US BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR CSAB MORTGAGE-BACKED PASS-THROUGH CERTIFICATES, SERIES 2006-3 Plaintiff/Respondent, v. MARYSE GUILLAUME; MR. GUILLAUME, HUSBAND OF MARYSE GUILLAUME; EMILIO GUILLAUME; MRS. EMILIO GUILLAUME, HIS WIFE; CITY OF EAST ORANGE, Defendants/Petitioners.	SUPREME COURT OF NEW JERSEY DOCKET NO. 068176 Civil Action Sat Below: Trial Court: Harriet Farber Klein, J.S.C. Appellate Division: Clarkson S. Fisher, Jr., J.A.D. Douglas M. Fasciale, J.A.D.

DEFENDANTS/PETITIONERS MARYSE GUILLAUME AND EMILIO GUILLAUME'S REPLY BRIEF

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PRELIMINARY STATEMENT

Respondent's opposition to certification is grounded in neither fact nor law. Rather, respondent's brief is rife with false statements meant to mislead this court to conclude that granting certification is a mere exercise in futility. To the contrary, the Guillaumes have substantial rights which, if vindicated, will enable them to pay the lawful amount due on their loan and remain in their home. Respondent now supports certification limited only to the Fair Foreclosure Act but not on the other questions set forth in the Petition. For the reasons set forth in the Petition and this Reply, this Court should grant certification on all of these issues.

POINT I

THE "SPARING" STANDARD EXPRESSLY EMPLOYED BELOW CONSTITUTES REVERSIBLE ERROR

A. THE RECORD IS CLEAR THAT THE TRIAL COURT AND APPELLATE COURT EMPLOYED THE WRONG STANDARD OF REVIEW

Respondent falsely states that "nothing in the record of the trial court supports the claim" that the trial court "used a 'sparing review.'" Rb 8. To the contrary, the trial judge stated outright that "[a] motion for relief from the Judgement under any of the six grounds in the rules should be granted sparingly." T1 28:5-7. Moreover, a reading of the record in its totality shows that is exactly how the trial court viewed the Guillaumes' motion. The Appellate Division unambiguously stated

"[a] motion for relief from judgment should be granted sparingly." Slip op. at *4. Respondent misrepresents that F.B. v. A.L.G. does not expressly distinguish between review of litigated judgments and default judgments but it does. Rb.9; see, 176 N.J. 201, 209-10 (2003) ("this was not a situation in which default judgment was entered . . ." and "Here, the support order was not entered in the context of a default judgment"). The record is clear that both the trial court and the Appellate Division failed to exercise discretion consonant with the principles this Court articulated in Housing Authority of Morristown v. Little, 135 N.J. 274 (1994), thus, this Court should conduct a de novo review.

B. CONTRARY TO RESPONDENT'S UNFOUNDED ASSERTION, THE RECORD IS CLEAR THAT THE GUILLAUMES DEMONSTRATED MISTAKE, INADVERTENCE, SURPRISE AND EXCUSABLE NEGLECT

Respondent falsely states that "the sole excuse" for not filing an answer sooner was the Guillaumes' belief that they had no legal defense, and that they presented nothing else relevant to this issue below. Rb 4-5 (emphasis is original). In making that claim, Respondent completely disregards twenty-two pages of correspondence between the parties that demonstrate the totality of the circumstances, including a letter in which Mrs. Guillaume clearly articulates her confusion, fear, and extreme stress (as well as her gratitude because she believes that the matter will be resolved by a loan modification):

> ... believe me, this is the first time I have ever been in such a situation. I didn't understand everything very well. This situation leads me to visit hospitals very often with severe headaches and chest pain from stress. I was scared and confused many days I thought I was going to die. I am happy now to see a light at the end of the tunnel.

Da150.

In making its false claim, respondent also entirely ignores the contradictory and inherently confusing content of its own letters to the Guillaumes, letters that informed them that foreclosure might be started sometime in the future (when in reality the foreclosure action was pending). See, e.g., Da39, Da44-45.

Similarly, with no citation to the record -- because there are no such facts in the record - U.S. Bank falsely asserts that the Guillaumes "*intentionally* made no effort to respond to the foreclosure complaint"; "*willfully* ignored . . . advice" to seek counsel; and were "*fully aware* that foreclosure was being pursued." There is not one scintilla of factual support in the record whatsoever for any of these outrageous proclamations.

