Deed of Trust. That year, Yvanova entered into a HAMP Trial Period Plan with Deutsche Bank that identified "the Lender" as "Deutsche Bank National Trust Company, as Trustee for Morgan Stanley ABS Capital I Inc. Trust 2007-HE1" (AA Vol. 1-2 p. 407-12).

(D) 2011: The Recorded Assignment of the Deed of Trust

Because California law does not require the recording of assignments of Deeds of Trust, the parties to the PSA were not required to, and did not, record an assignment of the Deed of Trust when Yvanova's debt was sold to Morgan 2007-HE1.

Ocwen, acting as attorney in fact for New Century, executed and recorded the Assignment of the Deed of Trust in 2011 because the PSA required that act at that time. The PSA obligated New Century to deliver "Assignments of Mortgages, in blank, for each Mortgage Loan" and provide them, along with "complete recording information" to the Servicer (AA Vol. 1-2 p. 339-40 §2.01(b)). The PSA then required the Servicer to record an Assignment of the Mortgage or Deed of Trust in California "**if foreclosure proceedings occur against a Mortgaged Property**" (*Id.* at p. 340; emphasis original). (Yvanova's documents again refute her argument; in this instance, her claim that "[i]f the Yvanova Deed of Trust had been legally transferred to [Morgan 2007-HE1] in 2007, there was no need for the December 2011 'Assignment'" (OB 6).)

Ocwen's confirmatory recording of an assignment could not and did not change the fact that Morgan 2007-HE1 had owned Yvanova's debt and was Deed of Trust beneficiary since 2007. The recording merely fulfilled the PSA's requirements while providing public notice of Deutsche Bank's right, as Deed of Trust beneficiary, to foreclose and sell the property. *See* Cal. Civ. Code § 2934; *Adler v. Sargent*, 109 Cal. 42, 49 (1895).[7/]

[7/] Although California does not require the recording of assignments of deeds of trust, Cal. Civ. Code § 2932.5 requires assignments of mortgages to be recorded before foreclosure takes place. (In mortgages, the borrower grants the power of sale to the mortgagee/lender; in deeds of trust, the power of sale is granted to a third party, the trustee.) The PSA's recording requirement thus assured that Section 2932.5 is fulfilled for mortgages.

(E) 2012: Foreclosure Notices and Substitution of Trustee

On January 31, 2012, Western Progressive, acting as agent for the Deed of Trust beneficiary, recorded a Notice of Default (RA 79-82). On February 28, 2012, Western Progressive was substituted as trustee under the Deed of Trust (RA 85). On August 20, 2012, Western Progressive recorded the Notice of Trustee's Sale (RA 88-90). Even if Yvanova's speculative allegation that the Deed of Trust was not conveyed and assigned to Morgan 2007-HE1 until 2011 were true, California law authorized each of these post-assignment acts. *See* Cal. Civ. Code §§ 2924(a)(1), 2924a, 2924f, 2934a (2012).

* * *

Yvanova does not and cannot challenge the existence and authenticity of these documents, which she submitted. She does not and cannot challenge New Century's authority to appoint Ocwen as its attorney in fact, enter into the PSA, and assign her debt to Morgan 2007-HE1. She does not and cannot challenge Ocwen's authority to record the Assignment of the Deed of Trust or the PSA's requirement that Ocwen record the Assignment in anticipation of foreclosure. She challenges only the timing of Ocwen's exercise of that authority based on her failure to read Section 2.01(b) of the PSA and her mistaken belief that the recording date of an assignment evidences the date the assignor conveyed her loan.

Yvanova's conclusory allegation of a post-closing assignment of her Deed of Trust, which is essential to her theory of standing, misreads and conflicts with her own documents. The Court should reject it. *See Blatty*, 42 Cal.3d at 1040; *Evans*, 38 Cal.4th at 17, 20.

II. YVANOVA LACKS STANDING BECAUSE SHE IS NOT A PARTY TO, OR INTENDED THIRD-PARTY BENEFICIARY OF, THE POOLING AND SERVICING AGREEMENT.

Cal. Civ. Code § 367 provides: "Every action must be prosecuted in the name of the real party in interest, except as otherwise provided by statute." A "real party in interest" is generally defined as "the person possessing the right sued upon by reason of the substantive law." *Killian v. Millard*, 228 Cal.App.3d 1601, 1605 (1991) (citation omitted). A plaintiff who is not the real party in interest lacks standing to sue. *Redevelopment Agency of San Diego v. San Diego Gas & Elec. Co.*, 111 Cal.App.4th 912, 920–21 (2003); *Cloud v. Northrop Grumman Corp.*, 67 Cal.App.4th 995, 1004 (1998).

Under California and New York law (which governs the PSA, *see* AA Vol. 1-2 p. 341-42, § 2.01(c)), a litigant who is not a party to, or an intended third-party beneficiary of, a contract lacks standing to challenge a party's breach of or noncompliance with that contract.

Cal. Civ. Code § 1559 "excludes enforcement of a contract by persons who are only incidentally or remotely benefited by it." *Martinez v. Socoma Cos.*, 11 Cal.3d 395, 400 (1974), citing *Lucas v. Hamm*, 56 Cal.2d 583, 590 (1961); *see also Restatement (Second) of Contracts* § 315 ("An incidental beneficiary acquires by virtue of the promise no right against the promisor or promisee"). As this Court held in *Murphy v. Allstate Ins. Co.*, 17 Cal. 3d 937, 944 (1976) (citations omitted):

> A third party should not be permitted to enforce covenants made not for his benefit, but rather for others. He is not a contracting party; his right to performance is predicated on the contracting parties' intent to benefit him.... As to any provision made not for his benefit but for the benefit of the contracting parties or for other third parties, he becomes an intermeddler.

