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October 21, 2011

Mark Neary, Clerk
Supreme Court of New Jersey
Hughes Justice Complex
25 W. Market Street
8th Floor
Trenton, New Jersey, 08625-0970

Re: US Bank National Association, As Trustee for CSAB Mortgage-Backed Pass-Through Certificates 2006-3 vs. Maryse Guillaume; Mr. Guillaume, Husband of Maryse Guillaume; Emilio Guillaume; Mrs. Emilio Guillaume, His Wife; City of East Orange
Supreme Court of New Jersey, Docket No. 068176

Dear Mr. Neary:

This firm represents Respondent, U.S. Bank National Bank, as Trustee for CSAB Mortgage-Backed Pass-Through Certificates, Series 2006-3. Enclosed for filing are the original and eight copies the following:

(1) Respondent's Motion For Leave to File a Supplemental Brief;
(2) Respondent's Proposed Supplemental Brief; and
(3) Certification of Service.

Should you have any questions, please feel free to call me.

Very truly yours,

Mark S. Melodia

MSM:cmp
Enclosures
cc: Margaret Lambe Jurow, Esquire (via email & U.S. Mail)
Alan J. Baldwin, Esquire (via email & U.S. Mail)

SUPREME COURT OF NEW JERSEY
DOCKET NO. 068176

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.	On Certification from the Superior Court of New Jersey, Appellate Division, granted September 27, 2011 Civil Action Sat Below: Appellate Division: Hon. Clarkson S. Fisher, Jr., J.A.D. Hon. Douglas M. Fasciale, J.A.D. Trial Court: Hon. Harriet Farber Klein, J.S.C.

RESPONDENT'S MOTION UNDER RULE 2:12-11 & 2:12-8 FOR LEAVE TO FILE A SUPPLEMENTAL MERITS BRIEF

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1. Respondent U.S. Bank National Association as Trustee for CSAB MORTGAGE-BACKED PASS-THROUGH CERTIFICATES, SERIES 2006-3 (the "Trustee") moves this Court for Leave to File a Supplemental Merits Brief (attached hereto).

2. After the Respondent filed its papers in opposition to the certification of this action, the Appellate Division made and approved for publication its decision in Bank of New York v. Laks, 2011 WL 3424983 (N.J. Super. Ct. App. Div. Aug. 8, 2011)(hereafter, "Laks").

3. Respondent promptly informed this Court of Laks by means of a short letter submitted under Rule 2:6-11(d).

4. In that same short letter, Respondent withdrew in part its opposition to certification of this action. In light of the Laks decision, Respondent joined with Petitioner in asking this Court to grant certification for purposes of resolving the dispute between the parties with respect to the sufficiency of the Notice of Intent to Foreclose.

5. The proposed Supplemental Merits Brief addresses in full the conflict between the decision of the Appellate Division panel in this case and the decision of the Laks panel.

6. The Supplemental Merits Brief is presented to assist the Court in deciding "a question of general public importance,"

resolving a conflict between decisions of the Appellate Division, and in the interest of justice. Cf., Rule 2:12-4.

7. Further, consideration of the matters set forth in the Supplemental Merits Brief is required "to secure a just determination," one of the touchstones for administration of the Courts. Rule 1:1-2.

8. For these reasons, Respondent seeks the leave of the Court to file the attached proposed Supplemental Merits Brief.

Dated: October 21, 2011

Respectfully submitted,

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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, Plaintiff/Respondent, v. MARYSE GUILLAUME, MR. GUILLAUME, HUSBAND OF MARYSE GUILLAUME, EMILIO GUILLAUME, MRS. EMILIO GUILLAUME, HIS WIFE, CITY OF EAST ORANGE, Defendants/Petitioners.	On Certification from the Superior Court of New Jersey, Appellate Division, granted September 27, 2011 Civil Action Sat Below: Appellate Division: Hon. Clarkson S. Fisher, Jr., J.A.D. Hon. Douglas M. Fasciale, J.A.D. Trial Court: Hon. Harriet Farber Klein, J.S.C.

RESPONDENT'S SUPPLEMENTAL BRIEF ON THE ISSUE OF COMPLIANCE WITH THE FAIR FORECLOSURE ACT

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PRELIMINARY STATEMENT

This Court should affirm the Appellate Division panel's decision and hold that the Notice of Intent ("NOI") sent to Defendants/Petitioners Maryse and Emilio Guillaume (the "Guillaumes") complied with the Fair Foreclosure Act ("FFA"), N.J.S.A. 2A:50-53 to -68.

