5/22/19

NO. 19-82

In the

Supreme Court of the United States

Paul V. Cannon,
Petitioner,
v.
Bank of America, National Association;
Mortgage Electronic Registration Systems, Inc.;
Bank Of New York Mellon, as Trustee for CWABS
Asset-Backed Certificates Trust 2007-9;
Specialized Loan Servicing, LLC,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR WRIT OF CERTIORARI

Paul V. Cannon
Petitioner
256 Winchester Street
Newton, MA 02461
(617) 332-8291

QUESTIONS PRESENTED

1. Taking the allegations in Mr. Cannon's Complaint as true, did the District Court properly dismiss the Complaint for failure to state a claim upon which relief may be granted?

2. If a borrower's loan has been securitized, does he no longer have the right to full disclosure regarding who <u>receives</u> his mortgage payments, in what amounts, and under what terms?

3. If, because of securitization, a borrower's mortgage payments are used in ways which are foreign to the terms stated in the loan documents he executed, are those receiving his money unjustly enriched?

4. Does a borrower remain obligated to the terms and conditions stated in the loan documents if the "lender" and/or its successor(s) breached the obligations on the lender side?

PARTIES TO THE PROCEEDING

Petitioner is **Paul V. Cannon**, a single man living in Massachusetts, the borrower of the subject "mortgage loan" and the Plaintiff / Appellant in the lower tribunals.

Respondents are **Bank of America, National Association** (a debt collecting loan "servicer"); **Mortgage Electronic Registration Systems, Inc.**; (a "straw man" entity created by banks and used to facilitate the securitization of mortgage loans); **Bank Of New York Mellon, as Trustee for CWABS Asset-Backed Certificates Trust 2007-9** (the securitized trustee and trust); and **Specialized Loan Servicing, LLC** (successor to Bank of America as debt-collecting loan "servicer").

TABLE OF CONTENTS

Appendix

TABLE OF AUTHORITIES

<u>Cases</u>

Laws, Statutes & Rules

Other Authorities

JURISDICTION

The First Circuit rendered its decision on February 21, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

OPINIONS BELOW

The United States District Court for the District of Massachusetts granted the dismissal of Petitioner's Complaint on December 12, 2017, in its one-sentence "Order of Dismissal" electronically signed by the clerk of the court.

The United States Court of Appeals for the First Circuit affirmed the District Court's dismissal in its one-paragraph "Judgment" issued February 21, 2019.

PETITION FOR WRIT OF CERTIORARI

Certiorari review is sought in this case involving a securitized loan because both trial and appellate courts failed or refused to apply existing laws that protect the borrower and guarantee full disclosure of the transaction, the parties, and most importantly, how the loan payments are handled. While there are those who assert that securitization changes nothing concerning the "loan" or the "obligations" associated thereto, the fact is that the elements of a securitized loan do not even *remotely* resemble those of a traditional loan. The end result is the total replacement of the "mortgage loan" transaction with a securities transaction that remains hidden from the borrower at all times.

In addition, securitization of mortgage loans virtually always depends upon the involvement of federal agencies and federal laws for the issuance of mortgage-backed securities and the granting of tax exemptions; therefore, mortgage loans are no longer solely a "state-specific" legal matter.

The instant case provides a unique opportunity for the U.S. Supreme Court to weigh in on the problems a borrower faces when attempting to exercise his right to full disclosure, but is told, by foreclosure lawyers and judges, that he "cannot challenge" the very issues that must be proven to determine the amount of the "debt," to whom it is owed, and how that person or entity purportedly became the "creditor" with full authority to enforce and foreclose.

STATEMENT OF THE CASE

On or about April 30, 2007, Petitioner Paul V. Cannon ("Petitioner" or "Mr. Cannon"), a single man living in Massachusetts, executed a Note and Mortgage which, he was led to believe, truthfully described a "mortgage loan" agreement. The party identified in the loan documents as the "lender" was Countrywide Home Loans, Inc. ("Countrywide"), and Mortgage Electronic Registration Systems, Inc. ("MERS") was listed as the "mortgagee" and as the "nominee" of the "lender." Mr. Cannon was never informed that his loan had been "securitized" from its origination, or the ramifications thereof.

In or around March of 2008, the Federal Bureau of Investigation made public its investigation of Countrywide for possible fraud relating to home loans and mortgages. In or around July of 2008, Bank of America ("BANA") acquired the assets and liabilities of Countrywide for a reported $4.1 billion. As part of this acquisition, Bank of America became the "servicer" of the subject loan, and began to submit mortgage statements to Mr. Cannon.

On or about September 22, 2011, an "Assignment of Mortgage" was recorded in Middlesex County, Massachusetts, in which instrument MERS purported to "assign" all its rights, title and interest regarding the Cannon Mortgage "together with the note" to Bank of New York Mellon FKA The Bank of New York ("BNYM") as Trustee for the Benefit of the Certificateholders of the CWABS Inc., Asset-Backed

Certificates, Series 2007-9 (the "securitized trust"). The document was signed by one Richard Paz, claiming to be "Assistant Secretary" of MERS. As is usually the case with such instruments, a copy of this "Assignment" was not supplied to the borrower, Mr. Cannon, at the time it was recorded.

