Supreme Judicial Court

FOR THE COMMONWEALTH OF MASSACHUSETTS

No. 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 APPEAL FROM A JUDGMENT OF THE LAND COURT

APPELLANTS' OPENING BRIEF

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Dated: May 14, 2010

CORPORATE DISCLOSURE STATEMENT OF
U.S. BANK NATIONAL ASSOCIATION

Pursuant to Supreme Judicial Court Rule 1:21(b)(i), Appellant U.S. Bank National Association, which is Trustee for the Structured Asset Securities Corporation Mortgage Pass-Through Certificates, Series 2006-Z ("U.S. Bank"), states that it is a wholly-owned subsidiary of U.S. Bancorp, which is a publicly-traded company. There are no publicly-held companies (outside of U.S. Bancorp) that own ten percent (10%) or more of U.S. Bank's stock.

CORPORATE DISCLOSURE STATEMENT OF
WELLS FARGO BANK, N.A.

Pursuant to Supreme Judicial Court Rule 1:21(b)(i), Appellant Wells Fargo Bank, N.A., which is Trustee for the ABFC 2005-OPT1 Trust, ABFC Asset Backed Certificates Series 2005-OPT1 ("Wells Fargo"), states that it is a direct and indirect subsidiary of Wells Fargo & Company, which is a publicly-traded company. There are no publicly-held companies (outside of Wells Fargo & Company) that own ten percent (10%) or more of Wells Fargo's stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

FEDERAL CASES

STATE CASES

FEDERAL STATUTES

STATE STATUTES

RULES

TREATISES

I. STATEMENT OF THE ISSUES PRESENTED

A. Whether the Land Court erred in ruling that Appellants' securitization documents did not act to assign the LaRace and Ibanez mortgages and thus did not confer legal authority on which to foreclose;

B. Whether the Land Court erred in ruling that Appellants' assignments of mortgage in blank did not act to assign the LaRace and Ibanez mortgages and thus did not confer legal authority on which to foreclose;

C. Whether the Land Court erred in ruling that Appellants did not have legal authority to foreclose through possession of the original notes, the original mortgages, the assignments of mortgage in blank, and the securitization documents;

   1. Whether the Land Court's interpretation of the notice requirements of Mass. Gen. L. ch. 244, § 14, was erroneous;

   2. Whether the Land Court erred in basing its decisions on the hypothetical occurrence of prejudice where no evidence of any prejudice existed in the record;

D. Whether the Land Court erred in ruling that the execution and recording of a confirmatory assignment did not validate the prior actions taken by Appellants in furtherance of foreclosure;

E. Whether the Land Court erred by not limiting its rulings to prospective application only, where it failed to take into consideration Title Standard No. 58 of the Real Estate Bar Association for Massachusetts and the far-reaching consequences of the retroactive application of its rulings on numerous titles to real property in Massachusetts.

II. STATEMENT OF THE CASE

These appeals arise from two foreclosure sales conducted by Plaintiffs-Appellants[1] after Defendants-Appellees defaulted on their mortgage loans. The Land Court erroneously ruled that Appellants were not the valid assignees of the mortgages and therefore did not have authority to issue notice and to conduct the sales. In so ruling, the Land Court ignored the plain language of the relevant securitization agreements for Appellees' loans, which affirmatively assigned and conveyed to Appellants all interest in the respective mortgages. The Land Court also ignored Appellants' good faith compliance with decades-long foreclosure industry practice, their status as assignees of the mortgages pursuant to assignments of mortgage in blank, and their legal possession and control of all indicia of ownership of the mortgage loans.

On these bases, Appellants had authority to issue notices of sale and to conduct the foreclosure sales

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[1] Plaintiffs-Appellants are U.S. Bank National Association, as Trustee for the Structured Asset Securities Corporation Mortgage Pass-Through Certificates, Series 2006-Z ("U.S. Bank, as Trustee"), and Wells Fargo Bank, N.A., as Trustee for ABFC 2005 OPT1 Trust, ABFC Asset Backed Certificates Series 2005-OPT1 ("Wells Fargo, as Trustee") (collectively, "Appellants").

on the subject properties. Nonetheless, in two sweeping decisions, the Land Court voided both foreclosures, rejected Title Standard No. 58 of the Real Estate Bar Association for Massachusetts ("REBA") that endorsed the foreclosure processes employed by Appellants, and created wide-spread uncertainty in the mortgage and title industries. Applying the Land Court's reasoning, foreclosure sales conducted pursuant to what it defines as invalid assignments are void, and homeowners, whose properties have a "void" foreclosure sale in the chain of title, may not actually own the properties they purchased in good faith. The Land Court's rulings cannot stand as a matter of law or policy, and, if affirmed, should be limited to prospective application only.

Accordingly, Appellants respectfully request that the Court (1) reverse the Land Court's Memorandum and Order denying Appellants' Motions for Entry of Default Judgment, dated March 26, 2009, vacate the Judgment that the Land Court entered against Appellants on that date, and reverse the Land Court's Memorandum and Order on Appellants' Motions to Vacate Judgment, dated October 14, 2009, and (2) enter judgment in Appellants' favor.

III. STATEMENT OF FACTS

A. Mortgage Securitization Practice

The Land Court's rulings implicate fundamental mortgage securitization practices - namely, whether the trustee of a securitization trust containing thousands of mortgage loans may foreclose on a mortgage held in that trust. Under Massachusetts law, a trustee, like Appellants here, has such authority.

Mortgage securitization is a mechanism by which mortgages are pooled together in a trust and converted into mortgage-backed securities that are easily bought and sold by investors. See MORTGAGE-BACKED SECURITIES: DEVELOPMENTS AND TRENDS IN THE SECONDARY MORTGAGE MARKET § 3:3 (Eric Smalley, et al. Eds., Thomson Reuters 2009-2010). Federal law expressly provides for the creation of mortgage-related securities. See, e.g., 15 U.S.C. § 77r-1. The typical securitization process involves several participants, including loan originators, a depositor, a master servicer, sub-servicers, a trustee, and investors. See TALCOTT J. FRANKLIN & THOMAS F. NEALON III, MORTGAGE AND ASSET BACKED SECURITIES LITIGATION HANDBOOK §§ 1:3-1:10 (Thompson Reuters 2009).

A securitization trust is created by a "pooling and servicing agreement" ("PSA"), or similar

agreement, under which all ownership interest in thousands of mortgage loans is simultaneously assigned and conveyed to the trustee of the securitized trust. See id. § 1:12. The mortgage loans are identified on a loan schedule incorporated into the PSA as an exhibit. [A692, 887, 1522]; [A1295].

Pursuant to the PSA, shortly after the mortgage loans are assigned and securitized, the "collateral file" for each loan in the trust is delivered to the legal possession and control of the trustee. [A693-95]. The collateral file for a loan typically includes the indicia of ownership of the subject loans, including the original note, endorsed in blank and thus bearer paper; the original mortgage; and an assignment of mortgage in blank.[2] [Id.].

The industry custom is not to record a document reflecting the assignment of a mortgage at the time the assignment occurs during securitization. Instead, a confirmatory assignment of mortgage in a more easily recorded form typically is recorded only after a mortgage loan goes into default and resort to the collateral is necessary. [A700-03]; Eno & Hovey, 28B

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[2] An assignment of mortgage in blank does not designate the assignee on the face of the document.

