SUPREME COURT CASE NO. S218973

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

APPELLANT'S REPLY BRIEF ON THE MERITS

Richard L. Antognini, (CA Bar No. 075711)
LAW OFFICES OF RICHARD L. ANTOGNINI
819 I Street
Lincoln, California 95648-1742
Telephone: (916) 645-7278
E-Mail: rlalawyer@yahoo.com
Attorneys for Plaintiff and Appellant
TSVETANA YVANOVA

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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

In their Answer Brief (or "Respondents' brief"), respondents attempt to distract this Court by arguing New York law governs and by assuming the crucial contracts were negotiated by parties with equal bargaining power. But, California law controls the crucial issues and it does not favor respondents. Equally important, the key contract, the Deed of Trust, was an adhesion contract. Thus, the issues in this case must be seen from the viewpoint of the average borrower. Because the Court should see it as a consumer protection case, it must find the Deed of Trust, the crucial consumer contract, gives the borrower clear notice that she can sue to challenge respondents' purported power to foreclose. She can, in other words, allege standing.

The Court also knows this is a pleading case—an appeal from a demurrer. "Appellate review of the sustaining of a demurrer tilts heavily in favor of permitting a plaintiff to proceed on the merits . . . ." *Fleet v. Bank of America*, 229 Cal.App.4th 1403, 1414 (2014). This Court will not decide standing for all time or for all cases. It merely will allow the plaintiff here,

TSVETANA YVANOVA (or "Yvanova"), the chance to allege standing. She will have a chance to plead her case, which is only the first step in a long litigation process. That is all she asks.

ARGUMENT

A. This Court's liberal standard of review for demurrers, and the Court's framing of the issue presented, allows Yvanova to raise new arguments.

Respondents' brief is littered with complaints that Yvanova has changed her theories on appeal, that she has waived the arguments she presents in her opening brief, and that she should not be allowed to amend her complaint before this Court. (See, e.g., Respondents' Brief, at pages 13-14, 35-36.) These complaints ignore decades of California law on leave to amend and this Court's own action in drafting the issue presented.

On multiple occasions, this Court has stressed: "The issue of leave to amend is always open on appeal, even if not raised by the plaintiff." *City of Stockton v. Superior Court*, 42 Cal.4th 730, 746 (2007); *Aubry v. Tri-City Hospital Dist.*, 2 Cal.4th 962, 970-971 (1992). The California Legislature has also made this principle the rule. Section 472c of the Code of Civil Procedure provides: "When any court makes an order sustaining a demurrer without leave to amend the question as to whether or not such court abused its discretion in making such an order is open on appeal even though no request to amend such pleading was made." Based on these

rules, the courts of appeal hold that a plaintiff can assert new legal theories and facts on appeal when seeking leave to amend:

> Contrary to longstanding rules generally precluding a party from changing the theory of the case on appeal a plaintiff may propose new facts or theories to show the complaint can be amended to state a cause of action, thereby showing the trial court "abused its discretion" in not granting leave to amend. The plaintiff "must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading." *Connerly v. State of California*, 229 Cal.App.4th 457, 460 (2014), *quoting Cooper v. Leslie Salt Co.*, 70 Cal.2d 627, 636 (1969) (citations omitted).

All Yvanova wants to do is take advantage of these cases by demonstrating how new legal theories support the claims she made before the trial court and the court of appeal. And, she wishes to use those theories to provide a response to the "issue presented" crafted by this Court. She asks for nothing unusual or unfair.

In addition, this Court reframed the crucial questions in this case by drafting a single issue presented. Respondents did not address that issue, at least not as crafted by this Court. So, in answering the question the Court has posed, the parties should be able to rely on all appropriate legal theories, whether argued before the court of appeal or not. And, this Court granted review not just to resolve a dispute between the parties, but to set down public policy on crucial issues in foreclosure law. It should establish public policy only after receiving thorough briefs that consider every

relevant argument on the issue presented. Yvanova's opening brief is presented in that spirit.

Last, respondents ignore the reality of Yvanova's situation. As the documents filed in the courts below show, Yvanova represented herself in the trial court and before the court of appeal. As a lay person, with no legal training or experience, she could not be expected to know all the relevant legal theories or even the facts relevant to her case. *Fleet v. Bank of America,* 229 Cal.App.4th at 1414. Yvanova's lack of experience or legal training should not be held against her now that she has experienced counsel, who has argued the crucial facts and the key legal theories in the opening brief.

