ISSUE PRESENTED

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?

INTRODUCTION

Dissenting in an unpublished opinion in *Peng v. Chase Home Finance, LLC*, 2014 Cal.App.Unpub.LEXIS 2451 (Ct. App. 2nd Dist., Div. 8, April 8, 2014), at ** 10-11, Justice Laurence Rubin perfectly stated the issue in this case:

> "The only party prejudiced by an illegitimate creditor-beneficiary's enforcement of the homeowner's debt, courts have reasoned, is the bona fide creditor-beneficiary, not the homeowner.
>
> Such reasoning troubles me. I wonder whether the law would apply the same reasoning if we were dealing with debtors other than homeowners. I wonder how most of us would react if, for example, a third-party purporting to act for one's credit card company knocked on one's door, demanding we pay our credit card's monthly statement to the third party. Could we insist that the third party prove it owned our credit card debt? By the reasoning of *Fontenot* and similar cases, we could not because, after all, we owe the debt to *someone*, and the only truly aggrieved party if we paid the wrong party would, according to those cases, be our credit card company. I doubt anyone would stand for such a thing." (Italics in original.)

In Tsvetana Yvanova's case, the stranger knocked on her door, insisted that it owned her mortgage and sold her home at a foreclosure sale.

All she asks is that she be allowed to allege and then prove the stranger was wrong—that it did not own her mortgage and it had no right to foreclose. She does not attack the securitization of home loans, or try to avoid her debt. She is not asking for a free house.

What Yvanova wants to do is consistent with California law and the deed of trust she signed. It also is consistent with California public policy. Her Deed of Trust expressly gives her standing to bring an action raising any defense she has against foreclosure. California public policy going back decades gives her standing. The Homeowners Bill of Rights, the latest expression of California public policy on foreclosures, gives her standing. The answer to the issue presented must be yes--a borrower has standing to challenge an assignment of the note and deed of trust on the basis of defects allegedly rendering the assignment void.

STATEMENT OF FACTS AND PROCEEDINGS BELOW

This is a pleading case—an appeal from an order sustaining a demurrer without leave to amend. It is not an appeal of a summary judgment or of a judgment after trial. In briefing the issue presented, Plaintiff and appellant TSVETANA YVANOVA (or "Yvanova") assumes this Court will follow the usual rules it applies when considering rulings on demurrers. This Court, like the trial court, must assume the truth of all facts the plaintiff properly pleads in her complaint. *Evans v. City of Berkeley,* 38 Cal.4th 1, 5 (2006). "Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context." *Blank v. Kirwan,* 39 Cal.3d 311, 318 (1985).

The Court must consider not only what the complaint says, but what it may say if it is amended: "And when [a demurrer] is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment. If it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm." *Blank v. Kirwan, supra.*

The summary of facts is based on the allegations Yvanova made in her Second Amended Complaint, construed in light of the above rules.

A. What the Second Amended Complaint alleges.

Yvanova owned a home located at 22054 Crespi Street, Woodland Hills, California 91364. (Respondents' Appendix [or "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.) She attached the Deed of Trust as an exhibit to her SAC. (RA, at page 18.) 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 granted the Trustee the power of sale, but only to protect the "Lender:" "This Security Instrument secures to the Lender: (i) the repayment of the Loan . . . and (ii) the performance of Borrower's covenants and agreements under this Security Instrument and the Note. *For this* purpose, Borrower irrevocably grants and conveys to Trustee, in trust, *with power of sale*, the following described property. . . ." (RA, at page 43; italics added.)

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 to be sold." (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.)

Critically, the Deed of Trust gave the borrower the right to file suit to "assert any other defense of Borrower to acceleration and sale:" "The notice shall further inform Borrower of the right to reinstate after acceleration and 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." (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, recorded an "Assignment of Deed of Trust." (RA, at pages 73-75.) 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." This entity was "a mortgage-backed security" or "MBS," which was a pool of mortgages packaged together into securities that are sold to investors. *Glaski v. Bank of America*, 218 Cal.App.4th 1079, 1093 (2013). Yvanova will refer to this entity as the Morgan Stanley MBS or the "investment trust."

This "assignment" was news to Yvanova and raised legitimate 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 and record 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 14, 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 alleges that a break in the chain of title deprives 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 can easily be amended to allege a claim for wrongful foreclosure, because Yvanova claims 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. . . . 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. Trial in her unlawful detainer case is set for January 6, 2015.

C. The Court of Appeal Affirms.

Yvanova appealed the order sustaining the demurrer. On April 25, 2014 the court of appeal affirmed in an unpublished opinion, which it ordered published on May 22, 2014. 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.

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, she had no "standing" to bring up a break in the chain of title. *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).

Second, although the court recognized that *Glaski v. Bank of America, supra,* a published opinion from the Fifth District, would allow her to pursue a claim for wrongful foreclosure, it rejected *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.*)

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. Yvanova filed her petition for review on July 2, 2014. The Court granted review on August 27, 2014, and limited briefing to the issue stated above.

ARGUMENT

A. Standard of Review

As stressed above, this is an appeal of a demurrer, not an appeal of a judgment after trial. This Court, like the court of appeal, applies a *de novo* standard of review. *Blank v. Kirwan, supra; Schifando v. City of Los Angeles,* 31 Cal.4th 1074, 1082 (2003).