In 2006, the Guillaumes sought and obtained a mortgage loan that refinanced a prior mortgage on their residence and provided them with some $61,000 in cash. The Guillaumes stopped making payments on the loan starting in March of 2008. They have continued to live in mortgaged property - "rent-free" - for over 3 1/2 years. On the eve of the duly-scheduled Sheriff's Sale of the mortgaged property, the Guillaumes asked the Chancery Division to vacate the default judgment entered against them on the basis that, *inter alia*, the NOI they received did not comply with all of the technical requirements of the FFA.

The Guillaumes have never contended that the NOI did not inform them of the nature of their default, their right to cure, the performance required to effectuate a cure, the date by which the cure had to take place, or who to contact to cure or otherwise address the default - the agent of the note holder and holder of the servicing rights to their mortgage, America's Servicing Company ("ASC"). It did. Nor, did the Guillaumes

contend that they could have effectuated a cure. They could not. Rather, the Guillaumes contend the NOI violated the FFA solely because it did not identify the name and address of the holder of their promissory note, Respondent U.S. Bank National Association as Trustee for CSAB MORTGAGE-BACKED PASS-THROUGH CERTIFICATES, SERIES 2006-3 (the "Trustee") - an entity with no direct involvement with - or control over - the servicing of their loan.

The Chancery Division and the Appellate Division rejected the Guillaumes' argument, reasoning that "[d]irecting the Guillaumes to contact ASC fulfilled the purpose of the notice provision under the FFA - making the debtor aware of the situation, and how and who to contact to either cure the default or raise potential disputes." *US Bank National Association, as Trustee v. Guillaume*, 2011 WL 1485258, *2-3 (N.J. Super. Ct. App. Div. Apr. 20, 2011).

While the Guillaumes' Petition for Certification was pending, another panel reached a different - and incorrect - result. *See Bank of New York v. Laks*, 2011 WL 3424983 (N.J. Super. Ct. App. Div. Aug. 8, 2011). In *Laks*, the panel held that it does not matter if an NOI satisfies the objectives of the FFA if it does not strictly comply with each and every technical requirement of the FFA, that an NOI must identify the

"lender" (as that term is defined in the FFA) regardless of whether that party has any involvement in the day-to-day management of the loan, and that the holder of the servicing rights to the mortgage and agent of the party holding the note - ASC in the instant case - is not a "lender" within the meaning of the FFA.

This Court should adopt the approach of the panel in this case and reject *Laks*. First, as the holder of the mortgage servicing rights and the agent of the note holder, ASC is a "lender" as that term is defined in the FFA. Such a conclusion is compelled by a plain reading of the FFA. Were that not the case, the FFA must be deemed ambiguous in the context of the modern residential mortgage industry and, taking into account the purpose of the FFA, the Court should find that a mortgage servicer - the entity that controls administration of loans both pre- and post-default - is a "lender" under the FFA.

Second, even if ASC were not a "lender," principles of equity independently compel the conclusion that the NOI in this case substantially complied with the FFA or should otherwise be deemed compliant. The Guillaumes have never contended that the NOI they received did not make them aware of the situation they faced and what they had to do. Indeed, the Guillaumes had - and took - every opportunity after receipt of the NOI (and the

ensuing complaint) to try to resolve the default, dealing exclusively with ASC. Further, the Guillaumes have never claimed that the alleged failure to identify the "lender" prejudiced them in any fashion or even that they would have contacted the "lender" instead of addressing their concerns with ASC. Indeed, any such contact at best would have simply brought them back full circle to ASC.

Under these circumstances, the NOI achieved its purpose and the public policy behind the FFA was fully vindicated in this case. Indeed, the panel's decision in this case finds further support in a 2009 decision out of Pennsylvania's Superior Court that addressed the same issue under the statute that inspired the FFA. *See Wells Fargo Bank v. Monroe*, 966 A.2d 1140, 1143 (Pa. Super. 2009) (Rejecting argument that a pre-foreclosure notice was deficient because it only identified the servicer of the loan and not the mortgagee; the notice sufficiently apprised the debtors of their options, which options they in fact exercised).

This Court should accordingly affirm the panel's ruling in this case that an NOI that identifies only a mortgage loan servicer complies with the FFA and, further, should disapprove any case that might be read to require a different result.

PERTINENT PROCEDURAL HISTORY

Following the filing of a Complaint, service on the Guillaumes, and a subsequent default judgment, the Guillaumes filed a motion to vacate the judgment entered against them arguing, *inter alia*, that the NOI sent to them did not comply with the FFA because it did not set forth the Trustee's name and address. After a series of hearings, the Chancery Division refused to vacate the default judgment on August 30, 2010. [Da235-236].

