

# Supreme Judicial Court

FOR THE COMMONWEALTH OF MASSACHUSETTS

No. SJC-11041

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HENRIETTA EATON,  
PLAINTIFF-APPELLEE,

v.

FEDERAL NATIONAL MORTGAGE ASSOCIATION & ANOTHER,  
DEFENDANTS-APPELLANTS.

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ON APPEAL FROM THE APPEALS COURT SINGLE JUSTICE

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**BRIEF OF *AMICUS CURIAE* MARIE MCDONNELL, CFE**

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Dated: September 30, 2011

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**STATEMENT OF AMICUS INTEREST**

I, Marie McDonnell, am a *Mortgage Fraud and Forensic Analyst* and a credentialed *Certified Fraud Examiner*. I am the founder and managing member of Truth In Lending Audit & Recovery Services, LLC of Orleans, Massachusetts and have twenty-four years' experience in transactional analysis, mortgage auditing, and mortgage fraud investigation. I am also the President of McDonnell Property Analytics, Inc., a litigation support and research firm that provides mortgage-backed securities research services and foreclosure forensics to attorneys nationwide. McDonnell Property Analytics also advises and performs services for county registers of deeds, attorneys general, courts and other governmental agencies.

I am the same Marie McDonnell who provided *amicus briefs* to the Massachusetts Land Court and to the Massachusetts Supreme Judicial Court in the landmark cases *U.S. Bank National Association v. Ibanez* and *Wells Fargo Bank, N.A. v. LaRice*, 458 Mass. 637 (2011) in which the courts vacated two foreclosures

prosecuted by trustees of securitization trusts.<sup>1</sup> My seminal contribution was to shift the debate beyond defective assignments of mortgage to an examination of the fatal breaks in the chain of title that occurred due to the utter failure of the entities that securitized these mortgages to document the transfers between themselves.

More recently, John O'Brien, Register of the Essex Southern District Registry of Deeds in Salem, Massachusetts, commissioned McDonnell Property Analytics, Inc. to conduct a forensic examination to test the integrity of his registry due to his concerns that: 1) Mortgage Electronic Registration Systems, Inc. ("MERS") boasts that its members can avoid recording assignments of mortgage if they register their mortgages into the MERS System; and 2) due to the robo-signing scandal spotlighting Linda Green as featured in a 60 Minutes exposé on the subject earlier this spring.

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<sup>1</sup> McDonnell's *Amicus* Brief is available on the Massachusetts Supreme Judicial Court's website at: [http://www.ma-appellatecourts.org/search\\_number.php?dno=SJC-10694&get=Search](http://www.ma-appellatecourts.org/search_number.php?dno=SJC-10694&get=Search).

I accepted this assignment on a pro bono basis because of its high and urgent value to the public trust, and to educate the 50 Attorneys General who are brokering a settlement with the subject banks in an attempt to resolve fraudulent foreclosure practices. My entire report with exhibits is available at no charge to the public at: <http://salemdeeds.com> and at <https://www.truthinlending.net>.

I defined the scope of the examination by selecting all assignments of mortgage that were recorded during the year 2010 to and from three of the nation's largest banks: JPMorgan Chase Bank, N.A., Wells Fargo Bank, N.A., and Bank of America, N.A. The sample was neither random nor arbitrary; we included every assignment that appeared in the Grantor / Grantee index using the registry's online search engine. The study included 147 assignments involving JPMorgan Chase; 278 assignments involving Wells Fargo Bank; and 140 assignments involving Bank of America.

Before examining the documents, I enlisted the help of Attorney Jamie Ranney of Nantucket, Massachusetts to establish definitions of terms based on Massachusetts law that I could rely upon to determine whether an assignment was either: *valid*,

*missing, questionable, invalid, fraudulent, or criminally fraudulent.* These definitions are attached as "Exhibit A" to my report; "Exhibit B" explains my methodology, protocols and practical applications for classifying assignments of mortgage according to the prescribed definitions; "Exhibit C" is a list of robo-signers that we identified which also provides information on whom the robo-signors executed documents for, who they were actually employed by (if we knew), and how many documents they executed.

From there, we researched the underlying mortgage and assembled all documents cross-indexed thereto such as prior assignments of mortgage, discharges of mortgage, orders of notice, and all documents recorded in connection with a completed foreclosure. This increased the population of examined documents to approximately 2,000. In total, 473 unique mortgages were analyzed, covering \$129,577,415 in principal obligations.

