Court of Appeal Case No. F064556
Superior Court Case No. 09CECG03601

IN THE COURT OF APPEAL, STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THOMAS A. GLASKI,
Plaintiff and Appellant

vs.

BANK OF AMERICA, NATIONAL ASSOCIATION AS SUCCESSOR BY MERGER TO "LA SALLE BANK N.A. AS TRUSTEE FOR WAMU MORTGAGE PASS-THROUGH CERTIFICATES SERIES 2005-AR-17" TRUST, CHASE HOME FINANCE LLC, JPMORGAN CHASE BANK, N.A., AND CALIFORNIA RECONVEYANCE COMPANY,
Defendants and Respondents.

Appeal from the Superior Court of the State of California
County of Fresno
Case No. 09CECG03601

The Honorable Alan Simpson, Judge

PETITION FOR REHEARING

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Pursuant to California Appellate Rule 8.268, Defendants-Respondents Bank of America, N.A. as Successor by Merger to "La Salle Bank N.A. as Trustee for WaMu Mortgage Pass-Through Certificates Series 2005-AR-17" Trust; JPMorgan Chase Bank, N.A. as successor by merger to Chase Home Finance, LLC; JPMorgan Chase Bank, N.A.; and California Reconveyance Company (together, "Respondents") respectfully petition this Court for rehearing of its July 31, 2013 opinion in this appeal.[1]

I. INTRODUCTION

In its July 31 opinion, this Court held that Plaintiff-Appellant Thomas A. Glaski has standing under California law to sue Respondents for wrongful foreclosure because the alleged failure to assign Glaski's mortgage note to the securitization trust before the trust's closing date, if true, would have rendered the assignment void under New York law. The parties had not briefed the issues of standing under California law or voidness under New York trust law, and, as this Court expressly acknowledged, there was no previous California state-court decision holding that a borrower has standing to bring a wrongful foreclosure suit in this context. This Court thus broke significant new legal ground in the absence of any adversarial briefing on questions of widespread importance to mortgagors, mortgagees, and the public in California.

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[1] The petition for reconsideration is timely under California Appellate Rule 8.268(b)(1)(B) because on August 8, 2013, this Court entered a publication order for the opinion.

Respondents respectfully submit that rehearing should be granted because the Court's opinion errs in at least two respects:

First, the Court incorrectly applied New York trust law to the question of whether the allegedly belated assignment of Glaski's mortgage note to the securitization trust would have rendered that assignment void. Assignment of a negotiable instrument such as a mortgage note is governed by Article 3 of the Uniform Commercial Code, and no provision of the UCC deems void an assignment of the note to a trust in violation of the trust's governing agreement. Even if state trust law did apply, however, Delaware law, rather than New York law, applies because the trust was established under and is governed by Delaware law. Unlike the New York statute upon which the Court rested its decision, the governing Delaware trust statute contains no provision voiding a transfer to the trust in alleged violation of its governing agreement. This Court has thus, in effect, issued an advisory opinion on an issue of New York state law—an opinion with which many New York courts of appeals disagree.

Second, the Court erred in holding that California law recognizes an exception to its general bar to third-party standing where the challenged assignment is void rather than voidable.[2] There is no California state-court

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[2] Glaski agrees that this Court's ruling is unprecedented. As counsel for Glaski informed this Court in his request for publication, the standing rule announced by the Court "is a first under California law. Until *Glaski*, no California appellate court had held that a borrower could challenge the power of a securitized trust to foreclose." Antognini Aug. 2, 2013 Ltr. 2.

authority supporting that novel holding, nor do the cases from other jurisdictions upon which the Court relied support application of that rule in this case. Indeed, there is significant California precedent to the contrary. The Court's novel holding is particularly troubling because, by creating a mechanism for challenging standing not provided by the Legislature, it thwarts California's comprehensive statutory scheme for nonjudicial foreclosures, which neither provides for nor contemplates judicial actions to test a foreclosing entity's authority to foreclose. Especially now that the Court's decision will be published, rehearing is warranted to prevent the confusion and uncertainty the opinion will sow among California courts.

