

APPEALS COURT

THE COMMONWEALTH OF MASSACHUSETTS

DOCKET No. 2019-P-0317

U.S. BANK TRUST, N.A.,
PLAINTIFFS-APPELEE,

v.

KELLY JOHNSON, ET AL.,
DEFENDANTS-APPELLANT.

A REVIEW OF A JUDGMENT FROM THE
CENTRAL HOUSING COURT

VERIFIED BRIEF OF AMICUS CURIAE

IN SUPPORT OF THE DEFENDANT-APPELLANTS

VACATING THE ORDERS SETTING THE
APPEAL BOND AND DENYING THE APPELANT'S MOTION TO
WAIVE THE APPEAL BOND

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JUNE 24, 2019

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This Brief is submitted pursuant to Mass. R. App. P. 17. Dawn Duncan as *pro se Amicus*, a local advocate for others affected by the crisis, and as a statewide advocate with Massachusetts Alliance Against Predatory Lending as a Board Member, an activist lobbying on the laws for more than 4 year and homeowner fighting for her own home. Your Amicus submits this brief in support of Defendants- Appellant, given the interest of the homeowners and "former" homeowners of Massachusetts.

STATEMENT OF INTEREST OF AMICUS CURIAE

Your *pro se amicus curiae* hereby submits a brief in this matter in the interests of the Massachusetts Constitution's guarantee of equal justice for all. She has an interest also as a homeowner who has spent the last 9 years of her life in the center of the maelstrom of the historic foreclosure crisis as a target herself, a local advocate for others affected by the crisis, and as a statewide advocate with Massachusetts Alliance Against Predatory Lending as a Board Member and an activist lobbying on the laws for more than 4 years.

As a current Massachusetts homeowner, your amicus has been directly affected by the foreclosure crisis, having almost lost her home due to highly questionable acts by the purported owner of the mortgage, which directly affects the

security of title to real property in Massachusetts.

As a community activist, your amicus has interfaced directly with dozens of homeowners whose lives have been devastated by the foreclosure crisis, and she has been involved in efforts to pass a local ordinance that required foreclosing banks to participate in pre-foreclosure mediation prior to initiating a foreclosure. Your amicus was involved in the outreach to many homeowners who participated in this highly successful program that had a nearly 100% success rate.

The interconnection of these roles as a homeowner, community activist and a board member of a statewide coalition give your amicus a unique perspective on how local ordinances and statewide legislation are important for addressing the impact of the foreclosure crisis in Massachusetts.

Your amicus is not an attorney. In her individual situation as a homeowner, your amicus has provided testimony to joint committees of the legislature and has been directly affected by issues related to problems with mortgage notes. She has personally had to argue for her mortgage "servicer" to follow the law and show her the 'wet ink' note; she has been the target of a non-compliant purported affidavit to meet Eaton and MGL Chapter 244 §35C

requirements; and she has received the new type of communications from foreclosure law mills attempting to side step the lack of a still existing negotiable note in her case.

Your amicus has helped craft and lobby for legislation addressing the ongoing foreclosure crisis, including legislation promoting the adoption of statewide pre-foreclosure mediation and legislation relating to the preparation and recording of affidavits in Massachusetts Registries of Deeds.

ISSUE FRAMED BY APPEALS COURT: QUESTION 2

Amicus responds to Question 3 (3/5/19 Amicus Announcement), framed by the Court as follows:

2. Where a defendant in a post-foreclosure summary process action has raised as a defense, the failure of the foreclosing entity to demonstrate that it (or the party on whose behalf the entity is authorized to act) holds the original note, has the defendant demonstrated a "not frivolous" appellate issue warranting the waiver of the requirement to post an appeal bond if the defendant is indigent? See G. L. c. 239, § 5; Eaton v. Federal National Mortgage Association, 462 Mass. 569, 586 n.26, 589 n.28 (2012). See also Mitchell vs. U.S. Bank Nat'l Ass'n, Appeals Court, No. 17-P-1445, slip op. at 3 (Mar. 4, 2019).

Duncan leaves to other Amicus/Amici the trotting out of the standard for the non-frivolous appeal; however, the Amicus question mentions explicitly the Eaton decision.

Duncan has seen other homeowners in her City of Lynn, MA and other homeowners around the state lose their homes illegally even given the clear failings of the recordation of a document that foreclosing mortgagees and their servicers claim is the only required proof regarding the Note existence and ownership. That purported affidavit is claimed to cover that the foreclosing mortgagee had legal ownership of the note to be able to foreclose and that the note itself was still a negotiable instrument that could support such a foreclosure.

Using her legal documents as an example, she herein shows that what was recorded as a legal affidavit was not - based on a facial analysis as well as based upon the actual viewing of what all the purported mortgagee's agents insisted was the wet ink note with her signature; it was not. Further, she shares with the Court what an affidavit meeting the requirements for particularly, with a credible affiant and under the relevant statute MGL Chapter 183 §5B ("183-5B") could look like.

The Eaton court allowed that an affidavit pursuant to the recordation statute, 183-5B could serve as notification to the world in the registry of deeds, sufficient for recordation purposes, that the foreclosing mortgagee claimed to be the owner of a note that is still enforceable

or the agent of such a person. This does not change that these documents once entered in a legal proceeding, this recorded document is merely evidence available for challenge like any other evidence; for instance, in an eviction case after an attempted foreclosure such as that of the Johnson/O'Dell case, it becomes merely evidence that must be proved up.

O'Dell and Johnson were never offered for cross examination the purported affiant for the note affidavits filed both pre- the purported auction and post- purported auction along with the affiant for the purported affidavit of sale attached to the foreclosure deed. The so-called Note affidavits themselves do not qualify under any standard of an affidavit (under personal knowledge or under the record hearsay exception) and neither of them qualify as being recorded pursuant to 183-5B.

The purpose of Duncan's Amicus Brief is to demonstrate to the court that there was no alternative to producing the original wet ink note under Eaton in this case nor in the vast majority of other cases given the systemwide practices of the foreclosing mortgagees which violate the law.

Similarly, the affidavit recorded in Duncan's property record (which thankfully has not yet been auctioned), claims to be a substitute for production of the wet ink

note; therein, the foreclosing mortgagee claims to have met the requirements of an affidavit recordable under 183-5B pursuant to the codification of the suggestion by the SJC in the Eaton decision under MGL Chapter 244 §35C.

Yet because Duncan knew her rights under the Uniform Commercial Code as codified in MGL Chapter 106 and specifically where there was a demand for payments on the note under §3-501, she was able to legally demand to see the Note; then, with some serious insistence and time committed over the phone, she got the purported servicer of the mortgagee/claimed noteholder to produce, what they assured her and was legally required under MGL Chapter 106 §3-501, was the document that has her original wet ink signature.

This "original wet ink" note did not, however, have such a wet ink signature from Duncan. See attached evidence. In fact, the lack of a negotiable debt instrument shows the Duncan mortgage to be a nullity, already without legal force or effect.

Therefore, not only is the debt itself not collectable and ongoing attempts to collect illegal, but the purported document called an affidavit in the registry of deeds obviously did not meet the requirements for the statute Chapter 244 §35C. As such an affidavit is a statutory pre-

requisite, no auction, therefore, could ever legally be advertised, nor executed, as to her home.

The document filed violated the requirements even on its face of being a legal affidavit. It violated the requirements of 183-5B as there was no lawyer certification on it. It failed to meet any Eaton purpose.

Thus, there was not even an attempt to follow the law in Duncan's situation (and many others like it). The appearance of a compliant affidavit functions to cover up the fact that the document was untrue; the purported affidavit, therefore, evidences perjury because apparently the foreclosing entity does not have the original wet ink note.

Further, under MGL Chapter 244 §14, the mortgagee had to provide a certificate under 209 CMR 18.21(a) and a copy again of the wet ink note. Therefore, as a required element of the notice of sale legally required for a foreclosure by sale, the bank sent her what it claimed was a copy of the original wet ink note. Given that such a wet ink note does not exist, the notice of sale that she was provided was also counterfeit and violated the statutory requirements to foreclosure.

Duncan wishes she could say that this pattern is unusual but she works with homeowners across the state. Too

many of those who now finally have a statutory lever¹ to show servicers that they must produce the wet ink note to foreclose, have found, like Duncan, that what is produced as the "wet ink" note is not actually the "wet ink" note.

The existence again in the registry of deeds of documents that claim to be affidavits in recordable form, statutorily compliant and in accordance with the Eaton decision means that the Johnson and O'Dell's of the world must have the right to demand to see the Note as a practical matter - otherwise, too frequently if unlike Duncan they had never forced compliance with the law to see the Note, could now not only be foreclosed but evicted under false pretenses.

Duncan reminds the court that even if these affidavits are recorded, it is not proof. Once in court, the Plaintiff would have the obligation to prove up what is referred to as an Eaton affidavit.

