In the Supreme Court of the State 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,

Defendant-Respondent.

Case No. S218973

Second Appellate District, Division One, Case No. B247188
Los Angeles County Superior Court, Case No. LC097218
Honorable Russell Kussman, Judge

AMICUS BRIEF OF THE ATTORNEY GENERAL IN SUPPORT OF PLAINTIFF AND APPELLANT TSVETANA YVANOVA

KAMALA D. HARRIS
Attorney General of California
NICKLAS A. AKERS
Senior Assistant Attorney General
MICHELE VAN GELDEREN
Supervising Deputy Attorney General
SANNA R. SINGER
Deputy Attorney General
State Bar No. 228627
110 West A Street, Suite 1100
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 645-2111
Fax: (619) 645-2012
Email: Sanna.Singer@doj.ca.gov
Attorneys for Amicus Curiae
the Attorney General of California

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INTRODUCTION

This case presents the question of whether, in a wrongful foreclosure action, a homeowner may bring suit on the basis that the foreclosing party lacked the power to foreclose because it did not own the homeowner's debt. In this case, Plaintiff alleges that the foreclosing party did not own Plaintiff's debt because one or more of the assignments of her debt were void. Thus, while Plaintiff owed a debt to someone, she did not owe it to the entity that foreclosed on her home. A homeowner is entitled to bring such a claim, just as she may protect herself against the wrongful invasion of her property interests in any other context.

Permitting a homeowner to assert a wrongful foreclosure claim on this basis is consistent with public policy, existing law, and recent legislative enactments designed to protect homeowners from abuses in the mortgage industry. Homeownership is one of the central goals of our state policymakers for good reason; it brings with it economic and social stability, and a better chance at succeeding in life for our children. Once homeownership is achieved, it must not be taken away lightly. To that end, California's non-judicial foreclosure statutes are designed to carefully balance creditors' rights to an efficient remedy for default against homeowners' rights against unlawful foreclosures.

One of the basic tenets of foreclosure law is that the foreclosing party must have an ownership interest in the debt securing the home that is to be foreclosed upon. There is no reason to depart from this fundamental premise where foreclosure proceeds non-judicially. Whether the correct party is foreclosing is not a technicality. A homeowner experiences real harm when a party with no interest in the debt forecloses because the homeowner has lost her home to the wrong party and is deprived of the opportunity to explore options with the true debt owner. It is impossible to

know whether that homeowner could have avoided foreclosure if the wrong party had not foreclosed; in other words, it matters who owns the debt.

Recognizing wrongful foreclosure actions to challenge foreclosures by the wrong party, such as those resulting from allegedly void debt assignments, is sound policy because it empowers homeowners to protect themselves against "fast and loose" foreclosure practices, incentivizes the mortgage industry to exercise due diligence in the foreclosure process, and helps avoid the confusion and unfairness that would result from more than one party having the power to foreclose. A contrary rule would lead to a legally untenable situation, i.e. that *anyone* can foreclose on a homeowner because *someone* has the right to foreclose.

STATEMENT OF INTEREST

The Attorney General, as the State's chief law enforcement officer, has responsibility to enforce state law, including laws related to homeowner protection. During California's recent housing bubble and subsequent burst, many mortgage industry abuses came to light, including irresponsible lending practices, careless or negligent review of homeowner records prior to initiating foreclosures (i.e., "robosigning"), and other procedural shortcuts. In addition, the frenetic pace at which debt was assigned from one lender to another caused confusion regarding which entity a homeowner should be working with to make payments, modify her loan, or discuss other options to avoid foreclosure. "Dual-tracking," or the practice of one arm of a bank negotiating a loan modification with a borrower while another arm simultaneously proceeded to foreclosure, was unfortunately commonplace.

The California Department of Justice, in cooperation with other state and federal agencies, made important inroads against these abuses through its participation in the National Mortgage Settlement (NMS) with five of the nation's largest mortgage service providers. The NMS cracked down

on practices like dual-tracking and required banks to provide a single point of contact for borrowers. In addition, the Attorney General supported California's own 2012 legislation, the Homeowner Bill of Rights (HBOR), which included similar provisions and afforded further protections for Californians.

Private wrongful foreclosure actions are a critical supplement to state enforcement of homeowner protection laws, helping to check misconduct in the mortgage industry. Attorney General Kamala D. Harris submits this *amicus curiae* brief pursuant to California Rules of Court, rule 8.520(f), presenting additional arguments, not raised by the parties, explaining why homeowners may challenge whether the entity purporting to foreclose is the true holder of the debt.

