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**SUPERIOR COURT
CLERK'S OFFICE**

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In RE APPLICATION BY
WELLS FARGO BANK, N.A.,
TO ISSUE CORRECTED
NOTICES OF INTENT TO
FORECLOSE ON BEHALF OF
IDENTIFIED FORECLOSURE
PLAINTIFFS IN
UNCONTESTED CASES

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
PASSAIC COUNTY

DOCKET NO. F-9564-12

OPPOSITION

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Foreclosure Defendants, AHMED ALLAN and HANI ALLAN, (F-27085-09), DERIK CHESTNUT and CAROLYN CHESTNUT (F-3861-09), ANTONIO GENTILE, (F- 55655-09), and CRAIG MILLER (F-29525-10), through their attorney, DAVID M. SCHLACHTER, of LAW OFFICES OF DAVID M. SCHLACHTER, LLC, submit the following in opposition and response to Petitioner's Petition to reinstate and otherwise move forward in the relevant foreclosure cases, as follows:

1. The listed Defendants are only a partial list of Defendants to be effected by this Order to show Cause.

WHO THIS PETITION AFFECTS

2. This Order to Show Cause also affects contested cases.
3. It also affects cases of those Defendants not served at the proper addresses or not served properly.

FATAL FLAWS OF THE NOTICES AND ACTIONS

4. As to the responding Defendants, they state unanimously as follows:
5. The Notices of Intent to Foreclose contained fatal flaws in that the correct Plaintiff was not named.
6. The Notices of Intent to Foreclose contained the fatal error of fraudulently, purposely, and with intent to deceive, contained the wrong Plaintiff.
7. The actions that followed also contained the wrong Plaintiff and thus should be dismissed.
8. These actions brought by parties without standing should be dismissed in their entirety as it is a fatal flaw per the Court rules (**see our Memorandum of Law**).
9. Further, Petitioner and the relevant banks did this purposely to get around the rules by taking the 'easy' way out, by naming a servicer instead of the actual holder of the Note and Mortgage.
10. The Petitioner banks did this in order to commence actions with little effort.

LACK OF STANDING CAUSED MANY PROBLEMS

11. This caused prejudice by:
 - a. Defendants had no idea who the party was that brought the action.
 - b. Defendants did not recognize that party and thus were at a disadvantage.
 - c. Defendants were lead to believe that they were to deal with the bank / party brining the action and not the actual party of interest that can resolve the claims.
 - d. Defendants wasted years negotiating with the wrong party in trying to bring about resolution.
12. The Court Rules and its reasons are clear: only the correct party with Standing can bring an action.

13. The added insult is that Petitioners are working to take away homes with this lazy and fraudulent conduct.

HOMEOWNERS NEGOTIATED WITH THE WRONG PARTIES

14. The problem with the wrong party bringing actions also led to problems in trying to negotiate modifications and work-outs.

15. Parties without authority claimed to be the ones to deal with and then modification packages were not processed properly, and loan modifications and work-outs were denied based on frivolous and 'lazy' reasons such as "pending sale" or NVP without further explanation.

16. Petitioner Banks, by allowing the wrong parties to bring these actions, and by not putting Defendants and the Courts on proper notice of the actual parties in interest made a huge mockery of the Court system.

17. Petitioners and the erroneous banks made a mockery of the justice system and irreparably harmed hundreds of homeowner's ability to resolve their foreclosure cases amicably and properly.

GOVERNMENT PROGRAMS COULD NOT BE UTILIZED

18. The Federal, State, and Local Governments set up programs (e.g. HAMP, NJ Foreclosure Mediation Program) to aid foreclosure Defendants.

19. However, because the party with authority was not the one in the action, Defendant Homeowners submitted applications that were not properly processed and attended mediation that was not properly helpful.

CASES SHOULD START FROM THE NOTICE OF INTENT

20. The only recourse to amend this is to make Petitioner banks commence the actions again from the Notice of Intent.
21. Petitioners should be made to mail out proper Notices of Intent to Foreclose and then have to commence foreclosure actions again.
22. All the foreclosure actions should be dismissed in their entirety.
23. This resolution matches the drastic upset and upheaval of our justice system caused by the wrong parties on the Notices of Intent and the foreclosure actions.
24. Petitioners already succeeded in evicting hundreds of homeowners through this fraudulent means.
25. A quick solution and cop-out should not be given to the Petitioners.
26. Petitioner's Petition should be granted, that they can amend the Notices of Intent but should have to start the proceedings from that point.
27. The argument that Petitioners lost years and will have to spend more money is only a further slap in the face to the justice system and homeowners that Petitioners defrauded and led astray with their previous tactics.

