BRIGHTHOUSE LIFE INSURANCE, LLC, Plaintiff, vs. OVERBROOK1 LLC, MICHAEL KALISCH; UNKNOWN OCCUPANTS #1-10, Defendants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No.: A-001503-24 Trial Court Docket No.: SWC- F-011243-23 *CIVIL ACTION* On Appeal From: Superior Court of New Jersey, Law Division, Civil Part, Hudson County Sat Below: Hon. Jodi Lee Alper , P.J.Ch..

DEFENDANTS'/APPELLANTS' MEMORANDUM OF LAW

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TABLE OF CONTENTS

TABLE OF JUDGMENTS, ORDERS & RULINGS

TABLE OF AUTHORITIES

PRELIMINARY STATEMENT

This matter concerns a bad faith commercial foreclosure on real property situated at 362-364 Chadwick, Newark, NJ 07112 (the "Subject Property"), which was instituted by Plaintiff/Respondent, Brighthouse Life Insurance, LLC ("Plaintiff"), against Defendants/Appellants, Overbrook 1 LLC and Michael Kalisch ("Defendants"), in addition to "unknown occupants." Specifically, the proposed Third-Party Defendant, Commercial Lender, LLC ("Assignor"), which assigned Plaintiff the subject note, failed to mitigate damages and did not even apply additional payments that Assignor automatically debited from Defendants' account following a single technical default that occurred due to a low balance in Defendants' account for a single payment. Despite the post-default continued automatic debiting of payments from Defendants, Plaintiff failed to apply said payments to any principal or interest, including default interest, thereby allowing the default interest to continue to unfairly accrue at a rate of 30% *per annum.*

As far as Defendants know, and according to the mortgage statements Defendants receive from Plaintiff, those additional payments continue to remain in proverbial limbo without being applied to any monies owed. When Defendant, Mr. Kalisch (the guarantor and principal of the LLC borrower), contacted Assignor, Assignor advised Mr. Kalisch that Defendants' payments would remain in limbo until the default interest was paid off, but that fails to explain why Assignor never

applied those post-default payments to the continuously accruing 30% default interest.

While Mr. Kailsch struggled to understand Assignor's handling of the loan or even the status of the account, Mr. Kalisch continued to attempt to engage Assignor in an effort to resolve the matter and to see what could be speedily arranged to make the account current.

Although Assignor advised Mr. Kalisch that Assignor would negotiate and work with Mr. Kalisch in good faith, Mr. Kalisch routinely had difficulty communicating with Assignor, which needlessly protracted Mr. Kalisch's efforts to promptly remedy these issues with Defendants' account, resulting in further default interest accruing, despite, again, subsequent payments having been made. Thus, Assignor not only failed to mitigate its damages but acted in bad faith and engaged in sharp practices that resulted in any potential amounts due inequitably increasing to extreme sums. Assignor next assigned the note to Plaintiff, which then immediately filed for foreclosure, also failing to engage in any effort to mitigate Plaintiff's damages.

Overall, Assignor (proposed Third-Party Defendant) and Plaintiff failed to mitigate damages, breached the implied covenant of good faith and fair dealing, which the Courts of this State have routinely applied even to commercial notes, and overall acted in bad faith and conspired to act in bad faith with Plaintiff. As a result

of Assignor's and Plaintiff's conduct, Defendants' real property is now well under water, making redemption or satisfaction extremely difficult, if not impossible, for Defendants. We respectfully ask this Court to overrule the lower court *in toto*, where the lower court rejected Assignor's and Plaintiff's ill conduct as a basis for granting Plaintiff relief, refused to allow Plaintiff to implead Assignor and refused to reopen/extend discovery even though the lower court granted Plaintiff leave to file a late motion for summary judgment.

PROCEDURAL HISTORY[1]

On September 26, 2023, Plaintiff filed a complaint for foreclosure of the Subject Property. (P-1 to P-13) On November 2, 2023, Defendants' predecessor counsel filed two (2) separate contested answers to the foreclosure complaint – one on behalf of Defendant, Overbrook1, LLC, and the other on behalf of Defendant, Michael Kalisch. (P-14 to P-36) On January 3, 2024, the lower court entered a case management order setting a discovery end date for March 15, 2024. (P-37 to P-38) The Undersigned's predecessor counsel conducted no discovery. The lower court set this matter for trial on June 24, 2024 (P-41 to P-43)

On April 9, 2024, Plaintiff's counsel sought an extension of time to file a dispositive motion, informing the lower court: "I am writing to respectfully request that the Court extend the dispositive motion deadline and the trial date as set forth

[1] T1 = Transcript of August 6, 2024
T2 = Transcript of October 11, 2024

in the Court's Case Management Conference entered on January 3, 2024 for sixty (60) days. Currently, the deadline for the filing of dispositive motions is April 19, 2024 and the trial is date is June 24, 2024. I have reached out to Defense Counsel, Mr. Michael Roberts, who has kindly consented to this request." (P-40) On April 9, 2024, the lower court made an entry on the electronic case jacket adjourning the trial date from June 24, 2024 to August 29, 2024, seemingly in response to Plaintiff's request to extend the time to file a dispositive motion since this adjournment of the trial date enabled Plaintiff to make its dispositive motion returnable 30 days prior to the trial date. (P-41 to P-43) On June 10, 2024, Plaintiff filed its motion for summary judgment. (P-44 to P-55)

On June 27, 2024, the Undersigned executed a substitution of counsel on behalf of Defendants. (P-56 to P-57) On July 23, 2024, the Undersigned filed an opposition to Plaintiff's motion for summary judgment. (P-58 to P-72) On August 7, 2024, the lower court granted Plaintiff summary judgment. *See* August 7, 2024 order of the lower court.

On September 12, 2024, the Undersigned filed a motion for reconsideration of the lower court's grant of summary judgment, or, in the alternative, a stay pending appeal. (P-75 to P-78) On October 11, 2024, the lower court denied Defendants' motion *in toto*. *See* the lower court's order of October 11, 2024. See the lower court's order of October 11, 2024. On January 24, 2025, the Undersigned filed this

appeal.

STATEMENT OF FACTS

For the sake of brevity, Defendants hereby respectfully incorporate the Certification of Michael Kalisch herein as if same were set forth herein at length. Said certification was filed in support of Defendants' opposition to Plaintiff's motion for summary judgment and in support of Defendants' motion for reconsideration. (P-58 to P-72)

LEGAL ARGUMENT

I. THE LOWER COURT'S GRANT OF SUMMARY JUDGMENT TO PLAINTIFF SHOULD BE OVERRULED BECAUSE PLAINTIFF AND ASSIGNOR BREACHED THE COVENANT OF GOOD FAITH AND FAIR DEALING AND ACTED IN BAD FAITH. (P-95 to P-97)

The Courts of this State have routinely held that: "It is well settled that 'an implied covenant of good faith and fair dealing' inheres in 'every contract in New Jersey'." *Wilmington Sav. Fund Society, FSB for Pretium Mortg. Acquisition Trust v. Daw*, 469 N.J. Super. 437, 452 (App. Div. 2021), *quoting Sons of Thunder, Inc. v. Borden, Inc.*, 148 N.J. 396, 420 (1997); *see also Restatement (Second) of Contracts § 205* (Am. Law Inst. 1981) ("Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement").

The Appellate Division continued that: "The implied covenant signifies that 'neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract'." *Wilmington Sav.,*

469 N.J. Super. at 452, *quoting Sons of Thunder, Inc.*, 148 N.J. at 420, (*quoting Palisades Props., Inc. v. Brunetti*, 44 N.J. 117, 130 (1965)). "A party breaches the implied covenant when it exercises its contractual functions 'arbitrarily, unreasonably, or capriciously' and with an 'improper motive'." *Wilmington Sav., 469 N.J. Super.* at 452, *quoting Wilson v. Amerada Hess Corp.*, 168 N.J. 236, 251 (2001). "For example, if it were shown that the lender deliberately rejected a reasonable repair proposal as a means to reap for itself greater accrued interest, or as a scheme to wipe out a borrower's equity in the premises, such bad-faith conduct might justify a remedy by a court of equity." *Wilmington Sav., 469 N.J. Super.* at 452, *quoting Wilson*, 168 N.J. at 251.

In *Wilmington Sav.*, the Appellate Division explained: "We would expect and hope that instances of abuse will be rare. But the implied covenant of good faith and fair dealing can provide a mechanism to prevent injustice in such instances. In particular, a court of equity has the power to abate the accrued mortgage interest if the borrower proves the lender or its agent acted in bad faith with respect to the disposition of the insurance proceeds." *Wilmington Sav., 469 N.J. Super.* at 455.

"Another element of the implied covenant of good faith and fair dealing in this context is transparency and clear communication with the homeowners." *Id.* Although *Wilmington Sav.* concerned a residential mortgage and the application of insurance funds, the result is still the same in the matter at Bar where the implied

covenant applies to all contracts, including commercial loans, and Defendants' post-default funds were never applied to anything – not even the default interest.

