

FILED Aug 19, 2013

Ira J. Metrick

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*Of Counsel
CHRISTINE M. FRIEDMAN
Member of NJ & DE Bars

August 16, 2013

Via Overnight Mail

Superior Court Clerk, Foreclosure Processing Services
Attention: Objection to Notice of Intention to Foreclose
25 W. Market Street
PO Box 971
Trenton, NJ 08625

RECEIVED
AUG 19 2013
SUPERIOR COURT
CLERK'S OFFICE

IN RE: Application by Citibank, NA., et als to Issue Corrected Notices of Intent to Foreclose on Behalf of Identified Foreclosure Plaintiffs
Docket No. F-17318-13

Dear Sir/Madam:

Please be advised that this office represents Defendants, Gregorio and Amparo Gagelonia, with regard to the above captioned matter. Enclosed herewith please find the original of Defendants' objection to the Order to Show Cause.

Kindly file same and return a filed copy via email to ira@metrickesq.com.

Thank you for your attention in this matter.

Very Truly Yours,



IRA J. METRICK

IJM:af

Enc.

cc: Clients
Honorable Margaret Mary McVeigh, P.J.Ch.
Theodore V. Wells, Esq., Paul, Weiss, Rifkind, Wharton & Garrison, LLP

RECEIVED

AUG 19 2013

SUPERIOR COURT
CLERK'S OFFICE

IRA J. METRICK, ESQ.
57 West Main Street
Freehold, NJ 07728
732-863-1660
Attorney for Defendants, Gregorio and Amparo Gagelonia

IN RE APPLICATION BY CITIBANK, N.A., CITI RESIDENTIAL LENDING, INC., CITIMORTGAGE, INC., AND CITIFINANCIAL SERVICES, INC. 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-17318-13 Civil Action OBJECTION TO ORDER TO SHOW CAUSE
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Defendant, Gregorio Gagelonia, is the subject of applicant's Order to Show Cause in the above captioned matter as well as the defendant in Docket No. F-10815-10. Please accept this written objection to "Citi's" Order to Show Cause to issue corrected notices of intent to foreclose for the following reasons:

OBJECTION: Plaintiff had no ownership interest in the loan at the time the original Notice of Intent to Foreclose was issued:

The original mortgage was issued to Mortgage Electronic Registration Systems, Inc. on behalf of Ark Mortgage, Inc. by Gregorio Gagelonia and Amparo Gagelonia. The assignment from MERS to CitiMortgage, Inc. is undated. However it was notarized on February 5, 2010, presumably the effective date. CitiMortgage filed its complaint in foreclosure on February 18, 2010. Accordingly, there is no way that plaintiff served a proper notice of intent to foreclose prior to the complaint filing for the following reasons:

The original NOI failed to set forth the name of the lender. As set forth in U.S. Bank Nat'l Ass'n v. Guillaume, 209 N.J. 449, 458 (2012), and again just recently in the case of Wells

Fargo Bank v. Dominguez, N.J. Super, A-0539-11T3, (App. Div.) (April 8, 2013), the NOI *must*, at a minimum, provide “the name and address of the lender.” N.J.S.A. 2A:50- 56(c) (11). This was reiterated by the Dominguez Court “the language of the Fair Foreclosure Act clearly conveys the legislature’s intent that the homeowner be notified of the identity of the entity that currently holds the mortgage” Dominguez at 3; citing N.J.S.A. 2A:50-56(c) (11). Citi did not possess any ownership interest when the initial NOI was issued.

In addition, the Fair Foreclosure Act, 2A:50-56(a) Notice of Intention to Foreclose, states only a “Residential Mortgage Lender” has the right to accelerate to debt and seek foreclosure. It additionally provides : “Residential mortgage lender" or "lender" means 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. Consequently, until CitiMortgage received the Assignment of the mortgage in February of 2010, they were not a “Residential Mortgage Lender,” and they had no right to serve a Notice of Intention to Foreclose.

OBJECTION: Permitting plaintiff to correct such massive errors in a Legislatively required document via a all-encompassing order to show cause is unjust.

The Fair Foreclosure Act requires a Plaintiff provide the homeowner with 30 days notice of its intent to foreclose *prior to filing the complaint*. Since CitiMortgage had no ownership interest when the original NOI was issued, it was required to serve another NOI prior to the complaint filing. Permitting Plaintiff to cure such massive errors in a document required by the legislature to protect homeowners via a sweeping and generic order to show cause violates the fundamentals of fairness and equity. Essentially, the plaintiff is demanding the court bypass the legislatively required procedures, implemented for the protection of homeowners, and approve *en masse*, a new form in effort to circumvent the normal judicial process. Plaintiff has brought

one action regarding hundreds of borrowers in order to save themselves the time and resources of bringing each action in the individual matter it affects. This may be beneficial to the plaintiff, and it may even serve some judicial economy. However the Fair Foreclosure Act was implemented to look out for the rights of homeowners, not to preserve Plaintiffs resources. For this reason the plaintiff should be required to comply with the fair foreclosure act, and the legislature's intent, and serve the corrected NOI prior to the commencement of litigation and not at the 11th hour in hundreds of cases.

OBJECTION: Plaintiff lacks standing and therefore defendants had no legal obligation to file an answer to the complaint.

Defendants submit to the court the plaintiff had no legal right to judicial enforcement of the mortgage because of the absence of valid endorsements and a proper assignment. Defendant asserts that plaintiff was never a holder of the note pursuant to New Jersey UCC prior to the time it filed a foreclosure action. Plaintiff relies on a defective assignment from MERS. However MERS is not a real party in interest to the loan and had no authorization from the original lender to assign the mortgage. As the New York Court set forth in LaSalle Bank National Association v. Lamy, 2006 WL 2251721 (N.Y. Sup. Ct.) August 7, 2006 at *2, MERS cannot assign the mortgage by itself without the authorization of the real owner in interest. Without any proof that MERS had the right to assign the mortgage there is no indication that CitiMortgage has any right to foreclose on this property. Therefore it may not be the proper party to issue the notice of intent to foreclose.

OBJECTION: The language of the proposed Notice of Intent to foreclose is misleading.

Several of the mortgagors identified in the Order to Show Cause are defendants in active foreclosure litigation with the debt accelerated as due in full. However, the proposed corrective NOI indicates that the mortgagor is in a pre-foreclosure status, that the debt may be accelerated, and that the servicer will start a mortgage foreclosure action upon the failure to forward the amount indicated. The NOI provides that “you must cure the default by August 6, 2013 to avoid acceleration of all sums due under the security instrument and the initiation of foreclosure proceedings.” However, the foreclosure proceedings were commenced this action in 2010. This language is confusing and misleading to the average homeowner.

These notices are not tailored to the situation at hand and are written in a manner that is confusing to the mortgagor. The majority of the persons affected by the Order to Show Cause have not retained counsel and will be misled and seriously prejudiced by the language in the corrected NOI's. It appears that the moving party is merely attempting to use judicial resources to approve a proposed form for future notices without regard for the deficiencies they are currently encountering. As the Court is aware the foreclosure process has been full of improperly processed foreclosures including improper service of process and the fact that Plaintiff does not even own the loan. To allow a broad and sweeping corrected NOI without regarding to standing and service issues would unduly prejudice homeowners.

OBJECTION: To allow a sweeping corrected NOI filed by parties who have failed to prove any legal right to the mortgage or note by its very act violates the Fair Foreclosure Act.

The Fair Foreclosure Act contains specific language indicating that the Notice of Intent must be mailed to defaulting homeowners *prior* to the filing of the foreclosure complaint. The Act uses the word “*shall*.” It does not provide for exceptions or alternative options. As the court

is aware, he who seeks equity must do equity. However, CitiMortgage, Inc. seeks to file a massive sweeping corrected NOI which by its own submission proves it violated the Fair Foreclosure Act because it seeks to have the NOI apply to both active foreclosures and inactive foreclosures. To allow such an act to occur completely defeats the purpose, intent and protections provided to homeowners through the Fair Foreclosure Act.

OBJECTION: Plaintiff is an improper party because the loan in question is an FHA loan and therefore must be in an FHA pool:

The mortgage plaintiff seeks to foreclose on clearly states on the first page it is an FHA loan. Specifically, it provides "FHA case number 352 – 5272168". In addition, at the bottom of each page it states "FHA- New Jersey Mortgage/Mers". Therefore, there can be no doubt this is an FHA loan. The FHA has been part of the Department of Housing and Urban Development (HUD), which established the Government National Mortgage Association (GNMA or Ginnie Mae) in 1968 to improve the secondary market for both single-family and multifamily FHA-insured loans. GNMA multifamily passthroughs are created when a mortgage originator makes an FHA project loan and then securitizes it as a GNMA pool. The originator pays a fee to GNMA to obtain GNMA's guarantee, which backs with the full faith and credit of the U.S. government, the full and timely payment of principal and interest. Although the loan originator is not required to securitize through GNMA, it must alternatively put the loan into an FHA-insured passthrough participation certificate, which, in the case of a default, usually pays 99% of principal and interest at the FHA debenture rate, generally a bit lower than the passthrough rate. In either event the FHA loan is to be placed in securitized pool. CitiMortgage does not represent a securitized pool, nor does it represent itself as a trustee. Therefore, Plaintiff cannot properly be the owner of the mortgage or note for these defendants.

The OTSC does not mention, refer or reference any securitized pool or the fact that the defendant's loan is an FHA loan. Ignoring momentarily the blatant standing issue, it is clear that the corrective NOI filed by CitiMortgage and served on Defendant on or about July 2, 2013 is still completely deficient and noncompliant with the Fair Foreclosure Act and the court's ruling in *Guillaume*. *Guillaume* states that strict compliance with the requirements of the Fair Foreclosure Act is necessary and that substantial compliance is insufficient. Plaintiff's "corrected NOI" still fails to provide defendant with the name of the actual owner of the loan. The holding in US Bank, N.A.v. Guillaume, 209 N.J. 449 (2012) agreed with the decision in Laks that the FFA requires the NOI to list the name and address of the Lender (defined to mean the original mortgagee or its assigns) in addition to providing contact information for the loan servicer. Plaintiff corrective NOI fails to comply with this requirement.

OBJECTION: Notice of Intent deficiency issues have been raised in applications filed under the various individual foreclosure dockets.

Certain homeowners have properly brought the issue before the Chancery Judges involved in the foreclosure arena. The Courts and litigants have been searching for a remedy appropriate to the circumstances of each case. To permit "Citi" plaintiffs to correct the Notices of Intent at this point would be fundamentally unfair to all homeowners. The more proper approach should be to either discontinue the foreclosures where NOI problems exist or have them proceed with the problem addressed by the chancery court judges handling these matters. In the present case although default may have been entered, the Defendant still has the right to contest the foreclosure, including an objection to the admittedly defective NOI. The corrected form of the NOI should only be permitted to be used going forward for actions yet to be filed.

For the reasons stated above and for those reasons that may be raised in any additional objections, it is respectfully requested that CitiMortgage, Inc's Order to Show Cause be denied in its entirety and/or denied as to the specifically identified homeowner, Gregorio Gagelonia. It is also respectfully requested the counsel fees be awarded in favor of the identified homeowners for bringing this action against parties not appropriately within the defined class or to which Plaintiff has no cause of action under the law due to lack of standing.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'Ira J. Metrick', is written over a long diagonal line that extends from the bottom left towards the top right of the signature area.

Ira J. Metrick, Esquire

IRA J. METRICK, ESQ.
57 West Main Street
Freehold, NJ 07728
732-863-1660
Attorney for Defendants, Gregorio and Amparo Gagelonia

IN RE APPLICATION BY CITIBANK, N.A., CITI RESIDENTIAL LENDING, INC., CITIMORTGAGE, INC., AND CITIFINANCIAL SERVICES, INC. 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-17318-13 Civil Action CERTIFICATION OF SERVICE
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Ira J. Metrick, of full age, hereby certifies as follows:

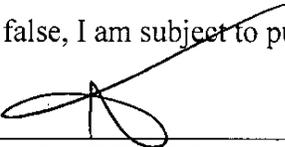
1. I am the attorney for the Defendants, Gregorio and Amparo Gagelonia, in the above captioned matter.

2. On August 16, 2013, I caused the original of the within documents to be sent for filing with the Clerk, Superior Court of New Jersey, Foreclosure Processing Services, Attn: Objection to Notice of Intent to Foreclose, via overnight mail; and simultaneously sent a copy to Theodore V. Wells, Esq, Paul, Weiss, Rifkind, Wharton & Garrison LLP, attorneys for Plaintiff, to 1285 Avenue of the Americas, New York, NY 10019, via overnight mail; and to the Honorable Margaret Mary McVeigh, Superior Court of New Jersey, Passaic County, to 71 Hamilton Street, Patterson, New Jersey 07505 via priority mail.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated:

8/16/13



IRA J. METRICK
Attorney for Defendants,
Gregorio and Amparo Gagelonia

IRA J. METRICK, ESQ.
57 West Main Street
Freehold, NJ 07728
732-863-1660
Attorney for Defendants, John and Dawn Norris

IN RE APPLICATION BY CITIBANK, N.A., CITI RESIDENTIAL LENDING, INC., CITIMORTGAGE, INC., AND CITIFINANCIAL SERVICES, INC. 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-17318-13 Civil Action OBJECTION TO ORDER TO SHOW CAUSE
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Defendants, John and Dawn Norris, are the subject of applicant's Order to Show Cause in the above captioned matter as well as the defendant in Docket No. F-57771-10. Please accept this written objection to "Citi's" Order to Show Cause to issue corrected notices of intent to foreclose for the following reasons:

OBJECTION: FANNIE MAE, NOT PLAINTIFF, OWNS AND CONTROLS
THE NOTE AND MORTGAGE

The proposed Notice of Intent to foreclose does not state that Fannie Mae owns the Defendant's loan. However, a search of publically available information shows that the Norris Note and Mortgage are owned by Fannie Mae and not the Plaintiff (Exhibit A). Specifically, Counsel undertook a search of a public data base maintained by Fannie Mae (<https://www.knowyouroptions.com/loanlookup>), which identifies whether Fannie Mae owns loans at specific addresses. (See Certification of Counsel submitted herewith) When Counsel entered the property address, the website returned the result "Yes. Our records show that Fannie Mae is the owner of your mortgage and it was acquired on May 1, 2005. This date is also referred to as the Fannie Mae settlement date". (Exhibit A) Accordingly, Plaintiff had no

ownership interest in the loan at the time the original Notice of Intent to Foreclose was issued and no ownership interest now.

The original mortgage in this matter did not name Mortgage Electronic Registration Systems, Inc. (MERS) as a mortgagee nominee and the Plaintiff has not disclosed any assignment of mortgage or other properly authenticated document to confirm that Fannie Mae has authorized the NOI and the foreclosure. Once the loan is sold to Fannie Mae, Plaintiff is required to show an assignment of mortgage in order to become a “residential mortgage lender” and be in position to issue a NOI.

BAC Home Loans Servicing LP, f/k/a Countrywide Home Loans Servicing, LP v. Durelli, Docket No. F-39250-10, (Ch. Div. July 18, 2012) (Exhibit B), was a case that involved a loan owned by Freddie Mac. However, in that case, MERS was named as the mortgagee nominee, and BAC Home Loans had received an assignment of mortgage through MERS, which was relied upon as the authority to pursue the foreclosure. It was the involvement of MERS that led the Court to conclude that there was no requirement of an assignment from Freddie Mac. As the Court is aware, MERS was created to track assignments of mortgages and the Fannie Mae Guidelines specifically authorize the use of a MERS assignment. In this case, MERS was not named as the nominee mortgagee, and therefore an assignment of mortgage was required to transfer the mortgage from Plaintiff to Fannie Mae at the time of the purchase of the loan, and then a second assignment was required from Fannie Mae to Plaintiff, to give Plaintiff the authority to bring this foreclosure before the Court. While the Plaintiff implies that no assignments were required, there is nothing in the record to give Plaintiff the authority to act on behalf of Fannie Mae and provide an NOI to the Defendants and attempt to foreclose.



As in Durelli, the Plaintiff has not provided proof that they are authorized by Fannie Mae to Foreclose. If they are authorized by Fannie Mae to foreclose, they should be able to provide proper documentation, including a written agreement that describes the process for the sale to Fannie Mae.

Contrary to the Durelli opinion, as discussed in Admin Order 01-2010, the purpose of the Court Rule is to help ensure the integrity of the residential mortgage foreclosure process. (Exhibit C, page 2). While it is understandable that Fannie Mae does not want NJ homeowners to know that the Federal Government is seeking to take their home, this does not relieve the Plaintiff of the obligation to comply with NJ Court Rules and NJ case law.

In Durelli, the Court states that there was no evidence of any assignment other than that from MERS. In that case, the Plaintiff claimed that it held a validly executed assignment. Here there is no MERS assignment, and no explanation as to how the Note and Mortgage were transferred to Fannie Mae. There is also no evidence of the terms upon which the Plaintiff may be permitted to foreclose this Fannie Mae owned loan.

The Court in Durelli, at page 8, acknowledged, "It is a general rule of equity that real parties in interest must be joined as parties and an assignee of a debt is a real party in interest." citing Zucher v. Modern Plastic Machinery Corp..., 24 NJ Super 158, 163 (App. Div. 1952). The Court went on to recognize that a Plaintiff must have possession of the Note or a valid assignment at the time the complaint is filed. In this case at bar, Fannie Mae is a real party in interest, and there is no assignment to the Plaintiff. Accordingly, Fannie Mae is an indispensable party to this action. This is especially relevant, as the Plaintiff has provided no evidence of the terms of the agreement that allow them to bring this action, and the Plaintiff has not provided a

valid assignment or a certification based upon personal knowledge that the Plaintiff possessed the Note at the time the complaint was filed.

Plaintiff did not have possession of the Note or a valid Assignment of Mortgage at the time the complaint was filed, and those facts have not changed. Fannie Mae maintains a publically available Servicing Guide on its website (Announcement 08-12 dated May 23, 2008 concerning Note Holder Status for legal Proceedings Conducted in the Servicer's Name is attached as Exhibit D) that addresses the issue of possession of the Note and foreclosure proceedings. It makes clear that Fannie Mae, at all times owns the mortgage note and maintains physical possession of same. In this matter, the Plaintiff has concealed the fact that Fannie Mae owns the Defendant's Note and contends without further explanation that it is the "lender" on the Defendant's loan, and it is the "creditor to whom the debt is owed."

In the Fannie Mae Guidelines, Section 101, at page 801-1, last paragraph, first sentence, that servicer, if initiating a complaint for Fannie Mae "must process foreclosures in accordance with... state laws..." This provision specifically places the burden on servicers to comply with the New Jersey Court Rules. Furthermore, pages 801-2, third paragraph, provides an address to use when dealing with an "assignment of mortgages" involving Fannie Mae. However, there is absolutely no record of this address in any assignment produced by Plaintiff. Contrary to the instructions of Fannie Mae, the Plaintiff has failed to produce an assignment of mortgage and can not be a "residential mortgage lender" pursuant to the FFA.

OBJECTION: Plaintiff has never been a "Residential Mortgage Lender" and therefore does not qualify to serve a NOI on the Defendants.

