No. _____

In The

# Supreme Court of the United States

ANH NGUYET TRAN,
[Additional Petitioners continued on back of cover]
*Petitioners*,

v.

BANK OF NEW YORK, now known as BANK OF NEW YORK MELLON by merger and/or acquisition, DEUTSCHE BANK NATIONAL TRUST COMPANY, HSBC BANK USA, N.A., U.S. BANK NATIONAL ASSOCIATION, and WELLS FARGO BANK, NATIONAL ASSOCIATION,
*Respondents,*

and

PETER DELAMOS, PHOKHAM SOULAMANY, and PHETSANOU SOULAMANY, SARAH M. YOUNG, TRI THIEN NGUYEN,
*Respondents.*

On Petition for Writ of Certiorari To the United States Court of Appeals for the Second Circuit

## PETITION FOR WRIT OF CERTIORARI

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Additional Petitioners, continued from front cover:

CHRISTINA T. SOULAMANY, LAI SOMCHANMAVONG, COLLEEN DWYER, ELAINE PHAN, HOA V. NGUYEN, HUAN N. TRAN, HUNG V. NGUYEN, KAY APHAYVONG, KIM-THUY NGUYEN, MAI L. PHAM, MINH A. TRINH, MY-HANH HUYNH, NHIEU V. TRAN, PATRICIA GUNNESS, PATRICIA S. ADKINS FKA PATRICIA S. OLSON, PETER HA, TINA LE, SUONG NGOC NGUYEN, LONG LE, THAI CHRISTIE, SEQUOIA HOLDINGS LLC, THIEM NGO, THUAN T. TRAN, THU LAM TRAN, THUY-TRANG NGUYEN, TUY T. HOANG, THOMAS T. HOANG, TUYEN T. THAI, TUYETLAN T. TRAN, UYEN T. THAI, THONG NGO, VAN LE, FKA VAN T. NGUYEN, and VU DINH,

*Petitioners*,

## QUESTIONS PRESENTED

Owners of real property who had taken out mortgages brought federal claims against trustees of mortgage trusts alleging that such trustees falsely claimed ownership of, and initiated foreclosure proceedings on, Petitioners' mortgages. The trustees' alleged lack of ownership of the mortgages was based on their failure to comply with the requirements of the instruments establishing the mortgage trusts when purporting to transfer ownership of the mortgages to the trusts. Petitioners argued that, under applicable state law, such non-compliance rendered the transfers void and hence the trustees never owned the mortgages on which they later sought to foreclose. The Second Circuit held that Petitioners lacked both constitutional and prudential standing to bring their claims. The questions presented are:

1. Whether the Second Circuit's holding, that Petitioners suffered no Article III "injury" from having paid money to and been foreclosed on by entities that did not own their mortgages, improperly relied on speculation that other actual owners might have done the same?

2. Whether the Second Circuit improperly relied on its view of the merits of the embedded state-law questions to resolve the federal question whether plaintiffs had prudential standing to even raise claims arguing the transfers of their mortgages were void?

## PARTIES TO THE PROCEEDINGS BELOW

Petitioners are: Anh Nguyet Tran, Christina T. Soulamany, Lai Somchanmavong, Colleen Dwyer, Elaine Phan, Hoa V. Nguyen, Huan N. Tran, Hung V. Nguyen, Kay Aphayvong, Kim-Thuy Nguyen, Mai L. Pham, Minh A. Trinh, My-Hanh Huynh, Nhieu V. Tran, Patricia Gunness, Patricia S. Adkins FKA Patricia S. Olson, Peter Ha, Tina Le, Suong Ngoc Nguyen, Long Le, Thai Christie, Sequoia Holdings LLC,[1] Thiem Ngo, Thuan T. Tran, Thu Lam Tran, Thuy-Trang Nguyen, Tuy T. Hoang, Thomas T. Hoang, Tuyen T. Thai, Tuyetlan T. Tran, Uyen T. Thai, Thong Ngo, Van Le, FKA Van T. Nguyen, and Vu Dinh.

Each was a plaintiff in the district court and an appellant in the court of appeals. Each was the mortgagor for mortgages that were purportedly transferred to mortgage-backed securities trusts of which the trustee defendants/respondents were the trustees.

The trustee Respondents are: Bank of New York, now known as Bank of New York Mellon by merger and/or acquisition; Deutsche Bank National Trust Company; HSBC Bank USA, N.A.; U.S. Bank National Association; and Wells Fargo Bank, National Association. Each was a defendant in the district court and an appellee in the court of appeals. Each was a trustee of one or more mortgage-backed securi-

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[1] Petitioner Sequoia Holdings L.L.C. has no publicly traded stock and has no parents or subsidiaries. No publicly held corporation or other publicly held entity owns 10 percent or more of Petitioner's stock.

ties trust that claimed ownership the mortgages of Petitioners and the individual Respondents.

The individual Respondents are: Peter Delamos; Phokham Soulamany; Phetsanou Soulamany; Sarah M. Young, and Tri Thien Nguyen. Like Petitioners, each was a plaintiff below and an appellant in the court of appeals. Each was the mortgagor for mortgages that were purportedly transferred to mortgage-backed securities trusts of which the trustee defendants/respondents were the trustees.

In the district court and in the court of appeals, 37 separate trusts also were named as defendants and as appellees, though they are not included as appellees in the caption of the Second Circuit's orders. App. B2 n. 3; App. A1-A2, D1-D2, E2, F2, G2. The trustees of those trusts, Respondents here, argued on behalf of such trusts, noting that a trust is not a person that can sue or be sued, and all actions against a trust must be brought against the trustee in its capacity as such. App. B3 n. 4. Accordingly, it is the trustees that are Respondents in this Court, in their capacity as trustees for those 37 trusts.

The trusts named as defendants below are:

American Home Mortgage Assets (AHMA 2006-1), Securitized Asset Backed Receivables (SABR 2005-HE1), Impac Secured Assets Corp (IMSA 2006-5), Countrywide Alternative Loan Trust (CWALT 2005-17), CHL Mortgage Pass-Through Trust (CWHL 2007-HYB2), Alternative Loan Trust (CWALT 2006-OA6), RALI Series 2006-QS8 Trust (RALI 2006-QS8), CHL Mortgage Pass-Through Trust (CWHL 2005-HYB6), Citigroup Mortgage Loan Trust (CMLTI 2007-6), IXIS Real Estate Capital Trust (IXIS 2006-

HE3), Lehman Mortgage Trust (LMT 2007-6), Merrill Lynch Mortgage Investors Trust (MLMI 2006-HE6), CWALT, Inc., Alternative Loan Trust (CWALT 2005-58), Opteum Mortgage Acceptance Corp. (OMAC 2005-1), GSAA Home Equity Trust (GSAA 2006-12), CHL Mortgage Pass-Through Trust (CWHL 2007-HY6), Citigroup Mortgage Loan Trust (CMLTI 2005-11), Fremont Home Loan Trust (FHLT 2005-1), Merrill Lynch Alternative Note Asset Trust (MANA 2007-A2), First Franklin Mortgage Loan Trust (FFML 2005-FF9), First Franklin Mortgage Loan Trust (FFML 2007-FF2), First Franklin Mortgage Loan Trust (FFML 2007-FFC), CHL Mortgage Pass-Through Trust (CWL 2005-11), CHL Mortgage Pass-Through Trust (CWHL 2007-3), CWHEQ Home Equity Loan Trust (CWL 2007-S2), Bear Stearns ALT-A Trust Series (BALTA 2005-4), Structured Adj. Rate Mtg. Loan Trust (SARM 2008-8XS), Lehman XS Trust Mgt. Pass-Through Cert. (LXS 2005-2 ), GreenPoint Mortgage Funding Trust (GPMF 2005-AR4), Alternative Loan Trust (CWALT 2006-OA19), Banc of America Funding (BAFC 2006-6), CWALT, Inc., Alternative Loan Trust (CWALT-2005-22T1), Bear Stearns ALT-A Trust (BALTA 2006-3), CHL Mortgage Pass-Through Trust (CWHL 2006-HYB5), CSMC Mortgage-Backed Trust (CSMC 2006-5), Alternative Loan Trust (CWALT 2006-29T1), and GSAMP Trust (GSAMP 2006-HE1). (Am. Compl. ¶¶ 3-4.).

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## PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

## OPINIONS BELOW

The Opinion and Order of the District Court for the Southern District of New York is available at 2014 U.S. Dist. LEXIS 40261 and is attached at Appendix B1-B18. The Judgment of the District Court for the Southern District of New York is attached at Appendix C1-C2. The initial Summary Order of the Second Circuit affirming the district court's Judgment is unpublished but available at 592 Fed. Appx. 24 and is attached at Appendix D1-D4. The Second Circuit's initial Order denying the petition for rehearing *en banc* is attached at Appendix E1-E2. The Second Circuit's Order granting appellants' motion to amend and correct the caption is attached at Appendix F1-F2. The Second Circuit's Amended Summary Order affirming the district court's Judgment is unpublished but available at 2015 U.S. App. LEXIS 12611 and is attached at Appendix A1-A4. The Second Circuit's Corrected Order denying the petition for rehearing *en banc* is attached at Appendix G1-G3.

## JURISDICTION

The court of appeals issued its initial Summary Order on January 30, 2015, and denied a timely petition for rehearing or rehearing *en banc* on April 3, 2015. App. D & E. Appellants sought an extension of time to and including August 31, 2015 to file a Petition for a Writ of Certiorari, which Justice Ginsburg granted.

On July 21, 2015, the Second Circuit granted an earlier motion to correct the parties listed on the docket, the Summary Order, and the Order denying rehearing *en banc*, all of which had mistakenly excluded 10 of the individual plaintiffs who had appeared on the complaint and on the notice of appeal but mistakenly been excluded from the court of appeals docket and the ensuing orders. App. F. Accordingly, on July 21, 2015, the Second Circuit issued an Amended Summary Order affirming the district court Judgment and a Corrected Order denying the petition for rehearing *en banc*. App. A & G.

