COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

Docket No. 2011-P-1478
SJC Docket No. SJC-11041

HENRIETTA EATON,

Appellee,

v.

FEDERAL NATIONAL MORTGAGE ASSOCIATION and
GREEN TREE SERVICING, LLC

Appellants.

ON APPEAL FROM AN INTERLOCUTORY ORDER OF THE SUFFOLK SUPERIOR COURT

BRIEF OF APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Green Tree Servicing, LLC ("Green Tree") discloses, in accordance with Supreme Judicial Court Rule 1:21, that it has the following members and corporate parent entities: Green Tree Licensing, LLC, Green Tree MHLLC, Green Tree HE/HT LLC, Green Tree MH Corp., Green Tree CL LLC, Green Tree HE/HI Corp., Green Tree Investments LLC, Green Tree Holding LLC, Green Tree Investment Holdings II LLC, Green Tree Credit Solutions LLC, GTCS Holdings LLC, Walter Investment Holdings, LLC, and Walter Investment Management Corp. Walter Investment Management Corp. is a publicly traded company.

STATEMENT OF THE ISSUES

1. Whether the lower court committed an error of law by requiring that a promissory note be "re-united" with a mortgage as a condition precedent to foreclosure.

STATEMENT OF THE CASE

In 2007, Henrietta Eaton ("Eaton") signed a promissory note in the principal amount of $145,000 payable to BankUnited, FSB ("BankUnited") (the "Note"). She also signed a mortgage (the "Mortgage") granting a security interest and "power of sale" in

property located at 141 DeForest Street, Roslindale, Massachusetts (the "Property") to Mortgage Electronic Registration Systems, Inc. ("MERS"), in its capacity as nominee for BankUnited.

In April 2009, MERS assigned the Mortgage to Green Tree Servicing, LLC ("Green Tree"). Following Eaton's default on the Note, Green Tree foreclosed and assigned its winning bid to Federal National Mortgage Association ("Fannie Mae"). Fannie Mae then sought to evict Eaton from the Property.

In response, Eaton filed a one-count Complaint in Suffolk Superior Court seeking a declaratory judgment invalidating the previously completed foreclosure. Eaton's sole claim is that Green Tree, the foreclosing mortgagee, did not conduct a valid foreclosure because it was not the holder of the Note at the time it foreclosed upon and sold the Property. Eaton also filed a motion for injunctive relief seeking to enjoin Fannie Mae's continued prosecution of the eviction. Green Tree and Fannie Mae opposed the motion.

On June 17, 2011, the Superior Court (McIntyre, J.) granted Eaton's motion. In its Memorandum of Decision and Order on Plaintiff's Motion for Preliminary Injunction (the "Order"), the lower court

recognized that under Massachusetts law, the Note and Mortgage could "travel independently" and be "separately transferred or assigned." However, it held that "the two instruments must be re-united in order to effectively foreclose the mortgagor's right to redeem the Property." Because Green Tree had stipulated for purposes of the motion that it did not hold the Note at the time of the foreclosure, the court found that Eaton was likely to prevail on her claim that Green Tree had conducted an invalid foreclosure.

On July 18, 2011, Green Tree and Fannie Mae sought interlocutory review from a single justice of this Court. By order dated August 18, 2011, the single justice (Carhart, J.) denied Green Tree and Fannie Mae's petition but concluded that the "issues presented merit full panel consideration" and reported his decision to a panel of this Court.

STATEMENT OF FACTS

On September 12, 2007, BankUnited funded a loan in the principal amount of $145,000 to Eaton. Record Appendix ("R."), 7, 27. In connection with the loan, Eaton signed the Note payable to BankUnited and a Mortgage granting a security interest in the Property

to MERS as "mortgagee", in its capacity as nominee for BankUnited, the "[l]ender." R., 7, 8, 12. By signing the Mortgage, Eaton expressly agreed:

> [T]o mortgage, grant and convey to MERS (solely as nominee for [BankUnited] and [BankUnited's] successors and assigns) and to the successors and assigns of MERS, ***with power of sale***, the [Property] . . .
>
> MERS holds only legal title to the interests granted by [her] in this Security Instrument, but if necessary to comply with law or custom, MERS (as nominee for [BankUnited] or [BankUnited's] successors and assigns) has the right to exercise any or all of those interests, including, but not limited to, ***the right to foreclose and sell the Property*** . . .