The original NOI in this matter failed to set forth the name of the lender. As set forth in U.S. Bank Nat'l Ass'n v. Guillaume, 209 N.J. 449, 458 (2012), and again just recently in the

case of Wells Fargo Bank v. Dominguez, N.J. Super, A-0539-11T3, (App. Div.) (April 8, 2013) (Exhibit E), the NOI *must*, at a minimum, provide “the name and address of the lender.” N.J.S.A. 2A:50– 56(c) (11). This was reiterated by the Dominguez Court “the language of the Fair Foreclosure Act clearly conveys the legislature’s intent that the homeowner be notified of the identity of the entity that currently holds the mortgage” Dominguez at 3; citing N.J.S.A. 2A:50-56(c) (11). Plaintiff did not possess any ownership interest when the initial NOI was issued.

The Dominguez case also involved a governmental entity, and the Court found that Wells Fargo was required to have received a valid assignment of mortgage, before they would have the authority to serve a NOI on the Defendants.

The Fair Foreclosure Act, 2A:50-56(a) Notice of Intention to Foreclose, states only a “Residential Mortgage Lender” has the right to accelerate to debt and seek foreclosure. It additionally provides : “Residential mortgage lender" or "lender" means 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. Consequently, without an Assignment of the Mortgage, Plaintiff was not, and is not a “Residential Mortgage Lender,” and they had no right to serve any Notice of Intention to Foreclose.

OBJECTION: Permitting plaintiff to correct such massive errors in a Legislatively required document via an all-encompassing order to show cause is unjust.

The Fair Foreclosure Act requires a Plaintiff provide the homeowner with 30 days notice of its intent to foreclose *prior to filing the complaint*. Since Plaintiff had no ownership interest when the original NOI was issued, it was required to serve another NOI prior to the complaint filing. Permitting Plaintiff to cure such massive errors in a document required by the legislature

to protect homeowners via a sweeping and generic order to show cause violates the fundamentals of fairness and equity. Essentially, the plaintiff is demanding the court bypass the legislatively required procedures, implemented for the protection of homeowners, and approve *en masse*, a new form in effort to circumvent the normal judicial process. Plaintiff has brought one action regarding hundreds of borrowers in order to save themselves the time and resources of bringing each action in the individual matter it affects. This may be beneficial to the plaintiff, and it may even serve some judicial economy. However the Fair Foreclosure Act was implemented to look out for the rights of homeowners, not to preserve Plaintiff's resources. For this reason the plaintiff should be required to comply with the fair foreclosure act, and the legislature's intent, and serve the corrected NOI prior to the commencement of litigation and not at the 11th hour in hundreds of cases.

OBJECTION: Plaintiff lacks standing and therefore defendants had no legal obligation to file an answer to the complaint.

Defendants submit to the court the plaintiff had no legal right to judicial enforcement of the mortgage because Plaintiff did not have possession of the Note or a valid assignment on the date the complaint was filed. Defendant asserts that plaintiff was never a holder of the note pursuant to New Jersey UCC prior to the time it filed a foreclosure action. Based upon Fannie Mae Guidelines, Plaintiff did not have physical possession of the Note at the time the complaint was filed

A foreclosing mortgagee must show that it has standing to file and pursue the action by demonstrating that it owns or controls the underlying debt. Wells Fargo Bank, N.A. v. Ford, 418 N.J. Super. 592, 597 (App. Div. 2011). See also Deutsche Bank National Trust Company v. Mitchell, 422 N.J. Super. 214; 2011 WL 3444223 (App. Div., Approved for Publication August

9, 2011); Bank of N.Y. v. Raftogianis, 418 N.J. Super. 323, 327-328 (Ch. Div. 2010); Cf. Kemp v. Countrywide Home Loans (In Re Kemp), 440 B.R. 624 (B.R.D. N.J. 2010) (Bank of New York's proof of claim disallowed where it did not have possession of the Note). "In the absence of a showing of such ownership or control, the plaintiff lacks standing to proceed with the foreclosure action and the complaint must be dismissed." Ford at 597.

In Mitchell, the Appellate Division ruled that when a plaintiff files a mortgage foreclosure action, it must have either a valid assignment or actual possession of the Note on the day that the complaint is filed and lack of standing cannot be cured after the fact. Mitchell at 214. An assignee of a mortgage must also produce a written assignment of mortgage in order to maintain a foreclosure action. Ford at 600, citing N.J.S.A. 46:9-9. Here, Plaintiff had neither at the time the complaint was filed. Furthermore, Plaintiff does not come to the Court with possession of the Note or a valid assignment of mortgage, as a basis for this application. Accordingly, there is no basis for Plaintiff to serve a NOI on Defendants.

OBJECTION: The language of the proposed Notice of Intent to foreclose is misleading.

Several of the mortgagors identified in the Order to Show Cause are defendants in active foreclosure litigation with the debt accelerated as due in full. However, the proposed corrective NOI indicates that the mortgagor is in a pre-foreclosure status, that the debt may be accelerated, and that the servicer will start a mortgage foreclosure action upon the failure to forward the amount indicated. The NOI advises that the Defendants must cure the default to avoid acceleration of all sums due under the security instrument and the initiation of foreclosure proceedings. However, the foreclosure proceedings were commenced this action in 2010. This language is confusing and misleading to the average homeowner.

These notices are not tailored to the situation at hand and are written in a manner that is confusing to the mortgagor. The majority of the persons affected by the Order to Show Cause have not retained counsel and will be misled and seriously prejudiced by the language in the corrected NOI's. It appears that the moving party is merely attempting to use judicial resources to approve a proposed form for future notices without regard for the deficiencies they are currently encountering. As the Court is aware the foreclosure process has been full of improperly processed foreclosures including improper service of process and the fact that Plaintiff does not even own the loan. To allow a broad and sweeping corrected NOI without regarding to standing and service issues would unduly prejudice homeowners.

OBJECTION: To allow a sweeping corrected NOI filed by parties who have failed to prove any legal right to the mortgage or note by its very act violates the Fair Foreclosure Act.

The Fair Foreclosure Act contains specific language indicating that the Notice of Intent must be mailed to defaulting homeowners *prior* to the filing of the foreclosure complaint. The Act uses the word "*shall*." It does not provide for exceptions or alternative options. As the court is aware, he who seeks equity must do equity. Plaintiff seeks to file a massive sweeping corrected NOI which by its own submission proves it violated the Fair Foreclosure Act because it seeks to have the NOI apply to both active foreclosures and inactive foreclosures. To allow such an act to occur completely defeats the purpose, intent and protections provided to homeowners through the Fair Foreclosure Act.

OBJECTION: Notice of Intent deficiency issues have been raised in applications filed under the various individual foreclosure dockets.

Certain homeowners have properly brought the issue before the Chancery Judges involved in the foreclosure arena. The Courts and litigants have been searching for a remedy

appropriate to the circumstances of each case. To permit "Citi" plaintiffs to correct the Notices of Intent at this point would be fundamentally unfair to all homeowners. The more proper approach should be to either discontinue the foreclosures where NOI problems exist or have them proceed with the problem addressed by the chancery court judges handling these matters. In the present case although default may have been entered, the Defendant still has the right to contest the foreclosure, including an objection to the admittedly defective NOI. The corrected form of the NOI should only be permitted to be used going forward for actions yet to be filed.

For the reasons stated above and for those reasons that may be raised in any additional objections, it is respectfully requested that CitiMortgage, Inc's Order to Show Cause be denied in its entirety and/or denied as to the specifically identified homeowners, John and Cindy Norris. It is also respectfully requested the counsel fees be awarded in favor of the identified homeowners for bringing this action against parties not appropriately within the defined class or to which Plaintiff has no cause of action under the law due to lack of standing.

Respectfully Submitted,

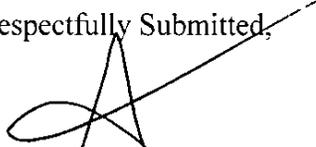

Ira J. Metrick, Esquire



EXHIBIT A

[Home](#)

Fannie Mae Loan Lookup Results: Match Found

It appears that Fannie Mae owns your loan, based on the information you entered:

JOHN NORRIS
2007 FAIRWAY DR
SPRING LAKE, NJ 07762
Last 4 Digits of Social Security Number: ****
Fannie Mae Loan Acquisition Date: **05-01-2005**
Mortgage Company: **CITIMORTGAGE, INC.**

FORECLOSURE CONSEQUENCES

What can happen if you are foreclosed on? Find out here so you can be prepared.

[GO TO OUR FORECLOSURE PAGE](#)

Results—Our Records Indicate:

- Your loan was acquired by Fannie Mae on or before May 31, 2009. Knowing the Fannie Mae Loan Acquisition Date is important because some programs, such as HARP, are available only on loans acquired by Fannie Mae on or before May 31, 2009.
- Your mortgage company is **CITIMORTGAGE, INC.**.
- You may be eligible for the [Home Affordable Refinance Program \(HARP\)](#) or the [Home Affordable Modification Program \(HAMP\)](#)—or other programs available exclusively for Fannie Mae borrowers.

Next Steps:

To help you find the option(s) that might be best for your situation, please answer the questions below.

Have you been delinquent on your mortgage in the past 12 months? Yes No

Note: In this case, "delinquent" means you have paid your mortgage payment late by 30 days or more at any time in the last 6 months. Or, that you had more than one late payment or made a payment more than 30 days late in the 6-month period prior to the last 6 months.

Do you anticipate having difficulty paying your mortgage in the near future (next 2-3 months)? Yes No

[Get Options](#)

Other Steps You Can Take:

Get Help Now

Contact a Fannie Mae Mortgage Help Center for free housing counseling and assistance with your mortgage.

Explore KnowYourOptions.com

Review the useful information and tools on this site to learn more about your options.

Contact Your Mortgage Company

Confirm these results and obtain additional information regarding your mortgage by contacting your mortgage company.

EXHIBIT B

2012 N.J. Super. Unpub. LEXIS 1732, *

BAC HOME LOANS SERVICING, LP, FKA COUNTRYWIDE HOME LOANS SERVICING, LP, Plaintiff, v.
JOSEPH DURELLI AND CHERYL DURELLI, Defendants.

DOCKET NO. F-39250-10

SUPERIOR COURT OF NEW JERSEY, CHANCERY DIVISION, GENERAL EQUITY PART, MERCER
COUNTY

2012 N.J. Super. Unpub. LEXIS 1732

July 11, 2012, Argued
July 18, 2012, Decided

NOTICE: NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS.

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CORE TERMS: mediation, foreclosure, mortgage, lender, certification, foreclosure action, servicer, modification, default, notice, holder, affirmative defense, session, foreclose, homeowner's, servicing, summary judgment, counterclaim, mortgagee's, modify, cure, attorneys' fees, attend, recorded, assigned, assignee, investor, Fair Foreclosure Act FFA, standing to bring, bad faith

COUNSEL: [*1] Donna M. Bates, Esq. (Reed Smith LLP) and Jessica A. Berry, Esq. (Fein, Such, Kahn & Shepard, P.C.), appearing on behalf of Plaintiff, BAC Home Loans Servicing, LP, FKA Countrywide Home Loans Servicing, LP.

Cheri Robinson, Esq. (Cheri Robinson & Associates), appearing on behalf of Defendants, Joseph and Cheryl Durelli.

JUDGES: Mary C. Jacobson, A.J.S.C.

OPINION BY: Mary C. Jacobson

OPINION

MOTION DECISION

FACTS

On March 10, 2006, Defendants Joseph and Cheryl Durelli executed a promissory note ("Note") whereby they borrowed \$272,000 from HSBC Mortgage Corporation (USA) to refinance the property located at 449 Newkirk Avenue, Hamilton, NJ (the "Property"). A non-purchase money mortgage was executed to Mortgage Electronic Registration System, Inc. ("MERS"), as nominee for HSBC Mortgage Corporation (USA) on March 10, 2006 for the Property. On April 1, 2006, the mortgage was recorded. Plaintiff claims that the mortgage was assigned by written assignment on July 20, 2010 by MERS, as nominee for HSBC Mortgage Corporation (USA) to Plaintiff. Plaintiff states this assignment was recorded on August 10, 2010. Plaintiff claims that on April 1, 2010, Defendants defaulted on the loan by failing to make a payment and that Defendants [*2] have remained in default from that time to the present.

Plaintiff thereafter elected to accelerate the amount due under the loan, pursuant to the acceleration clause in the mortgage agreement. Plaintiff states that Notices of Intent to Foreclose ("NOI") were sent to

Defendants on May 17, 2010, and that Defendants acknowledged receipt of the Notices on May 24, 2010.

Plaintiff filed its complaint in foreclosure against Defendants on August 12, 2010. Defendants filed a single contesting answer on October 27, 2010. Defendants' answer included an affirmative defense based on the Fair Foreclosure Act, twenty-six other affirmative defenses, and five counterclaims. Defendants' affirmative defenses are as follows: violation of the Fair Foreclosure Act,¹ 1) failure to state a cause of action, 2) statute of limitations, 3) waiver and/or estoppel, 4) Plaintiff is not the real party in interest and lacks standing, and Plaintiff failed to join all necessary parties, 5) unclean hands, fraud, illegality, collusion, and conspiracy, 6) any damages to Plaintiff were caused by its own comparative fault, 7) "Plaintiff has acted illegally an [sic] improperly at all relevant times and Plaintiff is therefore [*3] barred from any relief whatsoever", 8) Plaintiff is the superceding or intervening cause of any injury, 9) unjust enrichment, 10) Plaintiff's claims are barred by the doctrine of in pari delicto, 11) Plaintiff did not execute the mortgage and is not an assignee of the mortgage, 12) violation of the Fair Debt Collection Practices Act, 13) no contract existed in accordance with the terms set forth in the complaint, 14) violation of the Truth in Lending Act, 15) violation of the Real Estate Settlement Procedures Act, 16) mortgage was procured by fraud, duress, and/or undue influence, 17) violation of the Racketeer Influence and Corrupt Organizations Act, 18) Plaintiff has failed to provide payoff and reinstatement figures in accord with the Fair Debt Collection Practices Act, 19) loan money was not properly disbursed by the lender, therefore there was insufficient consideration for the contract, 20) implied waiver, 21) usury, 22) Plaintiff lacks standing, 23) failure to join all indispensable parties, 24) bad faith, 25) breach of fiduciary duty, 26) violation of the Fair Foreclosure Act. Defendants' counterclaims are as follows: 1) fraud, duress, and undue influence, 2) violation of the [*4] Truth in Lending Act, 3) violation of the Racketeer Influence and Corrupt Organizations Act, 4) violation of the Fair Debt Collection Practices Act, and 5) violation of the Real Estate Settlement Practices Act. Plaintiff filed an answer to Defendants' counterclaims on November 1, 2010.

FOOTNOTES

¹ THIS AFFIRMATIVE DEFENSE IS LISTED FIRST, BUT THEN THE NEXT SECTION OF THE ANSWER STARTS WITH THE FIRST AFFIRMATIVE DEFENSE AND CONTINUES TO NUMBER 26.

THE PARTIES PARTICIPATED IN NEW JERSEY'S RESIDENTIAL FORECLOSURE MEDIATION PROGRAM. MEDIATION SESSIONS TOOK PLACE ON OCTOBER 19, 2011, DECEMBER 14, 2011, AND FEBRUARY 15, 2012. THE COURT CONDUCTED CASE MANAGEMENT CONFERENCES FOLLOWING EACH MEDIATION SESSION AND ISSUED CASE MANAGEMENT ORDERS MEMORIALIZING EACH CONFERENCE. DURING THE FEBRUARY 15, 2012² CASE MANAGEMENT CONFERENCE, THE COURT WAS INFORMED BY MS. HOFFMAN, COUNSEL FOR PLAINTIFF, THAT FREDDIE MAC, THE INVESTOR ON THIS LOAN, WOULD NOT CONSIDER DEFENDANTS FOR A LOAN MODIFICATION BECAUSE THEY ARE PURSUING LITIGATION OPPOSING THE FORECLOSURE. IN ITS CASE MANAGEMENT ORDER, THE COURT STATED:

1. Counsel for plaintiff represented to the court that Freddie Mac is the investor on this loan and will not consider [*5] Ms. Durelli for a loan modification because she is also pursuing litigation opposing the foreclosure. Since there had been previous mediation sessions without such information being provided to the parties or the court, and since that position rendered the entire mediation process futile, the court directed Mr. Bender [counsel for Plaintiff] to provide a confirmation or clarification of the position of Freddie Mac as to the availability of loan modifications in litigated cases.

2. The plaintiff also noted that there were financial barriers that made offering a loan modification to the defendant unlikely in this case.

On February 17, 2012, counsel for Plaintiff sent correspondence to the court and Defendants addressing Freddie Mac's "policy" related to modifying loans in contested cases. In this correspondence, counsel for Plaintiff stated that he investigated Freddie Mac's policy. He confirmed that: Freddie Mac does have a guideline which indicates that modifications are not to be offered during active litigations. However, the guidelines also allow for a waiver of this position. Waivers are freely granted when a defendant qualifies for a loan modification and the loan modification will [*6] settle the litigation. That is why Plaintiff reviewed Defendants for a loan modification in the first instance. It defies logic for Plaintiff to go through all the effort and expense of reviewing Defendants for a loan modification and paying for multiple attorneys to attend multiple mediation sessions if there was truly a blanket prohibition on offering loan modifications in the context of litigation. Apparently, the individual that Ms. Hoffman was speaking with was not entirely familiar with the loan modification procedures.

The true obstacle to offering the Defendants a loan modification is their reliance on unemployment income. If Defendants can demonstrate sufficient income to qualify for a loan modification without factoring in the unemployment payments, then they can be offered a loan modification to settle this matter.

FOOTNOTES

² THE CASE MANAGEMENT ORDER INCORRECTLY LISTS THE DATE OF THE FORECLOSURE MEDIATION AND CASE MANAGEMENT CONFERENCE AS FEBRUARY 16, 2012 INSTEAD OF FEBRUARY 15, 2012.

ON MAY 10, 2012, THE COURT CONDUCTED A CASE MANAGEMENT CONFERENCE AT WHICH TIME IT ACKNOWLEDGED THAT PLAINTIFF HAD RECEIVED ALL NECESSARY FINANCIAL DOCUMENTS FROM DEFENDANTS FOR THE PURPOSES OF A LOAN [*7] MODIFICATION. THE COURT URGED THE PARTIES TO CONTINUE NEGOTIATING A RESOLUTION OF THE CASE OUTSIDE OF THE COURT'S MEDIATION PROGRAM AND AUTHORIZED PLAINTIFF TO FILE A MOTION FOR SUMMARY JUDGMENT. ON MAY 18, 2012, PLAINTIFF FILED THE INSTANT MOTION FOR SUMMARY JUDGMENT AND TO DISMISS DEFENDANTS' COUNTERCLAIMS WITH PREJUDICE. IN SUPPORT OF ITS MOTION, PLAINTIFF SUBMITTED THE CERTIFICATION OF LORENA DIAZ, AVP, OPERATIONS TEAM LEAD FOR BANK OF AMERICA, N.A. ("BANA"), SUCCESSOR BY MERGER TO PLAINTIFF, DATED MAY 17, 2012, AND THE CERTIFICATION OF DONNA M. BATES, ESQ., COUNSEL FOR PLAINTIFF.

DEFENDANTS FILED OPPOSITION ON JUNE 11, 2012. IN THEIR OPPOSITION, DEFENDANTS ARGUE THAT PLAINTIFF LACKS STANDING BECAUSE FREDDIE MAC, NOT PLAINTIFF, IS THE OWNER OF THE NOTE AND MORTGAGE. FURTHER, DEFENDANTS ARGUE THAT PLAINTIFF HAS NOT MEDIATED IN GOOD FAITH JUSTIFYING DISMISSAL OF THE FORECLOSURE COMPLAINT.

