SUPREME COURT OF NEW JERSEY
DOCKET NO. 068176

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| US BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR CSAB MORTGAGE-BACKED PASS-THROUGH CERTIFICATES, SERIES 2006-3,<br><br>Plaintiff/Respondent,<br><br>v.<br><br>MARYSE GUILLAUME, MR. GUILLAUME, HUSBAND OF MARYSE GUILLAUME, EMILIO GUILLAUME, MRS. EMILIO GUILLAUME, HIS WIFE, CITY OF EAST ORANGE,<br><br>Defendants/Petitioners. | On Certification from the Superior Court of New Jersey, Appellate Division, granted September 27, 2011<br><br>Civil Action<br><br>Sat Below:<br><br>Appellate Division:<br>Hon. Clarkson S. Fisher, Jr., J.A.D.<br>Hon. Douglas M. Fasciale, J.A.D.<br><br>Trial Court:<br>Hon. Harriet Farber Klein, J.S.C. |

# RESPONDENT'S BRIEF IN ANSWER TO *AMICI* FILINGS

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## TABLE OF CONTENTS


| | Page |
|---|---|
| TABLE OF AUTHORITIES | II |
| PRELIMINARY STATEMENT | 1 |
| ARGUMENT | 2 |
| POINT I. THE NOI SATISFIED THE FFA | 2 |
| POINT II. ALTHOUGH THE RIGHT TO RESCIND UNDER TILA IS STATUTORY, IT REMAINS AN EQUITABLE DOCTRINE SUBJECT TO EQUITABLE CONSIDERATIONS AND THE VAST MAJORITY OF COURTS REQUIRE AN ABILITY TO TENDER BEFORE GRANTING SUCH RELIEF | 10 |
| CONCLUSION | 17 |

## TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES .......... II

PRELIMINARY STATEMENT .......... 1

ARGUMENT .......... 2

POINT I. THE NOI SATISFIED THE FFA .......... 2

POINT II. ALTHOUGH THE RIGHT TO RESCIND UNDER TILA IS STATUTORY, IT REMAINS AN EQUITABLE DOCTRINE SUBJECT TO EQUITABLE CONSIDERATIONS AND THE VAST MAJORITY OF COURTS REQUIRE AN ABILITY TO TENDER BEFORE GRANTING SUCH RELIEF .......... 10

CONCLUSION .......... 16

# TABLE OF AUTHORITIES

**Cases** **Page(s)**

*American Mortg. Network, Inc. v. Shelton*,
486 F.3d 815 (4th Cir. 2007) .................................... 12

*FDIC v. Hughes Dev. Co.*,
938 F.2d 889 (8th Cir. 1991) .................................... 12

*Gianduso v. U.S. Bank Nat. Ass'n*,
No. 3:CV-09-1971, 2010 WL 4536986 (M.D. Pa. Nov. 2, 2010) ... 12

*Hodges v. Sasil Corp.*,
189 N.J. 210, 915 A.2d 1 (2007) .................................... 9

*Jobe v. Argent Mortg. Co., LLC*,
373 F. App'x 260 (3d Cir. 2010) .................................... 11, 12

*Johnson v. NovaStar Mortg., Inc.*,
No. CIV. 09-1799 JBS/KMW, 2011 WL 4549143
(D. N.J. Sept. 29, 2011) .................................... 12

*New Brunswick Sav. Bank v. Markouski*,
123 N.J. 402, 587 A.2d 1265 (1991) .................................... 9

*Ray v. Citifinancial, Inc.*,
228 F. Supp. 2d 664 (D. Md. 2002) .................................... 14

*Rudisell v. Fifth Third Bank*,
622 F.2d 243 (6th Cir. 1980) .................................... 12

*Stroczynski v. Miler*,
197 N.J. 36, 961 A.2d 704 (2008) .................................... 8

*United States v. Scurry*,
193 N.J. 492, 940 A.2d 1164 (2008) .................................... 10

*Williams v. Homestake Mortgage Co.*,
968 F.2d 1137 (11th Cir. 1992) .................................... 12

