Supreme Court Case No: S218973

IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

TSVETANA YVANOVA,

Plaintiff and Petitioner,

vs.

NEW CENTURY MORTGAGE CORPORATION, et al.,

Defendants and Respondents,

Petition for Review of a Published Decision

of the Court of Appeal, Second Appellate District, Division One

Case No: B247188

APPLICATION FOR LEAVE TO FILE AMICUS BRIEF AND AMICUS BRIEF IN SUPPORT OF RESPONDENTS

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APPLICATION OF AMERICAN LEGAL & FINANCIAL NETWORK AND UNITED TRUSTEES ASSOCIATION FOR LEAVE TO FILE AMICUS BRIEF IN SUPPORT OF RESPONDENTS

Pursuant to California Rule of Court Rule 8.200(c), the American Legal & Financial Network and the United Trustees Association hereby request leave of this Court to file the following amicus brief in support of the position of Respondents Ocwen Loan Servicing, LLC, Western Progressive, LLC and Deutsche Bank National Trust Company as Trustee for Registered Holders of Morgan Stanley ABS Capital I Inc. Trust 2007-HE1 Mortgage Pass-Through Certificates, Series 2007-HE1 (collectively, "Respondents"). This amicus brief will assert that the court correctly determined that Petitioner lacked standing to challenge the securitization of the subject loan, the assignment and/or the substitution of trustee as Petitioner is neither a party to those documents nor an intended third party beneficiary. Any contrary result would unduly impinge upon the carefully crafted statutory scheme of the California Legislature governing non-judicial foreclosures and cause excessive costs and delays in the process.

The purpose of this amicus brief is to assist the Court in determining that a borrower simply lacks standing to raise such challenges, particularly in the absence of any credible claim that: (1) the wrong party is foreclosing (as distinguished from the position Petitioner seems to urge, that *no party* has the right to foreclose here) and/or (2) that Petitioner has suffered any actual prejudice as a result. This proposed amicus brief also seeks to provide the Court with additional insight on the unique role of the foreclosure trustee under California law and explain to the Court the potential ramifications, if the lower court's decision were reversed, on various important public

policies, including the negative impact on lenders, trustees *and* borrowers.

As set forth in the following Statement of Interest, the ALFN and UTA have specialized knowledge regarding the intent and operation of California's non-judicial foreclosure laws as well as a significant interest in the outcome of this matter.

No party or counsel for a party in this case authored this brief in whole or in part, or made any monetary contribution intended to fund the preparation or submission of this brief, other than to the limited extent that a party might be a dues paying member of one or more of the amici. No person or entity made a monetary contribution intended to fund the preparation or submission of this brief, other than the amicus curiae, its members, and its counsel in this appeal.

For these reasons, the ALFN and UTA respectfully request the Court to grant its Motion and allow their amicus brief to be filed.

Respectfully submitted,

DATED: April 20, 2015

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STATEMENT OF INTEREST:

The United Trustees Association ("UTA") and American Legal & Financial Network ("ALFN") (collectively, "Amicus" or "Amici") hereby submit this Amicus Brief in support of an order affirming the lower court's ruling in favor of Respondents Ocwen Loan Servicing, LLC, Western Progressive, LLC, and Deutsche Bank National Trust Company, as Trustee or Registered Holders of Morgan Stanley ABS Capital I Inc. Trust 2007-HE1 Mortgage Pass-Through Certificate Series2007-HE1 (collectively, "Respondents").

The UTA is a national organization that, since 1968, has been the source for information, expertise, continuing education and opinion on trustee issues and practices for its members. UTA membership is comprised of those acting as trustees under real property deeds of trust, including employees of title companies, financial institutions, and independent companies. UTA members also work in allied and support organizations, including posting and publishing companies and computer service firms. Hundreds of UTA members, including foreclosure trustees, transact business in the State of California and will be directly and substantially affected by the Court's resolution of the instant Petition.

The UTA has been actively involved in the legislative process of various States for over 25 years. The UTA has previously filed amicus curiae briefs before, among others, the California Supreme Court, the California Courts of Appeal, the Federal Ninth Circuit Court of Appeals, and the United States Supreme Court in the cases of: *BFP v. Resolution Trust Corporation* (1994) 511 U.S. 531; *I.E. Associates v. Safeco Title Ins.*

Co. (1985) 39 Cal.3d 281, 216 Cal.Rptr. 438; *Trustors Security Service v. Title Recon Tracking Service* (1996) 49 Cal.App.4th 592; *Prudential Home Mortgage Company, Inc. v. Superior Court* (1998) 66 Cal.App.4th 1236; *Nguyen v. Calhoun* (2003) 105 Cal.App.4th 428; *Kachlon v. Markowitz* (2008) 168 Cal.App.4th 316; *Mabry v. Orange County Superior Court*, (2010) 185 Cal.App.4th 208; and *Biancalana v. T.D. Service Co.*, (2013) 56 Cal. 4th 807.

The ALFN is a national, non-profit network of legal and residential mortgage banking professionals and, since 2002, has been leading the industry as a provider of strategic and timely education. The largest national organization of its kind, the ALFN offers members of the residential mortgage banking community high quality educational and training resources. The ALFN's membership roster includes professionals from the following segments of the residential mortgage banking community: Legal, Residential Mortgage Bankers and Investors, Risk Evaluation, Investment Research, Consulting, Land and Title, Technology and Asset Protection. The ALFN has numerous members throughout California and/or who do business in California that would be directly and substantially affected by the Court's decision on this Petition.

The ALFN has been actively involved in the legislative process of various States for over 25 years. The ALFN has previously filed amicus curiae briefs before, among others, the California Supreme Court, the California Courts of Appeal, the Federal Ninth Circuit Court of Appeals, and the United States Supreme Court, including in the cases of *Jerman V. Carlisle, Mcnellie, Rini, Kramer, & Ulrich LPA,* 559 U.S. 573 (2010); *Ho v.*

Recontrust Co. pending Case No. 10-56884 (9th Cir. 2014) (with, among others, the UTA); and *Nativi v. Deutsche Bank National Trust Co.*, (2014) 223 Cal.App.4th 261.

Respectfully submitted,

DATED: April 20, 2015

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I. FACTS:

The ALFN and the UTA adopt the facts and procedural history as set forth by Respondents in their Opening Brief.

II. ISSUES:

As stated by this Court on August 27, 2014 in its order accepting this case for review, the only relevant issue is: "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?". The other issues urged in Petitioner's Opening and Reply Briefs are extraneous to this determination and should be disregarded by the Court.

III. STANDARD OF REVIEW:

The standard of review on appeal from a judgment dismissing an action after the sustaining of a demurrer without leave to amend is well established: "The function of a demurrer is to test the sufficiency of the [pleading] as a matter of law, and it raises only a question of law. [Citations]. On a question of law, we apply a de novo standard of review on appeal." *First Aid Services of San Diego, Inc. v. California Employment Dev. Dept.*, (2005) 133 Cal.App.4th 1470, 1476 (*citing Holiday Matinee, Inc. v. Rambus, Inc.*, (2004) 118 Cal.App.4th 1413, 1420. However, while the decision to sustain or overrule a demurrer is a legal ruling subject to de novo review on appeal, the granting of leave to amend involves an exercise of the trial court's discretion. *Westamerica Bank v. City of Berkeley*, (2011) 201 Cal.App.4th 598, 607.

The reviewing court gives the pleading a reasonable interpretation and treats the pleading subject to the demurrer as admitting all material facts properly pleaded. *Blank v.*

Kirwan, (1985) 39 Cal.3d 311, 318. The reviewing court does not, however, assume the truth of contentions, deductions or conclusions of law. *Moore v. Regents of University of California*, (1990) 51 Cal.3d 120, 125.

As stated in *First Aid Services of San Diego, Inc., supra*, 133 Cal. App. 4th at 1476-1477, *citing Aubry v. Tri–City Hospital Dist.,* (1992) 2 Cal.4th 962, 967:

> The judgment must be affirmed 'if any one of the several grounds of demurrer is well taken. [Citations].' [Citation]. However, it is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory. [Citation]. And it is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment. [Citation].

An appellant/petitioner bears the burden of proving that the lower court erred in sustaining the demurrer or abused its discretion in denying leave to amend. *City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, (1998) 68 Cal.App.4th 445, 459; *Coutin v. Lucas*, (1990) 220 Cal.App.3d 1016, 1020. As such, the lower court's decision to sustain a demurrer without leave is reviewed under an abuse of discretion standard. *Zipperer v. County of Santa Clara*, (2005) 133 Cal.App.4th 1013, 1019-1020 (2005).

A demurrer "may be sustained without leave to amend where the nature of the defects and previous unsuccessful attempts to plead render it probable plaintiff cannot state a cause of action." *Rappleyea v. Campbell*, (1994) 8 Cal. 4th 975, 985. "[W]here the nature of the plaintiff's claim is clear, and under substantive law no liability exists, a court should deny leave to amend because no amendment could change the result." *City of Atascadero, supra,* at 459-460.

IV. ANALYSIS AND ARGUMENT:

As an initial matter, there is an implied presumption in the issue as phrased by this Court that the putative defects borrowers claim to find in the securitization, assignment and/or substitution of trustee actually render those transactions void. This is a false premise; instead, as discussed more fully below, at worst, the asserted defects would—*if true*---render the transactions voidable but, even then, only at the instance of a party to those agreements, not the borrower.

A. A Brief Overview of Securitization:

To help put this issue in context, since most of the cases in which challenges such as those Petitioner seeks to raise involve securitized trusts[1], it would be useful to understand what securitization is and how, essentially, it operates.

