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*Pursuant to R:1-21-3(b)

December 3, 2012

Honorable Margaret Mary McVeigh
Superior Court of New Jersey
Passaic County Courthouse
71 Hamilton Street, Chambers 100
Courtroom 134
Paterson, New Jersey 07505

**Re: 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.
Docket No. F-09564-12**

Dear Judge McVeigh:

Please accept this letter brief in lieu of a more formal pleading in response to Your Honor's request that we and Wells Fargo submit simultaneous supplemental briefs on the issue of whether the Court may and should order that pre-judgment interest in these matters be calculated at the lesser of the legal rate or the contract rate of interest.

PRELIMINARY STATEMENT

The determination of what rate of interest, if any, to award to a plaintiff for the period between the filing of the complaint and the entry of judgment is within the sound discretion of the court. Ordinarily, in foreclosure matters the courts apply the contract rate of interest. But these are not ordinary times. Here, massive delays have been occasioned by the foreclosure plaintiffs which warrant the court's award of the lower, legal rate of interest rather than the contract rate.

STATEMENT OF FACTS AND PROCEDURAL HISTORY RELATED TO FORECLOSURE PLAINTIFFS' FAILURE TO PROSECUTE CASES

Delays in prosecution of foreclosure matters since December 2010 have been occasioned solely and completely by the foreclosure plaintiffs' refusal to comply with court rules. It is important to note that issues concerning the notice of intention to foreclose (NOI), which is what the court is considering here, had nothing to do with the Court action taken in December 2010 after which foreclosure plaintiffs simply refused to prosecute cases in New Jersey. The December 2010 amendment to the court rules arose from the Court's concern about robo-signing, concerns which were shared in some measure by local counsel for the foreclosure plaintiffs themselves. See, Press Release dated December 20,

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2010, http://www.judiciary.state.nj.us/superior/press_release.htm, (“New Jersey Chief Justice Stuart Rabner today announced a series of steps to protect the integrity of filings of foreclosures in New Jersey. His actions come after careful review of a report and series of recommendations presented to the Judiciary by Legal Services of New Jersey on ‘robo-signing’ irregularities by mortgage lenders and servicers and actions by other states. . . . ‘Today’s actions are intended to provide greater confidence that the tens of thousands of residential foreclosure proceedings underway in New Jersey are based on reliable information. Nearly 95 percent of those cases are uncontested, despite evidence of flaws in the foreclosure process,’ said Chief Justice Rabner. ‘For judges to sign an order foreclosing on a person’s home, they must first be able to rely on the accuracy of documents submitted by lenders. That step is critical to the integrity of the judicial process,’ said Rabner.”) With that the Court issued an emergent rule. That rule was simple in that it merely required that foreclosure plaintiffs affirm, through their counsel, that the facts contained in their foreclosure complaints were reliable and accurate.

The Court did not impose a stay or an injunction of any sort preventing any foreclosure plaintiffs from moving forward with their cases. See R. 4:64-2. In fact initially the Court required that the foreclosure plaintiffs file the certifications by February 18, 2011, roughly 8 weeks later, but relaxed that requirement and provided an open time frame for complying with the rules. See, Notices to the Bar, 12/20/2010 and 1/7/2011 and 1/31/2011 and 6/10/2011 and Administrative Order dated 12/20/10. (<http://www.judiciary.state.nj.us/notices/2010/n101220a.pdf>, <http://www.judiciary.state.nj.us/notices/2011/n110107i.pdf>, <http://www.judiciary.state.nj.us/notices/2010/n101220b.pdf> <http://www.judiciary.state.nj.us/notices/2011/n110610f.pdf> http://www.judiciary.state.nj.us/superior/notice_and_order_re_certofduediligence.pdf . It is hard to imagine that the certifications, stating only that the complaint seeking to foreclose someone’s home is based on reliable information, have still not been filed now nearly two years – more than 100 weeks – later.