ARGUMENT

I. CALIFORNIA HAS A STRONG PUBLIC POLICY IN FAVOR OF PROTECTING HOMEOWNERS FROM WRONGFUL FORECLOSURE

Protecting homeownership is a significant state interest. The public benefits of homeownership are far-reaching and well-known; they include promoting socio-economic mobility, fueling California's economy, ensuring stable home environments for residents, curbing urban blight, and promoting children's health and safety, among others. (See generally R. Cohen, Center for Housing Policy, Insights from Housing Policy Research: The Impacts of Affordable Housing on Health: A Research Summary (May 2011).) California law provides critical protections to homeowners to help achieve these important policy goals.

A. California's Foreclosure Statutes Strike a Careful Balance Between Efficiency in Foreclosure and Homeowner Protection

California's non-judicial foreclosure statutes (Civ. Code, § 2920 et seq.)[1] reflect a carefully crafted balance between creating an efficient foreclosure process and shielding homeowners from overzealous or improper foreclosures. California courts have recognized that the purpose behind California's non-judicial foreclosure statutes is three-fold: (1) to provide the creditor with a quick, inexpensive, and efficient remedy against the debtor; (2) to protect the debtor against the wrongful loss of his or her property; and (3) to ensure that a properly conducted sale is final and conclusive as to a bona fide purchaser. (*Moeller v. Lien* (1994) 25 Cal.App.4th 822, 830.)

With respect to the first goal—an efficient remedy for creditors—non-judicial foreclosures provide banks with a clear and expeditious process for obtaining the security on their loans in the case of borrower default. Under these statutes, the foreclosing party (i.e., the lender or its agent) initiates private proceedings directly against the borrower without the need for judicial oversight. (§ 2924 et seq.) Non-judicial foreclosure tends to be a more efficient and less expensive process than judicial foreclosure because there is no court involvement, neither an appraisal nor judicial valuation is required, and the debtor has no post-sale right of redemption. (Buchwalter, *Cause of Action in Tort for Wrongful Foreclosure of Residential Mortgage* (2012) 52 Causes of Action 2d 119, § 2.)

At the same time, the non-judicial foreclosure laws provide an array of safeguards to help ensure that a borrower does not wrongly lose his or her home. For example, the statutes impose detailed noticing and service

[1] All further references are to the Civil Code unless otherwise noted.

requirements, which if not strictly followed, result in a voidable foreclosure sale. (§ 2923.3 et seq.; *Miller v. Cote* (1982) Cal.App.3d 888, 894 ["a trustee's sale based on a statutorily deficient notice of default is invalid"].) In addition, homeowners are afforded multiple opportunities in which to cure a default. The owner of the debt, or his agent, must give the homeowner: (1) a three-month waiting period after the notice of default (§ 2924(a)); (2) another opportunity to bring loans current during a five-day reinstatement period prior to sale (§ 2924c); and (3) the right to invoke the "equity of redemption" or total payoff prior to sale, which gives the homeowner one final chance to avoid foreclosure (§§ 2903, 2905). In addition, prior to foreclosure, the owner of the debt or its agent must have contacted the homeowner to discuss loan modification options. (§ 2923.5, subd. (a)(2)). In other words, once homeownership is established, the non-judicial foreclosure statutes ensure that a homeowner will have every reasonable opportunity to preserve it.

B. The Recent Enactment of the HBOR Reflects a Legislative Intent to Protect Homeowners Against Abusive Practices, Including Foreclosures by the Wrong Party

As noted above, the HBOR was California's attempt to address a range of misconduct in the mortgage industry. HBOR imposed numerous protections for the homeowner, including: (1) a restriction on "dual-track" foreclosure, which prohibits mortgage servicers from advancing the foreclosure process when a loan modification in underway (§ 2923.6); (2) a requirement that lending institutions provide a single point of contact for the homeowner (§ 2923.7); (3) a requirement that loan servicers have reviewed "competent and reliable evidence" of default prior to initiating foreclosure, i.e., an anti-robosigning protection (§ 2924.17); and (4) a private right of action for plaintiffs seeking to enforce certain protections within the act (§ 2924.12).

The HBOR also enacted two reforms aimed at ensuring that only the proper party may foreclose on a mortgage or deed of trust. Newly added Civil Code section 2923.55 requires large lending institutions, prior to recording a notice of default, to provide a written notice to homeowners allowing them to request a copy of the original promissory note and any applicable assignments. (§ 2923.55(b).) In addition, newly added Civil Code section 2924(a)(6) provides that a foreclosing party must be the "holder of the beneficial interest" in the debt:

> 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.