JUST SOLUTION – AND RESOLUTIONS WILL FOLLOW

28. It is only with having the correct parties dealing with these matters and serving the proper Notices of Intent and bringing foreclosure actions, and participating in NJ Foreclosure Mediation and HAMP that actual, factual, and real solutions will result.
29. If the Court gives in to the Petitioner banks, and allows a "quick fix" then the result will be hundreds of Sheriff Sales scheduled on properties that homeowners did not have the practical, actual, or real ability to defend and come to a work-out.

30. While the Court may not be able to *compel* modifications and work-outs, the Court has the duty to see to it that applications for such *existing and helpful* programs be administered properly.

WHEREFORE, Defendants respectfully request the following relief: the Court deny the relief requested by Petitioners, instead the Court should dismiss the foreclosure actions in their entirety and require the correct party with actual standing to send out new Notices of Intent to Foreclose and commence cases from that point, and other such relief that the Court deems appropriate and necessary.

Respectfully submitted:

Passaic, NJ

September 24, 2012

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MEMORANDUM OF LAW

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The above named Respondents bring the following Memorandum of Law, through their attorney, May it Please the Court:

I. STANDING – FATAL FLAW AND CASES SHOULD BE DISMISSED

Lack of Standing is a fatal flaw in litigation. US Bank, N.A. v. Guillaume, 209 N.J. 449 (2012) held that that N.J.S.A. 2A:50-56(c)(11) requires that foreclosure plaintiffs list on the notice of intention the name and address of the actual lender, in addition to contact information for any loan servicer involved in the mortgage. It further held that a court adjudicating a foreclosure action in which N.J.S.A. 2A:50-56(c)(11) is violated may dismiss the action without prejudice, permit a cure or impose such other remedy as may be appropriate to the specific case. The court found that in deciding on an appropriate remedy, a trial court should consider the impact of the defect upon the homeowner's information about the loan's status and on the opportunity to cure the default.

In accordance with the above decision and reasoning, the instant action should be dismissed, rather than leave granted to amend the Notice to Foreclose on the following grounds:

Plaintiff does not have standing to bring forth the foreclosure action. Standing "refers to the plaintiff's ability or entitlement to maintain an action before the court." New Jersey Citizen

Action v. Riviera Motel Corp., 296 N.J. Super. 402, 409 (App. Div.), certif. granted, 152 N.J. 13 (1997), appeal dismissed as moot, 152 N.J. 361 (1998). Entitlement to sue requires a "sufficient stake in and real adverseness with respect to the subject matter" and a substantial likelihood of harm to the plaintiff by an unfavorable decision. Stubaus v. Whitman, 339 N.J. Super. 38, 47 (App. Div. 2001) (internal quotation marks and citation omitted), certif. denied, 171 N.J. 442 (2002).

"A lack of standing by a plaintiff precludes a court from entertaining any of the substantive issues presented for determination." In re Adoption of Baby T, 160 N.J. 332, 340 (1999). See also Watkins v. Resorts Int'l Hotel & Casino, Inc., 124 N.J. 398, 424 (1991).

To have standing to foreclose a mortgage, a party generally must "own or control the underlying debt." Ford, supra, 418 N.J. Super. at 597 (quoting Raftogianis, supra, 418 N.J. Super. at 327-28). That is, the plaintiff must own or possess the note when the original complaint is filed. Deutsche Bank Nat'l Trust Co. v. Mitchell, 422 N.J. Super. 214, 216 (App. Div. 2011).

A failure to provide either the original note or proper documentation and affidavits would result in the dismissal of the action, for a lack of standing. SBC Bank, USA, Nat'l Ass'n v. Polanco (N.J. Super., 2012) Therefore, A party seeking to foreclose a residential mortgage must have standing to commence a mortgage foreclosure action and must comply with the requirements of both the Fair Foreclosure Act (FFA), N.J.S.A. 2A:50-53 to -68, and Rule 4:64, which governs mortgage foreclosures among other actions. HSBC Bank USA v. Ulversoy (N.J. Super App. Div. 2012).

As an important and routine matter complaints for foreclosure should be filed in the name of the individual or entity with the authority to enforce the underlying debt. Id. In actions involving a negotiable note, plaintiff should generally be in a position to establish that it did have

possession of the note as of the date the complaint was filed as required by the UCC. Where that cannot be established, the complaint may be subject to dismissal, without prejudice to the filing of a new action. There is simply no reason for this court to disregard the substantive provisions of the UCC. Equity follows the law. See Dunkin' Donuts of America Inc. v. Middletown Donut Corp., 100 N.J. 166, 183–85, 495 A.2d 66 (1985).

