No. 20-112

IN THE

Supreme Court of the United States

SHERRY HERNANDEZ,
Petitioner

v.

PNMAC MORTGAGE OPPORTUNITY FUND INVESTORS, LLC; *et al.*,
Respondents

On Petition for Writ of *Certiorari* to the California Court of Appeal, Second Appellate District, Division Five

PETITION FOR REHEARING OF DENIAL OF PETITION FOR WRIT OF CERTIORARI

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November 4, 2020

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PETITION FOR REHEARING

Pursuant to Rule 44.2 of the Rules of the Supreme Court, Petitioner hereby respectfully moves the Court to reconsider its denial of her petition for writ of certiorari. The Order denying the petition was filed November 9, 2020. The issue presented for rehearing is intervening circumstances of a substantial effect and/or to other substantial grounds not previously presented. Since the California Supreme Court denied certiorari, and a pertinent Opinion was issued by the California Court of Appeals which was subsequently published which has a substantial effect on the issues raised in the Petition for Certiorari. Petitioner's Reply Brief was confined to responding to the Brief in Opposition. Here, Petitioner will address the evidence that the Assignment of the Deed of Trust is void, which supersedes consideration of other factors in determining the whether the foreclosure was wrongful. The matter of the use of the MERS® System to fabricate documents for the purpose of making it appear that a purported claimant has standing to obtain the remedy of foreclosure through nonjudicial proceedings.

I. The Assignment of Deed of Trust is Void

Petitioner's unwavering position has been that the Assignment of Deed of Trust ("Assignment") is void because the signatory did not have authority to sign it. "A subsequent title derived through a forged instrument is completely unenforceable, even if held by a bona fide purchaser." *WFG National Title Ins. Co. v. Wells Fargo Bank, N.A.*, (2020) 51 Cal.App.5th 881, 889, 264 Cal.Rptr.3d 717, 724. In *WFG* a fraud scheme led plaintiff lender to rely on a recorded forged deed to make the loan to defendant borrower. Lender sought a declaratory judgment of superior title to the prior lender. Affirming the judgment below, the *WFG* court found that where defendant borrower did not obtain a valid interest in the property secured by the Deed of Trust in exchange for the loan, neither did the plaintiff lender. *Id.* at 890.

Here, at the relevant time the signatory was an employee of Respondent PennyMac Loan Services, LLC ("PennyMac"). PennyMac was the loan servicer for Respondent PNMAC Mortgage Opportunity Fund Investors, LLC ("PNMAC"). The agent, through its employee, procured a property right for its principal.

Viewing these facts through the lens of forgery, we consider the applicable statute. The elements of California Penal Code §470 Forgery are: 1) the

instrument must be uttered, published, passed, or attempted to be passed, as true and genuine; 2) the person uttering or passing the forged instrument must know it to be false, altered, forged, or counterfeited; and 3) the intent must be to prejudice, damage, or defraud some person. *People v. Poland* (Cal. App. 5th Dist. Aug. 19, 1963), 219 Cal. App. 2d 422, 33 Cal. Rptr. 211, 1963 Cal. App. LEXIS 2391.

Applying our facts to Cal. Penal Code §470, we have—

1) the Assignment was published by recordation;

2) PennyMac, as agent, knew PNMAC did not hold an ownership interest on the Note, therefore lacked authority to direct its employee to execute the Assignment; and

3) recording the Notice of Default on the same day as the Assignment shows clear intent to defraud.

These facts are similar to those in *Century Bank v. St. Paul Fire & Marine Ins. Co.*, 4 Cal. 3d 319 (1971). Affirming the finding of forgery, the facts were clear. The signatory, with his supervisor's authorization, penned the supervisor's signature to an instrument and the supervisor attested the signature on behalf of the employer. The instrument was then passed to a third party with the intent to defraud. The court did not find that the supervisor's

signature was forged, but only that the supervisor knew he was not authorized to execute the instrument on behalf of the employer. *Century Bank v. St. Paul Fire & Marine Ins. Co.*, 4 Cal. 3d 319, 326 (1971). The dissent notes the significant change in Cal. Penal Code §470 in 1905, when signing an instrument with the signer's own name, but without authorization to do so, now constitutes forgery. *Id.* at 326.

