

**SUPREME COURT OF THE STATE OF NEW YORK  
APPELLATE DIVISION: SECOND JUDICIAL DEPARTMENT**

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U.S. BANK NATIONAL ASSOCIATION, AS  
TRUSTEE FOR CSAB MORTGAGE- BACKED  
PASS-THROUGH CERTIFICATES, SERIES 2006-3  
3476 Stateview Boulevard, Ft. Mill, SC 29715,

*Plaintiff-Appellant,*

- against -

DONNETTE SMITH,

*Defendant-Respondent,*

*(For Continuation of Caption See Inside Cover)*

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To Be Argued By:  
Chantal Hernandez  
15 Minutes

**Docket No.:**  
**2013-08653**

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**BRIEF FOR DEFENDANT-RESPONDENT**

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- and -

MORTGAGE ELECTRONIC REGISTRATION  
SYSTEMS, INC. AS NOMINEE FOR WALL  
STREET MORTGAGE BANKERS LTD. DBA  
POWER EXPRESS, NEW YORK CITY  
ENVIRONMENTAL CONTROL BOARD, NEW  
YORK CITY PARKING VIOLATIONS BUREAU,  
NEW YORK CITY TRANSIT ADJUDICATION  
BUREAU and JOHN DOE (Said name being fictitious,  
it being the intention of Plaintiff to designate any and  
all occupants of premises being foreclosure herein,  
and any parties, corporations or entities, if any, having  
or claiming an interest or lien upon the mortgage  
premises.)

*Defendants.*

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## **COUNTERSTATEMENT OF QUESTIONS PRESENTED**

1. Whether Plaintiff-Appellant failed to negotiate in good faith under New York Civil Practice Law and Rules (“CPLR”) 3408(f) by failing to comply with the directions of the Judicial Hearing Officers and referees in the foreclosure settlement conference part.

The Supreme Court correctly answered the question in the affirmative.

2. Whether tolling of interest is a permissible equitable remedy to redress a party’s failure to negotiate in good faith as required by CPLR 3408(f).

The Supreme Court correctly answered the question in the affirmative.

3. Whether tolling of interest from September 2012 to July 2013 was an appropriate remedy for Plaintiff-Appellant’s failure to negotiate in good faith as required by CPLR 3408(f).

The Supreme Court correctly answered the question in the affirmative.

## PRELIMINARY STATEMENT

This appeal arises out of New York's mandatory settlement conference procedures for residential foreclosure actions, enacted in 2008 and codified at CPLR 3408. Appellant grossly mischaracterizes the parties' obligations to negotiate in good faith under CPLR 3408(f) in a mortgage foreclosure case and seeks to eviscerate the Supreme Court's authority to order remedies for violations of CPLR 3408(f).

For almost four years, Appellant has engaged in obstructive and dilatory tactics that have stymied Respondent Donnette Smith's ("Smith") good faith efforts to save her home. At mandatory foreclosure settlement conferences held pursuant to CPLR 3408, Appellant repeatedly refused to comply with directions of Judicial Hearing Officers ("J.H.O.s") and referees to supply documentation to support its claim that it was restricted in its ability to modify Smith's mortgage. Hoping to save her home, Smith declined to accept at face value Appellant's naked "word" that it was unable to modify her loan, and she therefore supported the court's directive that Appellant prove its claim.

Upholding their duty to ensure that parties negotiate in good faith during the mandatory settlement conferences pursuant to CPLR 3408(f), the J.H.O.s and referees directed Appellant to produce proof that it was powerless to modify Smith's mortgage. Such documentation was requested to further the purpose of the



conferences of “determining whether the parties can reach a mutually agreeable resolution to help the defendant avoid losing his or her home, and evaluating the potential for a resolution in which payment schedules or amounts may be modified or other workout options may be agreed to . . . .” CPLR 3408(a). For instance, investors frequently waive stated restrictions to allow for a reduction of the interest rate, which here could have produced a home-saving modification for Smith.

Consistent with the court’s equitable authority in foreclosure actions, and as authorized by court rules implementing CPLR 3408, which obligates the courts to “ensure that each party fulfills its obligation to negotiate in good faith” during mandatory settlement conferences and “see that conferences not be unduly delayed or subject to willful dilatory tactics”, 22 NYCRR § 202.12-a(c)(4), the Supreme Court crafted a remedy carefully tailored to the harm occasioned by Appellant’s conduct. The court thus barred Appellant from collecting the interest that had accrued due to Appellant’s failure to comply with repeated directives aimed at promoting a negotiated settlement. This Court has recognized that both CPLR 3408(f) and 22 NYCRR § 202.12-a authorize courts to penalize a party that fails to negotiate in good faith, while noting that any such penalty must be “appropriate, permissible, and authorized,” and should be “tailored to the circumstances of each given case”. *Wells Fargo Bank, N.A. v. Meyers*, 108 A.D.3d 9, 23, 966 N.Y.S.2d 108, 118 (App. Div. 2d Dep’t 2013).

Tolling of interest is a remedy routinely employed by courts to maintain fairness in the course of mortgage foreclosure actions by placing the costs of delay on the party responsible for causing that delay. The Supreme Court's July Order upholding interest tolling was a remedy carefully tailored to the harm occasioned by Appellant's dilatory tactics. The Supreme Court's order should be affirmed.

