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October 28, 2011

VIA HAND-DELIVERY
Clerk of the Supreme Court of New Jersey
Hughes Justice Complex
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RE: U.S. Bank N.A., as Trustee for CSAB Mortgage-Backed Pass-Through Certificates, Series 2006-3 v. Maryse Guillaume, Emilio Guillaume, City of East Orange
Docket No. 068176

Dear Sir or Madam:

This office represents *Amici Curiae*, Seton Hall Center for Social Justice and the Center for Responsible Lending in support of Defendant-Petitioners Maryse and Emilio Guillaume in the above captioned matter. Enclosed please find for filing:

- Original and eight copies of Brief of *Amici Curiae* in support of Defendant-Petitioners;
- Original and one copy of Certification of Service;
- Stamped self-addressed envelope.

This brief should replace the original brief filed by the Center for Social Justice one week ago. Because the Court granted the Center's motion for an extension of time, the Center has revised its previous brief and added an additional section.

In addition, and importantly, this brief is also on behalf of the Center for Responsible Lending. The motion for extension of time that was granted this past Monday also permitted the Center for Responsible Lending to join in the new briefing.

Thank you for your assistance with this matter.

Very truly yours,

Linda E. Fisher

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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** **ON APPEAL FROM FINAL JUDGMENT OF:** **SUPERIOR COURT OF NEW JERSEY** **APPELLATE DIVISION** **DOCKET NO. A-0376-10T3** **CERTIFICATION OF SERVICE**

The undersigned hereby certifies that on October 28 2011, he served one copy of the revised brief of amici curiae by federal express, upon the following parties:

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SUPREME COURT OF NEW JERSEY
DOCKET NO. 068176

US BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR CSAB MORTGAGE-BACKED PASS-THROUGH CERTIFICATES, SERIES 2006-3	:	Civil Action
Plaintiff/Respondent,	:	Sat Below:
v.	:	Trial Court: Harriet Farber Klein, J.S.C.
MARYSE GUILLAUME; MR. GUILLAUME, HUSBAND OF MARYSE GUILLAUME; EMILIO GUILLAUME; MRS. EMILLIO GUILLAUME, HIS WIFE; CITY OF EAST ORANGE	:	Appellate Division: Clarkson Fisher, Jr., J.A.D. Douglas M. Fasciale, J.A.D.
Defendants/Petitioners.	:	

BRIEF OF *AMICI CURIAE* SETON HALL LAW CENTER FOR SOCIAL JUSTICE & CENTER FOR RESPONSIBLE LENDING

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Center for Social Justice at Seton Hall Law School ("the Center") is both a state-certified legal services program and a clinical legal education program where law students and professors work together on issues of public interest, including the rights of homeowners facing foreclosure. The Center has provided free legal assistance and advocacy on behalf of lower-income New Jersey homeowners involved in predatory lending, mortgage fraud, and foreclosure litigation for over a dozen years. The Center's cases regularly raise issues regarding notices, pleadings, and other document irregularities. For example, the Center has obtained the dismissal of foreclosure cases due to false pleadings regarding assignment of mortgage notes as well as defects in notices of intent to foreclose.

The Center also participated in the recent statewide litigation against the top six foreclosure filers over "robo-signing" and other documentation errors by banks in uncontested foreclosure cases. See Brief of Applicants-Intervenors Center for Social Justice, In re Residential Foreclosure Pleading & Document Irregularities, No. F-59553-10 (Ch. Div. Mar. 24, 2011). The Center's involvement in that litigation shed light on inadequate record-keeping practices by loan servicers and their sub-servicing companies. Id. at 2. The Center's brief emphasized the risk that these practices will result in inaccurate homeowner notices like the Notice of Intention to

Foreclose, which, in turn, can create borrower confusion. Id. at 7-8.

The Center for Responsible Lending ("CRL") is a non-profit policy, advocacy and research organization dedicated to exposing and eliminating abusive credit practices. CRL is an affiliate of Self-Help, a non-profit lender that operates state- and federally-chartered community development credit unions in North Carolina and California, and has provided $6 billion in financing to help over 50,000 low-wealth borrowers buy homes, build businesses, and strengthen community resources.

CRL focuses public and policymakers' attention on abusive practices in mortgage lending, conducts landmark studies that identify and expose abusive products and practices and works to ensure that consumers across the country are protected. As part of this mission, CRL regularly files *amicus* briefs in state and federal courts addressing foreclosure practices, most recently Dobson v. Substitute Trustee Servs., Inc. & Wells Fargo Bank Minn., N.A., No. 260A11, in the North Carolina Supreme Court, and the Truth in Lending Act in Bank of NY v. Parnell, 56 So. 3d 160 (La. 2010) in the Louisiana Supreme Court. Its litigation team also co-counsels mortgage lending cases in state and federal courts, including a case that helped expose mortgage servicers' robo-signing and other fraudulent foreclosure practices, U.S. Bank v. James, 272 F.R.D. 47 (D. Me. 2011), and an important TILA decision, Rand Corp. v. Moua, 559 F.3d 842 (8th Cir. 2009)(argued).

PRELIMINARY STATEMENT

The State of New Jersey has a longstanding policy of requiring foreclosing banks to give homeowners ample notice and multiple opportunities to avoid foreclosure. The Fair Foreclosure Act ("FFA") is the primary expression of that policy and a cornerstone of the State's judicial foreclosure system. Courts have construed the Act quite strictly, requiring clear notice to borrowers because informed homeowners stand a better chance of keeping their homes.

Similarly, through the Truth in Lending Act ("TILA"), Congress has expressed its more than forty-year-old policy of providing homeowners with timely and accurate information concerning the cost of consumer credit transactions. Congress values homeownership so highly that it gave them the right to rescind mortgage refinancings containing material violations of TILA. The critically important remedy of rescission is one of very few defenses homeowners have against foreclosure.

Robo-signing, the byzantine mortgage securitization process, the role of MERS, and the dismal record of mortgage modification efforts, have created enormous uncertainty about the foreclosure process and confusion about how homeowners can navigate it to resolve defaults. The relationship between a foreclosure plaintiff - generally a bank serving as trustee of a pool of mortgage-backed securities - and the banks that service individual mortgages is impossible for many homeowners to understand. U.S. Bank is no stranger to these issues.

This confusion, combined with faulty origination practices and the recession, has spurred a foreclosure crisis in New Jersey. A recent report estimates that more than one in ten New Jersey mortgagors are either in the foreclosure process or are more than 90 days delinquent. Press Release, MBA, Delinquencies Rise, Foreclosures Fall in Latest MBA Mortgage Delinquency Survey (Aug.22, 2011), available at http://goo.gl/8g5eE. Moreover, the court-ordered stay of New Jersey foreclosures was recently lifted, allowing 41,000 foreclosure actions that have been on hold to resume. See Sarah Portlock, N.J. Judge Allows 4 Major Banks to Resume Uncontested Foreclosure Proceedings, Star Ledger, Aug. 15, 2011.

Although some suggest that expedited foreclosure processes will clear the backlog, allowing banks to take shortcuts will only exacerbate the problem. It will lead to competing claims to homes, debt buyer actions to collect on long extinguished mortgage debt and elimination of vital opportunities for home retention - through litigation of meritorious claims and modification of viable loans - with the resultant dumping of additional foreclosed properties on a saturated housing market.

Upholding the legislature's bright-line rule under the FFA that the mortgage holder's name be included in a Notice of Intent to Foreclose informs homeowners at a critical stage - before the court is involved in the process - when homeowners are more likely to understand the process, take action to cure arrears and avoid foreclosure. Upholding that rule also ensures

that the mortgage holder - the entity to which the borrower is contractually liable and that ultimately decides whether or not to foreclose on the borrower's home - is not hiding behind a third party.

Like the FFA, TILA plays a critically important role in preserving homeownership. It safeguards homeowners facing foreclosure by drastically lowering the rescission threshold, giving them a practical tool to save their home. 15 U.S.C. §1635(i). TILA's intentional reordering of common law rescission - imposing tender on the creditor *first*, and tender by the homeowner *second* - furthers this goal. Requiring struggling homeowners to tender only after a court has ruled on liability and determined how much they will owe, TILA's rescission process assures a refinancing lender or prospective buyer that their deal will go through. Reversing the statutory process to require that homeowners pay upfront will render TILA's rescission right meaningless in almost every case, dramatically reducing homeownership - an outcome at odds with both Congressional and the New Jersey legislature's intent.

Finally, enforcement of existing evidentiary standards is vital to ensuring the integrity of the tens of thousands of uncontested default foreclosure judgments entered each year. Without evidentiary safeguards like authentication and the reliability of business records, a glut of improper foreclosure judgments and the resulting clouds on title will only hurt an already fragile housing market.

STATEMENT OF FACTS

Amici rely primarily on the Statement of the Matter in the Petition for Certification and provide here only a succinct recitation of facts relevant to this briefing.

The petitioners, Maryse and Emilio Guillaume, are among the many families in New Jersey affected by foreclosure and the notice requirements of the Fair Foreclosure Act. They purchased their home nearly nineteen years ago, Da16-22, and refinanced it on September 7, 2006 with a $210,000, 30 year mortgage loan ("the mortgage") from Credit Suisse Financial Corporation ("Credit Suisse"). Da17 ¶¶4,6, Da74-75. Among the documents provided to the Guillaumes at closing were a Truth in Lending Disclosure Statement ("TILDS") - whose material disclosure errors, discussed infra, form the basis for the Guillaumes' TILA rescission claim - a notice that identified Select Portfolio Services, Inc. ("SPS") as the servicer on the loan, Da30-31, and a mortgage, naming Mortgage Electronic Registration Systems, Inc. ("MERS") as the mortgagee, as a nominee for Credit Suisse. Da 83. Shortly thereafter, the servicing on their mortgage was transferred to America's Servicing Company ("ASC"), Da34, and MERS assigned its interest in the mortgage to US Bank as Trustee for CSAB Mortgage-Backed Pass-Through Certificates, Series 2006-3 ("US Bank"). Da66, Da83.

Nearly two years later, on May 18, 2008 the Guillaumes received a document entitled "Notice of Intention to Foreclose"

("NOI") from ASC.[1] Da37-38, Da121-123. This NOI was deficient in several material respects that form the basis for their claim under the FFA: it failed to include the mandated name and address of the lender and falsely represented that ASC was the holder and putative foreclosure plaintiff. Then, on July 15, 2008, contrary to the NOI's misrepresentation, the Guillaumes received a Foreclosure Complaint identifying U.S. Bank National Assiciation (*sic*) for the first time as the foreclosing party, Da1-8, and as "the Creditor to whom the debt is owed."