The forged deed in *WFG* met the elements of §470, and *Century Bank* elaborates on the "no authority" aspect of the statute. "Thus that language is to be construed in accord with the reasonable understanding of a layman as to what constitutes forgery or counterfeiting, rather than in accord with technical definitions and refinements of criminal statutes. It may be noted, however, that the precise conduct which caused plaintiff's loss in the present case falls within the literal definition of forgery set forth in Penal Code section 470." *Century Bank* 321-322.

Given the above, the Assignment is void as a forgery and meets the elements of §470.

II. Misuse of the MERS® System Undermines the Integrity of the Transfer of Property Rights

Only the true owner or beneficial holder of a Deed of Trust can bring to completion a nonjudicial foreclosure under California law. *Yvanova v. New Century Mortgage Corp*., (2016) 62 Cal. 4th 919, 920. Yvanova is consistent with *WFG*. In *WFG* a supervisor executed an instrument that he knew he was not authorized to execute; he then had his subordinate attest to the signature and the instrument was passed to a customer. "Whether the signatory signed his own name or that of another, it is the lack of authority to do so that renders an instrument void." *WFG* at 724-725. The signature was found to be a forgery.

A. The Bankruptcy court finds PNMAC, with the Assignment alone, was not entitled to enforce the Note

In the related bankruptcy proceeding of 2013, Respondents proffered the Assignment of Deed of Trust and a copy of the Note in stay relief proceedings. The Bankruptcy Court entered a tentative ruling that the Motion for Relief from Stay would be denied because the chain of title to PNMAC not established. The Bankruptcy Court's tentative ruling found that PNMAC lacked standing as a party in interest; the matter was continued to

opportunity to submit further proof. After their request for continuance was granted, Repondents submitted a Second Allonge and a power of attorney. The Bankruptcy Court reversed its tentative ruling and granted the motion on grounds that the proper standard for standing was not party-in-interest but "prudential" standing, obviating the need to consider the Second Allonge. Subsequently, in 2016 *Yvanova v. New Century Mortgage Corporation*, 62 Cal. 4th 919, 920, 199 Cal.Rptr.3d 66, 365 P.3d 845 (Cal. 2016), the California Supreme Court clarified the standard for establishing the real-party in-interest.

The Respondents, without a ruling from the Bankruptcy Court as to the Second Allonge, nonetheless submitted it to the trial court through a Request for Judicial Notice ("RJN"). The RJN consists of the Assignment, the Note, both allonges and the power of attorney, all prefaced with a declaration. As the case wound through the appellate process, the RJN has been the pivotal component.

B. In 2016 the Second Allonge fades from the case

In its 2016 Opinion the Court of Appeal detailed the defects of the Second Allonge, that it could not be authenticated. "Not only is the second allonge to the Note undated, it is executed on CitiMortgage's behalf"[b]y and through its Attorney in Fact PNMAC Capital Management LLC.' The parties have not

pointed to a document in the record before us memorializing an agreement by CitiMortgage to have PNMAC Capital Management LLC act as its attorney in fact." (2016 Op. at 13, FN6).

The remand of 2016 was a consequence of the defective Second Allonge. Without an ownership interest at the relevant time, the foreclosure would be wrongful; "[t]he deed of trust, moreover, is inseparable from the note it secures, and follows it even without a separate assignment. *Yvanova v. New Century Mortgage Corp*. at 927 (citing Cal. Civ. Code § 2936; *Cockerell v. Title Ins. & Trust Co.* (1954) 42 Cal.2d 284, 291; *U.S. v. Thornburg* (9th Cir. 1996) 82 F.3d 886, 892.)

