Supreme Judicial Court

FOR THE COMMONWEALTH OF MASSACHUSETTS
NO. SJC-10694

U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR THE STRUCTURED ASSET SECURITIES CORPORATION MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2006-Z,
PLAINTIFF-APPELLANT,

v.

ANTONIO IBANEZ,
DEFENDANT-APPELLEE.

WELLS FARGO BANK, N.A., AS TRUSTEE FOR ABFC 2005-OPT 1 TRUST, ABFC ASSET BACKED CERTIFICATES SERIES 2005-OPT 1,
PLAINTIFF-APPELLANT,

v.

MARK A. LARACE AND TAMMY L. LARACE,
DEFENDANTS-APPELLEES.

ON DIRECT APPELLATE REVIEW OF A JUDGMENT OF THE LAND COURT

BRIEF OF *AMICUS CURIAE* MARIE MCDONNELL, CFE

Marie McDonnell, CFE
Mortgage Fraud and Forensic Analyst
Certified Fraud Examiner

Truth In Lending Audit & Recovery Services, LLC
P.O. Box 2760, Orleans, MA 02653
Tel. (508) 255-8829 Fax (508) 255-9626
E-Mail: Marie.McDonnell@truthinlending.net
Website: http://truthinlending.net

Dated: October 1, 2010

DISCLAIMER

I, Marie McDonnell, am *a Mortgage Fraud and Forensic Analyst* and a *Certified Fraud Examiner*, not an Attorney. I was admitted on April 28, 2009 as Amicus Curiae by the Massachusetts Land Court in the instant matters which are now here on appeal before the Massachusetts Supreme Judicial Court.

I do not represent any of the Appellants or the Appellees in any capacity whatsoever. My involvement is strictly to assist the trier of fact in understanding the significance of the documentary evidence that has been presented by the Appellants, and to promote the public's interest.

Statements of fact, findings, or opinions expressed herein are based strictly on the documentary evidence, not the law, and are not to be interpreted as legal conclusions, which is the exclusive domain of the Massachusetts Supreme Judicial Court.

In order to assist the Court in comprehending the arcane subject of securitization and to pinpoint instances of fraud, mistake and irregularities in the Appellants' conduct as these became known through my forensic examination of the evidence, I communicate my findings in clear, concise language accepted and easily understood by the general populous for its plain meaning or as specifically defined in the Fraud Examiner's Manual published by the Association of Certified Fraud Examiners of which I am a Member in good standing.

Respectfully,

Marie McDonnell, CFE

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INTRODUCTION

On appeal here before the Massachusetts Supreme Judicial Court are two cases,[1] similar though not identical in nature, that were brought by the Appellants before the Massachusetts Land Court, Department of the Trial Court, in separate actions to remove a cloud on title some fourteen (14) and fifteen (15) months after Appellants had foreclosed on the Appellees' real property located in Springfield, Hampden County, Massachusetts.

The original issue involved whether or not *The Boston Globe,* in which the notices of foreclosure were published, was "a newspaper of general circulation in the town where the land lies" (Springfield) at the times of publication. This question was ultimately resolved by the Land Court (Long, J.) in favor of the Appellants and is not before this Court.

During the course of the proceedings below, the Land Court, *sua sponte*, took the opportunity afforded it by the Appellant's broadly worded complaint to examine whether the Appellants were the legal "holders" of the respective mortgages at the time of the foreclosure sale(s), and therefore, whether the

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[1] *U.S. BANK NATIONAL ASSOCIATION, as trustee for the Structured Asset Securities Corporation Mortgage Pass-Through Certificates, Series 2006-Z, v. ANTONIO IBANEZ*, Misc. Case No. 384283 (KCL)

WELLS FARGO BANK, N.A., as trustee for ABFC 2005-OPT1 Trust, ABFC Asset Backed Certificates Series 2005-OPT1 v. MARK A. LARACE and TAMMY L. LARACE, Misc. Case No. 386755 (KCL)

published notices, which named the Appellants as the foreclosing parties (even though they had no record interest in the property at the time of either publication or foreclosure), complied strictly with the provisions of M.G.L. c. 244, § 14.

On March 26, 2009, the Land Court issued a Memorandum and Order[2] vacating the judgments of foreclosure that had previously been granted to the Appellants. The Land Court reasoned as follows:

> Finally, I find and rule, however, that the other two foreclosures (U.S. Bank's in *Ibanez* and Wells Fargo Bank's in *Larace*) are invalid because the notices that named those entities failed to name the mortgage holder as of the date of the sale as required by G.L. c. 244, § 14. Neither U.S. Bank nor Wells Fargo Bank had been assigned the mortgages at the time notice was published and sale took place. 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.

The Appellants immediately filed a Motion to Vacate the order issued by Judge Long, and a hearing was scheduled on April 17, 2009. Shortly before the hearing began, Marie McDonnell, a Mortgage Fraud and Forensic Analyst, filed a Motion to Intervene in the Public Interest and submitted an Affidavit and Analysis in which she identified what were alleged to be fatal defects in the Assignments of Mortgage that purportedly

[2] The Land Court also considered a third action, *LaSalle Bank N.A., et al. v. Rosario*, Misc. Case No. 08-386018 (KCL), entering judgment for plaintiff in its March 26, 2009 Memorandum and Order.

conveyed the rights in the Appellees' loans to the Appellants (albeit after the foreclosure sale(s)).

At the April 17th hearing, the Appellants requested, and the Land Court granted, an opportunity to present "Supplemental Materials" that would purport to prove the Appellants were the legal owners and holders of the Ibanez and LaRace mortgage obligations at the time notice was published and the foreclosure sales were conducted.

The Appellants proffered their submissions on June 8, 2009. By this time, the Appellees were represented by counsel and filed their opposition briefs on or before June 29, 2009. Several amicus briefs were also submitted by that date, including a second Affidavit and Expert Report from McDonnell titled Evidence and the Burden of Proof in Documenting the Chain of Title in Securitized Mortgage Transactions. McDonnell's Report alleged that the Appellants' Assignments of Mortgage were not only invalid because they were dated post-notice and post-sale; but that they were also unauthorized and fraudulent. Moreover, McDonnell used the Appellants' own Supplemental Materials to allege that the individuals who executed the Foreclosure Deeds and other paperwork documenting the foreclosures had no authority to do so on behalf of Appellants.

On October 14, 2009, the Land Court issued a definitive Memorandum and Order on the Plaintiffs' Motions to Vacate Judgment in which it upheld its March

26, 2009 findings of fact and conclusions of law. The Court addressed, on the merits, new evidence submitted by the Appellants' and examined Appellants' arguments which centered on whether or not the Appellants' residential mortgage securitization documents could effectively supplant the requirements of M.G.L. c. 244, § 14.

The Appellants now seek to have the Massachusetts Supreme Judicial Court overturn the Land Court's Memorandums and Orders of March 26, 2009 and October 14, 2009.

