SUPREME COURT CASE NO. _____
COURT OF APPEAL CASE NO. B247188

IN THE SUPREME COURT OF CALIFORNIA

TSVETANA YVANOVA,

Plaintiff and Appellant,

v.

NEW CENTURY MORTGAGE CORPORATION, OCWEN LOAN SERVICING, LLC, WESTERN PROGRESSIVE, LLC, and DEUTSCHE BANK NATIONAL TRUST COMPANY, et al.,

Defendants and Respondents.

After a Published Decision by the Court of Appeal
Second Appellate District, Division One
Case No. B247188

PETITION FOR REVIEW

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ISSUE PRESENTED

In *Glaski v. Bank of America,* 218 Cal.App.4th 1079 (2013), the Fifth District held that a homeowner could state a wrongful foreclosure cause of action if he could allege specific facts that showed the foreclosing entity did not have the power to foreclose under the deed of trust. It also ruled that the borrower could allege the foreclosing party lacked authority because the assignment of his deed of trust into an investment trust violated the rules that governed that trust. The published opinion in this case, *Yvanova v. New Century Mortgage*, 226 Cal.App.4th 495 (2014), and the opinion in *Jenkins v. JPMorgan Chase Bank, N.A.*, 216 Cal.App.4th 497 (2013), are to the contrary. The court of appeal in *Yvanova* expressly rejected *Glaski* and then ordered its opinion published, creating an irreconcilable conflict in the published case law. The issue presented is:

Should this Court end the conflict in the lower California courts by applying the *Glaski* rules statewide and disapproving the court of appeal opinions in *Yvanova* and *Jenkins*?

WHY REVIEW SHOULD BE GRANTED

A home loan and deed of trust are nothing more than contracts. As contracts, they must be enforced to uphold their clear language. California allows nonjudicial foreclosures, but only if a contract gives a party the power to sell the home. The standard deed of trust grants that power only to the beneficiary under the deed of trust. (Some deeds of trust, like the deed

of trust in this case, use the term "lender" in place of "beneficiary".) The deed of trust allows it to be assigned, so that the party receiving the assignment can claim to be the beneficiary. Under California case law going back at least 60 years, the purported assignee has the burden of proving he owns the loan through a proper assignment. *Cockerell v. Title Ins. & Trust Co.*, 42 Cal.2d 284, 290 (1954).

California law also gives the power to foreclose to a "trustee, mortgagee, or beneficiary, or any of their authorized agents." Civil Code section 2924 (a) (1); *Jenkins v. JPMorgan Chase Bank,* 216 Cal.App.4th at 513. But, under the clear language of the standard deed of trust, the trustee can act only to protect the beneficiary. *Jenkins, supra,* 216 Cal.App.4t at 508-509. Although a loan servicer can claim to be the agent of the beneficiary, it acts only for the beneficiary and has no greater power than the beneficiary. *Ibid.* Thus, the power to start a foreclosure must come from the beneficiary. *Ibid.* This conclusion is required by the foreclosure statutes, *Ohlendorf v. American Home Mortgage Servicing,* 279 F.R.D. 575, 583 (E.D. Cal. 2010), and by the language of the deed of trust, *Jenkins, supra,* at 509.

Other courts in California have a different idea, which they have set down in published opinions. This idea states that it does not matter who is the beneficiary, because a homeowner can never bring an action to challenge the power of a party to foreclose. *Jenkins, supra,* 216

Cal.App.4th at 513; *Keshtgar v. U.S. Bank, N.A.*, 2014 Cal.App.LEXIS 498 (Cal. Ct. App. 2nd Dist., Div. Six June 9, 2014). This concept has taken hold in some courts, even though the California foreclosure statutes, the language in the standard deed of trust, and California case law mandate that a party claiming to be a beneficiary through an assignment first must prove that the assignment is proper.

Glaski stands against these cases because it concludes that a borrower can challenge the power of a purported beneficiary to foreclose, so long as the borrower can allege specific facts supporting the allegation. *Glaski v. Bank of America*, 218 Cal.App.4th at 1094-1095. The *Glaski* court stressed that its rules were mandated by the plain language of the deed of trust and the foreclosure statutes. *Ibid.*

Jenkins, and the cases that follow it, disregard the clear language of the deed of trust because they say it is irrelevant whether the proper party is foreclosing. They ignore this Court's pronouncement that an assignee of a loan must show it has a proper assignment. *Cockerell v. Title Ins. & Trust Co., supra.* Their rulings seem strange now that the California Legislature has amended the foreclosure statues to require explicitly that a foreclosing party demonstrate that it owns a loan. See Civil Code section 2924 (a) (6): "No entity shall record or cause to a notice of default to be recorded or otherwise initiate the foreclosure process unless it is the holder of the beneficial interest under the . . . deed of trust."

Because *Jenkins* has led other courts of appeal to disregard established California law and clear contractual language, this Court should grant review in this case and uphold *Glaski*. It should eliminate the confusion that now prevails in the lower courts by announcing the *Glaski* rules apply throughout California.

STATEMENT OF THE CASE

Until now, Plaintiff and appellant TSVETANA YVANOVA (or "Yvanova") represented herself in this foreclosure case. On her own, she appealed a decision by the trial court sustaining a demurrer to her Second Amended Complaint (or "SAC") without leave to amend. (Respondents' Appendix [or "RA"], at pages 133-135.) The court of appeal upheld the demurrer. *Yvanova v. New Century Mortgage*, slip opinion at pages 8-9. Yet, the court of appeal also agreed that it must "accept as true the properly pleaded factual allegations of the complaint. *Id.*, at page 5. This summary of facts is based on the allegations Yvanova made in her Second Amended Complaint, construed in light of the above rule.