*Yamamoto v. Bank of New York*,
329 F.3d 1167 (9th Cir. 2003) .................................... 12

**STATUTES**

15 U.S.C. § 1635(b) .................................... 13

15 U.S.C. § 1641(g)(1) .................................... 3

N.J.S.A. 2A:50-54 .................................... 4

N.J.S.A. 2A:50-56 .................................................. 2, 4

N.J.S.A. 2A:50-57(b(1) ................................................. 4

N.J.S.A. 2A:50-58 ...................................................... 4

N.J.S.A. 2A:50-59 ...................................................... 4

**RULE**

R. 4:50-1(a) ........................................................ 10, 16

**REGULATIONS**

12 C.F.R. 226.23 ....................................................... 3

75 Fed. Reg. 58539 (September 24, 2010) .............................. 13

75 Fed. Reg. 58547-58548 .............................................. 13

## PRELIMINARY STATEMENT

This brief will focus on Seton Hall's argument that the NOI, taken as a whole, did not substantially comply with the FFA when it identified the party that controls the default and loss mitigation process for the mortgage loan and otherwise strictly complied with all other content requirements. Given that the sole purpose of the FFA is to give the borrower the opportunity to effectuate a cure (as opposed to a loan modification or TILA rescission), the NOI before this Court complied with the purpose and spirit of the FFA. As such, this Court should affirm.

Should the Court decide to go beyond the question of whether the NOI satisfied the FFA and then concludes that there was an abuse of discretion in the finding of no excusable neglect, this brief goes on to show that Seton Hall's TILA rescission argument is contrary to federal appellate decisions on the subject.

This brief does not respond to Seton Hall's competency of the proofs argument to the extent it overlaps what was actually (and adequately) briefed in the lower courts. To the extent Seton Hall seeks to use its amicus filing to raise new substantive arguments for reversal never argued below based on the proofs submitted, the Court should reject that attempt outright.

## ARGUMENT

**POINT I. THE NOI SATISFIED THE FFA**

Seton Hall's brief cannot be taken seriously when it suggests the NOI here did not "meet the spirit of the law." Seton Hall agrees that the NOI strictly complied with subparagraphs (c)(1), (c)(2), (c)(3), (c)(4), (c)(5), (c)(6), (c)(7), (c)(8), (c)(9), and (c)(10) of N.J.S.A. 2A:50-56. And, Seton Hall does not dispute that the NOI strictly complied with the clause in subparagraph (c)(11) regarding "the telephone number of a representative of the lender whom the debtor may contact." Nonetheless, Seton Hall contends that the NOI, taken as a whole, did not even substantially comply with the FFA simply because it did not identify the Trustee's name and address pursuant to the other clause of subparagraph (c)(11).[1]

Seton Hall primarily argues that allowing substantial compliance "would create a slippery slope" with respect to other aspects of subparagraph (c) of N.J.S.A. 2A:50-56 - provisions with which the NOI here strictly complied - and that, therefore, recognition that the NOI here "meets the spirit" of the FFA could harm New Jersey homeowners. As pointed out above,

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1 Ironically, Seton Hall makes much of New Jersey's public policy of using notice requirements to inform homeowners of their rights and points to the Save New Jersey Homes Act of 2008 and the Mortgage Stabilization and Relief Act as illustrations of this policy - laws that explicitly recognize that servicers are "creditors" or "lenders."

however, substantial compliance with any of those other provisions is not before the Court. And, Seton Hall does not really dispute that the NOI gave the Guillaumes all the information that they needed to dispute their default or reinstate their loan to performing status. Thus, this aspect of Seton Hall's argument about prejudice adds nothing to this Court's analysis of whether only identifying a servicer in the NOI prejudices a borrower.

