To Be Argued By:
ALAN E. SCHOENFELD
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Appellate Division, First Department Case Nos. 2021-03399, 2021-03400, 2022-00030
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Court of Appeals

STATE OF NEW YORK

In the Matter of

KASOWITZ, BENSON, TORRES & FRIEDMAN, LLP,

Petitioner,

—against—

JPMORGAN CHASE BANK, N.A.,

Respondent-Appellant,

THE DAKOTA, INC.,

Respondent-Respondent,

(*Caption continued on inside cover*)

BRIEF FOR RESPONDENT-APPELLANT

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October 13, 2023

ALPHONSE FLETCHER, JR.,

Respondent,

—and—

FLETCHER INTERNATIONAL LTD., *et al.*,

Intervenors-Respondents.

CORPORATE DISCLOSURE STATEMENT

JPMorgan Chase Bank, N.A. is a wholly owned subsidiary of JPMorgan Chase & Co. JPMorgan Chase & Co. is a publicly held corporation. JPMorgan Chase & Co. does not have a parent corporation and no publicly held corporation owns 10% or more of its stock. However, The Vanguard Group, Inc., an investment adviser which is not a publicly held corporation, has reported that registered investment companies, other pooled investment vehicles, and institutional accounts that it or its subsidiaries sponsor, manage, or advise have aggregate ownership under certain regulations of 10% or more of the stock of JPMorgan Chase & Co.

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INTRODUCTION

This is a straightforward case. In the decision below, the First Department bound Respondent-Appellant JPMorgan Chase Bank, N.A. to a judgment entered in separate litigation in which Chase was never involved, denying Chase its constitutional right to a day in court. Under well-settled principles of due process and preclusion, that decision cannot stand. The Court should reverse.

In 2008, Respondent Alphonse Fletcher, Jr. assigned to Chase his interests in certain property associated with two apartment units of The Dakota, a cooperative apartment building in Manhattan, as security for a loan. Fletcher sued The Dakota in 2011, and in 2017, the supreme court entered a judgment awarding millions of dollars in attorneys' fees to The Dakota. That judgment was premised on an incorrect reading of Fletcher's lease. But Fletcher never challenged that interpretation. Indeed, he never meaningfully challenged the fee award at all.

This separate litigation followed to determine the appropriate disposition of the proceeds from the sale of the property that secured Chase's loan, which were insufficient to satisfy both Chase's lien and the attorneys' fee award to The Dakota. In that new suit, the First Department precluded Chase from arguing that the lease did not permit the fee award, holding that (1) Fletcher should have raised those arguments in the prior suit, (2) Chase should have intervened in that prior suit, and

(3) Chase's challenge to the attorneys' fee award would impermissibly collaterally attack and seek to destroy the validity of the prior judgment against Fletcher.

That decision is unconstitutional. "One of the most fundamental principles of our system of justice is that every person is entitled [to] a day in court notwithstanding that the same issue of fact may have been previously decided between strangers. Generally, therefore, a person may not be precluded from litigating issues resolved in an action in which that person was not a party." *Gramatan Home Invs. Corp. v. Lopez*, 46 N.Y.2d 481, 485-486 (1979). "[T]he consequences of a determination that a party is collaterally estopped from litigating a particular issue are great," so "strict requirements for application of the doctrine must be satisfied to insure that a party not be precluded from obtaining at least one full hearing on his or her claim." *Id.* at 485. "In properly seeking to deny a litigant two 'days in court', courts must be careful not to deprive him of one." *Reilly v. Reid*, 45 N.Y.2d 24, 28 (1978). The First Department's decision in this case effects precisely that forbidden deprivation.

First, contrary to the First Department's holding, this Court has made clear that judgments against assignors in post-assignment cases do not bind non-party assignees. State and federal courts across the country have agreed for over a century. *See infra* § I.A. This Court has never admitted any exceptions to that straightforward rule, and nothing about the assignment in this case calls for inventing such an

exception now. When Fletcher assigned his interests to Chase, those interests were not subject to a lien of millions of dollars of attorneys' fees to The Dakota. If that lien is to now be wielded in new litigation against Chase, vitiating Chase's right to recover the collateral pledged to secure its loan, then Chase must have an opportunity to challenge the legality of the fee award. *See infra* § I.B.

Second, New York law—as well as bedrock due process principles—confirm that absent parties are not required affirmatively to intervene in litigation to protect their rights. If their rights may be inequitably affected, then mandatory joinder rules protect them. Thus, contrary to the First Department's ruling, Chase is not bound by the judgment against Fletcher simply because Chase perhaps could have intervened in that prior suit. *See infra* § II.

Third, allowing Chase to make its case would not even attack, much less destroy, The Dakota's judgment against Fletcher. That judgment remains in place, and Fletcher is precluded from relitigating the validity of the fee award or any other issue that was or could have been raised in the prior litigation. None of that is at issue here. At issue now is a potential judgment against *Chase*. And Chase is entitled to its own day in court. *See infra* § III.

Fourth, affirming the First Department would have grave consequences for courts and litigants. Assignees would be forced to intervene in any case where they are merely permitted (but ought not be required) to do so or risk preclusion in later

litigation, causing proliferation of unnecessary intervention with attendant costs and delay. If assignees fail to intervene, they will be forced to move to vacate prior judgments, potentially disturbing rulings as between parties that each already had a fair chance to litigate their case. Affirming the First Department's unsupported decision would sacrifice the orderly resolution of cases between necessary litigants and the finality of judgments between those litigants. *See infra* § IV.

