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December 5, 2012

Via JEFIS

Clerk  
Superior Court of New Jersey  
25 West Market Street  
6<sup>th</sup> Floor North Wing  
Trenton, New Jersey 08625

*Re: In re Application by Wells Fargo Bank, N.A. to Issue Corrected Notices of Intent to Foreclose on Behalf of Identified Foreclosure Plaintiffs in Uncontested Cases  
Docket Number F-009564-12*

Dear Sir/Madam:

This firm represents Wells Fargo Bank, N.A. in the above-referenced matter. Enclosed for filing, please find the following documents:

1. Memorandum of Law regarding Pre-Judgment Interest and Other Costs;
2. Certification of Diane A. Bettino; and
3. This Certification of Service.

Thank you for your assistance with this matter.

Very truly yours,

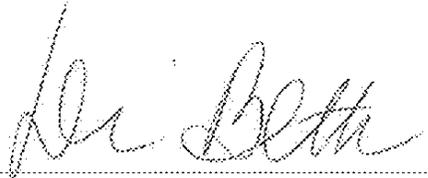


Mark S. Melodia

Enclosures

cc: The Hon. Margaret Mary McVeigh, P.J. Ch. (Via Hand Delivery)  
Margaret Lambe Jurow, Esquire (Via Email)





Diane A. Bettino

Dated: December 5, 2012

**REED SMITH LLP**

*Formed in the State of Delaware*

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Attorneys for Wells Fargo Bank, N.A.

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

) SUPERIOR COURT OF NEW JERSEY  
) CHANCERY DIVISION  
) PASSAIC COUNTY  
)  
) DOCKET NO.: F-009564-12  
)  
) CIVIL ACTION  
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**WELLS FARGO BANK, N.A.'S BRIEF REGARDING PREJUDGMENT  
INTEREST COMPUTATION AND OTHER COSTS**

## I. Preliminary Statement

At the November 15, 2012 Final Hearing on Wells Fargo Bank, N.A.'s ("Wells Fargo") Order to Show Cause ("OSC"), this Court heard argument from *amicus curiae* Legal Services of New Jersey ("Legal Services") and Wells Fargo on the issue of computing prejudgment interest, considering any delays that may have occurred in foreclosure actions. The Court ordered simultaneous briefing from Wells Fargo and Legal Services.

Wells Fargo requests that the Court adhere to the well-established law in New Jersey that requires enforcement of the plain terms of the prejudgment interest provisions to which borrowers and lenders agreed when the loans were originated. New Jersey case law dictates that, because the borrowers and lenders agreed to prejudgment interest rates within mortgages and notes, those interest rates must control, and the Court should not employ equity to alter those rates. Further, even if the Court looks beyond contract law, the equities in this matter favor Wells Fargo. Any delay was not caused by Wells Fargo and ultimately, the delay in moving the foreclosures to final judgment and then sheriff sale has benefitted Foreclosure Defendants, to the detriment of Wells Fargo.

Legal Services also argued, vaguely, that the final judgment amounts should not include late fees and property preservation fees. However, as with prejudgment interest, those are costs that are usually permitted by the contracts and the imposition of such costs are upheld by the New Jersey courts. Indeed, the mortgage of Legal Services client Mr. Clayton Pierce permits the lender to recover these types of costs. Furthermore, in addition to being agreed-upon costs that will be incurred in the event of a default, such costs are necessary to preserve the properties as well as the community in which the properties reside.<sup>1</sup>

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<sup>1</sup> Wells Fargo agreed to exclude attorneys' fees and costs in the Corrected NOIs. Those are the "fees and costs" referenced in the Guillaume decision and the category of costs that a trial court could "reduce" when considering a

Finally, as detailed in Point IV, during the past two years, New Jersey has experienced an actual and an effective stay of foreclosures due to various issues, including new Court Rules and binding Court decisions that caused uncertainty and ultimately, delay. Wells Fargo has been involved in, and at the forefront of, those events during these two years and has not delayed or caused delay. Ultimately, however, if this Court were to accept Legal Services' position, it would put Wells Fargo in a worse position than if it had elected instead to file individual motions in the pending 3,300 cases or had dismissed them. Such a decision would be inequitable because Wells Fargo followed the direction of the Supreme Court's April 4, 2012 Order when it filed the first OSC, which paved the way and assisted in developing this entirely new process for other servicers.

For the reasons set forth herein, Wells Fargo requests that the Court deny the request of Legal Services in its entirety.

**II. Pursuant to Binding New Jersey Law, This Court Must Uphold The Contractual Interest Rates to Which Borrowers and Lenders Have Agreed Upon**

In its opposition to the OSC, Legal Services argued that this Court should, and can, apply the prejudgment interest rates of R. 4:42-1, rather than the contractual interest rates. See October 18, 2012 letter. Legal Services acknowledges that borrowers have agreed to interest rates within loan contracts. See, e.g. October 18, 2012 letter ("These loans . . . include high rates of interest."). Nonetheless, Legal Services believes that, because the foreclosures have been delayed in moving to sheriff sale, the Court can ignore those contractual interest rates and impose a lower rate of interest than the one that the parties agreed to when the loans were issued.

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remedy to cure an NOI. Legal Services is referencing a completely different set of costs and there is nothing in the Guillaume decision or the FFA that speaks to or would authorize the reduction of these other, contractually permitted costs. See N.J.S.A. 2A:50-57(b)(3) (referencing "attorneys' fees and costs").

That argument fails, as New Jersey courts have consistently held that once parties agree to a contractual interest rate, i.e. the rate within a note and mortgage, that rate serves as the prejudgment interest rate. Shadow Lawn Savings and Loan Association v. Palmarozza, 190 N.J. Super. 314 (App. Div. 1983); Mid-Jersey National Bank v. Fidelity-Mortgage Investors, 518 F.2d 640 (3d Cir. 1975).

The Appellate Division squarely addressed the issue of computing pre and post-judgment interest rates in Shadow Lawn Savings and Loan Association v. Palmarozza, 190 N.J. Super. 314 (App. Div. 1983). In that case, the Palmarozzas had executed to Shadow Lawn Savings and Loan Association ("Shadow Lawn") a mortgage and a note, which contained an interest rate of 9.5% per year. The parties disputed the proper computation of interest, specifically, regarding whether Shadow Lawn could collect compound interest. Id.

The Appellate Division found that Shadow Lawn could not charge compound interest because the note and mortgage did not provide for such interest. Id. at 317. The Court stated that, "if a different effective rate of interest is to apply after default . . . this is a term and condition that should be negotiated by the parties and expressly set forth as part of their agreement." Id. As such, the Court focused on and upheld the express contractual terms to which the parties had agreed.

After determining that compound interest did not apply, the Appellate Division explained the proper computation of prejudgment interest to be applied after default. Id. at 318. Again, the contractual terms controlled:

The total unpaid principal and accrued interest should be determined as of the date the mortgage was declared in default and the full debt accelerated. From that date until the date of entry of judgment, interest will run at the contract rate of 9½% per annum on the full unpaid principal and interest due as of the date the mortgage was declared in default.

Id. (emphasis added). Thus, in Shadow Lawn, the Appellate Division made clear that prejudgment interest follows the terms of the note.

Since Shadow Lawn, New Jersey Courts have reiterated and reinforced the principle that prejudgment interest is computed in accordance with the terms of the contract. R. Jennings Mfg. Co., Inc. v. Northern Electric Supply Co., Inc., 286 N.J. Super. 413 (App. Div. 1995); Estate of Kolker, 212 N.J. Super. 427 (Law Div. 1986). For instance, in Estate of Kolker, the Court explained that “creditors whose claims include contract interest are entitled to recover that interest as of right, along with principal, as part of their overall claim.” Estate of Kolker, 212 N.J. Super. at 439. And, in R. Jennings Mfg. Co., Inc., the Appellate Division cited both Shadow Lawn and Estate of Kolker for the proposition that there are “disparate interest rates applied by the cases to contract claims prior to, and after, judgment.” R. Jennings Mfg. Co., Inc., 286 N.J. Super. at 417.

Further, the Third Circuit has reached precisely the same conclusion while applying New Jersey law. Mid-Jersey National Bank v. Fidelity-Mortgage Investors, 518 F.2d 640 (3d Cir. 1975), superseded by statute on other grounds. In Mid-Jersey National Bank, the lender filed an action against the borrower seeking damages based on the defendant’s default on the note. One of the issues in the case involved the amount of pre and post-judgment interest that the plaintiff should receive.

Regarding prejudgment interest, the Third Circuit concluded that the rate should follow the terms of the agreement between the parties. Id. at 645. As the Court explained, “for the rate of pre-judgment interest to be equitable *it should reflect the rate fixed by the parties in an arm's length transaction.*” Id. (emphasis added).

The foregoing cases make clear that, in New Jersey, once parties have reached a contractual agreement as to the interest rate, the computation of prejudgment interest must reflect the terms of the contract.

Therefore, Legal Services' argument that the interest rates in R. 4:42-11 should apply fails as a matter of law. Both the lenders and the borrowers must honor the contracts to which they agreed, and the contractual prejudgment interest rates must apply.

**III. Where the Parties Have Agreed to a Contractual Prejudgment Interest Rate, the Court Does Not Have the Discretion to Award a Different Amount of Prejudgment Interest**

Legal Services stated, in its opposition to the OSC, that the "court has discretion to impose the contract rate of interest or the pre-judgment rate of interest or some other equitable rate or none at all in contract matters including mortgage foreclosure matters." See October 18, 2012 letter. This contention lacks any actual legal basis.

In support of that argument, Legal Services cites Comment 2.1 to R. 4:64-2, which provides that, "in calculating the amount due . . . there may be three discrete interest periods: until default, assessed at the contract rate; between default and judgment, assessed either at the contract rate or by the court . . . ; and post judgment, assessed in accordance with R. 4:42-11(a)." Pressler & Verniero, *Rules Governing The Courts Of The State of New Jersey*, Gann (2013).

That Comment does not, as Legal Services suggests, state that the Court has discretion to award either the contract rate of interest or another rate. Rather, the Comment only indicates that two different rates may apply – that is, when the parties have explicitly agreed to a specific prejudgment interest rate in a contract, and when the parties have not agreed to a contractual prejudgment interest rate. If there is a contract rate, the contract rate applies.

The case law and Comments to the Court Rules underscore the distinction between these two circumstances. Specifically, Comment 3.1 to R. 4:42-11 states that “the allowance of prejudgment interest in commercial cases may also be a matter determined by contract.” And, in support of that legal principle, the Rule cites Van Note-Harvey Associates, P.C. v. East Hanover, 175 N.J. 535, 541-542 (2003) for the notion that “equitable principles do not apply where parties have obligated themselves to prejudgment interest by contract.” See Comment 3.1 to R. 4:42-11. In other words, Courts must apply the contractual interest terms, rather than equitable principles, when the contract specifically provides for prejudgment interest.

In Van Note-Harvey Associates, P.C., the Supreme Court of New Jersey faced the question of whether the “plaintiff was entitled to contractual prejudgment interest on accumulating overdue accounts receivable.” 175 N.J. at 542. Under the terms of the contract, the Township had obligated itself to pay prejudgment interest:

should the TOWNSHIP fail to issue a check in payment to the ENGINEER within seven (7) days after approval of such payment at the regularly scheduled TOWNSHIP meeting, the ENGINEER shall be entitled to interest on the approved portion of the invoice computed at the prime interest rate from the date until the date of payment.

Id. at 539. The trial court applied equitable principles and denied an award of prejudgment interest because, in the court’s view, “the plaintiff ha[d] not shown overriding and compelling equitable reason to justify such an award.” Id. at 541.

However, the Supreme Court of New Jersey determined that the trial court had erred by overlooking the contract’s clear terms, which provided for prejudgment interest. As the Supreme Court explained, “the Township as a public entity, like a private enterprise, has obligated itself contractually to pay prejudgment interest . . . In the face of those contractual provisions, the Township, as any private entity, *must be required to comply with its contractual obligations.*”

Id. at 542 (emphasis added). The Supreme Court therefore did not permit the application of equitable principles when the parties had agreed to prejudgment interest in the contract, even for a public entity.

Conversely, equitable principles can dictate the computation of prejudgment interest *in the absence* of a contractual agreement as to prejudgment interest. Courts have explicitly drawn this distinction. Estate of Kolker, 212 N.J. Super. at 439-440. As previously explained, in Estate of Kolker, the Superior Court of New Jersey, Law Division stated that “creditors whose claims include contract interest are entitled to recover that interest as of right.” Id. at 439. The Court contrasted such prejudgment interest created by contract with a situation where parties did not agree contractually to a specific rate of prejudgment interest:

Prejudgment interest usually stands on a different footing than post judgment interest or contract interest . . . [T]he allowance of prejudgment interest in contract and contract-like actions, even on liquidated claims, is not a litigant’s right but rests rather in the court’s discretion, required to be exercised with equitable principles and considerations in mind.

Id. at 439-440. Thus, in contract cases where the parties do not agree to prejudgment interest, equitable principles can apply; but where there is a contractual pre-judgment interest rate, that must be honored and upheld.

In a more recent, but unpublished, decision, the Appellate Division cited to the Supreme Court’s decision in Van Note-Harvey Associates, P.C. and reiterated and reinforced the rule that, where there is a contractual interest rate, the contractual terms control over equitable principles. Alsentzer v. Bulboff, 2005 WL 3701461 (App. Div. 2006) (unpublished). The Appellate Division explained that, “[a]lthough the allowance of interest in contractual actions is generally governed by equitable principles, *such principles are inapplicable when the rate of interest is, as*

here, determined by contract.” Id. at \*7 (emphasis added) (citing Van Note-Harvey Assocs., 175 N.J. at 541-42).