For many years prior to December 2010, courts uniformly required strict compliance with the Fair Foreclosure Act’s provisions with regard to Notices of Intention to Foreclose. See, Cho Hung Bank v. Kim, 361 N.J. Super. 331, 344-45 (App. Div. 2003); EMC Mortgage Corp. v. Chaudhri, 400 N.J. Super. 126, 138 (App. Div. 2008); Bank of New York Mellon v. Elghossain, 419 N.J. Super. 336, 342 (Ch. Div. 2010). Nonetheless, in general, foreclosure plaintiffs routinely issued deficient NOIs, correcting them only when challenged by a litigant and ordered to do so by a Court. Since the vast majority of cases are both uncontested and conducted without an attorney representing the homeowner, and a copy of the Notice of Intention to Foreclose is not required to be submitted in order to obtain a foreclosure judgment allowing the Office of Foreclosure to *sua sponte* notice the defect, the Chancery Judge assigned to the Office of Foreclosure signed judgments in cases in which the foreclosure plaintiff had never served a proper NOI. At the time of the issuance of the amended rule, the Court had no reason to know that foreclosure plaintiffs had routinely flouted the FFA or to what extent that routine flouting of the law might contribute to the foreclosure plaintiffs and their counsel’s failure to file the required certifications.

More than eight months after the issuance of the emergent rules during which time the foreclosure plaintiffs did not prosecute their cases, an appellate panel required dismissal of a foreclosure complaint in a contested matter in which a deficient NOI had been served. Bank of New York v. Laks, 422 N.J. Super. 201 (App. Div. 2011) . In an earlier unreported appellate case, Guillaume, the court had allowed correction following the Chaudhri case. The court granted certification in the Guillaume matter and

ultimately reversed Laks. US Bank v. Guillaume, 209 N.J. 449 (2012). But again, there was no stay of any proceeding during the time Guillaume was on appeal nor was there any change in the law with regard to what the FFA requires in a NOI nor any other valid reason why foreclosure plaintiff s failed and neglected to prosecute tens of thousands of foreclosure cases promptly after December 2010.

Even now with Guillaume allowing for corrective NOIs and the Court, apparently at the behest of the foreclosure plaintiff community, allowing mass correction of NOIs by way of order to show cause most major servicers have still not come to the court seeking to correct the NOIs and none of the foreclosure plaintiffs employing major servicers have filed the certifications required to prosecute the cases.

It seems that foreclosure plaintiffs and their counsel still do not have confidence in the accuracy and reliability of the information in the foreclosure complaints. Perhaps, with good reason. In this case, although allowed by order of April 4, 2012 to bring an order to show cause, there have been substantial delays. Delays in getting started, delays because foreclosure plaintiffs could not produce a letter containing the information that the court proposed as a model explanatory letter, delays because the mailing was done improperly, and for other reasons as well. Moreover, the Wells Fargo improperly identified nearly 1000 cases as being appropriate for this procedure and then sought to exclude them. This does not engender confidence in the foreclosure plaintiffs' recording keeping. Other servicers have experienced similar delays and inability to comply with these simple court corrective rules. None of this is the homeowners fault and should not result in the imposition of pre-judgment interest at high rates which are no longer warranted to compensate the plaintiffs for the time value of money.

LEGAL ARGUMENT

THE AWARD OF PRE-JUDGMENT INTEREST IS DEPENDANT UPON THE APPLICATION OF EQUITABLE PRINCIPLES AND WITHIN THE SOUND DISCRETION OF THE COURT.

