Supreme Judicial Court

COMMONWEALTH OF MASSACHUSETTS
No. 10694

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

v.

ANTONIO IBAÑEZ,
DEFENDANT-APPELLEE.

WELLS FARGO BANK, N.A., AS TRUSTEE FOR
ABFC 2005-OPT1 TRUST, ABFC ASSET BACKED
CERTFICATE SERIES 2005-OPT1,
PLAINTIFF-APPELLANT,

v.

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

ON APPEAL FROM A JUDGMENT OF THE LAND COURT

**BRIEF AND SUPPLEMENTAL RECORD APPENDIX
OF THE DEFENDANTS-APPELLEES
MARK A. LARACE AND TAMMY L. LARACE**

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STATEMENT OF ISSUES

I. Where the "Mortgagee's Sale of Real Estate" form is an integral part of G.L. c. 244, §14, and this form requires it to be brought and executed by the "present holder of the Mortgage", there is no ambiguity as to statutory language and the intent of the legislature in this regard.

A. The standard of appellate review for Land Court's statutory construction of G.L. c. 244, §14 is de novo.

B. The Land Court's statutory interpretation and construction of G.L. c. 244, §14 is correct and should be upheld.

II. Where there is no pre-notice and pre-sale Assignment of Mortgage to Wells Fargo Bank, as Trustee of ABFC 2005-OPT1 Trust, neither Wells Fargo Bank in its own capacity or in its capacity as trustee of said trust, is the "present holder of the Mortgage" for purposes of G.L. c. 244, §14 notice requirements in order to bring a valid foreclosure notice of LaRaces' home.

III. The Land Court correctly held that the LaRace Mortgage Assignment "in blank" failed to convey the LaRace Mortgage to the ABFC 2005-OPT1 Trust.

IV. G.L. c. 183, §6C clearly requires the name and address of the assignee to an Assignment of Mortgage in order to be in recordable form. Therefore, the attempted assignment of the LaRace Mortgage to the

trust is ineffectual and also violative of the trusts own PSA requirements.

V. Title Standard No. 58, a "professional opinion" drafted fifteen (15) years ago and proffered by REBA, does not constitute a rule of law nor does it enjoy any legal precedential value.

VI. Where Wells Fargo Bank "had no interest in the Mortgage being foreclosed (either recorded or unrecorded) at the time of publication or sale . . . [and] there was nothing in the Notice to indicate that it was acting (or purporting to act) as someone else's agent, much less the agent of the principal," Wells Fargo Bank was not the "present holder of the Mortgage" for purposes of G.L. c. 244, §14.

VII. Where Wells Fargo failed to comply with the court Order to submit properly authenticated records and failed to submit affidavit(s) of individual(s) with personal knowledge regarding the "Collateral File", there is no abuse of discretion by the Land Court in denying Plaintiffs' Motion to Vacate Judgment.

VIII. Where Wells Fargo failed to produce any evidence that there existed a validly executed, pre-notice, pre-sale Assignment of Mortgage rendering Wells Fargo Bank, in its capacity as Trustee of the ABFC 2005-OPT1 Trust, as the "present holder of the [Defendant LaRaces'] Mortgage", the G.L. c. 244, §14 Notice of Mortgagee's Sale of the Defendant LaRaces'

home is invalid, and the subsequent foreclosure sale is hence invalid.

IX. Where Wells Fargo failed to follow the requirements of a Massachusetts Trust, the conveyance of the LaRace Mortgage was ineffective. The terms of the trust clearly required the Depositor to convey the LaRace Mortgage, in recordable form to the trust on or prior to the Closing Date.

STATEMENT OF THE CASE

On October 30, 2008, the Plaintiff Wells Fargo Bank, N.A., as Trustee for ABFC 2005-OPT1 Trust, ABFC Asset Backed Certificates Series 2005-OPT1, brought a complaint against the Defendants Mark LaRace and Tammy LaRace in the Massachusetts Land Court. The Plaintiff sought equitable relief, pursuant to G.L. c. 231A, §1 (Declaratory Judgment) and G.L. c. 240, §6 (Removal of Cloud on Title) as follows:

a) the LaRaces' right, title, and interest in their home, previously having been foreclosed, had been extinguished by the Land Court's prior judgment on a Complaint to Foreclose Mortgage; and ii) the Plaintiffs' utilization of the Power of Sale contained in the Mortgage;

b) the publication of the Notice of Sale in the Boston Globe did not cause a cloud on title:

c) the title to Defendants' foreclosed property was vested in the Plaintiff in fee simple; and

d) for such other and further relief as the Court deems meet and appropriate. (A4, 24-25)

On January 5, 2009, a Case Management Conference was held and the following entry was made on the docket:

> . . . The issues are two-fold: (1) whether publication of the foreclosure sale in the Boston Globe complied with G.L. c. 244 §14 . . . , and (2) whether the Plaintiffs' failure to record its Mortgage assignment prior to the conduct of the foreclosure sale invalidates the sale. . . . (Emphasis supplied.)

(A4, 61)

On December 29, 2008, the Plaintiff filed a Request for Default, and on February 2, 2009, the Plaintiff filed a Motion for Entry of Default Judgment, which was heard on February 11, 2009. (A4, 5, 48, 225, 477-514)

On March 26, 2009, the Land Court issued a Memorandum and Order on Plaintiffs' Motion. (A577) On the same date, it also entered Judgment that the LaRace foreclosure was invalid because the G.L. c. 244, §14 notices failed to name the present holder of the Mortgage. (A594-95)

On April 6, 2009, the Plaintiff filed a Motion to Vacate Judgment, pursuant to Mass. R. Civ. P. Rule 59(e) and Rule 60(b)(1), (4) & (6). (A596-618)

After a hearing on April 17, 2010 on Plaintiffs' Motion to Vacate Judgment, the Land Court gave Plaintiff leave to submit on or before May 27, 2009 "properly authenticated" and "attested" documents

relative to the ownership of the LaRace Mortgage and Note. (A740-41)

On June 8, 2009, the Plaintiff filed a Memorandum of Law in Support of its Motion for Entry of Default Judgment,[1] to which it attached six (6) exhibits and three (3) affidavits.

On October 14, 2009, the Land Court issued a Memorandum and Order denying Plaintiffs' Motion to Vacate Judgment. (A7, 1136-62)

On October 30, 2009, the Plaintiff filed a Notice of Appeal from the March 26, 2009 Judgment and the October 14, 2009 denial of Plaintiffs' Motion to Vacate Judgment. (A1163)

STATEMENT OF FACTS

A. Undisputed Facts Established by the Plaintiffs' Complaint and Stipulations

Based upon the Defendants' failure to answer Plaintiffs' complaint, the following facts are undisputed:

Wells Fargo Bank, N.A., ("Wells Fargo") has a usual place of business at the offices of Option One Mortgage Corporation ("Option One"), 6501 Irvine Center Drive, Irvine, California, 92618.[2] (A22) Wells Fargo

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[1] Please note that the Plaintiff did not file a Memorandum of Law in support of its Motion to Vacate Judgment, the motion that was currently pending before the court.

[2] Option One is a wholly owned subsidiary of Block Financial, which is in turn a wholly owned subsidiary of H&R Block, Inc., whose principal business is the origination, sale and servicing of non-conforming

Bank, N.A., is the Trustee for ABFC 2005-OPT1 Trust. (A22) The Defendants Mark and Tammy LaRace are adult individuals and natural persons, formerly residing at 6 Brookburn Street, Springfield, Hampshire County, Massachusetts, 01119. (A22-23)

The Defendants' property at 6 Brookburn Street was encumbered by a Mortgage that the Defendants had granted to Option One on December 16, 2005. (A23)

The Plaintiff published, pursuant to G.L. c. 244, §14, a "Notice of Mortgagee's Sale of Real Estate", that 6 Brookburn Street would be sold at a foreclosure auction on July 5, 2007. (A23) On said date, the Property was auction to Wells Fargo for $120,397.03. (A24)

On May 7, 2008, the "Originator" Option One executed an Assignment of Mortgage to the Plaintiff.[3] The Assignment had an effective back-date of April 18, 2007. Plaintiff alleged that by virtue of this Assignment the Plaintiff became the holder of the Defendants' Mortgage. (A23)

On May 12, 2008, the Assignment was recorded and on May 15, 2008, the "Foreclosure Documents" were recorded with the Hampden Registry of Deeds. (A23)

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mortgage loans. (A2131) According to corporate filings with Massachusetts Secretary of State, Option One ceased active operations in early 2008 and withdrew its corporate registration in July 2008. (A1155)

[3] Whether Option One had ceased active operations as of the time it executed the Assignment of Mortgage is an open and unanswered question.