Finally, Justice Bluth's decision denying Chase's motion to intervene in the suit between Fletcher and The Dakota and vacate the judgment does not moot this case. To succeed on appeal of Justice Bluth's decision, Chase must demonstrate that it has met one of the narrowly limited grounds for vacatur in CPLR 5015(a) before the court will even consider the merits. Chase should not be subject to that additional procedural burden because it never should have been forced to move to intervene. A favorable decision here will eliminate that burden and permit unencumbered appellate review of the merits. The possibility of that outcome means the case is not moot. And as a prudential matter, absent correction by this Court, the First Department's decision will remain good law, threatening the due process rights of New York litigants and burdening courts, lenders, and consumers. *See infra* § V.

This Court should reverse the decision below and remand for further proceedings.

JURISDICTIONAL STATEMENT

The First Department's decision and order affirming the judgment of the Supreme Court, New York County, and declaring that the lien of The Dakota is senior to that of Chase, is a final determination of all causes of action. This Court has jurisdiction over this appeal under CPLR 5602(a)(1)(i). For the reasons explained in § V *infra*, the case is not moot.

QUESTION PRESENTED FOR REVIEW

In *Gramatan Home Investors Corp. v. Lopez*, 46 N.Y.2d 481 (1979), this Court held that "an assignee is not privy to a judgment where the succession to the rights affected thereby has taken place prior to the institution of the suit against the assignor." *Id.* at 487. In this case, the question presented is:

> Whether assignees are required to intervene in post-assignment suits involving their assignors on penalty of being bound by the judgment in that suit in future litigation.

Answer: No.

BACKGROUND

A. Chase's Priority Security Interest And The Fletcher Case

In 2008, Chase agreed to loan Fletcher $11,250,000.00, secured by the assignment to Chase of Fletcher's rights, title, and interest in the 965 shares of capital stock associated with certain apartment units in The Dakota, as well as the associated

proprietary lease ("Lease," and collectively with the apartment units, capital stock, and associated stock certificates, the "Property"). *See* R. 139-156, 958 (¶¶ 2, 6), 963 (¶¶ 2, 6), 968-971. The assignment took effect immediately, with no precondition of default. R. 970-971. Chase perfected its interest, securing a priority security interest in and lien on those units. *See* R. 972-1012. The assignment was to remain in effect as long as any part of the loan remained unpaid. R. 970.

In 2011, Fletcher sued The Dakota for allegedly discriminating against him when it refused to allow him to purchase an additional apartment and shares in the building—shares separate from and unrelated to those shares assigned to Chase. *See generally Fletcher v. The Dakota, Inc.*, Index No. 101289/11 (Sup. Ct. N.Y. Cnty.) (the "Fletcher Suit"). The Dakota counterclaimed for its legal fees and costs, vaguely citing the "proprietary lease between plaintiff Fletcher and defendant Dakota." R. 510-511. The supreme court severed and stayed those counterclaims. R. 2066.

On September 11, 2015, the supreme court granted summary judgment to The Dakota, dismissed Fletcher's claims, and referred the counterclaims to mediation. *See* R. 775 (¶¶ 21-22), 790-791 (2:13-3:6), 797-798 (4:7-5:8); 2066-2067. Fletcher failed to appear, which led to an inquest as to only the reasonableness of the fees. *See* R. 775 (¶¶ 21-22), 790-793 (2:21-5:17), 797-799 (4:16-6:23). On May 18, 2017, the referee issued a report finding that the fees were reasonable, and on June 5, 2017,

The Dakota moved for an order confirming the report and entering judgment in its favor. *See* R. 776-778 (¶¶ 24-27), 844-852. Fletcher again did not meaningfully object, and on December 14, 2017, the court issued a judgment granting the award of nearly $4 million of attorneys' fees to The Dakota. *See* R. 380-381 (n.2), 385, 776-778 (¶¶ 24-27), 855-860.

Article II, paragraph 15th of the Lease ("Paragraph 15th"), on which The Dakota now relies for its attorneys' fees, was not at issue in Fletcher's claims against The Dakota. *See* R. 191-192 (¶ 1), 241-253 (¶¶ 189-263, a-j). Fletcher did not argue before the mediator, the referee, or the supreme court that Paragraph 15th did not entitle The Dakota to such fees. *See* R. 775-777 (¶¶ 21-26). To the contrary, Fletcher's counsel expressly stated that he was "not contesting" The Dakota's entitlement to or the reasonableness of the fees. R. 821-822 (7:26-8:4).

It is undisputed that Chase was never joined as a party to the Fletcher Suit, did not intervene in the Fletcher Suit, did not control Fletcher's litigation of the Fletcher Suit, and did not otherwise participate in the Fletcher Suit, formally or informally.

