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October 10, 2013

Chief Justice Tani G. Cantil-Sakauye
and the Associate Justices
Supreme Court of California
350 McAllister St.
San Francisco, Ca. 94102

Re: Request for Depublication
Glaski v. Bank of America, N.A. et. Al.
California Court of Appeal, Fifth Appellate District – Case No. F0634556

TO: The Honorable Chief Justice and Associates of The California Supreme Court

I am writing in opposition to the request by Deutsche Bank National Trust Company's request to depublish in the above matter. I will only address one issue – the wrongful conduct of counsel seeking depublication.

COUNSEL IS ACTING IMPROPERLY

Morgan Lewis Has A Conflict Because Deutsche Is Being Sued By The Very Investors It Purports To Act As A Trustee For

A problem with the securitization of loans, is that the banks and their attorneys, that were, and are, involved in securitization serve no one but their own interests. They have violated countless laws. There are of course countless government and private cases pending regarding such. There are government actions, including criminal investigations against foreclosure law firms.[1]

In the instant matter, counsel purports to represent a trustee of a securitized trust ("Trust") acting for the benefit of the beneficiaries of the trust (called Certificate Holders, because they are issued certificates, "Investors"). This is false for many reasons. Deutsche is being sued by the Investors. Most Investors were institutional investors and most all have sued in connection with the trusts they invested in. It is difficult to find which lawsuit was filed in connection with the

[1] It is now commonly known that the Colorado Attorney General is conducting a criminal investigation of it's largest foreclosure law firm. (See: http://blogs.denverpost.com/thebalancesheet/2013/09/11/judge-no-attorney-client-privilege-in-foreclosure-investigation/10871).

specific WaMu Mortgage Pass--Through Certificates Series 2005--AR17 Trust, which is the Trust in the instant case. However, undoubtedly given the virtually every Investor has filed suit against Deutsche, it is likely in one of the legal actions. The banks have destroyed the retirement funds of countless public entities. (Just a few of the hundreds of such legal actions are: United States District Court, Southern District of New York, *Policemen's Annuity and Benefit Fund v. Bank of America et. al.,* Case No. 12-cv-2865; United States District Court Western District Of Washington At Seattle; *In Re: Washington Mutual Master* Case No.: C09-0037 [settled]; *Royal Park Investments SA/NV v. The Goldman Sachs Group et al.*, Case No. 652732/2013, in the Supreme Court of the State of New York, County of New York.)[2]

As set forth in the Court Of Appeal opinion, the securitized trust and REMIC are likely void. This is irrefutable, has been stated by many courts around the country, and class actions have already been certified on this basis. (See, Order Granting Certification, and a few of the cases and commentaries, submitted herewith).

In addition, in a striking case of "calling the kettle black"; Deutsche itself is claiming it was defrauded when it purchased loans from G.E. Capital. It is suing for the very same conduct Deutsche itself engaged in. (*Deutsche Bank National Trust Company, Solely As Trustee For The Morgan Stanley Abs Capital I Inc. Trust, Series 2007-He6, Et. Al. v. Wmc Mortgage L.L.C., et. al.* U.S. District Court, District of Connecticut, No. 3:13-cv-01347-CSH.)

Bank Attorneys Have Been And Are Being Sanctioned

Attorneys all over the country have been, and are being sanctioned, sued, and disbarred for conduct such as Morgan Lewis has engaged in regarding this matter. There are so many cases and articles regarding the wrongful conduct of attorneys representing the "Too Big To Fail" banks, it would difficult if not impossible to provide them all.

It couldn't have been said better than the eloquent court in, *In Re Nosek*.

In, *In re Nosek, 386 B.R. 374* (Bankr. D. Mass 2008), Ameriquest Mortgage Company ("Ameriquest") claimed that it was the holder of Nosek's mortgage, despite the fact that Ameriquest was the loan originator, had not held the note since

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[2] Royal Park Investments SA/NV said Deutsche Bank failed to disclose in offering documents that, among other things, by the time it sold RPI the last certificate in early 2007, it had taken a $4 billion to $5 billion short position in the MBS market, "essentially betting that the very same certificates they were selling would default at significant rates."

