**COMMONWEALTH OF MASSACHUSETTS**
**THE TRIAL COURT**
**LAND COURT DEPARTMENT**

HAMPDEN, ss.

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| U.S. BANK NATIONAL ASSOCIATION, as TRUSTEE FOR THE STRUCTURED ASSET SECURITIES CORPORATION MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2006-Z,<br><br>Plaintiff,<br><br>vs.<br><br>ANTONIO IBANEZ and SUCH OTHER PERSONS, IF ANY, AS MAY BE THE HEIRS OR LEGAL REPRESENTATIVES OF ANTONIO IBANEZ OR PERSONS CLAIMING UNDER ANTONIO IBANEZ,<br><br>Defendants. | Case No. 08 MISC 384283 KCL<br>Case No. 08 MISC 386755 KCL |
| WELLS FARGO BANK, N.A. as TRUSTEE FOR ABFC 2005-OPT1 TRUST, ABFC ASSET-BACKED CERTIFICATES, SERIES 2005-OPT1,<br><br>Plaintiff,<br>vs.<br><br>MARK A. LARACE and TAMMY L. LARACE, and SUCH OTHER PERSONS, IF ANY, AS MAY BE THE HEIRS OR LEGAL REPRESENTATIVES OF ANTONIO IBANEZ OR PERSONS CLAIMING UNDER MARK A. LARACE AND TAMMY L. LARACE,<br><br>Defendants. | |

**CONSOLIDATED MEMORANDUM OF POINTS AND AUTHORITIES OF AMICI CURIAE DARLENE MANSON, KEITH AND DEBORAH NICHOLAS AND GERMANO DEPINA AND PROPOSED AMICUS NATIONAL CONSUMER LAW CENTER IN OPPOSITION TO PLAINTIFFS' MOTION TO VACATE**

## I. INTRODUCTION

This memorandum is submitted on behalf of Amici Darlene Manson, Keith and Deborah Nicholas and Germano DePina and proposed amicus National Consumer Law Center (together "Amici"), who are named plaintiffs in an action pending in the United States District Court for the District of Massachusetts styled as *Manson v. GMAC Mortgage, LLC, et al.*, No. 1:08-cv-12166 ("*Manson*").[1] Currently pending in these cases are the Plaintiffs' motions to vacate the well-reasoned March 26, 2009 ruling ("the Ruling") of the Court. *See U.S. Bank National Association v. Ibanez,* No. 384283, 2009 WL 795201 (Mass. Land Ct. March 26, 2009) (ruling on three cases presenting similar questions of law) ("*Ibanez*"). The Plaintiffs in these cases have failed to make any showing whatsoever, whether on the basis of their additional evidentiary submissions or on the basis of their extended legal argument, that the Ruling should be vacated. The Ruling held that a foreclosure is invalid where the prosecuting entity did not hold a valid written mortgage assignment at the time notice was published and the sale took place. *Ibanez*, 2009 WL 795201 at *2. "Neither an intention to do so in the future nor the backdating of a future assignment meets the statute's strict requirement that the holder of the mortgage *at the time notice is published and auction takes place* be named in the notice." *Id.* (emphasis in original).

The Court should reject the efforts of Plaintiffs and Amici Real Estate Bar Association ("REBA") and Doonan, Graves and Longoria, LLC ("Doonan") to circumvent the Ruling's clear and accurate interpretation of the statute. First, the Plaintiffs, REBA and Doonan collectively fail to recognize that the Ruling is fundamentally a question of statutory interpretation. When

[1] *Manson* was initially filed in the Business Litigation Session of Suffolk Superior Court, but was removed by the defendants under the Class Action Fairness Act, 28 U.S.C. §§1332(d), 1453.

examined closely, G.L. c. 244, § 14 permits no other interpretation than that of the Ruling – the entity named in the notice and in whose name the foreclosure is carried out must be the current holder of a written mortgage assignment. The Plaintiffs in these cases were neither "mortgagees" under the statute, nor do they fit within any of the other statutory categories. Further, the Plaintiffs' effort to claim this status on the basis of "assignments in blank" should be rejected out of hand. A blank form of assignment conveys nothing at all.

