SUPREME COURT CASE NO. S218973
COURT OF APPEAL CASE NO. B247188

IN THE SUPREME COURT OF CALIFORNIA

TSVETANA YVANOVA,

Plaintiff and Appellant,

v.

NEW CENTURY MORTGAGE CORPORATION, OCWEN LOAN SERVICING, LLC, WESTERN PROGRESSIVE, LLC, and DEUTSCHE BANK NATIONAL TRUST COMPANY, et al.,

Defendants and Respondents.

After a Published Decision by the Court of Appeal
Second Appellate District, Division One
Case No. B247188

REPLY TO ANSWER TO PETITION FOR REVIEW

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INTRODUCTION

Although unpublished opinions from federal courts and some California appellate courts disagree with *Glaski v. Bank of America,* 218 Cal.App.4th 1079 (2013), only two published opinions reject *Glaski* by name: *Yvanova v. New Century Mortgage,* 226 Cal.App.4th 494 (2014), and *Keshtgar v. U.S. Bank, N.A.,* 226 Cal.App.4th 1201 (2014). Despite the number of unpublished opinions cited in the Answer to the Petition for Review (or "Answer"), the real conflict here is between four published opinions—*Glaski, Yvanova, Keshtgar,* and *Jenkins v. J.P. Morgan Chase Bank, N.A.,* 216 Cal.App.4th 497 (2013). No string-cite of unpublished opinions resolves this conflict; only review by this Court can end it.

ARGUMENT

A. A string of unpublished cases does not resolve the conflict in published case law.

The Answer's core argument against review is that a series of unpublished federal court opinions rejects *Glaksi v. Bank of America*:

> "The Federal Courts of California in the Central, Northern, Southern, and Eastern Districts have consistently regarded the opinion as unpersuasive. The Ninth Circuit has recently joined in the mass rejection of *Glaski.* The universal denunciation of *Glaski* by every district court in California, the Ninth Circuit, and each California Appellate District who have been confronted with the issue, leaves no reasonable likelihood that any Court would be inclined to follow it. [¶] As a result, there is no need for Supreme Court review on the issue because the opinion has already been laid to rest." (Answer, at page 1.)

This argument ignores several crucial facts. First, the federal courts in California do not set California law. Only the California Courts, and particularly this Court, do that. When this Court announces a rule of California law, all the federal courts, including the Ninth Circuit, must follow it. *West v. AT&T,* 311 U.S. 223, 236-237 (1940). If this Court grants review and upholds *Glaski*, the federal courts wil be bound by its decision.

Second, published California courts of appeal opinions are controlling precedent in the trial courts under an appellate court's jurisdiction: "Decisions of every division of the District Courts of Appeal are binding upon and must be followed by all . . . the superior courts of this state. . . ." *Auto Equity Sales, Inc. v. Superior Court,* 57 Cal.2d 450, 455 (1962).

Unpublished opinions, no matter how numerous, do not prevent published opinions from being controlling. Unpublished California court of appeal opinions cannot be cited as authority under Rule 8.1115 (a) of the California Rules of Court. Unpublished federal court opinions may be persuasive, but they do not bind any California trial court judge. *Landmark Screens, LLC v. Morgan, Lewis & Bockius, LLP,* 183 Cal.App.4th 238, 251, fn. 6 (2010).

If the unpublished opinion comes from a California appellate court, it cannot be cited by court rule. If the unpublished opinion comes from a

federal court, it does not bind the trial judge. He or she can choose to follow the published court of appeal opinion. The only conflict that matters is between published opinions. Unpublished opinions do not end that conflict because they are not controlling.

Third, when the courts of appeal split on an issue in published opinions, the trial courts have a dilemma. If the court of appeal with jurisdiction over them has decided the issue, they must follow that court of appeal opinion. If the court of appeal directly over them has not spoken on the issue, they fend for themselves. They can pick and choose among the published opinions, making inconsistent results a certainty. A trial judge in Fresno will feel bound by *Glaski*. A trial judge in Orange County will follow *Jenkins*. Trial judges in Los Angeles or Ventura Counties will adhere to *Yvanova* or *Keshtgar*.

