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 APPELLSTE REVIEW OF A JUDGMENT OF
THE LAND COURT

BRIEF OF ANTONIO IBANEZ, DEFENDANT-APPELLEE

Paul R. Collier, III, Esq.
Attorney at Law
675 Massachusetts Ave., 11th Floor
Cambridge, MA 02139
(617) 441-3303

Max W. Weinstein, Esq.
WilmerHale Legal Services Center
Of the Harvard Law School
122 Boylston Street
Boston, MA 02130
617-522-3003

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I. QUESTIONS PRESENTED

1. Whether a Land Court judge correctly entered judgment against U.S. Bank on the ground that G. L. c. 244, § 14, authorizes a foreclosure only by the holder of the mortgage, where the record established that U.S. Bank did not become the holder of the mortgage until fourteen months after the foreclosure sale.

2. Whether a Land Court judge abused his discretion in denying U.S. Bank's Rule 60(b) motion to vacate judgment on the grounds that U.S. Bank lacked a valid, foreclosable interest at the time of its foreclosure sale, where U.S. Bank failed to produce title documents as promised and as ordered produced, and where the Rule 60(b) motion was based upon claimed title obtained by mortgage assignments "in blank," a post-foreclosure mortgage assignment, possession of the note, and "financial interest[s]", "splintered rights" or "indicia of ownership?"

3. Whether U.S. Bank can prevail on appeal on the basis of arguments which U.S. Bank failed to make in the Land Court proceedings?

II. STATEMENT OF FACTS

A. Facts before the Land Court at Entry of Judgment.[1]

Plaintiff-Appellant U.S. Bank National Association ("Plaintiff-Appellant", "Bank" or "U.S. Bank"), as Trustee for the Structured Asset Securities Corporation Mortgage Pass-Through Certificates, Series 2006-Z (the "Trust") filed a Complaint to Remove Cloud from Title ("Complaint") in the Land Court on September 10, 2008. RA 9. As to the title issues

[1] The standard of review for the Land Court's two decisions varies markedly. *See* Section IV, *infra*.

raised in this appeal, the record before the Land Court at the entry of judgment in this action was limited, consisting of the allegations of the Complaint and statements and admissions made by U.S. Bank counsel at the hearing on the Motion for Entry of Default Judgment. The Complaint, at RA 18-19, ¶¶ 3, 5 and 8, states simply:

> ¶ 3. By virtue of an Assignment from American Home Mortgage Servicing Company … to U.S. Bank ***made on September 11, 2008*** … by U.S. Bank ***became*** the holder of a mortgage from Ibanez to Rose Mortgage …;
>
> ¶ 5. U.S. Bank caused a "Notice of Mortgagee's Sale of Real Estate" to be published on ***June 14, 2007, June 21, 2007, and June 28, 2007*** … that the Property would be sold at auction on July 5, 2007…;
>
> ¶ 8. On ***July 5, 2007***, the Property was duly sold at auction to U.S. Bank as the highest bidder for Ninety Four thousand Three Hundred Fifty and 00/000 Dollars ($94,350.00).

At the hearing on the motion for entry of default judgment,[2] the Land Court questioned the lawfulness of U.S. Bank's conducting a foreclosure sale at a time when U.S. Bank lacked any assignment of the mortgage:

> The Court: Well, right, but what I'm asking is why not do that, file the thing [proper

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[2] The transcripts of the January 5, February 11, and April 27, 2009 Land Court hearings belie U.S. Bank's suggestion, Appellant's Brief ("App. Br.") at 19 n.6, that it failed to submit available evidence because of the Land Court's "*sua sponte*" action. To the contrary, the Land Court raised the title issues in its first hearing on January 5, and in April entered a written order seeking production of further evidence – ***including the Trust Agreement now "proffered" by the bank.*** RA 692-697.

> assignment] and then proceed with your [foreclosure] notice
>
> U.S. Bank: … It was never really identified as a problem … admittedly, it's their own fault, the securitized industry, you know, has been caught with their "pants down" so to speak because they haven't done a very good job of keeping on top of the paperwork, keeping everybody informed, and making sure all there "Is" were dotted and their "Ts" were crossed.
> And I think there's been a ripple affect [sic] coming out of that, you know, attorneys see that happening, they start to challenge the status of title. The title companies see it happening, they start to challenge the status of title … I tell you for our law firm we do just what you say. We have changed our practice … and we don't start the Notice of Sale process until we do the assignment and get it of record.

RA 498-501. Also, U.S. Bank counsel told the court that banks "invariably have us bid the value of the mortgage … [so] at least for the borrowers there's no deficiency." RA 502. The Land Court's review of the foreclosure sale records actually filed by U.S. Bank established, to the contrary, that the bank's purchase was "$16,437.27 less than the amount of the outstanding loan and 15% less than the bank's calculation of the property's market value." RA 579.

At the close of the February 11, 2009 hearing, the Land Court invited U.S. Bank to address its concerns that G.L. c. 244, § 14 required that the then-current holder of the mortgage conduct the

foreclosure sale. RA 511.[3] The court then entered Judgment against the bank, holding that:

> To allow a foreclosing party, without any interest in the mortgage at the time of the sale (recorded or unrecorded), to conduct the sale in these circumstances, bid and then acquire good title by later assignment is completely contrary to G.L. c. 244, § 14's intent and commands.

U.S. Bank Nat'l Ass'n v. *Ibanez*, 17 Mass. Land Court Rptr. 202, 207 (Mar. 26, 2009) (hereinafter *Ibanez I*,)

B. Facts presented to the Land Court in the Post-Judgment Proceedings.

U.S. Bank then moved to vacate the Land Court's judgment, and a hearing was held on that motion on April 27, 2009. At that hearing, U.S. Bank counsel affirmatively represented that the bank would produce documents "to reflect that this particular note and mortgage at some point prior to the foreclosure were sold and assigned into a securitized trust." RA691. Upon inquiry, U.S. Bank specified the evidence which it would produce in support of its motion to vacate judgment, which included the "documents that created the securitized trust," and documents identifying the "blocks of mortgages sold into the trust... *which will include these mortgages*." RA 692-93. The Land Court emphasized that U.S. Bank's filing in support of the

[3] The Land Court judge cited *Bottomly v. Kabachnick*, 13 Mass. App. Ct. 480, 483-84 (1982), which held that "the first notice of sale was defective because it failed to identify the holder of the mortgage, thereby rendering the first foreclosure sale void as a matter of law."

motion to vacate judgment was to reflect the records "***at the time of the foreclosure sale.***" RA 734.

The Court entered a docket order on April 27, 2009, which authorized filing of only the following:

> (1) the documents which created the securitized trust and govern its operations, (2) the documents identifying the "blocks of mortgages sold into that trust," which purportedly include the mortgage at issue in this case, (3) the "collateral file" for the mortgage **as it existed at the time the foreclosure sale was noticed and conducted,** which was represented to include the original note, the original (or a copy) of the mortgage, endorsements or assignments "in blank," "other documents," and perhaps a timely assignment in recordable form, [and} (4) the master servicing agreement, showing the relationship between the trust and the loan servicer (which apparently was the entity instructing and supervising the attorneys who noticed and conducted the foreclosure)..., The court has concerns about the apparent practice of assignments "in blank," what plaintiff means by that term, the legal sufficiency of such a practice in the context of mortgage assignments and G.L. c. 244, § 14, and the possibility that names may have been placed on those documents post-notice and post-sale. Accordingly, all documents reflecting or purporting to reflect an assignment of the promissory note or mortgage must be produced in the form they existed **at the time the foreclosure sale was noticed and conducted, along with an affidavit from a witness with direct personal knowledge so attesting. That witness must also be available for examination at an evidentiary hearing if the court so directs.**

RA 742-3. The Court Ordered these documents filed no later than May 27, 2009. *Id.*

1. Documents promised, but never produced by Plaintiff-Appellants.

Most remarkably, and despite a further extension of time allowed by the Land Court, U.S. Bank *never produced any document identifying the mortgages held*

by U.S. Bank, even though the securitization records which U.S. Bank provided expressly required that "[e]*ach Mortgage Loan* ***will be*** *identified in a schedule appearing as an exhibit to the Trust Agreement*". RA 1295, 1522 (Larace PSA requiring listing of "each Mortgage identified on the Mortgage Loan schedules"). U.S. Bank also failed to produce any of the documents creating the Trust,[5] and **never produced an "affidavit from a witness with direct personal knowledge... attesting (that) all documents reflecting or purporting to reflect an assignment of the promissory note or mortgage (were) produced in the form they existed at the time the foreclosure sale was noticed and conducted**"; instead, U.S. Bank's filings were accompanied by affidavits merely stating that U.S. Bank had produced whatever documents it found in its custodian's files in May, 2009. RA 1071-82.

