COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

Ruth Adjartey, Ismail Abdelhamed, Vesta Ballou, Mildred Collins, Jackeline Cucufate, Marjorie Evans, Matthew Griffin, Gerard Hughes, Donna Mejias-Berrios, Janet Montgomery, Elizabeth Norris, Luciano Oliveira, Mychelyne Oliveira, Susan Osborne, Daniel Peristere, Christy Raymond, Caitlin Ryals, John Schumacher, Myron Swanston Petitioner-Appellants v. Worcester Housing Court, Original Respondent-Appellee, Santander Bank, Midfirst Bank, Nationstar Mortgage LLC, MRH Sub1 LLC, Freddie Mac, Fannie Mae, U.S. Bank N.A. As Trustee Of J.P. Morgan Acquisition Trust 2006-WMC3, Lisa Y. Barron, HSBC Bank USA N.A. As Trustee For Nomura Asset Acceptance Corporation Mortgage Pass Through Certificates Series 2005-AR3, HSBC Bank USA N.A. As Trustee On Behalf Of Fremont Home Loan Trust 2006-C Mortgage-Backed Certificates Series 2006-C, Savers Co-Operative Bank, Deutsche Bank National Trust Co. Trustee For Ameriquest Mortgage Securities Inc. Asset-Backed Pass Through Certificates Series 2003-13, US Bank N.A. As Trustee For Bear Stearns Asset Backed Securities Trust 2004-Ac4, U.S. Bank Trust N.A. Trustee Of Volt 2012-NP11Asset Holdings Trust Respondents-Appellees	Docket # SJC-12380

Christine Hilton, Ruth Adjartey, Ismail Abdelhamed, Vesta Ballou, Lori Cairns,

Jackeline Cucufate, Marjorie Evans, Gerard Hughes, Maria Navedo, Paul Norris John Schumacher, Jean Atkinson, Edna Austell, Annette Bent, Steven Bourassa, Samantha Farrar, Patricia Ferreira Bonilla, Kelly Johnson, Felix Kangaru, Heather Kozac, Cheryl Leblanc, Philippe Leblanc, William Marks, Deb Mccarthy, Keith Mckenzie, Paulette McKenzie, Miranda Morgan, Joseph Nuzzolilo, Cynthia O'Gara, Mychelyne Oliveira, Susan Osborne, Thomas Saxe, Al Solitro, Sherry Stanley, Myron Swanston, Stefani Tubert, Tracey Tobin, Cynthia White, Nunciata Sullivan, Lila Ortiz, Carl Rellstab, Carey Souda, Patricia O'Dell, Linda Potter, Brian Potter, Jasmine Alvarez, Petitioner/Intervenor-Appellants vs. Worcester Housing Court, Respondent-Appellee,	**Docket # SJC-12406**

Petitioner's Motion for Modification and Reconsideration of this Court's Decisions of April 10, 2019

NOW COMES Petitioner Marjorie Evans in the cases captioned above, and, pursuant to Massachusetts Rules of Appellate Procedure, Rule 27,[1] asks this Honorable Court to modify its decisions issued on April 10, 2019, in both *Adjartey, et al.*, and *Hilton, et al.*. Based upon what

[1] MRAP Rule 27, "Within 14 days after the date of the decision of the appellate court, any party to an appeal may file a motion for reconsideration or modification of decision …. It shall state with particularity the points of law or fact which it is contended the court has overlooked or misapprehended and shall contain such argument in support of the motion as the movant desires to present." This Court has granted Petitioners until May 6, 2019, to file this motion.

Petitioner and her co-Petitioners understand as the legal basis for their Petitions, the Court is asked to revise its [2]decisions treating as undisputed all facts presented by Petitioners and not denied by the Respondent Central Division of the Housing Court Department (WHC).

Petitioner also asks this Court to reconsider both decisions accordingly and to amend and expand their conclusions of law, in that Petitioners sued pursuant to G.L. c. 211, s. 3, for the relief from a lower court's abuse that, until July 1, 1974, was available from a higher court only under the venerable Writ of Mandamus.[3]

Petitioners believe that this Court has overlooked factors indicating that all but a few of their verified facts should be treated as undisputed, and that it may have misapprehended the nature of their self-represented petitions as "glorified appeals," when instead they function as a single, multi-party suit for this single relief: the equivalent of a Writ of Mandamus as to the WHC prosecuted under Mass Rules of Civil Procedure. If alternatively, the Court sees it as a Petition as to violations of protected equal rights as a discrimination complaint, it is still under Mass Rules of Civil Procedure.