In late 2015, Mr. Cannon, *still current on his loan payments*, began to suspect that there was something improper about his Countrywide loan, that it was not the "plain vanilla mortgage loan" he was led to believe, and thus employed a forensic loan auditing firm to find out what really happened. In the process, Mr. Cannon learned about the method banks use to convert mortgage loans, or more specifically, mortgage *payments*, into mortgage-backed securities, in the process now widely known (but not well understood) as "securitization."

The process of securitizing mortgage loans is what makes these transactions unrecognizable from a traditional "mortgage loan transaction" because, among other things, (a) the funds for the loans are usually obtained from monies solicited from investors by the sale of the securities before the loans even exist (and thus, not from the "lender" identified on the loan documents); and (b) the mortgage payments submitted by the many borrowers on those loans are commingled into a "pool" which has been sliced into "tranches" from which mortgage-backed securities offering various "returns" are derived (instead of being applied toward, and accounted for, the reduction of "principal" and "interest" by the "lender" or its successor, as represented in the loan documents).

Outraged to discover these facts, Mr. Cannon then submitted various letters, including a Qualified Written Request, as authorized under 12 USC § 2605 et seq. (the Real Estate Settlement Procedures Act or "RESPA"), and in accordance with 15 U.S.C. § 1641 et seq. (the Truth in Lending Act or "TILA"), first to Bank of America, and then to Specialized Loan Servicing ("SLS"), who succeeded BANA as the debt-collecting loan "servicer" in or around 2016. NEVER ONCE in any response from either debt collector was Mr. Cannon informed who actually <u>received</u> his mortgage payments, and the terms under which they were distributed. Instead, both BANA and SLS repeatedly alleged that the loan documents were "valid and binding" upon Mr. Cannon, and expressed their intent to continue to enforce them.

Now aware that mere correspondence would not provide an acceptable solution, Mr. Cannon initiated a civil lawsuit in Federal District Court in July of 2016, seeking relief for, among other things, the improper use of his mortgage payments and the various inappropriate acts done, and false statements made, associated therewith. This first lawsuit included several separate causes of action, including one for "Wrongful Foreclosure" which Mr. Cannon went into great detail to explain was brought to *prevent* a foreclosure "sale" which had not yet happened, but also in lieu of a cause titled "Wrongful Attempted Foreclosure" or "Wrongful Threatened

Foreclosure" which Mr. Cannon believed did not exist. Mr. Cannon also raised additional claims under certain Federal laws relating to truth in the lending process and the collection of mortgage debt. Mr. Cannon invoked the jurisdiction of the federal court on the basis of his federal claims, and on diversity of citizenship.

Apparently, the cause of Wrongful Foreclosure before the "sale" had taken place was sufficient for the District Court to grant the dismissal of the entire first Complaint, without prejudice, suggesting that it could be re-filed without including that claim.

In March of 2017, Mr. Cannon filed the Complaint on appeal in this matter. Mr. Cannon removed the cause of action for "Wrongful Foreclosure" but retained claims for violations of the Fair Debt Collection Practices Act; Fair Credit Reporting Act; Misrepresentation, Unjust Enrichment; Civil Conspiracy; Cancellation of Instruments; and added Slander of Title. Mr. Cannon thus invoked the jurisdiction of the Federal District Court by bringing the FDCPA and FCRA claims, as well as citing "diversity of citizenship" as the Defendants were citizens of different states.

Attached to this Complaint were many exhibits, including the full forensic audit, which shows, by way of screenshots from the Bloomberg / "ABSNet" database, the "loan level" details including the various "slices" of the loan pool where Mr. Cannon's loan and payments are found.

Mr. Cannon alleged that the "securitization" of his loan is not the same as a "true sale" of the loan from one legitimate creditor to the next, but instead, is the complete and total replacement of the transaction described in the loan documents with an entirely different transaction, with different parties, rights, obligations, and payment streams. Mr. Cannon alleged that the replacement of the "mortgage loan" transaction with the disguised securities transaction occurred instantly at the origination of his loan, citing as the bases for this allegation that (a) nearly all of Countrywide's loans were securitized; (b) securitization terms require the securitized trusts to obtain "ownership" of the loans within a very short time after origination; and that (c) his mortgage payments were always, from the very beginning, collected on behalf of the undisclosed "investors" who purchased the securities and who were paid "returns" derived from the "pool" of loan payments. In a subsequent Opposition to a Motion to Dismiss, Mr. Cannon cited the California Attorney General in *California v. Countrywide*, CA Superior Ct. No. LC081846 (2008), who confirmed that most of Countrywide's loans were sold "forward" – in other words, before the loans actually existed!

Mr. Cannon further alleged that the routine misapplication of his payments was not only improper, but because of this flaw, (a) he could not be "in default" to any of the recipients of his money; and (b) he could never have legally reduced the amounts of "principal" and "interest" by a single dollar even if he made "timely" and "full" payments for the entire thirty-year term of the loan!

