No.

IN THE

Supreme Court of the United States

ALLANA BARONI, PETITIONER

v.

THE BANK OF NEW YORK MELLON, FKA THE BANK OF NEW YORK, AS SUCCESSOR TRUSTEE OF JPMORGAN CHASE BANK, N.A. AS TRUSTEE FOR THE HOLDERS OF SAMI II TRUST 2006-AR6 MORTGAGE PASS THROUGH CERTIFICATES, SERIES 2006-AR6

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

RICHARD L. ANTOGNINI

Law Office of Richard L. Antognini
2036 Nevada City Hwy, Suite 636
Grass Valley, CA 95945
(916) 295-4896
rlalawyer@yahoo.com

DAVID G. BAKER
Counsel of Record

Law Office of David G. Baker
236 Huntington Ave Ste 317
Boston, MA 02115
bostonbankruptcy@gmail.com
(617) 340-3680

CURRY & TAYLOR ♦ 202-350-9073

QUESTION(S) PRESENTED

When a party to a Chapter 11 bankruptcy case contends it can enforce the terms of promissory note and deed of trust, can it prove it is a "creditor" entitled to make a claim under 11 U.S.C. § 501 (a) and Rule 3003 (c) (1) of the Federal Rules of Bankruptcy Procedure merely by showing it possesses the original promissory note, indorsed in blank?

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The opinion of the United States Court of Appeals for the Ninth Circuit is unpublished. That opinion is found in the Appendix to the Petition for a Writ of Certiorari (or "Pet. App."), at 2a. The opinion of the United States District Court for the Central District of California (Pet. App. 3a-9a), is unpublished. The order of the United States Bankruptcy Court, Central District of California (Pet. App. 10a-19a) also is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on February 8, 2018 (Pet. App. 1a-2a). The court of appeals denied Baroni's timely petition for rehearing on April 18, 2018. (Pet. App. 20a). This Court has jurisdiction under 28 U.S.C. § 1254 (1).

RELEVANT PROVISIONS INVOLVED

11 U.S.C. 101 defines certain terms used throughout the bankruptcy statutes. One term is "creditor." 11 U.S.C. § 101 (10) (A) states:

> The term "creditor" means—
> (A) entity that has a claim against the debtor that arose at the time or before the order for relief concerning the debtor…

11 U.S.C. § 501 (a) provides that "creditors" may file claims in a debtor's bankruptcy. It states:

> "A creditor or an indenture trustee may file a proof of claim. An equity security holder may file a proof of interest."

Language like section 501 (a) is found in Rule 3003 (c) (1) of the Federal Rules of Bankruptcy Procedure ("Bankruptcy Rules" or "Rule"). It provides:

> "Any creditor or indenture trustee may file a proof of claim within the time prescribed by subdivision (c) (3) of this title."

Rule 3003 (c) (2) warns parties who must file a claim. It states:

> Any creditor or equity security holder whose claim or interest is not schedule scheduled as disputed, contingent or unliquidated shall file a proof of claim or interest within the time prescribed by subdivision (c) (3) of this rule; any creditor who fails to do so shall not be treated as a creditor with respect to such claim for the purpose of voting and distribution.

STATEMENT

A. Baroni's Chapter 11 bankruptcy

Allana Baroni and her husband James Baroni, own a home in Camarillo, California. (Pet. App. 3a). They took out a loan on the home through Countrywide Home Loans. The loan was $1,248,000. (Pet. App. 3a). Countrywide Home Loans was identified on the

promissory note for the loan as the "Lender" and the "beneficiary" under the deed of trust. (Pet. App. 3a).

Baroni filed for Chapter 13 bankruptcy on February 1, 2012. (Pet. App. 3a). She later converted her case to a Chapter 11 bankruptcy. *Ibid.* Bank of New Mellon, as trustee for a securitized investment trust, filed a claim in Baroni's bankruptcy. (Pet. App. 3a-4a). It contended it had succeeded to the rights of Countrywide Home Loans and thus had become the "Lender" under the promissory note and the "beneficiary" under the deed of trust. *Ibid.*

Baroni filed an adversary complaint against BONYM objecting to BONYM's claim. (Pet. App. 4a). That adversary complaint alleged that BONYM did not own Baroni's loan, had no right to enforce the promissory note or deed of trust, and was not the Lender" under the promissory note or the "beneficiary" under the deed of trust. *Ibid.*

BONYM moved for summary judgment. It contended that under California's version of the Uniform Commercial Code (or "UCC"), it had a right to enforce the Baroni promissory note as a creditor because it possessed the original note, indorsed in blank. (Pet. App. 4a, 11a-13a). In opposition, Baroni argued against the authenticity of the indorsements to the original note and argued that the negative amortizing provision of the note rendered it nonnegotiable under the UCC, and thus ownership must be established.

The bankruptcy court agreed with BONYM and granted summary judgment. (Pet. App. 4a, 11a-13a) It found that under section 3301 of the California Commercial Code ("section 3301"), BONYM could enforce the promissory note because it possessed the original Baroni promissory note, indorsed in blank.

