SUPREME JUDICIAL COURT

THE COMMONWEALTH OF MASSACHUSETTS

DOCKET NO. SJC-12406

CHRISTINE HILTON, ISMAIL ABDELHAMED, RUTH ADJARTEY, VESTA BALLOU, LORI CAIRNS, JACKELINE CUCUFATE, MARJORIE EVANS, GERARD HUGHES, MARIA NAVEDO, PAUL NORRIS, JOHN SCHUMACHER, PETITIONERS-APPELLANTS,

v.

WORCESTER HOUSING COURT,

DEFENDANT- APPELLEE.

A REVIEW OF A DENIAL OF

CHAPTER 211 SECTION 3 PETITION

AMICI'S BRIEF

Jean Atkinson 7 Knowles Rd. Worcester, MA 01602, Edna Austell 124-A Brooks St. Worcester, MA 01606, Annette Bent 6 Rose Ln. Oxford, MA 01540, Steven Bourassa 216 Worcester Rd. Princeton, MA 01541, Lori Cairns 16 Chalmers Rd. Worcester, MA 01602, Samantha Farrar 10 Diamond St. Worcester, MA 01610, Patricia Ferreira Bonilla 44 Shrewsbury Green Dr. B Shrewsbury, MA 01545, Christine Hilton 121 Hampton St. Auburn, MA 01501, Kelly Johnson 18 Baxter St Worcester, MA 01602, Felix Kangaru 14 Moreland St. Worcester, MA 01609, Heather Kozac 230 Paxton St. Leicester, MA 01524, Cheryl LeBlanc 44 Nashua St. Fitchburg, MA 01420, Phillippe LeBlanc 11 Clarendon Rd. Auburn, MA 01501, William Marks 3 Frederick St. Worcester, MA 01605, Deb McCarthy 165 Lovell St. 2 Worcester, MA 01603, Keith McKenzie 32 Edgewater Av. Shrewsbury, MA 01545, Paulette McKenzie 32 Edgewater Av. Shrewsbury, MA 01545, Miranda Morgan 1488 Main St. Unit A Worcester, MA 01603, Lam Nguyen 111 Lakewood St. Worcester, MA 01603, Joseph Nuzzolilo 529 Lake Av. Worcester, MA 01604, Cynthia O'Gara 55 Abington St. Worcester, MA 01603, Mychelyne Oliveira 128 Paine St. 2 Worcester, MA 01605, Susan Osborne 69 Elm St. North Brookfield, MA 01535, Brian Potter 335 Goodale St. West Boylston, MA 01583, Thomas Saxe 87 King Philip Rd. Worcester, MA 01606, Al Solitro 6 Evergreen Av. West Boylston, MA 01583, Sherry Stanley 405 Granite St. Worcester, MA 01607, Myron Swanston 98 Prescott St. Lancaster, MA 01523, Stefani Tubert 47 Barnard Rd. Worcester, MA 01605,Cynthia White 5 Knowles Rd Worcester, MA 01602, Nunciata Sullivan P.O. Box 343 Wayland, MA 01778, Lila Ortiz 122 Southgate St. Worcester, MA 01603, Carl Rellstab 40 Laurel St. Worcester, MA 01605, Vesta Ballou 781 Ashland Ave. Southbridge, MA 01550, Carey Souda 1488 Main St. Unit A Worcester, MA 01603, Patricia O'Dell 18 Baxter St Worcester, MA 01602, Linda Potter 174 Providence Rd.#904 Grafton, MA 01519, Jasmine Alvarez 7 Cutler St. Worcester, MA 01604

Dated: July 13, 2018

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ISSUES

1. Has the Worcester Housing Court erred in engaging in the widespread and continuing practice of accepting Plaintiff's *ex parte* insertions of documents in purported post-foreclosure cases?
2. Did the Worcester Housing Court err in not meeting its obligations under the Canon SJC Rule 2.9 to avoid *ex parte* communications, given documents inserted in over 54 cases with no service on Defendants, nor evidence of such?
3. Did the Worcester Housing Court err in relying on documents inserted without legal entry into defendant's files under civil process?
4. Did the Worcester Housing Court also err in not recognizing, enforcing and addressing violations of the special stricter limitation on documents that may be included to commence a case under Summary Process Rule 2?
5. Does the Worcester Housing Court err when it assumes that documents inserted without notice in violation of *ex parte* rules can otherwise be accepted despite a lack of notice on the basis that they are publicly available or recorded in a Registry of Deeds?
6. Did the Worcester Housing Court err in relying on documents as *prima facie* proof of a legally valid foreclosure where even a superficial review of the documents reveal failure to meet the legal standards of such documents? Do the Judges especially err in not scrutinizing illegally inserted documents given that Defendants, without any notification, were denied their ability to challenge?
7. Did the Worcester Housing Court err in not requiring corporate disclosures under the cannon for judicial

conduct promulgated by the SJC in 2002, given the hundreds of cases they have had with (non-human)foreclosing entities and purported foreclosure purchasers?

8. Did the Worcester Housing Court err in not enforcing corporate disclosure rules at each required step?
   a. Even when Defendants requested proof of founding documents of Plaintiff?
   b. Even though the Judge does not know or recognize that this is required for all non-human, non-governmental entities?

9. Did the Worcester Housing Court err when the Judges did not fulfill their burden to implement corrections outlined in the *ex parte* court rules, such as:
   a. notifying defendants?
   b. providing defendants their right to challenge the *ex parte* documents?
   c. recognizing these documents as void, prejudicial and/or fraudulent, and striking them?
   d. failing to reopen cases, vacate judgments and dismiss with prejudice cases where *ex parte* insertions were made?

10. Did the Worcester Housing Court also err in:
   a. not sanctioning Plaintiff's attorneys and law firms for their *ex parte* violations, as required?
   b. not reporting the attorneys responsible for secreted *ex parte* documents to the Bar Board of Overseers?
   c. not recognizing these as commissions of Fraud Upon the Court in violation of procedural rules and the due process rights of Defendants which are Constitutionally protected?

11. Did the Judges err in failing to supervise and correct violations committed by court clerks in accepting *ex parte* communications and illegally entering docket items?

12. Has the Worcester Housing Court's unquestioning acceptance of Plaintiff's documents and arguments undermined even the most fundamental and central Defenses in post purported foreclosure Summary Process cases?

STATEMENT OF AMICI

This Court's Amici are all in possession of their homes after purported foreclosures. All are fighting for

their homes[1] as defendants in Summary Process eviction cases in the Worcester Housing Court ("WHC"), a court with two judges, or on appeal. Petitioners stand together as witnesses to the WHC's adjudication of their cases on the basis of documents inserted into their case files *ex parte,* without service to them, in contravention to the rules of civil procedure and the Constitutional guarantees of due process. Their various cases exhibit fraud, forgery, judicial misconduct, and additional violations of the Massachusetts Rules of Civil Procedure and the Massachusetts and U.S. Constitutions.

The Amici are victims and survivors of the traumatic experience of having their homes taken illegally in violation of their inalienable Constitutional right to property[2], established by the founding fathers.

The Massachusetts Constitution's Preamble asserts that all essential rights must be "protected," including by an "impartial interpretation" of our laws. In the triad of

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[1] They are all members of the Worcester Anti-Foreclosure Team ("WAFT"). This is a Massachusetts bank tenants'/mutual aid association with hundreds of members — homeowners and tenants fighting to save their homes from illegal foreclosures. **At present, nearly 100** members are defending against eviction in **WHC lawsuits.** WAFT is a Massachusetts Alliance Against Predatory Lending (MAAPL) member.

[2] There is evidence that the WHC is violating litigants' Constitutional rights to property, that is, to our "homes and farms."(*U.S. Nat'l Bank v. Ibanez*, 458 Mass. 637, 649 (2011) and our Constitutional guarantee to judicial protection of those rights. Cf. Massachusetts Declaration of Rights, Articles 1, 10, 11, 15, and 29.

life, liberty, and property, property is of equivalent human value when it is protected, and of equivalent human destruction when it is not. The Declaration of Rights of the Inhabitants of the Commonwealth, Part the First of the Massachusetts Constitution of 1780, accordingly provides:

> All people are born free and equal and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing and protecting property; in fine, that of seeking and obtaining their safety and happiness.

The right of this Court's Amici to acquire, possess, and protect their property is firmly established in Articles 10, 15, 29 and 39. Article 10 provides that “no part of the property of any individual can, with justice, be taken from him, ... without his own consent, or that of the representative body of the people.” Thus, the pervasive practices that characterize the WHC’s complicity in the taking of our property undermines our great Commonwealth. By way of bias, ignorance, and unethical conduct, the WHC has abrogated its Constitutional duty to affect an “impartial interpretation of the law, and administration of justice.”

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Articles 10, 15, 29 and 39. Article 10 provides that “no part of the property of any individual can, with justice, be taken from him, ... without his own consent, or that of the representative body of the people.” Thus, the WHC’s pervasive and uninhibited practices have allowed the taking of the property of our inhabitants, and in so doing, undermines our great Commonwealth. By way of bias, ignorance, and unethical conduct, the WHC has abrogated its Constitutional duty to affect an “impartial interpretation of the law, and administration of justice.”

This brief compiles personal attestations by the Amici of a pattern of judicial misconduct and due process violations in their cases. The Amici continually experience discrimination, witness intimidation, ridicule, dismissive treatment, and misdirection by plaintiffs’ attorneys. The WHC judges continually facilitate, turn a blind eye to, and exacerbate these injustices, even when they occur in open court. The WHC's actions and inactions have caused the Amici to suffer crippling destruction of their physical and mental health, their families’ well-being, their jobs and

financial security, and their reputations in the community.

The WHC has become a no man's land where the power and greed of an industry reign free, rather than impartiality and due process, applicable Massachusetts statutory law and regulations, or the precedents of the Supreme Judicial Court. The WHC has destroyed its credibility and function as a fair and just tribunal of the people.

SUMMARY OF ARGUMENT

Petitioners submit this Amicus brief with the gravest of concerns. The focus of the Appellant brief was the ever clearer bias of the WHC against *pro se* litigants defending purported post-foreclosure evictions, and the refusal of Judges of the WHC to recuse themselves given this bias. The Appellant brief addressed bias requiring recusal. The Chief Judge's insistence was that the only basis for her recusal would be ex parte communications *and she was not guilty of any,* but the Amici and co-members of WAFT have seen that the WHC regularly accepts them.

Petitioners submit this unexpected brief because of evidence that these violations are pervasive and ongoing.

Most of the Petitioners whose case files WAFT members reviewed are WAFT members; some are not, but almost all

of the Defendants in these cases, started and remain *pro se*. As such, this denial of their due process rights is particularly pernicious[3].

The Massachusetts Constitution's Preamble asserts that all essential rights must be "protected," including by an "impartial interpretation" of our laws. Along with life and liberty, property is of equivalent human value where protected, and of equivalent human destruction where denied. See Article I of the Declaration of Rights of the Inhabitants of the Commonwealth:

> All people are born free and equal and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing and protecting property; in fine, that of seeking and obtaining their safety and happiness.

These Amici seek redress for critical violations by the WHC of the Judicial Code of Conduct, court rules and due process rights in the 54 cases included here. The first instance of endemic *ex parte* violations was discovered nine months ago in mid-September 2017.

The practice of pervasive ex parte communications between Plaintiff attorneys and the WHC judges

a) Court staff are inserting these documents into defendant's file without compliance with general civil

[3] Given the expedited pace of Summary Process, in the first three months of compiling this evidence, at least five Defendants have lost their homes; now an additional five have been evicted by the WHC on the basis of the bias endangered by the *ex parte* insertions.

process rules and explicitly against the special restrictions of summary process rules;
b) Court staff are inserting these documents into files without confirming documentation of service;
c) These documents are made available for the Judge's consideration without the knowledge of the Defendants in these cases;
d) They are inserted at the very beginning of the case;
e) Without notice, Defendants are denied their right to challenge these documents' evidentiary value;
f) The Judges take no steps to correct these *ex parte* communications in accordance with the Judicial Conduct Code, or to repair the damage that their reliance on such documents has on the credibility of the Defendants and the judicial process;
g) The WHC Judges assume Registry documents to be especially truthful contrary to jurisprudence which affords them no special weight;
h) The inserted registry documents including those comprising Plaintiffs' prima facie case fail legal test of validity, even upon a cursory review;
i) The Judges have allowed themselves to be exposed to hundreds of pieces of *ex parte* "evidence."

Once made public, in Appellants' brief of February 26, 2018, *the WHC has persevered in its regular practice of accepting these documents against the Code of Judicial Conduct (see APP1422 (O'Gara).*

Ex parte documents discovered by Defendants in their own cases[4] have raised alarming questions regarding the presumptive biases of the Court with regard to the legality of the foreclosures, pro se defendant's defenses in court, and the pernicious accusation that any

[4] As WAFT members, Petitioners meet regularly to report on developments in our respective cases and to educate ourselves about the laws which protect and guarantee our rights. This necessarily means coming to understand and demand the fair application, in the WHC and appeals courts, of the legal protections that are intended to govern those processes.

organizational assistance accepted by defendants proceeding *pro se* is the criminal activity of practicing law without a license; it is a legally unfounded accusation asserted by the Court to invoke fear and intimidation, as is the affiliation with any political or activist group, strictly protected under our U.S. and State constitutions.

Amici seek justice and intervention in the protection of the inhabitants, values and laws of our great Commonwealth by ensuring the right of every citizen "to be tried by judges as free, impartial and independent as the lot of humanity will admit." Art. 29, Mass. Constitution.

STATEMENT OF RELEVANT FACTS

In the case of Tracy Tobin, Plaintiff served Tobin with only two documents: the Summons and Complaint, and a Notice to Quit. Nine months later, she received a response to her discovery request that was so minimal as to be considered unresponsive. Yet, Chief Judge Horan insisted that Tobin had received all the evidence she needed in Plaintiff's sworn discovery response. Checking her case file in the Clerk's office ***on 09/19/17, Tobin discovered copies of documents that had been inserted at the start of the case but were never served on her.*** Their

extra-judicial insertion explained the judge's statement - the judge had seen the illegally inserted documents in the file many months prior.

Tobin brought this due process violation to the attention of WAFT. Research revealed that this was not a singular, nor unintentional, event.

11/01/17, Grace Ross visited the Clerk's Office. In addition to the docket listed "Foreclosure Deed," she found from a few to 10 documents secreted in each of five files she could view. Each file had the initiating law firm's letter, listing only the attached Summons and Complaint, Notice to Quit, Foreclosure Deed and fee.

The case files show service upon Defendants only for the Summons and Complaint (the court promulgated single page standard form) and, separately, for the Notice to Quit. None of the law firms' cover letters below reference the numerous other documents found *ex parte* in the files.

Here, Petitioners list the Summary Process examples to show this *ex parte* practice, enumerating for the Court: the specific lawyers and law firms which filed papers and engaged in this *ex parte* practice, which Judge(s) accepted the *ex parte* communications, whether the Defendant adds their affidavit swearing to no knowledge

of inserted evidence, no receipt of service, no

opportunity to challenge validity of evidence.

02/21/14, Hagopian[5] files standard papers to commence *Fannie Mae v. Osborne, et al. (Judge Horan)*. He inserts "Foreclosure Deed" without service or entry (APP004-011). Defendant attaches her affidavit (APP018)

04/16/13 Defendant Shane O'Connell, through his attorney Craig Ornell, clearly lays out for the Court (Judge Horan) that Plaintiff's 'Affidavit of Sale' is not an affidavit.

05/05/2014, John Schumacher, *pro se*, submits a Defendant's *Memorandum in Support of his Motion for Relief from Judgement, under Rule 60, Sections (b)(4) and (b)(6)* which clearly lays out for Judge Horan that under prevailing well-settled law, the 'Affidavit of Sale' appearing in his file fails the legal requirements for an affidavit, so it cannot be relied upon as such.

08/18/15, Crocker[6] files standard papers to commence *USBank Trust, Trustee of VOLT v. Swanston. (Judge Horan)*. She inserts the "Foreclosure Deed" in the file. Defendant attaches his affidavit. (APP022-025)

01/13/16, Hughes[7] and McDonald[8] file standard papers to commence *Nationstar Mortgage LLC v. Ballou et al. (Judge Horan)* (APP034). 01/15/16, Hughes and McDonald insert the foreclosure deed and related documents (as "Memorandum of Nationstar Mortgage LLC Copy of Deed Submitted") without *no memorandum*, no service nor entry. Defendants attach their affidavit. (APP039-048). 04/20/18, Lori Cairns of WAFT ("Cairns") found *ex parte* insertions in this case. (APP052-070)

09/19/16, Beaton[9] and Linehan[10] file standard papers to commence *USBank Trust, Trustee LSF9 v. Santiago, et al. (Judge Horan)*. They insert the "Copy of Mortgage" without service or entry. (APP074-079)

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[5] Michael R. Hagopian, Esq. of Orlans PC
[6] Sarah Crocker, Esq. of Orlans PC
[7] Neil William Hughes, Esq. of Shechtman, Halperin Savage, LLP
[8] Patrick McDonald, Esq. of Shechtman, Halperin Savage, LLP
[9] Patrick D. Beaton, Esq. of Doonan Graves and Longoria, LLC
[10] Brian Linehan, Esq. of Doonan Graves and Longoria, LLC

11/29/16, McDonald files standard papers to commence *Webster Bank v. Hilton. (Judge Theophilis)*(APP150) McDonald inserts "Foreclosure Deed" without service or entry. Defendant attaches her affidavit (APP156)

12/5/16, Dickson[11] and Stoehr[12] file standard papers to commence *MidFirst Bank v. Alvarez (Horan)* (APP172) 12/13/16, Dickson and Stoehr insert "Foreclosure Deed and Assignment of Mortgage" without service or entry. Defendant attaches her affidavit. (APP179)

12/5/16, Benway[13] and Stoehr file standard papers to commence *Wells Fargo Bank as Trustee v. Freienbergs. (Judge Horan)* (APP183). 12/6/16, they insert the "Foreclosure Deed". 04/27/18, Cairns found *ex parte* insertions in this file. (APP197-APP222)

12/5/16, Benway, Fialkow[14] and Mikolinski[15] file standard papers to commence *USBank as Trustee v. Marks and all occupants. (Judge Horan)* (APP227). 12/6/16, they insert the "Foreclosure Deed" without service or entry. Defendant attaches his affidavit (APP244)

12/16/16, Kiser[16] files standard papers to commence *USBank as Trustee v. Bent, et al. (Horan).* He inserts the "Foreclosure Deed" without service or entry. Defendants attach their affidavit. (APP248-APP265)

02/17/16, Michael[17] filed standard[18] papers to commence *USBank Trust as Trustee LSF8 v. Burgwinkle, et al. (Judge Horan).* He inserts the "Foreclosure Deed" without service or entry (APP269-APP273). 04/20/18, Cairns found *ex parte* insertions in this file. (APP285-APP306)

03/06/17, Crocker and Spaniolo[19] files standard papers to commence *USBank Trust, Trustee LSF8 v. Atkinson* any and

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[11] Augusta G. Dickson, Esq. of Dickson Law Group P.C.
[12] Steven Michael Stoehr, Esq. of Orlans
[13] Christine J. Benway, Esq. of Law Office Christine J. Benway
[14] David Fialkow, Esq. of K & L Gates, LLP
[15] Edward Mikolinski, Esq. of K & L Gates, LLP
[16] Brian Michael Kiser, Esq. of Marinosci Law Group, P.C.
[17] Justin Michael, of Pierce, Esq
[18] Under Summary Process rules, the standard (allowed) documents to commence a case are: Notice to Quit, Summons and Complaint, fee and sometimes a special process server motion. See more below.
[19] Paul G Spaniolo, Esq. of Orlans PC

all occupants, Jean G (Judge Horan). They insert the "Foreclosure Deed" without service or entry. Defendant attaches her affidavit. (APP309-APP323)

03/06/17, Beaton, Linehan, Longoria[20], Merritt[21], and Swisher[22] file standard papers to commence *Fannie Mae v. Rellstab, et al. (Judge Theophilis).* They inserted the "Foreclosure Deed" without service or entry (APP327-APP344)

04/10/17, Crocker files standard papers to commence *Deutsche Bank as Trustee v. Tubert, et al. (Judge Horan).* She inserts the "Foreclosure Deed Submitted" without service or entry Defendants attach their affidavit. (APP351-APP360)