While generally, any particular action should in fact be dismissed should be addressed on a case-to-case basis, this is highly dependent on the circumstances. The higher Courts in this State have ruled that dismissal will probably be appropriate, in order to provide a clear incentive to plaintiffs to make sure that the issue of standing is properly addressed before any complaint is filed. Bank of N.Y. v. Raftogianis, 418 N.J. Super. 323, 13 A.3d 435 (N.J. Super. Ch., 2010). Without an affirmative "showing of such ownership or control, the plaintiff lacks standing to proceed with the foreclosure action and the complaint must be dismissed." Ibid. (citing Raftogianis, supra, 418 N.J. Super. at 357-59). Washington Mut. Bank v. Roggio (N.J. Super. App. Div., 2012)

II. FAILURE TO PROSECUTE – CASES TO BE DISMISSED

Additionally, the Court Rules are clear that foreclosure action has been pending for 12 months without any required action having been taken herein. As such, the action is subject to administrative dismissal without prejudice. According to R. 4:64-8, when a foreclosure matter has been pending for twelve months without any required action having been taken therein, the Clerk of the Superior Court shall issue written notice to the parties advising that the matter as to any of all defendants will be dismissed without prejudice 30 days following the date of the notice unless, within said period: the plaintiff must file with the Superior Court Clerk one of the following: (a) an amended complaint, (b) a request for default, (c) a notice of motion to enter

final judgment or other appropriate motion, or (d) an affidavit or certification asserting that the failure to take the next required action is due to an exceptional circumstance. If the plaintiff fails to make any such filing, the Superior Court Clerk shall enter an order of administrative dismissal of the matter as to all parties. In the instant case, as the foreclosure action has been pending for 12 months, without the required action have been undertaken at this time, it is appropriate for the court to issue written notice to the parties advising dismissal, rather than granting leave for the Plaintiff to fix deficiencies. This remedy will match the egregiousness of the malfeasances performed by Petitioners.

III. BAD FAITH NEGOTIATIONS

Furthermore, the action should also be dismissed, as Plaintiff engaged in malfeasance and bad faith negotiations by enticing borrowers to engage in modifications rather than contest the foreclosure action. The courts have routinely held that while Plaintiffs do not need to provide a modification, it does have to attend the Foreclosure Mediation Process and be productive and meaningful during that process. The Appellate Division of the Superior Court of New Jersey considered the Foreclosure Mediation Process in U.S. Bank Nat'l Assoc. v. Williams, 415 N.J.Super 358 (App. Div. 2010). The Court found that it is the obligation of the Plaintiff to come to the mediation process in good faith and ready to resolve this matter. *Id.* at 369, 370. As such, Plaintiff cannot entice borrowers to engage in modifications, rather than contest foreclosure actions, especially when such modifications are not approved.

The very nature of Fair Foreclosure Act requires Lenders to act in good faith in proceeding with foreclosure actions. The Legislature, in formulating the Act, found that "homeowners should be given every opportunity to pay their home mortgages, and thus keep their homes; and that lenders will be benefitted when residential mortgage debtors cure their

defaults and return defaulted residential mortgage loans to performing status." N.J.S.A 2A:50-54. The Act was enacted, at least in part, to give debtors multiple opportunities to correct a defaulted mortgage and retain possession of their home. Sturdy Sav. Bank v. Roberts (no cite) (N.J. Super., 2012). As such, Plaintiff should have given Defendant the opportunity to engage in modifications, in addition to the contesting of the foreclosure action instead of forfeiting such an opportunity.

IV. OTHER COURT RULES AFFECTED

R. 4:4-1. Summons: Issuance

The plaintiff, the plaintiff's attorney or the clerk of the court may issue the summons. If a summons is not issued within 15 days after the filing of the complaint the action may be dismissed in accordance with R. 4:37-2(a). Separate or additional summonses may issue against any defendants.

- **(a) Time for Filing.** In any trial court, unless otherwise stated, all papers required to be served by R. 1:5-1 shall be filed with the court either before service or promptly thereafter, unless the rule requiring service or filing provides otherwise. Whenever in these rules provision is made for the publication, mailing or posting of notice, proof thereof shall be filed with the court within 20 days after the publication or mailing or posting.
- **(a) Supporting Instruments.** Proof required by R. 4:64-1 may be submitted by affidavit, unless the court otherwise requires. The moving party shall produce the original mortgage, evidence of indebtedness, assignments, claim of lien (N.J.S.A. 46:8B-21), and any other original document upon which the claim is based. In lieu of an original document, the moving party may produce a legible copy of a recorded or filed document, certified as a true copy by the recording or filing

officer or by a New Jersey attorney, or a copy of an original document, if unfiled or unrecorded, certified as a true copy by a New Jersey attorney

- **c) Time; signatory.** The affidavit prescribed by this rule shall be sworn to not more than 60 days prior to its presentation to the court or the Office of Foreclosure.

These were not complied with by the correct party. Thus, the Court should not be extra lenient and allow a quick fix remedy. The Court, however, should dismiss these actions as the just remedy.

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**OPPOSITION TO PETITION TO AMEND MATTERS
BY ONLY FILING AMENDED NOTICES OF INTENT TO FORECLOSE**

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