Nevertheless, his opponents, through their attorneys, never actually "answered" the Complaint, but, as if routine, filed a "Motion to Dismiss" under F.R.C.P. 12(b)(6) "failure to state a claim upon which relief may be granted," supported by various legal arguments, always alleging that there was "nothing wrong" with what was done; that Mr. Cannon was still "fully obligated" to comply with the "mortgage loan" contract; that their enforcement of the "debt" was proper based on "possession" of the Note which had been endorsed "in blank;" and that Mr. Cannon had "no standing" to challenge an "assignment" of his Mortgage, or any of the elements of securitization, because he was not a party to those agreements. These arguments were "supported" by references to an "accounting" that purportedly showed amounts of "principal" and "interest" which were paid or still due and owing. However, neither the "accounting" nor any "declarations" filed by the attorneys for BANA, SLS, MERS, and BNYM ever disclosed how Mr. Cannon's payments were distributed, to whom, and in what amounts – even though this was a central issue in dispute – while at all times relevant, BANA, SLS, MERS, and BNYM fully acknowledged that it was for the "benefit" of a securitized trust, or the intended beneficiaries of that trust (the "certificateholders"), that the mortgage payments were collected.

Without scheduling an evidentiary hearing or allowing any discovery to commence, the District

Court again dismissed Mr. Cannon's Complaint, this time with prejudice. See "Order of Dismissal" Appendix p. A-3. At the hearing, Judge Young never reached the merits of the case, or the issues in dispute, but indicated that he had already made up his mind, telling Mr. Cannon "you lose." See Transcript of hearing, p. A-5.

Mr. Cannon appealed to the First Circuit Court of Appeals, but the appellate court affirmed, finding Mr. Cannon's claims "unpersuasive." See "Judgment" p. A-1.

Mr. Cannon petitions for certiorari review by the United States Supreme Court because, as he has now experienced, both the trial court, and the court of appeal, not only made their "rulings" without determining the facts, they also took steps to ensure that the facts would never be discovered, and thus, never entered into the court record. It therefore appears certain that in cases involving securitized loans, the very same courts which do an exemplary job of determining what happened in other matters, somehow "overlook" applicable rules and law, while expressing no interest in finding out what really happened. This is contrary to the purpose of the law as well as the rules of civil procedure. The active denial of justice to borrowers who dare to expose the fatal defects inherent in the securitization process constitutes a dangerous message to all Americans that the private policies of the "too big to fail" banks may have permanently replaced our system of law.

ARGUMENT

A. Pleading standard on a motion to dismiss

Petitioner's Complaint raised serious issues of genuine controversy. The Complaint was neither "frivolous" nor "vexatious" litigation, which are, or should be, essentially the only kinds of cases that the pleading standards are intended to "weed out" of the judicial system.

The controlling case law dealing with pleading standards begins with the general agreement that the allegations of the Complaint are to be taken as true, and in the light most favorable to the Plaintiff. There does not seem to be any case which has stated that the allegations of the Motion to Dismiss are to be taken as true.

In addition, Mr. Cannon verified his Complaint with a sworn statement that the allegations were true, or that he believed them to be true, and was therefore a competent witness with personal knowledge of the events within his control. The Defendants moving to dismiss the Complaint provided no sworn statements or witnesses, and therefore, their pleading contained nothing but hearsay statements by attorneys – persons who had no personal knowledge of any of the facts.

Mr. Cannon was under the impression that an unrebutted Affidavit stood as truth. In the absence of any contradicting sworn statements by any qualified witnesses, Mr. Cannon's sworn and verified allegations should have at least guaranteed him the right to due process until it was *proven* – not just alleged – that his Complaint could not possibly be true under any set of "facts."

Consider the following from *Stubbs vs. Bank of America*, Case No. 1:11-cv-1367-AT, U.S. Dist. Ct., North. Dist. of Georgia:

> "In determining whether a complaint states a claim upon which relief can be granted, courts accept the factual allegations in the complaint as true and construe them in the light most favorable to the plaintiff. *Hill v. White*, 321 F.3d 1334, 1335 (11th Cir. 2003). To survive a motion to dismiss, a complaint must allege facts that, if true, "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1949 (2009) (quotation marks omitted). A claim is plausible where the plaintiff alleges factual content that 'allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.' *Id.* The plausibility standard requires that a plaintiff allege sufficient facts 'to raise a reasonable expectation that discovery will reveal evidence' that supports the plaintiff's claim. *Bell Atlantic Corp. v. Twombly*, 550 U.S.

544, 556 (2007)."

Even the oft-cited *Twombly* decision favors the Plaintiff's claims, as it refers to ***discovery*** that would prove elements of the case. Discovery never commenced by virtue of the District Court's premature and erroneous dismissal, but if it had commenced, there was more than a reasonable chance that the facts and information discovered would have proven, at a minimum, that Mr. Cannon's mortgage payments were handled in a manner far different from the representations made in the loan documents. This one element would then lead to the related conclusions derived therefrom. As the saying goes, "just follow the money."

Clearly, Mr. Cannon's Complaint made several well-founded allegations which, if taken as true, stated several claims upon which relief could be granted.