Massachusetts Practice: Real Estate Law, REBA Tit. Std. No. 58 (4th Ed. 2008).

These practices ensure the efficient and effective transfer of ownership interest in a very large number of mortgage loans at once. The ability to easily transfer ownership interest in mortgage loans through the securitization process is essential to the practical working of the secondary mortgage market. See generally FRANKLIN & NEALON, MORTGAGE AND ASSET BACKED SECURITIES LITIGATION HANDBOOK §§ 1:37-1:47.

B. **The LaRace Mortgage Loan**

In May 2005, Appellees Mark A. LaRace and Tammy L. LaRace (the "LaRaces") obtained a mortgage loan in the amount of $129,000.00 from Option One Mortgage Corporation ("Option One") [A890-94], secured by real property in Springfield, Massachusetts. [A905-12]. Subsequently, the LaRace loan was sold by Option One to Bank of America. [A1486, 1708, 2096]. Bank of America, in turn, sold the loan to Asset-Backed Funding Corporation,[3] which pooled and assigned the

[3] The sale and assignment of the mortgage loans from Bank of America to Asset-Backed Funding Corporation was conducted pursuant to a Mortgage Loan Purchase Agreement, whereby "all of its right, title and interest in and to each Mortgage Loan ... including any Related Documents" was sold and

loan to Wells Fargo, as Trustee for the ABFC 2005-OPT1 Trust, subject to the Pooling and Servicing Agreement, dated October 31, 2005 ("LaRace PSA"). [A1443-1780].

The LaRace PSA assigned all interest in the LaRace note and mortgage to Wells Fargo, as Trustee. Specifically, the PSA provided:

> The Depositor [Asset Backed Funding Corporation], concurrently with the execution and delivery [of the Pooling and Servicing Agreement], does hereby transfer, assign, set over and otherwise convey to the Trustee [Wells Fargo] ... all the right, title and interest of the Depositor, including any security interest therein ... in and to ... each mortgage loan identified [by the Agreement]. [A1522] (emphasis added).

The LaRace PSA further provided that:

> The Depositor and the Trustee [Wells Fargo] intend that the assignment and transfer herein contemplated constitute a sale of the Mortgage Loans and the Related Documents, conveying good title thereto free and clear of any liens and encumbrances, from the Depositor to the Trustee. [A1524].

The term "Related Documents" is expressly defined as "the related Mortgage Notes, Mortgages and other related documents." [A1491] (emphasis added).

The LaRace PSA also assigned and conveyed to Wells Fargo, as Trustee all rights of the prior assignors and assignees as contained in the

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assigned. [A1709]. "Related Documents" is defined to include the "Mortgages." [A1708, 1491].

"Originator Mortgage Loan Purchase Agreement" (between Option One and Bank of America) and the "Mortgage Loan Purchase Agreement" (between Bank of America and Asset Backed Funding Corporation). [A1522, 1524-26, 1711-16]. This included the representation of the Depositor, Asset Backed Funding Corporation, that:

> [t]he Depositor had good and marketable title to each Mortgage Loan (insofar as such title was conveyed to it by the seller) [and that] ... [a]s of the Closing Date, the Depositor has transferred all right, title interest in the Mortgage Loans to the Trustee on behalf of the Trust. [A1530].

The PSA also incorporated the representation of the Seller (Bank of America) to the Depositor (Asset Backed Funding Corporation) contained in the Mortgage Loan Purchase Agreement:

> [t]he Seller is the sole owner of record and holder of the Mortgage Loan and the Mortgage Note ... and the Seller has good and marketable title thereto and has full right and authority to transfer and sell the Mortgage Loan to the Purchaser. [A1712].

Pursuant to the LaRace PSA, Wells Fargo, as Trustee was assigned the LaRace note and mortgage and had possession, at all relevant times, of the original LaRace note (endorsed in blank), the original LaRace mortgage, and an assignment of mortgage in blank. [A1522-23]; [A890-945 (LaRace Collateral File)].

After the LaRaces defaulted on their loan, Wells Fargo, as Trustee commenced foreclosure proceedings in May 2007. [A23, 938-39]. Pursuant to Mass. Gen. L. ch. 244, § 14, notices of sale were published in *The Boston Globe*, listing Wells Fargo, as Trustee as the party seeking foreclosure. [A23, 227, 945].

On July 5, 2007, the property was sold at auction to Wells Fargo, as Trustee for $120,397.03. [A24]. On or about May 7, 2008, Option One, as the former mortgagee, executed a confirmatory assignment of the LaRace mortgage to Wells Fargo, as Trustee, effective April 18, 2007, a date prior to the issuance of the foreclosure notice and the foreclosure sale. [A940]. The assignment was recorded on May 12, 2008. [A940, 941-44].

C. **The Ibanez Mortgage Loan**

On or about December 1, 2005, Appellee Antonio Ibanez ("Ibanez") obtained a mortgage loan in the amount of $103,500.00 from Rose Mortgage, Inc., secured by a mortgage on real property in Springfield, Massachusetts. [A960-66; 967-86]. Rose Mortgage sold the Ibanez loan to Option One. [A965, 987-88].

Subsequently, Option One sold the Ibanez loan to Lehman Brothers Bank, FSB, which in turn sold the loan

to Lehman Brothers Holdings, Inc. [A1242, 1295-96]. Lehman Brothers Holding sold the loan to Structured Asset Securities Corporation, which then pooled the Ibanez loan with other loans and assigned them to U.S. Bank, as Trustee for the Structured Asset Securities Corporation Mortgage Loan Trust 2006Z. [A1295-96]. The securitization was conducted pursuant to a Trust Agreement dated December 1, 2006. [A1292-1305].

A Private Placement Memorandum ("Ibanez PPM"), dated December 26, 2006, which described the securitization process as carried out by the Trust Agreement, establishes that an assignment of all interest in the Ibanez note and mortgage to U.S. Bank, as Trustee occurred. The Ibanez PPM provided:

> The Mortgage Loans will be assigned by Depositor to the Trustee [U.S. Bank].... Each transfer of a Mortgage Loan from the Seller to the Depositor and from the Depositor to the Trustee will be intended to be a sale of that Mortgage Loan and will be reflected as such in the Sale and Assignment Agreement and the Trust Agreement.... [A1295] (emphasis added).

The Trust Agreement, as described by the PPM, also assigned and conveyed to U.S. Bank, as Trustee all rights, representations and warranties provided by the Seller to the Depositor. [A1296-98]. The PPM further represented that:

> The related Transferor is the sole owner of record and holder of the Mortgage Loan and related mortgage ..., the related Transferor had good and marketable title to the mortgage and related mortgaged property, had full right and authority to transfer and sell the Mortgage Loans, and transferred such Mortgage Loans free and clear of any encumbrance. [A1296-97].

Pursuant to the Trust Agreement, U.S. Bank, as Trustee was assigned the Ibanez note and mortgage and had legal possession and control, at all relevant times, of the original note (endorsed in blank), the original mortgage, and an assignment of mortgage in blank, which were held by a custodian on its behalf. [A1295-96]; [A959-1025, 1058-70 (Collateral File)].