Read together, these sections confirm the Legislature's intent to ensure that the party foreclosing on a homeowner is the "holder" of the debt and can demonstrate proof of ownership if called upon to do so.[2]

While the HBOR reforms may have taken effect only recently, the provisions regarding debt ownership codify existing law. In California, it has always been the rule that only a debt owner or its agent has authority to foreclose, as discussed more fully below.

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[2] The problem of entities foreclosing without authority to do so was before the Legislature when it enacted these sections. (See, e.g., Sen. Rules Com. Conference Rep. No. 1 on Assembly Bill No. 278 (2011-2012 Reg. Session) June 26, 2012, pp. 23-24 [bank personnel testified about foreclosures initiated by parties without legal authority].)

II. A HOMEOWNER MAY BRING A CAUSE OF ACTION FOR WRONGFUL FORECLOSURE ON THE BASIS THAT THE ASSIGNMENT OF DEBT IS INVALID

Consistent with the public policy in favor of preserving homeownership, a plaintiff can properly bring a wrongful foreclosure action based on the allegation that the foreclosing party does not own the debt, i.e., the mortgage or the beneficial interest in the deed of trust. Contrary to Defendants' view, a plaintiff, even one in default, suffers real harm when a party without the right to do so forecloses on her home. Accordingly, a homeowner may bring a wrongful foreclosure action on the basis that the wrong party has foreclosed, whether due to an invalid assignment of the debt or for any other reason.

A. The Foreclosing Party's Lack of Authority Is a Proper Basis on which the Homeowner May Challenge a Foreclosure

A wrongful foreclosure action is a common law tort claim; it is an equitable action to set aside a foreclosure sale, or an action for damages resulting from the sale, on the basis that the foreclosure was improper. (See, e.g., *Munger v. Moore* (1970) 11 Cal.App.3d 1, 7-8.) The elements of a wrongful foreclosure claim are: (1) the defendant caused an illegal, fraudulent, or willfully oppressive sale of the property pursuant to a mortgage or deed of trust; (2) plaintiff suffered prejudice or harm; and (3) plaintiff tendered the amount of the secured indebtedness or is excused from tendering. (*Chavez v. IndyMac Mortgage Services* (2013) 219 Cal.App.4th 1052, 1062; *Lona v. Citibank, N.A.* (2011) 202 Cal.App.4th 89, 112.)[3]

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[3] Tender is typically excused in cases where: (1) the underlying debt is void, (2) the foreclosure or trustee's deed is void on its face, (3) a counterclaim offsets the amount due, (4) specific circumstances make it

(continued...)

A foreclosure may be "wrongful" for a number of reasons. For instance, the foreclosing entity may have failed to strictly comply with the notice or procedural requirements imposed by California's non-judicial foreclosure statutes or by the terms of the deed of trust. (See, e.g., *Anderson v. Heart Federal Sav. & Loan Assn.* (1989) 208 Cal.App.3d 202, 211; *Pfeifer v. Countrywide Home Loans* (2012) 211 Cal.App.4th 1250, 1267). It might also be wrongful because the plaintiff is not actually in default. (See, e.g., *Bank of Am. v. La Jolla Group II* (2005) 129 Cal.App.4th 706, 712.)

Another example—and the one relevant to this case—is that the foreclosure may be wrongful because it was initiated by a party without the lawful right to do so. (See, e.g., *Glaski v. Bank of America* (2013) 218 Cal.App.4th 1079, 1094; *Barrionuevo v. Chase Bank* (N.D. Cal. 2012) 885 F.Supp.2d 964, 972.) To legally foreclose on a person's home, the foreclosing party must be the true owner of the debt securing the property in question. A mortgage or deed of trust creates a lien on the secured property; this lien is contractual in nature but is also a property right. (4 Miller & Starr, Cal. Real Estate (3d ed. 2000) § 10:1, p. 25; see also *In re Elmore* (Bkrtcy. C.D. Cal. 2014) 94 B.R. 670, 676 [creditor has a contractual right to foreclose, also known as a lien, which is a property right].) Thus, the execution of a mortgage or deed of trust reflects a transfer of some of the "bundle of rights" that a homeowner has in his or her property, and a homeowner receives a reconveyance of those rights when he or she pays off the loan. (§§ 2939-2941.) Prior to reconveyance,

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(...continued)
inequitable to enforce the debt, or (5) the foreclosure has not yet occurred. (*Chavez, supra*, 219 Cal.App.4th at p. 1062.)