B. Securitization is Based on the "Pooling" of Mortgage Payments from Many Borrowers, then Paying "Returns" Derived from "Slices" of that Pool to Investors who are Not Contractually Connected to the Borrowers

The fact that a borrower's monthly mortgage payments are commingled with many other borrowers' payments, then paid out in ways which are foreign to the terms and conditions of the "mortgage loan" instruments, has far-reaching consequences. This single issue may be the reason the Courts seem so reluctant to allow any discovery, or to even express the need to determine the truth of the controversy so that justice may be done.

However, Mr. Cannon believes that he, just as any borrower, has the right to know exactly what happened with his money after he submitted his mortgage payments.

The arguments against this right of the borrower typically stem from allegations that the borrower "is not a party" to the third-party "contracts" such as the securitized trust agreements. However, this type of argument not only destroys the purpose of all fair lending laws, both state and federal, but additionally, constitutes an attempt to conceal illegal behavior by claiming that the existence of a third-party contract somehow "insulates" all the acts and the parties from any challenges by the borrower – never mind that these are the same parties who still collected, received and/or benefitted from the borrower's payments. But laws meant to prevent fraud should not be manipulated so as to facilitate fraud.

Mr. Cannon went into great detail to explain why the routine misapplication of his mortgage payments is improper; invalidates the "mortgage loan" "contract;" and unjustly enriches those who have received some or all of his payments. Mr. Cannon further explained why the failure to disclose the full truth about how his money was handled when he made mortgage payments – as well as the false information and "statements" submitted to conceal the truth – constituted misrepresentation.

Mr. Cannon fully expected the attorneys for the financial Defendants to put forth specious legal arguments, because, after all, if the truth were told, the attorneys, and their clients, are probably in trouble. However, Mr. Cannon did not expect the judges who oversaw his case to so quickly want to dispose of it that they actively resisted allowing the truth or the facts to become part of the record.

The only Judge Young could have properly dismissed Mr. Cannon's Complaint is to have made a determination that none of his claims had any merit at all. The Transcript record of the dialog from Judge Young at the December 12, 2017 hearing on the Motion to Dismiss is literally embarrassing, or it should be, for anyone with even a minor understanding of the purpose of the courts. Appendix, A-5.

Clearly, Judge Young was not willing – and probably not able – to explain why the commingling of Mr. Cannon's mortgage payments in a "pool" then having "returns" paid out to undisclosed investors from "slices" of the "pool" was no different than if a bank which had loaned him the money received the payments and accounted for them as "repayment of principal" and "interest income" on its books and records for tax purposes. Judge Young's simple conclusion was "you lose."

The Court is not a casino. The Plaintiff does not make a bet and wait on a roll of the dice to see if he "wins" or "loses." It is supposed to be a legal process of finding the truth, so that justice may be done.

Mr. Cannon would ask, how can a court make a ruling on a dispute without knowing the facts itself? And yet, every element of the subject "obligation" hinges on a true and correct accounting for the loan payments. Mortgage "statements" rely on paid and unpaid amounts of "principal" and "interest." The enforcement by way of foreclosure may only proceed after a "default" occurs. And a "default" may only take place if the "lender" or its successor has complied with the obligations on the lender side of the loan "contract."

But what if "default" under the loan documents is impossible? What if, as Mr. Cannon asserts, there is no legitimate "creditor" who can legally cancel the Note, record a "satisfaction of mortgage" and convey clear, unencumbered title to the property if he were to pay off the "debt" entirely?

Mr. Cannon contends that the banks have *knowingly* created a defective process with this "securitization," for the many ways that it benefits them. In many ways, the defects constitute totally illegal acts, such as the replacement of the "mortgage loan" transaction with a disguised securities transaction; or the representations made to U.S. government agencies about the manner in which loans will be "acquired" by the securitized trusts, but then taking a totally contrary position for the purpose of foreclosure.

Mr. Cannon asserts, just as F.R.C.P. 8(e) states, that his pleading should have been construed "so as to do justice." Our courts are not charged with a duty to prevent the truth from becoming public, regardless of claims that banks are "too big to fail." In any instance, a borrower who has the right to know what happened to his money, certainly deserves better than to be told "you lose" by a judge who has taken an oath to "faithfully and impartially" discharge his duty to administer justice "without respect to persons."

Therefore, under the pleading standards expressed in section A above, if the allegations in Mr. Cannon's Complaint were taken as true, and his mortgage payments were, indeed, applied toward a securities transaction under different terms and conditions than he agreed to, instead of exactly as required in the loan documents, wouldn't this fact lead any reasonable person to conclude that the person(s) or entity(ies) who received that money was/were unjustly enriched by it? Wouldn't a reasonable person conclude that the false statements made concerning the application of payments toward "principal" and "interest" or amounts thereof still due and owing constitute misrepresentations?

C. Securitized Loans Differ from Traditional Loans in Every Aspect

Most people still do not fully understand what the process of "securitizing" mortgage loans entails. They are told that mortgage loans are now "bundled" together and sold on Wall Street like stocks and bonds. In truth, securitization involves a complicated procedure which requires lengthy disclosures and an approval process by government regulatory agencies concerning the sales of such investment vehicles and the "tax exempt" status they seek.