In the meantime and in response to the NOI, the Guillaumes communicated with ASC in an effort to negotiate a loan modification and avoid foreclosure. They followed the express instruction in the NOI that all communications - including any disagreement with the assertion of default - be directed to ASC. Da41, Da46, Da47, Da48, Da49. The Guillaumes continued negotiation attempts with ASC following initiation of the foreclosure; only two weeks after the foreclosure filing, in a July 30, 2009 letter, ASC expressly assured the Guillaumes that their continued contact with ASC was the correct course: "By expressing your interest to work with us, you have taken the first step in resolving your current situation." Da39, Da44-45. After ASC denied their request for a modification, the

[1] ASC is a division of Wells Fargo Home Mortgage that services loans for other investors. The vast majority of ASC's mortgages were originated by other lenders, packaged into securities, and sold by those lenders into the secondary market. See https://www.wellsfargo.com/mortgage/account/servicing.

Guillaumes contacted legal counsel and, on August 31, 2009, rescinded their loan under TILA. Da51, Da52, Da68-69.

On November 11, 2008 U.S. Bank filed its notice of motion for default judgment against the Guillaumes pursuant to Rule 4:64-1(d). Da14. This notice of motion included a "Certification of Proof of Amount Due" signed by Steven Patrick, "Vice President of Loan Documentation" for ASC, pursuant to Rule 4:64-2(b). Da11-Da12. Appended to the Certification of Proof of Amount Due was a schedule of the amount due, pursuant to Rule 4:64-2(b), signed by Mr. Patrick. Da13. Also included in U.S. Bank's motion was a purported copy of the Guillaume's mortgage note that included a stamp with the text "Certified to be a True and Correct Copy," signed by Brian J. Yoder, Esquire. Da74-Da77. The record does not indicate that this document was accompanied by a separate certification as to its authenticity, or any of the other proofs required by Rule 4:64-2(a).

LEGAL ARGUMENT

Three questions are addressed in this amicus brief. The first is whether a lender's failure to adhere strictly to the FFA - by failing to identify itself in its notice of intention to foreclose and by falsely identifying ASC as the holder of the mortgage loan - provides a meritorious defense to a subsequent foreclosure action. The second question is whether a homeowner in foreclosure with a meritorious TILA rescission claim may be required to establish an ability to tender *first*, reordering the statutory rescission process and eliminating her right to an

adjudication of that claim. The final question is whether a lender's failure to comply with evidentiary standards governing default foreclosure judgments renders the judgment subject to vacation. If this Court holds that the FFA or TILA claims stated here provide a meritorious defense to the foreclosure, or that U.S. Bank's default judgment lacked a sufficient evidentiary basis, the Appellate Division's decision should be reversed, and the default judgment entered against the Guillaumes should be vacated under Rule 4:50-1(a) or (f).

Justice is the predominant factor in deciding whether or not to set aside a default judgment under subsections (a) and (f) of R. 4:50-1. Hous. Auth. of Morristown v. Little, 135 N.J. 274, 283-87 (1994). See also Nowosleska v. Steele, 400 N.J. Super. 297 (App. Div. 2008) (vacating default judgment in ejectment action because justice entitled borrower to assert protections under both federal and state law); see also Court Investment Co. v. Perillo, 48 N.J. 334, 331 (1966) ("[T]he very essence of (f) is its capacity for relief in exceptional situations...[and] its boundaries are as expansive as the need to achieve equity and justice."). Accordingly, "the opening of default judgments" is "viewed with great liberality, and every reasonable ground for indulgence is tolerated to the end that a just result is reached." Marder v. Realty Constr. Co., 84 N.J. Super. 313, 319 (App. Div. 1964), aff'd, 43 N.J. 508 (1964). In

this case, the default judgment against the Guillaumes must be vacated to achieve a fair and just result.[2]

Justice is not served when lenders are permitted to leave homeowners "guessing about the identity of the entity threatening acceleration of a mortgage obligation or a foreclosure action." This disarms the very homeowners the legislature sought to protect, making it more difficult for them to find the right party to resolve their claims. Bank of N.Y. v. Laks, __ A.3d __, 2011 WL 3424984 (App. Div. 2011). Nor is justice served by barring the courthouse door to the very group of homeowners Congress singled out for special protections - those facing foreclosure - and depriving them of their day in court to adjudicate their TILA rescission claim. The few effective defenses that homeowners may assert in foreclosure should not be eliminated in favor of expediency, particularly where, as here, they provide a real opportunity to preserve the home. Finally, justice is not served for the ninety-four percent of homeowners in uncontested foreclosures when lenders are permitted to obtain judgments despite their failure to submit sufficient proofs. In the longer run, neither individual nor collective State interests will be served by ignoring

[2] Courts in other jurisdictions have viewed the confusion created by "dual track" -- a servicer's ongoing loan modification discussions with homeowners while at the same time pursuing foreclosure -- as a valid basis for vacating a default. *See e.g. Option One Mortgage Corp. v. Massanet*, 2009 WL 380734 (NY Sup. Ct., Richmond Cty 2009); *Deutsche Bank v. Miele*, 20 Misc. 3d 1146(A)(Sup Ct, Richmond Cty 2008).

legislative and Congressional directives through a headlong rush to foreclose.

POINT I

THE FFA REQUIRES LENDERS TO STRICTLY COMPLY WITH ITS HOMEOWNER NOTICE REQUIREMENTS

The FFA establishes clear standards for a compliant notice of intention to foreclose. First, it must "clearly and conspicuously state in a manner calculated to make the debtor aware of the situation ... the name and address of the lender and the telephone number of a representative of the lender . . . ." N.J.S.A. 2A:50-56(c)(11). The Act defines "lender" as "any person, corporation, or other entity which makes or holds a residential mortgage, and any person, corporation or other entity to which such residential mortgage is assigned." N.J.S.A. 2A:50-55. Mortgage servicers are not "lenders" under this definition, though they may be representatives of lenders; therefore, compliance with the statute requires more than inclusion of a servicer's name in the notice. As Myron Weinstein points out, "Paragraph (11), unlike [the paragraph concerning payment of the cure amount], does not require that the 'name' of the lender's representative be included in the notice. This makes sense, because the name of the lender's representative is subject to change." 30 New Jersey Practice, Law of Mortgages with Forms, § 24.14, at 286 (Myron C. Weinstein) (2d ed. 2000). That occurs frequently, as servicers change midstream.

The current widespread uncertainty reflected in numerous court decisions regarding which entity has standing to foreclose militates in favor of enforcing the statute's bright-line standard for the notice of intent. It is the "lender" that must be named. As the court in Laks, supra, recently explained, "[t]here is no reason to conclude that the Legislature meant to have lenders serving notices of intention that could leave debtors guessing about the identity of the entity threatening acceleration of a mortgage obligation or a foreclosure action." Id.at 4. The FFA's requirement properly puts the burden on the lender to get it right at the outset by identifying itself in the NOI; further, because a compliant NOI is a condition precedent to accelerating the debt and filing a foreclosure action, strict enforcement of the statute benefits both lenders and homeowners.

Here, U.S. Bank not only failed to identify itself in the NOI, it affirmatively misrepresented that ASC held the mortgage and would initiate foreclosure proceedings against the Guillaumes if they were unable to cure their default. This abusive practice misleads borrowers about the foreclosure process. It is therefore unsurprising that while the Guillaumes made diligent efforts to negotiate with ASC to keep their home - as the appellate court confirmed - they were confused about the process and their efforts fell short. Other courts faced with this "dual track" problem have both vacated defaults and enjoined foreclosures from proceeding. See e.g., Option One

Corp. v. Massanet, 2009 WL 380734 (NY Sup. Ct., Richmond Cty 2009)(vacating default); Aames Funding v. Houston, 85 A.D. 3d 1070, 926 N.Y.S. 2d 639 (2d Dept. 2011)(reversing trial court's decision to allow servicer to foreclose while HAMP modification pending and staying foreclosure).

A. THE DESIGN AND PURPOSE OF THE FFA REQUIRE STRICT COMPLIANCE WITH ITS HOMEOWNER NOTICE REQUIREMENTS.

The FFA embodies longstanding New Jersey policy that homeowners with mortgages in default should receive timely and accurate notices to help them avoid foreclosure whenever possible. The Act's legislative findings contain the following declaration: "[It is] the public policy of this state that homeowners should be given every opportunity to pay their home mortgages and thus keep their homes . . . ." N.J.S.A 2A:50-54. The drafters intended to reduce foreclosures by mandating that lenders clearly disclose relevant information regarding the foreclosure process, including apprising homeowners of remedial steps they can take to avoid foreclosure. A. 1064 (Sponsor's Statement), 206th Leg. (N.J. Jan. 24, 1994). The Act is thus "remedial legislation intended to provide protection to residential mortgage debtors." Spencer Sav. Bank v. Shaw, 401 N.J. Super. 1, 6 (App. Div. 2008) (citing Atl. Palace Dev., LLC v. Robledo, 396 N.J. Super. 171, 178 (Ch. Div. 2007).

While enacted prior to the current foreclosure crisis, the FFA was prescient in focusing on procedural safeguards necessary to combat homeowner confusion and ensure lender compliance with the judicial foreclosure process. In fact, lender compliance

with the FFA's safeguards facilitates the legislature's goal of preserving homeownership by enabling homeowners to enter into early negotiations with the proper entity and consider loan modification or other early resolutions of default. And accurate compliance is not costly or burdensome to lenders.

The drafters envisioned a system of notices to forewarn borrowers of any adverse legal action that might be taken and apprise them of their rights at each stage in the process. A. 1064 (Sponsor's Statement), 206th Leg. (N.J. Jan. 24, 1994). These new notice rights were intended to assist borrowers in resolving payment issues and ultimately preserve their homes. Id. Specifically, the drafters sought to require a "warning notice" for homeowners prior to acceleration of the mortgage and filing of a foreclosure action. A. 1064 (Senate Committee's Statement), 206th Leg. (N.J. May 8, 1995).

This "warning notice" ultimately became the Notice of Intention to Foreclose, which requires lenders to give homeowners a 30-day notice prior to "accelerat[ing] the maturity of a residential mortgage obligation and commenc[ing] any foreclosure or other legal action to take possession of the residential property . . . ." N.J.S.A 2A:50-56(b). The notice must be sent via certified or registered mail; it must also list approximately 11 different types of information, written "in a manner calculated to make the debtor aware of the situation." Id. The information required includes the nature of the obligation or real estate security interest, the nature of the

default, the homeowner's right to cure, the amount required to cure, the date for receipt of the cure payment, notice that failure to cure could result in the loss of the property via foreclosure, the advisability of consulting legal counsel, and the possibility of financial assistance. N.J.S.A 2A:50-56(c)(1)-(10). The notice must also include "the name and address of the lender and the telephone number of a representative of the lender whom the debtor may contact." N.J.S.A 2A:50-56 (c)(11). The statute's use of the conjunctive "and" conveys that compliant notices must include all of this information. N.J.S.A 2A:50-56(c)(10).

