COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

NO. SJC-11490

U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR BEAR STEARNS ASSET-BACKED SECURITIES TRUST 2004-AC4

Plaintiffs-Appellee

v.

EDNA SCHUMACHER AND JOHN SCHUMACHER

Defendants-Appellants

A *SUA SPONTE* TRANSFER FROM THE APPEALS COURT
ON A FINAL JUDGEMENT OF THE WORCESTER HOUSING COURT
DEPARTMENT OF THE TRIAL COURT

BRIEF OF THE REAL ESTATE BAR ASSOCIATION FOR MASSACHUSETTS, INC. AND THE ABSTRACT CLUB

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The Amici submitting this brief are the Abstract Club and The Real Estate Bar Association for Massachusetts, Inc., formerly known as the Massachusetts Conveyancers Association ("REBA"). This brief is submitted in support of the Plaintiff-Appellee U.S. Bank National Association, as Trustee for Bear Stearns Asset-Backed Securities Trust 2004-AC4 ("U.S. Bank"), pursuant to Mass. R. App. P. 17 and pursuant to the Supreme Judicial Court's announcement dated August 2, 2013, soliciting supplemental briefing in this matter.

Specifically, this brief will address the significant impact to the title and real estate industry if this Court agrees with the Appellant's misplaced assertions that failure to strictly comply with the notice provisions of G.L. c. 244 § 35A ("§ 35A"), renders a non-judicial foreclosure sale void. A decision for the Appellants would lead to uncertainty of title to properties conveyed in the post-foreclosure Real Estate Owned ("REO") market.

If this Court agrees with the Appellants, this brief will argue in the alternative for a prospective holding and offer practical suggestions to limit the potentially draconian consequences of a decision that would void thousands of foreclosures.

STATEMENT OF INTEREST

The Abstract Club is a voluntary association of experienced lawyers who practice in the area of real estate law. It has been in existence for over 100 years and is limited by its by-laws to 100 members.

REBA is the largest specialty bar in the Commonwealth, a non-profit corporation that has been in existence for over 100 years. It has approximately 2,000 members practicing throughout the Commonwealth. REBA promulgates title standards, practice standards, ethical standards and real estate forms, providing authoritative guidance to its members and the real estate bar generally as to the application of statutes, cases and established legal principals to a wide variety of circumstances practitioners face in evaluating titles and handling real estate transactions.

The Amicus Committee, from time to time, files amicus briefs on important questions of law. On several occasions it has been requested to do so by the Massachusetts Supreme Judicial Court or the Massachusetts Appeals Court. All Committee members serve without compensation.

The central concern of all of the persons represented and advised by members of the Amici is reliability of record title. This submission by the

Abstract Club and REBA concerns the effect the Court's decision will have on the conveyancing bar's ability to determine with greater certainty the state of ownership of real estate titles with a foreclosure in the chain of title. The § 35A notice is not recorded at the registry of deeds, so third party buyers, or their attorneys, cannot perform a title examination to see if the letter was sent or whether the content of the notice strictly complies with § 35A.

This Court must consider the public policy implications of agreeing with the Appellants' position that strict compliance with § 35A is determined by a document that is not recorded. Today, most title insurances companies are reluctant to insure properties with a foreclosure in the chain of title. Title insurances companies do not want the risk of insuring a property with a foreclosure in the chain of ownership because of off record title matters stemming from foreclosures.

A decision for the Appellants on strict compliance would cause the state of record title, post-foreclosure, to become increasingly unreliable. Even if a third party purchaser is able to get a copy of the § 35A notice from the Land Court, the buyer cannot confirm if the content of the notice strictly complies.

QUESTIONS PRESENTED

I. Whether failure to strictly comply with the notice provisions of G. L. c. 244, § 35A, renders a non-judicial foreclosure sale void?

II. Whether the notice in this case, which listed the name and address of the mortgage servicer, and which identified as the "current mortgagee" an entity to whom the mortgage eventually was but had not yet been assigned, satisfied the statutory requirement that the notice provide the name and address of the mortgagee, or anyone holding thereunder?

ARGUMENTS

I. The Legislative intent of § 35A is to provide borrowers the greatest opportunity to cure the default before foreclosure.

G.L. c. 244 § 35A ("§ 35A") was enacted in 2007 as a result of a report entitled "Recommended Solutions to Prevent Foreclosures and to Ensure Massachusetts Consumers Maintain the Dream of Homeownership" (the "Report"). The Report represented that Massachusetts law provides no right to cure a default to avoid foreclosure, and without statutory protection "Massachusetts homeowners [are] los[ing] their homes even though they can pay their lenders the entire amount they are in default." See Report. The Report recommended that a law be enacted providing notice of intent to foreclose "90 days before the residential mortgage is foreclosed," which would

"ideally" be "accompanied by a listing or resources that consumers could contact for information on how to address their problems." See Report.