ARGUMENT

II. The Court Should Reconsider Its Incorrect Application Of New York Trust Law To The Question Of Whether The Allegedly Belated Assignment Of Glaski's Mortgage Note To The Securitization Trust Rendered That Assignment Void

This Court's opinion announced a new rule of California standing law in holding that "a borrower may challenge the securitized trust's claim to ownership by alleging the attempts to transfer the deed of trust to the securitized trust (which was formed under New York law) occurred after the trust's closing date." Slip op. 3.[3] According to the Court, a third party has standing to sue by alleging that an

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[3] The Court's statement in this regard sweeps too broadly. Section 2.08 of the Pooling and Servicing Agreement (PSA)—which the Court can consider here, *see infra*, at 6-7 and n.5—makes clear that certain post-closing transfers to the

assignment to the foreclosing entity is void. Since Glaski alleged in his operative second amended complaint that the Trust was a common-law trust organized under New York law, the Court looked to New York's Estates, Powers & Trusts law ("EPTL") to determine whether assignment of the mortgage note in alleged contravention of the trust agreement rendered that assignment void. *See* Slip op. 21. That was erroneous for two reasons: First, Article 3 of the Uniform Commercial Code—not state trust law—governs the assignment of a negotiable instrument, and there is no provision in the UCC comparable to the provision in the EPTL that would purport to void a transfer to the trust in violation of the trust agreement. Second, even if state trust law did apply, Delaware law, rather than New York law, applies because the trust was established under and is governed by Delaware law. Although the Court must accept allegations of fact as true on demurrer, it has no obligation to accept a plaintiff's erroneous conclusions of law. *See May v. City of Milpitas*, 217 Cal.App. 4th 1307, 1329; 159 Cal. Rptr. 3d 310, 323 (Ct. App. 2013) ("[F]or the purpose of assessing the petition's sufficiency to withstand a demurrer, we accept as true all well-pleaded factual allegations and we consider judicially noticed facts, and we disregard conclusions of law and allegations contrary to those judicially noticed facts."). There is no provision of the Delaware Statutory Trust Statute that would render an allegedly belated assignment to the trust void. More to the point, regardless of the state law that

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Trust are expressly contemplated and permitted by the agreement, and are consistent with the Trust maintaining its REMIC status. *See* PSA § 2.08.

applies, it is clear from the face of the Pooling and Servicing Agreement ("PSA") that Glaski's mortgage note was transferred to the trust in compliance with the terms of the PSA.

A. The UCC—Not State Trust Law—Governs Assignment Of A Mortgage Note; If State Trust Law Does Apply, It Is The Law Of Delaware, Not New York

A mortgage note is a negotiable instrument governed by Article 3 of the UCC. *See, e.g., In re Tovar*, 2012 WL 3205252, at *5 (9th Cir. B.A.P. Aug. 3, 2012) (applying California UCC); *HSBC Bank USA, Nat'l Ass'n v. Miller*, 889 N.Y.S.2d 430 (App. Div. 2009) (applying New York UCC). Accordingly, courts evaluating claims like Glaski's—*i.e.*, claims by borrowers regarding assignment of their mortgage notes to securitization trusts—apply the UCC and not trust law.[4] Nothing in UCC Article 3 would void a transfer to a trust in violation of the trust agreement. Courts applying the UCC thus consistently deny borrowers like Glaski standing to challenge foreclosure where assignment of their loan to the securitization trust allegedly breached the terms of the trust's pooling and servicing agreement. *See, e.g., In re Walker*, 466 B.R. 271, 285 (Bankr. E.D. Pa. 2012) (applying Pennsylvania UCC: "Because the Note is a negotiable instrument

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[4] *See, e.g., Jones v. Deutsche Bank Nat'l Trust Co.*, 2013 WL 3455716, at *8 n.7 (N.D. Tex. July 9, 2013) (in action challenging transfer of mortgage note to securitization trust, finding that UCC governs "the negotiation, transfer, and endorsement" of the note); *In re Parker*, 2010 WL 3927732, at *3 (Bankr. D. Vt. Sept. 29, 2010) (enforceability of a mortgage note held in a securitization trust is governed by UCC, "specifically Article 3 dealing with negotiable instruments").

and that BNYM is the holder the instrument, the Debtor lacks standing to assert that BNYM cannot enforce the Note due to an alleged failure to comply with the PSA."); *In re Smoak*, 461 B.R. 510, 519 (Bankr. S.D. Ohio 2011) (same, under Ohio UCC). Put simply, there is no basis under the law governing assignment of Glaski's mortgage—UCC Article 3—to conclude that Glaski has standing. *See* Cal. Comm. Code Ann. §§ 3101 *et seq.*