Procedural History

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[2] This same argument as to WHC as "nominal" and "alleged" facts applies in the third companion case, *Evans v. FHLMC*

[3] 'Mandamus' means 'we command.' Massachusetts abolished the Writ of Mandamus as of July 1, 1974. See MRCP Rule 81(b), Writs Abolished. Since then, the relief formerly available under that Writ is to be available by means of a civil action under MRCP Rule 2, One Form of Action. The MRCP apply to proceedings before a Single Justice of the Supreme Judicial Court or of the Appeals Court. See Rule 1.

In *Adjartey, et al.*, pursuant to MRCP Rule 4 (d)(3), Petitioners served their verified Petition on the WHC clerk and the Attorney General's Boston office.[4] The WHC entered an appearance before the single justice and moved to dismiss. After a denial, Plaintiffs moved for reconsideration. The single justice denied it. Petitioners then appealed to the full Court.

In *Hilton, et al.*, Petitioners similarly served their verified Petition on the WHC. It entered an appearance and opposed the Petition. Petitioners amended their Petition to add as Respondents the various plaintiffs in their post-foreclosure eviction cases before the WHC. It replied that, if the single justice accepted this amendment, it would not respond. The single justice denied the Petition. Plaintiffs appealed.

After Petitioners had appealed both *Adjartey* and *Hilton*, they by accident learned that the WHC Clerk's Office was accepting ex parte, and docketing, copies of documents recorded in the Registries of Deeds submitted by plaintiff foreclosing banks for the judges' use in post-foreclosure Summary Process actions for eviction.[5] Also, WHC Plaintiffs failed to serve copies of these documents upon defendants. Neither plaintiffs below nor WHC judges notified defendants/ Petitioners that these documents were in the files.[6]

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[4] Before doing so, Petitioners asked the SJC of Suffolk Court and confirmed that this was the proper way to make service on a governmental entity.

[5] This violates Uniform Summary Process Rule 2, and Rule 2.9, Ex Parte Communications, of the Code of Judicial Conduct.

[6] Rule 2.9 (B), Code of Judicial Conduct: "If a judge inadvertently receives an unauthorized ex parte

Petitioners then filed an Intervenor brief with this Court in *Hilton*, seeking a Preliminary Injunction against the WHC's acceptance and use of these ex parte documents. This Court transmitted Petitioners' request to the single justice. The WHC opposed. The single Justice denied a Preliminary Injunction. Appeals followed.

ARGUMENT

Petitioners' facts as presented paint a partial but powerful picture of the hostile, intimidating, and discriminatory[7] environment that the WHC has created for them and for those similarly situated.

This Court reviewed all of these facts as "alleged."[8]

Nonetheless, the facts set forth in the verified *Adjartey* and *Hilton* petitions, Petitioners' affidavits submitted with the *Hilton* petition, and facts in the Intervenors' brief in *Hilton* that the WHC said were undisputed, should have been reviewed instead as undisputed.

Pursuant to Massachusetts R.A.P. 27, Petitioners therefore move for modification of this Court's decisions in *Adjartey* and *Hilton* to indicate that these facts are

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communication bearing upon the substance of a matter, the judge shall make provision promptly to notify the parties of the substance of the communication."

[7] The WHC nowhere denied Petitioners' averred facts alleging threats by WHC judges, their consideration of affiliation, denial of access to justice on the basis of indigency and/or disability, disparate treatment, and refusal of the constitutional right to a "full hearing." Those are waived under MRCP Rule 8 (b). *Why not the constitutional right to a jury trial?*

[8] See Adjartey, et al., SJC-12380 April 10 2019 (slip op.), pp. 3, 5, 15, 22, 25.

undisputed, and that this Court amend and expand its conclusions of law accordingly.

Verified facts that Respondent fails to deny are not "alleged" but are undisputed

MRCP Rule 1 provides in pertinent part: "These rules govern the procedure before a single justice of the Supreme Judicial Court…." So the MRCP[9] apply here.

MRCP Rule 8 (b) provides in pertinent part: "A party shall … admit or deny the averments upon which the adverse party relies." In *Adjartey* and in the first *Hilton* petition, each Petitioner verified the petition. In *Hilton*, Petitioners also appended affidavits. To WHC as, therefore, a party to these cases. Rule 8 (b) is imperative: "A party … **shall** admit or deny the averments upon which the adverse party relies." Emphasis supplied.

In *Adjartey*, the WHC denied no verified facts.[10] To the rest of them, Rule 8 (d) applies: "Averments in a pleading to which a responsive pleading is required, … are admitted when not denied in the responsive pleading."