Consistent with the recommendations in the Report, § 35A's purpose is to provide a mortgagor in arrears with an opportunity to "protect[] and preserv[e] home ownership." 2007 Mass. Legis. Serv. Ch. 206 (H.B. 4387) (2007). As Supreme Judicial Court Justice Ralph Gants, then a Justice of the Superior Court, noted "§ 35A, . . . gave mortgage holders a 90 day *right to cure a default on a residential mortgage note before foreclosure proceedings may be commenced.*" Commonwealth v. H&R Block, Inc., (08-2474-BLS1) (WL 5975053) (2008) (Trial Order) (Gants, J) (emphasis added). The Land Court also recognizes the statute as a simple "limit[] . . . [to] certain actions a mortgagee may take to realize on its mortgage collateral." Deutsche Bank Nat. Trust Co. v. Jepson, (WL 605598) (Mass. Land Ct.) (2012).

§ 35A was not, and still is not, a part of the power of sale. Instead, § 35A was designed to give the borrower a final opportunity to bring his/her mortgage account current, dispute the arrearage, or engage in workout discussions before a mortgagee enforced its rights under the power of sale. Accordingly as explained *infra,* the moment the

foreclosure sale concludes, the mortgagor is "forever barred" from attacking the foreclosure via Section 35A. See US Bank National Association v. Ibanez, 458 Mass. 637, 646 *quoting* G.L. c. 183, § 21 (a proper foreclosure sale "forever bar[s] the mortgagor and all persons claiming under him from all right and interest in the mortgaged premises, whether at law or in equity."). As § 35A is not part of the statutory power of sale, it may not be considered as part of the former mortgagors' challenge to legal title in summary process actions.

§ 35A identifies the "mortgagee, or anyone holding thereunder" as the party authorized to send the statutory notice. "Although § 35A does not define 'mortgagee,' a regulation promulgated pursuant to the statute includes 'mortgage servicers' as mortgagees. 209 C.M.R. 56.02; See Foregger v. Residential Credit Solutions, Inc., (12-11914-FDS) (WL 3208596) at 13 (D.Mass. 2013): "The *legislature did not define the word 'mortgagee'* when it enacted § 35A; however, the use of the terms "mortgagee" and *"lender/note holder" have often been used in Massachusetts conveyance and foreclosure statutes interchangeably."* HSBC Bank, N.A. v. Brown, et. al., (12-SP-5103) (Winik, F.J.)(Boston Hsg. Ct.)(July 2013) at page 14 (emphasis added). The Brown court stated:

> "[The Court does] not believe that in enacting § 35A the legislature intended to impose a requirement that, construed as [the former owner] argues it should be, would turn a statutory cure provision (intended to give borrowers a fair opportunity to avoid the commencement of the foreclosure process) into a landmine designed to explode in the face of a note holder/mortgagee *months or years after the notice was given and the foreclosure was completed,* where the note holder/mortgagee had *provided the borrower with a cure notice that complied substantially* - but perhaps not perfectly - with the statute and provided sufficient information to enable the borrower to contact the note holder/mortgagee or its agent to accomplish the underlying legislative purpose."

Id. at page 20 (emphasis added). The Notice to Cure typically sent by the servicer substantially complies with § 35A because it provides all of the crucial information necessary for a mortgagor to engage in meaningful discussions to avoid foreclosure and cure default.

The Appellants definition of "mortgagee" is inconsistent with the legislative intent. The purpose of § 35A is to provide mortgagors an opportunity to negotiate with their servicer/lender to cure a default. See Report.

II. § 35A must be complied with prior to the exercise of the power of sale, not as part of it.

The Amici and the Appellee recognize the requirement of borrowers receiving a notice of the right to cure letter, prior to the mortgagee's acceleration of the underlying debt. The issue

presented is whether § 35A compels strict compliance to make the foreclosure valid. The Appellants incorrectly attempt to extend the power of sale to include requirements of § 35A. The resolution of this issue turns on a determination of when the exercise of the power of sale begins.

In US Bank National Association v. Ibanez, 458 Mass. 637, 647 (2011), this Court held that the foreclosure process starts with the first publication of the notice of sale, pursuant to G.L. c. 244 § 14. Ibanez involved actions to quiet title of properties that were foreclosed upon by exercising the statutory power of sale. Id. at 645. In Ibanez, this Court ruled that failure to correctly identify the holder of the mortgage in the notice of sale would render the notice defective and the foreclosure sale void. Id. at 648. This Court explained that:

> Because only a present holder of the mortgage is authorized to foreclose on the mortgaged property and because the mortgagor is *entitled to know who is foreclosing and selling the property*, the failure to identify the holder of the mortgage in the *notice of sale* may render the notice defective and the foreclosure sale void.