The method most commonly utilized to "securitize" mortgage loans necessitates that the facts relating to (a) the funding of the loan, and (b) the application of the borrower's payments, among other things, be concealed from, or misrepresented to, the borrower for reasons that become apparent when "securitized" loans are compared with "traditional" loans:

► In a "traditional" mortgage loan, the funds are provided by the lender. Thus, the borrower owes the money to the lender. But in a "securitized" loan, the party named as the "lender" on the loan documents is, more often than not, merely a "third party originator" who is paid a fee to obtain borrowers' signatures on loan documents. The funds for the loan come from monies solicited from secondary-market investors who purchased mortgage-backed securities before the loans ever existed. The money for the loan is eventually wired to the local escrow agent from an investment bank (sometimes referred to as a "warehouse lender") with a separate set of closing instructions that are not disclosed to the borrower. In this instance, the borrower never really "owes" anything to the "lender" named in the loan documents. It was on this basis that California Attorney General Edmund G. Brown, in *California v. Countrywide*, confirmed that securitized loans are sold "forward," or, in other words, before the borrower even signs the loan documents.

► In a "traditional" mortgage loan, the loan transaction is completely and truthfully disclosed. In a "securitized" loan, the transaction described in the loan documents never takes place, and instead, a disguised securities transaction, which is not disclosed to the borrower, replaces it.

► In a "traditional" mortgage loan, the parties to the transaction are properly identified. In a "securitized" loan, the parties to the actual transaction are not disclosed in the loan documents.

► In a "traditional" mortgage loan, the rights & obligations of the parties are accurately described. In a "securitized" loan, the rights & obligations of the parties are falsely stated in the loan documents.

► In a "traditional" mortgage loan, the lender has a legal "lien" on the property "secured" by the loan. This is evidenced by the lender being named the "mortgagee" (or "beneficiary") in the property records where the mortgage (or deed of trust) is recorded. In a "securitized" loan, the third party originator may be listed as "lienholder" until foreclosure commences (often by another entity), at which time, foreclosure documents such as an "assignment" of the mortgage are fabricated to create the appearance that the loan has been "transferred" to the foreclosing entity.

► In a "traditional" mortgage loan, the borrower deals directly with the lender. In a "securitized" loan, the Borrower deals only with a debt collector (called a loan "servicer"), and in fact, is most often denied direct contact with the person or entity that provided the funds.

► In a "traditional" mortgage loan, the borrower's payments are made to, and received by, the lender. In a "securitized" loan, the borrower's payments are paid to the debt-collecting loan "servicer" for the "benefit" of the ultimate recipients of the funds: undisclosed Wall Street investors who have no contractual connection to the borrower.

► IN WHAT IS POSSIBLY THE MOST CRITICAL PROBLEM IN THE SECURITIZATION PROCESS: In a "traditional" mortgage loan, the Lender applies mortgage payments toward "principal" and "interest" by accounting for the amounts of "repayment of principal" (not taxed) and "interest income" (fully taxable) as "receivables" on its books and records for tax purposes, thus reducing those amounts from each payment submitted by the borrower. In this way, the borrower may pay off his loan to a legitimate "creditor" who, upon payment in full, is legally authorized to (a) cancel the note and deliver it to the borrower; (b) record a "satisfaction of mortgage" in the property records; and (c) release its "lien" and convey clear, unencumbered title of the property to the borrower – which are the only reasons the borrower applies for the loan in the first place. In a "securitized" loan, the borrower's payments are commingled in a "pool" of payments from many other borrowers, and then paid out to investors as "returns" under terms & conditions which are totally different than those stated in the loan documents. Under this scenario, NO ONE accounts for the amounts of "repayment of principal" and "interest income" as receivables on his/its books and records for tax purposes. What this means is the borrower does not, and cannot, reduce the amounts of "principal" and "interest" from any amount of payments submitted, which naturally means the loan cannot ever be paid off in this manner. It also means that the borrower is making payments to parties who (a) cannot "cancel" the note; (b) have no authority to record the "satisfaction of mortgage" in the property records; and (c) cannot legally convey title of the property to the borrower, because they have no interest in the property to convey.

► In a "traditional" mortgage loan, if the borrower fails to make payments, the lender suffers "damage" and, if a specifically-stated number of payments are missed, the lender may declare that the loan is in "default." In a "securitized" loan, if the borrower fails to make payments, the secondary-market investors do not suffer "damage" in the same way a lending bank does (possibly suffering no damage at all because of various "guarantees" included with the securities), and therefore, these investors have no legal right to claim a "default" exists.

► In a "traditional" mortgage loan, the lender may legally foreclose if the loan is not repaid. In a "securitized" loan, the recipients of the borrower's money (secondary-market investors) have no legal right to foreclose; for this reason, foreclosure of "securitized" loans is routinely pursued by unauthorized parties represented by "foreclosure mill" law firms who have made a science of misrepresenting facts, concealing truth, fabricating evidence, and twisting both the meaning and intent of the law as "expedient" measures in order to facilitate the unlawful taking of property from the homeowner.