Because of postural issues with the Petition filed against an inferior court under G.L. Chapter 211, s. 3, the "required" nature of denial or admission appeared unclear.

In civil actions under, G.L. 211, s. 3, the SJC's Rule 2:22, 422 Mass. 1302 (1996), makes the court below a nominal party: "When the lower court is named as a respondent …. Unless otherwise ordered by the single justice, the lower

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[9] Also, A writ of Mandamus was subsumed - although its relief preserved - under MRCP. This is doubled underscored as the applicable Procedural Rules in this case.

[10] To the best of [illegible] knowledge, no such facts were denied as Petitioner Bonassa and others reviewed all WHC filings.

court shall thereafter be treated as a nominal party which may, but need not, appear and be heard."

Black's Law Dictionary, online edition, defines "nominal party" as "An entity whose involvement as a defendant in a case has no bearing on the outcome. …" If so, this suggests that a respondent lower court, if it really is a "nominal" party, should not be able to appear, be heard, and then do something as material to the outcome as to move for dismissal of Petitioners' Preliminary Injunction, etc.

Here, in fact, the respondent WHC ***did*** choose to "appear and be heard." It can scarcely be that a party can choose to appear before the single justice and be heard, and nonetheless not be subject to the MRCP that apply to every other party and in every other case.[11] Petitioners have found no authority on this point. Yet, unless the MRCP apply, *no procedural Rules will apply to a lower court "nominal party" in a G.L. s. 211, s. 3 proceeding against it*[12].

This would be absurd.[13] The SJC would not be party to absurdity.

Unless the MRCP apply here, furthermore, it would deny

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[11] Presumably the MRCP do apply to a lower court when the single justice, pursuant to Rule 2:22, "otherwise" orders it to appear and be heard. MRCP 1 explicitly states that proceedings of the Single Justice of the SJC are under MRCP.

[12] In fact, such lack of application of MRCP where those were the rules by which the Petitioners were measured would create what appears to be an unthinkable imbalance and violation of the Anglo-American legal concept of due process.

[13] Cf. Eaton v. Fed'l Nat'l Mortgage Ass'n, et al., 462 Mass. 569 (2012) (citation omitted) (court seeks to arrive at "sensible construction" of statute, and "shall not construe a statute to … produce absurd results").

Petitioners' due process rights to the relief formerly available under Mandamus.[14] Effective July 1, 1974, MRCP Rule 81(b) abolished Mandamus along with other writs. Yet the Reporter's Notes to Rule 81 MRCP Rule 2 (1973) promised: "Burial of these antiques … **does not mean elimination of the relief they afforded.**"[15] [emphasis added]

Nonetheless, to access that relief, a petitioner must have facts that are not just alleged, but are proven. "Differences in the forms of action having been abolished, the plaintiff should be denied relief *only when under the facts proven*, he is entitled to none." *Nester v. Western Union Telegraph Co.*, 25 F.Supp. 478, 481 (S.D.Cal. 1938), discussing the effect of the analogous Federal Rule 2; cited in Reporter's Notes to MRCP Rule 2 (1973).[Emphasis added.]

So Petitioners need "facts proven" to show their entitlement to relief. Under this Court's decisions in *Adjartey* and *Hilton*, however, Petitioners' facts are described merely as "alleged." This Court noted: "[T]he single justice made no findings of fact."[16] But the single justice had no need to.

As the Reporter's Notes observe:

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[14] Cf. Massachusetts Declaration of Rights, Article XI: "Every subject of the commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character." All Petitioners here contest the purported foreclosures of their respective homes, that is, their property.

[15] Cf. F.W. Maitland, The Forms of Action at Common Law: A Course of Lectures, 2d ed. (1965) 2: "The forms of action we have buried, but they still rule us from their graves."

[16] *Adjartey*, slip op. at 5.

"…Rule 8(d) sets up a straightforward way of dealing with failure to deny averments: (1) If the averments are contained in a pleading to which a responsive pleading is authorized, the pleader must either utilize the opportunity or be taken to have waived it. Rule 8(d) makes the admission automatic."

The WHC's responsive pleadings were authorized. Indeed, MRCP Rule 7(a) required the pleadings that responded to the petitions: "There shall be a complaint and … an answer…." So the WHC waived its opportunity, under MRCP Rule 8(d), to deny the facts so averred. In addition, it explicitly "does not dispute" the facts it specifies in its Opposition to Preliminary Injunction/ Emergency Stay, pp. 3 - 4.

