Supreme Judicial Court

FOR THE COMMONWEALTH OF MASSACHUSETTS

No. SJC-11299

ANNE-MARIE GALIASTRO and JOSEPH A. GALIASTRO,
Plaintiffs-Appellants,

v.

MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. & another,
Defendants-Appellees.

ON DIRECT APPELLATE REVIEW

BRIEF FOR *AMICUS CURIAE*,
IN SUPPORT OF PLAINTIFFS-APPELLANTS,
ANNE-MARIE GALIASTRO and JOSEPH A. GALIASTRO

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....iii

INTEREST OF *AMICUS CURIAE*.....1

ISSUE TO BE ADDRESSED.....2

SUMMARY OF FACTS.....3

SUMMARY OF ARGUMENT.....6

ARGUMENT.....8

I. Not having properly understood MERS role as only the "nominee" part of being a "mortgagee", the Superior Court erred in assuming that MERS was capable of exercising all of the functions that a full-fledged mortgagee can execute .....

II. Because of the traditional agency-type relationship between a lender and a mortgagee, the Superior Court erred in assuming this same agency relationship between MERS as nominee and either the lender or a hidden mortgagee. This is clarified where MERS is clearly only a nominee when there is an actual hidden mortgagee in addition to a lender. In all cases, MERS' ability to act solely as nominee means it cannot fulfill the mortgagee functions that require a beneficial interest or an interest in real property.....

III. Because a title-theory state requires a great interest in the real property, a potentially possessory interest pre-foreclosure, MERS inability to hold a beneficial interest and at best ability to function as a lien holder, the Superior Court erred in assuming MERS had capacity to function as a full mortgagee in Massachusetts.....

III. With the limited capacity as a nominee who can only hold a lien and has no interest in real property, MERS cannot carry out the

powers of a mortgagee in a number of the steps in a foreclosure let alone carry them out in strict compliance in contradiction to the Superior Court's decision.....

IV. Even if the Superior Court believed MERS can function fully as a mortgagee through their agency relationship with a note-holder or hidden mortgagee, it is a uniquely more dependent relationship than the standard note-holder/mortgagee relationship. The principal here holds all the beneficial interest and has to exercise functions the homeowner has a right to be able to put a name to.....

V. If MERS can legally have any role in foreclosure, its lack of beneficial interest in the property and power to enforce either the note or exercise the power of sale on its own means the court erred in not requiring full disclosure of the transfer of interest in the mortgage debt – either an off-book series of assignments if they exist or if not, in accordance with the need to trace the assignments of the mortgagee to identify who has the power of sale, through establish proper transfer of the note to ensure the power to enforce it.....

VI. Because the power to enforce the note is precedent to using the security for the debt – the mortgage – to enforce the note through the power of sale, it is not the existence of a purported note-holder that matters. The note has been referenced even in decisions leading up to the foreclosure crisis and those on the homeowner side believed they were required for foreclosure. Given experience with notes now sometimes provided in discovery, it is clearly the ability to assess the validity of note transfers that is critical. *Eaton* must be applied retrospectively.....

CONCLUSION.....46

TABLE OF AUTHORITIES

Cases

Boruchoff v. Ayvasian, 323 Mass. 1.....31

Com. v. Fremont, 452 Mass. at 740-41.....4

Eaton v. Federal National Mortgage Association, 462 Mass. 569 (2012).....2

Faneuil Investors Group, Ltd. Partnership v. *Selectmen of Dennis*, 458 Mass. 1 (2010).....25

Fannie Mae v. Hendricks (2012).....38

Goodwin v. Richardson, 11 Mass. 469 (1814).....44

HSBC Bank v. Paul Norris, No. 11-P-1916 Mass App Ct (2013) 38

HSBC Bank USA, N.A. trustee v. Matt (2013).....23

Lyons v. MERS, No. 11-P-560 Mass App Ct (2013).....38

Maglione v. BancBoston Mtge. Corp., 29 Mass.App.Ct. 88, (1990).....18

NationsBanc Mtge. Corp. v Eisenhauer, 49 Mass. App. Ct. 727 (2000).....40

Negron v. Gordon, 373 Mass. 199, (1977).....43

Perry v. Miller, 330 Mass. 261, (1953).....43

Roche v. Farnsworth, 106 Mass. at 513.....24

Saint Patrick's Religious, Educ. & Charitable Ass'n v. *Hale*, 227 Mass. 175 (1917).....25

U.S. Bank v. Ibanez, 458 Mass. 637.....7

Williams v. Resolution GGF Oy, 417 Mass. 377 (1994).....40

Young v. Miller, 6 Gray 152 (1856).....43

Federal Cases

In re Lopez, 446 BR 12 (D.Mass. 2011).....31

In re Schwartz, 366 B.R. 265 (Bankr. D. Mass. 2007). 40

Other Cases

Bank Of NY Mellon v. Deane, 2013 NY Slip Op 23224. . .33

State Statues

Chapter 194 of the Acts of 2012.....42

G.L. Chapter 106.....30

G.L. Chapter 183, § 3.....25

G.L. Chapter 183, § 6.....25

G.L. Chapter 244, § 14.....4

G.L. Chapter 244, § 35A.....42

Other Statutes

Article 3 of the Uniform Commercial Code.....30

NYUCC § 1-201.....34

NYUCC § 3-201, § 3-202, § 3-203, § 3-204.....34

NYUCC § 3-303.....34

NYUCC § 3-307.....34

Revised Uniform Commercial Code Article 3.....34

Authorities

Black's Law (8th ed. 2004).....8

Mendler, Massachusetts Conveyancers' Handbook § 5:7.01, at 114 (3d ed. 1984).....18

MERSCORP, Inc. and Mortgage Electronic Registration Systems, Inc., Case Law Outline, 2nd Quarter 2011 by MERSCORP Inc. Law Department.....17

The Official Comment to Revised Article 3, § 3-203; Transfer of Instrument; Rights Acquired By Transfer. 34

Osborne, Mortgages §§ 13-16 (2d ed. 1970).....18

This Brief is submitted in support of the appellants Anne-Marie and Joseph Galiastro pursuant to Mass. R. App. P. 17 and the Supreme Judicial Court's February 8, 2013 Announcement soliciting *amicus* briefs in this appeal. Grace Ross as *pro se Amicus*, the coordinator of the Massachusetts Alliance Against Predatory Lending submits this brief on behalf of the homeowners and former homeowners of Massachusetts.

STATEMENT OF INTEREST OF AMICUS CURIAE

Your amicus in this matter is filing a brief as a friend of the court.

Your pro se amicus is the Coordinator of the Mass Alliance Against Predatory Lending and as part of her responsibilities leads the team of advocates on behalf of homeowners across Massachusetts in state and municipal policy assessment and development to address and reverse the ongoing foreclosure crisis. Your amicus is also responsible for coordination and providing a clearinghouse for legal developments and rulings in the Massachusetts and federal courts on matters relating to foreclosures in Massachusetts. Your amicus brings over 25 years of policy analysis and development at the municipal, state, federal and international levels of government including in the area of housing and advocacy in Massachusetts District and Housing Courts on housing cases.

Your amicus believes this brief is desirable because of its reflection of your amicus' unique position straddling the ongoing legislative changes and discussions in the Massachusetts legislature and tracking of foreclosure settlements with the largest banks and legal arguments as they develop. This brief therefore the intersection of legislative history and to a more limited extent legal precedent in relation to standing in foreclosure matters in the Commonwealth as well as addresses the changes to Massachusetts' foreclosure statutes that directly impact the basis of the matter before you now.