See, e.g., Hess v. Ford Motor Co., 27 Cal.4th 516, 528 (2002) ("[T]he parties to the Release did not intend to benefit Ford.... Ford is an 'intermeddler' and cannot enforce the terms of the Release"); *Gantman v. United Pacific Ins.*, 232 Cal.App.3d 1560, 1566 (1991); *Mendel v. Henry Phipps Plaza West Inc.*, 6 N.Y.3d 783, 786-87 (2006).

Yvanova is not a party to the PSA, and she does not allege she is a beneficiary. And the plain language of the PSA shows that Yvanova is not an incidental third-party beneficiary, let alone an intended one. Nothing in its text suggests any intent to provide benefits to borrowers like Yvanova; the PSA changed nothing about her loan save the identity of the owner. Instead, the PSA is intended to "benefit the investors who buy securities backed by the mortgage pool...." *Reinagel v. Deutsche Bank Nat'l Trust Co.*, 735 F.3d 220, 228 n.29 (5th Cir. 2013); *see Rajamin*, 757 F.3d at 87.

A would-be plaintiff's contention that the contract is "void" is irrelevant to this analysis. Standing to enforce a contract is a threshold issue, to be resolved without regard to whether the agreement is allegedly void. *See Schauer v. Mandarin Gems of Cal., Inc.*, 125 Cal.App.4th 949, 955—6, 958 (2005).

This rule has been applied to assignments of debt since the earliest years of this State. In *Caulfield v. Sanders*, 17 Cal. 569, 571-72 (1861), this Court held that a debtor could not challenge an assignee's demand for payment of the debt by alleging that the assignment was unauthorized and lacked consideration, and was thus void:

> [D]efendant avers that he has reason to believe that the account was not transferred to the plaintiff until February, 1859, and that the transfer was procured from Redding alone, without consultation with his partners, and for a mere nominal consideration. If the matters thus stated were true in fact, they would constitute no defense to the

> action. It is of no consequence to the defendant, as it in no respect affects his liability, whether the transfer was made at one time or another, or with or without consideration, or by one or by all the members of the firm.

Id. at 572.

In *Seidell*, this Court rejected a challenge to an assignment of a promissory note and deed of trust as void as "taken for delay merely" to postpone foreclosure. 216 Cal. at 171. Purchasers of property encumbered by a deed of trust sued to enjoin a foreclosure sale, contending, among other things, that "the assignment of the note by the original payee thereof to the Tuxedo Land Company was without consideration, and that the assignment was made without any right or authority" by an unauthorized agent of the beneficiary. *Id.* at 167, 169. This Court rejected this claim because "this was not a matter which concerned appellants." *Id.* at 169. "[T]he appellants are in no position to question the validity of an assignment...." *Id.* at 170.

This limitation on standing is particularly important in the context of the PSA, which is a trust agreement. Under Cal. Prob. Code § 16420, only a beneficiary or co-trustee of a trust may sue for breach of trust. *See also Restatement of Trusts (Third)* § 94(1) (2012) ("A suit against a trustee of a private trust to enjoin or redress a breach of trust or otherwise to enforce the trust may be maintained only by a beneficiary or by a co-trustee, successor trustee, or other person acting on behalf of one or more beneficiaries").

The same is true under New York law. *See Estate of McManus*, 47 N.Y.2d 717, 719 (1979) (persons who "were not beneficially interested in the trust ... lack standing to challenge the actions of its trustee"); *Cashman v. Petrie*, 14 N.Y.2d 426, 430 (1964) ("A person who might incidentally

benefit from the performance of a trust but is not a beneficiary thereof cannot maintain a suit to enforce the trust or to enjoin a breach").

Even if Yvanova could allege facts showing a post-closing assignment of the Deed of Trust that violated the provisions of the PSA, the U.S. Court of Appeals for the Second Circuit, the California Courts of Appeal, and other federal and state courts across the country have held in near-uniform fashion that borrowers cannot challenge the assignment of a note or a deed of trust to a securitization trust – even based on allegations that the transfers are void. *See, e.g., Rajamin*, 757 F.3d at 91; *In re Davies*, 565 Fed. Appx. 630, 633 (9th Cir. 2014) ("the weight of authority holds that debtors ... – who are not parties to the pooling and servicing agreements – cannot challenge them.... We believe the California Supreme Court, if confronted with this issue, would so hold"); *Reinagel*, 735 F.3d at 228; *Karnatcheva v. JP Morgan Chase Bank, N.A.*, 704 F.3d 545, 547 (8th Cir. 2013); *Jenkins,* 216 Cal.App.4th at 515; *Arabia v. BAC Home Loans Serv., L.P.*, 208 Cal.App.4th 462, 473 (2012).