B. Facts Plaintiff Stipulated to at February 11, 2009 Hearing

At the February 11, 2009 hearing on Plaintiffs' Motion for Entry of Default Judgment, the Plaintiff stipulated as follows:

1. that the G.L. c. 244, §14 Notices were not issued in the name of the Mortgage holder of record (A484, 486);
2. the Notices issued named the ultimate assignor (A486); and
3. at the foreclosure sale, there were no other bids (A502).

C. Plaintiff Did Not Provide Any Documentary Evidence Regarding the Holder of the Mortgage Prior to Entry of March 26, 2009 Judgment

There was no documentary evidence whatsoever attached to the Plaintiffs' Complaint. (A22-25) The Plaintiff did not attach or introduce any documentary evidence, i.e., LaRace Note and Mortgage, Assignment of Mortgage, Power of Attorneys, and the like, that related to the issue of "present holder of the Mortgage" under G.L. c. 244, §14 prior to the entry of Judgment on March 26, 2009.

D. Plaintiffs' Claim for Relief

The Plaintiff sought to remove a cloud on title under G.L. c. 240, §10. (A24) Further, it sought a declaratory judgment that: a) the Defendants' right, title, and interest in the Property had been extinguished by the July 3, 2007 Judgment on Complaint to Foreclose and/or upon the execution of the Power of Sale contained in the Mortgage; b) that title was

vested in the Plaintiff in fee simple; and c) for such other relief as the Court deemed meet and just. (A24-25)

E. Proceedings up to Entry of Judgment

On December 29, 2008, the Plaintiff filed a request for default. (A4, 48) According to the Docket Sheet, no default was ever entered against Defendants. (A3-8)

On January 5, 2009, the Court determined that one of the issues to be address in this case was:

> whether the Plaintiffs' failure to record its Mortgage assignment prior to the conduct of the foreclosure sale invalidates that sale. (A61)

On February 2, 2009, the Plaintiff filed a Motion for Default Judgment. (A5, 225) On February 6, 2009, the Plaintiff filed a Supplemental Memorandum of Law. (A5, 371) On February 16, 2009, the Plaintiff filed a Second Supplemental Memorandum of Law. (A5, 515-525)

In none of these three (3) court filings is there any mention that the Defendants had failed to respond to the Plaintiffs' Complaint nor is there any request that a default judgment enter as a result of the Defendants' failure to defend. Instead, the Plaintiff addressed only the issues set out in the January 5, 2009 Order.

On February 11, 2009, a hearing on the Motion for Default Judgment was held. (A5, 479-514)

On March 26, 2009, the Land Court issued: (1) a Memorandum and Order on Plaintiffs' Motion for Entry of Default Judgment (A577); and (2) Judgment (A594-95).

The Land Court found and ruled that the LaRace foreclosure was invalid because the Plaintiff was "not assigned an interest in the Defendants' Mortgage until after the foreclosure sale had taken place;" and "because the Notices . . . failed to name the Mortgage holder as required by G.L. c. 244 §14." (A595)

F. Post-Judgment Proceedings

1. Motion to Vacate Judgment (Rules 59(e) and 60(b)(1)(4)&(6))

On April 6, 2009, the Plaintiff filed a Motion to Vacate Judgment, pursuant to Mass. R. Civ. P. Rules 59(e) & 60(b)(1), (4), & (6). (A596-618) The Plaintiff argued that: a) it was "surprised" by the Judgment, pursuant to Rule 60(b)(1); b) that the judgment is void because the Plaintiffs' right to due process was violated under Rule 60(b)(4); and c) the Land Court's failure to allow the Plaintiff "an opportunity" to amend its complaint and the court's misapprehension of the Plaintiffs' core argument entitles the Plaintiff to relief under Rule 59(e) and Rule 60(b)(6).[4] (A617)

On April 17, 2009, the Land Court held a hearing on Plaintiffs' Motion to Vacate Judgment. (A5, 681-739)

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[4] It should be noted that the Plaintifff did correctly state the standard of review of a Rule 59(e) and/or Rule 60(b) motion as being "clear abuse of discretion." (A598)

2. Leave for Plaintiff to Submit Documents

Based upon the Plaintiffs' representation "that documents may exist which show a pre-notice, pre-sale assignment sufficient under G.L. 244 §14," the Land Court issued the following Order:

> [T]he Plaintiff was given leave to submit the following materials …, each of which must be properly authenticated: (1) the documents which created the securitized trust and govern its operation, (2) the documents identifying the "blocks of mortgages sold into that trust," …, (3) the "Collateral File" for the Mortgage **as it existed at the time of 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, (4) the master servicing agreement, …, (5) the power of attorney under which the loan servicer acted in this instance, along with recording information, and (6) the powers of attorney or certificates of incumbency, … . 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 a 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.** (Emphasis in original.) (A740-741)

3. Plaintiffs' Submissions in Response to Order

On June 8, 2009, the Plaintiff filed its Third Supplemental Memorandum of Law. (A744-775) This

Memorandum of Law requested the Land Court to enter a judgment that (a) vacates the March 26, 2009 Judgment; (b) issues a new judgment declaring Defendants' right, title, and interest in the property be extinguished by the Plaintiffs' exercise of the Power of Sale contained in the Mortgage; and (c) declares that there is no cloud on title. (A774)

Attached to this Memorandum of Law was Exhibit A, (A1-15)(portions of documents downloaded from a website)(A776-881); Exhibit B (Mortgage Loan Schedule)[5]; Exhibit C (the "Collateral File")(A890-929); Exhibit D (Limited Power of Attorney)(A930-34); Exhibit E (Option One Mortgage Corporation Consent)(A935-37); Exhibit F (Foreclosure Documents)(A938-45); and Affidavits of Robert Salazar (A1080-81), Michelle Halyard (A1076-77), and Attorney Walter H. Porr, Jr. (A1073-1075).

4. **No Documents Submitted by Plaintiff were Properly Authenticated**

On June 8, 2009, Attorney Walter H. Porr, Jr. filed a "Second Supplemental Affidavit" which addressed the documentation that he produced on Wells Fargo's behalf in support of the Plaintiffs' Motion to Vacate Judgment. (A1073-75) None of the documentation which Attorney Porr produced, other than the "Collateral

[5] It should be noted that the Plaintiffs' Appendix does not contain Exhibit "B"; instead, the Plaintifffs have seemingly put in its place Mortgage Loan Schedule submitted by Marie McDonnell, *Amicus Curiae*.

File", was provided by Wells Fargo Bank, N.A., itself, or any authorized agent of said bank, or any other entity that may have been involved in the creation and/or use of said documentation. None of the documentation was authenticated by anyone, including Wells Fargo, or any authorized agents acting on its behalf, including attorney Walter H. Porr, Jr., or the website from whence all of it, except the "Collateral File", had been downloaded. (A1073-75)

As for the hard copy of the "Collateral File" that was produced, it also was not authenticated. There is no statement or affidavit from anyone at Wells Fargo or any other entity with first hand personal knowledge regarding the LaRace "Collateral File". The Affidavits of Robert Salazar and Michelle Halyard, two (2) employees of American Home Mortgage Servicing, Inc., filed by Plaintiff do not authenticate the "Collateral File". (A1076-77, 1080-81) They have no personal knowledge regarding the file itself or the contents thereof.