"Indeed, defendants internally called RMBS investments such as those sold to plaintiff 'pigs,' 'crap' and 'generally horrible' at the time they sold the certificates to plaintiff," RPI said, citing a U.S. Senate panel's report on the financial meltdown.

The suit alleges that while RPI's certificates "are now all rated at junk status or below, and are essentially worthless investments," Deutsche Bank has "profited handsomely," making a profit of about $1.5 billion on its shorting of the RMBS market.

November 30, 1997, and ended its mortgage servicer role as of March 31, 2005. Judge Joel B. Rosenthal placed blame on Ameriquest, the mortgage servicer, and Wells Fargo, the mortgage lender, for the mishandling of the Mortgage Assignment, stating: "It is the creditor's responsibility to keep a borrower and the Court informed as to who owns the note and mortgage and is servicing the loan, not the borrower's or the Court's responsibility to ferret out the truth…That Ameriquest had no role after March 2005—well before the trial in Adversary Proceeding 04-4517, was unknown to the court." Judge Rosenthal also did not allow Ameriquest to claim that PSAs give banks the inherent power to act in their own name on filing proofs of claim: "Ameriquest also seeks to hide behind the Pooling and Servicing Agreement by arguing that the document gave Ameriquest the power to act in its own name, including for the purpose of filing proofs of claim. That may be true but proofs of claim filed under a written power of attorney MUST have the power of attorney attached. Fed. R. Bank. P. 3001 and Official Form 10. No part of the agreement was attached to the proof of claim." Judge Rosenthal also blamed Wells Fargo, the mortgage lender, for the mishandling of the Mortgage Assignment, stating "This Court will not allow Wells Fargo or any other mortgagee to shirk responsibility by pointing the finger at their servicers." Judge Rosenthal imposed sanctions of $250,000 on Ameriquest and Wells Fargo, as well as sanctions on the law firms.

On May 28, 2009, U.S. District Court Judge William G. Young upheld the sanctions against Ameriquest, but overturned the sanctions against Wells Fargo. Judge Young's harshest criticisms were for the lawyers involved:

> **"After 43 years at the bar, the saddest thing about this case is the conduct of the lawyers — all the lawyers. A careful reading of the briefs in this case reveals only a single recognition that counsel did anything amiss in their misrepresentations to the Bankruptcy Court. There's blame aplenty, of course, each one blaming everyone else — including the hapless bankrupt homeowner. ... How is it that our profession, the legal profession —which could have and should have strongly counseled against the self interested excesses that set up the collapse — instead has eagerly aided and abetted those very excesses? How could we (all of us who profess to be lawyers) have fallen so low?"**
> (emphasis added).

In a footnote regarding the arguments of Ameriquest's national law firm Judge Young stated: "This argument is singularly unpersuasive. It is tantamount to saying, 'We've been making these misrepresentations for years. Until 2005, no one seemed to care.'"

The lawyers were reported to their respective State Bars by the court, but in California, the Bar did nothing because of it's own longstanding misconduct.[3]

[3] *The California Bar has been engaging in misconduct itself for many years. See, one example submitted herewith.*

MORGAN LEWIS IS ITSELF LIABLE

U.S Supreme Court 2010 – Bank Attorneys Strictly Liable Even For Even Minor Technical Mistake In A Letter

Jerman V. Carlisle, Mcnellie, Rini, Kramer & Ulrich Lpa et al; U.S. Supreme Court, 130 S. Ct. 1605 (2010) is a seminal Supreme Court case against attorneys representing banks. Many amicus briefs were filed.

The Fair Debt Collection Practices Act ("FDCPA") is a strictly liability statute and it is well settled that attorneys are included within the purview of it.

In *Jerman*, the defendants, a law firm and one of its attorneys, filed a complaint in state court seeking to foreclose on the plaintiff's property. They made a minor technical mistake. They attached to the complaint a notice stating, inter alia, that the debt would be assumed valid unless the plaintiff disputed the debt, "in writing" within thirty days of receiving the notice. The district court held that the collector's notice violated section 1692g(a)(3) of the FDCPA, but also held for defendants on the "bona fide error" defense, because the wording of the notice was based upon their error of law. The Sixth Circuit affirmed the district court, but the U.S. Supreme Court reversed.