AMICUS ANNOUNCEMENT

The Massachusetts Supreme Judicial Court issued a solicitation for amicus briefs or memoranda from interested parties so that it might hear all sides of the questions raised on appeal. Some of these questions relate to well-settled law and statutory construction; but others, namely the issues regarding the securitization of the residential mortgage loans that form the foundation of these cases, may constitute issues of first impression before the Court.

As the Massachusetts Supreme Judicial Court sits to hear these cases, the mainstream media in the United States is just beginning to break news exposing what consumers, advocates and foreclosure defense attorneys have been saying for several years, i.e., that the parties who securitized these loans on a massive scale negligently or intentionally skipped critical steps in

the process necessary to document the legal transfer of ownership in, and possession of, the promissory notes and mortgages that were allegedly bundled into "pools", transformed into securities and sold to the global capital markets as AAA rated investments.[3] (*See* Exhibit A. - Breaking News Stories)

In an attempt to "fix" this fatal defect and facilitate efficiencies, the mortgage servicing companies that control the foreclosure process typically employ "document execution teams" to create, execute, and record assignments of mortgage, affidavits, powers of attorney or whatever other paperwork is determined to be needed to provide a legal basis for foreclosure. (*See* Exhibit B. - JPMorgan Based Foreclosures on Faulty Documents, Lawyers Claim)

As a result, the public land records are increasingly being populated with fraudulent documents purporting to transfer mortgage rights from the originating lender directly to the trustee of a securitization trust (an act typically prohibited by the securitization documents themselves) when neither party has the legal authority to issue or accept such a transfer. Moreover, allegations are widespread throughout the country that foreclosure deeds are being recorded in the public records by entities and persons

[3] See *The Washington Post*, September 20, 2010, "Ally's GMAC mortgage unit temporarily halts evictions in 23 states."

See Bloomberg, September 27, 2010, "JPMorgan Based Foreclosures on Faulty Documents, Lawyers Claim."

who have no legal authority to do so, creating clouds on title that can only be corrected by costly litigation such as the instant litigation.

When these bogus documents are presented to the courts in support of a complaint to foreclose mortgage, judges automatically afford them deference and without question assume, like most people, that they are valid, particularly when such documents are being presented by an officer of the court (i.e., an attorney for a foreclosing bank). Many Judges, unaware of the underlying potential for fraud become unwitting participants in the wrongful foreclosure of the borrower's real property.

Concerned about these rogue practices, Congress Members Barney Frank (D-MA), Alan Grayson (D-FL), and Corrine Brown (D-FL) issued a letter on September 24, 2010 to Fannie Mae's President and CEO, Michael J. Williams, excoriating Fannie Mae for its employment of predatory 'foreclosure mills' in the State of Florida *"that specialize in speeding up the foreclosure process, often without regard to the process, substance, or legal propriety. According to the New York Times, four of these mills are both among the busiest of the firms and are under investigation by the Attorney General of Florida for fraud. The firms have been accused of fabricating or backdating documents, as well as lying to conceal the true owner of a note."*

(*See* Exhibit C. - Congress Members' Letter to Fannie Mae)

Recognizing the complex world of securitized mortgages, the Honorable Keith C. Long, whose Memorandums and Orders are here on appeal, addressed the question of a foreclosing party's standing to foreclose and required Appellants to show that they were the legal "holders" of the respective mortgages at the time the foreclosure sale was noticed and conducted, in compliance with the provisions of M.G.L. c. 244, § 14.

STATEMENT OF AMICUS INTEREST

I, Marie McDonnell, am a Mortgage Fraud and Forensic Analyst and a Certified Fraud Examiner credentialed by the Association of Certified Fraud Examiners. I am the founder and managing member of Truth In Lending Audit & Recovery Services, LLC located in Orleans, Massachusetts and have twenty-three (23) years' experience in transactional analysis, mortgage auditing, and mortgage fraud investigation.

I have been auditing residential mortgage transactions throughout the nation on behalf of consumers and the attorneys who represent them since 1991. From January 1992 through June 1994, my audits of complex negative amortization loans issued by subsidiaries of the Dime Savings Bank of New York led to Attorney General investigations in Massachusetts,

New Hampshire and Connecticut which resulted in multi-million dollar settlement awards and relief programs for consumers.

Then as now, I recognized that my specialized knowledge, forensic examination techniques, and analytic skills could be of assistance to authorities and to the trier of fact.

Accordingly, I filed a Motion to Intervene in the Public Interest with the Land Court in the matters currently on appeal before this Court. My Motion to Intervene was approved on April 28, 2009. I submitted an Affidavit and Analysis on April 17, 2009 which was not made part of the record on appeal; however, my June 29, 2009 Report, which incorporates much of the earlier submission, is included in the LaRaces' Supplemental Appendix at pages 2516 through 2623.

As the Supreme Judicial Court has been adequately briefed on the law, my contribution here is to discuss the paperwork that the Appellants filed with the Land Court when instituting the subject foreclosures; the documents recorded post-foreclosure in the Hampden County Registry of Deeds; and the securitization documents that have been proffered by the Appellants in support of their argument that the securitization documents are themselves evidence that the Ibanez and LaRace loans were properly and legally assigned into the Appellants' respective Trust Funds.

To assist this Honorable Court in coping with the thousands of pages of documentary evidence before it, I have organized an "Evidence Key" that cross-references the relevant documents discussed herein with their location in the Appendix and the LaRace Supplemental Appendix. (*See* Exhibit D. - Evidence Key)

STATEMENT OF THE CASE AND FACTS - IBANEZ

Amicus Curiae McDonnell hereby adopts the statement of the case and facts presented by the Massachusetts Land Court, Department of the Trial Court, and in the Ibanez Appellee Brief.

However, also relevant to this case – indeed, essential – are critical facts that arise upon an examination of the documents that Appellant U.S. Bank provided on June 8, 2009 which purport to grant, bargain, sell, assign, transfer, convey, set over and deliver to U.S. Bank, National Association, as Trustee for the Structured Asset Securities Corporation Mortgage Loan Trust 2006-Z ("SASC 2006-Z") all right title and interest in and to the Adjustable Rate Note and Mortgage executed in favor of Rose Mortgage, Inc. by Antonio Ibanez on December 1, 2005.

