COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT
No. SJC-12075

SANDRO TURRA,

Plaintiff-Appellant

v.

DEUTSCHE BANK TRUST COMPANY AMERICAS,

Defendant-Appellee

On Appeal from a Judgment of the Superior Court

BRIEF OF AMICI CURIAE NEW ENGLAND LEGAL FOUNDATION, THE REAL ESTATE BAR ASSOCIATION FOR MASSACHUSETTS, INC., AND THE ABSTRACT CLUB, IN SUPPORT OF DEUTSCHE BANK TRUST COMPANY AMERICAS

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CORPORATE DISCLOSURE STATEMENT

Amicus curiae New England Legal Foundation (NELF) states, pursuant to S.J.C. Rule 1:21(b)(i), that it is a 26 U.S.C. § 501(c)(3) nonprofit, public-interest law firm, incorporated in Massachusetts in 1977 and headquartered in Boston. NELF is governed by a self-perpetuating Board of Directors, the members of which serve solely in their personal capacities. NELF does not issue stock or any other form of securities and does not have any parent corporation.

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ISSUE PRESENTED

Does a mortgagee's failure to comply with G.L. c. 244, § 15A, render void a foreclosure sale conducted under the statutory power of sale set out in G.L. c. 183, § 21?

INTEREST OF AMICI CURIAE[1]

Amicus curiae New England Legal Foundation (NELF) is a nonprofit, public-interest law firm incorporated in Massachusetts in 1977 and headquartered in Boston. NELF's members and supporters include large and small businesses, other organizations in the New England business community, law firms, and individuals, all of whom believe in NELF's mission of promoting balanced economic growth in New England, protecting the free enterprise system, and defending economic and property rights.

Amicus curiae The Real Estate Bar Association for Massachusetts, Inc. (REBA) (formerly known as the Massachusetts Conveyancers Association) is the largest specialty bar in the Commonwealth. It is a non-profit

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[1] Neither the Appellee or its counsel nor any other individual or entity, aside from Amici and their counsel, has authored this brief in whole or in part, or has made any monetary contribution to its preparation or submission.

corporation that has been in existence for over 100 years and has more than 2,000 members who practice in cities and towns throughout the Commonwealth. REBA works toward the improvement of real estate law and practice through educational programs. REBA also promulgates title standards, practice standards, ethical standards and real estate forms, and has an active amicus curiae program to represent the views of its members in this Court and other courts.

Amicus curiae The Abstract Club is a voluntary association of experienced lawyers who practice in the area of real estate law in Massachusetts. It has been in existence for over 125 years and is limited by its by-laws to 100 members. It provides educational programs for its members and frequently files amicus briefs together with REBA to represent the views of the real estate bar to the courts.

Since the collapse of the housing market in 2008, there has been an increased number of lawsuits in which a homeowner has sought to thwart or undo a foreclosure because of the foreclosing party's alleged failure to comply with requirements of the Commonwealth's nonjudicial foreclosure law. This is

another such case, and it is of concern to Amici for several reasons.

First, the entire legal basis of this case depends on reading some sparse dicta of this Court with rigid literalness. As explained in Amici's brief, to do so leads to results that are legally and logically untenable, a problem that the plaintiff never acknowledges, let alone addresses.

Second, the plaintiff's view of G.L. c. 244, § 15A's so-called "post-foreclosure" requirements is irreconcilably at odds with the plain language of the controlling statute, G.L. c. 183, § 21. Section 21 unambiguously describes the mandatory statutory requirements for exercising the power of sale as ones that must be complied with *prior to* sale and conveyance.

Third, if the appellant's view were to be adopted by this Court, it would create great uncertainty concerning title because good title would then be dependent on documents not appearing in the record. Every foreclosure deed put on record, at least since the enactment of G.L. c. 244, § 15A in 1993, would become subject to challenge because there would be literally nothing anywhere on record that would

document a foreclosing mortgagee's compliance with § 15A. Since the plaintiff argues that a failure of compliance renders title void *ab initio*, a holding adopting his view would cast a very dark cloud indeed over thousands of titles.