Id. at 648 (emphasis added). This Court went on to state that "the foreclosing entity must hold the mortgage *at the time of the notice and sale in order to accurately identify itself as the present holder*" and thus have authority to sell the property under the

power of sale. Id. at 651 (emphasis added). It was clearly ruled that the start of the foreclosure "process" was the first publication of the notice of sale. The Court stated, "if the plaintiffs did not have their assignments to the Ibanez and LaRace mortgages at the *time of publication of the notice of sale*, they lacked authority to foreclose." Id. (emphasis added). The reasoning of this Court was based on reliance of record title. A foreclosing entity publishing a sale needs to be the mortgagee of record at the time the entity begins to exercise the power of sale.

It is important to note that § 35A was not mentioned in Ibanez although it was the law at the time the decision was issued. The Court had the opportunity to interpret the Legislature's intent to include § 35A as part of the exercise of the power of sale, but did not do so. A plain reading of § 35A indicates that the Legislature intended the notice of right to cure was to be completed prior to commencing the exercise of the power of sale.

Several courts in the Commonwealth (both state and federal), have held that a notice of the right to cure must be sent to the mortgagor and must include crucial information to allow a mortgagor to cure the default. See Aurora Loan Services v. Walter Murphy,

(S.E. Hsg Ct.) (Chaplin, F.J.) (12-SP-0521)(2012); See also Federal National Mortgage Association v. Rogers, (Malden,D.Ct.)(Leoney,J.)(12-SU-0200)(2012)(rejecting Defendant's argument that the notice of the right to cure was not in strict compliance with statutory power of sale); Wells Fargo Bank, N.A. v. Davies, (11-SP-5103) (Muirhead, A.J.) (Boston Hsg. Ct.)(2012) (noting G.L. c. 244 § 14 makes no reference to the notice of the right to cure as part of the foreclosure process). However, those courts note in their decisions that failure to strictly comply with § 35A does not void a foreclosure. One court explained that "[this Court] did not include an obligation to comply with § 35A in defining the statutory power of sale in Ibanez." Aurora Loan Services v. Walter Murphy, (S.E. Hsg Ct.) (Chaplin, F.J.) (12-SP-0521)(2012).

The Boston Housing Court took painstaking efforts to address the issue of strict compliance versus substantial compliance with § 35A in HSBC Bank, N.A. v. Brown, et. al., (12-SP-5103) (Winik, F.J.) (Boston Hsg. Ct.)(2013). In Brown, resembling the case at bar, the former mortgagor argued that the notice of the right to cure was defective because it "failed to identify [Mortgage Electronic Registration System] *MERS as mortgagee.*" Id. at page 11 (emphasis added). For this reason, among others, Brown argued that he

had a superior right of possession over any possessory right asserted by HSBC. In Brown, "[The Court saw] *no reason why the § 35A right to cure notice cannot be prepared by a mortgage loan servicer* acting on behalf of the "mortgagee" as that term is used in § 35A and as it may be reasonably construed." Id. at page 11 (emphasis added). The Brown Court went further into the § 35A analysis to state:

> "[t]he central purpose. . . set forth in § 35A is to *provide mortgagors with a fair opportunity to cure* a mortgage loan default *before the debt is accelerated and before the foreclosure process* is commenced through the invocation of the statutory power of sale . . . To accomplish this purpose the *statutory notice is intended to give the mortgagor information that would allow him [or her] to contact the party with the ultimate authority to make decisions* and take action necessary to allow the mortgagor to cure a mortgage loan default. . . . Historically, in almost all instance[s] the *party with such ultimate authority would be the lender/note holder or the servicer authorized in an agency capacity* to act on behalf of the lender/note holder."
> Id. at 15 (emphasis added).

The United States District Court for the District of Massachusetts also held that the statutory power of sale *does not* include an obligation to strictly comply with § 35A. See Sovereign Bank v. Sturgis, 863 F. Supp. 2d 75, 102-103 (D. Mass. 2012) ("The Supreme Judicial Court, in defining the statutory power of sale incorporated by . . . [the mortgage], *did not include an obligation to comply with § 35A")* (emphasis added).

Another judge of the District Court confirmed this in Sloane v. JPMorgan Chase Bank, N.A., 2013 U.S. Dist. LEXIS 142346 (D. Mass. 2013). The judge noted that the statutory power of sale is regulated by G.L. c. 244 §§ 11-17C, and it does NOT include § 35A which is "a more general provision relating principally to an *opportunity for a residential real property mortgagor to cure a default. It does not regulate the statutory power of sale.*" Id. at 3 (emphasis added).