The overlooked plaintiffs/appellants added to the docket and caption are: My-Hanh Huynh; Sarah M. Young; Suong Ngoc Nguyen; Long Le; Thiem Ngo; Thuan T. Tran; Thu Lam Tran; Tri Thien Nguyen; Thomas T. Hoang; and Vu Dinh.

Of the 10 appellants added to the corrected docket and captions, 8 join this Petition: My-Hanh Huynh; Suong Ngoc Nguyen; Long Le; Thiem Ngo; Thuan T. Tran; Thu Lam Tran; Thomas T. Hoang; and Vu Dinh.[1]

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[1] Because they were not part of the Second Circuit's docket and not listed on the Second Circuit's orders, these additional individuals were not listed as parties on the request for an extension of time. Conversations with the Clerk's office suggested that no correction could be made until the Second Circuit had first corrected its own docket and orders, which eventually occurred after the initial 90 days from the first denial of rehearing *en banc*. Again, per conversations with the Clerk's office, the added parties were included in the current Petition, filed under the time-frame as extended by Justice Ginsburg rather than per a re-started clock from the later date of the Amended Summary Order and Corrected Order denying rehearing *en banc*.

The two added appellants not joining this Petition – Sarah M. Young and Tri Thien Nguyen – are included as individual Respondents.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The district court had jurisdiction under 18 U.S.C. § 1964 and 28 U.S.C. §§ 1331 and 1367.

## CONSTITUTIONAL PROVISION INVOLVED

Article III, section 2, of the U.S. Constitution provides, in relevant part, that: "the judicial Power shall extend to all Cases, in Law and Equity, arising under * * * the laws of the United States * * *."

## STATEMENT OF THE CASE

1. This case involves a RICO suit by Petitioner property owners against Respondent banks in their capacity as trustees of residential mortgage-backed securities trusts. App. B3. Such trusts are formed to

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Insofar as this Court might determine that the extension of time granted by Justice Ginsburg does not apply to the additional Petitioners because they were not included in the request for an extension (which was filed and granted well before the Second Circuit corrected its docket), S. CT. R. 13.5, then as to such Petitioners, the Petition is timely because it is filed within 90 days of the Amended Summary Order and Corrected Order denying rehearing *en banc*, which are the only orders applying to those previously excluded parties.

In the alternative, if this Court concludes that the time for such added Petitioners nonetheless runs from the initial denial of rehearing *en banc* and that they are not covered by the extension granted by Justice Ginsburg, then such persons would be deemed Respondents and their joining in this Petition should be deemed either (1) a timely cross-petition pursuant, S. CT. R. 12.5, or (2) a timely response by such putative individual Respondents in support of the Petition, S. CT. R. 12.6.

pool and securitize a group of mortgages and thereafter to issue mortgage-backed securities to investors. App. B4. The trustees in this case purport to own the pooled mortgages on Petitioners' properties, and have collected mortgage payments and initiated foreclosure proceedings based on their claimed ownership of such mortgages. App. B4.

The amended complaint alleges that such trusts do not in fact own Petitioners' mortgages, have falsely represented otherwise, have thereby fraudulently collected mortgage payments from Petitioners and foreclosed on Petitioners' properties, and through such pattern of activities have violated and conspired to violate the Federal Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962. App. B6-B7. The amended complaint sought damages and injunctive relief. App. B7.

A central issue in the case is whether Respondents in fact owned Petitioners' mortgages. That question turned primarily on whether the mortgages were validly transferred from the originating banks to the mortgage trusts. Petitioners argued that the purported transfers failed to comply with the terms of the Pooling Service Agreements ("PSAs") creating the trusts because, *inter alia*, the trusts had already closed at the time of the attempted transfers. App. B4-B6. According to Petitioners, such failure rendered the transfers void under New York law and hence the trusts did not own their mortgages. App. B12-B13; *see, e.g.*, NEW YORK EPTL § 7-2.4 ("If the trust is expressed in the instrument creating the estate of the trustee, every sale, conveyance or other act of the trustee in contravention of the trust, except as

authorized by this article and by other provision of law, is void.").

2. The district court dismissed the amended complaint with prejudice, holding that Petitioners lacked standing to challenge the validity of the transfer of the mortgages to the trusts, and hence the validity of the trustees' claimed ownership of those mortgages. App. B9. The court agreed with Respondents that Petitioners were neither parties to, nor third-party beneficiaries of, the PSAs with which they claimed the trustees failed to comply and thus had no right to assert breaches of those trust-creating instruments. *Id*. In reaching that conclusion the court addressed a hotly disputed issue going to the merits of Petitioners' case: whether the trustees' failure to comply with the PSAs rendered the transfers at issue fully *void* under New York law, or instead merely *voidable* at the election of a party to the PSAs. App. B12-B16.

This issue was significant because if non-compliance merely rendered the transfers voidable at the election of the parties to the PSAs, and such parties had no so elected, Petitioners (if not themselves parties to or third-party beneficiaries of the PSAs) might arguably be characterized as asserting the rights of third parties rather than their own rights. However, if New York law declared such transfers *void* regardless of any election by the other parties to the PSAs, then Petitioners would not be asserting third-party rights, but instead relying upon New York law's determination of the validity *vel non* of such defective transactions, as they are fully entitled to do.

The district court, however, ruled that transactions allegedly failing to comply with the PSAs were merely voidable, notwithstanding the terms of a New York statute declaring such transactions void. B12-B15 (discussing EPTL § 7-2.4's provision declaring that certain non-compliant trust transactions are "void," but reasoning that non-compliant actions could be ratified by the parties to the PSAs and hence were merely voidable, not void).[2]

Finding that the transfers of Petitioners' mortgages were voidable rather than void, and hence that whether the trustees in fact owned the mortgages turned on an assertion of the rights of the beneficiaries of the trusts, the court concluded that Petitioners "have no standing to bring any claim based on alleged breaches of the PSAs" and dismissed the amended complaint with prejudice. App. B17.

Petitioners appealed.

3. On January 30, 2015, the Second Circuit affirmed by a brief and unpublished summary order. App. D1-D4. The court of appeals began by holding that it was reviewing the decision below *de novo* and could affirm on any basis supported by the record. App. D3, A3.[3]

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[2] Curiously, the notion that an action could be ratified implies that it is *not* valid unless it is in fact ratified by the relevant parties, while an action that is voidable *is* valid unless rejected by the relevant parties. Such illogic in treating the two as the same, while unfortunate, properly goes to the merits of the underlying claims, not the standing questions presented here.

[3] Because the final decision in this case is technically the substantively identical Amended Summary Order rather than the initial Summary Order, Petitioners will provide parallel cites to

The court then held that the claims in this case were indistinguishable from the claims in *Rajamin v. Deutsche Bank Nat'l Trust Co.*, 757 F.3d 79, 81 (2d Cir. 2014), which held that similarly situated plaintiffs disputing whether mortgage trusts validly owned their mortgages lacked constitutional and prudential standing to bring claims where the trusts' alleged lack of ownership was based on defective compliance with the PSAs setting up the trusts. App. D4, A3-A4. The court declined plaintiffs' invitation to overrule, overturn, or modify its *Rajamin* decision. *Id.*

Petitioners sought rehearing *en banc*.

4. On April 3, 2015, the Second Circuit denied Petitioners' petition for rehearing *en banc*. App. E1-E2.

5. On July 21, 2015, the Second Circuit granted a motion to correct the docket and the caption on the orders disposing of the case. App. F1-F2. Ten appellants had erroneously been left off the docket and the captions. The Court's order corrected that oversight.

6. Also on July 21, 2015, the Second Circuit issued its Amended Summary Order affirming the district court judgment and its Corrected Order denying rehearing *en banc*. App. A1-A4, G1-G3. The content, other than the date, the caption, and the titles of those new orders was identical to the court's earlier orders.

7. Petitioners now petition this Court for a writ of certiorari.

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both given that the determination was first made on January 30, 2015, even though reissued on July 21, 2015.

## REASONS FOR GRANTING THE WRIT

This Court should grant the petition for a writ of certiorari because the decision below conflicts with a decision of the First Circuit in its method of determining whether there is constitutional and prudential standing for plaintiffs bringing claims against mortgage trusts that turn on the validity of the transfer of mortgages to those trusts.

### I. The Circuits Are Split Regarding the Method for Determining the Standing of Property Owners to Challenge Foreclosures Based on Defective Assignments of Mortgages.

The decision below, based entirely on the Second Circuit's decision in *Rajamin*, applies a broad rule denying constitutional and prudential standing to property owners who, while making payments to and facing foreclosure from large mortgage trusts claiming to own their mortgages, are precluded from challenging whether such trusts in fact validly own their mortgages. Although the ultimate resolution of the merits of such ownership disputes turns on state law, whether plaintiffs have standing to litigate such questions in federal court is squarely a question of federal law.

#### A. Article III Standing.

On the question of Article III standing, the Second Circuit in *Rajamin* analyzed the basic standing question whether plaintiffs suffered an " 'injury in fact * * * which is (a) concrete and particularized, * * * and (b) actual or imminent, not conjectural or hypothetical.' " 757 F.3d at 85 (quoting *Lujan v. Defenders*

*of Wildlife*, 504 U.S. 555, 560 (1992)). The court reasoned that the injuries alleged by plaintiff property-owners were merely "hypothetical" because, although they made payments to and faced foreclosure from trusts that allegedly lacked rights to their mortgages, plaintiffs did not dispute the underlying debt in general, did not claim they paid more than they owed or were subject to competing claims for payment from the original owner of the loan, and did not deny that they were in default of such loans or allege they were subject to competing foreclosure claims. *Id*. at 85-86. Absent allegations of such imminent competing obligations, the court concluded that plaintiffs did not allege "sufficient injury to show constitutional standing." *Id*.