In fact, the real estate bar is already seeing the consequences of the unsettled state of the law. Most notably, insurability and financing are being negatively affected by the confusion. Some title insurance underwriters, who are aware that the question of compliance with 15A is being raised in litigation by borrowers, will not insure title without being given evidence that 15A notices were sent to all relevant parties within 30 days after the sale, even if the property was purchased by a third party and the actual closing required more than 30 days from the auction date to finance and complete. Other insurers require no such documentation, or apply varying requirements depending on whether the high bidder at auction was the foreclosing mortgagee or a third party. By instilling this sort of uncertainty in the title insurance industry, an overly literal reading of the law, like that advocated by the appellant, makes it harder to get financing, in particular commercial

financing, and that in turn limits the number of potential buyers and reduces the chances of maximizing the sale price of the property.

These unfortunate developments come on top of the difficulties created by § 15A itself, whose short, thirty-day deadline already leaves some third-party buyers scrambling to put their paperwork and financing in order. It also puts at risk the ultimate accuracy of the information given to municipal officials and tenants: notices sent out with the name of the third party purchaser prior to the completion of the closing may actively mislead the recipients if the third party is ultimately unable to complete the transaction.

NELF, REBA and the Abstract Club, together or separately, have appeared in the role of amicus curiae numerous times in this Court in cases dealing with real estate law.[2] They believe that their views may be of assistance to the Court in the present case and have therefore sought leave to appear and file this brief.

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[2] *See, e.g., Glovsky v. Roche Bros. Supermarkets, Inc.*, 469 Mass. 752 (2014); *Zoning Board of Appeals v. Herring Brook Meadow, LLC*, 84 Mass. App. Ct. 1132 (2014); *Eaton vs. Federal National Mortgage Association*, 462 Mass. 569 (2012).

ARGUMENT

I. The Statements Of This Court Relied Upon By Turra Are Dicta And Should Be Given No Weight In Deciding The Question.

This controversy concerns foreclosure by the statutory power of sale. That right is created by G.L. c. 183, § 21, which empowers a mortgagee to foreclose on a defaulting mortgagor without prior judicial authorization. Specifically, § 21 declares that a mortgagee "may sell the mortgaged premises[,] . . . first complying with the terms of the mortgage and with the statutes relating to the foreclosure of mortgages by the exercise of a power of sale, and may convey the same by proper deed or deeds to the purchaser."

This case turns on the identity of the statutes that are described in § 21 as related to the exercise of the power of sale and with which strict compliance is required. *See U.S. Bank N.A. v. Ibanez*, 458 Mass. 637, 646 (2011) ("'one who sells under a power [of sale] must follow strictly its terms'") (original insertion) (quoting *Moore v. Dick*, 187 Mass. 207, 211 (1905)). Absent strict compliance with the pertinent statutes, "there is no valid execution of the power, and the sale is wholly void." *Id.*

Relying on a few scattered remarks of this Court concerning G.L. c. 244, §§ 11-17C, Appellant Sandro Turra contends that G.L. c. 244, § 15A, specifically is one of those statutes. *See* Brief for Appellant (Turra Brief) at 7-11, 13-14. Primarily he relies on the concurrence in *U.S. Bank N.A. v. Schumacher*, 467 Mass. 421 (2014), and on the remarkable assumption that every part of that case is the holding. *See* Reply Brief for Appellant (Turra Reply) at 4-5 ("nothing in this decision was dictum"). The sentence in the concurrence on which he relies is in fact dictum, not the holding, and it does not provide a basis for Turra's call for the Court to apply the doctrine of stare decisis to this case. *See* Turra Brief at 16-19.[3]

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[3] The sentence Turra relies on is as follows:

> Where a defendant in the summary process action claims that the mortgage holder failed strictly to adhere to the requirements under the statutory power of sale set forth in G.L. c. 183, § 21, and the related requirements in G.L. c. 244, §§ 11-17C, proof of *any* violation of these requirements will void the foreclosure sale and, therefore, defeat the eviction.