In *Rajamin,* plaintiffs "challenged defendants' (a) ownership of plaintiffs' loans and mortgages, (b) right to collect and receive payment on the loans, and (c) right to commence or authorize the commencement of foreclosure proceedings where payments have not been made or received... on the ground, inter alia, that there was a lack of compliance with provisions of the [PSAs]." 757 F.3d at 82. Like Yvanova, the *Rajamin* plaintiffs "were neither parties to nor third-party beneficiaries of the assignment agreements." *Id.* at 81. The Second Circuit held that borrowers like Yvanova lack standing to assert claims based on non-compliance with PSAs or New York trust law because they are "nonparties" to the PSAs and not "beneficiaries of the securitization trusts." *Id.* at 88, 90; *see also*

Reinagel, 735 F.3d at 228 n.29 ("courts invariably deny mortgagors third-party status to enforce PSAs"); *Bank of New York Mellon v. Gales*, 982 N.Y.S.2d 911, 912 (N.Y. App. 2014).

The decision of New York's high court in *McManus* is instructive. There, litigants challenged a stock transfer in violation of a trust agreement as void. The Court held that, even if the transfer may have violated the trust agreement and New York law, because the litigants "were not beneficially interested in the trust ... they lack standing to challenge the actions of its trustee." *Estate of McManus*, 47 N.Y.2d at 719. "Given this disposition of the matter, we need not decide whether the conduct of the trustee comported with the terms of the trust...." *Id.*; *see Rajamin*, 757 F.3d at 88.

This refusal to confer standing on non-parties and non-beneficiaries who would allege breach of private agreements is based on public policy favoring the integrity of contracts, and stability and predictability in commercial affairs – and avoiding judicial intrusion on, and constant oversight of, the right to form and adjust legal relationships by agreement. Allowing a plaintiff who is not a contracting party or contract beneficiary to allege breach or defective performance deprives the actual parties and beneficiaries the fruits of their bargain. It also denies the actual parties and beneficiaries the right, when available, to ratify or otherwise accept breaches or lapses in performance.

Yvanova's misreading of the PSA underscores why strangers to contracts are not allowed to seek to enforce the obligations and interests of others. *See, e.g., Warth v. Seldin*, 422 U.S. 490, 499 (1975). This principle ensures that the party with the "appropriate incentive" to raise (or elect not

to raise) a challenge does so with "the necessary zeal and appropriate presentation." *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004).

III. YVANOVA LACKS STANDING BECAUSE SHE ALLEGES NOTHING TO SHOW THE ASSIGNMENT IS VOID.

Yvanova also lacks standing for the independent reason that her allegations do not and cannot show that the supposedly defective assignment is void.

Under New York and California law, "void" contracts are a nullity and cannot be ratified. *See* Witkin, *Summary of Cal. Law, Contracts* § 2 (2010); *Colby v. Title Ins. & Trust Co.*, 160 Cal. 632, 644-46 (1911) (illegal contracts); *Butler v. San Francisco Gas & Electric Co.*, 168 Cal. 32, 39 (1914) (assignment prohibited by agreement and statute); *Knight v. Knight*, 182 A.D.2d 342, 345 (N.Y. 1992) (gift in violation of will).

"Voidable" contracts, on the other hand, injure the rights of a party to the agreement, which that party may elect to invalidate or ratify. *See, e.g., Ephraim v. Metropolitan Trust Co.*, 28 Cal.2d 824, 837 (1946) (assignment and deed conveyed in violation of Cal. Civ. Code § 2924 held voidable, not void); *Hoppe v. Russo-Asiatic Bank*, 200 A.D. 460, 464-65 (N.Y. 1922) (assignment executed without authority was voidable and could be ratified). "Where an assignment is merely voidable at the election of the assignor, third parties, and particularly the obligor, cannot ... successfully challenge the validity or effectiveness of the transfer." 7 Cal.Jur.3d *Assignments* § 43 (2012). This principle assures that a third party cannot interfere with the right of the parties and beneficiaries to ratify any breach of the agreement or defects in its performance – a right that the parties and beneficiaries to the PSA at issue effectively have exercised in this case to the extent Yvanova's flawed theory of breach is somehow

viable. *See, e.g., Durgin v. Kaplan*, 68 Cal.2d 81, 91 n.10 (1968) ("A voidable contract ... may be ratified by implication from the ... retention and enjoyment of its benefits"); *Consolidated Loan Co. v. Harman*, 150 Cal.App.2d 488, 493 (1957) ("ratification may be shown by any conduct from which assent can fairly be implied").

(A) *Glaski*'s Errant Interpretation of New York Law

The centerpiece of Yvanova's Petition for Review was *Glaski v. Bank of America*, 218 Cal.App.4th 1079 (2013). That heavily-criticized decision departed from earlier Court of Appeal decisions holding that borrowers cannot challenge a foreclosing party's authority to foreclose by alleging an invalid assignment. *See, e.g., Fontenot v. Wells Fargo Bank, N.A.*, 198 Cal.App.4th 256, 271-72 (2011); *Herrera v. Federal National Mortgage Assn.*, 205 Cal.App.4th 1495, 1506 (2012). The *Glaski* panel misread New York law to grant standing to a borrower who alleged that a post-closing conveyance and assignment of a Note and Deed of Trust to a securitization trust was void.

Glaski is inapplicable and inaccurate. *First*, the plaintiff in *Glaski* alleged that the trustee of the securitization trust at issue was not the true owner of the Note. Yvanova's Second Amended Complaint, on the other hand, concedes that Morgan 2007-HE1 held and owned her Note (RA 10 ¶¶1-2; *see* AA Vol. 1-1 p. 6). Her contention is that Morgan 2007-HE1 holds, but does not own, the Deed of Trust because the assignment of that Deed of Trust post-dated, and thus violated, the PSA – even though, as noted above, "the assignment of the note carrie[s] with it the security of the deed of trust." *Seidell*, 216 Cal. at 170.