5. Plaintiff Did Not Provide Any Affidavits or Other Attestation Required by the Court Relating to the "Collateral File"

There are no affidavits or other attestation from any "witness with direct personal knowledge" as to the contents of the "Collateral File" at the time the foreclosure sale was noticed and/or conducted. (A741, A744-946, 1073-1077, 1080-81) Robert Salazar could

attest only to his part of delivering a request to Wells Fargo to obtain the "Collateral File" and once he was in receipt of it, forwarding it on to Michelle Halyard. (A1081)[6] Michelle Halyard could only attest to her part in delivering a request to Robert Salazar to obtain the "Collateral File" and once she was in receipt of it from Robert Salazar, forwarding it on to Attorney Walter H. Porr, Jr. (A1077) Other than suggesting that the "Collateral File" that he received was in fact the "original" one, which is not borne out by Robert Salazar's Affidavit, Attorney Porr's affidavit added nothing in this regard. (A1073-75)

6. Produced Documents Lack Evidentiary Support

The Land Court noted that, except for Registry recorded filings, the documents produced by Wells Fargo "lack evidentiary support". (A1146-47) Due to its ruling that Wells Fargo was not surprised pursuant to Mass. R. Civ. P. Rule 60(b)(1), that the Plaintiff is not entitled to a "do-over", and that the newly-presented facts do not lead to a different result, the court determined that it did not need to and would not consider the evidentiary issues and/or whether the documents produced were true or not. (A1146-47, including footnote 23 & 24)

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[6] Paragraph 5 of Salazar's Affidavit reflects receipt of "LaRace Collateral File" from Wells Fargo. It does not indicate or suggest that the file that he received was "original."

G. Facts Relating to the Securitization of the LaRace Mortgage

The central point to consider is that while Wells Fargo may have provided the court with over one thousand (1000) pages relating to the creation and operation of the ABFC 2005-OPT1 Trust, its Pooling and Servicing Agreement ("PSA")(A1443-1780), its Form S-3 Registration Statement (A1781-2062), and its Prospectus Supplements (A2063-2515), there is not one indicium of documentation as to what actually happened to the LaRace Note and Mortgage once it was signed and delivered to Option One and Option One in turn issued a blank undated Assignment of Mortgage in May 2005 up until the time of the purported post-foreclosure Assignment of Mortgage dated May 7, 2008. (A916, 940)

The PSA informs us that what is supposed to happen to the LaRace Note, Mortgage, and other related documents is that sometime prior to the Trust Closing Date of October 31, 2005, the "Originator" Option One should have sold the Note for value to the "Seller" Bank of America; and the "Seller" then would have sold the Note for value to the "Depositor" Asset Backed Funding Corporation; and the "Depositor" then would have sold the Note for value to the ABFC 2005-OPT1 Trust. (A1457-1504, 1520-31, 2072-74, 2130-38, SA2543-45, 2597-98)

Further, the securitization documentation required the "Originator" also to have assigned the LaRace

Mortgage in "recordable form" to the "Seller"; and the "Seller" to have assigned the LaRace Mortgage in "recordable form" to the "Depositor"; and then the "Depositor" was supposed to have assigned the Mortgage in "recordable form" to the "Trust". (A1457-1504, 1520-31, 2072-74, 2130-38, SA2543-45, 2597-98)

As for the Mortgage that the LaRaces signed to the "Originator" Option One, it has been established that it did not assign the LaRace Mortgage, in any form, let alone "recordable form" as required by the PSA, over to the "Seller" Bank of America (A916, 940); and the "Seller" did not assign the LaRace Mortgage in any form to the "Depositor" Asset Back Funding Corporation; and the "Depositor" did not assign the LaRace Mortgage to the ABFC 2005-OPT1 Trust. (A916, 940) Instead, the "Originator" signed, without corporate seal, a blank form entitled "Assignment of Mortgage" and this blank form allegedly found its way into the "Collateral File" produced by Wells Fargo to the Land Court. (A916, 1073-75)

The PSA repeatedly states that the only party that can assign and or transfer the LaRace Note, Mortgage, or related document into the ABFC 2005-OPT1 Trust is the "Depositor" Asset Back Funding Corporation. (A752-69, 1457-1504, 1520-31, 2072-74, 2130-38, SA2539-41, 2543-45, see Plaintiffs' Brief at 7-8) Nowhere does the PSA or any other of the securitization documents suggest that the "Originator" or the "Seller" may

assign and/or transfer any Mortgages and/or Notes into the Trust. In fact, the "Originator" and the "Seller" are expressly precluded from assigning or transferring any Notes and/or Mortgages and/or assignments of Mortgages into the trust. (A1520-31, 2072-74, 2130-38, SA2543-45)

The only Assignments of Mortgage were issued by the Originator Option One: a) an undated blank unrecordable Assignment of Mortgage, on which it appears that Option One's signature was notarized on May 26, 2005 (A916); and b) the May 7, 2008 Assignment of Mortgage, executed more than ten (10) months after the foreclosure sale on July 5, 2007, that was recorded in the Hampden Registry of Deeds. (A940)

The Defendants, for help in elucidation and understanding, refer to two (2) documents prepared by Mortgage Expert Marie McDonnell: a) the "LaRace Securitization Flow Chart" (SA2598); and b) the "LaRace Timeline" chart. (SA2599)

SUMMARY OF THE ARGUMENT

The Land Court made a thorough review of the law and facts before it, and delivered a well-reasoned opinion that should be affirmed by this court. First, the Land Court carefully considered the facts before it, and Massachusetts decisional case law, with regards to the interpretation of G.L. c. 244, §14. Massachusetts case law is clear, that in considering

the validity of the entity to enforce the power of sale in a borrower's Mortgage, the Note and the Mortgage are to be construed together. The facts clearly indicate that the LaRace Mortgage was not transferred in "recordable form" under Massachusetts law, nor was the assignment of the LaRace Mortgage conveyed in accordance with the trust's terms. Therefore, the Land Court did not err in its ruling. (pp. 19-27)

Second, the Plaintiffs' reliance on Title Standard No. 58 was misplaced, as it is only an expression of a "professional opinion", without the force of law. Plaintiffs' reliance on this statute was undertaken at their own peril. The Land Court carefully reviewed the supporting case law for Title Standard No. 58, and reasoned that the reading of that case law was flawed, and, therefore, the Title Standard has no basis in fact with regards to the situation of "back dated" Mortgages before this court. Further, contrary to Wells Fargo's assertions, a change in the understanding of Title Standard No. 58 will not create a disastrous result, as the Real Estate Bar Association has already amended this Title Standard once in response to a detrimental decision against its validity. Therefore, due to the fact that Title Standard No. 58 is merely an expression of "professional opinion", prospective only application of any detrimental ruling has no basis in statutory law or decisional case law. (pp. 28-34)

Third, Wells Fargo never provided any documentation regarding the LaRace Note, Mortgage, Assignments of Mortgage, other loan documents, Power of Attorneys, Pooling and Servicing Agreements, or Prospectus, prior to the March 26, 2009 Land Court Judgment. Wells Fargo never complied with the Land Court's Order to produce authenticated documents with their proffers of evidence (after the March 26, 2009 Judgment). Based upon the "evidence" proffered by Wells Fargo, under the Massachusetts Rules of Civil Procedure, the Land Court acted appropriately in denying Wells Fargo's Motion to Vacate. Therefore, the Land Court's ruling should be upheld. (pp. 35-39)

Fourth, Wells Fargo makes much of the fact that the "plain meaning" of the "securitization agreements" was ignored by the Land Court. This is so, Wells Fargo says, because the "plain language of the "securitization agreements" "clearly assigned" the LaRace Mortgage to the Trust. Unfortunately a close reading of the 1000+ ("clearly written" and "easy to understand") securitization agreements "clearly" shows that the terms of the trust were "clearly" not followed. The terms only authorized an entity named the "Depositor" to convey the LaRace Mortgage in recordable form (and Note) to the trust on or prior to the "Closing Date" (October 31, 2005). The Assignment of the LaRace Mortgage in evidence, clearly shows that a) it was initially assigned "in blank", and b) that when

it was later assigned, it was not conveyed by the "Depositor", c) nor was it in recordable form (under Massachusetts law), and d) it was conveyed well after the "Closing Date". Therefore, the Trust terms regarding the conveyance of the LaRace Mortgage and Note to the trust were clearly violated. Additionally, the Trust formation agreement (PSA) clearly provides the sole remedy for the Trustee and the Certificateholders for such defalcation, is to force the entity known as the "Seller" to repurchase or substitute this type of "Defective Mortgage Loan". Therefore, the Land Court did not err when it found that the conveyance of the LaRace Mortgage failed to follow the terms of the Trust. Based upon the fact that the Trust is a "Massachusetts Trust", the LaRaces are not seeking to enforce any colorable rights as a third party beneficiary to the PSA agreement, rather the LaRaces point to the fact that the terms of the trust (as well the terms encapsulated within the Prospectus Supplement) were not followed. (pp. 39-49)

ARGUMENT

I. WHERE THE "MORTGAGEE'S SALE OF REAL ESTATE" FORM IS AN INTEGRAL PART OF G.L. C. 244, §14, AND THIS FORM REQUIRED IT TO BE BROUGHT AND EXECUTED BY THE "PRESENT HOLDER OF THE MORTGAGE", THERE IS NO AMBIGUITY AS TO STATUTORY LANGUAGE AND THE INTENT OF THE LEGISLATURE IN THIS REGARD.