Schumacher, 467 Mass. at 432 (Gants, J. concurring) (original emphasis).

Contrary to Turra's view, *see id.* at 10-11, in *Schumacher* the Court did not undertake to identify all the statutes that must be complied with by a mortgagee who wishes to exercise the statutory power of sale. The holding was limited to defining the role of G.L. c. 244, § 35A in mortgage foreclosures. *See Schumacher*, 467 Mass. at 422 ("[W]e consider whether § 35A is part of the foreclosure process itself and, if so, whether a mortgagee's failure to comply strictly with its provisions, particularly the notice requirements, renders a foreclosure sale void. . . . We now conclude that G.L. c. 244, § 35A, is not part of the mortgage foreclosure process.").

As a purely incidental matter, both the Court's opinion and the concurrence also sought to dispel confusion that might have arisen in the minds of litigants concerning certain practice questions. *See id.* at 422 n.4, 429 & n.12; *id.* at 431-33 (concurrence). The concurrence, as preface to its discussion of "the practical consequence" of *Schumacher*, noted that recent legal developments had rendered "our jurisprudence in this area of law . . . difficult for even attorneys to understand." *Id.* at 431. The concurrence aimed specifically to dispel

these difficulties by offering guidance on practice questions that might arise, under four foreclosure scenarios, concerning what a mortgagor may plead, when and how a mortgagor should plead, and in which court. *See id.* at 432-33. The full Court, in endorsing the concurrence, understood exactly this to be the limited purpose of the concurrence. *See id.* at 429 n.12 ("The concurring opinion of Justice Gants accurately reflects the *practical consequences* of our decision today in conjunction with our decision in *Bank of Am., N.A. v. Rosa*") (emphasis added).

At no point, either in the Court's opinion or in the concurrence, was § 15A singled out for citation, quotation, or discussion; nor was there any reason that it should have been, for it was completely irrelevant to the disposition of the question posed in *Schumacher*, which concerned § 35A exclusively. *See supra* p. 8.

Consequently, the concurrence's remark about G.L. c. 244, §§ 11-17C, which of course includes § 15A, is dictum. It fits perfectly the test of "pure dictum" given by the First Circuit: "[I]t can be removed from the opinion without either impairing the analytical foundations of the court's holding or altering the

result reached." *Palmquist v. Shinseki*, 689 F.3d 66, 75 (1st Cir. 2012) (citation and quotation marks omitted). Indeed, the removal of the *entire* concurrence would effect no alteration in the holding of *Schumacher*, and Turra does not show otherwise.

Obviously, then, the Court's endorsement of Justice Gants's practice guidance for litigants does not elevate his passing remark on §§ 11-17C to some sort of holding on the law of § 15A.

Reasonably understood, the dicta Turra cites amount to saying only that the statutes related to the power of sale are to be found among §§ 11-17C (a view Turra himself has grudgingly accepted in his Reply, *see infra* pp. 16-17). Nowhere has this Court declared that every single one of those statutes lays out a foreclosure requirement in the sense intended by G.L. c. 183, § 21. Indeed, as demonstrated elsewhere in this brief, such a view is legally and logically untenable.

Moreover, even if we were to assume that the snippets Turra cites could bear the meaning he attributes to them, still, in light of their lack of sustained reasoning on the point, their irrelevance to the holdings of the cases he plucks them from, and the

absence of adversarial briefing there concerning § 15A, the Court should give them no weight now that the issue has been squarely placed front and center before this Court and has been fully briefed. *See Commonwealth v. Rahim*, 441 Mass. 273, 284-85 (2004).