After recognizing that the operation and structure of the mortgage industry had changed since the enactment of the FFA, the Chancery Division concluded that the court should be guided by the legislative purpose of the FFA and found that providing only information about the mortgage loan servicer satisfied the FFA:

> I'm of the view that the purpose of this statute, as indicated in its history and its language, should dictate the result today. … And that is, as it says, to make the debtor aware of the situation so that they have a reasonable opportunity to cure the defects and to know who to deal with when they get a letter that tells them in about 40-35 days you are going to be sued and that if you don't pay up with what is outstanding you may leave your property.
>
> When you look at it in the perspective the --the meaning is obvious and the purpose of the statute is not to play games. And as I think I've said and I saw in the papers, it's not a "gotcha" statue.

> In -- in all fairness these defendants have known now for quite a while what's going on. And they have known and they certainly should know now, who to call and who to write to if they either want to pay or they have a disagreement with their numbers that are stated in the letter.
>
> Even though the address is of the servicer, it is of no moment because there could be no confusion of who is who and the -- the servicer is the party that they have been dealing with and that they can pay to, or that they can contact to rectify their situation. And when you look at it they way, you see that the purpose of the Act is fulfilled.

[2T15:12-14; 2T16:3-17:13].

The Appellate Division affirmed, recognizing that the NOI at issue satisfied the purpose of the FFA because it is the servicer with whom borrowers will have had all contact in the past and with whom borrowers would negotiate any alternative to foreclosure such as a loan modification or a forbearance agreement:

> The NOI satisfied the purpose of the FFA because ASC is the appropriate party for the Guillaumes to contact to cure their default….
>
> Directing the Guillaumes to contact ASC fulfilled the purpose of the notice provision under the FFA - making the debtor aware of the situation, and how and who to contact to either cure the default or raise potential disputes. In 2006, ASC notified the Guillaumes that its name would "appear on [their] monthly statements and other communications regarding [their] mortgage loan." From that point forward, the

> Guillaumes made their monthly payments to ASC, and, after they received the NOI, the Guillaumes contacted ASC and were fully aware of the situation as they attempted to modify their loan.

2011 WL 1485258, *2-3.

STATEMENT OF PERTINENT FACTS

Credit Suisse Financial Corporation ("Credit Suisse") extended a $210,000 thirty year 6.75% fixed rate mortgage loan (the "Loan") to Petitioner/Defendant Maryse Guillaume on September 7, 2006. A portion of the proceeds of the Loan were used to satisfy a prior mortgage on the Guillaumes' residence and $61,719.87 was taken out in cash. [Da101-102]. The Loan was evidenced by a promissory note (the "Note") and secured by a mortgage (the "Mortgage") on the Guillaumes' residence that named Mortgage Electronic Registration Systems Inc. ("MERS") as mortgagee in a nominee capacity for Credit Suisse, "its successors and assigns." [Da74-78; Da89-100]. The Loan was securitized and transferred to the Trustee pursuant to a Pooling and Servicing Agreement dated October 1, 2006 relating to CSAB Mortgage-Backed Pass-Through Certificates, Series 2006-3 (the "PSA").[1]

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1 Portions of the PSA were submitted below. [Da82-83; Da109-111]. The complete PSA is a public record and can be found on the U.S. Securities and Exchange Commission website: www.sec.gov./Archives/edgar/data/1378535/000116231806001517/m1166psa41.htm.

Since the day the Loan was originated, Credit Suisse, MERS, and the Trustee were strangers to the Guillaumes. ASC became the servicer for the Loan on December 1, 2006, acting as the Trustee's agent and holding the Trustee's rights to administer the Loan; the Guillaumes immediately received notification that ASC now had the right to receive payments from them and that ASC's name would appear on their monthly statements "and other communications regarding your mortgage loan." [Da34; Da35; Da112; Da119]. Thereafter, the Guillaumes dealt exclusively with ASC. [1T14:1-2; 1T18:12-14].

Following a payment default, a Notice of Intent to Foreclose ("NOI") was sent to the Guillaumes on May 18, 2008. There is no dispute the NOI did not contain the names or addresses of Credit Suisse, MERS, or the Trustee; instead, the NOI identified only ASC - the entity that held the Trustee's servicing rights incident to the Mortgage. [Da121-122]. The Guillaumes contacted ASC within the 30-day period set forth in the NOI and the parties explored the Guillaumes' options over a lengthy period of time, ultimately - and unfortunately - without success. [Da36; Da39; Da40; Da51; Da150-162].