For litigants, their causes of action will depend on where they file. They will have a *Glaski* claim in Fresno, Stanislaus, Merced and surrounding counties. They will not have a cause of action in Los Angeles or Ventura. If they file in Sacramento or San Mateo Counties, they will have no idea if they can pursue a *Glaski* claim or not, because the First and Third Districts have not addressed *Glaski* issues in published opinions.

This conflict and the threat of inconsistent results are why Rule 8.500 (b) exists—to allow this Court to settle conflicts between published courts of appeal opinions that have reached opposite conclusions on the

same issue. That is what the Rule means when it says this Court can grant review to "secure uniformity of decision. . . ." Borrowers and homeowners throughout California deserve to know whether they can sue under *Glaski* or not. The rule should be the same everywhere; it should not depend on where you file your complaint.

B. The *Glaksi* rules are principles of California law, not New York law.

Next, the Answer argues review is not appropriate because *Glaski* misconstrues New York law. (Answer, at pages 6-7.) This Court does not solve conflicts in New York law. But, *Glaski* announced two rules of California law, not New York law. First, a borrower could allege and prove a theory that a foreclosing party lacked the power to foreclose, or lacked "standing." *Glaski v. Bank of America,* 218 Cal.App.4th at 1094. Second, if an investment trust "initiates nonjudicial foreclosure," a borrower could allege the trust did not own the loan and thus did not become the "beneficiary" because the transfer of the loan into the trust violated the trust's Pooling and Servicing Agreement. *Glaski v. Bank of America,* 218 Cal.App.4th at 1095.

The *Glaski* court adopted these rules because they were required by the language of the standard deed of trust in California, and because in California the person who claims to own a debt should prove ownership. *Glaski v. Bank of America,* 218 Cal.App.4th at 1094-1095; *Cockerell v. Title*

Ins. & Trust Co., 42 Cal.2d 284, 290(1954). New York law has nothing to do with these rules.

The Answer also does not cite controlling New York case law. *Rejamin v. Deutsche Bank National Trust Co.*, 2014 WL 1922317 (2nd Cir. June 30, 2014), is a decision from the Second Circuit Court of Appeals. It has the same effect as a Ninth Circuit opinion has in California. It may be persuasive, but it is not the last word on state law. Only the New York Court of Appeals has the final say on New York law, and the Answer cites no controlling case from the New York Court of Appeals.

Even if New York law bars a homeowners from challenging transfer of her loan into an investment trust, which it does not, California law is different. In California, any "interested party" may contend that a trustee of a trust does not own certain property, such as a loan. Probate Code section 850 provides, in part:

> (a) The following persons may file a petition requesting that the court make an order under this part:
>
> *****
>
> (3) The trustee or *any interested person* in any of the following cases:
>
> (A) Where the trustee is in possession of, or holds title to, real or personal property, and the property, or some interest, is claimed to belong to another.
>
> (B) Where the trustee has a claim to real or personal property, title to or possession of which is held by another." (Italics added.)

A homeowner in foreclosure qualifies as an "interested person." If an investment trust, acting through its trustee, contends it owns the loan on her home, the homeowner has an interest in contesting that claim. If she can show the trust does not own the loan, she can establish the trust has no power to foreclose under *Glaski*. That finding may prevent the foreclosure.

C. A homeowner can show prejudice when she is threatened with foreclosure by a party that does not own her loan.

The Answer argues that this Court should deny review because Yvanova supposedly cannot allege prejudice. (Answer, at pages 7-8) If Yvanova has not already alleged prejudice, she can amend her complaint to do so. First, she will lose her home to an entity that is a stranger to the loan and deed of trust and thus lacks the power to foreclose. *See, e.g., Rosenfeld v. J.P. Morgan Chase Bank, N.A.,* 732 F.Supp.2d 952, 973 (N.D. Cal. 2010) (applying California law), where the court ruled that "the initiation of foreclosure proceedings put the plaintiff's interest in her property sufficiently in jeopardy to allege an injury under section 17200" of the Business and Professions Code. The loss of her home will cause Yvanova irreparable injury, because her home is unique. *Rosenfeld v. J.P. Morgan Chase Bank, supra.* Damages will not compensate her. *Ibid.* She also operates her business from her home. Her business will be disrupted, and her income threatened, if she has to move.