It used to be that most residential mortgage loans were serviced and maintained by the originating lender throughout the life of the loan. Around 1970, when Ginnie Mae started selling securities backed by a portfolio of loans. securitization of residential mortgages really commenced, but it would be another twenty years before the emergence of the modern securitized trust, helped in part by the creation of Fannie Mae and Freddie Mac. However, perhaps the key factor in the growth of securitization was the 1986 creation by Congress of the Real Estate Mortgage Investment Conduit ("REMIC"), which is now a standard feature in many securitizations. According to Sheila Bair, the then Chairman of the FDIC, in testimony before Congress in 2007: "Securitization represents

[1] However, the borrowers' lack of standing to challenge an assignment or substitution of trustee would still exist even if their loans were assigned directly to a third person, without securitization.

an essential process in U.S. mortgage markets. By packaging loans in a way that is attractive to investors, securitization has increased the volume of credit available to borrowers and improved the liquidity of the mortgage markets. The result has been the development of a wide array of lending products that have contributed to unprecedented levels of home ownership in this country."[2] Indeed, as of 2005, according to the records of the FDIC, securitization of loans had already grown to $2.7 *trillion* dollars. It still hovers around that amount today, though it has varied.[3]

Simply put[4], "" A 'securitization' is a bundling of secured real property loans for sale as a group to institutional investors." *Hedging Cocepts, Inc. v. First Alliance Mtge. Co.,* (1996) 41 Cal.App.4th 1410, 1414; *see also Federal Home Loan Bank of San Francisco v. Countrywide Financial Corporation,* (2013) 214 Cal.App.4th 1520, 1523, fn.1 (also discussing how a basic securitization is set up).

As stated in the Hofstra Law Review article, "Special Purpose Vehicles in Bankruptcy Litigation,"[5]: "The key participants in the securitization process include the originator who is seeking to raise money, the SPV, and the servicer. Additional parties that are involved in securitization are the investment bankers, trustee, credit rating

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[2] https://www.fdic.gov/news/news/speeches/archives/2007/chairman/spapr1707.html
[3] https://www.fdic.gov/bank/analytical/regional/ro20063q/na/2006_fall01.html and http://www.federalreserve.gov/econresdata/releases/mortoutstand/current.htm
[4] A more detailed description can be found in the November 5, 2003 testimony of attorney Cameron L. Cowan on behalf of the American Securitization Forum before the House Subcommittees on "Financial Institutions and Consumer Credit" and "Housing and Community Opportunity." ("Cowan") http://financialservices.house.gov/media/pdf/110503cc.pdf
[5] Hofstra Law Review, Vol. 40 at 177, 183 (2011). *See also* discussion of "How Securitization Works" in Cowan, *supra.*

agencies, and investors." *See also Hedging Concepts, Inc., supra.* Significantly absent from this list is the borrower. The reason for this exclusion is simple: the borrower is not a party to the securitization documents nor a third party beneficiary of the securitization process—in fact, the securitization itself has no direct effect on the borrower or the borrower's obligations. *See, e.g. Siliga v. Mortgage Electronic Registration Systems, Inc.* (2013) 219 Cal.App.4th 75, 85 ("The assignment of the deed of trust and the note did not change [plaintiffs'] obligations under the note, and there is no reason to believe that...the original lender would have refrained from foreclosure in these circumstances. *Absent any prejudice*, the Siligas have no standing to complain about any alleged lack of authority or defective assignment"). [emphasis added]. The requisite prejudice must be that caused by the acquisition rather than by the borrower's own default.

B. <u>Borrowers' Typical Challenges to Enforcement and Their Flaws</u>:

Borrowers facing foreclosure assert a variety of claims seeking to challenge enforcement of the security instrument, or even the right of the original lender to foreclose, oftentimes arguing that there was a defect in the loan origination or the lender's handling of the loan payments, which somehow excused their performance. With the increasing number of loans being securitized, and the subsequent surge in defaults following the subprime "meltdown" in 2007, borrower discontent grew and new theories emerged as to how to attack the loan and try to avoid—or at least delay---foreclosure. The mere filing of the lawsuit became a tool enabling borrowers to keep

living in their homes for free---and for extended periods. Indeed, that was sometimes their real reason for filing.[6]

A review of these challenges, and the manner in which California courts have addressed the legal issues relating to the statutory non-judicial foreclosure process is fundamental to the analysis of Petitioner's claims. The most common attacks, and the reasons they usually fail, are the following:

1. Borrowers Never Agreed Their Note and Deed of Trust Could Be Sold

Particularly where the note and/or deed of trust refer to the "lender" having a right to enforce the loan, borrowers sometimes claim that only the original lender can foreclose or substitute a trustee (some even argue that only the original trustee can be the foreclosing agent). As a variation on this theme, borrowers sometimes contend that they never agreed that the original lender could transfer its rights in the loan documents to anyone else to enforce.

The short answer to these challenges is that the loan documents themselves usually contain express disclosures that the loan can be sold one or more times, without prior notice to the borrower. *See Cervantes v. Countrywide Home Loans, Inc.*, (9th Cir. 2011) 656 F.3d 1034, 1042; *Fontenot v. Wells Fargo Bank, N.A.*. (2011) 198 Cal.App.4th 256, 272, fn.11. If the deed of trust identifies Mortgage Electronic Registration Systems, Inc. ("MERS") as the beneficiary (typically as nominee for the original lender), there is also a

[6] Petitioner, like many other borrowers, insists she is not seeking a free house yet she defaulted in 2008 and still fails and refuses to make any payments to anyone, even into court, during the pendency of the case, despite continuing to live there [POB, pp.2 and 8].

provision in the deed expressly authorizing MERS to take any action the original lender could take. *Id.* As a practical matter, the sale or transfer of the rights in the loan has no effect on the borrower's obligations under the loan. *Herrera v. Federal National Mortgage Ass'n.* (2012) 205 Cal.App.4th 1495, 1508; *Fontenot, supra,* at 272.

2. The Creditor Must Show the Note/Deed as a Prerequisite to Foreclosure

As suggested by the description, borrowers often insist that they are entitled to see the original of the note and/or deed of trust as a precondition to foreclosure, apparently in the vain hope that the current owner or servicer will be unable to produce the original and, therefore, the borrower will be off the hook. Another argument borrowers make as to why the originals must be produced is to confirm that the note has been properly endorsed to the entity seeking to enforce it, with some claiming that blank endorsements are insufficient under the terms of the trust's Pooling & Servicing Agreement ("PSA") and/or law.

California law rejects these "show the note" arguments. *See, e.g., Gomes v. Countrywide Home Loans, Inc.*, (2011) 192 Cal. App. 4th 1149, 1154. Indeed, in *Debrunner v. Deutsche Bank Nat'l Trust Co.,* (2012) 204 Cal.App.4th 433, 440, the appellate court held that California law: "does not mandate physical possession of the underlying promissory note in order for this initiation of foreclosure to be valid." The transfer of a promissory note merely requires the possession of the note with an

endorsement (or allonge) either "special" (to a specific payee) or in blank. *See* California Commercial Code §§ 3109, 3204 and 3205.[7] The PSA never provides otherwise.

3. The Note and Deed of Trust were Split and Not Enforceable

Although not limited to loans in which MERS is named as the beneficiary ("nominee") in the deed, the argument that the note and deed of trust were irrevocably split—and hence became unenforceable by anyone—finds its most common appearance where a loan is being foreclosed upon. However, the validity of the splitting argument has itself been foreclosed, or at least, reined in by numerous courts. The Ninth Circuit, for example, in *Cervantes, supra,* at 1044, held that: "Even if we were to accept the plaintiffs' premises that MERS is a sham beneficiary and the note is split from the deed, *we would reject the plaintiffs' conclusion that, as a necessary consequence, no party has the power to foreclose.*" [emphasis added]. The Ninth Circuit went on to note: "Further, the notes and deeds are not irreparably split: the split only renders the mortgage unenforceable if MERS or the trustee, as nominal holders of the deeds, are not agents of the lenders." *Id.* As also noted in *Cervantes, supra*, at 1044, the security follows the note so there is no real split. *See also Domarad v. Fisher & Burke, Inc.,* (1969) 270 Cal.App.2d 543, 53; Civil Code § 2936.

4. Securitization/TARP/Insurance Paid Off the Loan:

The gist of this attack is either: (1) since the securitization of the loan paid off the original lender, the note has been repaid, *or* (2) the assignee received government bailout

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[7] New York law allows endorsements in blank. New York U.C.C. § 3–204(2).

funds (or some other mysterious government payment) or insurance which should be treated receipt of the funds satisfied the borrower's defaulted loan.

No court has ever given credence to these whimsical conceits. *See, e.g., Javaheri v. JPMorgan Chase Bank, N.A.,* 2012 WL 6140962, at *7 (C.D. Cal. Dec. 11, 2012) ("Although Javaheri contends that the Lender received payment in full upon securitization of his Note, courts have consistently disagreed, holding that `the sale or pooling of investment interests in an underlying note [cannot] relieve borrowers of their mortgage obligations.'") (*quoting Upperman v. Deutsche Bank Nat'l Trust Co.,* 2010 WL 1610414, at *2 (E.D. Va. Apr.16, 2010) and *citing Matracia v. JP Morgan Chase Bank, N.A.,* 2011 WL 3319721, at *3 (E.D. Cal. Aug. 1, 2011)), *aff'd* 561 Fed.Appx. 611 (9th Cir. Mar. 10, 2014), *cert. denied. See also Rosas v. Carnegie Mtge, LLC,* 2012 WL 1865480 at *8 (C.D. Cal. May 21, 2012)(and cases cited therein), noting that the courts consistently reject these theories.[8]

5. <u>The Signature on the Assignment was Forged/Robo-Signed</u>:

Borrowers sometimes seek to attack assignments by making the almost invariably unsupported assumption that the person signing the assignment lacked authority to do so on behalf of the putative assignor and/or that the person signing was a robo-signer, and/or that any signature on that assignment was "forged." They then attempt to bootstrap that

[8] With respect to insurance payments, the argument would also be barred by the Collateral Source Rule.

fallacious argument to invalidate the Substitution of Trustee[9] and later assignments, arguing that the assignment and substitution are thus void. However, such attempts misapprehend both concepts.[10]

"Robo-signing" is a loosely defined term but, according to Investopedia, a robo-signer is defined as "[a]n employee of a mortgage servicing company that signs foreclosure documents without reviewing them. Rather than actually reviewing the individual details of each case, robo-signers assume the paperwork to be correct and sign it automatically, like robots." [11]Despite all the negative press, the fact remains that, at least prior to the effective date of California's Homeowners Bill of Rights (HBOR)[12], there was nothing per se illegal or fraudulent about someone "robo-signing" a document. Robo-signing has nothing to do with the signer's authority, nor does it implicate either fraud or forgery. Instead robo-signing is concerned with whether the person signing the document bothered to read it or verify the facts as stated therein prior to signing. Because of this, claims of robo-signing are essentially irrelevant to the validity of an

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[9] Borrowers usually also ignore the effect of *Civil Code* § 2934a(d), making the recording of a substitution of trustee conclusive evidence of the authority of the substituted trustee to act. *West v. JP Morgan Chase Bank, N.A.* (2013) 214 Cal.App4th 780, 801.