II. Statutes Setting Out The Conditions For Perfecting The Statutory Power Of Sale All Require Compliance *Before* The Sale Takes Place. By Its Plain Terms, Section 15A Cannot Be One Of Them.

A single word decides this case, and that word is "first." As noted earlier, G.L. c. 183, § 21, declares that a mortgagee "may sell . . . and convey" the mortgaged property under the power of sale, but must "*first*" comply with the statutes related to that power (emphasis added).

While § 21 does not explicitly identify these statutes, it tells us a crucial fact about them. Because "first" means that compliance with the statutes must occur *prior to sale*, i.e., as a precondition of lawfully exercising the power to sell, it necessarily follows that no statute can be a statute related to the statutory power of sale, in the sense intended in § 21, if it imposes an obligation that is to be complied with only *after sale*.

That fact is key to deciding whether G.L. c. 244, § 15A is one of the statutes to which § 21 refers, as Turra contends. *See*, e.g., Turra Brief at 8-11. In relevant part, § 15A reads as follows:

> [A] mortgagee conveying title to mortgaged premises pursuant to the provisions of this chapter shall, *within thirty days of . . . conveying title*, notify all residential tenants of said premises, and the office of the assessor or collector of taxes of the municipality in which the premises are located and any persons, companies, districts, commissions or other entities of any kind which provide water or sewer service to the premises, of said . . . conveying title.[4]

(Emphasis added).

This Court should hold that, by its plain language, § 15A cannot be one of the statues referred to in § 21. Those statutes are described as imposing obligations that must be complied with "first," *before* a mortgagee may sell or convey the foreclosed property. *See* § 21. By contrast, the § 15A notice obligations do not even come into existence until *after* the sale and conveyance of the property by the foreclosing mortgagee. *See* § 15A (foreclosing mortgagee to give notice "within thirty days of . . .

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[4] Portions of § 15A dealing with mortgagees taking possession of the mortgaged premises before foreclosure are irrelevant to the conduct complained of here and therefore have been omitted.

conveying title"). And that makes sense because, in the nature of things, it is only after a sale is consummated that a foreclosing mortgagee can give notice to tax and sewer authorities "of said . . . conveying title." *See id.* Put more plainly, the mortgagee cannot give notice of the new owner until after the property has been sold. Thus, the timing of events inherent in § 15A's obligations means that it is not one of the statutes that G.L. c. 186, § 21, tells us impose *pre-sale, pre-conveyance* requirements on a foreclosing mortgagee.[5]

While Turra acknowledges the controlling authority of G.L. c. 183, § 21, he fails to draw the obvious conclusion from its plain language. *See* Turra Reply at 1-2, 4. Of the statutes that perfect the right to exercise the power of sale, § 21 declares that compliance with them comes "first" and sale and conveyance second, while in § 15A it is the other way round, with conveyance coming first and compliance coming second. There is simply no way to fit § 15A

[5] A checklist for conducting a foreclosure under the statutory power of sale is given in Arthur L. Eno, William V. Hovery & Michael Pill, *Real Estate Law* (4th ed. 2004) § 10.1. Nowhere in it does § 15A appear.

into the controlling description given in G.L. c. 183, § 21, a fact that Turra simply ignores.

In short, a failure to comply with § 15A does not nullify an earlier, otherwise valid exercise of the statutory power of sale.

III. In His Reply Turra Has Effectively Abandoned His Argument About The Necessity Of Compliance With "§§ 11-17C."

Turra's case depends on far too literal a reading of what this Court has said, in a few instances, about G.L. c. 244, §§ 11-17C. While it is true to say that these statutes all relate, in one way or another, to foreclosures, some of them do not set out *any* kind of requirement, let alone a requirement that a mortgagee must comply with in order to accomplish a valid foreclosure by statutory power of sale.