In the Johnson O'Dell case, Duncan has seen the original filings. The Central Housing Court was specifically notified of their challenge to the foreclosure in their answer, and the wet ink note, a necessary element

¹ Duncan sent a presentment letter under the Uniform Commercial Code, codified at MGL Chapter 106, §3-501.

thereof², in their discovery request forms. Therefore, with a factual challenge to the Plaintiff's claim to title to their home³, the Central Housing Court had to move beyond prima facie evidence to primary evidence. Once there is a factual challenge, any evidence that the Plaintiff can show based on affidavits (averments), are to be given no weight.

² Plaintiff has the burden of proving in this summary process action for possession after foreclosure by sale that it had a right to exercise and strictly complied with the "Statutory Power of Sale" provided in the Mortgage. MGL ch. 183 §21 sets out the "STATUTORY POWER OF SALE".

The documentation required prior to foreclosing as denominated in the terms of mortgage is legally essential to a valid foreclosure. "The mortgagee must first comply with the terms of the mortgage and with *the statutes relating to the foreclosure of mortgages by the exercise of a power of sale.*" (Emphasis in original). See, Eaton v. Federal Nat'l Mtge. Ass'n, 462 Mass. 569, 580-581, 969 N.E.2d 1118. The SJC generally considers "the statutes relating to ... foreclosure ...by sale" as MGL c. 244, §§ 11-17C. In other words, "...the holder of an assigned mortgage needs to take care to ensure that his legal paperwork is in order," See, U.S. Bank Nat'l Ass'n v. Ibanez, 458 Mass. 637, 655, 941 N.E.2d 40 (2011).

And most importantly from Eaton, at 585: "See generally Restatement (Third) of Property (Mortgages) § 1.1 comment (1997) (**"The function of a mortgage is to employ an interest in real estate as security for the performance of some obligation. . . . Unless it secures an obligation, a mortgage is a nullity"**).

³ As affirmed in BONY, trustee, v. Bailey. 460 Mass. 327 (2011), "Challenging a plaintiff's entitlement to possession has long been considered a valid defense to a summary process action for eviction where the property was purchased at a foreclosure sale. See New England Mut. Life Ins. Co. v. Wing, [191 Mass. 192](#), 195 (1906) (in summary process action "by the purchaser at a mortgagee's sale, the legal title may be put in issue, and it therefore became incumbent upon the plaintiff to establish its right of possession to the land demanded"). See also Sheehan Constr. Co. v. Dudley, [299 Mass. 51](#), 53 (1937) (in summary process action available to purchaser at foreclosure sale "it is incumbent upon such purchaser to establish his right of possession. The legal title in those circumstances plainly may be put in issue")."

Yet the record clearly shows that not only was the wet ink note not produced but the elements necessary to prove up the so called Eaton affidavit were never provided. The original Note, though once ordered by the Court, that order was then rescinded.

Once unfulfilled but no longer required by the Court in violation of its own requirement to establish subject matter jurisdiction that the Plaintiff have proven standing, this case never got over the threshold issue⁴ of standing as the court never established it had subject

⁴ **As a threshold issue, standing, herein ownership of the property must be determined first.** In their timely filed answer, Johnson/O'Dell raised the question of Plaintiff's standing. The Court was on notice. And in summary process, ownership of the property is an issue of standing without which the Court lacks subject matter jurisdiction; the case can never legally commence and must be dismissed with prejudice if found lacking. Without assessing Plaintiff's standing, Judge could not have legally reached any further question such as Summary Judgment. See *Rental Property Management Services v. Hatcher*, 479 Mass. 542 (2018) decision "when it becomes clear in a summary process action that a plaintiff **may not** be the owner of the property the Court is obligated to inquire to the plaintiff's standing, and if it finds the plaintiff lacks standing, dismiss the action". [emphasis added]

The inquiry as to standing is a *threshold* issue - neither discretionary nor allowed to fall prey to delay, see *HSBC Bank USA, N.A. v. Matt*, 464 Mass. 193, 199, (2013)

"To allow ..., even to **threshold issues such as standing**, ... Because standing is a question of subject matter jurisdiction, *Indeck Me. Energy, LLC v. Commissioner of Energy Resources*, supra at 516, it must be established irrespective of whether it is challenged by an opposing party. See *Nature Church v. Assessors of Belchertown*, [384 Mass. 811](#), 812 (1981) ("Courts . . . have **both the power and the obligation to resolve problems of subject matter jurisdiction whenever they become apparent, regardless whether the issue is raised by the parties**").

matter jurisdiction in this particular case⁵.

RELEVANT FACTS

On 02/27/2018, the claimed mortgagee submitted a document for recordation to purport to the world that it owns Defendant's note. The document titled "Affidavit Regarding Note Secured by Mortgage Being Foreclosed" was recorded at Southern Essex Registry of Deeds, Book #36553, Page #001. (Exhibit A)

The "foreclosing mortgagee" was identified as Specialized Loan Servicing LLC. The Signatory named Cynthia Wallace, with a title of Second Assistant Vice President, stated she was employed by Specialized Loan Servicing LLC. She swore the foreclosing mortgagee was the agent of the "note holder".

She claimed to: "have knowledge of the business records of Specialized Loan Servicing LLC as they relate to the Mortgage which is the subject of this affidavit. I am responsible for researching and having knowledge of many aspects of Specialized Loan Servicing LLC's business, including servicing of loan accounts, defaults and foreclosures. Specialized Loan Servicing LLC's records are kept in the ordinary course of business by persons who have a business duty to make such records. The records are made at or near the occurrence of events so

See *Abate v. Fremont Inv. & Loan*, 470 Mass. 821, 828, (2015), affirmed in *Hatcher*: **"At issue in the defendants' motions to dismiss was the threshold question of jurisdiction, or more specifically Abate's standing to bring the try title action. Where, as here, the determination of standing, and ultimately jurisdiction, necessarily reaches and effectively negates the merits of a petitioner's claim, the two-step procedure is not abrogated..."**

⁵ This is to be distinguished from having general subject matter jurisdiction of evictions after a truly legal and nonvoid foreclosure. It is the obligation of the court in each case to assess that it has subject matter jurisdiction over that particular Plaintiff and Defendant based upon proof of the Plaintiff's standing.

recorded. I have personal knowledge of the facts set forth in this affidavit based upon my review of Specialized Loan Servicing LLC's business records maintained in connection with the Mortgage and the related Mortgage loan account whose repayment the Mortgage Secures."

On September 30, 2016, the claimed mortgagee submitted a document for recordation to purport to the world that it owns Defendants' note. The document titled "Affidavit Regarding Note Secured by Mortgage being Foreclosed MGL c.244 sec. 35C" was recorded at the Worcester Registry of Deeds, Book #56063, Page #304. (Exhibit B)

The "foreclosing mortgagee" was identified as Caliber Home Loans, Inc. as servicer for US Bank Trust, N.A. as Trustee for LSF9 Master Participation Trust. The Signatory named Alyssa Salyers, with a title of Foreclosure Document Specialist II, stated she was employed by Caliber Home Loans, Inc. as servicer for US Bank Trust, N.A. as Trustee for LSF9 Master Participation Trust. She swore the foreclosing mortgagee was the "noteholder".

She claimed "having personal knowledge of the facts herein stated, under oath deposes and says as follows:

1. I am an officer or employee of duly authorized agent of Foreclosing Mortgage
2. In the regular performance of my job functions, I am familiar with business records maintained by Caliber Home Loans, Inc., for the purpose of serving mortgage loans. I have acquired personal knowledge of the information contained in this affidavit as a result of my review of Caliber Home Loans, Inc.'s business records. These records (which include data compilations, electronically imaged documents, servicing and loan payment histories and others) are accurate and reliable because they are made at or near the time by, or from information provided by persons with knowledge of the activity and transactions

reflected in such records, and are kept in the course of business activity conducted regularly by Caliber Home Loans, Inc. To the extent records related to the loan come from another entity, those records were received by Caliber Home Loan, In.. in the ordinary course of its business, have been incorporated into and maintain as part of the Caliber Home Loans, Inc., business records, and have been relied on by Caliber Home Loans, Inc. It is the regular practice of Caliber Home Loans. Inc. Mortgage servicing business to make and maintain these records.

On August 23, 2017, the claimed mortgagee submitted a document for recordation to purport to the world that it owns Defendant's note. The document titled "Post-Foreclosure Affidavit Regarding Note and Compliance with Mortgage Notice and Conditions Precedent To Acceleration and Sale "Eaton" and "Pinti" Affidavits" was recorded at the Worcester Registry of Deeds, Book #57622, Page #148. (Exhibit C)

The "foreclosing mortgagee" was identified as US Bank Trust, N.A. as Trustee for LSF9 Master Participation Trust. The Signatory named Alyssa Salyers, with a title of Foreclosure Document Specialist II, stated she was an "officer or employee of duly authorized agent of Foreclosing Mortgagee." She swore the foreclosing mortgagee was the "noteholder".