Before proceeding to examine the documents referenced below, this Court will find it helpful to refer to the visual aids that I provided to the Land Court: the first of these is a Securitization Flow Chart which illustrates the process flow required by

the Private Placement Memorandum for the SASC 2006-Z deal; the second is a Foreclosure Timeline that pinpoints the fatal defects in how the Ibanez foreclosure was conducted. Both of these visual aids were included in my Report of June 29, 2009 and are found in the LaRaces' Supplemental Appendix at pages 2551 and 2552. They are again provided as an exhibit hereto for the Court's convenience. (*See* Exhibit E. - Ibanez Securitization Flow Chart & Foreclosure Timeline)

The following additional facts, already in evidence, must be carefully considered by this Court:

1. The Adjustable Rate Note bears an original Loan Number: 0000013128, which is typed at the top right corner of Page 1. (*See* Appendix #960-964)

2. Two (2) Allonges to the Note were proffered by Appellants:

    a. Allonge #1 purports to indorse the Note from Rose Mortgage, Inc. to Option One Mortgage Corporation. Allonge #1 was executed by Ralph Vitiello, Chief Executive Officer of Rose Mortgage, Inc.; (*See* Appendix #965)

    b. Allonge #1 is consistent with the Assignment of Mortgage from Rose Mortgage, Inc. to Option One Mortgage Corporation dated December 8, 2005 (Assignment #1) which has been authenticated. (*See* Appendix #999-1000)

    c. Allonge #2 purports to indorse the Note from Option One Mortgage Corporation to an unnamed payee (a typical requirement of securitization deals; an indorsement "in blank"), thus converting it to bearer paper. (*See* Appendix #966)

    d. Allonge #2 is consistent with the Assignment of Mortgage dated January 23, 2006 (Assignment #2) in that both documents bear the Loan Number: 831058693. (*See* Appendix #989)

3. The Ibanez Mortgage recorded with the Hampden County Registry of Deeds bears an original Loan Number: 0000013128, which is typed at the top left corner of Page 1. This is consistent with Rose Mortgage, Inc.'s newly issued Adjustable Rate Note, Allonge #1, and Assignment #1 as described above. (*See* Supp. Appendix #2565-2584)

4. The Mortgage proffered by Appellants with the Supplemental Materials as part of the supposed original collateral file, however, has two (2) numbers that are handwritten at the top of Page 1: (*See* Appendix #967-986 and #1002-1021)

   a. Loan Number: 0015283807 represents the servicing number that Option One and subsequently, American Home Mortgage Servicing, Inc., used to track the Ibanez loan in its Mortgage Servicing Platform.

   b. Loan Number: 831058693 is identical to the Loan Number on Allonge #2 and Assignment #2 and represents the new owner of the Ibanez mortgage obligation which was, most likely, a securitization trust that was never identified in the chain of title of the Ibanez loan.

5. Finally, the Monthly Remittance Reports for the SASC 2006-Z Deal that I supplied as an exhibit to my June 29, 2009 Report clearly identify the Ibanez loan as **Loan Number: 0121463913** and not **Loan Number: 831058693** as noted on the conveyancing documents described above. (*See* Supp. Appendix #2559-2563)

6. **NOTE**: There is no Allonge from the investor who purchased the Ibanez mortgage obligation as Loan Number: 831058693 that would purport to convey the Ibanez Note to Appellant U.S. Bank who allegedly purchased the Ibanez mortgage obligation as Loan Number: 0121463913.

7. With respect to the securitization documents proffered, Appellant U.S. Bank's Attorney, Walter H. Porr, Jr., failed to disclose to the Land Court in his Second Supplemental Affidavit dated June 8, 2009 that the source of the Private Placement Memorandum on which U.S. Bank's appeal now largely rests, was taken from my Report of April 17, 2009; and that I had requested the document from Bloomberg Information Services.

   a. Further, Attorney Porr chose to omit the exhibit to my April 17, 2009 Report that demonstrated the Ibanez loan was not being

tracked as an asset of the SASC 2006-Z Trust Fund.

b. Attorney Porr dealt only with Fidelity Information Services, a default servicer for Option One, and failed to contact Appellant U.S. Bank directly to request the securitization documents.

c. Because the SASC 2006-Z securitization was a private placement deal, it was not registered with the Securities and Exchange Commission and the related securitization documents such as the Mortgage Loan Purchase Agreements and the Pooling and Servicing Agreement are not publicly available.

d. Most importantly, the original Mortgage Loan Schedule that would show whether or not the Ibanez loan was slated for acquisition by the SASC 2006-Z Trust Fund was never submitted into evidence.

8. There was no Power of Attorney put into evidence that would prove U.S. Bank, National Association as Trustee for the Structured Asset Securities Corporation Mortgage Loan Trust 2006-Z authorized Option One Mortgage Corporation, or its sub-agents, to execute any documents on the Trust's behalf.

a. For this reason, Option One's appointment of Cindi Ellis as "Assistant Secretary" with limited signing authority was ineffective with respect to the Ibanez loan.

b. It then follows that Cindi Ellis lacked the authority to execute any documents related to the Ibanez foreclosure, namely the Power of Attorney, Massachusetts Foreclosure Deed by Corporation, and Affidavit.

9. Under the pains and penalties of perjury, Cindi Ellis executed a Power of Attorney as Assistant Secretary of Option One, as Attorney-in-Fact for U.S. Bank National Association, as Trustee for the Structured Asset Securities Corporation Mortgage Pass-Through Certificates, Series 2006-Z on May 7, 2008 by which she appointed Steven A. Ablitt, Esq. Phil Raptis or John O'Hara agents of Ablitt & Charlton P.C. as Attorney-in-Fact for the limited and specific purposes of foreclosing upon the Ibanez property at 20 Crosby Street, Springfield, Massachusetts. (*See* Appendix 1061)

a. For the same reasons as stated above, this Power of Attorney was ineffective because Appellant failed to submit any evidence showing precisely how authority was granted from itself to Option One and from Option One to Cindi Ellis.

b. Moreover, this Power of Attorney purports to grant Ablitt & Charlton P.C. ("Ablitt") the authority to foreclose on the Ibanez property, retroactively, some ten (10) months after the sale had taken place.

c. Thus, the evident points to the fact that on April 17, 2007 when Ablitt docketed its Complaint to Foreclose Mortgage in the Land Court, Ablitt was without legal authority to do so.

10. For the foregoing reasons, all acts undertaken by Appellant U.S. Bank and its agents incident to the foreclosure of the Ibanez mortgage are void.

11. Moreover, because the evidence shows there was a failure to convey authority from Appellant U.S. Bank to Option One; from Option One to Cindi Ellis; and from Cindi Ellis to Ablitt, the instant foreclosure action should be unwound and declared void *ab initio* irrespective of the application of M.G.L. c. 244, § 14 to this particular case.