R, 14 (emphasis supplied).

After the loan was funded, the Note was indorsed in blank and transferred to Fannie Mae, which retained Green Tree to service the loan. R., 29. On April 22, 2009, MERS assigned its interest in the Mortgage to Green Tree (the "Assignment"). R., 7, 8, 30. On November 4, 2009, Green Tree conducted a foreclosure sale where it submitted the highest bid of

$170,185.89.[1] R., 8, 31-32. It then assigned its rights in the Memorandum of Sale to Fannie Mae. R., 8, 33-34. On November 24, 2009, a foreclosure deed was executed transferring the Property to Fannie Mae. R., 35-36.

On January 25, 2010, Fannie Mae commenced a summary process action seeking to evict Eaton from the Property. R., 8. In response, Eaton filed a one-count Verified Complaint in Superior Court seeking a declaration that the foreclosure completed by Green Tree was invalid. R., 6-11. Eaton maintained that the foreclosure was invalid because Green Tree did not hold the Note at the time of foreclosure, and requested that the Court issue a preliminary injunction to prevent her eviction pending resolution of her Superior Court claim. R., 4, 9-10. Green Tree and Fannie Mae opposed the motion. R., 4.

After two hearings, the court found that Eaton had demonstrated a reasonable likelihood of success on the merits of her claim. Add., 27-33. In its Order, the court determined that:

[1] For purposes of the preliminary injunction, it was stipulated that Green Tree did not hold the Note at the time of foreclosure. Addendum ("Add."), 26.

- Massachusetts law recognized that the Note and Mortgage could be "separately transferred or assigned," but that the "common law" required that the "two instruments must be re-united in order to effectively foreclose the mortgagor's right to redeem the Property";

- G.L. c. 244, § 14, which governs foreclosures, does not alter the common law rule;

- although G.L. c. 244, § 14 is directed to the "mortgagee," "the legislature likely did not intend the word mortgagee to mean that one can initiate a foreclosure without the note;"

- the legislature in G.L. c. 244, § 17B - a statute dealing with deficiency actions following a foreclosure - "implicitly assumes that the holder of the mortgage is also the holder of the mortgage note;" and

- all of the state Superior Court and federal district and bankruptcy court decisions holding that the mortgagee can foreclose without the note are distinguishable because in each case the plaintiffs "failed to provide support for their position."

Addm., 27-33. On August 18, 2011, the single justice denied Green Tree and Fannie Mae's petition for interlocutory review and reported his decision to a panel of this Court. Addm., 35.

ARGUMENT

I. Standard of Review

The sole issue before the Court is a conclusion of law which must be reviewed *de novo*. Fordyce v. Town of Hanover, 457 Mass. 248, 256 (2010). ("On

review, the motion judge's 'conclusions of law are subject to broad review and will be reversed if incorrect'"); see also Manfrates v. Lawrence Plaza Ltd. Partnership, 41 Mass. App. Ct. 409, 412 n.4 (1996).

II. The Superior Court Committed Reversible Error By Ignoring The Fact That Green Tree Was Entitled To Foreclose Under The Plain Language Of The Mortgage.

The lower court's conclusion that Green Tree's foreclosure was invalid because the Note was not "re-united" with the Mortgage vitiates the parties' contractual agreement.

