COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

NO. SJC-11927

FEDERAL NATIONAL MORTGAGE ASSOCIATION

Plaintiff - Appellee

v.

EDWARD M. REGO and EMANUELA R. REGO

Defendants - Appellants

BRIEF OF *AMICI CURIAE* REAL ESTATE BAR ASSOCIATION FOR MASSACHUSETTS, INC. AND THE ABSTRACT CLUB

Dated this 20th day of October, 2015

THOMAS J. SANTOLUCITO
(BBO# 640404)
tsantolucito@harmonlaw.com
(617) 558-6199
DANIELLE C. GAUDREAU
(BBO# 685562)
dgaudreau@harmonlaw.com
(617) 558-6131
HARMON LAW OFFICES, PC
150 California Street
NEWTON, MA 02458

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STATEMENT OF THE ISSUES

1. "Whether, in order to satisfy G.L. c. 244, § 14, an attorney-at-law who is retained by a mortgagee to conduct a foreclosure must be authorized by a writing under seal in order to validly exercise the power of sale[.]"

2. "[W]hether, in a post-foreclosure summary process action, the Housing Court may entertain a counterclaim by the mortgagors pursuant to G.L. c. 93A arising from the foreclosure."

See ANNOUNCEMENT, Supreme Judicial Court Docket No. SJC-11612 (Paper #3).

STATEMENT OF FACTS AND STATEMENT OF THE CASE

The *Amici Curiae* adopt and incorporate the Statement of The Case and the Statement of Facts set forth in Federal National Mortgage Association's brief.

STATEMENT OF INTEREST OF *AMICI CURIAE*

The *Amici* submitting this brief are the Real Estate Bar Association for Massachusetts, Inc. ("REBA"), formerly known as the Massachusetts Conveyancers Association, and the Abstract Club. REBA is the largest specialty bar in the Commonwealth, a non-profit corporation that has been in existence for over 100 years. It has over 2,000 members practicing throughout the Commonwealth.

Through its meetings, educational programs, publications and committees, REBA assists its members in remaining current with developments in the field of real estate law and practice and sharing in the effort to improve that practice. REBA also promulgates title standards, practice standards, ethical standards and real estate forms, providing authoritative guidance to its members and the real estate bar generally as to the application of statutes, cases and established legal principles to a wide variety of circumstances

practitioners face in evaluating titles and handling real estate transactions.

The Abstract Club is a voluntary association of experienced lawyers who practice real estate law. It has been in existence for over 100 years and is limited by its by-laws to 100 members.

The Amicus Committee is a joint committee of the two organizations comprised of real estate lawyers with many years of experience. The Amicus Committee, from time to time, files amicus briefs on important questions of law. On several occasions it has been requested to do so by this Court or the Appeals Court. All Committee members serve without compensation.

The *Amici* offer this brief in support of Federal National Mortgage Association's[1] position concerning the first of the two issues set forth in the Court's amicus announcement. Rather than restating the arguments made by the parties, the *Amici* contend that: 1) the statutory scheme provides that only one party may exercise the statutory power of sale; 2) an "attorney in writing under seal" connotes an agent

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[1] For simplicity and ease of reference, this brief shall refer to the Appellants as "the Regos" and the Appellee as "Fannie Mae."

"attorney in writing under seal" connotes an agent under a power of attorney and not the mortgagee's legal counsel; and 3) sound public policy dictates that foreclosure statutes should be interpreted to encourage foreclosing mortgagees to seek assistance of qualified legal counsel and not to deter counsel from representing foreclosing mortgagees.

INTRODUCTION

In 1984, this Court stated that the argument concerning the need for foreclosure counsel to produce sealed evidence of authority to draft and disseminate notices on behalf of a client came ***"perilously close to being frivolous."*** Fairhaven Sav. Bank v. Callahan, 391 Mass. 1011, 1012 (1984) (emphasis added). In the 31 years since, there has been no change to the relevant statutory language and foreclosure practice has not changed so much as to warrant a departure from the Court's treatment of this issue. As such, this Court should continue to follow Callahan and affirm the trial court's decision concerning this issue.