After Ibanez defaulted on his mortgage loan, U.S. Bank, as Trustee commenced foreclosure proceedings in April 2007. [A18, 1060]. Pursuant to Mass. Gen. L. ch. 244, § 14, notices of sale were published in *The Boston Globe*, listing U.S. Bank, as Trustee as the party seeking foreclosure. [A1065]. On July 5, 2007, the property was sold at auction to U.S. Bank, as Trustee for $94,350.00. [A19]. On or about September 2, 2008, American Home Mortgage Servicing, Inc. ("AHMSI") executed a confirmatory assignment of the Ibanez mortgage to U.S. Bank, as Trustee, which was recorded on September 11, 2008. [A1066-67].

D. **Procedural Background**

After the subject foreclosure sales, a question arose in the title insurance industry as to whether publication of foreclosure notices in *The Boston Globe* for property in Springfield, Massachusetts, satisfied Mass. Gen. L. ch. 244, § 14. To resolve any uncertainty for the two properties here, Appellants filed separate complaints in the Land Court on September 16, and October 23, 2008. [A17-26].

In both complaints, Appellants sought a declaration that Appellees' rights in the real property at issue were extinguished at foreclosure sale; that no cloud existed on the titles to the properties; and that Appellants held title to the properties in fee simple. [A17-21]. Both complaints raised only one issue - whether *The Boston Globe* was a newspaper of general circulation in Springfield for purposes of Mass. Gen. L. ch. 244, § 14. [A19-20, 24-25]. Neither of the Appellees responded to the complaints, and Appellants moved for entry of default judgment. [A580].

The Land Court informally consolidated the actions for pre-trial proceedings.[4] [A55, 61]. The Land Court, *sua sponte*, queried whether Appellants were the legal "holders" of the respective mortgages, and thus, whether the two notices of sale complied with Mass. Gen. L. ch. 244, § 14. [A578-79]. The Land Court requested briefing on this issue, which Appellants submitted in connection with their motions. [A61].

On March 26, 2009, the Land Court issued a Memorandum and Order disposing of Appellants' Motions for Entry of Default Judgment. [A577]. The Land Court first resolved the question presented in Appellants' complaints, holding that publication of the subject foreclosure notices in *The Boston Globe* satisfied Mass. Gen. L. ch. 244, § 14. [A584]. The Land Court then proceeded to find that (1) neither Appellant had a valid assignment of mortgage at the time of publication of the notices or at the time of the foreclosure sale, (2) the foreclosure notices failed to identify the "holder" of the mortgage, and

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[4] The Land Court also considered a third action, LaSalle Bank N.A., et al. v. Rosario, Case No. 08-386018 (KCL), entering judgment for plaintiff in its March 26, 2009 Memorandum and Order. [A593-95].

(3) the notices were deficient under Mass. Gen. L. ch. 244, § 14. [A592-93]. Put another way, the Land Court held that Appellants lacked authority as assignees to conduct the subject foreclosures. [Id.].

As a result, the Land Court not only denied the motions for entry of default judgment, but also, *sua sponte*, entered judgment against both Appellants, found both foreclosure sales void, and dismissed Appellants' complaints with prejudice. [A593-95]. Appellants then filed separate, but substantially similar, motions to vacate judgment. [A596, 637].

On October 14, 2009, the Land Court issued a Memorandum and Order denying Appellants' motions to vacate judgment and reaffirming its prior judgment. [A1136]. The Land Court again held that Appellants were not the "holders" of the respective mortgages. [A1156]. According to the Land Court, an entity becomes the "holder" of a mortgage for the purposes of Mass. Gen. L. ch. 244, § 14, only where the assignment is "in recordable form" and expressly identifies that entity as the assignee. [A587, 1147-48, 1158].

On October 30, 2009, Appellants filed separate notices of appeal from the Land Court's two memoranda and its judgment against both entities. [A1163-66].

IV. SUMMARY OF THE ARGUMENT

The Land Court's rulings were erroneous and should be reversed for the following reasons. First, the Land Court erred by ignoring the plain language of Appellants' securitization agreements that assigned all interest in Appellees' loans to Appellants. The assignment provisions in those agreements are valid and enforceable, and provided the legal predicate on which to provide notice pursuant to Mass. Gen. L. ch. 244, § 14, and to invoke the power of sale pursuant to Mass. Gen. L. ch. 183, § 21. [pp. 17-28].

Second, rather than giving effect to the language of assignment in the securitization agreements, the Land Court devoted much of its analysis to whether assignments of mortgage in blank satisfy Mass. Gen. L. ch. 244, § 14. The controlling language of assignment is found in the securitization agreements, but even if that were not the case, the Land Court erred in holding that assignments of mortgage in blank do not evidence a valid transfer of a mortgage. [pp. 28-34].

Third, the Land Court erred in ruling that Appellants' equitable interests in the mortgages as note holders, their status as owners of Appellees' mortgage loans under the operative securitization

agreements, and their legal possession and control of all indicia of ownership in the mortgages did not vest in them authority to foreclose. The Land Court's interpretation of Mass. Gen. L. ch. 244, § 14, is not supported by the law, and the Court erred in considering the hypothetical possibility of prejudice where no evidence existed in the record. [pp. 34-46].

Fourth, after the foreclosure sales, Appellants recorded confirmatory assignments of mortgage in accord with a decades-long practice in Massachusetts and in accordance with REBA Title Standard No. 58. The Land Court's rejection of the confirmatory assignments of mortgage was plain error. [pp. 46-48].

Finally, the Land Court's decisions have arguably affected thousands of properties that have a "void" foreclosure sale in their chain of title. As a matter of public policy, the Land Court's rulings should not stand. If, however, they are affirmed on appeal, sound policy mandates prospective application only of those rulings. [pp. 18-50].

V. STANDARD OF REVIEW

In disposing of Appellants' motions for entry of default judgment and subsequent motions to vacate judgment, the Land Court dismissed the complaints as a

matter of law. This Court reviews rulings of law and legal conclusions *de novo*. See Norfolk & Dedham Mut. Fire Ins. Co. v. Morrison, -- N.E.2d --, 2010 WL 1345156, at *3 (Mass. Apr. 8, 2010).

VI. ARGUMENT

A. The Land Court Erred In Ruling That The Securitization Agreements Did Not Assign The Mortgages To Appellants And That Appellants Did Not Have Legal Authority To Foreclose

Courts must interpret contracts in accordance with the plain meaning and intent of the parties as expressed therein. See Polito v. School Comm. of Peabody, 69 Mass. App. Ct. 393, 396 (2007). In doing so, courts must give effect to all of a contract's provisions and must not render words or portions of a contract superfluous. See Worcester Mut. Ins. Co. v. Marnell, 398 Mass. 240, 245 (1986).

The Land Court violated these basic tenets of contract law when it ignored the plain language of the LaRace and Ibanez securitization agreements. The LaRace PSA and the Ibanez Trust Agreement, by their plain terms, assigned all interest in the subject loans (including the mortgages) to Appellants. See Mass. Gen. L. ch. 183, § 28 ("the word 'assign' shall be a sufficient word to transfer the mortgage without

the words 'transfer and set over'"). That the securitization agreements were not formally titled "assignment of mortgage" is of no import. Cousbelis v. Alexander, 315 Mass. 729, 730 (1944) ("[t]he form of the memorandum is immaterial, if its contents adequately set forth the agreement") (quotation omitted). It is enough that the operative securitization agreements affirmatively assigned the mortgages to Appellants.