She claimed to have "personal knowledge of the facts herein stated, under oath deposes and say as follows:

1. I am an officer or employee of duly authorized agent of Foreclosing Mortgage, under a Power of Attorney which is still in full force and effect as of the date hereof.
2. In the regular performance of my job functions, I am familiar with business records maintained by Caliber Home Loans, Inc., for the purpose of serving mortgage loans. I have acquired personal knowledge

of the information contained in this affidavit as a result of my review of Caliber Home Loans, Inc.'s business records. These records (which include data compilations, electronically imaged documents, servicing and loan payment histories and others) are accurate and reliable because they are made at or near the time by, or from information provided by persons with knowledge of the activity and transactions reflected in such records, and are kept in the course of business activity conducted regularly by Caliber Home Loans, Inc. To the extent records related to the loan come from another entity, those records were received by Caliber Home Loan, In., in the ordinary course of its business, have been incorporated into and maintain as part of the Caliber Home Loans, Inc., business records, and have been relied on by Caliber Home Loans, Inc. It is the regular practice of Caliber Home Loans, Inc. Mortgage servicing business to make and maintain these records.

3. Based on my review of the business records of Caliber Home Loans, Inc., I certify that as of the dates when Notices of Sale relating to the mortgage at issue were mailed and published pursuant to M.G.L. Chapter 244 Section 14 up to and including the Foreclosure Sale Date, the Foreclosing Mortgagee was: the holder of the promissory note secured by the above mortgage..."

ANALYSIS OF FAILED NOTE AFFIDAVIT/THEORETICAL EXAMPLE OF A COMPLIANT ONE

Amicus provides a specific analysis of the failings of the recorded "affidavit" regarding claimed note ownership recorded in her land records. The affidavits are patterned on very similar language throughout Massachusetts registries in the experience of dozens who the Amicus knows through her work with the Mass Alliance Against Predatory Lending. This is also the patterned language offered in the recorded documents for Johnson/O'Dell's case that similarly

fail as affidavits, as recordable under 183-5B, as meeting the Eaton requirements or requirements under MGL Chapter 244 §35C.

The purpose of the recorded "Affidavit Regarding Note Secured by Mortgage Being Foreclosed" ("purported Affidavit") was in lieu of showing Duncan her original, wet ink promissory Note (hereafter, "Note"), in its then-current condition. Duncan had signed this at the origination of her mortgage loan, ostensibly from First Magnus Financial Corporation ("First Magnus").

The actual wet ink Note itself would show whether the Note still existed in 2018, and whether it was still negotiable. It would also show whether the party claiming to hold the Note and to be entitled to enforce it, or claiming to act for the Note Holder, was also the party claiming to hold the mortgage, as is required for that party to be the Mortgagee with jurisdiction and authority to foreclose. See *Eaton*.

For this purpose, *Eaton* Note 28 requires that an affidavit be "pursuant to G.L. c. 183, § 5B." 183-5B requires an affiant with personal knowledge.

This purported Affidavit was executed by a Cynthia Wallace identifying herself as a "Second Assistant Vice President" of Specialized Loan Servicing LLC ("SLS") as

assignee of the mortgage⁶. It averred that she had "personal knowledge of the facts set forth in this Affidavit..." Id. But this averment fails to meet the 183-5B criterion of "personal knowledge of the facts".

This purported Affidavit is not based on Personal Knowledge

Wallace put a check to answer item 3 (b): "Based upon my review of the business records of *SPECIALIZED LOAN SERVICING LLC*, I certify that: On this date, Specialized Loan Servicing LLC is: the authorized agent of the holder of said promissory note." Exhibit A, p. 2.

This is problematic in the extreme. Wallace *fails to identify who, according to her, is actually the holder of Duncan's promissory note.*

Presumably, of course, it is not First Magnus, the Mortgage Originator. It went out of business on 5/1/08.

⁶ It is worth noting as well the purported Affidavit's indication that SLS did not hold Duncan's Mortgage. The purported Affidavit recites that on May 31, 2011, Mortgage Electronic Registration Systems, Inc. ("MERS"), as nominee for Mortgage Originator First Magnus, assigned Duncan's Mortgage to BAC Home Loans Servicing, LP FKA Countrywide Home Loans Servicing LLP. This was not possible.

First Magnus went out of business in 2008. See page __, above. Thus MERS, as "nominee" of First Magnus, had no authority in 2011 to assign anything on behalf of this then-defunct company. Furthermore, there is no indication that First Magnus had any "successors and assigns" on whose instruction and on whose behalf MERS, a mere "nominee," could act. This is therefore an *Ibanez* gap, between the last Mortgage holder and the would-be foreclosing party, or, perhaps better, an *Ibanez* dead end. *U.S. Bank v. Ibanez*, 458 Mass. 637 (2012).

<https://www.bloomberg.com/research/stocks/private/snapshot.asp?privcapid=4270222>

Furthermore, if a party is not the Mortgage Originator, becoming the legal holder of a promissory note secured by a mortgage of real estate is an exacting process. To maintain the securitized asset of the mortgage, the Uniform Commercial Code requires each transfer of the Note to maintain the note-owner and the party entitled to enforce (P.E.T.E.) powers.

In fact, paragraph 1 of the standard Multistate Fixed Rate Note provides:

"The Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the 'Note Holder'."

Duncan's Note is this type of Note. This is a heightened standard.

Thus, unlike an ordinary Promissory Note made payable to Bearer or endorsed in blank, which anyone could find on the street and cash, a Mortgage Note requires that every single transfer of the Note from Mortgage Originator, through to the party intending to foreclose, has preserved that heightened standard of "party entitled to enforce." This standard requires that every transfer of the note, especially if it was not specially endorsed (i.e., made payable to a named payee), have other proof of the

transferor's intent to transfer the Note, and proof that it was transferred for value⁷.

This purported Affidavit says nothing about how Duncan's Note might have been transferred from First Magnus, the Mortgage Originator, to whoever the unidentified Note Holder might have been on February 8, 2018, the date on which Wallace executed this purported Affidavit.

As a related issue, the transferor must have signed and the transferee must have received Duncan's actual original wet ink Note. This is because the Note is like an ordinary bank check. Its value is in the paper itself that Duncan signed. So, if that paper has somehow been lost,

⁷ As the *Report Of The Permanent Editorial Board For The Uniform Commercial Code Application Of The Uniform Commercial Code To Selected Issues Relating To Mortgage Notes*, November 14, 2011 (PEB)⁷ clarifies on p.6: "the person in possession of the note must also demonstrate the purpose of the delivery of the note to it in order to qualify as the person entitled to enforce." For this reason UCC 9⁷ provides a 3-pronged test. The PEB continues:

"§ 9-203(b) of the Uniform Commercial Code provides that three criteria must be fulfilled in order for the owner of a mortgage note effectively to create a "security interest"

The first two criteria are straightforward -

- "value" must be given and
- the debtor/seller must have rights in the note or the power to transfer rights in the note to a third party.
- The third criterion may be fulfilled in either one of two ways. Either the debtor/seller must "authenticate"³⁵ a "security agreement"³⁶ that describes the note³⁷ or the secured party must take possession³⁸ of the note pursuant to the debtor's security agreement.

destroyed, or facially defaced, it is no longer negotiable, so to speak, by foreclosing on the property securing its repayment. Thus, to be a P.E.T.E., a purported Note Holder must meet the criterion of holding the original wet ink Note itself, or acting for the party that does hold it, and meet the heightened standard for each transfer of entitlement to enforce payment under the Note.

Here, if Duncan's wet ink Note still exists, and if the legal documents evidencing these legally required steps do exist for her Note, all such documents will be documents of the Note Holder, NOT of SLS. Wallace does not purport to have any knowledge of the unidentified Note Holder's documents. In any event, the unidentified Note Holder is not her employer. She is not competent to testify concerning the Note Holder's documents.

In addition, Wallace fails to identify any instrument by which the unidentified Note Holder has authorized SLS to act as its agent. Her averment that there is a Holder of Duncan's Note, and that Specialized Loan Servicing is its agent, is thus entitled to no weight.

None of Wallace's other averments is relevant. They all concern her supposed knowledge of her employer's records concerning Duncan's "Mortgage and the related

Mortgage loan account..." None of them concerns Duncan's Note⁸.

The purported Affidavit lacks an Attorney Certification

The purported Affidavit also fails 183-5B second criterion: a certificate by an attorney at law "that the facts stated ... are relevant to the title to certain land and will be of benefit and assistance in clarifying the chain of title..."

The sound policy of this provision is that it requires a member of the Massachusetts Bar, who is subject to discipline by the Massachusetts Board of Bar Overseers, to determine whether the facts stated in an affidavit pursuant to 183-5B, are relevant to title.

⁸ Even if Wallace did work for the Noteholder, her affidavit would fail: She could only swear to this affidavit on one of two bases, either she has personal knowledge of the existence in negotiable form of the physical paper note with Duncan's wet ink signature on it and all of the receipts of transfer for intent and for value from each of the purported legally complaint transfers of the wet ink note. Alternatively, she could have personal work experience from the relative departments so that she would have knowledge of meeting the requirements under the document hearsay exception. It would mean she had actual experience that documents necessary to show that each of those transfers were legally compliant and actual personal experience of the handling of wet ink notes on behalf of the note holder who is not even SLS. Instead her knowledge via "review" of business records - she has no personal working knowledge of creation of records not their timeliness; she has establish no relevant competence. And she would have to attach the business records sworn to.