A judge of the Land Court issued a ruling where § 35A was addressed squarely in Stephens-Martin v. Bank of N.Y. Mellon Trust Co., N.A., 2013 Mass. LCR LEXIS 148 (Mass. Land Ct. 2013). In Stephens-Martin the Petitioner claimed, among other things, that Bank of New York Mellon ("BONYM") and/or its agents "*failed to give Petitioner a compliant notice of right to cure,* pursuant to § 35A, and as a result *BONYM [was] not entitled to enforce its rights under MERS mortgage.*" Id. at 8 (emphasis added). "The Petitioner raise[d] *trivial issues with respect to noncompliance with § 35A*...Petitioner state[d] that the Notice to Cure did *not strictly comply [with] § 35A because it failed to give the name and address of the "mortgagee"...The Notice to Cure contain[ed] all material information required by § 35A.*" Id. at 9 (emphasis added).

Like the case at bar, in Stephens-Martin the servicer did not identify MERS in the notice. The court stated:

> "The *Petitioner rest[ed] her argument on "strict compliance"* with § 35A, *without considering the purpose and the substance of the Notice to Cure.* The purpose of the Notice to Cure is to *inform a borrower of its right to cure* any default prior to acceleration and initiation of foreclosure proceedings. *The party sending the Notice to Cure must identify who the borrower should contact to attempt to cure the default. . . Petitioners' contention that the name and address of the mortgagee were not provided on the Notice to Cure fails."* Stephens-Martin v. Bank of N.Y. Mellon Trust Co., N.A., 2013 Mass. LCR LEXIS 148 (Mass. Land Ct. 2013)at 34 (emphasis added).

In contrast, some lower courts, including the Northeast Housing Court, granted the former owners possession on the premise that § 35A requires the mortgagee, who was MERS, to be listed on the Notice of Right to Cure although MERS cannot help the former owners cure the default. See Federal Home Loan Mortgage Corporation v. Medina, (11-SP-1883) (Kerman, J.) (N.E. Hsg. Ct.)(2013) (where "the statutory notice dated September 8, 2009, by GMAC Mortgage, LLC failed to mention MERS"). See also Federal National Mortgage Assn' v. Eze, (12-SP-4488) (Kerman, J.) (N.E. Hsg. Ct.)(2013)(where "the 90 day notice of right to cure dated February 26, 2009, did not mention MERS"); See also Capital One NA v. DiRusso, (13-SP-1128) (Kerman,J.)(N.E. Hsg. Ct.)(2013)(where "[t]he notice

of cure rights by "Bank of America Home Loans" dated September 17, 2009, did not include the "name and address of the mortgagee [MERS]")). The amici disagree with the lower courts rulings' of § 35A and question whether the lower court has jurisdiction to entertain a § 35A challenge.

a. § 35A notice may not be attacked in summary process actions post-foreclosure.

Former mortgagors who claim harm from the technical shortcomings in letters that are substantially compliant with § 35A still have a remedy at law, but should be limited to monetary damages in actions other than summary process. In post-foreclosure summary process cases, a Defendant may place legal title at issue and hold the Plaintiff to proving its superior right of possession. See New England Mutual Life Insurance Co. v. Wing, 191 Mass. 192, 195 (1906). A foreclosing mortgagee's "'title is established in summary process by proof that the title was acquired strictly *according to the power of sale* in the mortgage; and *that alone is subject to challenge*.' " Bank of New York v. Bailey, 460 Mass. 327, 335-336 (2011), quoting Wayne Inv. Corp. v. Abbott, 350 Mass. 775 (1966) (emphasis added). The statutory power of sale is defined in G.L. c. 183 § 21.

The Supreme Judicial Court has at least twice expressly defined the term "statutes relating to the foreclosure of mortgages by the exercise of a power of sale" G.L. c. 183, §21, to mean G.L c. 244, §§ 11-17C. U.S. Bank Nat'l Ass'n v. Ibanez, 458 Mass. 637, 646 (2011); Eaton v. Fed. Nat'l Mortgage Ass'n, 462 Mass. 569, 581 (2012). The term "power of sale" does not appear anywhere in § 35A, which calls into question even further the Defendant's assertions. Because a Defendant in summary process may *only* challenge whether title to the Property was acquired strictly according to the power of sale, Bailey, 460 Mass. at 335-336, and because § 35A is not part of the statutory power of sale, this Court may not consider as a defense to summary process, whether the pre-foreclosure § 35A notice was given properly.[1]

III. The § 35A notice is not recorded so strict compliance cannot be ascertained by title examination.

The previous version of § 35A enacted in 2008 and the new version enacted in 2010 do not provide that the notice be recorded in the registry of deeds. It is clear that the Legislature did not require that the notice go on record because it is a contractual matter which is outside of recorded title.

[1] Although beyond the scope of this action, in cases where a national bank sent the right to cure notice, § 35A is preempted by federal law and is not applicable. See Sloane v. JPMorgan Chase Bank, N.A., 2013 U.S. Dist. LEXIS 142346 (D. Mass. 2013).