Second, the Plaintiffs and their allies misconstrue Massachusetts common law in an effort to bestow "mortgage holder" status upon themselves. While it may be true that a note-holder has equitable rights in the corresponding mortgage, it is not the case that a note-holder is automatically conferred all the rights of a mortgage holder. To the contrary, Massachusetts jurisprudence makes it quite clear that where, as here, a note and its mortgage are separated, the current mortgagee holds the mortgage in trust for the note-holder. *Barnes v. Boardman,* 149 Mass. 106, 114 (1889). The Supreme Judicial Court has addressed the question whether beneficiary of such a trust (i.e., the note-holder) may enforce the mortgage directly without first obtaining a written mortgage assignment, either voluntarily or through an action in equity. *Young v. Miller*, 72 Mass. 152, 154 (1856). The answer to that question is no. *Id.*

Last, this memorandum explains why the doomsday scenario posited by REBA should be disregarded. The system utilized by Plaintiffs and REBA's members has placed expediency and convenience before following the law. In their rush to foreclose, these institutions have declared their own rules, entrenching their practices around these creations. In so doing, these institutions, along with the title insurers who work with them, bear the risk of their own mistakes. It is not the function of the Land Court to relieve that risk. The real crisis at this time lies in the explosion in the number of homeowners who have lost their homes in recent years,

especially where the statutory foreclosure process was not properly followed. Providing homeowners with the full set of statutory procedural protections is a far more important value than providing comfort to those who unilaterally ignore the law.

## II. STATEMENT OF INTEREST

The Amici and the class and subclasses they seek to represent are Massachusetts citizens who have lost or are about to lose their homes to foreclosure. *Manson* is a challenge to foreclosures executed in the Commonwealth by entities improperly claiming status as mortgagee. The *Manson* complaint is based on the theory that an entity is not entitled to exercise the power of sale contained in G.L. c. 244, § 14 absent its possession of a valid written assignment of the subject mortgage at the time of notice and auction.

As articulated in the Ruling, the two cases *sub judice* raise substantially identical issues. While these cases are brought by U.S. Bank National Association ("U.S. Bank") and Wells Fargo Bank, N.A. ("Wells Fargo") in their capacities as trustees to remove a cloud on title under G.L. c. 240, § 6, the circumstances in which both the Ibanez and Larace foreclosures occurred require the Court to rule on issues of law that will directly impact *Manson*. The Amici thus have a substantial interest in the outcome of these actions. At a hearing on April 17, 2009, the Court denied a motion to intervene, but ruled that Ms. Manson, Mr. and Mrs. Nicholas and Mr. DePina would collectively be named an amicus curiae, with an order that the Plaintiffs serve them with their supplemental filings. Since that time, both Mr. Ibanez and the Larace Defendants have appeared with counsel in these actions. Amici will leave to those parties the arguments on specific factual shortcomings in Plaintiffs' "Third Supplemental Memorandum of Law in Support of Motion for Entry of Default Judgment," (referred to hereafter as "Wells Fargo Mem."

and "U.S. Bank Mem." respectively) and their associated exhibits. Amici submit this consolidated memorandum in order to address the overarching legal argument, as well as to respond to many of the unsubstantiated and flawed assertions contained in the submissions of the REBA ("REBA Mem.") and Doonan ("Doonan Mem.").

## III. ARGUMENT

There appear throughout the memoranda of Plaintiffs, REBA and Doonan several incomplete or misleading legal arguments. The Amici assert that the Ruling stands on a solid foundation of Massachusetts statutory and common law and should not be disturbed.

### A. The Plaintiffs Overlook the Question of Statutory Interpretation Before the Court

Absent from any of the submissions from the Plaintiffs, REBA or Doonan is an analysis of the fundamental question of statutory interpretation that underlies these cases – whether the Plaintiffs may properly be considered an entity that is invested with the power of sale under G.L. c. 244, § 14. Indeed, REBA goes so far as to suppose that the notice issued by Plaintiffs was proper because it "appropriately identified the party who intended to make the sale, the party who was the holder of the debt in default and to whom a formal assignment of the mortgage could be executed and delivered for recording upon request." REBA Mem. at 5. This statement circumvents the central question here – whether Plaintiffs were properly considered mortgagees (or other category of authorized entity) under the statute, i.e. whether they are authorized to conduct a foreclosure in the first place -- regardless of whether they were the party actually conducting the sale. The plain answer is that they are not.

#### 1. The Statute is to be Strictly Construed.

It bears emphasis that the starting point for this question of interpretation is the command