As a long time policy analyst advocate around housing issues, Coordinator of the Massachusetts Alliance Against Predatory Lending whose mission is to address the foreclosure crisis in partnership with the homeowners, former homeowners and tenants in foreclosed properties, and a former tenant who was directly impacted by a foreclosure, your amicus has an interest in the instant action and therefore your amicus respectfully submits this brief for your review in this matter.

STATEMENT OF THE ISSUES

This Honorable Court has solicited amicus briefs on the meaning of MERS role as "nominee" and whether, therefore, MERS can foreclose in its own name and in addition, whether the *Eaton* Decision (*Eaton v. Federal National Mortgage Association*, 462

Mass. 569 (2012) should be applied retrospectively. This brief explores two issues: the "nominee" status of MERS in relation to its claims and powers as a supposed "mortgagee" especially in relation to its power to foreclose in its own name and the potential retro-active nature of *Eaton* and the requirement of holding or acting as agent to the note-holder as a foreclosing mortgagee in a foreclosure in Massachusetts.

SUMMARY OF FACTS

Anne-Marie and Joseph Galiastro owned a home in Milford, Massachusetts. In July 2006, the Galiastros refinanced their home purchase loan through Fremont Investment and Loan Company ("Fremont")and executed a note obligating them to repay $436,000 to Fremont. The mortgage named Fremont as the "Lender." (Mortgage page 1, "Definitions," section "D"). The mortgage identified Mortgage Electronic Registration Systems, Inc. ("MERS") as "the mortgagee under this Security Instrument." (*Id.* at "C"). The note did not mention MERS.

In December 2009, attorneys for Harmon Law Offices, P.C. filed a complaint in the Land Court naming MERS as the plaintiff and requesting a declaration that the Servicemembers Civil Relief Act ("SCRA") did not bar MERS from proceeding with a non-judicial foreclosure sale of the Galiastros' home. The Land Court issued an Order dated February 2, 2010 declaring that MERS

had satisfied the requirements of the SCRA. On March 1, 2010, MERS served the Galiastros with the notice of foreclosure sale required by G.L. c. 244, § 14. The notice's caption read: **NOTICE OF MORTGAGE FORECLOSURE SALE** Re: Mortgage Electronic Registration Systems, Inc./Galiastro, Anne-Marie/Galiastro, Joseph." Below, at the signature space identifying the sender, the text read: "Mortgage Electronic Registration Systems, Inc., Present holder of mortgage By its Attorney, Harmon Law Offices, P.C." The notice stated that MERS intended to sell the Galiastro home at foreclosure sale on March 31, 2010.

On March 29, 2010, the Galiastros filed a complaint in the Worcester Superior Court naming MERS and the Harmon Law Office as defendants. The Galiastros asserted claims for damages and sought to enjoin the impending foreclosure sale. The Galiastros alleged that their loan was subject to an injunction that a Massachusetts Superior Court had issued against Fremont. *Com. v. Fremont, supra,* 452 Mass. at 740-41.

The Galiastros also asserted that the foreclosing entities lacked authority to exercise the power of sale in their mortgage. Based on information in correspondence with the Harmon Law Office, the Galiastros alleged that their loan had been sold to an investment trust. Complaint par. 9. The Galiastros indicated that they intended to pursue further discovery on the authority to foreclose issue. *Id.* par. 35-36. The complaint

alleged that neither Fremont nor MERS owned their note and therefore did not hold the right to enforce it. *Id.* par. 12-13, 68-69. The Galiastros averred that "MERS is not an authorized agent of Fremont" and that MERS "did not purchase the Galiastros mortgage by absolute sale, and as a 'nominee' only, it holds no beneficial interests in any mortgage asset." *Id.* par. 12. (1) MERS lacked authority to foreclose under G.L. c. 244, § 14 because MERS had no interest in the underlying debt. Complaint, par. 63-69; MERS and Harmon were attempting to foreclose in an unfair and deceptive manner, had conspired to violate the *Fremont* injunction and MERS' and Harmon's actions constituted fraud.

The Worcester Superior Court denied the Galiastros' request for injunctive relief. In November 2010, the Superior Court granted MERS' and Harmon's motion to dismiss, entering judgment on January 19, 2011. The Galiastros filed their notice of appeal on February 3, 2011.

Based on documents contained in the Galiastros' Supplemental Brief: in September 2011, signing officers for MERS executed an assignment of the Galiastros' mortgage from MERS to an entity named "Deutsche Bank National Trust Co., as Trustee for Fremont Home Loan Trust Series 2006-3." (Deutsche Bank as Trustee). The Superior Court denied the Galiastros' request to enjoin foreclosure by Deutsche Bank as Trustee. Deutsche Bank

as Trustee conducted a foreclosure sale of the Galiastros' home on January 13, 2012. Deutsche Bank as Trustee supposedly acquired title to the property through the high bid made at the sale.

SUMMARY OF ARGUMENT

MERS in its limited capacity as a "nominee"/"mortgagee" without beneficial interest in the property cannot act as the foreclosing entity for a number of reasons.

MERS ability to act as the foreclosing entity is directly circumscribed by its limited agency role as "nominee" and its definition of its role as "mortgagee" is always qualified by the statement "solely as nominee for lenders, its successors and assigns". MERS also claims it cannot accept payments as "mortgagee" nor act in any of the functions of a servicer nor hold an beneficial interest in property. This uniquely diminished role as "mortgagee" according to their own documents at its fullest maintaining a lien on the property and acting always as limited agent for the holder of mortgage debt means both that; (1) proof of not only proper off-record assignments of the mortgage (if they exist) are necessary to prove the right to exercise the power of sale but also necessary is proof of tracing proper transfer(s) of the note to ensure the identified note-holder at commencement of foreclosure still has the power

to enforce the note and; (2)that MERS does not have sufficient interest in property to act as a mortgagee in a title-theory state.

Given that Massachusetts law, clarified in *Ibanez*, has always required that the foreclosing mortgagee be able to legally exercise the power of sale, then the homeowner has a right to require proof of this. Regardless of the retrospective application of *Eaton*, MERS' unique scheme and more direct dependence upon the holder of the mortgage debt given its very limited agency capacity means that proof that it is the agent of the purported note-holder and the note-holder's ability to enforce the Note has always be a pre-requisite for MERS to foreclose in its own name if that is even possible in accordance with Massachusetts' law.

The necessity that a mortgage not be a nullity for the power of sale to be exercised in general not just in the case of MERS, also means that the negotiability of note and the purported note-holder's ability to enforce the note has always been a pre-requisite for foreclosure in Massachusetts; therefore, the foreclosing entity has always needed to either legally hold the note or act as an agent for a legal note-holder to be able to exercise the power of sale. *Eaton* must be retrospectively applied so that homeowners have a right to

ensure that only a note-holder legally with the power to enforce their negotiable note was allowed to do so.

ARGUMENT

Not having properly understood MERS role as only the "nominee" part of being a "mortgagee", the Superior Court erred in assuming that MERS was capable of exercising all of the functions that a full-fledged mortgagee can execute.

MERS as defendant appellant in its brief claims that a "nominee" can be considered the equivalent of being an agent and that it is well agreed that the mortgagee functions as an agent for the note holder.

To the extent to which MERS might argue to function as an agent, it is functioning as a "nominee" which is a very limited agency relationship not what one might consider a full agency relationship. Black's (8th ed. 2004) "defining "nominee" as ... (2) a person designated to act in the place of another, usu. in a very limited way". While referencing the established agency relationship between a mortgagee and lender, the mortgage-holder and the note-holder, this is not the agency relationship that MERS establishes.

In all acts proscribed in the standard MERS mortgage – as in the Galiastro mortgage – their role is continuously qualified by "as nominee for lender and lender's successors and assigns". Such a qualification cannot be ignored as this Honorable Court

has noted starting in Ibanez, that defining "nominee" is critical to clarification of MERS role. In fact, the relationship agreed to by all parties at the commencement of the MERS mortgage agreement is that MERS functions "solely as nominee" and the reference to "mortgagee" becomes a descriptor of the type of nominee role MERS will play.