The Defendant contends that the Land Court did employ the familiar tools of statutory interpretation, as set out in Seideman v. City of Newton, 452 Mass.

472, 477-78 (2008), in analyzing G.L. c. 244, §14: Foreclosure under power of sale; procedure; notice; form. The Land Court interpreted said Statute:

> according to the intent of the Legislature ascertained from all its words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated. Courts must ascertain the intent of a statute from all its parts and from the subject matter to which it relates, and must interpret the statute so as to render the legislation effective, consonant with sound reason and common sense. Words that are not defined in a statute should be given their usual and accepted meanings, provided that those meanings are consistent with the statutory purpose.

Id. (A582)

A. The Standard Of Appellate Review For The Land Court's Statutory Construction Of G.L. c. 244, §14 Is De Novo.

It is clear that the Supreme Judicial Court shall review the Land Court's statutory interpretation and construction de novo.

B. The Land Court's Statutory Interpretation And Construction Of G.L. c. 244, §14 Is Correct And Should Be Upheld.

The Land Court found that the G.L. c. 244, §14 is "broadly speaking, a consumer protection statute," requiring "strict compliance" with its notice provisions. Citing Bottomly v. Kabachnick, 13 Mass.App.Ct. 480, 483-84 (1982), the Land Court determined that the notice to be issued pursuant to

G.L. c. 244, §14 must identify the present holder of the Mortgage. And failure to do so renders the "sale void as a matter of law." (A585)

Given the many problems that can arise and have arisen from Mortgage foreclosure sales, the need for "strict compliance" with this statute is readily discernible. (A585) As noted by the Land Court, "only the foreclosing party is advantaged by [a] clouded title at the time of auction." (A586)

Wells Fargo agrees that the form of foreclosure notice that is made part of G.L. c. 244, §14 explicitly requires that "the present holder of the Mortgage" be identified in the Notice. (A586-87)

Wells Fargo argues that it does not need to comply with this requirement because the statute does not preclude "the use of other forms" as circumstances may require. (A587)

Having carefully considered this argument, the Land Court dismisses it on the basis that the Plaintiffs' position: a) ignores Bottomly v. Kabachnick, which found that the foreclosure sale was void as a matter of law where the Notice failed to identify the holder of the Mortgage; b) ignores the "fundamental precept[]" that "courts must ascertain the intent of a statute from *all of its parts* and from the subject matter to which it relates; and c) the statute contemplates that the present holder of the Mortgage is the entity to give Notice. (A587-88)

The LaRaces agree with the Land Court's statutory construction and interpretation and request that it be upheld on appeal.

Below, the LaRaces address Wells Fargo's additional arguments, all of which were rejected by the Land Court in its well-reasoned Memorandum and Order issued on March 26, 2009, that: a) the statute, if read "in its practical application, purpose and effect", would allow post-foreclosure recording of Assignment of Mortgages; and b) case law and conveyancer's title standards support a post-Notice/post-foreclosure auction Assignment of Mortgage so long as the ultimate assignee was the foreclosing party. (A586-88)

II. MASSACHUSETTS COURTS HAVE LONG HELD THAT THE NOTE AND MORTGAGE ARE TO BE CONSTRUED TOGETHER IN DETERMINING THE RIGHT OF THE FORECLOSING ENTITY TO ENFORCE THE POWER OF SALE IN A BORROWER'S MORTGAGE CONTRACT.

> What colloquially is thought of as a Mortgage is comprised of two separate legal documents - the Note and the Mortgage. The Note evidences the debt agreed upon determined from the Mortgage transaction. The Note grants the Mortgagee the right to collect payment. The Note is a negotiable instrument that is typically not recorded on the registry of deeds. On the other hand, the Mortgage evidences the security interest arising from the Mortgage transaction. The Mortgage typically grants the Mortgagee the right to foreclose and must be recorded with the registry of deeds. Therefore the right to foreclose arises from the contractual language in the Mortgage.[7] *See also* Kluge v.

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[7] Meg Rehrauer* - Regaining The Wonderful Life of Home ownership Post-Foreclosure - Defending Homeowners From Eviction After Foreclosure By Attacking The Ownership Rights Of The Foreclosing Entity, Northeastern University Law Journal Vol. 2, No. 1 Spring 2010 at page 10.

> Fugazy, 536 N.Y.S.2d 92, 93 (N.Y. App. Div. 1988) (finding that "absent transfer of the debt, the assignment of the Mortgage is a nullity"); *see also* Robert L. Marzelli & Elizabeth S. Marzelli, Massachusetts Real Estate 2d §5.1 (Lexis 2003) (stating that "[p]rior to instituting foreclosure proceedings it is wise to examine the Note and the Mortgage")

G.L. c. 244, §14 requires that the power of sale in a Mortgage contract only becomes operative ***upon breach of condition*** in the bargained for "conditions" between the parties to the Mortgage contract. Under Massachusetts law, a Mortgagee need only make reference to "the Statutory Condition", to provide the borrower Notice of the precise conditions in a Mortgage contract, the breach thereof, which trigger the right of the Mortgagee to enforce the power of sale against the borrower in the Mortgage contract. "*The Statutory Condition requires a Mortgagee to repay principal and interest and to perform any obligation contained in the Note* ***and the Mortgage.***" §9.6 Eno & Hovey, 28 Massachusetts Practice: Real Estate Law. An Assignment of Mortgage is a contract between the Mortgagor and the current Mortgagee and/or a third party assignee. This view has been recently followed in Massachusetts, "The third party becomes the assignee Mortgagee, assuming the right to payment from the Mortgagor, the right to foreclose, and any other right granted to the Mortgagee under the original Mortgage." Commonwealth v. Fremont Inv. & Loan, 452 Mass. 733 (2008).

Therefore, as the Mortgage is a contractual agreement between the Mortgagee and the borrower, in order to enforce the bargained for power of sale clause in the security instrument, there must be a current nexis between the borrower and the Mortgagee. "*In determining the rights of the Plaintiff, the Note and Mortgage are to be construed together.*" Strong v. Jackson, 123 Mass. 60, 64 (1877).

III. THE LAND COURT CORRECTLY HELD THAT THE LARACE MORTGAGE ASSIGNMENT "IN BLANK" FAILED TO CONVEY THE LARACE MORTGAGE TO THE ABFC 2005-OPT1 TRUST.

The record clearly shows that at the time of the publication of the LaRace auction (indeed even at the auction itself) the assignment of the LaRace Mortgage was not in Wells Fargo's possession and purportedly was not so until ten months after the actual auction sale of the LaRace home. Wells Fargo misplaced its reliance upon the flawed premise behind REBA Title Standard No. 58 in so acting. As will be discussed below, Title Standard No. 58 is no more than a "professional opinion", in which the judiciary views as only a potential exception to the hearsay rule. As such Title Standard No. 58 is only conditionally admissible as evidence under the sound discretion of a trial judge, and, therefore, any reliance on a "title standard" is at one's own peril.