B. Even if the Court can take judicial notice of the PSA, it does not establish Yvanova's loan was legally assigned.

Unlike Yvanova's opening brief, which focused on the Deed of Trust, respondents' brief concentrates on the Pooling and Servicing Agreement that supposedly governed the interpretation and operation of the securitized trust that claimed to own Yvanova's loan. (Called the Morgan Stanley MBS or the "investment trust" in Yvanova's opening brief, at page 6.) Respondents' argument begins with the curious statement that "'post-closing recordation does not in itself suggest that the assignments were made at the time of the recordation.'" (Respondents' brief, at page 17,

quoting Rajamin v. Deutsche Bank National Trust Co., 757 F.3d 79, 91 (2d Cir. 2014).)

But, the assignment does not use the past tense. It says: "the Assignor does . . . hereby grant, bargain, sell, transfer and set over unto Assignee. . . ." (RA, at page 72.) The use of the present tense tells most people, and certainly most homeowners, that the assignment is happening at the same time as the recording. The assignment was signed December 19, 2011 and recorded later in December 2011. (*Ibid.*) There is no language in the assignment warning anyone, let alone a homeowner, that the assignment had been done earlier. No language tells the homeowner the assignment had occurred on the effective date of the PSA, in January 2007.

Given the assignment's plain language, the average homeowner, such as Yvanova, would have questions about its validity. The investment trust that received the assignment had, according to the PSA, a January 1, 2007 cut-off date. (See PSA, definition of "Cut-off Date, in the definitions section of the PSA, found at https://www.sec.gov/Archives/edgar/data/1385840/000091412107000322/ms7263661-ex4.txt, accessed March 18, 2015.) The December 2011 date of the assignment is proof by itself that it was not executed in 2007 but in 2001. An assignment that comes nearly five years after the cut-off date surely raises questions.

Respondents then argue that the late assignment is perfectly consistent with the PSA, which provides, according to respondents,

recordation "of an assignment of a Deed of Trust in California only 'if foreclosure proceedings occur against a Mortgaged Property. . . .'" (Respondents brief, at page 9, *quoting* the PSA, at section 2.01 (b), AA Vol. 1-2, page 340; emphasis deleted.) The actual language of the PSA reads: "However, with respect to the Assignments of Mortgage referred to in clauses (i) and (ii) above, if foreclosure proceedings occur against a Mortgaged Property, the applicable Servicer shall record such Assignment of Mortgage. . . ." (AA Vol. 102, at page 340.)

This clause mentions nothing about California in particular. Further, it is limited to "Assignments of Mortgage referred to in clauses (i) and (ii) above. . . ." Clause (i) refers to mortgages where the "Trustee, the Custodian and each Rating Agency have received an Opinion of Counsel . . . that recordation of such Assignments of Mortgage in any specific jurisdiction is not necessary to protect the Trustee's interest. . . ." (*Ibid.*) This clause does not apply to Yvanova, because there was no document presented to the lower courts that said the "Trustee" under the PSA received a legal opinion that recordation was not necessary. As for clause (ii), it applies if "such Mortgage Loan is a MERS designated Mortgage Loan. . . ." (*Ibid.*) Yvanova's loan was not a MERS loan (RA, at pages 40, 42.) Clause (ii) does not help respondents. Because the Yvanova loan does not fall within Clauses (i) or (ii), respondents cannot claim the PSA somehow justifies the late assignment of her loan to the investment trust.

Respondents' claim about the assignment also does not make sense given the chronology of the foreclosure. They believe the late assignment was recorded only after Yvanova's loan went into foreclosure. But, respondents issued the first Notice of Default, which began the foreclosure process, on August 29, 2008. (RA, at page 65.) The assignment dates from over three years later, in December 2011. (RA, at page 72.) As respondents read the PSA, the assignment and the start of the foreclosure should occur close together. They should not occur more than three years apart.

In any case, even if the PSA language does somehow apply to the late assignment, it merely creates an issue of fact. Yvanova argues the December 2011 assignment violates the PSA because it came nearly five years after the PSA cut-off date. Respondents argue the late assignment occurred only because Yvanova's loan went into foreclosure. This is a factual dispute. Demurrers do not resolve factual disputes. *Evans v. City of Berkeley*, 38 Cal.4th 1, 5 (2006).