### **COUNTERSTATEMENT OF FACTS AND NATURE OF THE CASE**

**The Hardship that Caused the Default.** In 2007, Respondent suffered a disabling accident after which she was no longer able to work. (R. at 52.) As a consequence, she began missing mortgage payments in 2009. (*Id.*) In summer 2009, Smith contacted ASC, her mortgage servicer and Appellant's agent, to apply for a loan modification to bring her account current.<sup>1</sup> (*Id.*) In a document dated December 16, 2009, Appellant offered Smith a forbearance agreement that required her to make four reduced payments, after which Appellant promised to evaluate her for a loan modification. (R. at 67-68.) Appellant further promised to suspend all foreclosure activities should Smith timely make the payments. (*Id.*) On December 28, 2009, Smith signed the forbearance agreement and mailed it to Appellant along with a check for the first payment, due on January 6, 2010. (R. at 52, 69-70.) Appellant commenced the subject foreclosure action on January 4, 2010. (R. at 71.)

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<sup>1</sup> Hereinafter, ASC and Appellant are referred to collectively as "Appellant."

**Smith Attempts to Cure the Default.** Despite Appellant's violation of the express terms of the forbearance agreement by filing a foreclosure action, Smith continued making payments. (R. at 36, 53.) She made the four payments required under the forbearance agreement, with the last payment due April 6, 2010. (*Id.*) After receiving and accepting the fourth payment, Appellant did not offer a modification nor did it provide an explanation for its failure to do so. (*Id.*) Smith continued making payments until Appellant rejected her September 2010 payment, again, without explanation. (R. at 37, 53.)

Smith thereafter submitted five complete loan modification applications. (*See* R. at 53-59, 89, 100, 113, 127.) In response to her first submission, Appellant claimed that the application was incomplete, but did not identify what documents were allegedly missing. (R. at 89.) Appellant rejected the second application, stating only that it was unable to offer an affordable modified loan payment due to unspecified "investor guidelines." (R. at 97.) Two and a half months later, Appellant's counsel indicated that a modification might in fact be available, stating, "I just need something that my client would agree to." (R. at 158.) Smith's third, fourth, and fifth applications were submitted while the case was being conferenced in the Foreclosure Settlement Conference Part.

### **Appellant Abandons the Foreclosure Action in the Shadow Docket.**

CPLR 3408(a) requires that settlement conferences be held within 60 days of the filing of the proof of service. Appellant filed proof of service no later than January 11, 2010.<sup>2</sup> The first conference was not held until March 9, 2011, more than a year after the case was commenced. (R. at 39, 71.) The delay was caused by Appellant's violation of 22 NYCRR § 202.12-a by failing to file a request for judicial intervention ("RJI") when it filed proof of service of the summons and complaint. (R. at 37.) According to the court rules, a settlement conference is not held until the RJI is filed. *See* 22 NYCRR § 202.12-a.

Smith filed an RJI when she learned that Appellant's failure to file the RJI in accordance with court rules was the source of the delay in scheduling a settlement conference. (R. at 37.)

### **Appellant's Good Faith Violations in the Foreclosure Settlement**

**Conference Part.** The parties were in the Foreclosure Settlement Conference Part for a year, attending seven settlement conferences, prior to the entry of the October 5, 2012 Order ("October Order"). (R. at 39-48.) The first two conferences were overseen by Referee Douglas, while the subsequent five conferences were presided over by Referee Berson. (*See* R. at 39-48.) On numerous occasions while the

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<sup>2</sup> This Court is entitled to take judicial notice of undisputed court records and files. *Khatibi v. Weill*, 8 A.D.3d 485, 485, 778 N.Y.S.2d 511 (App. Div. 2d Dep't 2004).

matter was assigned to the Foreclosure Settlement Conference Part, the referees directed, and Smith requested, that Appellant produce copies of the mortgage and note. (R. at 10, 49.) Appellant refused to comply. (*Id.*) At the first six conferences the referees directed, and Smith requested, that Appellant produce evidence that it sought a waiver of the investor restrictions that Appellant claimed limited its ability to offer a loan modification to Smith. (R. at 44, 47.)

Appellant, through its agent ASC, is a participant in the United States Treasury Department's Home Affordable Modification Program ("HAMP"). As a HAMP participant, Appellant is required to offer homeowners loan modifications according to HAMP terms, should the homeowner meet HAMP eligibility criteria. If underlying investment documents purport to disallow changes to the terms of the loan in accordance with HAMP guidelines, the HAMP participant – here the Appellant – is required to seek a waiver of the impeding restrictions. (*See* R. at 494) (Making Home Affordable Program, Handbook for Servicers of Non-GSE Mortgages, Ch. II § 6.5 (Aug. 17, 2012)).

The Appellant repeatedly disobeyed the referees' directives and ignored Smith's requests that Appellant demonstrate that it sought a waiver of investor restrictions that allegedly impeded Appellant's ability to offer Smith a HAMP-compliant loan modification. (R. at 44, 48.) By February 9, 2012, after six settlement conferences, Smith's loan arrearage exceeded \$80,000. (R. at 148.)

On three separate occasions while the subject action was assigned to the Foreclosure Settlement Conference Part, Smith submitted complete loan modification applications. (R. at 100, 113, 127.) The first application was submitted March 9, 2011, the day of the first settlement conference. (R. at 39, 100.) In response to Smith's modification application, Appellant requested that Smith submit the same documents over and over again. (R. at 40-43.)