B. Background of the Issue Presented

1. Securitization

This case arises out of an attempt to assign Yvanova's loan to an MBS or mortgage-backed securitized trust. (Another name for such trusts is "investment trust.") The mortgage-backed securitized trust was one of the forces behind the home financing and refinancing boom in the last decade. *Glaski v. Bank of America,* 218 Cal.App.4th at 1082. 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 Pooling and Servicing Agreement or PSA, which typically required that each loan in the pool be transferred into the trust by a specific 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 the "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. JPMorgan Chase Bank, N.A.*, 214 Cal.App.4th 743, 764 (2013).

2. The tort of wrongful foreclosure.

Since the Court has asked for briefing on "an action for wrongful foreclosure," Yvanova first will explain the elements of a wrongful foreclosure claim.

The tort of wrongful foreclosure began in California with *Munger v. Moore*, 11 Cal.App.4th 1, 7-8 (1970), where the court found that wrongful foreclosure was similar to conversion, except that it arose from the wrongful conversion of real property:

> "Since conversion is a tort which applies to personal property, we disagree with the *Murphy* case [*Murphy v. Wilson*, 153 Cal.App.2d 132] to the extent that it purports to indicate that there may be a conversion of real property. We are inclined, however, to believe that with respect to real property the *Murphy* case was articulating a rule that has been applied in other jurisdictions. That rule is that a trustee or mortgagee may be liable to the trustor or mortgagor for damages sustained where there *has been an illegal, fraudulent or willfully oppressive sale of property under a power of sale contained in a mortgage or deed of trust. . . .*This rule of liability is also applicable in California, we believe, upon the basic principle of tort liability declared in the Civil Code that every person is bound by law not to injure the person or property of another or infringe on any of his rights." (Citations omitted; footnote omitted; italics added.)

Later opinions have likened wrongful foreclosure to a cause of action to set aside a trustee's sale, where the elements are:

> "(1) [T]he trustee or mortgagee caused an illegal, fraudulent or willfully oppressive sale of real property pursuant to a power of sale in a mortgage or deed of trust; (2) the party attacking the sale (usually but not always the trustor or mortgagor) was prejudiced or harmed; and (3) in cases where the trustor or mortgagor challenges the sale, the trustor or mortgagor tendered the amount of the secured indebtedness or was excused from tendering." *Lona v. Citibank, N.A.*, 202 Cal.App.4th 89, 103 (2011).

A homeowner states a cause of action for wrongful foreclosure when the plaintiff can allege the foreclosing party did not have the power to foreclose because the loan had never been properly transferred to it.

> "In *Barrionuevo v. Chase Bank, N.A.* (N.D.Cal.2012) 885 F.Supp.2d 964, the district court stated: '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.' (*Id.* at p. 973.) We agree with this statement of law, but believe that properly alleging a cause of action under this theory requires more than simply stating that the defendant who invoked the power of sale was not the true beneficiary under the deed of trust. Rather, 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 1093-1094.

These decisions apply the California opinions that allow a wrongful foreclosure claim when a "trustee caused an illegal, fraudulent or willfully oppressive sale of real property pursuant to a power of sale in a mortgage or deed of trust. . . ." *Lona v. Citibank, N.A.,* 202 Cal.App.4th at 103; *Munger v. Moore,* 11 Cal.App.3d at 7. They conclude that a foreclosure sale initiated by a party without the power to declare a default and pursue a foreclosure sale is "willfully oppressive." *Glaski v. Bank of America, supra.* A foreclosure by an unauthorized entity also is illegal, as it violates Civil Code section 2924 (a) (1). *Ibid.*

A wrongful foreclosure claim can exist even without fraud, as the bases for such a claim are independent of each other: "an illegal, fraudulent or willfully oppressive sale. . . ." *Lona v. Citibank, N.A.,* 202 Cal.App.4th at 103. A plaintiff need not allege the specific fraudulent statements or reasonable reliance on those statements. He can rest a wrongful foreclosure claim simply on breach of the terms found in the deed of trust. *Glaski v. Bank of America,* 218 Cal.App.4th at 1093-1094

C. Clear language in the Deed of Trust gives a borrower standing to challenge the power of a party to foreclose.

One of the great misunderstandings in foreclosure law is that the power of sale—the power to sell a home at a trustee's sale—is somehow governed exclusively by California's foreclosure statues, Civil Code sections 2924 *et seq. See, e.g., Fontenot v. Wells Fargo Bank, N.A.*, 198 Cal.App.4th 256, 272 (2011); *Jenkins v. JPMorgan Chase Bank, N.A.*, 216 Cal.App.4th at 511-512. Yet, as even the *Jenkins* opinion points out, the power of sale is created by contract, not be statute. *Ibid.* Thus, the "standing" issue at the heart of this case turns on the language of a contract, rather than the language of the foreclosure statutes.

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." *Jenkins v. J.P. Morgan Chase*, 216 Cal.App.4th at 508. Many deeds of trust use another name for the beneficiary—the "Lender." *Ibid.* For example, in the Yvanova Deed of Trust, "Lender is New Century Mortgage Corporation. . . . Lender is the beneficiary under this Security Instrument. (RA, at pages 40, 41.)