1. The LaRace PSA Assigned The LaRace Mortgage To Wells Fargo, As Trustee

The LaRace loan is subject to the plain language of the PSA, which transferred, assigned and conveyed all interest in the LaRace loan, including any security interest (i.e., the mortgage), to Wells Fargo, as Trustee, [A1522-24], and is identified on the Mortgage Loan Schedule appended to the PSA [A887].

Numerous other provisions in the PSA acknowledge and confirm this assignment of mortgage. At Section 2.02 of the PSA, for example, the Depositor and Wells Fargo, as Trustee acknowledged that:

> The Depositor and the Trustee intend that the assignment and transfer herein contemplated constitute a sale of the Mortgage Loans and the **Related Documents**, conveying good title thereto free and clear of any liens and encumbrances,

from the Depositor to the Trustee. [A1524] (emphasis added).

"Related Documents" includes "Mortgages." [A1491].

At Section 2.07 of the PSA, Wells Fargo, as Trustee again "acknowledge[d] the assignment to it of the Mortgage Loans and the delivery to it of the Mortgage Files, ... and the Trustee acknowledge[d] the assignment to it of all other assets included in the Trust Fund...." [A1531].[5] Wells Fargo, as Trustee, further acknowledged receipt of "all other assets included in the definition of 'Trust Fund.'" [A1531]. The LaRace PSA effected an assignment and sale of the LaRace mortgage, note and related ownership documents to Wells Fargo, as Trustee. By ignoring the terms of the PSA, the Land Court erred and should be reversed.

2. The Ibanez Trust Agreement Assigned The Ibanez Mortgage To U.S. Bank, As Trustee

The Trust Agreement referenced in the Ibanez PPM contains similar language of assignment to U.S. Bank, as Trustee.[6] The PPM specifically provides that:

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[5] "Mortgage Loans" and "Trust Fund" are defined terms in the PSA. [A1482, A1502].

[6] Because the Land Court entered judgment *sua sponte* on a motion for entry of default, the parties never engaged in discovery related to the securitization agreements. Instead, the Land Court considered the securitization documents, among others, which were submitted in connection with Appellants'

> Each transfer of a Mortgage Loan from the Seller to the Depositor and from the Depositor to the Trustee will be intended to be a sale of that Mortgage Loan and will be reflected as such in the Sale and Assignment Agreement and the Trust Agreement....

[A1295-96] (emphasis added). Additionally, in connection with the sale and assignment of each Mortgage Loan, the PPM required the original mortgage note, the original mortgage with evidence of recording indicated thereon, and related documents be delivered to the custodian on behalf of the trustee. [A1295-96].

The PPM establishes that the Trust Agreement served to sell all interest in the Ibanez loan, including the mortgage, to U.S. Bank, as Trustee. By concluding otherwise and ignoring the plain evidence of assignment, the Land Court erred and should be reversed.

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motions to vacate the judgment against them. In connection with the Ibanez loan, U.S. Bank, as Trustee submitted the PPM, which served as an offer of the mortgage-backed securities to investors, to the Land Court as evidence of the securitization of the Ibanez loan. The PPM details the provisions of the Trust Agreement, and evidences the assignment of the relevant mortgage to U.S. Bank, as Trustee as effectuated by the Trust Agreement. U.S. Bank, as Trustee represents that the language of assignment contained in the Trust Agreement is in accord with the analogous language of conveyance contained in the LaRace PSA. U.S. Bank, as Trustee is prepared to submit the Trust Agreement upon request by this Court or to the Land Court upon remand, if remand is deemed necessary.

3. The Land Court Fundamentally Misread The Securitization Agreements And Related Documents

As the above-cited language confirms, the operative securitization agreements assigned and sold the LaRace and Ibanez mortgages to Appellants. [A1522, LaRace PSA § 2.01 ("The Depositor ... does hereby transfer, assign, set over and convey" to Wells Fargo, as Trustee "all right, title and interest of the Depositor, including any security interest therein" to each Mortgage Loan)]; [A1523-24, LaRace PSA § 2.02 ("the assignment and transfer ... constitute[s] a sale of the Mortgage Loans and the Related Documents," including the "mortgage," to Wells Fargo, as Trustee)]; [A1295, Ibanez PPM at 119 (transfer of Mortgage Loan to U.S. Bank, as Trustee, is "a sale of that Mortgage Loan")].

The Land Court, however, wrongly ignored the plain language of the LaRace PSA and the Ibanez Trust Agreement (as described in the PPM). Instead, the Land Court ruled that "[t]he various agreements between the securitization entities stating that each had a right to an assignment of the mortgage are not themselves an assignment" and that "[a]t best, the agreements gave those entities a right to bring an

action to get an assignment." [A1158]. The Land Court misinterpreted the language of the securitization agreements. Nothing in the agreements suggests that the assignments of the mortgages were prospective or otherwise dependent upon the completion of an assignment of mortgage in recordable form. Rather, the language of assignment effected an immediate assignment of the mortgages to Appellants. The Land Court's fundamental misreading of the securitization agreements was erroneous and should be reversed.

4. The Land Court's Decisions Are Contrary To The Weight Of Authority On The Effect Of Securitization Agreements

Not only do the Land Court's decisions render nugatory entire portions of the LaRace PSA and Ibanez Trust Agreement, but those decisions are also inconsistent with the weight of authority.

At least one court applying Massachusetts law has found that a similar securitization agreement acted to assign all interest in loans (including the mortgages) to the securitization trustee. In In re Samuels, 415 B.R. 8, 18 (Bankr. D. Mass. 2009), the U.S. Bankruptcy Court for the District of Massachusetts ruled that "[t]he [Pooling and Servicing Agreement] itself, in

conjunction with the schedule of mortgages deposited through it into the pool trust, served as a written assignment of the designated mortgage loans, including the mortgages themselves." (emphasis added).

Courts in other jurisdictions endorse the same reasoning applied in In re Samuels. In U.S. Bank N.A. v. Cook, No. 07 C 1544, 2009 WL 35286 (N.D. Ill. Jan. 6, 2009), for example, the U.S. District Court for the Northern District of Illinois found that language similar to the LaRace PSA and Ibanez Trust Agreement effected an assignment of mortgage to the trustee. Id. at *3. The PSA in question provided that the depositor "does hereby assign to the trustee without recourse all the right, title, and interest of the Depositor in and to ... the Mortgage Loans." Id.; see also [A1522 (LaRace PSA)].

Likewise, in LaSalle Bank N.A. v. Nomura Asset Capital Corp., 180 F. Supp. 2d 465 (S.D.N.Y. 2001), the U.S. District Court for the Southern District of New York found that language contained in a PSA served to assign a mortgage to the trustee. Id. at 470-71. The PSA at issue provided that the depositor did "sell, transfer, assign, set over and otherwise convey to the Trustee ... all right, title and interest" that

the depositor held in the mortgage. Id. The court ruled that this language assigned all right, title and interest in the mortgage to the trustee. Id. at 471.