The Supreme Court rejected the argument that Congress only meant to impose liability on collectors who know that their conduct is unlawful, citing the "common maxim, familiar to all minds, that ignorance of the law will not excuse any person, either civilly or criminally. The Court also reconfirmed strict liability.

In January 2013, The Sixth Circuit specifically held lawyers involved in foreclosure are "debt collectors" within the FDCPA. The Sixth Circuit's holding is consistent with decisions from other circuits that have found lawyers engaged in mortgage foreclosure can qualify as "debt collectors" under the FDCPA. Those circuits include the Second, Third, Fourth, and Eleventh Circuits.

Previously in *Wallace v. Washington Mutual et. al.* 683 F.3d 323, 326 (6th Cir. 2012) the court held that attorneys are liable when their clients don't own the loan.

In *Wallace*, The district court found that plaintiff failed to state a claim under the Fair Debt Collection Practices Act because the failure to record an Assignment of Mortgage before filing a foreclosure action is not a deceptive practice under the Act. On appeal the court said, the single issue before us is whether the filing of foreclosure action by the law firm claiming ownership of the mortgage by its client Washington Mutual constitutes a "false, deceptive or misleading representation" under the Fair Debt Collection Practices Act when the bank has not received a transfer of the ownership documents. We hold that the complaint states a valid claim and reverse the dismissal of the case.

The case before the Sixth Circuit involved an Ohio law firm Lerner Sampson & Rothfuss, which in 2008 filed foreclosure paperwork against homeowner Betty Wallace. Not until a month later was the mortgage actually assigned to LSR's client Washington Mutual Bank FA from Wells Fargo Bank NA.

By falsely claiming WaMu held the mortgage, LSR may have committed the sort of "false representation … to collect or attempt to collect any debt" that is prohibited by the FDCPA, the Sixth Circuit said.

The Consumer Financial Protection Bureau has made clear that it agrees with this interpretation. On January 2, 2013, the CFPB's final rule defining larger participants of a market for consumer debt collection became effective. In its background discussion of the rule, the CFPB noted its agreement with cases holding that an attorney or other person who enforces security interests can qualify as a debt collector under the FDCPA.

Most states, including California have a state statutory scheme similar to the FDCPA. (In California: The Rosenthal Act). Damages of all sorts, including any "actual" emotional and physical distress and unlimited punitive damages can be collected and attorney's fees. The Ninth Circuit has held the remedies are cumulative of the FDCPA. *Arrow Financial Services, LLC*, 637 F.3d 939 (9th. Cir. 2011).

Attorneys who try to hide their liability and/or are closely related to a debt collector have been sanctioned also.

Recently, the U.S. Court of Appeals for the Tenth Circuit found that defendant debt collector's president and chief operating officer (president), along with the debt collector's lawyer, acted in bad faith by failing to disclose that the debt collector had a professional liability policy sufficient to cover plaintiff's Fair Debt Collection Practices Act (FDCPA) claims. Plaintiff brought a class action FDCPA suit against the debt collector and was awarded her fees and costs. The debt collector filed for bankruptcy and its insurer refused to cover the loss because the debt collector never tendered a timely claim. The district court found that the debt collector's attorney and president acted in bad faith to deprive plaintiff of a recovery from the insurer and ordered them to pay plaintiff's damages and fees owed by the debt collector as well as costs incurred litigating the bad faith issue.

The Tenth Circuit affirmed the sanction. The court noted that not only did the district court not believe the lawyer's and president's excuses for failing to disclose the insurance information, but also properly relied upon the facts that: (1) the debt collector had professional liability coverage for suits arising from its wrongful act, (2) the lawyer and president knew this, (3) during discovery the attorney failed to turn over documents reflecting the applicable insurance policy, and (4) the lawyer and president allowed the period for filing a timely claim to lapse. The court also

found that there was sufficient evidence to uphold the district court's ruling that the attorney had a "peculiarly close relationship" with the debt collector to warrant holding him jointly responsible for his "client's misdeeds in which he actively participated*."* *Anchondo v. Dunn*, 2013 WL 599798 (10th Cir. Feb. 19, 2013).

CONCLUSION

Counsel in this case should know better. It has a clear conflict. It is liable for violations of the FDCA and other laws. Because it has made false statements to this Court, and has a conflict of interest, it's Request should be stricken or denied.

Respectfully,

Michael T. Pines