To take a single example, § 17 contains neither a command nor a prohibition; there is literally nothing in it for anyone to comply with either way. It merely declares a legal fact: when a mortgagor conveys premises, despite the fact that the mortgage has already given the mortgagee the right to act as attorney or agent of the mortgagor in such matters, such a conveyance "shall not impair or annul" the right of the mortgagee. § 17. Because § 17 imposes

no duty of compliance on anyone, it obviously cannot be—despite being among §§ 11-17C—one of the statutes which G.L. c. 183, § 21 describes as requiring compliance by a mortgagee prior to a foreclosure sale.[6]

Turra quibbles with Deutsche Bank's statement that "at least half" of the statutes found in §§ 11-17C do not pertain to the power of sale. *See* Deutsche Bank Brief at 12 and Turra Reply at 2 n.1. In doing so, he misses the point. The correct proportion is not relevant. *One* exception, like § 17, suffices to establish that any court decision appearing to say that a valid power of sale depends on strict compliance with each statute from among §§ 11-17C cannot be taken at face value—but that is exactly how Turra has insisted on understanding several of this Court's statements. *See* Turra Brief at 8-9 ("§ 15A is one of the statutory requirements for a non-judicial foreclosure" because this Court "has held . . . that these statutes consist of G.L. c. 244,§§ 11-17C"), 10-

[6] Even when one of these statutes does lay down some kind of requirement concerning foreclosure by the statutory power of sale, a mortgagee's failure to comply does not necessarily void the sale. Deutsche Bank instances G.L. c. 244, § 15. Brief of Defendant-Appellee Deutsche Bank Trust Company Americas (Deutsche Bank Brief) at 13-14. *See also infra* pp. 18-19.

11 & n.8 (*Schumacher* "most relevant" case, "directly on point," because there this Court "decided the specific statutes required for a non-judicial foreclosure" and "explicitly stated the foreclosure statutes that . . . makeup [sic] the non-judicial foreclosure process: G.L. c. 244, §§ 11-17C").

Because, as § 17 illustrates, §§ 11-17C cannot be viewed monolithically as "the foreclosure statutes that . . . makeup [sic] the non-judicial foreclosure process," § 15A's supposedly critical role in this case cannot be established merely by citing the company it keeps in the General Laws.

Tellingly, in his Reply, Turra undercuts his own argument by conceding the heterogeneous nature of §§ 11-17C. *See* Turra Reply at 2 n.1. In response to Deutsche Bank's criticism of his treatment of §§ 11-17C as a monolithic block, Turra even admits that §§ 14, 15, and 15A are, in fact, the *only* statutes from among §§ 11-17C that have any bearing on the right to exercise the statutory power of sale. *See id.* ("§§ 14-15A are the only statutes relevant to this case . . . . Accordingly, Deutsche Bank was required

to have strictly complied with each of these statutes.").[7]

Nevertheless, he fails to acknowledge that his concession negates the simplistic argument he had advanced in his opening brief. *See id.* at 5-6. In an attempt to salvage his earlier, categorical position, the best Turra can do is to portray the rest of the statutes as still relating to foreclosures—in some way or another. *See id.* at 2 n.1. Unfortunately for Turra's case, G.L. c. 183, § 21 requires much more than that. *See supra* pp. 11-14.

IV. Turra's Attempt To Illustrate His Argument By A Comparison Further Demonstrates His Misunderstanding Of The Statutes He Discusses.

In an attempt to illustrate the putative significance of § 15A's location within §§ 11-17C, Turra compares it to §§ 14 and § 15. Characterizing the latter statutes as setting out "pre-foreclosure" requirements and "post-foreclosure" requirements respectively, he portrays § 15A as just another statute setting out a "post-foreclosure" requirement,

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[7] Turra errs in his choice of statutes, *see infra* pp. 17-20, but the point here is simply that he concedes that "§§ 11-17C" is not reliable when taken as a list of statutes related to the valid exercise of the statutory power of sale.

much as § 15 supposedly does. *See* Turra Brief at 15-16. The comparison is doubly noteworthy because, as just observed, he later stipulated that these three statutes are the only ones relevant to the exercise of a valid power of sale. *See supra* p. 16.