12. Finally, the Assignment of Mortgage dated September 2, 2008 (Assignment #3) from American Home Mortgage Servicing, Inc. as successor-in-interest to Option One Mortgage Corporation which purports to assign the Ibanez mortgage obligation to Appellant U.S. Bank fourteen (14) months post-foreclosure is invalid for the following reasons: (*See* Appendix #1066-67) (*See* Exhibit F. - Ibanez Assignment #3, 9/2/2008)

a. Assignment #3 was executed by Linda Green in her alleged capacity as "Vice President" for American Home Mortgage Servicing, Inc. ("AHMSI") as successor-in-interest to Option One Mortgage Corporation.

b. In actuality, Linda Green was employed at the time by DOCX LLC of Alpharetta, Georgia (a subsidiary of Lender Processing Services f/k/a Fidelity Information Services ("LPS")).

c. LPS shut down DOCX LLC in the spring of 2010 after the U.S. Attorney's Office for the Middle District of Florida began investigating

complaints that the company was creating "bogus assignments" and other documents used to facilitate judicial and non-judicial foreclosures nationwide.[4] (*See* Exhibit G. - U.S. Probes Foreclosure Data Provider)

d. In addition, American Home Mortgage Servicing Inc. is presently under investigation by the Texas Attorney General who on August 30, 2010 filed a civil action seeking a permanent injunction for, among other things, aggressive and unlawful debt collection tactics.[5]

e. No Powers of Attorney appear in evidence that authorized AHMSI, DOCX LLC, or Green to prepare and execute this Assignment of Mortgage.

f. Of critical importance to bear in mind is that Option One Mortgage Corporation divested its interest in the Ibanez Note and Mortgage on or about January 23, 2006 (some 2 ½ years before the foreclosure sale in question) when it endorsed the Note by Allonge #2 and Assigned the Mortgage to the unidentified purchaser of Loan Number: 831058693.

g. According to the Private Placement Memorandum for the SASC 2006-Z deal, only the Depositor, Structured Asset Securities Corporation, was permitted to convey loans into the Trust Fund; and it had to do so by the closing Date on or about January 28, 2007. (*See* Appendix #1167)

h. A purported Assignment of Mortgage created and executed fourteen (14) months after the foreclosure has taken place is, as Judge Long concluded, ineffective to transfer the mortgage obligation.

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[4] *See* Wall Street Journal, April 3, 2010, "U.S. Probes Foreclosure-Data Provider Lender Processing Services Unit Draws Inquiry Over the Steps That Led to Faulty Bank Paperwork, By Amir Efrati And Carrick Mollenkamp.

[5] *See* Official Website: *Attorney General Abbott Charges Home Loan Servicer With Violating State Debt Collection Laws*, August 30, 2010 http://www.oag.state.tx.us/oagNews/release.php?id=3458

ARGUMENT – IBANEZ

I. APPELLANT U.S. BANK'S ARGUMENT THAT THE JANUARY 23, 2006 ASSIGNMENT OF MORTGAGE "IN BLANK" CONVEYED THE IBANEZ NOTE AND MORTGAGE INTO THE STRUCTURED ASSET SECURITIES CORPORATION MORTGAGE LOAN TRUST 2006-Z FAILS ON THE FACE OF THE DOCUMENT BECAUSE THAT ASSIGNMENT CORROBORATES THE ALLONGE TO NOTE EXECUTED BY OPTION ONE MORTGAGE CORPORATION WHICH "SPECIFICALLY ENDORSED" THE IBANEZ NOTE, LOAN NUMBER 831058693, TO AN UNIDENTIFIED INVESTOR.

Amicus Curiae McDonnell hereby ratifies the findings of fact and conclusions of law reached by the Land Court on this point; as well as the arguments made by Ibanez in his Appellee Brief.

When preparing this Amicus Brief, I noticed certain details, recounted in the facts above, that had heretofore been overlooked with respect to the significance of how the Ibanez Note and Mortgage were rebranded along the way by significant changes in their respective Loan Number(s).

Upon examination, the evidence proffered by Appellant U.S. Bank in the Land Court shows that shortly after Rose Mortgage, Inc. sold the Ibanez Note and Mortgage (Loan Number: 0000013128) to Option One Mortgage Corporation. Option One thereafter rebranded the Ibanez Note and Mortgage as Loan Number: 831058693 and sold it to an unidentified Investor. (*See* Exhibit H. – Ibanez Note, Allonges, Mortgage and Assignments of Mortgage)

Appellant U.S. Bank has failed to proffer any evidence to show that the Ibanez Note was indorsed to

it or that the Mortgage was legally assigned from the Investor who acquired the Ibanez mortgage obligation from Option One on or about January 23, 2006 as Loan Number: 831058693.

On April 17, 2009, I submitted the current Mortgage Loan Schedule provided by Appellant U.S. Bank to Bloomberg Information Services which showed that as of that date, the Ibanez loan was not being tracked as an asset of the SASC 2006-Z Trust. (*See* Exhibit I. - Ibanez Mortgage Loan Schedule)

After researching the whereabouts of the Ibanez loan further, I explained in my Report of June 29, 2009 that Appellant U.S. Bank's Monthly Remittance Reports for May through August 2007 indicated that the Ibanez loan had been tracked in the SASC 2006-Z Trust as Loan Number: 0121463913. By September 2007 however, no trace of the Ibanez loan could be found even though by industry standards and reporting requirements, it should have been tracked as Real Estate Owned until the property was sold some fifteen (15) months later. (*See* Exhibit J. - Ibanez Monthly Remittance Reports)

Hence, the question of whether or not the Assignment of Mortgage dated January 23, 2006 "in blank" comports with the requirements of M.G.L. c. 244, § 14 appears to be a moot point in light of the fact that this Assignment of Mortgage unequivocally relates to an unidentified Investor, and not to Appellant U.S. Bank.

These details and new findings do not change the Land Court's conclusions as to applicability of M.G.L. c. 244, § 14 to foreclosures in Massachusetts. Rather, they only further support Judge Long's determination that Appellant U.S. Bank never had any right to conduct a foreclosure of the Ibanez property. The lesson here also demonstrates how opaque the system has become and that a forensic examiner with specialized knowledge and access to privileged information is required to "follow the mortgage," especially when that information is being suppressed.

II. APPELLANT U.S. BANK'S ARGUMENT THAT THE SECURITIZATION AGREEMENTS ASSIGNED THE IBANEZ MORTGAGE TO U.S. BANK, AS TRUSTEE AND VESTED LEGAL AUTHORITY TO FORECLOSE FAILS BASED ON THE OVERWHELMING WEIGHT OF THE EVIDENCE, OR LACK THEREOF, TO THE CONTRARY.

Appellant U.S. Bank failed to supply any "securitization agreements" in evidence in the Land Court. The only document relating to the SASC 2006-Z deal that was presented below was submitted by myself as an exhibit to my April 17, 2009 Report. I obtained the Private Placement Memorandum ("PPM") from Bloomberg Information Services after Lehman Brothers and Aurora Loan Services refused my requests for such information. I burned the 276-page document onto a CD and provided it to the Land Court (and to Appellant U.S. Bank) together with the Prospectuses covering the securitization framework of the Rosario and LaRace loans.

Appellant U.S. Bank appears to have turned around and re-submitted this same PPM to the Land Court on June 8, 2009 as its own document.

A PPM is essentially a disclosure document that describes a securities offering; it is not an agreement. Conspicuous by their absence are the documents that actually form and govern the SASC 2006-Z securitization. Such documents would include the Trust Agreement; the Sale and Assignment Agreement between the Sponsor and the Depositor; the Mortgage Loan Schedules for all "true sales" (identifying the Ibanez loan as part of the deal); the Servicing Agreement; the Custodial Agreement, etc.

Appellant U.S. Bank had the opportunity to submit its proof below, and it failed to do so. Its argument on appeal, that the phantom "securitization agreements" – evidenced only by the PPM - were effective to assign the Ibanez loan into the SASC 2006-Z deal, is unsupported hearsay and requires a leap of faith that does not meet the strict requirements of the Federal Rules of Evidence.