A standard, fully-functioning mortgagee normally has a beneficial interest in the property and can accept payments on the mortgage, assign the mortgage as an interest in property, and foreclose as an agent for the note holder as defined in Eaton. However, MERS has admitted to not only its inability to hold the note, but also that it does not accept payments on the property, it does not hold a beneficial interest in the property.

In MERS construction of mortgagee it has separated out the function of being the mortgagee of record from the other aspects of being a mortgagee which include the right to receive payments and other forms of beneficial interests. In fact, MERS only functions as a name-holder and can and does receive no payment for it's role as mortgagee but only from fees from its note-holder members – like a registry. Nor does it invest any money in any mortgage as it does not even pay it's own staff to oversee, control or regulate the actions of its note-holder

member organizations as they take actions as recorders in MERS' virtual registry.

Because of the traditional agency-type relationship between a lender and a mortgagee, the Superior Court erred in assuming this is the agency relationship between MERS as nominee and either the lender or a hidden mortgagee. This is clarified where MERS is clearly only a nominee when there is an actual hidden mortgagee in addition to a lender. In all cases, MERS' ability to act solely as nominee means it cannot fulfill the mortgagee functions that require a beneficial interest or an interest in real property.

There is something fundamentally confusing about MERS functioning as a nominee, as part of a mortgagee, when the mortgage debt itself is already bifurcated into two interconnected documents, the note and mortgage, where there is already an implied agency relationship between the note-holder and the mortgage-holder. Who then exactly is MERS acting as the nominee, the very limited agent, for? And to what subset of mortgagee rights and responsibilities has MERS as nominee limited itself to?

The MERS schema with MERS acting solely as nominee to the full role of a mortgagee makes conceptual sense – if not legal sense – in the specific example of the transfer of a mortgage into a securitization trust.

The securitized trust to obtain preferred tax status, usually REMIC status, required the ability to make several transfers of the mortgage debt, both the note and the mortgage itself, into the trust. The purpose in having several transfers of the mortgage loan into the trust was to make the debt itself bankruptcy remote and thereby protect the value being bundled together with other mortgage debt protected on behalf of the investors who would invest in the securitized trust.

To use an example of a standard pooling and servicing agreement such as that of the Trust supposedly holding the Galiastro loan, the transfer of the mortgage debt, *note and mortgage*, is explicitly defined in the pooling and servicing agreement (S-77), the trust documents created under New York common law. The mortgage itself therefore has to show, as does the note, the transfer of ownership (the "assignments" – S-77) from one party to the next to the next to the next. There the separate, but intertwined functions of the note and mortgage are both transferred into the trust and proof of the off-record assignments of the mortgage is required for the mortgage debt to be properly transferred into the securitized trust.

So while MERS' name may appear on the mortgage in the public face of the mortgage in the appropriate county registry of deeds, the mortgage instrument itself as well as the note has

to be assigned from party to party to get deposited into the securitized trust. The assignments of the mortgage have to exist and be filed by the depositor and certified to by the depositor into the trust for the trust to be able to claim legal ownership of the mortgage loan in question. The off-record assignments like the unrecorded assignments referenced in *Ibanez* must still exist and be available for scrutiny by the purportedly foreclosed upon owner to verify their legal compliance.

In this scenario, MERS does none of the transferring and the required assignments have to show that the mortgage itself was transferred. Thereby, the role of MERS purely as the faceplate on the mortgage for the public view is clear while the functional mortgage with its associated mortgage rights is, in fact, passing hand to hand from entity to entity to enter in and be operational in the hands of the trust itself.

In this scenario it is clear that MERS, in fact, does nothing but function as the nominee, simply the name publicly on the mortgage. The actual names on the mortgage and the assignments of the mortgage are the various entities in the chain of transfer required for transfer into the trust. If accomplished properly and not voided because of contravention of the trust document itself under New York common law trust law, it is the trustee of the securitized trust in whose hands rests

the actual mortgagee authority to carry out the power of sale in the mortgage. If the actual interest in property sufficient to exercise the power of sale vests in the Trust, then is it not required as the actually entity with the actual power of sale required to be named in the foreclosure process?

MERS would never need to play the role of foreclosing entity in this scenario. In fact, MERS does not function as the mortgagee in this scenario, it functions solely as nominee if the assignment of the mortgage out of MERS goes to the trust prior to foreclosure. But if the mortgage rights and responsibilities of the actual interest in the property never vested in MERS who was acting out solely the nominee side of the mortgage, then is this a real assignment? That is, does it actually transfer an interest in property?

In this case, because it is required by the trust document itself proof of the transfer of the mortgage through off book assignments should exist as required by the trusts own documents and therefore by New York law for the transfer of the mortgage not to be void into the trust. The attempt by MERS to claim capacity beyond its public face in the registry of deeds is only necessary if the trust has not properly executed its responsibilities in terms of movement of the actual mortgage interest.

In cases where the powers of the mortgage itself somehow became split in a new configuration that does not conform to standard note holder/mortgage holder powers and relationships – which seems to be the case here prior to whenever the Trust came to possess the actual note and mortgage – the MERS schema as nominee is at best messy. If the mortgage itself did not have a hidden life where it was, in fact, being transferred with its concomitant powers behind MERS' wizard of oz curtain then the MERS schema becomes muddied and conceptually and practically unclear.

In the Trust scenario, MERS' role as nominee while the rest of the functions of the mortgagee are being held by another entity is clear – even if they have not proven the legality of it. If instead the only existing entities off-record or on-record are MERS and the note holder and MERS cannot exercise any of the other capacities of a standard mortgagee because for instance it cannot accept payments, it cannot authorize a servicer, it cannot accept the money for the purchase of the foreclosure, it cannot own property, it cannot negotiate a modification of the mortgage, etc and we would argue cannot fulfill the obligation of a mortgagee especially in a title theory state where they need to have some potential possessory

interest in the property, then it is not clear in the MERS schema where those additional capacities vest.

To the extent to which mortgages and notes have traveled together and the distinction between those capacities was more blended, arguably all of those capacities could perhaps revert to the note holder. However, if that's true, then MERS never truly functions in those situations as the mortgagee because of its limited capacity as a nominee.

Therefore, while the title could be parsed for convenience sake in different ways, the legal and the practical reality is MERS does not function as the fully functional "mortgagee" – instead MERS uses the term as they have defined it outside of its traditional legal meaning in Massachusetts; MERS functions purely as a very limited *nominee agent* of a note holder where some of the traditional capacities of a mortgagee rests either in an undefined purgatory or become by custom, the exercise of the note holder as MERS claims in their brief or the invalid exercise by MERS as an agent without direction functioning beyond its nominee capacity.

In either scenario, MERS' contractual capacity is clearly defined in the mortgage as a "nominee for the lender, their successor and assigns": "mortgagee" is purely a descriptor of the larger universe within which MERS as nominee can claim a

very limited legal capacity. In other words, "mortgagee" exists as a reference to the general area of many legal responsibilities and rights that a mortgage holder has traditionally so as to identify for the signatories to the contract – and the legal future of the contract itself – within which universe, MERS as nominee will grab a small number of the rights and responsibilities.

In the case of the Galiastro mortgage, it appears to have in the beginning existed in the second muddy scenario, where MERS is identified in the mortgage as mortgagee but where its capacity in that role seriously curtailed the normal mortgagee's powers and then later became the clearcut "nominee only" in the first scenario, the Trust scenario outlined above. As such, since a party can only assign the powers it itself possesses, was the mortgage that was transferred from the initial MERS nominee/mortgagee still vested with the full range of powers when assumed by the entities that transferred it into the Trust off-record?