By the fourth settlement conference, held on October 12, 2011, Appellant had not conducted a review of Smith's modification application. (*See* R. at 39-43.) Appellant's counsel claimed its office had not received any documents. (R. at 43.) After being shown proof of the prior submissions, Appellant's counsel called its office, confirmed that documents were received, but stated that they were now "stale" and too old to be used for modification review.<sup>3</sup> (*Id.*) In an effort to spur progress, Referee Berson ordered that Smith submit a new application by October 31, 2011, and that at the forthcoming settlement conference Appellant send a bank representative to the conference. (R. at 43-44.)

At the fifth settlement conference, held on December 1, 2011, Amber Dieson, a bank representative was present. (R. at 44.) She stated only that a loan

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<sup>3</sup> When loan modification reviews are not conducted in a timely manner, banks will typically request that homeowners submit updated bank statements and pay stubs, claiming that prior submissions can no longer be used as a basis upon which to make a loan modification decision. The previously submitted documents are labeled "stale."

modification could not be offered due to an investor restriction. (*Id.*) Both Smith and the referees had requested at the first, second, third, and fourth conferences that Appellant produce evidence that it had sought a waiver of the investor restriction, which Appellant claimed prevented it from offering a loan modification. (*Id.*) No such evidence was produced. (*Id.*) At the conclusion of the fifth conference, Referee Berson directed Appellant to produce evidence that it had provided denial letters that describe the basis for the prior loan modification denials,<sup>4</sup> and again ordered Appellant to produce proof that it had sought waiver of the investor restrictions. (R. at 44-45.) This documentation was to be supplied to Smith on or by December 30, 2011. Additionally, Referee Berson directed Smith to prepare a settlement proposal. (R. at 45.)

On December 13, 2011, Appellant produced two denial letters, one dated November 10, 2010 and the other dated February 22, 2011. (R. at 45, 130-32.) Neither Smith nor her counsel had ever seen these letters, despite that they were both addressed to Smith. (R. at 46, 60.) The November letter purports to deny Smith's request for a pre-foreclosure sale, but Smith had never made such a request. (R. at 60, 132.) The February letter purports to deny Smith's request for a

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<sup>4</sup> HAMP requires that when a participating servicer rejects an applicant for a loan modification, it send a "non-approval notice," more commonly referred to as a denial letter. Making Home Affordable Program, Handbook for Servicers of Non-GSE Mortgages Ch. II § 2.3.2. The denial letter must state the primary reasons for the denial. *Id.*

repayment plan. (R. at 60, 130.) Again, Smith had never submitted such a request to Appellant. (*Id.*)

On January 17, 2012, Smith submitted a settlement proposal to Appellant in accordance with Referee Berson's December 2011 directive. (R. at 46.) Smith offered to make a \$15,000 upfront payment should the interest rate be reduced to four percent, and the loan re-amortized over 30 years. (R. at 135-36.) The upfront payment, in conjunction with the modification to the loan terms, would produce a monthly payment of \$1,866.69, which Smith had demonstrated she could afford because she had continued (and continues) to escrow \$2,000 every month. (*Id.*)

At the sixth settlement conference, held on January 26, 2012, Appellant did not prepare a response to Smith's settlement proposal and did not produce evidence of a waiver request, as directed by the Referee. (R. at 46-47.) The Referee directed Appellant to respond to the settlement proposal within 15 days. (R. at 47.) Referee Berson again directed Appellant to produce evidence that it had submitted to its investor a request that the investor waive alleged restrictions that prohibited modification of Smith's loan. (*Id.*) Smith presented the purported denial letters supplied by Appellant, and as evidence of their insufficiency, Referee Berson directed Appellant to produce copies of detailed denial letters at the following conference. (*Id.*) Referee Berson also ordered Appellant to present a copy of the mortgage and note. (R. at 47-48.)



Smith received three more denial letters on February 8, 2012. (R. at 47.) She had never before seen these letters, addressed to her and dated October 13, 2010, February 22, 2011, and December 5, 2011. (R. at 62-33, 137-44.) As with the previous two letters proffered by Appellant during settlement conferences, this next set of three was not responsive to the modification applications Smith submitted. (R. at 62-44.)

In a letter dated February 9, 2012, Appellant rejected Smith's settlement proposal. (R. at 148.) Appellant did not offer a counterproposal or any avenues for settlement. (*Id.*)

At the seventh and final settlement conference, held on March 1, 2012, Appellant provided no explanation of the issues raised by the five denial letters setting forth serial nonresponsive bases for denial of Smith's several fully complete loan modification application submittals. (R. at 48.) Furthermore, Appellant, for the sixth time, violated a referee's directive by failing to produce evidence that it had requested a waiver of the investor restrictions. (R. at 44, 47-48)

During the year that the case was assigned to the Foreclosure Settlement Conference Part, Smith had fallen further behind on her mortgage, with Appellant charging interest and foreclosure-related fees, but had come no closer to reaching a settlement. Because the negotiations had been stymied by Appellant's repeated disregard of referee directives, submission of duplicative and nonresponsive

document requests, refusal to timely review Smith's loan modification applications, and failure to produce evidence that it had sought a waiver of investor restrictions to clear the way towards a settlement, Smith requested that the case be released from the Foreclosure Settlement Conference Part. (R. at 48.)

**The Supreme Court Grants Smith's Order to Show Cause.** When Smith learned that the Referee would not be issuing a report regarding the conduct of the parties (R. at 49), she moved on September 25, 2012 by order to show cause for summary judgment and equitable relief. (R. at 27-29.)