Second, Glaski is wrong. That decision interpreted Section 7-2.4 of New York's Estates, Powers and Trusts Law because plaintiffs alleged that

the securitized trust at issue, like the one here, was formed under New York law. Section 7-2.4 provides: "If the trust is expressed in an instrument creating the estate of the trustee, every sale, conveyance or other act of the trustee in contravention of the trust, except as authorized by this article and by any other provision of law, is void." *Glaski* read Section 7-2.4 to mean that an assignment that allegedly violated the PSA would be "void, rather than merely voidable." *Id.* at 1095. The Court reached this conclusion despite the fact that no party with a right, obligation, or interest delineated in the PSA challenged any of its terms or the assignment at issue. Every subsequent California appellate decision, including the one below – and every federal decision – has disagreed. *See, e.g., Kan v. Guild Mortgage Co.*, 230 Cal.App.4th 736, 743-45 (2014) (collecting cases); *Siliga v. Mortg. Elec. Reg. Sys., Inc.*, 219 Cal.App.4th 75, 85 (2013).[2/]

(B) <u>The Second Circuit's Rebuke Of *Glaski*</u>

The U.S. Court of Appeals for the Second Circuit refuted *Glaski* in *Rajamin*: "[W]e are not aware of any New York appellate decision that has endorsed this interpretation of § 7-2.4." 757 F.3d at 90. "[T]he weight of New York authority is contrary to plaintiffs' contention that any failure to comply with the terms of the PSAs rendered defendants' acquisition of plaintiffs' loans and mortgages void as a matter of law." *Id.* at 88. "[S]uch an unauthorized act by the trustee is not void but merely voidable by the

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2/ *See also, e.g., Sanders v. Sutton Funding*, 2014 U.S. Dist. LEXIS 87954, at *14 (S.D. Cal. 2014); *Apostol v. Citimortgage*, 2013 WL 6140528, at *6 (N.D. Cal. 2013); *Zapata v. Wells Fargo Bank,* 2013 U.S. Dist. Lexis 173187, at *5 (N.D. Cal. 2013); *Haddad v. Bank of America,* 2014 U.S. Dist. Lexis 2205 (S.D. Cal. 2014); *In re Sandri*, 501 B.R. 369, 374 (Bankr. N.D. Cal. 2013); *Diunugala v. JP Morgan Chase Bank*, 2013 U.S. Dist. LEXIS 144326, *23-25 (S.D. Cal. 2013); *Deutsche Bank Nat'l Trust Co. v. Adolfo*, 2013 WL 4552407, *3 (N.D. Ill. 2013).

beneficiary." *Id.* at 89; *see Mooney v. Madden*, 597 N.Y.S.2d 775, 776 (N.Y. App. 1993) ("the beneficiary or beneficiaries [may] consent or ratify the trustee's *ultra vires* act or agreement").

The reason is straightforward. Under New York law – and California law (which has no equivalent to Section 7-2.4) – the unauthorized acts of trustees are subject to ratification: "The rule is perfectly well settled, that a *cestui que trust* is at liberty to elect to approve an unauthorized investment, and enjoy its profits, or to reject it at his option." *King v. Talbot*, 40 N.Y. 76, 90 (1869); *see Rajamin*, 757 F.3d at 88-89 (collecting cases); Cal. Prob. Code § 16465 ("[I]f the trustee, in breach of trust, enters into a transaction that the beneficiary may at his or her option reject or affirm, and the beneficiary affirms the transaction, the beneficiary shall not thereafter reject it and hold the trustee liable for any loss occurring after the trustee entered into the transaction"). Because "a void act is not subject to ratification..., such an unauthorized act by the trustee is not void but merely voidable by the beneficiary." *Rajamin*, 757 F.3d at 89. This principle, in turn, "is harmonious with the overall principle that only trust beneficiaries have standing to claim a breach of trust. If a stranger to the trust also had such standing, the stranger would have the power to interfere with the beneficiaries' right of ratification." *Id.*[3/]

3/ For similar reasons, Yvanova's errant suggestion that her loan may have been part of New Century's bankruptcy estate, even if true, would not provide standing. Violations of bankruptcy provisions protecting creditors are voidable, not void. *In re Tippett*, 542 F.3d 684, 691 (9th Cir. 2008). "An assignment from the [New Century] Liquidating Trust, without the approval of the Liquidation Trustee may be voidable at the option of the Trustee, but is not void as a matter of law." *Lizza v. Deutsche Bank Nat'l Trust Co.*, 1 F.Supp.3d 1106, 1116-17 (D. Haw. 2014).