Given lack of any attorney certification, for this reason alone, this document does not and cannot comport with 183-5B nor establish that SLS complied with *Eaton*, by either holding Duncan's Note or by acting for the Note Holder. It therefore failed to establish that SLS was a Mortgagee with jurisdiction and authority to foreclose on Duncan's Mortgage.

In Amicus' case viewing the wet ink note promised and stated to her as the actual wet ink note by the lawyers who hosted the viewing on behalf of their clients, her claimed mortgagee demonstrated a forged note *even though the recorded "affidavit" claimed otherwise*. The Johnson/O'Dell signatory also did not work for the purported Note holder, had no knowledge of its practices and lacked the required attorney certification. The non-frivolous nature of the Johnson/O'Dell demand and right to see the purported (and necessary element of a foreclosure) Note is thrown in to stark relief.

She further demonstrates that the offer of the SJC of an affidavit that qualifies as such and meets the necessities of 183-5B and thereby, might suffice as true evidence of a wet ink note is possible by providing the Court with as sample. See exhibit D

**PURPORTED 'EATON' REGISTRY AFFIDAVITS (ALSO KNOWN AS
MGL CHAPTER 244 §35C OR SIMILAR) NOT FUNCTIONING AS
SUBSTITUTES FOR PRODUCTION OF THE NOTE**

For three reasons the present practice of recording an affidavit in the registry of deeds to attempt to supplant the legal obligation to produce the wet ink note and proof of its legal acquisition fail.

First and most obviously, the documents that are recorded at the registry to fulfill the option offered by the Supreme Judicial Court (SJC) in the Eaton decision are facially in Duncan's case and that of Appellants' (and in almost every example of at least the few thousands that have been reviewed through the Mass Alliance Against Predatory Lending networks) invalid.

They are not legal affidavits and they are not in recordable form. They fail under the Eaton requirements and they fail under the requirements codified in MGL Chapter 244 §35C. As required under Eaton FN 28:

"...a foreclosing mortgage holder such as Green Tree may establish that it either held the note or acted on behalf of the note holder at the time of a foreclosure sale by **filing an affidavit** in the appropriate registry of deeds pursuant to G. L. c. 183, § 5B. The statute allows for the filing of **an affidavit** that is "relevant to the title to certain land and will be of benefit and assistance in clarifying the chain of title." Such **an affidavit** may state that the mortgagee either held the note or acted on behalf of the note holder at the time of the foreclosure sale..." [emphasis added]

The SJC appears to be clear that only an actual, legally compliant affidavit could serve as this legal substitution. Similarly, the statute repeatedly relied upon a true affidavit (from 2nd paragraph of subsection (b)):

"Prior to publishing a notice of a foreclosure sale, ... compliance with this subsection in **an affidavit** ... shall record **this affidavit** **The affidavit** certifying compliance with this subsection shall be conclusive evidence in favor of ... the arm's-length third party purchaser for value relying on **such affidavit** The filing of **such affidavit** shall not ... **on whose behalf the affidavit** is executed, ... including by reason of any **statement in the affidavit.**"
[emphasis added]

Second, not only does the recordation of the document not give it any greater evidentiary value but once entered as a document in a court of law it becomes like any other documentary evidence which must meet the court tests as **to evidence.**

Third, these documents are only meaningful to the extent to which their veracity can be depended upon. Amicus can only provide here her experience that what was provided as her wet ink note was not. That shows that the sworn affidavit that the foreclosing entity in her situation had the note is a falsity - pains and penalties of perjury were not a meaningful bar to falsity.

Amicus argues that the affidavits filed by the Appellee's do not confirm with the statutory requirements

any more than hers did; thus, they are not valid, of any legal force or effect and cannot replace production of the actual wet ink note.

It is important to point out that, when it comes to the foreclosure process, since 2012, purported mortgagees must file affidavits averring that they have complied with the foreclosure laws pursuant to MGL Chapter 244 section 35B & 35C.

That such stand alone affidavits in the registries of deeds filed to address steps in the foreclosure process are to be record only - like other stand alone affidavits - if compliant with 183-5B. This recordation requirement is explicit in the suggestions made in the Eaton and Pinti decisions.

This is affirmed where the general purpose of 183- 5B affidavits is underscored by the Massachusetts SJC in the more recent Bank of America v. Casey, trustee. 474 Mass. 556, Note 19 (2016):

"In two recent cases, this court has approved the use of an attorney's affidavit to clarify compliance with statutory requirements relating to mortgages that appear in the chain of title. See Pinti v. Emigrant Mtge. Co., [472 Mass. 226](#) , 244 (2015) (in connection with mortgage foreclosure proceeding, mortgage holder may record attorney's affidavit to demonstrate compliance with notice provisions of paragraph 22 of standard mortgage); Eaton, 462 Mass. at 589 n.28 (mortgage holder may use attorney's

affidavit to establish it held note or was agent of note holder at time of foreclosure sale). These decisions serve to illustrate the point we make here, which is that § 5B permits attorney's affidavits to explain a set of existing facts relevant to the chain of title where the facts had not been stated explicitly in the property record, whether through inadvertent omission or mistake or because no document previously called for them."

The Chief Title examiner of the Land Court, by his memo dated June 2012 just after the Eaton decision, indicated as well that these affidavits could be filed as affidavits pursuant to 183-5B:

"Subject to section 15 of chapter 184, an affidavit made by a person claiming to have personal knowledge of the facts therein stated and containing a certificate by an attorney at law that the facts stated in the affidavit are relevant to the title to certain land and will be of benefit and assistance in clarifying the chain of title may be filed for record and shall be recorded in the registry of deeds where the land or any part thereof lies."

Therefore, purported mortgagees were bound in any attempt to substitute an affidavit for production of the wet ink note pursuant to *Eaton* to provide such an affidavit conforming to affidavit and 183-5B requirements. After August 13 of 2012, such mortgagees seeking foreclosure of a property MUST also comply with the requirements of both MGL Chapter 244 §§35B & 35C, and 183- 5B.

**A. Each of the claimant mortgage's "Recorded"
"Affidavits" are Clearly Governed by 183-5B**

That these are to be recorded as 183-5B affidavits, was clear when the SJC suggested an affidavit on personal knowledge *pursuant to 183-5B* might serve to clarify that the mortgagee had the requisite relationship to the mortgage note - either as owner or agent of the note-owner prior to the foreclosure auction. See *Eaton v. Federal National Mortgage Association*, 462 Mass. 569 (2012):

"[\[Note 28\]](#) It would appear that at least with respect to unregistered land, a foreclosing mortgage holder such as Green Tree may establish that it either held the note or acted on behalf of the note holder at the time of a foreclosure sale **by filing an affidavit in the appropriate registry of deeds pursuant to G. L. c. 183, § 5B**. The statute allows for the filing of an affidavit that is "relevant to the title to certain land and will be of benefit and assistance in clarifying the chain of title." [emphasis added]

Immediately after the 06-22-12 *Eaton* decision, the Massachusetts legislature codified the filing of two affidavits pursuant to 183-5B as a statutory pre-requisite to publishing the Notice of Sale (the date of the foreclosure auction). Such publication is a requirement of a foreclosure by sale (MGL Chapter 244 section14) and necessary to invoking the Statutory Power of Sale (MGL Chapter 183 section 21). Otherwise no foreclosure by sale can occur and such an attempt is void by operation of law.

These two affidavits (sometimes combined as one

document) are variously known as a 244-35C affidavit, "Eaton" affidavit or "Note" affidavit and the other as an affidavit pursuant to 244 35B. The requirement that these attestations be recorded under 183-5B was immediately reflected in the Land Court Chief Title Examiner's guidance. See above ⁹. And in *Bank of America, N.A. v. Casey, trustee*, 474 Mass. 556 (2016), the SJC affirmed the necessity of meeting 183-5B, see above

Specifically, 183-5B requires the following specific compliance to be recorded as affidavits, as reiterated in Williams, Edmund A., Chief Title Examiner, Land Court, Commonwealth of Massachusetts, Memorandum: *MGL ch. 183 section 5b Affidavits: Notary Public's Acknowledgement Certificate* (02/07/2017)¹, acknowledgment-certificate:

⁹ The SJC's decision in *Pinti v. Emigrant Mtge. Co.*, 472 Mass. 226, 244 (2015) suggests a further affidavit be recorded again reciting that it be recorded in accordance with 183-5B: "The dissent questions the efficacy of prospective relief to alleviate the consequences of this decision for future purchasers because there is no requirement that in the case of a standard mortgage instrument containing paragraph 22 (see note 16, *supra*), a foreclosing mortgagee record the notice of default sent to the mortgagor pursuant to that paragraph. Post at 249. There may not be a statutory requirement at this time, but a mortgagee remains free to execute and then record an affidavit of compliance with the notice provisions of paragraph 22 that includes a copy of the notice that was sent to the mortgagor pursuant to that paragraph, and we presume that going forward, as a general matter, mortgagees will do so. See G. L. c. 183, § 5B."