Massachusetts courts have made rulings based on some of the defects in the securitization process, such as the failure to comply with the "A-B-C-D" chain of "true sale" transfers required by the trust agreements; and the "closing date" requirement which mandates that all loans be properly transferred through the above chain before the start of business, i.e., before the first "returns" are paid out, usually within 30-60 days of issuance of the securities. For example, in *U.S. Bank v. Ibanez*, 458 Mass 637 (2011), the Massachusetts Supreme Court examined two non-judicial foreclosures of securitized loans by banks who subsequently filed judicial actions for clear title. In each instance, the banks were denied title because they could not prove legal authority for the foreclosure they had already conducted. As the loans were securitized, the banks were required to provide some showing of how loans are "transferred" into the trusts; thus, "Pooling and Servicing Agreements" and/or "Private Placement Memorandums" were examined by the Court, and the required chain of transfers was clearly indicated as an essential, express condition for the operation of the trust.

In reviewing the Ibanez foreclosure, the Court stated:

> "According to the PPM, '[e]ach transfer of a Mortgage Loan from the Seller [Lehman Brothers Holdings Inc.] to the Depositor [Structured Asset Securities Corporation] and from the Depositor to the Trustee [U.S. Bank] will be intended to be a sale of that Mortgage Loan and will be reflected as such in the Sale and Assignment Agreement and the Trust Agreement, respectively.' The PPM also specifies that '[e]ach Mortgage Loan will be identified in a schedule appearing as an exhibit to the Trust Agreement.'
>
> However, U.S. Bank did not provide the judge with any mortgage schedule identifying the Ibanez loan as among the mortgages that were assigned in the trust agreement."

It should also be noted that there was no series of "assignments" of the Ibanez mortgage through the chain of Originator-Seller-Depositor-Trust.

The other foreclosure, by Wells Fargo, was examined in the same way, and, as in the Ibanez matter, authority could not be proven through the securitization requirements. Concluding that none of the foreclosures were valid, the *Ibanez* Court explained its reasoning, and cited another Massachusetts case on point:

"Where a plaintiff files a complaint asking for a declaration of clear title after a mortgage foreclosure, a judge is entitled to ask for proof that the foreclosing entity was the mortgage holder at the time of the notice of sale and foreclosure, or was one of the parties authorized to foreclose under G.L. c. 183, § 21, and G.L. c. 244, § 14. A plaintiff that cannot make this modest showing cannot justly proclaim that it was unfairly denied a declaration of clear title. See *In re Schwartz*, 366 B.R. 265, 269 (Bankr. D. Mass. 2007) at 266 ('When HomEq [Servicing Corporation] was required to prove its authority to conduct the sale, and despite having been given ample opportunity to do so, what it produced instead was a jumble of documents and conclusory statements, some of which are not supported by the documents and indeed even contradicted by them').

Interestingly, Massachusetts Attorney General Martha Coakley filed an "Amicus" brief in the *Ibanez* case, in favor of denying title to the banks, as well as ordering them to pay all the costs related to the frivolous actions, on the basis that both foreclosures were void under the law because, among other reasons, they "lacked valid assignments." Ms. Coakley stated in her brief:

> "Having profited greatly from practices regarding the assignment and securitization not grounded in the law, it is reasonable for them to bear the cost of failing to ensure that such practices conformed to Massachusetts law."

Ms. Coakley's Amicus brief in *Ibanez* was filed less than one year before she initiated a lawsuit on behalf of the Commonwealth of Massachusetts against Bank of America (and the other "too big" banks) for unfair and deceptive practices directly related to the fraudulent, unauthorized foreclosures resulting from the defective securitization process.

In *Horace vs. LaSalle Bank*, Alabama Circuit Court Case No. CV-08-362, Judge Albert L. Johnson ruled that the subject trust, which in that case did not receive physical possession of the loan assets by the Agreement's cut-off date, could not foreclose, nor could it "transfer" the authority to foreclose to any other entity or person as it lacked this authority itself. The court stated:

> "The court is surprised to the point of astonishment that the defendant trust

> (LaSalle Bank National Association) did not comply with the terms of its own Pooling and Servicing Agreement and further did not comply with New York law in attempting to obtain assignment of plaintiff Horace's note and mortgage. Horace is a third-party beneficiary of the Pooling and Servicing Agreement created by the defendant trust. Indeed without such Pooling and Servicing Agreements plaintiff Horace and other mortgagors similarly situated would never have been able to obtain financing." (p. 1)
>
> "Consequently…[the] defendant trust (LaSalle Bank National Association) is permanently enjoined from foreclosing on the property…." (p. 2)

As one continues to dig deeper, the fraud becomes even more evident. If, as Mr. Cannon suggests, the loan documents themselves do not describe the actual transaction which occurred, or the parties to the transaction, or the rights and obligations of the parties, the loan documents, taken together, do not constitute a valid "contract" under Massachusetts contract law.