Because a title-theory state requires a great interest in the real property, a potentially possessory interest pre-foreclosure, MERS inability to hold a beneficial interest and at best ability to function as a lien holder, the Superior Court erred in assuming MERS had capacity to function as a full mortgagee in Massachusetts.

MERS schema is in particular trouble in a title-theory state like Massachusetts. On page 15 of Appellee's brief, MERS refers to the mortgaging process as "establishing a lien on the property" and posits that they then hold legal title to the property. This is congruent with MERS basic legal model in which MERS defines itself as the named "mortgage lien holder" in land records[1].

[1] As published in MERSCORP, Inc. and Mortgage Electronic Registration Systems, Inc., Case Law Outline, 2nd Quarter 2011 by MERSCORP Inc. Law Department, the MERS "Basic Business Model" is: (1) Recording versus Registration. The mortgage or deed of trust is RECORDED in the applicable county land records. The mortgage information is REGISTERED on the MERS® System. The mortgage, deed of trust or assignment to Mortgage Electronic Registration Systems, Inc. must be recorded in the land records in order to perfect the mortgage lien. Registering the mortgage loan information on the MERS® System is separate and apart from the function that the county recorders perform. There are three types of loans registered on the MERS® System: loans closed on a security instrument where MERS is the original mortgagee ("MOM"); loans where the lien is assigned to MERS ("non-MOM"); and loans registered solely for tracking purposes where MERS is not the mortgagee or assignee ("iRegistration"). (2) Transfers of Mortgage Interests versus Tracking the Changes in Mortgage Interests: No mortgage rights are transferred on the MERS® System. The MERS® System only tracks the changes in servicing rights and beneficial ownership interests. Servicing rights are sold via a purchase and sale agreement. This is a non-recordable contractual right. Beneficial ownership interests are sold via endorsement and delivery of the promissory note. This is also a non-recordable event. The MERS® System tracks both of these transfers. MERS remains the mortgage lien holder in the land records when these non-recordable events take place. Therefore, because MERS remains the lien holder, there is no need for any assignments. Transactions on the MERS® System are not electronic assignments. Because MERS only holds lien interests on behalf of its Members, when a mortgage loan is sold to a non-MERS member, an assignment of mortgage is required to transfer the mortgage lien from MERS to the non-MERS member. Such an assignment is subsequently recorded in the land records providing notice as to the termination of MERS's role as mortgagee.

The distinction in Massachusetts law between being a lien theory state – which Massachusetts is not – and being a title theory state which Massachusetts is, is well expressed in *Maglione v. BancBoston* pointing out that the mortgagor retains an equity of redemption and upon payment of the note by the mortgagor or upon performance of any other obligation specified in the mortgage instrument the mortgagee's interest in the real property comes to an end. See *Maglione v. BancBoston* Mtge. Corp., 29 Mass.App.Ct. 88, (1990). Therefore, normally the mortgagee has an interest in the secured property for the purpose of protecting the interest of the note holder to payment on the debt that is securitized by the mortgage.

As laid out in *Maglione v. BancBoston,*

> "the difference between a "lien theory" and a "title-theory" as to the nature of a mortgage is that under the latter the mortgagee may enter into possession of the mortgaged premises upon default and before foreclosure, whereas under the "lien theory" there is no right of possession; the mortgagee must await the sale of mortgaged property and obtains satisfaction of the mortgagor's debt from the proceeds of the sale. Osborne, Mortgages §§ 13-16 (2d ed. 1970). The right of possession gives the mortgagee under a "title theory" regime slightly better control of foreclosure proceedings. See Mendler, Massachusetts Conveyancers' Handbook § 5:7.01, at 114 (3d ed. 1984)."

To foreclose in a title theory state is different than to foreclose in a lien theory state and in fact requires the additional capacity for possession prior to foreclosure.

The fact that MERS in their brief, does not understand the distinction between a lien hold on the property and a title hold on the property is significant. Because a title hold on the property includes the right of possession upon default but prior to the foreclosure sale expresses a greater interest or "control" in the property than a lien would provide. While a lien provides a means for payoff of a debt, the payoff comes in the sale, not in the possession of the property itself. Since MERS in its own corporate documents states that is cannot possess an interest in property, it may be able to foreclose and turn the monetary proceeds post-foreclosure over to the foreclosing lender, but it cannot act in possession of the property prior to foreclosure.

In a title theory state, the mortgage in and of itself carries with it a right to possession in a limited sense of the property prior to foreclosure under certain circumstances of default. Holding of the mortgage, therefore, represents and requires a real interest in the property prior to the actual foreclosure sale when the mortgage and note may still be held separately; it is not simply an interest in the monetary proceeds of a property after sale.

This creates a material distinction between being a general agent as mortgagee in a title theory state and what it means to

be a nominee who, in fact, has no actual interest and cannot have any in the property. While MERS may argue that its function as a nominee is indistinguishable from an agent for all practical purposes in a lien theory state, that does not mean that it is true in a title theory state.

Essentially MERS is arguing that it does not hold the part of a mortgagee's interest standardly held by a mortgagee as in totality – the ability to receive payment and hold a certain kind of interest in the property and have its name as the mortgagee of record; it holds only the naming rights, the right to be the mortgagee of record and perhaps functions incidental to that as an agent of holder(s) of the mortgage debt.

In a lien-theory state, nominee and agent may be sufficient to fulfill the rights and obligations of a mortgagee, but in a title-theory state, MERS if it only holds the agency capacity of a lien does not in fact have the capacity to exercise the other aspect of the capacity of a mortgagee as an agent of the note holder. It has to hold on its own the sufficient possession to represent the heightened control in a title theory state; it has to hold sufficient possession, real possessory interest in property to have the right to take possession and enter the property prior to foreclosure.

As stated in *Maglione v. BancBoston* Mtge. Corp., 29 Mass.App.Ct. 88, 90 (1990) "So it is that the mortgagor retains an equity of redemption, and upon payment of the note by the mortgagor or upon performance of any other obligation specified in the mortgage instrument, the mortgagee's interest in the real property comes to an end" [citations omitted] .” If a full mortgagee must hold “interest in the real property” until the note and mortgage are fulfilled, then MERS bar to an actual interest in real property is fatal to its claim as a full mortgagee in Massachusetts.

That capacity to hold a real interest in property and exercise the concomitant functions seems to rest with the split off aspects of the mortgagee that in the MERS construction rests with whoever has the capacity to accept payments and exercise a right of entry and possession prior to foreclosure. Where that capacity lies in the MERS construct is either nowhere, with a hidden actual mortgagee or with the lender. In the MERS construct, this limitation of a MERS as nominee separates off those two functions that would normally be held by a mortgagee agent in prior times into the role of servicers who collects the payments, some entity allowed to exercise possession and MERS which puts its name as mortgagee of record, but does not have sufficient interest in the property to function in a title

theory state to the full capacity that a mortgagee legally functions.

With the limited capacity as a nominee who can only hold a lien and has no interest in real property, MERS cannot carry out the powers of a mortgagee in a number of the steps in a foreclosure let alone carry them out in strict compliance in contradiction to the Superior Court's decision.

If MERS has such a limited capacity as simply being the nominee and the mortgagee of record according to their own corporate schema – this complete lack of ability to act as one with an actual possessory interest and as a mortgagee prior to sale – what interest in property then does MERS assign? For it is well settled, that you cannot transfer to another that which you do not have. If MERS does not have the full compliment of rights and capacities of a standard mortgagee, but only those of a nominee, and they get any additional capacity directly through the specific direction of the note-holder as their agent, then they can only assign the limited nominee aspects of the fuller compliment of mortgagee functions.