"The 5B Affidavit may come from an attorney-at-law or from an affiant other than an attorney-at-law, but in either case, the contents of the 5B Affidavit must include all of the following:

- 1) reference to MGL ch. 183 § 5B;
- 2) a statement that it is based upon the personal knowledge of the affiant;
- 3) reference to the previously registered document number;
- 4) execution under the pains and penalties of perjury;
- 5) acknowledgment of the affiant's signature; and
- 6) an attorney certification that the facts stated in the 5B Affidavit are relevant to the title, and will be of benefit and assistance in clarifying the chain of title. (separate certification affixed to the document, not notarized)"

**B. Pursuant to MGL Part II Title I Chapter 183
Section 5B, Affidavits compliant with the
statutory requirements of an affidavit are to be
recorded.**

1. MGL 183-5B clearly identifies the requirements to file such an affidavit as (i) The affiant must have personal knowledge of the facts stated therein, (ii) the affidavit must have a certificate by an Attorney at law that recertified that (iii) the facts stated therein must be relevant to the title to certain land and will be of benefit and assistance in clarifying the chain of title.
2. The statute does not specify any further requirements necessary for a valid affidavit pursuant to this section.
3. Therefore, the affidavit must meet the generally recognized legal criteria for an affidavit.

4. It is important to note that this section specifies that a person "may" file an affidavit and the Registry "shall" record a valid affidavit made pursuant to this section.
5. The use of the word "shall" on the Registry instead of "may" here creates a mandatory statutory duty on the Registry to record affidavits made pursuant to and compliant with MGL 183 § 5B. See, for instance, *Guardianship of Smith*, 43 Mass. App. Ct 493 (1997) 684 N.E 2d 613.
6. Further, the Defendant's affidavit complied with all the legal requirements of an affidavit made pursuant to this section and, therefore, has been recorded at the appropriate Registry.
7. The use of the word 'shall' in combination with the fact that the section is made subject only to MGL c. 184 § 15, is evidence that the Registry has no discretion to refuse to record affidavits which are compliant with MGL 183 § 5B.

It is worth noting that due to the fact that evidence of compliance with foreclosure rules must be submitted in the form of affidavits, that in addition to having to comply with the above- mentioned rules, the affidavits must comply with the legal standards required for affidavits.

More specifically, with the promulgation of 209 CMR 18.21A, affidavits must be based on personal knowledge of:

"(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 statement are based on personal knowledge."

C. THE STANDARD OF REVIEW FOR 183 5B AFFIDAVIT REQUIREMENTS

To show the 'Eaton' affidavit fails, the Defendant in these cases must show that the recorded document titled "affidavit" did not meet any of each element the standard required to be recorded under the statute.

Namely, the Plaintiff must prove either:

- ii. The property was subject to section 15 of chapter 184 (Lis Pendens); that chapter requires the intent of the party seeking recordation to want to record the existence of a court order;
- iii. The affiant did not have personal knowledge of the facts stated in the affidavit;
- iv. The affidavit lacks a certificate by an Attorney at Law as to "the facts stated herein" "being relevant to the chain of title to certain land and will be of benefit and assistance in clarifying the chain of title.

Given that these affidavits are files to avoid a court case to foreclose ("judicial foreclosure") (i) does not apply.

D. DOCUMENT MUST MEET STANDARD AFFIDAVIT REQUIREMENTS

The critical decision in Casey (2016) ruled that a 183-5B recorded affidavit relevant to title is binding on the title if its recitation of facts is true. It must, in fact, be an affidavit of personal knowledge as

to the veracity of the facts it recites.

The primary challenge to the Appellee's affidavit relates to "ii" above. See the basic standards for any document to be considered an affidavit (HSBC Bank USA, N.A. v. Galebach, 2012 Mass. App. Div. 155 (2012)):

"A useful rough test for evaluating the evidentiary sufficiency of any affidavit is simple: If the affiant were in court, testifying word-for-word in accordance with the contents of the affidavit, would the judge sustain an objection on any ground whatsoever? If the answer is "Yes" or even "Probably," the affidavit is at risk.' J.W. Smith & H.B. Zobel, Rules Practice § 56.6, at 281 (2d ed.2007). Another way to examine the admissibility of an affidavit is to ask whether the testimonial competency of the affiant is established through the circumstances. *T & S Wholesale, Inc. v. Kavlakian*, 1998 Mass. App. Div. 99, 100, citing *Stanton Indus., Inc. v. Columbus Mills, Inc.*, 4 Mass.App.Ct. 793, 794 (1976). *Duffy v. Commerce Ins. Co.*, [2009 Mass. App. Div. 196](#), 198."

Rule 56(e) of the M. R. Civ. Proc., 365 Mass. 824 (1974), requires that 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."

In this case, these documents named "affidavits" are transparently not based on personal knowledge nor contain the proscribed certificate by an attorney.

**E. AFFIDAVITS ONLY BINDING IN REGISTRY IF
TRUE BASED UPON AFFIANT'S PERSONAL
KNOWLEDGE**

The SJC clarified in *Casey* that affidavits need to be on personal knowledge and the regulatory interpretation explicitly in these cases. The province of the Attorney General also clarified the requirement for personal knowledge under 209 CMR 18.21A.

The statutory requirements for §35C repeat consistently that an "affidavit" must be provided. And the governing jurisprudence and regulatory requirements for 183 5B affidavits by servicers are explicit.

But even if some ambiguity is created because of the language of the statutory §§35B and 35C of Chapter 244, a business record hearsay exception is not met by these 'Eaton' or 'Note' affidavits. The evidentiary requirements for a record hearsay exception for affidavits are explicitly clear¹⁰ and these 'Eaton' or 'note' affidavits cannot meet those requirements.

¹⁰ Mass Rules of Evidence Rule 803, echoing Federal Rules of Evidence Rule 803(6) *where the affiant is swearing to the validity of the attached record*: 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

Amicus, therefore, takes the Court through why even were such a hearsay exception allowed for these types of affidavits, they would fail anyway.

Even to the extent that statutes, Chapter 244 §§35B and 35C reference review of business records, the business records hearsay exception must show: (i) the competency of the affiant as record keeper, (ii) with personal knowledge of regular business practices, who can attest to and (iii) bring in evidence of those business records created in the regular course of business.

As statutory forms for recordation are created to avoid the introduction of numerous lengthy records into our Registries of Deeds, the forms promulgated for "Note" affidavits for the registries (without exhibits) cannot be used in establishing a business records exception. Even the allowance of an affidavit under the record hearsay exception fails without the requisite attached exhibits as proof of businesses recordkeeping conducted in the regular

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.

course of business.

Nor would an affidavit recorded that complied with the record hearsay exception requirements mean that a Defendant would not have a right to challenge it and seek the primary evidence it claims to replace the necessity of. Even if a document satisfies the business record exception, the trial judge retains the discretion to consider the reliability of the evidence offered. See, N.E. Physical Therapy Plus, Inc. v. Liberty Mutual Insurance Company, 466 Mass. 358, 367 n.10 (2013). If a judge may consider a document's weight, an opponent must be allowed to challenge its evidentiary value.

**F. DOCUMENTS NOT IN RECORDABLE FORM FUNCTION AS
A LEGAL FICTION AND ARE INEFFECTIVE AS TO
TITLE**

These "Eaton" or "Note" affidavits regularly lack the 183-5B required lawyer certification as the Duncan and the Johnson/O'Dell ones do.

As relied upon in *Casey, McOuatt v. McOuatt*, 320 Mass. 410, 413 (1946) shows that:

"although mortgages are not specifically mentioned in G.L. c. 183, Section 4, [Note 9] referenced in the quoted passage from *McOuatt*, that statute applies to mortgages, and requires that a mortgage be recorded in the appropriate registry of deeds in order to provide effective notice to anyone beyond the parties to the mortgage transaction and those with actual notice of it. See *Tramontozzi v. D'Amicis*, 344 Mass. 514, 517 (1962). In other words,

unless a mortgage is recorded, it does not provide constructive notice of its existence."

Thus, if it is not in recordable form, it does not exist as a recorded instrument.

As such the documents further fail one of the principal objectives of recordation, which is to provide notice to all the world. The Court must therefore treat all foreclosure premised on the power of sale invoked by notice to all the world via valid, authentic and recorded documents as invalid, void and null, where no recordation, and therefore no notice, has been effectuated.

See *In re Mbazira, U.S. Bankr. Ct.*, No. 13-16586-WCH (D. Mass. Mar. 31, 2015):

"[I]f a [mortgage] is improvidently recorded due to a defective acknowledgement, the court must honor [G. L. c. 183, § 29,] by adopting a fiction that the [mortgage] is unrecorded and outside the chain of title").

Under MGL Chapter 244 Section 35C, certification language is required under 183-5B. This means that they must be legal affidavits, and they must be in recordable form. When a document has been entered in the Registry of Deeds in an unrecordable form, jurisprudence requires that the courts treat it as if it does not exist, and if it does not exist it cannot serve as constructive notice; such an unrecordable document abrogates statutory requirement and

fails as substitute for production of the wet ink note. Notice to the world has not been effectuated and they cannot be relied upon as evidence.