Section 14, setting out pre-sale notice requirements for a foreclosure by power of sale, truly is a statute inextricably related to the power of sale, in the sense intended by G.L. c. 183, § 21. It must be complied with *before* a mortgagor may validly exercise the statutory power of sale, or else the sale is void. We know this because § 14 says so. *See* § 14 ("no sale under such power shall be effectual to foreclose a mortgage, unless, previous to such sale, notice of the sale has been published"). *See also Eaton v. Federal Nat'l Mortgage Ass'n*, 462 Mass. 569, 571, 589 (2012).[8]

Section 15 is very different from § 14 in this critical regard. Together with its predecessor statutes, it has long required that a person who has

[8] After *Eaton* was decided, § 14 was amended by St. 2012, c. 194, § 1, effective November 1, 2012. The language quoted above is taken from the amended statute and is identical with that considered in *Eaton* except for one minor, stylistic change.

foreclosed on property by the power of sale record a copy of the notice of sale and an affidavit "fully and particularly" stating the acts taken to comply with the relevant requirements. *See* § 15. Unlike a failure to comply with § 14, however, the failure to record these documents does *not* render the earlier sale void.[9] *See Federal Nat'l Mortgage Ass'n v. Hendricks*, 463 Mass. 635, 637 (2012);[10] *Field v. Gooding*, 106 Mass. 310 (1871) (predecessor statute to § 15). At worst, a failure of § 15 compliance might put a buyer to the trouble of later having to defend his title with extrinsic evidence of the validity of the sale. *See Hendricks*, 463 Mass. at 642.

Turra's comparison of § 15A to §§ 14 and 15 therefore backfires on him. Section § 15A is *not* like § 14; a failure to comply with § 15A does not render a

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[9] Deutsche Bank made this point about § 15 when arguing that we already know that compliance with every statute lying within §§ 11-17C is not necessary for the valid exercise of the statutory power of sale. *See* Deutsche Bank Brief at 13. Turra later objected that the bank relied on old, superseded legal authorities. *See* Turra Reply at 7. In fact, the bank cited this Court's 2012 decision in *Hendricks*.

[10] After *Hendricks* was decided, § 15 was amended by St. 2015, c. 141, § 2, effective December 31, 2015. The amendment further regulates the evidentiary value of the documents and any challenges to them, but does not affect the holding in *Hendricks*.

foreclosure sale void. Section 15A *is* like § 15, however—just not in the way Turra imagines. Neither is among the mandatory statutes referred to by G.L. c. 183, § 21; neither sets out "post-foreclosure" requirements a mortgagee must comply with at risk of rendering an earlier sale void.[11] *See supra* pp. 11-14, 18-19.

Turra's failed comparison highlights the point made earlier concerning his monolithic view of §§ 11-17C, i.e., he is basing his view on a handful of dicta

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[11] They are alike too in that neither is intended to protect a mortgagor like Turra. *See Hendricks*, 463 Mass. at 641; Deutsche Bank Brief at 15-16. *See also Enos v. Secretary of Envtl. Affairs*, 432 Mass. 132, 135 (2000) (to have standing plaintiff must allege injury within "area of concern" of statute and that defendant "violated some duty owed to the plaintiff") (quotation marks and citations omitted). Turra contends that he need not show an injury because, he claims, § 15A is necessary to perfecting the statutory power of sale. *See* Turra Brief at 20, Reply at 5. That premise is false. *See supra* pp. 11-14. *See also Kiah v. Carpenter*, 89 Mass. App. Ct. 1113 (Rule 1:28 decision) (§ 15A protects third parties; not one of statutes meant by G.L. c. 183, § 21), further appellate review denied, 475 Mass. 1102 (2016). The cases Turra cites are of no avail. The homeowners in *Ibanez* did not have to show standing because they were not the ones who brought suit, *see* 458 Mass. at 638, 645, while *Eaton* concerned § 14, a statute that, *unlike § 15A*, actually does require compliance before the statutory power of sale may be exercised, *see* 462 Mass. at 571.

that were not meant to be, and cannot be, taken so literally. *See supra* pp. 7-10, 14-16.