The results of my investigation were shocking and revealed widespread, systemic, patterns of practice of fraud and abuse by the mortgage banking and servicing industries; and especially by their controversial private utility, Mortgage Electronic Registration

Systems, Inc. which has eviscerated transparency from the time-honored public recording system, and so defiled the integrity of the Southern Essex District Registry of Deeds that John O'Brien has called for a full forensic audit of his registry.

With respect to transparency i.e., how often could we track the true, current owner of a given mortgage, we found:

- Using our forensic tools and methods (typically unavailable to the general public and registry staff), we were able to trace ownership to only 287 of 473 mortgages (60%).
- 46% of mortgages were MERS registered; and 47% were owned by the Government Sponsored Enterprises (i.e., Fannie Mae, Freddie Mac, Ginnie Mae), respectively. Typically ownership of these mortgages is highly obscure.
- 37% of mortgages were securitized into public trusts (as opposed to private trusts), which are typically more discoverable through use of forensic tools and high cost, subscription-based databases.

With respect to the integrity of the chain of title i.e., how valid (legal) are the assignments of mortgage that we examined, we found:

- Only 16% of all assignments examined are valid.
- 75% of all assignments examined are invalid and an additional 8.7% are questionable (require more data.)



- 27% of the invalid assignments are fraudulent; 35% are "robo-signed;" and 10% violate the Massachusetts Mortgage Fraud Statute (M.G.L. Ch. 266 §35A(b) (4) .
- 683 assignments are missing, translating to approximately \$180,000 in lost recording fees per 1,000 mortgages whose current ownership can be traced.

My audit of the Southern Essex District Registry of Deeds is relevant here because Henrietta Eaton's situation is a case in point of what typically happens when Fannie Mae, its Servicer, and Mortgage Electronic Registration Systems, Inc. conspire to suppress the identity of the true owner and holder of a borrower's note and mortgage so that they can illegally foreclose upon the collateral property without raising suspicion.

My interest in offering this *amicus brief* is simply to shed the light of the truth on the documentary evidence available in the public record so that this venerable Court will not be fooled by the charade that is playing out before it now.

I offer my services here *pro bono* as a public service. I have not requested, accepted nor received any compensation for my efforts; nor do I have a stake

in the outcome of the litigation except to see that justice prevails.

#### STATEMENT OF THE ISSUES

1. The issue presented is the validity of a foreclosure conducted by a [successor] mortgagee who [took the mortgage by assignment and purported to] hold the mortgage but not the underlying promissory note at the time of foreclosure.

2. A condition precedent to resolving issue # 1 is to establish that the successor mortgagee seeking to foreclose can prove that it received a valid assignment of the mortgage from a party that itself held the mortgage. If more than one transfer was involved, the successor mortgagee must be able to provide a complete unbroken chain of assignments linking it to the record holder of the mortgage.<sup>2</sup>

3. If issue #2 fails, then issue #1 becomes academic in nature with respect to the instant case; however, the Supreme Judicial Court's ruling will be of inestimable value to other matters that involve the separation of the note from the mortgage due to

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<sup>2</sup> See *U.S. Bank v. Ibanez*, 458 Mass. 637 (2011).

securitization, the use of Mortgage Electronic Registration Systems, Inc., or inadvertence.

**STATEMENT OF THE CASE AND FACTS**

*Amicus Curiae* McDonnell hereby adopts the statement of the case and facts presented by the Plaintiff-Appellee, Henrietta Eaton, in her Brief of Appellee docketed with the Massachusetts Supreme Judicial Court on September 23, 2011 in the instant appeal.

However, also relevant to this case - indeed, essential - are critical facts that arise upon an examination of the assignment of mortgage recorded in the Suffolk County Registry of Deeds on May 20, 2009 at Book 44958 Page 249 by which Mortgage Electronic Registration Systems, Inc. as nominee for BankUnited, FSB purports to assign and transfer to Green Tree Servicing LLC all its right, title and interest in and to the Eaton mortgage.

Simply put, if the operative assignment is shown to be invalid, the issue of whether or not a mortgagee who neither owns nor holds the note can foreclose on the collateral property becomes academic in nature.

Moreover, if the assignment is invalid, the foreclosure of the Eaton property would fail as a

matter of law without having to consider the "splitting factor" i.e., that the note and mortgage are held by different entities.

Finally, if the assignment is invalid neither of the Defendants, Green Tree Servicing LLC nor its assignee Federal National Mortgage Association, have the requisite standing to invoke the jurisdiction of the Massachusetts courts.

Plaintiff-Appellee Eaton has pleaded her case well both in the Housing Court, the Suffolk County Superior Court, and before this Supreme Judicial Court. She has properly cited Massachusetts common law, the relevant statutes, and the terms of the mortgage contract itself, all of which require unification of the note and mortgage prior to the institution of a foreclosure action.