Ibid. It concluded that mere possession satisfied the bankruptcy code, including 11 U.S.C. 501 (a) and Rule 3003 (c) (1). *Ibid.* It entered judgment against Baroni on her adversary complaint and found BONYM could enforce its claim against her. *Ibid.*

B. Baroni Appeals.

Baroni appealed to the United States District Court for the Central District of California. That court affirmed the bankruptcy court's orders granting summary judgment. (Pet. App. 7a.) It found that under California law a promissory note, even if secured by a deed of trust on real property, could be transferred under section 3301. *Ibid.* Because BONYM proved it possessed the original promissory note indorsed in blank, BONYM could enforce the note under section 3301. BONYM thus qualified as a "creditor" under 11 U.S.C. § 501 (a) and under Rule 3003 (c) (1).

C. The Ninth Circuit Opinion

The Ninth Circuit affirmed the District Court. First, Baroni's negative amortizing promissory note was a "negotiable instrument" under the UCC, specifically California Commercial Code section 3104 (a). (Pet. App. 2a). Second, BONYM possessed the original promissory note indorsed in blank. *Ibid.* BONYM thus qualified as the "holder of the instrument" under California Commercial Code section 1201 (b) (21) (A) and could enforce the promissory note as a creditor in Baroni's bankruptcy.

Baroni filed a petition for rehearing, which the Ninth Circuit denied. (Pet. App. 20a.)

REASONS FOR GRANTING THE PETITION

I, Mere possession of the original promissory note does not give a party status as a "creditor" under 11 U.S.C. 501 (a) or under Rule 3003 (c) (1).

In the past, a bank would issue a home loan and keep that loan as an asset for years, if not decades. Rarely would it transfer the loan to another party. *Yvanova v. New Century Mortgage Corp.*, 62 Cal.4th 919, 926-927, 365 P.3d 845, 850-851 (Cal. 2016).

But, this no longer is the practice. Banks can issue loans and then sell them, or they can go out of business and have the FDIC transfer their assets to another bank. *Ibid.* Banks also can sell loans into investment trusts, which then appoint loan servicers to collect on those loans. *Rajamin v. Deutsche Bank National Trist Co.*, 757 F.3d 79, 81-83 (2nd Cir. 2014) (applying New York law). When a borrower defaults and the loan goes into foreclosure or collection, it can be difficult to determine what entity may foreclose or collect. *Veal v. American Home Mortgage Servicing, Inc. (In re Veal)*, 450 B.R. 897, 904-906 (9th Cir. BAP 2011) (or "*Veal*").

This problem—who owns a loan and who can enforce it—frequently collides with rules set down in the bankruptcy code and Federal Rules of Bankruptcy Procedure. 11 U.S.C. 501 (a) provides that "creditors" can make a claim in a debtor's bankruptcy. Rule 3003 (c) (1) states the same rule. Rule 3003 (c) (2) requires a "creditor" to file a claim when the claim is disputed, contingent or unliquidated. If the creditor fails to present a claim, it may lose the right to collect on that claim (or at least on that portion of the claim unsecured

by a lien on real property). *HSBC Bank USA, N.A. v. Blendheim, (In re Blendheim)*, 803 F.3d 477, 489-491 (9th Cir. 2015) ("*Blendheim*").

Bankruptcy law requires certainty on who owns a claim or who can enforce it. *Veal*, 450 B.R. at 906-907. It does so for several reasons. First, if a claim is not filed in time, the party that contends it owns the claim can be denied the right to enforce it against the debtor. *Blendheim*, 803 F.3d at 489-491. If a court wants to impose such a penalty, it must be certain it is moving against the right party, the party that is the "creditor" entitled to present the claim. *Ibid.* And a creditor must prove all elements of its claim, including its assertion it owns the debt. *Ibid.*

Second, once a debtor pays a "claim" to a "creditor" through her Chapter 11 or Chapter 13 plan, that claim is extinguished. No other party can later try to collect on the debt. *Veal*, 450 B.R. at 906-907; *Blendheim*, 803 F.3d at 489-491. The debtor receives assurance she need pay the claim but once. *Ibid.*

Third, creditors get the same reassurance. If they make a claim on a debt and the bankruptcy court allows the claim, they know they are the only entities that can collect on the claim. If another entity comes out of the woodwork to pursue the claim, that action will be barred. *Blendheim*, 803 F.3d at 489-491; *Veal*, 450 B.R. at 906-907.

Fourth, rules of constitutional standing (bankruptcy courts are federal courts, after all), require that a party is not an "creditor" entitled to collect on a "claim" unless it proves it owns the claim. *Veal*, 450 B.R. at 906-907.