B. Proceedings Before The Supreme Court

In 2015, the law firm Kasowitz, Benson, Torres & Friedman, LLP filed a petition seeking the seizure and sale of the Property to satisfy a judgment in its favor for unpaid legal fees. *See* R. 60-67. Kasowitz named Chase and The Dakota as Respondents due to Chase's recorded security interest and The Dakota's rights under

the Lease. *See* R. 61-62, 64-65 (¶¶ 7, 20, 23). They are the only two remaining parties, as Fletcher represented that he has no interest in the litigation, R. 2103, and Kasowitz assigned its rights to Chase and withdrew, R. 2094-2096.[1]

In The Dakota's answer, it asserted that it held a superior lien on the Property arising from, in relevant part, the legal fees incurred in defending the Fletcher Suit. R. 97-109, 180-183. The Dakota relied on Paragraph 15th. It reads:

> If the Lessee shall at any time be in default hereunder, and the Lessor shall take any action against the Lessee based upon such default, or if the Lessor shall defend any action or proceeding (or claim therein) commenced by the Lessee, the Lessee will reimburse the Lessor for all expenses (including but not limited to attorneys fees and disbursements) thereby incurred by the Lessor, so far as the same are reasonable in amount, and the Lessor shall have the right to collect the same as additional rent or damages.

R. 698, 712.

The Dakota argued that Paragraph 15th permitted it to obtain legal fees when it either (1) sued a shareholder who was in default or (2) defended itself in any suit brought by a shareholder, regardless of whether the shareholder was in default. Chase countered that Paragraph 15th allows The Dakota to obtain legal fees when it either (1) takes any action against a shareholder who is in default or (2) defends itself in any suit brought by a shareholder who is in default. On the correct reading of

[1] The sale of one apartment closed on June 26, 2018, and the sale of the other on June 9, 2020. R. 310 ¶ 3. The proceeds amounted to $9,274,239.89, R. 45-49; 940 (¶¶ 9-10), 954-956, which was insufficient to satisfy both Chase's and The Dakota's asserted liens, *see* R. 307-308, 917-919, 940 (¶ 10), 954-956.

Paragraph 15th, default is always a precondition for a fee award.[2] Chase further argued that The Dakota's reading rendered Paragraph 15th unconscionable because it would permit recovery of fees regardless of the case outcome or whether the shareholder was in default. *See Krodel v. Amalgamated Dwellings Inc.*, 166 A.D.3d 412, 413-414 (1st Dep't 2018).

In an interim ruling, the supreme court held that the judgment in the Fletcher Suit did not preclude Chase from arguing that Paragraph 15th did not entitle The Dakota to legal fees and that the competing, plausible contractual interpretations required discovery. *See* R. 616. Following that discovery, both parties moved for summary judgment. *See* R. 307-308, 917-919. In an abbreviated decision, the supreme court granted summary judgment to The Dakota, holding in relevant part that Paragraph 15th allowed The Dakota to recover attorneys' fees from the Fletcher Suit and was not unconscionable. *See* R. 5-12, 17-24.

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[2] When The Dakota explained the proposed amendment adding Paragraph 15th to its shareholders, it confirmed and agreed that fees were only available after a shareholder's default:

> This change enhances the Shareholders' ability … to recover our attorney[s'] fees and all other expenses which we incur as a result of an individual shareholder defaulting, or should litigation be commenced against us by an individual shareholder *who is in default*. To protect an individual shareholder, our ability to recover such expenses is limited to those instances *when the shareholder is actually in default*.

R. 131 (¶ 19) (emphasis added).

C. Proceedings Before The First Department

Chase timely appealed, *see* R. 27-28; *see also* 3-4; 15-16, and the First Department affirmed. But not because it agreed with the supreme court's reading of Paragraph 15th or its unconscionability analysis. The court instead held that Chase's arguments "should have been made by Fletcher after the Dakota's counterclaims against him were severed." Op. 3. Alternatively, "[a]s Fletcher's assignee, Chase could have sought to intervene in his action against the Dakota to argue that paragraph 15th was invalid." *Id.* Finally, the court observed that Chase's principal contentions were "impermissible collateral attack[s] on the Dakota's judgment" in the Fletcher Suit because they "would destroy the judgment altogether." Op. 2-3.

The First Department thus held that Chase was bound by the judgment in the Fletcher Suit even though Fletcher's assignment to Chase occurred years before the litigation began, and Chase was not a party, did not control Fletcher's litigation, did not agree to be bound by the outcome of that litigation, and did not otherwise fall into any recognized category of privity for purposes of preclusion. *See, e.g.*, *Taylor v. Sturgell*, 553 U.S. 880, 891-895 (2008) (describing the few instances when due process permits exceptions to "the rule against nonparty preclusion"). Rather, the court held that Chase was precluded from making its arguments simply because Fletcher could have independently done so in the prior litigation and because the court believed Chase could have intervened in that suit.

Chase moved the First Department for reargument or for leave to appeal its decision to this Court on November 18, 2022. The First Department denied that motion on January 17, 2023. *See* R. 2116-2118.