[10] Borrowers also tend to confound their own argument by improperly conflating "robo-signing" with fraud and forgery. The former, though, by its very nature does not involve any fraud or forgery (intentional acts) by the signer; instead, it turns on a lack of action by the signer, in failing to read and/or verify what is being signed.

[11] http://www.investopedia.com/terms/r/robo-signer.asp

[12] To the extent that there might be any claim available under HBOR, that legislation was not effective until January 1, 2013 and was enacted as non-urgency legislation. It is thus plainly not retroactive and could only apply to subsequent assignments. *Michael J. Weber Living Trust v. Wells Fargo Bank, N.A.*, 2013 WL 1196959, at *4 (N.D. Cal. Mar. 25, 2013); *Sabherwal v. Bank of New York Mellon*, 2013 WL 4833940, at *10 (S.D. Cal. Sept. 10, 2013).

assignment and substitution of trustee, since it does not matter whether the signer read either document or verified any claims therein—the issues are merely whether the assignor *intended* to transfer the loan and its security to the assignee and whether the assignee intended to appoint the new foreclosure trustee. The only party that could claim harm by any unwarranted transfer of interests from the assigner is the assignor, not the borrower whose debt is being assigned. Thus, borrowers such as Petitioner lack standing to challenge either document and the putative robo-signing is irrelevant to their liability on the Loan.

In general, forgery is the false making, *with the intent to defraud*, of a document that is not what it purports to be, as distinct from a document that is genuine but nevertheless contains a term or representation known to be false. *United States v. Price*, (9th Cir. 1981) 655 F.2d 958, 960. While borrowers might claim that an assignment was an invalid and fraudulent attempt to "paper over" an untimely and ineffective transfer to the Securitized Trust, or that signatures on a document might not match other putative exemplars of the signer's signature, borrowers rarely provide any support for these conclusions—just mere speculation. Significantly, the documents are always precisely what they purport to be, an assignment and a substitution of trustee. Moreover, borrowers seldom, and cannot, truthfully claim that the assignor did not intend, authorize and/or ratify the execution of the documents in its name nor that the assignee did not in fact acquire, and intend to acquire, the Loan from assignor. *Rakestraw v. Rodrigues*, (1972) 8 Cal.3d 67, 73: "A purported agent's act may be adopted expressly or it may be adopted by implication based on conduct of the purported principal from which an

intention to consent to or adopt the act may be fairly inferred, including conduct which is 'inconsistent with any reasonable intention on his part, other than that he intended approving and adopting it.'"[13] *See also Common Wealth Ins. Systems, Inc., supra,* (noting that ratification can occur even where the alleged forger was not an agent).

Certainly, it is never the case in these attacks that the assignor or assignee are challenging the transactions, *and they are the only ones who would have standing to do so*--it is simply irrelevant to the borrower which party enforces the note and deed of trust on behalf of the beneficiary. *See, e.g., Herrera, supra*, at 1507, holding that: "As to plaintiff, an assignment merely substituted one creditor for another, without changing her obligations under the note" [holding also, at 1506, that: "plaintiff failed to plead specific facts demonstrating the transfer of the note and deed of trust were invalid"].

As the Central District held in *Cerecedes v. US Bankcorp*, 2011 WL 2711071 at *5 (C.D. Cal July 11, 2011), a plaintiff cannot state a claim due to "robo-signing" where that plaintiff did not dispute the salient facts such as the default under the loan or receipt of pre-foreclosure notices. Borrowers who try to get around this by arguing that the signer actually works for a different entity than the one on whose behalf they are signing, also provide no authority--*and none exist*--to support their contention that one person could not be an employee of more than one entity, or, alternatively, could be an employee of one entity but still be authorized to act on behalf of another. The Ninth Circuit put this

[13] In fact, it is quite common—and proper—for corporations to provide powers of attorney or other authorizations allowing others to sign documents on their behalf, even conferring a limited officer status upon them. *Cervantes, supra.*

particular theory to rest in *Cervantes, supra*, at 1040. *See also Bain v. Metropolitan Mortgage Group, Inc.,* 2010 WL 891585 (W.D. Wash. Mar. 11, 2010), holding that: "There is simply nothing deceptive about using an agent to execute a document, and this practice is commonplace in deed of trust actions."

As previously discussed, while legal conclusions can provide the framework of a complaint, they must be supported by ***factual*** allegations showing actual harm or prejudice resulting from the robo-signing. *Lee, supra;. Cerecedes, supra; see also Nastrom v. New Century Mortg. Corp.* 2012 WL 2090145 at *6 (N.D. Cal. June 8, 2012). Borrowers cannot establish that harm by referring to documents to which they are not a party, such as the assignments or the substitution of trustee, particularly where the only claimed harm is a foreclosure resulting from the borrower's own default. A plaintiff must allege specific facts showing prejudice even if the assignment of the deed of trust is void. *Herrera, supra,* at 1507; *Debrunner v. Deutsche Bank National Trust Co.*, (2012) 204 Cal.App.4th 433, 443. As held in *Dick v. American Home Mortg. Servicing, Inc.*, 2013 WL 5299180 at *3 (E.D. Cal. Sept. 18, 2013): "California courts find a lack of prejudice when a borrower is in default and cannot show that the allegedly improper assignment interfered with the borrower's ability to pay or that the original lender would not have foreclosed under the circumstances." *See also Siliga, supra,* at 85; *Javaheri v. JPMorgan Chase Bank, N.A.* 2012 WL 3426278 at *6 (C.D. Cal. Aug. 13, 2012), holding that a borrower lacked standing to raise robo-signing as a defense against the validity of the assignment or the substitution because the borrower was not a party to those agreements. The identity of the trustee does not change the existence of the default nor the right to

foreclose as a result thereof—the only harm a borrower could point to would be the foreclosure and that i solely due to the borrower's default.

6. The Assignment/Acquisition of the Loan was Untimely:

One of the most common arguments borrowers make in attacking the enforcement of a power of sale clause in a deed of trust by a securitized trust or its servicer is to assert that the trust did not acquire the loan prior to its closing date and, as a result, the acquisition was void and the deed of trust unenforceable.[14] To the extent the borrowers bother to provide any basis for this assertion at all, it is usually based on the date on which the assignment was recorded versus the date upon which (according to the securitization documents) the trust closed. There are numerous flaws with this theory.

The issue of whether borrowers even have standing to raise the timeliness is discussed in the Sections on New York Trust law and *Glaski* below, but the initial false premise is that the date upon which the assignment recorded is the date upon which the trust actually acquired its interest in the loan. California law has long since rejected the notion that an assignment of a deed of trust needs to be recorded to be effective. *See Calvo v. HSBC Bank USA, N.A.,* (2011) 199 Cal.App.4th 118, 122*; Fontenot v. Wells Fargo Bank, N.A.,* (2011) 198 Cal.App.4th 256, 272 ("the lender could readily have assigned the promissory note to HSBC in an unrecorded document that was not disclosed to plaintiff."). Similarly, in *Cervantes, supra,* at 1038-39, the Ninth Circuit recognized that the execution dates on recorded assignments do not necessarily have to reflect the

[14] Some borrowers claim that the loan itself becomes unenforceable, others just take the position that the loan becomes unsecured.

actual date of acquisition of the beneficial interests in a loan and its security in order to be valid and effective.

This follows from the well-established principle that the security follows the note even without a recorded assignment. *Cervantes, supra*, at 1044; *Domarad, supra*; Civil Code § 2936.

Although the decision to defer recording an assignment can occur for other reasons, it is commonly seen where the loan is registered in the MERS system. In those instances, MERS tracks the transfers until such time as the loan either gets transferred to a non-MERS member or the beneficiary requests a formal assignment (usually after the loan goes into default). *See Gomes, supra,* at 1151 and *Cervantes, supra,* at 1038-39, discussing how MERS operates.

If an assignment need not be recorded *at the time the loan is acquired* as a prerequisite to bringing a non-judicial foreclosure[15], the question becomes how can borrowers challenge timeliness of the assignment at all?

In the absence of any specific facts supporting the contention that the loan was not actually acquired before the trust's closing date, a plaintiff making such a claim is relying on mere hope and speculation. As stated in *Jenkins, supra*, at 511-13, California does not permit such unsupported, preemptive lawsuits seeking to delay or prevent a non-judicial

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[15] HBOR does <u>not</u> impose any requirement that an assignment be recorded before an assignee seeks to foreclose; it merely mandates that the servicer review "competent and reliable evidence to substantiate...the right to foreclose."; *See* Civil Code § 2924.17. In any event,.in most instances there is a recorded assignment but the borrowers are complaining it had to be recorded at the time the note transferred in order to be effective.

foreclosure: "California courts have refused to delay the nonjudicial foreclosure process by allowing trustor-debtors to pursue preemptive judicial actions to challenge the right, power, and authority of a foreclosing `beneficiary' or beneficiary's `agent' to initiate and pursue foreclosure." *Id.* at 511.