ON JUNE 27, 2012, PLAINTIFF FILED A REPLY. IN ITS REPLY, PLAINTIFF ARGUES THAT DEFENDANTS' OPPOSITION IS PROCEDURALLY DEFICIENT BECAUSE DEFENDANTS FAILED TO DISPUTE PLAINTIFF'S STATEMENT OF UNDISPUTED MATERIAL FACTS. PLAINTIFF ALSO ARGUES THAT DEFENDANTS' OPPOSITION IS SUBSTANTIVELY DEFICIENT, BECAUSE [*8] IT FAILS TO REBUT PLAINTIFF'S *PRIMA FACIE* RIGHT TO FORECLOSE OR ADDRESS PLAINTIFF'S ARGUMENTS RELATED TO DISMISSAL OF THEIR COUNTERCLAIMS. PLAINTIFF ALSO ADDRESSES THE SUBSTANCE OF DEFENDANTS' OPPOSITION. PLAINTIFF ARGUES THAT IT HAS STANDING DESPITE THE FACT THAT FREDDIE MAC IS THE INVESTOR ON THE LOAN. IN SUPPORT OF ITS REPLY, PLAINTIFF ATTACHED A CERTIFICATION FROM RYAN DANSBY, AN EMPLOYEE OF BANA, AND SUPPORTING DOCUMENTS FROM THE FREDDIE MAC SINGLE FAMILY SERVICER GUIDE. PLAINTIFF ALSO INCLUDED A SECOND CERTIFICATION FROM DONNA M. BATES, ESQ., COUNSEL TO PLAINTIFF, TO WHICH IT ATTACHED COPIES OF CORRESPONDENCE SENT TO THE COURT ON FEBRUARY 17, 2012 AND THE COURT'S MAY 10, 2012 CASE MANAGEMENT ORDER.

ORAL ARGUMENT ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT WAS HEARD ON JULY 11, 2012. THE COURT RESERVED DECISION ON THE MOTION PENDING RELEASE OF THIS OPINION.

DISCUSSION

I. SUMMARY JUDGMENT STANDARD

PLAINTIFF HAS MOVED FOR SUMMARY JUDGMENT, TO STRIKE DEFENDANTS' ANSWER, TO DISMISS DEFENDANTS' COUNTERCLAIMS, TO ENTER DEFAULT, AND TO TRANSFER THE CASE TO THE OFFICE OF FORECLOSURE. A PARTY IS ENTITLED TO SUMMARY JUDGMENT WHERE THERE IS NO GENUINE ISSUE AS TO ANY MATERIAL FACT AND THE MOVING [*9] PARTY IS ENTITLED TO A JUDGMENT AS A MATTER OF LAW. *R. 4:46-2(C)*. THE DETERMINATION AS TO "WHETHER THERE EXISTS A GENUINE ISSUE WITH RESPECT TO A MATERIAL FACT REQUIRES THE MOTION JUDGE TO CONSIDER WHETHER THE COMPETENT EVIDENTIAL MATERIALS PRESENTED, WHEN VIEWED IN THE LIGHT MOST FAVORABLE TO A NON-MOVING PARTY . . . ARE SUFFICIENT TO PERMIT A RATIONAL FACT FINDER TO RESOLVE THE ALLEGED DISPUTED ISSUE IN FAVOR OF THE NON-MOVING PARTY." *BRILL V. THE GUARDIAN LIFE INSURANCE COMPANY OF AMERICA*, 142 N.J. 520, 523 (1995).

UNDER NEW JERSEY LAW, WHERE THERE IS PROOF OF EXECUTION, RECORDING, AND NON-

PAYMENT OF THE NOTE AND MORTGAGE, A MORTGAGEE HAS ESTABLISHED A *PRIMA FACIE* RIGHT TO FORECLOSE. *THORPE V. FLOREMOORE CORP.*, 20 N.J. SUPER. 34 (APP. DIV. 1952). IN THE EVENT OF A DEFAULT, A MORTGAGEE MAY ALSO ELECT TO DEMAND THE ENTIRE MORTGAGE DEBT, IF AN ACCELERATION CLAUSE EXISTS. *COX. V. KILLE*, 50 N.J. EQ. 176 (CH. DIV. 1892). AN ANSWER THAT DENIES THE ALLEGATIONS IN THE COMPLAINT OR RAISES SEPARATE DEFENSES, CONTESTING THE VALIDITY OR PRIORITY OF THE MORTGAGE OR THE LIEN BEING FORECLOSED, OR CREATING AN ISSUE WITH RESPECT TO THE PLAINTIFF'S RIGHT TO FORECLOSE IT, WOULD REBUT A PLAINTIFF'S *PRIMA* [*10] *FACIE* RIGHT TO FORECLOSE. *R. 4:64-1(C)(2)*; SEE *METLIFE V. WASHINGTON AVENUE ASSOCIATES*, 159 N.J. 484 (1999). ANY OTHER DEFENSE WOULD HAVE NO CONNECTION TO THE LIMITED SUBJECT MATTER OF THE FORECLOSURE ACTION AND, AS SUCH, WOULD NOT ARISE OUT OF THE SAME TRANSACTION AS THE FORECLOSURE ACTION. SEE *FALCONE V. MIDDLESEX CTY. MED. SOC.*, 47 N.J. 92 (1966). HOWEVER, AN AFFIRMATIVE DEFENSE MUST BE SUPPORTED WITH SPECIFIC FACTS. *R. 4:5-4*. IF ALL THE CONTESTING PLEADINGS HAVE BEEN STRICKEN OR OTHERWISE DEEMED NONCONTESTING, AN ACTION TO FORECLOSE A MORTGAGE IS DEEMED TO BE UNCONTESTED. *R. 4:64-1(C)(3)*.

A PARTY OPPOSING A SUMMARY JUDGMENT CANNOT SIMPLY RELY ON HIS DENIALS, ACCUSATIONS, OR UPON THE FACT THAT DISCOVERY HAS YET TO BE TAKEN. THE MORTGAGOR HAS A DUTY TO PRESENT FACTS THAT CONTROVERT THE MORTGAGEE'S *PRIMA FACIE* CASE, AND SUCH EVIDENCE PRESENTED IN OPPOSITION MUST BE SUBSTANTIAL. SEE *SPIOTTA V. WILLIAM H. WILSON, INC.*, 72 N.J. SUPER. 572, 581 (APP. DIV. 1962), CERTIF. DENIED, 37 N.J. 229 (1962); *BRILL, SUPRA*, 142 N.J. AT 530. IN *BRAE ASSET FUND, L.P. V. NEWMAN*, 327 N.J. SUPER. 129, 134 (APP. DIV. 1999) THE APPELLATE DIVISION STATED THAT "IT IS WELL SETTLED THAT 'BARE CONCLUSIONS IN THE [*11] PLEADINGS WITHOUT FACTUAL SUPPORT IN TENDERED AFFIDAVITS, WILL NOT DEFEAT A MERITORIOUS APPLICATION FOR SUMMARY JUDGMENT.'" *IBID.* (QUOTING *UNITED STATES PIPE & FOUNDRY CO. V. AMERICAN ARBITRATION ASS'N*, 67 N.J. SUPER. 384, 399-400 (APP. DIV. 1961)).

HERE, IT IS UNDISPUTED THAT DEFENDANTS EXECUTED THE NOTE AND MORTGAGE SUBJECT TO FORECLOSURE IN THIS ACTION. PLAINTIFF STATES THAT DEFENDANTS DEFAULTED ON APRIL 1, 2010. DEFENDANTS DO NOT DISPUTE THAT THEY DEFAULTED ON THE SUBJECT NOTE AND MORTGAGE. PLAINTIFF HAS THUS ESTABLISHED A *PRIMA FACIE* RIGHT TO FORECLOSE.

DEFENDANTS RAISE TWENTY-SEVEN AFFIRMATIVE DEFENSES IN THEIR ANSWER, BUT THE

MAJORITY OF THESE DEFENSES ARE NOT SUPPORTED BY SPECIFIC FACTS IN THEIR ANSWER OR IN THEIR OPPOSITION TO THIS MOTION. ALTHOUGH DEFENDANTS HAVE PLEADED TWENTY-SEVEN AFFIRMATIVE DEFENSES, THEY HAVE ONLY OPPOSED PLAINTIFF'S MOTION ON THE BASIS OF PLAINTIFF'S LACK OF STANDING, WHICH CORRESPONDS TO AFFIRMATIVE DEFENSES #4, 11, AND 22. BECAUSE DEFENDANTS FAILED TO ARGUE ANY OF THEIR COUNTERCLAIMS OR AFFIRMATIVE DEFENSES OTHER THAN STANDING, THEY HAVE WAIVED THEIR COUNTERCLAIMS AND AFFIRMATIVE DEFENSES.

II. CLAIMS RELATED TO PLAINTIFF'S STANDING (AFFIRMATIVE DEFENSES [*12] 4, 11, AND 22)

DEFENDANTS RAISE CLAIMS REGARDING PLAINTIFF'S STANDING IN AFFIRMATIVE DEFENSES NUMBER 4, 11, AND 22. IN THEIR FOURTH AFFIRMATIVE DEFENSE, DEFENDANTS ARGUE THAT PLAINTIFF IS NOT THE REAL PARTY IN INTEREST AND LACKS THE STANDING TO SUE. IN THEIR ELEVENTH AFFIRMATIVE DEFENSE, DEFENDANTS ARGUE THAT "THE MORTGAGEE NAMED IN PLAINTIFF'S PURPORTED MORTGAGE INSTRUMENT IS NOT PLAINTIFF AND UPON INFORMATION AND BELIEF PLAINTIFF IS NOT THE ASSIGNEE OF THE MORTGAGES." IN THEIR TWENTY-SECOND AFFIRMATIVE DEFENSE, DEFENDANTS ARGUE THAT THE CURRENT PLAINTIFF IS NOT THE PROPER PLAINTIFF IN THE FORECLOSURE ACTION AND LACKS STANDING TO PROCEED. IN THEIR OPPOSITION, DEFENDANTS ARGUE THAT PLAINTIFF IS NOT THE OWNER OF THE NOTE AND THUS LACKS STANDING TO PROCEED.

PLAINTIFF ARGUES THAT IT HAS STANDING TO BRING THIS FORECLOSURE ACTION BECAUSE IT HAS HELD THE NOTE SINCE APRIL 24, 2006. MOREOVER, PLAINTIFF STATES THAT IT WAS ASSIGNED THE MORTGAGE ON JULY 20, 2010, PRIOR TO THE FILING OF THE COMPLAINT. FINALLY, PLAINTIFF ARGUES THAT IT HAS AUTHORITY TO BRING THE INSTANT FORECLOSURE ACTION FROM FREDDIE MAC, THE INVESTOR ON THIS LOAN.

A. FAILURE TO RECITE CHAIN OF TITLE AS REQUIRED BY R. 4:64-1(10)

IN [*13] THEIR OPPOSITION, DEFENDANTS ARGUE THAT PLAINTIFF FAILED TO PROPERLY RECITE THE CHAIN OF TITLE AS REQUIRED BY R. 4:64-1(10). SPECIFICALLY, DEFENDANTS ARGUE THAT PLAINTIFF FAILS TO INCLUDE AN ASSIGNMENT TO FREDDIE MAC OR ANY OTHER ACKNOWLEDGMENT OF FREDDIE MAC'S INVOLVEMENT IN THE LOAN IN THE CHAIN OF TITLE. RULE 4:64-1(10) REQUIRES THAT "IF THE PLAINTIFF IS NOT THE ORIGINAL MORTGAGEE OR ORIGINAL NOMINEE MORTGAGEE, THE NAMES OF THE ORIGINAL MORTGAGEE AND A RECITAL OF ALL ASSIGNMENTS IN THE CHAIN OF TITLE" BE PROVIDED IN

THE COMPLAINT.

PLAINTIFF'S COMPLAINT STATES THAT THE NOTE WAS EXECUTED TO HSBC MORTGAGE CORPORATION (USA) AND THAT THE MORTGAGE WAS EXECUTED TO MERS AS NOMINEE FOR HSBC MORTGAGE CORPORATION (USA) ON MARCH 10, 2006. THE COMPLAINT STATES THAT THE MORTGAGE WAS SUBSEQUENTLY ASSIGNED BY MERS AS NOMINEE FOR HSBC MORTGAGE CORPORATION (USA) TO PLAINTIFF ON JULY 20, 2010. THE COMPLAINT STATES THAT THE ASSIGNMENT IS "TO BE RECORDED." THE COMPLAINT WAS FILED ON AUGUST 12, 2010. PLAINTIFF ATTACHED A COPY OF THE RECORDED ASSIGNMENT AS EXH. F TO THE CERTIFICATION OF LORENA DIAZ, AVP, OPERATIONS TEAM LEAD FOR BANK OF AMERICA, N.A., SUCCESSOR BY MERGER TO BAC HOME LOANS SERVICING, L.P., [*14] F/K/A COUNTRYWIDE HOME LOANS SERVICING, L.P. MS. DIAZ STATES THAT THE ASSIGNMENT WAS RECORDED ON AUGUST 10, 2010. THIS ASSERTION IS SUPPORTED BY THE COPY OF THE ASSIGNMENT ATTACHED TO HER CERTIFICATION. ALSO ATTACHED TO MS. DIAZ'S CERTIFICATION IS A COPY OF THE NOTE. THE NOTE HAS THREE UNDATED ENDORSEMENTS. PRESUMABLY, THE NOTE WAS INDORSED AS FOLLOWS, FIRST FROM HSBC MORTGAGE CORPORATION TO COUNTRYWIDE BANK, N.A., THEN FROM COUNTRYWIDE BANK, N.A., TO COUNTRYWIDE HOME LOANS, INC., AND FINALLY FROM COUNTRYWIDE HOME LOANS, INC., TO BLANK.

BOTH THE NOTE AND MORTGAGE CONTAIN THE PHRASE "SINGLE FAMILY-FANNIE MAE/FREDDIE MAC UNIFORM INSTRUMENT" AT THE BOTTOM OF THEIR RESPECTIVE FIRST PAGES. THERE IS NO OTHER REFERENCE TO FREDDIE MAC IN THE NOTE OR MORTGAGE OR IN THE COMPLAINT. PLAINTIFF'S COMPLAINT FAILS TO DISCUSS THE RELATIONSHIP BETWEEN FREDDIE MAC, HSBC, AND BANK OF AMERICA. THE COMPLAINT DOES NOT EVEN MENTION THAT PLAINTIFF TOOK POSSESSION OF THE SUBJECT NOTE AND MORTGAGE ON APRIL 24, 2006.

HOWEVER, R. 4:64-1(10) DOES NOT REQUIRE A RECITAL OF ALL OF THE INDORSEMENTS OR TRANSFERS OF THE NOTE. INSTEAD, R. 4:64-1(10) REQUIRES A RECITAL OF ALL ASSIGNMENTS OF THE MORTGAGE. THERE IS NO EVIDENCE [*15] THAT THE MORTGAGE WAS ASSIGNED TO ANY ENTITY PRIOR TO THE ASSIGNMENT MADE TO PLAINTIFF ON JULY 20, 2010, WHICH WAS RECORDED ON AUGUST 12, 2010. THUS, PLAINTIFF'S COMPLAINT IS NOT DEFICIENT FOR FAILURE TO PROPERLY RECOUNT THE CHAIN OF TITLE.

B. STANDING RELATED TO PLAINTIFF'S STATUS AS A HOLDER AND THE ASSIGNMENT TO

PLAINTIFF

DEFENDANTS ARGUE THAT FREDDIE MAC, NOT PLAINTIFF, IS THE OWNER OF THE LOAN AND THUS THAT PLAINTIFF LACKS STANDING TO BRING THE INSTANT FORECLOSURE ACTION. PLAINTIFF ARGUES THAT IT HAS STANDING TO BRING THE INSTANT FORECLOSURE ACTION BASED BOTH ON ITS STATUS AS A HOLDER OF THE NOTE AND A VALIDLY EXECUTED ASSIGNMENT. FURTHER, PLAINTIFF ARGUES THAT IT HAS BEEN AUTHORIZED TO INSTITUTE THE PRESENT FORECLOSURE ACTION BY FREDDIE MAC.

STANDING REQUIRES A "SUFFICIENT STAKE AND REAL ADVERSENESS WITH RESPECT TO THE SUBJECT MATTER OF THE LITIGATION [AND A] SUBSTANTIAL LIKELIHOOD OF SOME HARM VISITED UPON THE PLAINTIFF IN THE EVENT OF AN UNFAVORABLE DECISION." *JEN ELEC., INC. V. COUNTY OF ESSEX*, 197 N.J. 627, 645 (2009). IT IS A GENERAL RULE OF EQUITY THAT REAL PARTIES IN INTEREST MUST BE JOINED AS PARTIES AND AN ASSIGNEE OF A DEBT IS A REAL PARTY IN INTEREST. *ZURCHER V. MODERN PLASTIC MACHINERY CORP.*, 24 N.J. SUPER. 158, 163 (APP. DIV. 1952). [*16] FOR A FORECLOSURE PLAINTIFF TO HAVE STANDING TO SUE, IT MUST DEMONSTRATE THAT IT HAD OWNERSHIP OR CONTROL OVER THE NOTE AT THE TIME THE COMPLAINT WAS FILED. SEE *DEUTSCHE BANK NAT'L TRUST CO. V. MITCHELL*, 422 N.J. SUPER. 214, 222 (APP. DIV. 2011); *WELLS FARGO BANK, N.A. V. FORD*, 418 N.J. SUPER. 592, 597, (APP. DIV. 2011); *BANK OF N.Y. V. RAFTOGIANIS*, 418 N.J. SUPER. 323, 327-28 (CH. DIV. 2010).

A PERSON SEEKING TO ENFORCE A NOTE, EITHER AS A HOLDER OR A NONHOLDER IN POSSESSION WITH THE RIGHTS OF A HOLDER UNDER *N.J.S.A. 12A:3-101*, MUST HAVE POSSESSION OF THE NOTE. *RAFTOGIANIS, SUPRA*, 418 N.J. SUPER. AT 331-32. IN ORDER TO ESTABLISH STANDING AS A HOLDER OR A NONHOLDER IN POSSESSION WITH THE RIGHTS OF A HOLDER, THE PLAINTIFF MUST SHOW THAT IT HAD PHYSICAL POSSESSION OF THE INSTRUMENT AT THE TIME IT FILED ITS COMPLAINT.

ALTERNATELY, PLAINTIFF COULD ESTABLISH THAT IT HAS STANDING THROUGH PROOF OF A VALID ASSIGNMENT. THE APPELLATE DIVISION, IN *MITCHELL*, HELD THAT A PLAINTIFF CAN ESTABLISH STANDING AS AN ASSIGNEE UNDER *N.J.S.A. 46:9-9* "IF IT . . . PRESENTED AN AUTHENTICATED ASSIGNMENT INDICATING THAT IT WAS ASSIGNED THE NOTE BEFORE IT FILED THE ORIGINAL COMPLAINT." *MITCHELL, SUPRA*, 422 N.J. SUPER. AT 225. [*17] *N.J.S.A. 46:9-9* PROVIDES THAT:

All mortgages on real estate in this State, and all covenants and stipulations therein contained, shall be assignable at law by writing, whether sealed or not, and any such assignment shall pass and convey the

estate of the assignor in the mortgaged premises, and the assignee may sue thereon in his own name, but, in any such action by the assignee, there shall be allowed all just set-offs and other defenses against the assignor that would have been allowed in any action brought by the assignor and existing before notice of such assignment.

The language of the statute in conjunction with the Appellate Division's holding in *Mitchell* makes it clear that a plaintiff may prove that it has standing through the presentation of a properly authenticated assignment effectuated prior to the filing of the complaint.