Respondent also disingenuously implies that New Jersey law is settled that in the R. 4:50-1 context "lack of knowledge of the law is not an excuse for failing to act." Its sole support for that proposition is a reference to its Appellate Division brief citing a Pennsylvania case, U.S. Bank v. Mallory, 982 A.2d

986 (Pa. Super. 2009) and an unreported New Jersey Appellate Division opinion, HSBC Bank USA v. Sylvester, 2010 WL 668753*2 (App. Div. February 25, 2010), cert. denied 203 N.J. 92 (2010). (Focusing on the fact that the defendant was at all times represented by an attorney, who negotiated a forbearance agreement for her before entry of default instead of filing an answer.) Neither non-binding case supports that proposition.

C. MERITORIOUS DEFENSE - TILA

Respondent's charge that the Guillaumes have not presented any evidence to the Court regarding their ability to tender is similarly disingenuous. U.S. Bank did not oppose the Guillaumes' motion to vacate the judgment based on any defense to the TILA claim at the trial court, instead asserting holder in due course status. As such, the Guillaumes' trial counsel focused on the evidential infirmities of the proof (or lack of proof) presented in that regard. At the trial court, because Respondent did not raise it, the Guillaumes did not have an opportunity to address their ability to tender legally or factually.

Respondent does not address any of the cases cited in the Petitioner's brief regarding TILA. Instead respondent directs this court to an erroneous citation to its own brief at the Appellate Division (but not the trial court), relying on a short, unpublished decision of the Third Circuit and a proposed

rule that has been withdrawn. See, Board of Governors of the Federal Reserve System, Press Release, February 1, 2011. [hereinafter "Press Release"]

The Jobe case relied upon by the respondent in its appellate brief is both distinguishable and not precedential. Jobe v. Argent Mortgage Co., L.L.C., 373 Fed. Appx. 260 (3rd. Cir. Apr. 2, 2010) (citing Yamamoto v. Bank of N.Y., 329 F.3d 1167 (9th Cir. 2003) and American Mortg. Network, Inc. v. Shelton, 486 F.3d 815, 820 (4th Cir. 2007). In Jobe, the court affirmed a trial court decision arrived ***after a bench trial*** that the homeowners had failed to prove a TILA violation at all. The trial court went on to state in *dicta* that, even if they had proven such a violation, they would not be able to rescind because they could not tender.

Jobe and the cases it relied upon, *Yamamoto* and *Shelton,* are distinguishable from the majority of rescission cases which were cited in the Petitioner's brief but totally ignored in the Respondent's brief:

- In all three cases the courts did not evaluate ability to tender until **after** the consumers had an opportunity for discovery and to present the facts of their case.
- The courts in Shelton and Jobe did not reach ability to tender until after the primary question - whether there was a right to rescind - had been resolved. And, in Shelton,

the Fourth Circuit said the "the better practice may have been for the trial judge to set terms for rescission by allowing the Sheltons a time certain to tender the net loan proceeds. . ."

- Furthermore, in Yamamoto the trial court gave the homeowners sixty days to attempt tender (even though they said they could not to do so).

Before this court, respondent cites not case law but an unsupported statement in a proposed rule change promulgated by the Federal Reserve which has now been withdrawn. See, Press Release; 75 F.R. 58539-01 at 58629.

Even so the comment does not support respondent's contention. First, the comment recognizes that currently a security interest in violation of TILA is completely void. Id. at 58548. Second, the comment does not suggest that a consumer must plead tender or that a creditor is permitted to keep illegal finance charges; it just suggests that the tender, not the unreduced loan amount, should be a secured debt rather than an unsecured one. "The comment would clarify, consistent with the holding of the majority of courts that where the consumer's right to rescind is contested by the creditor, a court would determine **FIRST** whether the consumer's right to rescind has expired, **THEN** the amounts owed by the consumer **AND** the credit and **THEN** the procedures for the consumer to tender money or

property." Id. at 58632. (emphasis added). Here, the underlying TILA violation was and still is uncontested.

Several consumer groups presented comments to the proposed, but now withdrawn, rules describing the few recent cases requiring tender to be pled as "outlier cases" which "in effect, deprive homeowners of due process, denying them even the right to be heard on the merits and equities. Like the Red Queen in Alice's Wonderland, they presume, as a matter of law prior to hearing, that the equities would favor the creditor: 'Sentence first - verdict afterwards.'" December 23, 2010, National Consumer Law Center *COMMENTS to the Federal Reserve Board [Regulation Z; Docket No. R-1390]12 CFR Part 226: Truth in Lending - Proposed Rule*] available at http://goo.gl/S1ff5 p. 22. [Hereinafter "NCLC Comment"]. The NCLC Comment describes at length the history of how TILA remedies, including the tender element, have been carried out over the forty year history of the Truth in Lending Act. Id. at 21 to 31. In fact, in nearly all jurisdictions, plaintiffs need not plead the present ability to tender the loan to state a Truth in Lending Act claim. Id.; Botelho v. U.S. Bank, N.A., 692 F.Supp.2d 1174, 1180 (N.D. Cal. 2010). However, those cases which require such pleading are Federal cases imposing more stringent pleading requirements than New Jersey court rules do.