that the statute is to be strictly construed. *See McGreevey v. Charlestown Five Cents Sav. Bank*, 294 Mass. 480 (1936). The Ruling recognized this requirement repeatedly. *See Ibanez*, 2009 WL 795201 at *2, *4 *citing Bottomly v. Kabachnick*, 13 Mass. App. Ct. 480, 484 (1982) ("The manner in which the notice of the proposed sale shall be given is one of the important terms of the power and a strict compliance with it is essential to the valid exercise of the power."). Moreover, the Ruling articulated the reasons behind the strictness requirement, observing that Massachusetts system of non-judicial foreclosure leaves it primarily to the foreclosing entity to ensure a fair auction protects the mortgagor's interest. *Id.* The lack of any *ex ante* judicial involvement makes it difficult to correct mistakes committed during the foreclosure process. "As even a cursory glance at the current caseload of this court reveals, titles arising from mortgage foreclosures can have many problems." *Id.*, 2009 WL 795201 at *4. By requiring a foreclosing entity to abide strictly by the terms of the statute, courts recognize the public interest in promoting the clear transfer of title, whether by foreclosure or otherwise. The Plaintiffs' requests that the Court overlook the errors in the processes by which they hold and foreclose on properties – that they be permitted to execute the assignment that actually vests the foreclosing entity with the power to foreclose *after* the foreclosure has already been commenced and completed -- is wholly at odds with this fundamental strictness requirement.

### 2. Plaintiffs Are Not Mortgagees

It is beyond dispute that Plaintiffs are not "mortgagees" for the purposes of G.L. c. 244, § 14. As an initial matter, the Ruling's holding that the notice published and sent to the mortgagor under G.L. c. 244, § 14 must list the name of the current holder of the mortgage has not been seriously challenged. The Court rejected the Plaintiffs' contention that its notice need not name the current holder of the mortgage on three separate grounds. *See Ibanez*, 2009 WL 795201 at

*5. First, citing *Bottomly v. Kabachnick*, 13 Mass. App. Ct. 480 (1982) ("*Bottomly*"), the Court noted that the Appeals Court has held a foreclosure to be invalid on the basis of its failure to identify the holder of the mortgage. *Id.* Second, the Court noted that the form provided in G.L. c. 244, § 14 calls for the identification of the current holder of the mortgage. *Id.* That form, while not mandatory, is indicative of the legislature's intent on an issue central to the reasons for providing statutory notice in the first instance.[2] *Id.* Last, the Court held that the body of the statute itself provides that it be the holder of the mortgage in whose name the notice is published and sent. *Id.*

Even more fundamentally, however, the Plaintiffs cannot claim valid status as mortgagees. They are not the entities to which the properties were originally mortgaged. Whatever claim the Plaintiffs have to mortgagee status therefore arises from their faulty assignments. "While "mortgagee" has been defined to include assignees of a mortgage, in other words the current mortgagee, there is nothing to suggest that one who expects to receive the mortgage by assignment may undertake any foreclosure activity." *In re Schwartz*, 366 B.R. 265, 269 (Bankr. D. Mass. 2007). As discussed fully below, the Plaintiffs have no legal basis for a claim that they acquired mortgagee status via a valid assignment that occurred prior to the notice and sale.

### 3. Nor Do Plaintiffs Fit Within any of other Categories Entitled to Exercise the Power of Sale Under G.L. c. 244, § 14.

In addition to the mortgagee, the statute also permits other categories of person to

[2] *Bank of New York v. Appollos*, No. 08-ADMS-10045, 2009 WL 1111198 (Mass. App. Div. April 17, 2009), cited by REBA, is not to the contrary. In that case, the Appellate Division held merely that where the mortgagor had actual knowledge of a valid mortgage assignment to the foreclosing entity, the failure of that entity to include a reference to the assignment in its notice would not void the foreclosure. *Bank of New York v. Appollos*, 2009 WL 1111198 at *2 (noting that the omission of the assignment reference did not amount to a material defect in notice "[u]nder the particular facts of this case").

exercise the power of sale. These other categories include: 1) a person having his estate in the land mortgaged; 2) a person authorized by the power of sale; 3) the attorney duly authorized by a writing under seal; 4) the legal guardian or conservator of such mortgagee or person acting in the name of such mortgagee or person. G.L. c. 244, § 14. Plaintiffs do not argue that they fit within any of these particular categories, nor could they.[3] While Plaintiffs do assert that they were acting pursuant to the authority of the "of record" holder of the mortgage, *see* U.S. Bank's Motion to Vacate Judgment at 17, there is no explanation for how this argument comports with the authority conferred by the statute. Moreover, the actual notices provided to the Defendants do not identify the Plaintiffs as executing the power of sale on behalf of another party. To the contrary, the notices state that the Plaintiffs are purporting to be the current holders of the subject mortgages. *See, e.g.,* U.S. Bank Mem. at Exhibit C (Order of Notice, Complaint to Foreclose Mortgage, Certificate of Entry and Publication Notice all identifying U.S. Bank as present holder of subject mortgage).