**G. RECORDATION IN REGISTRY NOT A SALVE FOR
AFFIDAVITS WHICH FAIL LEGAL DEFINITION**

Recordation provides no cure for an affidavit's legal failure. Recordation alone is insufficient and, in fact, adds no evidentiary value to a document in a proceeding. See *Ibanez*. See also *Allen v. Allen*, 86 Mass. App. Ct. 295, 299-300, 305-308 (2014) (facially proper acknowledgment, reflecting grantor signed deed in presence of notary, deemed invalid where evidence established grantor in fact did not execute deed in notary's presence on date stated in deed). In *Abate*, the SJC pointed out in footnote 22:

"A petitioner may hold record title without having good title or may have good title without record title. See *Arnold v. Reed*, 162 Mass. 438, 440 (1894) (noting that forged deed creates record title but not good title and that adverse possession and deed executed through unrecorded power of attorney create good title, but not record title)."

As explained in detail from the Supreme Judicial Court decision in *Bevilaqua v. Rodriguez*, 460 Mass. 762 (2011):

"the fact that there 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 ... "). Recording may be

necessary to place the world on notice of certain transactions. See, e.g., G.L. c. 183, § 4 (leases and deed); G.L. c. 203, §§ 2-3 (trust documents). Recording is not sufficient in and of itself, however, to render an invalid document legally significant. See *Arnold v. Reed*, 162 Mass. 438, 440 (1894); *Nickerson v. Loud*, 115 Mass. 94, 97- 98 (1874) ("mere assertions ... whether recorded or unrecorded, do not constitute a cloud upon title, against which equity will grant relief'). As a result, it is the effectiveness of a document that is controlling 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").

H. AFFIDAVIT PURSUANT TO MGL Ch. 244 § 35C

MGL c. 244 § 35C's affidavit requirement that the foreclosing entity certify compliance is not a mere formalism: it is central to the Law's purpose in certifying the creditor has followed the Law and is evidence in post-foreclosure proceedings. G.L c. 244 § 35C's requirement that "prior to publishing a notice of a foreclosure sale, "...an officer or duly authorized agent of the creditor²,

shall certify compliance with this section in an affidavit based upon a review of the creditor's business records." Although the law states a review of the business records, the affiant is deposing "... having personal knowledge of the facts herein stated, under oath deposes and says as follows..." (*Italic added for emphasis*). See attached Duncan and Johnson/O'Dell examples.

Under MGL Chapter 244 §35C, section (b) states that:

"(b) A creditor shall not cause publication of notice of foreclosure, as required under section 14, when the creditor **knows or should know that the mortgagee is neither the holder of the mortgage note nor the authorized agent of the note holder.**"

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 subsection 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 subsection 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..."

Here the "creditors" do not swear as required under personal knowledge. The requirements needing to be met - both as to the "noteholder" meeting the qualifications of a Note holder including the existence of a still negotiable wet ink note - are not within the personal knowledge of the signatories. The wording of the documents recorded as affidavits betray that they cannot have sworn under personal knowledge (nor even as the requirements of a records hearsay exception.)

Nor would they ever meet a standard if one need only

imagine them on the witness stand. The affidavits are not particular. They are full of conclusions of law. And where they are sworn to as an employee of one organization on behalf of another organization they are further facially invalid¹¹.

The caveat of the first paragraph that the affiant "know or should know" cannot be met in these documents given there standard language

**IN THESE MANY WAYS THE OFFER OF AN ALTERNATIVE OF A
DOCUMENT MEETING THE REQUIREMENTS OF A TRUE AFFIDAVIT IN A
RECORDABLE FORM TO SUPPLANT THE NEED TO PRODUCE THE NOTE
FAIL
IN THE JOHNSON/ODELL CASE**

When Chapter 244 §35C affidavits are filed in the Registry of Deeds, they must meet all the criteria for a valid affidavit, they must be in recordable form, with an attorney certification that the facts stated in the §5B Affidavit "are relevant to the title, and will be of benefit and assistance in clarifying the chain of title," or they are invalid, and cannot be relied upon as evidence

¹¹ Quoting again from *Galebach* at 160: "Inasmuch as, [i]n construing statutes . . . [the terms] Person or whoever shall include corporations, societies, associations and partnerships, G.L. c. 4, § 7, Twenty-third, the acts of a corporation may well be narrated in the third person by one of its officers with knowledge of those actions." But as the *Galebach* court pointed out, where an affiant seeks to swear for another corporation, it is no more possible than swearing as to the personal knowledge of another person.

of the validity of a foreclosure.

The so called "Eaton" and "Note" affidavit in the Johnson/O'Dell case fail exactly these criteria and so cannot substitute for production of the Note. And such a Note still in negotiable form by the required party is a required element of a valid foreclosure.

As O'Dell and Johnson have a right to defense as to title and Plaintiff must demonstrate a valid foreclosure to own and thus have standing, such a challenge to produce the wet ink note cannot be a frivolous argument.

Respectfully submitted and I so swear as to any fact contained herein,

A handwritten signature in black ink, appearing to read 'Dawn R. Duncan', is written over a horizontal line.

Dawn R. Duncan, Amicus Curiae
67 Adams Street
Lynn, MA 01902
Dduncan7@gmail.com
781-307-7763

DATE: June 24, 2019

RULE 16(k) STATEMENT

I hereby certify that the foregoing Amicus Brief complies, to the best of my knowledge and belief, with the rules of Court pertaining to the filing of appellate briefs, including those specified in Mass. R. App. P 16(k).



Dawn R. Duncan, Amicus Curiae
67 Adams Street
Lynn, MA 01902
Dduncan7@gmail.com
781-307-7763

DATE: June 24, 2019

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished on this 24th day of June, 2019 by 1st class mail to:

PLAINTIFF

% Jonathan Stone Rankin, Esquire
Donald W. Seeley, Esquire
Orlans PC
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Waltham, MA 02452

Sogol Irene Plagany, Esquire
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DATE: June 24, 2019

EXHIBIT A



SO.ESSEX #194 Bk:36553 Pg:001
02/27/2018 10:47 AM AFFT NOTE Pg 1/2
eRecorded

**AFFIDAVIT REGARDING NOTE SECURED
BY MORTGAGE BEING FORECLOSED**

Property Address: 67 Adams Street, Lynn, MA 01902

Re: Mortgage from Dawn R. Duncan to Mortgage Electronic Registration Systems, Inc. acting solely as a nominee for First Magnus Financial Corporation, dated May 4, 2007 recorded in Essex County (Southern District) Registry of Deeds in Book 26898, Page 437 (the "Mortgage").

Assigned To: Specialized Loan Servicing LLC by assignment as follows: assignment from Mortgage Electronic Registration Systems, Inc., as nominee for First Magnus Financial Corporation, its successors and assigns to BAC Home Loans Servicing, LP FKA Countrywide Home Loans Servicing, LP dated May 31, 2011 recorded in Essex County (Southern District) Registry of Deeds in Book 30451, Page 469 and assignment from Bank of America, National Association successor by merger to BAC Home Loans Servicing, LP to Specialized Loan Servicing LLC dated April 21, 2017 recorded in Essex County (Southern District) Registry of Deeds in Book 35820, Page 2.

Foreclosing Mortgagee: Specialized Loan Servicing LLC

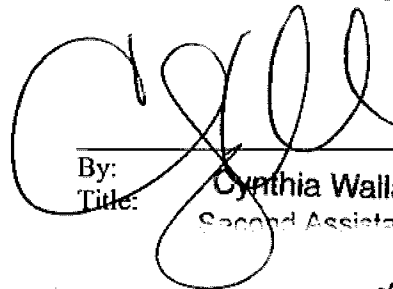
The undersigned, Cynthia Wallace, having personal knowledge of the facts herein stated, under oath deposes and says as follows:

1. I am: [Check One]
☒ An officer of *SPECIALIZED LOAN SERVICING LLC*, where I hold the office of Second Assistant Vice President.
☐ A duly authorized agent of Specialized Loan Servicing LLC under a power of attorney or other written instrument executed under seal, which remains in full force and effect as of the date hereof, and which is (check as applicable):
 - ☐ recorded in the _____ County Registry of Deeds at Book ____ Page ____
 - ☐ registered with the _____ County Land Registration Office as Document No. ____
 - ☐ recorded/registered herewith
2. *SPECIALIZED LOAN SERVICING LLC* is the loan servicer for the mortgage referenced above. In my capacity as Second Assistant Vice President (title), I along with others have knowledge of the business records of *SPECIALIZED LOAN SERVICING LLC* as they relate to the Mortgage which is the subject of this affidavit. I am responsible for researching and having knowledge of many aspects of *SPECIALIZED LOAN SERVICING LLC*'s business, including servicing of loan accounts, defaults and foreclosures. *SPECIALIZED LOAN SERVICING LLC*'s records are kept in the ordinary course of business by persons who have a business duty to make such records. The records are made at or near the occurrence of events so recorded. I have personal knowledge of the facts set forth in this affidavit based

upon my review of **SPECIALIZED LOAN SERVICING LLC**'s business records maintained in connection with the Mortgage and the related Mortgage loan account whose repayment the Mortgage secures.