D. Proceedings Following The First Department's Decision

Chase moved for leave to appeal to this Court on February 15, 2023. As Chase noted in that motion, and to protect its rights in the event this Court did not grant leave to appeal, Chase simultaneously followed the First Department's instruction and moved to intervene and vacate the judgment in the Fletcher Suit, doing so promptly to avoid any argument that its motion was not timely. *See* Mem. of Law In Support of Motion For Leave to Appeal at 6-7 n.1. The Dakota argued in opposition to that motion before Justice Bluth that Chase did not meet the requirements of CPLR 5015(a) to vacate the judgment, Chase's motion was untimely, and the supreme court's decision in this suit precluded Chase's motion. Justice Bluth denied Chase's motion to intervene and vacate on June 5, 2023, but Chase did not learn of that decision until June 23, 2023. This Court granted Chase's motion for leave to appeal on June 15, 2023. To preserve its rights in case of an adverse ruling from this Court, Chase noticed its appeal of Justice Bluth's decision on July 20, 2023.[3]

[3] The fact of these separate appeals is an accident of timing. Chase of course does not seek to litigate the merits of its case in two separate appeals. Following a

ARGUMENT

The First Department held that Chase was precluded from arguing that Paragraph 15th does not entitle The Dakota to attorneys' fees because (1) Fletcher "should have … made" these arguments in the Fletcher Suit, (2) Chase "could have sought to intervene" in the Fletcher Suit, and (3) a decision in Chase's favor "would destroy the judgment" against Fletcher. Op. 3. Each of these three holdings is incorrect as a matter of law. Affirming the First Department would move New York out of step with state and federal courts throughout the country on this fundamental issue of due process and lead to widespread and unnecessary intervention, to the detriment of New York courts and litigants.

I. Chase Is Not Bound By The Judgment In The Fletcher Suit Because That Litigation Began After Fletcher's Assignment To Chase

The First Department erroneously denied Chase the opportunity to make its case because it believed that Chase's arguments "should have been made by Fletcher after the Dakota's counterclaims against him were severed." Op. 3. The court thus bound Chase to Fletcher's arguments in a case where Chase was not a party. That decision would be constitutionally defensible only if Fletcher and Chase were privies in the Fletcher Suit. But the law is clear that assignees and assignors are only in privity with respect to *pre*-assignment litigation. There is no dispute that Fletcher

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favorable decision from this Court, Chase will take all appropriate steps to consolidate the appeals and rely solely on a remand in this case to resolve the merits.

assigned his interest in the Property to Chase years before the Fletcher Suit began, and there is no claim that Chase and Fletcher are privies for any reason other than their assignee/assignor relationship. The First Department's decision should therefore be reversed.

A. Assignees Are Not Bound By Post-Assignment Judgments Against Assignors

"Considerations of due process prohibit personally binding a party by the results of an action in which that party has never been afforded an opportunity to be heard." *Gramatan*, 46 N.Y.2d at 486. Of course, the absence of a party's name from the docket is not necessarily determinative, as "collateral estoppel bars not only parties from a previous action from litigating an issue decided therein, but those in privity with them as well." *Id.* "[T]he fundamental nature of the general rule that a litigant is not bound by a judgment to which she was not a party" requires that exceptions apply in only "limited circumstances." *Taylor*, 553 U.S. at 898. Privity thus extends just to those "who were connected with [the prior litigation] to such an extent that they are treated as if they were parties." *Gramatan*, 46 N.Y.2d at 486.

In the context of assignors and assignees, privity only exists as to litigation that pre-dates the assignment. This Court definitively held as much decades ago. In *Gramatan*, the defendant homeowners sought to preclude the assignee of their retail installment contract and mortgage from asserting the contract's validity, relying on a finding of fraud against the assignor in a prior suit by the Attorney General. 46

N.Y.2d at 484. The Attorney General's suit, however, was instituted "[a]lmost two years after the assignment." *Id.* And "[i]n the assignor-assignee relationship, privity must have arisen *after* the event out of which the estoppel arises." *Id.* at 486 (emphasis added). "Conversely, an assignee is *not* privy to a judgment where the succession to the rights affected thereby has taken place *prior* to the institution of the suit against the assignor." *Id.* at 487 (citations omitted, emphases added). An assignee can therefore be bound by the judgment in a suit involving the assignor *only* if "the action against the assignor is commenced before there has been an assignment." *Id.* 486-487. Because there was "no dispute that the assignment was made well before commencement of the … action against plaintiff's assignor, plaintiff [was] not bound by the terms of that judgment." *Id.* at 487.

That decision was grounded in a century of consistent due process precedent, both state and federal. This Court held in *Masten v. Olcott*, 101 N.Y. 152 (1886), that the "rule that estoppels bind parties and privies … applies only to a privity arising after the event out of which the estoppel arises." *Id.* at 161; *see also In re Farley*, 217 N.Y. 105, 110 (1916) ("[A] judgment … after the transfer of the certificate is not evidence against the new holder."). Shortly thereafter, the United States Supreme Court similarly explained that "nothing which the grantor can do or suffer after he has parted with the title can affect rights previously vested in the grantee, for there is no longer privity between them." *Postal Tel. Cable Co. v. City*

of Newport, Ky., 247 U.S. 464, 475 (1918); *see also Dull v. Blackman*, 169 U.S. 243, 248 (1898) ("It is well understood … that no one is privy to a judgment whose succession to the rights of property thereby affected occurred previously to the institution of the suit." (citation omitted)). Courts therefore "cannot, without disregarding the requirement of due process, give a conclusive effect to a prior judgment against" a grantor in a case against a grantee, unless the initial case arose before the transfer. *Postal Tel.*, 247 U.S. at 476.