A. What the Second Amended Complaint alleged.

Yvanova owns a home located at 22054 Crespi Street, Woodland Hills, California 91364. (RA, at pages 3-4.) On July 6, 2006, she took out a loan on the home. (RA, at pages 57-59.) The amount of the loan was $483,000. (RA, at page 42.) The lender was New Century Mortgage Corporation (or "New Century"). At the same time, Yvanova signed a

Deed of Trust. (RA, at pages 40-56.) The Deed of Trust provided security for the loan. If Yvanova did not perform by making payments, she could lose her house to a foreclosure sale, but only to the "lender." (*Ibid.*)

The Deed of Trust identified New Century alone as the "lender." (RA, at page 40.) The Deed of Trust told the borrower that only New Century, as the "lender", had the power to declare a default: "If Lender invokes the power of sale, Lender shall execute or cause Trustee to execute a written notice of the occurrence of an event of default and of Lender's election to cause the Property." (RA, at page 53.) Only the "Lender" had the power of sale: "If the default is not cured on or before the date specified in the notice, Lender at its option may require immediate payment in full of all sums secured by this Security Instrument without further demand and may invoke the power of sale and any other remedies permitted by Applicable Law." (RA, at page 53.)

On April 2, 2007, New Century filed for Chapter 11 bankruptcy. (RA, at page 4.) On August 1, 2008, the bankruptcy court approved its plan of reorganization. (*Ibid.*) Under the plan, New Century was liquidated, and its assets were transferred to a liquidating trust called the New Century Liquidating Trust or "NCLT." (*Ibid.*) Alan Jacobs was appointed trustee of NCLT. (*Ibid.*)

Like thousands of other Californians, Yvanova was hit hard by the recession and fell behind on her mortgage payments. On August 29, 2008,

Old Republic Default Management Services (or "Old Republic") issued a Notice of Default. (RA, at pages 64-65.) This Notice purported to identify New Century as the "beneficiary" of the Deed of Trust. (RA, at page 65.) ("Beneficiary" in this context meant "Lender" under the Deed of Trust.) This was curious, because New Century had been dissolved by the bankruptcy court. A few months later, on December 9, 2008, Old Republic issued a Notice of Trustee's sale. (RA, page 68.) The Notice indicated that New Century was the "beneficiary." (*Ibid.*)

Three years later, on December 19, 2011, Ocwen Loan Servicing, purporting to act as trustee, had recorded an "Assignment of Deed of Trust." (RA, at pages 73-73.) This "Assignment" attempted to transfer Yvanova's Deed of Trust from New Century (but not from NCLT) to an investment trust called "Deutsche Bank National Trust Company, as Trustee for the Registered Holder of Morgan Stanley ABS Capital I Inc. Trust 2007 HE1 Mortgage Pass Through Certificates, Series 2007-HE1." The Court of Appeal explained that this entity was "a mortgage-backed security (MBS), i.e., a collection or pool of mortgages packaged together into a security that is being sold to investors." *Yvanova v. New Century Mortgage Corp.*, slip opinion at page 3. Yvanova, like the court of appeal, will refer to this entity as the Morgan Stanley MBS.

This "assignment" was news to Yvanova and raised questions. First, the assignment was dated December, 2011, and was from New Century to

Morgan Stanley MBS. How could New Century make this transfer over three years after it had been liquidated? Second, as Yvanova learned, the loan servicer, Ocwen, and the trustee Western Progressive, believed that her Deed of Trust had been assigned to the Morgan Stanley MBS as early as 2007. Why, then, did someone think it was necessary to issue the "Assignment" in December 2011? Third, how could the Yvanova Deed of Trust be assigned to the Morgan Stanley MBS in December 2011, when that trust had a closing date of January 26, 2007 and required all property to be assigned to the trust within 90 days of that date?

This four-year gap revealed a break in the chain of title between New Century, the original lender, and Morgan Stanley MBS. If the Yvanova Deed of Trust had been legally transferred to the Morgan Stanley MBS in 2007, there was no need for the December 2011 "Assignment." The fact that the "Assignment" was issued indicated a problem in showing an unbroken chain of title.

B. Trial court proceedings.

Based on this break in the chain of title, Yvanova sued New Century, Ocwen and Deutsche Bank National Trust, the trustee for Morgan Stanley MBS, among other defendants. She filed her original complaint on May 14th, 2012. (RA, at page 137.) The defendants demurred, and she filed a first amended complaint. (RA, at page 138.) The defendants demurred to this complaint, but she was granted leave to amend. She filed

her second amended complaint (or "SAC") on November 5, 2012. (RA, at page 139.) In the SAC, she alleged that a break in the chain of title deprived Deutsche, Morgan Stanley MBS, and the other defendants of any power to foreclose:

> "2. However, NEW CENTURY did not assign the Deed of Trust to [Morgan Stanley MBS] as part of the sale of the underlying Note. NEW CENTURY never assigned the beneficial ownership of the purported Deed of Trust to any party. As a result of the transfer of the Note in blank from NEW CENTURY to MORGAN, the security interest in Plaintiff's property known as the Deed of Trust was terminated."
>
> 3. Plaintiff further alleges that Defendant NEW CENTURY, and each of them, cannot establish possession and/or proper transfer and/or endorsement of the Promissory Note and proper assignment of the Deed of Trust either to [Morgan Stanley MBS] or DEUTSCHE, as trustee; therefore, none of the Defendants have perfected any claim of title or security interest in the property. Defendants and each of them do not have the ability to establish that the Deed of Trust, that secured the Note were legally or properly acquired by Defendants." (RA, at page 5; original formatting eliminated.)

The SAC stated a single claim to quiet title to the Yvanova home. (RA, at pages 15-17.) However, it could easily be amended to allege a claim for wrongful foreclosure, because Yvanova claimed compensatory damages and other relief besides quiet title. "Plaintiff seeks redress from Defendants . . . for damages and other injunctive relief. . . ." (RA, at page 6.)