### B. The Plaintiffs Were Not the Holders of the Subject Mortgages at the Time of Notice and Sale

The Plaintiffs repeatedly assert that they were holders of the defendants' mortgages at the time the foreclosures were commenced and executed. *See, e.g.,* U.S. Bank's Mem. at 8-10. Yet, there was simply no writing that met the fundamental requirements of a mortgage assignment in existence at the time of the notice and sale.

#### 1. Statute of Frauds

The Plaintiffs acknowledge that a mortgage assignment is an agreement to convey an

[3] The long recognized principle of *expressio unius est exclusio alterius* precludes a finding that there are other potential categorical exceptions. *E.g., TRW Inc. v. Andrews*, 534 U.S. 19, 29 (2001).

interest in land, and therefore must comply with the strictures of the statute of frauds, G.L. c. 259, § 1. U.S. Bank Mem. at 9, *citing, inter alia, Young v. Miller,* 6 Gray 152, 153, *Denvir v. North Ave. Sav. Bank,* 290 Mass. 137, 138 (1935). Thus, in order for there to be a satisfactory transfer of the interest from the original mortgagee to the Plaintiffs, there is a burden to produce a written document, executed prior to the date of the notice and sale. The Ruling explicitly rejected any notion that the generalized securitization contract documents met the requirements of the statute of frauds. *See Ibanez*, 2009 WL 795201 at *5 n.19. Given the time they requested to produce more specific writings illustrating the assignment of the mortgages to the Plaintiffs, the sole mortgage assignment documents produced were "assignments in blank." These documents transfer nothing.

**2. An Assignment in Blank is Not Effective.**

Assuming *arguendo* that the securitizations were otherwise properly executed, successfully transferring ownership of the note to the Plaintiffs, these "assignments in blank" are completely ineffectual. The assignments identified by Plaintiffs purport to assign the interest of the mortgagee from the current holder of the mortgage to an entity that is represented in the document only by a blank space. *See, e.g.,* Exhibit A to U.S. Bank Mem. (January 23, 2006 Assignment of Mortgage from Option One Mortgage Corporation to "___").

Whatever case law exists in Massachusetts regarding mortgage assignments in blank, of which there is very little, consists of judging the validity of assignments in blank that were later fully executed under dubious authority. *See, e.g., Bretta v. Meltzer*, 280 Mass. 573, 575-76 (1932), *citing Phelps v. Sullivan*, 140 Mass. 36 (1885). Here, the assignments in blank were never executed. Instead, the Plaintiffs later created an entirely new assignment, executed after the foreclosure was commenced and the sale held, backdating the "effective date." For the

purposes of this Court's analysis, however, the only purported assignment in existence at the relevant time, was and remains a transfer with only one party to it.

There is no support for the position that an assignment of a mortgage in blank is sufficient to pass the interest in that mortgage from the assignee to some related party. Nor could there be. There is perhaps no more fundamental concept in the law of contracts than the notion that at least two parties are required to form a binding agreement. Restatement 2d of Contracts, § 9 ("There must be at least two parties to a contract, a promisor and a promisee, but there may be any greater number.")

Having failed to produce any effective evidence that a valid writing existed at the time of notice and sale making them the holders of the mortgage, Plaintiffs resort to an argument that the Court should deem them to be mortgagees for the purposes of G.L. c. 244, § 14 by virtue of their status as note-holders. This argument, too, fails.

### C. Note-holder Status Does Not Automatically and Without More Confer a Right to Foreclose the Corresponding Mortgage in Massachusetts

Both defendants in these cases have asserted that the Plaintiffs have failed, as a matter of fact, to illustrate that they were properly positioned as note-holders at the time of foreclosure. The defendants have pointed to numerous inconsistencies and problems with the evidence offered by Plaintiffs in these cases. Assuming *arguendo*, that the Plaintiffs have made out a satisfactory case that trusts on whose behalf they were acting were the valid holders of the notes in question, their arguments still lack merit.

Plaintiffs' have announced their position "that the 'Equitable Holder' of the mortgage can foreclose the same" as a mortgagee. U.S. Bank's Motion to Vacate Judgment at 18. Such a

position is plainly contradicted by the relevant Massachusetts jurisprudence.[4]

### 1. Plaintiffs' Citation of Massachusetts Doctrine on Rights of Note-Holders vis-à-vis the Corresponding Mortgage Does Not Fully Answer the Current Question.

Central to Plaintiffs' view of their authority to foreclose is the line of Massachusetts cases that address the circumstances in which a note and the mortgage that secures that note are separated. Plaintiffs correctly identify the Massachusetts doctrine that the noteholder in these circumstances is judged to have an equitable interest in the corresponding mortgage. *See* U.S. Bank's Motion to Vacate Judgment at 17-18, *citing Commonwealth v. Reading Savings Bank*, 137 Mass. 431, 443 (1883); *Barnes v. Boardman*, 149 Mass. 106, 114 (1889). Such a position is true as far as it goes – but it does not go far enough for the purposes of this Court's analysis.