04/18/17, Attorney Tom Vukmirovits, Esq. files standard papers to commence *Ridgemont Properties, Inc. v. Potter, et al. (Judge Horan)* (APP390). 04/19/17, he also inserts the "Foreclosure Deed" without service or entry. Defendants attach their affidavit. (APP392-APP398)

05/1/17, Crocker, Mitchell[23], Seeley[24], and Stoehr file standard papers to commence *USBank Trust, as Trustee LSF9 v. Tobin, et al. (Horan)* (APP408). 05/2/17, they insert the "Foreclosure Deed" without service or entry. Defendant attaches her affidavit. (APP1441-APP1443)

05/8/17, Crocker and Stoehr file standard papers to commence *Deutsche Bank as Trustee v. Buron, et al. (Judge Horan).* They insert the "Foreclosure Deed" without service or entry. Defendants attach their affidavit. (APP465-APP479)

05/15/17, Iarocci[25] files standard papers to commence *Wilmington Savings as Trustee Pretium v. Ashline, Jr., John P et al. (Judge Horan).* She inserts "Foreclosure Deed" without service or entry. (APP483-APP500)

06/5/17, Crocker and Stoehr file standard papers to commence case #17H85SP002061, *Deutsche Bank as Trustee v. Saxe, et al. (Judge Horan)* (APP505). 06/6/17, they insert

[20] Reneau Jean Longoria, Esq. of Doonan Graves and Longoria LLC
[21] David W. Merritt, Esq. of Bernkopf Goodman LLP
[22] Meredith Ann Swisher, Esq. of Bernkopf Goodman LLP
[23] Keith Andrew Mitchell, Esq. of Orlans PC,
[24] Donald W. Seeley, Jr., Esq. of Orlans PC
[25] Jennifer Marie Iarocci, Esq. of Marinosci PC

the "Foreclosure Deed Submitted" without service or entry. Defendant attaches his affidavit (APP507-APP517)

06/5/17, Crocker and Stoehr file standard papers to commence *Deutsche Bank as Trustee v. Driscoll, et al. (Judges Horan; Theophilis; Sullivan)* They insert the "Foreclosure Deed" without service or entry. Defendant attaches her affidavit. (APP548-APP552). 04/27/18, Cairns found *ex parte* insertions into this file. (APP566-APP604)

06/05/17, Plagany[26] and Stoehr file standard papers to commence two cases *HSBC Bank as trustee v. McKenzie, et al. (Judge Horan).* They insert "Foreclosure Deed" in the file without service or entry. Defendants attach their affidavit. (APP608-APP627). 06/05/17, Cairns found *ex parte* insertions into this file. (APP628-APP645)

06/14/17, Harris[27] files standard papers to commence *HSBC Bank as Trustee v. Prempeh. (Judge Horan).* He inserts the "Foreclosure Deed" without service or entry. Defendant attaches her affidavit. (APP649-APP660)

06/30/17, Mitchell, Plagany, and Stoehr file standard papers to commence *Deutsche Bank as Trustee v. Bourassa et al. (Judge Horan).* They insert the "Foreclosure Deed/Assignment of Mortgage" without service or entry. Defendant attaches his affidavit. (APP670-APP679)

07/7/17, Plagany, Seeley, and Stoehr file standard papers to commence *The BONY Mellon v. Austell et al. (Judge Theophilis)* (APP683). 07/10/17, they insert the "Foreclosure Deed" without service or entry. Defendant attaches her affidavit. (APP697). 07/7/17, Cairns finds *ex parte* insertions into this file. (APP698-APP727)

07/7/17, Kish[28] file standard papers to commence *Fannie Mae v. Solitro. (Judge Horan).* (APP732). 07/20/17, Kish inserts the "Foreclosure Deed Submitted" without service or entry. She inserted it after a coerced "agreement for judgement," without service or entry. (APP732-APP738)

07/7/17, Dickson, Plagany, Seeley, and Stoehr file standard papers to commence *Deutsche Bank as Trustee v. Nyaguthii, et al. (Horan/Sullivan).* They file "Miscellaneous Notice of Ownership". (APP778). 07/10/17,

[26] Sogol Irene Plagany, Esq. of Orlans PC
[27] Michael T Harris, Esq, of Law Offices of Michael O'Smith
[28] Tracy A. Kish, Esq. of Korde & Associates

they insert the "Foreclosure Deed Submitted" without service or entry. Defendants attach their affidavit. (APP791)

07/7/17, Dickson and Plagany file standard papers to commence *Deutsche Bank as Trustee v. Leblanc, et al. (Judge Horan)*. They insert the "Foreclosure Deed" without service or entry. Defendant attaches his affidavit. (APP829-APP842). 04/20/18 Michael Nwogbi found *ex parte* insertions in this file. (APP843-APP876)

07/10/17, Plagany files standard papers to commence *USBank Trust, as Trustee LSF9 v. Nguyen, et al (Judge Horan)*. She inserted the "Foreclosure Deed" without service or entry. Defendant attaches her affidavit. (APP881-APP889)

07/31/17, Plagany files standard papers to commence *Wells Fargo as Trustee v. Nuzzolilo, et al. (Judge Horan)* (APP918-APP919). 08/01/17, Plagany inserts the "Foreclosure Deed" without service or entry. Defendant attaches this affidavit.(APP1444)

08/4/17, Plagany, Seeley, and Stoehr file standard papers to commence *USBank as Trustee v. Ortiz, et al. (Judge Theophilis)*. They insert the "Foreclosure Deed Submitted" without service or entry. Defendants attach their affidavits (APP964-APP976)****case narrative below****

08/18/17, Plagany and Stoehr file standard papers to commence *Wells Fargo as Trustee v. Crotty, et al* and *Wells Fargo as Trustee v. Hidenfelter, et al. (Judge Horan).* They insert the "Foreclosure Deed Submitted" without service or entry. Defendants attach their affidavits. (APP1013-APP1027) 04/27/18, Cairns found *ex parte* insertions in this file. (APP1027-APP1048)

08/18/17, Plagany filed standard papers to commence *JPMorgan Chase v. Hackert (Horan).* She also inserted the "Foreclosure Deed Submitted" without service or entry. Defendant attaches her affidavit.(APP1052-APP1061) 04/27/18, Cairns found *ex parte* insertions in this file. (APP1062-APP1102)

08/21/17, Dorry[29] and Iarocci file standard papers to commence *USBank as Trustee v. LeBlanc (Judge Horan).* They insert the "Foreclosure Deed" without service or

[29] William Anthony Dorry, of Shapiro Dorry Masterson LLC.

entry. Defendant attaches her affidavit. (APP1106-APP1113)

09/5/17, Plagany files standard papers to commence *USBank as Trustee v. Estate of Edward Vickers et al. (Judge Theophilis)* (APP1142). *09*/7/17, Plagany inserts the "Foreclosure Deed Submitted" without service or entry. (APP1142-APP1148)

09/6/17, Cullen[30] files standard papers to commence *BONY Mellon as Trustee v. Warren (Judge Theophilis)*. He inserts the "Foreclosure Deed" without service or entry. (APP1158-APP???)

09/14/17, at U.S. Bank v. Torres hearing, Horan takes 'foreclosure deed' from file and tells Defendant she may not have seen this; public recognition it was not served.

09/15/17, Plagany files standard papers to commence *Wells Fargo Bank v. Stanley, et al. (Judge Horan)*. She inserts the "Foreclosure Deed" without service or entry. (APP1183)

10/5/17, Plagany and Stoehr file standard papers to commence *USBank Trust as Trustee LSF9 v. Johnson, et al.(Judge Horan).* They insert the "Foreclosure Deed" without service or entry. (APP1220). 04/20/18, Cairns found *ex parte* insertions in this file. (APP1228-APP1255)

10/6/17, Plagany and Polansky[31] file standard papers to commence two cases, *HSBC as Trustee v. Rivas, et al. (Horan)*. They insert the "Foreclosure Deed" in case #17H85SO004117. (APP1260). 10/11/17, Plagany inserted the "Foreclosure Deed" in case #17H85SO004118 without service or entry. Defendant attaches her affidavit. (APP1269-APP1270) 04/20/18, Michael Nwogbi finds *ex parte* insertions in this file. (APP1271-APP1315)

10/13/17, Iarocci files standard papers to commence *Deutsche as Trustee, v. Deleo, et al. (Judge Theophilis).* She inserted the "Foreclosure Deed" without service or entry. Defendants attach their affidavit (APP1319-APP1327)

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[30] Sean B. Cullen Esq. of Guaetta & Benson, LLC

[31] Kevin Patrick Polansky, Esq. of Nelson, Mullins, Riley & Scarborough LLP

11/20/17, Plagany and Stoehr file standard papers to commence *USBank Trust as Trustee LSF9 v. White et al. (Judge Horan)*. They insert the "Foreclosure Deed" without service or entry. (APP1340)

11/20/17, for reconsideration of Judgment, Guzman-Gayflor gave as one basis this ex parte due process violation

12/07/17, Mitchell and Plagany file standard papers to commence first case *US Bank Trustee v. Farrar*, (Judge Horan). They insert the "Foreclosure Deed" without service or entry. (APP1365-APP1367)

12/07/17, Mitchell and Plagany file standard papers to commence second case *US Bank Trustee v. Farrar*. (Judge Horan). They also inserted the "Foreclosure Deed" without service or entry. (APP1368-APP1370)

12/15/17, Plagany and Spaniolo file standard papers to commence *USBank Trust As Trustee LSF9 v. Hawley*. (Judge Horan) (APP1400-APP1405). 12/19/17, Plagany inserts the "Foreclosure Deed" without service or entry. (APP1404)

01/02/18, Hogberg[32] and Plagany filed standard papers to commence *USBank as Trustee v. Kinyanjui et al. (Judge Horan)*. They insert the "Foreclosure Deed" without service or entry. (APP1414-APP1421)

To all appearances, this ex parte practice is ongoing; WAFT ceased collecting evidence after this date.

01/17/2018, Jennifer Guzman-Gayflor and Boimah P. Gayflor submitted a Defendant's Motion to Order Plaintiff to File Corporate Disclosure Statement on Possible Judicial Conflict of Interest, pursuant to SJC Rule 1:21 .

01/17/2018 Keith McKenzie and Paulette McKenzie submitted a Defendant's Motion to Order Plaintiff to File Corporate Disclosure Statement on Possible Judicial Conflict of Interest, pursuant to SJC Rule 1:21.

01/30/2018, Jean Atkinson submitted a Motion to Stay Eviction for Due Process Violations, regarding documents inserted *ex parte* into Plaintiff's case against her.

[32] Eric Benjamin Hogberg of Houser & Allison, APC

02/26/2018, Appellants filed their brief in this case including public mention of finding ex parte documents in numerous cases.

02/27/2018, Lila and Richard Ortiz submitted a Defendant's motion regarding documents inserted *ex parte* into Plaintiff's case against them, and copies similarly inserted *ex parte* in the case against their tenant.

04/13/2018, Plaintiffs submitted a Plaintiff's Memorandum in Support of Motion for Summary Judgement to recover possession of property in their case against defendants Cynthia White and Eduardo and Reina Morales.

05/02/18, Brown[33] and Polansky file standard papers to commence *Diplomat Property Manager LLC v. O'Gara, et al. (Judge Horan)*. They insert the "Foreclosure Deed" without service or entry. (APP1425-1426)

05/09/2018 Cynthia White and Reina Morales submitted a Defendant's Opposition to Plaintiff's Motion for Summary Judgment.

05/17/2018, Steven Bourassa submits a Defendant's motion to order Plaintiff to file a corporate disclosure statement, pursuant to SJC Rule 1:21. The motion was denied without a hearing by Judge Horan on 05/17/2018

*In the ***Ortiz*** case, U.S. Bank brought post-foreclosure eviction actions against the Ortizes, homeowners, and against the Torreses, an elderly couple who rented an apartment from the Ortizes. The Torres had received no notice of the Ortiz's foreclosure auction. Ortiz got case dismissed for lack of discovery and non-appearance. Plaintiff refiled.

At the *Torres* hearing on 09/14/17, Judge Horan held in her hand the foreclosure deed inserted in the Torres'

[33] Attorney Matthew T. Brown

file. The court audio verifies that she told the Torreses that they "had probably never seen" this document; that the foreclosure had occurred; and that the Ortizes no longer owned the home.

Judge Horan accordingly determined ownership of the property, and the tenants' case, on the basis of a foreclosure deed inserted *ex parte* in both the homeowners' and tenants' case files. The homeowners had not yet had the chance to raise their rightful defense to U.S. Bank's claim of title, and she knew that the Torreses could not have known of nor challenged it, either. Judge Horan further advised the Torreses that the Ortizes had lied to them about owning the property, and that they "should sue Ortiz" for the rent collected.

With the transcript of that hearing, though terrified, Lila Ortiz argued to Judge Horan that she had already determined their case; she pointed out that the record proved there was no possibility of a full, fair, and impartial hearing, and she asked the Judge to recuse herself. Judge Horan ultimately did so, however, proclaiming she had done nothing wrong. Nonetheless, Judge Horan never informed the Ortizes of the *ex parte* documents in their file, nor had them removed as the Judicial Conduct Rules require. These illegally inserted

ex parte documents were left in the files to taint the analysis of all future reviews and appeals, and there were no sanctions against Plaintiff attorneys or repair of the damage to the Ortiz and Torres cases.

There followed a series of disasters, in which Lila Ortiz attempted to have the *ex parte* documents struck; however, the Court's lack of response to that motion affected her response to Plaintiff's discovery and required multiple appearances in Court in the attempts to resolve her dilemma. Her hearing dates were postponed three times for no substantive reason. Plaintiff, on the other hand, filed and the replacement Judge agreed to hear, *five in limine* motions to bar Ortizes' case for lack of production of documents. Missing so many work days from work in a short time endangered Lila Ortiz's job. In the face of this mishandling of their case, and the duress and hardships it engendered, it appears that the Ortizes cannot continue to fight for their home.

JURISDICTION

The widespread nature of these violations means that individual redress cannot function as an effective antidote (see Appellant exposition of unique jurisdiction of this Court for redressing a lower Court's misconduct).

The bias and prejudice expressed in the whole scale, consistent and unwavering acceptance of *ex parte* documents (which clearly fail upon review applying universally accepted standards, see below) and the impact on all litigants is endemic. Still, WAFT members tested other means of redress; so far these have failed.

Various individuals attempted appeals in their own cases. Many also went directly to their Judge to seek recognition of the *ex parte* nature of the documents, to have them stricken from consideration, and even request recusal of the Judge. With the exception of the very mixed success of Lila Ortiz, those attempts have failed.

A reporting of these conduct violations was submitted to the Judicial Conduct Commission in January and then again in March 2018. The Commission replied that, *even if true,* the allegations would not be accepted for review. The second response finally explained the report must be submitted as a conduct complaint about an individual judge; it cannot address the regular practice of an entire court. The report's enumeration of individual Judges' actions in particular cases was deemed insufficient.

The inaction of the Judicial Conduct Commission has been devastating. Documenting dozens of examples is

incredibly time consuming. It is almost impossible for *pro se* litigants to continually re-edit and re-submit massive amounts of evidence while simultaneously fighting for their lives in a Court that makes it known daily their firm bias against defendants' rights.[34]

When the inherent bias born of false documents used as *prima facie* evidence is allowed to stand, uncontested and unquestioned, it poisons the waters of the Court's decisions, and the appellate review process; it predisposes the Court towards erecting other procedural bars against litigants they have already judged. Legitimate motions and requests for reasonable time, discovery, case law against them, etc., are summarily denied, and they are increasingly ridiculed, dismissed, degraded or intimidated. The prejudicial impact is multiplied exponentially when it is has taken hold at the systemic level.

ARGUMENT

1. Has the Worcester Housing Court erred in engaging in the widespread and continuing practice of accepting Plaintiff's *ex parte* insertions of documents in purported post-foreclosure cases?

[34] The Judicial Conduct Commission has thus far either failed to accept or address evidence of serious judicial misconduct. Yet it provides no other forum or procedure for redress of the Court's misconduct that is not limited to a single justice. We protest the procedural bars raised against our duty, as the residents of this great Commonwealth, to report and defend against the deterioration of our fair and impartial system of justice.

The insertion of these documents in at least 54 case files is not just a minor procedural or technical issue. They are an insidious and systematic undermining of the legality of foreclosure-related eviction cases. These documents represent the de minimis *prima facie* showing and so contribute to what Defendants and others experience as the WHC's presumption that each and every foreclosure is not only valid but justified. Such a presumption is in contradiction to primary evidence which can be shown to establish the industry's rampant illegal foreclosures and post-"foreclosure" evictions in Massachusetts.

Plaintiff's *ex parte*, unproven documents are accessible to the WHC for long periods of time and at every critical stage in the process; these can and do affect a judge's understanding of the purported facts. In stark contrast to *ex parte* "evidence" submitted by Plaintiffs, Defendants' evidence does not receive the full consideration of the WHC. Judges have refused to admit Defendants' evidence *even when properly authenticated and served on opposing Counsel* in accordance with the rules of civil procedure. FN EXAMPLES.

WHC Judges have also stated in open court that *pro*

se litigants are not to be considered as knowledgeable, accurate reporters of the facts in their own cases, nor capable of the correct representation of law or Court rules. *See* appellant brief of 2/26/2018.

The practice of *ex parte* insertions substantiates a finding of improper judicial review based on illegal, unauthenticated communications. The WHC has effectively implemented an institutional practice of accepting evidence outside of the rules of civil procedure and contrary to our strict due process protections. Such procedural violations feed decisions almost universally favoring Plaintiffs. When used against Defendants who have no opportunity to know and challenge the evidence against them, one understands the grave negative impact being visited upon the rule of law in Massachusetts.

2. Did the Worcester Housing Court err in not meeting its obligations under the Canon SJC Rule 2.9 to avoid *ex parte* communications, given documents inserted in over 54 cases with no service on Defendants, nor evidence of such?

The Massachusetts Code of Judicial Conduct Rule concerning a judge's receipt and use of *ex parte* communications is clear, comprehensive, and mandatory. Rule 2.9 regarding Ex Parte Communications provides:

(A) <u>A judge shall not initiate, permit, or consider ex parte communications</u>, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending* or impending

matter,* except as follows:

(1) When circumstances require it, *ex parte* communication … which does not address substantive matters, is permitted, provided:

(a) the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the *ex parte* communication; and

(b) the judge makes provision promptly to notify all other parties of the substance of the *ex parte* communication, and gives the parties an opportunity to respond…

(B) If a judge inadvertently receives an unauthorized *ex parte* communication bearing upon the substance of a matter, the judge shall make provision promptly to notify the parties of the substance of the communications.

(C) A judge shall consider only the evidence presented and any adjudicative facts that may properly be judicially noticed, ...

(D) A judge shall make reasonable efforts, including providing appropriate supervision, to ensure that this Rule is not violated by court personnel.*

This Brief contains 54 WHC case files in which Petitioners have discovered documents that had been inserted *ex parte*, with no service upon Defendant(s) as required by law. Defendants had no awareness of these communications, and no opportunity to challenge their admissibility and probative value. Yet these documents are available to the WHC Judges in the case files they have during foreclosure-related hearings, and to which they refer regularly at the bench. Defendants experienced the resulting adjudications as pre-decided, no matter how clear cut the evidence establishing the illegality of the foreclosures.

The violation is so pervasive, it has acquired a name. The Plaintiffs' lawyers refer to it as the "entry packet." (See Plaintiff's memorandum 04/13/18 in White's case APP1525-APP1530).

It is exactly this invisible, undue influence of *ex parte* communications that the Code of Judicial Conduct prohibits in MA Courts.

In a typical post purported foreclosure, the case file will show a letter from Plaintiff's attorney listing the usual documents required to commence a summary process case: payment of the fee, the Summons and Complaint, and a Notice to Quit (the latter two with Service). Attorney's letters in these cases clearly show that documents that are referenced on the docket, are not attached to a motion or an affidavit entered into the file, nor any proof of service to defendant.

In all case files, the "Foreclosure Deed" must have a procedural vehicle in order to be formally entered, as well as another document indicating proof of service (Certificate of Service). Such a certificate states how a filing was served upon the other side (to whom and where); it must be signed and dated. Whether glancing at the docket, Plaintiff's letter, or viewing of the file

page by page, it is clear that no service was ever made to these Defendants.