In fact, as nominee because MERS has no beneficial interest in the mortgage, MERS cannot be injured or benefit regardless of what happens to a particular mortgage. They get the membership fee from the MERS member regardless of whether a particular mortgage gets paid or not, whether a particular mortgage is foreclosed or not. They literally have no skin in the game.

As such, MERS cannot establish standing, for instance, in a SCRA action in Land Court. As restated in the recent *HSBC Bank USA, N.A. trustee v. Matt,* (2013) decision,

> "To have standing in any capacity, a litigant must show that the challenged action has caused the litigant injury." *Sullivan v. Chief Justice for Admin. & Mgt. of the Trial Court,* 448 Mass. 15, 21 (2006), quoting *Slama v. Attorney Gen.,* 384 Mass. 620, 624 (1981) ... A plaintiff must have "a definite interest in the matters in content in the sense that his rights will be significantly affected by a resolution of the contested point." *Bonan v. Boston,* 398 Mass. 315, 320 (1986)"

While the servicemember legislation refers to "mortgagee" as does the MERS mortgage language, it is clear that as a "nominee" in the areas of responsibilities of a "mortgagee", MERS is neither injured nor benefited by the outcome of a servicemember hearing. MERS rights remain uneffected. It can still be listed in the Registry as a nominee regardless or the decision and it the value of the property post foreclosure is effected, MERS member business will continue. In fact, the entire self-imposed termination of MERS' making foreclosures in its own name for all mortgages across the country in no way harmed their existence as a corporation. They did not change their fee schedule for the loss of some key service they provide their members.

Mass G.L. Chapter 244 § 14 requires advertisement in the name of the mortgagee. A servicer may not advertise in its name

as they have no beneficial interest in the property, cannot discharge the mortgage nor perform the other responsibilities of a mortgagee *even though they function as an agent for the lender*; this is because their ability to act at the direction of the lender even if it were in their contract is not allowed by state law. Similarly, although in the mortgage contract, MERS is named as mortgagee as a further descriptor of their role as nominee and MERS may act as the agent of the lender in limited capacity, the definition in the contract cannot confer on MERS what law does not allow. With the limitations imposed on MERS' agency by its inability to have a beneficial interest in the property and have more than a lien-hold on property, MERS is incapable of fulfilling the functions necessary to foreclose in its name. Therefore, MERS if acting only as an agent of the lender – assuming the lender has the add-on capacities of a mortgagee when MERS as nominee cannot – would have to publish the foreclosure sale in the name as described in *Roche v. Farnsworth,* 106 Mass. 509 (1871) as he "who proposes to make the sale... "

As this honorable Court pointed out in *Ibanez:*

> "Most importantly, G.L. c. 244, § 14 requires complete transparency. *See, e.g.*, *Roche v. Farnsworth*, 106 Mass. at 513 ("These are obscurities that are inconsistent with the degree of clearness that ought to exist in such an advertisement."). What is at stake is of utmost importance and finality — the complete extinguishment of a person's rights in his or her property (often the home

> where that person and his or her family live) and the transfer of those rights to someone who wants (and is entitled) to complete assurance of good title to that property so that he or she can live there without concern."

As *U.S. Bank National Association v. Ibanez*, 458 Mass. 637, 649 (2011) explicated:

> "Like a sale of land itself, the assignment of a mortgage is a conveyance of an interest in land that requires a writing signed by the grantor. See G.L. c. 183, § 3; *Saint Patrick's Religious, Educ. & Charitable Ass'n* v. *Hale*, 227 Mass. 175, 177 (1917). In a "title theory state" like Massachusetts, a mortgage is a transfer of legal title in a property to secure a debt. See *Faneuil Investors Group, Ltd. Partnership* v. *Selectmen of Dennis*, 458 Mass. 1, 6 (2010).

An assignment as a conveyance of interest in property like a deed which therefore requires a writing, similarly requires "a recital of the amount of the full consideration thereof in dollars or the nature of the other consideration therefor, if not delivered for a specific monetary sum." See G.L. c. 183, § 6. MERS, however, can accept no payments nor hold any interest in land and therefore the assignment of its limited "nominee" rights carries with it no consideration for it is not a real interest in property. It is a service provided based upon a MERS member paying for its membership. MERS cannot transfer what it does not have and its assignment of its role as nominee is not properly described as an assignment since it conveys no interest in real property.

For the reasons laid out above, MERS fails in its nominee capacity to be able to take the actions necessary to function as a full mortgagee under Massachusetts laws – best exemplified by its inability to have a beneficial interest in property – in fact, MERS gets paid for a member to participate, it has no skin in any mortgage transaction. This is especially true in a title-theory state where an interest in the real property is a requirement of legal title in the property.

Even if the Superior Court believed MERS can function fully as a mortgagee through their agency relationship with a note-holder or hidden mortgagee, it is a uniquely more dependent relationship than the standard note-holder/ mortgagee relationship. The principal here holds all the beneficial interest and has to exercise functions the homeowner has a right to be able to put a name to.

In the MERS schema or theoretical construction of law, if they have the capacity to assign mortgages or foreclose on a property, MERS's actions are even more dependent upon the exercise of power that seems to have been retained actually by the note holder. Therefore, MERS faces specific hurdles in its attempt to foreclose in its own name in a title theory state. MERS cannot, in fact, function on behalf of the note holder as a mortgagee where it has, in fact, no beneficial interest in the property, except perhaps with explicit additional direction from the note-holder.

MERS then has a higher hurdle to meet in its relationship to the note holder. For instance, it's claim to function as nominee for the note holder without naming the note holder (and in fact naming a lender which in this case had gone out of business as its nominee and not naming the assigned interest in the mortgage and the note after that even if the assignment of mortgage was not recorded) means that the homeowner in fact does not know who holds any of the actual beneficial interest in their mortgage. Since MERS is functioning in an even more limited agency capacity as a nominee where it can't accept payments or in other ways function as having any actual interest in the property, the lack of information about who actually holds the mortgage and the note prior to foreclosure becomes more problematic.

The legal necessity for naming the mortgagee in the legal notice of foreclosure sale flows directly from the homeowner's right to know who has the beneficial interest in the foreclosure. The homeowner still has the right to refinance, have the mortgage discharged, negotiate a loan modification and even sell the property which would require establishing marketable title. MERS itself cannot accept payment or payment in full, negotiate a loan modification or even provide accurate

ownership information for the homeowner to assess the marketability of the title.

> **If MERS can legally have any role in foreclosure, its lack of beneficial interest in the property and power to enforce either the note or exercise the power of sale on its own means the court erred in not requiring full disclosure of the transfer of interest in the mortgage debt – either an off-book series of assignments if they exist or if not, in accordance with the need to trace the assignments of the mortgagee to identify who has the power of sale, through establish proper transfer of the note to ensure the power to enforce it.**

In the foreclosure itself, the ownership problems appear to be directly addressed by the parameters of the Ibanez ruling. In Ibanez, this Honorable Court made it clear that the homeowner has the right to know that a legitimate chain of custody of their mortgage was actually completed so that the final actor in the chain of ownership had the right to enforce the power of sale. As clarified in Ibanez, the right to challenge the validity of any and all mortgage assignments accrues to the homeowner at foreclosure because their interest in their home is being foreclosed – and they have a right to know that the entity ending their formal right t their property and home actually had the power to do so. The presence of MERS cannot preclude a firmly established right, re-affirmed in Ibanez for the homeowner to know and potentially challenge the validity of the transfer of the rights to title in their property.