Courts around the country have applied this principle to hold that non-party assignees are not bound by post-assignment judgments against assignors. *See, e.g.*, *Mecosta Cnty. Med. Ctr. v. Metro. Grp. Prop. & Cas. Ins. Co.*, 509 Mich. 276, 286 & n.4 (Mich. 2022) (same and collecting cases in support); *Indus. Credit Co. v. Berg*, 388 F.2d 835, 841-842 (8th Cir. 1968) (same and collecting more cases in support); *Wight v. Chandler*, 264 F.2d 249, 253 (10th Cir. 1959) (same and collecting even more cases in support). This rule also "remains a bedrock in the literature on the subject." *Mecosta*, 509 Mich. at 286 & n.5 (collecting literature).

Given this unanimity, it is unsurprising that the rule makes perfect sense. A pre-assignment judgment binds the assignee because the judgment defines the very right that was assigned. "In other words, the assignee succeeds to those rights subject to any earlier adjudication involving the assignor that defined those rights." *Mecosta*, 509 Mich. at 285; *see also Masten*, 101 N.Y. at 161 (an assignee is bound

by a pre-assignment judgment "because he comes in after the fact creating the estoppel by succession or representation to the original title or interest"). After all, "the grantor can transfer no better right or title than he himself has." *Postal Tel.*, 247 U.S. at 475; *see also Gramatan*, 46 N.Y.2d at 486 (the term privity "denote[s] a mutually successive relationship of the same rights to the same property").

By contrast, "[w]hen the litigation involving the assignor occurs after the assignment, the rights could not yet have been affected by the litigation at the time they were transferred to the assignee." *Mecosta*, 509 Mich. at 285; *see also Perry v. Globe Auto Recycling, Inc.*, 227 F.3d 950, 953 (7th Cir. 2000) (assignee who had previously brought its own claims and lost could acquire and then pursue an assignor's unpressed claims because the assignor "had the right to bring his own claim" at the time of the assignment, so "that is what he conveyed"). If the substance of the assignee's rights are to be altered through litigation, then due process requires that the assignee be a party to that suit.

B. This Precedent Squarely Applies And Requires Reversal

This Court has never recognized an exception to this well-settled rule, and nothing about the nature of the assignment in this case calls for one. As this Court explained in *Gramatan*, the "crucial inquiry focuses upon the juncture at which the relationship between the party to the first action and the person claimed to be his or her privy is established," and "an assignee is not privy to a judgment where the

succession to the rights affected thereby has taken place prior to the institution of the suit against the assignor." 46 N.Y.2d at 486-487. On February 8, 2008, Fletcher assigned to Chase his rights to the Property as security for repayment of a loan, with the assignment to remain in effect until the loan was repaid. *See* R. 970-971. The litigation that led to the attorneys' fee award did not begin until 2011. The judgment in the Fletcher Suit was not issued until December 14, 2017. *See* R. 855-860. At the time of the assignment, there was no litigation that threatened any competing lien on the Property, and certainly not a judgment imposing a lien of millions of dollars of attorneys' fees. If that lien is now to be enforced in litigation against Chase, then Chase must have an opportunity to make its case that the lien is invalid.

That this assignment secured a loan and contemplated a reversion following repayment of that loan is irrelevant. As a general matter, "[w]hen two or more persons have concurrent ownership interests in property, a judgment for or against one of them concerning his interest does not have effects under the rules of res judicata on another such owner." Restatement (Second) of Judgments § 54 (1982).

For example, neither a tenant nor a landlord can bind the other in litigation arising after the tenancy begins. *See Masten*, 101 N.Y. at 160-161 (a "judgment against a tenant … does not bind the landlord" where the "tenancy … originated prior to the … judgment"); *Dull*, 169 U.S. at 248 ("A tenant in possession prior to the commencement of an action of ejectment cannot … be lawfully dispossessed by

the judgment unless made a party to the suit." (citation omitted)). Likewise, "under well settled principles of jurisdiction, governing all courts, a decree against a mortgagor with respect to property does not bind a mortgagee whose interest was acquired before the commencement of the suit, unless he was made a party to the proceedings." *Chase Nat'l Bank v. City of Norwalk*, 291 U.S. 431, 438 (1934); *see also* 18A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 4461 (3d ed.) (recognizing that "a mortgagor's loss in litigation affecting the mortgaged property does not bind the mortgagee, nor can the mortgagee bind the mortgagor," because "[n]either party is allowed to jeopardize the security or ownership interests of the other"). There is no reason a different rule should apply when a bank secures a loan with an assignment of the relevant property interest in a cooperative apartment building.

Certainly nothing about the nature of this assignment rendered Fletcher an adequate representative of Chase's interests. *See Dull*, 169 U.S. at 248 ("No grantee can be bound by any judgment in an action commenced against his grantor subsequent to the grant; otherwise a man having no interest in property could defeat the estate of the true owner." (citation omitted)). Indeed, Fletcher failed to appear at the mediation regarding The Dakota's counterclaim for fees, *see* R. 775 (¶¶ 21-22); 790-793 (2:21-5:17), 797-799 (4:16-6:23), and his counsel expressly conceded that he was "not contesting" The Dakota's entitlement to attorneys' fees or the

reasonableness of those fees, R. 821-822 (7:26-8:4). Fletcher certainly did not represent or understand himself "to be acting in a representative capacity" for Chase, nor were there any "special procedures to safeguard the interests of absentees," as due process requires before an absent party may be bound by another in an earlier suit. *Taylor*, 553 U.S. at 898.