In the mortgage foreclosures at issue, the borrowers and lenders previously agreed to contractual prejudgment interest rates. For instance, in the foreclosure matter of U.S. Bank, N.A. v. Clayton Pierce, (docket number F-29698-08, in Union County), Legal Services represents Mr. Pierce. The Note that Mr. Pierce executed contained an agreed upon interest rate of 7.9%.

Such interest serves the function of compensating a lender “for lost earnings on a sum of money to which it was entitled, but which has been retained by another.” Sulcov v. 2100 Linwood Owners, Inc., 303 N.J. Super. 13, 43 (App. Div. 1997). And, under New Jersey law, the Court may not, as Legal Services suggests, fashion an equitable or discretionary amount of prejudgment interest. If the Court lowers the prejudgment interest rate to which the parties have agreed in a contract, the Court will ignore Supreme Court of New Jersey precedent. See Van Note-Harvey Associates, P.C., 175 N.J. at 542. Legally, the computation of prejudgment interest must follow the terms of each individual contractual agreement between a borrower and lender.

#### **IV. Wells Fargo Has Acted Expeditiously, and Any Delay Does Not Justify Deviating from the Contractual Prejudgment Interest Rates or Decreasing Other Costs**

In its opposition to the OSC, Legal Services contends that, due to the delay foreclosures have experienced, the Court should adjust the prejudgment interest rates. This argument must fail, as it completely overlooks: (A) the fact that any delay has harmed Wells Fargo and benefitted borrowers; and (B) the fact that Wells Fargo has prosecuted its foreclosures as expeditiously as possible, given the significant legal and process uncertainties that are well known to this Court.

##### **A. Any Delay Has Harmed Wells Fargo and Benefitted Borrowers**

To the extent the Court looks beyond the plain, contractual terms and considers the judicial delay as part of the analysis, it should find that the equities favor Wells Fargo. Therefore, any delay should not detract from the interest due to Wells Fargo under the contractual interest provisions. Rewriting the contractual interest provision would result in a highly inequitable result.

Contrary to Legal Services' suggestion in its opposition to the OSC that "the delay has been extremely prejudicial to homeowners," borrowers have not suffered any harm due to the delay. In fact, while the foreclosures have remained frozen, borrowers have avoided the substantial burdens of making mortgage payments and paying property taxes, homeowner's insurance, and flood insurance. As the servicer, Wells Fargo has taken on the burdens of paying the property taxes, homeowner's insurance, and flood insurance on behalf of borrowers who defaulted on their mortgages.

Legal Services' case involving Mr. Clayton Pierce exemplifies how Wells Fargo takes on those burdens when borrowers default on their loan obligations. To this point in time, Wells Fargo has advanced almost \$50,000.00 on Mr. Pierce's behalf for escrow disbursements for taxes and insurance.

Additionally, while prejudgment interest has continued to accrue, borrowers will likely never realize the burden of paying that accrued interest. This is because, in most cases, after the sheriff's sale takes place, Wells Fargo does not exercise its right to pursue deficiency judgments. See N.J.S.A. 2A:50-2 ("Except as otherwise provided, all proceedings to collect any debt secured by a mortgage on real property, shall be as follows . . . Second, an action on the bond or note for any deficiency, if, at the sale in the foreclosure proceeding, the mortgaged premises do not bring

an amount sufficient to satisfy the debt, interest and costs.”). The Court recognized this at the November 15, 2012 hearing:

12                   The other thing that I haven't seen, however,  
13   are actions for deficiencies. And so while these  
14   numbers, while the interest rate and the amount of  
15   judgment may be troubling to homeowners, I have not  
16   seen except perhaps in commercial settings, plaintiffs  
17   filing deficiency motions. And so maybe what we are  
18   looking at is form over substance.

Transcript, November 15, 2012, p. 74. Instead, Wells Fargo generally only collects on proceeds from the sheriff's sale and therefore incurs losses due to decreased property values. This has caused Wells Fargo harm and substantial burdens.

Furthermore, Wells Fargo has no incentive or interest in delaying the foreclosure process. The lender cannot recoup any of its losses on a non-performing loan until it receives the proceeds from the sheriff's sale, so delaying the foreclosure process delivers absolutely no benefit to the lender. Conversely, borrowers clearly benefit from an elongated foreclosure process, as they can remain in their homes for additional time without paying their monthly obligations under the note and mortgage.

Ironically, while arguing that the delay has harmed borrowers, Legal Services actually also requests *more* judicial process, not less. In doing so, Legal Services undermines its own argument.

Legal Services' October 18, 2012 objection makes multiple requests for remedies, which would involve yet more judicial process which in turn would cause additional delay. Those proposed remedies include:

- Individual hearings for borrowers who objected to the OSC, regardless of the form of the objection (oral, written, etc.); and
- Referral of matters to the vicinages where borrowers allege that Wells Fargo did not process loan modification applications properly.

At the November 15, 2012 Final Hearing, Ms. Jurow also orally requested that every objecting borrower receive an individual hearing:

9 MS. JUROW: Your Honor, what you can do  
10 though is you can give everyone who's objected an  
11 opportunity for a hearing. You can let those go to the  
12 individual vicinage judges. It is fewer than I think a  
13 tenth of a percent of the people who objected. The  
14 people who reached out and said I want to be heard, I  
15 want my day in court. Judges do have the ability to  
16 issue different remedies. They do have the ability to  
17 dismiss cases. They do have the ability to order  
18 equitable remedies.

Transcript, November 15, 2012, p. 56. Clearly, Legal Services' requested remedies would have further prolonged the foreclosure processes had this Court accepted those arguments.

Legal Services cannot have it both ways. Legal Services cannot simultaneously and credibly argue that judicial delays have prejudiced borrowers and then argue that additional judicial process (and delays) would benefit borrowers. Legal Services' argument regarding prejudice and delay must fail, and the Court must therefore enforce and uphold the agreement upon contractual prejudgment interest rates.

**B. Wells Fargo Has Prosecuted its Foreclosures Expeditiously**

To the extent that Legal Services suggests that Wells Fargo has not prosecuted foreclosures in a prompt manner, it is incorrect. The past several years have involved large-scale

changes in the legal framework of New Jersey's residential mortgage foreclosure process. Those changes, along with an increase in the volume of foreclosures, have led to uncertainty and delays in the foreclosure process. But Wells Fargo has always prosecuted its foreclosures as expeditiously as prudently possible. In fact, Wells Fargo has been at the forefront of clearing up legal uncertainties and pushing along foreclosure cases.

The first change to the legal landscape came in December of 2010, when the New Jersey Courts, on an emergent basis, amended Court Rules 1:5-6, 4:64-1 and 4:64-2. See December 20, 2010 Order. Those amendments required that counsel for Foreclosure Plaintiffs attach a Certification of Diligent Inquiry ("CODI") as to the accuracy of foreclosure documents and factual assertions. R. 4:64-2(d). Initially, Counsel for Foreclosure Plaintiffs in all uncontested residential foreclosure cases pending entry of judgment were ordered to file and serve a CODI by February 18, 2011. See December 20, 2010 Order. Various interested parties submitted comments on the new Rules, including issues and problems with implementing those new Rules as originally composed. The Supreme Court of New Jersey had not sought public comment prior to amending the Rules consistent with the ordinary Rule adoption process, but, on January 31, 2011, it retroactively sought public comment. See January 31, 2011 Order. At the same time, Chief Justice Rabner ordered an indefinite extension, "until further order," of the time for Foreclosure Plaintiffs' counsel to file a CODI in uncontested foreclosure actions pending entry of final judgment. Id. (emphasis added). After a period of public comment, the Supreme Court issued revised Rules governing CODIs on June 9, 2011.

On December 20, 2010, the Court also issued an Order to Show Cause to the six largest servicers, including Wells Fargo, concerning certain foreclosure processes. The Order to Show Cause required Wells Fargo to demonstrate to the Court that its foreclosure procedures were

compliant with the law, including the newly enacted CODI requirement. Over the next six (6) months, Wells Fargo worked with the Court and the Special Master appointed to that process. On August 15, 2011, the Special Master issued a recommendation to the Court to approve the processing of Wells Fargo's foreclosures as servicer. Judge Jacobson adopted the Recommendation on that same day, August 15, 2011.

Right around the same time that Judge Jacobson cleared the path for foreclosure processing by Wells Fargo as a servicer to continue, another hurdle arose which stalled foreclosures. On August 8, 2011, the Appellate Division issued a decision for publication in Bank of New York v. Laks, 422 N.J. Super. 201 (App. Div. 2011), which caused immediate havoc. In Laks, the Court held that if the NOI failed to adhere to the strict requirements of the FFA, the Court was deprived of subject matter jurisdiction and such a case must be dismissed without prejudice. Laks caused great uncertainty because the Supreme Court Order required retroactive application of the new CODI requirement to pending foreclosure cases.

Several months earlier, however, Wells Fargo had actually obtained a different decision from a different Appellate Division panel on the issue of the NOI requirements of the FFA. In U.S. Bank National Association v. Guillaume, 2011 WL 1485258 (App. Div. 2011), the Appellate Division held that the NOI that only listed Wells Fargo, the servicer, but not the lender, was sufficient because it put the defendant on notice of all of the information he would need to try to cure a default of his loan. The defendant, represented by Legal Services, sought review by the New Jersey Supreme Court. After the Laks decision was issued, causing a split in the case law, Wells Fargo immediately withdrew its opposition to the Guillaume Petition to the Supreme Court and joined in Legal Services' Petition. The Supreme Court agreed and took the case on an emergent basis. The Court heard argument on November 30, 2011, and decided the

matter on February 27, 2012. U.S. Bank National Association v. Guillaume, 209 N.J. 449 (2012). In rendering its decision, the Court noted “[i]n the wake of Laks, supra, there is a conflict in the case law with respect to a remedy for a violation of N.J.S.A. 2A:50-56(c)(11).” Guillaume, 209 N.J. at 475 (citation omitted). The Court overruled Bank of New York v. Laks, 422 N.J. Super. 201 (App. Div. 2011) and finally settled New Jersey law on the proper remedy for a technical violation of the FFA’s NOI requirements.

To implement the Supreme Court’s decision, on April 4, 2012, Chief Justice Rabner entered an Order authorizing the Honorable Margaret Mary McVeigh, P.J.Ch. and the Honorable Paul Innes, P.J.Ch. to entertain summary actions by Order to Show Cause as to why corrected NOI should not be allowed to be served in pending pre-judgment, uncontested foreclosure cases. April 4, 2012 Order. Wells Fargo filed the first application on May 29, 2012, and the present matter ensued. This Court has noted that the alternatives to this summary proceeding of either dismissal or individual motions, would not assist anyone in the process:

21 chance. And I don't think that dismissal of cases  
22 randomly and wholesale is an answer to the problem.  
23 It's not going to help the plaintiffs, it's not going  
24 to help the defendants. Continued delay, you're  
25 correct, is a problem.

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Transcript, November 15, 2012, p. 73. And in June, this Court noted that the Supreme Court issued the April 4, 2012 Order to provide for summary action that was filed by Wells Fargo and that individual actions would create an overwhelming problem for the Courts:

1 Court that this be done in a bulk fashion, that it not  
2 be done on an individual basis. That we don't have our  
3 vicinage judges dealing with thousands of cases one at  
4 a time. That would, in fact, create an overwhelming  
5 problem for the court.

Transcript, June 7, 2012 at p. 20.

As each legal issue has developed in New Jersey over the past few years, Wells Fargo has been at the forefront in attempting to promptly resolve the thorny issues. And Wells Fargo has expeditiously moved along its foreclosures. It worked diligently with the Special Master to receive approval of its foreclosure processes and was the first major bank to follow the Supreme Court's April 4, 2012 Order and institute the present OSC. As noted previously, this Court cannot put Wells Fargo in a worse position for following the Order of the Supreme Court than it would have been if it had filed individual motions in over 3,000 case or had dismissed all of the cases, thereby causing yet other issues and potential problems.

**V. This Court Should Not Reduce Any Contractually Permissible Inspection Fees or Appraisal Costs**

In Guillaume, the Court held that a trial court has the discretion to fashion a remedy for a violation of the FFA NOI requirements. The Court stated that a trial court could order a cure of the NOI and could also reduce the attorneys' fees and court costs incurred in the foreclosure case, citing to N.J.S.A. 2A:50-57(b)(3). Guillaume, 209 N.J. at 587. In attempting to offer the full host of remedies outlined in Guillaume, when Wells Fargo filed this OSC, Wells Fargo voluntarily agreed up front to exclude all attorneys' fees and court costs from the Corrected NOIs, not just reduce those fees. This Court entered that OSC.

However, very late in this process, Legal Services vaguely raised for the first time the issue of eliminating other types of costs that are permitted to be charged under the loan contracts, such as late fees, appraisal costs and inspection costs. The preceding analysis of New Jersey law concerning upholding the contract interest rate applies with equal force to other contractually permitted fees and costs to preserve the property/collateral. See, e.g. Alsentzer, 2005 WL 3701461, at \*7, wherein the Appellate Division upheld the award of late fees that were contractually agreed upon in the promissory note.