"Good faith is defined by the Uniform Commercial Code as "honesty in fact in the conduct or transaction concerned." *National Westminster Bank NJ v. Lomker*, 277 N.J. Super. 491, 496 (App. Div. 1994), *quoting* N.J.S.A. 12A:1-201(19) "*[A] commercial debtor may defend against enforcement of lender's rights where the lender has engaged in bad faith, misconduct or the like.*" *National Westminster Bank NJ*, 277 N.J. Super. at 496 (emphasis added), *citing Ramapo Bank v. Bechtel*, 224 N.J. Super. 191, 198 (App.Div.1988) (possibility of a concealed pre-transaction agreement not to pursue a co-guarantor in the event of default sufficient to overcome lender's motion for summary judgment).

Thus, the same principles that apply to implied covenants of good faith and fair dealing, which, again, is inherent in all contracts forged in this State, clearly apply to commercial loans, and bad faith acts and omissions of a commercial lender provide a commercial borrower a defense "*against enforcement of lender's rights where the lender has engaged in bad faith, misconduct or the like.*" *Ernest Bock, LLC v. Paul Steelman*, A-0469-19, 2021 WL 4771306 (App. Div. October 13, 2021) (P-98) (emphasis added), *citing Ramapo Bank*, 224 N.J. Super. at 198. (Emphasis there's.) This alone should have sufficed to defeat Plaintiff's motion for summary judgment.

"Related to this obligation is the requirement that a lender not 'unjustifiably impair' any collateral. *National Westminster Bank NJ*, 277 N.J. Super. at 497, *citing N.J.S.A.* 12A:3-60; *Langeveld v. L.R.Z.H. Corporation,* 74 *N.J.* 45, 50 (1977); *Lenape State Bank v. Winslow Corp*., 216 N.J. Super. 115, 124-25 (App. Div. 1987).

That is precisely what has happened here where automatically debited post-default payments could have been applied to default interest, but, per Plaintiff's own mortgage statements to Defendants, have bizarrely been applied to nothing. (P-58 to P-72) Though failing to apply Defendants' post- default payments to so much as accruing 30% default interest, Assignor and Plaintiff wasted the collateral, pushing the Subject Property under water and breached the implied covenant of good faith and fair dealing by blatantly failing to mitigate damages in bad faith.

II. THE LOWER COURT ERRED IN GRANTING PLAINTIFF AND ASSIGNOR SUMMARY JUDGMENT BECAUSE THEY IMPAIRED DEFENDANTS' COLLATERAL AND ACTED IN BAD FAITH. (P-95 to P-97)

Failure to apply post-default automatically debited payments to anything – not even default interest accruing at 30% - has wasted Defendants' collateral to the point that the subject property is under water. "Equitable in nature and characterized as 'probably the most important provision in the [UCC] to the surety [or guarantor]', the defense of impairment of collateral is available to a guarantor just as much as to the debtor." *National Westminster Bank NJ*, 277 N.J. Super. at 497, *quoting Langeveld, supra,* 74 *N.J.* at 51-52. "No less can be said for the defenses of lender

bad faith and misconduct." *National Westminster Bank NJ*, 277 N.J. Super. at 497, *citing Chemical Bank v. Paul,* 244 *Ill. App.*3d 772 (1993); *Sprague Nat. Bank v. Dotty,* 415 *N.W.*2d 725 (Ct. App. Minn. 1987), *rev. denied* (1988); *Olney Savings & Loan Assn. v. Farmers Market of Odessa, Inc.,* 764 *S.W.*2d 869 (Texas Ct. App. 1989).

National Westminster Bank NJ concerned guaranty language that did not expressly waive the defense of bad faith, and the Appellate Division held that the guarantors in a contract could assert the defense of impairment of collateral and bad faith where facts revealed the creditor sold property below appraisal and from under guarantor. *See National Westminster Bank NJ*, 277 N.J. Super. 491. There is no reason that this holding pertaining to waiver language (or the lack thereof) in commercial guarantees should differ for commercial notes, which similarly contains no such waiver language.

The *National Westminster Bank NJ* concluded: "In *Lenape,* we construed a guaranty that was not unlike the guaranties here to constitute an 'unequivocal' waiver of the defense of impairment of collateral." *Id.* at 499 "But we also held there that claims of wrongful and intentional interference with the collateral survived summary judgment." *Id.* "We did so pointing to the existence of an express provision in the guaranty discharging the guarantor's obligations where any 'deterioration, waste or loss [of the collateral] is caused by the willful act or willful

failure to act of Lender'." *Id.*, *quoting Lenape,* 216 *N.J. Super.* at 129.

The Appellate Division explained that: "The guaranties here do not contain this language. But neither do they expressly provide to the contrary, that is the guaranties do not say that willful misconduct discharges the guarantors' obligations. And, critically, however unequivocal and unconditional, the guaranties do not expressly waive the defenses of bad faith, fraud or conspiracy." *National Westminster Bank NJ*, 277 N.J. Super. at 499, *citing Chemical Bank v. Paul, supra,* 244 Ill. App. 3d at 783. The same may be said about the guarantee and note between Assignor and Defendants (and by virtue of the assignment with Plaintiff and Defendants).

Similarly, although *Wilmington Sav.* dealt with the application of insurance proceeds, how is that any different from a lender's application of payments to principal and interest from a debtor? Again, the *Wilmington Sav.* Court held: "In particular, a court of equity has the power to abate the accrued mortgage interest if the borrower proves the lender or its agent acted in bad faith " *Wilmington Sav., 469 N.J. Super.* at 455.

"Another element of the implied covenant of good faith and fair dealing in this context is transparency and clear communication. . . ." *Id.* Why would this be any different from the necessity to provide full transparency and to communicate regarding automatically debited payments to the lender in normal course that are

applied to nothing and left to hang in limbo?

Notably, while the *Wilmington Sav.* matter, again, involves a residential mortgage, that court did not fail to recognize that *every* contract in this State is governed by an implied contract of good faith and fair dealing. Where the trial court of equity "has the power to abate the accrued mortgage interest if the borrower proves the lender or its agent acted in bad faith" and a lender owes a duty of "transparency and clear communication" to a borrower, why, again, should the result be any different here?

As set forth in Defendant Kalisch's Certification (P-58 to P-72), Assignor continued to automatically debit payments following Defendants' single technical default, applied Defendants' post-default payments to nothing (not even default interest), failed to make any timely responses to Defendants' efforts to rectify the matter despite empty promises to do so, thereby causing the subject property to fall under water because of the accrual of 30% default interest while Assignor a dragged Defendants along, and then assigned the loan to Plaintiff, which did nothing other than immediately file to foreclose. Indeed, Plaintiff also did not seek to apply the post-default payments to anything – not even contiguously accruing 30% default interest – or engage Defendants in the dialogue that Assignor promised and never delivered. Plaintiff now seeks to reap the benefits of the 30% accrued default interest, which could have been mitigated or abated had Assignor or Plaintiff simply

applied Defendants' payments to that accruing interest, engaged in required transparency and promptly informed and communicated with Defendants as Assignor had emptily promised.

Surely, Defendants, as commercial borrowers, possess a defense "*against enforcement of lender's rights where the lender has engaged in bad faith, misconduct or the like[,]*" which misconduct is purely evident here. *Bock*, 2021 WL, *citing Ramapo Bank*, 224 N.J. Super. at 198. Summary judgment should be denied for this reason alone.

It is worth again emphasizing that Assignor (and Plaintiff) wasted collateral where neither applied additional payments that were automatically debited from Defendants' account post-default to any of the debt. Incredibly, despite the post-default continued automatic debiting of payments from Defendants, Plaintiff failed to apply said payments to any principal or interest, including default interest, thereby allowing the default interest to continue to unfairly accrue at a rate of 30% *per annum*, pushing the Subject Property under water.

As far as Defendants know, those additional payments continue to remain in proverbial limbo without being applied to any monies owed. Moreover, when Defendant, Mr. Kalisch, the guarantor and principal of the borrower, contacted Assignor, Assignor eventually advised Mr. Kalisch (through promises to communicate with Mr. Kalisch to rectify the issue) (P-58 to P-72) that his payments

would remain in limbo until the default interest was completely paid off, but that fails to explain why Assignor never applied those post-default payments to the 30% default interest.

While Mr. Kailsch struggled to understand Assignor's handling of the loan or even the status of the account, Mr. Kalisch continued to engage Assignor in an effort to resolve the matter and to see what could be speedily arranged to make the account current. (P-58 to P-72) "[A] debtor may defend against enforcement of lender's rights where the lender has engaged in bad faith, misconduct or the like." *Nat'l Westminster Bank NJ v. Lomker*, 277 N.J. Super. at 496. Again, the foregoing called for the denial of the motion for summary judgment.

"As a mortgagee resorting to a court of equity to enforce its security, plaintiff exposed itself to the operation of equitable principles and must submit to an equitable resolution." *Totowa Sav. & Loan Assoc. v. Crescione*, 144 N.J. Super. 347, 352 (App. Div. 1976) (citations omitted). General equitable principles apply in foreclosure actions, including the principle that "he who seeks equity must do equity." *Sovereign Bank, FSB v. Kuelzow*, 297 N.J. Super. 187, 197 (App. Div. 1997). "In this respect, equity follows the common law precept that no one shall be allowed to benefit by his own wrongdoing. Thus, where the bad faith, fraud or unconscionable acts of a petitioner form the basis of his lawsuit, equity will deny him its remedies." *Rolnick v. Rolnick*, 290 N.J. Super. 35, 45 (App. Div. 1996).