Again, the defendants demurred, and on February 8, 2013, the trial court sustained their demurrer without leave to amend:

> "As to the demurrer, the court finds that for the reasons stated in defendants' moving papers, the Second Amended Complaint fails to state or allege facts sufficient to constitute a cause of action as pled against these defendants. Moreover . . . The court notes that plaintiff has intermittently been in default since at least 2008 and represents to the court that she has not made attempts to discharge the debt or tender the amount owed." (RA, at page 135.)

On September 14, 2012, Yvanova's home was sold at a foreclosure sale. (RA, at page 5.) As of today, Yvanova continues to live in the home, although she faces eviction if she loses an upcoming trial on an unlawful detainer complaint.

C. The Court of Appeal Affirms.

Yvanova appealed. On April 25, 2014 the court of appeal affirmed in an unpublished opinion, which it ordered published on May 22, 2014. (See Exhibit A to this Petition for Review for the court of appeal opinion.) The court of appeal noted the core allegation of the SAC:

> "Plaintiff also alleged the 2011 transfer to Deutsche Bank was invalid because New Century Mortgage had entered into bankruptcy in August 2008, and the purported assignment to Deutsche Bank after liquidation was made without the authorization of the bankruptcy trustee and was irregular in several respects. Although several of the purported irregularities are specious (for example, plaintiff queries why an entity incorporated under the laws of one state might list its address in another state), the essence of plaintiff's allegations is that recorded documents, without more, do not establish chain of title running to Deutsche Bank. Ultimately, plaintiff alleged, Deutsche Bank never possessed the trust deed, and all downstream transfers were therefore void. She further alleged that transfer of the promissory note in blank

> from New Century Mortgage to Morgan Stanley terminated the security interest in her property." *Yvanova v. New Century Mortgage Corp.*, slip opinion at page 4.

The court of appeal agreed with respondents that Yvanova could not allege a cause of action to quiet title without first tendering the amount of the loan. *Yvanova v. New Century Mortgage Corp.*, slip opinion at page 6. But, the court suggested that she could amend her complaint to state a cause of action for wrongful foreclosure. *Yvanova v. New Century Mortgage Corp.*, slip opinion at page 7.

Ultimately, the court found that Yvanova could not allege any cause of action even if she could prove a break in the chain of title." *Yvanova v. New Century Mortgage Corp.*, slip opinion at page 7. First, any defective assignment did not harm her, because her obligations remained the same. Second, she had no "standing" to bring up a break in the chain of title:

> "Plaintiff argues the transfer of her promissory note and deed of trust from New Century Mortgage to Deutsch Bank and the subsequent securitization of the note were improper. But even if she is correct, 'the relevant parties to such a transaction were the holders (transferors) of the promissory note and the third party acquirers (transferees) of the note.' 'As an unrelated third party to the alleged securitization, and any other subsequent transfers of the beneficial interest under the promissory note, [plaintiff] lacks standing to enforce any agreements, including the investment trust's pooling and servicing agreement, relating to such transactions. 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. It is also possible to imagine one or many invalid transfers of the promissory note may cause a string of civil lawsuits between transferors and transferees.' But plaintiff 'may not assume the theoretical claims of hypothetical transferors and transferees' to assert causes of action for declaratory relief or wrongful foreclosure.'" *Yvanova v. New Century Mortgage Corp.,* slip opinion at pages 7-8, *quoting Jenkins v. JP Morgan Chase Bank, N.A.,* 216 Cal.App.4th 497, 515 (2013).

Third, although the court recognized that *Glaski v. Bank of America,* 218 Cal.App.4th 1079 (2013), a published opinion from the Fifth District, would allow her to pursue a claim for wrongful foreclosure, it rejected *Glaski*:

> "Plaintiff argues *Glaski v. Bank of America* (2013) 218 Cal.App.4th 1079 supports her argument that a borrower may challenge a nonjudicial foreclosure based on allegations that one or more transfers in the chain of title of a trust deed was void. She is correct. There, after concluding that noncompliance with the terms of a pooling and servicing agreement would render an assignment void, the court adopted without analysis the majority rule in Texas that an obligor may resist foreclosure on any ground that renders an assignment in the chain of title void. (*Reinagel v. Deutsche Bank Nat'l Trust Co*. (5th Cir. Tex. 2013) 722 F.3d 700, 705.) But no California court has followed *Glaski* on this point, and many have pointedly rejected it. (See, e.g., *Apostol v. Citimortgage, Inc*. (N.D.Cal., Nov. 21, 2013) 2013 U.S.Dist. Lexis 167308, 23-24; *Dahnken v. Wells Fargo Bank, N.A.*, C 13-2838 PJH (N.D.Cal., Nov. 8, 2013) 2013 U.S.Dist. Lexis 160686; *In re Sandri* (Bankr. N.D.Cal., Nov. 4, 2013) 2013 Bankr. Lexis 4663.) And as discussed above, *Jenkins* is directly to the contrary. We agree with the reasoning in *Jenkins*, and decline to follow *Glaski*." *Yvanova v. New Century Mortgage Corp.,* slip opinion at page 8.

The court stressed that *Jenkins* contradicted *Glaski*: "*Jenkins* is directly to the contrary." (*Ibid.*) It intensified that conflict when, on May 22, 2014, it ordered its opinion published. (See Exhibit A to Petition for Review, Order of May 22, 2014.) This order granted a request for publication from Deutsche Bank, Morgan Stanley MBS, and the other defendants. (*Ibid.*)

As matters stood on May 22, 2014, a published case, *Glaski v. Bank of America,* allowed a homeowner to plead a wrongful foreclosure cause of action based on a break in the chain of title. Two other published cases prohibited such a cause of action: *Jenkins v. JP Morgan Chase* and this case, *Yvanova v. New Century Mortgage.* On June 9, 2014, in *Keshtgar v. U.S. Bank*, 2014 Cal.App.LEXIS 498 (Cal. Ct. App. 2nd Dist, Div. 6, June 9, 2014), the Second District Court of Appeal, Division Six, issued a published opinion that barred a claim based on a chain of title break, at least at the pre-foreclosure sale stage. That opinion also refused to follow *Glaski*.