In Alsentzer (discussed above), “plaintiff Mark Alsentzer filed suit against defendant Stephen Bulboff seeking recovery of an unpaid balance of \$300,000 allegedly due on a promissory note, plus interest, penalties and attorney’s fees.” Id. at \*1. The promissory note provided for interest at 9.5% per year and for “a late charge of five cents for each dollar overdue for a period in excess of ten days.” Id. at \*2, \*7. Nonetheless, the Chancery Division “only allowed two years of prejudgment interest, finding that term ‘reasonable’ as the result of Alsentzer’s perceived delay in obtaining judgment on his claim. Late fees were similarly limited.” Id. at \*7. Relying on the express terms of the contractual agreement, the Appellate Division overruled and reversed the lower court: “we reverse, finding no basis in law for the court’s determination not to honor the terms of the note and no obligation on the part of Alsentzer to mitigate his damages by moving more swiftly.” Id. Further, the Appellate Division determined that equitable principles “are inapplicable when the rate of interest is . . . determined by contract.” Id. The Appellate Division not only required that prejudgment interest follow the contractual terms, but also increased the late fees, which had been limited due to the alleged delay. Id.

For a concrete example of the contractually permitted fees, Legal Services' client Mr. Pierce's mortgage contains a provision that permits the lender to recover from Mr. Pierce all amounts that are advanced to secure and to protect the property. See Pierce Mortgage, paragraph 9, a true and correct copy of which is attached hereto.

Furthermore, in addition to the fact that the contracts at issue typically allow such charges, these amounts are incurred in the necessary servicing of the contracts. For example, when a loan goes into default, Wells Fargo hires third party vendors to undertake property inspections to determine the status of the property. Property inspections reveal whether properties are abandoned, which then requires Wells Fargo to properly secure the property/collateral to prevent vandalism and blight. As the Court is aware from this OSC, many of the properties at issue in this case are now vacant. In addition, such inspections may reveal that the property is in need of repair and/or maintenance. Such actions, including securing, repairing and maintaining properties benefit the neighborhoods and community as a whole because these actions prevent vandalism, arson, blight, etc. which might spread to the neighboring properties. Thus, in addition to the fact that the contracts at issue typically permit the lender to pass these costs along in the event of default, the equities favor allowing Wells Fargo to collect such amounts as the servicer for the lender.

Finally, the Fair Foreclosure Act also speaks to the collection of late fees when a borrower is seeking to reinstate. Section 2A:50-57 of the Act provides borrowers with the

right at any time, *up to the entry of final judgment* or the entry by the office or the court of an order of redemption pursuant to subsection g. of section 11 of this act, to cure the default, de-accelerate and reinstate the residential mortgage by tendering the amount or performance specified in subsection b. of this section.

[Id. (emphasis added).]

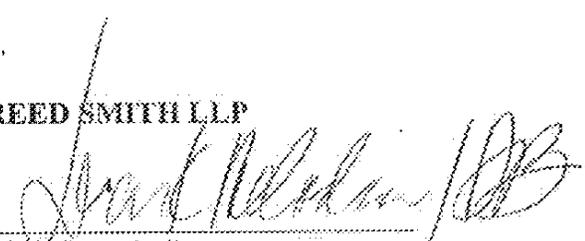
And subsection "b" states that, "to cure a default under this section, a debtor shall . . . (4) pay all contractual late charges, as provided for in the note or security agreement." Id. Thus, Section 2A:50-57 envisions circumstances where a Foreclosure Plaintiff files a complaint and, at some point prior to the entry of final judgment, the borrower cures the default by paying off the arrearages, including late fees.

Wells Fargo agreed, for purposes of the Corrected NOIs, to exclude all of the attorneys' fees and court costs that had been incurred in the pending cases. There is no reason to go beyond that offer because to do otherwise would unfairly prejudice and punish Wells Fargo when: the parties previously agreed in the contracts that such charges could be collected from the borrower; Such costs are incurred to benefit the properties and communities generally; the FFA allows for the recovery of such amounts; and Wells Fargo has diligently pushed along its foreclosures to the extent that it could.

#### **VI. Conclusion**

For all of the foregoing reasons, Wells Fargo asks that this Court enforce the contractual provisions to which borrowers and lenders agreed in their loan contracts and deny the application of Legal Services in its entirety.

**REED SMITH LLP**

  
\_\_\_\_\_  
Mark S. Melodia

Dated: December 5, 2012

**TAB #2**

16

Return To:  
FIRST HORIZON HOME LOAN CORPORATION

5901 COLLEGE BOULEVARD, 3RD FLOOR  
OVERLAND PARK, KS 66211



Received & Recorded Mortgage X  
Union County, NJ  
4/06/2006 8:47  
Jennise Rajopani  
County Clerk  
Consideration \$00  
RT Fee \$00  
Page 18  
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Prepared By:  
FIRST HORIZON HOME LOAN CORPORATION

5901 COLLEGE BOULEVARD, 3RD FLOOR  
OVERLAND PARK, KS 66211

[Space Above This Line For Recording Data]

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# MORTGAGE

## DEFINITIONS

Words used in multiple sections of this document are defined below and other words are defined in Sections 3, 11, 13, 18, 20 and 21. Certain rules regarding the usage of words used in this document are also provided in Section 16.

- (A) "Security Instrument" means this document, which is dated January 26th, 2006 together with all Riders to this document.
- (B) "Borrower" is  
CLAYTON S. PIERCE

Borrower is the mortgagor under this Security Instrument.  
(C) "Lender" is FIRST HORIZON HOME LOAN CORPORATION

Lender is a CORPORATION  
organized and existing under the laws of THE STATE OF KANSAS

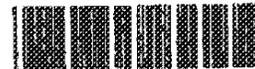
NEW JERSEY - Single Family - Fannie Mae/Freddie Mac UNIFORM INSTRUMENT

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YMP MORTGAGE FORMS - (000211-729)



M11636-0261

Lender's address is 4000 Horizon Way, Irving, Texas 75063

Lender is the mortgagee under this Security Instrument.

(D) "Note" means the promissory note signed by Borrower and dated January 26th, 2006

The Note states that Borrower owes Lender

THREE HUNDRED FORTY THOUSAND & 00/100 Dollars  
(U.S. \$ 340,000.00 ) plus interest. Borrower has promised to pay this debt in regular Periodic Payments and to pay the debt in full not later than February 1st, 2036

(E) "Property" means the property that is described below under the heading "Transfer of Rights in the Property."

(F) "Loan" means the debt evidenced by the Note, plus interest, any prepayment charges and late charges due under the Note, and all sums due under this Security Instrument, plus interest.

(G) "Riders" means all Riders to this Security Instrument that are executed by Borrower. The following Riders are to be executed by Borrower [check box as applicable]:

- |  |   |   |
|--|---|---|
| <input type="checkbox"/> Adjustable Rate Rider | <input type="checkbox"/> Condominium Rider              | <input type="checkbox"/> Second Home Rider  |
| <input type="checkbox"/> Balloon Rider         | <input type="checkbox"/> Planned Unit Development Rider | <input type="checkbox"/> 1-4 Family Rider   |
| <input type="checkbox"/> VA Rider              | <input type="checkbox"/> Biweekly Payment Rider         | <input type="checkbox"/> Other(s) [specify] |

(H) "Applicable Law" means all controlling applicable federal, state and local statutes, regulations, ordinances and administrative rules and orders (that have the effect of law) as well as all applicable final, non-appealable judicial opinions.

(I) "Community Association Dues, Fees, and Assessments" means all dues, fees, assessments and other charges that are imposed on Borrower or the Property by a condominium association, homeowners association or similar organization.

(J) "Electronic Funds Transfer" means any transfer of funds, other than a transaction originated by check, draft, or similar paper instrument, which is initiated through an electronic terminal, telephonic instrument, computer, or magnetic tape so as to order, instruct, or authorize a financial institution to debit or credit an account. Such term includes, but is not limited to, point-of-sale transfers, automated teller machine transactions, transfers initiated by telephones, wire transfers, and automated clearinghouse transfers.

(K) "Escrow Items" means those items that are described in Section 3.

(L) "Miscellaneous Proceeds" means any compensation, settlement, award of damages, or proceeds paid by any third party (other than insurance proceeds paid under the coverages described in Section 5) for: (i) damage to, or destruction of, the Property; (ii) condemnation or other taking of all or any part of the Property; (iii) conveyance in lieu of condemnation; or (iv) misrepresentations of, or omissions as to, the value and/or condition of the Property.

(M) "Mortgage Insurance" means insurance protecting Lender against the nonpayment of, or default on, the Loan.

(N) "Periodic Payment" means the regularly scheduled amount due for (i) principal and interest under the Note, plus (ii) any amounts under Section 3 of this Security Instrument.

(O) "RESPA" means the Real Estate Settlement Procedures Act (12 U.S.C. Section 2601 et seq.) and its implementing regulation, Regulation X (24 C.F.R. Part 3500), as they might be amended from time to time, or any additional or successor legislation or regulation that governs the same subject matter. As used in this Security Instrument, "RESPA" refers to all requirements and restrictions that are imposed in regard to a "federally related mortgage loan" even if the Loan does not qualify as a "federally related mortgage loan" under RESPA.

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(F) "Successor in Interest of Borrower" means any party that has taken title to the Property, whether or not that party has assumed Borrower's obligations under the Note and/or this Security Instrument.

**TRANSFER OF RIGHTS IN THE PROPERTY**

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. For these purposes, Borrower does hereby mortgage, grant and convey to Lender the following described property located in the \_\_\_\_\_ County \_\_\_\_\_ of \_\_\_\_\_ Union \_\_\_\_\_ [Type of Recording Jurisdiction] \_\_\_\_\_ [Name of Recording Jurisdiction]

All that tract or parcel of land as shown on Schedule "A" attached hereto which is incorporated herein and made a part hereof.

Property Account Number: County: **RWJ-1014-U** City: **N/A** which currently has the address of  
**3 ROBIN ROAD** [Street]  
**PANWOOD** [City], New Jersey **07023** [Zip Code]  
("Property Address");

TOGETHER WITH all the improvements now or hereafter erected on the property, and all easements, appurtenances, and fixtures now or hereafter a part of the property. All replacements and additions shall also be covered by this Security Instrument. All of the foregoing is referred to in this Security Instrument as the "Property."

**BORROWER COVENANTS** that Borrower is lawfully seized of the estate hereby conveyed and has the right to grant and convey the Property and that the Property is unencumbered, except for encumbrances of record. Borrower warrants and will defend generally the title to the Property against all claims and demands, subject to any encumbrances of record.

**THIS SECURITY INSTRUMENT** combines uniform covenants for national use and non-uniform covenants with limited variations by jurisdiction to constitute a uniform security instrument covering real property.

**UNIFORM COVENANTS.** Borrower and Lender covenant and agree as follows:

1. **Payment of Principal, Interest, Escrow Items, Prepayment Charges, and Late Charges.** Borrower shall pay when due the principal of, and interest on, the debt evidenced by the Note and any prepayment charges and late charges due under the Note. Borrower shall also pay funds for Escrow Items pursuant to Section 3. Payments due under the Note and this Security Instrument shall be made in U.S. currency. However, if any check or other instrument received by Lender as payment under the Note or this

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Security Instrument is returned to Lender unpaid, Lender may require that any or all subsequent payments due under the Note and this Security Instrument be made in one or more of the following forms, as selected by Lender: (a) cash; (b) money order; (c) certified check, bank check, treasurer's check or cashier's check, provided any such check is drawn upon an institution whose deposits are insured by a federal agency, instrumentality, or entity; or (d) Electronic Funds Transfer.

Payments are deemed received by Lender when received at the location designated in the Note or at such other location as may be designated by Lender in accordance with the notice provisions in Section 15. Lender may return any payment or partial payment if the payment or partial payments are insufficient to bring the Loan current. Lender may accept any payment or partial payment insufficient to bring the Loan current, without waiver of any rights hereunder or prejudice to its rights to refuse such payment or partial payments in the future. If Lender accepts such payments, it shall apply such payments at the time such payments are accepted. No offset or claim which Borrower might have now or in the future against Lender shall relieve Borrower from making payments due under the Note and this Security Instrument or performing the covenants and agreements secured by this Security Instrument.

2. Application of Payments or Proceeds. Except as otherwise described in this Section 2, all payments accepted and applied by Lender shall be applied in the following order of priority: (a) interest due under the Note; (b) principal due under the Note; (c) amounts due under Section 3. Such payments shall be applied to each Periodic Payment in the order in which it became due. Any remaining amounts shall be applied first to late charges, second to any other amounts due under this Security Instrument, and then to reduce the principal balance of the Note.

If Lender receives a payment from Borrower for a delinquent Periodic Payment which includes a sufficient amount to pay any late charge due, the payment may be applied to the delinquent payment and the late charge. If more than one Periodic Payment is outstanding, Lender may apply any payment received from Borrower to the repayment of the Periodic Payments if, and to the extent that, each payment can be paid in full. To the extent that any excess exists after the payment is applied to the full payment of one or more Periodic Payments, such excess may be applied to any late charges due. Voluntary prepayments shall be applied first to any prepayment charges and then as described in the Note.

Any application of payments, insurance proceeds, or Miscellaneous Proceeds to principal due under the Note shall not extend or postpone the due date, or change the amount, of the Periodic Payments.

