

United States Bankruptcy Court  
District Of Massachusetts

In re Kathleen A. Thomas,  
Debtor

Kathleen A. Thomas,  
Plaintiff

v.

CitiMortgage, Inc.,  
Flagstar Bank, FSB,  
and  
Allied Home Mortgage Capital Corporation,  
Defendants

Case No. 10-40549-MSH

Chapter 7

Adversary Proceeding No. 10-04086

**PLAINTIFF'S SUPPLEMENTAL MEMORANDUM**

The Plaintiff, Kathleen A. Thomas, offers this Supplemental Memorandum in Opposition to the Motion to Dismiss[#8] of Flagstar Bank, offering the following for the benefit of the Court in rendering its decision, in the discussion below.

**I. Introduction**

1. At the present time the Court is considering the claim of Flagstar Bank that they do not hold the mortgage and thus have no interest in the outcome of the case or ability to affect the outcome, as by releasing any interest they might have in the Note or Mortgage.
2. However, the Court's attention is directed to *Nosek v. Ameriquest (In Re Nosek)* 386 B.R. 374 (Bkrcy D. Mass. 2008), where the Court was faced with the unpleasant task of unraveling a case that had gone through eight days of trial, two appeals to the District Court, a further appeal to the First Circuit Court of Appeals – only to discover that the creditor actually holding the note and mortgage was Wells Fargo Bank and not Ameriquest, who had

admitted to owning the debt. In the reprise the Court assessed penalties of \$250,000 to each of the two lenders, and further substantial penalties to their counsel.

3. There have not been documents presented to the Court which are sufficient to eliminate the possibility that the mortgage is still owned by Flagstar Bank, and there have not been any affidavits filed which would satisfy the burden of production on the issue to explain the lack of indorsement on the face of the Note.
4. Considering the statements of counsel in the hearing, if Flagstar is actually eager to be dismissed from the case, preparing and filing such an affidavit should be easy to do, although the affiant would have to be prepared to make a statement under the pains and penalties of perjury.

## II. Statement of Law

5. Mass. G. L. c. 183C § 15 (a) establishes that any assignee or purchaser of a high cost home loan is liable for the violations of the chapter. There is no escape clause for an assignee which subsequently transfers its interest.
6. There is an escape clause if the subsequent holder has a policy against predatory lending or has required the assignor/seller of the loan to certify that the loan is not a high-cost home loan, but no indication of either of these conditions has been placed before the Court.
7. There are no reported cases interpreting c. 183C § 15, but its wording is similar to 16 U. S. C. § 1641 (d). See, e.g., *Thomas v. US Bank National Association ND et al*, 575 F.3d 794, 801, where the assignee liability was given matter-of-fact and literal interpretation, and, incidentally, the notion that there is preemption of such claims was disposed of by reference to the matter of the assignment as opposed to origination of the loan in question.

## III. Conclusion

8. The Motion to Dismiss is based at least in part on the notion that Flagstar Bank no longer

owns the loan in question, but a question of fact remains, and their liability as assignee is at least admitted – and from Plaintiff's standpoint a question to be resolved early in the case.

9. Until the chain of transfers and assignments of this mortgage loan is clear, however, such a defendant that admittedly possessed the mortgage and loan at one point, and which bears liability by at least a literal interpretation of the statute, should not be dismissed from this case.

10. The Plaintiff respectfully requests this Court consider and issue any further order of relief which in its wisdom it should deem meet and proper.

RESPECTFULLY SUBMITTED this 14th Day of October, 2010, for the plaintiff, Kathleen A. Thomas.

/s/ Laird J. Heal  
Laird J. Heal, BBO # 553901  
120 Chandler Street, #2R  
Worcester, MA 01609  
508-459-5095

Dated: August 23, 2010

#### Certificate of Service

I, Laird J. Heal, certify that I am over the age of 18 years and this day, following the Notification of Electronic Filing, I have caused service of the Opposition to the Motion to Dismiss of Flagstar Bank upon the following, by electronic service or by depositing, first-class postage prepaid, with the United States Mail.

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/s/ Laird J. Heal  
Laird J. Heal