only those having ownership in the mortgage or deed of trust may exercise the rights flowing under it, including the right to foreclose.[4]

This basic principle—that only a true debt owner or its agent has lawful authority to foreclose—has been long recognized in California law. (See, e.g., *Santens v. Los Angeles Finance Co.* (1949) 91 Cal.App.2d 197, 202 ["the trust deed is a mere incident of the debt and could only be foreclosed by the owner of the note;" *Dimock v. Emerald Properties LLC* (2000) 81 Cal.App.4th 868, 875 [interpreting non-judicial foreclosure statutes to codify existing law prior to 1935, which permits only the recorded trustee to foreclose at a given time].) This flows from the concept that the debt (i.e., a promissory note) and the security interest (i.e., a mortgage or deed of trust) are interconnected instruments that function and move together. (§ 2936 ["[t]he assignment of a debt secured by a mortgage carries with it the security"].)

Because the mortgage or deed of trust secures the debt, only the debt owner (or the debt owner's agents) can enforce it. (See § 2924 [foreclosure process may be initiated by "the trustee, mortgagee, or beneficiary, or any of their authorized agents"].) Thus, a non-debt-owner acts "wrongfully" when it forecloses on a deed of trust to which it is not the beneficiary, and a plaintiff can bring a wrongful foreclosure action challenging that conduct. (See, e.g., *Barrionuevo*, *supra*, 885 F.Supp.2d at p. 972 [plaintiff may

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[4] The rule that only the debt owner has the power to foreclose is not diminished by the California statutory scheme permitting a deed of trust model as opposed to a traditional mortgage. Under the deed of trust model, the debt owner retains the power to foreclose as the deed of trust's beneficiary. The trustee merely acts at the debt owner's direction. The trustee is not a "true trustee" and owes no fiduciary obligations; he or she merely acts as an agent for the debt owner-beneficiary. (*Vournas v. Fidelity Nat. Tit. Ins.* (1999) 73 Cal.App.4th 668, 677.)

"properly assert that only the 'true owner' or 'beneficial holder' of a Deed of Trust can bring to completion a nonjudicial foreclosure under California law"];) *Glaski*, *supra*, 218 Cal.App.4th at p. 1094 [agreeing with *Barrionuevo*'s assessment of California law but requiring that facts regarding a lack of debt ownership be pled with some specificity].)

B. Because a Void Assignment Deprives a Foreclosing Party of the Authority To Foreclose, a Homeowner May Bring a Wrongful Foreclosure Action on That Basis

A defect in the chain of title that renders a debt assignment void is one way in which a foreclosing party may lack the lawful authority to foreclose. One California appellate decision has directly addressed whether a wrongful foreclosure plaintiff may assert the foreclosing party's lack of power to foreclose in the specific context of allegedly void assignments, and found in favor of the plaintiff. In *Glaski v. Bank of America*, *supra*, 218 Cal.App.4th 1079, the court held that a wrongful foreclosure plaintiff had standing to challenge an assignment of his debt that was allegedly "void" as opposed to merely voidable. (*Id.* at p. 1097.) *Glaski* recognized the allegation that an assignment was void as a subset of the claim that the party attempting to foreclose must have the power to do so; that power flows from being the true owner of the debt.

Thus, the *Glaski* court correctly characterized plaintiff's claim as based on "the theory that a foreclosure was wrongful *because it was initiated by a nonholder of the deed of trust*" (italics added), which the court acknowledged has also been phrased as (1) the foreclosing party lacking standing to foreclose, or (2) a break in the chain of title. (*Glaski*, *supra*, 218 Cal.App.4th at p. 1093.) In such a case, the court found that the plaintiff's status as non-party to the contract was not determinative; rather, the plaintiff's ability to challenge the foreclosure turned on the nature of the assignment:

> 'Where an assignment is merely voidable at the election of the assignor, third parties, and particularly the obligor, cannot...successfully challenge the validity or effectiveness of the transfer [citing 7 Cal.Jur.3d (2012) Assignments, § 43, p. 70].' This statement implies that a borrower can challenge an assignment of his or her note and deed of trust if the defect asserted would *void* the assignment.