The plain language of the Mortgage, signed by Eaton as mortgagor, expressly authorizes MERS and its successors and assigns to exercise the statutory power of sale and to "exercise any or all of the [Lender's] interests including but not limited to the right to foreclose and sell the Property." See Schwanbeck v. Federal-Mogul Corp., 412 Mass. 703, 706 (1992)("[A]n unambiguous agreement must be enforced according to its terms."). Consistent with the express terms of the Mortgage, courts in several jurisdictions, including Massachusetts, have held that where a mortgagor grants the statutory power of sale to the

mortgagee (as identified in the mortgage), the mortgagee or its assignee may foreclose, even if it does not also hold the note. See e.g., In re Marron, No. 10-45395-MSH, 2011 WL 2600543 (Bankr. D. Mass. June 29, 2011) (Hoffman, J.) (MERS' right to foreclose was "acknowledged explicitly in the debtors' mortgage"); Adamson v. Mortgage Electronic Reg. Sys., Inc., No. 11-0693, 2011 WL 1136462, *3 (Mass. Super. Ct. Mar. 23, 2011) (Brassard, J.) ("The Mortgage, however, expressly grants MERS the authority to foreclose on the Property and to sell the Property"); Aliberti v. GMAC Mortgage, LLC, No. 11-10174, 2011 WL 1625036, *6 (D. Mass. Apr. 28, 2011) (Gorton, J.) (holding that assignee of original mortgagee entitled to foreclose without holding the note because power of sale granted by the mortgage itself); In re Huggins, 357 B.R. 180, 183 (Bankr. D. Mass. 2006) (where MERS was the named mortgagee in a recorded mortgage and was authorized to exercise the statutory power of sale, MERS could foreclose even though it was not the note holder); Lyons v. Mortgage Electronic Reg. Sys., Inc., No. 09 MISC 416377, 2011 WL 61186 (Mass. Land Ct. Jan. 4, 2011) (Cutler, J.) (same).[2]

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[2] See also Bucci v. Lehman Bros. Bank, FSB, No. PC-

Here, the language of the Mortgage is clear and manifests the parties' intent to empower a third party - not the lender - with the right to foreclose. Eaton and BankUnited, the lender, could have required that BankUnited be the entity authorized to foreclose in the event of default. However, by signing the Mortgage, Eaton contractually granted the power of sale not to BankUnited, but to MERS and its successors and assigns. R., 14. Indeed, the language selected by the parties and incorporated into the contract acknowledges that MERS, as "mortgagee," had the "right to exercise any and all of [the Lender's] interests including, but not limited to the right to foreclose and sell the Property . . . ." R., 12, 14.

Nothing in Massachusetts law prohibited Eaton and her lender from agreeing to grant the right to

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2009-3888, 2009 R.I. Super. LEXIS 110 (R.I. Super. Ct. Aug. 25, 2009)(Silverstein, J.) (same); Porter v. First NLC Financial Services, LLC, No. PC 10-2526, 2011 WL 1251246 (R.I. Super. Ct. Mar. 31, 2011) (Rubine, J.) (same); Hilmon v. Mortgage Elec. Registration Sys., Inc., 06-13055, 2007 WL 1218718 (E.D. Mich. Apr. 23, 2007) (Duggan, J.) (same); English v. Flagstar Bank, No. 09-11705, 2009 WL 3429674 (E.D. Mich. Oct. 21, 2009)(Cohn, J.) (same); Mortgage Elec. Registration Sys., Inc. v. Ralich, 982 A.2d 77, 81 (Pa. Super. Ct. 2009) (same). Bucci and Porter were decided under Rhode Island law, which, like Massachusetts law, authorizes non-judicial foreclosures under the statutory power of sale. See R.I.G.L. § 34-11-22.

foreclose to a third party. In fact, this was recently confirmed by the Supreme Judicial Court when it ruled that "a mortgage holder can foreclose on a property . . . by exercise of the statutory power of sale, if such power is granted by the mortgage itself." U.S. Bank Nat. Ass'n v. Ibanez, 458 Mass. 637, 646 (2011). The Court in Ibanez recognized that this arrangement is specifically authorized by G.L. c. 244, § 14 which grants the authority to foreclose not just to the mortgagee but also to the "person authorized by the power of sale." G.L. c. 244, § 14. To invalidate this specific grant of authority "would lead to anomalous and perhaps inequitable results, to wit, if [the mortgagee] cannot foreclose though named as mortgagee, then either [the note holder] can foreclose though not named as mortgagee or no one can foreclose, outcomes not reasonably or demonstrably intended by the parties." In re Huggins, 357 B.R. at 184.[3]