Second, if Yvanova wants to pursue a loan modification, she must deal with the party who actually owns the loan. Only that party can agree to change the loan terms. Third, if she wishes to pay off the loan through refinancing, she will need a reconveyance of the deed of trust from the entity that actually owns the loan. *Jenkins v. J.P. Morgan Chase Bank, N.A.,* 216 Cal.App.4th at 508. Fourth, if she ever sells the home, she will have to convey clear title to the buyer. She can do this only if the actual owner of the loan reconveys the deed of trust to her and thus extinguishes the lien on the property. *Ibid.* Until Yvanova knows who really owns her loan, she can do none of these things. Unless she is allowed to challenge the foreclosure, she suffers real prejudice.

D. The validity of *Glaski* and *Jenkins* is an issue that will continue to arise.

The conflict between *Glaski* and *Jenkins* has come before this Court several times in the past year. *See, e.g., Sporn v. J.P. Morgan Chase Bank, N.A.,* Case No. S216689 (rev. denied April 23, 2014), *Baldwin v. Bank of America,* Case No. S217238 (rev. denied June 11, 2014), and *Didak v. Merrill Lynch Mortgage Investors,* Case No. S212146 (rev. denied Sept. 18, 2013). It now returns to the Court in this case and in *Keshtgar v. U.S. Bank, N.A.,* Docket No. S220012 (pet. for review filed July 28, 2014). The difference is that *Sporn, Baldwin* and *Didak* are unpublished opinions; *Yvanova* and *Keshtgar* are published. The ongoing conflict in the lower

courts means that the issue will come up again and again. The conflict will go on until this Court steps in by granting review and deciding the issue.

CONCLUSION

For these additional reasons, plaintiff and appellant TSVETANA YVANOVA respectfully requests that the Court grant review in this case and reverse the decision of the court of appeal.

Dated: August 1, 2014

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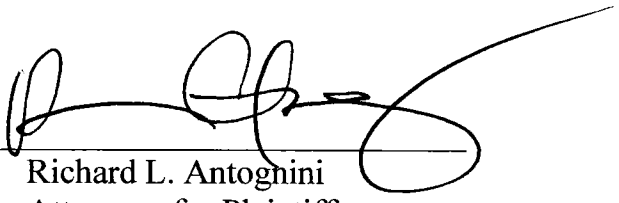
By: 

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

The text in this Reply Brief in Support of Petition for Review consists of 1,872 words, as counted by the Word 2007 word processing program used to generate the Petition.

Dated: August 1, 2014

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SUPREME COURT CASE NO. S218973
COURT OF APPEAL CASE NO. B247188
YVANOVA V. NEW CENTURY MORTGAGE

PROOF OF SERVICE BY FIRST CLASS MAIL

I, Richard L. Antognini, declare:

On August 1, 2014, I served the following document on the parties identified below: REPLY TO ANSWER TO PETITION FOR REVIEW. I placed true copies of this document in sealed envelopes addressed as follows:

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Second Appellate District, Division One
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(Efiled service only pursuant to CRC 8.70)

I deposited such envelopes in the mail at Lincoln, California. The envelope was mailed with postage fully prepaid. I am familiar with the firm's practice of collecting and processing correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on the same day with postage fully prepaid at Lincoln, California in the ordinary course of business. I am aware that on the motion of the party served, serivce is presumed invalid if the postage cancelled date or postage meter date is more than one day after the date of deposit stated in the mailing affidavit.

In addition, I sent a copy of the REPLY TO ANSWER TO PETITION FOR REVIEW to the following parties by email:

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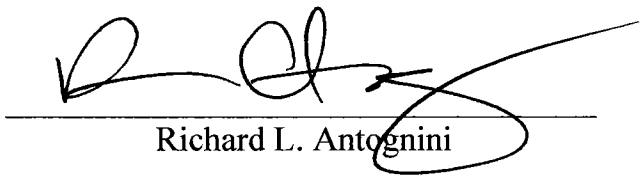
I declare under penalty of perjury of the laws of the State of California and the United States that the foregoing is true and correct. Executed on August 1, 2014 at Lincoln, California.



Richard L. Antognini