In support of her motion, Smith presented a 17-page affirmation from her attorney, Perry S. Friedman, Esq., a 16-page affidavit sworn by Smith, as well as 95 pages of exhibits supporting the factual claims presented in the affirmation and affidavit. (R. at 34-160.) The moving papers clearly document Appellant's persistent and variant violations of CPLR 3408(f)'s requirement that parties in foreclosure settlement conferences negotiate in good faith. (*Id.*)

The order to show cause, signed by the duty judge, Justice Larry D. Martin, demanded that Appellant show cause (1) why Smith should not be granted summary judgment based upon Appellant's failure to support its allegation that it is the holder of the mortgage and note; and, (2) why it should not be found that Appellant violated CPLR 3408(f) by failing to negotiate in good faith and, as a consequence, why interest should not be tolled, a modification compelled, and the

foreclosure action dismissed. (R. at 28-29.) The order to show cause further ordered a stay of the foreclosure proceedings pending a hearing and determination of the order, the tolling of interest, and service by September 28, 2012. (R. at 29.) The return date for the Motion was set for October 4, 2012. (R. at 28.)

**The Supreme Court Hearing on the Order to Show Cause.** On October 4, 2012, at the first hearing on the Motion, Justice Martin M. Solomon, the assigned IAS judge, gave Appellant the opportunity to submit written opposition to the order to show cause. (R. at 14-17; Appellant Br. 9.) Appellant declined to submit written opposition. (*Id.*)

Justice Solomon heard oral argument on the motion, inquiring into the basis for Smith's Motion. (R. at 9-16.) Smith informed Justice Solomon that the referees at the settlement conferences had been requesting a copy of the note for a year, but that Appellant had failed to produce it. (*Id.*) Appellant, in response, claimed that a copy of the note had been previously produced (R. at 10-11), but expressed confusion as to why it should be required to submit an additional copy upon a referee's order. (*See* R. at 13.)

During the course of the hearing, Appellant's counsel repeatedly attempted to talk over Justice Solomon (R. at 14-16), demonstrated indifference to the need to follow referee directives (R. at 13), and evinced a lack of understanding of the hardship caused by its delay, maintaining that seven settlement conferences over a

calendar year do not constitute a long negotiation. (*See* R. at 11.)

**The October Order.** Following the October 4, 2012 initial hearing on the Motion, Justice Solomon signed the October Order. (R. at 19.) The October Order did not decide the Motion. (R. at 17-19.)

Based upon evidence that Appellant had violated its obligations under CPLR 3408(f), Justice Solomon ordered that interest continue to be tolled “pending further order of this court or the parties reaching an agreement on the terms of a modification.” (R. at 14.) In the first two pages of the Order, Justice Solomon discussed CPLR 3408(f) and the evidence of Appellant’s failure to negotiate in good faith. (R. at 17-19.) Because Appellant had refused to submit written opposition to the order to show cause, Justice Solomon could only base his determinations on Smith’s account of Appellant’s conduct while in the Foreclosure Settlement Conference Part. Justice Solomon noted that Appellant repeatedly failed to comply with directives issued by the referees to produce documents, and asserted that negotiating in good faith requires, *inter alia*, “making reasonable efforts to comply” with the directives of the referees overseeing the settlement conferences. (R. at 18.)

Justice Solomon squarely placed the blame for the lack of settlement progress on Appellant, concluding that the “impasse” was caused by Appellant’s refusal to produce proof that it had sought a waiver of investor restrictions and the

original note. (*Id.*) Justice Solomon also faulted Appellant for not producing the “investor guidelines” and the pooling and servicing agreement. (*Id.*) These documents are the source of the investor restrictions, and thus would provide proof that investor restrictions do indeed exist that limit Appellant’s ability to modify Smith’s loan.

Following Appellant’s suggestion that further conferences were necessary, Justice Solomon ordered the Referee to hold an eighth settlement conference on October 25, 2012, at which Appellant was to produce the documents it had previously refused to furnish. (R. at 18-19.)

Smith’s Motion petitioned the Supreme Court for summary judgment and equitable relief. (R. at 28.) The Motion had requested tolling of interest, a directive requiring Appellant to issue an affordable loan modification, and dismissal of the foreclosure action based on a finding that Appellant violated CPLR 3408(f). (R. at 28.) While the October Order reflects that Justice Solomon found CPLR 3408(f) violations, and continued a tolling order, the tolling order was not final. (*See* R. at 17-19.) The tolling order remained in place pending a further order or a settlement. (R. at 19.) Appellant appealed the October Order. Smith has opposed the October Order appeal, arguing, *inter alia*, that the interlocutory October Order is not appealable as of right and Appellant has not requested leave to appeal. Smith has further opposed the October Order appeal as moot as a result

of the superseding July 5, 2013 Order (“July Order”).

**Subsequent Proceedings.** At the October 25, 2012, settlement conference, Appellant produced a copy of the pooling and servicing agreement (“PSA”) that governs the Residential Mortgage-Backed Security Trust into which Smith’s mortgage was placed. The PSA contains language by which the Trust’s investors purport to restrict modifications of mortgages placed into the trust. Appellant produced no other documents it had been ordered to produce. (R. at 21.) Referee Berson noted Appellant’s repeated failures to provide proof that a waiver of the investor restrictions was requested. (R. at 23.) Referee Berson further noted that HAMP required Appellant to maintain evidence in the loan file showing that reasonable efforts were made to seek a waiver of investor restrictions and “[p]laintiff’s failure to strictly comply with HAMP guidelines is required in order for there to be a good faith negotiation.” (*Id.*) Referee Berson determined that Appellant’s failure to comply with HAMP Guidelines indicated it had failed to negotiate in good faith and caused Smith to “plunge[] further into debt making further modification attempts even less affordable for her.” (R. at 26.) The matter was released from the settlement conference part for a determination of Smith’s Motion. (*Id.*)

On February 7, 2013, a further hearing on the Motion was held at which Smith’s then counsel requested a 30-day adjournment to substitute counsel. (R. at

613.) Appellant objected. (*Id.*) Justice Solomon granted the adjournment to allow new counsel time to submit reply papers. (R. at 613-14.)