While it is true, that someone may obtain a copy of the § 35A notice in the Land Court, as it is filed as part of the Service members Civil Relief Act ("SCRA") complaint, this is not considered record title or a part of a traditional title examination. However, due to the private nature of the contents, the notice is typically redacted placing an extraordinary burden on third party purchasers ascertaining strict compliance.

Conversely, the Legislature requires a recording in statutes where the mortgagee or anyone holding thereunder takes steps to exercise the power of sale. G.L. c. 244 § 35B (2)(f) states in relevant part, "[t]he creditor, or an officer or duly authorized agent of the creditor, *shall record* this affidavit with the registry of deeds for the county or district where the land lies." (emphasis added). See also G.L. c. 244 § 35C (b) which states in relevant parts, "[t]he creditor, or an officer or duly authorized agent of the creditor, *shall record this affidavit* with the registry of deeds for the county or district where the land lies."(emphasis added). The foreclosing entity is also required to record an affidavit of sale detailing the steps taken to exercise the power of sale. (See G.L. c. 244 § 14 & 15). The Legislature did not amend either G.L. c. 244 § 14 or G.L. c. 244 § 15

when it enacted § 35A or its amendments. There is no requirement that a recital of § 35A compliance must be in the Affidavit of Sale. (See G.L. c. 244 § 14).

Also worth noting, the Legislature did not place a requirement in § 35A to ensure the Notice to Cure was served via registered mail. The Appellants gloss over these facts, but they are crucial. G.L. c. 244 § 14 requires service of the notice of sale via certified mail to all persons of record, *prior to commencing the foreclosure*. (See G.L. c. 244 § 14 which states "unless a copy of said notice of sale has been sent by *registered mail to all persons of record*...")(emphasis added).Because the Legislature did not require certified mail delivery, it did not consider the notice of right to cure to be of the same import as the notices required to properly exercise the power of sale.

IV. The Appellants' attempt to limit the definition of the term "mortgagee" contained in § 35A, which was not the Legislature's intent.

The Appellants maintain that the term "mortgagee" means only the holder of the mortgage and as a result the Notice in the case at bar was defective. The Appellants definition of "mortgagee" is too narrow and inconsistent with the legislative intent and purpose of the statute. The very purpose of the legislation was to provide homeowners the opportunity to negotiate

with their servicer/lender in an attempt to modify the existing loan and avoid foreclosure. See Report.

Many mortgages in the Massachusetts "denominated MERS as mortgagee acting 'solely as nominee for [ABC] and [ABC]'s successors and assigns...Under Massachusetts law, a nominee in such a situation holds a *bare legal interest* and the note holder enjoys the beneficial interest." Orellana v. Deutsche Bank Nat'l Trust Co., 2013 U.S. Dist. LEXIS 135698 (D. Mass. 2013). "MERS's mortgagee status is narrowly circumscribed: it acts *solely as "nominee" for the owner or servicer of the mortgage*, including the owner's or servicer's successors and assigns." Culhane v. Aurora Loan Servicing, 826 F.Supp.2d 352 (1st Cir.)(2011) (emphasis added).

The MERS system was created to track off record transfers of interest in loans. Notwithstanding MERS designation as mortgagee, a "*mortgage may be enforced only by, or on behalf of, a person who is entitled to enforce the obligation the mortgage secures.*" Restatement (3rd) Property, comment to § 5.4 (c) (emphasis added). The Restatement goes further to say:

> [A] [m]ortgage may not be enforced except by a person having the right to enforce the obligation or one acting on behalf of such person. As mentioned, in general a mortgage is unenforceable if it is *held by one who has no right to enforce the secured obligation*. For example, assume that the original mortgagee transfers the mortgage

> alone to A and the promissory note that it secures to B. Since the obligation is not enforceable by A, A can never suffer a default and hence cannot foreclose the mortgage. B, as holder of the note, can suffer a default. However, in the absence of some additional facts creating authority in A to enforce the mortgage for B, B cannot cause the mortgage to be foreclosed since B does not own the mortgage...
>
> *The result is changed if A has authority from B to enforce the mortgage on B's behalf*. For example, A may be a trustee or *agent of B* with responsibility to enforce the mortgage at B's direction. A's enforcement of the mortgage in these circumstances is proper . . . *The trust or agency relationship may arise from the terms of the assignment, from a separate agreement, or from other circumstances. Courts should be vigorous in seeking to find such a relationship, since the result is otherwise likely to be a windfall for the mortgagor and the frustration of B's expectation of security*. Id. (emphasis added).

While MERS's role is important and has long been accepted by the federal and state governments, the courts, Fannie Mae and Freddie Mac, lenders and servicers, both in the Commonwealth and nationwide, MERS does not and could not directly assist any mortgagor with finding ways to cure a default or avoid foreclosure. In the case of MERS, the limited definition of "mortgagee" suggested by the Appellants would not achieve the intent of providing a mortgagor the right to cure because the holder of the bare rights contained in the mortgage lacks the ability to modify the note, make any other loss mitigation arrangements.