3. Funds for Escrow Items. Borrower shall pay to Lender on the day Periodic Payments are due under the Note, until the Note is paid in full, a sum (the "Funds") to provide for payment of amounts due for: (a) taxes and assessments and other items which can attain priority over this Security Instrument as a lien or encumbrance on the Property; (b) leasehold payments or ground rents on the Property, if any; (c) premiums for any and all insurance required by Lender under Section 5; and (d) Mortgage Insurance premiums, if any, or any sums payable by Borrower to Lender in lieu of the payment of Mortgage Insurance premiums in accordance with the provisions of Section 10. These items are called "Escrow Items." At origination or at any time during the term of the Loan, Lender may require that Community Association Dues, Fees, and Assessments, if any, be escrowed by Borrower, and such dues, fees and assessments shall be an Escrow Item. Borrower shall promptly furnish to Lender all notices of amounts to be paid under this Section. Borrower shall pay Lender the Funds for Escrow Items unless Lender waives Borrower's obligation to pay the Funds for any or all Escrow Items. Lender may waive Borrower's obligation to pay to Lender Funds for any or all Escrow Items at any time. Any such waiver may only be in writing. In the event of such waiver, Borrower shall pay directly, when and where payable, the amounts due for any Escrow Items for which payment

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of Funds has been waived by Lender and, if Lender requires, shall furnish to Lender receipts evidencing such payment within such time period as Lender may require. Borrower's obligation to make such payments and to provide receipts shall for all purposes be deemed to be a covenant and agreement contained in this Security Instrument, as the phrase "covenant and agreement" is used in Section 9. If Borrower is obligated to pay Escrow Items directly, pursuant to a waiver, and Borrower fails to pay the amount due for an Escrow Item, Lender may exercise its rights under Section 9 and pay such amount and Borrower shall then be obligated under Section 9 to repay to Lender any such amount. Lender may revoke the waiver as to any or all Escrow Items at any time by a notice given in accordance with Section 15 and, upon such revocation, Borrower shall pay to Lender all Funds, and in such amounts, that are then required under this Section 3.

Lender may, at any time, collect and hold Funds in an amount (a) sufficient to permit Lender to apply the Funds at the time specified under RESPA, and (b) not to exceed the maximum amount a lender can require under RESPA. Lender shall estimate the amount of Funds due on the basis of current data and reasonable estimates of expenditures of future Escrow Items or otherwise in accordance with Applicable Law.

The Funds shall be held in an institution whose deposits are insured by a federal agency, instrumentality, or entity (including Lender, if Lender is an institution whose deposits are so insured) or in any Federal Home Loan Bank. Lender shall apply the Funds to pay the Escrow Items no later than the time specified under RESPA. Lender shall not charge Borrower for holding and applying the Funds, annually analyzing the escrow account, or verifying the Escrow Items, unless Lender pays Borrower interest on the Funds and Applicable Law permits Lender to make such a charge. Unless an agreement is made in writing or Applicable Law requires interest to be paid on the Funds, Lender shall not be required to pay Borrower any interest or earnings on the Funds. Borrower and Lender can agree in writing, however, that interest shall be paid on the Funds. Lender shall give to Borrower, without charge, an annual accounting of the Funds as required by RESPA.

If there is a surplus of Funds held in escrow, as defined under RESPA, Lender shall account to Borrower for the excess funds in accordance with RESPA. If there is a shortage of Funds held in escrow, as defined under RESPA, Lender shall notify Borrower as required by RESPA, and Borrower shall pay to Lender the amount necessary to make up the shortage in accordance with RESPA, but in no more than 12 monthly payments. If there is a deficiency of Funds held in escrow, as defined under RESPA, Lender shall notify Borrower as required by RESPA, and Borrower shall pay to Lender the amount necessary to make up the deficiency in accordance with RESPA, but in no more than 12 monthly payments.

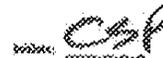
Upon payment in full of all sums secured by this Security Instrument, Lender shall promptly refund to Borrower any Funds held by Lender.

4. **Charges; Liens.** Borrower shall pay all taxes, assessments, charges, fines, and impositions attributable to the Property which can attain priority over this Security Instrument, leasehold payments or ground rents on the Property, if any, and Community Association Dues, Fees, and Assessments, if any. To the extent that these items are Escrow Items, Borrower shall pay them in the manner provided in Section 3.

Borrower shall promptly discharge any lien which has priority over this Security Instrument unless Borrower: (a) agrees in writing to the payment of the obligation secured by the lien in a manner acceptable to Lender, but only so long as Borrower is performing such agreement; (b) contests the lien in good faith by, or defends against enforcement of the lien in, legal proceedings which in Lender's opinion operate to prevent the enforcement of the lien while those proceedings are pending, but only until such proceedings are concluded; or (c) secures from the holder of the lien an agreement satisfactory to Lender subordinating the lien to this Security Instrument. If Lender determines that any part of the Property is subject to a lien which can attain priority over this Security Instrument, Lender may give Borrower a notice identifying the

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lien. Within 10 days of the date on which that notice is given, Borrower shall satisfy the lien or take one or more of the actions set forth above in this Section 4.

Lender may require Borrower to pay a one-time charge for a real estate tax verification and/or reporting service used by Lender in connection with this Loan.

5. Property Insurance. Borrower shall keep the improvements now existing or hereafter erected on the Property insured against loss by fire, hazards included within the term "extended coverage," and any other hazards including, but not limited to, earthquakes and floods, for which Lender requires insurance. This insurance shall be maintained in the amounts (including deductible levels) and for the periods that Lender requires. What Lender requires pursuant to the preceding sentences can change during the term of the Loan. The insurance carrier providing the insurance shall be chosen by Borrower subject to Lender's right to disapprove Borrower's choice, which right shall not be exercised unreasonably. Lender may require Borrower to pay, in connection with this Loan, either: (a) a one-time charge for flood zone determination, certification and tracking services; or (b) a one-time charge for flood zone determination and certification services and subsequent charges each time remappings or similar changes occur which reasonably might affect such determination or certification. Borrower shall also be responsible for the payment of any fees imposed by the Federal Emergency Management Agency in connection with the review of any flood zone determination resulting from an objection by Borrower.

If Borrower fails to maintain any of the coverages described above, Lender may obtain insurance coverage, at Lender's option and Borrower's expense. Lender is under no obligation to purchase any particular type or amount of coverage. Therefore, such coverage shall cover Lender, but might or might not protect Borrower, Borrower's equity in the Property, or the contents of the Property, against any risk, hazard or liability and might provide greater or lesser coverage than was previously in effect. Borrower acknowledges that the cost of the insurance coverage so obtained might significantly exceed the cost of insurance that Borrower could have obtained. Any amounts disbursed by Lender under this Section 5 shall become additional debt of Borrower secured by this Security Instrument. These amounts shall bear interest at the Note rate from the date of disbursement and shall be payable, with such interest, upon notice from Lender to Borrower requesting payment.

All insurance policies required by Lender and renewals of such policies shall be subject to Lender's right to disapprove such policies, shall include a standard mortgage clause, and shall name Lender as mortgagee and/or as an additional loss payee. Lender shall have the right to hold the policies and renewal certificates. If Lender requires, Borrower shall promptly give to Lender all receipts of paid premiums and renewal notices. If Borrower obtains any form of insurance coverage, not otherwise required by Lender, for damage to, or destruction of, the Property, such policy shall include a standard mortgage clause and shall name Lender as mortgagee and/or as an additional loss payee.

In the event of loss, Borrower shall give prompt notice to the insurance carrier and Lender. Lender may make proof of loss if not made promptly by Borrower. Unless Lender and Borrower otherwise agree in writing, any insurance proceeds, whether or not the underlying insurance was required by Lender, shall be applied to restoration or repair of the Property, if the restoration or repair is economically feasible and Lender's security is not lessened. During such repair and restoration period, Lender shall have the right to hold such insurance proceeds until Lender has had an opportunity to inspect such Property to ensure the work has been completed to Lender's satisfaction, provided that such inspection shall be undertaken promptly. Lender may disburse proceeds for the repairs and restoration in a single payment or in a series of progress payments as the work is completed. Unless an agreement is made in writing or Applicable Law requires interest to be paid on such insurance proceeds, Lender shall not be required to pay Borrower any interest or earnings on such proceeds. Fees for public adjusters, or other third parties, retained by Borrower shall not be paid out of the insurance proceeds and shall be the sole obligation of Borrower. If the restoration or repair is not economically feasible or Lender's security would be lessened, the insurance proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the

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excess, if any, paid to Borrower. Such insurance proceeds shall be applied in the order provided for in Section 2.

If Borrower abandons the Property, Lender may file, negotiate and settle any available insurance claim and related matters. If Borrower does not respond within 30 days to a notice from Lender that the insurance carrier has offered to settle a claim, then Lender may negotiate and settle the claim. The 30-day period will begin when the notice is given. In either event, or if Lender acquires the Property under Section 22 or otherwise, Borrower hereby assigns to Lender (a) Borrower's rights to any insurance proceeds in an amount not to exceed the amounts unpaid under the Note or this Security Instrument, and (b) any other of Borrower's rights (other than the right to any refund of unearned premiums paid by Borrower) under all insurance policies covering the Property, insofar as such rights are applicable to the coverage of the Property. Lender may use the insurance proceeds either to repair or restore the Property or to pay amounts unpaid under the Note or this Security Instrument, whether or not then due.

6. **Occupancy.** Borrower shall occupy, establish, and use the Property as Borrower's principal residence within 60 days after the execution of this Security Instrument and shall continue to occupy the Property as Borrower's principal residence for at least one year after the date of occupancy, unless Lender otherwise agrees in writing, which consent shall not be unreasonably withheld, or unless extenuating circumstances exist which are beyond Borrower's control.

7. **Preservation, Maintenance and Protection of the Property; Inspections.** Borrower shall not destroy, damage or impair the Property, allow the Property to deteriorate or commit waste on the Property. Whether or not Borrower is residing in the Property, Borrower shall maintain the Property in order to prevent the Property from deteriorating or decreasing in value due to its condition. Unless it is determined pursuant to Section 5 that repair or restoration is not economically feasible, Borrower shall promptly repair the Property if damaged to avoid further deterioration or damage. If insurance or condemnation proceeds are paid in connection with damage to, or the taking of, the Property, Borrower shall be responsible for repairing or restoring the Property only if Lender has released proceeds for such purposes. Lender may disburse proceeds for the repairs and restoration in a single payment or in a series of progress payments as the work is completed. If the insurance or condemnation proceeds are not sufficient to repair or restore the Property, Borrower is not relieved of Borrower's obligation for the completion of such repair or restoration.

Lender or its agent may make reasonable entries upon and inspections of the Property. If it has reasonable cause, Lender may inspect the interior of the improvements on the Property. Lender shall give Borrower notice at the time of or prior to such an interior inspection specifying such reasonable cause.

8. **Borrower's Loan Application.** Borrower shall be in default if, during the Loan application process, Borrower or any persons or entities acting at the direction of Borrower or with Borrower's knowledge or consent gave materially false, misleading, or inaccurate information or statements to Lender (or failed to provide Lender with material information) in connection with the Loan. Material representations include, but are not limited to, representations concerning Borrower's occupancy of the Property as Borrower's principal residence.

9. **Protection of Lender's Interest in the Property and Rights Under this Security Instrument.** If (a) Borrower fails to perform the covenants and agreements contained in this Security Instrument, (b) there is a legal proceeding that might significantly affect Lender's interest in the Property and/or rights under this Security Instrument (such as a proceeding in bankruptcy, probate, for condemnation or forfeiture, for enforcement of a lien which may attain priority over this Security Instrument or to enforce laws or regulations), or (c) Borrower has abandoned the Property, then Lender may do and pay for whatever is reasonable or appropriate to protect Lender's interest in the Property and rights under this Security Instrument, including protecting and/or assessing the value of the Property, and securing and/or repairing the Property. Lender's actions can include, but are not limited to: (a) paying any sums secured by a lien which has priority over this Security Instrument; (b) appearing in court; and (c) paying reasonable

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attorneys' fees to protect its interest in the Property and/or rights under this Security Instrument, including its secured position in a bankruptcy proceeding. Securing the Property includes, but is not limited to, entering the Property to make repairs, change locks, replace or board up doors and windows, drain water from pipes, eliminate building or other code violations or dangerous conditions, and have utilities turned on or off. Although Lender may take action under this Section 9, Lender does not have to do so and is not under any duty or obligation to do so. It is agreed that Lender incurs no liability for not taking any or all actions authorized under this Section 9.

Any amounts disbursed by Lender under this Section 9 shall become additional debt of Borrower secured by this Security Instrument. These amounts shall bear interest at the Note rate from the date of disbursement and shall be payable, with such interest, upon notice from Lender to Borrower requesting payment.

If this Security Instrument is on a leasehold, Borrower shall comply with all the provisions of the lease. If Borrower acquires fee title to the Property, the leasehold and the fee title shall not merge unless Lender agrees to the merger in writing.