There is a substantive difference, explained fully below, between one who has an equitable interest in a mortgage and one who may act in all circumstances as the mortgage holder itself, including for the purposes of foreclosure under G.L. c. 244, § 14. The line of cases identified by the Plaintiffs merely confirm that a noteholder not holding a valid mortgage assignment has the right to bring an equitable action to force an assignment from the current holder of the mortgage. Here, the Court is concerned with adjudging the validity of foreclosures already commenced and completed, not whether a noteholder has a right to be assigned the

[4] Doonan's submission improperly infers that the Court's April 21, 2009 docket entry endorses the position that a foreclosing mortgagee may prove its authority to foreclose by merely showing its status as note-holder. *See* Doonan Mem. at 2. The Court's April 21, 2009 docket entry allows no such conclusion. It merely summarized the Plaintiffs' evidentiary proffer as representing that "documents may exist which may show a pre-notice, pre-sale assignment sufficient under G.L. c. 244, § 14." *Ibanez*, "Notice of Docket Entry" at 1 (April 21, 2009). Contrary to Doonan's statement, the docket entry offered no view of what conclusion the newly produced evidence might yield, other than to note that "the Court has concerns about the apparent practice of assignments 'in blank'" *Id.* at 2. In fact, Massachusetts jurisprudence does not automatically confer the power to foreclose upon bare note-holders, as explained below.

corresponding mortgage.[5] Rather than confirming their status as mortgagees, the cases cited by Plaintiffs highlight the fact that a noteholder does not stand precisely in the shoes of the mortgage holder, as the Supreme Judicial Court has held.

### 2. There is a Substantive Difference Between one who has Equitable Rights in a Mortgage and one who Actually Holds the Mortgage.

#### a) *Barnes v. Boardman* – Creation of Implied Trust.

The flaw in Plaintiffs' bestowal of the authority of a mortgagee upon one who has equitable interest in the mortgage is apparent in the cases they themselves cite. In *Barnes v. Boardman*, 149 Mass. 106 (1889) ("*Barnes*"), the SJC made clear that Massachusetts does not strictly follow the majority position on the question that arises when the note and mortgage are separated. The *Barnes* court starts with the position on which Plaintiffs rely: "The general rule is familiar that an assignment or transfer of a mortgage debt carries with it an equitable right to an assignment of the mortgage." *Barnes*, 149 Mass. at 114. The *Barnes* inquiry, however, goes further. In such circumstances the SJC notes *other* jurisdictions in which "mere transfer of the debt without any assignment or even mention of the mortgage carries the mortgage with it, so as to enable the assignee to assert his title in an action at law."[6] *Id.* The SJC goes on to clarify that

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[5] As the Court correctly noted during the April 17, 2009 hearing, the relevant temporal focus of its inquiry is on the Plaintiffs' status as of the time of the notice and sale. The Plaintiffs' subsequent actions are irrelevant to the question of whether it was properly in a position to execute the power of sale at the time that it did so. The following section therefore discusses the Plaintiffs' status as of the time that it commenced and executed foreclosure.

[6] Massachusetts is to be contrasted with Connecticut, for example, where the legislature has made clear that a note-holder without legal title to the mortgage may foreclose. *See* Conn. G.S.A. § 49-17. The Connecticut statute explicitly states that if an entity forecloses in circumstances where it is not the mortgagee, but is entitled to payment under the note secured by the mortgage, title to the premises will vest in that entity in the same manner it would have vested in the mortgagee following the period of redemption. This statute's significance here is heightened by the absence of any such similar statutory provision in the Commonwealth. Moreover, the statute draws a clear line between a mortgagee and a "person entitled to receive the money secured" by the mortgage.

"[t]his doctrine has not prevailed in Massachusetts." *Id.*

Instead of automatically conferring mortgagee status on a note-holder who does not hold the corresponding mortgage, as is the case in other jurisdictions, *Barnes* notes that Massachusetts law interprets such a situation to create an implied trust. "[T]he tendency of the decisions [in Massachusetts] has been that in such a case the mortgagee would hold the legal title in trust for the purchaser of the debt, and the latter might obtain a conveyance by a bill in equity." *Id.* It is thus clear that a bare note-holder stands apart from a mortgagee, but has the legal right to assume that status by bringing an equitable action if the mortgage assignment is not voluntarily given. Plainly, no such action was brought here.