It is well settled in New Jersey that a court of equity has the discretion to deny the allowance of pre-judgment interest in contract matters entirely, or to set the rate of interest at either the legal rate, the contract rate or some other rate or as the equities suggest. Manning Engineering v. Hudson County Park Commission, 71 N.J. 145 (1976) ("the allowance of pre-judgment interest in a contract action is largely dependent upon the application of principles of equity."); Bak-A-Lum Corp. v. Alcoa Building Products, 69 N.J. 123 (1976); Rova Farms Resort v. Investors Insurance Company of America, 65 N.J. 474, 505 (1974); East Ridgelawn Cemetery v. Winne, 11 N.J. 459, 471(1953), ("Determination of the particular rate of interest rested largely within the sound discretion of the Chancery Division.") Hoover Steel Ball & Company v. Shaffer Ball Bearing, 90 N.J. Eq. 515, 517 (1919)(recognizing that whether interest after the maturity of a debt secured by a mortgage runs at the contract rate or the legal rate or some other rate is a subject of dispute and noting that the "whole pendency of courts of law and courts of equity for a considerable period of time has been to break away from hard and fast rules and charge and allow interest in accordance with the principles of equity in order to accomplish justice in each particular case"); Estate of Kolker, 212 N.J. Super. 427, 440 (App. Div. 1986) ("further the allowance of pre-judgment interest in contract and contract like actions, even on liquidated claims, is not a litigant's right but rests rather in the court's discretion, required to be exercised with equitable principles and considerations in mind.").

The New Jersey Supreme Court in the matter of Rova Farms Resort v. Investors Insurance Company of America, considered whether a trial court erred by not awarding pre-judgment interest to an insured who

sued his insurer because the insurer failed to settle a personal injury case against it within the policy limit exposing the insured to a large excess verdict. 65 N.J. 474 (1974) The insured was awarded a judgment against the insurer for the excess judgment which it had already paid. The New Jersey Supreme Court reiterated that the trial court has discretion in awarding pre-judgment interest. 65 N.J. at 505. The court noted that the basic consideration and reason for awarding the interest to a judgment is to compensate the plaintiff for the loss of use of the money during the period of the litigation.

Here, an award of the legal interest rate would fairly compensate the foreclosure plaintiffs for the loss of the use of money at a fair rate commensurate with the rates obtained in the State's Cash Management Accounts. See, R. 4:42-11 (a) (ii). The legal rate of interest is set in such a manner as to balance the needs of creditors and debtors and discourage either from gaming the system by using the courts as an investment strategy or parking place during economic fluctuations. Delaying prosecution of cases should not be an investment strategy. Legal interest fairly compensates for the time value of money and should be awarded in these cases at least from the period of December 2010 to the entry of judgment if not from the time of the filing of the complaint.

Many courts considering whether to apply the contract or legal rate of interest pre-judgment look to the Third Circuit case of Mid-Jersey National Bank v. Fidelity Mortgage Investors for guidance. 518 F.2d 640 (3rd Cir. 1975). In that case, the borrower contended that it was not liable for the debt at all. The court noted "it would appear that for the rate of pre-judgment interest to be equitable it should reflect the rate fixed by the parties in an arms-length transaction. The parties to this suit voluntarily agreed to a loan at an interest rate, at least with respect to the ninety day note at issue here, of 9¾%." The legal interest rate was less than 9¾%. The Third Circuit noted that "equity is not served by permitting a debtor to refuse repayment of a note when it becomes due and then profit by the delay resulting from the ensuing litigation." 516 F.2d at 645. But the opposite is true here where the delay has been occasioned by the foreclosure plaintiffs' failure to prosecute the actions and not by any dilatory actions of the homeowners and the homeowners are not profiting by the delay.

In the Mid-Jersey case delays were caused by the mortgagor to the prejudice of the mortgagee. This justified the awarding of the higher rate. But in this case where we are considering only uncontested pre-judgment cases, there can be no contention that the mortgagor caused any delay whatsoever. Here any delay in reaching judgment has been caused only by the foreclosure plaintiffs' failure to prosecute the cases. Thus, it is appropriate to award the lesser rate which, in most cases, will be the legal rate.