In the case of a Trust, where there would have had to have been transfers of an actual mortgage interest through mortgagees using their actual names not the name of MERS, MERS would certainly have to reveal if the mortgage had been assigned within the MERS system without those assignments having been recorded. Like any other assignments of mortgage by the time of foreclosure, the homeowner has a right to know what hands have held their mortgage and whether the assignments were legitimate between those hands of their mortgage. The MERS system does not, in fact, provide that information to the homeowner. Those become essentially off-book transactions. However, just as a homeowner has a right to know that all assignments of a mortgage were valid at foreclosure in other situations, that requirement would still apply in the MERS situation especially as MERS as nominee has admitted that it does not have a right to payments or any of the other kinds of interest in property that appear to be required in a title-theory state.

However, MERS argues that it has no beneficial interest in the property and so can only foreclose as the directed agent of the note-holder. Assuming for the sake of argument that its agency can even be expanded to that degree in its limited role as nominee, it is now the legal status of the note-holder that the homeowner has the right to know and therefore, challenge and

the note-holder must establish. If the right to exercise the power of sale is not established through the chain of valid assignments of the mortgage because MERS has claimed its name on the mortgage even though the beneficial and potentially possessory interest in the property has changed hands a number of times, the homeowner still retains the legal right to proof that the entity pulling the strings, enacting the power to foreclose on them does legally retain that power.

Similar to tracing ownership of their mortgage through a series of valid assignments is a homeowner having the right to trace the negotiation of their note through the legitimate chain of endorsements and holder status of a note once the note itself is going to be enforced. For MERS to foreclose and prove in court it could access the power of sale, it would need to reveal the actual owner of the beneficial interest in the property. If MERS claims to be functioning directly as the agent of the lender then the proper passage of the note following all of Article 3 of the Uniform Commercial Code and G.L. Chapter 106 requirements would be necessary to prove that the note-holder for whom MERS claims to act had the power to enforce the note at the time when the foreclosure happened.

This is because as firmly established, if the note has been satisfied then the mortgage is discharged by function of law.

Maglione v. BancBoston "Under the single justice's order, the debt owed the Magliones has been secured. The mortgagee's title, only a means to assure payment of an underlying debt, is without further relevance or force." If note-holder does not have the power to enforce the note then they or whoever claims to hold the mortgage clearly do not have the power to foreclose. Because if they do not have the power to enforce the note then they certainly do not have the power to use the note to enforce the contract secured by the note and therefore would not be able to exercise the power of sale.

To quote one of many such rulings, *In re Lopez,* 446 BR 12 (D.Mass. 2011): "under Massachusetts law, where a mortgage and the obligation secured thereby are held by different persons, the mortgage is regarded as an incident to the obligation, and, therefore, held in trust for the benefit of the owner of the obligation. (citing *Boruchoff v. Ayvasian*, 323 Mass. 1, 10." If there is no legal note-holder or the legal note-holder is other than MERS identified, then the purported trust relationship to use the power of sale in the mortgage does not exist.

If this court determines that MERS can function beyond its limited nominee status on behalf of the note-holder, it is still a requirement that the parties on whose behalf they claim to function is in fact the note-holder. A simple assertion even in

court that the party on whose behalf MERS functions is the note-holder would not even be sufficient if we were dealing with an enforcement of the note itself as a negotiable instrument. If the note is unenforceable or the party claiming to hold the note can not prove it has the power to enforce, then the accompanying security cannot be used to satisfy the debt either because the debt can no longer be enforced by any party because of a defective note or because the owner does not hold the power to enforce. In the schema of MERS, there has not even been documented or attested evidence that the purported note-holder is a member of MERS or even still purports to hold the note.

To enforce the note itself would require all of the proof necessary of a proper transfer of the note through whatever number of hands the note has been transferred. That requires more than just possession of the note but actual affidavits and proof of the properly executed chain of custody of the note and if the final endorsement is in blank, exhibit of the wet-ink copy with an affidavit attesting to its timely acquisition.

An incomplete list of evidence to prove the final note-holder's ability to enforce would include: Every transfer would have to be accompanied by evidence (such as an affidavit) that the transfer was "voluntary" and intended to vest the power to enforce in the next holder of the note. Along with such a chain

of affidavits, the note would have to be shown to be in possession of the holder from commencement of the foreclosure process including at the time of notice of the foreclosure sale through the auction and have been endorsed by the time of enforcement. For the note to be enforceable, it would have to show that the Note had no apparent defect – such as an unauthorized endorsement or voiding or being in default. Or alternatively if in default, proof would need to be provided that proper value had been paid, in good faith and without recourse. And for a transfer such as in bankruptcy or when transferred in bulk, special requirements apply – such as transfer with a Purchase and Assumption Agreement and a schedule explicitly and specifically including the note and showing proper execution. An allonge must be permanently affixed and attested to and additional endorsements should first fill the existing page and if not, some sworn explanation should be provided[2].

[2] NY Judge Battaglia's exposition of the requirements necessary in transferring a note so that it is enforceable is laid out in the recent decision, *Bank Of NY Mellon v. Deane*, 2013 NY Slip Op 23224:

> "The core of the law of negotiable instruments is found in Article 3 of the Uniform Commercial Code,... In 1990, The National Conference of Commissioners on Uniform State Laws proposed a revision of Article 3 that has been adopted in all of the states except New York."
>
> "Revised UCC Article 3 sets out those persons entitled to enforce an instrument, including, in the first instance, "the holder of the instrument" (*see* Revised UCC § 301 [i]), and "a nonholder in possession of the instrument who has the rights of a holder" (*see* Revised UCC § 301 [ii].)"
>
> "A "holder" is "a person who is in possession of ... an instrument ... issued or indorsed to him or to his order or to bearer or in blank." (*See* NYUCC § 1-201 [20].) "Negotiation is the transfer

MERS itself does not name the party with the beneficial interest in its notice of foreclosure sale. In the Galiastro case here, MERS did not name who the purported note-holder was

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of an instrument in such form that the transferee becomes a holder.""

"Thus, "[i]f the instrument is payable to order it is negotiated by delivery with any necessary indorsement; if payable to bearer it is negotiated by delivery." (NYUCC § 3-202 [1].)"

""Delivery" of a negotiable instrument "means voluntary transfer of possession." (*See* NYUCC § 1-201 [14].)'

""Any instrument specially indorsed becomes payable to the order of the special indorsee and may be further negotiated only by his indorsement." (NYUCC § 3-204 [1].)"

"an instrument may also be enforced by "a nonholder in possession ... who has the rights of a holder" (*see* Revised UCC § 301 [ii].) "Transfer of an instrument vests in the transferee such rights as the transferor has therein." (NYUCC § 3-201 [1].)"

""It is elementary ancient law that an assignee never stands in a better position than his assignor.""

"Revised UCC § 3-203 (a) provides, "An instrument is transferred when it is delivered by a person other than the issuer for the purpose of giving to the person receiving delivery the right to enforce an instrument." "The right to enforce an instrument and ownership of the instrument are two different concepts," with ownership "determined by principles of the law of property, independent of Article 3." (*See* Comment 1 to Revised UCC § 3-203.) Assuming a transfer "for value" (*see* NYUCC § 3-303), if the instrument is not then payable to bearer, the transferee has "the specifically enforceable right to have the unqualified indorsement of the transferor," **but "[n]egotiation takes effect only when the indorsement is made and until that time there is no presumption that the transferee is the owner."** (*See* NYUCC § 3-201 [3]; *see also* NYUCC § 3-307 [2].)"

"Under Revised Article 3, the only occasions for allowing a person *not* in possession of an instrument to enforce it are where the instrument has been lost, destroyed or stolen, or where the instrument has been paid by mistake and the payment is recovered. (*See* Revised UCC § 3-301 [iii], §§ 3-309, 3-418 [d].)"