(*Id.* at pp. 1094-1095, original italics.) In other words, *Glaski* concluded that a homeowner does have standing to challenge an assignment that is allegedly void, as opposed to merely voidable, because it would invalidate the transfer regardless of whether or not the parties to the assignment elected to challenge it.[5]

In a factually analogous case, the First Circuit further explained the reasoning for finding that a wrongful foreclosure plaintiff has standing to challenge an allegedly void assignment:

> The underlying reasoning behind this distinction is straightforward. A homeowner in Massachusetts—even when not a party to or third party beneficiary of a mortgage assignment—has standing to challenge the assignment as void because success on the merits would prove the purported assignee is not, in fact, the mortgagee and therefore lacks any right to foreclose on the mortgage. [Citations] ...
>
> That same homeowner, though, lacks standing to claim the assignment is voidable because the assignee still would have received legal title vis-à-vis the homeowner. Thus, even successfully proving that the assignment was voidable would not

[5] Some cases have held that a wrongful foreclosure plaintiff must allege not only the reason why the foreclosing party lacks authority, but also that there is no other possible theory under which the party had the right to foreclose. These cases appear to impose a heightened pleading requirement on plaintiffs, contrary to the general rule requiring only notice pleading. (*Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 272; *Herrera v. Federal Nat. Mortgage Assn.* (2012) 205 Cal.App.4th 1495, 1505.)

> affect the rights as between those two parties or provide the homeowner with a defense to the foreclosure action.

(*Wilson v. HSBC Mortgage Services, Inc.* (1st Cir. 2014) 744 F.3d 1, 9.) As the *Wilson* court discussed, if the assignment is merely voidable, the aggrieved parties to the assignment can undo the transaction at their option. An additional step—beyond the homeowner's control—is needed to invalidate the assignment and subsequent foreclosure. In contrast, a finding that an assignment is void results in the foreclosing entity lacking the power to foreclose. A homeowner is permitted to challenge the foreclosure on that basis, just as she can challenge any foreclosure on the ground that the foreclosing entity does not own the debt. (See also *Reinagel v. Deutsche Bank* (5th Cir. 2013) 735 F.3d 220, 225 [following the majority rule in Texas that the debtor may defend against an assignee's collection "on any ground which renders the assignment void"].)[6]

Because the voidness of an assignment negates ownership of the debt, a wrongful foreclosure plaintiff is not required to demonstrate privity of contract with the assignor and assignee. Defendants in this case take the position that a homeowner lacks standing to bring a wrongful foreclosure suit on the basis of an allegedly void debt assignment because the homeowner is not a party or privy to the contract assigning her debt from

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[6] Federal cases addressing this issue have gone in both directions. In addition to *Wilson* and *Reinagel*, federal cases finding that a homeowner has standing in this context include: *Culhane v. Aurora Loan Services of Nebraska* (1st Cir. 2013) 708 F.3d 282; *Cosajay v. Mortgage Electronic Registration Systems* (D.R.I. 2013) 980 F.Supp.2d 238; *Koufos v. U.S. Bank* (D. Mass 2013) 939 F.Supp.2d 40; *Ball v. Bank of New York* (W.D. Mo. 2013) 2012 WL 6645695; and *Bailey v. Wells Fargo Bank* (D. Mass Bankr. 2012) 468 B.R. 464. Federal cases finding that a homeowner lacks standing include: *Rajamin v. Deutsche Bank* (2nd Cir. 2014) 757 F.3d 79, 86; and *Livonia Properties v. 12840-12976 Farmington Road* (6th Cir. 2010) 2010 WL 4275305.

one lending institution to another, and so cannot enforce that contract. (See Respondents' Answer Brief on the Merits (RB), p. 23, citing *Martinez v. Socoma Cos.* (1974) 11 Cal.3d 394, 400 [interpreting California law to exclude "*enforcement of a contract* by persons who are only incidentally or remotely benefitted by it," italics added].) A wrongful foreclosure plaintiff, however, is not attempting to enforce the obligations of the debt assignment contract. A tort claim for wrongful foreclosure is not a breach-of-contract action, and therefore privity has no place in the analysis. Rather, the voidness of a contract (i.e., the assignment) is the predicate fact on which the plaintiff asserts that the foreclosing party lacked the power to foreclose.