Another flaw in these timing arguments is that, while borrowers *presume* that a late acquired asset must be unenforceable by the trust under the terms of its PSA and/or because it would supposedly cause the trust to lose its favorable tax treatment under federal law, the reality is that there is no such clause in either the securitization documents or the tax laws that voids the transaction. *Compare Glaski v. Bank of America,* 218 Cal. App. 4th 1079,, 1096-98 *with Wadhwa v. Aurora Loan Servs., LLC,* 2011 WL 2681483, at *4 (E.D. Cal. July 8, 2011) (rejecting argument that "assignment of the note to a [REMIC] renders any interest in the property other than plaintiffs' somehow invalid") and *Hafiz v. Greenpoint Mortgage Funding, Inc.*, (N.D. Cal. 2009) 652 F. Supp. 2d 1039, 1043 (argument that "all defendants lost their power of sale pursuant to the deed of trust when the original promissory note was assigned to a trust pool" is "both unsupported and incorrect").

Thus, while there might be unfavorable tax consequences, or other risks, for the investors/beneficiaries as a result of a late acquisition, those consequences would not render the late acquisition itself uncollectable. *See Frazier v. Aegis Wholesale Corp.*, 2011 WL 6303391, at *5 (N.D. Cal. Dec. 16, 2011) ("Even if Plaintiffs were right that their loan was not timely transferred to the trust, that does not mean that the owner of the note and deed of trust could not therefore foreclose. That would simply mean that the

loan was not put into the trust (i.e., the investment vehicle). It does not necessarily affect the trustee's authority set forth in the deed and assignment documents to initiate foreclosure.").

Ignored by most borrowers is the fact that, even if they could void the transfer of their loan to a trust or other third party, they would still remain liable for their default on the loan *to someone*, at least the transferor. Accordingly, their gambit would buy them nothing but delay.

7. The Party Seeking to Enforce the Note Lacked Standing:

Separate and apart from the question of timeliness, borrowers sometimes seek to challenge the standing of the servicer or current beneficiary by arguing that they need to show an unbroken chain of title (which, they might argue, is a condition of the operative PSA) or, in the case of the servicer, that it is not itself the entity authorized to institute foreclosure by the deed of trust, and/or that it must prove that it is a duly authorized agent of the current beneficiary (some borrowers even insist that there must be a recorded agency agreement or power of attorney). There is no law supporting a borrower's right to bring such attacks, particularly as borrowers are not parties to the PSA or to any other agreements between the servicer and the beneficiary. To the contrary, the law rejects such notions.

As to whether the rights under the loan can be assigned at all, this Court held in *Farmland Irr. Co. v. Dopplmaier,* (1957) 48 Cal.2d 208, 222: "The statutes in this state clearly manifest a policy in favor of the free transferability of all types of property, including rights under contracts. Civ. Code, §§ 954, 1044, 1458." (noting exceptions

where the duties sought to be assigned are personal in nature or the assignment of rights "would materially impair the nonassigning party's chance of obtaining the performance he expected."). As discussed above, the deeds of trust at issue here expressly state that the loan might be sold or transferred multiple times.

As a variation on this theme, borrowers sometimes insist that they need this information to insure that they are not paying the "wrong" person on the debt and to avoid the risk that there might be other claimants who will one day come after them on the same debt. Absent from these contentions is any factual basis for this belief and no other creditors are ever identified, let alone come forward to press their own demands.[16] Even in *Glaski*, *supra*, at 1094, the court found this to be too much of a stretch and insisted that "a plaintiff asserting this theory [wrongful foreclosure by the wrong entity] must allege facts that show the defendant who invoked the power of sale was not the true beneficiary."

In terms of the right of the servicer to act on behalf of the beneficiary of the loan, as noted in *Akopyan v. Wells Fargo Home Mtge., Inc.,* (2013) 215 Cal.App.4th 120, 137: "It is common for servicing rights to be transferred or sold independently of the loan itself, and for the mortgage loan servicer to be an entity separate from the loan originator, lender, or owner." In this regard, the court in *Jenkins, supra,* at 713 held that: "[W]e find the statutory provisions, because they broadly authorize a 'trustee, mortgagee, or beneficiary, or any of their authorized agents ' to initiate a nonjudicial foreclosure (§

[16] Such borrowers never avail themselves of the remedy of interpleading the funds owed into court and tend to balk at any suggestion that they should.

2924, subd. (a)(1), italics added), do not require that the foreclosing party have an actual beneficial interest in both the promissory note and deed of trust to commence and execute a nonjudicial foreclosure sale." The HBOR statutes also make this clear, specifically including the obligations of the loan servicer under the loan.[17] Moreover, the servicer need not separately prove to the borrower that it has a recorded power of attorney to act on behalf of the beneficiary; it need only comply with the notice requirements under RESPA, 15 USC § 2605(a), (b). *See also Finley v. LaSalle Bank Nat. Ass'n*, 2009 WL 3401453 at *2, fn.4 (N.D. Cal. Oct. 20, 2009). In essence, this argument is just a variation on the discredited "show me the note" theory.

Finally, the contention that an unbroken chain of title must be shown turns on whether: (a) there is such a clause in the securitization documents <u>and</u> (b) whether a non-party to those documents, such as the borrower, has standing to enforce the documents. The borrower's lack of standing to enforce the securitization documents is discussed below. Absent such a clause, though, the argument would be wholly inapplicable as the rule in California, as elsewhere, is that an assignment of the note itself suffices to convey the security. *Domarad, supra*; *Cervantes, supra,* at 1044; Civil Code § 2936.

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[17] The very existence of the recently enacted HBOR establishes the continuing relevance and wisdom of this Court's decision in *I. E. Associates, supra,* at 288, that any judicial expansion of the carefully crafted legislative scheme governing non-judicial foreclosures was unwarranted and improper. The Legislature can and will act in this area when it feels the need to do so. That the Legislature did not deem it appropriate, as part of its reforms under HBOR, to allow a borrower the right to demand proof regarding the securitization, assignment and/or substitution of trustee as precondition of foreclosure should dissuade this Court from doing so now.

8. Borrowers Lack Standing to Make at Least Three of these Attacks :

The last three types of attack identified above are the principal ones for which the issue of whether *the borrower* has standing matters most. As to the first three grounds, borrower standing to sue is not an issue since it turns on the validity and effect of the Note and Deed of Trust—documents to which the borrower is indisputably a party. Standing is irrelevant as to the fourth ground since it is clear that the loan is not paid off by the receipt of such funds.

As an initial matter, Petitioner's ploy of arguing that § 22 of the deed of trust itself creates her standing (because of the language that a lender's *optional* notice of acceleration of the debt must also "inform the Borrower of the right...to bring a court action to assert the non-existence of a default of Borrower to acceleration and sale") [Petitioner's Opening Brief ("POB") at p.18] is, at best, an overly optimistic reading of that provision. Even if there were an acceleration of the debt, and none was claimed to occur here, it would not create any rights in the borrower that did not already exist, nor would it extend any rights to challenge the separate securitization, assignment, and/or substitution of trustee documents. Nothing in § 22 (or any other provision of the deed cited by Petitioner) purports to go that far. Instead, a plain reading of the language makes clear that the lender is obliged, were there an acceleration, to remind the borrower that he or she is entitled to dispute the existence of the default giving rise to the acceleration. That is a far cry from challenging the right to assign a loan, securitize it, or enforce separate provisions governing non-judicial foreclosure under the power of sale in the deed. The case below was not about any lack of default by the Petitioner—at no time

does she deny her arrearage—or any defect in the deed of trust; rather it is about rights under agreements to which Petitioner is not a party.[18]

Additional reasons why borrowers lack standing to raise at least these last three challenges, and why public policy warrants rejecting such suits, are discussed below.

C. <u>The Non-Judicial Foreclosure Law Does Not Provide for Standing</u>

California Civil Code §§ 2924 – 2924k provides "the comprehensive statutory framework established to govern non-judicial foreclosure sales" and "is intended to be exhaustive." *See Moeller v. Lien* (1994) 25 Cal. App. 4th 822, 834*; see also Homestead Sav. v. Darmiento,* (1991) 230 Cal. App. 3d 424, 432-433. For this reason, as noted in *Vournas v. Fidelity National Title Ins. Co.*, (1999) 73 Cal.App.4th 668, 677, the trustee's "only duties are: (1) upon default to undertake the steps necessary to foreclose the deed of trust; or (2) upon satisfaction of the secured debt to reconvey the deed of trust." *Accord Heritage Oaks Partners, supra,* at 345. The holding in *I. E. Associates v. Safeco Title Ins. Co.*, (1985) 39 Cal.3d 281, 287-89 also reflects this limited role, stating:

> The rights and powers of trustees in nonjudicial foreclosure proceedings have long been regarded as strictly limited and defined by the contract of the parties and the statutes.... [¶] ... [T]here is no authority for the proposition that a trustee under a deed of trust owes any duties with respect to exercise of the power of sale beyond those specified in the deed and the statutes.

The Court then went on to acknowledge that: "There are, moreover, persuasive policy reasons which militate against a judicial expansion of those duties. **The nonjudicial**

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[18] The facetious argument that the assignment clause of the deed of trust does not inform Petitioner that she cannot raise these claims [POB at 23-24] does not merit a response.

foreclosure statutes -- an alternative to judicial foreclosure -- reflect a carefully crafted balancing of the interests of beneficiaries, trustors, and trustees." *Id.* at 288. [emphasis added] Although focused on the role of the trustee, the same analysis holds true for the foreclosing beneficiary under the deed of trust and its servicer.

In *6 Angels, Inc. v. Stuart-Wright Mtge., Inc.,* (2001) 85 Cal.App.4th 1279, 1287 (*citing Moeller, supra*, at 830, 832), another court explained: "The public policy underlying the comprehensive framework governing foreclosure sales is a concern for swift, efficient, and final sales.... (. [G]ranting relief under the circumstances present here would frustrate, rather than promote, this policy, by adding uncertainty to the finality of foreclosure sales." Nonetheless, Petitioner seeks to have this Court impose obligations on the trustee, the servicer and the loan beneficiary beyond their existing statutory and contractual duties. This would vitiate the public policies announced in *I.E. Associates, supra,* and reiterated in *6 Angels, Inc., supra,* and would involve the courts in precisely the sort of judicial expansion of the statutory duties prohibited by this Court under the holding of *I.E. Associates, supra*. As evidenced by the enactment of HBOR, the Legislature can and will expand those duties where it deems it appropriate to do so. It did not impose the duties upon which Peititioner insists.