That approach misconceives the notion of a concrete injury for constitutional purposes. Paying money or losing one's property to an entity lacking the rights to such property is a concrete injury regardless whether some third party who *did* have the rights to seek payment or foreclosure might have exercised those rights in a similar manner.[4]

Addressing constitutional standing to raise a similar claim based on a defective assignment of a mortgage, the First Circuit in *Culhane v. Aurora Loan*

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[4] Ironically, under the Second Circuit's reasoning, that the trustees, if not the owners of the mortgages, are purportedly only exercising rights that third parties (the original owners) could have exercised and hence causing no injury seems in painful tension with the notion that the trusts are somehow harmed by Petitioners' purported exercise of the rights of third parties (the beneficiaries of the trusts who are parties to the PSAs) against the trustees for failure to comply with the terms of the PSAs.

*Services of Nebraska*, 708 F.3d 282 (1st Cir. 2013), found more than sufficient injury for constitutional standing. In that case, Judge Selya, joined by Retired Justice Souter (sitting by designation) and Judge Lynch, held that a plaintiff facing foreclosure of her mortgage has constitutional standing to challenge the validity of the assignment of her mortgage and hence whether the foreclosing party properly owns her mortgage, even where she is neither a party-to nor a third-party beneficiary of the transaction by which her mortgage was assigned. 708 F.3d at 289-90.

Noting that the "essence of standing is that a plaintiff must have a personal stake in the outcome of the litigation," the court held that the "foreclosure of the plaintiff's home is unquestionably a concrete and particularized injury to her." *Id*. at 289. The *Culhane* court further found that the "identified harm — the foreclosure — can be traced directly to Aurora's exercise of the authority purportedly delegated by the assignment." *Id*. at 290. That the original owner of the mortgage might have had the right to foreclose if the assignment to the defendant was invalid was of no moment.

The decision in *Culhane* regarding the existence of concrete injury in cases alleging improper foreclosure by non-owners of mortgages squarely conflicts with the decisions in *Rajamin* and in this case that such plaintiffs face no injury because somebody else might have sought payment or foreclosed instead. Furthermore, the Fist Circuit has it right – paying money and facing foreclosure are immediate and concrete injuries. It is only the Second Circuit's suggestion

that such injuries would have occurred anyway, and hence involve no net harm, that is speculative.

### B. Prudential Standing.

On the question of prudential standing, the Second Circuit in *Rajamin* cited this Court's decision in *Warth v. Seldin*, 422 U.S. 490, 498 (1975), for the proposition that plaintiffs may only assert their own rights, not the rights of third parties, but failed to look to what rights were *asserted*, instead looking to the merits of such rights in deciding whether there was standing. 757 F.3d at 86-90. That, of course, gets things backwards.

The court, for example, recognized that plaintiffs had *asserted* they had the right to claim voidness due to non-compliance with the PSA provisions governing transfer of their mortgages into the trusts. But the court simply rejected the merits of that assertion by concluding that only parties or third-party beneficiaries of the PSA could void the transactions. *Id*. at 86-87. Claiming that a party is *wrong* about the rights they are asserting does not negate the fact that they are asserting their own rights and thus have prudential standing to do so. It merely means that they might (or might not) lose their case on the merits, once those merits are given full consideration.

The court in *Rajamin* similarly addressed plaintiffs' claim that by not complying with the terms of the PSAs, the assignments of their mortgages were void under the express provisions of New York trust law. *Id*. 87 (noting plaintiffs reliance on EPTL § 7-2.4, the same provision raised in the present case). After a brief bout of circular reasoning over

whether a claim that a transaction was void *in toto* was the same as invoking the rights of the parties to that transaction,[5] the court turned to the merits of plaintiffs' voidness argument and concluded that the under the statute unauthorized actions "are not void but voidable." *Id*. at 88-90. Based on that view of the merits of plaintiffs' claim, the court concluded that plaintiffs lacked standing to assert claims based on non-compliance with the PSAs.

The approach in *Rajamin* once again conflicts with the First Circuit's approach in *Culhane*. There, the court also considered whether the property-owner challenging a foreclosure based on an alleged defect in the assignment of her mortgage had prudential standing. Recognizing cases in other courts holding that mortgagers lack prudential standing to challenge mortgage assignments because they are neither parties nor third-party beneficiaries to such assignments, the First Circuit concluded that such cases "paint with too broad a brush." 708 F.3d at 290. Although looking at Massachusetts rather than New York law, the court held that a plaintiff would have

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[5] The court's suggestion that a claim of voidness under § 7-2.4 actually involved only the rights of the parties to the PSA, 757 F.3d at 87-88, assumed the court's subsequent conclusion that the provision merely makes a transaction voidable rather than void. If plaintiffs' assertion was correct that the statute renders non-compliant transactions void, then it has nothing to do with the rights of the parties to the PSA insofar as *none* of those parties could enforce (or excuse) a transaction that is void as a matter of law. If the law renders transactions fully void, regardless whether beneficiaries elect to claim a breach of the PSA, then the rights it creates belong to *anyone* seeking to challenge that transaction, not merely to the parties to the PSA.

standing to challenge a mortgage assignment as "invalid, ineffective, or void," and that "[i]f successful, a challenge of this sort would be sufficient to refute an assignee's status qua mortgagee." *Id*. at 291. By contrast, a mortgager would not have standing to assert that an assignment was merely voidable at the election of a party to that assignment. *Id*. What is notable for present purposes is that the First Circuit finds *standing* to raise "a challenge of this sort," regardless whether such a challenge is ultimately "successful." If the challenge is successful the plaintiff would win; if unsuccessful the plaintiff would lose. Those are merits questions, but the plaintiff has prudential standing to *raise* such a challenge in either event.

It is on this critical point that the First and Second Circuits diverge. The Second Circuit denies standing to even raise a voidness challenge the merits of which it questions, whereas the First Circuit allows such a challenge and then gives due consideration to that challenge on the merits. Once again, the First Circuit has it right.

Turning back to the present case, Petitioners argued that the transfer of their mortgages to the trusts was fully void, not merely voidable. That argument, whether ultimately determined after full consideration to be correct or incorrect under New York law, is an assertion not of the contractual rights of the parties to the PSAs, but of a statutory declaration of the invalidity of certain transactions, which may be relied upon by anyone. It is only if the transfers are viewed as valid but voidable solely at the option of the trusts' beneficiaries that Petitioners arguably would be asserting the rights of third parties

who had not themselves elected to void the transactions.

Given that Petitioners *argued* that the contracts were void, they were thus asserting their own rights to be free from the demands of non-owners, rather than the rights of beneficiaries to the trusts to potentially declare the transfers void.

By deciding the question of prudential standing on a superficial consideration of the merits of the claim – *i.e.*, whether the transfers were indeed void or merely voidable – the Second Circuit approach gave short shrift to state-law issues better addressed fully on the merits.[6]

Because the holdings in this case, and in *Rajamin* on which they relied, conflict with the holdings in *Culhane* on both Article III and prudential standing, this Court should grant certiorari.

## II. The Second Circuit's Conflation of Standing with the Merits Is Unsound Judicial Procedure that Should Be Corrected by this Court.

The issues in this case are worthy of this Court's attention because allowing a preliminary merits determination to control the question of constitutional standing is unsound and leads to untenable results. Here, the Second Circuit effectively reached the mer-

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[6] In a sense, the Second Circuit's approach is similar to disfavored unpublished dispositions, which encourage shallow analysis given their lack off precedential effect. In a comparable manner, resolving a state-law merits question as part of the federal prudential standing analysis tends to mask the underlying substantive issues and encourage less attention to and care with the state-law issues.

its of an issue while simultaneously claiming that the parties before it were not suitable to present those issues to it in the first place. The contradiction in such an approach is palpable and calls into question the integrity of the decision-making process.

The purpose of the prudential standing doctrine is act as "a shield to protect the court from any role in the adjudication of disputes that do not measure up to a minimum set of adversarial requirements" by ensuring that the parties are sufficiently motivated to contest the issues and give the pointed presentations needed. *Culhane*, 708 F.3d at 291. "There is no principled basis for employing standing doctrine as a sword to deprive mortgagors of legal protection conferred upon them under state law." *Id*. If the parties assert rights based on state statute rather than the elections of third parties, they should be allowed to litigate such claimed rights. If the parties are thought to be unsuitable to litigate whether transfers are void or voidable, and hence whether they can form the basis for ownership, then the court should not be resolving that very same issue in a case involving such parties.

The Second Circuit analysis thus swallows its own tail and makes no sense.

The Second Circuit approach also would lead to bizarre results in cases, such as *Culhane*, that are removed to federal court. *See* 708 F.3d at 288 (case removed from state court). State courts are not constrained by federal standing doctrine and thus could easily address the merits of a plaintiff's state-law challenge to the validity of an assignment or transfer of a mortgage. But once removed to federal court, the

Second Circuit would dismiss the case on *federal* grounds that nonetheless address the merits of state-law issues for which the plaintiffs are then deemed inadequate proponents. Rather than simply remanding the case to state court because the federal court is unwilling to let such plaintiffs in the door, the Second Circuit approach actually dismisses the case on the merits. That result thus prevents the state courts, which arguably have no such federal standing concerns and are the proper authorities on the merits of state law, from ever hearing the plaintiff's claims. Such a bait and switch is unreasonable and is disrespectful of state courts by denying them the ability to rule on claims that federal courts then refuse to rule on due to a supposed lack of "prudential" standing. There is nothing "prudent" about such an approach.

