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November 13, 2009

Via Lawyers Service
OCEAN COUNTY SUPERIOR COURT
CHANCERY DIVISION
ATTN: Frank A. Buczynski, Jr.
206 Courthouse Lane, 1st Floor
Toms River, New Jersey 08754

RE: The Bank of New York as Trustee etc. v. Wolf, et al.
Docket No. F-12418-08

Your Honor:

Please accept this letter brief in reply to plaintiff's opposition to defendant's motion to vacate the default judgment and permit an answer to be filed.

1. As a threshold matter, any purported facts set forth in plaintiff's letter brief must be stricken. Evidence cannot be submitted in support of a motion without a certification, pursuant to R. 1:6-6. Specifically, the Rule provides that factual evidence submitted in support of a motion where the facts do "not appear of record or not judicially noticeable [may be submitted to the court through] *affidavits* made on personal knowledge" (emphasis added). The affidavit must set forth "only facts which are admissible in evidence to which the affiant is competent to testify." Id. Here, plaintiff's attorney merely asserts facts in his letter brief with no affidavit at all, much less an affidavit by a person with personal knowledge of the facts.

2. Plaintiff misstates the standard for granting a motion to vacate default pursuant to R. 4:50-1. The Rule permits a court to set aside a judgment for any one of six separate reasons, set forth in subsections (a) through (f) of the Rule. Only one of those subsections, subsection (a), requires a showing of excusable neglect and a meritorious defense.

Pursuant to subsection (d) of the Rule, a void judgment may be vacated without a showing of excusable neglect or a meritorious defense. It is axiomatic that a void judgment is unenforceable. See, e.g., Garza v. Paone, 44 N.J. Super. 553, 557 (App. Div. 1957) (void judgments are "of no legal effect for any purpose"); See also Berger v. Paterson Veteran's Taxi, 244 N.J. Super. 200 (App. Div. 1990). Courts have sustained void judgments "only where the equitable doctrines of estoppel and reliance strongly compel such an

anomalous result[,]" Sonderman v. Remington Const. Co., Inc. 127 N.J. 96, 114 (1992) (Stein, J., concurring). No equities support the recognition of the default judgment entered here.

The judgment here is void (as set forth more fully in defendant's moving papers) because plaintiff failed to submit the proofs required in order to obtain a default judgment of foreclosure. Most significantly, plaintiff presented defective proofs as to the alleged indebtedness to plaintiff and as to plaintiff's purported security interest in the property. Plaintiff's inadequate proofs completely belie plaintiff's assertion that it has met its prima facie foreclosure case. Contrary to plaintiff's statement in its opposition, at no time did defendant "readily admit" that plaintiff ever made a prima facie case that it is entitled to foreclose. Exactly the opposite is true: defendant has shown that the judgment erroneously entered despite a complete absence of evidence proving this plaintiff had any right to bring this action.

3. With respect to subsection (a) of Rule 4:50-1, it is clear that Defendant has shown both the existence of excusable neglect and a meritorious defense. For purposes of vacating a default, the New Jersey Supreme Court has recognized that to be considered "meritorious" a defense need not be guaranteed to be successful, but must be at least arguably "worthy of judicial determination." O'Connor v. Altus, 67 N.J. 106, 109 (1975) (vacating entry of default pursuant to R. 4:43, where the defense "while perhaps tenuous" was "at least arguable"). Defendant has more than met this burden.

Plaintiff's own submission further supports defendant's argument that the loan violates the New Jersey Home Ownership Security Act (HOSA). The document titled "New Jersey High Cost Worksheet" attached to its letter brief should be deemed produced by plaintiff and constitutes an admission that the loan violates HOSA. This is so for two reasons. First, on its face, the document begins with a "Result Summary" that states:

CONCLUSION: This loan violates NEW JERSEY HIGH COST due to FEES.

Plaintiff states (without an appropriate certification) that the HOSA violation was cured by reducing the broker's fee by $508.00. That statement – even if taken as true -- simply does not explain the calculations on the document in a manner that allows the Court to determine whether plaintiff made adjustments sufficient to negate the HOSA violation. One would imagine that had plaintiff corrected this significant violation of New Jersey law, plaintiff would have documented the correction in its files. Yet plaintiff failed to provide the court with any such correction.