As a matter of public interest, I ask this Honorable Court to take judicial notice of facts that were not before the Trial Court below but which, nevertheless, are central to the issue of Appellant U.S. Bank's alleged standing in this case.

Here, I refer to the Official Records maintained by the Assessor's Office for the City of Springfield,

Massachusetts and specifically, the Sales/Ownership History that shows what happened to Antonio Ibanez's property at 20 Crosby Street after the Appellant U.S. Bank foreclosed. (*See* Exhibit K. - Sales/Ownership History)

Ibanez acquired 20 Crosby Street on December 2, 2005 from a real estate investor by the name of Knaggs Wilkenson who had purchased the property from U.S. Bank National Association fourteen (14) months earlier for the sum of $35,000.00.

One (1) year later, Ibanez paid Wilkenson $115,000.00 and spent approximately $20,000.00 of his own money improving the property.

Appellant U.S. Bank foreclosed on July 5, 2007 and on May 23, 2008 recorded its foreclosure deed which indicated it paid $94,350.00 at the sale.

On December 15, 2008, Appellant U.S. Bank sold the property to Blue Spruce Entities LLC for $0.00; in a simultaneous transaction, Blue Spruce Entities LLC sold the property to HomeSolutions Properties LLC for $5,500.00.

These facts raise serious questions about why Appellant U.S. Bank would pay $94,350.00 at auction for the Ibanez property and sell it for $0.00.

Typically, the acquisition price for a foreclosing mortgagee is a bookkeeping entry, not a cash payment. The fact that Appellant U.S. Bank could give away the Ibanez property for no consideration whatsoever

suggests that it may have lacked a pecuniary interest in the Ibanez loan to begin with.

This raises the question of whether Appellant U.S. Bank had standing to institute the original foreclosure action because it apparently would not have suffered any damages if it never collected what was alleged to be owed by the borrower Ibanez.

III. APPELLANT U.S. BANK'S ARGUMENT THAT IT HAD THE AUTHORITY TO FORECLOSE THE IBANEZ PROPERTY IS CONTROVERTED BY ITS OWN EVIDENCE OR LACK THEREOF.

The evidence presented to the Land Court unequivocally shows that there was a fatal break in the chain of title ownership on January 23, 2006 when Option One Mortgage Corporation indorsed the Ibanez Note via Allonge #2 and executed the Assignment in blank to an unidentified Investor.

At this point, the Note and Mortgage were bifurcated or "split". Option One had relinquished its interest in the Ibanez Note via Allonge #2. The Assignment in blank failed to name a Grantee or even reference the Mortgage it purported to assign. Thus, the Land Court properly determined that this Assignment of Mortgage conveyed no interest in the Ibanez Note and Mortgage pursuant to basic contract law, the Statute of Frauds, and M.G.L. c. 244, § 14.

Although the Mortgage remained nominally vested in Option One; Option One was impotent to act to enforce the Security Instrument unless it was instructed to do

so by the unidentified Note Holder of Loan Number: 831058693.

No evidence has been put forth by Appellant U.S. Bank that would show how, when and from whom it acquired the Ibanez Note upon which it relies to establish a debt owed, and a right to foreclose.

Assignment of Mortgage #3, which purports to transfer the Note and Mortgage from American Home Mortgage Servicing, Inc. as successor-in-interest to Option One Mortgage Corporation to Appellant U.S. Bank fourteen (14) months post-foreclosure is not only invalid because it is dated *ex post facto*; it appears to be a fictitious and fraudulent document executed by DOCX LLC employee Linda Green who had no personal knowledge of what she was signing.

It is precisely this conduct that the U.S. Attorney for the Middle District of Florida is investigating with respect to Green's employer, Lender Processing Services ("LPS"), who suddenly closed down DOCX LLC last spring and is now reviewing its internal document processing policies and procedures.

Finally, Appellant U.S. Bank argues that Assignment #3 was a "confirmatory assignment" which ratified the "securitization agreements". As has already been discussed, and as is established by the record, Appellant failed to produce any such documents as evidence in the Land Court.

STATEMENT OF THE CASE AND FACTS - LARACE

Amicus Curiae McDonnell hereby adopts and ratifies the statement of the case and facts presented by the Land Court, Department of the Trial Court, and in the LaRaces' Appellee Brief.

Relevant to this case are facts contained in the documents introduced by Appellant Wells Fargo Bank when it proffered its Supplemental Materials on June 8, 2009. Such documents like those submitted (and omitted) by Appellant U.S. Bank in the Ibanez case, show that Appellant Wells Fargo Bank did not have the legal authority to foreclose upon Appellees Mark and Tammy LaRace.

Before reading through the facts below, this Court will find it helpful to refer to the visual aids that I provided the Land Court: the first of these is a Securitization Flow Chart which illustrates the process flow required by the securitization documents for the ABFC 2005-OPT1 deal; the second is a Foreclosure Timeline that pinpoints the fatal defects in how the LaRace foreclosure was conducted. Both of these visual aids were included in my Report of June 29, 2009 and are found in the LaRaces' Supplemental Appendix at pages 2597 and 2598. They are again provided as an exhibit hereto for the Court's convenience. (*See* Exhibit L. - LaRace Securitization Flow Chart & Foreclosure Timeline)

For ease of reference, I also include the pertinent loan documents as an exhibit hereto. (*See* Exhibit M. - LaRace Note, Allonge, Mortgage and Assignments of Mortgage)

The following additional facts, already in evidence, must be considered:

1. The LaRace Adjustable Rate Note bears an original Loan Number: 231066435, which is typed at the top right corner of Page 1. (Appendix 890-893)

2. One (1) Allonge to the Note was proffered by Appellants:

    a. This Allonge (Allonge #1) purports to endorse the Note from Option One Mortgage Corporation to an unnamed payee (a typical requirement of securitization deals; an indorsement "in blank"), thus converting it to bearer paper. (*See* Appendix #894)

    b. Allonge #1 is consistent with the Assignment of Mortgage "in blank" dated May 26, 2005 (Assignment #1) in that both documents bear the Loan Number: 231066435. (Appendix #916)

3. The LaRace Mortgage recorded with the Hampden County Registry of Deeds and presented by Appellants with their Supplemental Materials, bears an original Loan Number: 231066435, which is typed at the top left corner of Page 1. This is consistent with Option One Mortgage Corporation's newly issued Adjustable Rate Note, Allonge #1, and Assignment #1 as described above. (Supp. Appendix #2624-2633)

4. With respect to the securitization documents that were proffered with the Supplemental Materials regarding the ABFC 2005-OPT1 deal, Appellant Wells Fargo Bank's Attorney, Walter H. Porr, Jr., downloaded those documents from the Securities and Exchange Commission's public access website rather than procuring them from the Appellant. (Appendix #1443 & 1599, #1781, #2063 & 2395)

    a. Hence, the securitization documents provided by Appellant are not executed copies, nor are they authenticated.