Although Assignor advised Mr. Kalisch that Assignor would negotiate and work with Mr. Kalisch in good faith, Mr. Kalisch routinely had difficulty connecting with Assignor, which dragged out Mr. Kalisch's efforts to promptly remedy these issues with Mr. Kalisch's account, resulting in further default interest accruing, despite, again, subsequent payments having been made. Summary judgment should be denied so a hearing may be held to ascertain the extent of damage to the collateral and what credits Defendants must receive.

III. THE LOWER COURT ERRED IN GRANTING PLAINTIFF AND ASSIGNOR SUMMARY JUDGMENT BECAUSE THE 30% DEFAULT INTEREST IS UNREASONABLE UNDER THE TOTALITY OF THE CIRCUMSTANCES. (P-95 to P-97)

The New Jersey Supreme Court has held: "An agreement, made in advance of breach, fixing the damages therefore, is not enforceable as a contract and does not affect the damages recoverable for the breach, unless (a) the amount so fixed is a reasonable forecast of just compensation for the harm that is caused by the breach, and (b) the harm that is caused by the breach is one that is incapable or very difficult of accurate estimation." *Metlife Capital Fin. Corp. v. Wash. Ave. Assocs. L.P.*, 159 N.J. 484, 493 (1999).

The New Jersey Supreme Court explained: "The Uniform Commercial Code provision on liquidated damages, adopted in New Jersey as N.J.S.A. 12A:2-718, incorporated this more flexible test. N.J.S.A. 12A:2-718 evaluates "reasonableness" in analyzing a stipulated damages provision. *Metlife Capital Fin. Corp.*, 159 N.J. at

494. The New Jersey Supreme Court continued that: "'In *Stuchin v. Kasirer,* the defendants in a foreclosure case challenged the application of an enhanced default rate, which increased the contract interest rate by fifteen percent. [*Stuchin v. Kasirer*, 237 N.J. Super. 604, 610 (App. Div. 1990).] [T]he Appellate Division remanded the issue to the trial court to receive 'appropriate evidence of the reasonableness or unreasonableness of the 15% rate increase. . . .'" *Metlife Capital Fin. Corp.*, 159 N.J. at 494-495, *quoting Stuchin*, 237 N.J. Super. at 614. Respectfully, the same is necessary here, where the rate of default interest is far higher – 30% - and summary judgment should have been denied so the that the lower court could have received 'appropriate evidence of the reasonableness or unreasonableness of the 15% rate increase. . . ." *Metlife Capital Fin. Corp.*, 159 N.J. at 494-495.

The Court added: "Treating reasonableness 'as the touchstone', we noted that the difficulty in assessing damages, intention of the parties, the actual damages sustained, and the bargaining power of the parties all affect the validity of a stipulated damages clause. We did not, however, consider any of those factors dispositive, and remanded the case, leaving 'to the sound discretion of the trial court the extent to which additional proof is necessary on the reasonableness of the clause.'" *Id.* at 495.

"Applying the principle that '[t]he overall single test of validity is whether the

[stipulated damage] clause is reasonable under the totality of the circumstances," the *Metlife Capital Fin. Corp.* Court "address[ed] the validity of the five percent late fee included in this contract." *Id.* The *Metlife Capital Fin. Corp.* Court concluded "that under that 'reasonableness' test, the five percent late fee is a valid measure of liquidated damages." *Id.* Here, the default rate at issue in the matter at Bar is 30%, not 5%.

The *Metlife Capital Fin. Corp.* Court reasoned that: "A number of factors demonstrate the "reasonableness" of this specific five percent late fee. Barbara Geer, one of MetLife's portfolio Management Specialists, testified about MetLife's procedures in dealing with delinquent payments. That testimony was uncontradicted. She also testified that a five percent late fee was normal industry custom in similar commercial mortgages." *Id.* at 497. Again, compare 5% with 30%, which is the default rate of interest in the matter at Bar.

The New Jersey Supreme Court concluded: "The five percent late fee in this case was not unreasonable. [T]his loan involved an arms-length, fully negotiated transaction between two sophisticated commercial parties, each represented by counsel. *MetLife* presented uncontroverted testimony that the five percent late fee was well within the normal industry standard, and was intended to compensate for the administrative costs associated with servicing delinquent loan payments. [The borrower] presented no evidence to overcome the presumptive reasonableness of the

stipulated damages clause. There is no evidence of fraud, duress or other unconscionable acts on the part of *MetLife*." *Id.* at 500. "Furthermore, case law from New Jersey and other jurisdictions suggests that a small percentage late charge on a commercial loan is simply part of the cost of doing business. A five percent fixed late charge negotiated between sophisticated commercial entities, is, in these circumstances, a valid measure of liquidated damages." *Id.*

Respectfully, while 5% may be small, 30% default interest , by contrast, is not, particularly where Defendants payments were never even applied to mitigate the continuously accruing interest. Indeed, in recent times, the New Jersey Office of Foreclosure has been applying approximately 16% in total interest during default periods in many cases, regardless of what is provided for in the note. That said, where default interest is also intended to compensate a lender for administrative and other costs, Assignor's and Plaintiff's conduct, as described in **Points I & II**, above, in the totality of the circumstances, warrants an equitable adjustment. Such an adjustment must respectfully be had only following a hearing to adjudicate, among other things, the industry standard against the backdrop of Assignor's and Plaintiff's conduct. As a result, Defendants respectfully submit that the lower court erred in entering summary judgment against Defendants.

IV. THE LOWER COURT ERRED IN GRANTING SUMMARY JUDGMENT TO PLAINTIFF AND ASSIGNOR BECAUSE DEFENDANTS REQUIRED DISCOVERY. (P-95 to P-97)

While it is unclear why my predecessor counsel did not engage in discovery with Plaintiff, Defendants should not be penalized for their former attorney's failure. Indeed, this Court granted Plaintiff the courtesy of additional time to file its motion for summary judgment even though Plaintiff asked to file that motion well beyond this Court's deadline set out in the Case Management Order. Defendants therefore asked the lower court to extend the same courtesy to Defendants and permit the reopening of discovery so that the highly fact-sensitive issues discussed in **Points I to III** above might have been investigated and property addressed. Unfortunately, while this issue was as thoroughly briefed before the lower court to the extent it is briefed here, the Undersigned regrettably neglected to file a notice of cross-motion to Plaintiff's motion for summary judgment to reopen/extend the discovery period. The Undersigned respectfully asked the lower court to forgive this omission during oral argument of the motion for summary judgment, where, again, the issue of the necessity for discovery was thoroughly briefed in the opposition, but the lower court declined to forgive the omission of a notice of cross-motion to reopen/extend discovery. Respectfully, the lower court erred in doing so, where the lower court is a court of equity and the issues were thoroughly briefed before it. In any event, this same relief was also denied in the disposition of Defendants' motion for

reconsideration. (P-97) it was denied there as well. *See* the lower court's order of October 11, 2024.

To defeat summary judgment based on incomplete discovery, the opponent must "demonstrate with some degree of particularity the likelihood that further discovery will supply the missing elements of the cause of action," or the defense. *Wellington v. Est. of Wellington*, 359 N.J. Super. 484, 496 (App. Div. 1977); s*ee also Friedman v. Martinez*, 242 N.J. 449, 472 (2020) (rejecting argument that summary judgment was premature). Defendants' need for discovery is by no means frivolous or *pro forma* or intended to senselessly delay. Instead, where the totality of the circumstances must be applied to determine the reasonableness of the default interest rate, in addition to questions surrounding the extent of the wasting of the collateral and why Assignor, and later Plaintiff, engaged in the conduct described above, discovery is respectfully essential. Again, Defendants should not be punished for my predecessor's failure to engage in discovery, which is critically needed, particularly where this Court extended the deadlines for Plaintiff so that could timely file its motion for summary judgment. Why were we denied the extension of a deadline where Plaintiff received an extension? Thus, Defendants respectfully ask that this Court reopen discovery so that the foregoing issues may be properly evaluated.

V. THE LOWER COURT ERRED IN GRANTING PLAINTIFF SUMMARY JUDGMENT BECAUSE PLAINTIFF HAS FAILED TO MEET THE STANDARD FOR SUMMARY JUDGMENT.

In New Jersey, the standard for granting summary judgment in a foreclosure case is well-established and requires the court to determine whether there is any genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law. This standard is articulated in Rule 4:46-2(c) of the New Jersey Court Rules, which states that summary judgment should be granted if "there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." *Delacruz v. Alfieri*, 447 N.J. Super. 1, 5 (Law Div. 2015); *Investors Bank v. Torres*, 457 N.J. Super. 53 (App. Div. 2018).