Massachusetts has, as do most states, statutory requirements that determine whether a contract is valid, void, voidable, or unenforceable. Under the Massachusetts Statute of Frauds, M.G.L. c. 259, contracts must, at a minimum, (a) be in writing; (b) correctly identify the parties; (c) contain an accurate description of property; (d) be based on lawful consideration; and (e) must be signed by the party to be charged. The Statute contains several bases for rescission, including misrepresentation, fraud, and undue influence or duress; and conditions for termination that include "impossibility of performance."

The banks attempting to collect and enforce the "obligation" against Mr. Cannon continue the common practice of repeatedly pushing the enforcement of the loan "contract" by stating to the borrower that the loan documents remain "fully enforceable" when, in fact, they were likely never enforceable under Massachusetts contract law:

► There was never any "lawful consideration" as stated in the loan documents (even though money was made available), because the party identified as the "lender" did not lend the money, and was therefore never owed the "debt."

► The transaction itself – the securitization transaction, which is the ONLY transaction that ever happened – was never fully disclosed.

► Obviously, if the transaction was misrepresented, then neither were the parties to the transaction properly identified, as the law requires.

► The requirement that the "lender" (or its "successor") "apply" the borrower's payments toward the reduction of "principal" and "interest" (which only a legitimate creditor can do) never took place, because the borrower's payments were used to pay undisclosed investors under the securitization terms, without the borrower's knowledge or permission.

► The fact that the borrower can never pay off, or even pay *down*, any amount of the "obligation" in the manner stated in the loan documents constitutes "impossibility of performance" and grounds for termination.

► Likewise, the stated "lender" in the loan documents cannot ever "apply" the borrower's payments toward "principal" and "interest" as required, because that "lender" is not owed the debt, and thus, will not, and in fact ***cannot***, tender mortgage payments as "receivables" on its books and records for tax purposes. This also constitutes "impossibility of performance" and is grounds for termination, as well as fraud.

As if all of this weren't enough already, there is one more element of securitization which seems to have been overlooked by litigants and courts alike – probably because it is hidden in the hardest place to see it: in plain view – but which should be enough to stop this massive fraud in its tracks, because the result is not only waves of wrongful foreclosures, but massive fraud upon the Federal Government in virtually every instance of securitization of mortgage loans.

The concept is "pass-through." Like a "pass-through" corporate entity, such as a limited liability company.

Sometimes, the phrase "pass-through" actually appears in the name of the securitized trusts, or in the title of the "certificates" issued by the trusts, or both. Sometimes it does not appear, but is still a necessary element of securitization.

The reason for this, in short, is the tax exemption granted the trust in this status. A securitized trust primarily operates as a Real Estate Mortgage Investment Conduit, or "REMIC," and as such, it is not the trust, but the holders of the certificates (the "residual interests"), who are liable for taxes on the "income" distributed from the pooled assets.

What this means should give anyone pause. **As a pass-through entity, the securitized trust cannot legally account for the mortgage payments as "interest income" and "repayment of principal," and therefore, cannot legally own the mortgage loans it lists as the "pooled" assets in the securities offerings.**

Yet, many – possibly millions – of foreclosures have been conducted, and completed, on behalf of these "pass-through" trusts which are, by their own admissions in documents filed with U.S. government agencies, legally prohibited from owning the loans they are supposedly foreclosing!!

Federal District Judge Christopher A. Boyko in *In re*

Foreclosure Cases, Nos. 1:07-cv-2282 et al., in the United States District Court, Northern District of Ohio, Eastern Division, addressed this situation in 2007 when he stated:

> "Neither the fluidity of the secondary mortgage market, nor monetary or economic considerations of the parties, nor the convenience of the litigants supersede [the court's] obligations." (pp. 4-5)

> "...unchallenged by underfinanced opponents, the institutions worry less about jurisdictional requirements and more about maximizing returns. Unlike the focus of financial institutions, the federal courts must act as gatekeepers, assuring that only those who meet diversity and standing requirements are allowed to pass through." (p. 5)

> "Counsel for the institutions are not without legal argument to support their position, but their arguments fall woefully short of justifying their premature filings, and utterly fail to satisfy their standing and jurisdictional burdens. The institutions seem to adopt the attitude that since they have been doing this for so long, unchallenged, this practice equates with legal compliance. Finally put to the test, their weak legal

> arguments compel the Court to stop them at the gate." (pp. 5-6)
>
> "The 'real party in interest' rule, to which the Plaintiff-Lenders continually refer in their responses or motions, is clearly comprehended by the Court and is not intended to assist banks in avoiding traditional ... requirements." (p. 5)

Therefore, discovery should have been required as a necessary element in the instant matter, to prove the facts. In *Lee vs. Equifirst et al.*, Case No. 3:10-cv-809, Judge Aleta A. Trauger in the United States District Court for the Middle District of Tennessee, Nashville Division, stated:

> "...although the plaintiff does not argue that she needs time for additional discovery, the court believes that the defendant's Motion for Summary Judgment is premature. The parties have not had a full and fair opportunity to engage in discovery. In fact, a discovery deadline has not even been set in this case, for various reasons apparent in the case record. Given the apparent lack of transparency regarding which defendant owned the plaintiff's loans at any given time, the court believes that it would be inappropriate to resolve the instant factual issue

before the close of discovery." (p. 9)

> "The court finds that, at least at this stage in the litigation, the plaintiff's documents are sufficient to create a genuine issue for trial regarding when EquiFirst sold the loans. Significantly, the defendant's sole piece of evidence is the self-serving declaration of its own employee...." (p. 8)

With all the evidence provided by Mr. Cannon, was there not even one single issue of genuine controversy? How did District Court Judge William G. Young determine that NONE of Mr. Cannon's claims had merit, when he could not have made that determination for himself? And, could this be the same Judge William G. Young who, just a few short years ago, wrote the following in *Culhane v. Aurora Loan Services of Nebraska*, 826 F.Supp.2d 352 (2011)?