    b. No Mortgage Loan Schedule was supplied that would show whether or not the LaRace loan was

actually slated for acquisition by the ABFC 2005-OPT1 Trust.

c. Rather, Attorney Porr attached as Exhibit "B" to his June 8, 2009 submissions an 8-page spreadsheet titled "Mortgage Loan Schedule" that I had downloaded from the Bloomberg Terminal and attached as an exhibit to my April 17, 2009 Report. On Page 6 of the spreadsheet, I noted that the LaRace loan was being tracked as a receivable in the ABFC 2005-OPT1 Trust. (Appendix #882-889)

   i. Attorney Porr did not disclose the source of Exhibit "B" (me) in his pleadings. [*See* Third Supplemental Memorandum of Law in Support of Motion for Entry of Default Judgment, Page 3, #2; and Page 7, Last Paragraph] (Appendix #744-775)

   ii. Nor did Attorney Porr identify the source of Exhibit "B" (me) in his sworn Affidavit executed under the pains and penalties of perjury on June 8, 2009. [*See* Second Supplemental Affidavit of Walter H. Porr, Jr.] (Appendix #1073-1075)

5. Along with its Supplemental Materials, Appellant Wells Fargo Bank supplied a Limited Power of Attorney executed on January 5, 2007 from Wells Fargo Bank, N.A. as Trustee of 112 different securitizations authorizing Option One to act on its behalf in performing its responsibilities to service certain mortgage loans held by Wells Fargo Bank N.A. in its capacity as Trustee for Option One Mortgage Acceptance Corporation as Depositor. [Supp. Appendix #2601-2605] (*See* Exhibit N. - Limited Power of Attorney, Annotated)

   a. Option One Mortgage Acceptance Corporation however, was not the Depositor in the LaRace securitization – rather, Bank of America was the Depositor. (*See* Exhibit K. - LaRace Securitization Flow Chart & Prospectus)

   b. From these facts one can deduce that Option One lacked the authority to institute foreclosure proceedings against Appellees Mark and Tammy LaRace.

   c. It follows logically that Option One's purported appointment of Cindi Ellis as "Assistant Secretary" with limited signing authority is ineffective with respect to the

LaRace loan since Option One had no authority itself from Appellant Wells Fargo Bank. (Appendix #1068-1070)

d. The consequence of this set of facts is that all documents executed by Cindi Ellis incident to the LaRace foreclosure, namely the Power of Attorney, Massachusetts Foreclosure Deed by Corporation, and Affidavit are all without legal force or effect. (Appendix #941, #943, & #944-945)

6. Under the pains and penalties of perjury, Cindi Ellis executed a Power of Attorney as Assistant Secretary of Option One, as Attorney-in-Fact for Wells Fargo Bank, N.A., as Trustee for ABFC 2005-OPT1 Trust, ABFC Asset-Backed Certificates, Series 2005-OPT1 on May 7, 2008 by which she purported to appoint Steven A. Ablitt, Esq. Phil Raptis or John O'Hara agents of Ablitt & Charlton P.C. as Attorney-in-Fact for the limited and specific purposes of foreclosing upon the LaRace property at 6 Brookburn Street, Springfield, Massachusetts. (Appendix #941)

   a. This Power of Attorney is ineffective because the evidence submitted by the Appellant, as noted above, proves that Option One was not authorized to act on behalf of the ABFC 2005-OPT1 Trust; and therefore, Cindi Ellis, herself, was without any authority to execute this document on behalf of Appellant Wells Fargo Bank.

   b. Moreover, this Power of Attorney purports to grant Ablitt & Charlton P.C. ("Ablitt") authority to foreclose, <u>retroactively</u>, some ten (10) months <u>after</u> the sale had taken place.

   c. Thus, on April 27, 2007 when Ablitt docketed its Complaint to Foreclose Mortgage with the Land Court, it was without legal authority to do so.

7. For the foregoing reasons, all acts undertaken by Appellant Wells Fargo Bank and its agents incident to the foreclosure of the LaRace mortgage are void.

8. Moreover, because the record shows that there was a failure to convey any legal authority from Appellant Wells Fargo Bank to Option One; from Option One to Cindi Ellis as "Attorney in Fact"; and from Cindi Ellis to Ablitt, the instant foreclosure action is also void.

9. Finally, the Assignment of Mortgage dated May 7, 2008 which purports to have an "Effective Date" of April 18, 2007 (Assignment #2) from Option One Mortgage Corporation to Appellant Wells Fargo Bank ten (10) months post-foreclosure is invalid for the following reasons: [Appendix #940] (*See* Exhibit O. - LaRace Assignment of Mortgage #2)

   a. Assignment #2 was executed by Cindi Ellis who, as it has already been established, was unauthorized to act on behalf of Appellant Wells Fargo Bank in this matter.

   b. Option One Mortgage Corporation divested its interest in the LaRace Note on or about May 26, 2005 (three (3) years before Assignment #2 was created) when it indorsed the Note by Allonge #1 and allegedly transferred it to the ABFC 2005-OPT1 Trust.

   c. According to the securitization documents for the ABFC 2005-OPT1 Trust – provided by Appellant to the Land Court - only the Depositor, Bank of America, N.A., was permitted to convey loans into the Trust. (*See* Pooling and Servicing Agreement, Section 2.01: Conveyance of Mortgage Loans)

   d. Moreover, the securitization documents supplied by Appellant in the Land Court state that all loans were required to be conveyed into the Trust by the Closing Date which was approximately on or before October 28, 2005.

   e. This purported Assignment of Mortgage, created and executed ten (10) months after the foreclosure had taken place is, as Judge Long correctly ruled, a nullity and transferred no rights in the LaRace mortgage to Appellant Wells Fargo Bank.

ARGUMENT – LARACE

IV. APPELLANT WELLS FARGO BANK'S ARGUMENT THAT THE MAY 26, 2005 ASSIGNMENT OF MORTGAGE "IN BLANK" CONVEYED THE LARACE NOTE AND MORTGAGE INTO THE ABFC 2005-OPT1 TRUST IS WITHOUT EVIDENTIARY SUPPORT.

Amicus Curiae McDonnell hereby adopts and ratifies the findings of facts and conclusions of law reached by

the Land Court on this point; as well as the arguments made by the LaRaces in their Appellee Brief.

The proposition that the May 26, 2005 Assignment of Mortgage together with the Note secured thereby from Option One Mortgage Corporation to an unnamed Grantee where there are no deed references therein; no affidavits in support thereof; no proof of offer and acceptance; no proof of consideration paid; no proof of delivery of the instruments; and no competent attestation from Appellant, leaves a document that purports to "speak for itself" but is mute on the subject. This Assignment of Mortgage, having been challenged by the Land Court and the Appellee, is without any form of legal support and cannot be considered competent evidence.