Respondents also are unwise to rely on the December 2011 assignment. They point out that under California law, "the assignment of the note carrie[s] with it the security of the deed of trust." (Respondents' brief, at page 19, *quoting Seidell v. Tuxedo Land Co.*, 216 Cal. 165, 170 (1932).) This contention works if the assignment actually assigns the promissory note and does not mention the deed of trust. In that event,

California law dictates that assignment of the promissory note also transfers the deed of trust. In Yvanova's case, however, the December 2011 assignment says nothing about assigning the note. It merely states: "Assignor does . . . hereby grant, bargain, sell, transfer and set over unto the Assignee . . . to the following deed of trust describing land therein. . . ." (RA, at page 72.) Without language specifically describing the promissory note, the December 2011 assignment might run afoul of the rule that the failure to assign the note with the deed of trust invalidates the deed of trust and makes the loan unsecured. *See, e.g., Carpenter v. Longan,* 83 U.S. 271, 275 (1873), *cited in* Respondent's brief, at page 19.

Respondents then come to their main argument under the PSA. The PSA, by its clear language, transferred the Yvanova loan from the lender to the investment trust automatically on the day the PSA went into effect. (Respondents' brief, at pages 19-20.) According to Respondents' reading of the PSA, the "PSA shows that New Century sold and assigned all right, title, and interest in her debt, including the beneficial interest in the Deed of Trust, to [the investment trust] in 2007, and that the Trust's ownership vested on that date. . . ." (Respondents' brief, at page 20.) Respondents quote this language from the PSA to support that proposition:

> [T]he Depositor, concurrent with the execution and delivery hereof, hereby sells, transfers, assigns, sets over and otherwise conveys to the Trustee for the benefit of the Certificateholders, without recourse, all the right, title and interest of the Depositor in and to the Trust Fund, and the Trustee, on behalf of the Trust, hereby accepts the Trust Fund. . . . (AA Vol. 1-2, p. 337, § 2.01 (a)).

This argument has two flaws, both fatal. One, it requires this Court to take judicial notice of a document that is not a recorded public record. (The PSA is on file with the SEC at the SEC's Edgar website; see cite above, at pages 4-5 of this reply brief.) As this Court has stressed, "When judicial notice is taken of a document . . . the truthfulness and proper interpretation of the document are disputable." *StorMedia, Inc. v. Superior Court,* 20 Cal.4th 449, 457, fn. 9 (1999). Or, as the courts of appeal put it, "Taking judicial notice of a document is not the same thing as accepting the truth of its contents or accepting a particular interpretation of its meaning." *Joslin v. H.A.S. Insurance Brokerage,* 184 Cal.App.3d 369, 374 (1986); *Herrera v. Deutsche Bank National Trust Co.,* 196 Cal.App.4th 1366, 369 (2011) (refusing to take judicial notice of documents in a wrongful foreclosure case). Respondents' argument rests on the assumption that this Court must both accept the truth of statements made in the PSA and, more important, must accept as true respondents' interpretation of the PSA. This Court's rules on judicial notice do not allow that.

Respondents may argue that Yvanova attached portions of the PSA to papers she submitted to the trial court and the court of appeal. From

there they may argue that Yvanova admitted the genuineness of the PSA and their interpretation of the document. But, you can read Yvanova's complaints and her opposition to the demurrers as saying that she disputed whether respondents had the power to foreclose. She also disputed whether the PSA, the December 2011 assignment, or any other document authorized the foreclosure. Nothing she submitted can be construed as an admission that the PSA allowed respondents to foreclose or that she accepted respondents' interpretation of the PSA.

The second problem is that respondents fail to cite all the relevant portions of the PSA. The PSA, for example, says the "Depositor, concurrently with the execution, and delivery hereof, hereby sells, transfers assigns . . . all the right, title and interest of the Depositor in the Trust Fund. . . ." (Respondents' brief, at page 20, quoting AA Vol. 1-2, p. 337, § 2.01 (a) of the PSA.) Who is the depositor? According to first page of the PSA and the PSA's definition section, the "Depositor" is "Morgan Stanley ABS Capital I Inc." Yet, respondents' argument misses a crucial step. The PSA does not explain how Yvanova's loan passed from New Century Mortgage Corporation, the originator of the loan, to the Depositor, Morgan Stanley ABS Capital I Inc. Nothing in the PSA purports to accomplish this transfer. Without that preliminary step, respondents cannot rely on the PSA as proof that the Depositor transferred the Yvanova loan to the investment trust. There is no indication that the Depositor had the right to do so.