18. **Mortgage Insurance.** If Lender required Mortgage Insurance as a condition of making the Loan, Borrower shall pay the premiums required to maintain the Mortgage Insurance in effect. If, for any reason, the Mortgage Insurance coverage required by Lender ceases to be available from the mortgage insurer that previously provided such insurance and Borrower was required to make separately designated payments toward the premiums for Mortgage Insurance, Borrower shall pay the premiums required to obtain coverage substantially equivalent to the Mortgage Insurance previously in effect, at a cost substantially equivalent to the cost to Borrower of the Mortgage Insurance previously in effect, from an alternate mortgage insurer selected by Lender. If substantially equivalent Mortgage Insurance coverage is not available, Borrower shall continue to pay to Lender the amount of the separately designated payments that were due when the insurance coverage ceased to be in effect. Lender will accept, use and retain these payments as a non-refundable loss reserve in lieu of Mortgage Insurance. Such loss reserve shall be non-refundable, notwithstanding the fact that the Loan is ultimately paid in full, and Lender shall not be required to pay Borrower any interest or earnings on such loss reserve. Lender can no longer require loss reserve payments if Mortgage Insurance coverage (in the amount and for the period that Lender requires) provided by an insurer selected by Lender again becomes available, is obtained, and Lender requires separately designated payments toward the premiums for Mortgage Insurance. If Lender required Mortgage Insurance as a condition of making the Loan and Borrower was required to make separately designated payments toward the premiums for Mortgage Insurance, Borrower shall pay the premiums required to maintain Mortgage Insurance in effect, or to provide a non-refundable loss reserve, until Lender's requirement for Mortgage Insurance ends in accordance with any written agreement between Borrower and Lender providing for such termination or until termination is required by Applicable Law. Nothing in this Section 18 affects Borrower's obligation to pay interest at the rate provided in the Note.

Mortgage Insurance reimburses Lender (or any entity that purchases the Note) for certain losses it may incur if Borrower does not repay the Loan as agreed. Borrower is not a party to the Mortgage Insurance.

Mortgage insurers evaluate their total risk on all such insurance in force from time to time, and may enter into agreements with other parties that share or modify their risk, or reduce losses. These agreements are on terms and conditions that are satisfactory to the mortgage insurer and the other party (or parties) to these agreements. These agreements may require the mortgage insurer to make payments using any source of funds that the mortgage insurer may have available (which may include funds obtained from Mortgage Insurance premiums).

As a result of these agreements, Lender, any purchaser of the Note, another insurer, any reinsurer, any other entity, or any affiliate of any of the foregoing, may receive (directly or indirectly) amounts that derive from (or might be characterized as) a portion of Borrower's payments for Mortgage Insurance, in exchange for sharing or modifying the mortgage insurer's risk, or reducing losses. If such agreement provides that an affiliate of Lender takes a share of the insurer's risk in exchange for a share of the premiums paid to the insurer, the arrangement is often termed "captive reinsurance." Further:

(a) Any such agreements will not affect the amounts that Borrower has agreed to pay for Mortgage Insurance, or any other terms of the Loan. Such agreements will not increase the amount Borrower will owe for Mortgage Insurance, and they will not entitle Borrower to any refund.

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(b) Any such agreements will not affect the rights Borrower has - if any - with respect to the Mortgage Insurance under the Homeowners Protection Act of 1998 or any other law. These rights may include the right to receive certain disclosures, to request and obtain cancellation of the Mortgage Insurance, to have the Mortgage Insurance terminated automatically, and/or to receive a refund of any Mortgage Insurance premiums that were unearned at the time of such cancellation or termination.

11. Assignment of Miscellaneous Proceeds; Forfeiture. All Miscellaneous Proceeds are hereby assigned to and shall be paid to Lender.

If the Property is damaged, such Miscellaneous Proceeds shall be applied to restoration or repair of the Property, if the restoration or repair is economically feasible and Lender's security is not lessened. During such repair and restoration period, Lender shall have the right to hold such Miscellaneous Proceeds until Lender has had an opportunity to inspect such Property to ensure the work has been completed to Lender's satisfaction, provided that such inspection shall be undertaken promptly. Lender may pay for the repairs and restoration in a single disbursement or in a series of progress payments as the work is completed. Unless an agreement is made in writing or Applicable Law requires interest to be paid on such Miscellaneous Proceeds, Lender shall not be required to pay Borrower any interest or earnings on such Miscellaneous Proceeds. If the restoration or repair is not economically feasible or Lender's security would be lessened, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower. Such Miscellaneous Proceeds shall be applied in the order provided for in Section 2.

In the event of a total taking, destruction, or loss in value of the Property, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower.

In the event of a partial taking, destruction, or loss in value of the Property in which the fair market value of the Property immediately before the partial taking, destruction, or loss in value is equal to or greater than the amount of the sums secured by this Security Instrument immediately before the partial taking, destruction, or loss in value, unless Borrower and Lender otherwise agree in writing, the sums secured by this Security Instrument shall be reduced by the amount of the Miscellaneous Proceeds multiplied by the following fraction: (a) the total amount of the sums secured immediately before the partial taking, destruction, or loss in value divided by (b) the fair market value of the Property immediately before the partial taking, destruction, or loss in value. Any balance shall be paid to Borrower.

In the event of a partial taking, destruction, or loss in value of the Property in which the fair market value of the Property immediately before the partial taking, destruction, or loss in value is less than the amount of the sums secured immediately before the partial taking, destruction, or loss in value, unless Borrower and Lender otherwise agree in writing, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument whether or not the sums are then due.

If the Property is abandoned by Borrower, or if, after notice by Lender to Borrower that the Opposing Party (as defined in the next sentence) offers to make an award to settle a claim for damages, Borrower fails to respond to Lender within 30 days after the date the notice is given, Lender is authorized to collect and apply the Miscellaneous Proceeds either to restoration or repair of the Property or to the sums secured by this Security Instrument, whether or not then due. "Opposing Party" means the third party that owes Borrower Miscellaneous Proceeds or the party against whom Borrower has a right of action in regard to Miscellaneous Proceeds.

Borrower shall be in default if any action or proceeding, whether civil or criminal, is begun that, in Lender's judgment, could result in forfeiture of the Property or other material impairment of Lender's interest in the Property or rights under this Security Instrument. Borrower can cure such a default and, if acceleration has occurred, reinstate as provided in Section 19, by causing the action or proceeding to be dismissed with a ruling that, in Lender's judgment, precludes forfeiture of the Property or other material impairment of Lender's interest in the Property or rights under this Security Instrument. The proceeds of any award or claim for damages that are attributable to the impairment of Lender's interest in the Property are hereby assigned and shall be paid to Lender.

All Miscellaneous Proceeds that are not applied to restoration or repair of the Property shall be applied in the order provided for in Section 2.

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initials: CSF

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**12. Borrower Not Released; Forbearance By Lender Not a Waiver.** Extension of the time for payment or modification of amortization of the sums secured by this Security Instrument granted by Lender to Borrower or any Successor in Interest of Borrower shall not operate to release the liability of Borrower or any Successors in Interest of Borrower. Lender shall not be required to commence proceedings against any Successor in Interest of Borrower or to refuse to extend time for payment or otherwise modify amortization of the sums secured by this Security Instrument by reason of any demand made by the original Borrower or any Successors in Interest of Borrower. Any forbearance by Lender in exercising any right or remedy including, without limitation, Lender's acceptance of payments from third persons, entities or Successors in Interest of Borrower or in amounts less than the amount then due, shall not be a waiver of or preclude the exercise of any right or remedy.

**13. Joint and Several Liability; Co-signers; Successors and Assigns Bound.** Borrower covenants and agrees that Borrower's obligations and liability shall be joint and several. However, any Borrower who co-signs this Security Instrument but does not create the Mass (a "co-signer"): (a) is co-signing this Security Instrument only to mortgage, grant and convey the co-signer's interest in the Property under the terms of this Security Instrument; (b) is not personally obligated to pay the sums secured by this Security Instrument; and (c) agrees that Lender and any other Borrower can agree to extend, modify, forbear or make any accommodations with regard to the terms of this Security Instrument or the Note without the co-signer's consent.

Subject to the provisions of Section 12, any Successor in Interest of Borrower who assumes Borrower's obligations under this Security Instrument in writing, and is approved by Lender, shall obtain all of Borrower's rights and benefits under this Security Instrument. Borrower shall not be released from Borrower's obligations and liability under this Security Instrument unless Lender agrees to such release in writing. The covenants and agreements of this Security Instrument shall bind (except as provided in Section 20) and benefit the successors and assigns of Lender.

**14. Loan Charges.** Lender may charge Borrower fees for services performed in connection with Borrower's default, for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument, including, but not limited to, attorneys' fees, property inspection and valuation fees. In regard to any other fees, the absence of express authority in this Security Instrument to charge a specific fee to Borrower shall not be construed as a prohibition on the charging of such fee. Lender may not charge fees that are expressly prohibited by this Security Instrument or by Applicable Law.

If the Loan is subject to a law which sets maximum loan charges, and that law is finally interpreted so that the interest or other loan charges collected or to be collected in connection with the Loan exceed the permitted limits, then: (a) any such loan charge shall be reduced by the amount necessary to reduce the charge to the permitted limit; and (b) any sums already collected from Borrower which exceeded permitted limits will be refunded to Borrower. Lender may choose to make this refund by reducing the principal owed under the Note or by making a direct payment to Borrower. If a refund reduces principal, the reduction will be treated as a partial prepayment without any prepayment charge (whether or not a prepayment charge is provided for under the Note). Borrower's acceptance of any such refund made by direct payment to Borrower will constitute a waiver of any right of action Borrower might have arising out of such overcharge.

**15. Notices.** All notices given by Borrower or Lender in connection with this Security Instrument must be in writing. Any notice to Borrower in connection with this Security Instrument shall be deemed to have been given to Borrower when mailed by first class mail or when actually delivered to Borrower's notice address if sent by other means. Notice to any one Borrower shall constitute notice to all Borrowers unless Applicable Law expressly requires otherwise. The notice address shall be the Property Address unless Borrower has designated a substitute notice address by notice to Lender. Borrower shall promptly notify Lender of Borrower's change of address. If Lender specifies a procedure for reporting Borrower's change of address, then Borrower shall only report a change of address through that specified procedure. There may be only one designated notice address under this Security Instrument at any one time. Any notice to Lender shall be given by delivering it or by mailing it by first class mail to Lender's address stated herein unless Lender has designated another address by notice to Borrower. Any notice in connection with this Security Instrument shall not be deemed to have been given to Lender until actually received by Lender. If any notice required by this Security Instrument is also required under Applicable Law, the Applicable Law requirement will satisfy the corresponding requirement under this Security Instrument.

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Title: \_\_\_\_\_

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16. **Governing Law; Severability; Rules of Construction.** This Security Instrument shall be governed by federal law and the law of the jurisdiction in which the Property is located. All rights and obligations contained in this Security Instrument are subject to any requirements and limitations of Applicable Law. Applicable Law might explicitly or implicitly allow the parties to agree by contract or it might be silent, but such silence shall not be construed as a prohibition against agreement by contract. In the event that any provision or clause of this Security Instrument or the Note conflicts with Applicable Law, such conflict shall not affect other provisions of this Security Instrument or the Note which can be given effect without the conflicting provision.

As used in this Security Instrument: (a) words of the masculine gender shall mean and include corresponding neuter words or words of the feminine gender; (b) words in the singular shall mean and include the plural and vice versa; and (c) the word "may" gives sole discretion without any obligation to take any action.

17. **Borrower's Copy.** Borrower shall be given one copy of the Note and of this Security Instrument.

18. **Transfer of the Property or a Beneficial Interest in Borrower.** As used in this Section 18, "interest in the Property" means any legal or beneficial interest in the Property, including, but not limited to, those beneficial interests transferred in a bond for deed, contract for deed, installment sales contract or escrow agreement, the intent of which is the transfer of title by Borrower at a future date to a purchaser.

If all or any part of the Property or any interest in the Property is sold or transferred (or if Borrower is not a natural person and a beneficial interest in Borrower is sold or transferred) without Lender's prior written consent, Lender may require immediate payment in full of all sums secured by this Security Instrument. However, this option shall not be exercised by Lender if such exercise is prohibited by Applicable Law.

If Lender exercises this option, Lender shall give Borrower notice of acceleration. The notice shall provide a period of not less than 30 days from the date the notice is given in accordance with Section 15 within which Borrower must pay all sums secured by this Security Instrument. If Borrower fails to pay these sums prior to the expiration of this period, Lender may invoke any remedies permitted by this Security Instrument without further notice or demand on Borrower.

19. **Borrower's Right to Reinstate After Acceleration.** If Borrower meets certain conditions, Borrower shall have the right to have enforcement of this Security Instrument discontinued at any time prior to the earliest of: (a) five days before sale of the Property pursuant to any power of sale contained in this Security Instrument; (b) such other period as Applicable Law might specify for the termination of Borrower's right to reinstate; or (c) entry of a judgment enforcing this Security Instrument. These conditions are that Borrower: (a) pays Lender all sums which then would be due under this Security Instrument and the Note as if no acceleration had occurred; (b) cures any default of any other covenants or agreements; (c) pays all expenses incurred in enforcing this Security Instrument, including, but not limited to, reasonable attorneys' fees, property inspection and valuation fees, and other fees incurred for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument; and (d) takes such action as Lender may reasonably require to assure that Lender's interest in the Property and rights under this Security Instrument, and Borrower's obligation to pay the sums secured by this Security Instrument, shall continue unchanged. Lender may require that Borrower pay such reinstatement sums and expenses in one or more of the following forms, as selected by Lender: (a) cash; (b) money order; (c) certified check, bank check, treasurer's check or cashier's check, provided any such check is drawn upon an institution whose deposits are insured by a federal agency, instrumentality or entity; or (d) Electronic Funds Transfer. Upon reinstatement by Borrower, this Security Instrument and obligations secured hereby shall remain fully effective as if no acceleration had occurred. However, this right to reinstate shall not apply in the case of acceleration under Section 18.