The two California Supreme Court cases on which Defendants rely in support of their theory that a homeowner may not challenge an invalid debt assignment are inapposite. Defendants cite to *Caulfield v. Sanders* (1861) 17 Cal. 569, for the proposition that a "debtor could not challenge an assignee's demand for payment by alleging that the assignment was unauthorized and lacked consideration, and was thus void." (RB, p. 24.) Not only is the *Caulfield* decision not a wrongful foreclosure case (it concerned a debt for printing and advertising services), but it does not involve a claim that the collecting party did not own the debt when it attempted to collect on it. Rather, the debtor asserted that the debt was assigned after collection commenced, and then only for nominal consideration without the consent of all partners of the firm selling the debt. (*Caulfield, supra,* 17 Cal. 569 at p. 572.) The Court concluded that these facts alone would not excuse the debtor from liability, but the Court did not suggest that the result would have been the same in the case of a void assignment (in fact, the word "void" does not appear in the decision) or that a non-creditor could demand payment at any given time. (See *ibid.*) The other cited case, *Seidell v. Tuxedo Land Company* (1932) 216 Cal 165, simply holds that an assignment is presumed authorized when made by the

prior owner or prior owner's agent, and when the debtor offers no evidence to the contrary. (*Id.* at p. 165.)

In sum, a wrongful foreclosure plaintiff may assert that an assignment of her mortgage or deed of trust is void, even though she is not a party to the assignment contract, because, if true, the result would be that the party attempting to foreclose on her lacks authority to do so.

C. A Homeowner Is Harmed When an Entity Without the Authority To Do So Forecloses on Her Home

A homeowner may challenge a void assignment because he or she is harmed anytime an entity without the lawful authority to foreclose does so. In order to state a claim for wrongful foreclosure, California courts have traditionally required that a plaintiff demonstrate "prejudice," or a causal link between the wrongful misconduct and resulting harm. (*Knapp. v. Doherty* (2004) 123 Cal.App.4th 76, 86; 4 Miller & Starr, Cal. Real Estate (3d ed. 2000) § 10:254, p. 989-990.) When a non-debt holder forecloses, a homeowner is harmed because she has lost her home to an entity with no legal right to take it. If not for the void assignment, the incorrect party would not have pursued a wrongful foreclosure. Therefore the void assignment is the "but for" cause of the homeowner's injury and all she is required to allege.

The First Circuit's decision in *Culhane v. Aurora Loan Services of Nebraska* (1st Cir. 2013) 708 F.3d 282 is on point. There, the court held that the plaintiff had properly alleged a causal link between the assignment in question and her injuries, even though she was behind in her payments:

> [T]here is a direct causal connection between the challenged action and the identified harm. The action challenged here relates to [entity's] right to foreclose by virtue of the assignment from MERS. The identified harm—the foreclosure—can be traced directly to [entity's] exercise of the authority purportedly delegated by the assignment.

(*Id.* at pp. 289-290; see also *Lueras v. BAC Home Loans Servicing, LP* (2013) 221 Cal.App.4th 49, 82-83 [finding causal connection between bank's deceptive practices and homeowner's foreclosure even though homeowner could not otherwise demonstrate ability to pay debt].) The critical issue is not the plaintiff's ability to pay; rather, the issue is whether the defendant's conduct resulted in the plaintiff's harm, i.e., a foreclosure that was wrongful because it was initiated by the wrong party.

Moreover, the identity of the party having authority to foreclose on a homeowner matters. For example, if an invalid assignment had not occurred, the original lender may have exercised more leniency with missed payments or worked out a loan modification plan with the homeowner. And as described above, foreclosures have moved at an unprecedented pace in recent years. It is possible that another lender would have engaged in a slower process that would have given the homeowner more time to improve his financial situation or seek other alternatives to avoid foreclosure. (See *Rufini v. CitiMortgage, Inc.* (2014) 227 Cal.App.4th 299, 311 [finding actual injury under Bus. & Prof. Code, § 17204 because plaintiff lost "the opportunity to pursue other means of avoiding foreclosure" due to defendants' allegedly deceptive practices].) Although a plaintiff need not allege such facts (which would, in many cases, be difficult if not impossible for the plaintiff to do without knowing the inner-workings of various banking institutions), these examples demonstrate that being foreclosed on by the wrong party can result in tangible harm.

Cases reaching the contrary result overlook this harm by incorrectly focusing on the plaintiff's ability to have avoided *any* foreclosure. For example, in *Fontenot*, *supra*, 198 Cal.App.4th at p. 272, the court found that the plaintiff had failed to demonstrate prejudice resulting from an allegedly improper transfer of her debt because the plaintiff: (1) conceded she was in default; (2) did not allege that the transfer interfered with her

ability to pay her debt; and (3) did not allege that the original lender would have refrained from foreclosure. (*Fontenot*, *supra*, 198 Cal.App.4th at p. 272.) Similarly, in *Herrera*, the court found that the plaintiffs could not demonstrate prejudice where they had agreed to assignments of their debt, had defaulted on their loan, and did not tender payment or cure the default. (*Herrera*, *supra*, 205 Cal.App.4th at p. 1508.) In essence, *Fontenot* and *Herrera* interpret "prejudice" narrowly to mean that the plaintiff must demonstrate that she could have avoided *any* foreclosure. These cases ignore the fact that whether a plaintiff had the financial means to avoid the instant wrongful foreclosure has nothing to do whether she could have avoided foreclosure in another context; and because the wrongful foreclosure occurred, the plaintiff can never know.