In addition, the Depositor sold its interest in the "Trust Fund." (Respondents' brief, at page 20.) Under the definition of "Trust Fund" in the PSA, the fund consists of "the Mortgage Loans. . . . ." The PSA then defines the "Mortgage Loans" as "an individual Mortgage Loan" that is "identified on the Mortgage Loan Schedule. . . ." In other words, all the Depositor transfers to the investment trust are a list of loans on the "Mortgage Loan Schedule." Nothing in the documents Yvanova submitted to the lower courts included a "Mortgage Loan Schedule." Further, such a schedule was required to be attached to the PSA. But, the PSA filed with the SEC contains no such schedule. There is no way to tell if, according to the terms of the PSA, Yvanova's loan was on the list of assets transferred by the Depositor.

Finally, the PSA provided that a transfer of a loan depended on the Depositor delivering to the Trustee the "the original Mortgage Note bearing all intervening endorsements, endorsed 'Pay to the order of _____, without recourse an signed . . . in the name of the last endorsee by an authorized officer." (PSA, section 2.01 (b) (i)). In addition, the Depositor was to deliver to the Trustee "the original Assignment of Mortgage for each Mortgage Loan endorsed in blank . . . the originals of all intervening assignments of Mortgage . . . evidencing a complete chain of title from the applicable originator . . . to the last endorsee with evidence of recording thereof. . . ." (PSA, at sections 2.01 (a) (v) and (vi).) Respondents cannot

point to any document in the record that shows the Depositor completed these tasks. But, without them, the Depositor could not transfer Yvanova's loan. In the end, the PSA does not support respondents' case; the PSA destroys it.

C. California law allows Yvanova to challenge the purported assignment.

Respondents' main argument is that because Yvanova was not a party to the PSA, she has no right to enforce it. First, this argument rests on a foundation of hypocrisy. Earlier, respondents contended that Yvanova was bound by the PSA, including its choice of law clause and its provision that her loan was automatically transferred by the "Depositor" as soon as the PSA went into force in 2007. (Respondents' brief, at pages 20, 21 and 23.) As even respondents must recognize, a contract binds a person only if that person is a party to the contract. *Martinez v. Socoma Cos.*, 11 Cal.3d 395, 400 (1974). By urging this Court to find that Yvanova is bound by the PSA, respondents concede she is a party to the PSA and can enforce its terms. Respondents then deny that admission by insisting she is not a party to the PSA. They cannot have it both ways.

Second, respondents rely on New York law to insist Yvanova cannot invoke the PSA. (Respondents' brief, at pages 23-24.) The PSA choice of law clause, however, is narrow and applies only to interpretation of the language used in the PSA. "This agreement shall be construed in

accordance with and governed by the substantive laws of the State of New York applicable to agreements made and to be performed in the State of New York." (PSA, at section 10.03 "Governing Law.)

How the language of the PSA should be interpreted is a secondary question, perhaps governed by New York law and perhaps not. As noted above, New York law applies to interpret the PSA if the PSA is "to be performed in the State of New York." In this case, however, the PSA was "to be performed" in California, because the loan was made in California, and the foreclosure occurred in California. Thus, Yvanova can argue the agreement was "performed" in part in California, which makes New York law inapplicable even under the PSA's choice of law clause.

But, before any court gets to the interpretation of the PSA, it must answer a preliminary question: who has the power to enforce terms of the PSA? The PSA's choice of law clause does not resolve that issue, because the clause just deals with interpretation of the PSA's terms. The answer to that crucial, first question should be a matter of California law, as it affects California homeowners. The PSA will determine who has the power to foreclose on their homes and who has the power to grant or deny loan modifications. Under California's choice of law rules, governmental interest analysis controls. *Washington Mutual Bank v. Superior Court,* 24 Cal.4th 906, 919 (2001). That process applies the law of the state whose interests are most affected by the choice of one state's law. *Ibid.*

Here, California borrowers have a huge stake in having California law applied. They live in California, own properties in California, and they expect California law to govern their obligations as borrowers. New York has a less meaningful interest. The investment trust may be located in New York (if it has a physical location at all), but its "Certificateholders" or investors are located in many states, not just New York. They may care little whether New York or California law applies. If the application of California law causes the investment trust to pay money to a California homeowner, the trust likely can recover that money from the loan servicer or the trust's trustee under the broad indemnification clause of the PSA. (See, e.g., sections 3.04 of the PSA, "Liability of the Servicers", section 8.01, "Duties of the Trustee," and section 8.05, "Trustee's Fees and Expenses.") California law will cause little, if any harm, to the trust and its "Certificateholders." California law, rather than New York law, should control on who can rely on the PSA to defend against a foreclosure.