Other decisions that reach the same conclusion include Wells Fargo Bank, N.A. v. Konover, No. 3:05 CV 1924 (CFD), 2009 WL 2710229, at *3 (D. Conn. Aug. 21, 2009) (PSA vested authority in trustee to bring legal action in the event of default); In re Kang Jin Hwang, 396 B.R. 757, 767 (Bankr. C.D. Cal. 2008) ("[i]f a loan has been securitized, the real party in interest is the trustee of the securitization trust"); and LaSalle Bank N.A. v. Lehman Bros. Holdings, Inc., 237 F. Supp. 2d 618, 632-33 (D. Md. 2002) (PSA granted trustee authority to bring suit on behalf of trust).

As "assigns" under the securitization agreements, Appellants had the authority under Massachusetts law to issue notices of sale pursuant to Mass. Gen. L. ch. 244, § 14, and to invoke the statutory power of sale set forth in Mass. Gen. L. ch. 183, § 21.

5. The Land Court Erred In Requiring An Assignment Be In Recordable Form

The Land Court objected to the securitization agreements because they were not "in recordable form" [A1158], but the Land Court's whole-cloth creation of

this prerequisite to the enforceability of an assignment is not supported by Massachusetts law.

There is nothing in the foreclosure notice statute (Mass. Gen. L. ch. 244, § 14), the statute setting forth the power of sale (Mass. Gen. L. ch. 183, § 21), or the Statute of Frauds (Mass. Gen. L. ch. 259, § 1), which requires that an assignment of mortgage be "in recordable form" in order to be enforceable in a foreclosure proceeding. Indeed, these statutes do not speak at all to the need for recordation, with the reason being that "[t]he interest of anyone in an existing mortgage may be shown by parol-evidence [and] is not confined to the record title." Lamson & Co. v. Abrams, 305 Mass. 238, 244 (1940); see also Equity One, Inc. v. Estate of Williams, 72 Mass. App. Ct. 1108, at *1 & n.2 (July 16, 2008) ("the Statute of Frauds does not require that a writing be recorded to effect a valid conveyance") (unpublished disposition).

Even the recording statute instructs that the failure to include certain information on the face of an assignment of mortgage has no effect on the validity of the assignment. See Mass. Gen. L. ch. 183, § 6C (failure to include name and address of

assignee "shall not affect the validity of any mortgage or assignment of a mortgage") (emphasis added); Mass. Gen. L. ch. 183, § 6B (failure to include street address "shall not affect the validity of the document")(emphasis added).

Thus, the Land Court was simply wrong when it held that the "recordability" of a document affects the validity of the assignments conveyed thereby. No such requirement is found in Massachusetts law.[7] The Land Court's unfounded creation of such a requirement does not, and cannot, alter the validity of the assignments effectuated here.

6. The Securitization Agreements Satisfy All Of The Land Court's Requirements

Even assuming, for the sake of argument, that the Land Court's "in recordable form" construct were the law, both sets of securitization agreements here meet all that the Land Court requires.

First, the LaRace PSA and the Ibanez Trust Agreement contain plain language of assignment (see §§ VI.A.1 & VI.A.2, supra), which demonstrates, in satisfaction of Mass. Gen. L. ch. 183, § 28, that

[7] Numerous Massachusetts cases hold that an assignment need not be recorded to be enforceable. See Montague v. Dawes, 94 Mass. 397, 400 (1866); MacFarlane v. Thompson, 241 Mass. 486, 489 (1922).

Appellants have been assigned all interest in the subject loans, including the security interests.

Second, the securitization agreements clearly identify the name and address of the assignees of the mortgages as Appellants. [A1295, 1522-24]. These agreements, therefore, satisfy the recording statute, Mass. Gen. L. ch. 183, § 6C.

Third, the securitization agreements satisfy the Statute of Frauds. All parties to the agreements, including the respective assignors and assignees, are signatories. Thus, the Statute of Frauds is no bar to the enforceability of the assignments effected by way of the securitization agreements.

Finally, the securitization agreements include mortgage schedules listing each mortgage loan assigned to Appellants thereunder. The original notes and mortgages, which were sold, assigned, and delivered pursuant to the LaRace PSA and the Ibanez Trust Agreement, identified the borrower name, the property address, and the book and page number for each mortgage. [A890-94, 895-914, 960-66, 967-86].

As unambiguous assignees under the securitization agreements, which themselves comply with the Land Court's requirements, Appellants had the authority to

issue notices of, and to conduct, foreclosure sales. The Land Court's finding to the contrary was in error and should be reversed.

B. The Land Court Erred In Ruling That The Assignments Of Mortgage In Blank Did Not Assign The Mortgages And That Appellants Did Not Have Legal Authority To Foreclose

The Land Court all but ignored the assignment provisions contained in the securitization agreements, and instead devoted much of its analysis to whether assignments of mortgage in blank satisfied Mass. Gen. L. ch. 244, § 14. The controlling language of assignment is found in the securitization agreements, but even if that were not the case, the Land Court erred in holding that the assignments of mortgage in blank did not effect a valid transfer of the mortgages. [A1147-48]. At the very least, the assignments of mortgage in blank evidence the assignments effectuated by the securitization agreements.

1. The Relevant Massachusetts Statutes Do Not Support The Land Court's Rulings

The Land Court makes much of the fact that assignments of mortgage in blank do not identify the assignee, and are thus not "in recordable form." [A587, 1147-48]. But nothing in Massachusetts law

requires an assignment of mortgage be recorded or in recordable form to be valid. See § VI.A.5, supra. Moreover, for the same reasons that the securitization agreements satisfy the legal requirements to convey a valid assignment of mortgage, the assignments of mortgage in blank are similarly enforceable under Massachusetts law. Appellants' assignments of mortgage in blank contain express language of assignment under Mass. Gen. L. ch. 183, § 28. [A916, 987]. And, for the purposes of the Statute of Frauds, each assignment of mortgage in blank is signed by Option One as the party "to be charged." Mass. Gen. L. ch. 259, § 1.

That the assignees' names are not also included on the assignments of mortgage in blank does not otherwise affect their validity under the Statute of Frauds. A deed is not invalid if alterations are made at the grantor's direction or where filling in of the blanks is immaterial to the validity of the instrument and does not alter its legal tenor and effect. See Phelps v. Sullivan, 140 Mass. 36, 36-37 (1885).

Here, the securitization agreements demonstrate the assignors' intent and act to assign all interest in the subject loans to Appellants by way of the

securitization agreements themselves. The transfer of the assignments of mortgage in blank to Appellants at the time of securitization further evidences and confirms the assignments that occurred by virtue of the securitization agreements, and, in fact, are effective assignments in their own right. Whether or not Appellants had filled in their respective names on the instruments, as the securitization agreements provided them authority to do, is immaterial to the validity of these instruments and does not alter their legal effect. Cf. Lynn Tucker Sales v. LeBlanc, 323 Mass. 721, 723 (1949) (alteration does not render instrument invalid where alteration reflects the intent of the parties); James v. Tilton, 183 Mass. 275, 277-78 (1903) (insertion of name in note not material "since it did not change in any respect what was already the legal effect of the note").

The Land Court's contrary conclusion is not supported by the cases which the Land Court cites, namely Flavin v. Morrissey, 327 Mass. 217 (1951) and Macurda v. Fuller, 225 Mass. 341 (1916). Flavin and Macurda addressed the issue of whether a deed in fee simple is invalid if it is executed with the grantee's name left blank, to be filled in at a later time.