Even were state trust law to apply, the Court still erred by applying New York rather than Delaware law. As an initial matter, Glaski's allegation that the Trust is established and governed by New York common law contradicts a publicly filed document that was invoked as the primary basis of his challenge to Respondents' authority to foreclose, referred to throughout Glaski's complaint, and relied upon by the Court in its opinion. Glaski's complaint incorporated by reference the PSA that established the Trust, and the complaint pleads that these documents had been filed with the Securities and Exchange Commission. *See* SAC ¶¶ 7-8, 27, 30-32. Under settled California law, consideration of the PSA in its entirety was appropriate,[5] and the incontrovertible fact that the Trust was

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[5] On a demurrer, the court properly takes "judicial notice of a fact or proposition within a recorded document that cannot reasonably be controverted, even if it negates an express allegation of the pleading." *Jenkins v. JPMorgan Chase Bank, N.A.*, 216 Cal.App.4th 497, 536; 156 Cal. Rptr. 3d 912, 944 (Ct. App. 2013) (internal quotation marks omitted)); *see also Coker v. JP Morgan Chase Bank, N.A.*, 218 Cal.App.4th 1, 6; 159 Cal. Rptr. 3d 555, 557 n.2 (Ct. App. 2013) ("Because we are reviewing a judgment of dismissal following an order sustaining a demurrer, we assume the facts alleged in the first amended complaint are true if they are not contrary ... to a fact of which we may take judicial notice."). As the

governed by Delaware law was thus properly before the Court: The PSA states explicitly that the Trust is a Delaware Statutory Trust, organized under the Delaware Statutory Trusts Statute, 12 Del. Code Ann. §§ 3801 *et seq.*, and governed by Delaware law. *See, e.g.*, PSA § 10.05 (governing law). New York law therefore has no relevance to Glaski's case.

Nonetheless, the "legal basis" for the Court's decision was the specific statutory language of New York's EPTL. But there is no similar provision of the Delaware Statutory Trusts Statute that would render invalid an allegedly belated assignment of Glaski's mortgage to the Trust. *See* 12 Del. Code Ann. §§ 3801 *et seq.* Indeed, more generally, Delaware courts reject the proposition that borrowers may challenge the allegedly improper assignment of their mortgage in these circumstances. *See, e.g.*, *Branch Banking & Trust Co. v. Eid*, 2013 WL 3353846, at *4 (Del. Super. Ct. June 13, 2013) ("[A] debtor is not a party to a mortgage assignment, is not a third party beneficiary to the assignment and cannot show legal harm as a result of the assignment. As such, the debtor has no legally

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operative second amended complaint alleges, the PSA is filed and recorded with the SEC and is publicly available on the SEC's website. *See* EDGAR Search Results, WaMu Mortgage Pass-Through Certificates, Series 2005-AR17 CIK# 0001347345, *available at* http://www.sec.gov/cgi-bin/browse-edgar?CIK=0001347345&Find=Search&owner=exclude&action=getcompany (last visited Aug. 19, 2013). *Kruss v. Booth*, 185 Cal.App.4th 699, 710; 111 Cal. Rptr. 3d 56, 66 (Ct. App. 2010) ("For the final of these determinations, the trial court relied on SEC filings of which it took judicial notice."); *Ampex Corp. v. Cargle*, 128 Cal.App.4th 1569, 1573; 27 Cal. Rptr. 3d 863, 866-867 (Ct. App. 2005) ("We take judicial notice that Ampex maintains a Web site at www.ampex.com. Among other things, the company posts its Securities and Exchange Commission filings on this Web site.").

cognizable interest in an assignment and therefore is not in a position to complain about it. Thus, it is not plaintiff who lacks standing to sue, but defendants who lack standing to contest the assignment."); *CitiMortgage, Inc. v. Bishop*, 2013 WL 1143670, at *4-5 (Del. Super. Ct. Mar. 4, 2013) (same). Thus, even if the Court were correct in its interpretation of California standing law—*see* Point II, *infra*—there is no legal basis for concluding that any assignment of Glaski's mortgage after the closing date would have rendered the assignment void and provided Glaski standing to sue.[6]