Finally, even if this Court thought that standing might occasionally turn on the merits of a state law claim, rather than on the nature of the right *asserted* – meritoriously or not – under state law, the more sensible answer in many such cases would be to certify the question to the highest state court, which could decide the merits question without the constraint of federal standing doctrine. The New York Court of Appeals, for example, has discretionary authority to accept certified questions from this Court or from a federal court of appeals where it appears that "determinative questions of New York law are involved in a case pending before that court for which no controlling precedent of the Court of Appeals exists." 22 NYCRR § 500.27. In this case, such certification would be the more sensible answer if a court felt un-

able to determine standing without reaching the merits of the embedded state-law questions.

## CONCLUSION

For the reasons above, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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Dated: August 31, 2015

# APPENDICES

## APPENDIX A

Tran v. Bank of N.Y.

United States Court of Appeals for the Second Circuit

July 22, 2015, Decided

14-1224-cv

Reporter

2015 U.S. App. LEXIS 12611

ANH NGUYET TRAN, CHRISTINA T. SOULAMANY & LAI SOMCHANMAVONG, COLLEEN DWYER, ELAINE PHAN, HOA V. NGUYEN, HUAN N. TRAN, HUNG V. NGUYEN, KAY APHAYVONG, KIM-THUY NGUYEN, MIA L. PHAM, MINH A. TRINH, NHIEU TRAN, PATRICIA GUNNESS, PATRICIA S. ADKINS, FKA PATRICIA S. OLSON, PETER DELAMOS, PETER HA & TINA LE, PHOKHAM SOULAMANY & PHETSANOU SOULAMANY, SARAH M. YOUNG, SUONG NGOC NGUYEN & LONG LE, THAI CHRISTIE & SEQUOIA HOLDINGS L.L.C., THIEM NGO, THUAN T. TRAN, THU LAM TRAN, THUY-TRANG NGUYEN, TRI THIEN NGUYEN, TUY T. HOANG & THOMAS T. HOANG, TUYEN T. THAI, TUYETLAN T. TRAN, UYEN T. THAI & THONG NGO, VAN LE FKA VAN T. NGUYEN, VU DINH, Plaintiffs-Appellants,

v.

BANK OF NEW YORK, now known as BANK OF NEW YORK MELLON by merger and/or acquisition, DEUTSCHE BANK NATIONAL TRUST COMPANY,

HSBC BANK USA, N.A., U.S. BANK NATIONAL ASSOCIATION, WELLS FARGO BANK, NATIONAL ASSOCIATION, Defendants-Appellees.[1]

Notice: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Appeal from the United States District Court for the Southern District of New York (Patterson, J.).

FOR APPELLANTS: TOMAS ESPINOSA, North Bergen, N.J.

FOR APPELLEES: ERIC R. SHERMAN, Dorsey & Whitney LLP, (Christopher G. Karagheuzoff, on the brief), Minneapolis, Minn., for US Bank National Association, as Trustee; Scott H. Kaiser, Bryan Cave LLP, (Christine B. Cesare, Nafiz Cekirge, on the brief), New York, N.Y., for the Bank of New York Mellon, as Trustee; Brian S. McGrath, Hogan Lovells US LLP, (Allison J. Schoenthal, Lisa J. Fried, on the brief), New York, N.Y, for HSBC Bank USA National Association, as Trustee, and Wells Fargo Bank National Association, as Trustee; BERNARD J. GARBUTT III, Morgan, Lewis & Bockius LLP, New York, N.Y., for Deutsche Bank National Trust Company, Solely in its Capacity as Trustee.

Present: PIERRE N. LEVAL, ROSEMARY S. POOLER, DENNY CHIN, Circuit Judges.

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[1] The Clerk of the Court is directed to amend the case caption as above.

**AMENDED SUMMARY ORDER**

**ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that the judgment of said District Court be and it hereby is **AFFIRMED**.

Plaintiffs-Appellants appeal from the March 26, 2014 judgment of the United States District Court for the Southern District of New York (Patterson, **[*2]** *J.*) granting the motion to dismiss of Defendants-Appellees on the basis that Plaintiffs lacked standing to bring any claim based on alleged breaches of Pooling and Servicing Agreements to which they were neither parties nor intended third-party beneficiaries. We assume the parties' familiarity with the underlying facts, procedural history, and specification of issues for review.

"We review the district court's grant of a motion to dismiss *de novo*, but may affirm on any basis supported by the record." *Coulter v. Morgan Stanley & Co.,* 753 F.3d 361, 366 (2d Cir. 2014). We accept the factual allegations in plaintiffs' complaint as true for purposes of reviewing the district court's dismissal for failure to state a claim, or for lack of standing, to the extent that the dismissal was based on the pleadings. *Rajamin v. Deutsche Bank Nat'l Trust Co.*, 757 F.3d 79, 81 (2d Cir. 2014).

Here, Plaintiffs do not identify any basis for distinguishing their claim from the claim at issue in *Rajamin*, where this Court recently held that mortgagors, who were not trust beneficiaries, lacked constitutional and prudential standing to bring an action based on trustee conduct that allegedly contravened the trust instrument. *Id. at 88.* Rather, Plaintiffs re-

quest that we both reverse the district court and overrule, overturn, or modify our decision in **[*3]** *Rajamin* because Plaintiffs assert that those decisions improperly construed *New York Estates, Powers, and Trusts Law § 7-2.4*. It is well established that we are "bound by the decisions of prior panels until such time as they are overruled either by an en banc panel of our Court or by the Supreme Court." *United States v. Wilkerson*, 361 F.3d 717, 732 (2d Cir. 2004). We therefore decline the invitation to revisit this Court's sound reasoning in *Rajamin*.

We have considered the remainder of Plaintiffs' arguments and find them to be without merit. Accordingly, the judgment of the district court hereby is AFFIRMED.

## APPENDIX B

***Tran v. Bank of New York***

United States District Court for the Southern District of New York

March 24, 2014, Decided; March 25, 2014, Filed

13 Civ. 580 (RPP)

**Reporter**

2014 U.S. Dist. LEXIS 40261

ANH NGUYET TRAN, et al., Plaintiffs, - against - BANK OF NEW YORK, et al., Defendants.

## OPINION & ORDER

**ROBERT P. PATTERSON, JR., U.S.D.J.**

On April 15, 2013, an Amended Complaint[1] was filed by thirty-eight individuals and one limited liability company[2]—(collectively, the "Plaintiffs")—

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[1] The original Complaint in this action was filed on January 25, 2013. (Compl., ECF No. 1.) Before serving any Defendant, the Plaintiffs filed their Amended Complaint on April 15, 2013. (Am. Compl., ECF No. 2.) It is the Amended Complaint that is operative here and that the Defendants seek to dismiss.

[2] Anh Nguyet Tran, Christina T. Soulamany, Lai Somchanmavong, Colleen Dwyer, Elaine Phan, Hoa V. Nguyen, Huan N. Tran, Hung V. Nguyen, Kay Aphayvong, Kim-Thuy Nguyen, Mai L. Pham, Minh A. Trinh, My-Hanh Huynh, Nhieu V. Tran, Patricia Gunness, Patricia S. Adkins, Peter Delamos, Peter Ha, Tina Le, Phokham Soulamany, Phetsanou Soulamany, Sarah M. Young, Suong Ngoc Nguyen, Long Le, Thai Christie, Thiem Ngo, Thuan T. Tran, Thu Lam Tran, Thuy-Trang Nguyen, Tri Thien Nguyen, Tuy T. Hoang, Thomas T. Hoang, Tuyen T. Thai, Tuyetlan T. Tran, Uyen T. Thai,

against trustees Bank of New York (now known as **[*2]** Bank of New York Mellon), Deutsche Bank National Trust Company, HSBC Bank USA National Association, U.S. Bank National Association, and Wells Fargo Bank National Association (the "Trustee Defendants"), as well as thirty-seven separate trusts[3]

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Thong Ngo, Van Le, Vu Dinh, **[*3]** and Sequoia Holdings LLC. (Am. Compl. ¶ 1.)

[3] American Home Mortgage Assets (AHMA 2006-1), Securitized Asset Backed Receivables (SABR 2005-HE1), Impac Secured Assets Corp (IMSA 2006-5), Countrywide Alternative Loan Trust (CWALT 2005-17), CHL Mortgage Pass-Through Trust (CWHL 2007-HYB2), Alternative Loan Trust (CWALT 2006-OA6), RALI Series 2006-QS8 Trust (RALI 2006-QS8), CHL Mortgage Pass-Through Trust (CWHL 2005-HYB6), Citigroup Mortgage Loan Trust (CMLTI 2007-6), IXIS Real Estate Capital Trust (IXIS 2006-HE3), Lehman Mortgage Trust (LMT 2007-6), Merrill Lynch Mortgage Investors Trust (MLMI 2006-HE6), CWALT, Inc., Alternative Loan Trust (CWALT 2005-58), Opteum Mortgage Acceptance Corp. (OMAC 2005-1), GSAA Home Equity Trust (GSAA 2006-12), CHL Mortgage Pass-Through Trust (CWHL 2007-HY6), Citigroup Mortgage Loan Trust (CMLTI 2005-11), Fremont Home Loan Trust (FHLT 2005-1), Merrill Lynch Alternative Note Asset Trust (MANA 2007-A2), First Franklin Mortgage Loan Trust (FFML 2005-FF9), First Franklin Mortgage Loan Trust (FFML 2007-FF2), First Franklin Mortgage Loan Trust (FFML 2007-FFC), CHL Mortgage Pass-Through Trust (CWL 2005-11), CHL Mortgage Pass-Through Trust (CWHL 2007-3), CWHEQ Home **[*4]** Equity Loan Trust (CWL 2007-S2), Bear Stearns ALT-A Trust Series (BALTA 2005-4), Structured Adj. Rate Mtg. Loan Trust (SARM 2008-8XS), Lehman XS Trust Mgt. Pass-Through Cert.( LXS 2005-2 ), GreenPoint Mortgage Funding Trust (GPMF 2005-AR4), Alternative Loan Trust (CWALT 2006-OA19), Banc of America Funding (BAFC 2006-6), CWALT, Inc., Alternative Loan Trust (CWALT-2005-22T1), Bear Stearns ALT-A Trust (BALTA 2006-3), CHL Mortgage Pass-Through Trust (CWHL 2006-HYB5), CSMC Mortgage-Backed Trust (CSMC 2006-5), Al-

(the "Trust Defendants") (collectively, the "Defendants"). (Am. Compl. ¶¶ 1-4.)