In sum, the Mortgage reflects no intent on the part of Eaton to prohibit MERS or its assigns from foreclosing on the Property if another party held the

[3] In Ibanez, the Supreme Judicial Court also confirmed that a note holder cannot foreclose if it is not the mortgagee. Id., 458 Mass. at 652-653.

Note. Cf. LaCosta v. McCalla Raymer, LLC, 110-CV-1171-RWS, 2011 WL 166902 (N.D. Ga. Jan. 18, 2011) (Story, J.) (rejecting argument that MERS' assignee could not foreclose merely because it did not also possess the promissory note, where mortgage granted MERS such power and contained no requirement that it must also hold note to exercise it.) Although both BankUnited and Eaton could have conditioned the assignment of the Mortgage on a "re-uniting" of the Note with the Mortgage, they did not, and this decision manifests an intent to allow MERS or its assigns to foreclose without possession of the Note. Green Tree, as MERS' assignee, therefore had the contractual right to exercise the statutory power of sale and foreclose, even if it did not hold the Note at the time of foreclosure. The court erred by ignoring and essentially invalidating this contractual arrangement.

III. The Plain Language of G.L. c. 244, § 14 Authorized Green Tree to Foreclose.

In addition to being granted with the authority to foreclose in the Mortgage itself, Green Tree was authorized to foreclose under G.L. c. 244, § 14, because it was the "mortgagee" and the "person

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authorized by the power of sale" at the time of foreclosure. G.L. c. 244 § 14.

Section 14 of Chapter 244 provides, in relevant part, that:

> ***the mortgagee*** or person having his estate in the land mortgaged, ***or*** a ***person authorized by the power of sale*** . . . may, upon breach of condition and without action, do all the acts authorized or required by the power [of sale] . . . .

G.L. c. 244, § 14 (emphasis supplied). Thus, the plain language of the statute grants Green Tree the right to foreclose because it is both the "mortgagee" and the "person authorized by the power of sale." Ibanez, 458 Mass. at 648 (a mortgagee or an entity holding a mortgage by assignment is entitled to foreclose).

In this case, Eaton's Mortgage specifically identifies MERS and its successors and assigns as the "mortgagee" and BankUnited as the "[l]ender." The lower court acknowledged that the well-understood definition of "mortgagee" at the time the statute was enacted was the entity "that takes or receives a

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mortgage." Addm., 30.[4] Nowhere does the statute reference "mortgage note holder" or impose any condition that the foreclosing party hold the note at the time of the foreclosure.

Every other court that has considered the issue under Massachusetts law has concluded, contrary to the lower court's ruling, that a mortgagee need not hold the underlying note to foreclose. For example, in Marron, the court held:

> [I]n Massachusetts, when a mortgage and applicable note are owned by different entities, the mortgagee is deemed to hold the mortgage in trust for the owner of the note, and the note owner has the right to seek judicial order requiring the mortgagee to assign the mortgage. Unless and until the mortgage is then assigned, however, the mortgagee retains legal title to the mortgage . . .

Id., 2011 WL 2600543 at *4 (internal citations omitted); see also Ibanez, 458 Mass. at 652. The court further held that:

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[4] The lower court relied on a 1999 change to the definition of "mortgagee" in Black's Law Dictionary that now includes the "lender." Addm., 30. This modification was made more than fifty years following the enactment of G.L. c. 244, § 14 and thus cannot support the court's conclusion that it demonstrates legislative intent at the time of enactment. It actually supports Green Tree and Fannie Mae's argument that the legislature intended the term "mortgagee" *not* to include the note holder.