D. Post-opinion proceedings.

Yvanova filed a petition for rehearing on May 9, 2014. The court of appeal denied the petition on May 27, 2014 and did not change any language in the opinion. Because the court of appeal ordered its opinion published on May 22, 2014, it became final on June 21, 2014. California Rules of Court, Rule 8.264 (b) (3). This petition for review is due 10 days

after the opinion becomes final, or by July 1, 2014. Rule 8.500 (e) (1). This petition is timely because it is given to Federal Express on July 1, 2014 for delivery the next day. Rule 8.25 (b) (3).

ARGUMENT

A. This Court should grant review to end conflict and confusion in the lower California courts over the rules announced in *Glaski* and in *Jenkins.*

1. Background

One of the forces behind the home financing and refinancing boom in the last decade was the mortgage-backed securitized trust. *Glaski v. Bank of America*, 218 Cal.App.4th 1079, 1082 (2013). Using this device, securities underwriters set up investment trusts, each having a trustee. Lenders would issue loans to homeowners, secured by a deed of trust that made the lender the "beneficiary" and thus able to enforce the deed through a power of sale. *Ibid.* In turn, the lenders would transfer the loans into the investment trust, which would sell bonds to investors. The trust used mortgage payments from borrowers to pay income to investors. *Ibid.*

The trust was governed by a PSA, which typically required that a loan had to be transferred into the trust by a cutoff date. *Glaski v. Bank of America*, 218 Cal.App.4th at 1096-1097. This cutoff date existed because it was required by Internal Revenue Service statutes and regulations. *Ibid.* Failure to transfer the loan into the trust by the cutoff date jeopardized the tax benefits the investment trust might receive. *Ibid.*

When the recession hit in 2008, many homeowners in California fell behind on their payments and foreclosures began. In the past, the lender that issued the loan would contact the foreclosure trustee, designated in the deed of trust, and instruct the trustee to start the foreclosure process. Sometimes, the lender delegated that power to a third party that also handled bill payments and other matters, called a loan servicer. *Jenkins v. J.P. Morgan Chase*, 216 Cal.App.4th 497, 508-509 (2013).

For many California homeowners, it was unclear who owned their loans, because those loans supposedly had been sold to investment trusts. In many cases, servicers and investment trusts took actions that led borrowers to believe that even these entities did not know who owned a particular loan. In *Glaski*, for example, Chase recorded two assignments of the Glaski deed of trust to an investment trust, both over two years after the trust's closing date. *Glaski v. Bank of America,* 218 Cal.App.4th at 1085. In *Yvanova v. New Century Mortgage*, the original lender, New Century, supposedly assigned Yvanova's loan to the Morgan Stanley MBS trust in 2011, four years after New Century went bankrupt, three years after it was liquidated, and nearly five years after the trust supposedly closed.

These actions led borrowers to challenge the power of lenders and servicers to foreclose. Borrowers alleged specific facts that showed an investment trust or bank lacked the power to foreclose. They pointed to inconsistent actions, as in *Glaski*¸ or other facts that indicated that

"foreclosing party lacked standing to foreclose," or "the chain of title relied upon by the foreclosing party contain[ed] breaks or defects." *Glaski v. Bank of America*, 218 Cal.App.4th at 1093. Nearly all of these cases arose from demurrers or motions to dismiss. *Glaski, supra; Scott v. JP Morgan Chase Bank, N.A.*, 214 Cal.App.4th 743, 764 (2013).

2. *Glaski* and *Jenkins*

Glaski, a decision by the Fifth Appellate District, found that a borrower could state a cause of action, and it announced two principles that collectively represented the "*Glaski* rule". First, a borrower could allege and prove a theory that a foreclosing party lacked the power to foreclose, or lacked "standing":

> "'Several courts have recognized the existence of a valid cause of action for wrongful foreclosure where a party alleged not to be the true beneficiary instructs the trustee to file a Notice of Default and initiate nonjudicial foreclosure. . . .' [A] plaintiff asserting this theory must allege facts that show the defendant who invoked the power of sale was not the true beneficiary." *Glaski v. Bank of America*, 218 Cal.App.4th at 1094, *quoting Barrionuevo v. Chase Bank, N.A.*, 885 F.Supp.2d 964, 973 (N.D. Cal. 2012) (applying California law).

Second, if an investment trust "initiates nonjudicial foreclosure," a borrower could allege the trust did not own the loan and thus did not become the "beneficiary" because the transfer of the loan into the trust violated the trust's PSA.

> "We reject the view that a borrower's challenge to an assignment must fail once it is determined that the borrower was not a party to, or third party beneficiary of, the assignment agreement. Cases adopting that position 'paint with too broad a brush.' Instead, courts should proceed to the question whether the assignment was void." *Glaski v. Bank of America*, 218 Cal.App.4th at 1095, *quoting Culhane v. Aurora Loan Services*, 708 F.3d 282, 290 (1st Cir. 2013) (applying Massachusetts law).

These holdings contrasted with *Jenkins v. J.P. Morgan Chase*, 216 Cal.App.4th at 513, where the court commented:

> "Moreover, we find the statutory provisions, because they authorize a 'trustee, mortgagee, or beneficiary, or *any of their authorized agents*, to initiate a foreclosure, do not require that the foreclosing party have an actual beneficial interest in both the promissory note and deed of trust to commence and execute a foreclosure sale." (Italics in original; citations omitted.)

As a corollary to this observation, the *Jenkins* court wrote that a homeowner did not have standing to challenge violations of the PSA: "As an unrelated third party to the alleged securitization, and any other subsequent transfers of the beneficial interest under the promissory note, Jenkins lacks standing to enforce any agreements, including the investment trust's pooling and servicing agreement, relating to such transaction." *Jenkins, supra*, 216 Cal.App.4th at 515.