In order to obtain summary judgment striking an answer as non-contesting, the certification submitted by plaintiff must be competent, which means based on personal knowledge. *Wells Fargo Bank, N.A. v. Ford*, supra, 418 N.J. Super. at 599. The certification must explain the source of the personal knowledge and must authenticate all attached documents. As part [*18] of the authentication, the person providing the certification must indicate the source of his or her knowledge that the attached documents are "true copies." *Id.* at 600. If a foreclosure plaintiff produces an endorsed copy of a note, "the date of that indorsement would be a critical factual issue in determining" issues such as whether the plaintiff had standing to bring the foreclosure action on the date the complaint was filed, and whether plaintiff is a holder in due course under the Uniform Commercial Code. *Id.* at 601.

The Appellate Division in *Ford* found the certification of Mr. Baxley inadequate to support Plaintiff's motion for summary judgment because it neither alleged that he had personal knowledge nor provided any explanation of the source of his personal knowledge to support Plaintiff's assertion that it was the holder and owner of the note. *Id.* at 599-600. Mr. Baxley identified himself only as "Supervisor of Fidelity National as an attorney in fact for HomeEq Servicing Corporation as attorney in fact for Wells Fargo," without explaining his job responsibilities. *Id.* at 594. Mr. Baxley's certification also failed to state the source of his knowledge that the attached mortgage [*19] and note were "true copies." *Id.* at 600. Finally, Plaintiff did not properly authenticate the purported assignment of the mortgage because the documents regarding the assignment were merely attached to the reply brief, not referenced in Mr. Baxley's certification. *Ibid.* In *Deutsche Bank Nat'l Trust Co. v. Mitchell*, supra, 422 N.J. Super. at 226, the Appellate Division held that a certification of proof of amount due submitted by a specialist of JP Morgan Chase Bank, N.A., servicer for Deutsche Bank, stating, that "[p]laintiff is still the holder and owner of the aforesaid obligation and Mortgage." was insufficient because the "certification [did] not make any mention of the assignment of the mortgage or how the signor knows that Deutsche Bank became the holder of the note."

Here, unlike in *Ford* and *Mitchell*, Ms. Diaz's certification is adequate. Ms. Diaz's certification states that she is an "AVP, Operations Team Lead for Bank of America, N.A., successor by merger to BAC Home Loans Servicing, L.P., f/k/a Countrywide Home Loans Servicing, L.P.," Diaz Cert. at ¶ 1. This statement demonstrates that she has access to the business records of Plaintiff and personal knowledge of its business [*20] practices, sufficient to provide the court with competent evidence regarding Plaintiff's standing. Ms. Diaz states that true and correct copies of pertinent documents are attached to her certification: the Note (Exh. A), Mortgage (Exh. B), HUD-1 Settlement Statement (Exh. C), Truth-in-Lending Disclosure Statement (Exh. D), Notices of Right to Cancel (Exh. E), Assignment (Exh. F), Notices of Intent (Exh. G), Defendants' payment history (Exh. H), and screen print of a computer business record evidencing the April 24, 2006 possession date (Exh. I).

1. Standing on the Basis of Plaintiff's Status as a Holder

It is undisputed that the Note is endorsed in blank. Consequently, it is a bearer instrument and Plaintiff must establish that it is a holder to have standing to proceed in this action. Ms. Diaz's certification states that Plaintiff became the holder of the note on April 24, 2006, which date is well prior to the filing of the complaint. This fact is a critical one in establishing standing for Plaintiff to bring this foreclosure action. *Deutsche Bank v. Mitchell*, supra, 422 N.J. Super. At 222 (citing *Bank of New York v. Raftogianis*, supra, 418 N.J. Super. at 327-328). Plaintiff supports [*21] this assertion with a screen print of a computer business record. Plaintiff provides a sworn certification from Ms. Diaz averring that this screen print demonstrates that Plaintiff took possession of the Note on April 24, 2006. However, Plaintiff offers no explanation for the fields on the screen print. The screen print lists a "CL Purch Dt" of April 24, 2006. Presumably, "CL Purch Dt" means "client purchase date" and reflects the date upon which Plaintiff took

possession of the note. The screen print and Ms. Diaz's sworn statement provide sufficient evidence to authenticate Plaintiff's assertion that it has held the Note since April 24, 2006. The same evidence also supports Plaintiff's standing to file and prosecute this foreclosure action.

2. Standing on the Basis of an Assignment

Where the court does not find standing on the basis that Plaintiff is the holder of the note, it often looks to the assignment as an alternate basis for standing, as suggested by the Appellate Division's holding in *Mitchell*, supra, 422 N.J. Super. at 225, that a foreclosure plaintiff may try to establish standing as an assignee if it possesses an authenticated assignment demonstrating that it was assigned [*22] the mortgage before it filed the original complaint. Here, the record contains an assignment from MERS, as nominee for HSBC Mortgage Corporation (USA) to BAC Home Loans Servicing, LP, f/k/a Countrywide Home Loans Servicing, L.P., which was executed on July 20, 2010. This assignment was recorded on August 10, 2010. The assignment is attached to Ms. Diaz's certification and she represents that it is a "true copy." Plaintiff's complaint was filed on August 12, 2010. This assignment is also sufficient to establish Plaintiff's standing to bring this foreclosure action.

3. Plaintiff's Authority to Foreclose

Defendants argue that because Freddie Mac owns the Note, Plaintiff lacks standing to foreclose. Plaintiff argues that it has standing to foreclose, notwithstanding Freddie Mac's status as investor for Defendants' loan.

In its reply brief responding to Defendants' arguments, Plaintiff attached the certification of Ryan Dansby. Mr. Dansby states he is "employed by Bank of America." Dansby Cert. at ¶ 1. Mr. Dansby states that "Federal Home Loan Mortgage Corporation ("Freddie Mac") is the investor on Defendants' loan. BANA is the servicer of Defendants' loan." Dansby Cert. at ¶ 3. Mr. Dansby [*23] states that he has attached "true and correct copies" of sections 66.17 and 66.24 of the Freddie Mac Single Family Servicer Guide. Mr. Dansby states that section 66.17 authorizes, and moreover requires BANA, in its role as the servicer, to institute foreclosure actions in BANA's name. Mr. Dansby states that section 66.24 requires BANA to monitor the progress of the foreclosure action.

Mr. Dansby does not state his title in his certification. He merely states that he is "familiar with business records maintained by BANA for the purpose of servicing mortgage loans," that the business records "include data compilations, electronically imaged documents, and others," and that he has "personally examined these business records." Dansby Cert. at ¶ 2. Mr. Dansby has failed to adequately state the basis for his knowledge or specify what information he reviewed in order to make his certification. Thus, his certification does not meet the standards set forth in *Ford* and *Mitchell*, which require him to affirmatively demonstrate that he has sufficient personal knowledge to authenticate the attached documents or make assertions on behalf of the Plaintiff. However, the Freddie Mac Single Family Servicer [*24] Guide is a publicly accessible document,³ of which the court can take judicial notice. See Biunno, *Current N.J. Rules of Evidence*, comment 7 on *N.J.R.E. 201* (2012).

FOOTNOTES

³ SEE FREDDIE MAC SELLER/SERVICER GUIDE AND FORMS,

[HTTP://WWW.FREDDIEMAC.COM/SELL/GUIDE/](http://www.freddiemac.com/sell/guide/) (FOLLOW "ALL REGS" HYPERLINK).

SECTION 66.17 STATES THAT "THE SERVICER MUST INSTRUCT THE FORECLOSURE COUNSEL OR TRUSTEE TO PROCESS THE FORECLOSURE IN THE SERVICER'S NAME." WHERE THE MORTGAGE IS REGISTERED WITH MERS, THE SERVICER IS REQUIRED TO "PREPARE AND

EXECUTE . . . AN ASSIGNMENT OF THE SECURITY INSTRUMENT FROM MERS TO THE
SERVICER AND INSTRUCT THE FORECLOSURE COUNSEL OR TRUSTEE TO FORECLOSE IN
THE SERVICER'S NAME AND TAKE TITLE IN FREDDIE MAC'S NAME ACCORDING TO THE
REQUIREMENTS OF SECTION 66.54.⁴ SECTION 66.24 REQUIRES THE SERVICER TO:

- 1 Identify any viable alternatives to foreclosure
- 2 Monitor the progress of the foreclosure
- 3 Facilitate prompt and efficient completion of the foreclosure proceedings and acquisition of clear and marketable title, including conducting the foreclosure in a way that will expedite an eviction of the tenant or Borrower

While Mr. Dansby's certification alone is insufficient to authenticate the sections of [*25] the Freddie Mac Single Family Servicer Guide or support Plaintiff's assertions regarding its authority to bring this foreclosure action, Plaintiff's statement that it is authorized and required to commence this foreclosure action in its name is supported by the relevant sections of the Freddie Mac Single Family Servicer Guide. Further, Plaintiff has demonstrated that it has standing to bring the instant foreclosure based on its status as a holder and the July 20, 2010 assignment. Defendants' challenge to this conclusion was not supported by any case law citation whatsoever, and flies in the face of well-accepted U.C.C. law applicable to the holders of notes. *See, e.g., Bank of New York v. Raftogjanis, supra*, 418 N.J. Super. at 330-332, 351-356. Notably, Defendants did not demonstrate any irregularity in these procedures based on Freddie Mac's contractual agreement that its servicers bring foreclosure actions in the name of the servicer.

FOOTNOTES

⁴ SECTION 66.54 ADDRESSES VESTING TITLE AFTER A FORECLOSURE SALE. IT STATES, IN
RELEVANT PART:

AFTER THE FORECLOSURE SALE THE SERVICER MUST ENSURE THAT THE TITLE TO THE
PROPERTY IS VESTED TO THE APPROPRIATE PARTY.

(A) CONVENTIONAL MORTGAGES

THE SERVICER MUST [*26] ENSURE THAT ITS FORECLOSURE COUNSEL OR TRUSTEE
CONDUCTS THE FORECLOSURE IN THE SERVICER'S NAME AND THAT TITLE TO THE
PROPERTY IS VESTED IN FREDDIE MAC'S NAME (IF THE PROPERTY IS NOT PURCHASED BY
A THIRD PARTY). THIS MUST BE DONE IN A MANNER THAT DOES NOT RESULT IN AN
OBLIGATION TO PAY TRANSFER TAXES. FREDDIE MAC WILL NOT REIMBURSE THE
SERVICER FOR ANY TRANSFER TAXES.

III. NOTICE OF INTENT

IN ITS MOVING BRIEF, PLAINTIFF ACKNOWLEDGES THAT DEFENDANTS PLEAD
AN AFFIRMATIVE DEFENSE BASED ON THE FAIR FORECLOSURE ACT ("FFA").
HOWEVER, PLAINTIFF CONTENDS THAT DEFENDANTS HAVE MERELY

ASSERTED A LEGAL CONCLUSION THAT THE NOTICE OF INTENT TO FORECLOSE ("NOI") DID NOT SATISFY THE FFA WITHOUT SPECIFYING *HOW* THE NOI SENT TO DEFENDANTS FAILED TO COMPLY. DEFENDANTS DO NOT ADDRESS THIS ISSUE IN THEIR OPPOSITION. AT ORAL ARGUMENT, DEFENSE COUNSEL ASSERTED THAT THE FAILURE OF THE NOI TO LIST FREDDIE MAC AS THE LENDER RENDERED THE NOTICE OF INTENT DEFICIENT UNDER THE FFA. COUNSEL FOR PLAINTIFF ASSERTS THAT PLAINTIFF SENT NOIS TO THE DEFENDANTS THAT ARE FULLY COMPLAINT WITH THE FFA. MOREOVER, COUNSEL FOR PLAINTIFF ARGUED THAT THIS CASE IS DISTINGUISHABLE FROM *BANK OF NEW YORK V. LAKS*, 422 N.J. SUPER. 201 (APP. DIV. 2011), [*27] AND *US BANK N.A. V. GUILLAUME*, 209 N.J. 449 (2012), BECAUSE IN THOSE CASES THE NOI WAS SENT BY AN ENTITY OTHER THAN THE PLAINTIFF IN THE FORECLOSURE ACTION.

THE FAIR FORECLOSURE ACT REQUIRES THAT A NOTICE OF INTENT TO FORECLOSE BE SENT BY THE LENDER BEFORE THE FORECLOSURE COMPLAINT IS SUBMITTED, *N.J.S.A. 2A:50-56(A)*, IN WRITING, *N.J.S.A. 2A:50-56(B)*, AND WITH CERTAIN INFORMATION: "CALCULATED TO MAKE THE DEBTOR AWARE OF THE SITUATION." *N.J.S.A. 2A:50-56(C)*. THE FFA REQUIRES "THE NAME AND ADDRESS OF THE LENDER AND THE TELEPHONE NUMBER OF A REPRESENTATIVE OF THE LENDER WHOM THE DEBTOR MAY CONTACT IF THE DEBTOR DISAGREES WITH THE LENDER'S ASSERTION THAT A DEFAULT HAS OCCURRED OR THE CORRECTNESS OF THE MORTGAGE LENDER'S CALCULATION OF THE AMOUNT REQUIRED TO CURE THE DEFAULT." *N.J.S.A. 2A:50-56(C)(11)*. 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*.

FOOTNOTES

5 THE NOTICE MUST ALSO CONTAIN A DESCRIPTION OF THE PARTICULAR OBLIGATION, THE NATURE OF THE DEFAULT CLAIMED, THE RIGHT OF THE MORTGAGOR TO CURE THE

DEFAULT, WHAT MUST [*28] SPECIFICALLY BE DONE TO CURE THE DEFAULT, THE DATE BY WHICH THE DEFAULT MUST BE CURED, THE CONSEQUENCES OF NOT CURING THE DEFAULT, THAT THE MORTGAGOR MAY STILL CURE AFTER THE FORECLOSURE COMPLAINT IS FILED BUT WILL BE LIABLE FOR THE MORTGAGEE'S ATTORNEYS' FEES, AND THE RIGHT OF THE MORTGAGOR TO TRANSFER THE REAL ESTATE. THE FFA ALSO REQUIRES THAT THE NOTICE ADVISE THE MORTGAGOR TO SEEK LEGAL COUNSEL, AND TO SUGGEST CONTACTING THE NJ BAR ASSOCIATION, LAWYER REFERRAL SERVICE, OR THE LEGAL SERVICES OFFICE. IN ADDITION, THE FFA REQUIRES THE NAME AND ADDRESS OF THE MORTGAGEE AND A TELEPHONE NUMBER OF THE MORTGAGEE'S REPRESENTATIVE WHOM THE DEBTOR MAY CONTACT IF THE MORTGAGOR DISAGREES WITH THE ASSERTION THAT THE LOAN IS IN DEFAULT. N.J.S.A. 2A:50-56(C)(1)-(11).

IN BANK OF NEW YORK V. LAKS, SUPRA, 422 N.J. SUPER. AT 213, THE APPELLATE DIVISION HELD THAT "[A] NOTICE OF INTENTION IS DEFICIENT UNDER N.J.S.A. 2A:50-56(C)(11) IF IT DOES NOT PROVIDE THE NAME AND ADDRESS OF THE LENDER." IN LAKS, THE LOAN SERVICER, COUNTRYWIDE HOME LOANS, SENT DEFENDANTS A NOI ON BEHALF OF THE LENDER. ID. AT 204. AT THE TIME THE NOI WAS SENT, THE PLAINTIFF, BANK OF NEW YORK, "HELD THE NOTE INDORSED IN BLANK AND THE [*29] MORTGAGE THROUGH MERS." ID. AT 207-08. THE COURT EXPLAINED THAT "[A] DEBTOR WHO RECEIVES A NOTICE OF INTENTION THAT DOES NOT REFER TO THE LENDER AND SUBSEQUENTLY RECEIVES A FORECLOSURE COMPLAINT FILED BY THE LENDER WILL BE JUSTIFIABLY CONFUSED." ID. AT 210. IN LAKS, THE APPELLATE DIVISION FOUND THAT A DEFICIENT NOI PROVIDED GROUNDS TO DISMISS THE FORECLOSURE COMPLAINT WITHOUT PREJUDICE. IBID. IN US BANK N.A. V. GUILLAUME, SUPRA, 209 N.J. AT 457, THE NEW JERSEY SUPREME COURT CONSIDERED THE APPROPRIATE REMEDY FOR A VIOLATION OF AN NOI SENT BY THE SERVICER, AMERICA'S SERVICING COMPANY, ON BEHALF OF THE LENDER. THE NEW JERSEY SUPREME COURT AFFIRMED THE APPELLATE DIVISION'S HOLDING IN LAKS 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." ID. AT 458. HOWEVER, THE COURT ALSO EXPLICITLY OVERRULED THE APPELLATE DIVISION'S HOLDING IN LAKS "THAT THE ONLY REMEDY AVAILABLE TO A TRIAL COURT FOR A VIOLATION OF N.J.S.A. 2A:50-56(C)(11) IS DISMISSAL WITHOUT PREJUDICE." IBID. THE NEW JERSEY SUPREME COURT HELD "THAT A COURT ADJUDICATING [*30] 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 . . ." *IBID.*

IT IS UNDISPUTED THAT THE PROPERTY IN ISSUE, 449 NEWKIRK AVE, HAMILTON, NEW JERSEY, IS A RESIDENTIAL PROPERTY INHABITED BY DEFENDANTS. THUS, THE FAIR FORECLOSURE ACT APPLIES. THE NOIS WERE SENT TO DEFENDANTS FROM BAC HOME LOAN SERVICING, LP, ON MAY 17, 2010. THE NOIS SET FORTH A DESCRIPTION OF THE LOAN IN DEFAULT, CLEARLY INFORMED THE RECIPIENT THAT THE DEBTOR IS IN DEFAULT, SPECIFIED THE AMOUNT OF MONEY NEEDED TO BE PAID BY THE DEBTOR IN ORDER TO CURE THE DEFAULT, AND THE DATE BY WHICH THE DEFAULT MUST BE CURED IN ORDER TO AVOID FORECLOSURE. THE NOTICES LISTED BAC HOME LOAN SERVICING, LP, AS THE PARTY TO WHOM THE PAYMENTS MUST BE MADE IN ORDER TO CURE THE DEFAULT AND PROVIDED AN ADDRESS FOR THE PAYMENTS. THE NOTICES ALSO DESCRIBED THE DEBTOR'S POST-FORECLOSURE RIGHT TO CURE THE DEFAULT. IN ADDITION, THE NOTICES RECOMMENDED THAT THE DEBTOR SEEK THE ADVICE OF AN ATTORNEY OF HER CHOOSING, AND TO CONTACT LEGAL SERVICES IF THE DEBTOR IS UNABLE TO AFFORD AN ATTORNEY. FINALLY, THE NOTICES [*31] INFORMED THE RECIPIENTS THAT THEY COULD CONTACT BAC HOME LOAN SERVICING, LP, TO DISCUSS THE NOTICES OR OBTAIN LOAN COUNSELING. AS PREVIOUSLY NOTED, BAC HOME LOAN SERVICING, LP HAS ESTABLISHED THAT IT HAS HELD THE NOTE SINCE APRIL 24, 2006. THUS, IN ITS ROLE AS A HOLDER, IT QUALIFIES AS A LENDER UNDER THE DEFINITION SET FORTH IN THE FFA. *SEE N.J.S.A. 2A:50-55.* BECAUSE BAC HOME LOAN SERVICING, LP, QUALIFIES AS A LENDER AT THE TIME THE NOIS WERE SENT TO DEFENDANTS, THE NOIS ARE FULLY COMPLIANT WITH THE REQUIREMENTS OF THE FFA.