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[6] In fact, even were New York trust law applicable here, the allegedly belated assignment of Glaski's mortgage after the Trust's closing date would not be void under E.P.T.L. § 7-2.4. The EPTL voids only "every sale, conveyance or other act *of the trustee* in contravention of the trust." N.Y. Est. Powers & Trusts Law § 7-2.4 (emphasis added). The act of transferring mortgage notes to a trust is not an "act of the trustee"; it is an act of the transferor. There is thus no statutory basis to deem void the assignment of a mortgage in breach of the terms of a pooling and servicing agreement. *See Deutsche Bank Nat'l Trust Co. v. Stefiej*, 2013 WL 1103903, at *3-4 (N.D. Ill. Mar. 15, 2013) (concluding that transfer of note in breach of pooling and servicing agreement was not void under E.P.T.L. § 7-2.4 because the failure to comply with the terms of the PSA was the fault of the *assignor*, not the trustee, and thus "defendants have not pointed to an act 'of the trustee' in contravention of the PSA's terms").

B. Regardless Of What Law Applies, Glaski's Mortgage Note Was Transferred To The Trust In Compliance With The PSA

Any dispute over the applicable state law ultimately is academic because Glaski's entire theory—that his mortgage note was belatedly assigned to the Trust—is wrong. The basis for Glaski's claim that his mortgage was not assigned to the Trust before its closing date (December 21, 2005) is the fact that Chase (as successor to WaMu) did not *record* its assignment of Glaski's mortgage to Bank of America (as successor to La Salle Bank) until June 15, 2009. But assignment and recording are two different things, and it is clear from the face of the PSA—which Glaski specifically pleads and incorporates into the SAC—that his mortgage actually was *assigned* by WaMu to the Trust before the closing date. Section 2.04 of the PSA states that WaMu "does hereby irrevocably sell, transfer, assign, set over and otherwise convey to the Trust, without recourse, all the Company's right, title and interest in and to the Mortgage Pool Assets." It further states that "[i]t is the express intent of the parties that the conveyance of the Mortgage Pool Assets to the Trust by the Company as provided in this Section 2.04 be, and be construed as, an absolute sale of the Mortgage Pool Assets." Glaski's entire complaint starts from the premise that his mortgage was among the assets assigned to the Trust; he takes issue only with what WaMu did (or did not) do as of a certain date. But his contentions in that regard rely on a partial and incorrect reading of the PSA, which makes entirely clear that his mortgage (like all

the mortgages included in the Trust corpus) was assigned to the Trust as of the date the PSA was executed.

Rehearing is thus appropriate to correct a foundational error in the Court's opinion—*i.e.*, the law governing whether the allegedly belated assignment is void—because correction of that error would yield a different result. *See Alameda County Mgmt. Emps. Ass'n v. Superior Ct.*, 195 Cal.App.4th 325, 329; 125 Cal. Rptr. 3d 556, 565 n.10 (Ct. App. 2011) (rehearing proper "'for the purpose of correcting any error which the court may have made in its opinion' where correction would likely produce either a different result or different reasoning" (alterations omitted) (quoting *San Francisco v. Pacific Bank*, 89 Cal. 23, 25 (1891)).

What is more, rehearing is proper to avoid an unnecessary conflict with the New York appellate courts on an issue of New York law. *See Simmons v. Superior Ct. in & for L.A. County*, 214 P.2d 844, 852 (Cal. Dist. Ct. App. 1950) ("unseemly controversy between courts of different states should be frowned upon and avoided if possible"). New York law is irrelevant to this case—the Trust is not governed by New York law—but even more compelling, the Court's decision on an issue of New York law conflicts with a long line of New York cases that have interpreted E.P.T.L. § 7-2.4 to mean that acts in violation of the trust instrument are in fact voidable, rather than void, as this Court held here. *See* Slip op. 21; *Bank of Am., Nat'l Assocs. v. Bassman FBT, L.L.C.*, 981 N.E.2d 1, 8-9 (Ill. App. Ct. 2012) (collecting and discussing New York appellate cases applying

E.P.T.L. § 7-2.4 and following cases that treat *ultra vires* acts as voidable rather than void).

Finally, rehearing is particularly warranted here because the parties had no occasion to brief and argue the applicability of the UCC or Delaware (or even New York) trust law.[7] As briefed to the Court, the question of Glaski's standing turned on whether the trial court properly held that, under *Gomes v. Countrywide Home Loans, Inc.*, 192 Cal.App.4th 1149; 121 Cal. Rptr. 3d 819 (Ct. App. 2011), "there is no legal basis to challenge the authority of the trustee, mortgagee, beneficiary or any of their authorized agents to initiate the foreclosure process." Appellant's Br. 14. The parties thus focused their appellate briefs on the proper reading of *Gomes* (*see* Appellant's Br. 26-29; Resps' Br. 10-14), and did not touch on the UCC or trust-law issues that underpin this Court's decision.