3. The offspring of *Jenkins.*

These two observations in *Jenkins* were *dicta*, because the court already had decided that Jenkins, the borrower, did not have a cause of action. *Jenkins, supra,* 216 Cal.App.4th at 513. Nonetheless, other,

published appellate decision have seized on these *dicta* to support their refusal to follow *Glaski.* For example, the court of appeal in *Yvanova* expressly embraced *Jenkins* and rejected *Glaski*:

> "Plaintiff argues *Glaski v. Bank of America* (2013) 218 Cal.App.4th 1079 supports her argument that a borrower may challenge a nonjudicial foreclosure based on allegations that one or more transfers in the chain of title of a trust deed was void. She is correct. . . . But no California court has followed *Glaski* on this point, and many have pointedly rejected it. And as discussed above, *Jenkins* is directly to the contrary. We agree with the reasoning in *Jenkins*, and decline to follow *Glaski*." *Yvanova v. New Century Mortgage Corp.*, slip opinion at page 8 (citations omitted).

Division 6 of the Second District also declined to follow *Glaski* and embraced *Jenkins:*

> "The facts alleged in *Jenkins* are similar to those alleged here. The plaintiff alleged the trustee of a securitized investment trust had no authority to initiate foreclosure on a trust deed because "the promissory note was not transferred into the investment trust with a complete and unbroken chain of endorsements and transfers ….The trial court sustained the defendant's demurrer without leave to amend. The Court of Appeal affirmed, citing *Gomes* for the proposition that California's comprehensive nonjudicial foreclosure scheme does not provide for a preemptive action to challenge the authority of the party initiating foreclosure. [¶] California cases hold, however, that even in postforeclosure actions a borrower lacks standing to challenge an assignment absent a showing of prejudice." *Keshtgar v. U.S. Bank, N.A.*, 2104 Cal.App.LEXIS 498, at **6-7, 10 (citations omitted).

There is no way to reconcile *Glaski, Yvanova* and *Keshtgar*. One holds that borrowers have standing to challenge improper, illegal or

inadequate assignments of a deed of trust; the others hold borrowers have no such right. This situation is a compelling case for review under Rule of Court 8.500 (b) (1), which calls for review of a court of appeal decision to "secure uniformity of decision."

Without guidance from this Court, homeowners will enjoy success or endure failure depending on where they bring their actions. Trial judges in Los Angeles, Ventura, Santa Barbara, and San Luis Obispo Counties will reject *Glaski* claims, because they will feel bound by *Jenkins, Yvanova v. New Century Mortgage* and *Keshtgar v. U.S. Bank. See, e.g.,* tentative ruling on demurrer in Perez v. Bank of America, Action No. KC066502 (Los Angeles Superior Court Feb. 24, 2014), at page 2 (where the trial court, in sustaining a demurrer without leave to amend, followed *Jenkins* and refused to follow *Glaski*.)

Trial judges in Orange County will follow *Jenkins* because it was decided by the court of appeal with direct jurisdiction over them. Judges in Fresno County will allow borrowers to sue because they will follow *Glaski. See, e.g.,* tentative ruling in Burt v. Bank of New York Mellon, Action No. 14CECG00641 (Fresno County Superior Court June 4, 2014) (where the trial court overruled a demurrer because it applied *Glaski*.)

Trial judges in San Francisco, Santa Clara or Sacramento Counties will be confused, because they have to resolve the conflict between *Glaski, Jenkins, Yvanova* and *Keshtgar.* Without an opinion from this Court, they

have no controlling authority. Homeowners will be subject to arbitrary and conflicting results, depending most of all on whether they are in a trial court controlled by *Glaski* or one controlled by *Jenkins, Yvanova* and *Keshtgar*. One of this Court's missions is to resolve such conflicts and avoid such results by bringing consistency to the case law.

B. *Jenkins* and its progeny are not consistent with California law or the language in the typical Deed of Trust.

Jenkins and the cases following it are neither consistent with California law on assignments or with the language in the typical California deed of trust. As even the *Jenkins* court recognized, *Jenkins v. J.P. Morgan Chase*, 216 Cal.App.4th at 508, the "customary provisions of a valid deed of trust include a power of sale clause, which empowers the beneficiary-creditor to foreclose on the real property if the trustor-debtor fails to pay back the debt owed under the promissory note." Further, the deed of trust allows the trustee—Old Republic and Western Progressive, in Yvanova's case--to initiate and conduct a foreclosure, but only to protect the beneficiary: "[S]hould the trustor-debtor default on the debt, the trustee must initiate foreclosure on the property for the benefit of the beneficiary-creditor. . . ." *Ibid*.

Yvanova's Deed of Trust is a typical California deed of trust and follows these rules. "If *Lender invokes the power of sale*, Lender shall execute or cause Trustee to execute a written notice of the occurrence of an

event of default and of Lender's election to cause the Property to be sold." (RA, at page 53; italics added.) Further, if "the default is not cured on or before the date specified in the notice, Lender at its option may require immediate payment in full of all sums secured by this Security Instrument without further demand and may invoke the power of sale and any other remedies permitted by Applicable Law." (*Ibid.*) Thus only the "lender" under the Yvanova Sporn Deed of Trust can declare a foreclosure and authorize a foreclosure sale. The trustee does not have this power, as it can act only for the beneficiary. *Jenkins v. J.P. Morgan Chase*, 216 Cal.App.4th at 508. A loan servicer can initiate a foreclosure, but it acts only as the agent of the beneficiary. *Ibid.*

All foreclosures, in other words, start with the "lender" or "beneficiary" under the deed of trust. Unless the foreclosure is initiated by the actual beneficiary, it is void. *Glaski v. Bank of America,* 218 Cal.App.4th at 1094. And, a loan servicer who acts as the agent for a party who is not a beneficiary lacks the power to foreclose. *Jenkins, supra; Glaski, supra.*