The Second Circuit has thus made it clear, like New York and California courts before and after *Rajamin*, that Yvanova lacks standing to challenge the assignment of her Deed of Trust for this independent reason.[4/]

Glaski pursued its mistaken interpretation to further a supposed purpose of protecting trust beneficiaries "from the potential adverse tax consequence of the trust losing its status as a REMIC [Real Estate Mortgage Investment Conduit] trust under the Internal Revenue Code." 218 Cal.App.4th at 1097. Respondents, like courts rejecting *Glaski*, question the ripeness and suitability of trying to protect against a hypothetical possibility when no beneficiary or party with an articulable interest seeks protection. To support its view, *Glaski* cited a trial court decision, *Wells Fargo Bank, N.A. v. Erobobo*, 39 Misc.3d 1220(A) (N.Y. Sup. 2013). The Second Circuit found *Erobobo* "unpersuasive" given its failure to cite or discuss the many contrary New York authorities. *Rajamin*, 757 F.3d at 89; *see also Butler v. Deutsche Bank Trust Co. Americas*, 748 F.3d 28, 37 n.8 (1st Cir. 2014) ("the vast majority of courts to consider the issue have rejected *Erobobo*'s reasoning....").

Other appellate courts have noted the more obvious and tangible risk that *Glaski*'s reading of Section 7-2.4 would *harm* trust beneficiaries: "We simply do not see how the New York legislature could have intended to allow a debtor in a commercial transaction to invoke the provisions of a trust to which it is a stranger in order to frustrate collection of the debt."

4/ Before *Rajamin*, other courts had found that New York precedent "makes clear that section 7-2.4 is not applied literally" and that acts in violation of a trust agreement are "voidable – not void." *Calderon v. Bank of America, N.A.*, 941 F.Supp.2d 753, 766-67 (W.D. Tex. 2013); *see, e.g., Sandri*, 501 B.R. at 375-76 ("New York intermediate appellate courts have repeatedly and consistently found that an act in violation of a trust agreement is voidable, not void").

Bank of America, N.A. v. Bassman FBT, LLC, 2012 Ill.App.2d 110729, *P38 (2012). "In reality, of course, a PSA is executed to benefit the investors who buy securities backed by the mortgage pool – investors who would be harmed by enforcing the PSA to keep mortgages out of the pooling trust." *Reinagel*, 735 F.3d at 228 n. 29.[8/]

IV. YVANOVA LACKS STANDING BECAUSE SHE CANNOT SHOW ACTUAL PREJUDICE.

The time-honored rule in California, as Yvanova concedes (OB 13), is that standing to pursue a wrongful foreclosure claim must include a showing of actual prejudice. *See Bank of America Ass'n v. Reidy*, 15 Cal.2d 243, 248 (1940); *Crist v. House & Osmonson, Inc.*, 7 Cal.2d 556, 559-60 (1936) ("evidence that actual prejudice was suffered" or "likely to result"); *Summerville v. March*, 142 Cal. 554, 558-59 (1904). Although the Court of Appeal held that further amendment of the Second Amended Complaint would have been futile for this reason, the Petition for Review and Opening Brief do not argue, and thus waive, this independent ground for affirmance. *See* Cal. R. Ct. 8.516. And Yvanova has not shown and could not show this essential element of the cause of action. The only "prejudice" she ties to the allegedly defective assignment of the Deed of Trust – the foreclosure sale – would have taken place regardless of the date of the assignment.

8/ *Glaski* compounded its error by misreading the Fifth Circuit decision in *Reinagel* as support. Although *Reinagel* invoked, without analysis, the Texas majority rule that a borrower may resist foreclosure on a ground that renders an element of the chain of title void, the Fifth Circuit rejected the argument that borrowers had standing to challenge an assignment as void because it violated a PSA: "[A]s the Reinagels concede that they are not party to the PSA, they have no right to enforce its terms unless they are intended third-party beneficiaries....." 735 F.3d at 228.

There is simply no prejudice when Yvanova is more than six years in default and does not and cannot contend that the allegedly improper assignment of the Deed of Trust changed her obligations under the Note, interfered with her ability to repay her debt, played any role in her default, caused her to face foreclosure any earlier, prevented her from contesting or avoiding foreclosure, or caused her to face duplicative payment demands or foreclosure proceedings. Indeed, Yvanova does not and cannot contend that foreclosure would not have taken place under the circumstances. *See, e.g., Fontenot,* 198 Cal.App.4th at 272 ("As to plaintiff, an assignment merely substituted one creditor for another, without changing her obligations under the note.... If MERS indeed lacked authority to make the assignment, the true victim was not plaintiff but the original lender, which would have suffered the unauthorized loss of a $1 million promissory note"); *Quale v. Aurora Loan Services, LLC*, 561 F.Appx. 582, 583 (8th Cir. 2014) ("[T]he Quales lack standing. Quite simply, the Quales were not injured by the assignment. The party injured by an improper or fraudulent assignment is the mortgagee-assignor (mortgage holder), not the mortgagor (homeowner)").

In fact, if Yvanova's theory were correct – and it is not – then New Century's attempted assignment failed, and New Century's bankruptcy estate is the beneficiary of the Deed of Trust. The Deed of Trust would thus authorize the bankruptcy estate or its successor to foreclose based on Yvanova's default under the Note. But as this alternate reality confirms, any dispute about the identity of the proper Deed of Trust beneficiary is an issue for the parties to the PSA, not a stranger to that agreement; and those parties can probably resolve that issue, if it exists – and it does not – without resort to litigation. In the absence of prejudice to Yvanova, this

lawsuit, like that in *Seidell,* is "taken for delay" merely to permit her to live in the property without making payments on her debt. 216 Cal. at 171.