ARGUMENT

I. ONLY ONE PARTY MAY EXERCISE THE STATUTORY POWER OF SALE.

In construing statutes, when "[t]he statutory language is plain and unambiguous", this Court is "constrained to follow it". White v. City of Boston, 482 Mass. 250, 253 (1998). The Court should look past the plain language of statutes only in extraordinary cases "where following the Legislature's literal command would lead to an absurd result, or one contrary to the Legislature's manifest intention."

Id. citing Attorney Gen. v. School Comm. Of Essex, 387 Mass. 326, 336 (1982).

G.L. c. 244, § 14 authorizes the following parties to exercise the statutory power of sale:

> [t]he mortgagee **or** person having his estate in the land mortgaged, **or** a person authorized by the power of sale, **or** the attorney duly authorized by a writing under seal, **or** the legal guardian or conservator of such mortgagee **or** person acting in the name of such mortgagee or person[.]

G.L. c. 244, § 14 (emphasis added). In listing the parties that may foreclose by sale, the General Court (the "Legislature") separated each by using the word "or." "It is fundamental to statutory construction that the word "or" is disjunctive 'unless the context and the main purpose of all the words demand otherwise.'" Bleich v. Maimonides Sch., 447 Mass. 38, 46-47 (2006) quoting Eastern Mass. St. Ry. Co. v. Massachusetts Bay Transp. Auth., 350 Mass. 340, 343 (1966).

Nothing in the statutory scheme suggests that the Legislature intended the word "or" to be used in a manner other than as a disjunctive separating entities that would each serve the same role in the process, that of the foreclosing party. It would be illogical and contrary to the plain meaning of § 14 for a mortgagee

and its "attorney" to exercise the statutory power of sale simultaneously in a single foreclosure. As G.L. c. 244, § 14 provides that only one party may exercise the statutory power of sale, and because the foreclosing entity in this case was the mortgagee, then the mortgagee's law firm cannot be an additional foreclosing entity under G.L. c. 244, § 14. As such, the law firm need not produce or record a sealed writing to effectuate a valid foreclosure. As such, this Court should affirm the trial court's judgment concerning this issue.

II. AN "ATTORNEY DULY AUTHORIZED IN WRITING"[2] REFERS TO AN AGENT THAT FORECLOSES IN PLACE OF THE MORTGAGEE AND NOT THE MORTGAGEE'S LEGAL COUNSEL.

In Massachusetts, an "attorney duly authorized by a writing under seal" may exercise the statutory power of sale in place of the mortgagee.[3] G.L. c. 244, § 14. Massachusetts has a long history of permitting authorized agents to foreclose in place of mortgagees. The predecessor to section 14 provided:

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[2] G.L. c. 244, § 14.

[3] The Legislature has since abolished the need for a seal in documents affecting real estate. G.L. c. 183, § 1A.

> [i]n all cases, in which a power of sale is contained in a mortgage deed of real property, the mortgagee, or any person having his estate therein, ***or in or by such power authorized to act*** in the premises, may, upon a breach of the condition thereof, give such notices and do all such acts as are authorized or required by such power[.]

St. 1857, c. 229, § 1 (emphasis added).

The Regos make much of the fact that this Court's 1867 decision in Cranston v. Crane - which suggests that a foreclosing mortgagee may delegate certain duties to an agent without a sealed writing, predates the current version of G.L. c. 244, § 14. Cranston v. Crane, 97 Mass. 459 (1867). See Brief of Edward and Emanuela Rego at p. 13. The continued viability of Cranston is irrelevant because both G.L. c. 244, § 14 and its predecessor contemplate instances where an agent exercises the power of sale **in place of the mortgagee**. As the District Court Appellate Division ("Appellate Division") has noted:

> [w]e construe the statutory language which specifies that an attorney duly authorized by a writing under seal may foreclose a mortgage ***to apply solely to those cases in which the agent or attorney-in-fact of the mortgagee purports to act as such in his own name***. It does not apply to cases in which the mortgagee acts in his own name but employs legal counsel to draft the documents and to take the steps necessary to foreclose the mortgage.

Fairhaven Sav. Bank v. Callahan, 1983 Mass.App.Div. 179, 181 (1983), aff'd. 391 Mass. 1011 (1984)(emphasis added). See also Coelho v. Asset Acquisition and Resolution Entity, LLC., No. 13-10166-GAO, 2014 WL 1281513 at *3 (D. Mass. Mar. 31, 2014) (mortgagee's law firm[4] was not the foreclosing entity when it "was not acting in its own name or interest").