The court must view all competent evidential materials presented in the light most favorable to the non-moving party. This means that the court should only grant summary judgment if the evidence is so one-sided that one party must prevail as a matter of law. The seminal case of *Brill v. Guardian Life Ins. Co. of Am.*, 142 N.J. 520 (1995) further clarifies that the court must determine whether the evidence presented is sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party. *Delacruz*, 447 N.J. Super. 1; *Residential Mortg. Loan Trust 2013-TT2 by U.S. Bank Nat. Association v. Morgan Stanley Mortg. Capital, Inc.*, 457 N.J. Super. 237 (App. Div. 2018); *Investors Bank v. Torres*, 457 N.J. Super. 5. (App. Div. 2018)

Respectfully, the questions of fact here are legion, ranging from the destruction and waste of collateral, the reasonableness of the default interest rate, to an overall absence of good faith and seemingly conspiratorial effort to improperly win as much of a recovery as possible against Defendants. As a result, summary judgment is improper and should be denied to Plaintiff.

CONCLUSION

In light of the foregoing, Defendants respectfully ask this Court to overrule the lower court and reinstate this matter for discovery and trial, while granting leave for the impleader of Assignor

LAW OFFICE OF ERIC J. WARNER, LLC
Counsel for Defendants

By:/s/ Eric J. Warner
Eric J. Warner, Esq.

Dated: May 15, 2025

Superior Court of New Jersey

Appellate Division

Docket No. A-001503-24

BRIGHTHOUSE LIFE INSURANCE, LLC, *Plaintiff-Respondent,* vs. OVERBROOK1 LLC and MICHAEL KALISCH, *Defendants-Appellants.* – and – UNKNOWN OCCUPANTS #1-10, *Defendants.*	:	CIVIL ACTION ON APPEAL FROM THE FINAL ORDER OF THE SUPERIOR COURT OF NEW JERSEY, CHANCERY DIVISION, ESSEX COUNTY DOCKET NO. SWC-F-011243-23 Sat Below: HON. JODI LEE ALPER, P.J.Ch.

BRIEF ON BEHALF OF PLAINTIFF-RESPONDENT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes and Other Authorities:

PRELIMINARY STATEMENT

Plaintiff-respondent Brighthouse Life Insurance, LLC (hereinafter "Lender"), respectfully submits this brief in opposition to the appeal of defendants-appellants Overbrook1 LLC (hereinafter "Borrower") and Michael Kalisch (hereinafter "Guarantor") (collectively, "Appellants"). Borrower and Guarantor appeal the August 7, 2024 Order granting Plaintiff's motion for summary judgment (hereinafter the "Summary Judgment Motion" or "Summary Judgment") and the October 11, 2024 Order denying their motion for reconsideration or a stay (hereinafter the "Motion to Reconsider") (collectively, the "Orders").

In the appeal, Appellants claims that Summary Judgment should not have been granted because Lender and its assignor breached the duty of good faith and fair dealing and impaired the collateral. However, the trial court correctly granted Summary Judgment because Lender proved its *prima facie* right to foreclose and the Appellants failed to rebut the showing or raise a triable issue of material fact. The trial court also correctly denied Appellants' Motion to Reconsider because they failed to establish good cause for reconsideration or the necessary requirements for a stay. Based on the above, the Orders should be affirmed in their entirety.

FACTUAL HISTORY

On May 25, 2021, Borrower executed and delivered a note ("Note") in the amount of $278,400.00 which was secured by a mortgage ("Mortgage") (collectively, "the Mortgage Loan") on premises known as 362-364 Chadwick Avenue, Newark, NJ 07112 (the "Mortgaged Premises"). (Pa15-37). The Mortgage was recorded in the County Clerk's Office of Essex County on June 7, 2021, as Instrument Number 2021070477 (Pa21). Guarantor executed a Guaranty Agreement of even date with the Mortgage Loan whereby he unconditionally guaranteed to the lender the payment of the Note. (Pa38-41). Borrower failed to make the payment due under the Mortgage Loan on August 1, 2022 and the Mortgage Loan remains in default. (Pa10). Although not required, notice of default was mailed to Appellants on October 20, 2022 via certified mail, return receipt requested and regular mail. (Pa10, 49-58). The default stated therein was not cured. (Pa10).

The Note and Mortgage were assigned to Lender by way of an assignment dated July 20, 2023 and recorded in the County Clerk`s Office of Essex County on July 24, 2023 as Instrument Number 2023 043814. (Pa10, 42-44). The original Note was delivered to Lender or its custodian/agent on or before September 26, 2022 and Lender or its custodian/agent has continuously maintained possession of the original Note since that date. (Pa10).

RELEVANT PROCEDURAL POSTURE

The foreclosure action was commenced by filing a complaint (hereinafter "Complaint") on September 26, 2023. (Da1-13). On November 2, 2023, Borrower filed a Contesting Answer. (Da14-24). The same day, Guarantor filed a substantially similar Answer with identical defenses. (Da25-36). No discovery was served by either party.

On June 10, 2024, Lender filed a Motion for Summary Judgment. (Da46-55, Pa1-144). The Motion was supported by the Certification of Anita Johnson ("Johnson Certification"), an Assistant Secretary of Fay Servicing, LLC, the servicer for the Lender, dated December March 27, 2024. (Pa8-58). On June 14, 2023, Appellants filed opposition to Summary Judgment (hereinafter "Opposition"). (Da57-74). Oral argument was held on August 6, 2024. On August 7, 2024, Hon. Jodie Lee Alper, P.J.Ch., granted Summary Judgment. (Da95-96).

On September 12, 2024, Appellants filed the Motion to Reconsider. After oral argument on October 11, 2024, Hon. Jodie Lee Alper, P.J.Ch. presiding, denied reconsideration. (Da97).

On September 30, 2024, Lender filed a motion to determine the reasonableness of the default interest rate. (Pa115-130). This motion was unopposed and granted on October 24, 2024. (Pa133-136). On November 22,

2024, Lender filed a motion for final judgment ("Final Judgment"). (Pa137-171). Final Judgment was uncontested and on December 13, 2024, judgment was entered in the amount of $504,303.80 plus interest, fees and costs. (Pa172-179). This appeal ensued.

STANDARD OF REVIEW

Rule 4:46-2(c) directs that summary judgment shall be granted "forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." On appeal, an appellate court employs that same standard and reviews the lower court's decision *de novo*. Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582, (2021). No special deference is afforded to the trial court's interpretations of the law and legal consequences that flow from established facts. Manalapan Realty, LP v. Twp. Comm. Of Manalapan, 140 N.J. 366, 378 (1995).

To determine whether there is a genuine issue of material fact, a court must "draw all legitimate inferences from the facts in favor of the non-moving party." Friedman v. Martinez, 242 N.J. 449, 472 (2020) (quoting Globe Motor Co. v. Igdalev, 225 N.J. 469, 480 [2016]). It must "consider whether the competent evidential materials presented, when viewed in the light most

favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged dispute issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). "The court's function is not 'to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.'" Rios v. Meda Pharm., Inc., 247 N.J. 1, 13 (2021) (quoting Brill, 142 N.J. at 540). An issue does not create a genuine dispute "[i]f there exists a single unavoidable resolution of the alleged disputed issue of fact." Brill, 142 N.J. 540 (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 [1986]). "[D]isputes on minor points do not" preclude summary judgment. Gilbert v. Stewart, 247 N.J. 421, 442 (2021) (citing J.H. v. R&M Tagliareni, LLC, 239 N.J. 198, 210 [2019]). If there is no genuine issue of fact, the court then must decide whether the lower court's ruling on the law was correct. Liberty Surplus, Ins. Corp. v. Nowell Amoroso, PA, 189 N.J. 436, 445-46 (2007). It is the non-moving party who must proffer specific facts demonstrating that there is a genuine issue of material fact. Housel v. Theodoridis, 314 N.J. Super. 597, 603-04 (App. Div. 1998).

The only material issues in a foreclosure proceeding are the validity of the mortgage, the amount of the indebtedness, and the right of the mortgagee to resort to the mortgaged premises." Great Falls Bank v. Pardo, 263 N.J. Super. 388, 394 (Ch. Div. 1993) aff'd 273 N.J. Super. 542, 545 (App. Div. 1994). Thus,

a plaintiff only need present three elements to establish a *prima facie* right to foreclose: "the execution, recording, and non-payment of the mortgage." Thorpe v. Floremoore, Corp., 20 N.J. Super. 34, 37 (App. Div. 1952).

DISCUSSION

POINT I: SUMMARY JUDGMENT SHOULD BE AFFIRMED BECAUSE LENDER ESTABLISHED A *PRIMA FACIE* CASE AND APPELLANTS FAILED TO REBUT THE LENDER'S *PRIMA FACIE* SHOWING OR RAISE A TRIABLE ISSUE OF MATERIAL FACT.

Lender established its *prima facie* right to foreclose through its demonstration that: 1) Borrower obtained the Mortgage Loan from Lender's predecessor-in-interest, 2) the Mortgage was duly recorded in the County Clerk's Office of Essex County, 3) Borrower defaulted under the Mortgage Loan and 4) the default was not cured. See Thorpe v. Floremoore, Corp., 20 N.J. Super. 34, 37 (App. Div. 1952).