IV. BAD FAITH CONDUCT AT MEDIATION

DEFENDANTS ARGUE THAT THE COMPLAINT SHOULD BE DISMISSED DUE TO PLAINTIFF'S BAD FAITH CONDUCT AT MEDIATION. DEFENDANTS NOTE THAT ON FEBRUARY 15, 2012, COUNSEL FOR PLAINTIFF APPEARED AT MEDIATION, STATED THAT IT LACKED SETTLEMENT AUTHORITY, AND REPRESENTED TO THE COURT THAT THE NOTE WAS OWNED BY FREDDIE MAC AND THAT FREDDIE MAC DOES NOT APPROVE LOAN MODIFICATIONS FOR PARTIES THAT ARE ACTIVELY LITIGATING THE FORECLOSURE ACTION. DEFENDANTS CONTEND THAT BECAUSE PLAINTIFF PARTICIPATED IN "NUMEROUS" MEDIATION SESSIONS WITHOUT THE AUTHORITY TO MODIFY THE LOAN ON BEHALF OF FREDDIE MAC, PLAINTIFF ACTED IN BAD FAITH. DEFENDANTS CONTEND THAT [*32] DUE TO PLAINTIFF'S "MISCONDUCT" THEY WERE

DENIED A MEANINGFUL OPPORTUNITY TO PARTICIPATE IN THE FORECLOSURE MEDIATION PROGRAM.

DEFENDANTS STATE THAT THEY HAVE INCURRED LEGAL EXPENSES FOR APPEARANCES AT MEDIATION. DEFENDANTS CONTEND THAT THESE EXPENSES WERE UNNECESSARY BECAUSE PLAINTIFF HAS ADMITTED THAT LOANS IN LITIGATION CANNOT BE MODIFIED AND THAT DEFENDANTS' "INCOME WAS UNACCEPTABLE." DEF. OPP. BR. AT UNNUMBERED P. 4-5. DEFENDANTS ARGUE THAT PLAINTIFF'S REVIEW OF DEFENDANTS' FINANCIAL INCOME WAS "POINTLESS AND DONE FOR THE SOLE PURPOSE OF PRESENTING A CHARADE TO THE COURT THAT IT IS MEDIATING IN GOOD FAITH." *ID.* AT UNNUMBERED P. 5. DEFENDANTS ARGUE THAT PLAINTIFF SHOULD NOT BE ABLE TO FORECLOSE UPON A LOAN THAT IT IS UNABLE TO MODIFY. DEFENDANTS ARGUE THAT DUE TO PLAINTIFF'S FAILURE TO MEDIATE IN GOOD FAITH, THEY HAVE INCURRED ADDITIONAL INTEREST, FEES, AND PENALTIES RELATED TO THE LOAN. FURTHER, DEFENDANTS ARGUE THAT PLAINTIFF'S REPRESENTATIONS THAT IT WAS CONSIDERING A MODIFICATION PRECLUDED DEFENDANTS FROM CONSIDERING OTHER OPTIONS SUCH AS A SHORT SALE. DEFENDANTS ARGUE THAT DUE TO PLAINTIFF'S BAD FAITH CONDUCT, THE COURT SHOULD DENY SUMMARY JUDGMENT TO PLAINTIFF AND DISMISS [*33] THE COMPLAINT.

PLAINTIFF ARGUES THAT THE ISSUE OF ITS AUTHORITY TO MODIFY DEFENDANTS' LOAN WAS REMEDIED THROUGH ITS FEBRUARY 17, 2012 LETTER TO THE COURT AND THE COURT'S MAY 10, 2010 CASE MANAGEMENT ORDER. FURTHER, PLAINTIFF ARGUES THAT DEFENDANTS' DISSATISFACTION WITH THE MEDIATION PROGRAM DOES NOT PROVIDE A LEGAL DEFENSE TO THE FORECLOSURE ACTION.

NEW JERSEY HAS A STRONG PUBLIC POLICY IN FAVOR OF ENSURING THAT HOMEOWNERS HAVE "EVERY OPPORTUNITY TO PAY THEIR HOME MORTGAGES, AND THUS KEEP THEIR HOMES[,] WHILE ALSO BENEFITING LENDERS WHEN 'RESIDENTIAL MORTGAGE DEBTORS CURE THEIR DEFAULTS AND RETURN DEFAULTED RESIDENTIAL MORTGAGE LOANS TO PERFORMING STATUS.'" *U.S. BANK NAT. ASS'N V. WILLIAMS*, 415 N.J. SUPER. 358, 366-367 (APP. DIV. 2010). NEW JERSEY'S FORECLOSURE MEDIATION PROGRAM "IS A JOINT EFFORT INSTITUTED BY THE NEW JERSEY JUDICIARY, THE OFFICE OF THE ATTORNEY GENERAL, THE PUBLIC ADVOCATE, THE DEPARTMENT OF BANKING AND INSURANCE, THE NEW JERSEY HOUSING AND MORTGAGE FINANCE AGENCY, AND LEGAL SERVICES OF NEW JERSEY, DESIGNED TO AID THE INCREASING NUMBER OF OWNERS FACING FORECLOSURE." *ID.* AT 368 (CITING PRESS RELEASE, OFFICE OF THE ATTORNEY GENERAL, STATEWIDE MORTGAGE

FORECLOSURE MEDIATION [*34] PROGRAM LAUNCHED (JAN. 9, 2009), AVAILABLE AT [HTTP://WWW.NJ.GOV/OAG/NEWSRELEASES09/PR20090109A.HTML](http://www.nj.gov/oag/newsreleases09/PR20090109A.html)). PURSUANT TO "[A] NOVEMBER 17, 2008 SUPREME COURT EMERGENCY ORDER, EFFECTIVE JANUARY 5, 2009, . . . COURTS WERE DIRECTED TO ENCOURAGE MEDIATION IN ALL FORECLOSURE CASES AND, SPECIFICALLY, MUST UTILIZE THE FMP WHENEVER A HOMEOWNER FILES OPPOSITION IN A FORECLOSURE PROCEEDING." *ID.* AT 369 (CITING PRESS RELEASE, NEW JERSEY JUDICIARY, JUDICIARY ANNOUNCES FORECLOSURE MEDIATION PROGRAM TO ASSIST HOMEOWNERS AT RISK OF LOSING THEIR HOMES (OCT. 16, 2008), AVAILABLE AT [HTTP://WWW.JUDICIARY.STATE.NJ.US/PRESSREL/PR081016C.HTM](http://www.judiciary.state.nj.us/pressrel/PR081016C.htm)).

THERE IS SCANT NEW JERSEY CASE LAW ADDRESSING THE FORECLOSURE MEDIATION PROGRAM. IN *U.S. BANK NAT. ASS'N V. WILLIAMS, SUPRA*, 415 N.J. SUPER. AT 372, THE COURT CONSIDERED WHETHER THE DEFENDANT HAD BEEN DENIED A MEANINGFUL OPPORTUNITY TO PARTICIPATE IN THE FORECLOSURE MEDIATION PROGRAM BECAUSE HE DID NOT HAVE A HOUSING COUNSELOR AT THE COMMENCEMENT OF MEDIATION. THE COURT FOUND THAT DEFENDANT WAS NOT REQUIRED TO HAVE A HOUSING COUNSELOR AND, MOREOVER, THAT HE RECEIVED THE ASSISTANCE OF A HOUSING COUNSELOR WITHIN ONE WEEK. *IBID.* THE COURT FOUND THAT DEFENDANT WAS PROVIDED [*35] A FULL OPPORTUNITY TO PARTICIPATE IN THE MEDIATION PROGRAM, BUT THAT AN INCOME SHORTFALL PREVENTED HIM FROM OBTAINING A LOAN MODIFICATION. *ID.* AT 373. IN DISCUSSING THE REQUIREMENTS OF THE FORECLOSURE MEDIATION PROGRAM, THE COURT NOTED THAT:

Mediations are successful when the interests of the homeowners and lenders align; homeowners stay in their homes, paying their mortgages, while lenders avoid foreclosure costs, carrying charges, and reduce the number of non-performing loans in their portfolio. New Jersey Foreclosure Mediation, *supra*, at 1. The main factor affecting the likelihood of achieving a loan workout is affordability, that is the homeowner's ability to satisfy the modified obligation. [*id.* at 371.]

No published New Jersey case has approved a sanction against a foreclosure plaintiff for its conduct in mediation. Case law in other states, however, has addressed the issue.

Both Maine and Nevada have foreclosure mediation programs. Case law in both states addresses the appropriate remedy where a lender is unprepared or lacks the authority to resolve the foreclosure through mediation. In *Pasillas v. HSBC Bank USA*, 255 P.3d 1281, 1282 (Nev. 2011), the Nevada Supreme Court addressed [*36] "whether a lender commits sanctionable offenses when it does not produce documents and does not have someone present at the mediation with the authority to modify the loan, as set forth in the applicable statute, [*Nev. Rev. Stat. § 107.086*], and the Foreclosure Mediation Rules (FMRs)." As in New Jersey, Nevada has a strong public policy in favor of allowing homeowners to keep their homes and enacted a "Foreclosure Mediation Program in 2009 in response to the increasing number of foreclosures in th[e] state." *Id.* at 1284. Nevada's Program:

requires that a trustee seeking to foreclose on an owner-occupied residence provide an election-of-mediation form along with the notice of default and election to sell. *NRS 107.086(2)(a)(3)*. If the homeowner elects to mediate, both the homeowner and the deed of trust beneficiary must attend, must mediate in good faith, provide certain enumerated documents, and, if the beneficiary attends through a

representative, that person must have authority to modify the loan or have 'access at all times during the mediation to a person with such authority.' [*Nev. Rev. Stat. § 107.086(4), (5)*]; FMR 5(7)(a). [*Ibid.*] At the close of mediation, the mediator must file [*37] a statement indicating whether the parties complied with the statute and rules governing the program. *Ibid.* The mediator may recommend sanctions against the lender for noncompliance. *Ibid.* The homeowner may then file a petition for judicial review in order to obtain sanctions against the lender. *Ibid.* If a homeowner fails to attend mediation, the administrator may certify that no mediation is required in the action. *Id.* at 1284 n. 6.

The Nevada Supreme Court in *Pasillas* held that the lender's failure to satisfy statutory mandates was a sanctionable offense. *Id.* at 1286. Under Nevada's Foreclosure Mediation Statute, *Nev. Rev. Stat. § 107.086(5)*:

there are four distinct violations a party to a foreclosure mediation can make: (1) "fail[ure] to attend the mediation," (2) "fail[ure] to participate in the mediation in good faith," (3) failure to "bring to the mediation each document required," and (4) failure to demonstrate "the authority or access to a person with the authority [to modify the loan]." If any one of these violations occurs, the mediator must recommend sanctions. [*Ibid.*]

The Court noted that:

[a]lthough [the lender] argued on appeal that their counsel at the mediation 'had the [*38] requisite authority and/or access to a person with the authority to modify the loan,' [the lender] did not controvert the mediator's statement that their counsel claimed at the mediation that additional investor approval was needed in order to modify the loan. [*Id.* at 1285-1286.]

Thus, the Court held that the lender had failed to meet the statutory requirements and found that sanctions were appropriate. *Id.* at 1286. The Nevada Supreme Court explained that the trial court has discretion over the sanctions to be imposed for a violation. The Court explained that:

When determining the sanctions to be imposed in a case brought pursuant to *NRS 107.086* and the FMRs, district courts should consider the following nonexhaustive list of factors: whether the violations were intentional, the amount of prejudice to the nonviolating party, and the violating party's willingness to mitigate any harm by continuing meaningful negotiation.

[*Id.* at 1287.]

The Court in *Pasillas* remanded the matter to the trial court for a determination of the appropriate sanctions for the violation. *Ibid.*

In *Holt v. Reg'l Tr. Serv. Corp.*, 266 P.3d 602, 604 (Nev. 2011), the Nevada Supreme Court addressed whether sanctions from [*39] a failed foreclosure mediation should preclude the lender from seeking another certificate for a foreclosure sale. *Ibid.* In that matter, the trial court held that denial of "the FMP certificate needed to conduct a valid foreclosure sale" and attorney fees for the homeowner were appropriate sanctions where the lender had failed to appear for two different mediation sessions. *Ibid.* The matter came before the Nevada Supreme Court to address whether the lender could obtain a new FMP certificate, not the sanctions imposed by the trial court. *Ibid.* The Nevada Supreme Court held that the lender was not precluded from seeking another FMP certificate. *Ibid.* Likewise, in *Daane v. Eighth Judicial Dist. Court of Nev.*, 261 P.3d 1086, 1087 (Nev. 2011), the Nevada Supreme Court reviewed whether a lender should be precluded from reinitiating a foreclosure after sanctions related to the FMP. *Ibid.* In *Daane*, the trial court found that denial of an FMP Certificate and attorney fees and costs was the appropriate sanction for a lender's failure to produce necessary documents and send a representative with the authority to negotiate. *Ibid.*

Bank of N.Y. v. Richardson, 15 A.3d 756, 758 (Me. 2011), provides [*40] an example of one trial court's approach to sanctions for bad faith negotiations within the context of foreclosure mediation. In *Richardson*, the Supreme Judicial Court of Maine considered a lender's appeal of a trial court's decision to dismiss the lender's foreclosure complaint with prejudice. The lender failed to appear at mediation on February 26, 2010, and the homeowner moved, unsuccessfully, to dismiss the foreclosure action. *Ibid.* At that time the court cautioned that the lender could be sanctioned for its failure to mediate in good faith. *Ibid.* The court rescheduled mediation for May 10, 2010, which was adjourned to May 17, 2010 at the lender's request. *Ibid.* The lender failed to appear at mediation for the second time on May 17, 2010. [*Id.* at 759]. On May 21, 2010, the court held a telephone conference and dismissed the foreclosure action with prejudice. *Ibid.* The court also required the lender to pay the homeowner's attorney's fees and a \$2,500

fine to the Foreclosure Diversion Program. *Ibid.* The court held that the lender's "failure to attend the second scheduled mediation was 'unexcused and clear evidence of bad faith and disregard for the Court.'" *Ibid.* The trial court also [*41] allowed the homeowners to proceed on their counterclaims. *Ibid.* The lender subsequently filed an appeal. *Ibid.* The Supreme Judicial Court of Maine found that the appeal was interlocutory and dismissed it without reaching the merits. *Id.* at 760.

Here, the parties attended mediation sessions on two separate occasions prior to February 15, 2012. The court anticipated that the parties would continue to review financial documents at the February 15 mediation session so that Plaintiff could determine whether a loan modification would be offered to Defendants. Meaningful negotiation did not occur on that day, however, due to Plaintiff's failure to provide a representative of the lender willing to negotiate with Defendants. In fact, counsel for both Plaintiff and Defendant were surprised when the representative of the client made available to Plaintiff's counsel by telephone for the purposes of the mediation stated that a loan modification would not be considered for the Durellis at all because of Freddie Mac's policy of denying loan modifications to borrowers engaged in active litigation over the foreclosure. As a result of this posture, the mediation session was rendered futile. All participants, [*42] including the mediator, committed time and resources unnecessarily, and a valuable mediation slot on the court's calendar was wasted. In its February 17, 2012 letter, Plaintiff explained that Freddie Mac's "policy" of denying modifications in contested cases is waivable and that the Freddie Mac representative made available to Plaintiff's counsel during mediation was misinformed about the policy. Plaintiff also stated that it was not Freddie Mac's policy, but Defendants' income shortfall that caused the parties' mediation attempts to fail.

Defendants seek dismissal of the foreclosure complaint due to the futile mediation session. Such a remedy is much too harsh. The court does conclude, however, that some sanction is appropriate for Plaintiff's conduct. Our court rules provide guidance in an analogous context. Rule 1:2-4 governs the imposition of sanctions for failure to appear. The rule states, in relevant part:

[i]f without just excuse or because of failure to give reasonable attention to the matter, no appearance is made on behalf of a party on the call of a calendar, on the return of a motion, at a pretrial conference, settlement conference, or any other proceeding scheduled by the [*43] court, . . . the court may order any one or more of the following: (a) the payment by the delinquent attorney or party . . . of costs, in such amount as the court shall fix, to the Clerk of the Court made payable to "Treasurer, State of New Jersey," or to the adverse party; (b) the payment by the delinquent attorney or party or the party applying for the adjournment of the reasonable expenses, including attorney's fees, to the aggrieved party; (c) the dismissal of the complaint, cross-claim, counterclaim or motion, or the striking of the answer and the entry of judgment by default, or the granting of the motion; or (d) such other action as it deems appropriate. [R. 1:2-4(a).]

Here, the court finds that an appropriate sanction for Plaintiff (and *not* Plaintiff's counsel) for the wasted mediation session is the payment of a reasonable counsel fee to Defendants' attorney for attending the mediation session on February 15, 2012. Indeed, this matter is similar to *Pasillas*, where the Nevada Supreme Court found a lender's inability to provide a representative with authority to negotiate and modify the loan during mediation to be a sanctionable offense, despite the fact that the representative [*44] was mistaken about its authority to negotiate. Although Plaintiff's representative may have been mistaken about Freddie Mac's policy, her misinformation caused undue delay and entailed extra costs for Defendants. Plaintiff's failure to provide a representative of the lender who was ready and willing to negotiate and modify the loan is akin to the failure of the Plaintiff to appear at the mediation session. Thus, the court finds that the sanction of payment of a reasonable counsel fee to Defendants is an appropriate response to Plaintiff's conduct.

New Jersey courts have cautioned that dismissal of a matter for failure to appear must be the sanction of last resort. See *State v. Prickett*, 240 N.J. Super. 139, 147 (App. Div. 1990); *State v. Audette*, 201 N.J. Super. 410, 414-15 (App. Div. 1985). As the Appellate Division explained, "[t]here are ways short of dismissal or default to deal with slowdowns which cost a party money, waste the lawyers' time, prejudice a plaintiff's ability to collect a judgment or a defendant's ability to defend against one, or unjustifiably consume judicial resources." *Audubon Volunteer Fire Co. No. 1 v. Church Constr. Co.*, 206 N.J. Super. 405, 407 (App. Div. 1986). [*45] New Jersey courts have found that the imposition of costs and attorney's fees is an appropriate remedy for a party's failure to appear at judicial proceedings. See *Bayne v.*

Johnson, 403 N.J. Super. 125, 145 (App. Div. 2008), cert. den., 198 N.J. 312 (2009); Rabboh v. Lamattina, 312 N.J. Super. 487, 493 (App. Div. 1998); Oliviero v. Porter Hayden Co., 241 N.J. Super. 381, 390-391 (App. Div. 1990); State v. Prickett, *supra*, 240 N.J. Super. at 147-148. Where the imposition of costs is authorized, "the allowance of costs is generally committed to the court's discretion." Oliviero v. Porter Hayden Co., *supra*, 241 N.J. Super. at 391 (citing Fortugno Realty Co. v. Shiavone-Bonomo Corp., 39 N.J. 382, 396 (1963); Hirsch v. Tushill, Ltd., Inc., 110 N.J. 644, 646, (1988)).