The cases that *Fontenot* and *Herrera* cite to in support of this narrow interpretation of prejudice are cited out of context. For instance, *Fontenot* cites to *Melendrez v. D & I Investment, Inc.* (2005) 127 Cal.App.4th 1238, in which the court simply found that plaintiffs could not demonstrate wrongful foreclosure from a low bid price alone, but also had to "prove a prejudicial irregularity." (*Id.* at p. 1258.) Another cited case, *Knapp. v. Doherty*, *supra*, 123 Cal.App.4th at p. 86, held that plaintiffs were not "prejudiced" by a notice of default that was sent earlier than statutorily required, and that therefore there was no "material" triable issue of fact. Finally, *Lo v. Jensen* (2001) 88 Cal.App.4th 1093, 1097-1098, merely stands for the proposition that a foreclosure sale could be set aside in the case of fraudulent collusion among bidders; the word "prejudice" does not appear in the decision.[7] None of these cases suggest that a homeowner

[7] The cases cited in Defendants' brief (RB, p. 33) are similarly inapposite—in fact, even further off point—and shed no light on the matter of prejudice. In *Bank of America Assn. v. Reidy* (1940) 15 Cal.2d 243, 248, (continued...)

should be required to show that she could have avoided foreclosure under any circumstances.

D. Permitting Wrongful Foreclosure Actions to Challenge Invalid Assignments is Sound Policy

Allowing homeowners to sue for wrongful foreclosure based on allegations that the foreclosing entity lacks an ownership interest in the mortgage or deed of trust is sound public policy. As noted above, public enforcement tools, while a critical part of protecting homeowners, are not sufficient to address the far-reaching abuses that occurred in the wake of the housing bubble burst. In addition, because there is no court oversight in a non-judicial foreclosure, it is important for there to be a way to challenge irregularities in that process. Empowering homeowners—who have the most at stake and the most to lose—with the ability to challenge improper loan assignments and other defects is the most direct way to accomplish that goal. Moreover, permitting such a cause of action would incentivize lending institutions to employ due diligence with respect to ensuring proper assignments and confirming who currently holds a loan.

A contrary rule, i.e., one that that would prohibit homeowners from bringing suit against entities that foreclose without the lawful authority to do so, would lead to incongruous results. Under Defendants' conception of the proper rule, a defaulting homeowner would have no ability to challenge

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(...continued)
the Court declined to set aside a sale at the behest of a junior lien holder based on alleged fraud in the bidding process when the seller had acted legally; there is no discussion of "standing" or "prejudice" anywhere in the decision. *Crist v. House & Osmonson, Inc.* (1936) 7 Cal.2d 556, 559-560, involved a quiet title action, which held that a seller could not set aside a sale to bona fide purchaser based on a slightly inaccurate property description that prejudiced no one but the buyer. These cases have no relevance to the elements of a wrongful foreclosure action brought by a homeowner.

a foreclosure by one bank simply because *another bank* has the right to take her home. Thus, under this view, if a third party claimed a right of occupancy or access premised on a lease or easement that a homeowner granted to someone else, the homeowner could not bring a trespass or eviction action against the third party because the homeowner had granted lease or easement rights to *someone*. This would be an absurd result.

At the same time, if more than one party claimed the power to foreclose at any given time, the practical effect would be to put the homeowner in jeopardy of being foreclosed upon by multiple parties.[8] As one Court of Appeal put it in an analogous context, "there simply cannot be at any given time more than one person with the power to conduct a sale under a deed of trust." (*Dimock v. Emerald Properties LLC, supra*, 81 Cal.App.4th at p. 875 [interpreting § 2934a].) A contrary result "would create inestimable levels of confusion, chaos and litigation." (*Ibid.*) For this important reason, and the others described above, only the true debt owner or its agents has the power to foreclose.