In their Amended Complaint, the Plaintiffs allege that the Defendants violated the Federal Racketeer Influenced and Corrupt Organizations Act ("RICO"), *18 U.S.C. § 1962*, and that they conspired to violate Federal RICO, *18 U.S.C. § 1962(d)*. (Id. ¶¶ 35-54.) Finally, the Plaintiffs seek to enjoin the Defendants from foreclosing on any of the properties of Plaintiffs in this pending action. (Id. ¶¶ 55-59.)

On August 2, 2013, the Trustee Defendants filed a joint motion to dismiss the Amended Complaint, or, in the alternative, to sever the Plaintiffs. (Defs.' Mem. of Law in Supp. of Joint Mot. **[*5]** to Dismiss the Compl. or to Sever Pls. ("Defs.' Mot."), ECF No. 40.) This motion was filed by the Trustee Defendants on their own behalves and on behalf of the Trust Defendants.[4] (Id. at 3.) On September 5, 2013, the Plaintiffs opposed the motion to dismiss. (Pls.' Br. in Opp'n to Defs.' Mot. ("Pls.' Opp'n"), ECF No. 45.) The Trustee Defendants filed a reply on October 7, 2013. (Reply Mem. of Law in Supp. of Joint Mot. to Dismiss

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ternative Loan Trust (CWALT 2006-29T1), and GSAMP Trust (GSAMP 2006-HE1). (Am. Compl. ¶¶ 3-4.)

[4] Trustee Defendants argue on behalf of the Trust Defendants because, under New York law, a trust is not a person that can sue or be sued, and litigation involving a trust must be brought by or against the trustee in its capacity as such. (Defs.' Mot. at 3 (citing **Kirschbaum *v. Elizabeth Ortman Trust,* 3 Misc. 3d 1110[A], 787 N.Y.S.2d 678, 2004 NY Slip Op 50545[U], 2004 WL 1372542, at *2, 3 (N.Y. Sup. Ct. 2004)** (trustees "as legal owners of the trust estate generally sue and are sued in their own capacity" because the trust itself lacks capacity to act)).)

or to Sever ("Defs.' Reply"), ECF No. 48.) Oral argument was held on this motion on November 5, 2013. (Tr. of Nov. 5, 2013 Hr'g ("Tr. 11/5/13").)

## I. BACKGROUND

The Plaintiffs are thirty-eight individuals and one limited liability company who own or **[*6]** owned residential real properties that have been the subject of foreclosure proceedings. (Am. Compl. ¶ 1.) The Plaintiffs mortgaged their properties at varying times between 2004 and 2007. (Id., Ex. 1.) The Trustee Defendants are trustees of residential mortgage-backed securities ("RMBS") trusts created under New York law for the purpose of pooling residential mortgage loans, including the Plaintiffs' mortgage loans, and issuing residential mortgage-backed securities to investors. (Defs.' Mot. at 2.) The Plaintiffs' mortgages were pooled and securitized at varying times between 2005 and 2007. (Am. Compl., Ex. 1.) The Trust Defendants are the RMBS trusts in which Plaintiffs allege that their mortgage loans are held. (Id. ¶¶ 2, 5.)

Each of the Plaintiffs' RMBS trusts was formed pursuant to a Pooling Service Agreement ("PSA"), which is a contract that governs a RMBS trust. (Id. ¶ 5.) Generally, parties to a PSA include a "depositor", who conveys the loans to the RMBS trustee in return for the certificates, the RMBS trustee (here, the Trustee Defendants), who owns and holds mortgage loans in trust for investors who buy certificates backed by the pooled mortgage loans, and a "servicer", **[*7]** who sees to administrative tasks involving the individual mortgage loans, such as monthly payment collection and, in cases of default, foreclo-

sure.[5] (Defs.'s Mot. at 3 (citing *Trust for the Certificate Holders of the Merrill Lynch Pass-Through Certificates, Series 1999-C1 v. Love Funding Corp.*, 556 F.3d 100, 104-05 (2d Cir. 2009) (describing the role of the PSA in the mortgage securitization process)).) A PSA governs the creation of the trust, the date of closing the trust, the date of the trust's formation, and what trustee actions are valid and invalid under the trust. (Am. Compl. ¶ 17.) In particular, each PSA provides for delivery of trust assets (consisting principally of promissory notes and mortgages) to the trustee in a particular manner on or before a specified closing date. (Id. ¶18.)

The parties agree that the PSAs follow a general template, and, at the Court's request, the Plaintiffs submitted a representative PSA, the PSA of Plaintiff Elaine D. Phan.[6] (Pls.' Letter of Nov. 6, 2013 ("Pls.'

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[5] Although Plaintiffs' claims are based on the premise that it is the Trustee Defendants that collect their mortgage loan payments and execute foreclosure proceedings, that premise is factually incorrect. The mortgage loan servicers "will collect the debt service payments on the loans and distribute the same to the investors" and "are responsible for enforcing the terms of a defaulted securitized **[*8]** loan. This responsibility may include...foreclosing on the property." Talcott Franklin & Thomas Nealon III, Mort. & Asset Based Sec. Litig. Handbook, §§ 5:111-5:112 (2013).

[6] PSAs are filed publicly with the Securities and Exchange Commission as part of the securitization process. Thus, the Phan PSA is also properly the subject of the Court's review as a publicly-available document filed with the Securities and Exchange Commission. See *Kramer v. Time Warner, Inc.*, 937 F.2d 767, 773-74 (2d Cir. 1991) **[*9]** (Court considering motion to dismiss may rely on documents required to be filed with the Securities and Exchange Commission).

11/6/13 Letter"), Ex. 3.) Section 2.01 of that PSA provides for the delivery of "the Mortgage File for each Mortgage Loan listed in the Mortgage Loan Schedule" within thirty days of the closing date of May 27, 2005. (Pls.' 11/6/13 Letter Ex.3, at I-6, I-31.) Section 2.02 provides that the Trustee will deliver a certification form by the closing date, certifying its acceptance of the Mortgage Files, to the Depositor, the Master Servicer, and Countrywide, the seller of the Countrywide Mortgage Loans to the Depositor. (Id. at I-7, II-5.)

The Plaintiffs' Amended Complaint alleges that the Defendants breached the PSAs, and that these breaches prevented the Trustee Defendants from acquiring ownership of the Plaintiffs' mortgage loans. Specifically, the Amended Complaint alleges that, in violation of Sections 2.01 and 2.02 of the PSAs, "[t]he delivery of the trust funds to each defendant...was never completed on the date of closing or at any other date permitted under the PSA." (Am. Compl. ¶¶ 18, 20.) The Plaintiffs also assert that other "conditions for acquisition of the loan by the trust," prescribed by the PSAs, were never met by the Defendants. (Id. ¶ 31.)

The Plaintiffs allege that the Defendants "each knew that each of them did not own" the Plaintiffs' mortgage loans and knew that they "never had standing to enforce the loans." (Id. ¶ 21.) The Defendants "fraudulently represented that the conditions [required by the PSA for the Defendants to acquire ownership of the mortgage loans] were met and/or concealed the fact that they were not met," (id. ¶ 31), and that based on these fraudulent representations,

**[*10]** the Defendants "collected from the Plaintiffs payment of the mortgage[s] and enforced the mortgage payments, wrongfully foreclosing on the corresponding listed Plaintiffs or sought to foreclose on their properties." (Id. ¶ 14.)

In doing so, the Defendants acted in concert "among themselves and with other[s] such as the servicers of the loans, [and] the [D]efendants' attorneys who sought to enforce the loans." (Id. ¶ 34.) The Defendants "have known of the systematic violations, exemplif[ied] above for years, and in like manner had engaged in this pattern of racketeering for years." (Id.)

The Plaintiffs allege that the Defendants' wrongful collection efforts constitute violations of Federal RICO, *18 U.S.C. § 1962*, and that the Defendants conspired to violate Federal RICO, *18 U.S.C. § 1962(d)*; and, finally, the Plaintiffs demand that the Defendants be enjoined from foreclosing on any of the properties of Plaintiffs in this pending action. (Id. ¶¶ 35-59.)

In their motion to dismiss, the Trustee Defendants argue: (1) that the Plaintiffs lack standing to maintain claims based on alleged breaches of the PSAs; (2) that the Amended Complaint fails to sufficiently allege a RICO violation by any **[*11]** Defendant; (3) that the Amended Complaint fails to allege a conspiracy to commit a RICO violation; (4) that the substantive RICO count and the conspiracy count are time-barred; (5) that the third count fails to identify a substantive claim for relief, and (6) that the all of the Plaintiffs are misjoined in this action. (Defs.' Mot. at 1-2.)

## II. STANDARD OF REVIEW

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). This standard is met "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. A court should not dismiss a complaint for failure to state a claim if the factual allegations sufficiently "raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555.

The United States Supreme Court has recognized limits on the class of persons who have standing to invoke the federal courts' decisional and remedial powers. Specifically, the Court has held that **[*12]** a plaintiff "generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin, 422 U.S. 490, 499, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975)*. In ruling on a motion to dismiss for want of standing, the trial court must "accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Id. at 501*. Only if the plaintiff's standing does not appear from all materials of the record may the complaint be dismissed for want of standing. *Id. at 502*.