ARGUMENT

This Court should affirm. The Chancery Division's decision is reviewed under an abuse of discretion standard. United

States v. Scurry, 193 N.J. 492, 502-03, 940 A.2d 1164 (2008). When reviewing a decision under that standard, an appellate court does not "'review the order for the purpose of determining whether it shall substitute its discretion for that of the court of Chancery.'" Wiktorowicz v. Stesko, 134 N.J. Eq. 383, 386, 35 A.2d 696 (E. & A. 1944) (quoting Masionis v. Romel, 101 N.J. Eq. 780, 782, 138 A. 892 (E. & A. 1927)). Instead, an appellate court reviews the decision to determine whether it was made "'without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" Scurry, 193 N.J. at 504 (citations omitted). Any such review can only lead to the conclusion that the Appellate Division reached the right result.

POINT I. ASC Is A "Lender" Within The Meaning Of The FFA

This Court should hold that a mortgage loan servicer is a "lender" within the meaning of the FFA.

A. As Holder Of The Mortgage Servicing Rights, ASC Fits Into The Statutory Definition

The FFA defines a "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. ASC fits within this definition because it is an agent of the note holder and holds certain rights traditionally incident to the

beneficial ownership of a mortgage - the rights to administer the mortgage and control the income derived from it.

As noted above, the Guillaumes' mortgage loan was sold by the originator and eventually was deposited into the CSAB MORTGAGE-BACKED PASS-THROUGH CERTIFICATES, SERIES 2006-3 pursuant to a Pooling and Servicing Agreement ("PSA"). The PSA under which ASC operates illustrates the concepts that a servicer is an agent of the Trustee and holds the Trustee's rights with respect to administration and control of the mortgage. Here, Article III of the PSA governs the administration and servicing of the mortgage loans that make up the corpus of the trust. The provisions of Article III allocate decision-making with respect to individual loans to ASC and other loan servicers and not the Trustee.

For example, ASC controls the foreclosure process. *See* Section 3.11(a). Further, ASC may - in its discretion - waive late fees, extend due dates for payments, and modify the terms of the loan (by capitalizing advances, causing unpaid items to be due as a balloon payment at the time of the last payment due on the loan, extending the maturity date, or reducing the interest rate). *See* Section 3.05(b) of the PSA. Loan servicers are also allocated responsibility for maintaining the records and documentation relating to the loans in the trust - not the

Trustee. *See* Section 3.07(a). And, the PSA goes so far as to require that insurance polices on mortgaged properties name the loan servicer - not the Trustee - as the loss payee. *See* Section 3.09(a).

The Legislature has itself recognized that, in controlling the rights to administer the mortgage and control the income derived from it, a mortgage servicer holds certain rights traditionally incident to the beneficial ownership of a mortgage and can in contexts similar to the FFA be deemed a "lender." *See* N.J.S.A 55:14K-85 (defining "lender" under the Mortgage Stabilization and Relief Act as including a "mortgage loan servicer that owns and is willing to refinance or is authorized to negotiate the terms of the homeowner's mortgage").

Moreover, this Court has recently recognized that a mortgage servicer is the agent of the note holder, controls the mortgage, and is the party whom the debtor must contact with respect to challenging or resolving a default, whether by way of a cure or a loan modification:

> The role of a servicing agent generally is to collect payments on the loan and, in the event of default, pursue foreclosure or other alternatives to secure payment of the loan. See *Adam J. Levitin & Tara Towomey, Mortgage Servicing*, 28 Yale J. on Reg. 1, 15, 23, 25-28 (2011).

Gonzalez v. Wilshire Credit Corp., 207 N.J. 557, 25 A.3d 1103 (2011).[2]

Indeed, Legal Services of New Jersey submitted an amicus brief in *Gonzalez* in which it acknowledged that securitization "fundamentally alters the traditional lending model and the relationships between the parties" and that securitization accomplishes "unbundling" of a mortgage loan into its constituent parts. *See* Amicus Brief of Legal Services of New Jersey in *Gonzalez* at 4. "Thus, most significantly for the case at hand, instead of administering its own mortgage account, the holder of the note and mortgage outsources collection and foreclosure duties to the mortgage servicer." *Id.* at 5. "The servicer is hired to perform three related roles on behalf of the trust - roles that traditionally would have been retained by the lender" transaction processing for loans that are not in default …, default management (i.e., collections and activities related to taking defaulted loans through foreclosure) and loss mitigation. *Id.*[3]

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2 *Cf. Fed. Nat'l Mort. Ass'n v. Bracero*, 297 N.J. Super. 105, 107 (Ch. Div. 1996) (In enacting the FFA, "[t]he legislature could not have intended to abrogate agency principles. There is no dispute that plaintiff's attorneys are clearly plaintiff's agents for purposes of the foreclosure action and notice to the attorney is equivalent to notice to the lender").