It is possible for a human mistake to be made in the process of transferring real estate interests, for example: the preparer of a deed, mortgage, or assignment may make a scrivener's error, omit a material term, or fail to name a party to the transaction. Such mistakes can be corrected by the original parties either by agreement or through appropriate court proceedings, both of which require basic evidentiary proof of the mistake and the following of specific procedural requirements to correct.

The business practice, however, adopted by the securitization industry of executing Assignments of

Mortgage “in blank,” was not a “mistake”. Rather, the banking industry and the attorneys who developed the securitization model intentionally created a dynamic system that was designed for high-speed, electronic transfers where efficiencies of scale were more important than compliance with state real property laws governing the orderly and authorized transfer of real estate interests at the time such transactions took place. Compromises like this were made in order to facilitate the unfathomable amount of money to be made in the process of pooling individual mortgage transactions for the securitization mill. As with the predatory mortgage lending scheme test-marketed by the Dime Savings Bank of New York in the late 1980s through the mid-1990s, a business decision was made at the highest executive levels of the organization to deal with these “technicalities” later.

As a result, required “interim” assignments transferring real property interests – notably the borrower’s mortgage – properly executed by a person or person(s) duly authorized to do so was simply not handled at the time the transfer actually occurred. When mortgage default rates began to soar, the “assignment problem” became urgent and extreme and mortgage servicing companies, who control the foreclosure process, attempted to correct the problem retroactively by back-dating the conveyancing documents

because the securitizers had not done so at the time of the transfer(s).

Unfortunately, the practice of creating retroactive assignments of real estate interests clearly promotes fraud, waste and abuse and virtually eliminates transparency in the process of buying and selling residential mortgages. As a result of the system set up by the banks, their servicing companies are feverishly, almost desperately, creating tens of thousands of improper Assignments of Mortgage, Affidavits, Powers of Attorney, etc. which largely appear to be fraudulently created in order to process the millions upon millions of foreclosure cases now in the pipeline.

Indeed, as I write this brief, news is breaking on a daily basis that confirms what I say here. Today's admission by JPMorgan Chase & Co. that it is suspending the some 56,000 foreclosures in the 23 states until a review of its foreclosure filing process is completed is only the tip of the iceberg. Robbie Whelan of the Wall Street Journal foreshadows the industry-wide "assignment problem" as he reports on JPMorgan's pronouncement in today's news:[6]

> "It has come to our attention that in some cases employees in our mortgage foreclosure operations may have signed affidavits about loan documents on the basis of file reviews done by other personnel,

[6] *Lender Halts Foreclosures, J.P. Morgan to Review 56,000 Home Loans as 'Robo-Signer' Troubles Crop Up*, THE WALL STREET JOURNAL, September 30, 2010.

> without the signer personally having reviewed those loan files," said Tom Kelly, a Chase spokesman.
>
> The announcement comes amid widespread concern over "robo-signers," employees of the mortgage-servicing companies that sign hundreds of affidavits related to foreclosure filings each day without properly reviewing the files associated with each case. Some judges in Florida, Maine and other states have begun tossing out foreclosure actions when they discover that the affidavits involved were signed by robo-signers, even if the borrower hasn't made mortgage payments for months or even years.
>
> In May, Ice Legal LP, a Royal Palm Beach, Fla., law firm, deposed Beth Ann Cottrell, a Chase document-signer who said she regularly signed off on about 18,000 foreclosure affidavits and other documents each month without reviewing the loan files.
>
> Earlier this month, Detroit-based GMAC Mortgage Co. announced it would suspend evictions and pending sales of foreclosed properties in certain states while it investigated its document-signing process. A GMAC robo-signer, Jeffrey Stephan, admitted in depositions that he signed as many as 500 foreclosure affidavits each day without reviewing the necessary files or having his signatures properly notarized.

This news bears out what I say here, that the underlying problem with the Appellants' Assignments of Mortgage is not simply that they were "dated retroactively," a practice encouraged by REBA Title Standard 58; rather, they are intrinsically and extrinsically fraudulent.

Therefore, it would be futile for this Honorable Court to grant retroactive immunity in an attempt to redress the "dating" problem because doing so cannot cure the underlying fraud. The chickens have finally

come home to roost, and the Appellants are simply going to have to face up to their failed business model and put things right for their customers.

V. APPELLANT WELLS FARGO BANK'S ARGUMENT THAT THE SECURITIZATION AGREEMENTS ASSIGNED THE LARACE MORTGAGE TO IT THEREBY GRANTING LEGAL AUTHORITY TO FORECLOSE FAILS BECAUSE THE APPELLANT HAS NOT PROVEN THAT THE LARACE NOTE AND MORTGAGE WERE LEGALLY CONVEYED INTO THE ABFC 2005-OPT1 TRUST.

Unlike the Ibanez loan which was purportedly securitized into a private placement deal, the LaRaces' loan was allegedly packaged into a public offering registered with the Securities and Exchange Commission ("SEC"). As such, the "Deal Documents" for the "ABFC 2005-OPT1 Trust" into which the LaRace loan was allegedly conveyed, are available for electronic download on the SEC's public access websites: http://www.secinfo.com or http://www.sec.gov.

On June 8, 2009, Appellant Wells Fargo Bank's Attorney, Walter H. Porr, Jr., submitted a compendium of documents relating to the ABFC 2005-OPT1 Trust that he evidently downloaded from the SEC's site at http://www.sec.gov. Attorney Poor submitted these documents in an attempt to demonstrate that Appellant Wells Fargo Bank was the legal owner and holder of the LaRace Mortgage as of the date it published notice and conducted the foreclosure sale.

Such documents might have some evidentiary weight if Attorney Porr had contacted his client – Appellant Wells Fargo Bank – directly and requested fully

executed, certified (or attested) copies of the Deal Documents along with the original Mortgage Loan Schedules. Such documents might have revealed the LaRaces' loan was slated for inclusion in the ABFC 2005-OPT1 Trust, but that evidence was never presented to the Land Court.

Instead, Attorney Porr copied an 8-page spreadsheet titled "Mortgage Loan Schedule" that I downloaded from the Bloomberg Terminal for inclusion in my April 17, 2009 Report. Attorney Porr annexed my spreadsheet and marked it as Exhibit "B" to his submissions to the Land Court of June 8, 2009 without revealing the true source of this information. (*See* Exhibit P. – LaRace Mortgage Loan Schedule)

Attorney Porr had further opportunity to identify the source of the Mortgage Loan Schedule he filed with the Land Court in his Third Supplemental Memorandum of Law in Support of Motion for Entry of Default Judgment, and in his Second Supplemental Affidavit, but he chose not to do so.

Notwithstanding the hundreds of pages of documents submitted by Appellant Wells Fargo Bank with their June 8, 2009 Supplemental Materials, no evidence, of any kind, was ever supplied to the Land Court that would tend to show that the LaRace Note and Mortgage were ever purchased by the ABFC 2005-OPT1 Trust; that the Note was negotiated according to Massachusetts General Laws; that the terms and requirements Pooling and

Servicing Agreement for the deal were actually followed; or that the subject Mortgage was properly assigned.