III. The Court Should Reconsider Its Holding That An Obligor Has Standing Under California Law To Challenge An Alleged Breach Of An Assignment Agreement

Rehearing is also proper to correct another "mistake of law" made in the to-be-published opinion that "might otherwise [lead] to confusion in later cases." *Alameda County Mgmt. Emps. Ass'n*, 195 Cal.App. 4th 325, 339; 125 Cal. Rptr.

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[7] *Cf.* Cal. Govt. Code § 68081 ("Before the Supreme Court, a court of appeal, or the appellate division of a superior court renders a decision in a proceeding other than a summary denial of a petition for an extraordinary writ, based upon an issue which was not proposed or briefed by any party to the proceeding, the court shall afford the parties an opportunity to present their views on the matter through supplemental briefing. If the court fails to afford that opportunity, a rehearing shall be ordered upon timely petition of any party.").

3d at 565 n.10. As Glaski himself recognizes, this Court's decision is the "first under California law" to hold that a borrower has standing to challenge assignment of his mortgage into a securitization trust in alleged violation of the trust's PSA. Antognini Aug. 2, 2013 Ltr. 2. In persuading this Court to publish its order, Glaski emphasized that the opinion was "of great importance to litigants, lawyer[s] and trial courts in foreclosure actions." *Id.* at 3. These same considerations counsel strongly in favor of rehearing.

A. The Court's Holding Conflicts With Well-Established California Common Law Rules

The Court's decision is flatly contrary to foundational principles of California common law. California courts hold to the well-established rule that "someone who is not a party to a contract has no standing to enforce the contract" except "where the contract is made expressly for that person's benefit." 14A Cal Jur. 3d *Contracts* § 310; *see Rodriguez v. Oto*, 212 Cal.App.4th 1020, 1028; 151 Cal. Rptr. 3d 667, 673 (Ct. App. 2013) ("The governing substantive principle is that a nonparty who claims benefits under the contract is entitled to do so as long as the claimed benefit does not flow to him as a mere incident of the agreement, but is one the contracting parties intended to confer."); *Mercury Cas. Co. v. Maloney*, 113 Cal.App.4th 799, 802; 6 Cal. Rptr.3d 647, 649 (Ct. App. 2003) ("A person who is not a party to a contract may nonetheless have certain rights thereunder, and may sue to enforce those rights, where the contract is made expressly for his benefit."). Glaski unquestionably cannot plead facts to make this

showing with respect to the PSA. *See, e.g., H.N. & Frances C. Berger Found. v. Perez*, 218 Cal.App.4th 37, 43; 159 Cal. Rptr. 3d 434, 439 (Ct. App. 2013) ("The intended beneficiary 'bears the burden of proving that the promise he seeks to enforce was actually made to him personally or to a class of which he is a member.'").

The Court did not discuss this well-established rule of California common law. Instead, the Court based its holding—that a borrower has standing to challenge assignment of his mortgage to a securitization trust in breach of the trust's PSA, allegedly rendering assignment of his obligation void—on a negative inference in a secondary source, a California Jurisprudence citation stating only that a borrower could *not* challenge a voidable assignment. *See* Slip op. 18 (citing 7 Cal. Jur. 3d *Assignments* § 43). Whatever California Jurisprudence says about standing to challenge a *voidable* assignment, it does not suggest that a borrower could challenge a *void* assignment, nor do any of the cases it cites.[8] Moreover,

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[8] In fact, one of the cited cases, *Ingle Manufacturing Co. v. Scales*, 36 Cal. App. 410 (Ct. App. 1918), directly supports Respondents' position. In *Ingle Manufacturing*, the defendant executed a contract to pay a commission to another individual who, in turn, assigned his interest in the commission to defendant Ingle Manufacturing. The plaintiff maintained that the assignment was invalid because the corporation's bylaws did not authorize it to receive the property in question. Quoting from an earlier case, the court held that the defendant had no ground to challenge the assignment, even if it was in violation of the bylaws and therefore *ultra vires*:

> The plea of *ultra vires*, as applied to plaintiff's right to receive an assignment ... is not available to the defendant, who owes the debt .... [W]hether the purchase of the mortgage in question was 'such as the purposes of the corporation required' was to be determined by its