A. Lender proved its *Prima Facie* right to Foreclose.

Lender established its *prima facie* entitlement to Summary Judgment through submission of the Note and recorded Mortgage executed by Borrower (Pa15-37) and proof of Borrower's default on August 1, 2022. (Pa10, 45-48). See Thorpe v. Floremoore, Corp., supra. Lender proved standing to foreclose by virtue of its physical possession of the original Note indorsed into blank on or before September 26, 2022 (Pa10, 15-20) and a valid assignment of mortgage,

assigning the Note and Mortgage to Lender prior to commencement of the action. (Pa42-44). See Deutsche Bank Trust Co. Americas v. Angeles, 428 N.J. Super. 315 (App. Div. 2012) (where, as here, the foreclosing mortgagee is not the original lender, standing is conferred by either "possession of the note or an assignment of the mortgage that predated the original complaint"); Bank of New York v. Raftogianis, 418 N.J. Super. 323, 348 (2010) (an assignment of mortgage without specific reference to the underlying obligation or note is treated as effectively transferring both the mortgage and the note).

Appellants failed to rebut Lender's *prima facie* showing or raise a triable issue of fact. Appellants claimed that the original lender failed to properly communicate with defendants and/or failed to properly apply three payments automatically debited from their account. According to Appellants, the original lender breached the duty of good faith and fair dealing and impaired the collateral because the debits were drawn after the default, while the loan was accruing default interest. However, none of Appellants' claims were directed against Lender; they were aimed at the original mortgagee, Commercial Lender LLC. Moreover, Appellants' allegations regarding a lack of communication wholly lacked substantiation. As such, Appellants failed to raise a triable issue of fact and Summary Judgment should be affirmed.

B. There was no Triable Issue of Fact as to Lender's Duty of Good Faith and Fair Dealing.

Appellants wholly fail to establish that the trial court erred in dismissing the defense of good faith and fair dealing. Initially, all of the Appellants' allegations are asserted against a non-party, Commercial Lender LLC, and no motion to implead this entity was filed. Appellants did not, nor could they, argue that Lender is liable for the actions of its assignor. See Carnegie Bank v. Shalleck, 256 N.J. Super. 23, 45 (App. Div. 1992) ("when a mortgage secures a negotiable instrument … a transfer of the negotiable instrument to a holder in due course to whom the mortgage is also assigned will enable the assignee to endorse the mortgage (as well as the negotiable instrument) according to its terms, free and clear of any personal defenses the mortgage may have against the assignor"). Even if the actions of the original mortgagee were a defense, Appellants failed to submit any evidence of their unsuccessful efforts to communicate with Commercial Lender LLC. As such, Appellants failed to raise a triable issue of fact.

Nor was it a breach of the duty of good faith for the Lender to hold three payments in suspense. The failure to apply these payments was not done "arbitrarily, unreasonably, or capriciously" or with an "improper motive", a required element of the good faith defense. See Wilson v. Amerada Hess Corp., 469 N.J. Super. 437, 452 (App. Div. 2021) ("without bad motive or intention,

discretionary decisions that happen to result in economic disadvantage to the other party are of no legal significance"). Rather, section six of the Note clearly and expressly permits the lender to accelerate the maturity and declare all sums immediately due and payable upon default. (Pa15-20). There is no dispute that the Mortgage Loan was in default when the payments were debited; nor is there any dispute that the payments were insufficient to cure the default. Thus, placing the payments in suspense was in accordance with the Mortgage Loan terms and cannot be evidence of bad faith. As the Court held in Arias, the duty of good faith and fair dealing "does not alter the terms of a written agreement." See Arias v. Elite Mortgage Group, Inc., 439 N.J. Super. 273, 281 (App. Div. 2015) (quoting Glenfed Fin. Corp. v. Penick Corp., 276 N.J. Super. 163, 175 [App. Div. 1994] cert. denied 139 N.J. 442 [1995]).

Nor was it bad faith to charge default interest while these partial payments were in suspense. Section seven of the Note permits default interest to accrue until the default is cured. (Pa15-20). It should further be noted that $6,125.88 in payments is shown in unapplied funds in the Amount Due Schedule submitted with Lender's Final Judgment Motion (Pa140) and as such, was credited to the Appellants' account. Lender did not breach the duty of good faith and fair dealing and Summary Judgment should be affirmed.

C. The Defense of Impairment of Collateral is Waived and Inapplicable.

Appellants also argue that the failure to apply post-default automatically debited payments wasted their collateral. Initially, it should be noted that no defense of impairment of collateral was asserted in Appellants' Answer (Da14-37) and thus, the defense is waived. See R. 4:6-2 ("every defense legal or equitable, in law or fact, to a claim for relief in the any complaint, counterclaim or third-party complaint shall be asserted in the answer thereto…")

Notwithstanding, Appellants' claim fails as a matter of law because the doctrine of impairment of collateral is only a personal defense in a suit against mortgagor and guarantor; it is not a defense to foreclosure. See Central Penn Nat. Bank v. Stonebridge Ltd., 185 N.J. Super. 289, 310 (Ch. Div. 1982) (the imposition of personal liability defenses in the foreclosure would have been premature); see also Montclair Sav. Bank v. Sylvester, 122 N.J. Eq. 518, 522 (E. & A. 1937) ("It is a corollary …that, to the bill to foreclose, there may be interposed only such defenses as are addressed to the validity or existence of the mortgage … liability for deficiency, in so far as it depends on matters not necessary to the adjudication of the right to foreclose, i.e. to resort to the mortgaged lands for satisfaction of the indebtedness, is a matter not cognizable in the foreclosure proceedings. That is the issue to be determined in the action on the bond").

In keeping with the above, National Westminster Bank N.J. v. Lomker, 277 N.J. Super. 491 (App. Div. 1994), relied upon by Appellants, is not a foreclosure; it is an action against the guarantors of a note. See id. The case of Wilmington Saving Fuds Society, FSB for Pretium Mortgage Acquisition Trust v. Daw, a residential foreclosure, is silent on the defense of impairment of collateral. See 469 N.J. Super. 437 (App. Div. 2021) (homeowner's insurance proceeds should be applied to the mortgage if repairs are objectively infeasible or would impair the lender's security). As such, the cases relied upon by Appellants do not aid them. The defense of impairment of collateral is waived and inapplicable and Summary Judgment should be affirmed.

POINT II: THE REASONABLENESS OF THE DEFAULT INTEREST RATE WAS NOT PROPERLY PRESERVED FOR APPEAL; NEVERTHELESS, THE DEFAULT RATE OF 35% IN A COMMERCIAL LOAN IS PRESUMED REASONABLE AND APPELLANTS FAILED TO REBUT THIS PRESUMPTION.

On appeal, Appellants challenge the reasonableness of the default interest rate. However, Appellants failed to oppose the Lender's motion to determine the reasonableness of the default interest ("Motion to Determine") or Final Judgment and have not appealed the orders granting same. Although Appellants claimed the default interest rate was unreasonable in opposition to Summary Judgment, the argument was premature. See Abbott Labs v. Gardner, 387 U.S. 136, 148-9, 87 S.Ct. 1507, 1515 (1967) (ripeness is a justiciability doctrine that

is designed to avoid premature adjudication of abstract arguments). Appellants were correctly advised by the Court that "if [they] believe that they have a legitimate argument that that rate is improper and was somehow caused by the wrongdoing of the lenders then that issue can be raised when the application for final judgment is made and the amount of interest or the rate of interest is set." See Tr. 13:13-18. Appellants never opposed the Motion to Determine or Final Judgment and as such, the issue is waived on appeal. See State v. Robinson, 200 N.J. 1 (2009) (by failing to raise the issue in the trial court, the defendant failed to properly preserve the issue for appellate review).

Notwithstanding, the default interest rate of thirty-five (35) percent is presumed reasonable and Appellants failed to meet their burden to rebut this presumption. See Metlife Capital Fin. Corp. v. Wash. Ave. Assocs. L.P. 159 N.J. 484 (1999). Under Metlife, default interest rates in commercial loans are presumptively reasonable and the party challenging the clause bears the burden of proving its unreasonableness. Id. (citing Wasserman's Inc. v. Township of Middletown, 137 N.J. 238-244 [1994]). The presumption arose from the Metlife's Court recognition that:

> "Default charges are commonly accepted as means for lenders to offset a portion of the damages occasioned by delinquent loans. As with the costs of late payments, the actual losses resulting from a commercial loan default are difficult to ascertain. The lender cannot predict the nature or duration of a possible default given many possible causes of borrower delinquencies. Nor is it possible

> when the loan is made to know what market conditions might be ten or fifteen years hence, and thus, what might be recovered from a sale of the collateral. For example, a lender cannot know what its own borrowing costs will be if the borrower defaults in paying a loan in the future, nor accurately predict what economic return it will lose when the borrower fails to repay the loan on time or how much in costs it will incur if the property is foreclosed or the borrower files for bankruptcy. Additional sums required in the context of collection activity, such as travel costs, expert fees and the costs of loan officers' involvement in collection activities are difficult to prove with respect to any specific loan at its outset." Id. at 501-502.