Service of a compliant notice is a condition precedent both to accelerating the amount due under the mortgage and to filing a foreclosure action - a foreclosure complaint must plead compliance with the notice requirement. That cannot be done truthfully, where, as here, the NOI was both deficient and false. N.J.S.A 2A:50-56(a),(f).

U.S. Bank's conduct here highlights the importance of strictly enforcing the Act's detailed notice requirements, particularly the contents of the Notice of Intention to Foreclose. It shows that strict enforcement is critical to ensuring that homeowners have clarity during the early "warning notice" phase, when cure is easiest. If the legislature had intended the servicer's information to suffice, it would not have separately required both the name and address of the lender and a phone number for "a representative of the lender whom the

debtor may contact." N.J.S.A 2A:50-56(c)(11). Allowing the lender to substitute the name and address of its servicer-representative in the notice would render this statutory language superfluous. Laks, supra,at 4.

Moreover, the importance of these procedural safeguards cannot be overstated where, as here, the legislature took care to include a non-waiver provision specifying that any agreement to waive the homeowner's rights under the Act shall be "against public policy, unlawful, and void." N.J.S.A. 2A:50-61. The Act's non-waiver provision is compelling evidence that the legislature intended to require strict compliance with all elements of the statutory scheme. See Shaw, supra, 401 N.J. Super. at 6 (citing Cho Hung Bank v. Kim, 361 N.J. Super. 331, 346 (App. Div. 2003) (noting that "non-waiver" provisions indicate legislative intent to require strict compliance with the FFA). Lenders cannot contract with homeowners to waive their rights under the Act, even where that waiver is knowing. Thus, courts should not engage in an end run around the non-waiver provision, effectively eviscerating that same requirement for unknowing homeowners by judicial fiat. Kim, supra, 361 N.J. Super. at 346. To judicially exempt U.S. Bank from the non-waiver requirement through this means would particularly offend the statute here; its notice was not only deficient, it was false.[3]

[3] U.S. Bank has a history of abusive litigation tactics directed against homeowners in foreclosure that undermine the integrity of the foreclosure process. See e.g. US Bank v. Padilla, 31 Misc, 3d

Anything less than strict enforcement would dilute these important protections, undermine the clear instruction of the statute and be inconsistent with this Court's rulings strictly enforcing detailed notice requirements in other statutes. This Court has ruled that cancellation of a worker's compensation insurance policy was ineffective when an employer failed to strictly comply with notice requirements of the Worker's Compensation Act. Sroczynski v. Milek, 197 N.J. 36, 43 (2008) (citing N.J.S.A. 34:15-81). This Court rejected a substantial compliance approach to the Worker's Compensation Act's notice requirements because rudimentary rules of statutory interpretation required the court to honor the "clear and unambiguous" language of the statute. Id. The FFA's notice requirements are similar to those in the Worker's Compensation Act in the clarity of their instructions and the omission of alternative, non-prescribed statutory notice methods. This Court emphasized in Milek that the statutory purpose of the relevant section is to ensure employee awareness of their insurance status. Milek, supra, 197 N.J. at 44. Similarly, the NOI ensures that borrowers are aware of their lender and their

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1208(A), (NY Sup. Ct., Duchess Cty 2011)(sanctioning US Bank's bad faith conduct in foreclosure mediation process: "bank's unnecessary, dilatory tactics and contradictory information" . . . "whether or not intentional" plunged the homeowner "deeper and deeper into arrears, raising the very real probability that she will never be able to extricate herself from this debt and work out an affordable loan modification.";US Bank v. Mathon, 29 Misc. 3d 1228(A)(NY Sup. Ct. Suffolk Cty 2010)("the Court has, thus far, been unable to find even a scintilla of good faith respecting Plaintiff's conduct. Plaintiff comes before this Court with seemingly unclean hands demanding equitable relief against defendants.")

status.

This Court also followed a strict compliance approach to notice requirements in a case involving the Federal Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692. Hodges v. Sasil Corp., 189 N.J. 210 (2007). Like the FFA, the FDCPA establishes a 30 day dispute period within which a consumer may question the validity of a debt. 15 U.S.C. § 1692. In its holding, this Court adopted strict rules for complaints that initiate summary dispossession proceedings in tenancy court. Hodges, supra, 189 N.J. at 223. This Court interpreted the FDCPA to require that eviction complaints expressly "state the amount of debt owed, the creditor's identity, and that the amount must be paid to the landlord or the clerk before 4:30 p.m. on the day of trial for the case to be dismissed." Id. The rationale for such a strict notice requirement was the FDCPA's purpose of providing clarity through notice. Hodges, supra, 189 N.J. at 223.

The Hodges opinion emphasized the importance of timely and accurate notice by explaining that "the clarity the New Jersey Supreme Court recommends will provide tenants with a comprehensive understanding of the debt they owe and will permit them to make informed decisions as they seek to fulfill payment obligations and utilize the [FDCPA] protection." Id. at 232. The same approach should be taken by the Court with respect to the notice rules set forth in the FFA, where the stakes are at least as high as they were in Hodges, likely higher. Homeowners

facing foreclosure are entitled to meaningful notice that would permit cure, mitigation, or at the very least awareness of their status.

In the foreclosure context, this Court has invalidated foreclosure sales under the In Rem Tax Foreclosure Act, N.J.S.A. 54:5-104.29 to -104.75, where notices to the property owner were deficient. Sonderman v. Remington Constr. Co., 127 N.J. 96 (1992); see also New Brunswick Sav. Bank v. Markouski, 123 N.J. 402, 425 (1991) (setting aside foreclosure sale of property where mortgagee was not properly notified as to pendency of sale). Strict compliance with the FFA's notice requirements is thus critical to reducing homeowner confusion, incentivizing payment of mortgages in default, and avoiding large-scale foreclosures. Anything less would undermine the comprehensive statutory scheme of the FFA and exacerbate the current foreclosure crisis.

B. THE SUBSTANTIAL COMPLIANCE DOCTRINE IS INAPPLICABLE TO THE FFA BECAUSE IT WOULD EVISCERATE THE ACT'S PROCEDURAL SAFEGUARDS AND SEVERELY PREJUDICE HOMEOWNERS.

The equitable doctrine of substantial compliance is inapplicable in the foreclosure setting. While its application would only increase the risk of borrower confusion, contrary to the FFA's purpose, compliance with the letter of the law has no appreciable cost to the lender.

Substantial compliance doctrine was created "to avoid the harsh consequences that flow from technically inadequate actions that nonetheless meet a statute's underlying purpose." Galik v.

Clara Maass Med. Ctr., 167 N.J. 341, 352 (2001). In Galik, this Court cautioned that "not every non-complying act is salvageable under the... doctrine." Id. at 353. Rather, this Court declared that a two-part analysis must be employed. Id. at 354-55. First, the Court must determine whether the legislative history of the statute reflects an "intent to preclude a substantial compliance analysis." Id. 354. Second, the court must evaluate the five traditional criteria for determining applicability of the doctrine to the statute: "(1) the lack of prejudice to the defending party; (2) a series of steps taken to comply with the statute involved; (3) a general compliance with the purpose of the statute; (4) a reasonable notice of petitioner's claims, and (5) a reasonable explanation why there was not a strict compliance with the statute." Id. at 355.

As to the first prong, the preceding section of this brief explains that the plain language and legislative history of the FFA demonstrates legislative intent to require that homeowners facing foreclosure receive timely and accurate notices. The Act lists the eleven required components of the Notice of Intention to Foreclose in a conjunctive manner - using "and" - and thus could not have intended for a lender to substantially comply with the provision by omitting anything included in the list. See N.J.S.A 2A:50-56(c)(10). Moreover, as explained above, the comprehensive nature of the FFA's notice regime, including its non-waiver provision, would lose its integrity if certain pieces were deemed superfluous in a substantial compliance analysis.

As to the second part of the test, an analysis of the five substantial compliance criteria also compels the conclusion that the doctrine should not apply to the FFA. Under the first criterion - lack of prejudice to the defending party - New Jersey homeowners would be severely prejudiced if this Court were to permit financial institutions to dilute the FFA's detailed notice requirements by condoning mere substantial compliance. Substantial compliance in this context would create a slippery slope. No notice could be trusted to contain fully accurate information and homeowners would not have sufficient information about their options to avoid foreclosure. For example, a homeowner who otherwise had the ability to cure a default might opt against pursuing a cure if the NOI stated an inflated amount owed, which is beyond their means. Financial institutions might be able to substantially comply while failing to offer a phone number or address to remit cure payments within the Act's thirty-day window; foreclosure might then ensue, but with a higher and less affordable cure amount necessary to cover attorney fees incurred in initiating foreclosure, solely because the homeowner was unsure about whom to contact. Thus, the risk of prejudice to homeowners is too great to justify application of the substantial compliance doctrine here.

The second and third criteria - a series of steps taken to comply with the statute, and a general compliance with the purpose of the statute - also militate against adopting a substantial compliance approach to the FFA. It would be

contrary to the Act's detailed notice regime for mere "general compliance" or "steps" toward compliance to suffice. Under the Act, the notice is either compliant or it is not. Moreover, as explained above, the purpose of the Act is to provide homeowners with every opportunity to pay their mortgages and keep their homes. A non-compliant notice may well cause the opposite result, by creating confusion during a vital stage in the process. Thus, a notice that is less-than-fully compliant would be contrary to the statutory purpose.

The fourth criterion - reasonable notice of claims - is not present in this context either. When a homeowner receives a NOI that mistakenly states the name of the servicer instead of the lender, and then 30 days later receives a foreclosure complaint from an unfamiliar plaintiff-lender, the homeowner lacks reasonable notice of the lender's claims. Indeed, in the instant case, ASC falsely stated that it, not U.S. Bank, could file a foreclosure action against the Guillaumes if they did not cure their default. While the NOI appeared to be complete, in fact, it was not. And it went further - US Bank outright misrepresented who held their note and who would foreclose, critical facts.

Homeowners, like the Guillaumes, who do not receive accurate information until service of the foreclosure complaint are further harmed, because they are then responsible for the lender's legal fees and costs, as well as their own costs of hiring foreclosure defense counsel. See N.J.S.A. 2A:50-56(a);

30 New Jersey Practice, Law of Mortgages with Forms § 24.16 (Myron C. Weinstein) (2d ed. 2000). And significantly for many homeowners in default, the delay caused by the failure to identify the holder of the loan in the NOI can mean the difference between a timely rescission claim to the proper entity, enabling them to resolve the default and remain in the home, and an expired rescission claim that can never be recovered. In sum, the Legislature clearly did not want to create a system where the burden to determine the identity of the plaintiff would rest on the homeowner.