3 The Attorney General acknowledged the same thing in its amicus brief in *Gonzalez*. *See* Amicus Brief of Attorney General

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Even before *Gonzalez*, this Court recognized the central role that loan servicers play in the post-default process when it adopted the recent amendments to the foreclosure rules. *See* R. 4:64-2. These amendments allow for *the servicer* to confirm the accuracy of a foreclosure complaint, review and confirm the accuracy of the underlying loan documents, and testify as to the amount due. *See* R. 4:64. The Court's amendments came after much public comment and debate and after every interested party agreed to the significant role servicers play in the mortgage industry and foreclosure process.

Against this backdrop, ASC is a "lender" for the purposes of the NOI and N.J.S.A. 2A:50-55: simply stated, it holds the Mortgage within the meaning of the FFA in the sense that it has been assigned control of the Mortgage as the Trustee's agent. That being the case, the Court should hold that the NOI complied with the plain language of the FFA and affirm.[4]

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in *Gonzalez* at 10 ("[M]ortgage servicers, rather than mortgage loan originators, manage the note-holder's relationships with homeowners during the life of the loan."). *See also id.* at 12 ("Servicers are responsible for all aspects of all the accounts in the [trust].").

4 The *Laks* panel observed that the trustee in that case did not claim that the servicer was a "lender" within the meaning of the FFA. 2011 WL 3424983, *3. This is not surprising because the issue of whether the NOI in that case violated the FFA because it only identified the mortgage servicer was not even raised in the appellate briefs (or before the Chancery

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B. The FFA Is Otherwise Ambiguous In The Context Of The Modern Residential Mortgage Industry And The Court Should Take Into Account The Purpose Of The FFA And Find That A Servicer Is A "Lender" Under The Act

This Court has recognized that "[i]t is frequently difficult for a draftsman of legislation to anticipate all situations and to measure his words against them." *New Capital Bar & Grill Corp. v. Div. of Employment Sec.*, 25 N.J. 155, 160, 135 A.2d 465 (1957) (citing *Alexander v. New Jersey Power & Light Co.*, 21 N.J. 373, 122 A.2d 339 (1956)).

"Hence cases inevitably arise in which a literal application of the language used would lead to results incompatible with the legislative design." *Id.* In such situations, "[i]t is the proper function, indeed the obligation, of the judiciary to give effect to the obvious purpose of the Legislature, and to that end 'words used may be expanded or limited according to the manifest reason and obvious purpose of

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Division). Nonetheless, the panel in *Laks sua sponte* decided that the "central question" before it was whether identifying only the mortgage loan servicer in an NOI violates the FFA. In deciding that it does, the *Laks* panel erred in concluding that the FFA's definition of "lender" did not encompass the holder of the mortgage servicing rights and agent of the note holder, and further erred in concluding that - even when the NOI makes a debtor fully aware of the situation and who to contact - an NOI that does not identify a "lender" pursuant to N.J.S.A. 2A:50-56(c)(11) does not comply with the FFA and mandates dismissal of a foreclosure complaint.

the law. The spirit of the legislative direction prevails over the literal sense of the terms.'" *Id.*

Indeed, this Court has said that, "when all is said and done, the matter of statutory construction … will not justly turn on literalisms, technisms, or the so-called formal rules of interpretation; it will justly turn on the breadth of the objectives of the legislation and the commonsense of the situation." *Jersey City Chapter, P.O.P.A. v. Jersey City*, 55 N.J. 86, 100, 259 A.2d 698 (1969). *See also Perrelli v. Pastorelli*, 206 N.J. 193, 200, 20 A.3d 354 (2011).

Here, the FFA provides that a "lender" means any entity that "makes or holds" a residential mortgage and any entity to which such mortgage is "assigned." N.J.S.A. 2A:50-55. This definition includes each of Credit Suisse, MERS, and the Trustee. Read literally, the NOI should identify all of these entities. That, of course, would be confusing and absurd, and clearly the drafters of the FFA did not anticipate the situation presented in this case. Under these circumstances, the Court should avoid standing on "literalisms, technisms, or the so-called formal rules of interpretation" and should instead "justly" examine "the breadth of the objectives of the legislation and the commonsense of the situation."

The legislative objective of the FFA is to give homeowners "every opportunity to pay their home mortgages" and to benefit lenders "when residential mortgage debtors cure their defaults." N.J.S.A. 2A:50-54. The NOI here accomplished this laudable objective and the Appellate Division decision in this case comports with the realities of modern mortgage loan administration.