Nonetheless, decisions suggest that WHC judges* have relied on such *ex parte* documents to deny Defendants' discovery requests which were timely and properly submitted under the Summary Process Rules (See Swanston, Tobin and others). These judges have asserted that Defendants are already in possession of all the evidence against them, and that such evidence prevails. The interlocutory and final decisions entered on that basis have the force and effect of an unconstitutional taking of property.[35]

3. Did the Worcester Housing Court err in relying on documents inserted without legal entry into defendant's files under civil process?

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[35] Petitioners have not attempted to investigate whether the WHC Clerk's Office includes such unadmitted, *ex parte* documents in records that it submits on appeal; however, *Atkinson* has just had to request that the Appeals Court review her file for exactly such inclusions. *Ex parte* taint is transmitted to the Appeals Court in the naming of docket entries as "Foreclosure Deed," "assignments of mortgage," etc. The mere identification of a document as such invokes a legal assumption; to list the "Foreclosure Deed" as evidence in the case subsumes that there was a foreclosure, and that it was legally valid. There is no corresponding challenge listed. To insert, as evidence, an "Affidavit of Sale," presumes a legally sound sale, witnessed or executed by the correct parties, and carried out in the correct manner.

This becomes a further poisoning of our Courts as *pro se* litigants face procedural obstacles, such as when the WHC Clerk's Office fails to compile or transmit the records for Defendants' timely noticed appeals. Even though the responsibility for failed forwarding of the record to the appeals court rests with its own Clerk's office, the WHC has dismissed these cases for lack of prosecution. (*Adjartey, Cucufate, Osborne, Evans)*

At least since February 2014,[36] attorneys for Plaintiff foreclosing banks (and some so-called third-party purchasers) have been inserting documents into post-foreclosure eviction case files. In addition to this regular practice, a WAFT member provides eye-witness report of a Plaintiff's attorney inserting documents into the case file, without notification to the Clerk.

Mass Rules of Civil Procedure for all Mass. courts require documents to be "entered" by utilization of a recognized procedure. Plaintiffs' attorneys do not accompany these *ex parte* documents by any affidavits attesting to their genuineness or reliability, nor do they attempt to enter them into the record by motion or other legal procedure. There is no evidence that WHC Judges have ever ruled on the admissibility of these documents.

4. Did the Worcester Housing Court also err in not recognizing, enforcing and addressing violations of the special stricter limitation on documents that may be included to commence a case under Summary Process Rule 2?

Most Petitioners received their Summons and Complaint (in the court promulgated short form) posted on their door or handed to them (and may also receive one by

[36] Originally, WAFT members thought this practice commenced in January 2016, but *Osborne's* case, filed on 2/23/14, was also found to contain secreted *ex parte* documents at its start.

mail)**. Their appended affidavits swear that they never received additional documents with the Court Summons.** Yet, Plaintiffs secreted into the files other documents considered all of their *prima facie* case for eviction.

However, Uniform Summary Process Rule 2 severely and explicitly limits the initial filing in a Summary Process Case:[37] the Summons and Complaint and a Notice to Quit.[38]

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[37] **Uniform Summary Process Rule 2: Form of Summons and Complaint; Entry of Action; Scheduling… ; Service of Process**
(a) Form of Summons and Complaint. The form of Summary Process Summons and Complaint, as promulgated by the Chief Administrative Justice..., shall be the only form of Summons and Complaint used in Summary Process actions. This form... shall be considered a writ in the form of an original summons as required by G.L. c. 239, § 2. …
(b) Service of Process. Service of a copy of a properly completed Summary Process Summons and Complaint shall be made on the defendant …. Service shall be made in accordance with Rule 4(d) of the Massachusetts Rules of Civil Procedure, provided that if service is not made in hand, the person making such service shall mail, first-class, to the defendant, at the address indicated on the Summary Process Summons and Complaint, a copy of the Summary Process Summons and Complaint; and provided further that return of service, including a statement of mailing where the latter was required, shall be made to the plaintiff only and shall be made in the appropriate space provided on the Summary Process Summons and Complaint. The date of service pursuant to this paragraph shall be deemed the date of commencement of the action….
(c) Entry Date; Scheduling of Trial Date……
(d) Entry of Action. Summary process actions shall be entered by filing with the clerk of the court in which the action is to be heard the following documents:
(1) The original of the properly completed form of Summary Process Complaint and Summons, a copy of which has been served on the defendant, with return of service recorded thereon;
(2) a copy of any applicable notice(s) of termination of the defendant's tenancy of the premises upon which the plaintiff(s) relies where such notice is required by law and any proof of delivery of such notice upon which the plaintiff(s) plans to rely at trial;
(3) in jurisdictions wherein rent control is in effect...;
(4) in jurisdictions wherein local laws governing condominium conversion evictions are in effect,...;
(5) any entry fee prescribed by law unless waived.
On the appropriate portion of the Summary Process Summons and Complaint the reason(s) for eviction shall be indicated by the plaintiff(s) in concise, untechnical form and with sufficient particularity and completeness to enable a defendant to understand the reasons for the requested eviction and the facts underlying those reasons.

[38] They may also file a special process server request.

The impartiality of the Justices cannot possibly remain untarnished with so many hundreds of unqualified documents used as evidence. Judges order Default Judgment and Summary Judgment based upon these “undisputed” facts.

5. Does the Worcester Housing Court err when it assumes that documents inserted without notice in violation of *ex parte* rules can otherwise be accepted despite a lack of notice on the basis that they are publicly available or recorded in a Registry of Deeds?

If the Court argues that these documents are in the public record, so the *ex parte* insertion without proper procedures into the file is not invalid or prejudicial, we protest: first, many of the documents that are claimed to be in the public record, are not. Secondly, there is information in the public record that could be relied upon and accessed for an argument. That does not absolve an adjudicatory body of the procedural obligation to have that evidence entered into the record properly, so that it may be tested as to its veracity and validity; the rules of evidence seek to ensure that only evidence which has been verified and qualified may be considered in a dispute, so as to protect the rights of all litigants in an adversarial process.

For instance, a police report may be in the public record, but not all parties would know of its existence or its contents. If relied upon by any party as evidence

in a case, it must be properly served on all sides. This gives the litigant whose rights might be affected an opportunity to challenge the evidence as to critical facts of the case. *No judge has notified any of these defendants of its reliance on these inserted documents.*

Furthering prejudice to Defendants, the WHC also fails to even-handedly give judicial notice to Defendants' publicly available Pooling and Servicing Agreements, Congressional Testimony as to the clear inadmissibility of MERS under Massachusetts law or MERS or Fannie Mae binding corporate documents and agreements.

6. Did the Worcester Housing Court err in relying on documents as *prima facie* proof of a legally valid foreclosure where even a superficial review of the documents reveal failure to meet the legal standards of such documents? Do the Judges especially err in not scrutinizing illegally inserted documents given that Defendants, without any notification, were denied their ability to challenge?

The Plaintiffs in these 54 (Exhibits AA-UU) cases have inserted into post-"foreclosure" eviction case files documents that are considered to be all of a purported *prima facie*[8] case for a legal foreclosure. These are centrally the purported Foreclosure Deed (MGL Chapter 244 section 14) and its attached purported Affidavit of Sale (MGL Chapter 244 sect. 15). They also often insert documents named the Certificate of Entry, Power of Attorney/Certificate of Appointment and a Note Affidavit

that were recorded together with the Foreclosure Deed; they are available for judicial notice in any event.

Affidavits Used in Foreclosure-Related Cases: The Same as Any Other Affidavits

One major impediment to the just determination of post-foreclosure eviction cases is the disregard, first by Plaintiffs and then by the WHC, of the requirement that affidavits used in such cases comply with the same standards of any affidavit. Routinely, the title 'Affidavit' on a document is enough for the WHC to assume its legal validity as an affidavit. Yet, in many foreclosure-related cases, purported "Affidavits" fail (on their face) to meet the evidentiary requirements — the requirement of personal knowledge or, failing that, the requirements of the business records exception to the rule against hearsay. This affects the standing of plaintiffs and the subject-matter jurisdiction of the courts.

An Affidavit Requires Personal Knowledge, Admissible Facts, Competent Affiant

The MRCP 56(e) sets forth these requirements. It provides:

> "Supporting and opposing **affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence,** and **shall show affirmatively that the affiant is competent to testify to the matters stated therein.**" [emphasis supplied.]

Just as with any other affidavit, these three requirements apply to every purported affidavit in connection with a foreclosure by sale in Massachusetts[39]. It is irrelevant whether the purported affidavit is recorded in a Registry, filed in a trial or appellate court, or used in any other way.

Statutory Form "Affidavit of Sale Under Power of Sale": A Simpler World

When a property is foreclosed on by sale, the change of ownership requires a new deed as with any sale of real property. But foreclosure by sale is non-judicial. So, was the sale "effectual to foreclose the mortgage"[40]? Subsequent purchasers will want to know. To recite all the steps required for this would lengthen deeds and "clutter" the Registry. *FNMA v. Hendricks,* 463 Mass. 635, 641 (2012). The Legislature in 1912 therefore created a specialized form of affidavit, the "Affidavit of Sale Under Power of Sale in Mortgage," to be recorded with the Foreclosure Deed. See M.G.L. c. 183, s. 8, and Appendix Form 12:

> "_____, named in the foregoing deed, make oath and say that the principal _____ interest_____ obligation _____ mentioned in the mortgage above referred to was not paid or

[39] With the promulgation of 209 CMR 18.21A in 2012, the personal knowledge requirement for ALL affidavits became explicit for this industry, if there had been any doubt.
[40] Cf. MGL chapter 244, s. 14.

tendered or performed when due or prior to the sale, and that I published on the ___ day of _____, 19__, in the _____, a newspaper published or by its title purporting to be published in _____ aforesaid and having a circulation therein, a notice of which the following is a true copy. (INSERT ADVERTISEMENT).

"Pursuant to said notice at the time and place therein appointed, I sold the mortgaged premises at _____ public auction by _____, an auctioneer, to _____, above named, for ____ dollars, bid by him, being the highest bid made therefor at said auction.

"Sworn to by the said ____, before me _____."

As is plain from its text, this short-form affidavit reflects a time when a single affiant, "named in the foregoing deed," was competent to make all the statements in the affidavit. Then, doubtless a local banker personally calculated the default, published the foreclosure sale notices, hired the auctioneer, and could testify from personal knowledge also as to the auction sale, the highest bidder, and the amount bid, because the banker attended the auction.[41] Thus, as the short form indicates, that competent banker could make these assertions in the first person. WAFT members have seen only one affidavit based on personal knowledge in the

[41] Comparison with the Certificates of Entry in all 54 cases shows that the affiant was not the purported mortgagee representative; mortgagees now hire independent contractors to attend auctions who need separate legal authorization; such recorded powers of attorney or certificates of appointment further show these independent contractors had no authority on the auction date

past 10 years.

AGs' Consent Judgments Adapt Foreclosure Sale Affidavits to the Present

In 2012, the federal government and 49 state Attorneys General entered into Consent Judgments with the five largest mortgage servicers[42], ("the AG Settlement") to remedy their blatant disregard of evidentiary requirements and other deficiencies in foreclosure practice.

Exhibit A, Section A, "Standards for Documents Used in Foreclosure and Bankruptcy Proceedings," to each Consent Judgment, reaffirms each servicer's obligation to comply with legal requirements and addresses adapting the foreclosure- related affidavits to the realities of present day foreclosure practice[43]. Each Consent Judgment accordingly provides[44]:

> "3. Servicer shall ensure that affidavits, … are based on the affiant's review and personal knowledge of the accuracy and completeness of the assertions in the affidavit, … set out facts that Servicer reasonably believes would be admissible in evidence, and show that the affiant is competent to testify on

[42] Ally (formerly known as GMAC), Bank of America, Citi, JP Morgan Chase, Wells Fargo

[43] The mortgagee might be a Delaware or New York trust, a foreign bank, or a government-sponsored entity in D.C.; the servicer might be in Oregon; a law firm in Michigan might retain the auctioneer; and the "bank" representative who bids at the foreclosure auction might be contract employee hired locally for the occasion.

[44] Can be viewed at (Last downloaded July 5, 2018): http://www.nationalmortgagesettlement.com/settlement-documents.html.

> the matters stated. **...** ***Separate affidavits, … shall be used when one affiant does not have requisite personal knowledge of all required information."*** [Emphasis supplied.]

Paragraph 3 thus mandates the use of as many affidavits as are needed. Thus, if a single affiant is not competent to testify on personal knowledge to all the facts that the statutory short-form requires, then a series of affidavits may be submitted, each by a competent affiant based on his/her personal knowledge. "The purpose of the statutory form remains as vital today as it was one hundred years ago." FNMA v. Hendricks, 463 Mass. 635, 640 (2012).

Affidavits That Refer to Other Documents Must Have Copies Attached

Another common practice among Plaintiffs in the WHC is to proffer affidavits that purport to be based on a review of business records, but without attaching copies of these documents or serving them on the opposing party. Where an affidavit refers to other documents, however, an affiant's unsupported statement is insufficient to establish the contents of those documents. MRCP 56(e) accordingly provides:

> "Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith."

When an affidavit refers to documents, therefore,

copies of those documents must be attached unless they are served with the affidavit. It is not uncommon to see affidavits in foreclosure-related cases that refer to documents, for instance - a borrower's promissory note - but which lack a copy of the note or the evidentiary accounting of financial default or the mortgage offer pursuant to MGL Chapter 244 section 35b. Absent a legislative provision that directs otherwise, however, this requirement applies to a purported affidavit used in connection with a Massachusetts foreclosure by sale, just as it does to any other affidavit subject to MRCP 56(e).

The Business Records Exception Also Requires Attached Copies of Records

Rule 803(6) of the Federal Rules of Evidence, and the corresponding Rule 803(6) of the Massachusetts Rules of Evidence, apply when a competent affiant testifies, on personal knowledge, to a regularly conducted activity as the basis for the admissibility of documents made in the course of that activity:

> "(6) ***Records of a Regularly Conducted Activity***. A record of an act, event, condition, opinion or diagnosis if:
> (A) the record was made at or near the time by — or from information transmitted by — someone with knowledge;
> (B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;
> (C) making the record was a regular practice of that activity;

> (D) **all these conditions are shown by the testimony of the custodian or another qualified witness,** or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and (E) the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness."

Foreclosing entities nonetheless have flouted these criteria for the business records exception to the rule against hearsay so pervasively, in foreclosure-related proceedings nationwide, that the above referenced Consent Judgments in 2012 AG Settlement, included the requirements for the records exception in the court-approved provisions binding those servicers. Exhibit A, para. 3, provides:

> "If an affiant relies on a review of business records for the basis of its affidavit, the referenced business record shall be attached if required by applicable state or federal law or court rule."

As Rule 803(6) shows, attaching copies of the references business record is required in Massachusetts. Cf. *Bartleman*, supra. In fairness to defendants fighting for their homes, a purported but non-compliant affidavit can and must be struck.

Statutory Form's Purpose: Preserve Specified Evidence of Foreclosure Sale, Not All

This Statutory Form is not meant to prove compliance with the Statutory Power of Sale. MGL c. 183, s. 21. "If the Legislature had intended affidavits of sale to be as

detail laden as G.L. c. 244, s. 15, and its predecessors require, there would have been no reason whatsoever even to create the statutory form." Id. Nor is it meant to preserve *all* the evidence relevant to compliance. The purpose of a statutory form is, rather, to "secure the preservation of evidence that the conditions of the power of sale named in the deed have been complied with. It is for the protection of those claiming under the sale …." Id., citing *Field v. Gooding*, 106 Mass 310, 312 (1871). See *Atkins v. Atkins*, 195 Mass. 124, 127 (1907); M.G.L. c. 244, s. 15.

Once a defendant in a Summary Process post-foreclosure action disputes the foreclosure, however, an Affidavit of Sale recorded with a foreclosure deed becomes evidence just like any other evidence, to be assessed by the judge as finder of fact.

> "If a plaintiff makes a prima facie case, it is then incumbent on a defendant to counter with his own affidavit or acceptable alternative demonstrating at least the existence of a genuine issue of material fact to avoid summary judgment against him." Id., at 642, citing *Deutsche Bank Nat'l Trust Co. v. Gabriel*, 81 Mass.App.Ct. 564, 568-570 (2012).
>
> "A deficient affidavit may be cured by extrinsic evidence that the power of sale was exercised properly and the foreclosure was valid." Id., cf. *O'Meara v. Gleason,* 246 Mass. 136, 139 (1923).

Recordation Does Not Affect Statutory Form's Evidentiary Weight

Because a foreclosure affidavit is evidence, like any other evidence, the court must weigh it like any other evidence, and reject it if the affiant is incompetent or lacks personal knowledge. As this court has observed:

> "[T]here is nothing magical in the act of recording an instrument with the registry that invests an otherwise meaningless document with legal effect. See *S&H Petroleum Corp. v. Register of Deeds for the County of Bristol,* 46 Mass. App. Ct. 535, 537 (1999) ('The function of a registry of deeds is to record documents. It is essentially a ministerial function….')" *Bevilacqua v. Rodriguez*, 460 Mass. 762, 771 (2011).

Thus it is a document's effectiveness that controls, rather than its mere existence. See *Bongaards v. Millen*, 440 Mass. 10, 15 (2003) (where grantor lacks title, "a mutual intent to convey and receive title to the property is beside the point.") Id.

If Short-Form Affidavit is Defective, Plaintiff Lacks a Prima Facie Case

Does the plaintiff however make a prima facie case where "an affidavit … is defective on its face…."? Cf. *Hendricks,* supra, p. 642. After all, the defendant then "needs no other evidence to proceed with his challenge." Id. The answer is no.

In *HSBC Bank v. Galebach,* 2012 Mass. App. Div. 155, the court reversed an order of summary judgment for HSBC

Bank where Janice Davis, Vice President of mortgagee Central Mortgage, in the affidavit of sale, described not her own acts but acts that "appear to have been done by someone other than Davis herself. Section 15 of G.L. c. 244 requires that the affidavit be executed by the person selling or that person's attorney stating *his acts*, or the acts of his principal or ward (emphasis added). The statutory model form for a foreclosure affidavit set out as Form 12 of the Appendix to G.L. c. 183 [note omitted] reflects this requirement of an affiant describing his or her acts in the first person." Id., pp. 159, 160. [Underlining supplied.] So the affiant must be able to testify, "I did X."

Similarly, in *Fed'l Home Loan Mortgage Corp. v. Bartleman*, 2017 Mass. App. Div. 41, the appellate court reversed the trial court's denial of defendant's motion for involuntary dismissal, and awarded possession to the Bartlemans, where the only trial "witness competent to testify as to the [mortgage] paragraph 22 notice [to defendant] was the keeper of records …. [who] was not the affiant of the affidavit of sale." Id. p. 46. It is unclear from the decision whether the affidavit of sale was defective on its face. The point here is that where the affiant in an affidavit of sale lacks competence to

testify as to a required fact, the plaintiff lacks a prima facie case.

In *Galebach,* however, it was clear to the appellate court from the face of the affidavit itself, and dispositive, that the affiant lacked the personal knowledge required for that affidavit to make out a *prima facie* case. To the trial court, this ought to have been equally clear. *Galebach* and *Bartleman* broke no new legal ground. What is unusual, however, is that these cases apply to documents headed "Affidavit," in post-foreclosure summary process cases, the same requirements of personal knowledge and competence that apply to any affidavit. MRCP 56(e). This should not be unusual.

Every Court Must Establish Standing, Subject-Matter Jurisdiction, in Each Case

Thus we come to every court's threshold responsibility in every case. *HSBC Bank, N.A., trustee, v. Matt*, 464 Mass. 193 (2013), laid out the applicable law: "[A] plaintiff must establish standing in order for a court to decide the merits of a dispute or claim. [Citation omitted.] Because standing is a question of subject matter jurisdiction, it must be established irrespective of whether it is challenged by an opposing party." [Citations omitted.] *Matt*, p. 199. Even if a defendant does not raise the issue, therefore, it is the

WHC's responsibility, in each post-foreclosure summary judgment action for eviction, to establish the plaintiff's standing and thus its own subject-matter jurisdiction. In cases such as these, the WHC must enforce the proper assessment of the validity of evidence, especially when ordinary adversarial scrutiny has been undermined by its own rule avoidance and oversight.[45]

As mentioned above, the days are gone when a single competent affiant could usually testify, from personal knowledge, to all of the facts required in the short-form affidavit of sale. Nowadays, each individual who did one or more of the acts involved must execute a separate affidavit that sets forth each affiant's personal knowledge as to those acts. Consent Judgments, Exhibit A, para. 3, supra; cf. *Galebach*, supra, pp. 159, 160; *Bartleman*, supra, p. 46. Now, in fact, sometimes no auctioneer or anyone else even appears to conduct a scheduled auction, although later a foreclosure deed and affidavit of sale is filed in the Registry nonetheless, and the purportedly foreclosing entity sues in Housing Court to evict the homeowner.[1]

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[45] As the overwhelming majority of cases are decided on Summary Judgment without ever reaching the fact scrutiny of a trial, these *ex parte* filings both contribute to and exacerbate the loss of due process.