As to the fifth criterion - a reasonable explanation why there was not strict compliance with the statute - there can be no reasonable explanation as to why sophisticated, multi-billion dollar financial institutions would omit rudimentary, yet critical, information from the NOI. Indeed, the lender in the instant case has failed to provide a reasonable explanation why it failed to strictly comply with the statute. As such, it should not be given the opportunity to seek shelter in the doctrine of substantial compliance.

C. LONGSTANDING NEW JERSEY POLICY RECOGNIZES THE IMPORTANCE OF TIMELY, ACCURATE NOTICE TO HOMEOWNERS FACING FORECLOSURE.

New Jersey has a public policy of using notice requirements to inform homeowners of their rights, provide them with key information necessary to take steps to avert foreclosure as well as the range of foreclosure-prevention options. As with the FFA, timeliness and accuracy of these

other notices is integral to the ability of homeowners to access these options at critical, time-sensitive periods in the foreclosure process. As such, the Appellate Division's decision to sanction mere substantial compliance with the FFA's notice requirements is contrary to state policy and also threatens the success of these other foreclosure-prevention efforts.

The Save New Jersey Homes Act contains several provisions aimed at providing timely and detailed notice to homeowners at risk of foreclosure. N.J.S.A. 46:10B-36 et seq. It requires lenders to notify homeowners prior to the resetting of a variable interest rate home loan so that homeowners can pursue refinancing options before going into default. N.J.S.A. 46:10B-39. The Act also requires lenders to notify these borrowers of their right to request a six-month forbearance period, and sets forth detailed requirements for the contents of that notice. N.J.S.A. 46:10B-50(a). The Mortgage Stabilization and Relief Act later amended the Save New Jersey Homes Act to provide financial assistance and housing counselors to assist homeowners with refinancing these high risk loans, helping to avoid foreclosure. S. 1599 (Mortgage Stabilization and Relief Act as Introduced), 213th Leg. (N.J. Nov. 13, 2008).

The Judiciary's Foreclosure Mediation Program also relies upon timely and accurate notice to homeowners as means to avert foreclosure. Administrative Office of the Courts, New Jersey Foreclosure Mediation Manual, October 2009, available at http://www.judiciary.state.nj.us/civil/foreclosure/11290_foreclo

sure_med_info.pdf. Lenders must notify homeowners concerning availability of the mediation program when the summons and complaint is filed, and again when serving the notice of motion for judgment. Id. at 2. The Administrative Office of the Courts is required to provide a similar notice to homeowners sixty days after the foreclosure complaint has been filed. Id.

Further, the legislature has recognized the importance of timely and accurate notice to homeowners in foreclosure who are at risk of falling prey to foreclosure rescue scams. The Foreclosure Rescue Fraud Prevention Act was recently passed by the Legislature and sent to the Governor for signature. S. 1651 (Foreclosure Rescue Fraud Prevention Act as Introduced), 214th Leg. (N.J. Mar. 11, 2010); Sarah Portlock, N.J. Legislature Bill Would Regulate Foreclosure Rescue Fraud, Offer Relief to Distressed Homeowners, Star Ledger, July 3, 2011, available at http://www.nj.com/business/index.ssf/2011/07/nj_legislature_bill_would_regu.html. This Act requires bonded foreclosure rescue companies to provide homeowners with certain disclosures, written in a large boldface font, concerning the nature of the rescue transaction. Id. As with the other notice requirements described above, the Legislature has again affirmed the importance of providing homeowners facing foreclosure with timely, accurate notices of their rights at a critical juncture, as a means to avoid the loss of their homes.

The policy of the State of New Jersey is clear: workouts, modifications, and other foreclosure-prevention options that

keep people in their homes are superior to a swift and less-than-compliant foreclosure process. Indeed, the Save New Jersey Homes Act recognizes that foreclosure of a family's home represents a loss of the family's most valuable financial asset, and that foreclosures undermine the health and economic vitality of neighborhoods. See N.J.S.A. 46:10B-37(b). More broadly, the Legislature noted that foreclosures result in the loss of millions of dollars in assets and state revenue from property tax proceeds. N.J.S.A. 46:10B-37(c).

State policy is similarly clear in recognizing the importance of timely and accurate notice to homeowners about alternatives to foreclosure. The Appellate Division's decision holding that a failure to comply with the FFA is without consequence for the foreclosing lender, threatens the efficacy of these other important state foreclosure-prevention methods that rely on notice.

D. THE APPROPRIATE REMEDY FOR A DEFECTIVE NOTICE OF INTENTION TO FORECLOSE IS DISMISSAL OF THE COMPLAINT WITHOUT PREJUDICE BECAUSE THE PLAIN LANAGUGE OF THE FFA REQUIRES IT, IT WOULD BEST SERVE THE ACT'S REMEDIAL PURPOSE, AND IT IS THE BEST OPTION AVAILABLE AFTER WEIGHING THE EQUITIES.

Dismissal of a foreclosure complaint without prejudice is the only meaningful remedy for a lender's failure to comply with the FFA's notice requirements and the only meaningful deterrent to future violations. When a foreclosure complaint is allowed to proceed despite a faulty notice of intention to foreclose, it undermines the integrity of the judicial foreclosure process because it is based on a premature and therefore illegal

acceleration of the homeowners' mortgage debt and a misrepresentation of compliance in the foreclosure complaint itself; homeowners who are dragged into court prematurely are forced to incur attorney's fees and court costs, not to mention damage to their credit. See also 30 New Jersey Practice, Law of Mortgages with Forms § 24.16 (Myron C. Weinstein) (2d ed. 2000).

1. The Plain Language Of The FFA Requires Dismissal Of the Foreclosure Complaint Without Prejudice And Re-Service Of a Compliant Notice Of Intention To Foreclose.

The plain language of the Act requires service of the NOI before the lender can "commence any foreclosure," N.J.S.A. 2A:50-56(a). The Act further requires lenders to certify that they complied with the Notice of Intention requirement in their foreclosure complaint. N.J.S.A. 2A:50-56(f). If the original notice was deficient, the lender's complaint is void and cannot be simply amended, as it lacked legal basis to "commence" in the first instance. See 30 New Jersey Practice, Law of Mortgages with Forms § 24.16 (Myron C. Weinstein) (2d ed. 2000). The homeowner is entitled to a compliant NOI, a 30-day period to cure, a proper acceleration of the debt and, only then, service of a legally-sufficient foreclosure complaint if the default has not been cured. See also New Brunswick Sav. Bank v. Markouski, 123 N.J. 402, 425 (1991), ("the general rule is that when insufficient notice of a sheriff's sale is given, the preferred remedy is that which restores that status quo ante to the greatest extent possible.")

2. The remedial nature of the FFA Requires Dismissal Without Prejudice as the Only Meaningful Way to Deter

Lender Noncompliance and Avoid Thwarting the Act's Purpose.

The FFA is remedial legislation and must be liberally construed in order to achieve its beneficent purpose of protecting homeowners facing foreclosure. Housing and Redev. Auth. of Tp. of Franklin v. Miller, 397 N.J. Super. 1, 5, (App. Div. 2007)(citing Torres v. Trenton Times Newspaper, 64 N.J. 458, 461, (1974); See also Spencer Sav. Bank v. Shaw, 401 N.J. Super. 1, 6 (App. Div. 2008). The drafters of the Act intended lenders to strictly comply with its notice requirements to ensure that homeowners understand the foreclosure process and can take steps to avoid losing their homes. Dismissal without prejudice furthers this remedial purpose by deterring lender non-compliance and incentivizing lenders to provide fully-compliant notices to homeowners prior to foreclosure. See EMC Mortg. Corp. v. Chaudhri, 400 N.J. Super. 126, 139 (App. Div. 2008) (concluding that a violation is best addressed by dismissal of the foreclosure complaint without prejudice); Laks, supra, at 6(dismissal without prejudice best effectuates the legislative purpose in adopting the Act).

Allowing lenders an opportunity to simply serve a revised and newly compliant notice during the pendency of foreclosure proceedings would "eviscerate the statute's plain meaning and effectively reward plaintiff for its neglect." Bank of N.Y. Mellon v. Elghossain, 419 N.J. Super. 336, 342 (Ch. Div. 2010). Importantly, it would undermine the integrity of the judicial foreclosure process itself. A late compliant notice could not

undo a wrongful acceleration of the debt under paragraph 22 of the mortgage, nor could it eliminate the complaint's false statement as to compliance with the NOI that was a condition precedent to initiating the foreclosure action. The only way to remedy these significant errors is to start the process again. Starting over protects the homeowner from the lost opportunity to negotiate with the lender before litigation costs piled up, from being saddled with a higher cure obligation that includes lender fees to initiate and litigate the foreclosure, additional lender attorney fees incurred to correct the NOI, and his or her own attorney fees to resolve the problem through litigation. 30 New Jersey Practice, Law of Mortgages with Forms § 24.16 (Myron C. Weinstein) (2d ed. 2000).

3. Weighing Costs and Benefits, Dismissal Without Prejudice Is the Best Available Remedy Because the Benefit Of Certainty From Strict Compliance would Outweigh Any Modest Delay Caused by Dismissal Without Prejudice.

Weighing the costs and benefits of the dismissal without prejudice remedy compels the conclusion that it is the best of the available alternatives. While a dismissal without prejudice would indeed delay foreclosure proceedings to allow the lender to issue a new notice of intention to foreclose, accelerate the mortgage debt and, if necessary, file a foreclosure complaint thirty days later, homeowners would receive the benefit of accurate and timely information about their right to cure their defaulted mortgage, time in which to effect a cure, and other

steps they can take to avoid foreclosure, affirming the central policy goals of the FFA.

Strict enforcement of the FFA could slightly delay an already backed-up foreclosure process or it could result in more pre-litigation resolutions - a win for both homeowners and lenders. In any case, any delays that presently exist in the foreclosure process - the borrower confusion, faulty notices, pleading irregularities, and standing-related challenges to foreclosure that have stalled New Jersey's foreclosure system - are largely the fault of the financial institutions that designed the complex system of securitization. Any additional delays resulting from dismissals without prejudice would pale in comparison. Nor is this remedy likely to result in a flood of litigation challenging the sufficiency of FFA notices. A high proportion of foreclosure judgments would not be subject to challenge due to existing law regarding finality of judgments which already contains reasonable limitations.

POINT II

CONGRESS FAVORED HOMEOWNERS RAISING RESCISSION IN FORECLOSURE. THIS CLEAR EXPRESSION IN THE STATUTE MUST BE RESPECTED AND NOT BE REVERSED THROUGH THE IMPOSITION OF PRECONDITIONS THAT DEPRIVE HOMEOWNERS OF THEIR DAY IN COURT.