This deed of trust language tracks California law. In California, if you want to start a foreclosure, you must own the loan. This is not a new idea. In *Adler v. Newell,* 109 Cal. 42, 49-50 (1895), this Court ruled that a mortgage "is a mere incident to the debt," and that the debt "belongs to the holder of the note, and could be foreclosed only by the latter." 60 years

later, this Court held that a party claiming to own a mortgage by assignment could not collect on that loan until it proved the assignment is valid. *Cockerell v. Title & Ins. Co.*, 42 Cal. 284, 292-293 (1954). This Court stressed in *Cockerell*:

> "In an action by an assignee to enforce an assigned right, the evidence must not only be sufficient to establish the fact of assignment when that fact is in issue but the measure of sufficiency requires that the evidence of assignment be clear and positive to protect an obligor from any further claim by the primary oblige." *Ibid.*

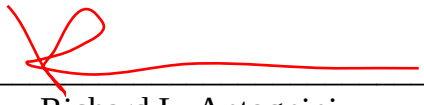
Allowing a non-beneficiary to initiate a foreclosure violates established California law. It permits a non-owner of a mortgage to collect the debt, an idea that goes against *Adler v. Newell*. It also permits a party to collect on a debt under an assignment without first showing it holds a valid assignment, violating *Cockerell*. Finally, this idea goes against the plain language of the typical California deed of trust. *Jenkins* and its progeny threaten these results. To prevent *Jenkins* and its offspring from warping California law, this Court should grant review and uphold *Glaski*.

CONCLUSION

For these reasons, plaintiff and appellant TSVETANA YVANOVA respectfully requests that the Court grant review in this case and reverse the decision of the court of appeal.

Dated: July 1, 2014

LAW OFFICES OF
RICHARD L. ANTOGNINI

By: 

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TSEVETANA YVANOVA

CERTIFICATE OF WORD COUNT
Calif. Rules of Court, Rule 8.204 (c) (1).

The text in this Petition for Review consists of 5,534 words, as counted by the Word 2007 word processing program used to generate the Petition.

Dated: July 1, 2014

LAW OFFICES OF
RICHARD L. ANTOGNINI

By: 

Richard L. Antognini
Attorneys for Plaintiff
and Appellant
TSVETANA YVANOVA

Exhibit A to Petition for Review-

Court of Appeal Opinion

Filed 4/25/14; pub. order 5/22/14 (see end of opn.)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

TSVETANA YVANOVA, Plaintiff and Appellant, v. NEW CENTURY MORTGAGE CORPORATION et al., Defendants and Respondents.	No. B247188 (Los Angeles County Super. Ct. No. LC097218)

APPEAL from an order of the Superior Court of Los Angeles County. Russell Kussman, Judge. Affirmed.

Tsvetana Yvanova, in pro. per., for Plaintiff and Appellant.

Houser & Allison, Robert W. Norman, Jr., Patrick S. Ludeman, for Defendants and Respondents.

Plaintiff Tsvetana Yvanova, in pro. per., brought an action against numerous financial institutions, alleging the mortgage and deed of trust on her residence were improperly securitized and assigned from the original lender to several successive mortgagees and trustees, and ultimately improperly sold at foreclosure. Plaintiff alleged instances of transfer fraud, claimed several assignments were ineffective, and denied that the ultimate trustee possessed a valid interest in the property. Although the only cause of the action in the operative complaint was entitled "To Quiet Title," plaintiff also sought restitution, damages, and declaratory relief. Defendants demurred to the complaint on the ground that plaintiff failed to state a cause of action for quiet title in that she failed to allege she tendered the loan balance. The trial court sustained the demurrer without leave to amend on that ground.

We affirm.

Background

Complaint

Plaintiff's original and first amended complaints, defendants' demurrers thereto and the rulings on those demurrers are not in the record on appeal. We take the facts from the second amended complaint, which is operative, for now accepting them as true, and from matters properly subject to judicial notice. The complaint is somewhat difficult to understand, as it includes plaintiffs' questions, arguments and evidence, citations to authority, references to civil pleadings in other jurisdictions, and an unclear timeline. From a close reading, however, we glean the following facts.

In 2006, plaintiff executed a promissory note in the amount of $483,000 secured by a deed of trust on her residence in Woodland Hills, California. The lender and beneficiary was New Century Mortgage Corporation. The trustee was Stewart Title Company. The deed of trust entitled the lender to substitute the trustee without notice to the borrower, assign the note to third parties without notice, and sell the property in case of default.

According to recorded documents, in August 2008 the trustee served plaintiff with a notice of default and election to sell, alleging plaintiff was in default on the note in the amount of $14,711.79. In 2007, when New Century Mortgage was in bankruptcy, the deed of trust was assigned by means of a Pooling and Servicing Agreement to Deutsche Bank National Trust Company as trustee for the Morgan Stanley ABS Capital I Inc. Trust 2007-HE1 Mortgage Pass Through Certificates, Series 2007-HE1, a mortgage-backed security (MBS), i.e., a collection or pool of mortgages packaged together into a security that is then sold to investors. We will hereafter refer to the security as the Morgan Stanley MBS.

In January 2012, Deutsche Bank served plaintiff with a second notice of default and election to sell, claiming she was in default on the note in the amount of $63,960.80. In February 2013, Western Progressive, LLC, was substituted in as trustee. In August 2012, Western Progressive executed a notice of trustee's sale, claiming plaintiff had an unpaid loan balance in the amount of $537,934.03. On September 14, 2012, Western Progressive sold the property to THR California, LLC for $355,000.01 and recorded a trustee's deed upon sale.

Plaintiff continues to live in the Woodland Hills residence.

Plaintiff filed suit on May 14, 2012. After two rounds of demurrer, plaintiff filed the second amended complaint. The complaint, entitled "Action to Quiet Title," contained one cause of action, captioned, "To Quiet Title." In it, plaintiff made three substantive allegations: (1) The assignment of the deed of trust to Deutsche Bank was "ante-dated, misrepresents material facts and entities, that render the instrument void"; (2) the substitution of Western Progressive as trustee "is void, due to ante dating, violating procedural trust rules and using entities, which do not have authority to act"; and (3) Western Progressive "conducted unlawful defective 'auction' sale (in violation of California Secretary of State regulations and Civ Code 1812.6) and subsequently executed a Trustee's Deed" that "is invalid, since its validity entirely depends on the previously recorded security instruments."