2. Securitization Evidence before the Court.

Although it did not comply with either its representations to the Land Court, or with the Land

[5] In what can only be characterized as deliberate distortion, U.S. Bank first cites an alleged Trust Agreement it failed to produce as operating as a conveyance, and then claims that the same Trust Agreement was not produced because "the parties never engaged in discovery related to the securitization agreements". *See* App. Br. at 19-20, n. 6. Unsurprisingly, the Bank does not disclose that it promised to produce that very Trust Agreement, or that the Land Court entered an order memorializing the U.S. Bank's representations. *Id.*

Court's April 27, 2009 order, U.S. Bank did produce some securitization records in the proceedings below: including a "Private Placement Memorandum" ("PPM") dated December 26, 2006, which purported to describe actions which "will" be taken at a future date to form the "Structured Asset Securities Corporation Mortgage Loan Trust, 2006-Z" ("SASC"), RA 1169-1441, and to convey assets to that Trust.[6] That Private Placement Memorandum expressly states that:

> Each Mortgage Loan held ... will be identified in a schedule appearing as an exhibit to the Trust Agreement which will specify with respect to each Mortgage Loan, among other things, the original principal balance and the Scheduled Principal Balance as of close of business on the cut-off date

RA 1295 The PPM required that "[a]s to each mortgage loan", U.S. Bank shall also receive "an original assignment of the mortgage to [U.S. Bank] or in blank *in recordable form.*" *Id.*[7] The PPM also provides that Lehman Brothers Holdings, Inc. ("Lehman Brothers") will sell the mortgage loans to the party that would

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[6] The precatory nature of the PPM is significant in light of U.S. Bank's newly asserted claim that the PPM proves a legally effective conveyance. App. Br. at 10-11, and 19-20.

[7] The Larace PSA is even stricter in its assignment requirements: requiring both "an original Assignment of Mortgage (which may be in blank), *in form and substance acceptable for recording*" and "an original copy of any intervening assignment of Mortgage showing a complete chain of assignments". RA 1522-1523. Obviously, no such records were produced in the related Larace action.

ultimately sell the loans to U.S. Bank, RA 1179, that "[a]pproximately 46.28%... of the Mortgage Loans *were acquired* by [Lehman Brothers] from Option One Mortgage Corporation," RA 1242 (emphasis added), and that "[a]pproximately 46.28% ...of the Mortgage Loans were originated generally in compliance with the Option One Underwriting Guidelines", RA 1250: meriting the conclusion that all of the loans which Lehman Brothers purchased from Option One Mortgage Corporation ("Option One") were originated by Option One. *Id.* Finally, U.S. Bank produced a "bailee letter" dated May 11, 2009 authorizing its counsel to "commence and prosecute a foreclosure action" as to the Ibanez loan, with "Foreclosure Start Date of 04-09-07." RA 959.

In contrast, the record contains public financial reporting data from the Trust – submitted to the Land Court by Ibanez – which indicates that the Ibanez mortgage is not an asset of the Trust. Ibanez Supplemental Appendix ("ISA") 22-54 The "Mortgage Pass-Through Certificates" issued by the Trust were apparently "not registered under the Securities Act... or any state securities or blue sky laws, but were instead ...offered for sale in one or more privately negotiated transactions." RA 1173. Data from such "Private Offerings" is available, however, through

Bloomberg Professional Service.[8] ISA 19-21. Through Bloomberg, a search obtained a report identifying mortgage-assets backing the Structured Asset Securities Corporation Mortgage Pass-Through Certificates Series 2006-Z.[9] ISA 22-54. No Series 2006-Z entry in the Bloomberg report identified any mortgage loan held by U.S. Bank in the Ibanez loan amount; no Series 2006-Z entry showed such a Massachusetts "mortgage loan in foreclosure" or "in REO". *Id.* Indeed, the Bloomberg report evidences that the Ibanez loan is not owned by U.S. Bank in its capacity as Trustee. *Id.*

a) Title and Conveyance Evidence

U.S. Bank produced a December 1, 2005 Rose Mortgage Note and Mortgage to support the contention that it owned the Ibanez mortgage prior to the foreclosure sale. RA 960, 967. The terms of the Ibanez mortgage provide, inter alia, that:

> **Lender** is Rose Mortgage, Inc...Lender is the mortgagee under this Security Instrument … [To secure his performance] Borrower does hereby mortgage, grant and convey to Lender and Lender's successors and assigns, with power of sale, the [Property] …
> **Lender … may invoke the STATUTORY POWER OF SALE… and the Property shall be sold in the manner prescribed by Applicable Law.**

[8] *See* Affidavit of Thomas A. Tarter, ISA 55, to the effect that Bloomberg financial data compilations are routinely relied upon by the public, and by those engaged in financial and banking service sectors for their activities.
[9] *See* Affidavit of Max Weinstein, ISA 19.

RA 967, 968, 977 (emphasis in original).[10]

Following the execution of the initial mortgage, on December 8, 2005, Rose Mortgage executed and had notarized the original Assignment of the Ibanez Mortgage, ***to no one*** (or "in blank" – i.e., with no assignee named).[11] The original Assignment then reappears, with the same signatures, dates and notarizations, identified this time as a "Certified True Copy"; however, when it reappears, the "Certified True Copy" had been altered in multiple ways: one of which was the post-notarization addition, by corporate stamp, of an assignee – "Option One Mortgage Corporation, a California Corporation." RA 999. That same document, with the exact same signature and the exact same notarization in the exact same location on the document, was then altered yet another time: this time, as the "original Assignment" upon which U.S. Bank relies for its ownership of the Ibanez mortgage. RA 987. By this iteration, the alteror has added by yet another rubber stamp an address for Option One – "3 ADA, Irvine, CA 92618," along with altered mailing and different recording information. *Id.* And,

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[10] Notably, the Ibanez mortgage expressly distinguishes between the "Lender" and "any purchaser of the Note". RA 973, ¶ 3. Only the Lender is authorized to "invoke the STATUTORY POWER OF SALE." RA 977.

[11] This assignment was produced by U.S. Bank, was filed in the court below, and is included in the Ibanez Supplemental Appendix, ("ISA") at 1.

following these repeatedly altered assignments of the Rose mortgage, U.S. Bank has yet another assignment of the Ibanez mortgage: once again to no one ("in blank"), but this time executed by Option One, and dated January 23, 2006, but never recorded. RA 989.

Similar flaws impeach the integrity of the "Allonges" U.S. Bank claims bring the Note into the Trust. *Compare* RA 965 and ISA 5. Specifically, U.S. Bank's "Collateral File" contains not only the post-notarization-adulterated Mortgage Assignment, but an "Allonge to Note" endorsed to "Option One Mortgage Corporation" by Ralph Vitiello, "Chief Executive Officer," succeeded by a Notarization that on December 8, 2005, Ralph Vitiello … Executive Vice President of Rose Mortgage, Inc. "executed this instrument". However, in the Loan Origination file appears an "Allonge to Note", in identical form, handwritten, endorsed "Pay to the order of [blank], WITHOUT RECOURSE", and executed by "Michael Pettrucelli, Vice President" ISA 4. Neither was dated. *Id.* And, to round out the integrity of title missteps, U.S. Bank's title claim depends upon an "Allonge to (the Rose Mortgage) Note (Investor)" executed by "Option One Mortgage Corporation, a California Corporation" on December 1, 2005 – or the same day as the loan closed **and one week before the Rose Mortgage allonge conveying the Note to Option One was executed**. RA 966.

Then, on September 2, 2008, ***fourteen months after the foreclosure sale,*** American Home Mortgage Servicing, Inc. ("American Home") "as successor in interest to Option One Mortgage Corporation," purported to execute an Assignment of the Ibanez Mortgage to U.S. Bank, as Trustee. RA 1066-67.

b) Foreclosure Evidence

In June 2007, U.S. Bank published three Notices of Mortgagee's Sale of Real Estate, asserting that U.S. Bank, as Trustee "is the current holder" of the Ibanez mortgage. RA 1065. Claiming to be the then-mortgage holder, U.S. Bank sold the Ibanez property to itself on July 5, 2007, for significantly less than the fair market value of the property and the mortgage indebtedness. RA 579, 1064. Ten months later, U.S. Bank reiterated its "holder" status in its recorded foreclosure deed and affidavit. RA 1063-64. Four months after that, U.S. Bank obtained, *for the first time,* an assignment of the Ibanez Mortgage executed by American Home, purportedly as successor in interest to Option One Mortgage Corporation. RA 1066-67.