Where, as here, the lender steadfastly refuses to modify mortgage loans -- despite its internal notes showing that the homeowner both qualified for a modification and that the net present value of the modification was substantially greater than would be garnered in a foreclosure sale, contentions which respondent does not dispute -- TILA rescission is a critical remedy to help right the ship, adjust mortgages and stabilize communities. Lea K. Shepard, IT'S ALL ABOUT THE PRINCIPAL: PRESERVING CONSUMERS' RIGHT OF RESCISSION UNDER THE TRUTH IN LENDING ACT, 89 *N.C. L. Rev.* 171, December, 2010 ("TILA's rescission provisions, albeit a blunt instrument in the consumer protection setting, must be vigorously enforced, particularly during periods of economic calamity, since the statute remains a singular source of borrower leverage in a legal and economic climate that remains generally inhospitable to homeowners"); see also Adam J. Levitan, Tara Twomey, Mortgage Servicing, 28 Yale J. on Reg. 1(2011)(the prosecution of avoidable foreclosures harms homeowners, communities, and even investors in mortgage backed securities); Wei Li and Sonia Garrison, Fix or Evict? Loan Modifications Return More Value than Foreclosures (Center for Responsible Lending) available at http://googl/wxOrQ (quoting Federal Reserve Chairman Ben Bernanke ". . . preventing avoidable foreclosures does not block necessary adjustments. Indeed, failing to prevent such foreclosures may heighten the

risk that house prices will move lower than they would otherwise need to go").

POINT II

EVIDENTIAL DEFICIENCIES IN THE PROOFS UNDERLYING FORECLOSURE JUDGMENTS ARE ISSUES OF SIGNIFICANT PUBLIC IMPORTANCE

In an attempt to divert this Court's attention from incontrovertible evidential deficiencies in the proofs underlying its default judgment, respondent claims that the Guillaumes did not raise the issue below. Any reading of the trial submissions on both sides reveal this contention to be utterly false. U.S. Bank sought to bolster the evidential support for the default judgment by having its attorney supply additional facts and documents to support its holder in due course arguments in opposition to the motion to vacate default judgment. Of course, these were rank hearsay of the sort recently sanctioned in the Third Circuit. In Re Taylor, Civ. Action No. 10-2154 (3d Cir. August 24, 2011) affirming 407 B.R. 618 (Bkr. E.D. Pa. 2009). Even the trial court recognized the infirmities in the evidence but accepted the proffer nonetheless. T1 27:6-17.

Moreover, the public importance of these evidential issues cannot be overstated, as highlighted by three very recently published Appellate Division decisions and a decision of the Third Circuit Court of Appeals. Wells Fargo Bank, N.A. v. Ford,

418 N.J. Super. 592 (App. Div. 2011); Bank of New York v. Laks, A-4221-09T3, ___ N.J. ___ (App. Div. August 8, 2011)("The certifications of plaintiff's representatives offered in the trial court are very similar to those we found insufficient in Wells Fargo Bank, N.A. v. Ford"); Deutsche Bank National Trust Co. v. Mitchell, A-4925-09T3 (App. Div. August 9, 2011) ("we think it important to note that the proofs presented by plaintiff . . . were inadequate."); In Re Taylor, Civ. Action No. 10-2154 (3d Cir. August 24, 2011) affirming 407 B.R. 618 (Bkr. E.D. Pa. 2009). All of these decisions make clear that the evidential issues are "of sufficient public concern" that this court may consider them even if they had not been raised, especially where the factual record before the court on the issue is complete. Cornblatt v. Barow, 153 N.J. 218, 230 (1998).

CONCLUSION

For the foregoing reasons and for the reasons set forth in the Petition and below, the petitioners respectfully request that this Court grant certification.

Respectfully submitted,
LEGAL SERVICES OF NEW JERSEY

By: Margaret Lambe Jurow
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Dated: 8/26/2011

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Maria S. Giovene, of full age, hereby certifies as follows:

1. I am employed by Legal Services of New Jersey as an Administrative Assistant.

2. On August 26, 2011, I caused two copies of the Defendants/Petitioners Maryse Guillaume and Emilio Guillaume's Reply Brief and Certification of Service to be delivered by Lawyers Service to:

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I certify that the foregoing statements made by me are true to the best of my knowledge, information and belief. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Maria S. Giovene

DATED: August 26, 2011