**The Order from which Appellant Appeals.** On July 5, 2013, Justice Solomon ruled on Smith's Order to Show Cause. (R. at 7-8.) Justice Solomon reiterated that in the October Order the court had found that Appellant failed to negotiate in good faith by refusing to comply with the directives of the settlement conference J.H.O.s and referees to provide documentation to support its claims. (R. at 7-8.) Justice Solomon noted "[i]t was only when th[e] court ordered the production of this documentation, under threat of sanction as a willful failure to comply with discovery under CPLR 3216, that plaintiff complied and produced the documentation." (R. at 7.)

The tolling of interest initiated on September 25, 2012 by the signed Order to Show Cause was continued by the October Order, pending further order of the court. (R. at 8.) The July Order supersedes the October Order and upheld the tolling of interest from October 5, 2012 through July 2013. (*Id.*) Justice Solomon acknowledged that Appellant had since complied with the production of documents ordered and "in the interests of justice" lifted the suspension on July 5, 2013. (*Id.*)

## ARGUMENT

### I. THE SUPREME COURT CORRECTLY DETERMINED THAT APPELLANT FAILED TO NEGOTIATE IN GOOD FAITH.

#### A. Appellant's Obligation to Negotiate in Good Faith

Under CPLR 3408(f), “[b]oth the plaintiff and defendant shall negotiate in good faith to reach a mutually agreeable resolution, including a loan modification, if possible.” CPLR 3408 was enacted with the express purpose to “help the defendant avoid losing his or her home.” CPLR 3408(a). The statute requires the presence of “good faith,” not simply the absence of “bad faith.” The mere absence of fraud or malice is not sufficient to establish compliance with the good faith requirement of CPLR 3408. See *Wells Fargo Bank, N.A. v. Van Dyke*, 101 A.D.3d 638, 638-39, 958 N.Y.S.2d 331, 332 (App. Div. 1st Dep’t 2012). In evaluating whether a party has complied with its good faith obligation, a court must make its “determination of good faith . . . based on the totality of the circumstances.” *Id.* at 639, 958 N.Y.S.2d at 332. The determination must be made in light of the “overall context of the parties’ relationship and the negotiations between them.” *Meyers*, 108 A.D.3d at 17, 966 N.Y.S.2d at 114; *see also, U.S. Bank, N.A. v. Rodriguez*, 41 Misc. 3d 656, 972 N.Y.S.2d 451 (Sup. Ct. Bronx Cty. 2013) (adopting the “totality of the circumstances” standard).

A growing body of case law provides guidance as to the particulars of good faith in the settlement conference context. First, courts have noted that “good



faith” is a “subjective concept.” *See HSBC Bank USA, Nat’l Ass’n v. McKenna*, 37 Misc. 3d 885, 905, 952 N.Y.S.2d 746, 761 (Sup. Ct. Kings Cty. 2012). For parties to satisfy their obligation to negotiate in good faith during settlement conferences, their entire course of conduct during the conferences must evince a genuine effort to reach a resolution. In other words, courts must evaluate “the degree to which a party discusses the issues, listens to opposing viewpoints, analyzes its risk of liability, and generally participates in the process of mediation,” in addition to “such objective criteria as attendance, exchange of pre-mediation memoranda, and settlement authority.” *Id.* Conduct such as providing conflicting information, misrepresentations, disobedience of court orders, and unduly delays have been held as a lack of good faith. *See U.S. Bank, N.A. v. Shinaba*, 40 Misc.3d 1239(A), 2013 WL 4822396 at \*12 (Sup. Ct. Bronx. Cty.). Patterns of delay, misrepresentation, and repetitive requests for documents demonstrate a failure to negotiate in good faith.

Here, Appellant repeatedly refused to negotiate in good faith during settlement conferences. Appellant engaged in dilatory tactics through repetitive requests for documents, failing to timely review Smith’s modification applications, blatant disregard of referee directives, and failure to produce evidence that it had sought a waiver of investor restrictions. (*See supra* pp. 6-11). It was Appellant’s refusal to deal “honestly, fairly, and openly” with Smith that led to protracted

settlement negotiations. *See Shinaba*, 40 Misc.3d 1239(A), 2013 WL 4822396 at \*12 (noting that once parties agree to participate in foreclosure settlement conferences, they are obligated to deal “honestly, fairly, and openly” with each other). For instance, Appellant refused throughout all the settlement conferences, including the post-October Order settlement conference, to make any effort to comply with repeated orders that Appellant document its efforts to seek a waiver of alleged investor restrictions. (*See supra* pp. 6-11, 16). Appellant is squarely to blame for the protracted settlement conferences that resulted from its pattern of dilatory conduct and disregard for court and referee directives.

Patterns of delay alone constitute failure to negotiate in good faith. *See Shinaba*, 40 Misc.3d 1239(A), 2013 WL 4822396 at \*12 (noting that good faith is a subjective concept and finding that delaying in reviewing applications and requiring repeat submissions are “independently unjust” in addition to constituting violations of HAMP regulations). When delay also violates the regulatory requirements governing mortgage servicing and loss mitigation, such violations constitute further indicia of a failure to negotiate in good faith. *Id.* The related regulatory provisions should be read together and harmonized. *See Yatauro v. Mangano*, 17 N.Y.3d 420, 427, 931 N.Y.S.2d 36, 39 (2011).