Here, the default interest rate of 35% is presumed reasonable and Appellants failed to meet their burden to establish that the rate is unreasonable. There is simply nothing in the record, no discovery or other evidence, to support such a conclusion. To the contrary, the Mortgage Loan resulted from an arm's length transaction between a lender and an experienced corporate investor for business purposes. Appellants could have opted out of the agreement or negotiated a lower rate if they desired to, but they did not take any such action. As such, the default rate is reasonable.

Moreover, the default interest rate is not illegal or usurious. See N.J.S.A. 2C:21-19(a) (permitting a maximum interest rate of 50% for any loan given to a corporation). Nor was it the result of fraud, duress or undue influence. As such, the Court should enforce the contract as written and uphold the rate that was agreed upon by the Parties. See County of Morris v. Fauver, 152 N.J. 80, 103 (1998) (the contract evidences the parties' intention and agreement with regard

to a reasonable default interest rate); M.J. Paquet, Inc. v. N.J. Dept. of Transp., 171 N.J. 378, 396 (2002) (it is well settled in New Jersey that contracts are generally given their plain and ordinary meaning); Schenk v. Hiji Assocs., 295 N.J. Super. 445, 450 (app. Div. 1996) cert. denied, 149 N.J. 35 (1997) (quoting U.S. Pipe & Foundry Co. v. American Arbitration Ass'n, 67 N.J. Super. 384, 393 [App. Div. 1961]) (it is not the court's function to make a better contract for either party or to supply terms that the parties have not agreed upon).

POINT III: THE TRIAL COURT PROPERLY DENIED APPELLANTS' REQUEST TO EXTEND DISCOVERY.

Appellants argue that the trial court erred by declining to extend discovery, as requested in their Opposition. However, Appellants' request to extend discovery was properly denied because (1) they failed to describe with any specificity what discovery they seek; (2) they never filed a motion to extend discovery, and (3) the request was untimely pursuant to R. 4:24-1(c) as the discovery end date had long since passed. Certainly, it cannot be said that the trial court abused discretion in denying the Appellants' request. See Jatczyszyn v. Marcal Paper Mills, Inc., 422 N.J. Super. 123, 130 (App. Div. 2011) (we review a trial court's denial of an extension for discovery under an abuse of discretion standard). As such, Summary Judgment should be affirmed.

POINT IV: THE TRIAL COURT PROPERLY DENIED APPELLANTS' MOTION FOR RECONSIDERATION AND A STAY.

For the reasons set forth above, the trial court also correctly denied Appellant's Motion to Reconsider. Although Appellants included the October 11, 2024 Order denying reconsideration in their Appeal, they do not argue, nor could they, that the trial court abused discretion when it denied reconsideration. See Cummings v. Bahr, 295 N.J. Super. 374, 389 (App. Div. 1996) (the trial court's denial of a motion for reconsideration is reviewed for abuse of discretion) (citing R. 4:49-2).

In the same Order, the trial court also denied a stay pending appeal. This was not an abuse of discretion because Appellants failed to establish the factors set forth in Crowe v. De Gioia. See 90 N.J. 126 (1982) (for an equitable injunction, movant must demonstrate irreparable harm, likelihood of success on the merits, and that a balance of equities favors the injunction). Appellants failed to demonstrate any harm if the stay is denied, let alone irreparable harm, because a sheriff's sale was not scheduled at the time. Final judgment had not even been entered yet. Appellants failed to demonstrate a likelihood of success because no appeal was filed and any appeal would be subject to dismissal as interlocutory. See Wells Fargo v. Garner, 416 N.J. Super. 520, 523 (until final judgment is entered, any preceding orders are considered interlocutory). Finally, a balance

of the equities did not favor a stay as same would only further delay the foreclosure. Appellants do not reside in the Mortgaged Premises and as such, are not facing the loss of their home. The loan is for investment purposes only. Lender has been carrying the taxes and insurance since the loan went into default on August 1, 2022. As the Court held in Deutsche Bank Trust Co. Americas v. Angeles, "in foreclosure matters, equity must be applied to plaintiffs as well as defendants." 428 N.J. Super. 315, 320 (App. Div. 2012). As such, the October 11, 2024 Order should be affirmed.

CONCLUSION

Appellants failed to demonstrate a triable issue of fact or that the court abused discretion in denying reconsideration of Summary Judgment. As such, the Orders should be affirmed in all respects.

Dated: June 30, 2025

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A Limited Liability Partnership formed in the State of New York
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BRIGHTHOUSE LIFE INSURANCE, LLC, Plaintiff, vs. OVERBROOK1 LLC, MICHAEL KALISCH; UNKNOWN OCCUPANTS #1-10, Defendants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No.: A-001503-24 Trial Court Docket No.: SWC- F-011243-23 *CIVIL ACTION* On Appeal From: Superior Court of New Jersey, Law Division, Civil Part, Hudson County Sat Below: Hon. Jodi Lee Alper , P.J.Ch..

DEFENDANTS'/APPELLANTS' REPLY MEMORANDUM OF LAW

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TABLE OF CONTENTS

TABLE OF JUDGMENTS, ORDERS & RULINGS

TABLE OF AUTHORITIES

PRELIMINARY STATEMENT

This matter concerns a bad faith commercial foreclosure on real property situated at 362-364 Chadwick, Newark, NJ 07112 (the "Subject Property"), which was instituted by Plaintiff/Respondent, Brighthouse Life Insurance, LLC ("Plaintiff"), against Defendants/Appellants, Overbrook 1 LLC and Michael Kalisch ("Defendants"), in addition to "unknown occupants."

Defendants concede that it was in error to seek a stay pending appeal in the manner done so below and that Defendants neglected to file a Notice of Cross-Motion when seeking to implead Plaintiff's predecessor, the assignor of the note, but Plaintiff's Respondent's brief is respectfully devoid from arguments that meet the substantive issues square on. Indeed, as explained in the Appellant's initial brief, despite the post-default continued automatic debiting of payments from Defendants, Plaintiff failed to apply said payments to any principal or interest, including default interest, thereby allowing the default interest to continue to unfairly accrue at a rate of 30% *per annum.* Contrary to Plaintiff's argument that Defendants somehow waived the right to argue the amount of default interest, Defendants raised that issue in their opposition to summary judgment and in their motion for reconsideration. Where summary judgment seeking a judgment of foreclosure is filed, all issues with respect to the possession of the subject real property and amounts owed are at issue.

Overall, Assignor (proposed Third-Party Defendant) and Plaintiff failed to mitigate damages, breached the implied covenant of good faith and fair dealing, which the Courts of this State have routinely applied even to commercial notes, and overall acted in bad faith and conspired to act in bad faith with Plaintiff. As a result of Assignor's and Plaintiff's conduct, Defendants' real property is now well under water, making redemption or satisfaction extremely difficult, if not impossible, for Defendants. We respectfully ask this Court to overrule the lower court *in toto*, where the lower court rejected Assignor's and Plaintiff's ill conduct as a basis for granting Plaintiff relief, refused to allow Plaintiff to implead Assignor and refused to reopen/extend discovery even though the lower court granted Plaintiff leave to file a late motion for summary judgment.

LEGAL ARGUMENT

I. THE LOWER COURT'S GRANT OF SUMMARY JUDGMENT TO PLAINTIFF SHOULD BE OVERRULED BECAUSE PLAINTIFF AND ASSIGNOR BREACHED THE COVENANT OF GOOD FAITH AND FAIR DEALING AND ACTED IN BAD FAITH. (P-95 to P-97)

The law is respectfully clear, and Plaintiff's efforts to convolute the law and facts should respectfully be disregarded. The Courts of this State have routinely held that: "It is well settled that 'an implied covenant of good faith and fair dealing' inheres in 'every contract in New Jersey'." *Wilmington Sav. Fund Society, FSB for Pretium Mortg. Acquisition Trust v. Daw*, 469 N.J. Super. 437, 452 (App. Div. 2021), *quoting Sons of Thunder, Inc. v. Borden, Inc.*, 148 N.J. 396, 420 (1997); *see*

also Restatement (Second) of Contracts § 205 (Am. Law Inst. 1981) ("Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement").

The Appellate Division continued that: "The implied covenant signifies that 'neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract'." *Wilmington Sav., 469 N.J. Super.* at 452, *quoting Sons of Thunder, Inc.*, 148 N.J. at 420, (*quoting Palisades Props., Inc. v. Brunetti*, 44 N.J. 117, 130 (1965)). "A party breaches the implied covenant when it exercises its contractual functions 'arbitrarily, unreasonably, or capriciously' and with an 'improper motive'." *Wilmington Sav., 469 N.J. Super.* at 452, *quoting Wilson v. Amerada Hess Corp.*, 168 N.J. 236, 251 (2001). "For example, if it were shown that the lender deliberately rejected a reasonable repair proposal as a means to reap for itself greater accrued interest, or as a scheme to wipe out a borrower's equity in the premises, such bad-faith conduct might justify a remedy by a court of equity." *Wilmington Sav., 469 N.J. Super.* at 452, *quoting Wilson*, 168 N.J. at 251.

In *Wilmington Sav.*, the Appellate Division explained: "We would expect and hope that instances of abuse will be rare. But the implied covenant of good faith and fair dealing can provide a mechanism to prevent injustice in such instances. In particular, a court of equity has the power to abate the accrued mortgage interest if

the borrower proves the lender or its agent acted in bad faith with respect to the disposition of the insurance proceeds." *Wilmington Sav., 469 N.J. Super.* at 455.

