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October 11, 2013

Chief Justice Tani G. Cantil-Sakauye
and Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

Re: *Glaski v. Bank of America, National Association* et al.
Supreme Court Case No. S213814;
Appellate Case No. F064556, Disposition Date 07/31/2013;
Trial Court Case No. 09CECG03601

RESPONSE IN OPPOSITION TO REQUESTS FOR DEPUBLICATION

Dear Justices of the Supreme Court:

Pursuant to California Rules of Court ("CRC"), Rule 8.1125(b) *et seq*., I hereby submit this response in opposition to the requests to de-publish the published opinion of the appellate court that were submitted by Morgan Lewis and Alvarado Smith for the above referenced case based on the following:

STATEMENT OF INTEREST AND INTRODUCTION

My heightened interest in this response to the de-publication requests is based on my interests and concerns for California real estate law as an individual, attorney consultant, paralegal and as a law student. The *Glaski* Opinion is long overdue in California due to the fact that there has been so much injustice and lack of attention paid to the laws and provisions that these entities must follow. The clarity with which the Appellate Court reasoned in its well-written Opinion qualified for publication and, respectfully, should not be disrupted.

THE DE-PUBLICATION REQUEST PROCESS IS NOT A FORUM TO RE-TRY THE CASE AND SHOULD ONLY BE UTILIZED TO CONFIRM THAT THE

APPELLATE COURT'S OPINION MET THE STANDARD FOR PUBLICATION[1]

The de-publication process should not be used as a forum to re-try the case. Supreme Court review was an available option but no petition was filed.

Justice Joseph R. Grodin wrote in 1984 in confirming earlier explanations by the late Chief Justice Donald R. Wright[2] and then Chief Justice Rose Elizabeth Bird[3], that **de-publication is only ordered because the majority of the justices consider the opinion to be wrong in some significant way, such that it would mislead the bench and bar if it remained citable as precedent**[4]. Such is not the case here.

The Appellate Court had no choice but to assume the purported "Trust" was formed under New York Trust Laws because Plaintiff claimed that it was. Defendants never refuted or objected to this stated fact in the instant case. Clearly, there are procedures in place for objecting to facts, or clarifying them, and although it is obvious that the defendants failed in this matter, they are not entitled to another bite at the apple. Request for de-publication is not proper where a plaintiff stated facts believed to be true and the defendants' attorneys dropped their guard in realizing this. This mishap does not change the general concept where the Court established that assets are prohibited from entering a trust after it is closed and the restrictive requirements to maintain limited liability for a pass through entity in order to mitigate tax liability or a tax exempt status, which is evident upon a cursory review of the relative trust documents.

Regardless of what law organized under, this was still a real estate mortgage investment conduit ("REMIC") Trust. Internal Revenue Code § 860 *et seq.* and Del. Code Ann. Title 12 §§3801-3824 each provide similar if not more comprehensive requirements related to the actual purpose of the trust; for instance:

> **"Every direct or indirect assignment, or act having the effect of an assignment, whether voluntary or involuntary, by a beneficiary of a trust of the beneficiary's interest in the trust or the trust property or the income or other**

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[1] See Joseph R. Grodin, *The Depublication Practice of the California Supreme Court*, 72 Cal. L. Rev. 514, 514 n.1 (1984).

[2] See Julie H. Biggs, Note 8. at 1185 n.20, *Decertification of Appellate Opinions: The Need for Articulated Judicial Reasoning and Certain Precedent in California Law*, 50 S. Cal. L. Rev. 1181, 1200 (1977) quoting Chief Justice Wright.

[3] In Justice Bird's address at the State Bar Convention in San Francisco, CA Sept. 10, 1978, in Report, L.A. Daily J., Oct. 6, 1978, at 4, 8, speaking of depublished opinions as ones "with which the court does not agree" and as "erroneous ruling[s]".

[4] *Grodin, supra*, note 7, at 514-15.

distribution therefrom that is un-assignable by the terms of the instrument that creates or defines the trust is void.[5]"

The decision so adamantly disputed by Morgan Lewis and Alvarado Smith is misplaced. If so many mandatory provisions and requirements were not set forth in trust agreements for the benefit and protection of the trusts, regardless of their being governed by New York or Delaware law, there would not be an opportunity to plead a trust entity's failure to comply as long as they met their duties and complied with them. Apparently, the bank attorneys urge that the misconduct and violations of law should go unchecked and that a homeowner who stands to lose their home through such draconian remedy should have no "standing" to defend their most prized possession. The Statute of Frauds also plays a pivotal role here. An interest in real property may only convey upon a writing (grant in this case). Since the assignment of deed represents such written grant, the statute at IRC 860 stands as an estoppel from the very assignment that purports to convey the interest at a date well beyond the closing date of the REMIC trust. It is an absurdity to think that these well-schooled bank attorneys would not see such an operation of law, regardless of the New York trust status.