Both cases involved overt acts of fraud such that a finding in the negative would have permitted the fraud to go unchallenged. In the present actions, however, there is no evidence or allegation of any fraud or impropriety that would make enforcement of the assignments in blank inequitable, as was the case with the deeds in Flavin and Macurda.

Furthermore, both cases involved deeds of real estate conveying full title to the properties at issue. An assignment of mortgage is not a "deed" as considered in Flavin and Macurda. While a mortgage may convey an interest in the underlying property, it is merely security for a debt evidenced in a note. See Vee Jay Realty Trust Co. v. DiCroce, 360 Mass. 751, 753 (1972) ("as to the all the world except the mortgagee, a mortgagor is the owner of the mortgaged lands, at least till the mortgagee has entered for possession"); Negron v. Gordon, 373 Mass. 199, 204 (1977) ("[i]t is only for the purpose of securing the debt that the mortgagee is to be considered owner of the property"); Weinberg v. Brother, 263 Mass. 61, 61 (1928) ("[t]he mortgage is merely security for the note. As the note has been transferred to the real owner, the defendant would hold the mortgage in trust

for the owner, even if there had been no assignment of it").

Nothing in Massachusetts law expressly requires an assignment of mortgage to identify the assignee by name to be valid or prohibits a party in possession of an assignment of mortgage (and the original note and mortgage) from invoking the statutory power of sale simply because the assignment fails to list the name of the assignee in possession. Thus, the Land Court erred when it ruled that the assignments of mortgage in blank failed to confer and evidence standing to issue notice of foreclosure and to exercise the power of sale, and its rulings should be reversed.

2. The Land Court Erred In Ruling That The Assignments Of Mortgage In Blank Did Not Comport With The Securitization Agreements

Contrary to the Land Court's reading, Appellants' securitization agreements do not impose a requirement that the assignments of mortgage in blank identify Appellants as assignees as a prerequisite for validity. Rather, the agreements contemplate an assignment of mortgage in blank that is ready to be recorded, except as to the name of the assignee. The LaRace PSA required the Depositor, at the time of the execution and delivery of the PSA, to "transfer and

assign" to the Trustee (Wells Fargo), among other things "an original Assignment of Mortgage (which may be in blank), in form and substance acceptable for recording." [A1522] (emphasis added). Similarly, the Ibanez PPM demonstrates that the Trust Agreement required delivery to the Trustee (U.S. Bank) of, among other things, "an original assignment of the mortgage to the Trustee or in blank in recordable form." [A1295] (emphasis added).

The only fair reading of these provisions is that an assignment in blank constitutes an assignment "in recordable form," and that the identity of the trustee need not be included on the face of the assignment of mortgage in blank for it to be valid and enforceable. A contrary reading - that an "assignment in blank in recordable form" means an assignment identifying the "name" of the assignee - impermissibly renders the phrase "in blank" meaningless. See Marnell, 398 Mass. at 245; Associated Credit Servs. v. Worcester, 33 Mass. App. Ct. 92, 93-94 (1992).

3. Appellees Lack Standing To Challenge Any Purported Non-Compliance With The Securitization Agreements

Even crediting the Land Court's finding that Appellants' assignments of mortgage in blank failed to

comply with the relevant securitization agreements, Appellees lack standing to challenge whether actions were taken in accordance with the terms of those agreements. See Spinner v. Nutt, 417 Mass. 549, 555 (1994). Appellees are not parties to the relevant agreements, and as a matter of law, are not the intended third-party beneficiaries thereof. [A1600]. See In re Samuels, 415 B.R. at 22; In re Almeida, 417 B.R. 140, 149 n.4 (Bankr. D. Mass. 2009). Thus, the Land Court erred in conferring on them the benefit of agreements to which they are not parties.

C. The Land Court Erred In Ruling That Appellants Did Not Have Sufficient Financial Interest To Foreclose

1. Appellants' Equitable Interest In The Mortgages As Note Holders And Their Legal Possession And Control Of All Indicia Of Ownership In the Mortgages At All Relevant Times Vested In Them Authority To Foreclose

The Land Court's interpretation of Mass. Gen. L. ch. 244, § 14, as permitting only a "holder" of a mortgage to issue notice of foreclosure was wrong. Courts have found that the power to foreclose is not limited to the mortgage holder, and it may be exercised by those possessing "sufficient financial interest[s]." Saffran v. Novastar Mortgage, Inc., No.

4:07-cv-40257-PBS, Order re: Emergency Motion for Stay Pending Appeal at 5-6 (D. Mass. Oct. 18, 2007); see also Nichols v. Cadle Corp., 139 F.3d 59, 62 (1st Cir. 1998) (splintered rights, taken together, comprise "ownership" of mortgage sufficient to permit foreclosure under loan agreement).

At the time the subject foreclosure notices issued and at the time of the sales, Appellants had legal possession of all indicia of ownership in the subject loans, including the original note, the original mortgage, and the original assignment of mortgage in blank. See Abrams, 305 Mass. at 244 ("interest ... in an existing mortgage ... is not confined to the record title"). Thus, Appellants possessed more than "sufficient financial interest" to issue notice of foreclosure and to exercise the power of sale. Each was identified as the assignee and owner of all interest in the respective loans by virtue of the operative securitization agreement. Each, as holder of a note endorsed in blank and payable to the bearer, had equitable ownership of the incidents of the mortgage. Comm. v. Globe Invest. Co., 168 Mass. 80, 81 (1897) (holder of note "is equitably entitled to assignments of the mortgages

given as security for the notes"); First Nat'l Bank of Cape Cod v. North Adams Hoosac Sav. Bank, 7 Mass. App. Ct. 790, 796 (1979) (holder of note "can thereafter enforce in equity an assignment of the mortgage").

The Land Court erred in not looking at the full evidence of ownership of the subject loans - the original notes and mortgages - which were assigned and sold to Appellants by way of the securitization agreements. In so ruling, the Land Court set a standard at odds with the standard employed by the U.S. Bankruptcy Court for the District of Massachusetts. Under that court's rules, a creditor may make a claim to assert its rights in a mortgage by "attaching copies of the original note, mortgage or security agreement to the proof of claim, [and] ... copies of any and all assignments or other appropriate documentation sufficient to trace the chain of ownership in the mortgage or security agreement." See U.S. Bankr. Court for D. Mass., Local Rules, Chapter 13 Rules, Rule 13-13 (emphasis added). The Bankruptcy Court looks beyond recorded assignments of mortgage to all indicia of ownership, including securitization agreements, in determining a party's rights in a

mortgage. The Land Court erred when it failed to do the same.

2. The Land Court's Construction Of The Notice Requirements Of Mass. Gen. L. Ch. 244, § 14 Was Erroneous

The Land Court's overly technical reading of Mass. Gen. L. ch. 244, § 14 was wrong. The proper focus should be on whether the notices provided the borrower with sufficient information to protect his or her own interests - and, in the case of a technical error, whether that error actually prejudiced the rights of the mortgagor.

Where a foreclosure sale is conducted with reasonable diligence and performed in a commercially reasonable manner, without evidence of fraud, misconduct, or prejudice, there is no reason to invalidate the sale. See States Res. Corp. v. The Architectural Team, Inc., 433 F.3d 73, 81 (1st Cir. 2005). The Land Court's contrary construction is premised on an erroneous adherence to the sample notice form appended to the statute and ignores the statute's express permission to employ other forms of notice. See Bank of N.Y. v. Apollos, No. 08-ADMS-10045, 2009 WL 1111198 (Mass. App. Div. Feb. 27, 2009) ("[a]s G.L. c. 244, § 14 does not mandate the use of

the form contained therein, and the form used in this case contains the elements that protect the mortgagor and prospective bidder, we find no error").