The law of this case, which will ultimately resolve issue #1, is well settled and does not require the Supreme Judicial Court to pay deference to the business models, innovations, rules and customs that the mortgage banking industry has adopted which have wreaked havoc of cataclysmic proportions throughout all sectors of our economy and have had far-reaching

effects on other sovereign nations and emerging markets around the globe.

What is baffling here is that the Defendant-Appellees who stand to profit from the instant foreclosure are purposely suppressing the identity of the "real party in interest." This Honorable Court should want to know, why is that? What's there to hide? What's there to gain? And how does this tie into the ever-increasing lack of transparency I quantified after auditing the Southern Essex Registry of Deeds?

#### SUMMARY OF THE ARGUMENT

*Amicus Curiae* McDonnell hereby adopts and ratifies the arguments, citations to relevant common law, Massachusetts General Laws, and the operative terms of the mortgage contract presented by the Plaintiff-Appellee, Henrietta Eaton, in her Brief of Appellee docketed with the Massachusetts Supreme Judicial Court on September 23, 2011 in the instant appeal.

Further, I argue below that not only does the Eaton mortgage require that the Note and the attendant Security Interest ("Mortgage") be transferred together when sold; but the policies and procedures of Defendant-Appellant Federal National Mortgage

Association ("Fannie Mae") require that its Loan Servicer hold both the note and the mortgage prior to instituting a foreclosure action. Additionally, if required by Applicable Laws, the Loan Servicer must also gain physical possession of the note by submitting a Request for Release of Documents from Fannie Mae's Document Custodian. . (See Exhibit A. - Fannie Mae Announcement 08-12, 5/23/2008)

Having an understanding of Fannie Mae's policies and procedures helps to explain why Mortgage Electronic Registration Systems, Inc. ("MERS") functions as it does, especially when a MERS Member is prosecuting a foreclosure action. However, as will become apparent, Fannie Mae's protocols and MERS' Rules are in direct conflict with the Massachusetts General Laws governing foreclosure.

The pivotal Assignment of Mortgage ("Assignment") that purports to transfer the Eaton Mortgage from Mortgage Electronic Registration Systems, Inc. ("MERS") as nominee for BankUnited, FSB to Green Tree Servicing LLC ("Green Tree") is invalid for a variety of reasons explained in detail below.

Moreover, the purpose of this Assignment is not to memorialize a true sale of the Note and Mortgage to

the Assignee; but rather, it is a litigation tool designed to close the gap in the chain of title so that it appears in the public record that the Assignee, Green Tree in this case, had the legal right to foreclose the property. This sham Assignment is a necessary precursor to the ultimate recordation of the Foreclosure Deed; otherwise, Registers of Deeds would not allow title to pass to the foreclosing entity.

It is incumbent upon consumers, their attorneys, registry staff, clerks of court, and judges to learn how to recognize these sham assignments because they are corrupting the chain of title in our land records; and because, once recorded, courts afford them deference rather than seeing them for what they are: counterfeits, forgeries and utterings.

The MERS System is no replacement for the time-honored public land recording system that is the foundation of our freedom, our prosperity, and our American way of life. By privatizing property transfer records MERS has been allowed to set up a "control fraud" of epic proportions that has facilitated the largest transfer of wealth in human history, and it should be abolished.

I have copious evidence that the MERS System simply does not do what it claims to do. It is incomplete, inaccurate, misleading, unreliable, self-contradictory, and asynchronous with the timing of events as they actually happened. Moreover, I have witnessed that certain entries reflected in MERS Milestone Reports appear to have been made during the course of litigation in an attempt to square MERS's internal records with the timeline of external events. Indeed, the "New Man at MERS," Bill Beckman was just interviewed by Mortgage Technology Magazine and he frankly admits: "We did not have a robust process to make sure that all the data on our system was accurate, timely and reliable. Our view was that is the servicer's data and they're relying on it for their own transactions, they're using their own systems, so we don't have to double check...Well, the regulators took the perspective of, 'No. You've got your name on it. It's your system. It is being used, but you don't know exactly the way it's being used, so there's no reason those two things shouldn't line up.'" (See Exhibit G. - The New Man at Mortgage Electronic Registration Systems, Inc., Bill Beckman Interview)



## ARGUMENT

## I. THE MORTGAGE CONTRACT CONTROLS.

On September 12, 2007, Henrietta L. Eaton ("Eaton" or "Appellee") executed a Note in favor of BankUnited, FSB to obtain funds in the amount of \$145,000.00. The terms of the subject Note indicate that the principal amount would be financed at a fixed interest rate of 6.875% per annum; and that the monthly installments of \$952.55 beginning on November 1, 2007 would be sufficient to fully amortize the obligation over the thirty (30) year term to maturity by October 1, 2037. (See Exhibit B. - Note, 9/12/2007)