> "...when I joined the district court bench over a quarter century ago, ... even then a "sea-change" was taking place among federal trial judges. Many no longer perceived their primary tasks as deciding motions after oral argument and presiding as neutral referees at trials. They were encouraged to consider themselves managers whose job was to dispose of cases expeditiously. From that perspective trials came to seem

wasteful.

Today, the conception that the judge is primarily an actual law teacher during court proceedings is held only by a shrinking minority. One judge at least has the courage to tell it like it is:

[There] is a change in the very culture of the United States District Court. It is no longer a trial court in many parts of the country. I have said it and I mean it, but it functions more like a state highway department. They will not try cases. More fundamentally, they will not set the cases for trial because the parties will mediate this case, and if I do not set it for trial, eventually it will settle. And settlement is a better reconciliation, because this is about relationships.

No it is not! It is about property, it is about money, and it is about serious disputes that are vital to the economy and need to be resolved fairly and straight up.

Patrick E. Higginbotham, EDTX and Transfer of Venue, 14 SMU Sci. & Tech. L. Rev. 191, 197 (2011).

Out of focus, we in the district courts

> are managing ourselves into oblivion. The larger consequences of the loss of focus on our core judicial responsibility and its tragic consequences for American democracy are detailed in Robert P. Burns, The Death of the American Trial (2009).

Thus, the dismissal of Mr. Cannon's Complaint is another travesty that had nothing to do with serving the interests of justice. If the courts truly have become nothing more than traffic cops, the American People should at least be informed of this transition, so that they could react accordingly.

REASONS FOR GRANTING THE PETITION

Mr. Cannon's loan was securitized in the usual way – which means the loan documents are false; the mortgage payments he submitted were routinely misapplied; and the banks and their attorneys continue to lie about it all, with only one goal in mind: to take his house from him – *illegally*.

Mr. Cannon's Complaint is an articulate, well-founded pleading that is far from "frivolous." It even contained a full forensic audit, supported with an Affidavit by the auditor; so, Mr. Cannon essentially had an "expert witness" with him in support of his claims. And finally, Mr. Cannon verified his Complaint with a sworn statement before a notary. His sworn statements were never rebutted by any witness with personal knowledge presented by the

Defendants.

However, Mr. Cannon, as the borrower, obviously does not have access to the financial books and records of the entities who handled his payments. If the Court was unsure that Mr. Cannon's claims of misapplied payments were, indeed, true, then it could have allowed discovery to commence, or scheduled an evidentiary hearing, or both.

Instead, the District Court was apparently swayed by members of an entire industry in which unauthorized foreclosures of securitized loans are prosecuted by highly-paid law firms – in other words, attorneys who know exactly what laws they are breaking, but do it anyway. Papers with outright false statements were filed in the instant case which contain the signatures of attorneys who have taken oaths promising not to do what they are guilty of doing on a daily basis. Obviously, these attorneys do not fear any repercussions from the many violations of the rules of professional conduct...at least, not at the moment.

In any event, Judge Young should have explained why Mr. Cannon no longer had a right to full disclosure of the financial details concerning his loan payments – a right he was guaranteed at the time of origination, by both state and federal law. Judge Young could have informed Mr. Cannon why the strangers who received his payments were not "unjustly enriched" instead of insulting him with the statement, "you lose."

Alas, just like the Savings & Loan scandal of the 1980's, where over 400 corporate executives went to prison; and just like the huge class-action lawsuit against big tobacco, the truth must, and will, eventually come out into the light and expose this securitization scam as the biggest fraud ever perpetrated upon the People of the United Sates in our entire history. It has certainly resulted in the largest transfer of wealth and property. As Thomas Jefferson once said:

> "If the American people ever allow private banks to control the issue of their currency, first by inflation, then by deflation, the banks and corporations that will grow up around them will deprive the people of all property until their children wake up homeless on the continent their Fathers conquered."

It seems that securitization of mortgage loans could be the method by which the banks are attempting to make America homeless, fulfilling Jefferson's words.

Therefore, the Supreme Court should take this opportunity to help create uniformity in foreclosures nationwide, restore order to our judicial system, and send an appropriate message to the attorneys helping the criminal banking enterprise that the private policies of banks will never permanently replace the American system of law and justice.

CONCLUSION

The Court should grant the Petition.

Respectfully Submitted,

Paul V. Cannon
256 Winchester Street
Newton, Massachusetts 02461
(617) 332-8291
Specializedrepair8@gmail.com
Petitioner

July 12, 2019.