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/Lender: "[S]hould the trustor-debtor default on the debt, the trustee must initiate foreclosure on the property for the benefit of the beneficiary-creditor. . . ." *Jenkins v. JPMorgan Chase Bank, N.A.* 216 Cal.App.4th at 508. In Yvanova's case, the Deed of Trust provides that the "Security Instrument accrues to the Lender (i) the repayment of the Loan . . . and (ii) the performance of Borrower's covenants and agreements under this Security Instrument and the Note. For this purpose, Borrower irrevocably grants and conveys to Trustee, in trust, with power of sale" title to Yvanova's home. (RA, at page 43.)

The Deed of Trust makes plain that only the Lender has the power to declare a default and initiate a foreclosure. "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;* italics added.) Thus only the "lender" under the Yvanova 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. JPMorgan Chase Bank, N.A.,* 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.*

One of the oldest rules of contract interpretation is that clear contract language must be applied as written. Civil Code section 1638 provides that "[t]he language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity." Applying that principle, this Court has held the "mutual intention of the parties is to be inferred, if possible, solely from the written provisions of the contract. Where contractual language is clear and explicit, it governs." *Powerine Oil Co. v. Superior Court,* 37 Cal.4th 377, 396 (2005).

As demonstrated above, the Yvanova Deed of Trust gives the power to declare a default—the power to begin a foreclosure—to the "Lender." (RA, at pages 43, 53.) So, only the "Lender" has the power to foreclose under the clear language of the Deed of Trust. Further, the trustee can order a sale, but only to protect the actual "Lender." And, the loan servicer can declare a default and a sale, but again only to protect the "Lender."

Clear language in the Deed of Trust gives the borrower—Yvanova, in this case—the right to sue to determine if the actual "Lender" is exercising the power to foreclose. Section 22 of the Deed of Trust, entitled "Acceleration; Remedies," states: "Lender shall give notice to Borrower prior to acceleration. . . . The notice shall further inform Borrower of the right to reinstate after acceleration and the right *to bring a court action to assert the non-existence of a default of Borrower to acceleration and sale.*" (RA, at page 53; italics added.)

This clear language controls. It grants a borrower like Yvanova the right to bring any court action that challenges the existence of a default, or that raises any other defense the borrower may have to loan acceleration or sale of her home. That right must include the right to allege the purported "Lender" is not really the "Lender" at all because the loan was not properly assigned to the purported "Lender."

If the alleged "Lender" is not the true "Lender," it has no right to declare a default, because it has no interest in the Deed of Trust. As a non-party to the contract, it also has no right to order a foreclosure sale. Unless a borrower has a right to make these arguments in a lawsuit—unless the borrower has "standing"—the contract language becomes a nullity. California law does not allow that result, because it requires courts to enforce clear contract language and to avoid absurd results. Civil Code section 1638; *Powerine Oil Co. v. Superior Court, supra.*

Other language in the Deed of Trust tells a borrower she has the right to sue to enforce the terms of the contract, including those terms that give the right of sale to the "Lender." The Deed of Trust further provides:

> "Neither Borrower nor Lender may commence, join, or be joined to any judicial action . . . that arises from the other party's actions pursuant to this Security Instrument or that alleges that the other party has breached any provision of, or any duty owed, by reason of this Security Instrument, until such Borrower or Lender has notified the other party . . . of such breach and afforded the other party hereto a reasonable period after the giving of such notice to take corrective action." (RA, at page 52.)

This pre-suit notice provision outlines the litigation the Deed of Trust allows. As one example, it speaks of "any judicial action . . . that arises from the other party's action pursuant to this Security Instrument. . . ." (*Ibid.*) That action by the other party can include a declaration of default by the purported "Lender" or a foreclosure sale ordered by the purported "Lender."

Litigation allowed under the Deed of Trust also can include any allegation that the other party has "breached any provision of, or any duty owed, by reason of" the Deed of Trust. The other provisions contemplated by this language must encompass the power of sale clauses, which only the "Lender" can invoke, and the power to declare a default clauses, again which only the "Lender" can trigger. In short, the quoted language implies the borrower has the right to sue over whether the actual "Lender" has authorized the declaration of a default or a foreclosure sale. This language means the Deed of Trust gives the borrower standing to attack an invalid transfer of her loan.

D. When the rules of interpretation for adhesion contracts are applied to the Deed of Trust, no conspicuous, plain and clear language deprives a borrower of standing to allege an invalid transfer of her loan.

Lenders and servicers maintain that borrowers cannot challenge an invalid assignment of their loans to a securitized trust. But, because the power of sale is a creation of contract, this theory must be supported by clear contract language. It is not, because the deed of trust is an adhesion contract.

An adhesion contract is a contract presented to a weaker party on a "take it or leave it" basis. *Steven v. Fidelity & Cas. Co.,* 58 Cal.2d 862, 882 (1962); *Graham v. Scissor-Tail, Inc.,* 28 Cal.3d 807, 818 (1981). Such a contract usually is a printed or standard form over which the parties do not bargain. (*Ibid.*) California courts hold that the standard deed of trust given to homeowners is an adhesion contract because there is no negotiation over its terms. The borrower either signs the contract or does not get the loan. *Fischer v. First International Bank,* 109 Cal.App.4th 1433, 1445-1446 (2003) ("standardized deeds of trust are contracts of adhesion"); *Kirk v. Source One Mortgage Services Corp.,* 46 Cal.App.4th 483, 491 (1996).