III. SUMMARY OF THE ARGUMENT

In some respects, this appeal is simple and straightforward. Plaintiff-Appellant U.S. Bank foreclosed on a mortgage by sale on July 2, 2007, and received its assignment of the foreclosed mortgage fourteen months later. (pp.16-30) This foreclosure

sale was undertaken pursuant to statutory provisions which required that non-judicial foreclosure sales be conducted only by mortgagees, or their assignees. (pp. 17-18) The foreclosure sale was authorized by a power of sale in the mortgage being foreclosed, which allowed only the original lender and its assignees to exercise the power, and U.S. Bank was neither. (pp. 16-17) Judicial precedent establishes that foreclosures under such powers of sale must strictly comply with the terms of the power - and invalidates foreclosure sales which do not name the mortgagee at the time of sale. (pp.18-40) Consequently, it seems unremarkable that the Land Court invalidated the U.S. Bank foreclosure sale, and denied its motion to vacate judgment; a holding which should be affirmed, given the deference afforded trial courts' Rule 60 decisions. (pp.16-17)

The appeal takes on greater significance, however, because Plaintiff-Appellant U.S. Bank insists that requiring foreclosing entities to possess legally sufficient and valid documents establishing title before foreclosure over-burdens securitized conveyances. (pp.30-44) U.S. Bank argues that this Court should discard the requirement that only entities with then-valid assignments of mortgagees' rights may lawfully foreclose upon an underlying mortgage; and that this Court should hold that an

entity with mere "financial interests[s]" or "splintered rights" may conduct foreclosure sales.(pp.23-33) However, the rule that U.S. Bank asks this Court to create is contrary to both statutory commandments and explicit contractual agreements between the borrowers and lenders themselves, and, moreover, likely to add uncertainty and inaccuracy to foreclosure titles.

The conflict actually presented by this appeal is, indeed, a significant one. (pp. 30-46) For literally hundreds of years, our system of conveyancing and recording of titles, deeds, and assignments has provided certainty and doctrines developed to protect integrity of title have served well. (pp. 30-46) The securitization documents - and specifically, the securitization documents for the securitized trusts at issue in this appeal - incorporate, and require compliance with, applicable title and assignment recording rules for the securitized mortgages held by them. (pp.35-36) However, neither trust has provided evidence that it complied with the recording requirements of their own trust documents, or the foreclosure statutes and contractual terms which govern conveyance and ownership of these mortgages. *Id.* Instead, U.S. Bank argues that this Court should do what U.S. Bank's own governing rules do not: relax or abrogate requirements

which ensure that title to real property is public and transparent, and allow undisclosed and private conveyance of mortgages, and even non-judicial foreclosure sales based on private and undisclosed conveyance, in the name of expediency. (pp.23-44)

The record here evidences repeated instances of careless - even reckless - treatment of long-standing rules governing the integrity of conveyancing documents, and careless - even reckless - disregard of statutory and contractual obligations governing non-judicial property foreclosures. (pp.41-46) Indeed, there is nothing in the record which lends confidence to the integrity that private, undisclosed and unrecorded securitized conveyances would have, were the Court to accept the invitation to abrogate the title protections contained in mortgages and foreclosure statutes. *Id.* More importantly, the statutory protections U.S. Bank violated are clear and unequivocal, and its remedy, if any, lies in the legislature. (pp.17-32)

Finally, U.S. Bank failed to even present the claims and evidence upon which it relies on appeal during the trial court proceedings. (pp. 47-50) Its improper attempts to assert these materials for the first time in this appeal should be rejected, as should its meritless insistence that decades-old

statutory requirements should be applied only to future conveyances. (pp.47-49)

IV. PLAINTIFF-APPELLANT MISSTATED THE STANDARD GOVERNING REVIEW OF U.S. BANK'S RULE 59 AND 60 MOTIONS TO VACATE JUDGMENT

Defendant-Appellee concurs that review of the Land Court's entry of default judgment is *de novo*. However, U.S. Bank materially misstated the standard for review of the denial of U.S. Bank's Rule 59 and 60(b)(1) and (2) Motions to Vacate Judgment, as the Court will reverse the denial of U.S. Bank 's motion only for "clear abuse of discretion"- with "marked deference to the lower court's resolution":

> In a motion under subsection (1) of rule 60 (b), the moving party bears the burden of justifying the motion … and "must make some showing of why he was justified in failing to avoid mistake or inadvertence". Relief is not justified for "any kind of garden-variety oversight" … Instead, "[t]he inadvertence, mistake or surprise as well as neglect must be excusable… . The moving party may prevail only if "the evidence relied on was not available … for introduction at the original [proceeding] by the exercise of reasonable diligence …" If the moving party fails to show why he did not have the evidence at the time of the original proceeding, the party will not prevail…
>
> Resolution of a rule 60 (b) motion rests in the discretion of the trial judge, and we "will show marked deference to the lower court's resolution of such a motion." A denial of a rule 60 (b) motion "will be set aside only on a clear showing of an abuse of discretion."

Cullen Enters. v. *Mass. Property Ins. Underwriting Ass'n,* 399 Mass. 886, 893-94 (1987) (internal citations omitted); *accord Sahin* v. *Sahin*, 435 Mass. 396, 399

(2001) ("The judge's determination under rule 60(b) will not be disturbed absent abuse of discretion.").

V. MASSACHUSETTS FORECLOSURE STATUTES PERMIT ONLY A NARROW CATEGORY OF PERSONS – PRIMARILY, THE MORTGAGEE – TO CONDUCT A FORECLOSURE SALE.

The Massachusetts foreclosure sale statute is clear and unambiguous; only the following may conduct a foreclosure pursuant to a power of sale:

> [t]he mortgagee or person having his estate in the land mortgaged, or a person authorized by the power of sale, or the attorney duly authorized by a writing under seal, or the legal guardian or conservator of such mortgagee or person acting in the name of such mortgagee or person, may, upon breach of condition and without action, do all the acts authorized or required by the power …

G.L. c. 244, § 14. This limitation of persons legally authorized to exercise the power of sale repeats throughout the Massachusetts foreclosure statutes:

> ***A mortgagee*** may, after breach of condition of a mortgage of land, recover possession of the land mortgaged by an open and peaceable entry thereon … G.L c. 244, § 1;

> …**upon any default …** ***the mortgagee*** **or his executors, administrators, successors or assigns may sell the mortgaged premises.** G.L. c. 183, § 21

Massachusetts courts have uniformly enforced this unequivocal requirement in applying G.L. c. 244, § 14:

> It is familiar law that one who sells under a power must follow strictly its terms. If he fails to do so there is no valid execution of the power and the sale is wholly void … The manner in which the notice of the proposed sale shall be given is one of the important terms of the power, and a strict compliance with it is essential to the valid exercise of the power … A purchaser under a power of sale must see to it at his peril that there has been a compliance with the legal and essential terms of the power. If there has not

> been, then he is not protected whether acting in good faith or not.

McGreevey v. *Charlestown Five Cents Sav. Bank*, 294 Mass. 480, 484 (1936); *accord*, *Bottomly* v. *Kabachnick*, 13 Mass. App. Ct. 480 (1990); *Lamson & Co.* v. *Abrams*, 305 Mass. 238 (1940); *Roche* v. *Farnsworth*, 106 Mass. 509, 513 (1871). Moreover, the power of sale must be exercised according to the express terms of the underlying contract, and the Ibanez mortgage authorizes only the mortgagee, or an entity then-holding a valid assignment from the mortgagee, to foreclose under the contractual power of sale:

> [T]he only person authorized by the Ibanez mortgage to invoke the power of sale is the "Lender", defined in the mortgage as Rose Mortgage, Inc. in its capacity as mortgagee … Thus, in full accordance with Massachusetts law…, the mortgage authorizes only the mortgagee or a valid assignee of the mortgagee to invoke the statutory power of sale. This does not include a person or entity which only holds the note. See Mortgage at 7, third full paragraph (distinguishing between "Lender" and "any purchaser of the Note").

U.S. Bank Nat'l Ass'n v. *Ibanez*, 17 Mass. Land Court Rptr. 679, 688 n. 53 (Oct. 14, 2009) (hereinafter "*Ibanez II*") (internal citations omitted). Nothing in the mortgage authorizes a power of sale foreclosure by an entity that possesses only "financial interest[s]", "splintered rights" or "indicia of ownership." App. Br. ("App. Br.") at 34-37.

A. A lender can only obtain the status and rights of a "mortgagee," including the right to conduct a foreclosure sale, by means of a written contract with the mortgagor.

A mortgage lender does not become a "mortgagee" merely by making a loan to a homeowner. Promissory notes, including the Ibanez promissory note, contain no power of sale and do not authorize a lender to conduct a foreclosure. RA 890-93, 960-63.

Instead, a lender becomes a mortgagee and obtains the rights of a mortgagee only when a mortgagor confers that status upon a lender by means of separate mortgage contract. In Massachusetts, a "title-theory" state, that mortgage contract acts as a conveyance to the lender of legal title to the mortgaged property. *See, e.g., Lamson & Co.*, 305 Mass. at 240 (An assignment of mortgage "convey[s] a legal estate in the mortgaged premises."). Accordingly, a party's right, if any, to sell a mortgaged property at a foreclosure auction pursuant to a power of sale is conferred by a particular mortgagor upon a particular mortgagee *by the terms of that mortgage contract*. The Ibanez mortgage authorizes no one other than the lender (and its assigns) to conduct a foreclosure sale.