The members of the [WAFT] are thoroughly familiar with the contents of several hundred post-foreclosure WHC cases. They have never seen a post-foreclosure summary process case with a series of foreclosure sale affidavits, each on personal knowledge, where these are obviously called for in order to cover the points in the short-form affidavit.

When such a series is needed, but there just a single, short-form affidavit, the plaintiff has not made out a prima facie case for the right of possession. Cf. *Hendricks*, supra, p. 642, citing *Lewis v. Jackson*, 165 Mass. 481, 486-487 (1896). Without extrinsic evidence, it seems impossible for the WHC to have subject-matter jurisdiction in such a case, and the court must dismiss it sua sponte. Cf. *Matt*, supra, p. 199, citing Mass. R. Civ. P. 12 (h) (3), 365 Mass. 754 (1974) ("Whenever it appears by suggestion of a party or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action"). [Underlining supplied.]

A faithful adherence to the factual disposition of the case is the very crux upon which a just determination must be rooted as to whether Foreclosures by Sale or Entry have been lawfully executed. The vast majority of elements for a legal foreclosure are legal “events,”

specific acts and documents that have to have been strictly or at the strictest level, executed. Without such a basis, these purported foreclosures should be regularly recognized by the Court as already null, void, and of no effect by operation of law *ab initio*[46].

Even a cursory inspection of the 54 Foreclosure Deeds and their associated, purported Affidavits of Sale, shows that none of these purported Affidavits qualifies as the evidence it claims to be[47].

7. Did the Worcester Housing Court err in not requiring corporate disclosures under the Cannon for Judicial Conduct promulgated by the SJC in 2002, given the hundreds of cases they have had with (non-human) foreclosing entities and purported foreclosure purchasers?

More than once, Defendants have not only brought the existence of these *ex parte* filings to the attention of

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[46] The Court is reminded that the Statute of Frauds was written to be clear and self-evident. After the Great Fire of London of 1666 destroyed 80% of London's private property, aristocrats immediately facilitated one another's land grabs by acting as witnesses. At that time, no one having an interest in a case could be a witness in it, so a pre-fire property owner without powerful connections could not establish proof of ownership. Parliament responded promptly and decisively with the Statute of Frauds (1677). This introduced certainty into English land ownership, regardless of a person's rank in society, by requiring any grantor conveying an interest in land to do so in writing, and to sign the document. In the Massachusetts colony, the Statute of Frauds at once became law. With the proviso that the grantor's signature must now be notarized, it is still good law in the Commonwealth. The Statute of Frauds is codified in M.G.L. Chapter 259, § 1.

[47] Petitioners are concerned that Plaintiffs' *ex parte* insertions are a surreptitious way to avoid any challenge by defendants to their purported *prima facie* case for eviction.

the Judge, but requested a Judge take action to ensure impartiality as required under the Judicial Conduct Code; under the relevant Code judges must, among other things, show no other basis for a conflict of interest by enforcing the requirement that a non-natural, non-governmental legal entity ("person") file a corporate disclosure pursuant to SJC Rule 1:21.[48]

Plaintiff has a definitive obligation to file a corporate disclosure at more than one juncture in these cases: they must be filed at initial appearances, when they seek waivers of the discovery rules (which request is their regular practice), in other interim motions, and critically, before Summary Judgment. 8 Defendants have requested them in these cases, starting in Nov. 2017.

The impact of failing to protect against possible conflicts of interests for judges in these foreclosure-related cases was just underscored in the 1st Circuit Court of Appeals. 1st circuit Court in *Hayden, et al v.*

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[48] Corporate Disclosure Statement on Possible Judicial Conflict of Interest, pursuant to SJC Rule 1:21. "(a) Who Must File. **In civil** and criminal **cases in the Trial Court** and appellate courts, **any nongovernmental corporate party to a proceeding must file a statement identifying all its parent corporations and listing any publicly held corporation that owns 10% or more of the party's stock or stating that there is no such corporation…**" Plaintiff must provide a corporate disclosure statement as required at the beginning of a case initiated by a non-human "person" and before any hearing for a contested motion. Despite numerous such hearings in these cases, Corporate Disclosure Statements are not filed with the WHC per SJC 1:21 Rule.

HSBC Bank USA, N.A., et al, 16-2274 (2018) very recently vacated a judgment in which the judge who participated in the opinion held a financial interest in a party to the case during the time the case was pending. The likely conflict of interest, given the emphasis on investment funds and generic portfolios on income from toxic assets, is clear cut and ongoing.

The handling of that situation underscores the critical importance of upholding the credibility of the Court's standing to intervene in and resolve conflict in our society without the taint of self-interest, especially critical in foreclosure-related cases where the wealthiest entities are moving to further fatten their coffers with the limited assets of hardworking, ordinary people.[49]

This is a due process violation of such magnitude that the WHC's decisions in these cases (including some interlocutory decisions), are rendered void. See, for instance, *Reporter's Notes, MRCP 60(b)(4):*

> "A judgement is void only if the court rendering it lacked jurisdiction of the subject matter or of the parties, or where it acted in a manner inconsistent with due process of law."

[49] NB: Defendants in these cases are uniquely disadvantaged because a foreclosure is the only taking of an inalienable right in which the State itself does not step in to prosecute, so they are forced to either pay for representation they cannot afford, or endanger their health, employment and care of family to commit to proceeding *pro se*.

8. Did the Worcester Housing Court err in not enforcing corporate disclosure rules at each required step?
a. Even when Defendants requested proof of founding documents of Plaintiff?
b. Even though the Judge does not know or recognize that this is required for all non-human, non-governmental entities?

The purpose of the corporate disclosure rule has been described as: "the identification of the real parties in interest in the litigation" — exactly what defendants have repeatedly sought.

Chief Judge Horan was on the bench when this rule was promulgated and revised. Whereas Defendants were unaware of the corporate disclosure rule at the time of its promulgation, the WHC and practicing attorneys would be aware of the requirements, and are solely responsible for their awareness of the requirements. Moreover, even if a litigant does not properly *name* a request, the Court must identify it and comply with it.

The Court failed hundreds of times to require these disclosures. Even more shocking is that it did so when Defendants repeatedly sought that the Court force a Plaintiff corporation, LLC or REMIC Trust to produce proof of its existence. A Fully executed REMIC founding document (Pooling and Servicing Agreement) was step one of this Court's Ibanez/LaRace test for a REMIC Trust to be a mortgagee - and dozens of *pro se* litigants have

attempted to enforce that requirement. The WHC should recognize that this forces its obligation to request a corporate disclosure.

When Petitioner (Bourassa) raised the corporate disclosure rule, Judge Horan declared it was too late to invoke the WHC's responsibility to show that it has no conflict of interest.

As these are due process issues, they could never be affected by laches (See above); further, Bourassa raised it in the context of the Plaintiff during a contested motion.

Nor have Plaintiffs met their obligation when they first appeared in front of the Appeals Court, nor have the Justices met their obligations to ensure such disclosure (McKenzie, Guzman-Gayflor and Bourassa requested it.)

The experience of bias is so extreme in the WHC, Judges would be expected to want to ensure publicly their compliance with the requirements of their bench by requesting these corporate disclosures; even without the prodding of defendants in these cases, especially after public notice of the Appellant's brief in this case.

The greatest concern for those familiar with this Court is that its Judges appear to have so little

knowledge of the entities appearing before them, that they do not even understand why corporate disclosure is necessary to ensure that a REMIC Trust does not control one of the Judges' investments, including their own home, or a retirement fund, or some other of their personal or business investments.

Judge Horan in the Guzman-Gayflor case stated that it does not matter whether the bank that claims to be trustee for the REMIC trust in the case is US Bank, N.A. or US Bank Trust, NA, because they are related corporations; in another case, she states that the REMIC Trust and its bank trustee were not corporations. When Judge Horan does not acknowledge that a REMIC trust is a non-human entity in front of her which as a "real estate mortgage investment conduit" may mean her own investments could be in this securitized trust, then the competency of the Court in these cases comes into question far beyond the issue of bias.

9. Did the Worcester Housing Court err when the Judges did not fulfill their burden to implement corrections outlined in the *ex parte* court rules, such as:
a. notifying defendants?
b. providing defendants their right to challenge the *ex parte* documents?
c. recognizing these documents as void, prejudicial and/or fraudulent, and striking them?
d. failing to reopen cases, vacate judgments and dismiss with prejudice cases where *ex parte* insertions were made?

As of 9/14/17, Judge Horan in the Torres case stated that Defendants "may not have seen" documents she herself had pulled from the Court file. 11/20/17, Guzman-Gayflor asked for reconsideration of Horan's decision of 11/9/17, where Horan stated she was relying on a foreclosure deed entered with the Summons and Complaint (impossible under Rule 2 and clearly with no service); Guzman-Gayflor made explicit that she had never been served the document Horan was relying upon. Horan took no action.

While WAFT members are no longer diligently checking each case, they include O'Gara as a recent example. The Judge imposed use and occupancy upon defendant as if Plaintiff had already proved ownership of the property before it even belatedly responded to discovery.

Our laws put the burden of ensuring the Courts' impartiality and fairness on the Court itself. When faced with obvious violations of due process such as these, the Court must act. The WHC has not.

10. Did the Worcester Housing Court also err in:
a. Not sanctioning Plaintiff's attorneys and law firms as required to address their *ex parte* violations?
b. not reporting the attorneys responsible for secreted *ex parte* documents to the Bar Board of Overseers?
c. Not recognizing these as commissions of Fraud Upon the Court in violation of procedural rules and the due process rights of defendants which are Constitutionally protected?

We have reviewed almost 90 case files beginning in 2016. We found this illegal practice in 54 cases. We have not checked a dozen newer filings, but they were evident in all those we did check. At least half of these case files include this fundamental violation of Defendants' due process rights. The number of law firms engaged in these 54 cases is 19; of those law firms, we found that nine had engaged in this practice more than once.

Thirty attorneys of record secreted these documents into files without notice to defendants, knowing that Judges would view and rely upon them, and no attempts were made to correct the violation as the case progressed or firms assigned new attorneys. In the case files that we inspected, this practice was overwhelmingly, though not exclusively, engaged in by the Orlans PLLC and Doonan, Graves & Longoria law firms.

In contrast, in Petitioner Stanley's case when the Judge was alerted to a mediation agreement negotiated by a paralegal representing themselves as an attorney, the Judge did not sanction the attorney (Stoehr) nor the Firm (Orlans PC).

In an inexplicable but not surprising countermove, she did strike Petitioner White's appeal on 7/3/18 signed by her attorney-in-fact under a valid power-of-attorney,

as the "unlicensed practice of law," and refused reconsideration. She also entered a finding of fact to support a *criminal charge* against the attorney-in-fact.

The single justice who was assigned to remedy the matter claimed no jurisdiction to correct, even given the blatant error and its use by the Judge as the basis for a criminal charge against an innocent person.

Upon discovery of such due process violations, the Court must also address and sanction the lawyers and law firms involved in manipulating the dockets under *complicit cover of the Court itself*.

Further, the *ex parte* violations function as a Fraud on the Court.

> A "Fraud on the Court" occurs where it can be clearly and convincingly demonstrated, that a party has sentiently set in motion an unconscionable scheme calculated to interfere with the judicial system's ability to impartially adjudicate a matter by improperly influencing the trier or unfairly hampering the presentation of the opposing party's claim or defense. *Commissioner of Probation v. Adams*, 65 Mass.App.Ct. 725, 729-730 (2006).
>
> Upon a finding of fraud upon the court, the Court may enter default judgments, dismiss claims, or dismiss entire actions. *Id.* at 731. "The doctrine embraces 'only that species of fraud which does, or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication." *Mt. Ivy Press, LP v. Defonseca,* 78 Mass.App.Ct. 340, 349 (2010), quoting from *Pina v.*

McGill Dev. Corp., 388 Mass. 159, 165 (1983) (internal cites omitted).

In repeatedly inserting documents into case file without the service on all parties as well as the Judges, Plaintiffs have clearly put an 'unconscionable scheme' in motion to 'interfere with the judicial system's ability to impartially adjudicate' and 'unfairly hampering the presentation of the opposing party's claim... defense;' that Plaintiffs used *ex parte* communications to submit documents fraudulently recorded in the Registry is just a further 'unconscionable scheme.'

The frequency with which such documents have been found in case files, the fact that Plaintiff's attorney have a name for this practice which they use in their pleadings, the remarkable consistency with which court staff, including the judges, have failed to notice, stem or sanction the recurring violations, is clear and convincing case of Fraud on the Court.

Forgery of evidence, especially the most important and central evidence in a case, is a very grave and serious matter and undisputedly acts to "improperly influenc[e] the trier or unfairly hampe[r] the presentation of the opposing party's. . .defense." *Rockdale Mgmnt. Co. v. Shawmut Bank, N.A.*, 418 Mass. 596, 598 (1994).

Fraud on the Court has been found in cases where a party has perjured him or herself and the court has relied upon fabrications when reaching a judgment. *See Matter of Neitlich*, 413 Mass. 416, 423 (1992) (Fraud on the Court where attorney made false statement with intent to deceive the court); *Rockdale Mgmt. Co* at 598-599 (Fraud on the Court where party forged letter, proffered forged letter in response to interrogatories, and testified under oath as to authenticity of letter); *Munshani v. Signal Lake Venture Fund II, LP*, 60 Mass.App.Ct. 714, 719-710 (2004) (Fraud on the Court where party fabricated an email, submitted fabricated e-mail with false affidavit to court, and attempted to hide fabrication from court for several months).

The production of affidavits, foreclosure deeds, and other testamentary evidence that are *prima facie*, inherently, or otherwise false, faulty, forged, counterfeit, or otherwise invalid, certainly rise to the level of forgery of evidence. That these are inserted and accepted by a means hampering Defendants' ability to defend, puts this practice dead center to a Fraud on the Court. See above.

The deliberate and calculated Fraud on the Court is a brazen attempt to mislead the Court and make the Court an accessory to its fraudulent actions.

> "When faced with a finding of fraud on the court, "the judge has broad discretion to fashion a judicial response warranted by the fraudulent conduct." *Commissioner of Probation* at 731 citing *Rockdale Mgmt. Co.* at 598.

The judge should seek "to secure the full and effective administration of justice." *O'Coin's, Inc. v. Treasurer of the County of Worcester,* 362 Mass 507, 514 (1972).

See *Commissioner of Probation* at 731(internal citations omitted):

> "Judges may exercise their inherent powers to fashion remedies that not only realistically protect the integrity of the pending litigation, but that also 'send an appropriate message to those who would so abuse the courts of the Commonwealth.' . . . Such power exists 'without statutory authorization and cannot be restricted or abolished by the Legislature.'"

Here, no WHC judge has stepped in to exercise judicial sanctions and protections - instead, they have been instrumental in perpetuating it, and they are complicit in its spread.

Upon a finding that Plaintiffs have acted to intentionally deceive this Court, any judgments in Plaintiff's favor should be vacated, and their complaints dismissed with prejudice. Foreclosure Deeds and

Affidavits which are exposed as false or fraudulent should be reported to the relevant Registries for cancellation.

11. Did the Judges err in failing to supervise and correct violations committed by court clerks in accepting *ex parte* communications and illegally entering docket items?

The Rules of Judicial Conduct regarding *ex parte* communications could not be clearer. They require judges to control and correct violations of the legal and administrative procedures of the court which include *ex parte* communications. A judge must be especially scrupulous in avoiding *ex parte* communications and expunging *ex parte* communications where they find them. They have a responsibility to oversee and sanction any staff which, as custodians of the court, have permitted documents to be illegally inserted into cases in contravention of due process.

Still, Plaintiff's attorneys continue to initiate, and the clerks of the Court continue to facilitate, the inclusion of these *ex parte* clerk's in dozens, if not hundreds, of cases. The Clerks and the Judges who supervise them must be held accountable for it, as the insertion into the case files of official court documents is within their express authority and control, *see,* SJC Rule 2.9(D).

The Court's promulgated "*A Guide By and For Massachusetts Court Staff*, Section G: Ex parte communications," states:

> "Black's Law Dictionary defines *ex parte* as "on one side only; by or for one party; done for one party only." Court staff should remember the basic principle that neither parties nor attorneys may communicate with the judge *ex parte*. Be sure that you do not violate this restriction by carrying a message from a party to a judge or by speaking to a judge on behalf of a court user. To do so could give one side in a case an unfair advantage.
>
> Many self-represented court users feel that they have a right to communicate directly with a judge to explain their situations and problems. When a court user makes this type of request, court staff should explain that communications with a judge occur only at a hearing or trial, when the other side also is present. While you are explaining this rule, it sometimes helps to ask court users how they would feel if the judge communicated privately with the other side in their case. Court staff also can explain procedures, such as motions, that would allow the court user to properly bring his or her concerns to the court's attention.
>
> Sometimes, court users attempt to communicate directly with a judge by writing to the judge. Such correspondence should be returned to the party, with an explanation about the prohibition against such *ex parte* communications."

12. Has the Worcester Housing Court's unquestioning acceptance of Plaintiff's documents and arguments undermined even the most fundamental and central Defenses in post purported foreclosure Summary Process cases?

The WHC's acceptance and support of *ex parte* insertions epitomizes its unquestioning receipt of any statements, interpretations and behaviors from Plaintiff/Bank's attorneys, and with its dismissal, disbelief, and undermining of any statements,

interpretations and behaviors of *pro se* Defendants. Chief Judge Horan has acted upon and spoken on the record of her presumption that *pro se* defendants do not know case law, statutes or court rules.

Judge Horan has flipped through *pro se* motions at the bench and exclaimed, "I'm not going to read this." In challenges to Plaintiff's attorney's statements, she has turned to Defendants and said, "the lawyers don't lie." When faced with sound briefs and legal arguments presented by Defendants that have worked together through WAFT, or local law librarians, the Judge has employed intimidation and scare tactics to threaten that they are colluding in the illegal practice of law.

The fatal twisting of the two key decisions in this area of law and the resultant Summary Process cases feels like the final nail for Petitioners.

A repeated but especially outrageous example of this is Plaintiff banks' misconstrued and regularly accepted argument that under *Ibanez,* homeowners do not have standing to challenge an assignment. This is false, both under the procedural rules that govern standing, as well as under the jurisprudence established in *Ibanez.*

In *Ibanez*, there were two homeowners: Ibanez and LaRace. Neither Ibanez nor LaRace were parties to the

case, as the case made its way up to and into the SJC. Therefore, there was no issue of standing with regard to the homeowners, because they were not parties to the case. But even if they had been parties to the case, it is a well-established tenet of black letter law that Plaintiffs bear the burden of proof in their case: standing is about the right of a Plaintiff to invoke the court's adjudication on a particular claim. The Defendants are brought into the matter by the Plaintiffs, and as such, appear because they must. Defendant homeowners in a non-judicial foreclosure, therefore, have no burden to prove standing in our judicial system.

Ibanez established no precedent whatsoever regarding the burden of proof for standing. The decision of the SJC in *Ibanez* went to voidness, and to affirm that voidness is binding on the world *including upon the Courts*. The foreclosures were deemed void on the basis that there were no fully executed assignments, and that mortgagors have a right to know the real party in interest prior to foreclosure, and so proof of a valid assignment is critical.

Another example of the WHC's acceptance of Plaintiffs' wildly misstated law is that the invalidity of a foreclosure cannot be a defense to eviction by any

other party other than the mortgagor. This is in direct contradiction to *Bank of N.Y.* v. *Bailey*, 460 Mass. 327, 334 *(2011)* and the cases upon which it was grounded. The *Bailey* decision cites well-established case law to underscore that a homeowner, mortgagor, family member of a mortgagor, or a *bona fide* tenant, have the right to claim as a valid defense to foreclosure the invalidity of that foreclosure. The WHC, however, routinely disregards the authority of this Court and jurisprudence by ruling that the only party with a right to challenge the validity of a foreclosure is the mortgagor.