Several recent court decisions have interpreted the provisions of Mass. Gen. L. ch. 244, § 14, and the similar provisions of Mass. Gen. L. ch. 244, § 17B (governing deficiency notices), in accordance with a practical approach to providing notice.

In Tarvezian v. Debral Realty, No. 921437, 1996 WL 1249891, at *3 (Mass. Super. Ct. Sept. 27, 1996), the Superior Court refused to invalidate a foreclosure sale where the Section 17B deficiency notice identified the wrong entity as the holder of the mortgage. The court distinguished Bottomly v. Kabachnick, 13 Mass. App. Ct. 480 (1982), and Roche v. Farnsworth, 106 Mass. 509 (1871), upon which the Land Court here relied, as "situations wherein the mortgagor received no actual notice as to the identity of the holder, what properties were being foreclosed upon or when the sale was to be conducted" and found that "[n]o logical inference can be drawn showing that the inadequacy of the letters of notification sent to the plaintiff, in this case, negatively affected the sale price." Tarvezian, 1996 WL 1249891, at *3.

In FDIC v. Kefalas, 62 Mass. App. Ct. 1121, at *1 (2005) (unpublished disposition), the original mortgagee, the Bank of New England ("BNE"), was declared insolvent and placed under a receivership. When the New Bank of New England ("NBNE"), which assumed substantially all of BNE's assets, published notices of foreclosure, it listed BNE as the mortgage holder. Id. In rejecting the mortgagor's challenge to the notice for failure to name NBNE, the court held "we fail to see why the change in name was significant" and "[t]he defendant's assertion that the difference in name may have prejudiced the outcome of the sale is entirely speculative." Id.

In Nichols v. Cadle Co., 139 F.3d 59 (1st Cir. 1998), the First Circuit rejected an argument that a foreclosure was invalid because the notice was published and foreclosure sale conducted by a party that was not the holder or the assignee of the mortgage at the time of sale. Id. at 61. The court held that even if the defendant was not the holder of the mortgage at those times, "[t]he trust has not shown any respect in which it has been disadvantaged." Id. at 62.

In Bank of New York v. Apollos, 2009 WL 1111198, the notice of foreclosure sale did not name the holder of the mortgage and failed to make reference to the unrecorded assignment under which the assignee held the mortgage. Nevertheless, the court found that because the notice listed the essential elements of the foreclosure sale, the mortgagor's interests were protected. Id. at *1-2. The court also found that "[t]here is no suggestion that the sale was conducted in a commercially unreasonable manner." Id. Absent prejudice, the court refused to invalidate the sale.

The above-described cases all reject a hyper-technical interpretation of the notice statutes and recognize the importance of focusing on whether prejudice resulted from the manner of issuance, and content, of the notices of foreclosure. The Land Court erred when it eschewed this practical approach in favor of a rigid, formalistic construction of the notice statute.

As in the cases discussed above, the foreclosure notices at issue here identified the party seeking to exercise the power of sale, the party that was the holder of the underlying debt (i.e., the note), and the party to which a formal confirmatory assignment of

the mortgage could be executed and delivered upon request. Appellants also had possession of all of the original ownership documents, and were assignees of the mortgages under the operative securitization agreements. The notices identified the party possessing all indicia of ownership of the mortgage. Appellees, or any potential bidder at the foreclosure sale, could have requested confirmation of Appellants' authority to conduct the sale and/or to issue notice, and both entities could have produced such evidence. Neither Appellee, nor anyone else, however, requested such confirmation at or before the foreclosure sales.

In interpreting Mass. Gen. L. ch. 244, § 14, the Land Court relied heavily on the holdings of Roche v. Farnsworth, 106 Mass. 509 (1871), and Bottomly v. Kabachnick, 13 Mass. App. Ct. 480 (1982). This was error. In those cases, unlike the cases here, the foreclosure notices failed to identify any party as the purported holder of the mortgage or as the party purporting to act under the power of sale. Thus, they did not provide the mortgagor with any information to use if necessary to challenge the foreclosures.

In Roche, the notice listed only the original mortgagor and mortgagee, neither of which had

maintained any interest in the property. This Court found that "it is not unreasonable strictness to require [the party acting under the power of sale] to state what property he proposes to sell, and who proposes to make the sale, and who advertises it for sale." Roche, 106 Mass. at 513. Thus, Roche stands for the proposition that the notice should list: (1) what is being sold; (2) who is doing the selling; and (3) who is advertising the foreclosure sale. The sales here met all of these conditions.

In Bottomly, the Appeals Court voided a foreclosure sale based on a defective notice "because it failed to identify the holder of the mortgage." 13 Mass. App. Ct. at 483-84. Yet that notice, unlike the notices here, failed to identify either the holder (or purported holder) of the mortgage or the party conducting the foreclosure sale. Id. at 481. While the language chosen by the court in Bottomly suggests a bright-line rule, the facts of the case indicate a more practical holding, namely that the notice must identify the party that purports to exercise the power of sale and to issue the notice.

Unlike Roche and Bottomly, the foreclosure notices at issue here provided Appellees with all the

information necessary to protect their rights. The Land Court's overly formal reading of the requirements of Mass. Gen. L. ch. 244, § 14 should not stand.[8]

3. The Land Court Erred In Basing Its Decision On The Hypothetical Possibility Of Prejudice

The above-cited cases, Tarvezian, Kefalas, Nichols, and Apollos, establish that a court should not invalidate a foreclosure sale absent, among other things, a showing of prejudice by the party seeking to invalidate the sale. Recognizing this rule, the Land Court conjured up prejudice. It speculated that the purported lack of valid assignments had chilled potential bidders at the foreclosure sales, thereby lowering the sales prices. This finding is not supported by any record evidence. Indeed, the Land Court itself described its discussion of prejudice as derived "by fair inference" and as "not 'factual findings' *per se*." [A1145]. The Land Court's creation of prejudice constitutes plain error.

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[8] Even if the Court determines that Appellants failed to comply with Mass. Gen. L. ch. 244, the sanction for such non-compliance should not be to preclude Appellants from reforeclosing. Nonetheless, the standards imposed by the Land Court have frustrated Appellants' ability to reforeclose, thereby impairing, if not precluding, their right to recover on their notes.

Nothing in the factual record suggests that the manner in which Appellants were named in the notices had any impact on the transactions or the accepted bids, or caused harm to the defaulted mortgagors. Before and at the foreclosure sales, no potential bidders questioned Appellants' authority to foreclose, or requested that indicia of ownership be provided. No other party has come forward to claim a competing interest in the mortgages. Moreover, at the time of the sales, Appellees did not question Appellants' authority to foreclose, even though by law, information concerning Appellants' identity was available to them. See 15 U.S.C. § 1641(f)(2); 12 U.S.C. § 2605(e). Appellees had ample opportunity to challenge the foreclosure proceedings prior to the sales but failed to do so.