A rule allowing a party to enforce a home loan merely by possessing the original note indorsed in blank does not satisfy these policies. This rule means

that multiple parties can claim to own the same loan and have the power to collect the same debt. For example, one bank can possess the original promissory note; a second bank can claim to own the note through a sales contract, and yet not possess the original note. *Veal*, 450 B.R. at 906-907. As the *Veal* court observed, 450 B.R. at 909:

> Article 3 [which allows the possessor of the note to enforce it] deals primarily with payments obligations surround a negotiable instrument, and the identification of the proper party to be paid in order to satisfy and discharge the obligations represented by that negotiable instrument. *As will be seen, Article 3 does not necessarily equate the proper person to be paid with the person who owns the negotiable instrument.* Nor does it purport to govern completely the manner in which those ownership interests are transferred. (Italics added.)

And, as the UCC recognizes, even a thief can enforce a promissory note. So long as he steals the note, indorsed in blank, he can collect on it, even if the rightful owner also is pursuing a claim. *Veal*, 450 B.R. at 912, fn. 25. A debtor can be forced to pay twice—once to the thief, and once to the rightful owner. "If, however, the maker pays someone other than a 'person entitled to enforce'—even if that person physically possesses the note the maker signed—the payment generally has no effect on the obligations under the note." *Veal*, 450 B.R. at 910.

The Third Circuit warned in *Adams v. Realty & Development, Inc.*, 852 F.2d 163, 168 (3rd Cir. 1988):

> From the maker's standpoint, therefore, it becomes essential to establish that the person who demands payment of a negotiable note, or to whom payment is made, is the duly qualified holder. Otherwise, the obligor is exposed to the risk of double payment, or at least to the expense of litigation incurred to prevent duplicative satisfaction of the instrument. These risks provide makers with a recognizable interest in demanding proof of the chain of title. Consequently, plaintiffs here, as makers of the notes, may properly press defendant to establish its holder status.

The California Supreme Court expressed the same concern in *Yvanova v. New Century Mortgage Corp.*, 62 Cal.4th at 938, 365 P.2d at 857. It stressed that a borrower owes a debt to only one party—the actual owner—and not to the world: "The borrower owes money not to the world at large but to a particular person or institution, and only the person or institution entitled to payment may enforce the debt by foreclosing on the security." *Ibid.* Further, "the possibility that multiple parties could each foreclose at the same time, that is, increases the borrower's overall risk of foreclosure." *Id.*, 62 Cal.4th at 938, 365 P.2d at 858.

This is not a theoretical problem. Often, multiple parties have claimed to own the same loan. *See, e.g.*, *In re Foreclosure Cases*, 521 F.Supp.2d 650 (S.D. Ohio 2007). In *In re Nosek*, 386 B.R. 374 (Bank. D. Mass. 2008), the court faced multiple proofs of claim for the same home loan, and irreconcilable statements about who owned the loan. It imposed sanctions on one purported "creditor." *Id.*, 386 B.R. at 381-383

In *Sciarratta v. US Bank, N.A.*, 247 Cal.App.4th 552, 562-563 (Cal. Ct. App. 2016), both Bank of America and Deutsche Bank claimed to own the same home loan through two different assignments. The court found that the plaintiff stated a claim for wrongful foreclosure because two creditors could not claim ownership of the same loan. *Ibid.* Finally, in *Hacker v. Homeward Residential*, 23 Cal.App.5th 111, 121-122 (Cal. Ct. App. 2018), two investments trusts argued they owned the same home loan. The court concluded that the plaintiff could sue both for wrongful foreclosure, as only one of them could collect on the loan through foreclosure. *Ibid.*

Mere possession of a promissory note indorsed in blank is not enough to make a party a "creditor" entitled to present a "claim" under 11 U.S.C. 501 (a) and under Rule 3003 (c) (1). Possession allows multiple, other entities to assert a right to collect on a loan by claiming they own the loan through a sales agreement or other contract under Article 9 of the UCC or through other means. *Veal*, 450 B.R. at 909-910. Simple possession does not create the certainty bankruptcy law requires for a party to be a "creditor." It does not guarantee the debtor will pay the debt only once, and it does not protect the debtor from other parties who may insist the own her loan. It also does not satisfy the constitutional rule for standing.

The threat that debtors may face multiple claimants for the same debt is real. This Court should grant certiorari to hold that possession of a promissory note, without more, is not enough to prove you are a "creditor" entitled to make and collect on a "claim" in a bankruptcy case. Only by clarifying this issue will the Court insure the policies behind § 501 (a) and Rule 3003 (c) (1) are upheld.

CONCLUSION

For these reasons, petitioner ALLANA BARONI respectfully requests that the Court grant her petition for writ of certiorari.

DAVID G. BAKER
Counsel of Record

Law Office of
David G. Baker
236 Huntington Ave
Ste 317
Boston, MA 02115
bostonbankruptcy@gmail.com
(617) 340-3680

RICHARD L. ANTOGNINI

Law Office of
Richard L. Antognini
2036 Nevada City Hwy, Suite 636
Grass Valley, CA 95945
rlalawyer@yahoo.com
(916) 295-4896