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> **Massachusetts law does not require unity of ownership of a mortgage and its underlying note prior to the foreclosure. Taken to its logical conclusion, a mortgagee who is not the note holder may exercise the power of sale and foreclose the mortgage but as a fiduciary for the note holder, to whom it must account for foreclosure sale proceeds.**

Marron, 2011 WL 2600543, at *5 (emphasis added); see also Carlson v. Wells Fargo Bank, N.A., as Trustee, No. 10-41291, 2011 WL 3420436, *6 (Bankr. D. Mass. Aug. 2, 2011) (Hoffman, J.) ("the holder of a mortgage on real estate in Massachusetts may foreclose the mortgage even if it is not entitled to enforce the related promissory note); Aliberti, No. 11-10174, 2011 WL 1625036 at *6 (holding that mortgagee need not also hold promissory note in order to validly foreclose); McKenna v. Wells Fargo Bank, N.A., No. 10-10417, 2011 WL 1100160, *2 (D. Mass. Mar. 21, 2011) (Tauro, J.) (same); Adamson, No. 11-0693, 2011 WL 1136462 (same); Valerio v. U.S. Bank, N.A., 716 F. Supp. 2d 124, 128 (D. Mass. 2010) (Gorton, J.); Lyons, No. 09 MISC 416377, 2011 WL 61186; In re Lopez, 446 B.R. 12, 17-18

(Bankr. D. Mass. 2011); Huggins, 357 B.R. at 183 (same).[5]

Here, the lower court acknowledged that a note and mortgage may "be separately transferred or assigned." Addm., 27; see Lamson & Co., Inc. v. Abrams, 305 Mass. 238, 245 (1940) ("[t]he holder of the mortgage and the holder of the note may be different persons"). However, it then failed to take this premise to its "logical conclusion;" that a mortgagee may foreclose, and if there is a surplus, hold the proceeds in trust for the note holder. See Marron, at *4. Instead, the lower court relied on language in two cases, one of them nearly 150 years old, to erroneously conclude that c. 244 § 14 authorizes foreclosure only by a person who is both the "mortgagee" ***and*** the "note holder." The lower court reached this conclusion despite the fact that the statutory language expressly allows foreclosure by any "mortgagee" or person "authorized by the power of

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[5] In the face of this weight of authority, the lower court erroneously stated that "these decisions were based upon plaintiff's failure to cite supporting authority." Addm., 32-33. In fact, all of these decisions applied the terms of the mortgage and the plain language of the statute, and concluded that they authorized foreclosure without the unification of the two instruments.

sale," and contains no requirement that such foreclosing persons also hold the underlying debt. G.L. c. 244 § 14.

"Where the language of a statute is clear and unambiguous, it is ***conclusive*** as to legislative intent." Pyle v. School Committee of South Hadley, 423 Mass. 283, 285 (1996) (emphasis supplied). If the ordinary meaning of a statutory term yields a "workable result," then a court should not resort to extrinsic aids, such as prior caselaw or legislative history, to guide its statutory interpretation. Boston Housing Authority v. National Conference of Firemen and Oilers, Local 3, 458 Mass. 155, 162 (2010) ("We do not look to extrinsic sources to vary the meaning of an unambiguous statute unless a literal construction would yield an absurd or unworkable result"); Pyle, 423 Mass. at 286 (a statute must be "construed as written" if it is unambiguous). Here, G.L. c. 244 § 14 unambiguously grants the right to foreclose to both the "mortgagee," meaning a person who takes a mortgage, **and** to the "person authorized by the power of sale." G.L. c. 244 § 14. Under the Mortgage, MERS and its assigns were both. Its

assignee, Green Tree, was therefore entitled to foreclose.