The Court's bias is so strong that even the most clear-cut violations of the foreclosure process - ones that render a foreclosure void by operation of law *ab initio*, those that would be considered settled law in any other court - do not deter a decision in favor of the plaintiff banks. See examples in preliminary injunction.

The Court rules under such a degradation of justice that all homeowners and other occupants entering the Worcester Housing Court, must, as the lost souls were admonished in Dante's *Inferno,* "Give up hope, ye who enter here."

CONCLUSION

The outlined violations debilitate the fair adjudication of cases in the WHC. At the opening of a case, behind-the-scenes exchanges and Plaintiff's submission of key "evidence" without authentication and review, undermines the impartiality of the sitting Judge, all adjudicators on appeal, and the reputation of the Court. Procedural requirements are impacted, as are due process rights; Plaintiff's standing is taken for granted and Defendants' core defense as to title is pre-emptively decided. The strict time limits that govern housing cases can mean that a family whose home has been illegally foreclosed on void authority may be forced onto the street. Defendants are not fully apprised of what makes up the evidence against them and are left shooting in the dark to protect one of their most inalienable rights.

The WHC has become the locus of an insurmountable and invisible handicap for the Defendants in all 54 of these cases. WHC has created that same insurmountable handicap for an unidentified number (but in the hundreds) of defendants similarly situated. Inevitably, trust in the validity of the system and recognition of the Court's authority has disintegrated.

PRAYER FOR RELIEF

Defendants respectfully ask this Honorable Court, the only one with the jurisdiction and authority to promptly address the due process violations that Petitioners detail here, to take notice of and remedy these serious violations of justice.

In addition to what this Honorable Court considers mete and just, Defendants believe that this should include:

(1) Ending the practice of accepting documents that are *ex parte*
(2) Ending the practice of accepting documents disallowed by rule in commencing Summary Process cases
(3) Requiring enforcement of Corporate Disclosure Rules
(4) Requiring enforcement of the repair requirements when *ex parte* documents have been inserted in a file, including dismissal with prejudice
(5) Dismissals of still open cases, and vacating judgments in cases where *ex parte* documents were allowed without repair of the due process violations
(6) Vacating and reversing all judgments in all affected cases
(7) Sanctioning any WHC Judge, WHC Clerk's Office Supervisor or staff, and member of the Massachusetts Bar, who is or has been involved in these fundamental violations of our due process rights guaranteed by the Massachusetts and U.S. Constitutions *with consideration* given to the *knowing, intentional, and repetitive destruction of these rights*
(8) Declaring null, void, and of no effect every **interlocutory and final** decision in a post- "foreclosure" eviction case by the WHC

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

We, the undersigned, certify pursuant to MA, R. App. P. 16 (K) that the forgoing brief complies with the rules of this court to the best of our ability.

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CERTIFICATE OF COMPLIANCE

We, the undersigned, certify pursuant to MA, R. App. P. 16 (K) that the forgoing brief complies with the rules of this court to the best of our ability.

Patricia Ferreira

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Date 6/23/18

CERTIFICATE OF SERVICE

We, the undersigned, hereby certify that a true and correct copy of the above and foregoing has been furnished on ~~June 21~~, le July 13 2018

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ADDENDUM

Massachusetts Rules and Orders of the Supreme Judicial Court
Chapter 1
Section 1:21 Corporate Disclosure Statement on Possible Judicial Conflict of Interest.

(a) Who Must File. In civil and criminal cases in the Trial Court and appellate courts, any nongovernmental corporate party to a proceeding must file a statement identifying all its parent corporations and listing any publicly held corporation that owns 10 percent or more of the party's stock or stating that there is no such corporation. In a criminal case, if an organization is a victim of the alleged criminal activity, the government must file a statement identifying the victim and if the victim is a corporation providing the information required by this paragraph.

(b) Time for Filing. The manner of filing the corporate disclosure statement shall be as follows:

(i) Appellate Court. In an appellate court, a party must file an original and nine copies of the statement required in paragraph (a) within 30 days of the entry of the appeal upon the docket. In the single justice session of the Supreme Judicial Court, a party must file in accordance with subparagraph (ii). Even if such statement has already been filed, the party's principal brief must include the statement before the table of contents.

(ii) Trial Court; Civil Case. In a civil case in the Trial Court, a party must file an original and one copy of the statement required in paragraph (a) with its first appearance, pleading, petition, motion, response or other request. A copy of the statement must also be filed with each contested motion.

(iii) Trial Court; Criminal Case. In a criminal case in the Trial Court, a party must file an original and one copy of the statement required in paragraph (a) upon the defendant's initial appearance pursuant to Mass. R. Crim. P. 7. A copy of the statement must also be filed with each contested motion.

(c) Supplemental Filing. In any case, a party shall promptly file a supplemental statement upon any change in the information that the statement requires.

Chapter 3
Section 3:09 Code of Judicial Conduct
Canon 2
Rule 2.9 *Ex Parte Communications*

(A) A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending* or impending matter,* except as follows:

(1) When circumstances require it, ex parte communication for scheduling, administrative, or emergency purposes, which does not address substantive matters, is permitted, provided:

(a) the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication; and

(b) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication, and gives the parties an opportunity to respond.

(2) A judge may engage in ex parte communications in specialty courts,* as authorized by law.*

(3) A judge may consult with court personnel* whose function is to aid the judge in carrying out the judge's adjudicative responsibilities, or with other judges, subject to the following:

(a) a judge shall take all reasonable steps to avoid receiving from court personnel* or other judges factual information concerning a case that is not part of the case record. If court personnel* or another judge nevertheless brings information about a matter that is outside of the record to the judge's attention, the judge may not base a decision on it without giving the parties notice of that information and an opportunity to respond. Consultation is permitted between a judge, clerk-magistrate, or other appropriate court personnel* and a judge taking over the same case or session in which the case is pending with regard to information learned from prior proceedings in the case that may assist in maintaining continuity in handling the case;
(b) when a judge consults with a probation officer, housing specialist, or comparable court employee about a pending* or impending* matter, the consultation shall take place in the presence of the parties who have availed themselves of the opportunity to appear and respond, except as provided in Rule 2.9(A)(2);
(c) a judge shall not consult with an
appellate judge, or a judge in a different Trial Court Department, about a matter that the judge being consulted might review on appeal; and
(d) no judge shall consult with another judge about a pending matter* before one of them when the judge initiating the consultation knows* the other judge has a financial, personal or other interest that would preclude the other judge from hearing the case, and no judge shall engage in such a consultation when the judge knows* he or she has such an interest.

(4) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to settle civil matters pending before the judge.
(5). A judge may initiate, permit, or consider any ex parte communication when authorized by law* to do so.

(B) If a judge inadvertently receives an unauthorized ex parte communication bearing upon the substance of a matter, the judge shall make provision promptly to notify the parties of the substance of the communication.
(C) A judge shall consider only the evidence presented and any adjudicative facts that may properly be judicially noticed, and shall not undertake any independent investigation of the facts in a matter.
(D) A judge shall make reasonable efforts, including providing appropriate supervision, to ensure that this Rule is not violated by court personnel.*

COMMENT
[1] To the extent reasonably possible, all parties or their lawyers shall be included in communications with a judge.
[1A] “Ex pane communication” means a communication pertaining to a proceeding that occurs without notice to or participation by all other parties or their representatives between a judge (or court personnel* acting on behalf of a judge) and (i) a party or a party's lawyer, or
(ii) another person who is not a participant in the proceeding.
[2] Whenever the presence of a party or notice to a party is required by this Rule, it is the party's lawyer, or if the party is self-represented, the party, who is to be present or to whom notice is to be given, unless otherwise required by law.* For example, court rules with respect to Limited

Assistance Representation may require that notice be given to both the party and the party's limited assistance attorney.

[3] The proscription against ex parte communications concerning a proceeding includes communications with lawyers, law teachers, and other persons who are not participants in the proceeding, except to the limited extent permitted by this Rule.

[4] Paragraph (A)(2) permits a judge to engage in ex pane communications in conformance with law,* including court rules and standing orders, governing operation of specialty courts.*

[4A] Ex parte communications with probation officers, housing specialists, or other comparable court employees are permitted in specialty courts* where authorized by law.* See Paragraph (A)(2) and Comment [4]. Where ex parte communications are not permitted, a judge may consult with these employees ex parte about the specifics of various available programs so long as there is no discussion about the suitability of the program for a particular party.

[5] A judge may consult with other judges, subject to the limitations set forth by this Rule. This is so whether or not the judges serve on the same court. A judge must avoid ex parte communications about a matter with a judge who has previously been disqualified from hearing the matter or with an appellate judge who might be called upon to review that matter on appeal. The same holds true with respect to those instances in which a judge in one department of the trial court may be called upon to review a case decided by a judge in a different department; for example, a judge in the Superior Court may be required to review a bail determination made by a judge in the District Court. The appellate divisions of the Boston Municipal Court and of the District Court present a special situation. The judges who sit as members of these appellate divisions review on appeal cases decided by judges who serve in the same court department. However, the designation of judges to sit on the appellate divisions changes quite frequently; every judge on the Boston Municipal Court will, and every judge on the District Court may, serve for some time as a member of that court's appellate division. Judges in the same court department are not barred from consulting with each other about a case, despite the possibility that one of the judges may later review the case on appeal. However, when a judge is serving on an appellate division, the judge must not review any case that the judge has previously discussed with the judge who decided it; disqualification is required. Consultation between or among judges, if otherwise permitted, is appropriate only if the judge before whom the matter is pending* does not abrogate the responsibility personally to decide it.

[6] The prohibition in Paragraph (C) against a judge independently investigating adjudicative facts applies equally to information available in all media, including electronic media.

[7] A judge may consult the Committee on Judicial Ethics, the State Ethics Commission, outside counsel, or legal experts concerning the judge's compliance with this Code.

Massachusetts Rules of Civil Procedure
Rule 4: Process

(a) Summons: Issuance. Upon commencing the action the plaintiff or his attorney shall deliver a copy of the complaint and a summons for service to the sheriff, deputy sheriff, or special sheriff; any other person duly authorized by law; a person specifically appointed to serve them; or as otherwise provided in subdivision (c) of this rule. Upon request of the plaintiff separate or additional summons shall issue against any defendant. The summons may be procured in blank from the clerk, and shall be filled in by the plaintiff or the plaintiff's attorney in accordance with Rule 4(b).

(b) Same: Form. The summons shall bear the signature or facsimile signature of the clerk; be under the seal of the court; be in the name of the Commonwealth of Massachusetts; bear teste of the first justice of the court to which it shall be returnable who is not a party; contain the name of the court and the names of the parties; be directed to the defendant; state the name and address of the plaintiff's attorney, if any, otherwise the plaintiff's address, and the time within which these rules require the defendant to appear and defend; and shall notify him that in case of his failure to do so judgment by default may be rendered against him for the relief demanded in the complaint.

(c) By Whom Served. Except as otherwise permitted by paragraph (h) of this rule, service of all process shall be made by a sheriff, by his deputy, or by a special sheriff; by any other person duly authorized by law; by some person specially appointed by the court for that purpose; or in the case of service of process outside the Commonwealth, by an individual permitted to make service of process under the law of this Commonwealth or under the law of the place in which the service is to be made, or who is designated by a court of this Commonwealth. A subpoena may be served as provided in Rule 45. Notwithstanding the provisions of this paragraph (c), wherever in these rules service is permitted to be made by certified or registered mail, the mailing may be accomplished by the party or his attorney.

(d) Summons: Personal Service Within the Commonwealth. The summons and a copy of the complaint shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows:

> **(1)** Upon an individual by delivering a copy of the summons and of the complaint to him personally; or by leaving copies thereof at his last and usual place of abode; or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by statute to receive service of process, provided that any further notice required by such statute be given. If the person authorized to serve process makes return that after diligent search he can find neither the defendant, nor defendant's last and usual abode, nor any agent upon whom service may be made in compliance with this subsection, the court may on application of the plaintiff issue an order of notice in the manner and form prescribed by law.
>
> **(2)** Upon a domestic corporation (public or private), a foreign corporation subject to suit within the Commonwealth, or an unincorporated association subject to suit within the Commonwealth under a common name: by delivering a copy of the summons and of the complaint to an officer, to a managing or general agent, or to the person in charge of the business at the principal place of business thereof within the Commonwealth, if any; or by delivering such copies to any other agent authorized by appointment or by law to receive service of process, provided that any further notice required by law be given. If the person authorized to serve process makes return that after diligent search he can find

no person upon whom service can be made, the court may on application of the plaintiff issue an order of notice in the manner and form prescribed by law.

(3) Upon the Commonwealth or any agency thereof by delivering a copy of the summons and of the complaint to the Boston office of the Attorney General of the Commonwealth, and, in the case of any agency, to its office or to its chairman or one of its members or its secretary or clerk. Service hereunder may be effected by mailing such copiesto the Attorney General and to the agency by certified or registered mail.

(4) Upon a county, city, town or other political subdivision of the Commonwealth subject to suit, by delivering a copy of the summons and of the complaint to the treasurer or the clerk thereof; or by leaving such copies at the office of the treasurer or the clerk thereof with the person then in charge thereof; or by mailing such copies to the treasurer or the clerk thereof by registered or certified mail.

(5) Upon an authority, board, committee, or similar entity, subject to suit under a common name, by delivering a copy of the summons and of the complaint to the chairman or other chief executive officer; or by leaving such copies at the office of the said entity with the person then in charge thereof; or by mailing such copies to such officer by registered or certified mail.

(6) In any action in which the validity of an order of an officer or agency of the Commonwealth is in any way brought into question, the party questioning the validity shall forthwith forward to the Attorney General of the Commonwealth by hand or by registered or certified mail a brief statement indicating the order questioned.

(e) Same: Personal Service Outside the Commonwealth. When any statute or law of the Commonwealth authorizes service of process outside the Commonwealth, the service shall be made by delivering a copy of the summons and of the complaint: (1) in any appropriate manner prescribed in subdivision (d) of this Rule; or (2) in the manner prescribed by the law of the place in which the service is made for service in that place in an action in any of its courts of general jurisdiction; or (3) by any form of mail addressed to the person to be served and requiring a signed receipt; or (4) as directed by the appropriate foreign authority in response to a letter rogatory; or (5) as directed by order of the court.

(f) Return. The person serving the process shall make proof of service thereof in writing to the court promptly and in any event within the time during which the person served must respond to the process. If service is made by a person other than a sheriff, deputy sheriff, or special sheriff, he shall make affidavit thereof. Proof of service outside the Commonwealth may be made by affidavit of the individual who made the service or in the manner prescribed by the law of the Commonwealth, or the law of the place in which the service is made for proof of service in an action in any of its courts of general jurisdiction. When service is made by mail, proof of service shall include a receipt signed by the addressee or such other evidence of personal delivery to the addressee as may be satisfactory to the court. Failure to make proof of service does not affect the validity of the service.

(g) Amendment. At any time in its discretion and upon such terms as it deems just, the court may allow any process or proof of service thereof to be amended unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process is issued.

(h) Certain Actions in Probate Courts: Service. Notwithstanding any other provision of these rules, in actions in the Probate Courts in the nature of petitions for instructions or for the

allowance of accounts service may be made in accordance with G.L. c. 215, § 46, in such manner and form as the court may order.
(i) Land Court. In actions brought in the Land Court, service shall be made by the court where so provided by statute.
(j) Summons: Time Limit for Service. If a service of the summons and complaint is not made upon a defendant within 90 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion.

Amended February 24, 1975, effective July 1, 1974; December 17, 1975, effective January 1, 1976; June 2, 1976, effective July 1, 1976; December 13, 1982, effective January 1, 1982; March 29, 1988, effective July 1, 1988.

Reporter's Notes (1996): With the merger of the District/Municipal Courts Rules of Civil Procedure into the Massachusetts Rules of Civil Procedure in 1996, two differences that had existed between the two sets of rules have been eliminated. Prior to the merger, the District Court version of Rule 4(f) required proof of service to be made to the court and to the party; in addition, the District Court version included constables among those who are not required to make an affidavit of service. The merged set of rules adopts the version of Rule 4(f) contained in the Massachusetts Rules of Civil Procedure. Under the merged set of rules, proof of service in the District Court is required to be made only to the court and constables are required to make affidavit of service. It should be noted that there may be additional requirements in connection with service of process imposed by statute. See, for example, G.L. c. 223, § 31, which provides that where service is made at the defendant's last and usual place of abode in District Court actions, "the officer making service shall forthwith mail first class a copy of the summons to such last and usual place of abode. The date of mailing and the address to which the summons was sent shall be set forth ... in the officer's return."

Reporter's Notes (1975) : Rule 4(c) has been amended to make clear that process in the types of actions covered by Rule 4(h) need not be served by any of the individuals enumerated in Rule 4(c).

Rule 4(h) has been inserted to correct a serious inconvenience resulting from the apparent applicability to such Probate Court matters as petitions for instructions and accounts of Rule 4's general service requirements. If Rule 4, as originally promulgated, applied to this type of case, the cost of service might frequently assume excessive proportions. A petition for instructions involving a trust with numerous beneficiaries could require substantial service charges; an account in a common trust fund with over a thousand participants would impose massive expenses.

Prior to July 1, 1974, it was unquestioned that notice of the pendency of a petition for instructions, or the presentation for allowance of an account could be--and invariably was -- effected by citation, served in hand or by publication. Moreover, a statute, G.L. c. 215, § 46, authorized the court to direct service to be made by registered mail, thus permitting appreciable

saving in service costs. (Another statute, G.L. c. 4, § 7, equating certified mail with registered mail for this purpose, permitted an even less expensive procedure.)

As the amendatory legislation accompanying the Rules, Acts, 1974, c. 1114, repealed neither G.L. c. 215, § 46, nor G.L. c. 4, § 7, many probate courts continued to issue citations in the old form even after July 1, 1974. Others required service in accordance with Rule 4.

To eliminate the confusion, and to maximize flexibility in the particular class of actions affected, Rule 4(h) now explicitly approves both methods of procedure: In any Probate Court action seeking instructions or the allowance of an account, service may--but need not--be made by citation. In those rare cases whose strategy dictates service by an officer, the usual Rule 4 procedure is available.

Although the change in Rule 4(c) and the language of Rule 4(h) are both declaratory of existing practice as to accounts, the Supreme Judicial Court, in the order of February 24, 1975 promulgating the amendments, specifically made the new material retroactive to July 1, 1974. Thus service between July 1, 1974 and February 24, 1975 was valid, so long as it was made either: (1) In accordance with a citation; or (2) In accordance with Rule 4.

Reporter's Notes (1973):

Rule 4 deals with process and service. It extensively changes Federal Rule 4 to meet state conditions and to adopt such existing state law as the "long-arm" statute, G.L. c. 223A, §§ 1-8.

Rule 4(a), unlike Federal Rule 4(a), puts the onus of delivering process to the server upon the plaintiff or his attorney, rather than upon the clerk. It explicitly allows the plaintiff or the attorney to obtain the blank summons form in advance.

Rule 4(c) permits special court appointment of process servers.

Rule 4(d) somewhat changes the Massachusetts rule that in actions of tort or contract, not involving an attachment, the summons need not contain a copy of the declaration. Under Rule 4(d), the summons does not contain the complaint, but the two must be served together.

Rule 4(d)(1) allows process to be "left at [defendant's] last and usual place of abode," G.L. c. 223, § 31. The Rule makes clear that service on a statutorily authorized agent may also require the giving of additional notice, and that the plaintiff must consult the statute and fulfill its requirements. If service in any of the modes prescribed by Rule 4(d)(1) is impossible, the plaintiff may obtain an order of notice. See G.L. c. 223, § 34; c. 227, § 7. Divorce proceedings brought in the Superior Court, c. 208, § 6, although governed by these rules, are, in matters of notice and service, controlled by G.L. c. 208, § 8.

Rule 4(d)(1) incorporates prior law covering service upon infants and incompetents. No statute treats the situation precisely, of G.L. c. 206, § 24. At common law, an infant or an incompetent must be served like any other defendant, and service must precede the appointment of a guardian ad litem, Taylor v. Lovering, 171 Mass. 303, 306, 50 N.E. 612, 613 (1898); Reynolds v. Remick, 327 Mass. 465, 469, 470-471, 99 N.E.2d 279, 281-282 (1951).