Petitioner places great reliance on *Cockerell v. Title Ins. & Trust Co.*, (1954) 42 Cal.2d 284, 292-93 to establish her standing, claiming *Cockrell* requires an assignee to prove its assignment in order to foreclose. Her reliance is misplaced. *Cockerell did not involve a challenge to a non-judicial foreclosure*; rather, it was a post-sale dispute

between competing junior lienholders over the right to surplus proceeds from that sale.[19] Conversely, in the typical borrower attack on an assignee's right to non-judicially foreclose, there are no competing claimants to the note or deed, just wild speculation that *there could be*. In addition, *Cockerell* did not address, let alone impose, any requirements on a successor beneficiary or a loan servicer to prove the existence of an assignment simply to collect on a loan in the normal course of business, nor did it authorize a speculative suit by a borrower to obtain proof of the enforceability of the note.

Adler v. Newell (1895) 109 Cal. 42 offers Petitioner no better outcome. There, the court was faced with a situation not presented here--multiple adverse claimants to the rights under the loan and the borrower brought the action to determine which one was entitled to the rights. By contrast, borrowers such as Petitioner, even if they feign concern over the possibility that other claimants might exist, cannot point to any actual competing claimants or conflicting demands on their loan. In contrast to *Adler* and *Cockrell*, the type of challenges at issue here involve non-judicial foreclosure proceedings in which the only ones disputing the rights of the beneficiaries, servicers and/or trustees are the borrowers themselves.

Petitioner also goes to great lengths to argue that HBOR itself creates standing [POB at 30-37]. Petitioner continues to misread the applicable law and engage in wishful

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[19] Petitioner also ignores the Court's analysis: "[T]he time of transfer of the deed of trust is immaterial.... While no particular form of assignment is necessary, the assignment, to be effectual, must be a manifestation to another person by the owner of the right indicating his intention to transfer, without further action or manifestation of intention, the right to such other person...." Id. at 291.

thinking. Thus, while Petitioner touts Civil Code §§ 2923.55, 2924(a)(6) and 2924.17 as statutory authority for her standing to challenge the validity of the securitization and assignment processes, the statutory language belies her reliance. Section 2923.55(b)(1) merely requires a mortgage servicer to send the borrower, upon request, a limited range of specifically identified documents—not including any securitization documents but encompassing "any assignment, *if applicable*, of the borrower's mortgage or deed of trust required to demonstrate the right of the mortgage servicer to foreclose." [emphasis added] The statute does not require that there be an assignment, nor that it be recorded (hence, the "if applicable" language), and it certainly does not give the borrower the right to dispute the validity or timeliness of the assignment. Section 2924(a)(6), for its part, simply states:

> 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.

Again, the statute makes no reference to securitization at all, nor to any right of the borrower to attack that authority at all, let alone attacking it based on imagined defects in the timing or manner in which that authority was obtained; instead the statute focuses on the question of whether the holder of the beneficial interest has authorized the foreclosure to commence. <u>There is no question in this case, or its myriad siblings, of whether the</u>

current beneficiary authorized the foreclosure.[20] Rather the borrowers merely dispute whether the beneficiary can enforce its rights due to technical or temporal glitches the borrowers hope to find in the acquisition process.

Petitioner's citation to § 2924.17 fares no better. Once more, that statute has nothing to do with securitization and does nothing to create standing in the borrower to attack the timing and processes of either the securitization or assignment of the loan. Section 2924.17 instead imposes a duty on the mortgage servicer (not the trustee or the beneficiary) to "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." The mortgage servicer is not required to consider the timeliness of the acquisition of the loan vis-à-vis the trust's closing date, nor to first record an assignment. It is just obligated to confirm the default and that it has the requisite authority from the beneficiary. The borrower has no right to second-guess that review and the statute may only be enforced by a covered government entity. Civil Code § 2924.17(c).

It is also ludicrous for Petitioner to contend that HBOR "overruled" *Jenkins, supra* or any "like cases" [POB at 32-33]. Nothing in HBOR or its legislative history even hints at such an intent and, as HBOR predates *Jenkins* (which was decided after its

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[20] Most, but not all, borrowers do not dispute that the current beneficiary was *intended* to acquire the loan, though some do try to argue that the original lender did not or could not approve such a transaction, whether because of a bankruptcy, cessation of business or otherwise. Petitioner does seem to dispute the intent/ability of the original lender, New Century, to approve the transfer in light of its bankruptcy albeit based on mistaken presumptions as to the effect of the date of recording of the assignment [POB at 6].

effective date), it would be difficult for it to have intended to overrule a case that had yet to be decided.

Of course, as previously noted, since HBOR did not go into effect until January 1, 2013 and is not retroactive,[21] these arguments fail for the additional reason that the securitization, assignment and/or substitution sought to be challenged predate the effective date.[22] Petitioner's suggestion that this Court find that HBOR "merely restates long-standing California law" [POB at 36] ignores the legislative history, the language of the statutes (including the "sunset" clauses), and common sense.[23]

Finally, while it would be contrary to well-established law and policy to adopt Petitioner's theories to allow borrowers to challenge a beneficiary's (or its servicer's)

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[21] California law is clear that statutes operate prospectively absent a clear indication that the Legislature intended retroactive application. *Western Security Bank v. Superior Court,* (1997) 15 Cal.4th 232, 243; *Evangelatos v. Superior Court,* (1988) 44 Cal.3d 1188,1207- 1210. *See also* fn.9, *supra.* Petitioner's claim that the Court should not reject HBOR claims based on the effective date of the statutes because it would "draw the...courts...into hundreds of disputes" over when conduct took place [POB at 36] is not only unsupported but runs counter to logic and good pleading—indeed, were it otherwise, the same argument would apply with even greater force to statute of limitations defenses. In a well-pled complaint, whether the conduct occurred before or after the effective date of HBOR should be obvious.

[22] It should also be noted that most of the provisions of HBOR, including those upon which Petitioner seeks to rely, "sunset" on January 1, 2018 so, rather than constituting either a reaffirmation of existing law or a seismic in the law, it is actually just a temporary fix to a crisis.

[23] *Jolley v. Chase Home Finance, LLC,* (2013) 213 Cal.App.4th 872, 905-05, provides no meaningful support since the court there acknowledged that HBOR was inapplicable to conduct occurring prior to its effective date and conceded [at 901] that the case before it involved a construction loan rather than a residential mortgage, which invoked different considerations.

rights under an assignment to conduct a non-judicial foreclosure, it would be particularly egregious to find standing for the borrower to sue a foreclosure trustee as well.

A foreclosure trustee occupies a unique position in most disputes over a non-judicial foreclosure. Unless the trustee is itself properly chargeable with some wrongdoing in the conduct of its statutory or contractual duties *it is utterly irrelevant* to the trustee whether the foreclosure sale of the property is upheld or voided due to an act or omission of the beneficiary. Indeed, a trustee under a deed of trust is not considered to be a trustee in the traditional sense of that term. As stated in *Stephens, Partain & Cunningham v. Hollis*, (1987) 196 Cal.App.3d 948, 955:

> Although commonly called a "trustee," a trustee under a deed of trust is not the kind of trustee identified in former Civil Code section 2229. Just as a panda is not an ordinary bear, a trustee of a deed of trust is not an ordinary trustee. "A trustee under a deed of trust has neither the powers nor the obligations of a strict trustee; he serves as a kind of common agent for the parties. [Citations.]" (3 Witkin, Summary of Cal. Law (8th ed. 1973) Security Transactions in Real Property, § 9, p. 1497; see 7 Witkin, op. cit. supra, Trusts, § 3, pp. 5368-5369.)

Instead, while an ordinary trustee owes certain fiduciary duties to its principals, the trustee under a deed of trust owes only such duties as are specifically set forth by the Civil Code or by contract. *Id. Cf. Monterey S. P. Partnership v. W. L. Bangham, Inc.*, (1989) 49 Cal.3d 454, 462-63 (holding that a trustee had no duty to defend a beneficiary's interest in the property against a competing mechanic's lien); *Heritage Oaks Partners v. First American Title Ins. Co.*, (2007) 155 Cal.App.4th 339, 345-46 (refusing to find any duty owed by the trustee to a third party purchaser at the foreclosure sale: "Recognizing such a duty would upset the "carefully crafted balancing" of interests

described in *I.E. Associates v. Safeco Title Ins. Co.*"). Those duties do not include deciding whether there has been a default entitling the beneficiary to foreclose nor being the arbiter in disputes between the trustor and the beneficiary over the debt. *See, e.g., Fleisher v. Continental Aux. Co.*, (1963) 215 Cal.App.2d 136, 139: "Without more, the case authority in California does not support the imposition of any further duty on the trustee, such as to make inquiry as to the status of the underlying debt before making a reconveyance." *Accord Hatch v. Collins,* (1990) 225Cal.App.3d 1104, 1111-12, rejecting a claim by the trustor of breach of fiduciary duty by the trustee: "A trustee therefore, while an agent for both the beneficiary and the trustor, does not stand in a fiduciary relationship to either."