California Jurisprudence cannot serve as authority to overturn a long line of California cases holding to the contrary: California courts (both state and federal) have repeatedly invoked the principle that only intended third-party beneficiaries can sue to challenge the contract parties' breach, and therefore have repeatedly held that borrowers like Glaski may not pursue wrongful foreclosure claims premised on a breach of a pooling and servicing agreement because borrowers are not parties to these agreements and the agreements are not made expressly for the borrowers' benefit. *See, e.g., Jenkins*, 216 Cal.App.4th 497, 515; 156 Cal. Rptr. 3d at 927 ("As an unrelated third party to the alleged securitization ... Jenkins lacks standing to enforce any agreements, including the investment trust's pooling and servicing agreement, relating to such transactions.").[9] These courts have done so notwithstanding the fact that a borrower alleges that the defect in the assignment

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> Board of Directors and is not open to investigation at the instance of the defendant.

Id. at 412 (quoting *Savings Bank of San Diego v. Barrett*, 126 Cal. 413, 417 (1899)).

[9] *Sami v. Wells Fargo Bank*, 2012 U.S. Dist. LEXIS 38466, at *15 (N.D. Cal. Mar, 21, 2012) ("[T]he court finds that she lacks standing to do so because she is neither a party to, nor a third party beneficiary of, [the PSA]."); *Hale v. World Sav. Bank*, 2012 WL 4675561, at *6 (E.D. Cal. Oct. 1, 2012) (same); *Armstrong v. Chevy Chase Bank, FSB*, 2012 WL 4747165, at *2-3 (N.D. Cal. Oct. 3, 2012) (same); *McLaughlin v. Wells Fargo Bank, N.A.*, 2012 WL 5994924, at *4 (C.D. Cal. Nov. 30, 2012) (same); *Deerinck v. Heritage Plaza Mortg. Inc.*, 2012 WL 1085520, at *5 & n.10 (E.D. Cal. Mar. 30, 2012) (same).

renders it "void,"[10] and they have done so where the alleged voidness springs from the fact that the mortgage was transferred to the trust after the closing date of the trust.[11]

Although the Court acknowledged "that some *federal* district courts" had "rejected the post-closing date theory of invalidity," it declined to follow them on the grounds that these cases "do not address the principle that a borrower may challenge an assignment that is void and they do not apply New York trust law." Slip op. 22-23 (emphasis added). The Court thus ignored the California *state* cases that had rejected this same theory of invalidity. *See, e .g., Jenkins*, 216 Cal.App.4th 497, 509-510; 515; 156 Cal. Rptr. 3d at 923-924, 927. And even for the federal district courts (of which there are more than "some"), numerous cases involved allegations that the trust was governed by New York law, *see, e.g., McLaughlin*, 2012 U.S. Dist. LEXIS 170826, at *4-5, and others involved allegations that the defective assignment was purportedly "void," *see, e.g.,*

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[10] *See, e.g., Almutarreb v. Bank of N.Y. Trust Co.*, 2012 WL 4371410, at *2 n.1 (N.D. Cal. Sept. 24, 2012); *Ramirez v. Kings Mortg. Servs., Inc.*, 2012 WL 5464359, at *2 (E.D. Cal. Nov. 8, 2012).

[11] *See, e.g., Jenkins*, 216 Cal.App.4th 497, 510-511; 156 Cal. Rptr. 3d at 923-924; *Sabherwal v. Bank of N.Y. Mellon*, 2013 WL 101407, at *7 (S.D. Cal. Jan. 7, 2013); *Dinh v. Citibank, N.A.*, 2013 WL 80150, at *3 (C.D. Cal. Jan. 8, 2013); *Gilbert v. Chase Home Fin.*, 2013 WL 2318890, at *3 (E.D. Cal. May 28, 2013); *Newman v. Bank of N.Y. Mellon*, 2013 WL 1499490, at *3 (E.D. Cal. Apr. 11, 2013). Still other cases have held that borrowers lack standing to raise myriad challenges based on purported breaches of pooling and servicing agreements. *See, e.g., Tilley v. Ampro Mortg.*, 2012 U.S. Dist. LEXIS 1935, at *11 (E.D. Cal. Jan. 6, 2012); *Hale*, 2012 WL 4675561, at *6; *Elliott v. Mortgage Elec. Registration Sys.*, 2013 U.S. Dist. LEXIS 61820, at *3 (N.D. Cal. Apr. 30, 2013).