Rule 4(d)(2) governs service upon a business entity. Basically, it allows the entity to be served via its officers, manager, or service-receiver designated by appointment or statute.

A domestic entity may, alternatively, be served by leaving the papers at the principal office with the person in charge of the business. This somewhat widens prior Massachusetts practice. For an

example of the kind of statutory notice covered by the proviso clause of Rule 4(d)(2), see G.L. c. 181, § 4. The "order-of-notice" provision follows Rule 4(d)(1).
Rule 4(d)(2), unlike the cognate Federal Rule, does not refer to "partnerships". Because Massachusetts law so clearly treats partners as individuals for purposes of suit, Shapira v. Budish, 275 Mass. 120, 126, 175 N.E. 159, 161 (1931), use of the federal language would work an undesirable change in substantive law.
Rule 4(d)(3), like Federal Rule 4(d)(4), covers service upon the sovereign or one of its agencies. Service is complete upon delivery to the Attorney General's office or upon the mailing of the papers to him by registered or certified mail.
Rule 4(d)(4) governs service upon political subdivisions of the Commonwealth subject to suit. It simplifies the procedure set out in G.L. c. 223, § 37, and applies the principles of the rest of Rule 4 to service of political subdivisions. Rule 4(d)(4) requires the plaintiff to bring the fact of suit to the attention of the person who is most likely to sound the litigational alarm; but it does not require him to do more.
Rule 4(d)(5) applies the principles of Rule 4(d) to service of public entities subject to suit under a common name.
Rule 4(d)(6) is designed to ensure that the Attorney General receives prompt notification of any possible court test (however collateral) of an order of an officer or agency of the Commonwealth. The Rule seeks to minimize the inconvenience to the public which results when such test does not come to the Attorney General's attention until late in the litigation. Rule 4(d)(6) is therefore a mandate of convenience. Failure to observe it will not vitiate otherwise valid service; courts should, however, be alert to compel observance of its requirements.
Rule 4(e) controls out-of-state service. It embodies the procedure set out in the long-arm statute (G.L. c. 223A, §§ 6-7), which in turn relied heavily upon Federal Rule 4(i) (a section omitted, therefore, from these rules). Rule 4(e) is largely self-explanatory and is flexible enough, when read with Rule 4(d)(1) and (2) and G.L. c. 223, § 37; c. 223A, §§ 1-3, to cover most order-of notice situations. See also c. 227, § 7.
Rule 4(f) requires direct filing by the server. It should be emphasized that any delay by the process server does not bar the plaintiff. See Peeples v. Ramspacher, 29 F.Supp. 632, 633 (E.D.S.C.1939).
Rule 4(g) tracks Federal Rule 4(h) verbatim. It follows the spirit of the Federal Rules, refusing to allow "technicalities" to obstruct justice. See Rule 15(covering amendments to pleadings) and Rule 60 (covering relief from judgments). It will work no substantial change in Massachusetts practice. See G.L. c. 231, § 51.

Rule 56: Summary Judgement
(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.
(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.
(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing

affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions answers to interrogatories, and responses to requests for admission under Rule 36, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. Summary judgment, when appropriate, may be rendered against the moving party.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Amended March 7, 2002, effective May 1, 2002.

Reporter's Notes to Rule 56(C) (2002): The 2002 amendment to Rule 56(c) deletes the phrase "on file" from the third sentence, in recognition of the fact that discovery documents are generally no longer separately filed with the court. See Rule 5(d)(2) and Superior Court Administrative Directive No. 90-2. The previous reference to admissions has also been replaced by a reference to "responses to requests for admission under Rule 36." The amendment is merely of the housekeeping variety and no change in practice is intended.

Reporter's Notes (1973): Except in a narrow class of cases, Massachusetts has up to now lacked any procedural device for terminating litigation in the interim between close of pleadings and trial. Under G.L. c. 231, §§ 59 and 59B, only certain contract actions could be disposed of prior to trial. In all other types of litigation, no matter how little factual dispute involved, resolution had to await trial.

Rule 56, which, with a small addition, tracks Federal Rule 56 exactly, responds to the need which the statutes left unanswered. It proceeds on the principle that trials are necessary only to resolve issues of fact; if at any time the court is made aware of the total absence of such issues, it should on motion promptly adjudicate the legal questions which remain, and thus terminate the case. The statutes, so far as they went, embodied this philosophy. They aimed "to avoid delay and expense of trials in cases where there is no genuine issue of fact." Albre Marble & Tile Co., Inc. v. John Bowen Co., Inc., 338 Mass. 394, 397, 155 N.E.2d 437, 439 (1959). Rule 56 will extend this principle beyond contract cases. Thus in tort actions where the facts are not disputed, summary judgment for one party will be appropriate. Should the facts concerning liability be undisputed, but damages controverted, Rule 56(c) authorizes partial summary judgment: the court may determine the liability issue, leaving for trial only the question of damages.

The important thing to realize about summary judgment under Rule 56 is that it can be granted if and only if there is "no genuine issue as to any material fact." If any such issue appears, summary judgment must be denied. So-called "trial by affidavits" has no place under Rule 56. Affidavits (or pleadings, depositions, answers to interrogatories, or admissions) are merely devices for demonstrating the absence of any genuine issue of material fact. Introduction of material controverting the moving party's assertions of fact raises such an issue and precludes summary judgment.

On the other hand, because Rule 56 recognizes only "genuine" material issues of fact, Rule 56(e) requires the opponent of any summary judgment motion to do something more than simply deny the proponent's allegations. Faced with a summary judgment motion supported by affidavits or the like, an opponent may not rely solely upon the allegations of his pleadings. He bears the burden of introducing enough countervailing data to demonstrate the existence of a genuine material factual issue.

If, however, the opponent is convinced that even on the movant's undisputed affidavits, the court should not grant summary judgment, he may decline to introduce his own materials and may instead fight the motion on entirely legal (as opposed to factual) grounds. Indeed, the final sentence of Rule 56(c) makes clear that in appropriate cases, summary judgment may be entered against the moving party. This is eminently logical. Because by definition the moving party is always asserting that the case contains no factual issues, the court should have the power, no matter who initiates the motion, to award judgment to the party legally entitled to prevail on the undisputed fact.

Rule 60: Relief from Judgment or Order

(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) Mistake; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59 (b), (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court. Writs of review, of error, of audita querela, and petitions to vacate judgment are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Effective July 1, 1974.

Reporter's Notes (1973): Rule 60 encompasses two basic situations: (a) the correction of mere clerical mistakes in the judgment or other part of the record, and (b) substantive relief from a final judgment. Included in Rule 60(b) are all possible grounds for relief from a final judgment. A motion under Rule 60(b) performs the same function as the former Massachusetts procedures of writ of review, writ of error, writ of audita querela and petition to vacate judgment. As will be noted below, Rule 60 preserves the substance of these remedies. But with the adoption of Rule 60, the relief is available through simple "motion" under Rule 60(b). In addition, Rule 60 does not prohibit the court from entertaining an independent action to relieve a party from a judgment. A motion under Rule 60 is addressed to the trialjudge's judicial discretion, and is generally not reviewable except for a clear abuse of discretion. Farmers Co-operative Elevator Association v. Strand, 382 F.2d 224 (8th Cir.1967). Further, because a Rule 60(b) motion does not affect the finality of the judgment, it does not toll the time for taking an appeal. Compare Rule 62 (e).

Rule 60(a) is limited to the correction of purely clerical errors. Errors within the purview of Rule 60(a) include "misprisions, oversights, omissions, unintended acts or failures to act." First National Bank v. National Airlines, 167 F.Supp. 167 (S.D.N.Y.1958). In effect, Rule 60(a) merely seeks to ensure that the record of judgment reflects what actually took place. Substantive errors or mistakes are outside the scope of Rule 60(a). See Stowers v. United States, 191 F.Supp. 795 (N.D.Ga.1961) holding that failure to consider interest as an element of a judgment is a substantive matter beyond Rule 60(a).

Further, Rule 60(a) does not apply unless the mistake springs from some oversight or omission; it does not cover mistakes which result from deliberate action. Ferraro v. Arthur M. Rosenberg Co., Inc., 156 F.2d 212 (2d Cir.1946). The word "record" in Rule 60(a) refers not only to process, pleadings, and verdict but also to evidentiary documents, testimony taken, instructions to the jury, and all other matters pertaining to the case of which there is a written record. Rule 60(a) covers mistakes or errors of the clerk, the court, the jury, or a party. The taking of an appeal does not divest the trial court of power to correct errors. However, once the case is docketed in the appellate court, the trial court

can only grant relief after first
obtaining the appellate court's leave.
Rule 60(b) affords a "party or his legal representative" a means of obtaining substantial relief from a "final judgment, order or proceeding." Interlocutory judgments thus do not fall within Rule 60(b). They remain subject to the complete power of the court rendering them to afford such relief from them as justice requires. This has long been the federal rule. John Simmons Co. v. Grier Brothers Co., 258 U.S. 82, 12 S.Ct. 196, 66 L.Ed. 475 (1922). Rule 60(b) leaves this unchanged. Rule 60(b) incorporates all possible grounds for relief from judgment; such relief must be sought by "motion as prescribed in these rules or by an independent action." The phrase "independent action" has been interpreted to mean, not that a party could still utilize the older common law and equitable remedies for relief from judgment, but rather "that courts no longer are to be hemmed in by the uncertain boundaries of these and other common law remedial tools." Klapprott v. United States, 335 U.S. 601, 69 S.Ct. 384, 93 L.Ed. 266 (1949). The court now has power "to vacate judgments whenever such action is appropriate to accomplish justice." Id. Thus, as presently interpreted, Rule 60(b) contains the substance of the older remedies while simplifying the procedure for obtaining such relief.
Rule 60(b)(1) allows relief for "mistake, inadvertence, surprise or excusable neglect." It applies to acts of the court, parties or third persons. Thus Rule 60(b)(1) has been held to permit granting of relief where the court overlooked one small item of damages concerned with the major issues of the case. Southern Fireproofing Co. v. R.F. Ball Construction Co., 334 F.2d 122 (8th Cir.1964). Similarly, the oversight of an attorney's law clerk in failing to serve a more definite statement of claim may be ground for vacating a judgment dismissing the complaint under the mistake or inadvertence clause of Rule 60(b)(1). Weller v. Socony Vacuum Oil Co. of New York, 2 F.R.D. 158 (S.D.N.Y.1941). Where a default judgment was based on a misunderstanding as to appearance and representation by counsel, relief was granted under Rule 60(b)(1). Standard Grate Bar Co. v. Defense Plant Corp., 3 F.R.D. 371 (M.D.Pa.1944).
The "excusable neglect" clause of the section has been frequently interpreted. It seems clear that relief will be granted only if the party seeking relief demonstrates that the mistake, misunderstanding, or neglect was excusable and was not due to his own carelessness. See Petition of Pui Lan Yee, 20 F.R.D. 399 (N.D.Cal.1957); Kahle v. Amtorg Trading Corp., 13 F.R.D. 107 (D.N.J.1952). The party seeking the relief bears the burden of justifying failure to avoid the mistake or inadvertence. The reasons must be substantial. For example, the misplacing of papers in the excitement of moving an attorney's office was held not to constitute excusable neglect sufficient to relieve the party from a default judgment entered for failure to file an answer. Standard Newspaper Inc. v. King, 375 F.2d 115 (2nd Cir.1967). Likewise, ignorance of the rules of civil procedure has been held not to be "excusable neglect." Ohliger v. U.S., 308 F.2d 667 (2nd Cir.1962).
Rule 60(b)(2) affords a party relief from a final judgment, order or proceeding on the ground of newly discovered evidence.
The movant bears the burden of showing that the evidence could not have been discovered by due diligence in time to move for a new trial under Rule 59 (b). See Flett v. W.A. Alexander & Co., 302 F.2d 321, 324 (7th Cir.), cert. denied, 371 U.S. 841, 83 S.Ct. 71, 9 L.Ed.2d 77 (1962):
"Rule 60(b) provides for extraordinary relief and may be invoked only upon a showing of exceptional circumstances."

It is also settled practice that the phrase "newly discovered evidence" refers to evidence in existence at the time of trial but of which the moving party was excusably ignorant. Brown v. Penn. R.R., 282 F.2d 522 (3rd Cir.1960), cert. denied 365 U.S. 818, 81 S.Ct. 690, 5 L.Ed.2d 696 (1961). The results of a new physical examination are not "newly discovered evidence" within the meaning of the Rules, Ryan v. U.S. Lines Co., 303 F.2d 430 (2nd Cir.1962).

Finally, the evidence must be of a material nature and so controlling as probably to induce a different result. Giordano v. McCartney, 385 F.2d 154 (3rd Cir.1967).

Rule 60(b)(3) allows relief from a final judgment, order or proceeding on the basis of "fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party".

The section does not limit the power of the court to:

1) entertain an independent action to enjoin enforcement of a judgment on the basis of fraud; or

2) set aside a judgment on its own initiative for fraud upon the court.

Since neither the fraud nor misrepresentation is presumed the moving party has the burden of proving by clear and convincing evidence that the alleged fraud or misrepresentation exists and that he is entitled to relief.

Prior to the adoption of Federal Rule 60(b), relief was afforded for extrinsic fraud, that is, fraud collateral to the subject matter, but denied for intrinsic fraud relating to the subject matter of the action. Because of difficulty in differentiation, Rule 60(b) explicitly abolishes the distinction, at least with respect to a timely motion under Rule 60(b)(3).

These distinctions may, however continue to exist with respect to the independent action and the action of the court on its own initiative.

Rule 60(b)(3) includes any wrongful act by which a party obtains a judgment under circumstances which would make it inequitable for him to retain its benefit. Fraud covered by Rule 60(b)(3) must be of such a nature as to have prevented the moving party from presenting the merits of his case. Assmann v. Fleming, 159 F.2d 332 (8th Cir.1947). See also U.S. v. Rexach, 41 F.R.D. 180 (D.P.R.1966).

Rule 60(b)(3) refers to "misconduct of an adverse party," and thus does not literally apply to the conduct of third persons. However, it is safe to assume that if the fraud is derivatively attributable to one of the parties (as for example, fraud by his attorney), it is within Rule 60(b)(3). Even if the fraud is not attributable to one of the parties, relief may still be available through an "independent action" or the residual clause, Rule 60(b)(6).

Rule 60(b)(4) allows relief from a void judgment; it gives no scope to the court's discretion. A judgment is either void or valid. Having resolved that question, the court must act accordingly.

An erroneous judgment is not a void judgment. A judgment is void only if the court rendering it lacked jurisdiction of the subject matter or of the parties, or where it acted in a manner inconsistent with due process of law.

Although Rule 60(b)(4) is ostensibly subject to the "reasonable" time limit of Rule 60(b), at least one court has held that no time limit applies to a motion under the Rule 60(b)(4) because a void judgment can never acquire validity through laches. See Crosby v. Bradstreet Co., 312 F.2d 483 (2nd Cir.) cert. denied, 373 U.S. 911, 83 S.Ct. 1300, 10 L.Ed.2d 412 (1963) where the court vacated a judgment as void 30 years after entry. See also Marquette Corp. v. Priester, 234 F.Supp. 799 (E.D.S.C.1964) where the court expressly held that clause Rule 60(b)(4) carries no real time limit.

Finally, a party may obtain relief from a void judgment through an independent action to enjoin its enforcement.

Rule 60(b)(5) affords relief if "the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application." The time for moving under Rule 60(b)(5) is stated to be a "reasonable time", to be determined in light of all the circumstances of the case.

It is important to note that relief under this clause is available only where the judgment is based on a prior judgment which has been reversed or otherwise vacated. Rule 60(b)(5) may not be used as a substitute for appeal. It does not authorize relief from a judgment on the ground that the law applied by the court in making its adjudication has been subsequently overruled or declared erroneous in another and unrelated proceeding. Berryhill v. United States, 199 F.2d 217 (6th Cir.1952).

Rule 60(b)(5) significantly affects appellate procedure where, for example, a judgment is based upon a prior judgment and the two judgments are appealed simultaneously. In this situation it would be proper for the appellate court to consolidate the two appeals and make a final adjudication based on both judgments. See Butler v. Eaton, 141 U.S. 240, 11 S.Ct. 985, 35 L.Ed. 713 (1891).

The third clause of Rule 60(b)(5) only applies to judgments having a prospective effect, as, for example, an injunction, or a declaratory judgment. It does not apply in the usual money damages situation because such a judgment lacks prospective effect. Ryan v. U.S. Lines Co., 303 F.2d 430 (2d Cir.1962). Specifically, the clause allows relief from a judgment which was valid and equitable when rendered but whose prospective application has, because of changed conditions, become inequitable. This power to grant relief from the prospective features of a judgment has always been clearly recognized in equity. See State of Pennsylvania v. Wheeling & Belmont Bridge Co., 18 How. 421 (1855).

Rule 60(b)(6) contains the residual clause, giving the court ample power to vacate a judgment whenever such action is appropriate to accomplish justice. Pierre v. Bemuth, Lembeke Co., 20 F.R.D. 116 (S.D.N.Y.1956). Rule 60(b)(6) is, however, subject to two important internal qualifications. First, the motion must be based upon some other reason than those stated in Rule 60(b)(1)-(5); second, the other reason urged must be substantial
enough to warrant relief.

A motion under Rule 60(b)(5) or (6) must be made within a "reasonable time." A motion under Rule 60(b)(4) probably has, as noted above, no effective time limit.

Motions under Rule 60(b)(1)-(3) are also subject to a "reasonable time" limitation which may never exceed one year after the judgment, order or proceeding in question. Further, Rule 60(b) explicitly prohibits the enlargement of Rule 60(b) time limits.

The saving clause in Rule 60(b) which allows the court to set aside a judgment for fraud upon the court contains no time limit. Likewise, the time limitations of Rule 60(b) do not apply to the independent action preserved by the rule. Presumably, concepts of reasonableness and laches would control.

When equitable principles warrant relief a party may obtain relief even though time for a Rule 60(b) motion has expired, through an independent action on the basis of accident, fraud, mistake, or newly discovered evidence. West Virginia Oil & Gas Co. v. George E. Breece Lumber Co., 213 F.2d 702 (5th Cir.1954). See also the Federal Advisory Committee Note of 1946:

"If the right to make a motion is lost by the expiration of the time limits fixed in these rules, the only other procedural remedy is by a new or independent action to set aside a judgment upon those principles which have heretofore been applied in such an action.
Where the independent action is resorted to, the limitations of time are those of laches or statutes of limitations."
It is not clear, however, just what statute of limitations applies.
In an independent action, the same requirements outlined above with respect to motions under Rule 60(b) must be met.
There should logically be no distinction between intrinsic or extrinsic fraud, if the independent action is based on fraud. See Rule 60(b)(3), discussed above. However, it has been held that the troublesome distinction between intrinsic and extrinsic fraud is still effective with respect to independent actions and that only extrinsic fraud will support such an action. Dowdy v. Hawfield, 189 F.2d 637 (D.C.Cir.) cert. denied 342 U.S. 830, 72 S.Ct. 54, 96 L.Ed. 628 (1951).
Although nothing in Rule 60(b) so specifies, the concepts of sound judicial administration suggest that the independent action should ordinarily be brought in the court (subject to statutory venue requirements) which heard the original action.
Generally, Rule 60(b) affords the same relief formerly available. The former procedures for such relief included:
(1) By general consent of all parties and the court. Brooks v. Twitchell, 182 Mass. 443, 447, 65 N.E. 843, 845 (1903). (2) By motion of the prevailing party within three months, G.L. c. 250, § 14. Marsch v. Southern New England Railroad, 235 Mass. 304, 305, 126 N.E. 519, 520 (1920). (3) Where the execution has been in no part satisfied, by petition to vacate judgment, brought within one year. G.L. c. 250, §§ 15-20. Gould v. Converse, 246 Mass. 185, 140 N.E. 785 (1923). Maker v. Bouthier, 242 Mass. 20, 136 N.E. 255 (1922). Shour v. Henin, 240 Mass. 240, 133 N.E. 561 (1922). (4) By writ of review, in some cases without petition, and generally but not always within one year. G.L. c. 250, § 21 et seq. Lynn Gas & Electric Co. v. Creditors National Clearing House, 235 Mass. 114, 126 N.E. 364 (1920). Carrique v. Bristol Print Works, 8 Met. 444, 446 (1844). Silverstein v. Daniel Russell Boiler Works, Inc., 268 Mass. 424, 167 N.E. 676 (1929). (5) By writ of error, usually within six years. Former G.L. c. 250, § 3 et seq. Lee v. Fowler, 263 Mass. 440, 443, 161 N.E. 910, 911 (1928). (6) By bill in equity to compel the vacation of the judgment and to restrain its enforcement. Brooks v. Twitchell, supra at 447, 65 N.E. at 845. Joyce v. Thompson, 229 Mass. 106, 118 N.E. 184 (1918). Nesson v. Gilson, 224 Mass. 212, 112 N.E. 870 (1916). Farquhar v. New England Trust Co., 261 Mass. 209, 158 N.E. 836 (1927).
In addition to the above, the remedy of audita querela also existed in Massachusetts, G.L. c. 214, § 1, but was rarely used.