"Another element of the implied covenant of good faith and fair dealing in this context is transparency and clear communication with the homeowners." *Id.* Although *Wilmington Sav.* concerned a residential mortgage and the application of insurance funds, the result is still the same in the matter at Bar where the implied covenant applies to all contracts, including commercial loans, and Defendants' post-default funds were never applied to anything – not even the default interest.

"Good faith is defined by the Uniform Commercial Code as "honesty in fact in the conduct or transaction concerned." *National Westminster Bank NJ v. Lomker*, 277 N.J. Super. 491, 496 (App. Div. 1994), *quoting* N.J.S.A. 12A:1-201(19) "*[A] commercial debtor may defend against enforcement of lender's rights where the lender has engaged in bad faith, misconduct or the like.*" *National Westminster Bank NJ*, 277 N.J. Super. at 496 (emphasis added), *citing Ramapo Bank v. Bechtel*, 224 N.J. Super. 191, 198 (App.Div.1988) (possibility of a concealed pre-transaction agreement not to pursue a co-guarantor in the event of default sufficient to overcome lender's motion for summary judgment).

Thus, the same principles that apply to implied covenants of good faith and fair dealing, which, again, is inherent in all contracts forged in this State, clearly apply to commercial loans, and bad faith acts and omissions of a commercial lender

provide a commercial borrower a defense "*against enforcement of lender's rights where the lender has engaged in bad faith, misconduct or the like.*" *Ernest Bock, LLC v. Paul Steelman*, A-0469-19, 2021 WL 4771306 (App. Div. October 13, 2021) (P-98) (emphasis added), *citing Ramapo Bank*, 224 N.J. Super. at 198. (Emphasis there's.) This alone should have sufficed to defeat Plaintiff's motion for summary judgment.

"Related to this obligation is the requirement that a lender not 'unjustifiably impair' any collateral. *National Westminster Bank NJ*, 277 N.J. Super. at 497, *citing N.J.S.A.* 12A:3-60; *Langeveld v. L.R.Z.H. Corporation,* 74 *N.J.* 45, 50 (1977); *Lenape State Bank v. Winslow Corp*., 216 N.J. Super. 115, 124-25 (App. Div. 1987).

That is precisely what has happened here where automatically debited post-default payments could have been applied to default interest, but, per Plaintiff's own mortgage statements to Defendants, have bizarrely been applied to nothing. (P-58 to P-72) Though failing to apply Defendants' post- default payments to so much as accruing 30% default interest, Assignor and Plaintiff wasted the collateral, pushing the Subject Property under water and breached the implied covenant of good faith and fair dealing by blatantly failing to mitigate damages in bad faith.

II. THE LOWER COURT ERRED IN GRANTING PLAINTIFF AND ASSIGNOR SUMMARY JUDGMENT BECAUSE THEY IMPAIRED DEFENDANTS' COLLATERAL AND ACTED IN BAD FAITH. (P-95 to P-97)

Failure to apply post-default automatically debited payments to anything – not

even default interest accruing at 30% - has wasted Defendants' collateral to the point that the subject property is under water. "Equitable in nature and characterized as 'probably the most important provision in the [UCC] to the surety [or guarantor]', the defense of impairment of collateral is available to a guarantor just as much as to the debtor." *National Westminster Bank NJ*, 277 N.J. Super. at 497, *quoting Langeveld, supra,* 74 *N.J.* at 51-52. "No less can be said for the defenses of lender bad faith and misconduct." *National Westminster Bank NJ*, 277 N.J. Super. at 497, *citing Chemical Bank v. Paul,* 244 *Ill. App.*3d 772 (1993); *Sprague Nat. Bank v. Dotty,* 415 *N.W.*2d 725 (Ct. App. Minn. 1987), *rev. denied* (1988); *Olney Savings & Loan Assn. v. Farmers Market of Odessa, Inc.,* 764 *S.W.*2d 869 (Texas Ct. App. 1989).

National Westminster Bank NJ concerned guaranty language that did not expressly waive the defense of bad faith, and the Appellate Division held that the guarantors in a contract could assert the defense of impairment of collateral and bad faith where facts revealed the creditor sold property below appraisal and from under guarantor. *See National Westminster Bank NJ*, 277 N.J. Super. 491. There is no reason that this holding pertaining to waiver language (or the lack thereof) in commercial guarantees should differ for commercial notes, which similarly contains no such waiver language.

The *National Westminster Bank NJ* concluded: "In *Lenape,* we construed a

guaranty that was not unlike the guaranties here to constitute an 'unequivocal' waiver of the defense of impairment of collateral." *Id.* at 499 "But we also held there that claims of wrongful and intentional interference with the collateral survived summary judgment." *Id.* "We did so pointing to the existence of an express provision in the guaranty discharging the guarantor's obligations where any 'deterioration, waste or loss [of the collateral] is caused by the willful act or willful failure to act of Lender'." *Id.*, *quoting Lenape,* 216 *N.J. Super.* at 129.

The Appellate Division explained that: "The guaranties here do not contain this language. But neither do they expressly provide to the contrary, that is the guaranties do not say that willful misconduct discharges the guarantors' obligations. And, critically, however unequivocal and unconditional, the guaranties do not expressly waive the defenses of bad faith, fraud or conspiracy." *National Westminster Bank NJ*, 277 N.J. Super. at 499, *citing Chemical Bank v. Paul, supra,* 244 Ill. App. 3d at 783. The same may be said about the guarantee and note between Assignor and Defendants (and by virtue of the assignment with Plaintiff and Defendants).

Similarly, although *Wilmington Sav.* dealt with the application of insurance proceeds, how is that any different from a lender's application of payments to principal and interest from a debtor? Again, the *Wilmington Sav.* Court held: "In particular, a court of equity has the power to abate the accrued mortgage interest if the

borrower proves the lender or its agent acted in bad faith " *Wilmington Sav., 469 N.J. Super.* at 455.

"Another element of the implied covenant of good faith and fair dealing in this context is transparency and clear communication. . . ." *Id.* Why would this be any different from the necessity to provide full transparency and to communicate regarding automatically debited payments to the lender in normal course that are applied to nothing and left to hang in limbo?

Notably, while the *Wilmington Sav.* matter, again, involves a residential mortgage, that court did not fail to recognize that *every* contract in this State is governed by an implied contract of good faith and fair dealing. Where the trial court of equity "has the power to abate the accrued mortgage interest if the borrower proves the lender or its agent acted in bad faith" and a lender owes a duty of "transparency and clear communication" to a borrower, why, again, should the result be any different here?

As set forth in Defendant Kalisch's Certification (P-58 to P-72), Assignor continued to automatically debit payments following Defendants' single technical default, applied Defendants' post-default payments to nothing (not even default interest), failed to make any timely responses to Defendants' efforts to rectify the matter despite empty promises to do so, thereby causing the subject property to fall under water because of the accrual of 30% default interest while Assignor a dragged

Defendants along, and then assigned the loan to Plaintiff, which did nothing other than immediately file to foreclose. Indeed, Plaintiff also did not seek to apply the post-default payments to anything – not even contiguously accruing 30% default interest – or engage Defendants in the dialogue that Assignor promised and never delivered. Plaintiff now seeks to reap the benefits of the 30% accrued default interest, which could have been mitigated or abated had Assignor or Plaintiff simply applied Defendants' payments to that accruing interest, engaged in required transparency and promptly informed and communicated with Defendants as Assignor had emptily promised.

Surely, Defendants, as commercial borrowers, possess a defense "*against enforcement of lender's rights where the lender has engaged in bad faith, misconduct or the like[,]*" which misconduct is purely evident here. *Bock*, 2021 WL, *citing Ramapo Bank*, 224 N.J. Super. at 198. Summary judgment should be denied for this reason alone.

It is worth again emphasizing that Assignor (and Plaintiff) wasted collateral where neither applied additional payments that were automatically debited from Defendants' account post-default to any of the debt. Incredibly, despite the post-default continued automatic debiting of payments from Defendants, Plaintiff failed to apply said payments to any principal or interest, including default interest, thereby allowing the default interest to continue to unfairly accrue at a rate of 30% *per*

annum, pushing the Subject Property under water.

As far as Defendants know, those additional payments continue to remain in proverbial limbo without being applied to any monies owed. Moreover, when Defendant, Mr. Kalisch, the guarantor and principal of the borrower, contacted Assignor, Assignor eventually advised Mr. Kalisch (through promises to communicate with Mr. Kalisch to rectify the issue) (P-58 to P-72) that his payments would remain in limbo until the default interest was completely paid off, but that fails to explain why Assignor never applied those post-default payments to the 30% default interest.

While Mr. Kailsch struggled to understand Assignor's handling of the loan or even the status of the account, Mr. Kalisch continued to engage Assignor in an effort to resolve the matter and to see what could be speedily arranged to make the account current. (P-58 to P-72) "[A] debtor may defend against enforcement of lender's rights where the lender has engaged in bad faith, misconduct or the like." *Nat'l Westminster Bank NJ v. Lomker*, 277 N.J. Super. at 496. Again, the foregoing called for the denial of the motion for summary judgment.