Ignoring the purposes for which the FFA was enacted, Seton Hall also contends that the failure to identify the "lender" prejudices those borrowers who have the right to rescind under TILA for under disclosure of the finance charge where their 3 year deadline for doing so might run in the time period between receipt of the NOI and filing of the foreclosure complaint.[2]

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[2] This was not the case with the Guillaumes as their alleged right to rescind did not even come into existence until the foreclosure complaint was filed. If a borrower is seeking to exercise an extended TILA rescission right (beyond the normal 3 business day period) and the loan is not in foreclosure, Regulation Z provides that the tolerance is the greater of $100 or 1/2 of 1% of the principal amount for the Guillaumes' loan. 12 C.F.R. 226.23. Because that number was in excess of $1,000 in the case of the Guillaumes, their claimed under disclosure of $120 did not give raise to a right to rescind until the foreclosure complaint was filed, at which time the tolerance was reduced to $35. *Id.* Thus, the Guillaumes did not even have a right to rescind until the foreclosure complaint was filed and the fact that the NOI did not identify the Trustee had no impact on their ability to exercise a right to TILA rescission. More to the point, TILA itself addresses this issue by requiring that a new owner of a loan notify the borrower that it has acquired the beneficial rights. *See* 15 U.S.C. § 1641(g)(1).

This is legally irrelevant as the FFA has nothing to do with a borrower's rights under TILA.

The FFA reflects the Legislature's judgment that all parties benefit "when residential mortgage debtors cure their defaults and return defaulted loans to performing status." N.J.S.A. 2A:50-54. Indeed, an examination of the language and legislative history of the FFA confirms that the *sole* purpose of the FFA is to give the borrower an opportunity to effectuate a *cure*. Putting aside the legislative findings and declaration, the FFA's substantive provisions grant a borrower in default the right "to ***cure*** the default, de-accelerate and reinstate the residential mortgage by tendering the amount or performance specified in subsection b. of this section. The payment or tender shall be made to the person [*i.e.*, the servicer] identified in paragraph (5) of subsection c. of [N.J.S.A. 2A:50-56]." *See* N.J.S.A. 2A:50-57(a) (emphasis added).

"To ***cure*** a default under this section, a debtor shall … (1) pay or tender to the person [*i.e.*, the servicer] identified pursuant to paragraph (5) of subsection c. of [N.J.S.A. 2A:50-56] … ***all sums which would have been due*** in the absence of default[.]" *See* N.J.S.A. 2A:50-57(b(1) (emphasis added). Other provisions of the FFA speak only to the right to "cure." *See, e.g.*, N.J.S.A. 2A:50-58 and 2A:50-59. Thus, nothing in the FFA suggests that it grants a borrower the right to information

about a loan modification or requires that a loan modification be offered. From the borrower's perspective, then, the sole purpose of the FFA and the NOI is to afford the borrower the opportunity to bring his or her debt current. Thus, the fact that the NOI did not identify the Trustee for TILA rescission purposes is legally irrelevant to any analysis of whether the NOI substantially complied with the FFA.

Seton Hall's TILA argument should accordingly be rejected as having no bearing on the FFA issue before this Court. Further, at the end of the day, Seton Hall simply avoids the key point here - whether an NOI that identifies only a servicer inhibits the exercise of a borrower's right to cure. As demonstrated in prior submissions, it did not in the specific case of the Guillaumes and does not do so - logically or legally - in the case of other borrowers.

The Trustee notes that the Guillaumes' Supplemental Brief argues that identifying the Trustee as the "lender" in the NOI is critical to a homeowner who is seeking to negotiate a loan modification and then goes on to claim that the record in this case reflects that the Guillaumes were eligible for a loan modification but were never advised of same because of an "inherent conflict" between servicers and note holders. The first point is legally irrelevant as just discussed: the FFA is

intended only to effectuate a cure.[3] Moreover, any argument that being able to contact the Trustee was critical for the Guillaumes flies in the face of the very language of the PSA (cited at pp. 10-11 of Respondent's Supplemental Brief filed on October 21, 2011), and also ignores the fact that the Guillaumes had the knowledge they needed to seek - and in fact sought - a loan modification form their servicer, the proper and only party to contact in that regard.[4]

The claim that the Guillaumes were eligible for a loan modification but ASC did not tell them that they were is demonstrably false and utterly irresponsible. The record in fact reveals that ASC reviewed numerous options with the

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3 Indeed, this Court has procedures in place requiring mediation in foreclosure cases before a judgment is taken.