3. Based upon my review of the business records of **SPECIALIZED LOAN SERVICING LLC**, I certify that:
- a. [Check One]
[X] The requirements of G.L. c. 244, section 35B have been complied with.
[] G.L. c.244, section 35B is not applicable to the above mortgage.
 - b. On this date, Specialized Loan Servicing LLC is:
[Check One]
[] the holder of the promissory note secured by the above mortgage.
[X] the authorized agent of the holder of said promissory note.

Signed under the pains and penalties of perjury this 8 day of February, 2018.



By:

Title:

Cynthia Wallace

Second Assistant Vice President

Subscribed and sworn before me in the county of Douglas, State of Colorado, this 8 day of Feb, 2018.



(Notary's official Signature)

10-10-20

(Commission Expiration)

Seal:

CHELSEA CAIN NOTARY PUBLIC STATE OF COLORADO NOTARY ID 20164038510 MY COMMISSION EXPIRES 10/10/2020

EXHIBIT B

Worcester District Registry of Deeds - 20/20 Perfect Vision i2 Document Detail Report

Current datetime: 6/24/2019 7:44:34 PM

Doc#	Document Type	Town	Book/Page	File Date	Consideration
111497	AFFIDAVIT		56063/304	09/30/2016	
Property-Street Address and/or Description					
18 BAXTER ST					
Grantors					
ODELL PATRICIA A, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS INC, PRIMARY RESIDENTIAL MORTGAGE INC, WELLS FARGO BANK NA, U S BANK TRUST NA TR, LSF9 MASTER PARTICIPATION TRUST, CALIBER HOME LOANS INC					
Grantees					
References-Book/Pg Description Recorded Year					
48365/63 MTG 2012, 50548/265 ASM 2013, 55467/324 ASM 2016					
Registered Land Certificate(s)-Cert# Book/Pg					



**AFFIDAVIT REGARDING NOTE SECURED
BY MORTGAGE BEING FORECLOSED
MGL c. 244 sec. 35C**

Property Address: 18 Baxter Street, Worcester, MA 01602

Mortgage: Mortgage from Patricia A. Odell to Mortgage Electronic Registration Systems, Inc. as a nominee for Primary Residential Mortgage Inc., its successors and assigns, dated December 27, 2011 and recorded with the Worcester County (Worcester District) Registry of Deeds at Book 48365, Page 63, assigned to Wells Fargo Bank, NA by assignment recorded in said Registry of Deeds in Book 50548, Page 265, assigned to U.S. Bank Trust, N.A., as Trustee for LSF9 Master Participation Trust by assignment recorded in said Registry of Deeds in Book 55467, Page 324.

Foreclosing Mortgagee: U.S. Bank Trust, N.A., as Trustee for LSF9 Master Participation Trust

The undersigned, Alyssa Salyers, having personal knowledge of the facts herein stated, under oath deposes and says as follows:

1. I am: [Check One]
☐ An officer or employee of Foreclosing Mortgagee, where I hold the office of _____
☒ An officer or employee of duly authorized agent of Foreclosing Mortgagee.
2. In the regular performance of my job functions, I am familiar with business records maintained by Caliber Home Loans, Inc., for the purpose of servicing mortgage loans. I have acquired personal knowledge of the information contained in this affidavit as a result of my review of Caliber Home Loans, Inc.'s business records. These records (which include data compilations, electronically imaged documents, servicing and loan payment histories and others) are accurate and reliable because they are made at or near the time by, or from information provided by, persons with knowledge of the activity and transactions reflected in such records, and are kept in the course of business activity conducted regularly by Caliber Home Loans, Inc. To the extent records related to the loan come from another entity, those records were received by Caliber Home Loans, Inc., in the ordinary course of its business, have been incorporated into and maintained as part of the Caliber Home Loans, Inc.'s business records, and have been relied on by Caliber Home Loans, Inc. It is the regular practice of Caliber Home Loans, Inc., mortgage servicing business to make and maintain these records.
3. Based on my review of the business records of Caliber Home Loans, Inc., I certify that the Foreclosing Mortgagee is: [Check One]
☒ the holder of the promissory note secured by the above mortgage.
☐ the authorized agent of the holder of said promissory note.

Signed under the penalties of perjury this 11th day of Sept., 2016

Caliber Home Loans, Inc., as servicer for U.S.
Bank Trust, N.A., as Trustee for LSF9 Master
Participation Trust

By: Alyssa Salyers

Name: Alyssa Salyers

Title: Foreclosure Document Specialist II

Limited power of attorney recorded
with Middlesex County (South) Registry
of Deeds in Book 64397, Page 142.

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document, to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of California

County of _____

Subscribed and sworn to (or affirmed) before me on this _____ day of _____, 20____, by _____, proved to me on the basis of satisfactory evidence to be the person(s) who appeared before me.

Signature _____

(Notary Seal)

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

STATE OF CALIFORNIA COUNTY OF San Diego
 Subscribed and sworn to (or affirmed) before me on this 16 day of September
 20 16 by Alyssa Salyers
 proved to me on the basis of satisfactory evidence to be the person(s) who appeared before me.

Jeannette L. Faust
 (Signature of Notary)

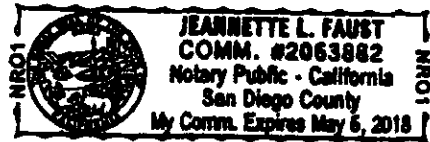


EXHIBIT C

Worcester District Registry of Deeds - 20/20 Perfect Vision i2 Document Detail Report

Current datetime: 6/24/2019 7:39:43 PM

Doc#	Document Type	Town	Book/Page	File Date	Consideration
92100	AFFIDAVIT		57622/148	08/23/2017	
Property-Street Address and/or Description					
18 BAXTER ST					
Grantors					
ODELL PATRICIA A, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS INC, PRIMARY RESIDENTIAL MORTGAGE INC, WELLS FARGO BANK NA, U S BANK TRUST NA TR, LSF9 MASTER PARTICIPATION TRUST, CALIBER HOME LOANS INC					
Grantees					
References-Book/Pg Description Recorded Year					
48365/63 MTG 2012, 50548/265 ASM 2013, 55467/324 ASM 2016					
Registered Land Certificate(s)-Cert# Book/Pg					



2017 00092100

Bk: 57622 Pg: 148

Page: 1 of 2 08/23/2017 11:07 AM WD

Bk: 57622 Pg: 148

**POST-FORECLOSURE AFFIDAVIT REGARDING NOTE AND
COMPLIANCE WITH MORTGAGE NOTICE PROVISIONS AND
CONDITIONS PRECEDENT TO ACCELERATION AND SALE
"Eaton" AND "Pinti" Affidavits**

Property Address: 18 Baxter Street, Worcester, Massachusetts 01602

Mortgage: Mortgage from Patricia A. Odell to Mortgage Electronic Registration Systems, Inc., as nominee for Primary Residential Mortgage Inc., its successors and assigns, dated December 27, 2011 and recorded with the Worcester County (Worcester District) Registry of Deeds at Book 48365, Page 63. Assigned to Wells Fargo Bank, NA by assignment recorded in said Registry of Deeds in Book 50548, Page 265. Assigned to U.S. Bank Trust, N.A., as Trustee for LSF9 Master Participation Trust by assignment recorded in said Registry of Deeds in Book 55467, Page 324.

Foreclosing Mortgagee: U.S. Bank Trust, N.A., as Trustee for LSF9 Master Participation Trust

Foreclosure Sale Date: June 5, 2017

The undersigned, Alyssa Salyers, having knowledge of the facts herein stated, under oath deposes and says as follows:

1. I am: **[Check One]**
☐ An officer or employee of Foreclosing Mortgagee, where I hold the office of _____
☒ An officer or employee of a duly authorized agent of Foreclosing Mortgagee, under a Power of Attorney which is still in full force and effect as of the date hereof.
2. In the regular performance of my job functions, I am familiar with business records maintained by Caliber Home Loans, Inc. for the purpose of servicing mortgage loans. I have acquired personal knowledge of the information contained in this affidavit as a result of my review of Caliber Home Loans, Inc.'s business records. These records (which include data compilations, electronically imaged documents, servicing and loan payment histories and others) are accurate and reliable because they are made at or near the time by, or from information provided by, persons with knowledge of the activity and transactions reflected in such records, and are kept in the course of business activity conducted regularly by Caliber Home Loans, Inc. To the extent records related to the loan come from another entity, those records were received by Caliber Home Loans, Inc. in the ordinary course of its business, have been incorporated into and maintained as part of Caliber Home Loans, Inc.'s business records, and have been relied on by Caliber Home Loans, Inc. It is the regular practice of Caliber Home Loans, Inc.'s mortgage servicing business to make and maintain these records.
3. Based upon my review of the business records of Caliber Home Loans, Inc., I certify that as of the dates when Notices of Sale relating to the mortgage at issue were mailed and published pursuant to M.G.L. Chapter 244, Section 14 up to and including the Foreclosure Sale Date, the Foreclosing Mortgagee was: **[Check One]**
☒ The holder of the promissory note secured by the above mortgage.
☐ Authorized by the owner of the promissory note secured by the above mortgage to conduct the foreclosure sale.
4. Based upon my review of the business records of Caliber Home Loans, Inc., I certify that: **[Check One]**
☒ Notice(s) of Default to Mortgagor(s) pursuant to the terms and conditions precedent in the mortgage to acceleration and sale were sent in strict compliance with the mortgage;
☐ Notice(s) of Default to Mortgagor(s) pursuant to the terms and conditions precedent in the mortgage to acceleration and sale was sent on or before July 17, 2015 and/or the mortgage contains no conditions precedent to acceleration and sale.