A. The Court's Interpretation Of Pre-Existing Case Law Was Erroneous.

Even if the statute were subject to interpretation in light of pre-existing caselaw, the lower court identified no authority requiring that the Note and Mortgage be "re-united" prior to foreclosure. The two cases the lower court relied upon, Wolcott v. Winchester, 81 Mass. 461 (1860) and Crowley v. Adams, 226 Mass. 582 (1917), did not hold that a mortgagee must also possess the note in order to foreclose. Rather, the cases deal with the rule that a mortgage may not be foreclosed if the underlying debt has been paid off. See Wolcott, 81 Mass. at 465 ("It is well established that a mere outstanding naked mortgage title, *the debt already having been paid*, cannot avail the mortgagee, so as to sustain an action upon the mortgage") (emphasis supplied);[6] Crowley, 226 Mass. at 584-585 ("It is plain

[6] Wolcott involved a priority dispute between two mortgagees, one of which also held the underlying note. To the extent that the Court held the mortgagee with possession of the note had a priority over one who did not hold the note, such a holding does not support a conclusion that one is *required* to hold the note in order to validly foreclose. In fact, almost

however, that if at the date of the assignments to Murphy the debts secured had been paid as the judge found, there was no default or breach of condition and under such circumstances the foreclosure in each instance whether by entry or sale under the power did not pass a good title to the purchaser . . ."). The cases do not reflect any underlying "common law" rule that a note and mortgage, separately transferred, must be "re-united" prior to foreclosure, as the lower court held.

The lower court's error was recently recognized by the Bankruptcy Court. In Marron, Case No. 10-45395, *3 (Bankr. D. Mass. Aug. 29, 2011) (order on motion for reconsideration), the court denied a motion for reconsideration that relied upon the lower court's decision here. See Addm., 43. In declining to follow the lower court's interpretation of Wolcott and Crowley, the Marron court recognized that "[t]he fact that the debt has been paid [in those cases] is what led the SJC to conclude that the assignee 'should be held to have known . . . that possession of the note

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thirty years following its decision in Wolcott, the Supreme Judicial Court recognized that Massachusetts law permits a mortgage and note to be split and separately assigned. See Barnes v. Boardman, 149 Mass. 106, 114 (1889).

was essential to an enforceable mortgage.'" Id. As recognized by Marron, the court's reliance on these cases was erroneous.

B. The Lower Court's Reliance on G.L. c. 244, § 17B Was Misplaced; Section 17B Supports Green Tree and Fannie Mae's Interpretation.

The court next relied on G.L. c. 244, § 17B, a different section of Chapter 244 governing deficiency actions *following* a foreclosure, to interpret section 14. Section 17B provides:

> No action for a deficiency shall be brought after June thirtieth, nineteen hundred and forty-six by the holder of a mortgage note or other obligation secured by mortgage of real estate after a foreclosure sale by him taking place after January first, nineteen hundred and forty-six unless a notice in writing of the mortgagee's intention to foreclose the mortgage has been mailed, postage prepaid, by registered mail with return receipt requested . . .

G.L. c. 244, § 17B. The lower court concluded that because Section 17B is directed to "the holder of a mortgage note" and allows a deficiency action following a "foreclosure sale *by him*," the legislature must have intended Section 14, which addresses foreclosures, to grant the authority to foreclose only to the "holder of a mortgage note."

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The lower court's conclusion is justified neither by logic nor the statutory language. Section 17B governs deficiency actions, not foreclosures. Even if the two statutes conflicted (which they do not, as we explain below), the lower court was obligated to apply the foreclosure section to this controversy, not a different provision governing deficiency actions. See In re MCI WorldCom Network Servs., Inc., 454 Mass. 635, 647 (2009) (where two statutes conflict, the more specific statute applies); Doe v. Attorney General, 425 Mass. 210, 215 (1997) (same).