In affirming the Appellate Division's decision in Callahan, this Court recognized the distinction between cases where a mortgagee's agent forecloses and cases where "the []mortgagee conducted the foreclosure, with its lawyers merely assisting in the preparation of legal documents." Callahan, 391 Mass. at 1012.[5] There is no compelling reason for why the Court should cease to recognize this distinction.

In this case and in Callahan, the law firm's role consisted of preparing and disseminating statutory notices that disclose the mortgagee as the foreclosing

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[4] The law firm whose acts were at issue in Coehlo was Harmon Law Offices, P.C. The undersigned attorneys are both associated with Harmon Law Offices, P.C.

[5] The Appellate Division has applied the 'Callahan rule' in Federal Nat'l Mortgage Assn. v. Isaac, No. 14-ADMS-40007, 2013 WL 9890785 (Mass.App.Div. Nov. 12, 2014) and Federal Nat'l Mortgage Assn. v. Rogers, No. 13-ADMS-10025, 2015 WL 2000845 (Mass.App.Div. April 7, 2015).

entity, and providing affidavits attesting to these acts. See Callahan, 1983 Mass.App.Div. at 180 (clerk at mortgagee's law firm prepared notices of intent to foreclose, notices of foreclosure sale and notices of intent to claim a deficiency). There is no evidence that the law firm in this case retained an interest in the property, benefitted directly from the foreclosure or maintained control over the foreclosure process. The acts of drafting, publishing and mailing notices in the mortgagee's name and providing affidavits do not, without more, suggest that the mortgagee's lawyers exercised the power of sale. As Orlans Moran (the law firm representing the mortgagee in this case) did not exercise the power of sale on its own behalf, it need not provide or record written evidence of its authority[6] to exercise the power of sale and its failure to produce such evidence does not render the foreclosure void. As such, this Court should affirm the trial court's judgment concerning this issue.

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[6] Even if the Court were to find that a mortgagee's legal counsel must provide written evidence of authority, nothing in G.L. c. 244, § 14 abrogates a mortgagee's ability to ratify and confirm previous acts of its "attorney" under general agency law. See Licata v. GGNSC Malden Dexter LLC, 466 Mass. 793, 802 (2014).

III. SOUND PUBLIC POLICY REQUIRES THAT FORECLOSURE STATUTES BE INTERPRETED 1) TO ENCOURAGE FORECLOSING MORTGAGEES TO RETAIN LEGAL COUNSEL, AND 2) NOT TO DETER LAWYERS FROM REPRESENTING FORECLOSING MORTGAGEES.

Foreclosure requirements in Massachusetts are complex and evolving. In Massachusetts, the body of statutory, regulatory, and decisional law concerning mortgage lending, loan servicing and foreclosures continues to evolve with changing requirements in areas such as the regulation and licensing of mortgage originators, lenders and brokers (G.L. c. 255E & 255F, 209 C.M.R. 41, 42, 940 C.M.R. 8), mortgage loan servicing (209 C.M.R. 18; 12 C.F.R. § 1024.30, *et seq.*), foreclosure monitoring (G.L. c. 244, § 14A), default notice requirements (G.L. c. 244, § 35A), foreclosure avoidance (G.L. c. 244, § 35B, 209 C.M.R. 56) and the treatment of tenants after foreclosures (G.L. c. 186A), to name a few.

As now-Chief Justice Gants acknowledged, this Court's "jurisprudence in this area of law is difficult for even attorneys to understand." U.S. Bank Nat. Ass'n v. Schumacher, 467 Mass. 421, 431 (2014)(Gants J., concurring). Over the past several years, this Court has issued a number of decisions concerning mortgage foreclosures, some of which have altered foreclosure and postforeclosure practice drastically.)See e.g. U.S. Bank Nat'l Ass'n v.

Ibanez, 458 Mass. 637 (2011), Eaton v. Fed. Nat'l Mortg. Ass'n, 462 Mass. 569 (2012), Bank of America, N.A. v. Rosa, 466 Mass. 613 (2013), Schumacher, 467 Mass. 421 (2014) and most recently, Pinti v. Emigrant Mortgage Co., 472 Mass. 226 (2015).