Ignoring the Chancery Division's on-the-ground experience, the *Laks* panel hazarded that notices of intent that do not identify the holder of the note "have the potential to undermine the Legislature's purpose" because it might be possible that a debtor who receives an NOI from a servicer and then a complaint from the note holder might be "confused" in some fashion. 2011 WL 3424983, *5. The panel's logic is flawed. Indeed, the Guillaumes have never claimed that they were confused when served with a complaint naming the Trustee as plaintiff.[5]

The NOI, of course, is sent pre-filing and its purpose is to resolve the situation short of litigation, if possible. Introducing a "new" entity into the equation at that juncture has the potential to confuse at a key time when the debtor has

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5 Nor did Laks claim she was confused by the fact that her NOI did not identify the party ultimately named as plaintiff in her case.

been given a 30-day window to address the situation.[6] Certainly this was the view of the Chancery Division - the court charged with the day-to-day management of these cases. [1T13:24-14:4]. *Cf. Fed. Nat'l Mort. Ass'n v. Bracero*, *supra*, 297 N.J. Super. at 108 (Although the FFA states that the response 14-day letter is to be mailed to the "lender," the response should more appropriately be sent to counsel for the lender: "a literal interpretation would inhibit the common goal of efficiency and fairness in foreclosure proceedings. A law dictating the debtor's response be sent to the lender would require numerous additional communications between the lender and its counsel ... and makes more likely the possibility that the response will be misplaced and/or not received by the appropriate processor employed by the lender.").

Given the foregoing, the Court should reach a similar conclusion with respect to notices of intent to foreclose - that is, that a loan servicer can be a "lender" for the purposes of an NOI. In short, the legislative objectives and principles of agency, efficiency, and common sense compel the rejection of the

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6 Any attempt to contact a trustee or MERS at that point would simply waste precious time and at best would simply result in the debtor being directed full circle back to the servicer. Sending communications to a trustee at a corporate trust department also makes more likely the possibility that the response will be misplaced and/or not received by the appropriate person. Thus, such communications have the effect of undercutting the policy behind the FFA.

Guillaumes' argument that the NOI was fatally defective and this Court should interpret "lender" as used in the FFA to include servicers of mortgage loans within its ambit.

POINT II. Equitable Principles Compel The Conclusion That The NOI Satisfied The Requirements Of The FFA

This Court should otherwise find that equitable principles support a holding that the NOI satisfied the requirements of the FFA.

A. The NOI Substantially Complied With The FFA

The equitable doctrine of substantial compliance - a doctrine that not only has "deep roots in the English common law," but also "repeated recognition" in this Court's cases "in a wide array of contexts," supports a finding that the NOI complied with the FFA. *Galik v. Clara Maas Medical Center*, 167 N.J. 341, 351-52, 771 A.2d 1141, 1148 (2001) (citations omitted). The purpose of the doctrine "is to avoid the harsh consequences that flow from technically inadequate actions that nonetheless meet a statute's underlying purpose." *Id.* (citation omitted).

This Court has looked to a statute's legislative history and language in order to determine whether the Legislature meant to exclude "the highly just doctrine of substantial compliance which is so well designed to avoid technical defeats of valid claim." *Zamel v. Port of N.Y. Auth.*, 56 N.J. 1, 6, 264 A.2d 201

(1970) (Rejecting a defendant's contention that substantial compliance is inapplicable to a claim with respect to which notice is a statutory pre-condition to the maintenance of suit).

The FFA's notice and cure provisions are similar to, and appear to be patterned on, Pennsylvania's statute governing pre-foreclosure notices. 30 N.J. Prac., Law of Mortgages § 24.12 (2d ed.). Significantly, the panel's decision in this case that the NOI complied with the FFA finds support in a 2009 decision of Pennsylvania's Superior Court. *See Wells Fargo Bank v. Monroe*, 966 A.2d 1140 (Pa. Super. Ct. 2009). There, the court specifically rejected the argument that a pre-foreclosure notice was deficient because it only identified the servicer of the loan and not the mortgagee. *Id.* at 1143. As did the panel in this case, the Pennsylvania Superior Court found that, by identifying the servicer, the notice sufficiently apprised the debtors of their options - which options they in fact exercised (as did the Guillaumes). *Id.* at 1143.

Further, there is nothing in the pertinent statutory history or language of the FFA to indicate the Legislature meant to exclude the application of the substantial compliance doctrine to the FFA. The FFA does not state that the contents of an NOI must "strictly comply" with the subparagraph 56(c). On the contrary, the FAA provides that the NOI be written "in a

manner calculated to make the debtor aware of the situation[.]" N.J.S.A. 2A:50-56(c).

The cases that have found that the FFA requires strict compliance have done so relying solely on the N.J.S.A. 2A:50-61, which provides that "[w]aivers by the debtor of rights provided pursuant to this act are against public policy, unlawful, and void, unless given after default pursuant to a workout agreement in a separate written document signed by the debtor." *See Laks*, and *EMC Mortg. Corp. v. Chaudri*, 400 N.J. Super. 126, 946 A.2d 578 (App. Div. 2008).[7] This reliance goes too far.