The only practical interpretation of § 35A, which is consistent with and would achieve the Legislature's objective, is a broad definition of mortgagee which includes lenders and servicers. The Brown court recognized that if courts adopt the Appellants interpretation of § 35A, the mortgagor would be dealing with a "party that, without the control of the underlying note, would have *no authority to accept payment to cure a mortgage loan default or modify a mortgage loan* (here, MERS, with an office in Reston, Virginia housing a set of disembodied computers maintained by a clerical staff). *The irony is obvious.*" Id. at 17 (emphasis added). MERS has no authority to engage in loss mitigation efforts with the mortgagor, so including MERS's information on the § 35A notice would not achieve the Legislature's intent of connecting the mortgagor with the individual ultimately responsible to assist in curing a default.

The United States District Court held that the terms mortgagee and servicer are interchangeable. Sheehy v. Consumer Solutions 3, LLC, 2013 U.S. Dist. LEXIS 132747 (D. Mass.2013). In Sheehy the Court recognized that the Legislature provided that the Division of Banks ("DOB") was to promulgate regulations to help implement § 35A. The federal court stated, "[t]he [DOB] has promulgated regulations

providing guidance and standardization on compliance with § 35A. Those regulations define the terms "mortgagee" and "creditor" to *expressly include "mortgage servicer."* Id. Furthermore, the [DOB] issued a Frequently Asked Question section on its website that advise[d] the following:

> Q: The regulations do not explicitly allow for the mortgagee or servicer to send the Notice on letterhead. *Is it okay for the lender to send the Notice on letterhead?*
> A: *Yes.* A mortgagee or mortgage servicer or *any entity authorized to act on behalf of the mortgagee may send the Notice* on its letterhead.
> Q: Is it *acceptable for the servicer to put its name in the Notice* everywhere the word "Mortgagee" appears?
> A: *Yes.* It is acceptable for the servicer or any entity authorized to act on behalf of the mortgagee to put its name in every space that references mortgagee. The references should be consistent throughout the Notice." Id. at 4, 5 (emphasis added).

In March 2012, the Division of Banks promulgated regulations defining the term "mortgagee" as it relates to § 35A. (See 209 Code Mass. Regs. 56.02). The pertinent regulation issued pursuant to this statute, defines "Mortgagee" as:

> An entity to whom property is mortgaged, the mortgage creditor or lender including, but not limited to, *mortgage servicers*, lenders in a mortgage agreement and *any agent, servant or employee of the mortgagee* or any *successor in interest or assignee of the mortgagee's rights*, interests or obligations under the mortgage agreement. Id. (emphasis added)

As explained *supra*, the mortgage servicer, as the agent for the lender, typically sends the right to

cure notice, which complies with the statutory requirements.

V. There is a split among the lower courts regarding compliance with § 35A.

Several courts in the Commonwealth agree with the Appellee's and the Amici's assertion that substantial compliance with § 35A is sufficient. See US Bank, N.A. v. Seta, (Barnstable D.Ct.)(11-SU-0910); Conti v. Wells Fargo Bank, N.A., (11 MISC 456834 AHS 2012 WL 2094375) (Mass. Land Ct.) (2012); Courtney v. US Bank, (D.Mass.)(12-12181-NMG) (Gorton, J) (2013); US Bank v. Goncalves, (S.E. Hsg. Ct.)(11-SP-2822) (Edward, J.)(2012); See Sovereign Bank v. Sturgis, 863 F. Supp. 2d 75 (D. Mass. 2012). However, some courts rely on strict compliance. The split in authority between the courts has led to uncertainty, particularly regarding title to post-foreclosure real estate.

A judge in the Quincy District Court recently granted judgment for possession to the former mortgagor ruling that the bank failed to strictly comply with § 35A and thus the foreclosure sale was invalid, despite the United States District Court of Massachusetts declaring the foreclosure proper and the United States Court of Appeals for the First Circuit affirming the District Court's ruling. (See National Mortgage LLC v. Culhane, et. al, (Quincy D.Ct) (13-SU-0726)(Coven, J.)(2013). See also Culhane v. Aurora

Loan Servs., 826 F. Supp. 2d 352 (D. Mass. 2011), Culhane v. Aurora Loan Servs. of Neb., 708 F.3d 282 (1st Cir. 2013). The United States Court of Appeals for the First Circuit concluded "that Aurora's foreclosure of the [former owner's] property *complied with the requirements of applicable law.*" Culhane v. Aurora Loan Servs. of Neb., 708 F.3d 282, 295 (emphasis added). The judge in Quincy District Court declined to give weight to the rulings of the United States District Court of Massachusetts or the United States Court of Appeals for the First Circuit, as it relates to the validity of foreclosure. This is one of many examples where the common law doctrine of res judicata and laches are ignored in summary process evictions.