**1. Appellant Violated HAMP Regulations and Created Unnecessary Delay by Failing to Adequately or Timely Evaluate or Respond to Smith's Mortgage Loan Modification Applications**

For servicers that participate in HAMP, a benchmark of good faith under CPLR 3408 is compliance with HAMP guidelines. *See U.S. Bank, Nat'l Ass'n v. Thomas*, 40 Misc. 3d 1241(A), 2013 WL 5184458 at \*5 (Sup. Ct. Kings Cty.) (holding that the record supported the referee's finding that plaintiff and its counsel failed to negotiate in good faith during settlement conferences "by, among other acts and omissions, their failure to follow HAMP directives"); *see also Rodriguez*, 41 Misc. 3d at 664, 972 N.Y.S.2d at 457 ("[W]here it is shown that a foreclosure plaintiff failed to follow HAMP guidelines, such failure violates the plaintiff's CPLR 3408(f) duty to proceed in good faith."); *One West Bank, FSB v. Greenhut*, 36 Misc.3d 1205(A), 2012 WL 2478213 at \*5 (Sup. Ct. Westchester Cty.).

Furthermore, the HAMP guidelines "reflect[] the knowledge and judgment of complex markets and institutions that most judges do not have, and what the program requires is presumably a fair accommodation of the interest of lenders, homeowners, and others with an interest in enforcement of the mortgage." *Deutsche Bank Nat'l Trust v. Izraelov*, 40 Misc. 3d 1238(A), 2013 WL 4799151 at \*6 (Sup. Ct. Kings. Cty.). HAMP regulates processing procedures and criteria for loan modification applications for servicers who opted into the program and agreed to process applications according to the guidelines. *See generally Wigod v. Wells*

*Fargo Bank, N.A.*, 673 F.3d 547, 556-57 (7th Cir. 2012). “In addition, Treasury’s own HAMP directive states that servicers must implement the program in compliance with state common law and statutes.” *Id.* at 580.

In this case, Appellant failed to properly review Smith’s multiple modification applications. (*See supra* pp. 7-11). In addition to duplicative demands for financial documents Smith had repeatedly submitted, Appellant issued five denial letters that were unresponsive to Smith’s modification applications. (*See supra* pp. 9-11). On December 13, 2011, Appellant presented two denial letters, one dated November 10, 2010 and the other dated February 22, 2011. (R. at 45, 130-32.) Neither Smith nor her counsel had ever seen these letters, despite that they were both addressed to Smith. (R. at 46, 60.) The November letter purports to deny Smith’s request for a pre-foreclosure sale, but Smith had never made such a request. (R. at 60, 132.) The February letter purports to deny Smith’s request for a repayment plan. (R. at 60, 130.) Again, Smith had never submitted such a request to Appellant. (*Id.*) The remaining three denial letters similarly were never seen by Smith, also appear to be manufactured after-the-fact and back-dated, and fail to properly respond to mortgage loan modification applications Smith had submitted to Appellant during the course of the parties’ extended negotiations. (*See supra* pp.10-11).

**2. Appellant Caused Inordinate Delay by Repeatedly Disobeying Court Orders Requiring that Appellant Submit Proof of Its Purported Efforts to Obtain Waiver of Investor Restrictions on Loan Modification Terms**

Under HAMP Guidelines, Ch II. § 6.5, servicers are required to maintain evidence in the loan file showing that “the servicer made a reasonable effort to seek a waiver from the investor and whether that waiver was approved or denied.” This does not require that the waiver be approved—the servicer merely needs to have proof that it attempted to obtain a waiver.

Here, Appellant repeatedly violated referee directives to produce proof that an attempt was made to obtain a waiver of investor restrictions throughout the settlement conferences, including the conference following the October Order. (*See supra* pp. 6-11, 16). The court directed that Appellant produce documentary proof – proof that HAMP obligates Appellant to maintain – to facilitate negotiations and explore all possible options. The referees were not forcing Appellant to agree to a modification, but instead ensuring that Appellant fulfilled its obligation to negotiate in good faith.

This Court recently reversed a Supreme Court’s order following a good faith hearing that *sua sponte* directed the plaintiff to re-evaluate the defendant under HAMP and stayed proceedings until the re-evaluation was completed. *Flagstar Bank, FSB v. Walker*, --- N.Y.S.2d--- , 2013 WL 6800917 (App. Div. 2d Dep’t). The Court noted that plaintiff satisfactorily established that the loan was ineligible

for modification under HAMP because it was insured by the Federal Housing Administration (“FHA”) and did not originate prior to January 1, 2009. *Walker*, --- N.Y.S.2d--- , 2013 WL 6800917 at \* 1. The Court reasoned that the courts cannot force parties to reach an agreement. *Id.* The Court, however, stated that “the Supreme Court should have made a determination as to whether the plaintiff satisfied its obligation pursuant to CPLR 3408(f) to ‘negotiate in good faith to reach a mutually agreeable resolution’ . . . .” *Id.* It remitted the case for a factual finding as to whether plaintiff negotiated in good faith and, if applicable, an appropriate remedy. *Id.*

This recent decision is distinguishable from Smith’s case. Smith does not have an FHA mortgage and her mortgage was originated in August 2006, (*See R.* at 187-211), prior to the January 1, 2009 cut-off. Furthermore, HAMP guidelines are applicable to Smith’s mortgage because it is a non-GSE mortgage secured by a one-to-four-unit owner occupied single-family property. (*See R.* at 187-211, 408.) Here, the Supreme Court did not improperly force Appellant to evaluate a loan that was otherwise ineligible for HAMP. The Supreme Court directed that Appellant follow applicable HAMP guidelines and provide proof of (i) alleged investor restrictions that prevented Appellant from offering an affordable, HAMP-compliant modification and(ii) Appellant’s attempts to obtain from the investor a waiver of any such restrictions. Both categories of documentary proof are required

by HAMP.