Unlike the LaRace Note, which is governed by Article 3 of the Uniform Commercial Code (and Codified

in Massachusetts under G.L. c. 106) that allows "assignment of negotiable instruments" in blank, the Mortgage is governed by traditional contract rules. An Assignment of Mortgage is a contract between the Mortgagor and the current Mortgagee and/or a third party assignee. The third party becomes the assignee Mortgagee, assuming the right to payment from the Mortgagor, the right to foreclose, and any other right granted to the Mortgagee under the original Mortgage.[8] The Mortgagor also retains the contractual right to redeem as against the Mortgagee or its assignee. Therefore, the parties must be in privity of contract in order for the Mortgagee or its assignee to be able to validly enforce the power of sale clause in a mortgagor's security instrument. Therefore, in order for an Assignment of Mortgage to be effective, there must be an offer, acceptance, and consideration, and an actual named assignee at the time the power of sale is being enforced as against a borrower.

There is no offer, acceptance, or consideration in the May 2005 Assignment of the LaRace Mortgage, and there cannot be where the Assignment is "in blank". (A916) Further, Wells Fargo suggests that it is an "industry custom" that would permit an "in blank" assignment. It would be difficult at best to have mutuality of assent between the assignor of the LaRace

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[8] Commonwealth v. Fremont Inv. & Loan, 452 Mass. 733 (2008).

Mortgage (Option One), and a non-existent assignee at the time of the assignment, therefore, the Land Court did not err in holding that an assignment in blank of the LaRace Mortgage was an ineffective assignment to the trust.

IV. G.L. C. 183, §6C CLEARLY REQUIRES THE NAME AND ADDRESS OF THE ASSIGNEE TO AN ASSIGNMENT OF MORTGAGE IN ORDER TO BE IN RECORDABLE FORM. THEREFORE, THE ATTEMPTED ASSIGNMENT OF THE LARACE MORTGAGE TO THE TRUST IS INEFFECTUAL AND ALSO VIOLATIVE OF THE TRUSTS OWN PSA REQUIREMENTS.

The Legislature added G.L. c. 183, §6C, under St. 1989 c. 177, which is applicable to assignments of Mortgages. From a review of Massachusetts case law it appears that this statute has never come under judicial review. Reading the statute, it appears as though there is an internal inconsistency that needs clarification by this court:

> Section 6C. Every Mortgage and assignment of a Mortgage presented for record shall contain or have endorsed upon it the residence and post office address of the Mortgagee or assignee if said Mortgagee or assignee is a natural person, or a business address, mail address or post office address of the Mortgagee or assignee if the Mortgagee or assignee is not a natural person. Such endorsement shall be recorded as part of the Mortgage or assignment of a Mortgage. Failure to comply with this section shall not affect the validity of any Mortgage or assignment of a Mortgage or the recording thereof. <u>No register of deeds shall accept a Mortgage or assignment of a Mortgage for recording unless it is in compliance with the requirements of this section</u>.

The only logical interpretation of the last two sentences (which are directly in opposite of each

other), would be that the phrase: "Failure to comply with this section shall not affect the validity of any Mortgage or Assignment of a Mortgage or the recording thereof" would be that it either refers only to a prospective application, or that it is incorporating G.L. c. 184, §24 by reference (which allows a 10 year curative provision for defects contained within deeds). (A1098) The last sentence of G.L. c. 183, §6C clearly states: "No register of deeds shall accept a Mortgage or Assignment of a Mortgage for recording unless it is in compliance with the requirements of this section." In fact the entire statute is directed solely towards the mandate that in order to be in "recordable form" at the time of the assignment, a Mortgage assignee's name and address must be incorporated on the face of the Assignment, save the one sentence referenced above.

Therefore, it is the LaRaces' position that the Land Court did not err, when it stated that in Massachusetts in order for an Assignment of Mortgage to be in "recordable form" under G.L. c. 183, §6C, an assignee's name and address must be contained within the Assignment of Mortgage. Therefore, the Appellants' assignment of the LaRace Mortgage in blank was clearly ineffective to assign the LaRace Mortgage to the trust, as it was assigned "in blank".

V. REBA TITLE STANDARD NO. 58, IS A "PROFESSIONAL OPINION" DRAFTED AND PROFFERED FIFTEEN (15) YEARS AGO BY THE CONVEYANCING BAR, AND DOES NOT CONSTITUTE A RULE OF LAW NOR DOES IT ENJOY ANY LEGAL PRECEDENTAL VALUE.

Massachusetts courts have been faced with the evidentiary weight to be applied to title standards such as the one at issue before this court. In Fall River Savings Bank v. Callahan, 18 Mass.App.Ct. 76 (1984), the court was faced with a protest by the Defendant (Callahan), to the receipt in evidence of "title standards adopted and published by the Massachusetts Conveyancers' Association."[9]

As a preliminary matter the court determined that the Plaintiff had erroneously admitted the Conveyancers' Association published title standards under G.L. c. 233, §79B, inserted by St. 1947, c. 285, §1, relating to the admission of statements of facts of general interest to persons engaged in an occupation. The Callahan court went on to find that the correct exception to the hearsay rule that the title standards should have been admitted was G.L. c. 233, §79C, as title standards are an expression of "professional opinion". Id. at 79.

As a professional opinion, REBA title standards have no legal precedental value, need not be followed by the court, and may not even be introduced into evidence, except by the discretion of the courts. It

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[9] This organization is now known as The Real Estate Bar Association ("REBA").

is clear that Title Standard No. 58, can hardly be described as a long held relied upon principle. Fall River Savings v. Callahan 18 Mass.App.Ct. 76, 83.

Therefore, Massachusetts courts have clearly stated that title standards (such as REBA Title Standard No. 58 at issue before this court) may only be admitted as an exception to the hearsay rule, and only at the discretion of the presiding Judge. Therefore, Title Standard No. 58 can hardly be described as a long held relied upon principle, due to the fact that its admissibility is clearly only conditional.

VI. THE LAND COURT CORRECTLY HELD THAT MONTAGUE V. DAWES DOES NOT PROVIDE SUPPORT FOR THE "PROFESSIONAL OPINION" SET OUT IN REBA TITLE STANDARD NO. 58(3).

The Real Estate Bar Association ("REBA") Title Standard No. 58 was enacted in 1995, and contains 3 sections. With specific relevance to the case before this court the LaRaces solely focus on Section three which states:

> (3). The Recording of an Assignment of Mortgage executed either prior to, or subsequent, to foreclosure where said Mortgage has been foreclosed, of record, by the Assignee. However, if the Assignment is not dated prior, or stated to be effective prior to the commencement of a foreclosure, then a foreclosure sale after April 19, 2007 may be subject to challenge in the Bankruptcy Court, see: In Re: Schwartz,366 B.R. 265 (Bankr.D.Mass. 2007).

In the Comments below state:

> (c) Subsection 3 is based upon Montague v. Dawes, 94 Mass. 397, 12 Allen 397, 1866 WL 4867 (1866).

The Land Court undertook an extensive analysis of the holding in Montague v. Dawes in its initial Order and Notice issued on March 26, 2009. "Montague predates the publication of G.L. c. 244 § 14, which was not enacted until 1877, so it is unclear what, if any, guidance it gives on the notice issue." (A590)[10] Further, the Land Court stated that the *only* proposition that Montague holds is that title derived from a foreclosure sale by an assignee of a Mortgage *in possession of that assignment at the time of the auction* is not defeated by the fact that the assignment was not recorded until after the foreclosure took place, so long as the mortgagor is aware of the assignment and it is "unaccompanied with the suggestion that it was not recorded from improper motives, or in some way the circumstance actually affected the sale by misleading the purchasers or otherwise ...." (A590-591)[11] In the case at bar, as noted by the Land Court, Wells Fargo was not in physical possession of the LaRace Mortgage at the time of botice and auction. Based on the well-reasoned opinion by the Land Court, the holding that Title Standard No. 58 is based on a

[10] See footnotes 23 and 24 at (A590) for a more in depth discussion of the Montague holding.

[11] See footnote 25 at (A591) for a more in depth discussion of the facts of Montague.

flawed reading of Montaque v. Dawes, was clearly not in error, nor was the Land Court's analysis of the facts of LaRace, which clearly provide the evidentiary foundation that Wells Fargo did not have physical possession of the LaRace Mortgage (and Note) at the time of notice and auction. Therefore, even if Montaque v. Dawes was applicable to Plaintiff, it would not help their cause. The Land Court correctly held that Title Standard No. 58 is of no assistance to Plaintiff and thus did not err.