The law is clear. A decision in an action involving "either assignee or assignor is not preclusive against the other" unless "an action has been brought by the assignor before the assignment and a subsequent action is brought by the assignee on the same obligation." Restatement (Second) of Judgments § 55 (1982). In that circumstance (and only that circumstance) "the assignee is precluded … from relitigating the issues determined … in the action by the assignor." *Id.* The First Department's ruling contravened that well-established rule. It should be reversed.

II. Chase Had No Affirmative Duty to Intervene In The Fletcher Suit Because Due Process Does Not Permit, And New York Law Does Not Impose, Any Such Duty

The First Department also erred in holding that Chase had an affirmative duty to intervene in the Fletcher suit, on pain of preclusion in later cases. The United States Supreme Court long ago recognized that "[t]he law does not impose upon any person absolutely entitled to a hearing the burden of voluntary intervention in a suit to which he is a stranger. … Unless duly summoned to appear in a legal proceeding, a person not a privy may rest assured that a judgment recovered therein will not

affect his legal rights." *Chase*, 291 U.S. at 441. In other words, due process does not "permit the preclusion of a plaintiff's claim on the ground that he *could* have intervened in a state court litigant's action if he did not actually do so." *Green v. City of Tucson*, 255 F.3d 1086, 1101 (9th Cir. 2001) (emphasis in original), *overruled in irrelevant part by Gilbertson v. Albright*, 381 F.3d 965 (9th Cir. 2004). That is true regardless of whether the absent party has notice of the ongoing litigation. "Joinder as a party, rather than knowledge of a lawsuit and an opportunity to intervene, is the method by which potential parties are subjected to the jurisdiction of the court and bound by a judgment or decree." *Martin v. Wilks*, 490 U.S. 755, 765 (1989); *see also Taylor*, 553 U.S. at 897-898 (holding that binding a nonparty would "violate[] due process" even if it "had notice of the original suit," and discussing *South Central Bell Telephone Co. v. Alabama*, 526 U.S. 160 (1999)).[4]

New York law gives effect to that due process requirement by requiring *joinder*, not intervention, when "[p]ersons … who might be inequitably affected by a judgment in the action" are not included as parties at the outset. CPLR 1001(a). New Yorkers need not worry that their rights are being litigated in their absence—if

[4] To be clear, Chase disputes that it had reasonable notice that its rights were being litigated in the Fletcher Suit, which involved allegations of racial discrimination related to the purchase of property that had nothing to do with Chase, rather than in this case, where Chase was a party and where the validity and superiority of all relevant liens was being litigated. But it does not matter, as Chase would have had no duty to intervene even if it had been on notice.

they "might be inequitably affected," then they will be joined. *Id.* Of course, strangers to the litigation are free to *choose* to intervene. New York law outlines when absent parties "shall be permitted to intervene," CPLR 1012, and "may be permitted to intervene," CPLR 1013. But no rule mandates that absent parties *must* intervene if they might be inequitably affected by the judgment. As the law makes clear, that is the job of mandatory joinder.

Imposing an affirmative duty to intervene would rewrite those rules and undermine binding United States Supreme Court precedent. Rather than require the parties to join everyone whose rights might be affected under CPLR 1001(a), the burden would shift to absent parties: Anyone who *can* intervene under CPLR 1013 *must* do so or risk preclusion in later litigation to which they are actually a party. For good reason, *see infra* § IV, that is not the law. Indeed, such a requirement would be unconstitutional. If The Dakota wished to bind Chase to the judgment in the Fletcher Suit, it should have sought to join Chase pursuant to CPLR 1001(a). It did not.

III. Allowing Chase Its Day In Court Would Not Collaterally Attack Or Destroy The Judgment Against Fletcher

The First Department's conclusion that a finding in Chase's favor would be an "impermissible collateral attack" and "destroy the judgment [against Fletcher] altogether," Op. 2, 3, squarely conflicts with controlling law. A party cannot impermissible collaterally attack or seek to destroy a prior judgment merely by

asserting its constitutional right to a day in court. Whatever the contours of those doctrines, they cannot vitiate a litigant's due process rights.

Consistent with due process principles, the collateral attack doctrine only applies when the party accused of collaterally attacking a prior judgment was a party or in privity with a party in the prior case. *See ABN AMRO Bank, N.V. v. MBIA Inc.*, 17 N.Y.3d 208, 227 (2011). As discussed, Chase and Fletcher were not privies. *See supra* § I. This suit will not even affect, much less destroy, The Dakota's ability to enforce its judgment from the Fletcher Suit as against Fletcher. But The Dakota cannot wield that judgment as against Chase because Chase was not a party.

This principle is well-settled. "[W]hen a car and bus collide and the car driver, suing the bus company in tort, is found innocent of comparative fault and wins, the driver still cannot defend with that victory a later action brought against him by a bus passenger. The passenger was not a party to the earlier suit." Siegel, N.Y. Prac. § 458 (6th ed.) (discussing *Neenan v. Woodside Astoria Transp. Co.*, 261 N.Y. 159, 161 (1933)). That is so even though "the jury in the second action may, disagreeing with the jury in the first, find that the car driver was at fault. It may, indeed. Inconsistencies like that are always a possibility when not all claims arising from a single occurrence are tried together." *Id.*

A second jury's determination in a suit between the car driver and a passenger that the driver was at fault thus does not "destroy" or impermissibly collaterally

attack the first jury's contrary judgment in a suit between the car driver and the bus company, which remains binding on the parties actually involved in that case (and their privies). To the contrary, precluding the passenger from having her opportunity to make her case "would infringe upon [her] constitutional right to due process," which "would not permit a litigant to be bound by an adverse determination made in a prior proceeding to which he was not a party or in privity with a party." *ABN*, 17 N.Y.3d at 227 (rejecting application of collateral attack doctrine).