This Court should therefore modify its decisions of April 10, 2019, in both *Adjartey* and *Hilton*, to find as undisputed, rather than as "alleged," all Petitioners' facts that the WHC does not deny in the verified *Adjartey* and *Hilton* complaints and in the *Hilton* affidavits, and the facts in the Intervenors' brief that the WHC explicitly "does not contest."[17] This Court should then reconsider, amend, and expand its conclusions of law accordingly.[18]

The Questionable Legality and Constitutionality of Rule 2:22, Second Paragraph

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[17] See *Adjartey* pp.3(2x), 7, 15, 19, 25, 29(2x); *Hilton* p.4.

[18] The WHC presumes that plaintiffs below submit, ex parte, copies of documents recorded in the Registries of Deeds "to prove they have standing." Opposition, fn. 4. At oral argument on December 6, 2018, however, *Hilton* Petitioner Annette Bent demonstrated how the suite of Registry of Deeds documents filed ex parte in her case, taken together, showed the purported foreclosure of her mortgage to be void. A void "foreclosure" does not prove standing. Presumably the WHC could thereafter have submitted a 22 C letter denying any of Bent's facts. It never did.

Actions pursuant to G.L. c. 211, s. 3, invoke the SJC's authority to superintend inferior courts. In such actions, however, Petitioners question whether lower courts can be treated as "nominal parties" pursuant to SJC Rule 2:22.[19] The SJC promulgated Rule 2:22 pursuant to G.L. c. 211, s. 3: "[T]he justices of the supreme judicial court … may issue such … rules as may be necessary or desirable …." On this authority, Rule 2:22 provides: "Unless otherwise ordered by the single justice, the lower court shall thereafter be treated as a nominal party which may, but need not, appear and be heard." The statute does not provide this. But G.L. c. 211, s.3 does have a relevant provision: that, unless the SJC finds a law unconstitutional, its "general superintendence *shall not include the authority to supersede any general … law …*." [emphasis added]

Yet Rule 2:22 supersedes G.L. c. 211, s. 3, by imposing a condition concerning a respondent lower court that the Legislature did not authorize. So this Rule is of questionable legality in Mandamus-styled cases against an

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[19] The one case in the 45 years since the abolition of Mandamus (1974) that accorded that Writ's relief is evidently Reznik v. Garaffo, et al., 466 Mass. 1034 (2013) (Extraordinary relief warranted where "further attempts [to appeal] in the trial court … would have been futile.") Petitioners wonder whether the near-unavailability of relief once available under Mandamus contributes to the breakdown in stare decisis that they observe in the lower courts. See, e.g., their respective cases in WHC; Appeals Court decision in Cucufate (needs cite) (no need to prove standing in Summary Judgment eviction action; Strawbridge (by misquoting Eaton, eviscerated Eaton's requirement of a G.L. c. 183, s. 5B affidavit, certified by a member of the Massachusetts Bar, to show that a would-be foreclosing entity held the borrower's promissory note.) Add re FAR declined in both.

inferior court where only this Court has jurisdiction.

Whether Rule 2:22 comports with the Massachusetts Constitution is likewise questionable. Article XXX of the Declaration of Rights provides in pertinent part:

> "[T]he legislative department shall never exercise the executive and judicial powers, or either of them…: the judicial shall never exercise the legislative and executive powers, or either of them …."

This Court has held legislation unconstitutional when the legislature has exercised the powers of the judiciary.[20] The related prohibition applies equally to the SJC's exercise of the legislative power, in promulgating the second paragraph of Rule 2:22.

Evidently this issue has not previously been raised. The remedy presumably is to modify Rule 2:22 by deleting its second paragraph, so that it comports with the provisions of G.L. c. 211, s. 3. Fortunately, this remedy lies squarely within the authority of the SJC.

In conclusion, for the above reasons it appears that because MRCP was (and had to be) the controlling Civil Procedure our facts should have been overwhelmingly recognized as admitted; this Court can change its wording and presumption that they were only alleged. Petitioner requests that this Court do so and reconsider the impact of factual basis and its legal conclusions accordingly,

I so swear,

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[20] See, e.g., *Sparhawk v. Sparhawk,* 116 Mass. 315 (1874) (Legislature has no power to "substantially alter the nature and effect of judgments … already rendered by the courts, without violating the Constitution which prohibits it from exercising judicial power." Citing *Denny v. Mattoon,* 84 Mass 361 (1861).

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CERTIFICATE OF SERVICE

I, the below signed, hereby certify that a true and correct copy of the above and foregoing has been furnished to all opposing parties by pre-paid First Class Mail, U.S.P.S.

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Re: Docket #15H85SP003287, #15H85SP003288, #16H85SP003289,

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