4 Securitization contracts may expressly bar, expressly authorize, or remain silent on loan modifications. Express authorization is the most common arrangement. Sometimes specific guidelines are in place (*e.g.* Fannie Mae Servicing Guidelines) and any exceptions must be authorized. However, in all instances, the borrower must go through the servicer. A trustee does not maintain loan servicing information and the servicer is the borrower contact, as Legal Services and the Attorney General have already admitted in their amicus filings in the *Gonzales* case. *See* Respondent's Supplemental Brief at pp. 12-13. Indeed, any mail sent to a corporate trust department will at best ultimately end up in the hands of the servicer, perhaps too late to do any good. It should be noted, however, that the reality is that the servicer and the borrower will have begun discussion of the default and any options well before an NOI is sent.

Guillaumes and *the Guillaumes were not interested in pursuing the options that were offered*:

- "**UNABLE TO REACH AGRMT W/BWR** REPAY, RBP, MORT, MOD, PCSF, PARTIALCLAIM, MODSF, SS, DL, LIQUID RVWD. FURTHER RVW SHOWS IS ELIG FOR A MOD SPEC FORB." [Da161-162].
- "BASED ON VRBL FINCL INFO FRM 2008-11-20, INC=$$3,899.00, AND EXP=$$1,025.00 SIP=26.96% SPCL FB PRIOR TO A MOD PRE-QUAL IS ALT BASED ON SUGGESTED GDLNS **BUT BWR NOT INTERESTED IN SPCL FB**" [Da161]
- "**PKG NOT SENT AS BWR NOT INTERESTED IN CONTINUING TO RVW OPTS**" [Da161].

The record further reflects that the Guillaumes were not providing requested information [Da159, Da158, Da155, Da154, Da153] and were otherwise "uncooperative." [Da157, Da154, Da153]. Accordingly, the claim that the Guillaumes were eligible for a loan modification - and that it was concealed from them - is outrageous.

Against this backdrop, the NOI substantially complied with the FFA. The Guillaumes were put on notice of the claim that they were in default, they were advised how and when to cure that default, and they were directed to the only party that had authority to deal with them. They had every opportunity to cure and have never suggested they could do so or were prevented from doing so because they did not have the Trustee's name and separate mailing address.

Seton Hall has accordingly argued that this Court has no power to engage in a substantial compliance analysis in the

first place. This Court should reject this assertion outright. The Trustee has already addressed several of the points Seton Hall makes with respect to the FFA itself and will not repeat them here. *See* Respondent's Supplemental Brief filed on October 21, 2011, at pp. 18-21. That being the case, this brief will simply address the cases Seton Hall cites involving other laws that it says compel a strict compliance approach here. A close examination of those cases indicates either that they support Respondent's position or have no application to the situation now before this Court.

For example, the Court in *Stroczynski v. Miler*, 197 N.J. 36, 961 A.2d 704 (2008), the primary case cited by Seton Hall, actually engaged in a substantial compliance analysis and concluded that the policies that inform the substantial compliance doctrine - actions that meet the spirit of the law but technically fall short - were not satisfied in that case because a required sworn certification that a document was sent was not provided. *Id.* at 43-44, 961 A.2d at 709. In terms of the instant case, the parallel would be the failure to certify compliance with the FFA in the Foreclosure Complaint - something that clearly would not satisfy the spirit of the law. Thus, *Stroczynski* has no application to the matter now before this Court.

The second case Seton Hall cites on the strict compliance point, *Hodges v. Sasil Corp.*, 189 N.J. 210, 915 A.2d 1 (2007), does not even contain the words "strict compliance" or "substantial compliance," and otherwise does not support an argument that this Court is powerless to engage in a substantial compliance analysis here. Thus, *Hodges* is of no assistance to this Court's analysis in this case.[5]

Finally, Seton Hall argues that, in the foreclosure sale context, this Court has invalidated sheriff's sales where notices are deficient. *See, e.g., New Brunswick Sav. Bank v. Markouski*, 123 N.J. 402, 424, 587 A.2d 1265 (1991). *Markouski*, however, does not support a conclusion that this Court cannot engage in a substantial compliance analysis in this case. Indeed, this Court expressly stated that, where there is no or insufficient notice of a sheriff's sale, "the appropriate relief will depend on the circumstances." *Id.* at 424. Thus, in a case where no notice was provided, this Court *sua sponte* decided to instruct the lower court to grant additional time for redemption instead of vacating the sale. *See United States v. Scurry*, 193 N.J. 492, 940 A.2d 1164 (2008).