...the Official Comment to Revised Article 3, § 3-203; Transfer of Instrument; Rights Acquired By Transfer:

"The right to enforce an instrument and ownership of the instrument are two different concepts ... Ownership rights in instruments may be determined by principles of the law of property, independent of Article 3, which do not depend upon whether the instrument was

which would properly require an affidavit as MERS is not a person that can swear to its information. Given that MERS admits to not overseeing the veracity and validity of MERS member transfers in its own system, it cannot even properly attest to the purported note-holder under even the standard business exemption in an affidavit based upon execution in the course of standard business practice *because MERS states in its own corporate documents and numerous court cases*, that it does not verify the legal validity of the information in its own system.

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transferred under Section 3-203. Moreover, a person who has an ownership right in an instrument might not be a person entitled to enforce the instrument. For example, suppose X is the owner and holder of an instrument payable to X. X sells the instrument to Y but is unable to deliver immediate possession to Y. Instead, X signs a document conveying all of X's right, title, and interest in the instrument to Y. Although the document may be effective to give Y a claim to ownership of the instrument, Y is not a person entitled to enforce the instrument until Y obtains possession of the instrument. No transfer of the instrument occurs under Section 3-203 (a) until it is delivered to Y." (Official Comment 1 to Revised UCC § 3-203.)

"Where a plaintiff, therefore, is not a holder of the note, but establishes "standing" pursuant to transfer, either by assignment or delivery, the plaintiff must show that its transferor had the right to enforce the note before transfer.

"In sum, in the usual case, a plaintiff has "standing" to prosecute a mortgage foreclosure action where, at the time the action is commenced: (1) the plaintiff is the holder of the note (*see* NYUCC § 1-201 [20]); *or* (2) the plaintiff has possession of the note by delivery (*see* NYUCC § 1-201[14]), from a person entitled to enforce it, for the purpose of giving the plaintiff the right to enforce it; *or* (3) the plaintiff has been assigned the note, by a person entitled to enforce it, for the purpose of giving the plaintiff the right to collect the debt evidenced by the note, and the plaintiff tenders the note at the time of any judgment."

Judge Battaglia's summary, to be in line with the *Eaton* decision must allow for the following statuses of the noteholder but to foreclose in Massachusetts you can be that noteholder or an agent there for. Since the agent to act on behalf of the noteholder would have to establish that the noteholder they represent held that note such that they are entitled to enforce it. Agency can not confer powers not held by party on whose behalf the agent acts.

Without a proper affidavit as to the identity of the note holder along with all of the proof that the chain of transfer of the note was done properly and therefore the power to enforce the note was properly transferred and still held by the named note-holder, the claim to foreclose on behalf of the present note-holder is meaningless. Just as the homeowner in foreclosure has a right to know that all assignments were done properly so that the mortgage is enforceable, if MERS claims to function as an agent for the note holder then the homeowner similarly has a right to know that the mortgage could be enforced because the note holder had the power to enforce the note. MERS does not discharge its obligation to prove that the mortgage can be enforced anymore than any other assignee or agent would have to prove that if all of the assignments of mortgage had been recorded. The fact that they can use assignments that were not recorded does not relieve them of the obligation of proving, if challenged, that those assignments were done properly.

If MERS claims that it can hold mortgagee status constant while the note changed hands, but it is the holder of the note at the final chain of transfers of the note that can allow MERS to enforce the mortgage then surely the note holder at the end of the chain of the note holders has to still have the power to enforce the note. Otherwise, they could not give a power that

they do not have to MERS to enforce the power of sale in the mortgage. Otherwise, to turn the MERS appellant's brief's argument on its head MERS would be getting differential treatment which is illegal; it would be receiving a pass on the transfer of the power of sale as an expression of the power to enforce the note that no other mortgagee of record behind whom there is a series of assignments or transfers of the beneficial interest in the property is allowed by Massachusetts' law.

The *Eaton* decision primarily addressed whether traditionally and historically the foreclosing entity in Massachusetts needed to hold both the mortgage and the note. While the decision was made to apply prospectively, it held that the mortgagee had to hold the mortgage and the note or be the agent of the note holder.

> **Because the power to enforce the note is precedent to using the security for the debt – the mortgage – to enforce the note through the power of sale, it is not the existence of a purported note-holder that matters. Contrary to previous argument, the note has been referenced even in decisions leading up to the foreclosure crisis and those on the homeowner side believed they were required for foreclosure. Given experience with notes now that homeowners are sometimes receiving them in discovery, it is clear that it is the ability to review the validity of the transfers of the note that is critical. *Eaton* must be applied retrospectively.**

The prospective nature of the decision was made in large part because of a statement by the industry that it had not understood the necessity of the unity of the mortgage and the

note. In fact, the decision to allow the mortgagee to function as the agent of the note-holder seems to be largely influenced as well by a concern for the challenges that a retrospective *Eaton* decision would open the state's land records to.

However, while the industry may argue that they didn't know they needed to have authority of the note as well as the mortgage to foreclose, there were numerous cases in the pipeline and general conversation among homeowners and long time property attorneys in our state assuming that the authority of the note was required to foreclosure as well as the mortgage. The *Fannie Mae v. Hendricks (2012)* case was held pending the decision as were other challenges in various jurisdictions.

The *Norris* and *Lyons* homeowners had filed and stood by their argument while Eaton was being decided and made their way up to the Appeals Court. See *HBSC Bank v. Paul Norris,* No. 11-P-1916 Mass App Ct (2013) and *Lyons v. MERS,* No. 11-P-560 Mass App Ct (2013). They, therefore, benefited from the understanding of the Appeals Court judges that it would be a capricious application of the law not to allow those who had already raised the issue of ownership of the note in their cases during the same time period that Eaton had – and so would benefit or loose based on the particular, idiosyncratic path their case had taken through our court structure.

In fact, as in this *Galiastro* case where the note challenge was raised prior to the lower court *Eaton* decision, it would seem particularly unfair for this court to note the assumptions of the foreclosing entities and their lawyers to determine its application of law instead of the assumption of those who are losing ownership of the primary asset they are likely to hold in their lives and their lawyers. In fact, to not allow homeowners who believed they had a right to proof that the foreclosing entity held both the note and mortgage to foreclosure their ownership potentially illegally in contravention of one of the fundamental rights in our Constitution seems particularly unfair. In fact, a due process argument could be made that the application of the law in such a way becomes the act of the state allowing the illegitimate taking of our citizens' property without access to legal defense in the Court's legal interpretation of this issue on the side of those who would deprive residents of our state of their property – the vast majority of whom are not residents of our state even in their corporate personhood. If for no other reason therefore, the retroactive application of *Eaton* as the common law of our state for the common people of our Commonwealth would seem fair.

Plaintiff MERS here quotes *Eaton,* "In the property law context, we generally apply our decisions prospectively out of

'concern for litigants and others who have relied on existing precedent.'" Clearly, the long ago decisions where the legal reliance on the note of the mortgage was clarified might have been beyond recall for present lawyers for lenders but a cursory review of some of the recent decisions prior to the *Eaton* decision and before the beginning of the foreclosure crisis showed that all of them referred to the mortgage and the note in the context of foreclosure. See *NationsBanc Mtge. Corp. v Eisenhauer,* 49 Mass. App. Ct. 727 (2000); *Williams v. Resolution GGF Oy,* 417 Mass. 377 (1994); *In re Schwartz,* 366 B.R. 265 (Bankr. D. Mass. 2007); *Maglione v. BancBoston Mtge. Corp*, 29 Mass. App. Ct. 88 (1990).