In pursuit of the objective of giving homeowners "every opportunity to pay their home mortgages," the FFA contains provisions granting the borrower a right to receive a written notice to foreclose by certified mail (N.J.S.A. 2A:50-56), a right to cure the default (N.J.S.A. 2A:50-57), and a right to notice 14 days before the submission of proofs for the entry of a final judgment and another opportunity to cure at that time

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7 Although cited by these decisions as stating that the FFA requires strict compliance, *Cho Hung Bank v. Kim*, 361 N.J. Super. 331, 345, 825 A.2d 566, 574 (App. Div. 2003), actually engaged in a substantial compliance analysis and concluded that the NOI in that case fell short of the standard. The *Kim* panel did remark that, "[i]f the debtor cannot waive the statute, we would hesitate to endorse its judicial waiver or modification in any case, but surely not one in which final judgment has been rendered in the face of so many failures to comply with statutory requirements." 361 N.J. Super. at 345.

(N.J.S.A. 2A:50-58). While N.J.S.A. 2A:50-61 protects against advance waivers of the right to receive any notice or the right to cure, nothing in this provision suggests that the Legislature intended to abrogate the doctrine of substantial compliance.

Thus, one commentator has observed that a technical violation of the FFA (*e.g.*, omission of an immaterial fact) will not require dismissal of a foreclosure complaint:

> [T]he mortgagee's notice of intention need not be phrased in a manner identical to the Fair Foreclosure Act. ***A technical violation of the Act will not require dismissal of a foreclosure complaint.*** However, if a notice of intention omits or misstates a material fact, the notice may be void.

Tross, New Jersey Foreclosure Law and Practice § 2.4 (emphasis added).

The NOI here substantially complied with the FFA. As summarized in the legislative history, N.J.S.A. 2A:50-56 requires that, "before accelerating the mortgage loan or taking any other legal action to take possession of the residential property, which is the subject of the mortgage, the lender is required to give the debtor a warning notice at least 30 days in advance, providing the debtor with the following information: the particular obligation or real estate security interest; the nature of the default claimed; the right to the debtor to cure the default; what performance is required by the debtor to cure

the default; the date by which such cure must take place without the lender taking further legal steps to take possession of the property; that if the debtor does not cure the default by the time specified, the right to cure will still be present but additional costs are likely to be incurred by the debtor; advice to seek counsel; and the name and phone number of the person whom the debtor can contact to dispute a lender's assertion that default has occurred the correctness of the lender's calculation of the amount required to cure a default." *See Sponsors' Statement, legislative history*, page 8, line 39 to line 9:1.

In describing the written notice, the legislature did not bother to refer to "the name and address of the lender" as being required. This omission confirms that "the name and address of the lender" was not deemed to be material so long as the debtor had - as was the case here - "the name and phone number of the person whom the debtor can contact to dispute a lender's assertion that default has occurred the correctness of the lender's calculation of the amount required to cure a default." Indeed, subparagraph 56(c) provides a further gloss, requiring only that "[t]he written notice shall clearly and conspicuously state [the information] ***in a manner calculated to make the***

debtor aware of the situation[.]" N.J.S.A. 2A:50-56(c) (emphasis added). That is precisely what happened here.[8]

Here, there is no dispute that the NOI sent to the Guillaumes set forth every item listed in subparagraph 56(c) except "the name and address of the lender" (if one assumes ASC is not a "lender" within the meaning of the FFA). An analysis of the NOI under the equitable doctrine of substantial compliance can only lead to the conclusion that the FFA was satisfied here. There is an utter lack of prejudice to the Guillaumes. They received notice and, in response, took steps to try to resolve their situation. The NOI evidenced more than a general compliance with the FFA and there is a reasonable explanation why there was not strict compliance with just one of the multitude of items listed in subparagraph (c) (again, assuming that a servicer cannot be deemed a "lender" under the FFA).

Given the NOI requirements of the FFA, the Trustee's address is not a material fact. The NOI contained information

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[8] In enacting the FFA, the Legislature contemplated that "[t]he Attorney General, in consultation with the Commissioner of Banking, shall promulgate regulations ... to implement [the] act, including, but not limited to, regulations governing the form and content of notices of intention to foreclose." N.J.S.A. 2A:50-68. This was never done and, accordingly, the residential mortgage industry has never had the specific guidance the Legislature expected the industry would receive through the mandated regulations.