**b) *Young v. Miller* – Powers of Note-Holder Under Implied Trust.**

In *Young v. Miller*, 72 Mass. 152 (1856) (Shaw, C.J.) ("*Young*") the SJC articulates the precise authority of the note-holder in the circumstances where the note and mortgage are separated. *Young* involved a mortgage that secured two notes, A & B. *Young*, 72 Mass. at 152. The mortgagee indorsed note A to the plaintiff, but did not assign her the mortgage, but rather retained it, as well as note B. *Id.* The mortgagee subsequently assigned both the mortgage and note B to the defendant, who discharged the mortgage. *Id.* The plaintiff then brought a writ of entry to foreclose on the mortgage because note A had been defaulted. *Id.*, 72 Mass. at 153. The circumstances are thus nearly identical in all relevant respects to the case here – a bare note-holder sought to foreclose on a mortgage where she did not hold the corresponding mortgage, by assignment or otherwise.

The *Young* Court's analysis begins by supposing the same common law rule that would later be endorsed in *Barnes* -- where the note and mortgage are separated, the note-holder becomes the beneficiary of a trust and the mortgagee becomes the trustee of that trust. *Id.*, 72

Mass. at 154. The *Young* Court proposed this rule as such:

> When a party holds a mortgage to secure the payment of a single negotiable note only, and no formal assignment is made of the mortgage, and nothing to indicate an intention of the parties that it is not to be assigned; as the mortgagee and indorser of the note, after such indorsement, would hold only a barren fee, without beneficial interest, and as the mortgage accompanying the note would be highly beneficial to the indorsee for the security of his note, the law may well imply the intention of the parties that the mortgage is thenceforth to be held by the mortgagee in trust for the indorsee. *Id.*

Assuming that rule to be true, *Young* considered whether the bare note-holder had the authority to bring a writ to foreclose the mortgage without first becoming holder of that mortgage. "But supposing that such a trust would be implied, then the question is, whether such a *cestui que trust* can maintain a real action. The opinion of the court is that he cannot." *Id.* In support of its holding, the *Young* court cited authority forbidding the beneficiary of similar trusts from maintaining his own action. *Id.*, 72 Mass. at 156, *citing, inter alia, Somes v. Skinner,* 16 Mass. 348; *Crane v. March*, 4 Pick. 131. Just as the plaintiff note-holder in *Young* could not bring a writ to foreclose the mortgage without a proper assignment, so should the Court determine that the Plaintiffs' equitable interest in the mortgages did not confer upon them such a right.

These cases have never been overruled. Thus, under Massachusetts law, where a note and its corresponding mortgage have been separated, a court should infer that the mortgage holder holds the mortgage in trust for the benefit of the note-holder. As the Plaintiffs assert, the note-holder thus has equitable rights in the mortgage. However, it is also clear that the note-holder does not have the authority to act directly on this interest to foreclose the mortgage without first taking steps to realize its inchoate interest – whether by voluntary assignment or equitable action against the mortgage holder. Such a requirement is not burdensome to the note-holder. As this Court has already noted, "there is nothing difficult or inhibitive in a requirement

that assignment documents be in place at the time of notice and auction." Where an assignment cannot be obtained voluntarily, an action sounding in equity is the proper avenue of redress. Plaintiffs' foreclosure actions violate this longstanding Massachusetts doctrine.

**c) REBA is Wrong.**

Offering its own view on *Roche v. Farnsworth*, 106 Mass. 509 (1871) ("*Roche*") and *Bottomly*, REBA posits that "[i]t is unreasonable strictness to invalidate otherwise properly conducted foreclosures simply because the party conducting the sale had not yet received the formal assignment of the mortgage. . . ." REBA Mem. at 5.

REBA's interpretation of these cases offers no substantive rebuttal to this Court's ruling in *Ibanez*. The Ruling quoted *Bottomly* as stating that the notice in that case "was defective *because it failed to identify the holder of the mortgage*, thereby rendering the first foreclosure sale *void as a matter of law*." *Ibanez*, 2009 WL 795201 at *5, *quoting Bottomly*, 13 Mass. App. Ct. at 483-84 (emphasis in *Ibanez*). *See also id.* at *5 n.18, *citing Roche*, 106 Mass. at 513. REBA offers nothing but conclusory statements to justify its position that there is somehow a difference between a notice that leaves the mortgagee space blank and a notice that fills that space incorrectly with the name of an entity that is not the mortgagee. Read broadly, the *Ibanez* decision draws upon both *Bottomly* and *Roche* to describe the foundational purpose of the notice requirement of G.L. c. 244, § 14 – to protect the interest of the mortgagor and others who benefit from a robust response to the public notice of the sale. REBA's criticism of the *Ibanez* decision does not explain why inaccurate notice information is better than no notice information in this regard. The Amici assert that neither notice formulation is "consistent with the degree of clearness that ought to exist in such an advertisement." *Id.* Nor is the position consistent with the plain language of the statute.