Homeownership is part and parcel of the American dream. TILA protects that dream by regulating lender conduct and mandating the timely and accurate disclosure of material loan terms. 15 U.S.C. § 1601 et seq. TILA offers the critical, substantive protection of rescission to prevent the dream from

becoming a nightmare when lenders violate the statute and homeowners face the loss of their home to foreclosure. 15 U.S.C. §§ 1635 & 1635(i). The essence of that protection is the reordering of the common law rescission process allowing homeowners to rescind *first,* requiring lenders to act and tender back to the consumer *second* and designating tender by the consumer as the *final step* in the process. This reordering is essential because homeowners, especially those in foreclosure, likely cannot obtain refinancing for the balance of their mortgage (as defined by their lender) to tender before the merits of their TILA claims both lower their balance and allow a court to fashion a workable tender process. That very basic right of rescission is in jeopardy here -- whether homeowners raising rescission under TILA in foreclosure will have their day in court. The Guillaumes were deprived of their day in court when, disregarding the plain language of the statute, and this Court's jurisprudence on statutory construction, DiProspero v. Penn, 183 N.J. 477, 492, 505 (2005), the Appellate Division erroneously imposed a precondition on that right in the form of a requirement that they *first* prove an ability to tender back the proceeds of their loan. The TILA process makes rescission practically and not just theoretically available to struggling homeowners whose mortgage transaction violated TILA. This Court should uphold that critical protection, respecting Congress's decision to provide an explicit and significantly more

protective right of rescission for borrowers facing foreclosure. 15 U.S.C. § 1635(i).

In contrast, U.S. Bank urges this Court to undermine that special rescission protection for even the small number - six percent - of New Jersey foreclosure defendants who actually file contesting answers, see Administrative Order 01-2010, In the Matter of Residential Mortgage Foreclosures..., available at http://goo.gl/zVzfF. U.S. Bank argues that this Court should, through a judicial rewrite of TILA, prematurely cut off the rights of the very homeowners Congress sought most to protect without affording those homeowners their day in court on the merits of their claims. U.S. Bank would have this Court rewrite the plain language of TILA to revert to the common law process Congress very purposefully altered, and require homeowners in foreclosure to prove an ability to tender back the loan proceeds *first*. That U.S. Bank so argues is no surprise because, as a practical matter, upholding TILA's statutory rescission process as written is the only way that the vast majority of homeowners will be able to utilize rescission to preserve homeownership, as the statute intends, by proving their claim has merit.

Almost all homeowners enter into a mortgage contract on their residence because they do not have the capital to buy their home. When that contract is breached with a TILA violation, the homeowner has a right to TILA's statutory rescission process. To effectuate TILA rescission, courts must allow the case to proceed so that they can evaluate all fees and

interest charges that have been imposed on the homeowner over the life of the loan, subtract from the principal balance those fees and charges that TILA disallows and then credit all payments made by the borrower against the principal owing on the loan to arrive at the homeowner's tender obligation. Without knowing how much is owed for tender, a borrower who is willing and able to tender through a sale or refinancing of the home will be unable to secure either funding or a purchaser. See, e.g., Burrows v. Orchid Island TRS, LLC, 2008 WL 744735, at *6 (C.D. Cal. Mar. 18, 2008) ("[I]t is unreasonable to require plaintiff to demonstrate, at this stage of the litigation [motion to dismiss], that he can return the loan proceeds . . . Ordering plaintiff - who is shouldering the responsibility of paying the mortgage in question - to demonstrate that he can immediately return the loan proceeds would effectively deprive him of an opportunity to seek relief.").

Only when a Court has determined that it will void the security interest and has calculated the proper amount to be tendered back to the bank, can the homeowner obtain new financing - only at that point is it appropriate to decide how to structure that tender.[4] Though prescriptive, at this point

[4] For example, a borrower whose claimed mortgage balance when she rescinds (including interest, late fees and attorney fees) is $200,000, might owe a lower tender amount of $150,000 because rescission eliminates all interest and fees and credits the borrower for any payments previously made. 15 U.S.C. § 1635(b). A borrower who qualifies for a refinancing at the $150,000 tender amount or could sell an otherwise underwater home and fully pay off the tender amount, may not be able to do the same with a $200,000 mortgage balance. It

and this point only, the statute offers courts discretion to come up with a tender process through which the parties can be brought back to status quo ante. The court engages in an assessment whether the equities come into play. The good or bad actions of the parties should be considered at this appropriate stage of the proceeding, and should guide the court in fashioning a tender process that respects those actions and enables homeowners in foreclosure like the Guillaumes a reasonable opportunity to pay the tender and stay in their home.

To be clear, following TILA's mandate does not mean that borrowers get a "free house;" it means that lenders and borrowers make tenders that restore the parties to their pre-loan positions. Requiring premature proof of ability to tender, as U.S. Bank so keenly urges, not only violates the statute, but will render the right of rescission under TILA meaningless in almost every case. It will, thus, eliminate lenders' incentive to comply with the law and dramatically reduce homeownership - an outcome at odds with both Congressional and the New Jersey legislature's intent.

A. CONGRESS DID NOT MAKE THE ABILITY TO TENDER A THRESHOLD ISSUE FOR HOMEOWNERS ASSERTING THER RIGHT TO RESCIND UNDER TILA, ESPECIALLY FOR HOMEOWNERS IN FORECLOSURE.

TILA "regulates the relationship between lenders and consumers, including mortgagees and mortgagors, by requiring certain disclosures regarding loan terms and arrangements." McCutcheon v. America's Servicing Co., 560 F.3d 143, 147 (3d

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is essential that a struggling homeowner be able to provide the certainty of a known, lower tender amount to a new lender or buyer.

Cir. 2009).[5] In regulating the relationship between lenders and homeowners, TILA emphasizes disclosure of credit terms and provides special protection - the right of rescission - for mortgage refinancings because refinancings subject the consumer's homeownership to the risk of foreclosure. In re Porter, 961 F.2d 1066, 1073 (3d Cir. 1992) (citing 15 U.S.C. § 1635(a)). TILA rescission serves as a powerful deterrent against unscrupulous tactics, incentivizes due diligence on the part of lenders, and ultimately, provides homeowners, especially those in foreclosure, with recourse when lenders fail to comply. To this end, homeowners' right of rescission has a positive impact on the overall health of the credit market. It deters bait and switch tactics, motivates true and accurate disclosures, and cultivates honest lending.

Rescission is a blunt but important instrument because borrowers cannot easily evaluate the terms and costs of loans in the midst of a loan closing. Consumer mortgage transactions involve myriad complex legal documents most of which homeowners are encountering without adequate time to read carefully and in which lenders can easily hide or manipulate costs or

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[5] See Cooper, 238 F. Supp. at 54 ("Congress intended TILA to assure a meaningful disclosure of credit terms so that consumers will not be misled as to the costs of financing"); Szczubelek v. Cendant Mortg. Corp., 215 F.R.D. 107, 127 (D.N.J. 2003) (noting that Congress enacted to the statute to aid "unsophisticated consumer[s] so that [they] would not be easily misled as to the total costs of financing"); Williams v. Chartwell Fin. Servs., Ltd., 204 F.3d 748 (7th Cir. 2000); First Nat'l Bank v. Office of the Comptroller, 956 F.2d 1456 (8th Cir. 1992) (fundamental purpose of TILA was to mandate disclosure so that borrowers could make informed decisions).

information.[6] Moreover, the social dynamic of a mortgage closing frequently pressures borrowers to sign the documents presented, regardless of misgivings or reservations. See 73 Fed. Reg. 1672, 1715-16 (Jan. 9, 2008). Because borrowers typically trust and believe that their lender is looking out for their interests, it is unlikely that they will uncover omissions and misrepresentations. This is especially true in a case where the terms of the mortgage may be accurate or reasonable, but where a lender, as happened here, is overcharging for government recording fees, the accuracy of which a homeowner would have no reason to doubt.[7]

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[6] William C. Apgar & Christopher E. Herbert, U.S. Dep't of Hous. & Urban Dev., Subprime Lending and Alternative Financial Service Providers: A Literature Review and Empirical Analysis § 2.2.3, at 1-15 (2006) ("even the most sophisticated borrower will find it difficult to evaluate the details of a mortgage."); James M. Lacko & Janis K. Pappalardo, Fed. Trade Comm'n, Improving Consumer Mortgage Disclosure: An Empirical Assessment of Current and Prototype Disclosure Forms, at ES-11 (2007), available at www.ftc.gov/os/2007/06/P025505MortgageDisclosureReport.pdf (prime borrowers have difficulty answering questions about their loans); Wiliam C. Apgar, Allegra Calder, & Gary Fauth, Jt. Ctr. for Housing Studies, Harvard University, Credit, Capital and Communities: The Implications of the Changing Mortgage Banking Industry for Community Based Organizations 40, 50-51 (Mar. 2004), available at www.jchs.harvard.edu/publications/communitydevelopment/ccc04-1.pdf (discussing inability of even sophisticated consumers to understand mortgage products).

[7] Congress defined inflated settlement charges as finance charges. 15 U.S.C. § 1605(d)(1) (exempting from the computation of finance charge only those title fees "which are or will be paid to public officials"); see also 12 C.F.R. §§ 226.4 & 226.4(c)(7). By so doing, Congress made a failure to include the overcharge in the finance charge disclosure a violation of TILA that could trigger the right to rescind. Indeed, it is the very type of violation Congress sought to prevent by holding lenders liable when they inflate fees that consumers are unlikely to uncover even if they carefully review their loan documents. These insidious violations are often widespread, siphoning fees from homeowners that may seem insignificant but in the aggregate total large sums. See, e.g., Cooper v. First Gov't Mortgage & Investors Corp., 238 F. Supp. 2d 50, 61-62 (D.D.C. 2002).

TILA has specific and clear requirements that put lenders on notice of their obligations. In turn, lenders are held strictly liable for failure to comply with certain specific disclosure requirements deemed "material" and outlined in the statute. Thomka v. A.Z. Chevrolet Inc., 619 F.2d 246, 249-50 (3d Cir. 1980) ("A creditor who fails to comply with TILA in any respect is liable . . . regardless of the nature of the violation or the creditor's intent"); Shepeard v. Quality Siding & Window Factory, Inc., 730 F. Supp. 1295, 1299 (D. Del. 1990) ("strict liability in the sense that absolute compliance is required and even technical violations will form the basis for liability.").