A. Wells Fargo's Argument For Prospective Application Is Not Well-Founded And Without Merit.

Wells Fargo's argument that should this Court uphold the Land Court's statutory interpretation of G.L. c. 244, §14 and uphold its ruling that the foreclosure sale of the LaRaces' home is invalid, that this case be applicable only prospectively and not retroactively. In support of its position, Wells Fargo cites three (3) cases in support thereof. The Defendants contend that all three (3) cases are clearly distinguishable on the facts and, in fact, do not support a prospective limitation on the applicability of the Land Court's ruling.

The first case cited by Plaintiff is Powers v. Wilkinson, 399 Mass. 650 (1987). Powers involved only the prospective application of the definition of "issue" with regards to non-marital children, as a recipient of a devise. The trust in that case was

created on May 7, 1959, and the donor established an inter vivos trust that, by its terms, was to be construed according to the laws of the Commonwealth. The court, quoting Weber v. Aetna Casualty & Sur. Co., 406 U.S. 164, 175 (1972), stated:

> the general rule is in favor of retroactive application of a change in decisional law, ... [but] [p]rimarily because of concern for litigants and others who have relied on existing precedents, judicial changes in Massachusetts contract and property ***law*** (emphasis added) have been given only prospective effect. The court based its prospective application upon the precedent being controlling in the Commonwealth for 150 years or more.

Powers at 849.

The next case Wells Fargo cites is Turner v. Greenaway, 391 Mass. 1002 (1984). The issue before the Turner court was whether G.L. c. 209, §1, as appearing St. 1979, c. 727, [2] should be applied to a tenancy by the entirety created before the statute's effective date of February 11, 1980, where a creditor seizes the non-debtors home after the effective date of the statute. Once again, the Plaintiffs' reliance on this case to support its position is misplaced, as it deals with a discussion of retroactivity with regards to the application of an enacted ***statute***, not a 15 year old "professional opinion".

Lastly, Wells Fargo cites Charron v. Amaral, 451 Mass. 767 (2008). The issue before the Charron court was whether a same sex couple can pursue a claim for loss of consortium due to personal injury caused by

another, where the couple was not married when the personal injury cause of action accrued, but can demonstrate that they would have been married if so permitted by law, and the couple did in fact marry when permitted following Goodrich v. Department of Pub. Health, 440 Mass. 309 (2003). Yet again, Plaintiffs' reliance on this case is off point, as it deals with the retroactive application of a very long-held legal concept, not a "professional opinion".

Therefore, Plaintiffs' reliance on Title Standard No. 58 can clearly be distinguished from the issues involved in its cited cases, and accordingly, the Plaintiffs' public policy request here is without bases, legitimacy, or merit, and, therefore, must be disregarded by this court.

B. The Real Estate Bar Association Has Already Altered Standard No. 58 In Response To An Adverse Judgment Against Its Validity.

Wells Fargo makes much of the fact that Title Standard No. 58 is a "long held" and relied upon principle, yet it did not sound the sirens of doom when the Standard was not strictly followed after an alteration was made that inured to its benefit.

In, In re: Schwartz, 366 B.R. 265 (Bankr.D.Mass. 2007) Judge Rosenthal stated:

> *Deutsche states in its memorandum that "[t]here is no requirement that an assignment be recorded prior to the foreclosure." While this is a correct statement of the law, Lamson v. Abrams, 305 Mass. 238, 241, 25 N.E.2d 374 (1940), it ignores that the assignment it 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. [8] While "Mortgagee" has been defined to include assignees of a Mortgage, in other words the current Mortgagee, there is nothing to suggest that one who expects to receive the Mortgage by assignment may undertake any foreclosure activity.*

In re: Schwartz at 269.

Subsequent to the Schwartz ruling the Real Estate Bar Association Amended Title Standard No. 58, subsection (3). In the Credits below the wording of this title standard states the following: "Adopted May 8, 1995, Amended May 5, 2008 to add second sentence to Subsection (3) and Caveat."[12] This second sentence cautions against foreclosing without creating the "appearance" of being in physical possession of the assignment of a borrowers Mortgage prior to foreclosure.

Thus, Plaintiffs' "chicken little" forewarning of doom "backed" by its statements before this court that this "professional opinion" is an "imprimatur" of such sacred import that it could never be disregarded rings hollow, and accordingly, this court should reject Appellants' position in this regard.

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[12] See Appellants' brief at Tab F, second page.

VII. WHERE WELLS FARGO BANK FAILED TO COMPLY WITH COURT ORDER TO SUBMIT PROPERLY AUTHENTICATED RECORDS AND FAILED TO SUBMIT AFFIDAVIT(S) OF INDIVIDUAL(S) WITH PERSONAL KNOWLEDGE REGARDING THE "COLLATERAL FILE", THERE IS NO ABUSE OF DISCRETION BY THE LAND COURT IN DENYING PLAINTIFFS' MOTION TO VACATE JUDGMENT.

Wells Fargo did not provide any documentation regarding the LaRace Note, Mortgage, Assignments of Mortgage, other loan documents, Power of Attorneys, Pooling and Servicing Agreements, Prospectus, prior to the entry of the March 26, 2009 Land Court Judgment.

At a hearing on Wells Fargo's Motion to Vacate Judgment, pursuant to Mass. R. Civ. P. Rule 59(e) and Rule 60(b)(1), (4), and (6), counsel for Wells Fargo requested that the court provide the Plaintiff with an opportunity to submit the following documentation: a) documents that created the securitized trust; b) blocks of Mortgages that were sold into the trust; c) the "Collateral File"; d) master servicing agreement; e) power of attorneys; and f) certificates of incumbency. (A692-697; 740)

The Land Court granted Wells Fargo leave to submit these documents so long as "each of which must be properly authenticated." (A740) Further, with respect to "all documents reflecting or purporting to reflect an assignment of a 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."** (Emphasis in original) (A741)

In violation of the Land Court's Order, none of the documents produced by Wells Fargo were authenticated; and no affidavit was submitted from a witness with direct personal knowledge regarding the assignment of the Note or Mortgage. (A744-945; 1073-77; 1080-81)

The Defendant contends that neither the Land Court nor this Supreme Judicial Court need to consider these unauthenticated documents, that there would be no abuse of discretion in disregarding them, and that there is no abuse of discretion in denying Wells Fargo's Motion to Vacate.

VIII. WHERE WELLS FARGO BANK CANNOT SHOW AN ABUSE OF THE COURT'S DISCRETION IN ITS DENIAL OF PLAINTIFFS' MOTION TO VACATE JUDGMENT, PURSUANT TO MASS. R. CIV. P. RULE 59(e) AND RULE 60(b)(1), (4), & (6), THE COURT'S JUDGMENT DECLARING THE FORECLOSURE SALE INVALID SHOULD BE UPHELD.

Denial of Wells Fargo's Motion to Vacate Judgment rests within the sound discretion of the Trial Court, and "will be set aside only on a clear showing of an abuse of discretion." Murphy v. Administrator of the Division of Personnel Administration, 377 Mass. 217, 227 (1979). This court has held that the standard of review is not "substituted judgment." Bucchiere v. New England Tel. & Tel. Co., 396 Mass. 639, 641 (1986); Scannell v. Ed. Ferreirinha & Irmo, LDA, 401 Mass. 155, 160 (1987). "[I]t is sufficient that the judge could have found for the [non-moving party] within the bounds

of her discretion; beyond that appellate inquiry is at an end." Id.

The Defendants contend that Wells Fargo has not and cannot show that the Land Court abused its discretion in denying its Motion to Vacate Judgment. The Land Court permitted Wells Fargo to produce over one thousand pages of documentation, gave Wells Fargo a full hearing on its motion, and then issued a twenty-seven (27) page well-reasoned decision supporting its denial. The Land Court's denial was well "within the bounds of his discretion." Thus, appellate inquiry should thereupon be at an end.

A. Mass. R. Civ. P. Rule 60(b)(1).

In Murphy, relief under Rule 60(b)(1) was sought in order to permit the court to consider additional documents which had not previously been submitted to the court. The Plaintiffs in that case alleged that they were unaware of the existence of the additional documents until after judgment had entered. The trial court denied the Motion to Vacate Judgment and this Court upheld this denial.