The court did not force an agreement on the parties but instead fulfilled its obligation to ensure that the parties negotiated in good faith, including following applicable HAMP guidelines. It was Appellant's refusal to comply with court directives that attempted to address the waiver of investor restrictions issues that resulted in protracted negotiations. The waiver issues could have been resolved very early on in negotiations if the Appellant had not blatantly disregarded its obligation to comply with court orders and HAMP regulations.

Furthermore, the Supreme Court acted in a manner that is consistent with *Walker*. The good faith issue was fully briefed to the Supreme Court and it held hearings on the Motion. The July Order determined that Appellant failed to meet its 3408(f) obligation to negotiate in good faith and that tolling of interest was an appropriate remedy for that violation.

**B. The Foreclosure Settlement Conference Part Referees Are Authorized to Compel Production of Documentation to Facilitate Negotiations**

The Supreme Court "has the affirmative obligation to ensure that the primary statutory goal of keeping homeowners in their homes (see CPLR 3408[a]) and the concomitant obligation of ensuring that the parties act in good faith (see 22 NYCRR 202.12-a[c][4]) are met." *U.S. Bank, Nat'l Ass'n v. Padilla*, 31 Misc. 3d 1208(A), 2011 WL 1348387 at \*3 (Sup. Ct. Dutchess Cty.). Rules promulgated by

the Chief Administrator of the Courts to implement CPLR § 3408(f) recognize the court's enforcement authority: "The court shall ensure that each party fulfills its obligation to negotiate in good faith and shall see that conferences not be unduly delayed or subject to willful dilatory tactics so that the rights of both parties may be adjudicated in a timely manner." 22 NYCRR § 202.12-a(c)(4).

Appellant argues that settlement conference referees utterly lack any power to fulfill their statutory obligations under CPLR 3408. (Appellant Br. 19-20). Appellant misinterprets CPLR 3048(e) and court rules to mean that the court cannot require a HAMP-participant servicer to provide proof it sought a waiver of investor restrictions because that demonstration is not expressly listed in CPLR 3408 or 22 NYCRR § 202.12-a. This interpretation is absurd. CPLR 3408(e) states that the court shall send a notice to the parties identifying documents that the parties should bring to settlement conferences. "For the plaintiff, such documents should include, *but are not limited to*, the payment history, an itemization of the amounts needed to cure and pay off the loan, and the mortgage and note." CPLR 3408(e) (emphasis added). This language clearly states that the list provided is not an exhaustive list.

Furthermore, CPLR 3408 and 22 NYCRR § 202.12-a read together make it clear that settlement conference referees have power to compel document production to further settlement negotiations. As previously stated, CPLR 3408



was enacted to help the defendant avoid losing his or her home. CPLR 3408(a) states:

“[T]he court shall hold a mandatory conference . . . for the purpose of holding settlement discussions pertaining to the relative rights and obligations of the parties under the mortgage loan documents, including, but not limited to determining whether the parties can reach a mutually agreeable resolution to help the defendant avoid losing his or her home, and evaluating the potential for a resolution in which payment schedules or amounts may be modified or other workout options may be agreed to, *and for whatever other purposes the court deems appropriate.*” (emphasis added).

22 NYCRR § 202.12-a(c)(2) echoes this language, including providing that “[t]he court may also use the conference for whatever other purposes the court deems appropriate.” The court is also obligated to ensure that each party negotiates in good faith and that conferences are “not unduly delayed or subject to willful dilatory tactics.” 22 NYCRR § 202.12-a(c)(4).

The pertinent Order of Reference to Hear & Determine, *In re Foreclosure Conference Part* (Kings Cty. Sup. Ct. June 1, 2011) (Appellant Br. Addendum), states that the referees “may conference, negotiate, settle, adjourn, and make procedural determinations regarding the qualifications of cases pending before them in the Residential Foreclosure Conference Part, as defined by the law of New York State, *and in conjunction with all applicable federal legislation and/or programs.*” (*Id.*) (emphasis added).

Here, Judge Solomon's October Order referred the matter back to the settlement conference part and ordered Appellant to produce the PSA, investor guidelines, promissory note, and proof that it sought a waiver of the alleged investor restrictions (if any) contained in the PSA. This documentation was ordered because it contained information essential to address critical issues in the case—whether a home-saving solution was feasible. On October 25, 2012, after a year of settlement conferences, Appellant finally produced the PSA, which in fact contained a restriction preventing an interest rate reduction; but such restrictions are routinely waived by investors in order to achieve loan modifications in specific cases. Hence HAMP requires that Appellant submit a request to investors that they waive the interest reduction restriction. Had that request been granted, an affordable modification that would have allowed Smith to remain in her home was achievable.