Adhesion contracts, including deeds of trust, are subject to special rules of interpretation and enforcement. One rule is that the deed of trust cannot be enforced or interpreted to defeat the weaker party's reasonable expectations: "Although contracts of adhesion are generally enforceable according to their terms, a provision contained in such a contract cannot be enforced if it does not fall within the reasonable expectations of the weaker or 'adhering" party.'" *Fischer v. First International Bank,* 109 Cal.App.4th at 1446.

Another rule is that the stronger party in an adhesion contract—the party that drafts it—cannot enforce its terms unless those terms are conspicuous, plain and clear. Writing in the context of insurance policies, this Court has held: "But to be enforceable, any provision that takes away or limits coverage reasonably expected by an insured must be 'conspicuous, plain and clear.' Thus, any such limitation must be placed and printed so that it will attract the reader's attention. Such a provision also must be stated precisely and understandably, in words that are part of the working vocabulary of the average layperson." *Haynes v. Farmers Ins. Exchange,* 32 Cal.4th 1198, 1204 (2004) (citations omitted).

This rule applies to deed of trust, and not just to insurance policies. *Fischer v. First International Bank,* 109 Cal.App.4th at 1449. If the terms in the deed of trust are not conspicuous, plain and clear, and if they cannot be understood by the average borrower, they cannot be enforced. *Ibid.*

The Yvanova deed of trust does not pass this test. The document is lengthy for a consumer contract, as it runs 14 single-spaced pages, not including the signature page or notary page. (RA, at pages 40-53.) The print is small (perhaps Times New Roman 12 point) and not easy to read. (*Ibid.*) These factors alone suggest the contract terms are not conspicuous, plain and clear. *Haynes v. Farmers Ins. Exchange, supra; Fisher v. First International Bank, supra.*

In addition, the Deed of Trust contains no language, conspicuous or otherwise, telling the borrower he has no right to challenge an invalid assignment of his loan. It also has no language warning the homeowner that a non-beneficiary has the power to authorize a foreclosure. As noted above, the deed of trust states "If Lender invokes the power of sale. . . ." (RA, at page 53.) Further, "Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument. . . ." (*Ibid.*) "Lender at its option may require immediate payment in full of all sums secured by this Security Instrument…and may invoke the power of sale. . . ." (*Ibid.*) There is nothing in this language that warns a borrower that a non-beneficiary—a non-"Lender"—can "invoke the power of sale."

The deed of trust informs the borrower that she has the right to sue to enforce the clear language of the agreement: "The notice shall further inform 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."* (RA, at page 53; italics added.) When measured against the rules that govern adhesion contracts, 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. Rather, as explained above, the contract's clear and conspicuous language tells her she has that exact right.

Lenders and servicers no doubt will point to the "assignment" clause in the Deed of Trust: "[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 Borrower." (RA, at page 51.) Some courts have seized on this language as implying the borrower cannot challenge an invalid assignment. *See, e.g., Fontenot v. Wells Fargo Bank, N.A.*, 198 Cal.App.4th at 271-272. But, nothing in this language informs the borrower she cannot attack the validity of the assignment; the clause merely states the loan can be sold. Other terms in the Deed of Trust tell the borrower in clear language she has the power to challenge any breach of the Deed of Trust. She is given the right to sue for any breach of duty created by the Deed. (RA, at page 53.)

Further, the assignment clause is confusing. It tells the borrower that the loan can be sold at any time without notice, but it then implies this transfer will affect only who services the loan: "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 servicing obligations. . . ." (RA, at page 51.) The average borrower, reading this language, will think a sale of the loan changes only the servicer. She is not put on notice that the sale of the loan will change who can declare a default, or who can order a sale. She certainly is not told that this language means she cannot sue to challenge whether an alleged "Lender" really owns the loan and has the power to foreclose. If the assignment clause was intended by the drafter to cutoff the borrower's right to challenge the assignment, it should have used clear language to that effect. It did not.

E. California law long has recognized that parties who are not privies to a contract have standing to enforce duties created by that contract.

1. For decades, this Court has found ways around "privity of contract," which is just another way of describing "standing."

The lending industry and some lower California courts maintain that borrowers have no standing to enforce the terms of an investment trust's Pooling and Servicing Agreement or PSA. They rely on the idea of privity of contract—that you cannot enforce a contract when you are not a party to the contract. Borrowers argue that securitized trusts, like the trust in Yvanova's case, have cutoff dates for property to be transferred into the trust. The trust's PSA sets that cutoff date. By arguing that a late transfer of a loan breaches the PSA's terms, homeowners are attempting to enforce the PSA even though they are not parties to the PSA. The only parties to the PSA are the trust, the investors in the trust, the master servicer established under the PSA and the loan servicer. Borrowers lack "privity," according to lenders.

Lenders and servicers often rely on *Jenkins v. JP Morgan Chase Bank, N.A.*, 216 Cal.App.4th 497 (2013), to support this argument. There, Jenkins, the borrower, contended the foreclosure violated the terms of the PSA because "the promissory note was not transferred into the investment trust with a complete and unbroken chain of endorsements and transfers…." 216 Cal.App.4th at 510. The *Jenkins* court concluded Jenkins did not have a cause of action because 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 transactions." *Id.*, at 515.