## III. ANALYSIS

### A. The Plaintiffs Do Not Have Standing to Assert Claims Based on Breaches of the PSAs

The Plaintiffs' Amended Complaint is predicated upon alleged breaches of the PSAs which, the Plaintiffs allege, made the assignment of their mortgage loans by the original lending institution to the Trustee Defendants invalid. (Am. Compl. ¶¶ 14, 21.) With full knowledge of the invalidity of this transfer, the Trustee Defendants allegedly "concealed" from the Plaintiffs the fact that they did not validly own the mortgage loans and sought to foreclose on certain of the Plaintiffs' properties, in violation of RICO and as part of a conspiracy **[*13]** to violate RICO. (Id. ¶¶ 35-54.) In their motion, the Trustee Defendants argue that the Plaintiffs are neither parties to nor third-party beneficiaries of the PSAs, and therefore lack standing to assert claims based on breaches of those agreements. (Defs.' Mot. at 5.) This argument has merit. Even construing the Amended Complaint in favor of the Plaintiffs, the Plaintiffs' standing to bring this action is lacking based on a careful review of the entire record. Therefore, the Amended Complaint must be dismissed.

The PSAs here are to be interpreted under the New York Estates, Powers, and Trusts Law ("EPTL"). (Pls.' 11/6/13 Letter, Ex. 3 § 10.03 (New York law governs the interpretation of the PSA); Pls.' Opp'n at 10; Defs.' Reply at 2.) New York courts interpreting the EPTL consistently hold that litigants who are not beneficiaries of a trust lack standing to enforce the trust's terms or to challenge the actions of the trustee. See *In re Estate of McManus,* 47 N.Y.2d 717, 390

N.E.2d 773, 774, 417 N.Y.S.2d 55 (N.Y. 1979) (individuals "not beneficially interested" in a trust lack standing to challenge the trustee's actions); *Cashman v. Petrie*, 14 N.Y.2d 426, 201 N.E.2d 24, 26, 252 N.Y.S.2d 447 (N.Y. 1964) ("A person who might incidentally benefit from **[*14]** the performance of a trust but is not a beneficiary thereof cannot maintain a suit to enforce the trust or to enjoin a breach."); *Naversen v. Gaillard,* 38 A.D.3d 509, 831 N.Y.S.2d 258, 259 (N.Y. App. Div. 2007) ("The Supreme Court properly determined that since the defendants were not beneficiaries of the G. Everett Gaillard Revocable Trust, they lacked standing to challenge the actions of the plaintiff as its trustee.").

The Amended Complaint does not allege that the Plaintiffs were parties to the PSAs, (see generally Am. Compl. ¶¶ 1-59), and the representative PSA provided by the Plaintiffs for the Court's review does not include any provision indicative of a party status for borrowers or mortgagors. (See generally Pls.' 11/6/13 Letter Ex.3.) Though the Second Circuit has not ruled directly on this issue, district courts in this Circuit and elsewhere have generally held that "a nonparty to a PSA lacks standing to assert noncompliance with the PSA as a claim or defense unless the non-party is an intended (not merely incidental) third-party beneficiary of the PSA."[7] *Rajamin v.*

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[7] In so holding, the Court in *Rajamin* stated that it was joining "the weight of the case law around the country." *Rajamin*, 2013 U.S. Dist. LEXIS 45031, 2013 WL 1285160, at *3. Indeed, many federal courts, including several federal **[*16]** appellate courts, have held that a plaintiff-borrower lacks standing to bring any claim that is based upon alleged noncompliance with a PSA or the assignment of the plaintiff's mortgage loans. See,

e.g., Robinson v. Select Portfolio Servicing, Inc., 522 F. App'x 309, 312 (6th Cir. 2013) (under Michigan law, plaintiffs/mortgagors lacked standing to allege unfair practices against RMBS trustee challenging the assignment of their mortgage based on alleged noncompliance with a PSA because they were not parties to, or third-party beneficiaries of, the assignment or the PSA); Karnatcheva v. JPMorgan Chase Bank, N.A., 704 F.3d 545, 547 (8th Cir. 2013) ("Under Minnesota law, mortgagors do not have standing to request declaratory judgments regarding trust agreements relating to mortgage-backed securities because the mortgagors are not parties to or beneficiaries of the agreements."). See also Calderon v. Bank of America N.A., 941 F.Supp.2d 753, 766 (W.D. Tex. 2013) (holding that the plaintiffs did not have standing to challenge an after-the-deadline-transfer of a mortgage loan in violation of a PSA because the transfer would merely be voidable at the election of the parties to the PSA, not **[*17]** void); Abruzzo v. PNC Bank, N.A., No. 4:11-CV-735-Y, 2012 U.S. Dist. LEXIS 113945, 2012 WL 3200871, *2 (N.D. Tex. July 30, 2012) (holding that the plaintiffs did not have standing to challenge the assignment of their mortgage on the ground that the assignment violated a PSA because the plaintiffs were not parties to the PSA); In re Correia, 452 B.R. 319, 324 (B.A.P. 1st Cir. 2011) (finding that debtors lacked standing to challenge the chain of title under a PSA because they could not show that they were a party to the contract); In re Almeida, 417 B.R. 140, 149 n.4 (Bankr. D. Mass. 2009)(same); Dauenhauer v. Bank of New York Mellon, No. 3:12-cv-01026, 2013 U.S. Dist. LEXIS 74934, 2013 WL 2359602, *5 (M.D. Tenn. May 28, 2013) (collecting cases); Preciado v. Wells Fargo Home Mortg., No. 13-00382 LB, 2013 U.S. Dist. LEXIS 65835, 2013 WL 1899929, *5 (N.D. Cal. May 7, 2013)("The weight of persuasive authority in this district is that a plaintiff has no standing to challenge foreclosure based on a loan's having been securitized."); Lester v. J.P. Morgan Chase Bank, No. C 12-05491 LB, 2013 U.S. Dist. LEXIS 86420, 2013 WL 3146790, *6 (N.D. Cal. June 18, 2013) (same); Clark v. Lender Processing Services, Inc., 949 F.Supp.2d 763, 771 (N.D. Ohio 2013) (Plaintiffs lack standing to assert any claim based on allegedly **[*18]** faulty assignments of the notes and mortgages into the PSAs because Plaintiffs are not parties to the agreements).

*Deutsche Bank Nat. Trust Co., No. 10 Civ. 7531 (LTS), 2013 U.S. Dist. LEXIS 45031, 2013 WL 1285160, at *3 (S.D.N.Y. Mar. 28, 2013)* (citing, inter alia, **[*15]** *Livonia Property Holdings, LLC v. 12840-12976 Farmington Road Holdings, LLC, 717 F. Supp. 2d 724, 736-37 (E.D. Mich. 2010)* ("For over a century, state and federal courts around the country have [held] that a litigant who is not a party to an assignment lacks standing to challenge that assignment."), aff'd, *399 F. App'x 97 (6th Cir. 2010))* ; see also *Karamath v. U.S. Bank, N.A., No. 11 Civ. 1557 (RML), 2012 U.S. Dist. LEXIS 135038, 2012 WL 4327613, at *7 (E.D.N.Y. Aug. 29, 2012)* (mortgagor "is not a party to the PSA or to the Assignment of Mortgage, and is not a third-party beneficiary or either, and therefore has no standing to challenge the validity of that agreement or the assignment") adopted by *No. 11 Civ. 1557 (NGG), 2012 U.S. Dist. LEXIS 135007, 2012 WL 4327502 (E.D.N.Y. Sep. 20, 2012).* These cases have further held that for a party to be considered a third-party beneficiary to a PSA, the intent to render a non-party a third-party beneficiary must be clear from the face of the PSA. *Rajamin, 2013 U.S. Dist. LEXIS 45031, 2013 WL 1285160, at *3* (internal citations omitted).

In an effort to establish their standing in the face of this case law, the Plaintiffs argue that the breaches of the PSAs, specifically, the transfers of ownership after the closing dates specified in the PSAs, rendered the conveyances void under *Section 7-2.4 of the EPTL*. (Pls.' Opp'n at 9.) That section provides that "if the trust is expressed in the instrument creating the estate of the trustee, every sale, conveyance

or other act of the trustee in contravention of the trust, except as authorized by this article and by any other provision of law, is void." *EPTL § 7-2.4*. The Plaintiffs argue first that the conveyances are void under *EPTL § 7-2.4*, and, second, that because the conveyances are void under that section, they have standing, even as non-parties, to challenge the assignments. (Pls.' Opp'n at 7.)

First, though some courts have held that non-compliance with the terms of a PSA renders an assignment void under *EPTL § 7-2.4*, the weight of the case law holds that such an assignment is merely voidable, and therefore outside the scope of that section. A void contract **[*19]** is "invalid or unlawful from its inception," while a voidable contract "is one where one or more of the parties have the power, by the manifestation of an election to do so, to avoid the legal relations created by the contract." 17A C.J.S. Contracts § 169. The Plaintiffs cite two cases that found that acceptance of the note and mortgage by a trustee after the closing date of the PSA renders an assignment void under *EPTL § 7-2.4*. *Wells Fargo Bank, N.A. v. Erobobo, 39 Misc. 3d 1220[A], 972 N.Y.S.2d 147, 2013 NY Slip Op 50675[U], 2013 WL 1831799 (N.Y. Sup. Ct. 2013)*; *Glaski v. Bank of America, 218 Cal. App. 4th 1079, 160 Cal. Rptr. 3d 449 (Cal. Ct. App. 2013)* (relying on Erobobo).