Furthermore, the Land Court's speculation that Appellants' notices chilled the sales prices is without any factual support. Nothing in the record suggests that the sale prices were not commercially reasonable. See States Resources Corp., 433 F.3d at 81 ("[a]bsent evidence of bad faith or improper conduct ... mere inadequacy of price will not

invalidate a sale unless it is so gross as to indicate bad faith or lack of reasonable diligence").

Finally, the Land Court's concern that prospective bidders, as part of their pre-auction due diligence, would search registry records and elect not to attend an auction if they could not determine that the party publishing the notice of sale was actually the "record holder," directly contradicts the Land Court's own holding that an assignment need not be recorded before the foreclosure sale. [A592-93]. Indeed, in upholding the Rosario foreclosure (see Note 4, supra), the Land Court found that the assignee held, but had not recorded, a valid assignment at the time of the sale. [A580-81]. A prospective bidder would be no more likely to know that a trustee had a "valid" assignment as in Rosario, than he or she would know that a trustee had a purportedly "invalid" assignment as in LaRace or Ibanez. The Land Court had no basis to conclude that a so-called "invalid" assignment had any effect on the auction price.[9]

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[9] The Land Court's holding also stands in marked contrast to the experience of practitioners. [A1084-94] (REBA Amicus Brief at 6 ("It is the experience of the Committee members that prospective bidders do not inquire as to these matters unless there is some extraordinary reason to do so.").

There is no evidence that any potential bids were chilled in these cases, and without any evidence of actual harm, the Land Court's "inference" of prejudice is not tenable and should be rejected.

D. The Land Court Erred In Ruling That The Retroactive Recording Of An Assignment Is Invalid And Does Not Confirm The Prior Assignment And The Validity Of All Actions Taken By The Assignee

The Land Court found that a party seeking to foreclose must first obtain an assignment of the mortgage in a recordable form. In doing so, the Land Court erroneously rejected decades-long industry practice of recording "confirmatory" assignments of mortgage after a foreclosure sale.

The customary practice in the industry is to not record assignments of mortgage contemporaneously with the transfer and assignment of the loan at the time of securitization. [A691-95, 700-03]. The assignment is carried out by way of the securitization agreements, and a "confirmatory" assignment of mortgage is typically recorded only after the loan goes into default and resort to the collateral is necessary. [A702-03]. Recording an assignment of mortgage in this fashion acts to confirm, via an instrument in a more easily recorded form, the prior assignment that

has occurred through securitization. See In re Samuels, 415 B.R. at 20-22 (confirmatory, post-foreclosure assignment ratified transfer of ownership interest in note and mortgage); In re Almeida, 417 B.R. at 149-50; Linkage Corp. v. Trs. of Boston Univ., 425 Mass. 1, 18 (1997); DiLorenzo v. Atl. Nat'l Bank of Boston, 278 Mass. 321 (1932).

This industry practice, which has been in place for at least the past twenty years in Massachusetts, is set forth in REBA Title Standard No. 58:

> A title is not defective by reason of: ... [t]he recording of an Assignment of Mortgage executed either prior, or subsequent, to foreclosure where said Mortgage has been foreclosed, of record by the Assignee.[10] See REBA Title Std. No. 58, supra.

REBA Title Standard No. 58 further provides that actions taken by the note holder are confirmed and ratified by recording a post-foreclosure assignment of mortgage. Id., cmts.

REBA Title Standards represent industry practice, are relied upon by industry practitioners, are based on Massachusetts law, and are cited by courts as persuasive authority. See In re Hayes, 393 B.R. 259, 267-28 (Bankr. D. Mass. 2008); In re Varrichione, 354

[10] In May 2008, REBA revised Title Standard No. 58, to add a limited caveat applicable to actions in the federal bankruptcy courts.

B.R. 563, 571 (Bankr. D. Mass. 2006); Cornwall v. Forger, 27 Mass. App. Ct. 336, 342 n.6 (1989).

At the time of the foreclosure sales here, Appellants acted in accordance with industry practice and procedure and applicable law. The Land Court's rejection of Title Standard No. 58 - and the validity of post-foreclosure, confirmatory assignments - was plain error, and its decisions should be reversed.[11]

E. The Land Court's Holdings, If Affirmed, Must Be Limited To Prospective Application

The Land Court's decisions have had far-reaching effects on Massachusetts foreclosure law and potentially raise serious implications with respect to the status of title to hundreds of properties, if not more, in the Commonwealth. Accordingly, should the Land Court's rulings be affirmed, this Court should limit those decisions to prospective application only.

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[11] Notwithstanding the Land Court's suggestion to the contrary [A1158], nothing in Massachusetts law requires that a party seeking to foreclose demonstrate evidence of each and every prior assignment of mortgage in the chain-of-title. The Land Court implicitly recognized this truism by finding the unrecorded assignment of mortgage, which was endorsed from the last assignee of record to the foreclosing entity, valid in Rosario (see Note 4). [A580]. In any event, Appellants' securitization agreements reference and incorporate the prior assignments of mortgage. [A1522, 1524-26, 1530, 1711-16, 1296-98].

"In the area of property law, the retroactive invalidation of an established principle is to be undertaken with great caution." Powers v. Wilkinson, 399 Mass. 650, 662-63 (1987); Turner v. Greenaway, 391 Mass. 1002, 1003 (1984). Thus, judicially-rendered changes to established property law are typically given only prospective effect. Powers, 399 Mass. at 662-63; Charron v. Amaral, 451 Mass. 767, 772-73 (2008). The expectations of the public and the reliance of the bar and the title and mortgage industries on settled law and practice justifies limiting such changes to future transactions. See Charron, 451 Mass. at 775.

At the time of the subject foreclosure sales, industry practice recognized the validity of foreclosures for which assignees had recorded confirmatory assignments only after issuing foreclosure notices and completing the foreclosure sales. See REBA Title Std. No. 58, supra. The Land Court affirmatively rejected this decades-long industry practice. To punish Appellants for their good-faith adherence to industry practice and standards is unreasonable and constitutes error.

Moreover, the Land Court's decisions have created serious uncertainty throughout the mortgage and title industries. Under the Land Court's rulings, innocent third-party purchasers may not have clear title to their property where a prior foreclosure sale was conducted pursuant to industry practice. Also, the Land Court's rulings, as a practical matter, suggest a standard that, as applied to past foreclosures, frustrate the ability of investors (or anyone) to reforeclose on properties in which the foreclosure sales are deemed "invalid," thereby effectively nullifying the right to enforce debt instruments.

Accordingly, the Court should vacate those decisions, and, if the Court does affirm them, do so prospectively only - such that the sales at issue here and all foreclosure sales consummated before the final disposition of these appeals, cannot be invalidated or clouded by virtue of the Land Court's rulings.

VII. CONCLUSION

For the foregoing reasons, Appellants respectfully request that the Court reverse the Land Court's rulings, vacate the judgment entered by the Court, and enter judgment for Appellants.

Respectfully submitted,

U.S. BANK NATIONAL ASSOCIATION, as TRUSTEE FOR THE STRUCTURED ASSET SECURITIES CORPORATION PASS-THROUGH CERTIFICATES, SERIES 2006-Z, and

WELLS FARGO BANK, N.A., as TRUSTEE FOR ABFC 2006-OPT1 TRUST, ABFC ASSET-BACKED CERTIFICATES, SERIES 2005-OPT1,

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May 14, 2010