D. Generally, a Non-Party Lacks Standing to Sue Under an Agreement

As discussed in *Killian v. Millard,* (1991) 228 Cal.App.3d 1601, 1605, in rejecting the claim of a non-party seeking to void an investment contract:

> It is well settled that only parties with a real interest in a dispute have standing to seek its adjudication. (Code Civ.Proc., § 367.) A real party in interest ordinarily is defined as the person possessing the right sued upon by reason of the substantive law. (*Powers v. Ashton* (1975) 45 Cal.App.3d 783, 787, 119 Cal.Rptr. 729.) "The question of standing to sue is one of the right to relief and goes to the existence of a cause of action against the defendant (*cf. Los Angeles Fire & Police Protective League v. Rodgers*, [1970] 7 Cal.App.3d 419, 423 [86 Cal.Rptr. 623)." (*Payne v. United California Bank* (1972) 23 Cal.App.3d 850, 859, 100 Cal.Rptr. 672.) "The right to relief ... goes to the existence of a cause of action ... Where the complaint states a cause of action in someone, but not in the plaintiff, a general demurrer for failure to state a cause of action will be sustained." (*Parker v. Bowron* (1953) 40 Cal.2d 344, 351, 254 P.2d 6).)
>
> Millard had no substantive right in the contract between Syndicators and Investors. He lacked standing to seek to void that contract.

See also Lafferty v. Wells Fargo Bank, (2013) 213 Cal.App.4th 545, 570 (third party who was not an intended beneficiary of an agreement lacked standing to sue under it); *Gantman v. United Pacific Ins. Co.*, (1991) 232 Cal.App.3d 1560, 1566-1569 (where a corporation is party to a contract, the corporation is the only party with standing to sue, as the only real party in interest).

With one published exception, *Glaski, supra.* this precept has been followed in all the cases in California that have considered whether a borrower can challenge defects in the context of a securitization, assignment, or substitution of trustee—all agreements to which the borrower is *not* a party nor an intended third party beneficiary. *Jenkins v. JP Morgan Chase Bank, N.A.*, (2013) 216 Cal.App.4th 497, 515 ("an unrelated third party to the alleged securitization, and any other subsequent transfers of the beneficial interest...lacks standing to enforce any agreements, including the investment trust's pooling and servicing agreement, relating to such transactions."), and *Siliga, supra* (and cases cited therein), recognizing that the assignment does not change the borrower's obligations. *See also Mobine v. OneWest Bank, FSB*, 2012 WL 1520116 at *3 (S.D. Cal. Apr 27, 2012) ("To the extent Plaintiff attempts to create an issue in the FAC as to OneWest's standing to collect payments on the loan as a result of the securitization process, courts have uniformly held that whether a loan is securitized has no bearing on a party's standing on a party's interest in a loan."); *Bernardi v. JP Morgan Chase Bank, NA*, 2012 WL 2343678 at *2 (N.D Cal. June 20, 2012) ("this court must conclude—as many other courts have previously—that Plaintiff cannot plead an actual controversy in the absence of standing to enforce the PSA."); *Sami v. Wells Fargo Bank*, 2012 WL

967051 at *4-6 (N.D. Cal. March 21, 2012) (rejecting claim that securitization invalidates standing to foreclose and finding borrower has no standing to argue violations of the terms of a PSA rendered the securitization void).

Petitioner's reliance on *Berrera v. State Farm Mut. Auto, Ins. Co.*, (1969) 71 Cal.2d 659, 675-76 is misplaced as that case involved a claim by an accident victim under an insurance policy issued to one of its insured—making the plaintiff the intended third party beneficiary of the contract, unlike the borrower's relationship to the securitization and assignment process—and insurance claims are treated differently than other disputes as a matter of public policy. *See, e.g. Erlich v. Menezes,* (1999) 21 Cal.4th 543, 552-554. Here, there is no intent to benefit a borrower in the course of securitizing or selling a loan, nor is the borrower's obligation altered as a result. The only change from the borrower's perspective isas to the entity to whom payment must be made. It is simply irrelevant to a borrower's obligations who that entity is as long as the borrower is told where to make the payments and who to contact if there are problems. RESPA already amply protects the borrower's interests in this regard.

The invocation of the factors of *Biakanja v. Irving,* (1958) 49 Cal.2d 547 [POB at 28-33] adds nothing to the core question in this Petition—standing---as the *Biakanja* test, by its own terms, merely determines whether a tort duty is owed to third parties "not in privity" of contract, typically in the context of a negligence claim.[24] *Id.* at 650. It does

[24] Negligence is not one of the theories upon which borrowers typically challenge the validity of securitizations, assignments, or substitutions of trustee. Petitioner, for example, sued only to quiet title. *Mendoza v. JP Morgan,* also pending before this Court

not affect the validity or enforcement of a contract, nor does it create standing in a non-party to that contract to challenge its enforcement or transmute ordinary contract disputes into torts. *See generally Stop Loss Ins. Brokers v. BTMG,* (2006) 143 Cal.App.4th 1036, 1042-43, holding that "courts have not applied the *Biakanja* factors to create broad tort duties in arms-length business dealings whenever it is convenient to resort to the law of negligence. *Biakanja* and *J'Aire* address the specific situation that arises when (1) the defendant was acting pursuant to a contract, and (2) the defendant's negligent performance of the contract injures a third party. Neither of these prerequisites is met in this case."

Moreover, applying the six *Biakanja* factors to a typical challenge to securitization or assignment *would not* favor the borrower. As this Court observed in *Quelimane Co. v. Stewart Title Guaranty Co.*, (1998) 19 Cal.4th 26, 58 (finding that the *Biakanja* test did not warrant finding negligence in refusing to issue title insurance on property encumbered by a tax lien): "Recognition of a duty to manage business affairs so as to prevent purely economic loss to third parties in their financial transactions is the exception, not the rule, in negligence law." This Court therefore held: "[W]e decline to recognize a duty to avoid business decisions that may affect the financial interests of third parties, or to use due care in deciding whether to enter into contractual relations with another." *Id.*

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involved claims of quiet title and wrongful foreclosure. *Glaski* sued for wrongful foreclosure, fraud, cancellation of instruments, declaratory relief, quiet title and unfair business practices. 218 Cal.App.4th at 1087-88 (overruling the demurrers as to the wrongful foreclosure claim).

Assuming, arguendo, that the six factors of the *Biakanja* were relevant here, they would be of no avail to borrowers such as Petitioner. The six factors are: "[1] the extent to which the transaction was intended to affect the plaintiff, [2] the forseeability of harm to him, [3] the degree of certainty that the plaintiff suffered injury, [4] the closeness of the connection between the defendant's conduct and the injury suffered, [5] the moral blame attached to the defendant's conduct, and [6] the policy of preventing future harm." 49 Cal.2d at 650. Despite the contortions of POB, none of these factors are implicated by either securitization or assignment, and most of them do not come out in borrower's favor even with respect to substitutions of trustee.

First, neither securitization nor assignment of a loan is intended to affect the borrower's interests; rather, they are for the benefit of the financial institutions which elect to trade in the secondary market, and the transactions do not alter the borrower's rights and duties under the loan.

Second, neither securitization nor assignment (nor a substitution of a trustee, for that matter) causes the borrower any harm. It is irrelevant to the borrower who owns or services the loan. Thus, there is no forseeability.

Third, the degree of certainty that the borrower suffered injury, if any, cannot typically be determined at the pleading stage absent detailed factual pleading by the borrower, which tends to be absent.

However, even where such injury has been established, the borrower would run afoul of the Fourth part of the test as the injury would not be attributed to the securitization, assignment or substitution.

Fifth, no moral blame attaches to the sale or acquisition of a loan in the secondary market, nor to the execution of an assignment or substitution of trustee.

Sixth, the policy of preventing future harm has no real applicability to securitizations, assignments or substitutions—they are not inherently bad nor, even under Petitioner's strained theories, do they themselves cause the harm.

E. New York Trust Law and REMIC Rules Do Not Support Standing

In large measure, *Glaski* based its finding that a borrower had standing on its interpretation of New York State Trust law, which governed the securitized trust at issue there.[25] *Glaski, supra,* at 1096-97. According to *Glaski,* a literal reading of New York Trust law would render the post-closing acquisition of a loan by a securitized trust void, rather than merely voidable, and, as a result, a borrower was entitled to challenge the enforceability of a late-acquired (or otherwise defective) deed even though the borrower was not a party to the trust documents. *Id. Glaski* got it wrong.

As an initial matter, the sole New York case which *Glaski* cited to support its interpretation of New York law was *Wells Fargo Bank, N.A. v. Erobobo* (Apr. 29, 2013) 39 Misc.3d 1220(A), 2013 WL 1831799, slip opn. p. 8—a New York *trial level* decision. The higher (appellate level) New York courts that have considered the issue, which *Glaski* blithely ignored, had long before come to the opposite conclusion. *See, e.g. Mooney v. Madden,* (1993) 193 A.D.2d 933, 933-34, 597 NYS2d 775, 776; *Hine v. Hine,* (1907) 118 A.D. 585, 592, 103 NYS 535, 540; and *In re Levy*, (2010) 69 A.D.3d 630,

[25] Many, but by no means all, securitized trusts specify that they are governed by New York law. Many, but by no means all, borrowers file complaints simply assuming New York Trust law applies regardless of whether it does.

632, 893 NYS2d 142, 144, all recognizing that an act in violation of the terms of the trust was merely voidable—at the option of the beneficiary of that trust—not void. *See also Bank of New York Mellon v. Gales,* (2014) 116 AD3d 723, 725, 982 NYS2d 911, 912, affirming denial of mortgagor's motion to dismiss foreclosure complaint because they "did not have standing to assert noncompliance with the subject lender's pooling service agreement."

In reliance on these cases, among others, and its review of the governing New York statutes[26], in *Rajamin v. Deutsche Bank Nat'l Trust Co.* (2d Cir. N.Y. 2014) 757 F.3d 79, 90[27] the Second Circuit rejected *Erobobo* and, by express reference, *Glaski*:

> While a few other courts have reached conclusions about EPTL § 7-2.4 similar to that of the *Erobobo* court, *see, e.g., Auroa Loan Services LLC v. Scheller*, No. 2009-22839, 2014 WL 2134576, at *2-*4 (N.Y.Sup.Ct. Suffolk Co. May 22, 2014); *Glaski v. Bank of America, National Association*, 218 Cal.App.4th 1079, 1094-98, 160 Cal.Rptr.3d 449, 461-64 (5th Dist. 2013), we are not aware of any New York appellate decision that has endorsed this interpretation of § 7-2.4. And most courts in other jurisdictions discussing that section have interpreted New York law to mean that "a transfer into a trust that violates the terms of a PSA is voidable rather than void," [citations omitted]; *see also Butler v. Deutsche Bank Trust Co. Americas*, 748 F.3d 28, 37 n. 8 (1st Cir.2014) ("not[ing] without decision... that the vast majority of courts to consider the issue have rejected *Erobobo*'s reasoning, determining that despite the express terms of [EPTL] § 7-2.4, the acts of a trustee in contravention of a trust may be ratified, and are thus voidable").