The court notes that while Defendants seek the dismissal of the foreclosure complaint on the basis of Plaintiff's bad faith conduct in mediation, they did not file a cross-motion. Thus, Defendants' request is procedurally improper. Further, dismissal of the foreclosure complaint is too harsh a remedy to redress Plaintiff's actions. See, e.g., Holt, *supra*, 266 P.3d at 604; see generally State v. Prickett, *supra*, 240 N.J. Super. at 147. [*46] Despite the setback that occurred during mediation on February 15, 2012, Plaintiff promptly corrected its misstatement by letter dated February 17, 2012. Further, it appears that Plaintiff has continued to evaluate whether a loan modification might be possible for Defendants. Plaintiff's actions, however, caused Defendants to needlessly incur attorney's fees and costs to attend the mediation session on February 15, 2012. Foreclosure defendants are almost always in financial distress and can ill afford to pay an attorney to attend a mediation session rendered futile by Plaintiff's actions. Thus, the court finds that the appropriate remedy for Plaintiff's inability to provide a bank representative willing to negotiate at mediation to be the award of reasonable counsel fees incurred by Defendants for appearing at the February 15, 2012 mediation.

After establishing that the party seeking fees is entitled to an award, a reasonable fee must be determined. See RPC 1.5(a), which catalogues the "factors to be considered in determining the reasonableness of a fee." Here, the court will compensate Ms. Robinson for her appearance at the mediation session. Taking into account the relevant factors [*47] set forth in RPC 1.5(a), the court finds that a fee of \$500.00 is reasonable under the circumstances and would provide for Ms. Robinson's time spent at court and travel time at \$200.00 per hour for 2.5 hours. The court hopes that imposition of this modest sanction will prevent similar occurrences in the future.

CONCLUSION

Plaintiff's motion for summary judgment is granted and Defendants' answer and counterclaims are stricken. Plaintiff has demonstrated standing by proving that it became the holder of the note, as well as the recipient of a properly authenticated assignment prior to its initiation of this foreclosure action. Further, Plaintiff has demonstrated that it was authorized by Freddie Mac to pursue the instant foreclosure litigation in its own name.

The court denies Defendants' request to dismiss the foreclosure complaint on the basis of Plaintiff's bad faith conduct during mediation, but finds that a reasonable attorney's fee is an appropriate remedy to redress Plaintiff's actions. Plaintiff shall pay \$500.00 to Defendants' counsel by August 31, 2012.

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Date/Time:Sunday, July 22, 2012 - 8:34 PM EDT

EXHIBIT C

IN THE MATTER OF RESIDENTIAL MORTGAGE
FORECLOSURE PLEADING AND DOCUMENT
IRREGULARITIES

Administrative Order 01-2010

ADMINISTRATIVE ORDER DIRECTING
SUBMISSION OF INFORMATION FROM
RESIDENTIAL MORTGAGE FORECLOSURE
PLAINTIFFS CONCERNING THEIR DOCUMENT
EXECUTION PRACTICES TO A SPECIAL
MASTER

To: Foreclosure Plaintiffs Filing 200 or more residential mortgage
foreclosure actions in 2010:

AURORA LOAN SERVICES
BANK OF NEW YORK MELLON
BAYVIEW LOAN SERVICING, LLC
BENEFICIAL NEW JERSEY
DEUTSCHE BANK, N.A.
FEDERAL HOME LOAN MORTGAGE
FEDERAL NATIONAL MORTGAGE ASSOCIATION
HOUSEHOLD FINANCE CO
HSBC BANK USA, N.A.
HSBC MORTGAGE CORPORATION
HUDSON CITY SAVINGS
METLIFE HOME LOANS

MIDFIRST BANK
MORTGAGE ELECTRONIC REGISTRATION SYSTEM
NATIONSTAR MORTGAGE
NJ HOUSING & MORTGAGE FINANCE AGENCY
PHH MORTGAGE CORP
PNC BANK
SOVEREIGN BANK
SUNTRUST MORTGAGE INC.
TD BANK, N.A.
THE BANK OF NEW YORK
US BANK, N.A.
WACHOVIA BANK N.A.

This Administrative Order regarding uncontested residential mortgage
foreclosure matters is issued by the Acting Administrative Director of the Courts in the
performance of his supervisory responsibilities over the Office of Foreclosure in the
Administrative Office of the Courts as provided by the Rules of Court (as set forth
below), in accordance with the Supreme Court's Order of December 20, 2010, adopting
emergent amendments to the Rules of Court, and the accompanying Notice to the Bar,
in coordination with the December 20, 2010 order to show cause issued by Superior
Court Judge Mary Jacobson regarding certain uncontested residential mortgage

foreclosures. The Administrative Order is in response to the request by the Chief Justice for an examination into the foreclosure document preparation and filing practices.

This order addresses several steps taken by the Judiciary today in an effort to ensure the integrity of the residential mortgage foreclosure process: (1) Judge Jacobson's order directing six lenders and service providers who have been implicated in irregularities in connection with their foreclosure practices to show cause why the processing of uncontested residential mortgage foreclosure actions they have filed should not be suspended; (2) administrative action directing twenty-four lenders and service providers who have filed more than 200 residential foreclosure actions in 2010 to demonstrate affirmatively that there are no irregularities in their handling of foreclosure proceedings, via submissions to retired Superior Court Judge Walter R. Barisonek, who has been recalled to temporary judicial service and assigned as a Special Master; and (3) the adoption of amendments to the Rules of Court and a Notice to the Bar which require plaintiff's counsel in all residential foreclosure actions to file certifications confirming that they have communicated with plaintiff's employees who have (a) personally reviewed documents and (b) confirmed the accuracy of all court filings, and which remind all counsel of their obligations under the New Jersey Rules of Professional Conduct.

Foreclosure rates are climbing rapidly across the nation, and New Jersey is no exception. In recent years, New Jersey's courts have witnessed an enormous expansion in foreclosure filings. In court year 2006, plaintiffs filed 21,752 foreclosure

actions; by court year 2010, that number grew to 65,222 foreclosure filings. Thus, in the past five years, the annual rate of foreclosure filings in this State has nearly tripled.

In court year 2010, approximately 11,500 answers were filed in foreclosure actions. Of those, answers in only about 4,500 cases – that is, in just six percent of all foreclosure actions – were deemed to be contested. Thus, 94 percent of foreclosure cases proceed in the absence of any meaningful adversarial proceeding. The significance of this disparity is even more striking because many of the contested proceedings are defended pro se. Because these actions frequently lack an aggressive defense, the Office of Foreclosure and our General Equity judges are tasked with the responsibility of ensuring that justice is done for absent and pro se parties.

On November 4, 2010, the Supreme Court received a detailed report prepared by Legal Services of New Jersey, with supporting materials, alleging industry-wide deficiencies in foreclosure filings. Serious questions have surfaced about the accuracy of documents submitted to courts by lenders and service-providers in support of foreclosure requests.

In New Jersey, proceedings in state and bankruptcy courts have revealed instances of pervasive “robo-signing”¹ in foreclosure and bankruptcy filings. In In re Rivera, 342 B.R. 435 (Bankr. D.N.J. 2006), EverHome Mortgage Co.² (EverHome) hired

¹ “Robo-signers” are mortgage lender/servicer employees who sign hundreds -- in some cases thousands -- of affidavits submitted in support of foreclosure claims without any personal knowledge of the information contained in the affidavits. “Robo-signing” may also refer to improper notarizing practices or document backdating.

² Formerly known as Alliance Mortgage Co. In re Rivera, 342 B.R. 435, 442 (Bankr. D.N.J. 2006).

First American National Default Outsourcing, LLC³ (FANDO) to process foreclosure and bankruptcy documents.⁴ Amirah Shahied was a FANDO employee whose signature appeared on numerous foreclosure and bankruptcy certifications alleging debtor default.⁵ Shahied admitted to receiving stacks of signature pages -- detached from any corresponding certifications -- and signing them in bulk.⁶ Not only did the New Jersey law firm representing EverHome fail to verify whether Shahied had personal knowledge of the facts relevant to each case, the firm's attorneys filed at least 251 certifications in Shahied's name after Shahied's FANDO employment terminated.⁷ Firm attorneys testified that for at least four years, they knowingly affixed pre-signed documents prepared by the outsourcing company to certifications alleging debtor default.⁸

In state court proceedings, Thomas Strain, an employee of a servicing company associated with the New Jersey and Pennsylvania law firm of Phelan, Hallinan & Schmieg, LLP (Phelan), admitted in a deposition to notarizing approximately fifty foreclosure-related documents per day, often outside the signer's presence.⁹ After New Jersey Chancery Division judges expressed concerns related to Phelan's mortgage

³ In 2004, First American National Default Outsourcing, LLC purchased another outsourcing company with which the firm worked called LOGS Financial Services, Inc. Id. at 439.

⁴ Id. at 443-44.

⁵ Id. at 443.

⁶ Id. at 456-57.

⁷ Id. at 444, 456-57.

⁸ See id. at 446-55.

⁹ See Deposition of Thomas P. Strain at 8, 22, Bank of New York v. Ukpe, No. F-10209-08 (Ch. Div. Dec. 18, 2008).

assignment practices, Phelan spent \$175,000 to redo approximately 3,000 assignments that Strain had notarized.¹⁰

Questions have also arisen as to whether plaintiffs filing foreclosure actions actually own the underlying mortgages. In a recent case, a New Jersey equity court found that a plaintiff attempting to foreclose a mortgage, which had been transferred through a series of securitizations, never obtained actual title to the underlying mortgage.¹¹ Confounding the problem, the court found that plaintiff's filings made "no meaningful attempt to comply with the provision of R. 4:64-1(b)(1) by 'reciting all assignments in the chain of title.'"¹²

Nationally, six major institutions have recently been implicated in robo-signing activities: Bank of America; JPMorgan Chase; Citi Residential; GMAC (now Ally Financial); OneWest Bank; and Wells Fargo.

Bank of America

As the robo-signing issue drew national attention, a deposition implicating Bank of America came to light, suggesting that Bank of America foreclosed on homes with the aid of documents executed en masse, in the absence of due diligence, by people with no knowledge of the information contained in the documents and no experience in the financial services or mortgage processing industry.¹³ On October 8, 2010, Bank of

¹⁰ See Transcript of Oral Argument at 3-4, 16-17, U.S. Bank Nat'l Assoc. v. Sinchegarcia, No. F-18446-08 (Ch. Div. May 27, 2009).

¹¹ Bank of New York v. Raftogianis, ___ N.J. Super. ___, ___ (Ch. Div. 2010) (slip op. at 2).

¹² Id. at ___ (slip op. at 47, 48).

¹³ A signer for Bank of America said in a deposition taken in Massachusetts that she signed about 400 documents per day. See Deposition of Krystal Hall at 4-9 (Nov. 30, 2009)(provided by Legal Services of New Jersey). See also Ariana Cha, Bank of America Joins J.P. Morgan Chase, Ally in Halting Foreclosures in 23 States, Wash. Post, Oct. 1, 2010, http://voices.washingtonpost.com/political-economy/2010/10/bank_of_america_halts_foreclos.html.

America Home Loans announced a freeze on foreclosure sales pending a review of foreclosure documents in all fifty states.¹⁴ The moratorium began in the wake of increased scrutiny surrounding robo-signing practices, as numerous legislators and state prosecutors began investigating foreclosure documentation practices.¹⁵ On October 18, 2010, Bank of America Home Loans announced that it would resubmit affidavits in 102,000 foreclosure actions in judicial foreclosure states and proceed to resume foreclosure sales.¹⁶

J.P. Morgan Chase & Co.

Deposition testimony of an employee of Chase Home Finance, a division of J.P. Morgan Chase & Co., revealed that her team of eight people was responsible for signing affidavits, deeds, assignments, allonges, lost note affidavits, and lost mortgage affidavits.¹⁷ Her team executed about 18,000 affidavits per month.¹⁸ She did not personally review any information to determine the factual accuracy of documents she signed.¹⁹ On September 30, 2010, J.P. Morgan Chase & Co. announced a suspension of foreclosures in all judicial foreclosure states, pending a review of procedures.²⁰

JPMorgan announced in early November that it would begin re-filing foreclosure

¹⁴ Press Release, Bank of America Home Loans, Statement from Bank of America Home Loans (Oct. 8, 2010), available at <http://mediaroom.bankofamerica.com/phoenix.zhtml?c=234503&p=irol-newsArticle&ID=1480657>.

¹⁵ See Dan Fitzpatrick, Damian Paletta, & Robin Sidel, BofA Halts Foreclosures, Wall St. J., Oct. 9, 2010, at A1.

¹⁶ Press Release, Bank of America Home Loans, Statement from Bank of America Home Loans (Oct. 18, 2010), available at <http://mediaroom.bankofamerica.com/phoenix.zhtml?c=234503&p=irol-newsArticle&ID=1483909>.

¹⁷ Deposition of Beth Ann Cottrell at 6, Chase Home Finance, LLC v. Koren, No. 50-2008-CA-016857 (Fla. Cir. Ct. May 17, 2010).

¹⁸ Ibid.

¹⁹ Id. at 7-11, 35-36.

²⁰ David Streitfeld, JPMorgan Suspending Foreclosures, N.Y. Times, Sept. 30, 2010, at B1.

documents within a few weeks; that estimate has since been revised and re-filing will not be wholly underway for several months.²¹

Citi Residential Lending, Inc.

An individual employed by Nationwide Title Clearing, Inc., with signing authority for Citi Residential Lending, Inc., testified in a deposition that when he signed documents for Citi, he did not review them for substantive correctness.²² Indeed, he could not even explain what precisely an assignment of mortgage accomplishes.²³ He had no prior background in the mortgage industry.²⁴ Further, a second person with signing authority for Citi Residential Lending, Inc., testified that she never reviewed any books, records, or documents before signing affidavits and that she instead trusted the company's internal policies and procedures to ensure the accuracy of the information she signed.²⁵ She signed several documents each day (in many instances without knowledge of what she was signing) and indicated that they were often notarized outside of her presence.²⁶ On November 18, 2010, Harold Lewis, Managing Director of CitiMortgage, informed the House Financial Services Committee that Citi initiated a

²¹ Dan Fitzpatrick & Ruth Simon, Foreclosure Restarts Limp Out of the Gate, Wall St. J., Nov. 27, 2010, at B1.

²² Deposition of Bryan Jay Bly at 32-33, Deutsche Bank Nat'l Tr. Co. v. Hannah, No. 2009-CA-1920 (Fla. Cir. Ct. July 2, 2010).

²³ Id. at 39-40.

²⁴ Id. at 23-27.

²⁵ Deposition of Tamara Price at 7-8, 14-18, 24, Deutsche Bank Nat'l Tr. Co. v. Young, No. CA-2007-0114 (Fla. Cir. Ct. Apr. 21, 2008).

²⁶ Id. at 19-20.

review of 10,000 affidavits for correctness and another 4,000 affidavits to ensure that a notary was present when they were signed.²⁷

GMAC, LLC (Ally Financial)

The team leader of the document execution unit of GMAC Mortgage, LLC (now Ally Financial Inc.) testified in a deposition that his team of thirteen people executed approximately 10,000 “affidavits and things of that nature” per month.²⁸ The signer assumed that these documents were checked for accuracy prior to their submission for signing, though he lacked actual personal knowledge of their contents.²⁹ Notarization often occurred at a different time and place than signing, and signers would sometimes not check that all listed exhibits were attached to the affidavits they signed.³⁰ In September, Ally Financial announced a temporary freeze on evictions in judicial foreclosure states, citing “an important but technical defect” in foreclosure filings.³¹

OneWest Bank

In a deposition for a case where IndyMac Federal Bank, FSB (now OneWest Bank, FSB) serviced a mortgage owned by Deutsche Bank National Trust Company, a OneWest employee described the process of executing documents. She signed

²⁷ Robo-Signing, Chain of Title, Loss Mitigation and Other Issues in Mortgage Servicing: Hearing Before the H. Comm. on Financial Servs., 111th Cong. 3 (2010) (statement of Harold Lewis, Managing Director, CitiMortgage).

²⁸ Deposition of Jeffrey Stephan at 6-7, GMAC Mortgage, LLC v. Neu, No. 50-2008-CA-040805XXXX-MB (Fla Cir. Ct. Dec. 10, 2009) (hereinafter Stephan, Dec. 2009 Dep.). In subsequent deposition testimony, the witness revised his estimate and indicated that the number was 6,000 to 8,000 documents per month. Deposition of Jeffrey Stephan at 46-47, Fed. Nat’l Mortgage Ass’n v. Bradbury, No. BRI-RE-09-65 (Me. Dist. Ct. June 7, 2010) (hereinafter Stephan, June 2010 Dep.).

²⁹ E.g., Stephan, Dec. 2009 Dep., supra note 28, at 10, 12-13.

³⁰ Stephan, June 2010 Dep., supra note 28, at 54, 56; Stephan, Dec. 2009 Dep., supra note 28, at 13.

³¹ Ariana Eunjung Cha, Ally Financial Suspends Evictions in 23 States, Wash. Post, Sept. 21, 2010, at A14.

approximately 750 documents per week, taking no more than thirty seconds to execute each document.³² She did not personally check the accuracy of the documents and instead relied on others to check prior to signing.³³ Documents were notarized, and witnessed if necessary, some time after execution, outside of the employee's presence.³⁴

Banks utilizing loan servicers have expressed concern. For example, Deutsche Bank has issued several letters and memoranda to its servicers expressing concern regarding allegations of potential defects in foreclosure practices, procedures, and/or documentation, and reminding the servicers to conduct themselves in accordance with applicable law.³⁵

Wells Fargo

Wells Fargo employees have admitted in depositions to signing documents without verifying the information contained therein. In one foreclosure case, a loan administration manager stated that he signed 50 to 150 documents per day, including assignments, declarations, and affidavits related to foreclosure.³⁶ He signed the documents without checking the information and relied on employees of another

³² Deposition of Erica Johnson-Seck at 11-13, IndyMac Fed. Bank, FSB v. Machado, No. 50-2008-CA-037322XXXX MB AW (Fla. Cir. Ct. July 9, 2009).

³³ Id. at 14-16.

³⁴ Id. at 18, 21-22.

³⁵ See Memorandum from Deutsche Bank Nat'l Trust Co. and Deutsche Bank Trust Co. Ams. to Securitization Loan Servicers (Oct. 8, 2010); Memorandum from Deutsche Bank Nat'l Trust Co. and Deutsche Bank Trust Co. Ams. to Securitization Loan Servicers (Jul. 28, 2008); Memorandum from Deutsche Bank Nat'l Trust Co. and Deutsche Bank Trust Co. Ams. to Securitization Loan Servicers (Aug. 30, 2007).

³⁶ Deposition of H. John Kennerty at 9, Geline v. Nw. Tr. Servs., No. 09-2-46576-2-SEA (Wash. Super. Ct. May 20, 2010).

department to ensure the accuracy of the information.³⁷ The manager and others with the same position could sign as a Vice President of Loan Documentation for purposes of executing loan documents but were not otherwise officers of the company.³⁸

In another foreclosure case, an employee stated that she spent about two hours a day signing between 300 to 500 documents.³⁹ She held the title of Vice President of Loan Documentation for the purpose of signing the documents.⁴⁰ She did not review or have personal knowledge of the facts in the documents, relying on outside counsel or an employee in the foreclosure department for accuracy.⁴¹ Similarly, for a bankruptcy case in Texas, a Wells Fargo employee stated that she sometimes did not personally review documents before signing, relying on the expertise of the document preparer.⁴²

On October 27, 2010, Wells Fargo stated in a press release that “[a]s part of the company’s review of its foreclosure affidavit procedures, the company has identified instances where a final step in its processes relating to the execution of the foreclosure affidavits (including a final review of the affidavit, as well as some aspects of the notarization process) did not strictly adhere to the required procedures.”⁴³ Wells Fargo then announced that it would “submit supplemental affidavits for approximately 55,000 foreclosures” in all judicial foreclosure states.⁴⁴

³⁷ Id. at 61-64, 69.