Or consider *Gramatan* itself. A court had previously held that the contract at issue was invalid, but this Court nonetheless held that the assignee was free to argue its validity in the subsequent suit because it was neither a party nor privy to any party in the original action. 46 N.Y.2d at 487. A finding in that second suit involving *the assignee* that the contract was valid would not "destroy" the prior judgment against *the assignor*. That judgment against the assignor would continue to bind the assignor—but not the assignee, who was not a party to the first litigation. Other courts applying the well-established rule that "the privity doctrine cannot be applied if the rights to property were acquired by the person sought to be bound before the adjudication" have expressly recognized that giving assignees their day in court does not amount to "an impermissible collateral attack on the [prior] judgment" against separate parties. *Gerrity Bakken, LLC v. Oasis Petroleum N. Am., LLC*, 915 N.W.2d 677, 684 (N.D. 2018).

Different courts reaching different conclusions in different cases on the same or similar questions is hardly rare. "Indeed, it is routine for institutions like banks or insurance companies to take assignments of large numbers of claims arising out of a single transaction or occurrence, and given the vagaries of litigation they undoubtedly win some and lose some." *Perry*, 227 F.3d at 953. That variety of outcomes is a predictable and valuable function of giving each person a chance to make their case, rather than binding everyone to the choices of whichever strangers happen to be in court first.

The meaning and validity of Paragraph 15th is finally decided as between Fletcher and The Dakota, as indeed is every issue that Fletcher raised or could have raised in the Fletcher Suit. And it will stay that way regardless of the outcome in this suit between Chase and The Dakota. Had the Property been sold for an amount that exceeded Chase's interest, Fletcher would be precluded from arguing that he, rather than The Dakota, is entitled to the balance. Nor can he raise such an argument if The Dakota seeks to enforce its judgment against him through any other means. Fletcher had his day in court. True, a court in this case might (and should) ultimately interpret Paragraph 15th in a way that would have prevented The Dakota's judgment against Fletcher had Fletcher made the same arguments. But that does not destroy The Dakota's judgment against Fletcher, which will remain fully enforceable *as*

against Fletcher. Because Chase never had its day in court, the meaning and validity of Paragraph 15th insofar as it affects *Chase's* rights has not been finally determined.

Just as the bus company cannot relitigate the car driver's fault, so too Fletcher cannot relitigate the underlying judgment. And just as the car driver cannot use the judgment against the bus company to deny bus passengers their day in court, so too The Dakota cannot use the judgment in the Fletcher Suit to deny Chase its opportunity to be heard. It is a feature of our legal system, not a bug, that different courts and juries reach different conclusions when presented with different evidence and argument by different parties.

IV. Affirming The First Department's Decision Would Burden Future Courts, Unsettle Procedural Rules, Prejudice Litigants, And Increase Costs With No Commensurate Benefits

Even if the First Department's novel holding were not prohibited by well-established due process and preclusion principles as well as New York statutes governing intervention, there is every prudential reason to reverse. *See Lubonty v. U.S. Bank Nat'l Ass'n*, 34 N.Y.3d 250, 255, 259 (2019) (rejecting interpretation of procedural rule "that produces inequitable and potentially absurd results," encourages "gamesmanship," and "would raise a host of practical issues"); Wright & Miller, *Federal Practice & Procedure* § 4452 (surveying scholarship and concluding "it would be better to forgo any general duty of intervention" and instead rely on mandatory joinder).

Affirming the First Department would radically increase the stakes of all litigation in which any absent party *could* intervene, since failure to do so might give rise to later preclusion. Mass intervention by unnecessary parties would greatly impede dispute resolution. Multiplication of parties breeds complexity, delay, and expense. Participation by intervenors, seeking only to protect against potential later preclusion, will lead to difficult questions of venue and jurisdiction. Intervenors will seek discovery and discovery will be demanded of them, leading to further disputes. Intervenors will file and defend against unique dispositive motions. They will present their own evidence and have unique evidence presented against them, the admissibility of which may vary as between parties, requiring imperfect limiting instructions. And they will require separate entries on verdict forms, with separate instructions, again giving rise to further unnecessary disputes.

The First Department's ruling will also wreak havoc on the finality of judgments. Absent parties who realize they have failed to intervene in a case that has otherwise concluded will have to promptly move to vacate the judgment, potentially unraveling the final decision as between the actual litigants who had their day in court. And it will invite gamesmanship. Parties can target assignors for whom the relevant issue is less important or who are more likely to default—for example, because they have already given up hope of keeping the collateral or any proceeds from its sale. If the case escapes the assignee's notice (as it likely would if the

assignor simply defaults) then the strategic plaintiff can wield the judgment against the assignee in a new lawsuit with higher stakes. The plaintiff can thus sidestep the crucible of litigation entirely and skip straight to collection.