Signed under the pains and penalties of perjury this 12th day of June, 2017

See Limited Power of Attorney recorded with the Worcester County (Worcester District) Registry of Deeds at Book 56312, Page 358.

U.S. Bank Trust, N.A., as Trustee for LSF9 Master Participation Trust, by Caliber Home Loans, Inc., as its attorney in fact

Affiant Signature: Alyssa Salyers

Print Name: Alyssa Salyers

Title: Authorized Officer

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document, to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of California

County of San Diego

Subscribed and sworn to (or affirmed) before me on this 12 day of June,

20 17, by Alyssa Salyers, proved to me on the basis of satisfactory evidence to be the person(s) who appeared before me.

Signature

Jeannette L Faust

(Notary Seal)



Property Address: 18 Baxter Street, Worcester, MA 01602

EXHIBIT D

EXAMPLE

**AFFIDAVIT PURSUANT TO MGL CHAPTER 183 5B FOR COMPLIANCE WITH MGL
CHAPTER 244 §35C**

Subject property:

Mortgagor(s):

Mortgage: Origination date: _____; Originator: _____; Lender _____;
[Yes/No] Mortgage Electronic Registration Systems, Inc. as nominee of _____;
Mortgage recorded in _____ Registry of Deeds, Book #xxx, Page #xxx

Present Mortgagee is XXX according to the records of [____ Registry of Deeds /
SomethingorOther Servicing].

On _____ [date], _____ [name] made an assignment of [mortgage/beneficial
interest in mortgage] to _____, recorded at _____ Registry of Deeds, Book #XXX,
Page #XXX.

Repeat for each subsequent assignment of mortgage.

My name is Jane Doe. I have been an employee of SomethingorOther Servicing
("SOS") for the last 17 years.

I am making this affidavit based on my own personal knowledge and of my own free
will.

In my employment at SOS I have worked (1) in the mail room; (2) in our Agency
Division that deals with SOS as the agent for a Principal-Mortgagee; (3) in the Billing
Division, collecting payments and posting them to SOS's accounting records; and (4) for
two years answering phones in customer service.

In the Agency Division, we are responsible for receiving and maintaining custody of the
original transmittal letter from any Mortgagee that transfers a Note to a Principal for
which SOS is the Agent. This is the division to which a transferor of a Note sends its
letter of intent to transfer the Note to a named Client-Principal.

The Agency Division also receives the purchase money for each Note from a Principal, and transmits the funds to the transferor of the Note on behalf of the Principal, when it is acquiring a mortgage loan that SOS will then be servicing.

[Yes/No] The Principal named above is the Mortgagee

On _____ [date], in relationship to the above mortgage loan, SOS received a letter of intent dated _____ from _____ [transferring party], stating its intent to transfer the Note to our Principal, _____.

On xxx date, in accord with our regular business practice, SOS then contacted our document custodian by [email/other _____] on behalf of our Principal _____ [name] (copy of email/other _____ appended as Exhibit __) and verified that the document custodian had received the original Note. See Exhibit _____, copy of [email/other _____ from document custodian, dated _____, verifying receipt of the Note.

The document custodian, as a regular business practice, takes photographs of each Note received in its present-day condition, front and back, and all allonges, if any, and sends these to the SOS Agency Division. See attached affidavit, dated _____, from document custodian _____ [name], swearing that any Indorsements on the Note and on any allonge are signed with wet ink; authenticating the appended photographs of the Note as of _____ [date] for the mortgage loan identified above; and identifying the documents that the document custodian received in the file for this mortgage loan, on behalf of this Principal.

These photographs of the Note, front and back, and any allonge(s), clearly show that any allonge is affixed permanently to the Note and is not separable from it.

Each page is free of facial defects.

[Applicable/Not Applicable] If SOS's Principal is a securitized Trust, each of the transfers of the Note accords with the sponsor-depositor-trust party requirements of the Trust's Pooling and Servicing Agreement ("PSA"), final Note Indorsement complies with the PSA's indorser requirements, and, Mortgage and Note were conveyed into Trust before the PSA closing date of _____.

Further, as required under the PSA, SOS has assessed that (1) this mortgage loan is not predatory under applicable Federal, Massachusetts and local law and (2) that all previous mortgagees were registered as necessary where mortgage was a foreign corporation/LLC/LP and, therefore, this mortgage could be accepted under the PSA.

[Applicable/Not Applicable] If SOS's Principal is Fannie Mae or Freddie Mac, the final Indorsement is in blank as required by their respective servicer agreements.

Further, as required by Fannie Mae and Freddie Mac contracts, SOS has assessed that (1) this mortgage loan is not predatory under applicable Federal, Massachusetts and local law and (2) that all previous mortgagees were registered as necessary where mortgage was a foreign corporation/LLC/LP and, therefore, this mortgage could be accepted by Fannie Mae and Freddie Mac.

On _____ [date], SOS received from the prior servicer _____ [name], a letter dated _____, informing SOS that the servicing of this mortgage loan (Mortgage and Note) would be transferred to SOS.

On ____ [date], SOS's Principal received the assignment of this Mortgage.

SOS also received from the previous servicer by electronic file, as I know from my experience working in the Billing Division, the full accounting for this mortgage loan, including all payments to any previous servicer with their dates, back to the date of origination.

On _____ [date], SOS sent our legally required change of servicing letter to the Mortgagor.

On _____ [date], SOS verified by [email/other _____] with the now previous servicer that we had in fact received the entire accounting and that our document custodian had received the entire file.

I can attest that SOS has a regular business procedure for integrating electronic records of the previous billing history for a mortgage loan into the SOS computer system, called _____[name].

On ____ [date], the previous billing records for this mortgage loan were integrated into SOS's _____ [name] system, and since then our Billing Division has been posting to SOS's accounting records for this mortgage loan all payments that SOS has received on it.

I attach here, as Exhibit __, a complete copy of the accounting, which I can tell from my years of experience in the Billing Division is an accurate accounting of all the payments on this mortgage loan that SOS has received or has not received.

I can therefore attest on behalf of the mortgagee/noteholder Principal for whom we are the Agent that SOS, on its behalf, did receive from the previous servicer its letter of intent to transfer the Note (see Exhibit ____), and that the file that the document custodian received from the previous servicer included all the intent letters for every previous transfer of the Note and the accounting, for each prior Note Holder, of the funds that it had paid for that Note. (See document custodian's affidavit, Exhibit __)

Attached as Exhibit __ are a copy of the intent letter that SOS received from the prior servicer, and a copy of the wire payment, dated _____, of \$_____ for this Note that SOS sent on behalf of our Principal to the previous Note Owner.

I can therefore swear on behalf of SOS that SOS took all the steps as to this Note and mortgage loan that SOS takes in the ordinary course of business for all such Notes and mortgage loans; that the document custodian's affidavit is attached as Exhibit ____; and that the actual original wet ink Note is in the custody of the SOS document custodian at this time.

Attached as well, as Exhibit __, is a copy of SOS's servicing agreement with the Principal identified above, dated _____, showing that SOS had the authority to perform all of the functions specified above on this Principal's behalf in this case.

I so swear based on my personal knowledge of the transactions in which I had a part for this Note, and based on my experience in working in the all the relevant divisions of SOS as to the authenticity, validity, and proper form of the attached business records.

I can further swear that such records are regularly created in this way in the ordinary course of SOS's business, at the time at which each of the transactions there included is required to occur.

Signature & date

Name
Title
Property
Municipality, state, zip

STATE OF XXX

_____(County), s.s.

On this ____ day of _____, 20____, before me, the undersigned notary public, personally appeared _____ who proved to me through _____ (mark an X) satisfactory evidence of identification, which was _____, or was _____ (mark an X) known to me to be the person(s) who signed the preceding document in my presence, and who swore or affirmed to me that the contents of the document are truthful and accurate to the best of his/her/their knowledge and belief.

Notary Public
Printed Name:

My Commission Expires: _____

ATTORNEY CERTIFICATE

On this ____ day of _____, 20____, I, _____, hereby certify that I am an attorney at law with offices at _____, _____, Massachusetts, and that the facts stated in the foregoing affidavit are relevant to the title to the premises therein described and will be of benefit and assistance in clarifying the chain of title thereto.

Attorney
Printed Name:
BBO#