For decades, however, this Court has granted standing to plaintiffs to allege breaches of contract when they are not parties to the contracts. Privity has not stood in the way. In *Barrera v. State Farm Mutual Automobile Ins. Co.*, 71 Cal.2d 659, 675-676 (1969), the Court held:

> “The proposition that a party to a contract may owe a duty of care to a third person not in privity with either party to the contract is not new. Nor can we doubt that a third person not in privity of contract with the defendant may recover for the defendant's breach of a duty arising out of a contract with a second party when the only risk of harm created by that breach of duty affected an intangible interest. ‘Privity of contract is not necessary to establish the existence of a duty to exercise ordinary care not to injure another, but such duty may arise out of a voluntarily assumed relationship if public policy dictates the existence of such a duty.’" *Id., quoting Merrill v. Buck,* 58 Cal.2d 552, 561-562 (1962).

In *Barrera,* 72 Cal.2d at 676, this Court relied on its earlier ruling in *Biakanja v. Irving,* 49 Cal.2d 647, 650 (1958):

> "The determination whether in a specific case the defendant will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the forseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm."

As this Court has ruled time and again, “privity”—and thus “standing”--should not bar a plaintiff in all cases from suing to enforce a contract when it is not a party. For example, in *Biakanja,* the plaintiffs, beneficiaries under a will, sued a notary whose negligence invalidated the will. The notary argued the beneficiaries had no power to sue—they had no “standing,” in other words—because they were not parties to the will. This Court disagreed. Rather, it held the “determination of whether in a specific case the defendant will be held liable to a third person not in privity is a matter of policy. . . .” *Biakanja v. Irving,* 49 Cal.2d at 650.

In *Connor v. Great Western Savings & Loan Association,* 69 Cal.2d 850 (1968), homeowners who bought defective homes sued the developer’s construction lender. The lender said they had no claim because they were not “in privity,” as they were not parties to the construction loan. This Court found for the homeowners because “the lending institution owed a duty to the purchasers ‘to exercise reasonable care to prevent the construction and sale of seriously defective homes.’” *Barrera v. State Farm Mutual Automobile Ins. Co.,* 71 Cal.2d at 676, *quoting Connor v. Great Western Savings & Loan Association,* 69 Cal.2d at 867.

In *Barrera v. State Farm Mutual Automobile Insurance Co.,* this Court ruled that a third person injured by an insurance carrier’s insured had “standing” to enforce the carrier’s obligations under the insurance contract: “Similar considerations . . . impel the holding that the automobile liability insurer incurs a direct duty to those members of the public, situated as the plaintiff, who stand to benefit from a validity of a contract of insurance. . . .” *Barrera v. State Farm Mutual Automobile Ins. Co.,* 71 Cal.2d at 676.

In others words, “standing” and its twin concept “privity” do not always bar a plaintiff from relying on a contract to which she is not a party. Rather, the question becomes one of public policy and requires a court to consider the *Biakanja v. Irving* factors.

2. The *Biakanja* factors favor granting Yvanova standing.

The *Biakanja* factors favor standing for borrowers who wish to sue for wrongful foreclosures based on PSA violations. First, there is the "extent to which the transaction was intended to affect the plaintiff. . . ." A transfer of a loan into an investment trust after the closing date may appear, at first glance, to be just a transaction that harms the trust and its investors. If the IRS challenges the transaction, the trust may lose its tax status and investors may lose tax benefits.

A closer look reveals something else. By transferring a home loan into the trust, the trust becomes a major influence in the borrower's life. If the borrower wants to apply for a loan modification, the trust decides whether to grant it. Some trusts may be more tolerant of loan defaults, and more willing to work them out, than others. Other trusts may be more reluctant to go through with a foreclosure sale. And, if a trust with no right to the loan sells a borrower's home at foreclosure, the borrower suffers devastating harm. Who the trust is has a real impact on the borrower.

Second, there is the "forseeability of harm" to the borrower. If the trust has no power to foreclose because the transfer of the loan is invalid as a violation of the PSA, the foreclosure cannot go forward. It must be delayed until the chain of title issue is worked out. This delay can give the borrower a chance to pursue a loan modification, a refinance, a short sale, or other remedies. But, if the borrower does not have "standing" to challenge a late assignment of his loan to the investment trust, she has no way to block the foreclosure sale. She loses her home as a result. That harm is not just foreseeable; it is certain.

Third, we have the factor of “the degree of certainty that the plaintiff suffered injury.” Again, the standing issue is crucial for homeowners. For many, allowing standing may be the only way they can challenge a foreclosure. Without standing, they will not be able to attack invalid transfers to an investment trust and will lose their homes. That fact shows the certainty of injury.

Fourth, we turn to “the closeness of the connection between the defendant's conduct and the injury suffered.” Denying a borrower standing means that many homeowners will have no claim. They will have no way of stopping a foreclosure sale. They may not have time to pursue a short sale, loan modification, loan reinstatement, or refinancing. They will lose their homes. That factor shows the strong link between denying standing and home loss.