The Second Circuit then went on to hold that:

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[26] Some borrowers even rely on provisions of the New York Trust law that have no application to business trusts, such as the securitized trusts at issue in most of these cases, but rather only to personal, charitable or family trusts.

[27] As noted by the Second Circuit's opinion, *Id.* at 86, Rajamin also filed an unsuccessful action against Deutsche Bank in the Los Angeles Superior Court, LASC Case No. B237560. The appellate court's decision was, unfortunately, unpublished.

> In sum, we conclude that as unauthorized acts of a trustee may be ratified by the trust's beneficiaries, such acts are not void but voidable; and that under New York law such acts are voidable only at the instance of a trust beneficiary or a person acting in his behalf. Plaintiffs here are not beneficiaries of the securitization trusts; the beneficiaries are the certificateholders. Plaintiffs are not even incidental beneficiaries of the securitization trusts, for their interests are adverse to those of the certificateholders. *Plaintiffs do not contend that they did not receive the proceeds of their loan transactions; and their role thereafter was simply to make payments of the principal and interest due.* **The law of trusts provides no basis for plaintiffs' claims.**

Id. [emphasis added]. *See also Anh Nguyet Tran v. Bank of New York*, 2014 WL 1225575, at *5 (S.D. N.Y. Mar. 24, 2014), finding *Glaski* and *Erobobo* "run counter to better-reasoned cases, which apply the rule that a beneficiary can ratify a trustee's ultra vires act."

F. ***Glaski* was Wrongly Decided and has Repeatedly Been Rejected**

The State and Federal Courts in California have been no more receptive to the holding of *Glaski* than were those in New York.

1. Pre-*Glaski* Cases

The state of the law prior to *Glaski* reflects that the *Glaski* decision was an outlier. *See, e.g., Siliga, supra* (borrowers lacked standing to complain about servicer's and assignee's alleged lack of authority to foreclose where borrowers were in default under the note, absent evidence that the original lender would have refrained from foreclosure); *Jenkins, supra* (borrower does not have the right to bring a preemptive judicial action to determine defendants' standing to foreclose; foreclosing party need not have beneficial interest in promissory note and deed of trust); *Fontenot, supra* (to recover on wrongful foreclosure claim, borrower must demonstrate that the alleged imperfection in the

foreclosure process was prejudicial; no prejudice exists where borrower was in default and the assignment of the loan did not interfere with the borrower's ability to pay); *accord Herrera, supra,* at 1506.

The foregoing analysis holds even greater weight where the borrower files suit before the trustee's sale occurs. As discussed in *Gomes, supra,* at 1155, California's nonjudicial foreclosure scheme does not "provide for a judicial action to determine whether the person initiating the foreclosure process is indeed authorized." (holding also that: "The recognition of the right to bring a lawsuit to determine a nominee's authorization to proceed with foreclosure on behalf of the noteholder would fundamentally undermine the nonjudicial nature of the process and introduce the possibility of lawsuits filed solely for the purpose of delaying valid foreclosures."). Petitioner nonetheless seeks to encourage just such purely speculative lawsuits.

2. Post-*Glaski* Cases

While the correct legal decision is not a game of numbers, it is nonetheless significant that the vast majority of subsequent decisions have refused to adopt the holding of *Glaski.*[28] *See, e.g., Flores v. EMC Mtge. Co.,* (E.D. Cal. 2014) 997 F.Supp.2d 1088, 1104 ("Of key importance, numerous courts disagree with and refuse to follow *Glaski,* including this Court."); *Haddad v. Bank of America, N.A.,* 2014 WL 67646, at *3-5 (S.D. Cal. Jan. 8, 2014)("This Court finds the reasoning in the above-cited caselaw to

[28] It is no coincidence that all three of the cases up for review by this Court, *Yvanova, Kesthgar* and *Mendoza,* are ones that rejected *Glaski.* Other than *Glaski*, itself (as to which the parties did not seek review by this Court), there are no published decisions that find borrower standing to challenge a securitization as defective.

be more persuasive than the reasoning in *Glaski.*") ; *Zapata v. Wells Fargo Bank, N.A.*, 2013 WL 6140528, at *6 (N.D. Cal., Dec. 10, 2013) ("Every court in this district that has evaluated *Glaski* has found it is unpersuasive and not binding authority"); *Boza v. U.S. Bank NA*, 2013 WL 5943160 at *7 (C.D. Cal. Oct. 18, 2013) ("More recently, other district courts have declined to follow Glaski, noting that it is 'in a clear minority' on the issue of standing."); *Newman v. Bank of New York Mellon,* 2013 WL 5603316, at *3 n.2 (E.D. Cal. Oct. 11, 2013) ("[N]o courts have yet followed *Glaski* and *Glaski* is in a clear minority on the issue.); *In re Sandri*, (Bankr. N.D. Cal. 2013) 501 B.R. 369, 374-77 (rejecting *Glaski* in favor of the holding of the majority of California courts that borrowers lack standing to assert defects in the authority to foreclose).

Instead, most courts that have addressed the same issues have expressly rejected or distinguished *Glaski*, with most holding that California law is clear that a borrower who is not a party to the securitized trust has no rights under the trust documents. *See, e.g., Flores, supra* (and cases cited therein); *In re Sandri, supra; see generally Lester v. JP Morgan Chase Bank*, 2013 WL 3146790 (N.D. Cal. June 18, 2013), holding that borrowers have "no standing to challenge foreclosure based on a loan's having been securitized" and that securitizing a loan does not, of itself, extinguish the right to foreclose.

The most recent published decision to reject *Glaski* is *Boyce v. T.D. Service Co.*, 2015 WL 1290770 (Mar. 23, 2015), where the court held:

> Notwithstanding *Glaski*, we reject the argument that the assignment of the $1.155 million note and deed of trust to a mortgage investment pool is a "get out of debt" card for appellant. "Because a promissory note is a

> negotiable instrument, a borrower must anticipate it can and might be transferred to another creditor. As to [appellant], an assignment merely substituted one creditor for another, without changing [his]/her obligations on the note." (*Herrera v. Federal National Mortgage Assn.* (2012) 205 Cal.App.4th 1495, 1507, 141 Cal.Rptr.3d 326.) Appellant argues that the transfer of the note and deed of trust from PMG Mortgage to Option One, and from Option One to Wells Fargo were improper. Even if he is correct, "the relevant parties to such a transaction were the holders (transferors) of the promissory note and the third party acquirers (transferees) of the note." (*Jenkins v. JPMorgan Chase Bank, N.A., supra*, 216 Cal.App.4th at p. 515, 156 Cal.Rptr.3d 912.) Appellant is not the victim because his loan obligation remained unchanged. "Instead, the true victim may be an individual or entity that believes it has a present beneficial interest in the promissory note and may suffer the unauthorized loss of its interest in the note. It is also possible to imagine one or many invalid transfers of the promissory note may cause a string of civil lawsuits between transferors and transferees." (Ibid.) But appellant "may not assume the theoretical claims of hypothetical transferors and transferees for the purposes of showing a 'controversy or concrete actuality.' [Citation.]" (*Ibid.*)

Indeed, even in the recent case of *Kan v. Guild Mortgage Company,* (2014) 230 Cal.App.4th 736, the court, while declining the opportunity to further pile on in noting the varied errors in the *Glaski* opinion, instead found *Glaski* was wholly inapplicable where the foreclosure sale had not yet taken place:

> Critically, the primary claim at issue in *Glaski* was one for wrongful foreclosure. In contrast, Kan seeks to assert a preforeclosure cause of action for quiet title. Although *Glaski* discussed *Gomes*, *supra*, 192 Cal.App.4th 1149, and distinguished it in certain respects, *Glaski* did not take issue with *Gomes*'s holding that a preforeclosure, preemptive action is not authorized by the nonjudicial foreclosure statutes because it creates an additional requirement that a foreclosing entity first demonstrate in court that it is entitled to foreclose. (See *Gomes*, *supra*, 192 Cal.App.4th 1149, 1154-1156.) As explained in *Jenkins* (a case not discussed in the *Glaski* opinion), allowing a plaintiff to assert a preemptive action like the one Kan proposes "would result in the impermissible interjection of the courts into a nonjudicial scheme enacted by the California Legislature." (*Jenkins*, *supra*, 216 Cal.App.4th 497, 513.) Further, it "'would be inconsistent with the policy behind nonjudicial foreclosure of providing a quick, inexpensive and efficient remedy.'" (*Id.* at p. 512, quoting *Gomes*, *supra*, 192 Cal.App.4th

> 1149, 1154, fn. 5.) *Jenkins* involved allegations essentially identical to Kan's proposed amended allegations—that the subject deed of trust was not assigned to the investment trust prior to its closing date. We agree with *Jenkins* that such allegations do not give rise to a viable preemptive action that overrides California's nonjudicial foreclosure rules.

At 743-44. While *Kan* chose not to address the post-foreclosure effect of *Glaski*, *Boyce* is a post-foreclosure decision and the defects in the *Glaski* opinion, discussed in the preceding Sections, do not all depend on whether a foreclosure sale occurred to establish why *Glaski* was incorrectly decided and should not be followed.