Third, respondents are wrong when they insist the crucial contract in this case is the PSA. (Respondents' brief, at pages 20, 21 and 23.) The key document is the Yvanova Deed of Trust. Only that contract creates a power of sale, which allows the "Lender" under the Deed of Trust to declare a default and order a foreclosure sale. *Jenkins v. JPMorgan Chase Bank, N.A.*, 216 Cal.App.4th 497, 508 (2013). Without rights granted under the Deed of Trust, respondents clearly would lack the power to foreclose. *Ibid.*

Nothing in California's foreclosure statutes creates a non-judicial power of sale; that power must exist under a contract, the Deed of Trust. *Ibid.*

California law controls the interpretation and application of a contract when California is "the place where it is to be performed." Civil Code section 1646. The Yvanova Deed of Trust was to be performed in California. The Deed governed property in California, called for notices of default to be issued to a California resident, and permitted a foreclosure sale by the "Lender" in California. Civil Code section 1646 dictates that the crucial questions in this case be decided by California law.

Fourth, the clear language of the Yvanova Deed of Trust, which this Court must apply as written, *Powerine Oil Co. v. Superior Court,* 37 Cal.4th 377, 396 (2005), grants Yvanova standing. Yvanova dealt with the impact of this language extensively in her opening brief and will not repeat that analysis here. (See Opening Brief, at pages 17-20.) But, the Court should focus on two clauses in the Deed of Trust. Respondents mention the first one in their brief: "The covenants and agreements of this Security Instrument shall bind . . . and benefit the successor and assigns of Lender." (RA, at page 50, Deed of Trust, section 13, cited by Respondents' brief, at page 4.) The investment trust in this case claims to be an "assign" of the "Lender" through the December 2011 assignment and through the PSA.

The trust thus is bound by the Deed of Trust and all its clauses. One crucial clause is section 22, which provides that the borrower has 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.) Read according to its plain language, this clause entitles the borrower, such as Yvanova, to bring suit to assert *any defense* she may have against a foreclosure sale. One such defense has to be a possible violation of the PSA by an assignment of her loan after the investment trust's 2007 closing date. Since the investment trust has agreed to be bound by the terms of the Deed of Trust, including the borrower's right to sue, it must recognize the borrower has standing to challenge a foreclosure by alleging a lack of compliance with the PSA. And, as Yvanova points out in her opening brief, the investment trust must accept that nothing in the Deed of Trust tells the borrower she has no such right. (Opening Brief, at pages 22-24.)

Fifth, respondents forget that under California law, the investment trust, as the party claiming it has been assigned the Yvanova loan, must prove that assignment. Numerous cases stand "for the general principle that the party asserting a right under an assigned instrument bears the burden of demonstrating the assignment." *Fontenot v. Wells Fargo Bank,* 198 Cal.App.4th 256, 270 (2011), *citing Neptune Society Corp. v. Longanecker,* 194 Cal.App.3d 1233, 1242 (1987). *Neptune Society,* in turn, relied on this Court's opinion in *Cockerell v. Title Ins. & Trust Co.,* 42 Cal.2d 284, 292 (1954), where the Court held:

> The burden of proving an assignment falls upon the party asserting rights thereunder. 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 the fact is in issue [citation] 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. (Citations omitted.)

Cockerell has never been overruled or limited and it remains controlling law. Under *Cockerell,* the investment trust must demonstrate it holds Yvanova's loan pursuant to a valid transfer. Yvanova does not have that burden. The investment trust, not Yvanova, must prove it has standing to enforce the Deed of Trust. It has not demonstrated as a matter of law that it has standing. Yvanova has alleged it does not and created a disputed issue of fact on standing. That should have been enough to get her past respondents' demurrer.

D. Yvanova can allege the assignment is void.

Respondents make much of the distinction between "void" contracts and "voidable" contracts. (Respondents' brief, at pages 28-33.) According to them, a void contract is "a nullity and cannot be ratified." (Respondents' brief, at page 28.) Voidable contracts, conversely, "injure the rights of a party to the agreement, which that party may elect to invalidate or ratify." (*Ibid.*) They believe this distinction is crucial to this case and favors them. It is irrelevant. The "issue presented," as drafted by this Court, assumes the late assignment is void.

The question is not whether the Yvanova Deed of Trust is void. The question is whether the investment trust, as the purported holder of Yvanova's loan, had the power to order a foreclosure on her home. The foreclosure had to start with the trust as the claimed assignee of the "Lender." *Jenkins v. JPMorgan Chase Bank, N.A.,* 216 Cal.App.4th at 508. The investment trust could claim that power only if it had a valid assignment of the Yvanova Deed of Trust. *Cockerell v. Title Ins. & Trust Co.,* 42 Cal.2d at 292. Either it was an assign of the lender or it was not. Void or voidable makes no difference.