In all refinancings, even if the statute is not violated, the homeowner has a three-day 'cooling off' period during which she can cancel the transaction for any reason or for no reason at all. 15 U.S.C. § 1635(a). If a homeowner exercises this unconditional right to rescind, there is little to unwind or undo because the statute prohibits lenders from disbursing loan funds during the three-day period. 12 C.F.R. § 226.23(c). Where

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Moreover, U.S. Bank's claim that county recordation tax rates are not easily ascertainable is not credible. From the day the Guillaumes applied for a refinancing of their existing home loan, the lender knew the address of the property and was obligated to discover the county in which it was located and the applicable tax rates. This information was due to the Guillaumes in the form of a Good Faith Estimate of Closing Costs within three days after application. 24 C.F.R. § 3500.7(a). The only variable early in the loan process is uncertainty about the final principal amount of the loan -- not the rates. Prior to closing, the principal balance is fixed, here at $210,000, and calculating the recordation tax is simple arithmetic. When the lender chooses to pad the fee and retain the proceeds, it takes the risk that homeowners might default on their loans and exercise their right to rescind.

there are material violations of TILA, however, a homeowner may exercise rescission for up to three years, as the Guillaumes did here. See Cappuccio v. Prime Capital Funding LLC, 649 F.3d 180, 188 (3d Cir. 2011).

Congress defined as "material" a handful of disclosures whose violation gives rise to an extended right to rescind. 15 U.S.C. §§ 1602(u), 1635; 12 C.F.R. § 226.23(a)(3) n.48. Understating the finance charge, a material disclosure that expresses the cost of the borrower's credit in dollars, is the violation alleged here. The statute is fleshed out, establishing exacting standards for evaluating whether a finance charge disclosure is compliant under specified circumstances. TILA tolerates different amounts of error in disclosing the finance charge, depending on the remedy sought - statutory damages or rescission - and the borrower's status. 15 U.S.C. §§ 1605(f), 1635(i)(2).[8]

When a homeowner is facing foreclosure, TILA is more intolerant of error than it is for borrowers not in default. For example, the Guillaumes allege that they were overcharged for a government recording fee that was inflated by $120. Id. This overcharge would not have been a material violation if the Guillaumes had rescinded before receiving the NOI because the statute is less protective for borrowers not in default,

[8] For example, an error of more than $100 will subject a lender to the risk of a statutory damages claim. An error of more than $35 triggers the right of a borrower in foreclosure to rescind the loan. But a much greater error is required for rescission by borrowers not in default.

allowing an error of as much as $1050 for the Guillaumes loan amount.[9] 15 U.S.C. § 1605(f)(2). However, Congress was clear - saving homes is the primary goal of the rescission remedy and when homeowners are in foreclosure the statute views the loan transaction differently. It tolerates very little error - an error of $35 is sufficient to assert a rescission claim.[10] 15 U.S.C. § 1635(i). Thus, the Guillaumes' violation is more than three times greater than the $35 amount needed and, if proven, it is unquestionably a material violation and not "de minimis" as the trial court erroneously ruled. 15 U.S.C. § 1635(i); 12 C.F.R. § 226.23(h).

Once a violation has been established, the transaction must be unwound: where a homeowner asserts the rescission right during the extended three-year period, the process of unwinding the loan can be complicated. As prescribed by TILA and its regulations, rescission follows a simple but unique three part

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[9] 15 U.S.C. § 1605(f)(2) states that

> the disclosure of the finance charge . . . shall be treated as being accurate for purposes of section 1635 . . . if . . . the amount disclosed as the finance charge does not vary from the actual finance charge by more than an amount equal to one-half of one percent of the total amount of credit extended."

Thus, the tolerance for finance charge errors for the Guillaume's loan would be ½ of 1% of the loan amount of $210,000 or $1050.

[10] Specifically, 15 U.S.C. § 1635(i) states:

> Notwithstanding section 1605(f) of this title . . . for the purposes of exercising any rescission rights after the initiation of any judicial or nonjudicial foreclosure process, the disclosure of the finance charge and other disclosures affected by any finance charge shall be treated as being accurate for purposes of this section if the amount disclosed as the finance charge does not vary from the actual finance charge by more than $35 or is greater than the amount required to be disclosed under this subchapter.

(emphasis added).

process that "reorder[s] . . . common law rescission rules . . . to put the consumer in a stronger bargaining position" because the lender has violated the law. Large v. Conseco Fin. Serv. Corp., 292 F.3d 49, 55-56 (1st Cir. 2002). First, upon receipt of the notice of rescission, the creditor must release any security interest that it holds on the property immediately and the borrower is no longer liable for any finance or other charge associated with the mortgage. 15 U.S.C. § 1635(b) ("When an obligor exercises his right to cancel . . . any security interest given by the obligor . . . becomes void upon such a rescission."); 12 C.F.R. §§ 226.15(d)(1), 226.23(d)(1).

Second, within twenty days of receiving the notice of rescission, the creditor must return to the consumer any amount of money or property that has been given to anyone in connection with the transaction. 15 U.S.C. § 1635(b); 12 C.F.R. §§ 226.15(d)(2), 226.23(d)(2). Third, after the creditor has given back the money or property, the homeowner must tender any loan proceeds he or she received to the creditor. 15 U.S.C. § 1635(b); 12 C.F.R. §§ 226.15(d)(3), 226.23(d)(3). If a homeowner rescinds a transaction and the lender does not comply with its obligations as set forth in step 2, the borrower may bring an action in state or federal court or enforce his or her rescission rights. 15 U.S.C. § 1640(a).

Because it evokes the common law, the term rescission can be confusing, but TILA rescission is a conscious reordering of the common law rescission process. At common law, a borrower

could rescind a transaction only if he or she first returned the money or property received from the lender. Conduit & Foundation Corp. v. Atlantic City, 2 N.J. Super. 433 (Ch. Div. 1949); Family Fin. Servs. v. Spencer, 677 A.2d 479, 487 (Conn. App. Ct. 1996) (citing 17A Am. Jur. 2d Contracts §§ 590, 600-01 (1991)) ("Under common law rescission, the rescinding party must first tender the property that he has received under the agreement before the contract may be considered void.").

Congress deliberately chose to reverse traditional common law rescission procedures for the benefit of homeowners. See Official Staff Commentary 12 C.F.R. §§ 226.15(d)(3)-1, 226.23(d)(3)-1; Large, 292 F.3d at 55 ("Rescission under the TILA is 'automatic' in the sense that, in contrast to common law rescission, the borrower need not first return the loan proceeds received under the agreement to effect a rescission."); Williams v. Homestake Mortgage Co., 968 F.2d 1137, 1140 (11th Cir. 1992) ("The sequence of rescission and tender set forth in § 1635(b) is a reordering of common law rules governing rescission."); see also Johnson v. GMAC Mortgage Corp., 162 S.W.3d 119, 120-21 (Mo. Ct. App. 2005) (holding that TILA rescission does not require an offer of tender prior to the release of the security interest in contrast with the common law); Family Fin. Serv. V. Spencer, 677 A.2d 479, 486-87 (Conn. App. Ct. 1996).

Effectuating this reverse process can be complicated as the offending lender has a security interest in the borrower's home, the homeowner has made payments to the lender that the

statute requires the lender to return (*i.e.*, interest and/or fees), and the amount of principal the homeowner must return to the lender, *i.e.*, the principal amount of the loan excluding any interest and/or fees and accounting for payments, is not always clear. See Handy v. Anchor Mortgage Corp., 464 F.3d 760, 764 (7th Cir. 2006). Moreover, the borrower may have compensatory and statutory damage claims that a court could incorporate into the tender process.

The statute and regulations contemplate the need for courts to have some flexibility in resolving TILA rescission claims. Courts have the equitable authority to modify the procedures for effectuating rescission, which are steps two and three of this process. 15 U.S.C. § 1635(b) (final sentence); 12 C.F.R. §§ 226.15(d)(4), 12 C.F.R. § 226.23(d)(4). However, there is no similar equitable or legal authority for courts to modify the first step of the rescission process. Courts do not have the power to impose preconditions on the right to rescind in the first instance.[11] Botelho v. U.S. Bank, N.A., 692 F. Supp. 2d 1174, 1181 (N.D. Cal. 2010) (holding in the context of tender in TILA rescission that "[t]he enumerated elements of any given

[11] Respondent misleadingly cites to the Federal Reserve Board's proposal to amend Regulation Z. See Federal Reserve Board, 75 Fed. Reg. 58539 (Proposed September 24, 2010); see also Resp. Opp. to Petition for Cert. at 17-18. An administrative agency's proposed regulation -- especially one the agency did not and no longer has authority to adopt - has no persuasive authority. Cf. Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986). The Board's authority to act expired on July 22, 2011, when the Dodd-Frank Wall Street Reform and Consumer Protection Act, PL 111-203 (July 21, 2010), transferred the authority to enforce and implement TILA to the Consumer Financial Protection Bureau. See 15 U.S.C. § 1604.

claim are among the most fixed of legal principles . . . . The list of elements cannot be altered on a case-by-case basis."). The Federal Reserve Board's Official Staff Commentary explains:

> The sequence of procedures under § 226.23(d)(2) and (3), or a court's modification of those procedures under § 226.23(d)(4), does not affect a consumer's substantive right to rescind and to have the loan amount adjusted accordingly. Where the consumer's right to rescind is contested by the creditor, a court would normally determine whether the consumer has a right to rescind and determine the amounts owed before establishing the procedures for the parties to tender any money or property.

Off'l Staff Comm. to Reg. Z, 12 C.F.R. Pt. 226, Supp. I at ¶ 23(d)(4)-1 (emphasis added). The Board's interpretation of the regulations is entitled to great deference. Ford Motor Credit Co. v. Milhollin, 444 U.S. at 557, 559-60, 100 S. Ct. at 792-94. Congress has noted that "[w]here a [borrower] . . . is prohibited from [tendering] . . . [t]he committee expects that the courts, at any time during the rescission process, may impose equitable conditions to insure that the [borrower] meets his [or her] obligations after the creditor has performed [its] obligations as required under the act." S. Rep. No. 96-368, at 29 (1979), reprinted in 1980 U.S.C.C.A.N. 236, at 265 (emphasis added). The homeowner is not obligated to return any portion of the loan unless and until the lender acts as set forth in 12 C.F.R. § 226.23(d)(1) and (2). See 12 C.F.R. § 226.23(d)(3).

In TILA, Congress created a substantive right to rescind and established the procedures for effectuating that right.

This Court's jurisprudence dictates that it will effectuate the plain language of the statute and respect its underlying congressional intent. Accordingly, the Court should not allow New Jersey courts to erect a barrier to rescission by making the ability to tender a condition precedent to exercise that right under TILA.

As here, in DiProspero v. Penn, 183 N.J. 477 (2005), the Court considered whether a prior common law rule should be engrafted onto a later statutory claim. The Court ruled,

> It is not the function of this Court to "rewrite a plainly-written enactment of the Legislature [ ]or presume that the Legislature intended something other than that expressed by way of the plain language." O'Connell v. State, 171 N.J. 484, 488, 795 A.2d 857 (2002). We cannot "write in an additional qualification which the Legislature pointedly omitted in drafting its own enactment," Craster v. Bd. of Comm'rs of Newark, 9 N.J. 225, 230, 87 A.2d 721 (1952), or "engage in conjecture or surmise which will circumvent the plain meaning of the act," In re Closing of Jamesburg High School, 83 N.J. 540, 548, 416 A.2d 896 (1980). "Our duty is to construe and apply the statute as enacted." Ibid.