The cases decided in the Land Court have held that a notice that incorrectly identified the name of the mortgagee but otherwise substantially complied with the requirements of § 35A and provided the borrower with information regarding the entity with the "ultimate authority on the Mortgage and Note" was sufficient. Conti v. Wells Fargo Bank, N.A., (11 MISC 456834 AHS)(Mass. Land Ct.) (2012). In an analogous Truth in Lending Act context, the 1st Circuit Court of Appeals emphasized "objective reasonableness, rather than subjective understanding" in upholding a notice

that was facially deficient due to contradictory deadlines because it contained sufficient information for a "reasonably alert person" to determine the correct deadline. See Palmer v. Champion Mortg., 465 F.3d 24, 28-29 (1st Cir. Mass. 2006). See also Carye v. Long Beach Mortg. Co., 470 F. Supp. 2d 3 (D. Mass. 2007) (holding that even though the notice failed to include the date of the transaction an "average person would be aware" of the deadline).

If this Court agrees with the Appellants' position, it would be impractical for third party buyers at foreclosure sales to determine if the foreclosing entity met all the technical requirements of § 35A. Moreover, it would be difficult for a third party buyer of a post-foreclosure property to obtain judgment in the summary process action against a former mortgagor who raises a § 35A strict compliance defense or counterclaim. This is not speculation, the amici are seeing former mortgagors challenging third party purchasers right to possession in summary process on the basis of § 35A. See Samoyoa v. Guzman, (N.E. Hsg. Ct.) (Kerman, J.)(13-SP-3153). In Samoyoa, the former mortgagor is currently challenging the third party buyers, who seeks to occupy the unit for dwelling purposes, right to possession based on § 35A.

In another lower court case, the judge declared, "[a]fter considering this issue carefully, I conclude[d] that in a summary process action brought by a purchaser after foreclosure against a holdover mortgagor, it is not appropriate to require the [new owner] to *show technical compliance with all of the provisions of § 35A* in order to establish a prima facie case." Federal Home Loan Mortgage Corp. v. LaPorta, et. al., (Chelsea D.Ct.) (LaMothe, A.J.)(12-SU-0335)(2013)(emphasis added).

VI. G.L. c. 183 § 21 provides for certainty of title following foreclosures that comply with the power of sale. Failure to adhere to the statute will frustrate the housing market recovery.

It is well settled that "one who sells under a power [of sale] 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." Moore v. Dick, 187 Mass. 207, 211 (1905). Conversely, a foreclosure that complies with statutory requirements "shall forever bar the [former mortgagor] and all person claiming under him from *all right and interest* in the mortgaged premises, whether at law or in equity." G.L. c. 183 § 21 (emphasis added).

Some non-judicial foreclosure states, such as New Hampshire, impose a statute of limitation on challenges to provide certainty of title once the foreclosure is complete. This allows third party

buyers and foreclosing entities the ability to convey title without the challenges or attack on their superior right of title. New Hampshire, also a non-judicial foreclosure state, has a statute that is analogous to the power of sale set forth in G.L. c. 183 § 21. N.H. Rev. Stat. Ann. § 479: 25 ("RSA § 479:25"). RSA § 479:25 II-a in relevant part states:

> "No claim challenging . . . the conduct of the foreclosure sale *shall be brought by the [former owner]* or any record lienholder after *one year and one day* from the date of the recording of the foreclosure deed for such sale (emphasis added)."

Under RSA § 479:25 II-a, for a former owner "to preserve a challenge to the validity of the foreclosure," he or she must file an action to enjoin the foreclosure *prior to the sale*. Gordonville Corp. N.V. v. LR1-A Ltd. P'ship, 151 N.H. 371, 377 (2004) (emphasis added). "If the [former owner] fails to do so, he or she *may not challenge the foreclosure's validity* based on facts which the [former owner] knew or should have known soon enough to reasonably permit the filing of a petition prior to the sale (emphasis added)." Murphy v. Fin. Dev. Corp., 126 N.H. 536, 540 (1985); See also People's Utd. Bank v. Mtn. Home Developers of Sunapee, LLC, 858 F. Supp. 2d 162, 167-68 (D.N.H. 2012). A statutory bar would apply after one year of the foreclosure sale in New Hampshire. In a recent opinion issued by the Federal District Court

Judge in New Hampshire held that "challenges to the foreclosure must occur *before the foreclosure sale is held*, relying upon RSA § 479:25". See Calef v. Citibank, N.A., 2012 U.S. Dist. LEXIS 135159 (D.N.H. 2012). In Calef, the federal court applied New Hampshire state law and found that the former owner, who was foreclosed upon, was barred from asserting various challenges after the foreclosure sale.