Any potential concerns about permitting homeowners to preemptively challenge a would-be foreclosing party's authority prior to the initiation of foreclosure proceedings are not present in the instant case and others like it, which take place after a foreclosure has occurred. (See, e.g., *Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149, 1154-57 [holding that borrower could not bring a pre-foreclosure action to

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[8] The risk of foreclosure by a party that does not presently own a debt is compounded by the long term of many home loans, and by the lengthy statute of limitations for foreclosure on a deed of trust, which may extend for up to 60 years. (See § 882.020(a).) This is not to suggest that the right to foreclose may not rightfully pass from one entity to another, but that the sale and re-sale of loans over a lengthy period of time increase the risk of error and confusion, and underscore the importance of providing homeowners with a right to challenge unlawful foreclosures.

determine whether the owner of a note had authorized its nominee to initiate foreclosure proceedings because, *inter alia*, homeowner did not have right to demand proof of authority to undertake a foreclosure]; *Jenkins v. JP Morgan Chase Bank* (2013) 216 Cal.App.4th 497, 511 [homeowner did not have standing to challenge a foreclosing party's lack of authority in a declaratory relief action, expressing concern with creating a "preemptive" cause of action that would allow homeowners to demand proof of authority prior to the initiation of foreclosure];[9] see also *Kan v. Guild Mortgage Co.* (2014) 230 Cal.App.4th 736 [acknowledging the distinction between pre-foreclosure and post-foreclosure cases]; but see *Siliga v. Mortgage Electronic Registration Systems, Inc.* (2013) 219 Cal.App.4th 75, 82 [defining action as "preemptive" when notice of sale was recorded but the sale had not yet taken place, and when plaintiff's claims were non-specific].)

Because the wrongful foreclosure claims at issue in this case do not involve preemptive challenges, there is no similar policy concern about thwarting creditors' ability to efficiently foreclose on their security, and therefore the general rule holds: a homeowner can bring a wrongful foreclosure action on the basis that the foreclosing party lacks the power to foreclose because it does not own the debt.

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[9] The *Jenkins* court found, contrary to *Glaksi*, that the plaintiff lacked standing to allege non-compliance with a PSA because the plaintiff was neither a party to, or third-party beneficiary of, the PSA. But since the Jenkins court had already held the plaintiff's claim was prohibited as a preemptive action, the finding regarding standing was dicta. (*Jenkins*, *supra*, 216 Cal.App.4th at pp. 513-14.)

CONCLUSION

The Court should hold that homeowners may bring a wrongful foreclosure action on the basis that the party foreclosing on them lacks the power to foreclose because they do not own the debt, either due to an allegedly void assignment or for any other legally cognizable reason.

Dated: April 17, 2015

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
NICKLAS A. AKERS
Senior Assistant Attorney General
MICHELE VAN GELDEREN
Supervising Deputy Attorney General

SANNA R. SINGER
Deputy Attorney General
Attorneys for Amicus Curiae the Attorney General of California

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CERTIFICATE OF COMPLIANCE

I certify that the attached **AMICUS BRIEF OF THE ATTORNEY GENERAL IN SUPPORT OF PLAINTIFF AND APPELLANT TSVETANA YVANOVA** uses a 13 point Times New Roman font and contains 5,982 words.

Dated: April 17, 2015

KAMALA D. HARRIS
Attorney General of California

SANNA R. SINGER
Deputy Attorney General
Attorneys for Amicus Curiae
the Attorney General of California

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **Tsvetana Yvanova v. New Century Mortgage Corporation et al**
Case No.: **S218973**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On April 17, 2015, I served the attached **AMICUS BRIEF OF THE ATTORNEY GENERAL IN SUPPORT OF PLAINTIFF AND APPELLANT TSVETANA YVANOVA** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

Richard L. Antognini
LAW OFFICES OF RICHARD L ANTOGNINI
819 I Street
Lincoln, CA 95648
Attorneys for Plaintiff and Appellant

Eric D. Houser
Robert W. Norman, Jr.
HOUSER & ALLISON, APC
3780 Kilroy Airport Way, Suite 130
Long Beach, CA 90806
Attorneys for Defendants/Respondents

K. Lee Marshall
Nafiz Cekirge
Andrea N. Winternitz
Sarah Samuelson
BRYAN CAVE LLP
560 Mission Street, Ste. 2500
San Francisco, CA 94105
Attorneys for Defendants/Respondents

California Court of Appeal
Second Appellate District- Division One
Ronald Reagan State Building
300 South Spring Street
2nd Floor, North Tower, Rm. 2217
Los Angeles, CA 90013

Los Angeles County Superior Court
Attn: Hon. Russell S. Kussman
6230 Sylmar Avenue
Van Nuys, CA 91401

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on April 17, 2015, at San Diego, California.

Charlette Sheppard
Declarant

Signature

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