183 N.J. 492. As this Court further explained in rejecting an argument to write a common law limitation into "AICRA, a detailed and comprehensive statute," like TILA, "[t]he Legislature did not articulate in its statutory scheme a requirement that injured plaintiffs must prove a serious life impact to meet the threshold." Id. at 505. Similarly, this Court should not upset the carefully crafted legislative process and its intentional reordering of the common law rule.

Many courts follow the statute's rescission process and respect its plain language, recognizing there is no authority in

the statute to require a borrower to tender first. See, e.g., Coleman v. Crossroads Lending Group, Inc., 2010 WL 4676984 (D. Minn. Nov. 9, 2010); James v. Bridge Capital Corp., 2011 WL 309692 (D. Or. Jan. 27, 2011); Savard v. JP Morgan Chase Bank, N.A., 2010 WL 2802543 (D. Colo. July 14, 2010). In fact, the Maine Supreme Judicial Court's clear ruling just two months ago reinforces the statutory process. "[T]he statute specifies that tender is not required until the creditor has performed its obligations under the law." Deutsche Bank Nat'l Trust Co. v. Pelletier, 2011 ME 87, ¶ 13 (2011).[12]

Here the Guillaumes have adequately pled their right to rescind based on a materially false disclosure of the finance charge as decided by Congress. The plain language of the statute dictates that the Court decide whether this claim has merit and, if so, to then determine their tender amount. We discuss below how the Court should weigh the equities in crafting a process for the Guillaumes to tender.

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[12] A number of district courts, particularly those in the Ninth Circuit, now require pleading tender after facing an onslaught of *pro se* TILA rescission filings by homeowners using form pleadings in an effort to stop and often to undo completed non-judicial foreclosures. See, e.g., Bernardo v. U.S. Bank, N.A., 2011 WL 367475 at *7-8 (N.D. Cal. Aug. 22, 2011); Austero v. Aurora Loan Servs. Inc., 2011 WL 3359729, at *16 (N.D. Cal. Aug. 3, 2011); see also Webb v. Suntrust Mortgage, Inc., 2010 WL 2950353 (N.D. Ga. July 1, 2010). However, other California district courts have rejected that analysis and ruled the other way. See, e.g., Burrows v. Orchid Island TRS, LLC, 2008 WL 744735, at *6 (C.D. Cal. Mar. 18, 2008)("it is unreasonable to require Plaintiff to demonstrate, at this [motion to dismiss] stage of the litigation, that he can return the loan proceeds."); Pelayo v. Home Capital Funding, 2009 WL 1459419, at *7 (S.D. Cal. May 22, 2009).

B. REQUIRING HOMEOWNERS TO PROVE ABILITY TO TENDER PRIOR TO DETERMINING LIABILITY, TENDER AMOUNT, TIMING, AND TERMS OF RESCISSION PRACTICALLY EVISERATES HOMEOWNERS' RIGHT TO RESCIND.

Applying the plain language of the statute also makes practical sense. It is simply unworkable to condition a homeowner's right to pursue TILA rescission on ability to tender because the tender obligation cannot be calculated with certainty at the motion to dismiss or other analogous stages of litigation. Burrows v. Orchid Island TRS, LLC, 2008 WL 744735, at *6 (C.D. Cal. Mar. 18, 2008) ("it is unreasonable to require Plaintiff to demonstrate, at this [motion to dismiss] stage of the litigation, that he can return the loan proceeds.").

Moreover, a conditional rescission right would both decrease lenders' willingness to engage with homeowners to modify loans or reach other resolution of the rescission claim without the involvement of the courts, and would also effectively deny TILA's protection to a significant percentage of homeowners in distress. This Court should effectuate TILA's primary consumer protection goal by construing the statute and its rescission-based protection in favor of homeowners. See Cappucchio, 649 F.3d 188. To do so, this Court should direct New Jersey courts to fashion fair tender processes at the appropriate stage of the litigation and with due consideration for saving homes.

It is unworkable to require proof of ability to tender before the court determines whether a statutory right to rescind

exists.[13] To prove he or she can tender the necessary funds, the consumer must know, at a minimum, what amount will be due, the procedure for making payment, and the payment schedule.

Conditioning a homeowner's right to rescission on proof of the homeowner's ability to tender the lump sum of the loan amount in the beginning of a litigation places "the cart before the horse." Williams v. Saxon Mortg. Co., 2008 WL 45739, at *7 (S.D. Ala. Jan. 2, 2008). In the early stages of litigation, it is difficult, if not impossible, "to accurately assess . . . a [borrower's] post-adjudication capacity to tender." Lea Krivinskas Shepard, It's All About the Principal: Preserving Consumers' Right of Rescission Under the Truth in Lending Act, 89 N.C. L. Rev. 171, 210 (2010); see also Williams, 2008 WL 45739, at *5-6 (finding "no evidence . . . to suggest that suitable arrangements could not be made for [the lender] to be made whole . . . within a reasonable time period," and "declin[ing] to exercise its discretion to extinguish [a borrower's] right of rescission altogether based on the mere possibility that [the borrower] may encounter difficulty in refinancing the loan").

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[13] Respondent's heavy reliance on the Third Circuit's unpublished opinion in Jobe v. Argent Mortgage. Co., LLC, 373 F. Appx. 260 (3d Cir. Apr. 2, 2010) is misplaced. See Respondents Brief in Opposition to Petition for Certification. In Jobe the court considered the merits of the borrowers' TILA claim and determined that they did not have the substantive right to rescind because they had not sufficiently proven a TILA violation in the first place. Jobe, 373 F. Appx. at 262; the court further noted in *dicta* that the borrowers had testified that they were unable to pay back the loan proceeds. This is a slender strand indeed on which to rest any decision reversing the statute's plain text for the Guillaumes.

Ultimately, once the Court has calculated the homeowner's tender obligation, the homeowner may satisfy this obligation in a variety of ways, including: "(1) relying on damages from other successful claims to reduce her overall obligation to the creditor; (2) seeking loans from friends and family to help reduce the deficiency between the tender obligation and the value of her home; or (3) attempting to refinance the loan with a community bank, whose underwriting standards might be somewhat less rigorous than those of large commercial banks." Shepard, supra, 89 N.C. L. Rev. at 210. Where, as discussed below, the homeowner needs to invoke the court's equitable authority in order to effectuate tender, a variety of options are available to facilitate that tender.

To be clear, whenever a party requests the court to modify the rescission process, that party is invoking the equitable power of the court. See Williams, 968 F. 2d at 1141-42. Equity is fact specific. In re Sterten, 352 B.R. 380, 389 (Bankr. E.D. Pa. 2006). Courts cannot analyze the equities without evidence of the facts underlying origination of the loan and all parties' conduct since origination and through the foreclosure process. See Coleman, supra. Here, U.S. Bank ignores the equitable nature of its request and that courts use their equitable authority to modify the rescission process for the benefit of homeowners, as well as for lenders. In keeping with "the flexible and equitable nature of TILA's rescission remedy" courts have discretion to creatively structure a tender process.

Coleman, 2010 WL 4676984, at *8. Ordinarily, the equities favor a process that will save a borrower's home. Id. ("Rendering [homeowner] homeless would not serve the goal of returning her to the status quo before the Loan").

Lenders that seek to reverse the statutory process for their benefit are seeking a special exception and must come before the court with clean hands. U.S. Bank cannot make this claim. Its deception and violations of fair play must doom its effort: (1) U.S. Bank's bad faith dual track negotiation lulled the Guillaumes into believing they could resolve their default through a loan modification and that a foreclosure action would not proceed during the loan modification period; (2) U.S. Bank affirmatively misrepresented that ASC was the holder and failed to identify itself in the NOI; (3) U.S. Bank improperly accelerated the Guillaumes' obligation securing the mortgage where acceleration depended on a proper NOI; and finally (4) U.S. Bank's foreclosure filing was improper where it was based on a false certification that it had properly served the NOI.

In contrast, the Guillaumes diligently pursued avenues to obtain a loan modification. Like many other homeowners, they were confused by the dual track process, which is both understandable and excusable.

The purpose of considering the equities is to fashion a tender process that is fair to all parties in light of the totality of the circumstances and the remedial purpose of TILA. A number of courts have crafted tender to allow homeowners to

repay loan proceeds over a period of time. See Coleman, 2010 WL 4676984 at *8 (collecting cases); Consumer Solutions REO, LLC v. Hillery, 2010 WL 1222739, at *1 (N.D. Cal. Mar. 24, 2010) (same). As the Sterten court concluded a payment plan is appropriate and equitable for a consumer with a meritorious TILA claim.

> [A]n appropriate and equitable mechanism for effectuating the rescission of the Transaction in this case . . . appears to be one that involves harmonizing a number of potentially competing considerations. . . . .The consumer protective purposes of TILA and its private attorney general system of enforcement support the fashioning of a remedy that will provide effective relief for this consumer who has successfully invoked her rights under the statute. These considerations would lead me to restructure the mortgage repayment terms in a fashion as to maximize the likelihood that the Debtor will be able to afford the monthly instalment amount for satisfaction of the Repayment Amount, even though it may result in a lengthy repayment period. . . . I find th[e] impact on [the lender] to be proportionate in a transaction rescinded under TILA.

In re Sterten, 352 B.R. at 390.

POINT III

ENFORCING EXISTING EVIDENTIARY STANDARDS IN UNCONTESTED FORECLOSURE ACTIONS ENSURES THE INTEGRITY OF DEFAULT JUDGMENTS AND AVOIDS "TOXIC TITLE" PROBLEMS THAT ONLY UNDERMINE THE HOUSING MARKET'S RECOVERY

The health of New Jersey's housing market depends on the integrity of its judicial foreclosure process. Tens of thousands of uncontested default foreclosure judgments are entered each year in New Jersey, and those properties are often later sold to third-party buyers. Administrative Order 01-2010, In the Matter of Residential Mortgage Foreclosures..., at p. 3,

available at http://goo.gl/zVzfF. However, banks may obtain those judgments despite having submitted insufficient proof to support foreclosure. Bank of N.Y. v. Raftogianis, 418 N.J.Super. 323, 327-28 (Ch.Div. 2010) ("As a general proposition, a party seeking to foreclose a mortgage must own or control the underlying debt."). These omissions often mask larger, systemic problems with foreclosure cases resulting from well-documented defects in the mortgage origination and securitization process. Indeed, the omitted evidence may call into question the plaintiff's standing to foreclose in the first place.