To the extent Section 17B is even useful in interpreting Section 14, it actually supports Green Tree and Fannie Mae's interpretation of the statute, not that of Eaton. Section 17B explicitly distinguishes between a "mortgage note holder" and a "mortgagee." G.L. c. 244 §17B ("No action for a deficiency shall be brought . . . by the *holder of a mortgage note* . . . after a foreclosure sale by him . . . unless a notice in writing of *the mortgagee's* intention to foreclose the mortgage has been mailed, postage prepaid, by registered mail with return receipt requested . . . .") The statute uses the term "mortgagee" when referencing the person authorized to

foreclose, and "holder of a mortgage note" to describe the person authorized to bring a deficiency action. Its use of these two separate phrases demonstrates its intent to ascribe to them different meanings, even if they may occasionally be used interchangeably. See 81 Spooner Road LLC v. Town of Brookline, 452 Mass. 109, 114 (2008) (holding that "although these two terms ['size' and 'bulk'] are often used synonymously, their appearance in the same statutory series requires us to construe them differently if each is to have meaning"); Tamulevich v. Robie, 426 Mass. 712, 713-714 (1998). Section 17B, in using the term "the holder of a mortgage note," demonstrates that the legislature knew how to refer specifically to debt holders. Had it intended to restrict foreclosure to such entities, it would have used that term in Section 14.

By ignoring the plain language of G.L. c. 244, § 14, by supplanting the plain language with resort to a misinterpretation of pre-existing case law, and by erroneously relying on language contained in G.L. c. 244, § 17B, the court committed reversible error.

IV. Public Policy Requires That The Court Enforce The Parties' Contractual Agreement.

Finally, the lower court erroneously suggested that public policy required a "re-uniting" of the Mortgage and Note, because of potential "unfairness" to borrowers. Addm., 33. The lower court's concerns are illusory, both in this case and as general matter.

In this case, Eaton, BankUnited, and MERS specifically agreed, as they were authorized to do by statute, that MERS and its assignees would have the power of sale upon Eaton's failure to make monthly payments due under the Note. As such, there is nothing "unfair" about allowing MERS' assignee to exercise that power and enforce the parties' agreement. The court's conclusory statement that "sound reason" requires this anomalous result is supported by nothing more than pure speculation, and is insufficient to override the express terms of the parties' agreement.

In any event, the lower court's "policy" concerns do not permit it to ignore the clear language of Section 14, which authorize foreclosure by a "mortgagee" ***or*** a person "authorized by the power of sale," -- here, Green Tree - without regard to whether

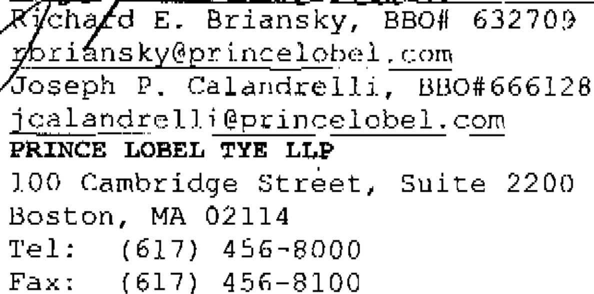
that entity is also the "mortgage note holder." Courts are "not free to ignore or to tamper with [a] clear expression of legislative intent. If the law is to be changed, the change can only be made by the Legislature." Commonwealth v. Jones, 417 Mass. 661, 664 (1994).

CONCLUSION

For the foregoing reasons, Green Tree and Fannie Mae respectfully submit that the Superior Court committed an error of law in issuing the Order, and that the single justice committed the same error by denying their petition. As such, they respectfully request that this Honorable Court reverse the Order and enter an order denying Eaton's motion for injunctive relief.

Respectfully Submitted,

FEDERAL NATIONAL MORTGAGE ASSOCIATION and GREEN TREE SERVICING, LLC,
By their attorneys,



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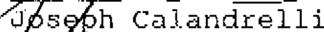
Dated: September 2, 2011

Certificate of Compliance

I, Joseph Calandrelli, certify pursuant to Mass. R. App. P. 16(k) that the foregoing brief complies with the rules of this Court.



Joseph Calandrelli

Certificate of Service

I, Joseph Calandrelli, certify that on September 2, 2011, two true and accurate copies of the foregoing brief were served on counsel of record for Eaton by delivering them by overnight mail, postage prepaid to:

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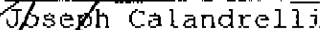

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