GLASKI DECISION DOES NOT AFFECT CALIFORNIA'S COMPREHENSIVE FRAMEWORK

The misconception that the *Glaski* decision will have any bearing on California's statutory non-judicial foreclosure scheme is meritless. California's foreclosure statutes that establish the comprehensive framework that these two law firms so feverishly aim to preserve fail to recognize that that very framework still mandates that the party that declares a default, invokes non-judicial foreclosure and exercises the power of sale clause must still be the creditor to whom the debt is owed. *Glaski* does not change that. Longstanding California law allows a borrower to set aside a trustee's sale or prevent the wrong party from foreclosing. Further, a borrower's right to "bring a court action to assert the non-existence of a default or any other defense necessary to acceleration and sale" is paramount and notably derives from the deed of trust, which is the original contract between the parties. No one, not even the Court, has the power to usurp or vacate the terms of the borrower's contract, or the pooling and servicing agreement, for that matter, that exists as a result of that original contract. The *Glaski* opinion has nothing to do with the misconduct of parties that fail to comply with the comprehensive framework that has

[5] Chapter 35, Trusts, Subchapter III. General Provisions § 3536.

been in existence for years, and has mainly suffered from its lack of enforcement in the lower courts, hence the reason for California's recent appellate decisions that bolster the homeowner's argument in every effort to protect their home.

THE CONTENTION THAT ACTS IN CONTRAVENTION TO THE TRUST ARE VOIDABLE AND CAN BE RATIFIED FAILS

Statements in the requests for de-publication that Delaware Statutes provide no comparable provision that would render a belated assignment to a trust void is simply untrue. Further, the contention that these assignments that take place after the closing date are voidable, and not void, because they can be "ratified" by the beneficiaries of the trust is baseless. Not only are the beneficiaries or "certificateholders" to these trusts not gathered together to vote and ratify these void assignments, they have not even met to appoint the legal counsel who made the valiant efforts in submitting the de-publication requests. In addition, these same certificateholders cannot ratify any act in contravention to the trust that would jeopardize the tax benefits experienced by the REMIC trusts, which is basically the sole purpose for their construction. The beneficial holders of the REMIC trust in this case would be precluded from ***any*** action on this loan because the loan never conveyed timely, as governed by the IRC Rule 860 et. Seq., thus, it is not an asset of the trust by operation of law.

The PSAs generally require the transfer of the mortgage loans to the trusts to be completed within a strict time limit – three months – after formation of the trusts in order to ensure that the trusts qualify as tax-free REMICs. In order for the trust to maintain its tax free status, the loans must have been transferred to the trust no later than three months after the "startup day," i.e., the day interests in the trust are issued (*See* Internal Revenue Code §860D(a)(4)). If loans are transferred into the trust after the three-month period has elapsed, investors are injured, as the trusts lose their tax-free REMIC status and investors like those purported to ratify these void acts may face several adverse draconian tax consequences, including: (1) the trust's income becoming subject to corporate "double taxation"; (2) the income from the late-transferred mortgages being subject to a 100% tax; and (3) if late transferred mortgages are received through contribution, the value of the mortgages being subject to a 100% tax. (*See* Internal Revenue Code §§860D, 860F(a), 860G(d)). In addition, applicable state trust law generally requires strict compliance with the trust documents, including the PSAs, so that failure to strictly comply with the timeliness, endorsement, physical delivery, and other requirements of the PSAs with respect

to the transfers of the notes and security instruments means the transfers would be void and the trust would not have good title to the mortgage loans. As a result of all the penalties and financial ramifications, it is preposterous to fathom that the beneficiaries would ratify such consequences.

A BORROWER IS NOT CLAIMING A PARTY OR BENEFIT IN A CONTRACT WHEN ASSERTING THAT AN ASSIGNMENT IS VOID

Contrary to the statements in the requests for de-publication, a borrower is not asserting any benefit in a void assignment. A borrower is not showing that he or she has been legally harmed but that the document itself is a legal nullity. To hold otherwise would allow any stranger to a deed of trust to record an assignment and subsequently foreclose with impunity based on this "immunity clause" and the command to prohibit the borrower from defending their home. One cannot simply "lob one over the fence" and cast his dirty asset whenever or wherever he pleases, then boldly make such a false statement as these Glaski pundits do so often. The challenge to a void assignment is akin to the assertion that a defunct corporation is unable to sue or transact business. Even though the party making the assertion is not a party to the corporate articles, the assertion is that the corporation lacks capacity to operate and therefore its acts are void.

GLASKI WAS CORRECTLY DECIDED

Whether Glaski was a party or third party beneficiary to the purported Pooling and Servicing Agreement ("PSA") is irrelevant. The PSA itself did NOT allow transfer into the purported trust AFTER the closing date whether the borrower invokes "standing" or not and whether or not a party to the PSA. The Appellate Court ruled that such a transfer after the "closing-date" was not allowed as it would violate the purpose of the "securitized trust." There is a longstanding maxim under California Civil Code §3517 that "[No] one can take advantage of his own wrong." It is axiomatic here that the entities formed and governed by the PSAs must comply with their duties and obligations to the trusts. When they fail to comply, which is a

wrong, they do not want anyone to challenge them when they seek to benefit from their violations.

CONCLUSION

The justices' reasoning was sound, applicable and well-reasoned. Defendants' Petition for Rehearing was rightfully denied and the numerous requests for publication were properly considered and the case was properly certified for publication. The arguments proffered supporting the requests are nothing more than meritless attempts to re-argue the case, which is not the purpose of de-publication.

The Appellate Court's Opinion was correctly decided**.** For the foregoing reasons, I respectfully request this Honorable Court deny all requests to de-publish the above referenced Appellate Court Opinion due to the importance that the continued ability to cite this well-reasoned Opinion will provide.

Respectfully submitted,

By: 

JAMES L. MACKLIN