Further, the holdings of *Barnes* and *Young* are contrary of REBA's position. In Massachusetts, it is not permissible to foreclose first and get a written assignment of the mortgage later. This not only runs counter to the requirement that statute be construed strictly, but also is directly contradicted by *Young*, in which the note-holder plaintiff was prohibited from foreclosing the corresponding mortgage. REBA's attempts to justify the system in which its members participate are not surprising, but they are flatly inconsistent with governing law.

### D. REBA's Description of the Ruling's Fallout is Misplaced

REBA's submission includes a significant effort to convince the Court that regardless of the Ruling's merit, it should not be allowed to stand, lest the system of assignment and foreclosure constructed by financial institutions, title insurers and foreclosure attorneys will be left in ruin, causing widespread disruption. *See* REBA Mem. at 7-8. *See also* Doonan Mem. at 5.[7] Yet it is not the role of the Land Court to rubber stamp industry practices merely because such a ruling represents the path of least resistance. Whatever consequences the Land Court's proper interpretation of the statute and common law have, they lie at the feet of those who engaged in those unsupported practices, to their own benefit, and their insurers, who purposefully bore the risk of such mistakes.

#### 1. The Land Court has Fulfilled its Role Properly.

Much has been stated in both the popular media and in the courts regarding the

[7] Doonan's argument that any challenge is waived by the failure of the affected homeowner to dispute the validity of the foreclosure prior to its consummation is without merit. The Ruling considered and rejected a similar argument, noting that "[t]his contention (which places the burden and expense of a lawsuit on the mortgagor and allows a statutory violation with potentially severe adverse consequences to proceed unchecked if a lawsuit is not brought) is contrary to the 'consumer protection' nature of the statute. *Ibanez*, 2009 WL 795201 at *6. Moreover, the logical conclusion of Doonan's argument is absurd inasmuch as it would erase the common law claim of wrongful foreclosure. Massachusetts jurisprudence recognizes such a claim. *See, e.g., Kattar v. Demoulas*, 433 Mass. 1, 12 (2000).

carelessness with which the mortgage industry has operated in recent years.[8] This characteristic has received perhaps the most attention in connection with mortgage origination. *See, e.g., Commonwealth v. Fremont Investment & Loan*, 452 Mass. 733 (2008) (finding a subprime lender's routine practice of faulty underwriting that doomed a mortgage to foreclosure to be violation of G.L. c. 93A). But it remains true with regard to foreclosure practice as well. *See In re Nosek*, 386 B.R. 374, 380 (Bankr. D. Mass. 2008) *vacated in part by* 2009 WL 1473429 (D. Mass. May 26, 2009) ("Unfortunately the parties' confusion and lack of knowledge, or perhaps sloppiness, as to their roles is not unique in the residential mortgage industry."), *citing, inter alia, In re Maisel,* 378 B.R. 19 (Bankr. D. Mass. 2007); *In re Schwartz,* 366 B.R. 265 (Bankr. D. Mass. 2007); *In re Foreclosure Cases,* 2007 WL 3232430 (N.D. Ohio 2007).

The system by which the industry prosecutes foreclosures arising from defaults of securitized loans is but another example of the residential mortgage industry placing the value of expediency and its own convenience ahead of following the law strictly.[9] *See, e.g.*, Gretchen Morgenson, *Foreclosures Hit a Snag for Lenders*, N.Y. TIMES, Nov. 15, 2007, at C1. The Ruling held that the Plaintiffs' system of backdating mortgage assignments, along with REBA's Title Standard justifying the practice, ran counter to G.L. c. 244, § 14, and the cases interpreting

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[8] Further, the mortgage industry has been taken to task by law enforcement for the consequences of its less than stringent internal policing. In June 2008, the FBI announced that it had recently concluded a three-month crackdown on mortgage fraud that yielded over 287 arrests in a series of cases that caused over $1 billion in losses. *See* John D. Arterberry, Executive Deputy Chief, Fraud Section, Criminal Division, United States Department of Justice, "Operation Malicious Mortgage" (August 21, 2008), *available at* http://www.csbs.org/Content/NavigationMenu/PublicRelations/Presentations Speeches/MaliciousMortgageDOJ.ppt.