In California, when a party authorizes a foreclosure without the power to do so, the foreclosure is void, not voidable. *See, e.g., Pro Value Properties, Inc. v. Quality Loan service Corp.,* 170 Cal.App.4th 579, 581, 583 (2009), *and Glaski v. Bank of America*, 218 Cal.App.4th 1079, 1094 (2013). As the First District recently held, "a sale is rendered void when it is conducted by an entity that lacks authority to do so." *Ram v. OneWest Bank*, 223 Cal.App.4th 1, 10 (2015).

The question of whether a foreclosure is "void" must be decided by California law. The foreclosure sale here occurred in California and harmed a California homeowner, not a New York borrower. New York has no interest in this question. California law dictates that if Yvanova can allege an improper assignment, she has alleged a void foreclosure sale. She has alleged an invalid assignment by charging that the 2011 assignment of

her Deed of Trust violated the terms of the PSA, which required a transfer of all property into the trust by its 2007 closing date.

Respondents' void vs. voidable argument has another flaw. As respondents note, even if a contract is voidable, the injured party can chose to ratify it despite its flaws. (Respondents' brief, at page 28.) So, assuming respondents are correct—and they are not—the investment trust could choose to ratify the invalid 2011 assignment of the Yvanova Deed of Trust. But, can this Court assume as a matter of law that they would ratify? No. The assignment violated the PSA by being made over four years after its closing date. The federal tax laws require a closing date because they require that all property be deposited into the trust before that date. *Glaski v. Bank of America*, 218 Cal.App.4th at 1093, fn. 12; 26 U.S.C. §§ 860A (a) and 860D (a); Oppenheim, *et al., Deconstructing the Black Magic of Securitized Trusts*, 41 Stetson.L.Rev. 745, 757-758 (2012).

Under the Internal Revenue Code, income received by an REMIC investment trust is not taxed if the trust is properly formed. (*Ibid.*) The investment trust in Yvanova's case was a REMIC trust. (*Ibid.*) But, if property is transferred into the trust after the closing date, that action can jeopardize the trust's tax exempt status. Oppenheim, *et al., Deconstructing the Black Magic of Securitized Trusts*, 41 Stetson.L.Rev. at 757-758. Investors in the trust also could face increased tax liabilities and possible IRS audits. (*Ibid.*)

A decision by the trustee for the trust to ratify a late assignment could expose the trust itself to an IRS investigation and loss of its non-taxable status. It also could harm the investors in the trust. Because the trustee owes a fiduciary duty to the trust, it may be reluctant to ratify a late assignment if harm to the trust or investors could result. So, it hardly is settled as a matter of law that the Trustee of the investment trust here would approve a late assignment. Even if the assignment is voidable, as respondents contend, ratification is a disputed issue of fact no demurrer should resolve. *Evans v. City of Berkeley*, 35 Cal.4th at 5; *Common Wealth Insurance Systems, Inc. v. Kersten*, 40 Cal.App.3d 1014, 1026 (1974) (holding that ratification ordinarily is an issue of fact). Because this case is before the Court following a demurrer, the void vs. voidable argument ultimately does respondents no good.

E. Yvanova does not have to allege "prejudice" to have standing.

Respondents next contend that the "time honored rule in California, as Yvanova concedes (OB 13), is that standing to pursue a wrongful foreclosure claim must include a showing of actual prejudice." (Respondents brief, at page 33.)

Yvanova never conceded this "prejudice" rule applied to her case. Respondents purport to find support for this alleged admission on page 13 of the Opening Brief. That page merely quotes language from a case that

mentions prejudice; Yvanova did not say she agreed with the prejudice test. She does not, for several reasons.

First, the "prejudice" test cannot be applied when a borrower alleges a foreclosure is void because the lender or servicer has no power to foreclose:

> The second element—prejudice—is met when an irregularity in the proceeding adversely affects the trustors' ability to protect their interest in the property. 'Prejudice' however, 'is not presumed from 'mere irregularities' in the process. . . .' [¶] A sale is not rendered void merely because of minor or technical defects. . . . A sale is rendered void when the defects are substantial. . . . Similarly, *a sale is rendered void when the foreclosure sale is conducted by an entity that lacks the authority to do so. Ram v. OneWest Bank,* 234 Cal.App.4th at 8, *quoting Fontenot v. Wells Fargo Bank, N.A.,* 198 Cal.App.4th at 272 (italics added).