Mortgagees conduct the vast majority of foreclosures in Massachusetts pursuant to the "statutory power of sale," codified at G.L. c. 183, § 21. In order for a mortgagee to exercise the

statutory power of sale, it must be an explicit term in the mortgage contract between the mortgagor and mortgagee. *Norton* v. *Joseph*, 2009 WL 58896 at *3, Docket No. 374733 (CWT) (Mass. Land. Ct. Jan. 12, 2009) ("The statutory power is not applied by default in the event of its omission; failure to invoke the power in some way [in a contract] results in no such power."). If incorporated, the statutory power of sale authorizes a mortgagee "upon any default" to "sell the mortgaged premises … by public auction on or near the premises …." G.L. c. 183, § 21.[15] Where, and only where, there is authority to foreclose pursuant to a contractual power of sale does G.L. c.244, § 14 set out additional statutory protections which supplement the statutory power of sale, and which must be strictly followed for a foreclosure sale to be valid. *Bottomly* v. *Kabachnick*, 13 Mass. App. Ct. at 484; *McGreevey* v. *Charlestown Five Cent Savings Bank*, 294 Mass. 480, 484 (1936).

B. A party who is not the original lender and mortgagee under the mortgage contract can only obtain the status and contractual rights of the original mortgagee by means of a valid, written assignment to that party.

Under the default common law rule, a party may freely assign its contract rights. However, if a party

[15] The statutory short form provides only the content for a term of a contract between a particular mortgagor and a particular mortgagee.

other than the original mortgagee seeks to foreclose pursuant to the statutory power of sale, that party must have obtained an assignment of the mortgage. *See* G.L c. 83, § 21 ("*[T]he mortgagee or his executors, administrators, successors or assigns* may sell the mortgaged premises …"). While a mortgagee may assign to another party its rights in a mortgage contract, including the contractual right to foreclose, such an assignment is itself a contract for the conveyance of an interest in land. Accordingly, under well-settled Massachusetts law, the assignment of a mortgagee's contract rights must be in writing. Only the written, executed assignment of a mortgage contract can effectively transfer ownership of that mortgage. *See Warden* v. *Adams*, 15 Mass 233, 236 (1818) ("No interest passes by a mere delivery of a mortgage deed, without an assignment in writing and by deed."); *see also* G.L. c. 259, § 1(4).

Moreover, and as U.S. Bank concedes, a written assignment of a mortgage contract must "adequately set forth the agreement." *See Cousbelis* v. *Alexander*, 315 Mass. 729, 730 (1944) (*quoting Hurley* v. *Brown*, 98 Mass. 545, 546 (1868)); *see also* App. Br. at 18. This Court has long held that such a written agreement "must contain the terms of the contract agreed upon - the parties, the locus (if an interest in real estate is dealt with), in some circumstances the price, and

it must be signed by the party to be charged or by someone authorized to sign on his behalf." *Cousbelis*, 315 Mass. at 730 (quoting *Des Brisay* v. *Foss*, 264 Mass. 102, 109 (1928)). Our General Laws codify these requirements, *inter alia*, by precluding the recording of any assignment that does not specifically name the assignee. G.L. 183, § 6C.

A party has no right to exercise a mortgagee's power of sale unless and until it has obtained the mortgagee's contractual right to foreclose by a written, executed assignment:

> [T]he assignment … provided to the Court was not signed until after the foreclosure sale. Acquiring the mortgage after the entry and foreclosure sale does not satisfy the Massachusetts statute. While "mortgagee" has been defined to include assignees of a mortgage … there is nothing to suggest that one who expects to receive the mortgage by assignment may undertake any foreclosure activity.

In re Schwartz, 366 B.R. 265, 269 (Bankr. D. Mass. 2007).[16]

Numerous courts[17] have rejected supposedly "retroactive" assignments, in which a mortgagee

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[16] The *Schwartz* decision invalidating post-foreclosure sale assignments issued on April 19, 2007, two and a half months before the Ibanez foreclosure sale.

[17] *See, e.g., Countrywide Home Loans, Inc.* v. *Taylor*, 17 Misc.3d 595 (N.Y. Sup. Ct., 2007) ("Language in the purported assignment to Countrywide states that the '[a]ssignment shall be deemed effective as of August 1, 2006.' Such attempt at retroactivity, however, is insufficient to establish Countrywide's ownership interest at the time the action was commenced. Indeed, foreclosure of a mortgage may not be brought by one who has no title to it …"); *Deutsche Bank Trust Co.*

attempts to justify an invalid foreclosure it conducted prior obtaining the right to foreclose by written, valid assignment.[18]

C. Non-mortgagees possessing mere "financial interests," "splintered rights' or "indicia of ownership" cannot conduct a foreclosure sale under G.L. c. 244, § 14.

In an attempt to avoid the consequences of the absence of an assignment at the time of the Ibanez foreclosure sale, U.S. Bank insists that a non-mortgagee may nevertheless conduct a foreclosure if that entity possesses mere "financial interest[s]," "splintered rights," or "indicia of ownership." App. Br. at 34-37. Adoption of these assertions would, quite literally, abrogate the terms of the statutory

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Americas v. *Peabody*, 866 N.Y.S.2d 91 (N.Y. Sup. Ct. 2008) ("The crucial issue then is whether the written assignment, dated after the commencement of the action but stated to be effective on a date before the commencement, was effective to give plaintiff the requisite interest in the mortgage and thus standing to commence an action to foreclose it. Recently, finding such post-commencement dated assignments ineffective, several trial level courts have said "no"."); *U.S. Bank Nat'l. Ass'n* v. *Kosak*, 16 Misc.3d 1133(A) (N.Y. Sup. Ct. 2008); *Countrywide Home Loans, Inc.* v. *Hovanec*, 15 Misc.3d 1115(A) (N.Y. Sup. Ct., 2007).

[18] For both the Larace and Ibanez mortgages, Appellants obtained post-foreclosure "assignments" that were executed long after the foreclosure auctions at issue - more than a year later, in the case of the Ibanez mortgage. Below, U.S. Bank insisted that both of these "assignments" had retroactive force. Appellants apparently no longer claim that they were entitled to conduct foreclosures by virtue of these post-foreclosure assignments; Appellants now argue that these post-foreclosure assignments merely "confirm … ***the prior assignment*** that has occurred through securitization." App. Br. at 46 - 47 (emphasis added).

power of sale in the Ibanez mortgage contract and annul G.L. c. 244, § 14, which permit only a "mortgagee" to exercise a power of sale. It would also create undesirable uncertainty as to the validity or invalidity of a foreclosure; disputes about the adequacy of the foreclosers financial interests or splintered rights would be inevitable.

U.S. Bank cites in support of its direct assault on the Massachusetts statute and Massachusetts decisional law only two federal decisions, *Saffran* v. *Novastar Mortgage, Inc.*, No. 4:07-cv-40257-PBS (D. Mass. Oct. 18, 2007)[19] and *Nichols* v. *Cadle Corp.*, 139 F.3d 59, 62 (1st Cir. 1998)[20], neither of which

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[19] In *Saffran*, the mortgagor's original lender and original mortgagee, Novastar, sought to establish its authority to conduct a foreclosure auction of the mortgagor's home. In the mortgage contract, Novastar had designated a third party as its "nominee" for certain purposes. However, in the mortgage contract, Novastar explicitly reserved for itself the right to conduct a foreclosure pursuant to the power of sale. The court found that Novastar was entitled to conduct a foreclosure as the original mortgagee and pursuant to the explicit terms of the mortgage, which authorized Novastar *by name* to exercise the power of sale.

[20] In *Nichols*, it was uncontroverted that the foreclosing mortgagee, Cadle Co., had been assigned the subject note and mortgage contract by the FDIC. Cadle entered into a written "loan agreement" with a third party, but that agreement "reserve[d] to Cadle the responsibility to collect on the note and (if necessary) to foreclose on the mortgage." *Nichols*, 139 F.3d at 61. The *Nichols* court interpreted "the loan agreement as leaving Cadle as the mortgagee," and thereby held that Cadle had authority as the mortgagee to exercise the mortgage contract's power of sale pursuant to G.L. c. 244, § 14. *Id.* at 62.

actually stands for the proposition that a non-mortgagee possessing mere "financial interests[s]" or "splintered rights" may conduct a foreclosure. In fact, in both cases, the courts found that the foreclosing entity possessed the power of sale pursuant to the explicit written terms of the operative contract. Accordingly, U.S. Bank asks this Court judicially to amend the plain language of the Massachusetts foreclosure sale statute to create from whole cloth a new category of persons who may sell a borrower's home in a foreclosure auction, surely an ill-advised request.

Finally, U.S. Bank advances the position that it was entitled to conduct a foreclosure sale because it had "equitable ownership of the incidents of the mortgage" as the purported "holder[s]" of the Ibanez and Larace promissory notes. App. Br. at 35. Whatever the status of the multiple allonges and the original Note (*but see* VI.H *infra*), the concept of an "equitable holder" or "forecloser" of a mortgage contract simply does not exist in Massachusetts law. To the contrary, by statutory command and decisional enforcement, it is well settled in Massachusetts that

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Accordingly, in both *Nichols* and *Saffran*, the foreclosing party was the present mortgagee pursuant to a written, valid contract. Neither case provides any support for allowing a non-mortgagee – the mere possessor of "financial interests" or "splintered rights" – to exercise a mortgagee's power of sale.

the last assignee of a mortgage contract is the holder of that mortgage – even if only a holder of in trust:

> In some jurisdictions it is held that the mere transfer of the debt without any assignment or even mention of the mortgage, carries the mortgage with it, so as to enable the assignee to assert his title in an action at law. This doctrine has not prevailed in Massachusetts, and the tendency of the decisions here has been that in such case the mortgagee would hold the legal title in trust for the purchaser of the debt, and that the latter might obtain a conveyance by a bill in equity.