However, those cases run counter to better-reasoned cases, which apply the rule that a beneficiary can ratify a trustee's ultra vires act. See *Mooney v. Madden, 193 A.D.2d 933, 597 N.Y.S.2d 775, 776 (N.Y. App. Div. 1993)* ("A trustee may bind the trust to an otherwise invalid act or agreement which is

outside the scope of the trustee's power when the beneficiary or beneficiaries consent or ratify the trustee's ultra vires act or agreement."); *Washburn v. Rainier, 149 A.D. 800, 803, 134 N.Y.S. 301 (N.Y. App. Div. 1912)* (same); 106 N.Y. Jur. 2d Trusts § 431 ("the trustee may bind trust to an otherwise **[*20]** invalid act or agreement which is outside the scope of the trustee's power when beneficiary consents to or ratifies the trustee's ultra vires act or agreement"). Where an act can be ratified, it is voidable rather than void. See *Hackett v. Hackett, 34 Misc. 3d 1233[A]; 950 N.Y.S.2d 608, 2012 NY Slip Op 50356[U], 2012 WL669525, at *20 (N.Y. Sup. Ct. 2012)* ("A void contract cannot be ratified; it binds no one and is a nullity. However, an agreement that is merely voidable by one party leaves both parties at liberty to ratify the transaction and insist upon its performance.") (internal citation omitted). Notably, trust beneficiaries need not actually ratify the act to render an act voidable and therefore outside the scope of *EPTL § 7-2.4*, rather, the fact that trust beneficiaries could ratify such an act is sufficient to render it voidable. *Bank of America Nat'l Ass'n v. Bassman FBT, LLC, 2012 IL App (2d) 110729, 981 N.E.2d 1, 9, 366 Ill. Dec. 936 (Ill. App. Ct. 2012).*

Applied to the context of alleged non-compliance with the terms of a PSA, courts considering *EPTL § 7-2.4* have held that "even if it is true that the Notes were transferred to the trust in violation of the trust's terms [after the closing date of the trust], that transaction could be ratified by the beneficiaries **[*21]** of the trust and is therefore merely voidable." *Omrazeti v. Aurora Bank FSB, No. SA:12-CV-00730-*

*DAE, 2013 U.S. Dist. LEXIS 88644, 2013 WL 3242520, at *7 (W.D. Tex. June 25, 2013)*; see also *Calderon, 941 F.Supp.2d at 766* (same); *Bassman, 981 N.E.2d at 9* ("Hence, numerous cases, including several that specifically reference *7-2.4*...indicate that under various circumstances a trustee's ultra vires acts are not void."). Following this case law, even assuming that the transfer of Plaintiffs' mortgages to their respective trusts violated the terms of their respective PSAs, the after-the-deadline transactions would merely be voidable at the election of one or more of the parties—not void.

Furthermore, even if the allegedly untimely conveyances were to be considered void under *EPTL § 7-2.4*, district courts in the Second Circuit have found that that section does not provide standing to mortgagors to challenge the conveyances. In Karamath, the plaintiff-mortgagor alleged that the trustee defendant had no legal or equitable interest in her loan because the assignment of the note was invalid, and the transfer was void under the EPTL. *Karamath, 2012 U.S. Dist. LEXIS 135038, 2012 WL 4327613, at *7*. The Eastern District nevertheless held that because the **[*22]** plaintiff was not a party to the PSA or to the Assignment of Mortgage, and was not a third-party beneficiary of either, she therefore had no standing to challenge the validity of that agreement or the assignment.[8] Id.; see also *Rajamin,* 2013 U.S.

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[8] The foreclosure proceedings of the Plaintiffs are not a part of the record, so it is unclear whether the Plaintiffs have raised this issue in their underlying foreclosure proceedings, but *Karamath* additionally held that the proper time to raise the issue of ownership of the note is at the underlying foreclosure ac-

Dist. LEXIS 45031, 2013 WL 1285160, at *3 ("Plaintiffs have not alleged any facts that would support plausibly a claim that they are intended third-party beneficiaries of the PSAs. Thus, Plaintiffs lack standing to challenge Defendants' alleged ownership of the Notes and [Deeds of Trust] or authority to foreclose based on non-compliance with the PSAs.").

Finally, the Plaintiffs argue that whether or not they are intended third-party beneficiaries of the PSAs is a "fact-laden issue" that cannot be determined within the context of the Defendants' motion to dismiss. (Pls.' Opp'n at 19.) However, Plaintiffs bear the burden to plead facts showing their intended third-party beneficiary status. *Premium Mortg. Corp. v. Equifax, Inc.*, 583 F.3d 103, 108 (2d Cir. 2009); Rajamin, 2013 U.S. Dist. LEXIS 45031, 2013 WL 1285160, at *3. The Plaintiffs do not make any such factual allegations in the Amended Complaint. (See generally Am. Compl. ¶¶ 1-59.) Moreover, the Plaintiffs can only attain status as intended third-party beneficiaries if the PSAs themselves "clearly evidence[] an intent to permit enforcement" by them. *Premium Mortg, 583 F.3d at 108* (quoting *Fourth Ocean Putnam Corp. v. Interstate Wrecking Co.*, 66

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tion, and mortgagors who do not raise it at that time waive their right to challenge the validity of the assignment. See *Karamath*, 2012 U.S. Dist. LEXIS 135038, 2012 WL 4327613, at *7 ("To the extent plaintiff is arguing that [the trustee defendant] lacks standing to foreclose on the mortgage, that is an affirmative defense that plaintiff **[*23]** waived when she failed to assert it in the foreclosure action."). Because the Trustee Defendants have not raised this argument, this Court does not consider whether the Plaintiffs waived any right to argue that the assignment of their mortgages were invalid.

N.Y.2d 38, 485 N.E.2d 208, 212, 495 N.Y.S.2d 1 (N.Y. 1985)). The Plaintiffs point to no such provisions, and the Court's independent search **[*24]** has discovered none. (See generally Pls.' 11/6/13 Letter Ex.3.) While the Plaintiffs' Opposition argues that the PSAs place duties upon mortgage loan servicers to safeguard the Plaintiffs' properties from such perils as physical destruction and tax forfeiture, (Pls.' Opp'n at 19-20), the Plaintiffs fail to explain how such provisions would be intended to benefit them, as opposed to the RMBS certificateholders, for whom the Plaintiffs' properties constitute collateral securing their investment. Accordingly, the Plaintiffs have failed to allege that they are intended third-party beneficiaries of the PSAs, and they therefore lack standing to bring claims based on alleged breaches of those agreements.

For the foregoing reasons, the Plaintiffs have no standing to bring any claim based on alleged breaches of the PSAs, and, because the theory underlying the Plaintiffs' claims is untenable, any amendment of the Amended Complaint would be futile. See *Foman v. Davis,* 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962). Therefore, the Amended Complaint is dismissed with prejudice in its entirety. Furthermore, because the standing issue is dispositive, this Court need not reach the other issues raised in the motion to dismiss **[*25]** or the issue of severance.

## IV. CONCLUSION

For the reasons discussed herein, the Defendants' joint motion to dismiss the Amended Complaint is GRANTED. The Clerk of the Court is ordered to close this case.

IT IS SO ORDERED.

Dated: New York, New York
March 24, 2014

*/s/* Robert P. Patterson, Jr.
United States District Judge

## APPENDIX C

Case 1:13 -cv-00580-RPP Document 58 Filed 03/26/14

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF NEW YORK**

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ANH NYUYET TRAN, et al.,

Plaintiffs,

-against-

**13 CIVIL** 580 (RPP)
**JUDGMENT**

BANK OF NEW YORK, et al.

Defendants.

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Whereas on August 2, 103, the Trustee Defendants having filed a joint motion to dismiss the Amended Complaint, or, in the alternative, to sever the Plaintiffs, and the matter having come before the Honorable Robert P. Patterson, United States District Judge, and the Court, on March 24,2014, having rendered its Opinion and Order granting Defendants' joint motion to dismiss the Amended Complaint, it is,

**ORDERED, ADJUDGED AND DECREED:** That for the reasons stated in the Court's Opinion and Order dated March 24,2014, Defendants' joint motion to dismiss the Amended Complaint is granted; accordingly, the case is closed.

**Dated:** New York, New York
March 26, 2014

**RUBY J. KRAJICK**
**Clerk of the Court**

**BY:** s/ [illegible]
Deputy Clerk

## APPENDIX D

***Tran v. Bank of N.Y.***

United States Court of Appeals for the Second Circuit

January 30, 2015, Decided

14-1224-cv

**Reporter**

592 Fed. Appx. 24; 2015 U.S. App. LEXIS 1479

ANH NGUYET TRAN, CHRISTINA T. SOULAMANY, LAI SOMCHANMAVONG, COLLEEN DWYER, ELAINE PHAN, HOA V. NGUYEN, HUAN N. TRAN, HUNG V. NGUYEN, KAY APHAYVONG, KIM-THUY NGUYEN, MIA L. PHAM, MINH A. TRINH, NHIEU TRAN, PATRICIA GUNNESS, PATRICIA S. ADKINS, FKA PATRICIA S. OLSON, PETER DELAMOS, PETER HA, TINA LE, PHOKHAM SOULAMANY, PHETSANOU SOULAMANY, THAI CHRISTIE, SEQUOIA HOLDINGS L.L.C., THUY TRANG NGUYEN, TUY T. HOANG, TUYEN T. THAI, TUYETLAN T. TRAN, UYEN T. THAI, THONG NGO, VAN LE, FKA VAN T. NGUYEN, Plaintiffs-Appellants,

v.

BANK OF NEW YORK, now known as BANK OF NEW YORK MELLON by merger and/or acquisition, DEUTSCHE BANK NATIONAL TRUST COMPANY, HSBC BANK USA, N.A., U.S. BANK NATIONAL

ASSOCIATION, WELLS FARGO BANK, NATIONAL ASSOCIATION, Defendants-Appellees.[1]

**Notice:** PLEASE REFER TO *FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1* GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Substituted opinion at *Tran v. Bank of N.Y., 2015 U.S. App. LEXIS 12611 (2d Cir. N.Y., July 22, 2015)*

Appeal from the United States District Court for the Southern District of New York (Patterson, J.).

For Appellants: TOMAS ESPINOSA, North Bergen, N.J.