Where were the "existing precedents" that the lawyers for the industry claimed reliance upon? No such precedent is cited here or to this Amicus' knowledge, in *Eaton.* The financial industry in less than two decades had created or re-created numerous new financial instruments and institutions that stood on legal theories that had crept away from existing practice. Mortgage Companies that lent outside of existing Banking practices and regulations came and went in less than two decades. MERS' own belief it's ability to legally foreclose in it's own name came and went in less than that time. The list is long of these briefly lived legal formulations but their brief

widespread use did not mean they were based in actual legal precedents nor should others bear the brunt of their creative re-formulations of traditional laws nor they lack of research into long ago precedents that actually established our laws.

Eaton was not a new formulation, it was a reaffirmation of an old formulation that had informed even recent decisions even though their precedential basis had slipped from the conscious collective memory.

However, this amicus would argue that the critical reason for the retroactive application of Eaton is because there was a deeper issue lurking behind the question that the *Eaton* Court sought to address.

Since the *Eaton* decision, the legislature of our state has codified the requirement that the foreclosing lender hold both the mortgage and the note or act with the authority of the note holder in legislation passed two weeks after the decision came down. Initial legislation to clarify this had, in fact, been filed five years earlier in the legislature and a few more times more recently although no action had been taken. In fact, the Land Court changed the filing requirements for servicemember cases to require clarification of a holder of the note as well as the mortgage after the *Eaton* decision as well. (This, in conformity with the fact that the legislature decided with the

passage of the right to cure law, G.L. Chapter 244, § 35A, in the fall of 2007 that the foreclosure process starts at Land Court and so the requirement of the mortgagee also acting under the authority of the note during the foreclosure process is met).

The deeper question that has become revealed by these changes and is characterized in the first known foreclosure that fell under the new legislative requirements of Chapter 194 of the Acts of 2012, the new foreclosure statute. In that case, the *Feijo* case, the foreclosing lender violated that statute by not timely filing – prior to advertisement of the auction sale in the paper – the affidavit attesting to ownership of the note. However, when they sought to evict that family (case still ongoing) they did produce a copy of the note supposedly evidencing all the intervening endorsements up unto the party that claimed the authority of the note in its foreclosure. This revealed that the problem may not be a question of who claims to hold the note during foreclosure, but *whether the note holder themselves has the power to enforce the note*. It is this deeper potential problem that most convincingly requires that the identity of the note holder be legally challengeable going back in time.

When we dig deeper into the critical issue of the note holder actually holding the note we believe that is actually where the critical issues are going to need to be addressed. As quoted extensively in the *Eaton* decision there are numerous decisions[3] saying that the mortgage itself is meaningless without the note and that without the enforcement of the note against the home on the basis of the power of sale in the mortgage that the note as a negotiable instrument could in fact just simply be paid off by cash. Such a cash pay-off would be the common action at a time when there's not a foreclosure crisis where so many of the homeowners who get into trouble are also underwater. If they

[3] As cited in *Eaton*: "A real estate mortgage in Massachusetts has two distinct but related aspects: it is a transfer of legal title to the mortgage property, and it serves as security for an underlying note or other obligation--that is, the transfer of title is made in order to secure a debt, and the title itself is defeasible when the debt is paid. See *U.S. Bank Nat'l Ass'n v. Ibanez*, 458 Mass. 637, 649 (2011) (Ibanez) (Massachusetts is a "title theory" State in which "a mortgage is a transfer of legal title in a property to secure a debt"); *Perry v. Miller*, 330 Mass. 261, 263 (1953), and cases cited (legal title held by mortgagee is "defeasible upon the payment of money or the performance of some other condition"); *Goodwin v. Richardson*, 11 Mass. 469, 475 (1814) (mortgage deed "purports to convey to the mortgagee a present estate in fee simple, defeasible on the performance of a certain condition by the mortgagor"). See also *Negron v. Gordon*, 373 Mass. 199, 204 (1977) ("[T]he mortgagee holds bare legal title to the property subject to defeasance on the mortgagor's performance of the obligation secured by the mortgage. It is only for the purpose of securing the debt that the mortgagee is to be considered owner of the property" [citations omitted]); *Young v. Miller*, 6 Gray 152, 153 (1856) ("The true character of a mortgage is the pledge of real estate to secure the payment of money, or the performance of some other obligation"); *Maglione v. BancBoston Mtge. Corp.*, 29 Mass.App.Ct. 88, 90 (1990) ("So it is that the mortgagor retains an equity of redemption, and upon payment of the note by the mortgagor or upon performance of any other obligation specified in the mortgage instrument, the mortgagee's interest in the real property comes to an end" [citations omitted])."

were not underwater and could re-finance, they would discharge the note or sell some other major asset that still had value.

Revealed in the Feijo note – in the first household whose foreclosure was covered by the new state law that had been based on *Eaton* – is that the note itself is a mess. When notes were transferred individually from one person to another perhaps once or even twice during the life of a 30 year mortgage the compliance with transfers of the note was readily verifiable and done at arms length in transactions with the light of day.

Now, literally millions of notes across the country, for instance, have been transferred into private label securitized trusts in a mill process which the trustees themselves have admitted in the public record they do not bother to verify – much like MERS not verifying the transfers of the notes behind its iron screen. It turns out that the trustees have not verified proper transfer of the note through the several hands that are required for notes to be legally transferred into trusts. The note in the *Feijo* case here referenced, exhibits at least 13 legal discrepancies in the transfer of the note including a readily apparent facial defect that should render the note non-negotiable. As well, the Feijo note was not even a note that was transferred into a securitized trust or behind the MERS iron curtain.

We believe the critical issue here is not who claims to be owner of the note, but whether their claim is legally valid and actually vests in them the power to enforce. It is in fact the power to enforce the note which is foundational to the ability to use the mortgage as collateral and actually access the power of sale. As such the required existence of the legally holding of the note as well as the mortgage to enforce is not optional. And its requirement retrospectively is necessary to provide the light of day required on the ownership and legal power to enforce the note by the purported note holder throughout the foreclosure process. If indeed, this reveals not that the industry did not know that the existence of a note-holder was likely to be necessary but that they know that they have not handled negotiable instruments with the legal diligence required and fear the revealing of that reality, then that is exactly the role of the courts to protect the legitimate property interests and contractual rights of homeowners in our state.

The Trust itself in the Galiastro case was required by its own trust document to properly transfer the note and certify to that process. Surely, Galiastro and the one quarter of homeowners whose mortgages were supposedly transferred through securitization mills into securitized trusts deserve to know if

those notes can be enforced before their home is used as collateral – as do all the other homeowners in Massachusetts.

We pray, therefore, as this Honorable Court recognized in *ibanez:*

> The issues in this case are not merely problems with paperwork or a matter of dotting i's and crossing t's. Instead, they lie at the heart of the protections given to homeowners and borrowers by the Massachusetts legislature. To accept the plaintiffs' arguments is to allow them to take someone's home without any demonstrable right to do so, based upon the assumption that they ultimately will be able to show that they have that right and the further assumption that potential bidders will be undeterred by the lack of a demonstrable legal foundation for the sale and will nonetheless bid full value in the expectation that that foundation will ultimately be produced, even if it takes a year or more. The law recognizes the troubling nature of these assumptions, the harm caused if those assumptions prove erroneous, and commands otherwise.

CONCLUSION

The decision of the Superior Court should be reversed and the matter remanded.

Respectfully submitted,

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Dated: September 30, 2013

CERTIFICATE OF SERVICE

I hereby certify that I have served by hand a copy of the attached Amicus Brief, upon Attorneys Todd S. Holbrook at Morgan, Lewis, Bockius, Offices, P>C., 225 Franklin Street, 16th Fl, Boston, MA 02110 and Glenn F. Russell at Law Office of Glenn F. Russell, Jr., 38 Rock Street, Suite #12, Fall River, MA 02720 on this 52nd day of October, 2013.

As well as electronically upon Attorneys Todd S. Holbrook, Robert Brochin of Morgan, Lewis, Bockius, Glenn F. Russell,

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