Second, even if the plaintiff reduced the fee to the broker in order to compensate for a $508.00 overage, the loan still violates HOSA as shown by plaintiff's document. Specifically, plaintiff argues that the prepayment penalty should be excluded from the calculation of points and fees because it is equal to a conventional prepayment penalty. Simple mathematics show that plaintiff's calculations are wrong.

On the first page of the New Jersey High Cost Worksheet, in the section marked "NJ DISCOUNT/PPP EXCLUSION" the document requires an input for the maximum prepayment penalty as [E], and for 2% of the Maximum Principal[1] as [F]. Then the document states:

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[1] Using 2% of the "maximum principal" to determine the conventional prepayment penalty is inappropriate. HOSA defines a conventional prepayment penalty as 2% of the "amount prepaid." There is no justification for using the speculative, theoretical maximum principal amount in this calculation.

> If [E] is GREATER THAN [F], the loan does not have a Conventional Prepayment Penalty, and [E] may NOT be excluded from Points and Fees.
>
> If [E] is LESS THAN OR EQUAL TO [F][] [E] may be excluded from Points and Fees.

Plaintiff's document then erroneously indicates that both [E] and [F] are equal to $5,251.54. Having determined that [E] and [F] were equal, Plaintiff treats the prepayment penalty as if it were conventional, and excludes it from the points and fees calculation (see "FEE TEST" section d on the second page of the document).

However neither [E] nor [F] can be $5,251.54 as a mathematical matter. In fact, the maximum prepayment penalty is thousands of dollars greater than any of (1) $5,251.54, (2) an actual conventional prepayment penalty and (3) 2% of the maximum principal.

As for the [F] input, it is completely unclear how Plaintiff came up with $5,251.00 as the conventional prepayment penalty. HOSA defines a conventional prepayment penalty as:

> Any prepayment penalty or fee that may be collected or charged in a home loan, and that is authorized by law other than by thia act, provided the home loan (1) does not have an annual percentage rate that exceeds the conventional mortgage rate by more than two percentage points; and (2) does not permit any prepayment fees or penalties that exceed two percent of the amount prepaid.

The chart below indicates a conventional prepayment penalty based on 2% of original note amount and based on 2% of the maximum principal.

	Principal		x 2%
Original Loan Amount:	$ 240,000.00	$	4,800.00
Maximum Loan Amount with Negative Amortization (115% of Original Loan Amount):	$ 276,000.00	$	5,520.00

The plaintiff's figure, $5,251.54, is 2% of $262,577.00, a number that does not appear to relate to anything in the loan documents.

Next, for the [E] input, plaintiff inexplicably states on its New Jersey High Cost Worksheet that the maximum prepayment penalty for this loan is $5,251.54, but the calculation of $5,251.54 as the maximum prepayment penalty due under the note is also mathematically incorrect. To reiterate, the prepayment penalty called for by the prepayment penalty addendum to the note reads as follows:

> If within the first THIRTY SIX months after the execution of this Note, I make prepayment(s), the total of which exceeds twenty (20) percent of the original principal amount of this Note, 'I agree to pay a Prepayment Penalty in an amount equal to the payment of six (6) months' advance interest on the amount by which the total of my prepayment(s) during the twelve (12) month period immediately preceding the date of the prepayment exceeds twenty (20) percent of the original Principal amount of this Note. Interest will be calculated using the rate in effect at the time of prepayment.

Hence, a prepayment penalty is charged when (1) the prepayment is made within thirty-six months of the loan closing and (2) the prepayment is at least 20% of the original principal amount. The amount of the prepayment penalty under the note is six months' advance interest on the prepaid amount that exceeds 20% of the original loan amount. HOSA includes in the definition of "points and fees" "the maximum prepayment penalty that may be charged under the terms of the loan documents."