20. **Sale of Note; Change of Loan Servicer; Notice of Grievance.** The Note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times without prior notice to Borrower. A sale might result in a change in the entity (known as the "Loan Servicer") that collects Periodic Payments due under the Note and this Security Instrument and performs other mortgage loan servicing obligations under the Note, this Security Instrument, and Applicable Law. There also might be one or more changes of the Loan Servicer unrelated to a sale of the Note. If there is a change of the Loan Servicer, Borrower will be given written notice of the change which will state the name and address of the new Loan Servicer, the

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MI1636-0271

address to which payments should be made and any other information RESPA requires in connection with a notice of transfer of servicing. If the Note is sold and thereafter the Loan is serviced by a Loan Servicer other than the purchaser of the Note, the mortgage loan servicing obligations to Borrower will remain with the Loan Servicer or be transferred to a successor Loan Servicer and are not assumed by the Note purchaser unless otherwise provided by the Note purchaser.

Neither Borrower nor Lender may commence, join, or be joined to any judicial action (as either an individual litigant or the member of a class) that arises from the other party's actions pursuant to this Security Instrument or that alleges that the other party has breached any provision of, or any duty owed by reason of, this Security Instrument, until such Borrower or Lender has notified the other party (with such notice given in compliance with the requirements of Section 15) of such alleged breach and afforded the other party hereto a reasonable period after the giving of such notice to take corrective action. If Applicable Law provides a time period which must elapse before certain action can be taken, that time period will be deemed to be reasonable for purposes of this paragraph. The notice of acceleration and opportunity to cure given to Borrower pursuant to Section 22 and the notice of acceleration given to Borrower pursuant to Section 18 shall be deemed to satisfy the notice and opportunity to take corrective action provisions of this Section 20.

21. Hazardous Substances. As used in this Section 21: (a) "Hazardous Substances" are those substances defined as toxic or hazardous substances, pollutants, or wastes by Environmental Law and the following substances: gasoline, kerosene, other flammable or toxic petroleum products, toxic pesticides and herbicides, volatile solvents, materials containing asbestos or formaldehyde, and radioactive materials; (b) "Environmental Law" means federal laws and laws of the jurisdiction where the Property is located that relate to health, safety or environmental protection; (c) "Environmental Cleanup" includes any response action, remedial action, or removal action, as defined in Environmental Law; and (d) an "Environmental Condition" means a condition that can cause, contribute to, or otherwise trigger an Environmental Cleanup.

Borrower shall not cause or permit the presence, use, disposal, storage, or release of any Hazardous Substances, or threaten to release any Hazardous Substances, on or in the Property. Borrower shall not do, nor allow anyone else to do, anything affecting the Property (a) that is in violation of any Environmental Law, (b) which creates an Environmental Condition, or (c) which, due to the presence, use, or release of a Hazardous Substance, creates a condition that adversely affects the value of the Property. The preceding two sentences shall not apply to the presence, use, or storage on the Property of small quantities of Hazardous Substances that are generally recognized to be appropriate to normal residential uses and to maintenance of the Property (including, but not limited to, hazardous substances in consumer products).

Borrower shall promptly give Lender written notice of (a) any investigation, claim, demand, lawsuit or other action by any governmental or regulatory agency or private party involving the Property and any Hazardous Substance or Environmental Law of which Borrower has actual knowledge, (b) any Environmental Condition, including but not limited to, any spilling, leaking, discharge, release or threat of release of any Hazardous Substance, and (c) any condition caused by the presence, use or release of a Hazardous Substance which adversely affects the value of the Property. If Borrower learns, or is notified by any governmental or regulatory authority, or any private party, that any removal or other remediation of any Hazardous Substance affecting the Property is necessary, Borrower shall promptly take all necessary remedial actions in accordance with Environmental Law. Nothing herein shall create any obligation on Lender for an Environmental Cleanup.

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⑆-6(75) (cont)

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CS/P

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MI1636-0272

NON-UNIFORM COVENANTS. Borrower and Lender further covenant and agree as follows:

22. Acceleration; Remedies. Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument (but not prior to acceleration under Section 18 unless Applicable Law provides otherwise). The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument, foreclosure by judicial proceeding and sale of the Property; (e) the Borrower's right to reinstate after acceleration and the right to assert in the foreclosure proceeding the non-existence of a default or any other defense of Borrower to acceleration and foreclosure; and (f) any other disclosure required under the Fair Foreclosure Act, codified at Sections 2A:50-53 et seq. of the New Jersey Statutes, or other Applicable Law. If the default is not cured on or before the date specified in the notice, Lender at its option may require immediate payment in full of all sums secured by this Security Instrument without further demand and may foreclose this Security Instrument by judicial proceeding. Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this Section 22, including, but not limited to, attorneys' fees and costs of title evidence permitted by Rules of Court.

23. Release. Upon payment of all sums secured by this Security Instrument, Lender shall cancel this Security Instrument. Borrower shall pay any recordation costs. Lender may charge Borrower a fee for releasing this Security Instrument, but only if the fee is paid to a third party for services rendered and the charging of the fee is permitted under Applicable Law.

24. No Claim of Credit for Taxes. Borrower will not make deduction from or claim credit on the principal or interest secured by this Security Instrument by reason of any governmental taxes, assessments or charges. Borrower will not claim any deduction from the taxable value of the Property by reason of this Security Instrument.

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Form 1-81

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CSP

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MI1636-0273

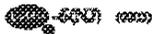
BY SIGNING BELOW, Borrower accepts and agrees to the terms and covenants contained in this Security Instrument and in any Rider executed by Borrower and recorded with it.

Signed, sealed and delivered in the presence of:

\_\_\_\_\_  
CLAYTON S. PIERCE (Seal)  
-Borrower

\_\_\_\_\_  
\_\_\_\_\_  
(Seal)  
-Borrower

0056796063



MI1636-0274

SCHEDULE C

File Number: NWJ-1014-U

Policy Number:

Beginning at a point in the northeasterly side line of Robin Road, said point being in the division line between lot number 1 and Block "P" as delineated on a certain map entitled "Map of Subdivision of Property of Fanwood Homes, Inc." said map being filed in the Union County Register's Office on May 14, 1959, as Map No. 505-A and lands as delineated on a certain map entitled "Map of Fanwood Terrace" said map being filed in the Union County Register's Office on November 7, 1937 as Map No. 29-F, said beginning point being also distant southeasterly 100.00 feet measured along said side line of Robin Road from the point where the same is intersected by the southeasterly side line of Coriell Avenue, if said side lines are produced to an intersection; thence (1) South 44 degrees 02 minutes East along said side line of Robin Road 75.00 feet to a point and corner in the division line between lot number 1 and 2 in Block "P" on the first above mentioned map; thence (2) North 45 degrees and 58 minutes East along said last mentioned division line 100.00 feet to a point and corner in the division line between lot number 1 in Block "P" on said map and lands as delineated on the aforesaid map entitled "Map of Fanwood Terrace"; thence (3) North 44 degrees and 02 minutes West along said last mentioned division line 75.00 feet to a point and corner in the first above mentioned division line between said lot number 1, in Block "P" on said map and lands delineated on the aforesaid map entitled "Map of Fanwood Terrace"; thence (4) South 45 degrees and 58 minutes West along said last mentioned division line 100.00 feet to the point of Beginning.

Being all of lot number 1 in Block "P" on said "Map of Subdivision of Property of Fanwood Homes, Inc."

NOTE: For Informational Purposes Only: Being Lot 25, Block 105, Tax Map of the Borough of Fanwood, County of Union.

Being the same premises which Clayton Pierce, also known as Clayton S. Pierce, married, by Indenture dated 05-23-95 and recorded 06-12-95 in the Union County Clerk's Office in Deed Book 4254 page 259, granted and conveyed unto Clayton S. Pierce and Evelyn Nelson, husband and wife.

ALTA Owner's Policy  
Schedule C

(NWJ-1014-U-PFD/NWJ-1014-U/1)

M11636-0275

STATE OF NEW JERSEY,

UNION County ss:

On this 26<sup>th</sup> day of January, 2006, before me, the subscriber,  
personally appeared  
CLAYTON S. PIERCE

who, I am satisfied,  
is/are the person(s) named in and who executed the within instrument, and thereupon acknowledged that  
he/she/they signed, sealed and delivered the same as his/her/their act and deed, for the purposes therein  
expressed.

*Salome Wangwe*

Notary Public

SALOME WANGWE  
NOTARY PUBLIC  
STATE OF NEW JERSEY  
MY COMMISSION EXPIRES JAN. 20, 2009

FIRST HORIZON HOME LOAN CORPOR  
5901 COLLEGE BOULEVARD  
3RD FLOOR  
OVERLAND PARK

Inst.#  
397876

KS 66211

Paid

Recording Fee

180.00

RT Fee

.00

Mortgage

0056796063  
-6(NJ) 0000

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Notarized \_\_\_\_\_

Form 3031 1/01

M11636-0276

END OF DOCUMENT



Received & Recorded Assignments-4  
 Union County, NJ Inst# 128624  
 11/09/2007 13:24 Pgs-2  
 Joanne Rajoppi Consider. .00  
 County Clerk RT Fee .00



This document prepared by:  
 Bill Hamblin  
 First Horizon Home Loan Corporation  
 5901 College Blvd. Overland Park, KS 66211  
 913-262-9393

*11/4/07*

0056796063 Assignment of Mortgage

For Value Received and without recourse, First Horizon Home Loan Corporation hereby grants, assigns and transfers to: US Bank National Association, as trustee for structured Asset Investment Loan trust, 2006-3

All the rights, title and interest of the undersigned in and to that certain Real Estate Mortgage in the amount of \$340,000.00

Dated 1/26/2006

Executed by CLAYTON S. PEREIRA

To First Horizon Home Loan Corporation whose address is 5901 College Boulevard, 3rd floor, Overland Park, KS 66211

Recorded on 4/6/06 in Book/Volume No. 11636

Page(s) 261 as Document No. \_\_\_\_\_

UNION County Records, State of NJ, on real estate legally described as follows:

All that certain lot, piece or parcel of land, with the building and improvements thereon erected, situate, lying and being in the Borough of Fanwood, County of Union and State of New Jersey, bounded and described as follows: Beginning at a point in the northeasterly side of line of Robin Road, said point being in the division line between lot number 1 in Block "P" as delineated on a certain map entitled "Map of Subdivision of Property of Fanwood Homes, Inc." said map being filed in the Union County Register's Office on May 14, 1958 as map No. 505-A and lands as delineated on a certain map entitled "Map of Fanwood Terrace" said map being filed in the Union County Register's Office on November 7, 1927 as Map No. 29-F, said beginning point being also distant southeasterly 100.00 feet measured along said side line of Robin Road from the point where the same is intersected by the southeasterly side line of Corlett Avenue, if said side lines are produced to an intersection; Thence: (1) South 44 degrees 02 minutes East along said side line of Robin Road 75.00 feet to a point and corner in the division line between lots number 1 and 2 in Block "P" on the first above mentioned map; (2) North 45 degrees 58 minutes East along said last mentioned division line 100.00 feet to a point and corner in the division line between Lot number 1 in Block "P" on said map and lands as delineated on the above said map entitled "Map of Fanwood Terrace"; (3) North 44 degrees 02 minutes West along said last mentioned division line 75.00 feet to a point and corner in the first above mentioned division line between said lot number 1, in Block "P" on said map and lands delineated on the aforesaid map entitled "Map of Fanwood Terrace"; (4) South 45 degrees 58 minutes West along said last mentioned division line 100.00 feet to the point or place of beginning. Being all of lot number 1 in Block "P" on said "Map of Subdivision of Property of Fanwood Homes, Inc."

Together with the note or notes therein described or referred to, the money due and to become thereon with interest, and all rights accrued or to accrue under said Real Estate Mortgage.

AB1360-0096

Dated: March 8, 2006

First Horizon Home Loan Corporation

Bill Hamblin, Div. Admin. Officer

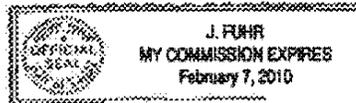
State of Kansas  
County of Johnson

On March 8, 2006 before me, the undersigned, a Notary Public in and for the said County and State, personally appeared Bill Hamblin to me personally known, who, being duly sworn by me, did say that he is the Div. Admin. Officer of First Horizon Home Loan Corporation, a Kansas Corporation and that said instrument was signed on behalf of said corporation by authority of its Board of Directors and said Div. Vice President acknowledged said instrument to be the free act and deed of said corporation. In testimony whereof, I have set my hand and affixed my official seal the day and year last above written.



Notary Name: J. Fuhr  
Notary Public for the state of Kansas  
My commission expires: 02/07/10

Send tax statement to/  
This document prepared by:  
Bill Hamblin  
First Horizon Home Loan Corporation  
5901 College Blvd.  
Overland Park, KS 66211  
913-262-9393



END OF DOCUMENT

PHELAN HALLINAN & SCHMIEG, PC  
ONE PENN CTR. @ SUBURBAN STA.  
1617 JFK BLVD., SUITE 1400  
PHILADELPHIA

Inst. #  
126624

PA 19103-9897  
Recording Fee 60.00  
RT Fee .00

Assignments

AB1360-0097

**TAB #1**

Not Reported in A.2d, 2005 WL 3701461 (N.J.Super.A.D.)  
 (Cite as: 2005 WL 3701461 (N.J.Super.A.D.))