[9] A perhaps ironic consequence of the Plaintiffs' hurried, assembly line approach to foreclosure is that it is not always in their interest. There is evidence to support the position that investors in the securities issued by the trust would fare better were the trustee to authorize aggressive loan modification efforts. *See This American Life: No Map*, "Act One" (Episode 380 of Chicago Public Radio podcast), *available at* http://thislife.org/Radio_Episode.aspx?episode=380 (describing the position that loan modifications often benefit both investors and homeowners).

it. *Ibanez*, 2009 WL 795201 at *6-*8. In so doing, the Land Court was fulfilling its longstanding role of interpreting the law of proper title conveyance.

In *Tyler v. Judges of the Court of Registration*, 175 Mass. 71 (1900) ("*Tyler*"), Chief Justice Oliver Wendell Holmes, Jr. considered a constitutional challenge to the statutory foundation of the Land Court (originally created by Chapter 562 of the Acts of 1898 as the "Court of Registration"). The petitioner argued that the Land Court's decree of registration denied others due process of law by declaring the registrant to have good title against claims both known and unknown. The *Tyler* court noted that "the very meaning" of "a judicial proceeding to clear titles" was "to get rid of unknown as well as known claims, -- indeed, certainty against the unknown may be said to be its chief end." *Tyler*, 175 Mass. at 73.

The Ruling directly vindicated this most basic public interest in the maintenance of clear record of the ownership of land by passing judgment upon the Plaintiffs' action to remove a cloud on title. The Ruling interpreted the statute to determine that the Plaintiffs had not properly conducted the foreclosure process.

### 2. It is Not the Role of the Land Court to Relieve Plaintiffs and their Allies of the Consequences of their Errors

REBA and Doonan both assert that the Ruling will effect massive disruption on the real estate market. First, it must be noted that the Ruling is not the first or only decision adjudging such practices to be unlawful under G.L. c. 244, § 14. *See, e.g.*, *In re Schwartz*, 366 B.R. 265 (Bankr. D. Mass. 2007). Indeed, the Plaintiffs brought these very cases before the Court because they were unable to obtain title insurance in order to resell the subject properties. *Ibanez*, 2009 WL 795201 at *2 ("According to the plaintiffs, despite their successful bids and their subsequent recording of all the relevant documents, they cannot obtain title insurance for the properties-making them effectively unsaleable -- unless and until these issues are resolved in their favor.")

While the Ruling undoubtedly carries great significance, the Plaintiffs' characterization of it as a clean break from prior law that will unleash disorder in the real estate industry is overstated.

More to the point, it is not the role of the Land Court to relieve the risk of practices created for the benefit of the residential mortgage industry. The Land Court's chief end is to interpret the law in order that there be a clear record of ownership in land. *See Tyler*, 175 Mass. at 73. When mortgage industry actors collectively created a system of foreclosure in the context of securitization that served their own needs, and drafted a Title Standard to sanction that system, they accepted a risk that this process would run afoul of the statute. As illustrated by the Plaintiffs' complaints here, that risk was willingly borne by the title insurers. The Land Court has now identified a flaw in this practice. The consequences of the system's flaws lie at the feet of the institutions that constructed it and the title insurers who accepted that risk. It is not the province of the Land Court to relieve these entities from that risk.

Last, the Amici reject the vision of the Plaintiffs, REBA and Doonan regarding the crisis that will erupt if the Ruling is not overturned or significantly narrowed. In their view, whatever disruption is caused by the Ruling to the business practices of REBA's members or the legal work of Doonan pales in comparison to the crisis that is manifested in the explosion in the number of homeowners who have lost their homes to foreclosure in recent years. The Land Court's own statistics indicate that the number of foreclosure cases originated under the Servicemembers Civil Relief Act has grown more than three-fold in recent years, from 9,309 in 2004 to 30,679 in 2008.[10] To the extent that the ill effects of this recent explosion are heightened by instances in which the statutory foreclosure process was not properly followed, the Land Court's March 26, 2009 ruling helps alleviate the crisis. One result will undoubtedly be more

[10] These statistics are made available by the Land Court on its website at: http://www.mass.gov/courts/courtsandjudges/courts/landcourt/stats2008fiveyear.html

time for some homeowners to find an alternative to foreclosure from among the many public policy initiatives designed to foster foreclosure prevention.

## IV. CONCLUSION

For the reasons stated above, the Plaintiffs' Motion to Vacate Judgment should be denied and the Ruling should be left undisturbed.

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**Certificate of Service**

I hereby certify that a true and accurate copy of the above was served on all parties herein as set forth below by first class mail, postage prepaid, on June 29, 2009.

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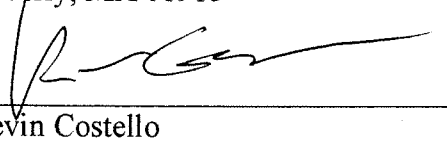

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