V. Compliance With § 15A Is Not Mandatory For *Any* Purpose.

As this Court has noted, the word "shall," while generally signifying a mandatory obligation, *Hashimi v. Kalil*, 388 Mass. 607, 609 (1983), does not do so when inconsistent with a statute's dominant purpose, *Wilson v. Commissioner of Transitional Assistance*, 441 Mass. 846, 852-53 (2004) (citing *Swift v. Registrars of Voters of Quincy*, 281 Mass. 271, 276 (1932)). Because § 15A bears virtually all the earmarks of a directory statute, the Court should find that it is not mandatory, despite its use of "shall." *See* § 15A (mortgagee "shall, within thirty days of . . . conveying title, notify," etc.).

"One indication that the legislature intended a time limitation to be directory instead of mandatory is if there is no sanction for noncompliance." 73 Am. Jur. 2d *Statutes* § 14. *See also* 82 C.J.S. *Statutes* § 493 at 648. *Cf. LeClair v. Town of Norwell*, 430 Mass. 328, 338 (1999) (in absence of express statutory requirement or other necessity to void contract

violating statute, statutory provision inferred to be directory and not prohibitory of contract).

As explained in a standard treatise:

> The violation of a directory statute is attended with no consequences, since there is a permissive element. . . . Although directory provisions are not intended by the legislature to be disregarded, the seriousness of noncompliance is not considered so great that liability automatically attaches for failure to comply. . . . If the statute is merely a guide for the conduct of business and for orderly procedure, rather than a limitation of power, it is directory.

1A Norman J. Singer & J.D. Shambie Singer, *Sutherland Statutes and Statutory Construction* § 25:3 at 583-84 (7th ed. 2009).

Here, § 15A imposes no penalty, fine, or other adverse legal consequence that would flow "automatically" from a failure to give the timely notices described in the statute.[12] This is in sharp contrast to G.L. c. 244, § 14, which by its plain

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[12] For this reason, § 15, to which Turra himself likens § 15A, *see supra* pp. 17-18, was long ago pronounced "directory," despite its use of "shall," *see Field*, 106 Mass. at 312-13. Pending House Bill 1625 § 13 and Senate Bill 805 § 13 both propose to institute a $100 fine for each day of failure to notify a municipality under § 15A. Were such a provision to become law, it would supply the automatic penalty now absent from the statute and mark a step toward making the statute mandatory. At present, a penalty is conspicuous by its absence.

terms penalizes a failure to comply with it by voiding the sale. *See supra* p. 18.[13]

As just touched on in the quotation from *Sutherland*, another mark of a directory statute is that its concern is to regulate the orderly conduct of business. In other words, its "provisions [are] designed to secure order, system, and dispatch." 73 Am. Jur. 2d *Statutes* § 10. *See also* 82 C.J.S. Statutes § 492 at 646. *Cf.* 73 Am. Jur. 2d *Statutes* § 10 (certain statutory duties of public officials directory for same reason); *Commonwealth v. Cook*, 426 Mass. 174, 180 (1997) ("We have held previously that a