Massachusetts has a "strong public policy" favoring the selection and employment of lawyers by those in need of legal services. Walsh v. O'Neil, 350 Mass. 586, 590 (1966). To help mortgagees navigate this complex area of law, the Court should interpret foreclosure statutes to encourage mortgagees to engage qualified counsel to perform procedural tasks relating to foreclosures without the need for a sealed writing - so long as there is full disclosure that the mortgagee is the foreclosing entity. Permitting attorneys to draft, publish and mail statutory notices on behalf of their clients minimizes errors and ensures that interests of lenders, borrowers and the Commonwealth are protected.

Interpreting § 14 as the Regos suggest will impose more than just a writing requirement - it will require that mortgagees' lawyers be treated as parties exercising the power of sale. Treating lawyers who have no direct stake in a foreclosure as independent

and substantive participants in the process is likely to increase lawsuits against lawyers that practice in this area, which will deter qualified lawyers from representing foreclosing mortgagees.

To promote the involvement of lawyers and minimize errors with foreclosures, this Court should continue to construe G.L. c. 244, § 14 to avoid painting mortgagees' counsel, who perform procedural tasks at the direction of their clients, as actors in the foreclosure process.

CONCLUSION

For all of the reasons set forth herein, this Honorable Court should affirm the trial court's determination that attorneys who assist mortgagees by performing administrative tasks in connection with a foreclosure conducted in the mortgagee's name, need not offer written or sealed evidence of authority to perform these acts.

Respectfully submitted,

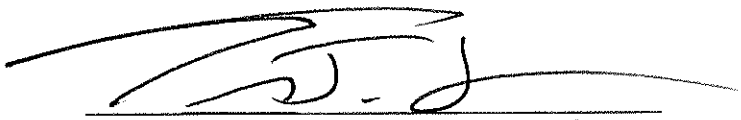
The Real Estate Bar
Association for Massachusetts,
Inc. and The Abstract Club

By their attorneys,

THOMAS J. SANTOLUCITO, ESQ.
(BBO# 640404)
tsantolucito@harmonlaw.com
(617) 558-6199
DANIELLE C. GAUDREAU, ESQ.
(BBO# 685562)
dgaudreau@harmonlaw.com
(617) 558-6131
HARMON LAW OFFICES, PC
150 California Street
NEWTON, MA 02458

CERTIFICATION

I, Thomas J. Santolucito, counsel for the *Amici*, hereby certify that this brief complies with the Rules of Court that pertain to the filing of amicus briefs, including, but not limited to, Mass. R.A.P. 17, 19 and 20.



THOMAS J. SANTOLUCITO, ESQ.
(BBO# 640404)
tsantolucito@harmonlaw.com
(617) 558-6199
HARMON LAW OFFICES, PC
150 California Street
NEWTON, MA 02458

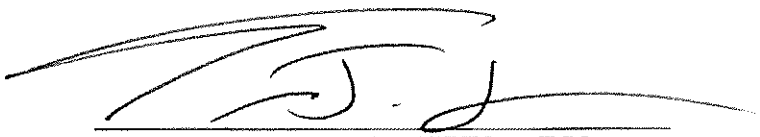
CERTIFICATE OF SERVICE

Pursuant to Mass.R.A.P. 13(d), I hereby certify, under the penalties of perjury, that on this date of October 20, 2012, I have served two copies of this brief, upon the counsel of record for each party by first class mail to the following person(s) and address(es).

Richard E. Briansky, Esq.
Amy B. Hackett, Esq.
McCarter & English, LLP
265 Franklin Street
Boston, MA 02110

Laura D. Sannicandro, Esq.
Boyle, Shaughnessy & Campo, P.C.
695 Atlantic Avenue, 11th Floor
Boston, MA 02111

Michael Weinhold, Esq.
Amy Anthony, Esq.
79 Merrimack Street, Suite 302
Lowell, MA 01852



THOMAS J. SANTOLUCITO, ESQ.
(BBO# 640404)
tsantolucito@harmonlaw.com
(617) 558-6199
HARMON LAW OFFICES, PC
150 California Street
NEWTON, MA 02458