To guarantee the debt, Eaton executed a Mortgage encumbering residential property located at 141 Deforest Street, Roslindale, Massachusetts 02131 ("Property"). The Mortgage names BankUnited, FSB ("BankUnited") as the Lender and defined "MERS" as Mortgage Electronic Registration Systems, Inc. MERS is a separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns. MERS is the mortgagee under this Security Instrument. (See Exhibit C. - Mortgage, 9/12/2007)

The Mortgage in question is what is known as a MERS Original Mortgage ("MOM") and is being tracked in the Mortgage Electronic Registration Systems, Inc. database as MIN #100526500053612901. MERS reports that as of June 24, 2011, the status of the Eaton Mortgage is "Inactive" meaning that the servicing rights and the beneficial ownership rights in the Mortgage are no longer being tracked in the MERS System. It also indicates that Green Tree Servicing LLC was the last Servicer of record and that *Fannie Mae* was the Investor, i.e. owner and holder of the Mortgage Loan at the time the Mortgage was deactivated. (See Exhibit D. - MERS Research Results)

A close reading of the Note and Mortgage clearly indicates that the contract is between Eaton as Borrower and BankUnited as Lender. MERS has no position in the Note and is not authorized to take any action on behalf of the Lender under the terms thereof. The Mortgage, on the other hand, provides that MERS may take certain actions on behalf of the Lender if so directed by the Lender or the Lender's successors and assigns. The granting clause reads as follows:

This Security Instrument secures to Lender: (i) the repayment of the Loan, and all renewals, extensions and modifications of the Note; and (ii) the performance of Borrower's covenants and agreements under this Security Instrument and the Note. For this purpose, Borrower does hereby mortgage, grant and convey to MERS (solely as nominee for Lender and Lender's successors and assigns) and to the successors and assigns of MERS, with power of sale, the following described property located in the County of Suffolk which currently has the address of 141 Deforest Street, Roslindale, Massachusetts 02131.

There is no contractual language in the Mortgage that gives MERS the independent right to enforce the Note and Mortgage; or even to assign its position in the Mortgage without the express direction and authorization of the Lender or the Lender's successors and assigns.

The Mortgage contains notice to the Borrower that the instruments memorializing the mortgage obligation may be sold; however, the clear representation made to Eaton was that her Note and Mortgage, if sold, would move together and remain inextricably linked. The relevant section of the uniform covenants contained in the Mortgage reads as follows:

¶ 20. Sale of Note; Change of Loan Servicer; Notice of Grievance. The Note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times without prior notice to Borrower.

A sale might result in a change in the entity (known as the "Loan Servicer") that collects Periodic Payments due under the Note and this Security Instrument and performs other mortgage loan servicing obligations under the Note, this Security Instrument, and Applicable Law. [Emphasis supplied]

Thus, irrespective of whether or not MERS is involved in a nominal capacity, the Mortgage must follow the Note pursuant to the strict language of the contract between the parties. Notwithstanding MERS' overall scheme to avoid the recording of Assignments in the public records, the Lender or the Lender's successor and assigns are bound to do so under the terms of the mortgage contract and all Applicable Laws as explained further below.

Massachusetts General Laws Chapter 183 governing the recording of documents in the county Registry of Deeds does not specify when an assignment of mortgage must be recorded. The presumption here is that all assignees would want to record their position in order to protect themselves from the risk of loss. While auditing the Southern Essex District Registry of Deeds, we came across numerous assignments that were recorded as much as ten (10) years after the mortgage had been discharged. Those were an obvious attempts to

close the gap in the chain of title which stands for the proposition that, eventually all valid assignments must be recorded to maintain the integrity of title to real property.

In contrast, M.G.L. Ch. 185 § 67 is explicit on this subject and requires that all assignments affecting registered land *shall* be registered. The statute in its entirety states emphatically:

The owner of registered land may mortgage it by executing a mortgage deed. Such deed may be assigned, extended, discharged, released in whole or in part, or otherwise dealt with by the mortgagee by any form of deed or instrument sufficient in law for the purpose. *But such mortgage deed, and all instruments which assign, extend, discharge and otherwise deal with the mortgage, shall be registered, and shall take effect upon the title only from the time of registration.* [Emphasis supplied]

The clear statutory requirement codified in M.G.L. Ch. 185, § 67 establishes that all instruments that assign the mortgage shall be registered. If nothing else, common sense dictates that this requirement carries over to recorded land as well; otherwise, in a situation where a property consists of an assemblage of both recorded land and registered land, the result would be absurd i.e., the chain of title to Parcel I would be different from Parcel II

even though both lots were equally impacted by the same transactions. This is not a hypothetical situation as I have just completed an analysis of a case involving this scenario.