The Opening Brief's only vague suggestion of prejudice appears in an unrelated argument that "the [securitization] transaction was intended to affect the plaintiff" (OB 28). To support this argument, the best Yvanova can offer is a hypothetical that is not even tied to Respondents: "Some trusts may be more tolerant of loan defaults, and more willing to work them out, than others" (*Id.*). But that is not prejudice. Yvanova knew, from the day she obtained her loan, that the Note and Deed of Trust could be transferred without notice and that, if she defaulted, the property could be sold in foreclosure. Whether Deutsche Bank is more or less tolerant of defaults is beside the point – particularly when the record shows that Deutsche Bank agreed to a HAMP Trial Period Plan to modify Yvanova's loan, but her default continued (AA Vol. 1-2 p. 408-12; RA 79-82). *See, e.g., Siliga*, 219 Cal.App.4th at 84-85 (borrowers lacked standing to challenge authority to foreclose absent evidence the original lender would not have foreclosed).

V. YVANOVA'S NEW THEORIES IGNORE THE ISSUE PRESENTED AND FAIL AS A MATTER OF LAW.

Rather than answer the Issue on Appeal, Yvanova offers two new theories that were not presented below or in the Petition for Review: (1) that Deed of Trust language describing the contents of a notice of default grants Yvanova "standing" to allege breach of a separate agreement (the PSA) to which she is not party or intended third-party beneficiary (OB 15-24); and (2) that Yvanova can pursue an unprecedented "negligent securitization" claim under *Biakanja v. Irving*, 49 Cal.2d 647 (1958), and

its progeny (OB 24-41). Each theory is waived. In any event, each fails as a matter of law.

(A) The Deed of Trust Does Not Provide Standing to Sue for Breach of the PSA.

Yvanova believes she has "standing": to enforce the PSA because (1) the Deed of Trust includes language requiring a notice of default to inform the borrower of "the right to bring a court action to assert the non-existence of a default or any other defense of Borrower to acceleration and sale" (OB 18, 22-23, *quoting* RA 57); and (2) the Deed of Trust does not say she lacks standing to sue (OB 22).

Yvanova is not suing for breach of the Deed of Trust. She does not contend that the recorded Notice of Default failed to advise her of the right to bring a court action – and that Notice includes the required language (RA 68-69, 80-82). Yvanova's arguments fail for the simple reason that the Deed of Trust did not create or confer an otherwise non-existent right to enforce a separate obligation (assignment of the Deed of Trust) under a separate agreement (the PSA) to which she was not a party or intended third-party beneficiary.

In any event, the arguments lack logic and precedential support. The first argument – that, in Yvanova's words, the Deed of Trust "implies" she "has the right to sue over whether the actual 'Lender' has authorized the declaration of a default" (OB 19) – imagines that a contractual description of the contents of a notice of default (about claims that could be brought *before*, not after, acceleration and sale) "implies" and thus somehow creates a substantive cause of action that does not exist in statutory or common law. The Deed of Trust says nothing about, and does not provide for, a cause of action to challenge the assignment of a Deed of Trust (and instead

gave New Century authority to assign the Deed of Trust, without notice to Yvanova). It does not and cannot create a cause of action where none exists.

The second argument is a fallacy, arguing existence from absence: "the deed of trust does not use conspicuous and clear language to warn Yvanova that she has no power to challenge an invalid assignment of her loan" (OB 23). But Respondents do not say the Deed of Trust bars this suit. Whether or not the Deed of Trust is a contract of adhesion, its failure to say Yvanova "has no power to challenge an invalid assignment" does not mean Yvanova can make that challenge by alleging the breach of a separate agreement to which she is not a party or beneficiary. The Deed of Trust also does not say that Yvanova "has no power" to sue for breach of its terms in Nova Scotia. Yet Yvanova could not bring that suit in Nova Scotia.

In any event, these arguments assume that the assignment violated the PSA and is void – and that Yvanova could challenge the assignment on that ground. As shown above, those assumptions are wrong.

(B) Yvanova's "Duty" Theory Fails As A Matter of Law.

Yvanova also pursues a negligence theory of "standing" that is beyond the scope of the Issue on Appeal (OB 24-41). None of Yvanova's cases assessing the potential imposition of a duty under the law of negligence uses the word "standing." None holds that a plaintiff can, through alleging negligence, invalidate – let alone void – a contract to which she is not a party. And none authorizes or involves a wrongful foreclosure claim based in negligence.

A wrongful foreclosure claim can be based on a statutory violation or an "illegal, fraudulent or willfully oppressive sale of property under a

power of sale contained in a mortgage or deed of trust." *Munger v. Moore*, 11 Cal.App.3d. 1, 7 (1970). This Court has never recognized a wrongful foreclosure claim based in negligence. *See, e.g., I. E. Associates v. Safeco Title Ins. Co.*, 39 Cal.3d 281, 283-84 (1985) (affirming judgment against borrowers alleging trustee negligence); *Sierra-Bay Fed. Land Bank Ass'n v. Superior Court*, 227 Cal.App.3d 318, 334 (1991) ("It is simply not tortious for a commercial lender to lend money, take collateral, or to foreclose on collateral when a debt is not paid").

Moreover, Yvanova's "duty" theory is not about negligent foreclosure, but negligent securitization: the breach of a supposed duty of care in New Century's conveyance and assignment of the Deed of Trust to Morgan 2007-HE1. Even if that duty and breach existed, Yvanova could not undo the foreclosure sale; she could only recover the damages proximately caused by the negligent act, *i.e.*, the allegedly belated assignment of the Deed of Trust. That, in turn, reveals the absence of logic and harm. Yvanova's argument, stripped of its rhetoric, is that Respondents owed her a duty to assign the Deed of Trust before the Trust's closing date. But if that duty existed and was not breached, the impact on Yvanova would have been the same: foreclosure.