In Interchange State Bank v. Rinaldi, the appellate court reviewed how the trial court ought to exercise its discretion in determining whether to award contract rate interest or the legal rate of interest holding that the trial courts may award a higher rate of interest when such an award is fair and equitable. 303 N.J. Super. 239, 260 (App. Div. 1997). It stands to reason that a trial court may also award the lower rate of interest when such award would be fair and equitable. The Interchange State Bank court noted that the courts have expressed "grave doubts concerning the equity of allowing [a party] to profit in this fashion from the prosecution of an appeal while [the adverse party] remains inadequately compensated for the use of its money." 303 N.J. at 264.

The overarching principle is that neither party should be prejudiced or rewarded in terms of an interest rate during a time of highly fluctuating interest rates by virtue of the time it takes to receive a judicial

determination. To that end, courts must discourage deliberate delays and not allow the court system to be a parking place until higher interest rates may be obtained in other investments.

Here, homeowner defendants are being prejudiced by the delay in prosecuting their cases. There is nothing that a homeowner can do to accelerate the entry of judgment. Homeowners in foreclosure cannot take advantage of historically low rates to refinance or otherwise mitigate the excessive running of interest which the foreclosure plaintiffs seek to recover against the sale of the home. The homeowner is stuck in a damned if you do damned if you don't situation with regard to staying in the house. Generally, foreclosure plaintiffs will not even accept deeds in lieu of foreclosure. In the absence of some way to give the house to the bank, staying in the house is responsible to neighbors and helps to maintain the property and prevent it from falling into disrepair. But staying in the house exposes homeowners to taunts by the foreclosure plaintiffs that they are trying to live for free. While many would like nothing more than to stay in their homes with an affordable payment, they do not seek to live for free. Many, as Your Honor has read in their *pro se* objections, simply want to know when the foreclosure will end and the bank will take the house. One woman had even moved out to new housing but was still mowing the lawn in the house subject to foreclosure.

The foreclosure judgments in these cases will include actual costs such as real estate taxes paid by the plaintiffs and legitimate insurance costs.¹ Thus in no sense is the homeowner living for "free". Living for free would mean that the bank paid these costs without reimbursement or the ability to recover them through the sale of the property. Interest rates are now at historic lows, but the debt underlying the mortgages on these cases that have languished from lack of prosecution are based on contracts that impose the extremely high rates of interest that prevailed in the 1990s and 2000s in both prime and subprime mortgages. The amount of interest over this two-year delay is not insubstantial. For example, for a typical \$350,000 mortgage the difference between contract rate of interest and the legal rate may be more than \$20,000 and could be the difference between surplus funds to the homeowner and a deficiency.

In 2005, Judge Todd sitting in the Law Division in Atlantic County, refused to provide contract rate interest pre-judgment in a credit card collection case in which the plaintiff delayed in seeking entry of judgment. Capital One v. Monge, 380 N.J. Super. 266 (Law Div. 2005). In that case, Capital One brought an action in Special Civil Part on March 3, 2001. It alleged that the defendant was indebted for \$1,680.17. The interest rate was 25% per year. The defendant did not answer the complaint and default was entered against her on April 23, 2001. Capital One, however, took no action to enter judgment until February 2005. It then sought pre-judgment interest of more than \$2,000 an amount computed at the 25% per annum rate.

Judge Todd when confronted with the unopposed request for entry of judgment, raised the issue of whether the contract rate of interest was appropriate *sua sponte* and scheduled a hearing at which the

¹ Other fees are inappropriate to add to the judgment such as excessive fees to drive by the property or broker price opinions to help the bank track the value of its collateral during the period of the delay. Although, counsel for Wells Fargo indicated several times during the November 15, 2012 hearing that foreclosure counsel fees and costs had been waived, I expect that those too will be sought when the judgment packages are submitted and sought at the theoretical maximum rate provided by court rule rather than the actual lower amounts paid to local foreclosure counsel or those counsel's out of pocket costs for service of process and other expenses imposing yet another upcharge on homeowners.

defendant responded in writing and appeared. While the defendant acknowledged the responsibility for the underlying debt, she expressed surprise at the substantial amount of interest now being charged her. Judge Todd held that it was not appropriate to award pre-judgment interest at the contract rate in that case. He reasoned that R. 4:42-11, although not required in contract actions, does deal with the computation of interest post-judgment and is applicable to all types of actions. He noted that the interest allowed on judgment after the entry of judgment is relatively modest. Judge Todd went on to recognize that the awards of pre-judgment interest are discretionary.