Perhaps most interesting, for present purposes, on March 3, 2014, the court in Petitioner's bankruptcy dismissed her adversary complaint, which asserted similar claims to those at issue in this case, again based on her lack of standing to challenge securitization. *Yvanova v. THR California/LP/LLC/Successor to DBNB, Trustee to MSAC-2007 Trust HE-1)*, 2014 WL 815774 at *7-8 (Bankr. C.D. Cal. Mar. 3, 2014), ruling, in pertinent part: "However, a majority of courts have declined to follow *Glaski*. This Court adopts the reasoning of the overwhelming authority. Plaintiff lacks standing to allege violations of the PSA and an invalid assignment of the Deed of Trust. These theories do not change Plaintiff's obligations under the note." *Id.* at *8.

G. <u>Allowing Standing to Sue Would Be Against the Public Interest</u>

Allowing the borrower standing to challenge the validity of either the assignment or substitution of trustee based upon claimed defects in the timing or effect of the execution of those documents would have a devastating impact on the non-judicial foreclosure process and, ultimately, on the availability of residential loans altogether. If the Legislature had intended to grant a borrower standing, it would have provided for it in

the comprehensive statutory scheme governing non-judicial foreclosures. Instead, even under the recently enacted HBOR, the only verification obligation the Legislature elected to place on mortgage servicers *did not include* any private right on the part of the borrower to obtain proof, or even confirmation, of that verification. *See* Civil Code § 2924.17.

As held by this Court in *Dreyfuss v. Union Bk. of California,* (2000) 24 Cal. 4th 400, 411:

> **The nonjudicial foreclosure provisions evince the legislative intent to establish an equitable trade-off of protections and limitations affecting the defaulting borrower and his or her creditor**. In a nonjudicial foreclosure, the borrower is protected, inter alia, by notice requirements and a right to postpone the sale, in order to avoid foreclosure either by redeeming the property from the lien before the sale or finding another a purchaser. (Civ. Code, §§ 2903, 2924, 2924g.) Nonjudicial foreclosure proceedings must be conducted by auction in a fair and open manner, with the property sold to the highest bidder (id., § 2924g), permitting the borrower, or anyone else, to participate in setting the price for the property. Most important, the borrower is relieved from any personal liability on the debt. (See Roseleaf Corp. v. Chierighino (1963) 59 Cal. 2d 35, 42 [27 Cal.Rptr. 873, 378 P.2d 97].) Thus, in the event of a default, the borrower stands to lose only such property as he or she specifically chose to place at risk, leaving the creditor to carry the burden of any additional loss in value if the amount of the debt exceeds the value of the assets pledged as security for the loan. **For its part, the creditor gains the certainty of a "quick, inexpensive and efficient remedy**." (Moeller v. Lien, supra, 25 Cal. App. 4th at p. 832.) **A properly conducted sale does not require judicial oversight and constitutes "a final adjudication of the rights of the creditor and debtor."** (emphases added).
>
> [emphases added].

Similarly, this Court, in *I. E. Associates, supra,* rejected claims that trustees have a duty to search for a trustor's current address in order to provide notice of the sale, cautioning that "imposing on the trustee a duty of taking reasonable steps to discover the

trustor's current address would bring far more cost and uncertainty into the system." *Id.* at 289. *Accord Perez v. 222 Sutter Street Partners*, (1990) 222 Cal.App.3d 938, 945. *See also Residential Capital, LLC v. Cal-Western Reconveyance* (2003) 108 Cal.App.4th 807, 825 (trustee not liable to third party purchaser for failure to verify status of pending foreclosure); *Heritage Oaks Partners, supra; Monterey S. P. Partnership, supra; Fleisher, supra.*

Allowing borrowers to raise purely speculative challenges to the right to non-judicially foreclose on a deed of trust under California law would be tantamount to imposing additional obligations on the trustee, the beneficiary of the loan or its servicer beyond those required by statute or contract. This would clearly frustrate the well-established and sensible public policy behind the non-judicial foreclosure process and upset the legislatively determined balance between the rights of the borrower and the creditor. This would only serve to inject considerable—and unwarranted—costs and uncertainty into the carefully crafted, statutory non-judicial foreclosure system. The trustee, who typically does not have access to the information or resources needed to independently resolve disputes between a borrower/trustor and beneficiary, would be put at risk every time it commenced a foreclosure and the costs *for all parties*, <u>including the struggling borrower</u>, would increase exponentially. The statutorily authorized non-judicial foreclosure process would jam up, if not grind to a halt.

This is not baseless speculation; according to Realty Trac, when Nevada implemented its new, more stringent, foreclosure proceedings in October, 2011, the number of non-judicial foreclosures dropped over 75% from September, 2011 to October,

2011 when the new laws took effect. In fact, according to the records maintained by Nevada's court-mandated Foreclosure Mediation Program (which gets paid a fee upon the filing of every Notice of Default), the number of foreclosures in September 2011—the month before the new law went into effect—was 4,684 while the following month the number was just 80.[29]

Unsurprisingly, in the wake of HBOR, the number of borrower lawsuits seeking to delay or prevent foreclosure also skyrocketed. Giving borrowers' standing to challenge agreements to which they are not a party (such as the securitization, assignment and/or substitution of trustee) will inevitably swell the rising tide of speculative litigation—designed more to buy time than redress any actual harm to the borrower.

Borrowers sometimes try to justify delaying foreclosures by claiming that there is no real harm to the true beneficiary/investors since they have the value of the property to fall back on should borrowers fail to prevail. However, this claim ignores economic reality. There are very real costs to the servicer and the beneficiary/investors as a result of the delay beyond just the attorney fees and costs of litigation. Not only are there carrying costs for the property that the borrowers are frequently not paying (taxes, insurance and maintenance) but the income stream which is supposed to flow to the beneficiaries from the loan payments ceases. Exacerbating the problem is the serious risk

[29] In the ensuing 28-month period, October 2011 to February 2014, the average number of NOD filings in Nevada was just under 1,040 per month (including an unusually robust 4,855 NODs in September, 2013).

of decreasing property values—the property can wind up being worth *less than* the balance owed on the loan during the delay caused by the borrower's tactics.[30]

As a consequence, lenders who intend to sell their loans in the secondary market—which are most of them---will be more reluctant to make loans in California, let alone to refinance existing loans from other lenders.Those who do get loans are likely to find the criteria stricter and the rates higher due to the increased risk. Investors will also be more hesitant about investing in securitized trusts for similar reasons, further drying up the pool of funds available to make loans. The rate of borrower defaults will also probably increase as borrowers find it harder to obtain new credit (and/or as a result of some less scrupulous borrowers' "gaming the system" to continue to live in properties without having to make any payments to anyone). The amount of available housing in the market will shrink as there will be fewer foreclosed properties for sale; and those properties that are not being (on which borrowers are already not making their loan payments) are also less likely to be properly insured or maintained, resulting in increased blight and property hazards. Unfortunately, these harms are not just speculative., Some of them are already being felt across the State under existing laws such as HBOR and local ordinances.

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[30] According to RealyTrac, as of the fourth quarter of 2014, there were still 7,052,570 U.S. residential properties seriously underwater--13% of all mortgaged properties, down from a high of 12,824,279 in the second quarter of 2012. http://www.realtytrac.com/news/mortgage-and-finance/year-end-2014-underwater-home-equity-report/ In California alone for that same quarter, about 11.5% of homeowners were in negative equity or near negative equity status according to CoreLogic. http://www.corelogic.com/research/negative-equity/corelogic-q4-2014-equity-report.pdf

Whether or not these potential consequences are an acceptable or desirable outcome is a decision that is best reserved to the Legislature, not the Courts.

V. CONCLUSION

Accordingly, the ALFN and the UTA respectfully submit that this Court should deny the Petition and affirm the lower court's ruling that a borrower lacks standing to challenge the securitization of a real estate secured loan, the assignment of that loan and/or even any substitution of the foreclosure trustee in connection therewith. There is simply no good faith basis upon which such a challenge should be allowed by one who is not a party to those transactions, particularly absent any actual prejudice. Any contrary result would be contrary to public policy and the public interest.

Respectfully submitted,

DATED: April 20, 2015

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CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.520(c) of the California Rules of Court, I hereby certify that this brief contains 13,825 words, including footnotes but excluding the accompanying Application for Leave to File. In making this certification, I have relied on the on the Microsoft Word 2010 word-processing program used to prepare this brief.

Respectfully submitted,

DATED: April 20, 2015

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PROOF OF SERVICE

I, Julie L. Hansen, declare as follows:

I am employed in the County of Orange, State of California. I am over the age of eighteen (18) and not a party to the within action. My business address is 4665 MacArthur Court, Suite 280, Newport Beach, California 92660. I am readily familiar with the practices of Wright, Finlay & Zak, LLP, for collection and processing of correspondence for mailing with the United States Postal Service. Such correspondence is deposited with the United States Postal Service the same day in the ordinary course of business.

On April 20, 2015, I served the within **APPLICATION FOR LEAVE TO FILE AMICUS BRIEF AND AMICUS BRIEF IN SUPPORT OF RESPONDENTS** on all interested parties in this action as follows:

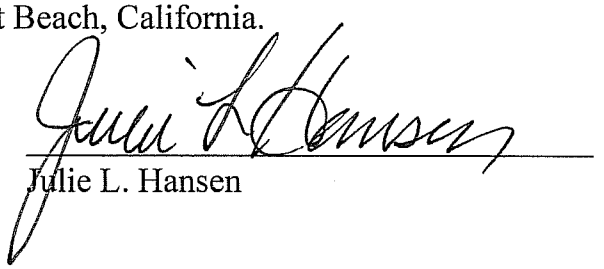
[X] by placing [ ] the original [X] a true copy thereof enclosed in sealed envelope(s) addressed as follows:

[X] (BY OVERNIGHT- NEXT DAY DELIVERY) I placed true and correct copies thereof enclosed in a package designated for overnight delivery with the delivery fees provided for.

[X] ELECTRONIC SUBMISSION – Pursuant to CRC, rule 8.212(c)(2), I caused electronic submission to the California Supreme Court.

[X] (State) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on April 20, 2015, at Newport Beach, California.



Julie L. Hansen

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