Barnes v. *Boardman*, 149 Mass. 106, 114 (1889); *see also* Ibanez II, at 687, ("[A]ctually holding something and having only the right to be its holder are two very different things … The holder of the note may have an equitable right to obtain assignment of the mortgage by filing an action in equity, but that is all it has."). The mere possessor of a promissory note is not the mortgagee, absent the written, valid assignment of the mortgage contract. G.L. c. 244, § 14 simply does not authorize a non-mortgagee to conduct a foreclosure auction, even if that non-mortgagee has bare possession of a promissory note.[21]

Despite U.S. Bank's campaign to expand and obscure the entities authorized to take property by foreclosure sale without judicial action, G.L. c. 244,

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[21] *See also Young v. Miller*, 72 Mass. 152 (1856), holding that where ownership of a mortgage and an underlying are separated, the note-holder cannot bring a foreclosure action.

§ 14 (and the related statutes) are simple and direct: only a mortgagee may exercise a mortgagee's contractual power to conduct a foreclosure sale. "[W]hen a statute speaks with clarity to an issue[,] judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished." *Beaupre* v. *Cliff Smith & Assoc.*, 50 Mass. App. Ct. 480, 491 (2000) (quoting *Estate of Cowart* v. *Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992)). As the Land Court itself recognized, "[w]hat [U.S. Bank] *truly* seek[s] is a change in the foreclosure sale statue, which can only come from the legislature." *Ibanez II*, 17 Mass. Land Court Rptr at 681, RA 1141.

There is nothing in these statutory enactments, or in the common law doctrines they embody, which was a surprise to U.S. Bank; indeed, the Bank's knowledge of these requirements is the only explanation for the contents of the Bank's foreclosure notices.[22]

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[22] For example, in its complaint to foreclose, U.S. Bank represented itself to be "the owner (or assignee) and holder of a mortgage with the statutory power of sale." RA 1060. In U.S. Bank's "Power of Attorney" authorizing the sale, the Bank represented that "U.S. Bank … holds a mortgage [on the Ibanez property.]" RA 1061; in its Certificate of Entry, U.S. Bank "made oath" that it was "the present holder of a certain mortgage given by Antonio Ibanez," RA 1062; in its notice to Ibanez and its public notices of foreclosure sale, U.S. Bank justified its foreclosure upon "the Power of Sale contained in [the Ibanez] mortgage… *of which mortgage U.S. Bank… is the present holder*," RA 1065; and *in its own foreclosure deed to itself, U.S. Bank represented that on July 5, 2007, when it sold itself the Ibanez property, U.S. Bank was the "current*

In short, the record confirms that *both* the Land Court *and* U.S. Bank understood that a foreclosure sale could only be conducted by the then-current holder of a mortgage.

D. Neither REBA Title Standard 58 nor its doomsday scenario alters the statutory command that only martgagees may foreclose by sale under G.L. c. 244 § 14

In an effort to uphold its post-foreclosure assignment, U.S. Bank asserts the authority of Real Estate Bar Association Standard No. 58, and, without any factual basis, states that upholding the Land Court's decision "create[s] serious uncertainty throughout the mortgage and title industries." Appellant's Brief at 46-50; Eno & Hovey, 28B Mass. Prac.: Real Estate L., REBA Tit. Std. No. 58 (4th ed. 2008). Even were this true - which the year and a half since the Ibanez decision suggest it is not - this argument cannot shield it from the truth that, in the

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holder of a mortgage from Antonio Ibanez to Rose Mortgage…." RA 1063. Yet, at the time the Land Court entered its original judgment in this action, both U.S. Bank and the Land Court "knew" from the allegations in U.S. Bank's Complaint – which were binding upon U.S. Bank – that U.S. Bank actually conducted the Foreclosure Sale "[based on] …an assignment from [American Home]… to U.S. Bank *made on September 11, 2008* …by virtue of (which) U.S. Bank *became* the holder of a mortgage from Ibanez to Rose Mortgage…" Complaint, RA 18, ¶3.

Indeed, many Massachusetts conveyancers were neither surprised by, nor in disagreement with, the Land Court's holding as to the legal structure governing foreclosures. William H. Hovey, *How Not to Foreclose a Mortgage*, Mass. Lawyer's Weekly, Aug. 31, 2009.

blunt words of title doctrine "[U.S. Bank] could not convey what [it] did not own." *Powers* v. *Orr*, 10 Land Court Rptr. 137 (2002). As U.S. Bank was not "mortgagee," it could not convey the mortgaged premises even to itself, much less to a public bidder needing clear, conveyable title. That is, neither a note holder nor a ***future*** mortgage assignee holds a mortgage; consequently, even had U.S. Bank been a note holder or a future mortgagee, it could not conduct a foreclosure sale and sell the Ibanez property: "Delivery and seisin of a deed of land to which the grantor has no title does not effect a disseisin." *Cornwall* v. *Forger*, 27 Mass. App. Ct. 336, 341 (1989). And, despite the vigorous advocacy of REBA's Title Standard 58,[24] a voluntary private association's statement of sound practice does not amend the legislature's command that mortgagees - **and only mortgagees** - may foreclose by sale. *Id.*, 27 Mass. App. Ct. at 342 n.6,341 (Construing a "Mass. Conveyancers Assoc. Title Standard" as a "rule of thumb"; while "revision of established law … is, however, a task properly within the province of the legislature.").

[24] Or, as the Land Court held in rejecting an effort to determine title on the basis of a REBA Title Standard, "In any event, the court rejects the … argument which conflates a standard of professional responsibility with the law…." *Sullivan v. Leonard*, 13 Land Court Rptr. 482, 484 (2005).

Finally, as the Land Court set out in careful detail, REBA Title Standard No. 58 is just plain wrong:

> The plaintiffs' final citation is REBA Title Standard No. 58 … It provides, in relevant part, "[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." REBA Title Standard No. 58. The accompanying note states that this portion of the standard "is based on *Montague* v. *Dawes*, 12 Allen 397 (1866)." Id. (Comment) … I have great respect for REBA … [b]ut the latter portion [of the title standard] (relating to assignments made after notice is published and sale has occurred) misconstrues the statute, the holding in *Montague*, and the teachings of *Bottomly* and *Roche*. As discussed above, G.L. c. 244, § 14 requires publication in the name of the holder of the mortgage for the foreclosure sale to be valid. *Bottomly*, 13 Mass. App. Ct. at 483-84. It does so to assure potential bidders that the foreclosing party can promptly deliver good title and to prevent "opportunities for collusion and for taking unfair advantage of the mortgagor." *See Roche*, 106 Mass. at 513. … To allow a foreclosing party, without any interest in the mortgage at the time of the sale (recorded or unrecorded), to conduct the sale in these circumstances, bid, and then acquire good title by later assignment is completely contrary to G.L. c. 244, § 14's intent and commands.

Ibanez I, at 207.

VI. AT THE TIME OF THE FORECLOSURE SALE, APPELLANT HAD NOT OBTAINED A WRITTEN, VALID ASSIGNMENT OF THE MORTGAGEE'S RIGHTS UNDER THE MORTGAGE CONTRACT.

As to U.S. Bank's appeal of the denial of its Motion to Vacate Judgment pursuant to Mass. R. Civ. Pro. 59 and 60, U.S. Bank's unexplained and unjustified failure to keep the evidentiary promises it made to the Land Court judge was reason enough for the court's denial, and reason enough to affirm that

denial upon appeal. However, and more importantly, the motion proceedings established that U.S. Bank lacked legal authority to foreclose upon the Ibanez mortgage at the time that it sold and bought the Ibanez property. Specifically, the PPM filed with the court below did not and could not convey the Ibanez mortgage to U.S. Bank, the assignments "in blank" did not and could not convey the mortgage to U.S. Bank, the assignment altered post-execution and notarization did not and could not convey the mortgage to U.S. Bank, and the record evidence indicates that the mortgage is not, in actuality, an asset of U.S Bank, as Trustee.

The real dispute presented in this appeal is more profound than each of U.S. Bank's flawed or altered documents, its belated or retroactive assignments, and its careless and unkept promises. What U.S. Bank is actually seeking, in the name of securitization convenience, is for this court to discard the transparency and clarity of our long-standing land recording doctrines and systems,[25] and replace them with a conveyance scheme which, uses so-called "assignments in blank" and post-notarization "filled-

[25] At its core, this effort is flawed in the most fundamental way: because, no matter how viewed, title to real estate is not, and should not be treated as, bearer paper. A Note is just a debt, carrying no power beyond the right to claim payment, and with no real force until presented to a court. A mortgage is, in Massachusetts, quite literally ownership of a family's

in" assignments to convert real estate title documents into "bearer paper" - as though titles are the equivalents of as $20.00 bills. This system would, it is true, validate U.S. Bank's Ibanez foreclosure, by doctrinally approving the numerous conveyances that U.S. Bank 's filings claim took place here - without verification, without documentation, and without recorded conveyance of any kind; certainly, such an opaque, recordless system would make easier the instant, private trading of borrowers' mortgages which U.S. Bank desires.