Trial Court Rules
Trial Court Rules Uniform Summary Process Rule 2: Form of Summons and Complaint; Entry of action; Scheduling of trial date; Service of Process

(a) Form of Summons and Complaint
The form of Summary Process Summons and Complaint, as promulgated by the Chief Administrative Justice of the Trial Court, shall be the only form of summons and complaint used in summary process actions. This form of Summary Process Summons and Complaint shall be considered a writ in the form of an original summons as required by G.L. c. 239, § 2. This form shall be available in blank at each of the courts at which summary process actions may be commenced.

(b) Service of Process
Service of a copy of a properly completed Summary Process Summons and Complaint shall be made on the defendant no later than the seventh day nor earlier than the thirtieth day before the entry day, provided, however, that service shall not be made prior to the expiration of the tenancy by notice of termination or otherwise except as permitted by statute. Service shall be made in accordance with Rule 4(d) of the Massachusetts Rules of Civil Procedure, provided that if service is not made in hand, the person making such service shall mail, first-class, to the defendant, at the address indicated on the Summary Process Summons and Complaint, a copy of the Summary Process Summons and Complaint; and provided further that return of service, including a statement of mailing where the latter was required, shall be made to the plaintiff only and shall be made in the appropriate space provided on the Summary Process Summons and Complaint. The date of service pursuant to this paragraph shall be deemed the date of commencement of the action subject to proper entry in accordance with the provisions of Rule 2(d).
Service shall be made by those authorized to make service by Rule 4(c) of the Massachusetts Rules of Civil Procedure, provided that such service shall be made as required by this section.

(c) Entry date; scheduling of trial date
Entry dates for summary process actions shall be each Monday and cases shall be placed on the list for hearing on the second Thursday following the entry date without any further notice to the parties. Subject to the prior approval of the Administrative Justice of his or her Department, the First Justice of any Division may designate Friday, Monday, Tuesday, and Wednesday as summary process trial days either as alternatives to Thursday or in addition to Thursday. The cases shall be placed on the list for hearing on the second Friday, the second Monday, the third Tuesday, or the third Wednesday after the Monday entry day without any further notice to the parties when such day is designated as a summary process trial day. Summary process actions originally commenced in the Superior Court Department shall be added to the next non-jury list for assignment for trial.

(d) Entry of action
Summary process actions shall be entered by filing with the clerk of the court in which the action is to be heard the following documents:

(1) The original of the properly completed form of Summary Process Complaint and Summons, a copy of which has been served on the defendant, with return of service recorded thereon;
(2) a copy of any applicable notice(s) of termination of the defendant's tenancy of the premises upon which the plaintiff(s) relies where such notice is required by law and any proof of delivery of such notice upon which the plaintiff(s) plans to rely at trial;
(3) in jurisdictions wherein rent control is in effect a copy of a certificate of eviction granted by the appropriate rent control agency, or an affidavit of exemption;
(4) in jurisdictions wherein local laws governing condominium conversion evictions are in effect, a copy of any applicable affidavit of compliance with such local laws;
(5) any entry fee prescribed by law unless waived.

On the appropriate portion of the Summary Process Summons and Complaint the reason(s) for eviction shall be indicated by the plaintiff(s) in concise, untechnical form and with sufficient particularity and completeness to enable a defendant to understand the reasons for the requested eviction and the facts underlying those reasons.

(e) Method and time for filing

Filing of the Summary Process Summons and Complaint and necessary accompanying documents, if any, shall be by delivery in hand or by first-class mail to the clerk. Filing by mail is complete upon receipt by the clerk. Papers and documents required in accordance with the preceding paragraph shall be filed together no later than the close of business on the scheduled Monday entry day. Late filing of the summons and complaint shall not be permitted without the written assent of the defendant or the defendant's attorney.

Commentary

The procedure for commencing a summary process action under this rule can be summarized in the following three steps:

First a plaintiff wishing to institute an action must secure and complete the required form. One item he must indicate on the form is the date of the hearing. In order to determine this, the plaintiff must choose an entry day (any Monday, prior to which he can get effective service on the defendant and return of service. The hearing date will be on the second Thursday following the Monday entry day selected (unless Friday, Monday, Tuesday, or Wednesday, as a day other than or in addition to Thursday, is approved for that court). Although cases originally commenced in the Superior Court Department are at first scheduled for a hearing on the second Thursday after the entry day, it is likely that such Superior Court cases would have to be rescheduled as provided in section (c).

Second, the plaintiff must have a copy of the completed Summary Process Summons and Complaint properly served on the defendant and get the original of this form back from the process server showing a return of service. Service must be made not later than the seventh day nor earlier than the thirtieth day before Monday entry day chosen. Therefore, service could be made on the Monday of the week prior to a Monday entry day. Note that Rule 2(b) provides that service is not to be made prior to the expiration of the tenancy except as permitted by law. See G.L. c. 186, §§ 11 , 12 ; G.L. c. 239, § 1 ; see also, Hodgkins v. Price, 137 Mass. 13 .

Third, the plaintiff must file with the court the original of the completed Summary Process Summons and Complaint (showing return of service), the entry fee and possible certain other documents. This Filing constitutes entry of the action. Filing must be made no later than the

close of business on the Monday entry day. Note that if filing is by mail, the documents must arrive in court by the Monday entry day. The hearing will be on the second Thursday (or second Friday, second Monday, third Tuesday, or third Wednesday, if so designated) following the Monday entry day.

This three-step procedure is required to allow flexibility in the time for commencing these actions yet at the same time to provide an automatic hearing date that can be predetermined and communicated to the defendant with the summons and complaint. Commencement of the summary process action under these rules occurs when proper service of the Summary Process Summons and Complaint is completed, subject, however, to the proper entry of the action.

It should be noted that the clerk should not refuse to accept a summons and complaint for failure to file documents which may be required by Rules 2(d)(2), (3) or (4). It is a matter for the determination of the court as to whether such documents are required. It should be noted further that the requirement in Rule 2(d)(3) that a certificate of eviction, if any is necessary, be filed and served with the Summary Process Summons and Complaint satisfies the requirement of District Court Administrative Regulation No. 3-73 and the statutory law it reflects. That regulation requires that a certificate of eviction, issued before the commencement of the action, be filed with the court before any judgment will be entered.

Rule 2(d) requires that the plaintiff state the reason(s) for eviction on the summons and complaint. While the substantive law of the Commonwealth may not always require a reason for termination of a tenancy, it does require a reason for eviction. That reason might be simply that a tenant is holding against the right of the landlord after the tenancy has been terminated. When the termination of the tenancy itself requires some reason -- e.g. breach of lease, termination in a rent control jurisdiction, nonpayment of rent -- the reason for the termination must be provided. See G.L. c. 239, §§ 1 , 1A .

It should be noted that the provisions of Mass. R. Civ. P. 6(a), concerning holidays, are applicable to summary process actions. Therefore, if the entry day or the day for filing answers is a holiday, the entry or filing day would be the next day on which the court is open for business. However, if the plaintiff selects a hearing date which is a holiday, the hearing would be scheduled either the next business day after the holiday or one week later on the following Thursday (or Friday or Monday, if applicable). In rent control jurisdictions, a certificate of eviction is a prerequisite to the commencement of a summary process action. The granting of a certificate of eviction by a rent control board is subject to judicial review. In Gentile v. Rent Control Board of Somerville, 365 Mass. 343 , 350 f.n. 7, the Supreme Judicial Court stated that, if a complaint is filed challenging the issuance of the certificate of eviction, in many instances that complaint and any related summary process action may be consolidated for trial. Therefore, the court should consider the possibility of consolidation in such cases in order to avoid piecemeal litigation.

Federal Rules of Evidence
Article VIII. Hearsay
Rule 803. Exceptions to the Rule Against Hearsay
The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:
(6) Records of a Regularly Conducted Activity. A record of an act, event, condition, opinion, or diagnosis if:

> **(A)** the record was made at or near the time by — or from information transmitted by — someone with knowledge;
> **(B)** the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;
> **(C)** making the record was a regular practice of that activity;
> **(D)** all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and
> **(E)** the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

Massachusetts Rules of Evidence
Article VIII. Hearsay
Section 803. Hearsay exceptions; availability of declarant immaterial
The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
(6) Business and Hospital Records

> **(A) Entry, Writing, or Record Made in Regular Course of Business**
> A business record shall not be inadmissible because it is hearsay or self-serving if the court finds that (i) the entry, writing, or record was made in good faith; (ii) it was made in the regular course of business; (iii) it was made before the beginning of the civil or criminal proceeding in which it is offered; and (iv) it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event, or within a reasonable time thereafter.

209 Code of Massachusetts Regulations
18.00: Conduct of the business of debt collectors and loan servicers
18.21A: Mortgage loan servicing practices

1. A third party loan servicer may not use unfair or unconscionable means in servicing any mortgage loan. Without limiting the general application of the foregoing, the following conduct is a violation of 209 CMR 18.21A:

   (a) Failing to comply with the provisions of M.G.L. c. 183, § 54D regarding providing loan payoff information to a consumer.
   (b) Collecting private mortgage insurance beyond the date for which private mortgage insurance is no longer required.
   (c) Failing to comply with the provisions of M.G.L. chapter 244, §§ 35A, 35B or 35C regarding the right to cure a mortgage loan default and other requirements.(d) Knowingly or recklessly facilitating the illegal foreclosure of real property collateral.
   (e) Failing to comply with the provisions of 12 CFR 1024.38(b)(2), or other applicable provision of 12 CFR Part 1024, regarding the evaluation of borrowers for loss mitigation options.
   (f) Failing to comply with the provisions of 12 CFR 1024.41(b)(2), or other applicable provision of 12 CFR Part 1024, regarding providing borrowers with written acknowledgment of receipt of loan modification documentation and required follow up.
   (g) Failing to comply with the provisions of 12 CFR 1024.41(g), or other applicable provision of 12 CFR Part 1024, regarding the process of concluding the modification process prior to initiating a foreclosure.
   (h) Failing to comply with the provisions of 12 CFR 1024.40, or other applicable provision of 12 CFR Part 1024, regarding providing borrowers with contact information for a designated individual.
   (i) Nothing in 209 CMR 18.21A shall be construed to prevent a third party loan servicer from offering or accepting alternative loss mitigation options, including other modification programs offered by the third party loan servicer, a short sale, a deed-in-lieu of foreclosure or forbearance, if the borrower requests such an alternative, is not eligible for or does not qualify for a loan modification under a government sponsored mortgage loan modification program or proprietary modification program, or rejects the third party loan servicer's loss mitigation proposal.
   (j) 209 CMR 18.21A(2) contains requirements that are in addition to those contained in M.G.L. c. 244, § 35B and 209 CMR 56.00 regarding "certain mortgage loans", as that term is defined pursuant to 209 CMR 56.02.

2. Information and documentation provided by third party loan servicers in the context of foreclosure proceedings. To the extent a servicer is authorized to act on behalf of a mortgagee,

   (a) A third party loan servicer shall ensure that all foreclosure affidavits or sworn statements are based on personal knowledge.
   (b) A third party loan servicer shall ensure that foreclosure affidavits or sworn statements shall set forth a detailed description of the basis of affiant's claimed personal knowledge of information contained in the affidavit or

sworn statement, including sources of all information recited and a statement as to why the sources are accurate and reliable.

(c) A third party loan servicer shall certify in writing the basis for asserting that the foreclosing party has the right to foreclose, including but not limited to, certification of the chain of title and ownership of the note and mortgage from the date of the recording of the mortgage being foreclosed upon. The third party loan servicer shall provide such certification to the borrower with the notice of foreclosure provided pursuant to M.G.L. ch. 244, § 14, and shall also include a copy of the note with all required endorsements.

(d) A third party loan servicer shall comply with all applicable state and federal laws governing the rights of tenants living in foreclosed residential properties.

Massachusetts General Law

Part II, Title I, Chapter 183
Section 3: Estate created without instrument in writing
An estate or interest in land created without an instrument in writing signed by the grantor or by his attorney shall have the force and effect of an estate at will only, and no estate or interest in land shall be assigned, granted or surrendered unless by such writing or by operation of law.

Section 8: Statutory forms; alteration or substitution; "incorporation by reference" defined
The forms set forth in the appendix to this chapter may be used and shall be sufficient for their respective purposes. They shall be known as "Statutory Forms" and may be referred to as such. They may be altered as circumstances require, and the authorization of such forms shall not prevent the use of other forms. Wherever the phrase "incorporation by reference" is used in the following sections, the method of incorporation as indicated in said forms shall be sufficient, but shall not preclude other methods.

Part II, Title I, Chapter 183
Section 21: "Statutory power of sale" in mortgage
The following "power" shall be known as the "Statutory Power of Sale", and may be incorporated in any mortgage by reference:

(POWER.)

But upon any default in the performance or observance of the foregoing or other condition, the mortgagee or his executors, administrators, successors or assigns may sell the mortgaged premises or such portion thereof as may remain subject to the mortgage in case of any partial release thereof, either as a whole or in parcels, together with all improvements that may be thereon, by public auction on or near the premises then subject to the mortgage, or, if more than one parcel is then subject thereto, on or near one of said parcels, or at such place as may be designated for that purpose in the mortgage, first complying with the terms of the mortgage and with the statutes relating to the foreclosure of mortgages by the exercise of a power of sale, and may convey the same by proper deed or deeds to the purchaser or purchasers absolutely and in fee simple; and such sale shall forever bar the mortgagor and all persons claiming under him from all right and interest in the mortgaged premises, whether at law or in equity.

Part III, Title III, Chapter 239
Section 2: Jurisdiction; venue; form of writ
Such person may bring an action in the superior court in the county in which the land lies if the plaintiff seeks money damages and there is no reasonable likelihood that recovery by the plaintiff will be less than or equal to $25,000, or such other amount as is ordered from time to time by the supreme judicial court. Where multiple damages are allowed by law, the amount of single damages claimed shall control. Such person may bring an action in the district court in the judicial district in which the land lies.

Such person may bring the action by a writ in the form of an original summons to the defendant to answer to the claim of the plaintiff that the defendant is in possession of the land or tenements in question, describing them, which he holds unlawfully against the right of the plaintiff, and, if rent and use and occupation is claimed, that the defendant owed rent and use and occupation in

the amount stated; but, subject to the approval of the supreme judicial court, the judge of the housing court of the city of Boston shall determine the form of the writ in the actions brought in his court. Failure to claim rent and use and occupation in the action shall not bar a subsequent action therefor.

Part III, Title III, Chapter 240
Section 1: Petition to compel adverse claimant to try title
If the record title of land is clouded by an adverse claim, or by the possibility thereof, a person in possession of such land claiming an estate of freehold therein or an unexpired term of not less than ten years, and a person who by force of the covenants in a deed or otherwise may be liable in damages, if such claim should be sustained, may file a petition in the land court stating his interest, describing the land, the claims and the possible adverse claimants so far as known to him, and praying that such claimants may be summoned to show cause why they should not bring an action to try such claim. If no better description can be given, they may be described generally, as the heirs of A B or the like. Two or more persons having separate and distinct parcels of land in the same county and holding under the same source of title, or persons having separate and distinct interests in the same parcel or parcels, may join in a petition against the same supposed claimants. If the supposed claimants are residents of the commonwealth, the petition may be inserted like a declaration in a writ, and served by a copy, like a writ of original summons. Whoever is in the enjoyment of an easement shall be held to be in possession of land within the meaning of this section.

Part III, Title III, Chapter 240
Section 5: Application of preceding sections
The four preceding sections shall not apply to any property, right, title or interest of the commonwealth.

Part III, Title III, Chapter 244
Section 1: Foreclosure by entry or action; continued possession
A mortgagee may, after breach of condition of a mortgage of land, recover possession of the land mortgaged by an open and peaceable entry thereon, if not opposed by the mortgagor or other person claiming it, or by action under this chapter; and possession so obtained, if continued peaceably for three years from the date of recording of the memorandum or certificate as provided in section two, shall forever foreclose the right of redemption.

Part III, Title III, Chapter 244
Section 2: Entry without judgment; memorandum or certificate; recording
If an entry for breach of condition is made without a judgment, a memorandum of the entry shall be made on the mortgage deed and signed by the mortgagor or person claiming under him, or a certificate, under oath, of two competent witnesses to prove the entry shall be made. Such memorandum or certificate shall after the entry, except as provided in section seventy of chapter one hundred and eighty-five, be recorded in the registry of deeds for the county or district where the land lies, with a note of reference, if the mortgage is recorded in the same registry, from each record to the other. Unless such record is made, the entry shall not be effectual for the purposes mentioned in the preceding section.

Part III, Title III, Chapter 244
Section 14: Foreclosure under power of sale; procedure; notice; form
The mortgagee or person having estate in the land mortgaged, or a person authorized by the power of sale, or the attorney duly authorized by a writing under seal or the legal guardian or conservator of such mortgagee or person acting in the name of such mortgagee or person, may, upon breach of condition and without action, perform all acts authorized or required by the power of sale; provided, however, that no sale under such power shall be effectual to foreclose a mortgage, unless, previous to such sale, notice of the sale has been published once in each of 3 successive weeks, the first publication of which shall be not less than 21 days before the day of sale, in a newspaper published in the city or town where the land lies or in a newspaper with general circulation in the city or town where the land lies and notice of the sale has been sent by registered mail to the owner or owners of record of the equity of redemption as of 30 days prior to the date of sale, said notice to be mailed by registered mail at least 14 days prior to the date of sale to said owner or owners to the address set forth in section 61 of chapter 185, if the land is then registered or, in the case of unregistered land, to the last address of the owner or owners of the equity of redemption appearing on the records of the holder of the mortgage, if any, or if none, to the address of the owner or owners as given on the deed or on the petition for probate by which the owner or owners acquired title, if any, or if in either case no owner appears, then mailed by registered mail to the address to which the tax collector last sent the tax bill for the mortgaged premises to be sold, or if no tax bill has been sent for the last preceding 3 years, then mailed by registered mail to the address of any of the parcels of property in the name of said owner of record which are to be sold under the power of sale and unless a copy of said notice of sale has been sent by registered mail to all persons of record as of 30 days prior to the date of sale holding an interest in the property junior to the mortgage being foreclosed, said notice to be mailed at least 14 days prior to the date of sale to each such person at the address of such person set forth in any document evidencing the interest or to the last address of such person known to the mortgagee. Any person of record as of 30 days prior to the date of sale holding an interest in the property junior to the mortgage being foreclosed may waive at any time, whether prior or subsequent to the date of sale, the right to receive notice by mail to such person under this section and such waiver shall constitute compliance with such notice requirement for all purposes. If no newspaper is published in such city or town, or if there is no newspaper with general circulation in the city or town where the land lies, notice may be published in a newspaper published in the county where the land lies, and this provision shall be implied in every power of sale mortgage in which it is not expressly set forth. A newspaper which by its title page purports to be printed or published in such city, town or county, and having a circulation in that city, town or county, shall be sufficient for the purposes of this section.

The following form of foreclosure notice may be used and may be altered as circumstances require; but nothing in this section shall be construed to prevent the use of other forms.

(Form.)
MORTGAGEE'S SALE OF REAL ESTATE.
By virtue and in execution of the Power of Sale contained in a certain mortgage given by . . . . . .<\/y> to . . . . . .<\/y> dated . . . . . .<\/y> and recorded with
. . . . .