Fifth and sixth, we find two related factors: “the moral blame attached to the defendant's conduct, and the policy of preventing future harm." “Moral blame attached to the defendant’s conduct” is just another way of saying public policy favors imposition of a duty and ignoring privity of contract. *Barrera v. State Farm Mutual Automobile Insurance Co.*, 71 Cal.2d at 675-

676; *Biakanja v. Irving,* 49 Cal.2d at 650. The "policy of preventing harm" is another way of saying public policy condemns a defendant's conduct. *Ibid.*

In this case, the public policy comes in California's Homeowners' Bill of Rights, which emphatically bars foreclosures by entities that do not own a loan. The Homeowners Bill of Rights (or "HBOR") grants standing to a borrower to challenge an invalid assignment of her loan. The HBOR includes section 2924 (a) (6) to the Civil Code, which provides:

> "No entity shall record or cause a notice of default to be recorded or otherwise initiate the foreclosure process unless *it is 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. No agent of the holder of the beneficial interest under the mortgage or deed of trust, original trustee or substituted trustee under the deed of trust may record a notice of default or otherwise commence the foreclosure process except when acting within the scope of authority designated by the holder of the beneficial interest. (Italics added.)"

To enforce the command of section 2924 (a) (6), the HBOR amends section 2923.55 of the Civil Code. Before a lender or loan servicer can even begin the foreclosure process, it must tell the borrower she can demand evidence the foreclosing entity has the power to foreclose. Section 2923.55 provides, in part:

(a) A mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent may not record a notice of default pursuant to Section 2924 until all of the following:

(1) The mortgage servicer has satisfied the requirements of paragraph (1) of subdivision (b).

* * * * *

(b)

(1) As specified in subdivision (a), a mortgage servicer shall send the following information in writing to the borrower:

* * * * *

(B) A statement that the borrower may request the following:

(i) A copy of the borrower's promissory note or other evidence of indebtedness.

(ii) A copy of the borrower's deed of trust or mortgage.

(iii) *A copy of any assignment, if applicable, of the borrower's mortgage or deed of trust required to demonstrate the right of the mortgage servicer to foreclose.*" (Italics added.)

Another section of the HBOR makes plain that California law allows a foreclosure only if the party initiating the process has the power to foreclose. Civil Code section 2924.17 (b) commands: "Before recording or filing any of the documents described in subdivision (a), a mortgage servicer *shall* ensure that it has reviewed competent and reliable evidence to substantiate the borrower's default *and the right to foreclose*, including the borrower's loan status and loan information." (Italics added.)

The documents listed in subsection (a) of section 2924.17 include "a notice of default, notice of sale, assignment of a deed of trust, or substitution of trustee recorded by or on behalf of a mortgage servicer in connection with a foreclosure subject to the requirements of Section 2924, or a declaration or affidavit filed in any court relative to a foreclosure proceeding. . . .”

Sections 2924 (a), 2923.55 and 2924.17 lay down a strong public policy—a party that initiates a foreclosure must have the power to foreclose. It must, in short, own the homeowner’s loan and have a legal assignment of the deed of trust. These statutes must be interpreted according to their plain language. *People v. Cook*, 16 Cal.4th 1210, 1215 (1997); *Pineda v. Williams-Sonoma Stores, Inc.*, 51 Cal.4th 524, 530 (2011). A court cannot “under the guise of construction, rewrite the law or give words an effect different from the plain and direct import of the terms used.” *Dicampli-Mintz v. County of Santa Clara*, 55 Cal.4th 983, 992 (2012).

As explained above, lenders and servicers read *Jenkins v. JPMorgan Chase Bank, N.A.*, 216 Cal.App.4th at 514-515, and related cases to hold that borrowers have no “standing” to argue a loan has not been properly transferred into an investment trust. Whatever else may be said about *Jenkins* and like cases, the HBOR has overruled them. The HBOR, and especially Civil Code sections 2924 (a) (6), 2924.17 and 2923.55, have established the policy that only entities with the power to foreclose—i.e., only entities who actually own the loan—can authorize a foreclosure.

So, let us consider the fifth and sixth *Biakanja* factors in light of the HBOR: "the moral blame attached to the defendant's conduct, and the policy of preventing future harm." The HBOR enacts several statutes that mean only the true owner of a loan can authorize a foreclosure. Unless those statutes are to be treated as a nullity, they give standing to a borrower to challenge a late assignment of her loan. Any ruling that a borrower lacks standing goes against that strong public policy and invites "moral blame." And, by granting standing, this Court reinforces the HBOR and deters lenders and servicers from proceeding with foreclosures unless they actually know either they or their principals own the loan. That ruling will prevent future harm. The *Biakanja* factors compel a conclusion that the borrower has "standing to challenge an assignment of the note and deed of trust on the basis of defects allegedly rendering the assignment void."

3. The HBOR dictates public policy here.

Lenders and servicers no doubt will argue that the HBOR does not apply here because the conduct alleged in Yvanova's complaint predates the HBOR. This point does not make a difference.

First, the HBOR does not represent a seismic change in California public policy. For years, the California courts have held that only the owner of a loan has the power to enforce the loan's terms. 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). The 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.*

By holding that a borrower could not challenge an invalid assignment of her loan, *Jenkins v. JPMorgan Chase Bank, N.A.* and later cases attempted to change decades of California law. They also did not mention *Cockrell*, a controlling case. The HBOR merely restored California law to what it was before *Jenkins*. It did not represent a fundamental change.