The cost, however, would be substantial, as this Court long-ago held:

> The convenience which men might occasionally find in leaving blanks in sealed instruments to be filled after delivery, would be but a slight compensation for the evils which would follow the abrogation of the ancient rule of the common law.

Burns v. *Lynde*, 6 Allen 305, 312 (1863).

A. U.S. Bank was not the holder of the Ibanez mortgage when the foreclosure notices were published and the auction was conducted.

Although the Land Court gave U.S. Bank leave to submit all the documents in its possession, custody or control that "may exist which may *show a pre-notice, pre-sale assignment sufficient under G.L. c. 244, § 14*," RA 742, the plain fact remains that U.S. Bank first obtained a written assignment of the Ibanez

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home: a home which, through the power of sale, may be taken without any judicial action whatsoever.

mortgage on September 2, 2008, more than a year after U.S. Bank conducted its foreclosure sale. In fact, the record demonstrates that (1) Rose Mortgage executed an assignment "in blank" of the Ibanez mortgage on December 8, 2005, (2) at some time subsequent to December 8, 2005, the Rose Mortgage assignment was altered by the addition of the Option One corporate stamp, identifying Option One as the assignee – an alteration made on the face of the previously notarized "original assignment"; and (3) on or about January 23, 2006, Option One executed another assignment "in blank". No subsequent assignment of the Ibanez mortgage occurred until American Home executed the post-foreclosure assignment on September 2, 2008. Therefore, at the time of the June, 2007 foreclosure notices and July foreclosure sale, the ***best case*** for U.S. Bank is that Option One was, and remained, the mortgagee and holder of the Ibanez Mortgage.

B. Despite its unsupported representations regarding an alleged "Trust Agreement," U.S. Bank submitted no valid writing effectuating an assignment of the mortgagee's rights prior to conducting a foreclosure auction.

Recognizing the importance of a valid, written pre-foreclosure assignment, the Bank argues that the "Ibanez Trust Agreement … assigned all interest in the subject loans (including the [Ibanez] mortgage) to

U.S. Bank." App. Br. at 17.[28] However, U.S. Bank never submitted this document to the Land Court. Moreover, U.S. Bank never submitted a "schedule" of mortgage loans governed by the alleged Trust Agreement, despite receiving leave from the Land Court to do so.[29] Finally, U.S. Bank represents that *Lehman Brothers* and *SASC* were the entities who, by means of the unproduced Trust Agreement, validly assigned the Ibanez mortgage to U.S. Bank - but there is no evidence in the record that either of these entities ever owned or held the Ibanez mortgage. Given the Land Court's express request for the Trust documents, and U.S. Bank's wholesale failure to provide them below, it is difficult to imagine a more appropriate occasion for application of the rule that the reviewing court will disregard and strike statements of counsel in their appellate brief not based upon, and supported by citation to, the record below. *Service Publications,*

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[28] U.S. Bank never argued in the court below that the Trust Agreement itself conveyed the Ibanez mortgage to U.S. Bank; in such circumstances, it is barred from that argument on appeal. *S. Kemble Fischer Realty Trust v. Board of Appeals*, 9 Mass. App. Ct. 477, 480 (1980) ("An attempt… to argue on appeal a point of law not raised before the trial judge… brings nothing before the appellate court.")

[29] On April 17, 2009, the Land Court gave U.S. Bank leave to "submit … (1) the documents which created the securitized trust and govern its operations, (2) the documents identifying the 'blocks of mortgages sold into that trust,' which purportedly include the mortgage at issue in this case …" [RA742]. Quite simply, U.S. Bank did not submit **any documents** corresponding to either of these categories.

Inc. v. *Goverman*, 396 Mass. 567, 580 (1986); *Boston Edison Co.* v. *Brookline Realty & Inv. Corp.*, 10 Mass. App. Ct. 63, 69 (1980)

In sum, a document which is not produced, does not name the mortgaged property or the mortgagor, and names assignors who are themselves strangers to the Ibanez mortgage cannot possibly establish U.S. Bank's authority to conduct a foreclosure sale. This "jumble of documents and conclusory statements" simply does not establish that U.S. Bank was assigned the Ibanez mortgage by means of a valid, written contract. *See, e.g., Schwartz*, 366 B.R.at 267.

C. The Private Placement Memorandum did not and could not Convey the Ibanez Mortgage to U.S. Bank.

U.S. Bank concedes that it submitted to the Land Court only the Private Placement Memorandum (PPM), which it characterizes as advertising material for mortgage-backed securities. App. Br. at 20 ("[A]n offer of mortgage-backed securities to investors."). While U.S. Bank appears to argue that the PPM evidences an effective assignment of the Ibanez mortgage, to the contrary, the PPM describes an intended, generic transfer of assets pursuant to a trust agreement that will occur at some point in the future. RA 1295 ("The Mortgage Loans *will* be assigned by the Depositor to the Trustee") (emphasis added). U.S. Bank accordingly concedes that the record

contains no direct evidence of the terms of the alleged Trust Agreement; instead it "represents that the language of assignment contained in the Trust Agreement is *in accord* with the analogous language contained in the LaRace PSA." App. Br. at 20 n. 6 (emphasis added). *But see* VI.B *supra*. However, the PPM explicitly represents that "[e]ach Mortgage Loan [held by the Trust] will be identified in a schedule appearing as an exhibit to the Trust Agreement." RA 1295. Despite the PPM's representation that a schedule of mortgage loans governed by the Trust Agreement "*will*" exist, U.S. Bank never submitted such a document, or any other document in any way indicating that the Ibanez mortgage is one of the mortgage loans to which the PPM refers, nor any other evidence that U.S. Bank, as Trustee owns the ***Ibanez*** mortgage. Accordingly, U.S. Bank cannot credibly claim to have established its authority to foreclose on the basis of such a document.

The only evidence that the mortgage was ever transferred to U.S. Bank is the September, 2008 post-foreclosure assignment from Option One – more than a year after U.S. Bank's foreclosure sale.[32]

[32] Even had U.S. Bank obtained this assignment prior to its foreclosure sale, such a document would be just as problematic for U.S. Bank. The assignor named in this document is neither the "Seller" (Lehman Brothers) nor the "Depositor" (SASC) named in the PPM. Indeed, under the terms of the PPM, SASC as the "Depositor" was

D. Even under *In re Samuels*, the lone Massachusetts decision on which U.S. Bank relies, the alleged trust agreement cannot demonstrate U.S. Bank's authority to conduct a foreclosure sale.

U.S. Bank cites only a single Massachusetts decision, *In re Samuels*, 415 B.R. 8 (Bankr. D. Mass. 2009), for the proposition that a "securitization agreement" can "act[] to assign all interest in loans (including the mortgages) to the securitization trustee." App. Br. at 22. In fact, the court in *Samuels* found that the operative "securitization agreement" ***did not*** demonstrate the securitization trustee's ownership of a mortgage, because the trustee could not prove each link in the "chain of title" from the originating lender to the trustee:

> In order to establish that it holds not only the… Note but also the Mortgage, Deutsche Bank … relies on showing a chain of three assignments of the mortgage: from [Lender] to Ameriquest, then Ameriquest to ARSI, and then ARSI to Deutsche Bank. The problem with this strategy is that Deutsche Bank has adduced no writing evidencing the first of these transfers, from Argent to Ameriquest. … Deutsche Bank has adduced evidence of an agreement pursuant to which Argent agreed

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required to assign all mortgage loans to the Trustee. RA 1295. Based on the description of the alleged Trust Agreement in the PPM (because the Trust Agreement was never produced), there is no indication that U.S. Bank, as Trustee, had the authority to accept assets from any party other than the "Depositor." If this is the case, the acceptance of the Ibanez mortgage by U.S. Bank pursuant to the post-foreclosure assignment would have been ultra vires and void under New York law, which presumably governs the Trust (though Appellees cannot be certain without the Trust Agreement). Est. Powers & Trusts § 7-2.4 (providing that under New York law, acts by a trustee in contravention of an express trust are void).

> to transfer mortgage loans to Ameriquest, but it has adduced no writing evidencing the assignment of the... Mortgage from Argent to Ameriquest. Consequently, the chain of title is incomplete...

Samuels, 415 B.R. at 20.[33]

Accordingly, under the reasoning of *Samuels*, the alleged trust agreement herein, even if it had been produced, could not *possibly* show that U.S. Bank owns the Ibanez mortgage - since, as in *Samuels*, the record herein contains no evidence of multiple links in the purported chain of tile as set forth above.[34] Thus, under *Samuels*, the alleged - but not produced - trust agreement would be insufficient to demonstrate U.S. Bank's ownership of the Ibanez mortgage.