Yvanova, of course, argues that the investment trust claiming to own her loan has no power to foreclose because it is acting pursuant to an invalid assignment. Since she attacks its very power to foreclose, she need not allege prejudice.

Second, the prejudice rule should apply only to cases where the borrower alleges procedural defects in the foreclosure process. The early cases that created the prejudice rule relied on the observation that mere procedural problems in a foreclosure sale should not be enough to overturn the sale without prejudice. For example, collusion in the foreclosure sale bidding process was the basis for the claim in *Lo v. Jensen,* 88 Cal.App.4th 1093 (2001). In *Angell v. Superior Court,* 73 Cal.App.4th 691 (1999), the

notice of default and the notice of trustee's sale contained errors in the amounts due under the loan. Both were procedural errors and the courts held the plaintiffs had to allege prejudice. *Fontenot v. Wells Fargo Bank, N.A.*, 198 Cal.App.4th at 272, relied on both cases to create a prejudice rule it applied to all wrongful foreclosure claims. The *Fontenot* court stressed that "Prejudice is not presumed from 'mere irregularities' in the process." *Ibid.*

But, Yvanova does not rely on procedural errors or "mere irregularities in the process." She does not say the notices she received were late, or were not delivered. She argues an error of substance—the investment trust authorized the foreclosure, the entities that started the process, had no power to foreclose because they had no interest in her loan. This error makes the foreclosure on Yvanova's home void. *Ram v. OneWest Bank, supra.* When an error makes a sale void, it no longer is procedural. The cases imposing a prejudice rule, since they are based on procedural errors, do not apply. They do not require Yvanova to allege prejudice.

Third, there is something irregular about imposing a prejudice test in a wrongful foreclosure case. Ordinarily, to allege a tort or breach of contract, you must allege a breach of duty or breach of contract, and that the breach caused you damages. *See, e.g., Reichert v. General Ins. Co.,* 68 Cal.2d 822, 830 (1968). There is no separate requirement that you charge

you were "prejudiced." Imposition of a prejudice test requires a strong public policy which, when you look at the case law and the foreclosure statutes, does not exist.

Fontenot v. Wells Fargo Bank, 198 Cal.Ap.4th at 270-271, purported to find support for a prejudice rule in the public policy behind the foreclosure statutes. It identified that policy as only giving "the creditor/beneficiary with a quick, inexpensive and efficient remedy against a defaulting borrower. . . ." *Id.*, *quoting Moeller v. Lien*, 25 Cal.App.4th 822, 830 (1994). Yet, *Moeller v. Lien* did not hold the "quick, inexpensive and efficient remedy against a default creditor" was the sole purpose for the foreclosure statutes. Another was "to protect the debtor/trustor from a wrongful loss of property." *Moeller v. Lien*, 25 Cal.App.4th at 830. Imposing a foreclosure test in addition to requiring damage weakens this policy because it makes it harder for borrowers to allege "a wrongful loss of property." Contrary to what the *Fontenot* opinion suggests, the multiple policies behind the foreclosure statutes do not mandate a prejudice test.

And, the statutes, as amended by the Homeowners Bill of Rights, seek to avoid unlawful foreclosures initiated by parties that lack the power to foreclose. Civil Code section 2924 (a) (6) now provides that "No entity shall record or cause 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. . .*" (Italics added.)

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.) These statutes now reflect a clear California public policy: foreclosures shall not be initiated by a party unless it has the power to foreclose. A prejudice test interferes with that policy because it makes it harder for borrowers to allege and prove violations of the Homeowners Bill of Rights. If this Court applies present California public policy as found in the Homeowners Bill of Rights, it will see that the prejudice test has no place in this case.

This Court also cannot assume that every borrower who goes into default will lose her home. If it does, it will confer on lenders and servicers broad immunity, because no borrower will be able to sue for wrongful foreclosure once she has defaulted. No California statute or public policy justifies immunity. Moreover, default is only the beginning of the foreclosure process. Borrowers in default are encouraged to apply for loan modifications and lenders and servicers are encouraged to grant them. See Civil Code section 2923.4. If this Court imposes a prejudice test, it will frustrate that policy.