Numerous lower courts have ruled in various summary process actions that the foreclosure was void based on § 35A without any thought to the effect on title. In many cases the former mortgagor, despite knowledge of the foreclosure sale, asserts a § 35A challenge within the summary process eviction. This Court must balance the equities and consider the highly prejudicial effect on bona fide purchasers caused by delays in asserting the claims raised by the Appellees in the Housing Court.

A third party buyer who purchases a foreclosed property ascertains the marketability of title through public records searches of the registry of deeds and probate courts. Title insurance is issued based on the quality of title and that information is also derived from the public records. This Court understood the need to ascertain title from public records when it issued its decision in Bank of New York v. Bailey,

460 Mass. 327 (2011). In the Bailey case, this Court ruled that "in a summary process action for possession after foreclosure by sale, the plaintiff is required to make a *prima facie* showing that it obtained a deed to the property at issue and that the deed and affidavit of sale, showing compliance with the statutory foreclosure requirements, were *recorded.*" Id. at 336 (emphasis added). Essentially, an owner who derives title from a foreclosure who seeks possession in a summary process action must prove its title subject to the defendant's right to challenge it.

If this Court permits former mortgagors to defend summary process cases based on strict compliance with § 35A, conveying foreclosed properties will be risky and create a "chilling effect" on potential buyers from purchasing those properties. Some buyers purchase properties at foreclosure to occupy as their primary residence. It takes considerable time and effort to obtain a judgment for possession. This is counter-productive to the recovery of the housing market. Failing to attract private buyers would further frustrate the bank's ability to obtain the highest price possible at a foreclosure. Lower prices at foreclosure sales increase any deficiencies to the former mortgagor after the foreclosure. The amici are

not speculating on a result that may occur because this Court has seen this result as it pertains to deficiencies assessed post-foreclosure in Cambridge Sav. Bank v. Cronin, 289 Mass. 379, 383 (1935).

VII. If this Court agrees with the Appellants, the decision must be prospective.

This Court has established the legal framework for analyzing whether a ruling should be prospective. See Knott v. Racicot, 442 Mass. 314 (2004) (ruling that option contracts are not presumptively valid if executed under seal, but must be supported by consideration if prospective); Keller v. O'Brien, 425 Mass. 774 (1997)(holding that alimony terminates on remarriage of spouse is prospective); Eaton v. Federal Nat'l Mortgage Assn., 462 Mass. 569 (2012)(holding that a foreclosing entity must show that it, or an agent acting on its behalf, held the note upon exercising the power of sale).

In determining whether a decision should be prospective, the Court looks at three factors:

> (1)Whether a new principle has been established whose resolution was not clearly foreshadowed; (2) whether retroactive application will further the rule; and (3) whether inequitable results, or injustice or hardships, will be avoided by a holding of non-retroactivity.

Keller v. O'Brien, 425 Mass. 774,782 (1997) citing McIntyre v. Associates Fin. Servs. Co. Mass., 367 Mass. 708, 712 (1985), citing Chevron Oil Co. v.

Huson, 404 U.S. 97, 106-107, 92 S. Ct. 349, 355-356, L.ED.2d 296 (1971). Decisions that apply rulings prospectively are often limited to cases involving contract and property law issues, such as the cases at bar. See Payton v. Abbott Labs, 386 Mass. 540 (1982).

A retroactive application of this Court's ruling would adversely affect the real estate market. Third party buyers relying on the foreclosure being valid have bought and sold foreclosed properties, often several times over. A majority of innocent purchasers of property will find their homes to be unmarketable either for sale or financing. There would be irreparable harm caused to many property owners if a ruling is applied retroactively.

CONCLUSION

For the foregoing reasons, Housing Court's decision should be affirmed. However, if this Court is inclined to disaffirm the Housing Court ruling, the application should be applied only on a prospective basis.

Respectfully submitted
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CERTIFICATION of COMPLIANCE

I, Benjamin O. Adeyinka, counsel for the Amici, hereby certify that this brief submitted herewith complies with the rules of court that pertain to the filing of amicus briefs, including but not limited to: Mass.R.A.P. (17)(brief of an amicus curiae); Mass.R.A.P. (19)(filing and serving of briefs); Mass.R.A.P. (20)(form of brief, appendices' and other papers).

Respectfully submitted
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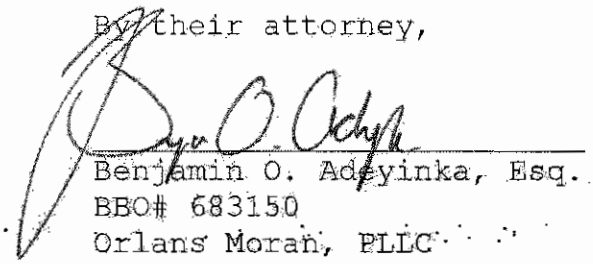
By their attorney,



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