C. In 2019 the Second Allonge returns to the case

In 2019 the same court, without comment, affirmed the trial court's grant of the RJN. "A second allonge to the Note indicates 'CitiMortgage, Inc. [b]y and through its Attorney in Fact PNMAC Capital Management LLC' endorsed the note in blank, which would operate to assign its interest to whoever actually holds the Note." H*ernandez v. PNMAC Mortg. Opportunity Inv'rs*, No. B287048, 2019 Cal. App. Unpub. LEXIS 7477, at 3 (Nov. 12, 2019).

The Assignment was then authenticated by virtue of the fact that the signatory executed it "in his

capacity as an assistant secretary of MERS." *Id.* at 4. The MERS membership, as used here, is a power of self-assignment. This the heart of the problem.

III. SELF-ASSIGNMENT IS IMPLICIT IN THE MERS® SYSTEM

A. The MERS signing officers are support staff acting on behalf of their employer, but are used to fabricate documents for the purpose of creating false claims to real estate and in civil litigation

The structure of the MERS System enables its members to transfer property rights without tracking consideration given or received. The 2019 Opinion states, "MERS relies on its members to have someone on their own staff become a MERS officer with the authority to sign documents on behalf of MERS. [Citation.] As a result, most of the actions taken in MERS's own name are carried out by staff at the companies that sell and buy the beneficial interest in the loans".) (citing *Cervantes v. Countrywide Home Loans, Inc.* (9th Cir. 2011) 656 F.3d 1034, 1040.) 2019 Op. at 14.

Petitioner has consistently alleged a void assignment based on self-assignment: at the time of the assignment the signatory was employed by the agent of the assignee. The 2019 Opinion implies this proof would defeat the authority of the Assignment:

"Moreover, of all the other documents bearing Graves's signature that plaintiff attaches to her complaint, *none were executed on the same day as the Assignment*. There is thus not even a factual predicate to conclude he acted in more than one capacity simultaneously." *Id.* (Emphasis added.)

The implication of the 2019 Opinion is that a signatory cannot act on behalf of more than one employer simultaneously, where the ambit of simultaneous is time, "the same day." However, Petitioner's documents were specifically selected for a different purpose, to demonstrate a pattern of practice between the signatory and the notary to create fabricated documents solely for the purpose of creating the appearance of standing to foreclose on homes throughout the nation. The use of fabricated evidence is a due process violation in criminal proceedings. See *McDonough v. Smith*, 139 S. Ct. 2149, 204 L. Ed. 2d 506 (2019). The use of fabricated evidence should be no less a due process violation when used to support a false claim to real estate in the public records and civil litigation.

Since the California Court of Appeal published its Opinion in *WFG National Title Ins. Co. v. Wells Fargo Bank, N.A.*, (2020) 51 Cal.App.5th 881, 889, 264 Cal.Rptr.3d 717, the conclusion that the Assignment of Deed of Trust is void as a forgery

must be called to the attention of this Court by this Petition for Rehearing.

B. Whether MERS, as nominee and holder of legal title, has an agency relationship with the beneficial owner of the Note has long been a subject of dispute

Agency has been an issue with assignments under the authority of MERS. *Landmark Nat'l Bank v. Kesler*, 289 Kan. 528; 216 P.3d 158 (2009) noted the conflict throughout the States. "The legal status of a nominee depends on the context of the relationship of the nominee to its principal. Various courts have interpreted the relationship of Mortgage Electronic Registration Systems and the lender as an agency relationship." *Landmark Nat'l Bank v. Kesler*, 289 Kan. 528, 530; 216 P.3d 158, 161 (2009).

In 2012 the District Court for the Western District of Washington certified three questions to the Washington Supreme Court on home foreclosures. (*Bain v. Metro. Mortg. Grp., Inc.* (2012) 175 Wn.2d 83.) Only Question 1 is relevant here.