Second, the case that *Jenkins* rested on itself allowed a borrower to attack a party's power to foreclose. *Jenkins*, 216 Cal.App.4th at 512-513, relied on *Gomes v. Countrywide Home Loans, Inc.*, 192 Cal.App.4th 1149 (2011), to justify its conclusion that a borrower could never challenge an invalid assignment of a loan. Yet, *Gomes* never went that far. *Gomes* ruled that a plaintiff can attack the authority of a party to conduct a foreclosure if his complaint "identified a *specific factual basis* for alleging the foreclosure was not initiated by the correct party." *Gomes v. Countrywide Home Loans, Inc.*, 192 Cal.App.4th at 1156 (italics added).

Fontenot v. Wells Fargo Bank, N.A., 198 Cal.App.4th at 271-272, reached the same conclusion. There, the court upheld a demurrer to a wrongful foreclosure cause of action against MERS and HSBC. The court wrote that "Plaintiff's cause of action ultimately seeks to demonstrate that the nonjudicial foreclosure sale was invalid because HSBC lacked authority to foreclose, never having received a proper assignment of the debt." Plaintiff's wrongful foreclosure claim failed because she was "required to allege not only that the purported MERS assignment was invalid, but also that HSBC did not receive an assignment of the debt in any other manner. *There is no such allegation.*" (Italics added.) If plaintiff could have alleged an invalid assignment of the loan, she would have had a case. *Id.*

Here, as required by *Gomes* and *Fontenot*, Yvanova's complaint made specific, factual allegations that the transfer of her loan was invalid. The assignment of her Deed of Trust was dated December, 2011, and was from New Century to Morgan Stanley MBS. New Century supposedly made this transfer over three years after it had been liquidated, which was legally impossible. (RA, at pages 73-75.) Then, her Deed of Trust was assigned to the investment trust in December 2011, even though the 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. (*Ibid.*) Her claims thus fit within a pattern of case law that, up to *Jenkins*, allowed a borrower to challenge an invalid transfer of a loan. The HBOR does not change this case law; it merely restates it.

Third, if this Court finds that the HBOR does not control Yvanova's case because she alleges conduct that occurred before January 1, 2013, the HBOR's effective date, it will draw the trial courts and courts of appeal into hundreds of disputes over whether conduct in a particular case took place before or after January 1. To avoid this avalanche of problems, the Court can hold that the HBOR merely restates long-standing California law.

Fourth, California courts have turned to the HBOR to determine California public policy and then applied that policy to actions that a lender or servicer took even before the HBOR went into force. In *Jolley v. Chase Home Finance, LLC*, 213 Cal.App.4th 872 (2013), the court of appeal imposed a duty of care on Chase, the lender and servicer, when handling the administration of a construction loan. It found that duty by relying on the HBOR, even though Chase's conduct occurred before the HBOR was effective. It concluded it had to apply California public policy as it existed in the present, rather than as it existed in the past:

> "Of course, these provisions do not apply to our case. The question for our purposes is whether the new legislation sets forth policy considerations that should affect the assessment whether a duty of care was owed to Jolley at that time. We think it does." *Jolley v. Chase Home Finance, LLC,* 213 Cal.App.4th at 905.

This Court should do the same. It should apply California public policy as it now exists. The HBOR sets that policy, and the HBOR dictates that borrowers have standing to sue for an invalid assignment of a loan. This Court's mission, in part, is to find and apply present California public policy. It granted review in this case to determine California public policy as it now exists, not how it may or may not have existed in the past. The HBOR is now California policy and it must be applied here.

F. Even before the HBOR, the California foreclosure statutes had no preemptive effect.

Some courts, when they hold that borrowers do not have standing to challenge an invalid assignment, rely on the idea that the California foreclosure statutes "preempt" the foreclosure field. *Jenkins v. JPMorgan Chase Bank, N.A.*, 216 Cal.App.4th at 512. *Jenkins*, in turn, relies on *Gomes v. Countrywide Home Loans, Inc.*, 192 Cal.App.4th at 1154-1155, for this proposition. The *Gomes* court noted:

> “California’s foreclosure scheme is set for in Civil Code sections 2924 through 2924k, which ‘provide a comprehensive framework for the regulation of a nonjudicial foreclosure sale. . . . [¶] By asserting a right to bring a court action to determine whether the owner of the Note has authorized its nominee to initiate the foreclosure process, [the borrower] is attempting to interject the courts into this comprehensive nonjudicial scheme.’” *Gomes v. Countrywide Home Loans, Inc.,* 192 Cal.Ap.4th at 1154-1155, *quoting Moeller v. Lien,* 25 Cal.App.4th 822, 830 (1994).

A close reading of the foreclosure statutes reveals no language expressly preempting other California statutes. This Court rejects any attempt to say that one statute overrides another statute. *Cf. Murillo v. Fleetwood Enterprises,* 17 Cal.4th 985, 992 (1998). Courts must apply all relevant statutes together. *Ibid.* In addition, the California Legislature, when enacting the HBOR, eliminated any doubt on the preemption question. Civil Code section 2924.12 (h) provides: “The rights, remedies, and procedures provided by this section are in addition to and independent of any other rights, remedies, or procedures under any other law. Nothing in this section shall be construed to alter, limit, or negate any other rights, remedies, or procedures provided by law.”