Deeds, Book . . . . . .<\/y>, page . . . . . .<\/y>, of which mortgage the undersigned is the present holder, ...<\/y>.
(If by assignment, or in any fiduciary capacity, give reference to the assignment or assignments recorded with . . . . .Deeds, Book . . . . . .<\/y>, page . . . . . .<\/y>, of which mortgage the undersigned is the present holder, ...<\/y>)
for breach of the conditions of said mortgage and for the purpose of foreclosing the same will be sold at Public Auction at . . . . . .<\/y>o'clock, ...<\/y> M. on the . . . . . .<\/y> day of . . . . . .<\/y> A.D. (insert year), ...<\/y> (place) . . . . . .<\/y> all and singular the premises described in said mortgage,
(In case of partial releases, state exceptions.)
To wit: "(Description as in the mortgage, including all references to title, restrictions, encumbrances, etc., as made in the mortgage.)"
Terms of sale: (State here the amount, if any, to be paid in cash by the purchaser at the time and place of the sale, and the time or times for payment of the balance or the whole as the case may be.)
Other terms to be announced at the sale.
(Signed) ___
Present holder of said mortgage.___

A notice of sale in the above form, published in accordance with the power in the mortgage and with this chapter, together with such other or further notice, if any, as is required by the mortgage, shall be a sufficient notice of the sale; and the premises shall be deemed to have been sold and the deed thereunder shall convey the premises, subject to and with the benefit of all restrictions, easements, improvements, outstanding tax titles, municipal or other public taxes, assessments, liens or claims in the nature of liens, and existing encumbrances of record created prior to the mortgage, whether or not reference to such restrictions, easements, improvements, liens or encumbrances is made in the deed; provided, however, that no purchaser at the sale shall be bound to complete the purchase if there are encumbrances, other than those named in the mortgage and included in the notice of sale, which are not stated at the sale and included in the auctioneer's contract with the purchaser.

For purposes of this section and section 21 of chapter 183, in the event a mortgagee holds a mortgage pursuant to an assignment, no notice under this section shall be valid unless (i) at the time such notice is mailed, an assignment, or a chain of assignments, evidencing the assignment of the mortgage to the foreclosing mortgagee has been duly recorded in the registry of deeds for the county or district where the land lies and (ii) the recording information for all recorded assignments is referenced in the notice of sale required in this section. The notice shall not be defective if any holder within the chain of assignments either changed its name or merged into another entity during the time it was the mortgage holder; provided, that recited within the body of the notice is the fact of any merger, consolidation, amendment, conversion or acquisition of assets causing the change in name or identity, the recital of which shall be conclusive in favor of any bona fide purchaser, mortgagee, lienholder or encumbrancer of value relying in good faith on such recital.

Part III, Title III, Chapter 244
Section 15: Copy of notice; affidavit; recording; evidence; effect of legal challenges
(a) For the purposes of this section, the following words shall have the following meanings unless the context clearly requires otherwise:

"Arm's length third party purchaser for value", an arm's length purchaser who pays valuable consideration, including a purchaser's heirs, successors and assigns, but not including the foreclosing party or mortgage note holder or a parent, subsidiary, affiliate or agent of the foreclosing party or mortgage note holder or an investor or guarantor of the underlying mortgage note including, but not limited to, the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation and the Federal Housing Administration.

"Deadline", 3 years from the date of the recording of the affidavit.

(b) The person selling or the attorney duly authorized by a writing or the legal guardian or conservator of the person selling shall, after the sale, cause a copy of the notice and an affidavit fully and particularly stating the person's acts or the acts of the person's principal or ward which shall be recorded in the registry of deeds for the county or district in which the land lies, with a note of reference thereto on the margin of the record of the mortgage deed if it is recorded in the same registry. If the affidavit shows that the requirements of the power of sale and the law have been complied with in all respects, the affidavit or a certified copy of the record thereof, shall be admitted as evidence that the power of sale was duly executed.

(c) If an affidavit is executed in accordance with this section, it shall, after 3 years from the date of its recording, be conclusive evidence in favor of an arm's length third party purchaser for value at or subsequent to the foreclosure sale that the power of sale under the foreclosed mortgage was duly executed and that the sale complied with this chapter and section 21 of said chapter 183. An arm's length third party purchaser for value relying on an affidavit shall not be liable for a foreclosure if the power of sale was not duly exercised. Absent a challenge as set forth in clause (i) or (ii) of subsection (d), title to the real property acquired by an arm's length third party purchaser for value shall not be set aside.

(d) Subsection (c) shall not apply if: (i) an action to challenge the validity of the foreclosure sale has been commenced in a court of competent jurisdiction by a party entitled to notice of sale under section 14 or a challenge has been asserted as a defense or a counterclaim in a legal action in a court of competent jurisdiction, including the housing court department pursuant to section 3 of chapter 185C, by a party entitled to notice of sale under said section 14 and a true and correct copy of the complaint or pleading asserting a challenge has been duly recorded before the deadline in the registry of deeds for the county or district in which the subject real property lies or in the land court registry district before the deadline; or (ii) a challenge to the validity of the foreclosure sale is asserted as a defense or counterclaim in a legal action in a court of competent jurisdiction, including the housing court department pursuant to said section 3 of said chapter 185C, by a party entitled to notice of sale under said section 14 who continues to occupy the mortgaged premises as that party's principal place of residence, regardless of whether the challenge was asserted prior to the deadline, and a true and correct copy of any pleading asserting the challenge in the legal action was duly recorded in the registry of deeds for the

county or district in which the subject property lies or is duly filed in the land court registry district within 60 days from the date of the challenge or before the deadline, whichever is later.

An attested true and correct copy of the complaint or pleading described in this subsection shall be accepted for recording in the registry of deeds or, in the case of registered land, in the land court registry district.

After the entry of a final judgment in a legal challenge under clause (i) or (ii) and the final resolution of any appeal of that judgment, the affidavit shall immediately become conclusive evidence of the validity of the sale if the final judgment concludes that the power of sale was duly exercised. If the final judgment concludes that the power of sale was not duly exercised, the foreclosure sale and affidavit shall be void. If the final judgment does not determine the validity of the foreclosure sale and the deadline for the affidavit to become conclusive has not expired, any party entitled to notice of sale under section 14 may file or assert another legal challenge to the validity of the foreclosure sale under said clause (i) or (ii).

(e) The recording of an affidavit and the expiration of the deadline shall not relieve an affiant or any other person on whose behalf an affidavit was executed and recorded from liability for failure to comply with this section, section 14 or any other requirements of law with respect to the foreclosure.

(f) A material misrepresentation contained in an affidavit shall constitute a violation of section 2 of chapter 93A.

Part III, Title III, Chapter 244
Section 35B: Requirement of reasonable steps and good faith effort to avoid foreclosure; criteria; notice of right to pursue modified mortgage; recording of affidavit of compliance

(a) As used in this section, the following words shall, unless the context clearly requires otherwise, have the following meanings:?

"Affordable monthly payment", monthly payments on a mortgage loan, which, taking into account the borrower's current circumstances, including verifiable income, debts, assets and obligations enable a borrower to make the payments.

"Borrower", a mortgagor of a mortgage loan.

"Certain mortgage loan", a loan to a natural person made primarily for personal, family or household purposes secured wholly or partially by a mortgage on an owner-occupied residential property with 1 or more of the following loan features: (i) an introductory interest rate granted for a period of 3 years or less and such introductory rate is at least 2 per cent lower than the fully indexed rate; (ii) interest-only payments for any period of time, except in the case where the mortgage loan is an open-end home equity line of credit or is a construction loan; (iii) a payment option feature, where any 1 of the payment options is less than principal and interest fully amortized over the life of the loan; (iv) the loan did not require full documentation of income or assets; (v) prepayment penalties that exceed section 56 of chapter 183 or applicable federal law;

(vi) the loan was underwritten with a loan-to-value ratio at or above 90 per cent and the ratio of the borrower's debt, including all housing-related and recurring monthly debt, to the borrower's income exceeded 38 per cent; or (vii) the loan was underwritten as a component of a loan transaction, in which the combined loan-to-value ratio exceeded 95 per cent; provided, however, that a loan shall be a certain mortgage loan if, after the performance of reasonable due diligence, a creditor is unable to determine whether the loan has 1 or more of the loan features in clauses (i) to (vii), inclusive; and provided, further, that loans financed by the Massachusetts Housing Finance Agency, established in chapter 708 of the acts of 1966 and loans originated through programs administered by the Massachusetts Housing Partnership Fund board established in section 35 of chapter 405 of the acts of 1985 shall not be certain mortgage loans.

"Creditor", a person or entity that holds or controls, partially, wholly, indirectly, directly or in a nominee capacity, a mortgage loan securing an owner-occupied residential property, including, but not limited to, an originator, holder, investor, assignee, successor, trust, trustee, nominee holder, Mortgage Electronic Registration System or mortgage servicer, including the Federal National Mortgage Association or the Federal Home Loan Mortgage Corporation; provided, that "creditor" shall also include any servant, employee or agent of a creditor; and provided, further, that the bodies politic and corporate and public instrumentalities of the commonwealth established in chapter 708 of the acts of 1966 and in section 35 of chapter 405 of the acts of 1985 shall not be a creditor.

"Creditor's representative", a person who has the authority to negotiate and approve the terms of and modify a mortgage loan, or a person who, under a servicing agreement, has the authority to negotiate and approve the terms of and modify a mortgage loan.

"Modified mortgage loan", a mortgage loan modified from its original terms including, but not limited to, a loan modified under 1 of the following: (i) the Home Affordable Modification Program; (ii) the Federal Deposit Insurance Corporation's Loan Modification Program; (iii) any modification program that a lender uses which is based on accepted principles and the safety and soundness of the institution and authorized by the National Credit Union Administration, the division of banks or any other instrumentality of the commonwealth; (iv) the Federal Housing Administration; or (v) a similar federal loan modification plan.

"Mortgage loan", a loan to a natural person made primarily for personal, family or household purposes secured wholly or partially by a mortgage on residential property.

"Net present value", the present net value of a residential property based on a calculation using 1 of the following: (i) the federal Home Affordable Modification Program base net present value model; (ii) the Federal Deposit Insurance Corporation's Loan Modification Program; (iii) the Massachusetts Housing Finance Agency's loan program used solely by the agency to compare the expected economic outcome of a loan with or without a modified mortgage loan; or (iv) any model approved by the division of banks to consider the total present value of a series of future cash flows relative to a mortgage loan.

"Residential property", real property located in the commonwealth, on which there is a dwelling house with accommodations for 4 or fewer separate households and occupied, or to be occupied,

in whole or in part by the obligor on the mortgage debt; provided, however, that residential property shall be limited to the principal residence of a person; provided, further, that residential property shall not include an investment property or residence other than a primary residence; provided, further, that residential property shall not include residential property taken in whole or in part as collateral for a commercial loan; and provided, further, that residential property shall not include a property subject to condemnation or receivership.

(b) A creditor shall not cause publication of notice of a foreclosure sale, as required by section 14, upon certain mortgage loans unless it has first taken reasonable steps and made a good faith effort to avoid foreclosure. A creditor shall have taken reasonable steps and made a good faith effort to avoid foreclosure if the creditor has considered: (i) an assessment of the borrower's ability to make an affordable monthly payment; (ii) the net present value of receiving payments under a modified mortgage loan as compared to the anticipated net recovery following foreclosure; and (iii) the interests of the creditor, including, but not limited to, investors.

(1) Except as otherwise specified in a contract, a servicer of pooled residential mortgages may determine whether the net present value of the payments on the modified mortgage loan is likely to be greater than the anticipated net recovery that would result from foreclosure to all investors and holders of beneficial interests in such investment, but not to any individual or groups of investors or beneficial interest holders. The servicer shall act in the best interests of all such investors or holders of beneficial interests if the servicer agrees to or implements a modified mortgage loan or takes reasonable loss mitigation actions that comply with this section. Any modified mortgage loan offered to the borrower shall comply with current federal and state law, including, but not limited to, all rules and regulations pertaining to mortgage loans and the borrower shall be able to reasonably afford to repay the modified mortgage loan according to its scheduled payments. Notwithstanding section 63A of chapter 183, any modified mortgage loan may be made without the consent of the holders of junior encumbrances and without loss of priority for the full amount of the loan thereby modified and shall not be construed so as to grant to any such holder of a junior encumbrance rights which, except for said revision, the holder would not otherwise have.

(2) A creditor shall be presumed to have acted in good faith and to have complied with this subsection, if, prior to causing publication of notice of a foreclosure sale, as required by section 14, the creditor:

(i) determines a borrower's current ability to make an affordable monthly payment;

(ii) identifies a modified mortgage loan that achieves the borrower's affordable monthly payment, which may include 1 or more of the following: reduction in principal, reduction in interest rate or an increase in amortization period; provided, however, that the amortization period shall not be more than a 15 year increase; provided, further, that no modified mortgage loan shall have an amortization period that exceeds 45 years;

(iii) conducts a compliant analysis comparing the net present value of the modified mortgage loan and the creditor's anticipated net recovery that would result from foreclosure; provided, that the analysis shall be compliant if the analysis is in accordance with the formula presented in at

least 1 of the following: (A) the Home Affordable Modification Program; (B) the Federal Deposit Insurance Corporation's Loan Modification Program; (C) any modification program that a lender uses which is based on accepted principles and the safety and soundness of the institution and authorized by the National Credit Union Administration, the division of banks or any other instrumentality of the commonwealth; (D) the Federal Housing Administration; or (E) a similar federal loan modification plan; and

(iv) either (A) in all circumstances where the net present value of the modified mortgage loan exceeds the anticipated net recovery at foreclosure, agrees to modify the loan in a manner that provides for the affordable monthly payment; or (B) in circumstances where the net present value of the modified mortgage loan is less than the anticipated net recovery of the foreclosure, or does not meet the borrower's affordable monthly payment, notifies the borrower that no modified mortgage loan will be offered and provides a written summary of the creditor's net present value analysis and the borrower's current ability to make monthly payments, after which the creditor may proceed with the foreclosure process in conformity with this chapter.

(c) Under this section, for certain mortgage loans, the creditor shall send notice, concurrently with the notice required by subsection (g) of section 35A, of the borrower's rights to pursue a modified mortgage loan. Said notice shall be considered delivered to the borrower when sent by first class mail and certified mail or similar service by a private carrier to the borrower at the borrower's address last known to the mortgagee or anyone holding thereunder. A copy of said notice shall be filed with the attorney general. The process for determining whether a modified mortgage loan is offered shall take no longer than 150 days. Not more than 30 days following delivery of the notice as provided for in this subsection, a borrower who holds a certain mortgage loan shall notify a creditor of: (i) the borrower's intent to pursue a modified mortgage loan which shall include a statement of the borrower's income and a complete list of total debts and obligations, as requested by the creditor, at the time of receipt of the notice; (ii) the borrower's intent to pursue an alternative to foreclosure, including a short sale or deed-in-lieu of foreclosure; (iii) the borrower's intent not to pursue a modified mortgage loan and pursue the right to cure period described in section 35A; or (iv) the borrower's intent to waive the right to cure period and proceed to foreclosure. A borrower who holds a certain mortgage loan and fails to respond to the creditor within 30 days of delivery of the notice provided for in this subsection shall be considered to have forfeited the right to cure period and shall be subject to a right to cure period of 90 days. A borrower shall be presumed to have notified the creditor if the borrower provides proof of delivery through the United States Postal Service or similar carrier. Not more than 30 days following receipt of the borrower's notification that the borrower intends to pursue a modified mortgage loan, a creditor shall provide the borrower with its assessment, in writing, under subsection (b). The assessment shall include, but not be limited to: (i) a written statement of the borrower's income, debts and obligations as determined by the creditor; (ii) the creditor's net present value analysis of the mortgage loan; (iii) the creditor's anticipated net recovery at foreclosure; (iv) a statement of the interests of the creditor; and (v) a modified mortgage loan offer under the requirements of this section or notice that no modified mortgage loan will be offered. If a creditor offers a modified mortgage loan, the offer shall include the first and last names and contact phone numbers of the creditor's representative; provided, that the creditor shall not assign more than 2 creditor's representatives responsible for negotiating and approving the terms of and modifying the mortgage loan. The assessment shall be provided by first class

and certified mail. A creditor shall be presumed to have provided the assessment to the borrower if the creditor provides proof of delivery through the United States Postal Service or similar carrier. A borrower who receives a modified mortgage loan offer from a creditor shall respond within 30 days of receipt of the assessment and offer of a modified mortgage loan. The borrower may: (i) accept the offer of a loan modification as provided by the creditor; (ii) make a reasonable counteroffer; or (iii) state that the borrower wishes to waive the borrower's rights as provided by this section and proceed to foreclosure. The borrower's response shall be in writing and, if a counteroffer is proposed, shall include substantiating documentation in support of the counteroffer. The response shall be provided by first class and certified mail. A borrower shall be presumed to have responded if the borrower provides proof of delivery through the United States Postal Service or similar carrier. A borrower who fails to respond to the creditor within 30 days of receipt of a modified mortgage loan offer shall be considered to have forfeited the 150 day right to cure period and shall be subject to a right to cure period of 90 days. Where a counteroffer is proposed, the creditor shall accept, reject or propose a counteroffer to the borrower within 30 days of receipt. Under this section, additional offers by both parties shall be considered during the right to cure period; provided, however, that a borrower may at any time state, in writing, that the borrower wishes to waive the borrower's rights as provided by this section and proceed to foreclosure. Nothing in this section shall be construed as preventing a creditor and a borrower from negotiating the terms of a modified mortgage loan by telephone or in person following the initial offer of a modified mortgage loan by a creditor; provided, however, that all offers, whether by a creditor or a borrower, shall be in writing and signed by the offeror. The right to a modified mortgage loan, as described in this section, shall be granted once during any 3?year period, regardless of the mortgage holder.

(d) The notice required in subsection (c) shall, at a minimum, include the appropriate contact information for modification assistance within the office of the attorney general; provided, that, the notice shall be similar in substance and form to the notice promulgated by the division of banks under section 35A.

(e) Nothing in this section shall prevent a creditor from offering or accepting an alternative to foreclosure, such as a short sale or deed-in-lieu of foreclosure, if the borrower requests such alternative, rejects a modified mortgage loan offer or does not qualify for a modified mortgage loan under this section.

(f) Prior to publishing a notice of a foreclosure sale, as required by section 14, the creditor, or if the creditor is not a natural person, an officer or duly authorized agent of the creditor, shall certify compliance with this section in an affidavit based upon a review of the creditor's business records. The creditor, or an officer or duly authorized agent of the creditor, shall record this affidavit with the registry of deeds for the county or district where the land lies.

The affidavit certifying compliance with this section shall be conclusive evidence in favor of an arm's-length third party purchaser for value, at or subsequent to the resulting foreclosure sale, that the creditor has fully complied with this section and the mortgagee is entitled to proceed with foreclosure of the subject mortgage under the power of sale contained in the mortgage and any 1 or more of the foreclosure procedures authorized in this chapter; provided, that the arm's-length third party purchaser for value relying on such affidavit shall not be liable for any failure

of the foreclosing party to comply and title to the real property thereby acquired shall not be set aside on account of such failure. The filing of such affidavit shall not relieve the affiant, or other person on whose behalf the affidavit is executed, from liability for failure to comply with this section, including by reason of any statement in the affidavit. For purposes of this subsection, the term "arm's-length, third party purchaser for value" shall include such purchaser's heirs, successors and assigns.

(g) On a bi-annual basis, a creditor shall report the final outcome of each loan modification on all mortgage loans for which the creditor sent to a borrower a notice of the right to pursue a modified mortgage loan to the division of banks.

(h) The division of banks shall adopt, amend or repeal regulations to aid in the administration and enforcement of this section, including the minimum requirements which constitute a good faith effort by the borrower to respond to the notice required under subsection (c); provided, that, such regulations may include requirements for reasonable steps and good faith efforts of the creditor to avoid foreclosure and safe harbors for compliance in addition to those under this section. The division of banks shall make any available net present value models accessible to all creditors.

Part III, Title V, Chapter 259
Section 1: Actionable contracts; necessity of writing

No action shall be brought:

First, To charge an executor or administrator, or an assignee under an insolvent law of the commonwealth, upon a special promise to answer damages out of his own estate;

Second, To charge a person upon a special promise to answer for the debt, default or misdoings of another;

Third, Upon an agreement made upon consideration of marriage;

Fourth, Upon a contract for the sale of lands, tenements or hereditaments or of any interest in or concerning them; or,

Fifth, Upon an agreement that is not to be performed within one year from the making thereof;

Unless the promise, contract or agreement upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith or by some person thereunto by him lawfully authorized.