E. An "Assignment in Blank" Conveys Nothing .

In its next futile attempt to avoid the absence of a valid, pre-foreclosure assignment, U.S. Bank has submitted the Option One assignment "in blank", purportedly executed on January 23, 2006, and purportedly in the custody of Wells Fargo on May 4, 2009. This assignment, however, does nothing to

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[33] The *Samuels*' holding demonstrates that the mortgagee's chain-of-title proof ("from Argent to Ameriquest") was not satisfied, even though... "Argent endorsed the Note in blank and also executed a written assignment in blank—i.e., without designation of an assignee—of the Note and Mortgage." *Samuels*, 415 B.R. at 17.

[34] As in *Samuels*, Appellant claims that multiple assignments of the mortgage occurred prior to assignment to Appellant itself - from Option One to Lehman Brothers Bank, FSB to Lehman Brothers Holding, Inc. to the Structured Asset Securities Corp. to the Bank. App. Br. at 9-10.

support U.S. Bank's allegation that it was the pre-foreclosure assignee of the Ibanez mortgage, because this assignment "in blank" identifies no assignee. Massachusetts common law has long held that a conveyance in land, in which a blank had been left for the name of the grantee, is inoperative as a conveyance. *See Macurda* v. *Fuller*, 225 Mass. 341, 344 (1916); *Phelps* v. *Sullivan*, 140 Mass. 36, 36-37 (1885); *Burns*, 6 Allen at 311. Even if U.S. Bank's name had been later added to the assignment by parol authority of Option One, the assignee's name creates a substantial part of the instrument itself, and therefore redelivery of the assignment after the blanks were filled would have been necessary. *See Burns*, 6 Allen at 310. U.S. Bank submits no evidence in the June 8th submission that redelivery occurred; most importantly the empty spaces remained blank; no assignee was ever named in this assignment.

The Option One blank assignment is also invalid on the grounds that as a contract, it lacked the required two or more parties: Option One being the only party mentioned. *See Eastman* v. *Wright*, 6 Pick. 316, 321 (1828); *see also Situation Mgmt. Sys.* v. *Malouf, Inc.*, 430 Mass. 875, 878 (2000) (the mutual assent of two or more persons to be bound by an exchange of promises is the basis of a contract). As

our courts recognize, a conveyance of real estate which lacks a grantee is, quite simply, void:

> The deed signed by her, incomplete because of failure to name the grantee, … was invalid…. It conveyed no title.

Flavin v. *Morrisey*, 327 Mass. 217, 219 (1951). The reasons for this rule were well-explained long ago:

> Every deed well made must be written; i.e. the agreement must be all written before the sealing and delivery of it; for if a man seal and deliver an empty piece of paper or parchment, albeit he do there withal give commandment that an obligation or other matter shall be written in it, and this be done accordingly, yet this is no good deed.
>
> When the paper was delivered, it had no validity or meaning. The filling of the blanks created the substantial parts of the instrument itself; as much so as the signing or sealing … Our statutes, which provide for the conveyance of real estate by deed, acknowledged and recorded, and for the acknowledgment and recording of powers of attorney for making deeds, are evidently based on the ancient doctrines of the common law respecting the execution of deeds; and a valuable and important purpose which these doctrines still serve is, to guard against mistakes which are likely to arise out of verbal arrangements, from misunderstanding and defect of memory, *even where there is no fraud.*
>
> The convenience which men might occasionally find in leaving blanks in sealed instruments to be filled after delivery, would be but a slight compensation for the evils which would follow the abrogation of the ancient rule of the common law.

Burns, 6 Allen at 312.[35] This flows from a first principle of contract law: that one cannot contract

[35] U,S, Bank repeatedly argues that assignments in blank "…effect a valid transfer of the [Ibanez and Larace] mortgages," as "filling in the blanks [later] is immaterial to the validity of the instrument." App. Br. at 28-32. The most troubling issue raised by the

with his or herself. *Eastman*, 6 Pick. at 321. U.S. Bank points to no legal authority that an assignment is valid when there is no Party B.[36] Indeed, neither statutory provisions nor decisional law suggest that there is a valid assignment from one party to another, where "another" is merely a blank space. *Id.*

F. The Assignment from Rose Mortgage to Option One is Void, as it was altered after its Execution and Notarization.

The common law doctrines invalidating documents conveying real estate where no grantee is named have yet another consequence in this action: the invalidation of the assignment from Rose Mortgage, where the grantee – Option One – was filled in after the assignment was notarized, or sealed:

> The instrument delivered to [Grantor's agent] was without validity and the direction to… to fill the blank space [for grantee] with the name…of

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contention that assignments in blank are completed valid transfers is the obvious question: transfers to whom? To no one? But the broader implications are more sobering: do we really want assignments of mortgages – in Massachusetts, documents conveying both legal ownership and the right to non-judicial foreclosure – to be "valid transfers", where the owner is just a blank "to be filled in later?"

[36] Only the written, executed assignment of a mortgage contact can effectively transfer ownership of that mortgage. *See Warden,* 15 Mass at 236 ("No interest passes by a mere delivery of a mortgage deed, without an assignment in writing and by deed."). To satisfy the statute of frauds, an assignment "must contain the terms of the contract agreed upon – the parties, the locus (if an interest in real estate is dealt with), in some circumstances the price, and it must be signed by the party to be charged or by some one authorized to sign on his behalf." *Cousbelis v. Alexander*, 315 Mass. 729, 730 (1944).

> [the alleged Grantee] conferred... no legal right because the filling in of such a blank created a substantial part of the deed itself, "stood on the same footing as signing and sealing and could be authorized only by a power under seal."

MacUrda, 225 Mass. at 344(internal citations omitted). As there is no valid assignment from Rose Mortgage to Option One, both the assignment "in blank" and the American Home confirmatory assignment are invalid.

G. The Post-Foreclosure Assignment "confirmed" Nothing.

U.S. Bank also insists that the Land Court erred in concluding that the post-foreclosure assignment dated September 8, 2008 did not validate the July 5, 2007 foreclosure sale. The flaws in this argument are legion starting with the problem that the confirmatory grantor had no title to convey. *See supra.*

Even disregarding this fatal flaw, first, and most obviously, an independent act is not a confirmatory conveyance, and a confirmatory assignment acts merely to cure a defect in the assignment being "confirmed." A "confirmable" error frustrates the intentions the parties sought to accomplish in the assignment being confirmed:

> [C]onfirmation is the approbation or assent to an estate already created [by the confirmer], which, as far as it is in the confirmer's power, makes it good and valid. So that **the confirmation does not regularly create an estate** ... Such a writing creates no title, and conveys nothing which has come into the grantor's ownership since the making of the original [grant]. It takes the place of the original [grant], and is evidence of the making of the former conveyance **as of the time when it was made.** If under our system of

> registration or otherwise, it is necessary to give it effect as in itself a conveyance, it is only confirmatory evidence of the title which passed by the original [grant].

Scaplen v. *Blanchard*, 187 Mass. 73, 76 (1904); *accord* *Gould* v. *Wagner*, 196 Mass. 270, 276 (1907) ("The deed was given to correct errors of description … and to confirm the title conveyed by said [Grantor]… and it may well be doubted whether it operated to convey any title on the part of the petitioner.")

No such "confirmable" error occurred, when Option One executed the so-called "assignment in-blank", which its alleged successor's September 2008 assignment is now claimed to have been intended to cure. That is, when Option One executed the blank assignment on January 23, 2006 - in the language of *Scalpen*, 187 Mass. at 76, "**as of the time when it was made**" – it did not intend to convey ownership to U.S. Bank, as Trust; it could not have, since the Trust - for which U.S. Bank is the Trustee -- did not exist before December 26, 2006. PPM, RA 1027.

Equally fatally, the post-foreclosure assignment was executed by American Home, and not Option One. At best, the record shows that Option One had been the mortgagee since the delivery of the Rose Mortgage-Option One assignment dated December 8, 2005. However, there is no evidence that American Home ever owned the Ibanez Mortgage, other than the conclusory statement that American Home was the "successor in interest" to

Option One. Without an assignment from Option One to American Home, or without some other evidence of the transfer of Option One's interest in the Mortgage to American Home, U.S. Bank has produced no evidence that American Home had any authority to assign the Ibanez Mortgage. *Samuels,* 415 B.R. at 20.

In short, whatever the September 2, 2008 American Home assignment accomplished, it did not, and could not retroactively validate a foreclosure sale by an entity which lacked power of sale rights at the time the foreclosure sale was conducted.

H. The Undated and Conflicting Allonges Make doubtful whether U.S. Bank Possessed the Note at the Time of the Foreclosure Sale.

In another unavailing attempt to bolster its allegation that it held the Ibanez mortgage, U.S. Bank also submitted to the Land Court a copy of the Ibanez note and two allonges. In informal discovery, U.S. Bank also produced to counsel the Loan Closing File, as of the date of the closing. ISA 8-9. That file includes *yet a third allonge* - apparently existing as of the closing - which itself casts doubt on the integrity of the chain of possession of the Ibanez Note. *Id.* The first allonge, which has no indication of the date of its execution, was made payable to "Option One Mortgage Corporation, A California Corporation (Without Recourse)" and was executed by Ralph Vitiello, CEO of Rose Mortgage. RA 965. The

second allonge is made payable in blank, and is executed by Sheryn Cervantes as Assistant Secretary of Option One. RA 966. The second allonge contains multiple dates, with none identified as the date of execution. According to the affidavits submitted by U.S. Bank, the Note and these two allonges were held by Wells Fargo, for American Home on May 4, 2009. RA 1073-83. U.S. Bank has provided no testimony or evidence indicating who had possession of the note or the status of the allonges as of the operative dates - the foreclosure notice and sale dates.