**C**

Only the Westlaw citation is currently available.

**UNPUBLISHED OPINION. CHECK COURT  
 RULES BEFORE CITING.**

Superior Court of New Jersey,  
 Appellate Division,  
 Mark ALSENTZER, Plaintiff-Respondent/  
 Cross-Appellant,  
 v.  
 Stephen N. BULBOFF, Defendant/Third-Party  
 Plaintiff-Appellant,  
 and  
 Stout Partnership, Third-Party Defendant/  
 Respondent.

Argued Oct. 25, 2005.

Decided Jan. 26, 2006.

**Background:** Creditor brought action against debtor, seeking unpaid balance on promissory note, and debtor counterclaimed, seeking damages as the result of creditor's failure to close on two stock purchase agreements between debtor and creditor and between debtor and creditor's partnership. The Superior Court, Chancery Division, Gloucester County, entered summary judgment in favor of creditor on promissory note, and after a bench trial, dismissed counterclaim.

**Holdings:** On cross-appeals, the Superior Court, Appellate Division held that:

- (1) creditor and partnership did not breach stock purchase agreements, and
- (2) creditor was entitled to prejudgment interest in accordance with written terms of promissory note.

Affirmed in part, reversed in part, and remanded.

West Headnotes

**[1] Corporations and Business Organizations**

**101 ⇨2751**

101 Corporations and Business Organizations  
 101X Mergers, Acquisitions, and Reorganizations

101X(D) Sale or Transfer of All or Controlling Interest of Stock

101k2747 Agreements to Purchase or Sell Stock

101k2751 k. Performance or breach.

Most Cited Cases

(Formerly 101k118)

Creditor and creditor's partnership did not breach stock purchase agreements with debtor, even if creditor had actual oral notice of debtor's desire to close on agreements, where the agreements explicitly required written notice of a closing date to be provided by debtor, and he failed to provide such a date prior to the expiration of the agreements.

**[2] Interest 219 ⇨43**

219 Interest

219III Time and Computation

219k41 Stipulations as to Time

219k43 k. Particular provisions. Most Cited Cases

Creditor was entitled to prejudgment interest on unpaid portion of promissory note in accordance with the written terms of the promissory note.

On appeal from Superior Court of New Jersey, Chancery Division, General Equity Part, Gloucester County, Docket No. C-45-01. Steven E. Angstreich argued the cause for appellant/third-party plaintiff (Levy, Angstreich, Finney, Baldante, Rubenstein & Coren and Russell & Russell, attorneys; Mr. Angstreich, Amy R. Brandt and Brock D. Russell of counsel).

William F. Ziegler argued the cause for plaintiff-respondent/cross-appellant and third-party defendant/respondent (Holston MacDonald Uzdavinis

Not Reported in A.2d, 2005 WL 3701461 (N.J.Super.A.D.)  
(Cite as: 2005 WL 3701461 (N.J.Super.A.D.))

Eastlack & Ziegler attorneys; Mr. Ziegler, John C. Eastlack Jr. and Samuel J. Myles on the brief).

Before Judges AXELRAD, PAYNE and LEVY.

*Steven E. Angstreich* argued the cause for appellant/third-party plaintiff (*Levy, Angstreich, Finney, Baldante, Rubenstein & Coren and Russell & Russell*, attorneys; *Mr. Angstreich, Amy R. Brandt and Brock D. Russell* of counsel). *William F. Ziegler* argued the cause for plaintiff-respondent/cross-appellant and third-party defendant/respondent (*Holston MacDonald Uzdavinis Eastlack & Ziegler* attorneys; *Mr. Ziegler, John C. Eastlack Jr. and Samuel J. Myles* on the brief).

PER CURIAM.

\*1 On July 11, 2001, plaintiff Mark Alsentzer filed suit against defendant Stephen Bulboff seeking recovery of an unpaid balance of \$300,000 allegedly due on a promissory note, plus interest, penalties and attorney's fees. Bulboff answered and filed a counterclaim against Alsentzer. He later filed a third-party complaint against an entity for which Alsentzer then acted as managing partner, Stout Partnership. In the counterclaim and third-party complaint, Bulboff sought damages as the result of Alsentzer's failure to close on two stock purchase agreements (SPAs) between Alsentzer and himself and one agreement between Stout and himself.

On November 21, 2003, the trial court entered summary judgment in Alsentzer's favor on the note. It also found breach of the notice provisions of the SPAs, but reserved for trial whether compliance with the notice provisions had been waived. In an amended judgment entered on June 30, 2004 after a bench trial, the court dismissed Bulboff's counterclaim and third-party complaint, finding that Bulboff had failed to properly schedule a closing on the SPAs as specified by their terms, that those terms had not been waived, and that the agreements had expired. In addition to awarding Alsentzer \$300,000 on his promissory note claim, the judge

granted interest in the amount of \$57,000 for a period of two years, together with penalties of \$17,850. Lawyers' fees of \$27,175 and costs of \$1,870.86 were additionally awarded, for a total sum of \$403,895.86.

Bulboff has appealed the dismissal of his counterclaim and third-party complaint. Alsentzer has cross-appealed the court's award of interest, penalties and attorneys' fees.

On appeal, Bulboff claims that the court erred in (1) finding that Alsentzer and Stout Partnership did not breach the SPAs when they had actual knowledge of Bulboff's desire to close and refused to do so; (2) permitting Alsentzer and Stout to assert defective notice as a defense to their failure to close; (3) ruling that Alsentzer and Stout did not waive strict compliance with the SPAs' notice requirements; (4) failing to address Bulboff's claim of Alsentzer's breach of his duty of good faith and fair dealing by leading Bulboff to believe that a closing date would be set and in denying Bulboff's reasonable expectations; and (5) agreeing that Alsentzer and Stout had a right to rescind the SPAs, and that such rescission was embodied in the document known as the Stout II partnership agreement.

In his cross-appeal, Alsentzer argues that the trial court erred in arbitrarily limiting interest and penalties due under the note to a two-year period and awarding counsel fees only for recovery on the note. We affirm in part and reverse in part.

#### I.

This dispute arises out of a series of transactions between Bulboff, who owned or leased approximately thirteen car wash facilities, and Alsentzer, the chief executive officer of United States Plastic Lumber (USPL), a managing partner of Stout Partnership and a member of the board of directors of Mace Security International. Relevant facts commence with negotiations for the sale by Bulboff of his car wash businesses to American Wash Services, which was thereafter scheduled to merge into Mace. Consideration for the sale by

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Bulboff consisted in part of the receipt by him of shares of Mace common stock.

\*2 After the sale of Bulboff's car wash businesses had been negotiated, Alsentzer as general partner of Stout, designated as "seller," and Bulboff as "buyer" entered into a SPA, dated only by the year 1999, whereby Bulboff would exchange 313,348 of his shares in Mace for 313,348 shares of USPL owned by Stout.<sup>FN1</sup> An additional SPA, dated March 26, 1999, provided for the exchange by Alsentzer as "seller" of 100,000 USPL shares for 100,000 restricted shares of common stock in Mace owned by Bulboff, the "buyer." In a third SPA dated July 1, 1999, Bulboff as "seller" agreed to sell 25,000 restricted shares of common stock in Mace to Alsentzer for \$2.00 per share. All agreements were drafted by Bulboff's attorney. A principal purpose of these transactions was to diversify the parties' stock holdings. Additionally, Bulboff, sought to acquire unrestricted shares of USPL so that he could sell them and repay a debt to Alsentzer, which we will discuss later in this opinion.<sup>FN2</sup>

FN1. In May 1999, an agreement was entered between USPL and Bulboff restricting Bulboff's right to sell these shares for a period of one year.

FN2. Bulboff claimed at trial that sale of the 100,000 shares of USPL that were the subject of the March 26, 1999 agreement was not restricted.

The agreements each provided that the sales or exchanges would occur at a "Closing (as hereinafter defined)" and "[i]n the event a closing does not occur prior to the Expiration Date, this Agreement shall terminate and be of no further force or effect." The three agreements also contained a section entitled "Certain Definitions" that stated:

For purposes of this Agreement, the following terms shall have the following meanings:

a. "Closing" shall mean five (5) business days after the closing of a transaction pursuant to which Mace acquires all of the shares of American Wash Services, Inc., pursuant to a Merger Agreement dated March 29, 1999 ("the Paolino Agreement").

b. "Expiration Date" shall mean the date that the Paolino Agreement is terminated without a closing taking place.

In a section entitled "Closing Procedures," each agreement provided: "At any time from the date hereof until the Expiration Date, Buyer may set the date and place of the Closing by delivering written notice thereof to Seller at least three days prior to the designated date of Closing." Addresses for the service of notice were provided. The agreements also stated that "[a]ny provision of this Agreement may be amended or waived only with the prior written consent of the Seller and Buyer."

Neither of the SPAs envisioning a stock swap contained a provision for a market value adjustment if one stock to be swapped became more valuable than the other. Unfortunately, that is what happened, and USPL's value at one time came to exceed approximately twice that of Mace, thereby making a swap disadvantageous to Alsentzer and Stout. Additionally, testimony and evidence at trial established Alsentzer's concern that the stock transactions would be regarded as illegal insider trading by the Securities and Exchange Commission as the result of the business relationship between Alsentzer and both Mace and USPL.

Because the debt carried by Bulboff's car wash businesses at the time of the closing on their sale was greater than the parties had anticipated, necessitating a cash contribution by him, on July 1, 1999, a further agreement was reached between Bulboff and Alsentzer whereby Alsentzer loaned Bulboff the sum of \$450,000. The loan was secured by a promissory note and a pledge of 200,000 shares of Mace stock. The note provided for payment of interest from July 1, 1999 of nine and one-half per-

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cent per annum. The maturity date of the loan was October 1, 1999, at which time a lump-sum balloon payment of the entire outstanding balance plus interest was due. Additionally, the note provided for the payment of a late charge of five cents for each dollar overdue for a period in excess of ten days and for the payment by the defaulting debtor of reasonable attorney's fees incurred in collecting on the note. Bulboff returned \$150,000 of the balance of the loan immediately, as not needed. The remainder was not repaid, nor was the stock that served as collateral tendered. Bulboff claimed at trial that his purpose in signing the March 26, 1999 SPA was to acquire enough saleable shares of US-PL to fund repayment of his debt to Alsentzer. Bulboff's liability on the principal amount of the note is not disputed on appeal.

\*3 On June 30, 1999, the car wash deal closed, and a merger of American Wash Services and Mace occurred on July 5, 1999. None of the SPAs was consummated. At trial, Bulboff testified that he had sent several notices to close to Alsentzer. However, he produced a copy of only one notice which proposed two possible closing dates, but did not set a definite date for closing. Bulboff testified that he had hand delivered the notice to Alsentzer in Florida. Alsentzer denied receipt. The court credited Alsentzer's testimony, finding that Bulboff's recollection at trial of alleged events relating to notice that he had been unable to recall during his deposition rendered Bulboff's trial testimony incredible. In argument before us, Bulboff's counsel conceded the absence of proper written notice.<sup>FN3</sup>

FN3. Alsentzer has made no claim under the July 1, 1999 SPA, in which he as "buyer" could elect to close. That SPA is not a focus of this appeal.

According to Alsentzer's testimony, by late in the summer of 1999, both he and Bulboff recognized that the stock swap deals were dead. However, the alternative of pooling the stock was raised by Alsentzer. On November 2, 1999, a proposed agreement captioned the "Stout II Partner-

ship Agreement" was faxed on behalf of Alsentzer to Bulboff's New Jersey attorney. The agreement provided for the formation of a partnership between the Stout Partnership and Bulboff for "the purpose of purchasing or acquiring securities and making other investments in real or personal property as the opportunity may arise and as may be agreed upon by the Partners." The initial capital contribution by the partners was stated as 413,348 shares each of Mace and USPL, the total amounts of the prior stock swap agreements, and it was proposed that the stock would be pooled and sold, with the proceeds divided equally between the parties. Bulboff eventually rejected this proposal.

Matters lay fallow thereafter until June 2001 FN4 when Alsentzer demanded payment on the note or release of the shares pledged as security. Bulboff defaulted, and suit was commenced by Alsentzer.

FN4. Bulboff testified that during this period, "I got involved in my divorce, and I was thrown from my home and my life was in turmoil... I was living in-basically living in my car out of my house, and I was just worried about basic living. I didn't have a job." Trial testimony disclosed sporadic oral contact between Bulboff and Alsentzer.

## II.

Following entry of partial summary judgment and trial of remaining issues, the court issued an opinion from the bench. First, the judge confirmed his prior determination that notice of an intent to close was not properly provided, because Bulboff had failed to offer evidence of a writing conforming to the requirements of the SPAs that was delivered to Alsentzer or Stout. He also found evidence of receipt by Alsentzer of any other form of adequate notice by Bulboff or his attorney to be absent, and determined that any communications by Bulboff with Alsentzer were too indefinite to constitute notice, in that they may have indicated a general desire to close, but did not state a closing date. The

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court relied additionally upon testimony by Bulboff's attorney that he had never been requested by Bulboff to set a closing date, and that Bulboff was unwilling to disturb the friendly relationship that he maintained with AIsentzer by demanding a closing. The judge further cited to testimony that suggested that at the time, Bulboff lacked the shares of Mace stock necessary for a closing to occur.