The chart below illustrates that no conceivable interpretations of the prepayment penalty clause results in a maximum prepayment penalty of or even close to the $5,251.54 that plaintiff used in its calculation.[2]

	Principal	6 Months' Interest @ 8.125%	Month 1	Month 2	Month 3	Month 4	Month 5	Month 6
Original Loan Amount:	$ 240,000.00	$ 9,733.91	$ 1,625.00	$ 1,623.94	$ 1,622.87	$ 1,621.79	$ 1,620.70	$ 1,619.61
80% of Original Loan Amount:	$ 192,000.00	$ 7,787.12	$ 1,300.00	$ 1,299.15	$ 1,298.29	$ 1,297.43	$ 1,296.56	$ 1,295.69
Maximum Loan Amount with Negative Amortization (115% of Original Loan Amount):	$ 276,000.00	$ 11,194.00	$ 1,868.75	$ 1,867.53	$ 1,866.30	$ 1,865.06	$ 1,863.81	$ 1,862.55
80% of Maximum Loan Amount with Negative Amortization:	$ 220,800.00	$ 8,955.20	$ 1,495.00	$ 1,494.02	$ 1,493.04	$ 1,492.05	$ 1,491.05	$ 1,490.04

Under any interpretation, the maximum prepayment penalty far exceeds all three of (1) two percent of the note amount ($4,800.00); (2) two percent of the maximum principal that could be charged under the note ($5,520.00), and (3) the $5,251.54 inexplicably used in plaintiff's calculations. As such, the prepayment penalty cannot be a "conventional prepayment penalty," and by plaintiff's own admission must be included in the "points and fees." Using plaintiff's own worksheet, the loan is undoubtedly a "high cost loan" under HOSA.

Significantly, the above analysis illustrates that the loan documents are inherently complicated and the HOSA defense not readily apparent to a lay-person (or even many lawyers). As such, it is entirely reasonable that Mr. Wolf was not immediately aware of the HOSA violation, and these inherent obstacles

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[2] One can determine that plaintiff must have calculated the monthly interest as roughly $875.26, because $5,251.54 divided by six is $875.26. The Court may take judicial notice of these calculations because they are readily replicable using any mortgage calculator. The calculator used to develop this chart can be found at http://www.bretwhissel.net/cgi-bin/amortize

demonstrate why Mr. Wolf's delay in recognizing (and therefore asserting) the defense was "excusable neglect."

4. Mr. Wolf's motion to vacate the default is also appropriately granted pursuant to R. 4:50-1(f), in the interest of justice, another subsection of the rule that does not require a showing of excusable neglect. In enacting HOSA, the New Jersey Legislature made clear the State's strong public policy of eradicating predatory lending as evidenced not only by HOSA's preamble, but also by the harsh penalty imposed for its violation. Where, as here, a HOSA violation becomes apparent, the Court should allow the case to be determined on its merits based on the significant public policy at stake, particularly in the midst of this foreclosure crisis.

5. If the judgment is not vacated, plaintiffs deprive not only Mr. Wolf, but Mr. Wolf's other creditors of their share of Mr. Wolf's bankruptcy estate. As set forth in Mr. Wolf's moving papers, Mr. Wolf filed a Chapter 7 bankruptcy on or around April 16, 2009 and received a discharge in or around August, 2009. Unaware of the HOSA claim, Mr. Wolf did not schedule it as an asset in his bankruptcy petition. This office has notified the Chapter 7 trustee, Andrea Dobin, of Mr. Wolf's potential HOSA claim. (See Supplemental Certification of Rebecca Schore, Exhibit A). If the judgment is vacated, the bankruptcy will be reopened, and the proceeds of the HOSA claim will be subject to the claims of Mr. Wolf's unsecured creditors. A failure to vacate the judgment inappropriately deprives any innocent creditors of payment in favor of the plaintiff, regardless of plaintiff's culpability for HOSA violations.

6. Both the state and federal governments have adopted programs designed to respond to the current foreclosure crisis and prevent foreclosure where a mortgage can be modified, i.e., New Jersey's foreclosure mediation program and the federal government's Housing Affordable Modification Program (HAMP). Both programs militate strongly against conducting a foreclosure sale before evaluation of loan modification. Should the court decline to vacate the default despite the above, Mr. Wolf respectfully requests a stay of the foreclosure sale pending completion of mediation and pending the servicer's compliance with federal law.

For the foregoing reasons and those set forth in his moving papers, Mr. Wolf respectfully requests that this Court vacate the default judgment and permit a late answer to be filed.

Respectfully submitted,

LEGAL SERVICES OF NEW JERSEY
Attorneys for Defendant

By: 
Rebecca Schore

cc: William Wolf
Andrea Dobin