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[5] In one respect, *Hodges* actually supports the arguments made by U.S. Bank in this case: in the course of its discussion, the Court stressed that statutory words must be read in context, "giving sense to the legislation as a whole." *Id.* at 223, 915 A.2d at 8. This is precisely what the lower courts did in this case.

Accordingly, Seton Hall's reliance on cases involving other statutes in no way supports a conclusion that this Court cannot engage in a substantial compliance analysis here. And, as demonstrated above, Seton Hall's arguments that the NOI did not substantially comply with the FFA fall short. For these reasons and those set forth in the Trustee's prior briefing, this Court should find that the NOI substantially complied with the FFA and affirm.

**POINT II. ALTHOUGH THE RIGHT TO RESCIND UNDER TILA IS STATUTORY, IT REMAINS AN EQUITABLE DOCTRINE SUBJECT TO EQUITABLE CONSIDERATIONS AND THE VAST MAJORITY OF COURTS REQUIRE AN ABILITY TO TENDER BEFORE GRANTING SUCH RELIEF**

The Court should not even reach Seton Hall's TILA argument. Before a default judgment can be set aside under R. 4:50-1(a), one must establish both excusable neglect *and* a meritorious defense. No one has seriously suggested that the lower courts abused their discretion in finding that the Guillaumes did not establish excusable neglect in failing to respond to the Complaint they admit they were served with or to follow repeated instruction to seek assistance from an attorney. That being the case, there is no reason for this Court to go the next step and address whether the lower courts abused their discretion in finding that the Guillaumes were otherwise not entitled to the remedy of TILA rescission. Accordingly, the discussion of the issue in Seton Hall's brief is academic - even assuming that, in

granting certification, the Court contemplated that it might address any issue other than the question of compliance with the FFA.

Nonetheless, in the interest of a complete and accurate record before this Court, Respondent briefly demonstrates below why Seton Hall's merits brief on TILA rescission is without merit. The Third Circuit has joined with other federal appellate courts and has said that, in order for a borrower to obtain rescission under TILA, the borrower must be able to tender a return of the loan proceeds. *Jobe v. Argent Mortg. Co., LLC,* 373 F. App'x 260, 262 (3d Cir. 2010) (*per curiam*) (affirming the district court's holding that rescission was inappropriate where plaintiffs had no evidence of an ability to tender and had not made any payments for four years). This should be the end of the analysis.

Seton Hall buries *Jobe* in a footnote on the 17th page of its 20 page discussion of TILA. There, Seton Hall argues that the Third Circuit's decision is unpublished and that its discussion is *dicta* unworthy of any consideration by this Court. The federal courts in the Third Circuit see it differently, as should this Court.

Since *Jobe*, the district courts in the Third Circuit have followed the Third Circuit's conclusion that TILA rescission is unavailable where a borrower does not establish an ability to

tender. *See Johnson v. NovaStar Mortg., Inc.*, No. CIV. 09-1799 JBS/KMW, 2011 WL 4549143, *4 n.2 (D. N.J. Sept. 29, 2011) ("Plaintiff has not demonstrated in the record any ability to tender payment on the net proceeds she received under the loan, which is an additional requirement for rescission under TILA.") (citing *Jobe*); *Gianduso v. U.S. Bank Nat. Ass'n*, No. 3:CV-09-1971, 2010 WL 4536986, *2 (M.D. Pa. Nov. 2, 2010) ("We agree with Defendants and will enter judgment in their favor on Plaintiffs' rescission claim [where there no evidence of an ability to tender].") (citing *Jobe*).