In the end, prejudice is nothing more than an enhanced causation test. As lenders and servicers see it, the borrower cannot allege prejudice

because his own default on the loan led to the foreclosure and the loss of his home. Respondents make that very argument. (Respondents brief, at page 34.) Yet, causation is an issue of fact that courts cannot resolve on demurrer in a foreclosure situation. *Mirkin v. Wasseman,* 5 Cal.4th 1082, 1093 (1993); *Alliance Mortgage Co. v. Rothwell,* 10 Cal.4th 1226, 1239 (1995).

F. California public policy favors standing for borrowers.

In her opening brief, Yvanova explained why the *Biakanja v. Irving* factors--based on *Biakanja v. Irving* 49 Cal.2d 657 (1958)--favored standing. (Opening Brief, at pages 24-41.) Respondents naturally attack this position and argue that Yvanova wants to impose a "duty" on lenders. (Respondents brief, at pages 37-41.) Yvanova anticipated much of this attack in her opening brief and responded to it. (Opening Brief, at pages 24-41.) But, she wishes to add a few points.

Standing is just another word for "privity of contract." For decades, defendants, especially financial institutions, have argued they owe no duty to a plaintiff because the plaintiff was not a party to their contract. *See, e.g., Connor v. Great Western Savings and Loan Assoc.*, 69 Cal.2d 850, 864 (1968). They have attempted to set up "privity" as a fortress. And, for decades, this Court has attacked the privity fortress by holding privity does not deprive a plaintiff of standing. Privity, in other words, cannot be used to shield a financial defendant from liability to non-contracting parties.

Connor v. Great Western Savings and Loan Association, supra. *Biakanja* shows this Court another way out of the standing trap respondents want to use against borrowers. That is why Yvanova discussed the *Biakanja* factors in detail.

The *Biakanja* factors, as even respondents concede, come down to two—public policy and moral blame. (Respondents brief, at pages 40-42.) Public policy is set by the Homeowners Bill of Rights, because it is the present public policy of California. Past public policy, which lenders and servicers insist favors them, instead favors borrowers because this Court has held for decades that a creditor must prove it has a valid assignment. *Cockerell v. Title Ins. & Trust Co.,* 42 Cal.2d at 292. As for moral blame, respondents attack Yvanova because she committed the unforgivable sin of defaulting on her loan. She was like thousands of California homeowners who were victims of the Great Recession. California law does not cast blame on her; it requires that she receive help if asked. See Civil Code section 2923.4

But, respondents should not throw stones when they live in glass houses. There was nothing wrong with loan securitization, but lenders and servicers did not do the vital paperwork. They did not do the proper assignments, make sure assignments were made before the closing dates of various trusts, or draft documents that adequately informed borrowers of their rights and obligations. They alone are to blame for these failures.

Borrowers like Yvanova did not draft the PSAs that govern investment trusts, write the terms of deeds of trust that control foreclosures, or prepare assignments that purported to transfer loans. If moral blame is a factor in weakening the concepts of privity and standing under California law, it surely works in favor of borrowers.

CONCLUSION

For these additional reasons, plaintiff and appellant TSVETANA YVANOVA respectfully requests that this Court find she has standing and that it reverse the judgment of the court of appeal.

Dated: March 19, 2015

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 8.520 (c) (1).

The text in this Reply Brief on the Merits consists of 6,738 words, as counted by the Word 2007 word processing program used to generate the Petition.

Dated: March 19, 2015

LAW OFFICES OF
RICHARD L. ANTOGNINI

By:

Richard L. Antognini
Attorneys for Plaintiff
and Appellant
TSEVETANA YVANOVA

SUPREME COURT CASE NO. S218973
YVANOVA V. NEW CENTURY MORTGAGE

PROOF OF SERVICE BY FIRST CLASS MAIL AND EMAIL

I, Richard L. Antognini, declare:

On March 19, 2015, I served the following document on the parties identified below: APPELLANT'S REPLY BRIEF ON THE MERITS. I placed a true copy of this document in a sealed envelope addressed as follows:

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

K. Lee Marshall, Esq.
Bryan Cave LLP
560 Mission Street, Suite 2500
San Francisco, CA 94105
(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)

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In addition, I sent a copy of the APPELLANT'S REPLY BRIEF ON THE MERITS to the following parties by email:

Charles Ward Cox
California Contract Paralegal
2705 Ravazza Road
Reno, Nevada
(Emailed to Charles.cox@proacm.com)

Mark F. Didak
Law Office of Mark F. Didak
6701 Center Drive West, 14th Floor
Los Angeles, California
(Emailed to mdidak@didaklaw.com)

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 March 19, 2015 at Lincoln, California.

_____

Richard L. Antognini