Although produced to Ibanez counsel, U.S. Bank appears to have chosen not to submit to the Court this *third* allonge. *See* Collier Affidavit, ¶¶ 3, 4 ISA 8. The third allonge to note was included in the closing file, and it is endorsed "Pay to the order of: ____ WITHOUT RECOURSE" from Rose Mortgage and signed by Michael Petrucelli, Vice President. ISA 4. The existence of a third allonge raises the very issue of why the law requires an allonge must be affixed to a note. G.L. c. 106 § 3-204 ("For the purpose of determining whether a signature is made on an instrument, a paper affixed to the instrument is a part of the instrument").[38] The requirement that an

[38] *See also Town of Freeport* v. *Ring*, 727 A.2d 901, 905 (Me. 1999) (regarding nearly identical Maine statute court held "a signature on a separate, unattached piece of paper is not an indorsement of the

allonge be affixed to the note helps meet the dual policy objectives of preventing fraud and preserving the chain of title to an instrument. *Southwestern Resolution Corp.* v. *Watson*, 964 S.W.2d 262, 264 (Tex. Comm'n App.1997) (*citing Adams,* 853 F.2d at 167). In this instance, these objectives are defeated by significant uncertainty surrounding how, when, which, or even whether any of these three allonges were physically attached to the note. Notably, despite the Court's request for an affidavit verifying the physical state of these documents as of the date of the foreclosure sale, no affiant has "spoken" as to the attachment of any of the allonges on that date: or on any other date, for that matter. It is impossible to know based on the various un-affixed *and undated* allonges who was the holder of the note at the time of the Ibanez foreclosure publication and sale. And, of course, the note – *lacking any power of sale* – provides no authority to foreclose, and does not convey with it "mortgagee" status.[39]

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instrument"); *Adams* v. *Madison Realty & Development, Inc.*, 853 F.2d 163, 166 (3d Cir.1988) ("indorsement sheets … not physically attached to the instruments in any way … patently fail to comply with the explicit Code prerequisite.").

[39] A copy of the "Certified" note, with the "affixed" (or adjacent) allonge, was included in the Exhibits to the Affidavit of Paul R. Collier, III. ISA 14-17.

I. Evidence that the Ibanez Mortgage is not included in the only available listing of Trust-held Mortgages is reason enough to deny the Bank's Motion to Vacate Judgment.

Upon offer by U.S. Bank counsel, the Land Court, in the proceedings below, expressly requested that U.S. Bank provide the Trust exhibit "identifying the 'blocks of mortgages sold into that trust,'" which purportedly include the mortgage at issue in this case." RA 742-3. In breach of this request, U.S. Bank provided nothing of the kind. Ibanez, however, provided properly authenticated (and unobjected-to) evidence that the Ibanez mortgage was not included in the Trust assets. ISA 22-54. And, as record-evidence to which no objection was made, the Land Court was entitled to accept its accuracy. *Madsen* v. *Irwin*, 395 Mass 715, 721 (1985).

On this basis alone, the Land Court was within its discretion in denying U.S. Bank's Motion to Vacate Judgment.

VII. U.S. BANK'S ARGUMENT THAT THE LAND COURT ERRED IN NOT APPLYING THE PROSPECTIVE APPLICATION DOCTRINE TO A THIRTY FIVE YEAR OLD STATUTE IS MERITLESS.

U.S. Bank now argues that the Land Court erred in not limiting its construction of the thirty five year old foreclosure sale statute to future foreclosures, an argument which U.S. Bank did not make below. It is axiomatic that, by failing to raise the issue in the proceedings below, U.S. Bank cannot now prevail on this claim. And it is equally axiomatic that the

"Prospective Application" request of Amicus Real Estate Bar Association (REBA) in the trial court does not alter that result - as the court "deals only with issues presented by the parties," and need not even consider issues raised only in the briefs of an amicus. *United Technologies Corp.* v. *Liberty Mut. Ins. Co.*, 407 Mass. 591, 593 (1990); *Pineo* v. *Executive Council*, 412 Mass. 31, 36 (1992).

However, even moving past its waiver problem, U.S. Bank's argument is meritless; indeed, it is an argument that conflates a jurisprudential doctrine applicable only to judicial changes in well-established and long-standing rules of *common law* affecting real property; and the doctrine that *recently enacted statutes* are prospectively applied, absent a clearly expressed legislative command for retroactive application. *Powers* v. *Wilkinson*, 399 Mass. 650, 662-63 (1987) and *Turner* v. *Greenaway*, 391 Mass. 1002, 1003 (1984). There is not, and has never been, a doctrine that an interpretation of a long enacted statute can be limited to prospective cases.

Lastly, of course, U.S. Bank's entire argument rests upon its insistence that the Land Court's Ibanez decision altered long-standing judicial interpretation of G.L. c. 244, § 14, a contention which Judge Long rebutted in conscientious detail:

> First, [U.S. Bank's argument] ignores *Bottomly* v. *Kabachnick*, which states that the notice in that

> case "was defective because it failed to identify the holder of the mortgage, thereby rendering the first foreclosure sale void as a matter of law." ... *Bottomly* is the most recent case construing the notice provisions of the statute and is the starting point for the proper interpretation of the earlier cases and proper title practice. As noted above, *Bottomly* unequivocally holds that a notice that fails to identify the holder of the mortgage is defective, thereby rendering the "foreclosure sale void as a matter of law." ... G.L. c. 244, § 14 requires publication in the name of the holder of the mortgage for the foreclosure sale to be valid.

Ibanez I, *supra* at 205-07 (citations omitted).

VIII. THE COURT SHOULD DISREGARD AND STRIKE FACTS AND ARGUMENTS NOT PRESENTED BELOW.

Throughout its statement of facts and its substantive arguments, U.S. Bank states facts never presented to the court below: from "representations" as to the contents of the Trust documents, App. Br. at 19 n. 6, to its casual pronouncement that "[t]he industry custom is not to record a document reflecting the assignment of a mortgage," *Id.* at 5, to its insistence that U.S. Bank was merely "foreclos[ing] on a mortgage held in that trust." *Id.* at 4. Similarly, U.S. Bank argues on appeal issues which it did not argue below - from the claim that the Trust documents are a mortgage assignment to the claim that the Ibanez holding should be prospective in its application.

We rely on the give-and-take testing of factual allegations which takes place in the trial court to "find the truth" between often-disputed facts. Tactics which evade this testing are improper. The trial court

judge has the right to expect that a party, in proceedings before him, will present all of the facts and arguments which justify his claims. Our trial courts, and our trial judges, have the right not to be sand-bagged by claims without having had the opportunity to consider and address them - and Appellate Rule 16 mandates this:

> The requirement that a party provide 'an appropriate and accurate record reference' for each and every fact… in the brief . . . is not an idle technical requirement. Among other things, it prevents parties from exaggerating or distorting the facts…, or from inserting into the analysis on appeal facts that are simply nonexistent.

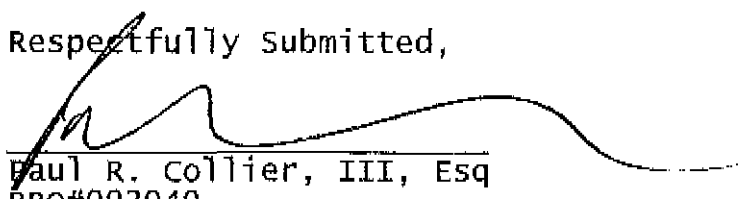
City of Lynn v. *Thompson*, 435 Mass. 54, 56 (2001).

This Court should disregard, and strike, all alleged "facts" which are not accompanied by actual citations to the record in the Land Court proceedings, and all arguments which U.S. Bank failed to present in those proceedings. *Service Publications, Inc.*, *supra*; *Boston Edison Co.*, *supra*.

IX. CONCLUSION

The Land Court's judgment should be affirmed.

Respectfully Submitted,



Paul R. Collier, III, Esq
BBO#092040
Attorney At Law
675 Massachusetts Ave.,
12th Floor
Cambridge, MA 02139
(617) 441-3303
paul.collier@paulcollierlawoffice.com

Max Weinstein, BBO# 600982
WilmerHale Legal Services
Center
of Harvard Law School
122 Boylston Street
Jamaica Plain, MA 02130
mmweinstein@law.harvard.edu
(617) 522-3003

ON THE BRIEF:
Eloise P. Lawrence, BBO #655764
Meyer H. Potashman, BBO #667196
Greater Boston Legal Services
197 Friend Street
Boston, MA 02114
(617) 603-1647

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