Plaintiff alleged the 2006 deed was void due to "Notary fraud, Robo-signed instruments, misidentification of entities, ante-dating of instruments, misrepresentation of material fact within the recorded public documents, 'void ab initio' Deed of Trust and Assignment of Deed, due to the use of non-existent business entities, officially out of business or without authority to act."

Plaintiff also alleged the 2011 transfer to Deutsche Bank was invalid because New Century Mortgage had entered into bankruptcy in August 2008, and the purported assignment to Deutsche Bank after liquidation was made without the authorization of the bankruptcy trustee and was irregular in several respects. Although several of the purported irregularities are specious (for example, plaintiff queries why an entity incorporated under the laws of one state might list its address in another state), the essence of plaintiff's allegations is that recorded documents, without more, do not establish chain of title running to Deutsche Bank. Ultimately, plaintiff alleged, Deutsche Bank never possessed the trust deed, and all downstream transfers were therefore void. She further alleged that transfer of the promissory note in blank from New Century Mortgage to Morgan Stanley terminated the security interest in her property.

On February 7, 2012, defendants demurred to the second amended complaint on the ground that plaintiff failed to state a cause of action for quiet title because she failed to allege tender to cure her default on the promissory note. Defendants argued plaintiff's allegations in the complaint were irrelevant without an allegation of tender, or fraud at the time the deed of trust was entered into. On February 8, 2013, the trial court sustained defendants' demurrer without leave to amend "for the reasons stated in defendants' moving papers." The court noted that at the hearing plaintiff represented she had not attempted to discharge the debt or tender the amount owed, and therefore could not quiet title in herself.

Defendants represent that the trial court entered judgment in their favor on February 8, 2013, but no such judgment has been included in the record on appeal. Neither does the record contain plaintiff's notice of appeal.

After an initial round of briefing on appeal we requested further briefing on whether plaintiff's allegations might support a cause of action for wrongful foreclosure. In response, both parties submitted extensive letter briefs, which we have considered.

DISCUSSION

A. Standard of review

In reviewing an order sustaining a demurrer without leave to amend, we accept as true the properly pleaded factual allegations of the complaint. (*McCall v. PacifiCare of California, Inc*. (2001) 25 Cal.4th 412, 415.) Where, as here, the complaint references the terms of a contract, we consider those terms as part of the pleading. Furthermore, the allegations of the complaint must be liberally construed with a view to attaining substantial justice among the parties. (Code Civ. Proc., § 452; *King v. Central Bank* (1977) 18 Cal.3d 840, 843.) We review the complaint de novo to determine whether the trial court properly sustained the demurrer. (*Cantu v. Resolution Trust Corp*. (1992) 4 Cal.App.4th 857, 879.)

B. Procedural Defects

Plaintiff's appeal is defective in several respects. Most immediately, plaintiff has provided us with no notice of appeal. But as defendants represent that judgment has been entered and do not complain the appeal is untimely, we will presume the appeal is proper.

Plaintiff's submissions on appeal disregard many rules of court. Her opening brief is improperly formatted and contains no statement of appealability, certificate of interested parties, table of contents, table of authorities, or certificate of word count. (Cal. Rules of Court, rules 8.204, subd. (a)(2)(A-B), 8.208, 8.204, subds. (a)–(c).) Further, plaintiff lodged a four-volume appellant's appendix, but the appendix contains no proof of service, and defendants represent they were never served with one, in violation of court rule 8.124, subdivision (e)(1)(A).

Plaintiff argues that a trial court may not dismiss a case brought by a litigant in propria persona, and as such a litigant she need not comply with the court's rules. She is incorrect. A party may choose to act as his or her own attorney, but "such a party is to be

treated like any other party and is entitled to the same, but no greater consideration than other litigants and attorneys." (*Barton v. New United Motor Manufacturing* (1996) 43 Cal.App.4th 1200, 1210.) As with attorneys, in propria persona litigants must follow correct rules of procedure. (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246-1247.)

Defendants request that we disregard plaintiff's opening brief and appendix. Although it is within our discretion to do so, we think our request for further briefing clarified the pertinent issues and gave both parties an opportunity to address them.[1]

C. Substantive Issue

Plaintiff's essential allegation is that Deutsche Bank's receipt of title from New Century Mortgage's bankruptcy estate was defective for several specified reasons. Deutsche Bank therefore had no proper title to her trust deed and no standing to foreclose. Plaintiff contends this defect permits her to quiet title. Defendants demurred, and the trial court sustained the demurrer, on the ground that plaintiff's default and failure to tender the amount due on her loan deprived her of standing to seek quiet title.

As defendants argued and the trial court found, plaintiff is not entitled to quiet title because she failed to allege she tendered funds to discharge her debt. (*Aguilar v. Bocci* (1974) 39 Cal.App.3d 475, 477 [a plaintiff may not quiet title in himself without discharging his debt].) But when evaluating a complaint the court must attend to the facts properly alleged therein, not the labels appended to them or the theories for recovery. (*Quan v. Truck Ins. Exchange* (1998) 67 Cal.App.4th 583, 592.) We construe the complaint liberally, in attempt to attain substantial justice between the parties. (*King v. Central Bank*, *supra*, 18 Cal.3d at p. 843.)

In our request for letter briefing we invited the parties to discuss, in essence, whether plaintiff should be given leave to amend to allege a cause of action for wrongful foreclosure. Plaintiff responded as follows: "Despite the fact that Plaintiff/Appellant has presented all facts and factual allegations correctly, to support her claim and additional 4-

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[1] Plaintiff's request for leave to file a time chart is granted.