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[13] G.L. c. 244, § 17B affords a second contrast. It is incontrovertible that a mortgagee's failure to provide § 17B notice of its intention to pursue a deficiency action against the mortgagor does not void a foreclosure sale, unlike the failure to give § 14 notice. *See Sovereign Bank v. Sturgis*, 863 F. Supp. 2d 75, 81 (2012) ("A foreclosure can be conducted properly without the mortgagee sending a § 17B notice") (citing *Framingham Sav. Bank v. Turk*, 40 Mass. App. Ct. 384, 386 (1996)). In that regard, § 17B resembles § 15A. *See supra* pp. 11-14. On the other hand, unlike § 15A, failure to comply with § 17B's notice requirement is attended "automatically" with an adverse legal consequence—the permanent forfeiture of the right to bring a deficiency action. *See Guempel v. Great American Life Ins. Co.*, 11 Mass. App. Ct. 845, 851 (1981). Hence, in these three notice statutes we see the Legislature carefully distinguishing between what consequences, if any, it will impose on a notice statute within G. L. c. 244, §§ 11-17C.

statute that relates only to the time of performance of an agency's duty is to be considered as directory only and not mandatory.").[14]

Echoing these goals, § 15A's purpose is to ensure "the prompt collection of water and sewer bills" or, in the somewhat fuller description of the original Senate bill, "to facilitate the prompt collection of water, sewer and tax bills and to prevent unlawful interruption of service to tenants during change of title to premises." *See* Deutsche Bank Brief at 15 (quoting St. 1993 c. 382 and S.B. 5 Gen. Court, Reg. Sess. (1993)). Accordingly, the requirements set out in the statute are clearly intended to ensure that the conveyance of title into new hands is accompanied by a reduced risk of disruption to the prompt payment of certain bills, while also improving the chances of an orderly continuation of services to tenants. *See* § 15A.

The absence of negative or prohibitory words, such as "no later than," "under no circumstances,"

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[14] The mandatory/directory distinction is frequently encountered in statutes controlling the duties of public officials and agencies. The strictures applicable in such cases apply, *mutatis mutandis*, outside that setting.

etc., may also indicate that a statute is directory. *See* 82 C.J.S. *Statutes* § 494 at 648-49, § 497 at 652; *Sutherland* § 25:3 at 586. Here, § 15A is written without any such expressions.

A final mark of a directory statute is that it regulates procedures or the timing of performance, rather than the essence of the underlying concern. *See* 82 C.J.S. *Statutes* § 492 at 646; *Sutherland* § 25:3 at 587 ("Generally those directions which do not go to the essence of the issue at hand but which deal merely with procedures are not commonly considered mandatory."). *Cf. Kiss v. Board of Appeals*, 371 Mass. 147, 157 (1976) ("'As to a statute imperative in phrase, it has often been held that where it relates only to the time of performance of a duty by a public officer and does not go to the essence of the thing to be done, it is only a regulation for the orderly and convenient conduct of public business and not a condition precedent to the validity of the act done.'") (quoting with approval *Cheney v. Coughlin*, 201 Mass. 204, 211 (1909)).

Obviously, the concern underlying § 15A is the actual payment of tax, water, and sewer bills, together with the actual uninterrupted provision of

services to tenants. But § 15A itself does not regulate any of these things directly, but only timing and procedural questions.

Section 15A is best viewed, then, as a simple housekeeping measure enacted for the benefit of third parties. As such, it is directory and so cannot be one of the mandatory statutes referred to in G.L. c. 183, § 21. Were the Legislature ever to wish to make its obligations mandatory, it knows how to do so.

CONCLUSION

For the reasons set forth here, the Court should affirm the judgment in favor of Deutsche Bank and hold that a failure to comply with G.L. c. 244, § 15A, does not render void a foreclosure sale conducted under the power of sale set out in G.L. c. 183, § 21.

Respectfully submitted,

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Dated: October 24, 2016

CERTIFICATE OF COMPLIANCE

Pursuant to Mass. R. App. P. 16(k), I hereby certify that this brief complies with the rules of court pertaining to the filing of an amicus brief, including, but not limited to, Mass. R. App. P. 16, 17, and 20.

Dated: October 24, 2016

John Pagliaro

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CERTIFICATE OF SERVICE

I hereby certify that on October 24, 2016, I served the within brief by causing two copies to be delivered by first-class mail, postpaid, to counsel of record as follows:

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