³⁸ Id. at 10-13.

³⁹ Deposition of Xee Moua at 29-31, Wells Fargo Bank, NA v. Stipek, No. 50-2009-CA-012434XXXMB-AW (Fla. Cir. Ct. Mar. 9, 2010).

⁴⁰ Id. at 40.

⁴¹ Id. at 31, 46-48.

⁴² Deposition of Tamara Savery at 28-30, Guevara v. Wells Fargo Bank, N.A., No. 07-32604 (Bankr. N.D. Tex. July 15, 2009).

⁴³ Press Release, Wells Fargo & Company, Wells Fargo Provides Update on Foreclosure Affidavits and Mortgage Securitizations (Oct. 27, 2010).

⁴⁴ Ibid.

Others have raised questions about the entire industry's handling of foreclosure matters.

Congressional Report

On November 16, 2010, the Congressional Oversight Panel released an in-depth report analyzing the recent robo-signing allegations.⁴⁵ The Panel found that “[t]he foreclosure documentation irregularities unquestionably show a system riddled with errors.”⁴⁶ Legal consequences stemming from alleged irregularities

range from minor, curable title defects for certain foreclosed homes in certain states to more serious consequences such as the unenforceability of foreclosure claims and other ownership rights that rely on the ability to establish clear title to real property, forced put-backs of defective mortgages to originators, and market upheaval. The severity and likelihood of these various possible consequences depend on whether the irregularities are pervasive and when in the process they occurred.⁴⁷

The Panel's report “emphasizes that mortgage lenders and securitization servicers should not undertake to foreclose on any homeowner unless they are able to do so in full compliance with applicable laws and their contractual agreements.”⁴⁸

Congressional Testimony

Katherine Porter, Professor of Law at University of Iowa College of Law, testified that it is still unclear whether “the problems in mortgage servicing occur sporadically or

⁴⁵ Congressional Oversight Panel, November Oversight Report Examining the Consequences of Mortgage Irregularities for Financial Stability and Foreclosure Mitigation (Nov. 16, 2010), available at <http://cop.senate.gov/documents/cop-111610-report.pdf> (submitted under § 125(b)(1) of Title 1 of the Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343).

⁴⁶ Id. at 34.

⁴⁷ Id. at 14.

⁴⁸ Id. at 6.

are endemic.”⁴⁹ Yet, after conducting comprehensive studies, Professor Porter opined “that the structure of the mortgage servicing industry and the lack of accountability by financial institutions in the securitization process make it a fair inference that the problems from flawed foreclosure are not isolated incidents.”⁵⁰ She suggested that “[t]he key task going forward is to provide transparent measures of the depth of deficient paperwork and to provide reliable monitoring of foreclosure processes.”⁵¹

The Honorable F. Dana Winslow of the New York State Supreme Court, testifying before the House of Representatives Committee on the Judiciary, stated that there have been deficiencies in plaintiff mortgagees’ proof of their rights to foreclosure.⁵² Specifically, proof of standing to bring a foreclosure action has become a large problem. Mortgagees often fail to produce Notes or produce the wrong Notes. There are often gaps in the chain of title. The information provided by plaintiff mortgagees often differs from the County Clerk’s records.⁵³ Doubt has also been cast over the validity of signatures on assignments.

Other States

Other state courts and attorneys general have responded in kind. The Chief Administrative Judge of the Courts of the State of New York recently issued an order directing attorneys filing residential foreclosure actions to certify that they have

⁴⁹ TARP Foreclosure Mitigation Programs: Hearing Before the Congressional Oversight Panel 7 (2010) (statement of Katherine Porter, Professor of Law, University of Iowa College of Law).

⁵⁰ Id. at 9.

⁵¹ Id. at 14.

⁵² Foreclosed Justice: Causes and Effects of the Foreclosure Crisis Before the H. Comm. on the Judiciary, 111th Cong. (2010)(statement by F. Dana Winslow, Justice, N.Y. State Supreme Court).

⁵³ Ibid.

personally reviewed the accuracy of all relevant documents and notarizations.⁵⁴ At least four state attorneys general and the attorney general for the District of Columbia have required certain lenders, including those named in this Order, to prove the validity of their residential mortgage foreclosure processes.⁵⁵

Authority

The Judiciary has an overriding concern about the integrity of the judicial process. Its obligation to administer justice extends to safeguarding that process, which depends on the integrity of documents filed with the court. The questionable practices discussed above have the potential to call into question: (1) the validity of affidavits, certifications, assignments, and other documents filed with the court; (2) the integrity of residential mortgage foreclosure records; (3) the integrity of the judicial system as a whole; and (4) the integrity of titles passed through purchase at foreclosure sale.

The Rules Governing the Courts of the State of New Jersey specifically authorize the Administrative Director of the Courts, at the direction of the Chief Justice and the Supreme Court, to promulgate and enforce rules and directives related to case processing and such other matters as the Chief Justice and the Supreme Court direct.⁵⁶ Further, by statute, the Administrative Director, at the direction of the Chief Justice, is required to:

⁵⁴ New York State Unified Court System, Attorney Affirmation-Required in Residential Foreclosure Actions (Oct. 20, 2010). Justice Schack of the Supreme Court, Kings County, New York has denied motions and dismissed foreclosure cases due to insufficiencies of the documents presented to the court. See, e.g., Onewest Bank, F.S.B. v. Drayton, No. 15183/09 (N.Y. Sup. Ct. Oct. 21, 2010); HSBC Bank USA, N.A. v. Charlevagne, 872 N.Y.S.2d 691 (N.Y. Sup. Ct. 2008).

⁵⁵ See Congressional Oversight Panel, supra, note 49, at 44-46 (detailing actions taken in New York, California, Arizona, Ohio, the District of Columbia, and Connecticut).

⁵⁶ R. 1:33-3.

(a) Examine the administrative methods, systems and activities of the . . . employees of the courts and their offices and make recommendations to the Chief Justice with respect thereto.

(b) Examine the state of the dockets of the courts, secure information as to their needs for assistance, if any

(g) Examine, from time to time, the operation of the courts, investigate complaints with respect thereto, and formulate and submit to the chief justice recommendations for the improvement thereof.⁵⁷

The Office of Foreclosure, an administrative unit within the Administrative Office of the Courts, is responsible for reviewing mortgage foreclosure complaints; reviewing uncontested tax, mortgage, condominium, and homeowner association liens and timeshare foreclosures; and recommending the entry of certain orders and judgments in uncontested foreclosure matters subject to the approval of a New Jersey Superior Court judge designated by the Chief Justice,⁵⁸ which judge historically has been the General Equity Judge in Mercer County, whose name appears on all judgments of foreclosure. The Office of Foreclosure provides the only review of uncontested foreclosure actions, and that review is restricted to making recommendations related to the matters listed in R. 1:34-6; the Office of Foreclosure is not empowered to make rulings.⁵⁹

Operative Provisions of this Order

To protect the integrity of the process and ensure the veracity of filings with the court in foreclosure cases and pursuant to the authority of the Administrative Director of the Courts as set forth above, I announce the following steps:

⁵⁷ N.J.S.A. 2A:12-3.

⁵⁸ R. 1:34-6; R. 4:64-1; R. 4:64-7; First Union Nat'l Bank v. Penn Salem Marina, Inc., 190 N.J. 342, 356 (2007).

⁵⁹ Wells Fargo Home Mortgage v. Stull, 378 N.J. Super. 449, 452 n.1 (App. Div. 2005).

1. In a separate proceeding, Judge Mary C. Jacobson, Presiding Judge of the General Equity Division, Mercer County, has today issued an order directing the six lenders and service providers identified above, who have been implicated in irregularities in connection with their handling of foreclosure matters, to show cause why the processing of uncontested residential foreclosure matters they have filed should not be suspended. In that order to show cause, Judge Jacobson indicates her intention to appoint a Special Master to inquire into the document preparation practices of those entities and to review any remediation plans they may be directed to submit.

2. All other lenders and service providers who have filed more than 200 residential foreclosure actions in 2010 (as listed in the caption of this administrative order) are required, within 45 days, to demonstrate affirmatively that there are no irregularities in their handling of foreclosure proceedings. To that end, they are to detail the processes they follow and, in particular, outline the manner in which documents are handled, reviewed, and verified, in order to demonstrate the reliability and accuracy of documents and other submissions to the court in foreclosure proceedings. As appropriate, they should describe the practices of their subsidiaries and all related servicers and outsource firms acting on their behalf. In addition, they should confirm their full compliance with the Rules of Court and applicable statutes.

3. Those lenders and service providers described in the previous paragraph are to make submissions to retired Superior Court Judge Walter R. Barisonek, who by separate order effective January 3, 2011 has been recalled to temporary judicial service and assigned as Special Master, and who will be paid by the Judiciary. Submissions should be in the form of affidavits or certifications. On reviewing such submissions, the

Special Master may request additional information and take appropriate follow-up measures including taking live testimony and referring matters to Judge Jacobson for further review.

4. Foreclosure actions involving the institutions described in paragraph 2 above will continue to be processed by the Superior Court Clerk's Office and the Office of Foreclosure during the 45-day period during which materials are to be submitted.⁶⁰ If the Special Master finds the submitted documents sufficient to establish that an institution has not engaged in irregular practices, then foreclosure actions involving those institutions will continue to be processed by the Superior Court Clerk's Office and the Office of Foreclosure in the normal course.

If the Special Master finds the documents provided to be insufficient or finds they raise concerns that an institution has engaged in irregular practices, the Special Master may refer the matter to Judge Jacobson for appropriate action, including conducting a hearing and, depending on her findings, ordering the suspension of processing residential mortgage foreclosure actions involving a particular institution.

All counsel are reminded of their obligations under the New Jersey Rules of Professional Conduct and that, pursuant to Rule 1:4-8(a)(3), an attorney's signature on any paper filed with a court "certifies that to the best of his or her knowledge, information, and belief, formed after an inquiry reasonable under the circumstances," all "factual allegations have evidentiary support, or, as to specifically identified allegations, they are either likely to have evidentiary support or they will be withdrawn or corrected if reasonable opportunity for further investigation or discovery indicates insufficient

⁶⁰ This paragraph does not apply to the parties who are the subject of Judge Jacobson's order.

evidentiary support.” All counsel are further reminded that pursuant to Rule 4:64-1(b)(10), “if plaintiff is not the original mortgagee or original nominee mortgagee,” the complaint must provide “the name of the original mortgagee and a recital of all assignments in the chain of title.”

Further, I hereby direct that, pursuant to the Supreme Court’s order of December 20, 2010 adopting emergent amendments to the Rules of Court and the Notice to the Bar accompanying that rule amendment order, plaintiff’s counsel in all residential foreclosure actions shall file the following with the court: (1) an affidavit or certification executed by the attorney that the attorney has communicated with an employee or employees of the plaintiff who (a) personally reviewed documents for accuracy and (b) confirmed the accuracy of all court filings in the case to date; (2) the name(s), title(s), and responsibilities of the employee(s) of the plaintiff who provided this information to the attorney; and (3) an affidavit or certification executed by the attorney that all the filings in the case comport with all requirements of Rule 1:4-8(a).

The aforementioned shall be filed: (1) immediately upon the commencement of any new residential mortgage foreclosure action filed after the date of this order, as to the accuracy of the information contained in the complaint, as set forth in Rule 4:64-1(b)(1) through (13); (2) within 60 days of the date of this order in any residential foreclosure action today pending and awaiting judgment, as to the accuracy of the complaint and of any proofs submitted; (3) within 45 days of the date of this order in any residential foreclosure action in which judgment was entered but no sale of the property has yet occurred; and (4) with the motion to enter judgment in all future

residential foreclosure actions in which judgment is sought, as to the accuracy of any proofs submitted pursuant to Rule 4:64-2.

/s/ Glenn A. Grant

Hon. Glenn A. Grant, J.A.D.
Acting Administrative Director of
the Courts

Date: December 20, 2010

EXHIBIT D



3500 MacArthur Avenue, NW
Washington, DC 20007-2899

Announcement 08-12

May 23, 2008

Amends these Guides: Servicing

Note Holder Status for Legal Proceedings Conducted in the Servicer's Name

Introduction

Currently, the Fannie Mae *Servicing Guide* grants servicers, acting in their own names, the authority to represent Fannie Mae's interests in foreclosure proceedings as holder of the mortgage note. With this Announcement, Fannie Mae is clarifying that the ability of the servicer to represent Fannie Mae's interests as holder of the mortgage note also applies to bankruptcy, probate, and other legal proceedings. In order to more fully describe Fannie Mae's policies with regard to the servicer's note holder status, a new section of the *Servicing Guide* has been created and is outlined below.

New Servicing Guide Section

Servicing Guide, Part I, Chapter 2, Section 202.06, Note Holder Status for Legal Proceedings Conducted in the Servicer's Name

Fannie Mae is at all times the owner of the mortgage note, whether the note is in Fannie Mae's portfolio or whether owned as trustee, for example, as trustee for an MBS trust. In addition, Fannie Mae at all times has possession of and is the holder of the mortgage note, except in the limited circumstances expressly described below. Fannie Mae may have direct possession of the note or a custodian may have custody of the note. If Fannie Mae possesses the note through a document custodian, the document custodian has custody of the note for Fannie Mae's exclusive use and benefit.

Temporary Possession by the Servicer

In order to ensure that a servicer is able to perform the services and duties incident to the servicing of the mortgage loan, Fannie Mae temporarily gives the servicer possession of the mortgage note whenever the servicer, acting in its own name, represents Fannie Mae's interests in

- foreclosure actions,
- bankruptcy cases,
- probate proceedings, or
- other legal proceedings.

This temporary transfer of possession occurs automatically and immediately upon the commencement of the servicer's representation, in its name, of our interests in the foreclosure, bankruptcy, probate, or other legal proceeding. When Fannie Mae transfers possession, the servicer becomes the holder of the note as follows:

- If a note is held at Fannie Mae's document delivery facility, Fannie Mae has possession of the note on behalf of the servicer so that the servicer has constructive possession of the note and the servicer shall be the holder of the note and is authorized and entitled to enforce the note in the name of the servicer for Fannie Mae's benefit.
- If the note is held by a document custodian on Fannie Mae's behalf, the custodian also has possession of the note on behalf of the servicer so that the servicer has constructive possession of the note and the servicer shall be the holder of the note and is authorized and entitled to enforce the note in the name of the servicer for Fannie Mae's benefit.

Physical Possession of the Note by the Servicer

In most cases, a servicer will have a copy of the mortgage note. If a servicer determines that it needs physical possession of the original note to represent Fannie Mae's interests in a foreclosure, bankruptcy, probate, or other legal proceeding, the servicer may obtain physical possession of the original note.

If Fannie Mae's possession of the original note is direct because the custody documents are at its document delivery facility, the servicer should submit a request to obtain the original note and any other custody documents that are needed to the Custody Department through the Loan Document Request System (LDRS) on Fannie Mae's Web site (www.efanniemae.com).

If Fannie Mae possesses the original note through a third party document custodian that has custody of the note, the servicer should submit a *Request for Release/Return of Documents (Form 2009)* to Fannie Mae's custodian to obtain the note and any other custody documents that are needed.

In either case, the servicer should specify whether the original note is required or whether the request is for a copy.

Reversion of Possession to Fannie Mae

At the conclusion of the servicer's representation of Fannie Mae's interests in the foreclosure, bankruptcy, probate, or other legal proceeding, or upon the servicer ceasing to service the loan for any reason, possession automatically reverts to Fannie Mae, and Fannie Mae resumes being the holder, just as it was before the foreclosure, bankruptcy, probate, or other legal proceeding. If the servicer has obtained physical possession of the original note, it must be returned to Fannie Mae or the document custodian, as applicable. The temporary transfer of possession, and any reversion of possession to Fannie Mae, are evidenced and memorialized by this Section of the *Guide*. This *Guide* provision may be relied upon by a Court to establish that the servicer conducting the foreclosure, bankruptcy, probate, or other legal proceeding in its name has possession, and is the holder, of the note during the foreclosure, bankruptcy, probate, or other legal proceeding, unless the Court is otherwise notified by Fannie Mae.

Revised *Servicing Guide* Section

Fannie Mae is amending the existing *Servicing Guide* section that currently references the note holder provision for foreclosures. Pertinent information from this section has been removed and incorporated into the new section above. The revised section that follows replaces in its entirety the existing section in the *Servicing Guide* and servicers should refer to this Announcement regarding this topic until the *Servicing Guide* is updated at a future date.

***Servicing Guide*, Part VIII, Chapter 1, Section 102: Initiation of Foreclosure Proceedings**

Foreclosure Proceedings for First Mortgage Loans

Foreclosure proceedings for a first mortgage can begin whenever at least three full monthly installments are past due. Foreclosure proceedings may begin at once for any mortgage if the borrower is not eligible for relief from foreclosure under the Soldiers' and Servicemembers Civil Relief Act (or any state law that similarly restricts the right to foreclose) and the property has been abandoned or vacated by the borrower and it is apparent that the borrower does not intend to make the mortgage payments. In addition, foreclosure proceedings for any mortgage may be started immediately if

- the borrower was advised in writing of the relief provisions that were available and his or her written response indicated a lack of interest in fulfilling the mortgage obligation (or gave permission for the commencement of foreclosure proceedings, if the borrower was subject to the provisions of the Servicemembers Civil Relief Act or any state law that similarly restricts the right to foreclose); or
- income from rental of the property is not being applied to the mortgage payments and arrangements cannot be made to apply it, and it has been established that the borrower is not eligible for relief under the Servicemembers Civil Relief Act or any state law that similarly restricts the right to foreclose. (Refer to Part III, Chapter 1, Exhibit 1 for additional information.)

Fannie Mae requires a servicer to contact its servicing consultant, portfolio manager, or Fannie Mae's Servicing Solutions Center before it initiates foreclosure proceedings for an eMortgage. If the security property is located in a state in which there are Fannie Mae-retained attorneys (or trustees), the servicer must use one of the firms we have retained for the state. If there are not any Fannie Mae-retained attorneys (or trustees) designated for the state in which the security property is located, the servicer may retain its own attorney, but Fannie Mae will require that attorney to work closely with an attorney that Fannie Mae designates.

Foreclosure Proceedings for Second Mortgages

Foreclosure proceedings for a second mortgage can begin when at least two full monthly installments are past due. As long as the servicer has complied with the requirements of the Servicemembers Civil Relief Act (if applicable) and any state law that restricts the right to foreclose, it can start foreclosure proceedings for a second mortgage immediately if the first mortgage is in default and the second mortgage instrument includes a provision that the second mortgage will be considered in default, regardless of the status of its payments, if the first mortgage is in default.

Physical Possession of the Note by the Servicer

In most cases, a servicer will have a copy of the mortgage note that it can use to begin the foreclosure process. However, some jurisdictions require that the servicer produce the original note before or shortly after initiating foreclosure proceedings.

If Fannie Mae's possession of the note is direct because the custody documents are at the document delivery facility, to obtain the note and any other custody documents that are needed, the servicer should submit a request to the Custody Department through the Loan Document Request System (LDRS) on Fannie Mae's Web site (www.efanniemae.com).

If Fannie Mae possesses the note through a document custodian that has custody of those documents, to obtain the note and any other custody documents that are needed, the servicer should submit a *Request for Release/Return of Documents* (Form 2009) to Fannie Mae's custodian.

In either case, the servicer should specify whether the original note is required or whether the request is for a copy.

Effective Date

The changes outlined in this Announcement are effective immediately.