The Court held that relief under Rule 60(b)(1) is only granted if the party seeking relief can demonstrate that the mistake, inadvertence, or neglect was excusable and "was not due to his own carelessness." (Citations omitted.) Id. at 228.

In the case at bar, Wells Fargo was well aware that the Land Court was going to be considering whether

the Plaintiffs' failure to record its Mortgage assignment prior to the conduct of the foreclosure sale invalidates the sale. (A4, 61) And yet, Wells Fargo did not attempt to provide and/or introduce one document pertaining to this issue prior to the entry of March 26, 2009 Judgment. The Land Court's denial of Wells Fargo's Motion to Vacate pursuant to Rule 60(b)(1) should be upheld.

B. Mass. R. Civ. P. Rule 60(b)(4).

Wells Fargo's Motion to Vacate Judgment pursuant to Rule 60(b)(4) did not meet the requirements of that section of the rule.

> A judgment is void 'if the court from which it issues lacked jurisdiction over the parties, jurisdiction over the subject matter, or failed to provide due process of law.' ... A judgment is not void simply because it is later determined to have been erroneous.

Eastern Sav. Bank v. Salem, 33 Mass.App.Ct. 140, 143 (1992).

It appears that Wells Fargo is attempting to argue that the Land Court's judgment failed to conform to the requirements of due process of law. (A599) Other than that bald statement of law, the Plaintiff fails to set out any facts to support this contention. It is certainly hard-pressed to argue that based upon its request that the court enter a declaratory judgment, that it is void because the court did not enter a judgment in its favor. That certainly does not rise to a question of the court's jurisdiction over the case.

C. Mass. R. Civ. P. Rule 60(b)(6).

Relief pursuant to Rule 60(b)(6) shall be granted only in extraordinary circumstances. Bromfield v. Commonwealth, 400 Mass. 254, 257 (1987). A party must show that there is a reason to justify the relief requested and that the reason is not within the grounds set forth in Rule 60(b)(1)-(5). Parrell v. Keenan, 389 Mass. 809, 814-815 (1983).

Again, Wells Fargo does not set out any facts which would support a finding of extraordinary circumstances sufficient to grant relief under Rule 60(b)(6). The Land Court was correct in its denial of the Plaintiffs' Motion to Vacate Judgment, and its denial should be upheld.

IX. APPELLANT IS A "MASSACHUSETTS TRUST" AND, THEREFORE, WAS REQUIRED TO FOLLOW ITS OWN TERMS WITH REGARDS TO THE CONVEYANCE OF THE LARACE MORTGAGE TO THE TRUST.

A. Background And History Of "Massachusetts Trusts".

A "securitization trust" is nothing more than the latest twist on an almost two (2) century old idea; using a trust as the vehicle for a "for profit" unincorporated business organization ("UBO"), in order to circumvent statutory corporate requirements, namely taxation. These UBO's are what is known as "business", "common law", or more prophetically, "Massachusetts

trusts."[13] These Trusts quickly gained popularity due to the fact that they had extreme malleability and were free from statutory corporate mandates; chief among these was corporate taxation. In a line of Massachusetts decisions[14] during the early 1900's, the Massachusetts Supreme Judicial Court recognized the validity of these "unincorporated business organizations."[15]

In Williams v. Milton, 215 Mass. 1 (1913), the Massachusetts Supreme Judicial Court undertook an analysis of the factors that were necessary for one of these "unincorporated business organizations" to be designated as a "trust" and not merely a partnership acting in name only as a trust. The court found that the determining factor was the passivity of the cestuis que trustant.

> *In order to establish that these "organizations" were trusts, the court found that the "sole right of the cestui que trust is to have the property administered in their interest by the trustees, who are the masters, to receive income while the trust*

[13] As their name implies, these trusts have their genesis right here in the Commonwealth, having been introduced as a carryover from England in 1827.

[14] Williams v. Milton, 215 Mass. 1, 5 (1913); Frost v. Thompson, 219 Mass. 360 (1914); 365; Dana v. Treasurer, 227 Mass. 562, 565 (1918); and Priestley v. Treasurer, 230 Mass. 452, 455 (1918).

[15] The popularity of these trusts became so great that business moguls were actively seeking out this form of business organization to "cheat the system". The backlash of this desire created persons known as "trust busters", and this in fact was the genesis of "anti-trust" legislation.

> *lasts, and their share of the corpus when the trust comes to an end.*

Id. at 11.

In Hecht v. Malley, 265 U.S. 144 (1923), the United States Supreme Court gave a nod of validity to organizations known as "*Massachusetts Trusts*". The Court found that these trust instruments, whether pure trusts or partnerships are unincorporated but are not organized under any statute, and they derive no power, benefit, or privilege from any statute. "The Massachusetts statutes, however, recognize their existence and impose upon them, as "associations", certain obligations and liabilities." Id. at 147. Further, the Court stated:

> The 'Massachusetts Trust' is a form of business organization, common in that state, consisting essentially of an arrangement whereby property is conveyed to trustees, in accordance with the terms of an instrument of trust.

Id. at 146.

B. Purpose And Terms Of The ABFC 2005-OPT1 Trust.

Indeed, it is specifically the fact that the ABFC 2005-OPT1 Trust is set up as a Real Estate Mortgage Investment Conduit (REMIC), that it receives favorable tax treatment under 860D of the Internal Revenue Code of 1986, as amended (the "Code"). (A 2217) The Certificateholders of this trust are not actively involved in the management of the trust, they cannot select trustees, nor do they have any entitlement to

ownership of the underlying collateral for these certificates (Mortgage loans). (A1443-1780) The Certificateholders are only entitled to the monthly income stream of the borrower's monthly principal and interest payments, and rights to the corpus proceeds upon the Trust's termination. (A1443-1780) Therefore, under the holding in Williams, the trust at issue in this case would be considered a true "Massachusetts Trust".

Thus, the "Massachusetts Trust" created by the October 1, 2005 Pooling and Servicing Agreement in which it is alleged that the LaRace Note was placed must follow strictly its own terms. With respect to the strict requirements of this PSA that the LaRace Note be sold and transferred from the Originator to the Seller; and from the Seller to the Depositor; and from the Depositor to the Trust, there is absolutely no evidence that this is what happened. (A2130-31; 2138)

The PSA before this court requires that the only party that can place anything into this Massachusetts Trust is the Depositor Asset Back Funding Corporation. (A1522) Further, the PSA requires that every Mortgage Note and related documents be placed in the Trust on or before October 31, 2005. (A2074) Any Assignment of Mortgage placed in the Trust must be in recordable form. (A2139)

C. Assignment of Mortgage As It Pertains To The LaRace Loan.

a. The Assignment of Mortgage Produced As Part Of The "Collateral File".

The Assignment of Mortgage that appears in the "Collateral File" was undated and no assignee was identified or named. (A916) It was "in blank". It was in "unrecordable form". The assignor was the Originator Option One.

Per the terms of the ABFC 2005-OPT1 Trust, the Orginator was prohibited from placing this Assignment of Mortgage into the Trust. Only the Depositor could make this assignment, and only if it was delivered prior to the Closing Date of October 31, 2005. There is no evidence that the Depositor in fact delivered this "in blank" unrecordable Assignment of Mortgage from the Originator into the ABFC 2005-OPT1 Trust at any time, let alone prior to October 31, 2005. The Defendants would argue that the only Assignment of Mortgage that would have been transferable or assignable into the Trust would be one executed and delivered by the Depositor Asset Back Funding Corporation.

b. The PSA Provides That The Sole Remedy For A "Defective Mortgage Loan" Is For The Seller To Repurchase, Or Substitute The "Defective Loan".

Under the heading, "Assignment of The Mortgage Loans" is stated the following:

> On or about October 31, 2005 (the "**Closing Date**") the **Depositor** will transfer to the Trust Fund all of its right, title and interest in and to each Mortgage Loan, the

> related Mortgage Notes, Mortgages and other related documents (collectively, the **"Related Documents"**), including all scheduled payments with respect to each such Mortgage Loans due after the Cut-off Date. (A2138)

The PSA contemplates defects, such as the ineffective assignment of the LaRace Mortgage to the trust, if the above terms are not followed.