For Appellees: ERIC R. SHERMAN, Dorsey & Whitney LLP, (Christopher G. Karagheuzoff, on the brief), Minneapolis, Minn., for US Bank National Association, as Trustee.

Scott H. Kaiser, Bryan Cave LLP, (Christine B. Cesare, Nafiz Cekirge, on the brief), New York, N.Y., for the Bank of New York Mellon, as Trustee.

Brian S. McGrath, Hogan Lovells US LLP, (Allison J. Schoenthal, Lisa J. Fried, on the brief), New York, N.Y, for HSBC Bank USA National Association, as Trustee, and Wells Fargo Bank National Association, as Trustee.

BERNARD J. GARBUTT III, Morgan, Lewis & Bockius LLP, New York, N.Y., for Deutsche Bank

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[1] The Clerk of the Court is directed to amend the case caption as above

National Trust Company, Solely in its Capacity as Trustee.

Present: PIERRE N. LEVAL, ROSEMARY S. POOLER, DENNY CHIN, Circuit Judges.

**[*25] SUMMARY ORDER**

**ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that the judgment of said District Court be and it hereby is **AFFIRMED**.

Plaintiffs-Appellants appeal from the March 26, 2014 judgment of the United States District Court for the Southern District of New York (Patterson, *J.*) granting **[**2]** the motion to dismiss of Defendants-Appellees on the basis that Plaintiffs lacked standing to bring any claim based on alleged breaches of Pooling and Servicing Agreements to which they were neither parties nor intended third-party beneficiaries. We assume the parties' familiarity with the underlying facts, procedural history, and specification of issues for review.

"We review the district court's grant of a motion to dismiss *de novo*, but may affirm on any basis supported by the record." *Coulter v. Morgan Stanley & Co., 753 F.3d 361, 366 (2d Cir. 2014)*. We accept the factual allegations in plaintiffs' complaint as true for purposes of reviewing the district court's dismissal for failure to state a claim, or for lack of standing, to the extent that the dismissal was based on the pleadings. *Rajamin v. Deutsche Bank Nat'l Trust Co., 757 F.3d 79, 81 (2d Cir. 2014)*.

Here, Plaintiffs do not identify any basis for distinguishing their claim from the claim at issue in *Rajamin*, where this Court recently held that mortgagors, who were not trust beneficiaries, lacked constitutional and prudential standing to bring an action based on trustee conduct that allegedly contravened the trust instrument. *Id. at 88*. Rather, Plaintiffs request that we both reverse the district court and overrule, overturn, or modify our decision in *Rajamin* because **[**3]** Plaintiffs assert that those decisions improperly construed *New York Estates, Powers, and Trusts Law § 7-2.4*. It is well established that we are "bound by the decisions of prior panels until such time as they are overruled either by an en banc panel of our Court or by the Supreme Court." *United States v. Wilkerson, 361 F.3d 717, 732 (2d Cir. 2004)*. We therefore decline the invitation to revisit this Court's sound reasoning in *Rajamin*.

We have considered the remainder of Plaintiffs' arguments and find them to be without merit. Accordingly, the judgment of the district court hereby is AFFIRMED.

## APPENDIX E

Case 14-1224, Document 120, 04/03/2015, 1476635

**UNITED STATES COURT OF APPEALS**
**FOR THE**
**SECOND CIRCUIT**

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At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 3rd day of April, two thousand fifteen.

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Anh Nguyet Tran, Christina T. Soulamany, Lai Somchanmavong, Colleen Dwyer, Elaine Phan, Hoa V. Nguyen, Huan N. Tran, Hung V. Nugyen, Kay Aphayvong, Kim-Thuy Nugyen, Mia L. Pham, Minh A. Trinh, Nhieu Tran, Patricia Gunness, Patricia S. Adkins, FKA Patricia S. Olson, Peter Delamos, Peter Ha, Tina Le, Phokham Soulamany, Phetsanou Soulamany, Thai Christie, Sequoia Holdings L.L.C., Thuy Trang Nguyen, Tuy T. Hoang, Tuyen T. Thai, Tuyetlan T. Tran, Uyen T. Thai, Thong Ngo, Van Le, FKA Van T. Nguyen,

Plaintiffs - Appellants,

v.

**ORDER**

Docket No:
14-1224

Bank of New York, now known as Bank of New York Mellon by merger and/or acquisition, Deutsche Bank National Trust Company, HSBC Bank USA N.A., U.S. Bank National Association, Wells Fargo Bank, National Association.

Defendants - Appellees.

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Appellants Patricia S. Adkins, Kay Aphayvong, Thai Christie, Peter Delamos, Colleen Dwyer, Patricia Gunness, Peter Ha, Tuy T. Hoang, Tina Le, Van Le, Thong Ngo, Hoa V. Nguyen, Thuy Trang Nguyen, Hung V. Nugyen, Kim-Thuy Nugyen, Mia L. Pham, Elaine Phan, Sequoia Holdings L.L.C., Lai Somchanmavong, Christina T. Soulamany, Phetsanou Soulamany, Phokham Soulamany, Tuyen T. Thai, Uyen T. Thai, Anh Nguyet Tran, Huan N. Tran, Nhieu Tran, Tuyetlan T. Tran and Minh A. Trinh, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk
[SEAL]

**APPENDIX F**

Case 14-1224, Document 139, 07/21/2015, 1558755

**UNITED STATES COURT OF APPEALS**
**FOR THE**
**SECOND CIRCUIT**

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At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 21st day of July, two thousand fifteen.

Before: Rosemary S. Pooler,

*Circuit Judge*.

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Anh Nguyet Tran; Christina T Soulamany & Lai Somchanmavong; Colleen Dwyer; Elaine Phan; Hoa V Nguyen; Huan N Tran; Hung V Nguyen; Kay Aphayvong; Kim-Thuy Nguyen; Mai L Pham; Minh A Trinh; My-Hanh Huynh; Nhieu V Tran; Patricia Gunness; Patricia S Adkins FKA Patricia S. Olson; Peter Delamos; Peter Ha & Tina Le; Phokham Soulamany & Phetsanou Soulamany; Sarah M Young; Suong Ngoc Nguyen & Long Le; Thai Christie & Sequoia Holdings LLC; Thiem Ngo; Thuan T Tran; Thu Lam Tran; Thuy-Trang Nguyen; Tri Thien Nguyen, Tuy T Hoang & Thomas T Hoang; Tuyen T Thai; Tuyetlan T Tran;

Uyen T Thai & Thong Ngo; Van Le FKA Van T Nguyen; Vu Dinh;

Plaintiffs-Appellants,

v.

**ORDER**

Docket No. 14-1224

Bank of New York now known as Bank of New York Mellon by merger and/or acquisition, Deutsche Bank National Trust Company, HSBC Bank USA, N.A., U.S. Bank National Association, Wells Fargo Bank, National Association,

Defendants-Appellees.

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Plaintiffs-Appellants have filed a motion to amend and correct the caption on the appellate docket, on the Court's Summary Order, and on the order denying their petition for rehearing *en banc* to reflect the caption used in their Amended Complaint and in the Notice of Appeal.

IT IS HEREBY ORDERED that the motion is GRANTED. The Clerk is directed to amend the caption to conform with the caption set forth above.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

[SEAL]

**APPENDIX G**

Case 14-1224, Document 140, 07/21/2015, 1558764

**UNITED STATES COURT OF APPEALS**
**FOR THE**
**SECOND CIRCUIT**

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At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 21st day of July, two thousand fifteen.

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Anh Nguyet Tran; Christina T Soulamany & Lai Somchanmavong; Colleen Dwyer; Elaine Phan; Hoa V Nguyen; Huan N Tran; Hung V Nguyen; Kay Aphayvong; Kim-Thuy Nguyen; Mai L Pham; Minh A Trinh; My-Hanh Huynh; Nhieu V Tran; Patricia Gunness; Patricia S Adkins FKA Patricia S. Olson; Peter Delamos; Peter Ha & Tina Le; Phokham Soulamany & Phetsanou Soulamany; Sarah M Young; Suong Ngoc Nguyen & Long Le; Thai Christie & Sequoia Holdings LLC; Thiem Ngo; Thuan T Tran; Thu Lam Tran; Thuy-Trang Nguyen; Tri Thien Nguyen, Tuy T Hoang & Thomas T Hoang; Tuyen T Thai; Tuyetlan T Tran; Uyen T Thai & Thong Ngo; Van Le FKA Van T Nguyen; Vu Dinh;

Plaintiffs-Appellants,

**CORRECTED ORDER**

Docket No. 14-1224

v.

Bank of New York now known as Bank of New York Mellon by merger and/or acquisition, Deutsche Bank National Trust Company, HSBC Bank USA, N.A., U.S. Bank National Association, Wells Fargo Bank, National Association,

Defendants-Appellees.

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Appellants Anh Nguyet Tran, Christina T Soulamany, Lai Somchanmavong, Colleen Dwyer, Elaine Phan, Hoa V Nguyen, Huan N Tran, Hung V Nguyen, Kay Aphayvong, Kim-Thuy Nguyen, Mai L Pham, Minh A Trinh, My-Hanh Huynh; Nhieu V Tran, Patricia Gunness, Patricia S Adkins FKA Patricia S. Olson, Peter Delamos, Peter Ha & Tina Le, Phokham Soulamany & Phetsanou Soulamany, Sarah M Young, Suong Ngoc Nguyen & Long Le, Thai Christie & Sequoia Holdings LLC, Thiem Ngo, Thuan T Tran, Thu Lam Tran, Thuy-Trang Nguyen, Tri Thien Nguyen, Tuy T Hoang & Thomas T Hoang, Tuyen T Thai, Tuyetlan T Tran, Uyen T Thai & Thong Ngo, Van Le FKA Van T Nguyen, Vu Dinh, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk
[SEAL]