* * * * *

Servicers should contact their Servicing Consultant, Portfolio Manager, or Fannie Mae's National Servicing Organization's Servicing Solutions Center at 1-888-326-6438 if they have questions about Announcement 08-12.

Michael A. Quinn
Senior Vice President
Single-Family Risk Officer

EXHIBIT E

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0539-11T3

WELLS FARGO BANK, N.A.,

Plaintiff-Appellant,

v.

NUBIA DOMINGUEZ; Mr. DOMINGUEZ,
husband of NUBIA DOMINGUEZ,
JUAN G. DOMINGUEZ; MRS. DOMINGUEZ,
his wife,

Defendants-Respondents.

Argued September 20, 2012 - Decided April 8, 2013

Before Judges Fuentes, Grall and Ashrafi.

On appeal from Superior Court of New Jersey,
Chancery Division, General Equity Part,
Bergen County, Docket No. F-48760-09.

Diane A. Bettino argued the cause for appellant
(Reed Smith, attorneys; Ms. Bettino, Henry F.
Reichner and Kellie A. Lavery, of counsel and
on the brief).

Rebecca Schore argued the cause for
respondents (Legal Services of New Jersey,
attorneys; Ms. Schore and Margaret Lambe
Jurow, on the brief).

PER CURIAM

Plaintiff, Wells Fargo Bank, N.A. (Wells Fargo), appeals
from an order dismissing without prejudice its complaint to

foreclose a mortgage executed by defendants Nubia and Juan G. Dominguez. The order was entered on cross-motions for summary judgment.¹ The judge determined that the notices of intention Wells Fargo served prior to filing the foreclosure complaint did not comply with N.J.S.A. 2A:50-56(c)(11), a provision of the Fair Foreclosure Act (FFA), N.J.S.A. 2A:50-53 to -68. In conformity with this court's decision in Bank of New York v. Laks, 422 N.J. Super. 201 (App. Div. 2011), the judge determined that a dismissal without prejudice was required.

Several months after the order of dismissal was entered, the Supreme Court overruled Laks "[t]o the extent that [it] holds that the only remedy available to a trial court for a violation of N.J.S.A. 2A:50-56(c)(11) is dismissal without prejudice." U.S. Bank Nat'l Ass'n v. Guillaume, 209 N.J. 449, 458 (2012). The court held that a judge "may dismiss the action without prejudice, permit a cure or impose such other remedy as may be appropriate to the specific case." Ibid. Wells Fargo, however, does not challenge the remedy. Rather, it claims that its notice of intention was not deficient. We disagree.

The FFA requires a "residential mortgage lender [to] give the residential mortgage debtor notice of [its] intention [to

¹ The judge also denied defendant Nubia Dominguez' motion for summary judgment on her counterclaim, but she has not filed a cross-appeal contesting that determination.

foreclose] at least 30 days in advance" of commencing a foreclosure action. N.J.S.A. 2A:50-56(a). "The notice of intention is a central component of the FFA, serving the important legislative objective of providing timely and clear notice to homeowners that immediate action is necessary to forestall foreclosure." Guillaume, supra, 209 N.J. at 470.

The FFA further provides that the notice of intention must, among other things, provide "the name and address of the lender." N.J.S.A. 2A:50-56(c)(11). The term "lender" is statutorily defined 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 (emphasis added). As Guillaume explains, "[t]hat language clearly conveys the Legislature's intent that the homeowner be notified of the identity of the entity that currently holds the mortgage." 209 N.J. at 472. "[T]he Legislature, intending to protect homeowners at risk of foreclosure, has unmistakably directed that a homeowner shall be advised of the exact entity to which he or she owes the balance of the loan." Ibid.

There is no dispute that Wells Fargo filed this foreclosure complaint on September 11, 2009, and served notices of intention on February 15, March 15 and July 12, 2009. Thus, the notices

of intention were timely served. Moreover, there is no dispute that the mortgage was assigned to Wells Fargo on September 9, 2009, a date about two months after the last notice of intention was served and only two days before Wells Fargo filed its complaint. That assignment is included in the record, and there is no evidence suggesting an assignment of the mortgage on an earlier date.

The question here is whether Wells Fargo was the "lender," within the meaning of the FFA, when it served the notices. Each of the notices of intention identify Wells Fargo as the holder of the mortgage. The trial judge found the several notices of intention Wells Fargo served deficient because the mortgage was assigned after they were issued.

On appeal, Wells Fargo contends that the date of the mortgage assignment is meaningless because Wells Fargo held the note prior to that date. The mortgage assignment contains a statement that amounts to a legal opinion supporting that argument. It states: "The transfer of the mortgage and accompanying rights was effective at the time the loan was sold and consideration passed to the Assignee. This assignment is solely intended to describe the instrument sold in a manner sufficient to put third parties on public notice of what has

been sold." But the assignment does not state the date on which the loan was sold.

In support of the legal proposition asserted in the assignment, Wells Fargo focuses on the passage from Guillaume observing that the Legislature "unmistakably directed that a homeowner shall be advised of the exact entity to which he or she owes the balance of the loan." Ibid. Wells Fargo also relies upon the principle that "an assignment of a bond or note evidencing a secured obligation will operate as an assignment of the mortgage 'in equity.'" Bank of N.Y. v. Raftoqianis, 418 N.J. Super. 323, 348 (Ch. Div. 2001) (citing 29 New Jersey Practice, Law of Mortgages § 11.2, at 748 (Myron C. Weinstein) (2d ed. 2001)); see also Hyman v. Sun Ins. Co., 70 N.J. Super. 96, 101 (App. Div. 1961) (noting "an assignment of a debt, if not limited in its scope, carries with it the promises and undertakings connected therewith and tending to secure its payment"); Fed. Reserve Bank of Phila. v. Welch, 122 N.J. Eq. 90, 92 (Ch. 1937) (noting "the transfer of the notes . . . secured by the bond and mortgage, operate[d] as an assignment of the bond and mortgage"); Stevenson v. Black, 1 N.J. Eq. 338, 343 (Ch. 1831) (noting as "a general rule" the "assignment of the bond operates as an assignment of the mortgage").

Because we conclude that the record submitted on summary judgment does not include sufficient competent evidence to establish when Wells Fargo obtained possession of the note, there is no reason to discuss this objection to the judge's ruling. Wells Fargo has not established the predicate fact upon which the argument rests – that it held the note prior to the assignment of the mortgage.

The evidence concerning Wells Fargo's ownership of the note is as follows. In September 2007, ten years after purchasing a home in Bogota, defendants refinanced their mortgage with a \$237,500 loan from Emigrant Mortgage Company. On December 21, 2007, to refinance the Emigrant loan, they took out a \$288,000 loan from Majestic Home Mortgage Corporation (Majestic) secured by the mortgage at issue here.

The record includes two copies of the note dated December 21, 2007 and signed by Nubia Dominguez, memorializing the borrower's promise to repay Majestic and her understanding of Majestic's right to transfer the note and her obligation to pay the note holder. The copies of the note are substantially identical. Both bear identical eighteen-digit loan numbers, and both are stamped "CANCELLED." The copies differ in that one includes a handwritten ten-digit number beneath the typed loan number, and an additional stamp, which reads "CERTIFIED TRUE

COPY MAJESTIC HOME MORTGAGE," over which a large X is handwritten. The other includes a different additional stamp – "ALLONGE ATTACHED FOR THE PURPOSE OF ENDORSING THE NOTE."

Paragraph ten of the note links it with the mortgage. In pertinent part it provides: "In addition to the protections given to the Note Holder under this Note, a Mortgage, Deed of Trust, or Security Deed (the "Security Instrument"), dated the same date as this Note, protects the Note Holder from possible losses which might result if I do not keep the promises which I make in this Note."

The mortgage bears the eighteen-digit loan number that appears on both copies of the note and a ten-digit handwritten number identical to the one handwritten on the second copy of the note. It identifies Majestic as the lender, and it defines the term "Note" with reference to the date, loan amount and last date for full payment set forth in the note. The mortgage lists Nubia Dominguez, married, and Juan G. Dominguez, married, as the borrowers, and they both signed the mortgage.

The mortgage explains the relationship between the note holder and the mortgage as follows:

This Security Instrument secures to Lender:
(i) the repayment of the Loan, and all renewals, extensions and modifications of the Note; and (ii) the performance of Borrower's covenants and agreements under this Security Instrument and the Note.

The mortgage includes a grant to MERS²:

For these purposes, Borrower does hereby mortgage, grant and convey to MERS (solely as nominee for Lender and Lender's successors and assigns) and to the successors and assigns of MERS [the property described].

The record also includes two copies of the "ALLONGE TO PROMISSORY NOTE," referenced in the note. Each allonge is dated December 21, 2007, but neither copy provides any information about the date on which the subsequent endorsements were made. The first copy includes two endorsements: the first, from Majestic to HSBC Mortgage Corporation USA without recourse; and the second, from HSBC to Wells Fargo without recourse. The second copy of the allonge to promissory note differs materially from the first in that it includes a third endorsement in blank from Wells Fargo. This copy of the allonge includes the eighteen-digit typed number that appears on the note and mortgage and the ten-digit number that is handwritten on the second copy of the note. Like the first copy of the allonge, it does not indicate the date of any endorsement.

² Defined as follows: "'MERS' is the Mortgage Electronic Registration Systems, Inc. MERS is a separate corporation that is acting solely as a nominee for Lender and Lender's Successors and assigns. MERS is the mortgagee under this Security Instrument. . . ."

The only information in the record about the date Wells Fargo acquired the note is found in a certification of Kyle N. Campbell, Wells Fargo's Vice President of Loan Documentation. It includes the following assertions relevant to the date Wells Fargo acquired the note.

1. . . . I have personally reviewed the business records of Wells Fargo as they pertain to the Loan The business records are maintained in the regular course of business[], and it is the regular practice of Wells Fargo to maintain these records.

. . . .

3. Wells Fargo obtained physical possession of the original Note on March 14, 2008.

4. The original Note was maintained by Wells Fargo [] at a secure location in Minneapolis, Minnesota until May 12, 2011, when it was sent to counsel for Wells Fargo, Reed Smith, LLP.

The documents appended to Campbell's certification, which Campbell characterized as "true and correct" without explaining the basis for the assertion, include, among others, the note and allonge, the mortgage, and the previously discussed September 9, 2009 assignment of the mortgage which is from MERS, as nominee of Majestic, its successors and assigns, to Wells Fargo.

There is no document or business record supporting Campbell's assertion that Wells Fargo obtained physical

possession of the original note on March 14, 2008, despite the fact that Wells Fargo's responses to interrogatories indicate that it will provide all documents pertaining to "the purchase, sale or assignment of the mortgage loan." Thus, Campbell's assertion of Wells Fargo's possession of the note from March 14, 2008 forward is unsupported. The only document in the record fixing a date on which any pertinent interest was transferred or assigned is the September 9, 2009 assignment of the mortgage. That assignment is from MERS to Wells Fargo.

In opposing Wells Fargo's motion for summary judgment, defendants disputed Wells Fargo's possession of the note as of March 14, 2008. They claimed "upon information and belief" that "Fannie Mae is the actual holder and owner of the Note." A claim they supported with a certification of Margaret Lambe Jurow, Esq., of Legal Services. According to Jurow, after receiving papers from Wells Fargo on January 11, 2011, she searched "MERS public data base which identifies investors on notes related to its mortgages." The MERS data base listed "Fannie Mae and not Wells Fargo" as the investor for this loan.

Jurow also certified that she searched the "Fannie Mae lookup site," and it listed this loan "as being owned by Fannie Mae and not Wells Fargo." She provided a copy of what appears to be a printout of the information as it was displayed on the

Fannie Mae site. That document depicts a request for information on this property by its address. It states: "Match Found. Based on the property information entered, it appears Fannie Mae owns a loan at this address."³

This record does not permit a finding that Wells Fargo took possession of the loan on March 14, 2008, and held it in a secure place thereafter until delivering it to Wells Fargo's attorneys on May 12, 2011. Campbell's certification is the only document in the record supporting those facts, and it suffers from many of the defects that this court found fatal in Wells Fargo Bank, N.A. v. Ford, 418 N.J. Super. 592, 599-600 (App. Div. 2011).

"A certification will support the grant of summary judgment only if the material facts alleged therein are based, as required by Rule 1:6-6, on 'personal knowledge.'" Id. at 599 (citing Claypotch v. Heller, Inc., 360 N.J. Super. 472, 489 (App. Div. 2003)). The closest Campbell's certification comes to alleging personal knowledge of the date on which Wells Fargo

³ Although the printout includes a disclaimer stating that Fannie Mae "makes no representation, warranty or guarantee regarding the accuracy or completeness of the results," explanatory material found apparently printed from the site states that match found "means that Fannie Mae owns a loan at the address entered in the search." This certification, like Campbell's, has certain deficiencies. For example, it does not include a certification that the document which appears to be a printout of the computer screen is a true copy.

obtained physical possession of the original note and retained it until it was sent to Wells Fargo's attorneys is his allegation that he personally reviewed records maintained in the regular course of Wells Fargo's business. But knowledge gleaned from review of records is not "personal knowledge." It is knowledge based on hearsay statements included in records, which may or may not be admissible. See N.J.R.E. 803(c)(6) (setting forth the conditions for admission of hearsay included in business records).

Rule 1:6-6 permits an affiant to assert facts "which are admissible in evidence to which the affiant is competent to testify." It also permits an affiant to annex "certified copies of all papers or parts thereof" referenced in the affidavit. R. 1:6-6. Here, there were no copies of papers, let alone certified copies, supporting Campbell's bald assertion that Wells Fargo had possession of the note on and after March 14, 2008.

Because Campbell's certification is insufficient to permit a finding that Wells Fargo held the note when it served the several notices of intention, and because there is no dispute that the mortgage was assigned to Wells Fargo long after the notices of intention were served, we affirm the trial judge's

determination that the notices of intention did not comply with the FFA.

We recognize that the judge also found that Wells Fargo had physical possession of the note on March 14, 2008. But for the reasons stated above, that finding lacks adequate support in the record submitted on the motion.

Because Wells Fargo presented the original note in the trial court, it is important to stress the limited significance of this opinion in order to avoid any potential for confusion. This order of dismissal without prejudice is not based on the merits of the foreclosure action and does not have any impact on the question of Wells Fargo's ability to foreclose as a holder of the note and mortgage. See Ford, supra, 418 N.J. Super. at 600-01. The order of dismissal without prejudice is based solely on Wells Fargo's failure to establish that it served notices of intention conforming with the requirements of the FFA, which it may correct by service of a notice that conforms with N.J.S.A. 2A:50-56(c)(11).

We have considered whether it would be appropriate to remand to permit the trial judge to determine whether a remedy other than dismissal without prejudice is appropriate in this case. Guillaume sets forth factors the trial court should consider in exercising its discretion to fashion an appropriate

remedy for a defective notice of intention, and the judge did not have the benefit of that decision. 209 N.J. at 479. Because the briefs on appeal were filed after the Court's decision in Guillaume and Wells Fargo has not requested that relief, we decline to remand for reconsideration of the remedy.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION

IRA J. METRICK, ESQ.
57 West Main Street
Freehold, NJ 07728
732-863-1660
Attorney for Defendants, John and Dawn Norris

IN RE APPLICATION BY CITIBANK, N.A.,
CITI RESIDENTIAL LENDING, INC.,
CITIMORTGAGE, INC., AND
CITIFINANCIAL SERVICES, INC. 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-17318-13

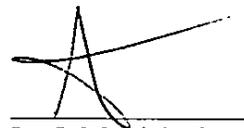
Civil Action

CERTIFICATION OF
IRA J. METRICK, ESQ.

I, Ira J. Metrick, Esq., of full age, hereby certify as follows:

1. I am an attorney licensed to practice law in the State of New Jersey and I represent the Defendants, John and Dawn Norris, in the above captioned matter.
2. On August 12, 2013 and again on August 16, 2013, I did the Fannie Mae look up at <https://www.knowyouroptions.com/loanlookup>.
3. Fannie Mae's web site reported that this loan was acquired by Fannie Mae on May 1, 2005. Attached as Exhibit A is a true copy of the results of the search performed on August 16, 2013.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.



Ira J. Metrick, Esq.

8/16/13

Date

EXHIBIT A

[Home](#)

Fannie Mae Loan Lookup Results: Match Found

It appears that Fannie Mae owns your loan, based on the information you entered:

JOHN NORRIS
2007 FAIRWAY DR
SPRING LAKE, NJ 07762
Last 4 Digits of Social Security Number: ****
Fannie Mae Loan Acquisition Date: 05-01-2005
Mortgage Company: CITIMORTGAGE, INC.

Results—Our Records Indicate:

- Your loan was acquired by Fannie Mae on or before May 31, 2009. Knowing the Fannie Mae Loan Acquisition Date is important because some programs, such as HARP, are available only on loans acquired by Fannie Mae on or before May 31, 2009.
- Your mortgage company is **CITIMORTGAGE, INC.**
- You may be eligible for the [Home Affordable Refinance Program \(HARP\)](#) or for the [Home Affordable Modification Program \(HAMP\)](#)—or other programs available exclusively for Fannie Mae borrowers.

Next Steps:

To help you find the option(s) that might be best for your situation, please answer the questions below.

Have you been delinquent on your mortgage in the past 12 months? Yes No

Note: In this case, "delinquent" means you have paid your mortgage payment late by 30 days or more at any time in the last 6 months. Or, that you had more than one late payment or made a payment more than 30 days late in the 6-month period prior to the last 6 months.

Do you anticipate having difficulty paying your mortgage in the near future (next 2-3 months)? Yes No

[Get Options](#)

Other Steps You Can Take:

Get Help Now

Contact a Fannie Mae Mortgage Help Center for free housing counseling and assistance with your mortgage.

Explore KnowYourOptions.com

Review the useful information and tools on this site to learn more about your options.

Contact Your Mortgage Company

Confirm these results and obtain additional information regarding your mortgage by contacting your mortgage company.

FORECLOSURE CONSEQUENCES

What can happen if you are foreclosed on? Find out here so you can be prepared.

[GO TO OUR FORECLOSURE PAGE](#)

IRA J. METRICK, ESQ.
57 West Main Street
Freehold, NJ 07728
732-863-1660
Attorney for Defendants, John and Dawn Norris

IN RE APPLICATION BY CITIBANK, N.A., CITI RESIDENTIAL LENDING, INC., CITIMORTGAGE, INC., AND CITIFINANCIAL SERVICES, INC. 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-17318-13 Civil Action CERTIFICATION OF SERVICE
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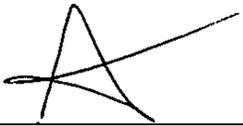
Ira J. Metrick, of full age, hereby certifies as follows:

1. I am the attorney for the Defendants, John and Dawn Norris, in the above captioned matter.
2. On August 16, 2013, I caused the original of the within documents to be sent for filing with the Clerk, Superior Court of New Jersey, Foreclosure Processing Services, Attn: Objection to Notice of Intent to Foreclose, via overnight mail; and simultaneously sent a copy to Theodore V. Wells, Esq, Paul, Weiss, Rifkind, Wharton & Garrison LLP, attorneys for Plaintiff, to 1285 Avenue of the Americas, New York, NY 10019, via overnight mail; and to the Honorable Margaret Mary McVeigh, Superior Court of New Jersey, Passaic County, to 71 Hamilton Street, Patterson, New Jersey 07505 via priority mail.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated:

8/16/13



IRA J. METRICK
Attorney for Defendants, John and Dawn Norris