Lenders and servicers also contend that allowing a borrower to attack a party’s power to foreclose undermines the public policy behind California’s foreclosure statutes. They see that policy as solely favoring quick, unchallengeable foreclosures. Again, *Jenkins* embraced this argument, and again it relied on *Gomes:* “Consequently, the *Gomes* court concluded that allowing a trust-debtor to purse such an action . . . 'would be inconsistent with the policy behind nonjudicial foreclosure of providing a quick, inexpensive and efficient remedy.'" *Jenkins v. JPMorgan Chase Bank, N.A.*, 216 Cal.App.4th at 512, *quoting Gomes v. Countrywide Home Loans, Inc.*, 192 Cal.App.4th at 1156.

The *Gomes* case forgot, however, that there was more than one policy behind the foreclosure statutes. It cited *Moeller v. Lien*, 25 Cal.App.4th at 830, as authority for its conclusion that public policy barred an action to challenge a party's power to foreclose. *Gomes*, 192 Cal.App.4th at 1154-1155. *Moeller v. Lien* identified another purpose behind the foreclosure statutes, in additional to the speed remedy cited by *Gomes*: "(2) to protect the debtor/trustor from wrongful loss of the property." *Moeller v. Lien*, 25 Cal.App.4th at 830.

Permitting a wrongful foreclosure suit to challenge the authority of a party to foreclose upholds this principle, because it prevents the wrongful loss of a home. Even the *Gomes* court recognized that such a suit was proper when the plaintiff could allege specific facts showing the foreclosing entities did not have the power to foreclose. *Gomes v. Countrywide*, 192 Cal.App.4th at 1156; *Fontenot v. Wells Fargo Bank*, 198 Cal.App.4th at 271. Yvanova, as shown above, has made such specific allegations of fact in her complaint.

In any case, the California foreclosure statutes now make clear that a "quick, inexpensive and efficient remedy" no longer is the exclusive policy. Rather, the statutes require that a foreclosing party demonstrate it actually owns the loan, and they give borrowers the explicit right to sue to contest that claim. Civil Code sections 2923.55 (a) and (b), 2924 (a) (6), 2924.12 (b), and 2924.17 (b).

G. Lenders and Servicers cannot complain that they will be unduly burdened if borrowers are given standing to allege that assignments of their loans are invalid.

Lenders and services will contend that they will suffer an undue burden if borrowers have standing to attack invalid loan assignments. This argument has no merit. First, as demonstrated above, the language of the typical deed of trust gives standing. Lenders and servicers have used this language for years. They should not be surprised that borrowers rely on the deed of trust to argue standing.

Second, the HBOR expressly affirms that borrowers have standing. See Civil Code sections 2923.55 (a) and (b), 2924 (a) (6), 2924.12 (b), and 2924.17 (b). Lenders and services have faced this environment since January 2013, the effective date of the HBOR. Their efforts to conform to it have not caused them any known large losses or led to a disruption of the housing market in California.

Third, the major servicers of mortgages in California, such as Bank of America, Wells Fargo, Citimortgage, and JPMorgan Chase, among others, agreed to the National Mortgage Settlement in April 2012. That settlement imposed on them the obligation to prove they had the power to foreclose: "Servicer shall implement processes to ensure the Servicer or the foreclosing entity has a documented enforceable interest in the promissory note and mortgage (or deed of trust) . . . or is otherwise a proper party to the foreclosure action." Consent judgment and consent settlement in *United States v. Bank of America Corp.,* Case No. 12-CV-00361 (D.D.C. April 4, 2012), Settlement Term Sheet, Section I. C. (1).

In addition, "Servicer shall set forth the information establishing the party's right to foreclose . . . in a communication sent to the borrower. . . ." *Id.,* Settlement Term Sheet, Section I. C. (3), at page A-8. Affirming borrowers' standing merely is another way of enforcing these terms. Because the major servicers already are required to follow these mandates, borrower standing imposes no great obligation on them or the lending industry.

CONCLUSION

Borrowers have standing, because clear contract language in deeds of trust; California public policy; as expressed in the foreclosure statutes; and decades of California law grant them the right to sue.

Again, this is a pleading case. By finding standing, this Court simply will allow borrowers to allege that invalid transfers of their loan may make some foreclosures void. It will not decide the merits of any action. Borrowers still will have to prove their cases. Borrowers, lenders and servicers will engage in discovery and may move for summary judgment. Some suits will go to trial. This case will not determine how all those actions end. But, it will at least allow them to begin.

For these reasons, plaintiff and appellant TSVETANA YVANOVA respectfully requests that the Court reverse the judgment of the court of appeal.

Dated: November 18, 2014

LAW OFFICES OF
RICHARD L. ANTOGNINI

By:

Richard L. Antognini
Attorneys for Plaintiff
and Appellant
TSEVETANA YVANOVA

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

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LAW OFFICES OF
RICHARD L. ANTOGNINI

By:

Richard L. Antognini
Attorneys for Plaintiff
and Appellant
TSVETANA YVANOVA