The only document that purports to convey the LaRace Note and Mortgage into the ABFC 2005-OPT1 Trust is the unauthorized Assignment of Mortgage dated May 7, 2008, executed by Cindi Ellis as Assistant Secretary to Option One Mortgage Corporation ten (10) months post-foreclosure that purports to be "effective" as of April 18, 2007.

This Assignment is invalid and inoperative not only because Cindi Ellis was not authorized to execute the document or that it violates M.G.L. c. 244, § 14; but because it violates the terms of the Trust Agreement, the Pooling and Servicing Agreement, and the representations and warranties made to the Securities and Exchange Commission and bondholders about how the securitization of the mortgages in the deal was to occur. Specifically, the Assignment purports to transfer the Note and Mortgage from the Originator, Option One Mortgage Corporation, directly into the ABFC 2005-OPT1 Trust, which is a prohibited act under the terms of the securitization documents. According to the Appellant's own securitization documents, only the Depositor can convey the assets into the Trust, and in this case, it had to do so on or before October 28, 2005.

At bottom, since Appellant Wells Fargo Bank, who is presumably aware that they are bound by their own agreement(s) that they themselves created and executed and agreed to be bound by – as noted by Judge Long in the Land Court – had to have known that the Assignment of Mortgage dated May 7, 2008 was being manufactured and improperly executed for the express purpose of creating a document which purported to give Appellant Wells Fargo Bank the right to institute foreclosure proceedings against Mark and Tammy LaRace.

It is impossible to view the creation of this Assignment of Mortgage, in the aggregate of this transaction, as anything other than an intentional fraud.

VI. APPELLANT WELLS FARGO BANK'S ARGUMENT THAT IT HAD THE AUTHORITY TO FORECLOSE THE LARACE PROPERTY IS CONTROVERTED BY THE APPELLANT'S OWN EVIDENCE OR LACK THEREOF.

This argument is easily defeated by Appellant Wells Fargo Bank's own submissions and omissions to wit:

1) The Assignment of Mortgage "in blank" dated May 26, 2005 conveys nothing;

2) The Limited Power of Attorney dated January 5, 2007 which authorized Option One Mortgage Corporation to act on behalf of Wells Fargo Bank, N.A. in its capacity as Trustee for Option One Mortgage Acceptance Corporation, depositor rather than the Depositor for the ABFC 2005-OPT1 Trust namely, Asset Backed Funding Corporation is a nullity with respect to the LaRace transaction;

3) The failure to submit any evidence whatsoever that the LaRace loan was acquired by the ABFC 2005-OPT1 Trust is fatal; and

4) The bogus Assignment of Mortgage created and executed by Cindi Ellis on May 7, 2008, ten (10) months post-foreclosure is both unauthorized and fraudulent.

REBA TITLE STANDARD 58

The Real Estate Bar Association has filed an amicus brief in these matters to request that should the Supreme Judicial Court uphold the Land Court's decisions in *Ibanez* and *LaRace* i.e., that M.G.L. c. 244, § 14 requires that a mortgagee who is an assignee must have a fully executed, recordable assignment in hand as of the date of the first required publication of the mortgagee's notice of sale, should only be applied prospectively.

In support thereof, REBA argues that a group of innocent people who have purchased foreclosed properties over the past fifteen years face the prospect that their titles may be clouded or even declared void if the foreclosure is challenged and found to be improper. REBA ruminates that this group may be unable to seek recourse against the foreclosing lender either because the property has been sold multiple times or the lender is nowhere to be found.

These fears are largely imaginary. For one thing, most of these problems involve securitization trusts who purchased various forms of insurance to cover its

errors and omissions. Secondly, these foreclosures are being prosecuted by a handful of gargantuan mortgage servicing companies that are alive and well; and that are profiting handsomely from default servicing and foreclosure. Should any one of those go under, they too have errors and omissions insurance that this group of harmed individuals can sue.

Finally, the mortgage industry and the foreclosure conveyancing bar are well aware that consumers who have been ravaged by predatory lending and wrongful foreclosure schemes do not have the emotional, psychological or monetary wherewithal to challenge the likes of Appellants U.S. Bank and Wells Fargo Bank.

The sad fact is that the wrongdoers have gotten away with the most enormous transfer of wealth in human history representing trillions upon trillions of dollars, and they have yet to be held accountable.

Yielding to REBA's request that the *Ibanez* and *LaRace* rulings be prospective in nature sends the wrong message and it should not be granted.

CONCLUSION

Judge Long carefully considered the facts before him in *Ibanez* and *LaRace*, and he accurately applied the relevant Massachusetts General Laws and case law in his well reasoned Memorandums and Orders of March 26, 2009 and October 14, 2009. His decisions are a hallmark of fairness and justice; they are a credit to the man, and

to the American system of jurisprudence. This Honorable Court should ratify the Land Court's reasoning and uphold its decisions on appeal.

In his October 14, 2009 Memorandum, Judge Long wisely admonished:

> The issues in this case are not merely problems with paperwork or a matter of dotting i's and crossing t's. Instead, they lie at the heart of the protections given to homeowners and borrowers by the Massachusetts legislature. To accept the plaintiffs' arguments is to allow them to take someone's home without any demonstrable right to do so, based upon the assumption that they ultimately will be able to show that they have that right and the further assumption that potential bidders will be undeterred by the lack of a demonstrable legal foundation for the sale and will nonetheless bid full value in the expectation that that foundation will ultimately be produced, even if it takes a year or more. The law recognizes the troubling nature of these assumptions, the harm caused if those assumptions prove erroneous, and commands otherwise.
>
> (Long, J., 10/14/2009)

In closing, I wish to thank the Honorable Justices of the Massachusetts Supreme Judicial Court for their service, and for accepting my amicus brief which is allowing me to participate in this process so vital to our living democracy.

I also wish to thank the Honorable Keith C. Long for allowing me to intervene in the cases below as Amicus Curiae and for keeping an open mind as I offered evidence and factual analysis that proved to be helpful to him as he deliberated on the issues.

Respectfully submitted,

Marie McDonnell, CFE
Mortgage Fraud and Forensic Analyst
Certified Fraud Examiner

Truth In Lending Audit & Recovery Services, LLC
P.O. Box 2760, Orleans, MA 02653
Tel. (508) 255-8829 Fax (508) 255-9626
E-Mail: Marie.McDonnell@truthinlending.net
Website: http://truthinlending.net

CERTIFICATE OF COMPLIANCE

This brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to: Mass. R. A. P. 16(a)(6) (pertinent findings or memorandum of decision); Mass. R. A. P. 16(e) (references to the record); Mass. R. A. P. 16(f) (reproduction of statutes, rules, regulations); Mass. R. A. P. 16(h) (length of briefs); Mass. R. A. P. 18 (appendix to the briefs); and Mass. R. A. P. 20 (form of briefs, appendices, and other papers).

Marie McDonnell, CFE
Mortgage Fraud and Forensic Analyst
Certified Fraud Examiner