The Third Circuit and its district courts have thus joined the United States Circuit Courts of Appeals for the Fourth Circuit, Sixth Circuit, Eighth Circuit, Ninth Circuit, and Eleventh Circuit, each of which have adopted the same approach. *See American Mortg. Network, Inc. v. Shelton*, 486 F.3d 815, 819-820 (4th Cir. 2007); *Yamamoto v. Bank of New York*, 329 F.3d 1167, 1173 (9th Cir. 2003); *Williams v. Homestake Mortgage Co.*, 968 F.2d 1137 (11th Cir. 1992); *FDIC v. Hughes Dev. Co.*, 938 F.2d 889, 890 (8th Cir. 1991); *Rudisell v. Fifth Third Bank*, 622 F.2d 243, 254 (6th Cir. 1980). Indeed, the Federal Reserve Board has explicitly recognized that "[t]he majority of courts that have considered this issue condition the creditor's release of the security interest on the consumer's proof of tender[.]"

*See* 75 Fed. Reg. 58539, 58547-58548 (September 24, 2010).[6] In acting in a manner consistent with and sanctioned by those decisions, it cannot be said that the lower court decision was irrational, departed from established polices, or rested on an impermissible basis, and therefore no abuse of discretion should be found here.

Seton Hall nonetheless claims that all these federal appellate decisions are wrong and that, in all cases, the security interest must be vacated once a borrower "rescinds," with no requirement that the loan proceeds be returned regardless of any ability to tender. Not only is this argument not supported by the overwhelming weight of the cases, this argument also ignores the section of the TILA statute which states that "[t]he procedures prescribed by this subsection shall apply except when otherwise ordered by a court." 15 U.S.C. 1635(b).

While Congress intended to provide consumers with a rescission remedy under TILA, that remedy was premised on the common understanding that rescission "restores the *status quo*

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6 This observation was made in the context of what was a Federal Reserve Board proposed amendment to Regulation Z which explicitly endorsed the approach adopted by the majority of courts. This proposed amendment was withdrawn, but only because rulemaking authority for TILA was scheduled to transfer to the Consumer Financial Protection Bureau in July 2011. *See* http://www.federalreserve.gov/newsevents/press/bcreg/20110201a.htm.

*ante* [and] [i]f a party has a legal or equitable right to annul a transaction, he may do so, but only upon returning any benefit he has received." *Ray v. Citifinancial, Inc.*, 228 F. Supp. 2d 664, 667 (D. Md. 2002). It is this provision, as well as basic notions of fairness and common sense, that have persuaded most courts to require tender as a precondition for rescission.

Seton Hall quotes at length from TILA, Regulation Z and the Regulation Z Commentary concerning the actions that must take place when a consumer rescinds. These steps, however, are geared to the ordinary situation where the borrower rescinds within the 3-day rescission period and no funds have yet been disbursed. Where a borrower is seeking to rescind well *after* the 3-business day period has elapsed, and the funds have necessarily already been disbursed, the situation is markedly different. To deal with such a situation, TILA and Regulation Z allow a court to modify the procedures set forth in the rule "[f]or example, when a consumer is in bankruptcy proceedings and prohibited from returning anything to the creditor, or ***when the equities dictate.***" Commentary, pgh. 23(d)(4)-1 (emphasis added).

Using this authority, courts have typically required borrowers to tender or offer to tender the principal (and any subsequent advances made thereafter by the creditor) as a necessary precondition to rescission and <u>before</u> requiring the

creditor to refund any fees and/or extinguish its lien. They do this because equity so dictates; *i.e.* because it would simply be inequitable in most cases for the court to require a creditor, because of a technical disclosure error, to extinguish its lien and refund all interest and fees that it collected from the borrower without requiring the borrower at the same time to tender the principal.

This Court should not accept any argument that the Chancery Division was required to open the judgment, permit rescission, and - given that they could not tender - then craft an equitable remedy for the Gulliaumes. There is no claim in this case that the loan the Guillaumes received was anything other than what they applied for - one in which they received some $61,000 in cash. Nor can there be any claim that a thirty year 6.75% fixed rate loan is in any way inequitable. They received significant "cash out" and have lived in their house rent-free for several years while ASC has paid the taxes and insurance on the property. Any remedy other than complete tender would thus be unsupportable and unfair to the Trust.[7]

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7 The Guillaumes' have previously referred to the Chancery Division's passing remark during one of the hearings concerning the *de minimus* nature of the violation (the basis for rescission was the claim that, although the loan complied with TILA at origination, an overcharge of $120 allowed them to rescind when foreclosure was commenced). However, that specific observation did not form the basis of the Chancery Division's ultimate decision or the Appellate Division's decision to affirm.