5 causes of action—the core facts remain unchanged. However, a leave to amend will greatly benefit the framing of the case for two reasons: First: New developments in the economic and legal history since 2012 and new annotated case law supporting the issues discussed and Second: following the Supplement brief questions, Appellant/Plaintiff will be able to frame the same issues in a more succinct and focused manner with more appropriate causes of action." Defendants, on the other hand, argued amendment would be futile because plaintiff cannot state a cause of action for declaratory relief or wrongful foreclosure for the same reasons she may not quiet title in herself: She has no standing to challenge Deutsch Bank's claim to title.

We agree with defendants. "Because a promissory note is a negotiable instrument, a borrower must anticipate it can and might be transferred to another creditor. As to plaintiff, an assignment merely substituted one creditor for another, without changing her obligations under the note." (*Herrera v. Federal National Mortgage Assn*. (2012) 205 Cal.App.4th 1495, 1507.) An impropriety in the transfer of a promissory note would therefore affect only the parties to the transaction, not the borrower. The borrower thus lacks standing to enforce any agreements relating to such transactions. (*Jenkins v. JPMorgan Chase Bank, N.A.* (2013) 216 Cal.App.4th 497, 515 (*Jenkins*).)

Plaintiff argues the transfer of her promissory note and deed of trust from New Century Mortgage to Deutsch Bank and the subsequent securitization of the note were improper. But even if she is correct, "the relevant parties to such a transaction were the holders (transferors) of the promissory note and the third party acquirers (transferees) of the note." "As an unrelated third party to the alleged securitization, and any other subsequent transfers of the beneficial interest under the promissory note, [plaintiff] lacks standing to enforce any agreements, including the investment trust's pooling and servicing agreement, relating to such transactions." (*Jenkins*, *supra*, 216 Cal.App.4th at p. 515.) 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. It is also possible to imagine one or many invalid transfers of the promissory note may cause a string of civil lawsuits between transferors and transferees." (*Ibid*.) But plaintiff "may not assume the theoretical claims of hypothetical transferors and transferees" to assert causes of action for declaratory relief or wrongful foreclosure. (*Ibid*.)

Plaintiff argues *Glaski v. Bank of America* (2013) 218 Cal.App.4th 1079 supports her argument that a borrower may challenge a nonjudicial foreclosure based on allegations that one or more transfers in the chain of title of a trust deed was void. She is correct. There, after concluding that noncompliance with the terms of a pooling and servicing agreement would render an assignment void, the court adopted without analysis the majority rule in Texas that an obligor may resist foreclosure on any ground that renders an assignment in the chain of title void. (*Reinagel v. Deutsche Bank Nat'l Trust Co*. (5th Cir. Tex. 2013) 722 F.3d 700, 705.)

But no California court has followed *Glaski* on this point, and many have pointedly rejected it. (See, e.g., *Apostol v. Citimortgage, Inc*. (N.D.Cal., Nov. 21, 2013) 2013 U.S.Dist. Lexis 167308, 23-24; *Dahnken v. Wells Fargo Bank, N.A.*, C 13-2838 PJH (N.D.Cal., Nov. 8, 2013) 2013 U.S.Dist. Lexis 160686; *In re Sandri* (Bankr. N.D.Cal., Nov. 4, 2013) 2013 Bankr. Lexis 4663.) And as discussed above, *Jenkins* is directly to the contrary. We agree with the reasoning in *Jenkins*, and decline to follow *Glaski*.

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. Therefore, any cause of action for wrongful foreclosure would fail as a matter of law.

DISPOSITION

The judgment is affirmed. Respondents are to receive their costs on appeal.

CHANEY, J.

We concur:

ROTHSCHILD, Acting P. J.

JOHNSON, J.

Filed 5/22/14

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

TSVETANA YVANOVA, Plaintiff and Appellant, v. NEW CENTURY MORTGAGE CORPORATION et al., Defendants and Respondents.	No. B247188 (Los Angeles County Super. Ct. No. LC097218) ORDER CERTIFYING OPINION FOR PUBLICATION

THE COURT:

The opinion filed in the above-entitled matter filed on April 25, 2014, was not certified for publication in the Official Reports. For good cause it now appears that the opinion should be published in the Official Reports and it is so ordered.

ROTHSCHILD, Acting P. J. CHANEY, J. JOHNSON, J.

SUPREME COURT CASE NO. S_____
COURT OF APPEAL CASE NO. B247188
YVANOVA V. NEW CENTURY MORTGAGE

PROOF OF SERVICE BY FIRST CLASS MAIL

I, Richard L. Antognini, declare:

On July 1, 2014, I served the following document on the parties identified below: PETITION FOR REVIEW. I placed true copies of this document in sealed envelopes addressed as follows:

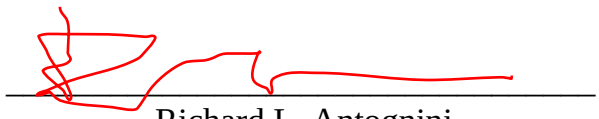
Robert W. Norman, Esq.
House & Allison, APC
3780 Kilroy Airport Way, Suite 130
Long Beach, California 90806
(Counsel for all Respondents)

Hon. Russell Steven Kussman
Los Angeles County Superior Court
Department Q
6230 Sylmar Avenue
Van Nuys, California 91401

Court of Appeal
Second Appellate District, Division One
300 South Spring Street, 2nd Floor
Los Angeles, California 90013
(Efiled service only pursuant to CRC 8.70)

I deposited such envelopes in the mail at Lincoln, California. The envelope was mailed with postage fully prepaid. I am familiar with the firm's practice of collecting and processing correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on the same day with postage fully prepaid at Lincoln, California in the ordinary course of business. I am aware that on the motion of the party served, serivce is presumed invalid if the postage cancelled date or postage meter date is more than one day after the date of deposit stated in the mailing affidavit.

I declare under penalty of perjury of the laws of the State of California and the United States that the foregoing is true and correct. Executed on July 1, 2014 at Lincoln, California.



Richard L. Antognini