> Within 60 days following the Closing Date, the Trustee will review (or cause a custodian to review) the Mortgage Loans and the Related Documents pursuant to the Pooling and Servicing Agreement and if any Mortgage Loan or Related Document is found to be defective in any material respect and such defect has a material and adverse effect on the Certificateholders and is not cured within 120 days following notification thereof to the Seller (or within 90 days of the earlier of the Seller's discovery or receipt of notification if such defect would cause the Mortgage Loan not to be a "qualified Mortgage" for REMIC purposes), the Seller will be obligated to either
>
> (i) substitute for such Mortgage Loan an Eligible Substitute Mortgage Loan; provided, however, such substitution is permitted only within two years of the Closing Date and may not be made unless an opinion of counsel is provided to the effect that such substitution will not disqualify any of the REMICs comprising the Trust Fund as a REMIC or result in a prohibited transaction tax under the Code or required purchase or substitution no later than 90 days after the earlier of its discovery or receipt of notification of the defect. (A2139)

The PSA (as incorporated in the Prospectus Supplement), <u>referring to the above passage, clearly defines "Defective Mortgage Loans" as follows</u>: *Mortgage Loans required to be transferred to the Originator or the Seller as described in the preceding paragraphs are referred to as* ***"Defective Mortgage Loans."*** (A2141)

The PSA (as incorporated in the Prospectus Supplement), then clearly provides the sole remedy for the Trustee and the Certificateholders for the failed conveyance of the LaRace Mortgage ("Related Document") to the trust as a "Defective Mortgage Loan",

> *The obligation of the Seller to repurchase or substitute for a Defective Mortgage Loan is* ***the sole remedy*** *regarding any defects in the Mortgage Loans and Related Documents available to the Trustee or the Certificateholders.* (A2139)

Therefore, the "plain meaning" of the PSA contemplates that the sole remedy for the failed conveyance of the LaRace Mortgage (and Note) to the trust, is to force the "Seller" (Bank of America) to repurchase or substitute this "Defective Mortgage Loan".

c. The Assignment of Mortgage Dated May 7, 2008 And Recorded In The Hampden County Registry Of Deeds.

The Assignment of Mortgage that was eventually recorded in May 2008, some ten (10) months after the foreclosure sale, in the Hampden County Registry of Deeds and upon which Wells Fargo relies is hopelessly defective.[16]

It clearly states that Originator Option One "assigned" the LaRace Mortgage "together with the Note or Notes described therein or referred to" on May 7, 2008 to Wells Fargo, c/o the Option One at Option One's usual place of business in Irvine, California, in Wells

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[16] This Assignment of Mortgage appears to be wholly different from the "in blank" one that appears in the "Collateral File".

Fargo's capacity as Trustee for ABFC 2005-OPT1 Trust. (A940) In light of Judge Long's determination that Option One "ceased active operations in early 2008", there is a question where Option One even had the authority or capacity to execute this purported Assignment of Mortgage. (A1155) It appears that the Assignment of Mortgage was sent to itself. It should be noted that this Assignment of Mortgage does not appear in the "Collateral File" kept by Wells Fargo.

Again, in direct violation of the terms of the Trust, the Originator Option One is attempting to execute and deliver an Assignment of Mortgage directly to the Trust. It is dated May 7, 2008, which is some thirty-two (32) months after the trust's Closing Date set out in the PSA.[17] The fact that it is purportedly backdated to April 17, 2007, does not help make the assignment any more valid. Even if accepted, this back-dating is still more than eighteen (18) months after the Trust's Closing Date.

Therefore, the Land Court correctly held that the Trust was in violation of its own terms with regards to the Assignment of the LaRace Mortgage into the trust. As Judge Long noted in his October 14, 2009 Memorandum and Order: "The problem the Plaintiffs face (the present title defect) is entirely of their own making

[17] In light of Judge Long's determination that Option One "ceased active operations in early 2008", there is a question where Option One even had the authority or capacity to execute this purported Assignment of Mortgage.

as a result of their failure to comply with the statute and the directives in their own securitization documents." (A1141)

Massachusetts Courts have been confronted with this issue previously. In the case of In re Hayes, 359 B.R. 259 (Bankr.D.Mass. 2007), the court was faced with a substantially similar issue that is currently before this court, namely that the conveyance of a borrowers loan failed to comply with the requirements of the PSA, and thus the foreclosing trustee for the trust failed to affirmatively establish its standing.

> Thus consistent with the holdings in In re Maisel, 378 B.R. 19, 22 (Bankr.D.Mass. 2007), and In re Parrish, 326 B.R. 708, 719 (Bankr.N.D.Ohio 2005), the Court finds that Deutsche Bank failed to adequately trace the loan from the original holder, Argent Mortgage Company, LLC, to it.

In re Hayes at 268. Further, reviewing In re Hayes at 270 n.1 the court stated,

> As discussed below, Deutsche Bank is a party to a Pooling and Service Agreement, dated as of October 1, 2004. The Depositor under the Pooling and Service Agreement, namely the Seller of pass-through certificates reflecting beneficial ownership interests in certain real estate Mortgage investment conduits, is Argent Securities Inc., not Argent Mortgage Securities, Inc. Under the Pooling and Service Agreement, the Trustee of the Trust Fund, consisting of a segregated pool of assets comprised of Mortgage loans and certain other related assets, is Deutsche Bank National Trust Company. Deutsche Bank erroneously identified itself in its own Motion.

Hayes at 270 n.1.

Therefore, the Hayes court gave deference to the requirements of the PSA, and accordingly held that the conveyance of the borrower's loan did not comport with its requirements and thus the Trustee's standing to bring an action to lift the automatic stay failed. Appellants cite to In re Samuels, 415 B.R. 8 (Bankr.D. Mass. 2009), as being in opposition to the holding of In re Hayes. Unlike Appellants' depiction of the holding of this case, a close reading reveals that it essentially confirms the holding in, In re Hayes.

> The documents submitted with the proof of claim do not by themselves show a valid assignment of rights from Argent to Deutsche Bank and do not fully support the asserted claim. It follows that the proof of claim is not supported by the documents adequate to establish the assignment of rights on which it is based and therefore that the claim does not enjoy prima facie validity.

In re: Samuels at 17.

The court went on to rule in favor of the moving party against the debtor Samuels, however the ruling was based upon the Trustee's fall back argument which was based upon a confirmatory assignment filed in the registry of deeds which described its status as such, and also explained the original Assignment of Mortgage was "lost". In re: Samuels at 19. Unlike the Samuels case, Wells Fargo has not filed any document specifically referenced as a "Confirmatory Assignment", nor has it ever asserted that the original assignment of the LaRace Mortgage was "lost".

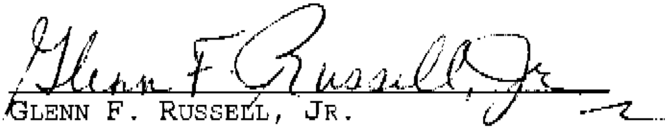
Therefore, the holdings of In re Hayes, and In re Samuels, support the LaRace's position that the Trustee (Wells Fargo) has failed to document the chain of assignments of the LaRace Mortgage leading from Option One (as Originator) to the Mortgage Loan Seller (defined as Bank of America) (A2073) to the Depositor, then finally from the Depositor to the Trust. The sole indicium of evidence proffered by Wells Fargo is the Assignment of Mortgage (and Note or Notes referred therein) from Option One (Originator-Servicer), in blank, to the trust, purportedly in May 2005. Clearly, the terms of the trust were not followed, and therefore, as in In re Hayes, Wells Fargo cannot enjoy any right to any interest in the LaRace Mortgage or Note.

What is indisputable from the evidence produced by Wells Fargo is that purported May 7, 2008 Assignment of Mortgage at a minimum is defective and invalid, if not in fact fraudulent and recorded in bad faith and with an intent to deceive the Defendant, the registry of deeds, the public, and the courts.

CONCLUSION

For the foregoing reasons, the LaRace Appellees respectfully request that the court affirm the Land Court's Rulings, and reject Wells Fargo Appellant's prospective only application of this ruling.

Respectfully submitted,



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