"Is Mortgage Electronic Registration Systems, Inc., a lawful "beneficiary" within the terms of Washington's Deed of Trust Act, Revised Code of Washington section 61.24.005(2), **if it never held the promissory note secured by the deed of trust**? [Short answer: No.]". (*Bain v. Metro. Mortg.*

Grp., Inc. (2012) 175 Wn.2d 83, 91 [285 P.3d 34, 37].) [Emphasis added]. "MERS is an ineligible "'beneficiary' within the terms of the Washington Deed of Trust Act," if it never held the promissory note or other debt instrument secured by the deed of trust." *Id.* at 110.

Following the certified question in *Bain*, the Seattle County Recorder commissioned an audit of its property records. The results were stunning.

> In our opinion, MERS Assignments are inherently deceptive when they pretend to transfer economic (beneficial) and legal interests that MERS does not, in fact, possess. Through the MERS® System, MERS members know who the current beneficiary is but frequently withhold that information to avoid recording interim assignments, and to suppress the identity of the true beneficiary.[1]

The actual lender must exist to cause an agent to assign its beneficial interest in the Note and Deed of Trust. If the assignment is made without the lender's consent, the lender can ratify the assignment. A nonexistent entity cannot have an agent and cannot

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[1] http://registryaudit.us/wp-content/uploads/2015/10/CITY-OF-SEATTLE-REVIEW-OF-MORTGAGE-DOCUMENTS-9.8.2015-CERTIFIED-436-Pages.pdf (p.28)

ratify an act by its agent. That is why agency terminates upon the death of the death of the principal, which is a fundamental principle of law.

The matter is not settled, as highlighted in *Bain*. "But MERS offers no authority for the implicit proposition that the lender's nomination of MERS as a nominee rises to an agency relationship with successor note holders. MERS fails to identify the entities that control and are accountable for its actions. It has not established that it is an agent for a lawful principal." *Bain v. Metro. Mortg. Grp., Inc.* (2012) 175 Wn.2d 83, 107.

Confusion and inconsistent outcomes in litigation resulted in a national effort to improve oversight and establish a uniform application of the MERS Rules. In 2011 a host of defendant lenders and servicers, as members of MERS, entered into the MERS Consent Order ("Consent Order"). Respondents are also subject to the Consent Agreement.

The Consent Order required lenders and servicers to establish rules of conduct for the MERS Members, known as the MERS Rules. In particular, foreclosures on property or recording of affidavits solely in the name of MERS were prohibited; claiming MERS holds a beneficial interest in a property right was prohibited; and property rights cannot be transferred solely in the name of MERS.

Rule 8 of the MERS Rules now defines the criteria for assigning property rights. The signing officers may "assign the lien of any mortgage loan naming MERS as the mortgagee when the Member is also the current promissory note-holder, or if the mortgage loan is registered on the MERS System, and is *shown to be registered to the Member.*"

REASON FOR GRANTING REHEARING

Due to the extreme hardships caused by a foreclosure including injury and death especially in the time of the Pandemic, as well as the divergence of opinions in Federal and State courts with regard to MERS® System, granting this Petition of Rehearing and providing nationwide guidance that the MERS® System may result in the creation of forged instruments should stem the expected surge in fraudulent foreclosures that may otherwise occur in the foreclosure outbreak predicted for late 2021-2022 and beyond.

This case originated with the 2008 real estate market crash. Due process rights were routinely[2] denied to homeowners by the use of unauthorized instruments which are forgeries under Cal. Penal Code §470 in a judicial system overwhelmed with the

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[2] Like California, the forgery laws of most states include the signing of documents without authority as a type of forgery,

volume of foreclosures, bankruptcies and other civil litigation as homeowners tried to defend the roof over their head. They had to watch as the lenders and servicers took their homes by hiding behind the veil of the MERS® System, which did not require proof of ownership interest, in accordance with the terms of every deed of trust naming MERS as the legal beneficiary.

CONCLUSION

Petitioner respectfully requests that the Petition for Reconsideration be granted.

Respectfully submitted,

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CERTIFICATE OF GOOD FAITH

I, RHONDA HERNANDEZ, Esquire, certify that this petition has been submitted on the grounds specified in Rule 44.2. of the Supreme Court. It is presented in good faith and not for the purpose of delay.

Rhonda Hernandez