Even if this argument was appropriate and not waived by Yvanova's failure to raise it below or in the Petition for Review, the notion that a borrower could pursue a cause of action for negligent securitization of her loan fails for at least two additional reasons: (A) a lender owes no duty of care to the borrower unless its actions exceed the normal role of a lender (and securitization does not exceed that role); and (B) even if *Biakanja* applied, Yvanova cannot fulfill its six-part test.

(C)

(D) A Lender's Duty of Care to Borrowers Is Limited.

There is "a general rule precluding tort recovery for noninsurance contract breach, at least in the absence of violation of 'an independent duty arising from principles of tort law.'" *Freeman & Mills, Inc. v. Belcher Oil Co.*, 11 Cal.4th 85, 102 (1995). There is also a long-standing rule, confirmed by this Court ten years after *Biakanja*, that a lender may be liable to a borrower for negligence only when its conduct moves "beyond the domain of the usual money lender." *Connor v. Great Western Sav. & Loan Ass'n*, 69 Cal.2d 850, 864 (1968).

Yvanova alleges nothing to suggest that New Century, in selling her debt and conveying and assigning the Note and Deed of Trust – or Morgan 2007-HE1, in acquiring her debt, including the Deed of Trust – did anything "beyond the domain of the usual money lender." The sale and securitization of residential loans has been standard practice in the financial services industry since the 1990s. *See* Steven L. Schwarcz, *The Alchemy of Asset Securitization*, 1 Stan. J.L. Bus. & Fin. 133, 135, n.79 (1994). The California Commercial Code authorizes the sale of notes and other negotiable instruments without the borrower's consent. And, of course, Yvanova consented to the sale in her Note and Deed of Trust.

As a result, even if the Court were to consider this theory, it would not need to undertake a *Biakanja* analysis.

(E) The *Biakanja* Analysis Negates the Existence of a Duty.

The six-factor test prescribed by *Biakanja* merely underscores the faulty logic and legal inadequacy of a theory that Respondents owed Yvanova a duty of care in securitizing her debt. *See* 49 Cal.2d at 650.

The "Extent to Which The Transaction Was Intended To Affect The Plaintiff." The securitization was solely for the purposes of the

parties to the PSA and the Certificateholders who are the beneficiaries of the securitization trust. The PSA shows that New Century's sale of the loan to Morgan 2007-HE1 was not intended to and did not affect Yvanova. She was not a party to the Agreement or an intended third-party beneficiary of the Trust. She alleges nothing to show the transaction changed her debt, her repayment obligations, or affected her in any other way. The best Yvanova can state is a hypothetical that isn't even tied to Respondents: "Some trusts may be more tolerant of loan defaults, and more willing to work them out, than others" (OB 28). But as noted above, Yvanova knew and agreed, on the day she obtained her loan, that the Note and Deed of Trust could be transferred without notice – and thus regardless of whether the purchaser was more or less tolerant of defaults – and she knew and agreed that, if she defaulted, the property could be sold in foreclosure. Deutsche Bank's level of tolerance of defaults is irrelevant, particularly when the record shows that Deutsche Bank was tolerant and agreed to modify Yvanova's loan, yet she continued to fail to make any payments (AA Vol. 1-2 p. 408-12; RA 79-82).

The "Foreseeability of Harm to the Plaintiff"/ "The Degree of Certainty That the Plaintiff Suffered Injury"/"The Closeness of the Connection Between the Defendant's Conduct and the Injury Suffered." Yvanova's inability to allege any harm or actual prejudice resulting from her hypothetical theory of negligence – *i.e.*, from the Deed of Trust being assigned to Morgan 2007-HE1 after, rather than before, the closing date – resolves the next three *Biakanja* factors. There was no foreseeable harm because Yvanova suffered no harm at all. The only possibility of harm she alleges is foreclosure. But the foreclosure resulted

from her default and her failure to cure that default, not from the assignment of her Deed of Trust.

Yvanova's "negligent securitization" theory proposes that the parties to the PSA owed her a duty to assign her loan before the Trust closed. She argues, in other words, that if Respondents had transferred the loan in accordance with the PSA, she would not have been harmed. But if that had happened, Deutsche Bank would have undisputed authority to foreclose. Yvanova's circular argument effectively concedes the absence of prejudice.

"If the [injury] would have happened anyway, whether the defendant was negligent or not, then his negligence is not a cause in fact, and of course cannot be the legal or responsible cause." 2 Witkin, *Summary of Cal. Law, Torts* § 1185; *see, e.g., Bank of America, N.A. v. Superior Court*, 198 Cal.App.4th 862, 873 (2011).

"The Moral Blame Attached to the Defendant's Conduct" and "The Policy of Preventing Future Harm." The final two factors also succumb to Yvanova's inability to show harm. Yvanova was in the best position to protect her interests. She defaulted in 2008 and has lived in the property for six years without making loan payments. Although Deutsche Bank offered and agreed to a HAMP Trial Period Plan, she continued to fail to make payments. She alleges nothing to show any unreasonableness on Respondents' part, or any departure from any statutory or common law requirement in conducting the foreclosure sale. Even if Yvanova's loan was conveyed and assigned after the Trust's closing date, she does not allege any violation of law, simply the possible breach of a private agreement that no party to or beneficiary of that agreement has raised (and that the parties have ratified through their actions). And Yvanova's documents show that Ocwen was performing a contractual duty under the

PSA when it recorded the Assignment of the Deed of Trust in 2011. Compliance with contractual obligations "is not blameworthy and is, instead, a policy consideration that militates against concluding that the company had a tort duty...." *Summit Fin. Holdings, Ltd. v. Continental Lawyers Title Ins.*, 27 Cal.4th 705, 716 (2002).