Virtually none of these default judgments will ever be challenged, leaving a potential cloud on subsequent title transfers. The blatant evidentiary problems with U.S. Bank's default judgment motion in the present case would have never surfaced had the Guillaumes not been lucky enough to secure pro bono counsel and litigate the matter. No one - the market, the banks, the courts, homeowners, or communities - benefits from "conveyor belt" foreclosures that proceed in default, and potentially flood the market with homes with clouded title. See Bevilacqua v. Rodriguez, 2011 WL 4908845 (Mass. S.J.C. Oct. 18, 2011) (overturning U.S. Bank's sale of foreclosed property to third-party where U.S. Bank had failed to prove it had properly been assigned the mortgage). Thus, strict enforcement of evidentiary standards for default judgments is vital to ensuring the integrity of the judicial foreclosure process.

The Administrative Office of the Courts ("AOC") plays a vital role in protecting the integrity of this process. In 2010, approximately ninety-four percent of the 65,222 foreclosures filed with the AOC were deemed uncontested and thus, proceeded to a default judgment without the benefit of a true adversarial proceeding. Administrative Order 01-2010, In the Matter of Residential Mortgage Foreclosures..., at p. 3, available at http://goo.gl/zVzfF. Of the six percent of those cases deemed contested, many were defended by homeowners appearing pro se. Id. Thus, the AOC has recognized that its Office of Foreclosure has "the responsibility of ensuring that justice is done for absent and pro se parties" and "safeguarding that process, which depends on the integrity of documents filed with the court." Id. at 3, 13. The only judicial review that an uncontested foreclosure will receive is generally from the Office of Foreclosure.

New Jersey's court rules on general motion practice provide a basic framework for the evidentiary standards governing default judgments. Like any other motion, a motion for a default judgment of foreclosure must comply with Rule 1:6-6. R. 1:6-6 (Evidence on Motions; Affidavits). If a motion is based upon facts not in the record or not judicially-noticeable, Rule 1:6-6 requires the motion to include affidavits based upon personal knowledge. Id. Only those facts that are admissible in evidence to which the affiant is competent to testify may be included. Id. Certified copies of all papers referred to in the

affidavit must be incorporated into it by reference and annexed thereto. See Id.; See also Celino v. General Acc. Ins., 211 N.J. Super. 538, 544 (App. Div. 1986). A certification may be submitted in lieu of an affidavit, but only if it contains a dated certification that the statements made therein are true and that the certifying party is aware that if anything is willfully false he or she would be subject to punishment. R. 1:4-4. These rules apply equally to standard motions for relief and motions for final judgment by default. See R. 4:43-2.

In foreclosure actions, New Jersey Court Rules place an even higher burden on banks to prove that they have the right to foreclose, to ensure the integrity of final judgments affecting title. The Rules provide specificity regarding the proofs that banks must provide in its motion. See R. 4:64-1(d); R. 4:64-2(a), (b). In an uncontested matter, the bank may seek a default judgment only upon proof of both the amount due under the mortgage loan and the documentation in support of the right to foreclose.[14] Id. The "supporting instruments" specified by rule are: 1) the original mortgage, 2) evidence of indebtedness, 3) assignments, 4) claims of lien by condo associations, and 5) "any other original document upon which the claim is based." R. 4:64-2(a). The rule also specifies that the Proof of Amount Due must include, inter alia, a schedule of charges annexed to the

[14] The record indicates that U.S. Bank's motion for default judgment against the Guillaumes was prepared on or after September 15, 2008 and stamped as filed on November 11, 2008. As such, the amendments to Rule 4:64-2 that became effective on September 1, 2008 controlled the disposition of this motion and will be the subject of this discussion.

affidavit or certification which itemizes the basis for the amount the bank is alleged is due. R. 4:64-2(b).

Proper authentication of these documents is also necessary to ensure their accuracy and the integrity of a default judgment. Under Rule 4:64-2 the bank may submit copies of the required documentation in lieu of the originals, but only if the copies are "certified as [] true cop[ies]" by a New Jersey attorney. R. 4:64-2(a). In order to certify a document as a "true copy" New Jersey law has long held that an attorney must compare the copy with the original, word for word, and attest to having conducted this comparison in his or her certification. State v. Black, 31 N.J. Super. 418, 423 (App. Div. 1954). Without this specific attestation, the attorney has not established that he or she has personal knowledge regarding the authenticity of the document, nor are they competent to testify on the subject. See R. 4-46-2(c) ("the affidavit shall be made on personal knowledge of all of the facts recited therein. . .").

Like countless others filed in New Jersey's courts, U.S. Bank's motion for default judgment against the Guillaumes was not supported by the proper evidence. A closer look at those deficiencies provides a glimpse under the proverbial rock that is the uncontested foreclosure judgment process. The record suggests that U.S. Bank's September 2008 motion failed to include a copy of the original mortgage setting forth their lien interest in the property and consequent right to foreclose as

required by Rule 4:64-2(a). Nor does the record indicate that U.S. Bank provided evidence of the multiple assignments of the note and mortgage that were required in order to complete the chain of ownership in the securitization process. Id.

As is also common in default foreclosure judgments, the evidence that U.S. Bank did provide was never properly authenticated. U.S. Bank provided a copy of what appears to be the Guillaume's Note as evidence of their indebtedness. R. 4:64-2(a). But this document only contains a stamp in the upper right hand corner with the text "Certified to be a True and Correct Copy" and signed by Brian J. Yoder, Esquire. A separate affidavit or certification incorporating this document by reference was not provided, as required by Rule 1:6-6. Regardless of whether a separate certification was necessary, this stamp also fails to include a certification by Mr. Yoder that he compared the copy to the original, the required method for authentication of photocopied documents. State v. Black, 31 N.J. Super. 418, 423 (App. Div. 1954). Nor does it contain a dated certification that the statements made by the affiant are true and that he is aware that if they are false he might be subject to punishment. R. 1:4-4. Mr. Yoder's mere stamp does not meet the basic standards for the authentication of evidence and the photocopied document he submitted was insufficient to prove U.S. Bank had standing to foreclose on the Guillaumes' home. In fact, given current industry standards, it is highly unlikely that Mr. Yoder ever compared the original to the

photocopy, as most foreclosure-related documentation is transmitted to counsel electronically. See In Re Taylor, 655 F.3d 274 (3rd Cir. 2011) (noting that foreclosure counsel using electronic systems for the transmission of foreclosure-related information should not abdicate their professional judgment to a "black box").

Other than the Certification of Proof of Amount Due[15] and purported copy of the Guillaume's note, the record suggests that U.S. Bank submitted nothing else in support of its motion for judgment. Under Rule 4:64-2(a) this omission should have been fatal to U.S. Bank's motion for judgment. Nevertheless, U.S. Bank was issued a final judgment of foreclosure and a sheriff's

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[15] Well-documented problems with the computer systems that provide the payment history data that underlies Certifications of Proof of Amount Due raise serious questions about the trustworthiness of this evidence. See N.J.R.E. 803(c)(6) (Records of Regularly Conducted Activity); See also New Jersey Div. of Youth and Fam. Servs. v. M.C. III, 201 N.J. 328, 347 (2010) ("...the method and circumstances of the preparation of the writing must justify allowing it into evidence."). Most mortgage servicing companies and their foreclosure attorney-vendors utilize default sub-servicing companies like Lender Processing Services, LLP, and their various software platforms to exchange information necessary to process a foreclosure--including the preparation of certifications of amount due. See e.g. Website of Phelan Hallinan & Schmieg, LLP, available at http://fedphe.com/ (last accessed Oct. 26, 2011)(stating that they "utilize every case management and invoice reporting systems used by the industry, including VendorScape, NewTrak, IClear, LenStar, Alltel, and New Invoice.").

The errors that can result from the use of these systems are rarely discovered by the plaintiff's attorney because of how highly the process is automated. See In Re Taylor, Supra,(upholding award of Rule 11 sanctions on bank's attorneys and servicer who failed to properly investigate obvious discrepancies in the amount due, in reliance on same NewTrak system used by U.S. Bank's attorneys in this case); In Re Wilson, 2011 WL 1337240, (Bankr. E.D. La. 2011) (finding LPS liable for sanctions due to fraud on the court due to inaccuracies in sworn statements to the court); Abigail Field, Why Your Bank May Be Wrong About What You Owe on Your Mortgage, Daily Finance, Mar. 28, 2011, available at http://www.dailyfinance.com/2011/03/28/mortgage-bank-wrong-about-what-you-owe/ (last accessed Oct. 26, 2011) (former LPS employee explains security breaches in mortgage borrower payment history data). Moreover, LPS has been the subject of regulatory agency enforcement due to serious improprieties in its foreclosure-related services. See Consent Order, In the Matter of Lender Processing Services, Inc. et al., Before the Board of Governors of the Federal Reserve System, et al., FRB Docket Nos. 11-052-B-SC-1, 11-052-B-SC-2, 11-052-B-SC-3, Apr. 13 2011, available at http://www.federalreserve.gov/newsevents/press/enforcement/enf20110413a11.pdf

sale of the home was scheduled. Had the Guillaumes never challenged the sufficiency of U.S. Bank's default judgment before the sale, their home would have most likely been sold to an unwitting buyer.

New Jersey courts have increasingly ruled against the evidence submitted by banks in foreclosure actions on authenticity grounds. Wells Fargo Bank v. Ford, 418 N.J. Super. 592, 599 (App. Div. Jan. 28 2011) (citing Claypotch v. Heller, Inc., 360 N.J.Super. 472, 489, (App. Div. 2003) (holding that a certification in support of bank's motion for summary judgment must comply with Rule 1:6-6 and the facts stated therein must be based on personal knowledge); Deutsche Bank Nat'l Trust Co. v. Wilson, 2011 WL 148271 (App. Div. Jan. 19, 2011) (unpublished) (reversing judgment of foreclosure because of insufficiency of affidavit evidence); Aurora Loan Services, LLC v. Toledo, 2011 WL 4916380 (App. Div. Oct. 18, 2011) (unpublished) (reversing grant of summary judgment to bank where its certification was not based on personal knowledge pursuant to Rule 1:6-6).

* * *

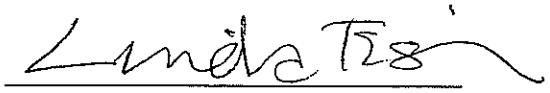
A foreclosure case is litigation like any other. When someone's home is at stake, law, policy, and rules of evidence should not bend for the sake of volume or expediency. New Jersey remains a judicial foreclosure state - preserving the integrity of its foreclosure process is essential to the proper functioning of the housing market and the legal system during a time of crisis.

CONCLUSION

For the foregoing reasons, the opinion of the Appellate Division in this matter should be reversed.

Respectfully submitted,

SETON HALL CENTER FOR
SOCIAL JUSTICE



LINDA E. FISHER

DATE: October 28, 2011