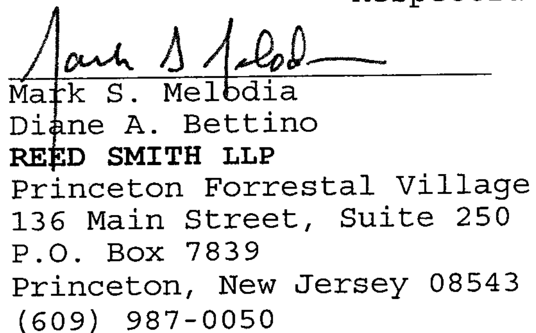
Likewise, the Guillaumes' prior argument that there was no evidence in the record to support a finding that they are unable to tender misses the mark by a wide margin: <u>the Guillaumes had the burden</u> of showing a meritorious defense, *i.e.*, that they were entitled to TILA rescission. Accordingly, the Guillaumes were obliged to show that that they could tender the loan proceeds and return the parties to the *status quo ante*. They have not and cannot point to any such evidence; indeed, they implicitly concede they cannot by arguing that the Chancery Division should have crafted alternative equitable relief. Thus, there is no basis to reverse on the TILA point even had the Guillaumes shown excusable neglect under R. 4:50-1(a). For this reason, the Court should affirm.

**CONCLUSION**

For the reasons set forth above and in all of the Trustee's prior submissions, this Court should affirm.

Dated: November 7, 2011

Respectfully submitted,



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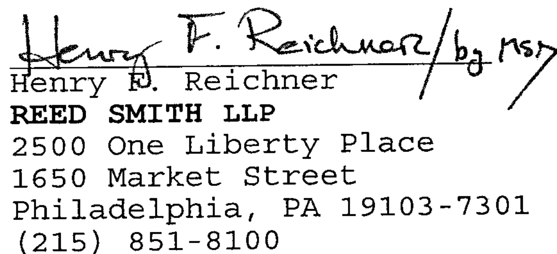

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| US BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR CSAB MORTGAGE-BACKED PASS-THROUGH CERTIFICATES, SERIES 2006-3,<br><br>Plaintiff/Respondent,<br><br>v.<br><br>MARYSE GUILLAUME, MR. GUILLAUME, HUSBAND OF MARYSE GUILLAUME, EMILIO GUILLAUME, MRS. EMILIO GUILLAUME, HIS WIFE, CITY OF EAST ORANGE,<br><br>Defendants/Petitioners. | On Certification from the Superior Court of New Jersey, Appellate Division, granted September 27, 2011<br><br>Civil Action<br><br>Sat Below:<br><br>Appellate Division:<br>Hon. Clarkson S. Fisher, Jr., J.A.D.<br>Hon. Douglas M. Fasciale, J.A.D.<br><br>Trial Court:<br>Hon. Harriet Farber Klein, J.S.C.<br><br>**CERTIFICATION OF SERVICE** |

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

1. I am a partner at Reed Smith LLP of Pennsylvania.

2. On November 7, 2011, I caused the following documents to be delivered:

   a. Original and nine copies of Respondent's Brief in Answer to *Amici* Filings

By Hand Delivery to:

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3. On November 7, 2011, I caused two copies of Respondent's Brief in Answer to *Amici* Filings to be delivered by U.S. mail to:

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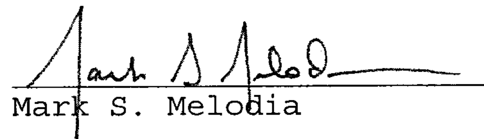
I certify that the foregoing statements made by me are true to the best of my knowledge, information and belief. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.



Dated: November 7, 2011

Mark S. Melodia