More broadly, institutional actors will affirmatively have to monitor the courts to identify cases in which they "could have sought to intervene" that might one day lead to a judgment that could affect their rights. Op. 3. If the Court abandons *Gramatan*, every bank assigned a property interest as collateral for a loan must monitor the borrower who assigned them that interest. Every loan servicer assigned a mortgage must monitor the original mortgagee. Every tenant who assigns their rights in a property must monitor the new sub-tenant. And if they *can* intervene in any case tangentially involving the relevant property, then they *must*, or risk forfeiting their rights. If they fail to intervene in time, then they must move to vacate the judgment. Assignees who must engage in additional monitoring and widespread prophylactic intervention will pass those costs on to consumers, needlessly rendering the underlying transactions more expensive, with attendant inequitable results.

There is no justification for these costs. The law already requires that everyone (1) necessary to afford complete relief to the parties or (2) "who might be inequitably affected by a judgment in the action" be *joined*. CPLR 1001(a). An additional *intervention* requirement serves only to compel participation of persons who are *not* necessary or will *not* be inequitably affected. "Such concerns have

played an important role in limiting mandatory joinder decisions" under the analogous federal rules. Wright & Miller, *Federal Practice & Procedure* § 4452. If let stand, the First Department's decision will judicially rewrite those rules and undo the considered balance that § 1001(a) struck.

New Yorkers should be able to trust that they will only be bound by decisions in cases to which they are a party or in privity with a party. That has been the law for decades. There is no reason to change course.

V. This Appeal Is Not Moot Because A Favorable Decision Would Eliminate An Obstacle To Appellate Review Of The Merits

Far from mooting this appeal, the proceedings before Justice Bluth after the First Department's decision confirm the need for review by this Court. An "appeal is not moot if an appellate decision will eliminate readily ascertainable and legally significant enduring consequences that befall a party as a result of the order which the party seeks to appeal." *Veronica P. v. Radcliff A.*, 24 N.Y.3d 668, 671 (2015). Reversing the First Department's erroneous decision in this case would allow Chase to obtain unencumbered appellate review of the merits on remand, without having to first make the heightened procedural showing necessary to succeed on a motion to vacate and without having to address The Dakota's other various non-merits arguments. Because an appellate decision will eliminate that consequence of the First Department's decision, this appeal is not moot.

There is a closed universe of bases for vacating a final judgment. Under the First Department's ruling, an absent party who theoretically could have intervened in a prior case is bound by the judgment in that case unless they can show: excusable default, if the motion is made within one year of the judgment; newly discovered material evidence that would not have been discovered previously; misconduct by an adverse party; lack of jurisdiction, rending the original judgment void; or reversal, modification, or vacatur of a prior judgment or order on which the judgment at issue was based. *See* CPLR 5015(a)(1)-(5). To protect the finality of past judgments, the grounds listed in CPLR 5015(a) are exceedingly narrow.

Chase argued in its motion to intervene and vacate the judgment in the Fletcher Suit that it had made the required showing under CPLR 5015(a). The Dakota argued it had not. While Justice Bluth sided with Chase on this issue, The Dakota would presumably raise the same arguments on appeal of that decision. The Dakota also argued before Justice Bluth that Chase's motion should be denied as untimely and barred by res judicata on the basis of the supreme court's decision in the case now on appeal before this Court. Those arguments are without merit, but The Dakota could only make them at all because of the First Department's ruling now on appeal before this Court.

Chase must meet this heavy burden under CPLR 5015(a)—and must counter The Dakota's various other procedural arguments—only because the First

Department held that Chase is bound by the judgment in the Fletcher Suit and so can obtain relief only by intervening in that suit and vacating that judgment. That burden is thus a "readily ascertainable and legally significant enduring … result of the order which [Chase] seeks to appeal." *Veronica*, 24 N.Y.3d at 671. On remand following a favorable decision from this Court, Chase would not have to make any showing under CPLR 5015(a) and The Dakota could not make its non-merits arguments. Such a favorable decision thus "will eliminate" that additional burden. *Id.*

In short, this appeal will determine whether Chase is entitled to unencumbered appellate review of the issue at the heart of this case: whether Paragraph 15th permitted The Dakota to recover attorneys' fees from the Fletcher Suit. Because "enduring consequences potentially flow from the order appealed from, the appeal is not moot." *N.Y. State Comm'n on Jud. Conduct v. Rubenstein*, 23 N.Y.3d 570, 576 (2014).

Nor does Justice Bluth's decision (or Chase's notice of appeal) counsel in favor of vacating the order granting leave to appeal as a prudential matter. Absent relief from this Court, the decision below will bind courts in the First Department, litigants will be denied the opportunity to make their case to which they are constitutionally entitled, institutional players will be forced to adopt expensive monitoring and intervention regimes that will burden courts and raise costs, and litigants will be unable to trust the finality of past judgments because absent parties

will be forced to intervene and move to vacate rather than litigating their own separate case. *See supra* § IV. That error must be corrected.

CONCLUSION

For the reasons stated above, the Court should reverse the First Department's decision and remand for further proceedings.

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Respectfully submitted.

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CERTIFICATION

I certify pursuant to 500.13(c)(1) that the total word count for all printed text in the body of the brief, exclusive of the statement of the status of related litigation; the corporate disclosure statement; the table of contents, the table of cases and authorities and the statement of questions presented required by subsection (a) of this section; and any addendum containing material required by subsection 500.1(h) of this Part is 7,708 words.

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