Judge Todd noted that “the plaintiff has come to the court to enforce an obligation that arises under the parties’ agreement and presumably can be expected to proceed as contemplated under our rules. At plaintiff’s request, defendant was served with a summons and complaint approximately 4 years ago. At that point it would be reasonable for defendant to conclude that any dispute would be resolved within the court system fairly and promptly. In this case, however, it appears that plaintiff elected to delay that anticipated resolution for an extended period of time. It is one thing to permit that delay. It is another thing to expect the court to be involved in a process which exposes defendant to exorbitant rate of interest for an extended period of time. To now award interest at the rate indicated in the parties’ agreement would have that affect.” 380 N.J. Super. at 270. Judge Todd noted that “if a plaintiff who has entered into an agreement providing for substantial interest payments is permitted to recover pre-judgment interest throughout the period of an extended default, that plaintiff will have a substantial incentive to delay the litigation.” 380 N.J. Super. at 271. He went on to note that had judgment been entered promptly the post-judgment interest which is mandatory would be between 6% and 1% per year, not 25%. He further noted that by delaying the entry of judgment, the plaintiff substantially increased its rate of return. Judge Todd found that “any substantial award of interest would be inconsistent with our general goal of encouraging the prompt and efficient resolution of litigation.” 380 N.J. Super. at 272

Judge Todd acknowledged that the problem arose in part from the court rules because the Special Civil Part cases were not subject to automatic dismissal for lack of prosecution pursuant to R. 1:13-7. The foreclosure matters here should have been subject to dismissal for lack of prosecution automatically after twelve months, however, automatic dismissal had not been accomplished for a number of years. In June 2012, the court amended the procedure to require the Clerk to notify foreclosure plaintiffs whose cases have been pending for longer than twelve months and to allow the foreclosure plaintiffs explain if there are exceptional circumstances that warrant the delay. R. 4:64-8. This is a new procedure and does not seem to be in full swing yet. The court’s allowing the foreclosure plaintiffs to maintain their actions without prosecuting them for this extended period of time and to allow them to correct NOIs rather than dismiss their cases and refile them has saved foreclosure plaintiffs in this case alone nearly \$800,000 in filing fees. The delay should not also allow them to collect excessive interest through the sale of the family home.

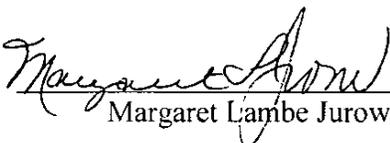
Despite the housing crisis and robo-signing actions locally and nationally, financial institutions, including Wells Fargo, have enjoyed extremely profitable years. The servicing arms of financial institutions in particular have enjoyed great success. See Well Fargo Press Release dated 1/17/2012 announcing huge profits and strong performance in mortgage servicing. <https://www.wellsfargo.com/downloads/pdf/press/4q11pr.pdf>. They should not be provided with excessive interest for the time that they have flatly refused to comply with the rules of court and have delayed these cases.

CONCLUSION

For the foregoing reasons and those encompassed in the prior submissions in this matter, this court should order that pre-judgment interest in the matters encompassed in this Court's ruling should be limited to the legal rate of interest as set forth in R. 4:42-11 for the period from at least December 20, 2010 to the entry of judgment.

Respectfully submitted,

LEGAL SERVICES OF NEW JERSEY
Amicus Curiae

By: 
Margaret Lambe Jurow, Esq.

cc: Diane Bettino, Esq.
Jennifer Perez, Clerk of the Superior Court (original and one copy)