"As a mortgagee resorting to a court of equity to enforce its security, plaintiff exposed itself to the operation of equitable principles and must submit to an equitable resolution." *Totowa Sav. & Loan Assoc. v. Crescione*, 144 N.J. Super. 347, 352 (App. Div. 1976) (citations omitted). General equitable principles apply in

foreclosure actions, including the principle that "he who seeks equity must do equity." *Sovereign Bank, FSB v. Kuelzow*, 297 N.J. Super. 187, 197 (App. Div. 1997). "In this respect, equity follows the common law precept that no one shall be allowed to benefit by his own wrongdoing. Thus, where the bad faith, fraud or unconscionable acts of a petitioner form the basis of his lawsuit, equity will deny him its remedies." *Rolnick v. Rolnick*, 290 N.J. Super. 35, 45 (App. Div. 1996).

Although Assignor advised Mr. Kalisch that Assignor would negotiate and work with Mr. Kalisch in good faith, Mr. Kalisch routinely had difficulty connecting with Assignor, which dragged out Mr. Kalisch's efforts to promptly remedy these issues with Mr. Kalisch's account, resulting in further default interest accruing, despite, again, subsequent payments having been made. Summary judgment should be denied so a hearing may be held to ascertain the extent of damage to the collateral and what credits Defendants must receive.

III. THE LOWER COURT ERRED IN GRANTING PLAINTIFF AND ASSIGNOR SUMMARY JUDGMENT BECAUSE THE 30% DEFAULT INTEREST IS UNREASONABLE UNDER THE TOTALITY OF THE CIRCUMSTANCES. (P-95 to P-97)

The New Jersey Supreme Court has held: "An agreement, made in advance of breach, fixing the damages therefore, is not enforceable as a contract and does not affect the damages recoverable for the breach, unless (a) the amount so fixed is a reasonable forecast of just compensation for the harm that is caused by the breach, and (b) the harm that is caused by the breach is one that is incapable or very difficult

of accurate estimation.*"* *Metlife Capital Fin. Corp. v. Wash. Ave. Assocs. L.P.*, 159 N.J. 484, 493 (1999).

The New Jersey Supreme Court explained: "The Uniform Commercial Code provision on liquidated damages, adopted in New Jersey as N.J.S.A. 12A:2-718, incorporated this more flexible test. N.J.S.A. 12A:2-718 evaluates "reasonableness" in analyzing a stipulated damages provision. *Metlife Capital Fin. Corp.*, 159 N.J. at 494. The New Jersey Supreme Court continued that: "'In *Stuchin v. Kasirer,* the defendants in a foreclosure case challenged the application of an enhanced default rate, which increased the contract interest rate by fifteen percent. [*Stuchin v. Kasirer*, 237 N.J. Super. 604, 610 (App. Div. 1990).] [T]he Appellate Division remanded the issue to the trial court to receive 'appropriate evidence of the reasonableness or unreasonableness of the 15% rate increase. . . .'" *Metlife Capital Fin. Corp.*, 159 N.J. at 494-495, *quoting Stuchin*, 237 N.J. Super. at 614. Respectfully, the same is necessary here, where the rate of default interest is far higher – 30% - and summary judgment should have been denied so the that the lower court could have received 'appropriate evidence of the reasonableness or unreasonableness of the 15% rate increase. . . ." *Metlife Capital Fin. Corp.*, 159 N.J. at 494-495.

The Court added: "Treating reasonableness 'as the touchstone', we noted that the difficulty in assessing damages, intention of the parties, the actual damages

sustained, and the bargaining power of the parties all affect the validity of a stipulated damages clause. We did not, however, consider any of those factors dispositive, and remanded the case, leaving 'to the sound discretion of the trial court the extent to which additional proof is necessary on the reasonableness of the clause.'" *Id.* at 495.

"Applying the principle that '[t]he overall single test of validity is whether the [stipulated damage] clause is reasonable under the totality of the circumstances," the *Metlife Capital Fin. Corp.* Court "address[ed] the validity of the five percent late fee included in this contract." *Id.* The *Metlife Capital Fin. Corp.* Court concluded "that under that 'reasonableness' test, the five percent late fee is a valid measure of liquidated damages." *Id.* Here, the default rate at issue in the matter at Bar is 30%, not 5%.

The *Metlife Capital Fin. Corp.* Court reasoned that: "A number of factors demonstrate the "reasonableness" of this specific five percent late fee. Barbara Geer, one of MetLife's portfolio Management Specialists, testified about MetLife's procedures in dealing with delinquent payments. That testimony was uncontradicted. She also testified that a five percent late fee was normal industry custom in similar commercial mortgages." *Id.* at 497. Again, compare 5% with 30%, which is the default rate of interest in the matter at Bar.

The New Jersey Supreme Court concluded: "The five percent late fee in this

case was not unreasonable. [T]his loan involved an arms-length, fully negotiated transaction between two sophisticated commercial parties, each represented by counsel. *MetLife* presented uncontroverted testimony that the five percent late fee was well within the normal industry standard, and was intended to compensate for the administrative costs associated with servicing delinquent loan payments. [The borrower] presented no evidence to overcome the presumptive reasonableness of the stipulated damages clause. There is no evidence of fraud, duress or other unconscionable acts on the part of *MetLife*." *Id.* at 500. "Furthermore, case law from New Jersey and other jurisdictions suggests that a small percentage late charge on a commercial loan is simply part of the cost of doing business. A five percent fixed late charge negotiated between sophisticated commercial entities, is, in these circumstances, a valid measure of liquidated damages." *Id.*

Respectfully, while 5% may be small, 30% default interest , by contrast, is not, particularly where Defendants payments were never even applied to mitigate the continuously accruing interest. Indeed, in recent times, the New Jersey Office of Foreclosure has been applying approximately 16% in total interest during default periods in many cases, regardless of what is provided for in the note. That said, where default interest is also intended to compensate a lender for administrative and other costs, Assignor's and Plaintiff's conduct, as described in **Points I & II**, above, in the totality of the circumstances, warrants an equitable adjustment. Such an

adjustment must respectfully be had only following a hearing to adjudicate, among other things, the industry standard against the backdrop of Assignor's and Plaintiff's conduct. As a result, Defendants respectfully submit that the lower court erred in entering summary judgment against Defendants.

IV. THE LOWER COURT ERRED IN GRANTING SUMMARY JUDGMENT TO PLAINTIFF AND ASSIGNOR BECAUSE DEFENDANTS REQUIRED DISCOVERY. (P-95 to P-97)

While it is unclear why my predecessor counsel did not engage in discovery with Plaintiff, Defendants should not be penalized for their former attorney's failure. Indeed, this Court granted Plaintiff the courtesy of additional time to file its motion for summary judgment even though Plaintiff asked to file that motion well beyond this Court's deadline set out in the Case Management Order. Defendants therefore asked the lower court to extend the same courtesy to Defendants and permit the reopening of discovery so that the highly fact-sensitive issues discussed in **Points I to III** above might have been investigated and property addressed. Unfortunately, while this issue was as thoroughly briefed before the lower court to the extent it is briefed here, the Undersigned regrettably neglected to file a notice of cross-motion to Plaintiff's motion for summary judgment to reopen/extend the discovery period. The Undersigned respectfully asked the lower court to forgive this omission during oral argument of the motion for summary judgment, where, again, the issue of the necessity for discovery was thoroughly briefed in the opposition, but the lower court

declined to forgive the omission of a notice of cross-motion to reopen/extend discovery. Respectfully, the lower court erred in doing so, where the lower court is a court of equity and the issues were thoroughly briefed before it. In any event, this same relief was also denied in the disposition of Defendants' motion for reconsideration. (P-97) it was denied there as well. *See* the lower court's order of October 11, 2024.

To defeat summary judgment based on incomplete discovery, the opponent must "demonstrate with some degree of particularity the likelihood that further discovery will supply the missing elements of the cause of action," or the defense. *Wellington v. Est. of Wellington*, 359 N.J. Super. 484, 496 (App. Div. 1977); s*ee also Friedman v. Martinez*, 242 N.J. 449, 472 (2020) (rejecting argument that summary judgment was premature). Defendants' need for discovery is by no means frivolous or *pro forma* or intended to senselessly delay. Instead, where the totality of the circumstances must be applied to determine the reasonableness of the default interest rate, in addition to questions surrounding the extent of the wasting of the collateral and why Assignor, and later Plaintiff, engaged in the conduct described above, discovery is respectfully essential. Again, Defendants should not be punished for my predecessor's failure to engage in discovery, which is critically needed, particularly where this Court extended the deadlines for Plaintiff so that could timely file its motion for summary judgment. Why were we denied the extension of a deadline

where Plaintiff received an extension? Thus, Defendants respectfully ask that this Court reopen discovery so that the foregoing issues may be properly evaluated.

CONCLUSION

In light of the foregoing, Defendants respectfully ask this Court to overrule the lower court and reinstate this matter for discovery and trial, while granting leave for the impleader of Assignor

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By:/s/ Eric J. Warner
Eric J. Warner, Esq.

Dated: May 15, 2025