\*4 The judge then found that the requirement of notice had not been waived, since there was no evidence that expressly or by implication demonstrated that AIsentzer had knowingly and voluntarily relinquished his rights in that regard. The court found:

This is not an agreement that lapsed on the basis of allegedly some oblique technical deficits. This is just a total failure of the buyer to ask in plain everyday English for a firm settlement date and set a time and place for settlement, which is the simplest of all things to do. As I said, also, there was no written or oral waiver of any terms, in my view.

\* \* \*

As I said, Bulboff never really indicated a firm date for settlement, never instituted a lawsuit, and the bottom line here is that there still wouldn't have been a claim made if Mr. A did not make an effort to collect his note.

The judge found further that AIsentzer came to believe that the stock swap envisioned by two of the SPAs was instead a sale with insider trading implications that could violate the law, but that AIsentzer still favored diversification. For that reason he sought to repudiate the agreements, which he in any case thought were long dead, and to substitute the stock pooling arrangement contained in the Stout II partnership agreement forwarded to Bulboff on November 2, 1999. The judge found further that, although Bulboff ultimately rejected the pooling proposal, his willingness to discuss it was consistent with AIsentzer's impression that the initial stock swap agreements

had lapsed. The court noted testimony by Bulboff's attorney that in connection with the rejection of the Stout II proposal, the attorney had orally demanded that the original stock swap agreements be honored. However, the attorney admitted that the demand was never reduced to writing, and no closing date was proposed.

The court found that by the time of the November 2 proposal, the SPAs had expired. In that connection, the judge noted an ambiguity in the expiration date of the SPAs arising from the definitional section of those agreements, which provided for a closing to occur five days after the merger of American Wash Services into Mace, but further defined the expiration date of the agreements as occurring when "the Paolino Agreement is terminated without a closing taking place"-a definition deprived of any significance by the fact that the closing had occurred. In this circumstance, in which the agreements could otherwise be construed as non-terminable, the court found that case law required that a "reasonable" time for termination be read in to them, and that such time had passed.

In general, the court rejected the credibility of Bulboff, finding that his conduct did not comport with business practices with which Bulboff was entirely familiar and his claim that he provided notice to AIsentzer and was strung along by him was not supported by the attorney that represented Bulboff throughout the period in question. Further, the court found that trial testimony at variance from that given by Bulboff in deposition exhibited a "clarity of recollection born of desperation," not the truth. Evidence that Bulboff claimed to exist to support his positions had not been produced during trial, and its absence had not been adequately explained. Indeed, the judge repeatedly observed that Bulboff's excuses for the lack of evidence most closely resembled "the dog ate my homework." Yet, "[i]n this case we have no dog, no x-ray of the dog," to establish the dog's conduct as an appropriate excuse.

\*5 The judge ended his opinion by stating:

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In this case I clearly conclude that Bulboff was not snookered in any way, or no one made him wait to do anything. The bottom line here is that Mr. Bulboff and his attorney just did not do anything the right way, and that's the bottom line in this case.

For all these reasons I find that as a matter of law that the contract was appropriately canceled, that there was no ... estoppel here, no breach of good faith and fair dealing, no waiver and no deal.

The counterclaim and third-party complaint were thus dismissed.

### III.

[1] Our review of the record satisfies us that the court's extensive findings of fact with respect to the counterclaim and third-party complaint were based upon substantial credible evidence and that no manifest denial of justice has taken place. We therefore decline to disturb those findings on appeal. *Rova Farms Resort, Inc. v. Investors Ins. Co.*, 65 N.J. 474, 483-84, 323 A.2d 495 (1974) Because Bulboff's arguments before us in large measure constitute challenges to the court's factual findings, those arguments are likewise rejected.

Bulboff argues on appeal that because Aisentzer, and through him, Stout, had actual oral notice of Bulboff's "desire to close," the court erred in finding that Aisentzer and Stout did not breach the SPAs. However the clear and unambiguous notice provisions of the agreements did not permit the expression of a mere desire for action to trigger the obligations that the agreements contained. *County of Morris v. Fenner*, 153 N.J. 80, 103, 707 A.2d 938 (1998) (where the terms of a contract are clear, the court must enforce it as written); *East Brunswick Sewerage Auth. v. East Mill Assoc., Inc.*, 365 N.J.Super. 120, 125, 838 A.2d 494 (App.Div.2004) ("A court has no power to rewrite the contract of the parties by substituting a new or different provision from what is clearly expressed in the instrument.") (citing *Schanck v. HJI Assocs.*,

295 N.J.Super. 445, 450, 685 A.2d 481 (App.Div.1996), *certif. denied*, 149 N.J. 35, 692 A.2d 48 (1997) and *Tomasuoli v. U.S. Fid. & Guar. Co.*, 75 N.J.Super. 192, 201, 182 A.2d 582 (App.Div.1962)). The agreements explicitly required written notice of a closing date to be provided by Bulboff to Aisentzer, and he has now admitted that no such notice was ever delivered.

The judge, by distinguishing precedent offered by Bulboff, found further that no evidence of notice in any other form that was of sufficient specificity to meet the agreements' terms was offered, either. We will not disturb that finding, which was based upon a thorough review of the evidence and evaluation of the credibility of the parties.

In the absence of actual notice, neither Aisentzer or Stout was obligated to act. Precedent cited by Bulboff, which concerns situations in which actual notice was received, is thus inapposite. See *G.B. Capital Mortgage Servs. Inc. v. Mari-lao*, 352 N.J.Super. 274, 800 A.2d 150 (App.Div.2002) (finding homeowner had waived strict compliance with statutory notice of foreclosure by declining to have notice posted on house); *Gaglia v. Kirchner*, 317 N.J.Super. 292, 721 A.2d 1028 (App.Div.1999) (actual notice of the rejection of a real estate contract was sufficient to avoid the contract, despite improper form of rejection), *certif. denied*, 169 N.J. 91, 733 A.2d 496 (1999); *Public Service Elec. & Gas Co. v. Uphold*, 316 N.J.Super. 168, 719 A.2d 1268 (App.Div.1998) (strict compliance with statutory notice of cancellation provisions was not required when actual notice had occurred and no prejudice was demonstrated), *certif. denied*, 160 N.J. 90 (1999); *Walford v. Unsatisfied Claim & Judgment Fund Bd.*, 113 N.J.Super. 495, 274 A.2d 317 (Law Div.1971) (notice to the Board, which was not on the statutorily mandated form, was sufficient to trigger the Board's duty to defend).

\*6 We find no legal support for Bulboff's further contention that Aisentzer and Stout were precluded from asserting that Bulboff's notice was de-

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fective because they had not notified Bulboff of that conclusion. Alsentzer's and Stout's inaction in that regard does not provide evidence of their waiver of the notice provisions of the agreements, either expressly or by implication. The judge found after a review of the trial record that no evidence of a voluntary and intentional relinquishment of a known right on Alsentzer's or Stout's part had been adduced by Bulboff, as required to prove waiver.

*County of Morris, supra*, 155 N.J. at 104, 713 A.2d 1043; *West Jersey Title & Guar. Co. v. Industrial Trust Co.*, 27 N.J. 144, 152-53, 141 A.2d 782 (1958).

Nor can Alsentzer's obvious diminishment of interest in consummating the SPAs be interpreted as creating an estoppel barring insistence upon compliance with those agreements' notice provisions. The testimony suggests Bulboff recognized Alsentzer's reluctance to close, and as a result of their friendship, did not press the issue with him. The evidence does not disclose misleading conduct on the part of Alsentzer or of reliance by Bulboff upon such conduct. *Knorr v. Smeal*, 178 N.J. 169, 178, 836 A.2d 794 (2003); *Casamasino v. City of Jersey City*, 158 N.J. 333, 354, 730 A.2d 287 (1999); *County of Morris, supra*, 153 N.J. at 104, 707 A.2d 958.

We do not construe the court's opinion as according either Alsentzer or Stout the right to "rescind" the SPAs while they remained in effect. The court instead read a reasonable termination provision into the agreements, as it was legally required to do given the absence of any clear indication when they were terminable and no evidence that the parties intended their perpetual duration. *See In re Miller's Estate*, 90 N.J. 210, 218-19, 447 A.2d 549 (1982) (a perpetual contract is not favored, and if a contract contains no express terms as to its duration, it is terminable at will or after a reasonable time); *Restatement (Second) of Contracts* § 204 (1981) (when the parties to a valid contract have not agreed in respect to a term that is essential to a determination of their rights and duties,

a term that is reasonable in the circumstances shall be supplied by the court). We decline to disturb the court's factual finding that termination had occurred, and was recognized to have occurred prior to November 2, 1999 and prior to any definite expression by Bulboff of an intent to close at a specific time. The SPAs had become financially unviable, and that fact was known to both Alsentzer and Bulboff.

Finally, we find no support for Bulboff's position on appeal that the court erred in determining that Alsentzer had not breached a duty of good faith and fair dealing in "leading Bulboff to believe Alsentzer would set a closing date and denying Bulboff his reasonable expectations under the Stock Purchase Agreements." Bulboff is correct that such a duty is inherent in every contract. *Wilson v. Amerada Hess Corp.*, 168 N.J. 236, 244, 773 A.2d 1121 (2001). However, after a comprehensive review of the evidence, the court suggested such a claim had not been supported by any evidence of unfair dealing. We concur. Bulboff possessed the power to require that the parties' obligations under the SPAs be performed. Evidence demonstrates that he failed to exercise that power.

\*7 As a consequence of the foregoing, we affirm the trial court's order dismissing Bulboff's counterclaim and third-party complaint as the result of his failure to meet his burden of proof on the issues raised therein.

### III.

Following trial of the matter, the court held additional argument on the issues of interest and late fees on the promissory note and attorneys' fees.

[2] As we have previously stated, the promissory note, entered on July 1, 1999, provided for payment of interest at a rate of nine and one-half percent per annum. The agreement further provided that "[c]ommencing August 1, 1999 and continuing on the first day of each month thereafter until October 1, 1999, Maker shall pay interest only ... at the aforesaid rate ... on the principal balance outstand-

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ing during the previous month." The entire balance on the note was payable in full on the maturity date, October 1, 1999. The agreement additionally stated:

If Maker shall fail to pay any sum when due or if Maker shall in any other way be in default hereunder, then the entire unpaid principal balance of this Note, together with interest accrued thereon and with all other sums due or owed by Maker hereunder or under the terms of the Stock Pledge Agreement shall at the option of Payee become due and payable immediately together with a reasonable attorney's fee for collection and payment of the same may be enforced and recovered by the entry of judgment on this Note and the issuance of execution thereon.

The remedies of Payee provided herein and in the Stock Pledge Agreement shall be cumulative and concurrent, and may be pursued singly, successively and together at the sole discretion of Payee, and may be exercised as often as occasion therefore shall occur; and the failure to exercise any such right or remedy shall in no event be construed as a waiver or release of the same.

Maker (and all endorsers, sureties and guarantors) waive presentment for payment, demand, notice of demand, notice of nonpayment or dishonor, protest and notice of protest of this Note, and all other notices in connection with the delivery, acceptance, performance, default or enforcement of the payment of this Note; liability hereunder shall be unconditional and shall not be affected in any manner by any indulgence, extension of time, renewal, waiver or modification granted or consented to by Payee.

A verified complaint seeking recovery on the loan was filed in the matter by Alsentzer on July 11, 2001 after entry, on July 9, 2001, of an order to show cause why Bulboff should not be restrained from transferring the 200,000 shares of Mace stock that served as collateral for the loan.

Despite the terms of the agreement, the court

only allowed two years of prejudgment interest, finding that term "reasonable" as the result of Alsentzer's perceived delay in obtaining judgment on his claim. Late fees were similarly limited.

Alsentzer has appealed from the court's ruling, and we reverse, finding no basis in law for the court's determination not to honor the terms of the note and no obligation on the part of Alsentzer to mitigate his damages by moving more swiftly. Although the allowance of interest in contractual actions is generally governed by equitable principles, such principles are inapplicable when the rate of interest is, as here, determined by contract. *Van Note-Harvey Assocs. v. Twp. of E. Hanover*, 175 N.J. 535, 541-42, 816 A.2d 1041 (2003). On appeal, Alsentzer seeks interest from October 1, 1999 and is entitled to that sum. Late fees shall similarly be enhanced. Bulboff is entitled to a credit for any interest and late fee payments made to date.

\*8 As a final matter, we find that the trial judge correctly interpreted the note as authorizing an award of attorneys' fees to Alsentzer, and that he properly exercised his discretion in limiting those fees to an amount attributable solely to the action on the note. *Packard-Bamberger & Co., Inc. v. Collier*, 167 N.J. 427, 444, 771 A.2d 1194 (2001); *Grubbs v. Knoll*, 376 N.J.Super. 420, 431-32, 870 A.2d 713 (App.Div.2005).

We affirm the court's grant to plaintiff Alsentzer of attorneys' fees and its dismissal of defendant Bulboff's counterclaim and third-party complaint. We reverse its award of interest and late fees, and remand the matter for entry of an amended judgment.

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END OF DOCUMENT



I further certify that on this date, I caused copies of the foregoing documents to be served  
via email on:

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

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

A handwritten signature in cursive script, appearing to read "Mark S. Melodia". The signature is written in dark ink and is positioned above a horizontal line.

Mark S. Melodia, Esquire

Dated: December 5, 2012