Almutarreb, 2012 WL 4371410, at *2 n.1; *Ramirez*, 2012 WL 5464359, at *2. Without citing or discussing these cases—and without any briefing on their relevance or persuasiveness—this Court "reject[ed] the view that a borrower's challenge must fail once it is determined that the borrower was not a ... third party beneficiary of[] the assignment contract." Slip op. 18-19.

The prior rule (and the super-majority rule)—that a borrower cannot base a challenge on an assignment contract if the borrower is not a third-party beneficiary of the assignment contract—was correct. There is no basis for a mortgage exception, or a mortgage-assignment exception, to the well-established foundational rule that non-parties to a contract cannot invoke the contract's provisions unless they are intended, third-party beneficiaries of the contract.

The Court relied on four cases to depart from this rule, but none supports its holding. In *Gilbert v. Chase Home Finance LLC*, No. 1:13-cv-265, 2013 WL 2318890, at *3 (E.D. Cal. May 28, 2013), the court applied California contract law to hold—consistent with the litany of cases recited above—that the borrower had no standing to complain that the transfer of his loan occurred after the mortgage securitization trust's closing date in violation of the PSA. In *Reinagel v. Deutsche Bank National Trust Co.*, --- F.3d ---, 2013 WL 3480207 (5th Cir. July 11, 2013), the Fifth Circuit recited the general rule that an "obligor *may* defend 'on any ground which renders the assignment void,'" *id.* at *3, but observed that "courts invariably deny mortgagors third-party status to enforce PSAs," *id.* at *5 n.29. The Court further held that the mortgagors "had no right to enforce [the PSA's]

terms," and that, even if they did, "the fact that the assignments violated the PSA—a separate contract—would not render the assignments void." *Id.* at *5. Similarly, *Culhane v. Aurora Loan Services of Nebraska*, 708 F.3d 282, 290-291 (1st Cir. 2013), acknowledged the general rule that a "nonparty who does not benefit from a contract generally lacks standing to assert rights under that contract," but determined that an exception was warranted in view of unique features of Massachusetts mortgage law, which are inapplicable to California mortgagors like Glaski. And *Conlin v. Mortgage Electronic Registration System*, 714 F.3d 355, 362 (6th Cir. 2013), while recognizing that borrowers have standing to sue for void but not voidable assignments, meaningfully limited that holding, requiring the borrower to show not only voidness, but also prejudice: "Even were the assignment ...invalid, ... [p]laintiff has not shown that he was prejudiced. He has not shown that he will be subject to liability from anyone other than [the foreclosing party]; he has not shown that he would have been in any better position to keep the property ...; and he has not shown that he has been prejudiced in any other way."

Indeed, *Conlin* underscores another aspect of this Court's dramatic departure from settled principles of California law. Under California law, "a plaintiff in a suit for wrongful foreclosure has generally been required to demonstrate [that] the alleged imperfection in the foreclosure process was prejudicial to the plaintiff's interests." *Fontenot v. Wells Fargo Bank, N.A.*, 198 Cal.App.4th 256, 272; 129 Cal. Rptr. 3d 467, 480 (Ct. App. 2011); *see also Depner*

v. Joseph Zukin Blouses, 13 Cal.App.2d 124, 127-128 (Ct. App. 1936) ("Inasmuch as the wronged party in the instant case has not by a judicial adjudication or otherwise declared the agreement of March 22, 1932, void, we are of the opinion that the said agreement remains in full legal force and effect."). This Court has previously applied this principle to bar challenges premised on purportedly invalid assignments:

> [E]ven if any subsequent transfers of the promissory note were invalid, Jenkins is not the victim of such invalid transfers because her obligations under the note remained unchanged. Instead, the true victim may be an entity or individual who believes it has a present beneficial interest in the promissory note and may suffer the unauthorized loss of their interest in the note. It is also possible to imagine one or many invalid transfers of the promissory note may cause a string of civil lawsuits between transferors and transferees.