The only tangible harm is the injury Yvanova would wreak on the beneficiaries of the Trust: the Certificateholders who acquired an interest in her debt. Her failure to fulfill her loan obligations has deprived them of the benefit of their investment. Yvanova would now deprive them of recourse to their security. This Court should not assist her.

(F) The California Homeowners' Bill of Rights Is Inapplicable and Irrelevant.

In yet another diversion from the Issue on Appeal, Yvanova shoehorns the California Homeowners' Bill of Rights ("HBOR") into her "negligent securitization" argument (OB 30-41). HBOR took effect on January 1, 2013 – one year after Ocwen recorded the Assignment of the Deed of Trust, eleven months after Western Progressive recorded the Notice of Default, and after the foreclosure sale took place (RA 75-77, 79-82, 93-94). This temporary amendment of the nonjudicial foreclosure scheme, which expires on January 1, 2018, is not retroactive. Its provisions do not apply here.

Yvanova invokes HBOR's addition or amendment of Cal. Civ. Code §§ 2924(a)(6), 2923.55, and 2924.17 as representing public policy considerations that somehow support the judicial creation of a retroactive, pre-HBOR "duty" that the Legislature, by enacting HBOR and limiting its application to events occurring from 2013 through 2018, confirmed did not exist at the time of the events at issue. Indeed, Yvanova proposes that, by

enshrining a common law duty of care based on the public policy underpinnings of HBOR, this Court should make permanent obligations that the Legislature has explicitly established as temporary.

In any event, the supposed violations of a non-existent pre-HBOR public policy stem from Yvanova's faulty speculation that Morgan 2007-HE1 did not own her Deed of Trust until Ocwen recorded the Assignment in 2011. But California law, including HBOR, does not require recording an assignment of a Deed of Trust; and, as shown above, the PSA – by which Morgan 2007-HE1 acquired Yvanova's debt in 2007 – did not require Ocwen, as the Servicer, to record the assignment unless and until foreclosure was imminent (AA Vol. 1-2 p. 340).

Yvanova says Respondents would violate HBOR's Section 2924(a)(6). If it applied – and it does not – that section requires the party initiating foreclosure to be "the holder of the beneficial interest under the mortgage or deed of trust, the original trustee or the substituted trustee under the deed of trust, or the designated agent of the holder of the beneficial interest"; but neither this section nor any other HBOR provision requires a foreclosing party to "demonstrate" its authority before commencing nonjudicial foreclosure. And, as noted above, Yvanova's documents show that Morgan 2007-HE1 in fact owned and held the Deed of Trust, and that Respondents gave public notice of its authority to foreclose by recording the Assignment of the Deed of Trust.

In any event, HBOR's private enforcement mechanisms do not include a wrongful foreclosure action to overturn the sale. Cal. Civ. Code § 2924.12 provides that, after a Trustee's Deed Upon Sale is recorded (which occurred here in 2012), a plaintiff may only obtain "actual economic damages" resulting from a "material violation" of Sections

2923.55 and 2924.17, among others. Those provisions apply, in turn, only to loan servicers, requiring them to ensure that any documents they record in connection with a foreclosure are "accurate and complete and supported by competent and reliable evidence ... to substantiate the borrower's default and the right to foreclose, including the borrower's loan status and loan information." In this case, Ocwen, the loan servicer, did not record anything in connection with the foreclosure except the Assignment of the Deed of Trust, which contains nothing about Yvanova's default, her loan status, or her loan information – and Yvanova does not allege that any statement in that instrument is inaccurate.

CONCLUSION

For these reasons, there is no reasonable possibility that Yvanova could amend the Second Amended Complaint to state a viable wrongful foreclosure claim. This Court should affirm.

Date: January 28, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify under Cal. Rule Ct. 8.204(c)(1) that this Respondents' Brief uses 13-point Times Roman type and contains approximately 12,021 words (as calculated by the Microsoft Word software used to prepare this brief), including footnotes but not the cover, tables of contents and authorities, certificates, and signature block.

BRYAN CAVE LLP

By: K. Lee Marshall
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CERTIFICATE OF SERVICE

I am employed in the County of San Francisco, State of California. I am over the age of 18 and not a party to the within action. My business address is 560 Mission Street, Suite 2500, San Francisco, California, 94105.

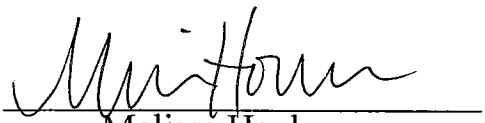
On January 28, 2015, I served the foregoing document described as **RESPONDENTS' ANSWER BRIEF ON THE MERITS** on each interested party in this action as follows:

SEE ATTACHED SERVICE LIST

☒ **By Mail** - I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. Postal Service on that same day with postage thereon fully prepaid at Santa Monica, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

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

Executed on January 28, 2015, at San Francisco, California.



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