"in a manner calculated to make the debtor aware of the situation." It is the servicer with whom borrowers will have had all contact and familiarity and with, and whom borrowers would negotiate any alternative to foreclosure, such as a loan modification or a forbearance agreement. Directing borrowers to contact the servicer by providing the servicer's name and contact information serves the very purpose of the notice provisions of the Fair Foreclosure Act: it makes debtors aware of the situation, and how and who to contact in order to cure the default or raise any potential disputes. Simply put, this Court should hold that the NOI complied with the Fair Foreclosure Act and affirm.

B. The Equitable Powers Of The Chancery Division Support The Conclusions Reached Below Upholding The NOI

Finally, general equitable principles support the finding that the NOI here complied with the FFA.

The Chancery Division is a court of equity and general equitable principles apply to the remedy of foreclosure. *Brinkley v. Western World Inc.*, 275 N.J. Super. 605, 610, 646 A.2d 1136, 1138-39 (Ch. Div. 1994), *aff'd*, 292 N.J. Super. 134, 678 A.2d 330 (App. Div. 1996) ("plaintiff's argument with respect to strict enforcement of the conclusive presumption and time limitation set forth in N.J.S.A. 54:5-52 is rejected"). Thus, a determination as to whether an action "... warrants the

remedy of foreclosure involves the operation of equitable principles [and] … is subject to the exercise of discretion by the court." *Sanguigni v. Sanguigni*, 197 N.J. Super. 505, 507, 485 A.2d 332 (Ch. Div. 1984). *See also United States v. Scurry*, 193 N.J. 492, 502-03, 940 A.2d 1164 (2008).[9]

Further, "while equity may not disregard statutory law, it looks to intent, rather than merely its form." *Monmouth County Div. of Social Services v. C.R.*, 316 N. J. Super. 600, 608 (Ch. Div. 1998). That is precisely what the Chancery Division did here. Thus, the decision by the Chancery Division finding that the NOI satisfied the objectives of the FFA is a proper exercise of that court's equity jurisdiction and was no abuse of discretion. The Court should affirm on this ground.[10]

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9 Thus, given that the matter before it arose in the context of a foreclosure proceeding, the *Laks* panel erred in applying a *de novo* standard of review.

10 Should the Court determine that the NOI did not comply with the FFA, the rule should apply prospectively only (as is discussed in a proposed amicus brief being filed with the Court). Further, the Court should hold that the appropriate remedy when an NOI violates the FFA is one that a number of lower courts have already adopted - instead of dismissing the complaint, the courts have permitted the transmission of a new NOI giving debtors the opportunity to cure the existing default without being required to make any payment toward the plaintiff's attorneys' fees and costs to the date of the new NOI (as is discussed in a proposed amicus brief being filed with the Court).

CONCLUSION

The Guillaumes defaulted on their mortgage loan in March of 2008, over 3 1/2 years ago, and they have continued to live in the property since then – making no loan, tax, or insurance payments. This case does not involve a situation where no notice of intent to foreclose was given. Rather, the NOI received by the Guillaumes made them fully "aware of the situation." The Court should find that the NOI complied with the FFA and affirm.

Dated: October 21, 2011

Respectfully submitted,

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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, Plaintiff/Respondent, v. MARYSE GUILLAUME, MR. GUILLAUME, HUSBAND OF MARYSE GUILLAUME, EMILIO GUILLAUME, MRS. EMILIO GUILLAUME, HIS WIFE, CITY OF EAST ORANGE, Defendants/Petitioners.	On Certification from the Superior Court of New Jersey, Appellate Division, granted September 27, 2011 Civil Action Sat Below: Appellate Division: Hon. Clarkson S. Fisher, Jr., J.A.D. Hon. Douglas M. Fasciale, J.A.D. Trial Court: Hon. Harriet Farber Klein, J.S.C.

Mark S. Melodia, of full age, hereby certifies as follows:

1. I am a partner at Reed Smith LLP.

2. On October 21, 2011, I caused the following documents to be hand delivered to Mark Neary, Clerk of the Supreme Court of New Jersey, Hughes Justice Complex, 25 West Market Street, Trenton, New Jersey 08625-0970:

a. Original and eight copies of Respondent's Motion for Leave to File A Supplemental Brief;

b. Original and eight copies of Respondent's Proposed Supplemental Brief

3. On October 21, 2011, I caused two copies of Respondent's Motion to be delivered by U.S. mail and e-mail to:

Alan J. Baldwin, Esquire
Broderick Newmark & Grather
20 South Street, Suite 3
Morristown, NJ 07960

Margaret Lambe Jurow, Esquire
Legal Services of New Jersey
100 Metroplex Drive at Plainfield Avenue
Suite 402
Edison, New Jersey 08818-1357

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

Dated: October 21, 2011

Mark S. Melodia