Jenkins, 216 Cal.App.4th 497, 515; 156 Cal. Rptr. 3d at 927. This Court's opinion dispenses with the prejudice requirement, requiring a borrower to allege only that the challenged defect renders assignment of his mortgage void. *Conlin* demonstrates that such a rule, in the absence of any showing of prejudice, is boundless and unwarranted. Many California courts agree, holding that a borrower may not challenge an assignment on the grounds that the assignment breached the terms of the PSA because, even if true, the breach does not

automatically prejudice the borrower by exposing the borrower to more than one judgment against him.[12]

B. The Court's Holding Undermines California's Comprehensive Statutory Framework For Nonjudicial Foreclosures

This Court's unwarranted departure from black-letter principles of California law is all the more inappropriate in this nonjudicial foreclosure action. California Civil Code section 2924 establishes a "comprehensive statutory framework established to govern nonjudicial foreclosure sales [which] is intended to be exhaustive." *Moeller v. Lien*, 25 Cal.App.4th 822, 834; 30 Cal. Rptr. 2d 777, 785 (Ct. App. 1994). Section 2924 does not require a foreclosing party to "produce the promissory note or otherwise prove it holds the note" to nonjudicially foreclose. *Jenkins*, 216 Cal.App.4th 497, 512; 156 Cal.Rptr.3d at 925 (citation omitted). Nor does it require a foreclosing party to establish a chain of ownership in order to nonjudicially foreclose. *Dennis v. Wachovia Bank, FSB*, No. 10-01596, 2011 WL 181373, *7-8 (N.D. Cal. Jan. 19, 2011). That is because requiring a foreclosing party to establish its interest in the note "would

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[12] *See, e.g., Jenkins*, 216 Cal.App.4th 497, 515; 156 Cal. Rptr. 3d at 927; *Dinh*, 2013 WL 80150, at *4 ("[E]ven if Plaintiff was right that his loan was not timely transferred to the trust ...[i]t does not necessarily affect the trustee's authority set forth in the deed and assignment documents to initiate the foreclosure."); *Newman*, 2013 WL 1499430, at *3 n.2 ("The Court finds it noteworthy that, despite Newman's contention that Defendants cannot foreclose, no other party has ever come forward to enforce Plaintiff's obligations under the deed of trust" (internal quotation marks omitted)); *Frazier*, 2011 WL 6303391, at *5 ("Even if Plaintiff were right that their loan was not timely transferred to the trust ...[t]hat would simply mean that the loan was not put into the trust.").

fundamentally undermine the nonjudicial nature of the process[.]" *Gomes*, 192 Cal.App. 4th 1149, 1155; 121 Cal. Rptr. 3d at 824. This Court's ruling threatens to do just that. The decision would allow a borrower—based on nothing more than a partial reading of the PSA, a specious allegation that his note was transferred after the trust closing date, and an improper reading of (inapplicable) state law—to preclude a mortgagee, its trustee, or even the mortgage servicer from foreclosing on a mortgage that is indisputably in default (and which the mortgagor does not even claim he can satisfy). That is plainly inconsistent with the California statutory provisions governing the nonjudicial foreclosure process, none of which "suggest[] that such a judicial proceeding is permitted or contemplated." *Id.*

This Court's decision should be corrected before it results in expenditure of this State's judicial resources in addressing the inevitable confusion that will result on a question of significant importance to the courts and to the public. That confusion is unnecessary because it springs from the Court's mistaken premise that New York law governs whether the assignment in question is void. Even if this Court were correct that Glaski has standing to press a claim that assignment of his mortgage note is void, under governing law it is not void, and this appeal can be resolved on that ground alone. Rehearing should be granted to correct the

Court's foundational errors and the mistaken legal conclusions that follow from those errors.[13]

CONCLUSION

For the foregoing reasons, Respondents' petition for rehearing should be granted.

Dated: August 20, 2013

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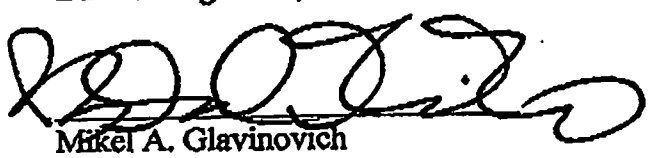
[13] At the very least, this Court should de-publish the opinion—which was initially filed as unpublished. As discussed above, publication is particularly unwarranted here, where the Court's critical rulings as to standing under California law and voidness under New York trust law were not briefed by the parties. *See supra*, at 11-12 & n.7.

CERTIFICATE OF BRIEF LENGTH

[California Rules of Court, rule 8.204(c)(1)]

Pursuant to California Rules of Court, rule 8.204(c)(1), I certify that the foregoing brief contains 6,031 words, as shown by the word count function of the computer program used to prepare the brief.

Dated: August 22, 2013



Mikel A. Glavinovich

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JULIA EVANS

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