**II. THE PIVOTAL ASSIGNMENT OF MORTGAGE THAT PURPORTS TO TRANSFER THE EATON MORTGAGE TO DEFENDANT GREEN TREE IS INVALID.**

Black's Law Dictionary defines the term *valid* as "having legal strength or force, executed with proper formalities, incapable of being rightfully overthrown or set aside... Founded on truth of fact; capable of being justified; supported, or defended; not weak or defective...Of binding force; legally sufficient or efficacious; authorized by law...as distinguished from that which exists or took place in fact or appearance, but has not the requisites to enable it to be recognized and enforced by law." (See Black's Law Dictionary, Sixth Edition, © 1990, page 1550)

My examination of the Assignment of Mortgage recorded in the Suffolk County Registry of Deeds on May 20, 2009 at Book 44958 Page 249 by which Mortgage Electronic Registration Systems, Inc. as nominee for BankUnited, FSB purports to assign and transfer to Green Tree Servicing LLC all its right, title and interest in and to the Eaton mortgage revealed the

following facts: (See Exhibit E. Assignment of Mortgage)

1. The Appellants state in their Brief that, "After the loan was funded, the Note was endorsed in blank and transferred to Fannie Mae, which retained Green Tree to service the loan." [Appellant's Brief, p. 4]
2. On information and belief, this transfer from BankUnited to Fannie Mae occurred at or near the origination date of September 12, 2007.
3. Accordingly, BankUnited had no interest in the Eaton Mortgage to transfer on April 22, 2009.
4. Moreover, BankUnited had conveyed all right title and interest to Fannie Mae and could not sell the Mortgage for a second time to Green Tree.
5. The Appellants admit that Green Tree was the Loan Servicer.
6. The Assignment of Mortgage in question was executed by Monica Medina, Assistant Secretary of Mortgage Electronic Registration Systems, Inc. acting on behalf of BankUnited, FSB.
7. Monica Medina is not an employee of MERS; and she was not employed by BankUnited on April 22, 2009 when she executed this Assignment.
8. In truth, Monica Medina is employed by Green Tree Servicing LLC at its headquarters in Tempe, Arizona.
9. Thus, what we have here is a fictitious, self-dealing Assignment of Mortgage that contains false statements, misrepresentations, and omissions of material fact in order to deceive or defraud. It was prepared and executed by Green Tree without BankUnited's knowledge, authority or consent.

10. This Assignment was not prepared for the purpose of legally transferring the Eaton Mortgage to Green Tree. Rather, it is a litigation tool that was prepared under false pretenses to close the gap in the chain of title to so that Green Tree could prosecute the instant foreclosure, which it completed on November 4, 2009.

In preparation for writing this *amicus brief*, I called upon Register John O'Brien to search the Southern Essex District Registry of Deeds filings for other assignments that were executed by Monica Medina ("Medina"). As of this writing, eleven (11) assignments were provided to me for review. The results are astonishing and clearly establish a pattern and practice of assignment fraud. Medina executed the assignments on behalf of ten (10) different assignors in her dual role as a MERS Certifying Officer or as Authorized Agent for Green Tree. (See Exhibit F. - Robo-Signer Monica Medina)

In my capacity as a Certified Fraud Examiner, I hereby certify to the Massachusetts Supreme Judicial Court that the above-described Assignment of Mortgage is fraudulent and therefore, it is void as a matter of law. Thus, everything that flows from this "breeder document" is tainted with fraud and must be revoked.



**CONCLUSION**

In closing, I want the Justices to know that my audit of the Southern Essex District Registry of Deeds enabled me to examine 565 Assignments of Mortgage, the majority of which were prepared in order to foreclose on John O'Brien's electorate. Every single assignment of mortgage that I examined that was prepared to prosecute a foreclosure, without exception, is tainted with the same fraud that I have detailed here.

The consequences to homeowners, the public land recording system and the state and federal court systems are devastating. In particular, the Massachusetts Land Court is being used as the entry point for these false documents as foreclosure law firms introduce them with Complaints to Foreclose in Servicemembers Civil Relief Act cases. The crisis is so severe; it requires the immediate attention of the Executive, Legislative and Judicial branches of the Commonwealth of Massachusetts in order to protect its citizens, its real property, and the rule of law.

Respectfully submitted,

*Marie Mc Donnell*

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