In *Deutsche Bank National Trust v. Izraelov*, 40 Misc. 3d 1238(A), 2013 WL 4799151 (Sup. Ct. Kings Cty.), the court held that it was appropriate for the presiding settlement conference referee to request that the plaintiff provide information related to prohibitions or restrictions on modifications asserted by the lender or servicer. *Id.* at \*7. The court stated that “[a]ssuming the prohibition or restriction to exist . . . the plaintiff has an obligation to proceed in good faith to obtain . . . a ‘waiver’ of the prohibition or restriction in the particular action. The

court or referee may require the plaintiff to provide evidence of compliance, including requiring the documentation described in HAMP[] . . . .” *Id.* at \*8.

Similar to *Izraelov*, the referees in this case requested proof of investor restrictions and proof of an attempt to seek a waiver. As a HAMP participant, Appellant possessed a preexisting obligation to undertake these steps pursuant to the federal HAMP program. The referees were not forcing an agreement on the parties, but were fulfilling their obligations to explore all options that could allow Smith to remain in her home. *See Bank of Am. N.A. v. Lucido*, 35 Misc. 3d 1211(A), 2012 WL 1292732 at \*5 (Sup. Ct. Suffolk Cty.) (“It must be pointed out that in this matter as in all other foreclosure matters assigned to this Part, the Court has only attempted to fulfill its statutory responsibilities and has not, in any manner forced, coerced nor compelled any particular resolution.”) Orders requiring Appellant to provide proof of attempts to seek a waiver of investor restrictions furthered the purpose of settlement conferences to reach a mutually agreeable resolution. Good faith does not require Appellant to offer a mortgage loan modification to Smith, but Appellant was required to explore the available options and to comply with court and referee orders. It is the Appellant’s delay in complying with these orders that resulted in the interest tolling order here at issue.

### **C. The Record Supports Finding that Appellant Failed to Negotiate in Good Faith**

The Supreme Court's determination that the Appellant failed to negotiate in good faith should be granted deference because it is supported by the record. *See McKenna*, 37 Misc. 3d at 894-95, 952 N.Y.S.2d at 753-54 ("The referee's findings are particularly entitled to deference where credibility is at issue, since the referee has the opportunity to see and hear the witnesses."). In *U.S. Bank National Ass'n v. Thomas*, 40 Misc. 3d 1241(A), 2013 WL 5184458 (Sup. Ct. Kings Cty.), the court found that the referee's finding that the plaintiff and its counsel failed to negotiate in good faith was supported by the record, particularly due to "their failure to follow HAMP directives, their needless delaying of the workout process, their misrepresentations that a modification offer would be finalized by certain times and their violation of the referee's directive." *Id.* at \*5.

In the present case, the record is replete with examples of Appellant's failure to negotiate in good faith during settlement conferences, including Appellant's disregard of referee directives, submission of duplicative and nonresponsive document requests, refusal to timely review Smith's loan modification applications, provision of non-responsive and back-dated letters purporting to respond to Smith's loan modification requests, and failure to produce evidence that it had sought a waiver of investor restrictions. (*See supra* pp. 6-11, 16). Referee Berson noted that Appellant had been directed to produce evidence of whether a

waiver of investor restrictions was requested at each of the seven conferences and the post-October Order conference, but failed to comply. (R. at 23.) Referee Berson also noted that Appellant’s “failure to follow all of the HAMP guidelines in its loan review process can hardly be deemed ‘good faith’ participation in settlement negotiations.” (R. at 26.)

Judge Solomon’s July Order granted the branch of Smith’s motion requesting a finding that Appellant failed to negotiate in good faith under CPLR 3408. (R. at 7-8.) Judge Solomon’s determination considered a list of papers considered on review of Smith’s motion, including the Referral of Referee Berson. (R. at 7.) Based on the record before him, Judge Solomon concluded that Appellant had failed to negotiate in good faith and deference should be given to his decision.

## **II. THE SUPREME COURT PROPERLY BARRED APPELLANT FROM COLLECTING INTEREST.**

### **A. The Supreme Court Has Authority to Provide Redress for Violation of CPLR 3408(f)**

CPLR 3408(f) states that “[b]oth the plaintiff and defendant shall negotiate in good faith to reach a mutually agreeable resolution, including a loan modification, if possible.” This Court has acknowledged that the Supreme Court has authority to enforce CPLR 3408(f): “It would certainly seem that CPLR 3408(f) and 22 NYCRR 202.12–a(c)(4) both provide the courts with the authority

to take some action where a party fails to satisfy its obligation to negotiate in good faith.” *Meyers*, 108 A.D.3d at 19-20, 966 N.Y.S.2d at 115. To read the statute otherwise would amount to erasing the “shall” from the text of CPLR 3408. N.Y. Stat. Law § 76 (requiring that every word, if possible, be given effect); *see also*, *In re New York & Brooklyn Bridge*, 72 N.Y. 527 (1878) (“In construing a statute effect must be given, if practicable, to all of the language employed”); 2009 N.Y. Laws Ch. 507 § 10–a(1) (S. 66007) (granting the Chief Administrator of the Courts authority to promulgate rules related to foreclosure settlement conferences that “may include granting additional authority to sanction the egregious behavior of a counsel or party”).

Appellant argues that courts lack authority to impose sanctions for failure to negotiate in good faith pursuant to CPLR 3408(f) and therefore cannot toll interest as remedy for 3408(f) violations. (Appellant Br. 21-26). In support of its contention that the trial court did not have authority to toll interest commensurate with delay it caused, Appellant advances a tortured interpretation of prevailing Second Department decisions.

First, Appellant wrongly posits that *Indymac Bank, F.S.B. v. Yano-Horoski*, 78 A.D. 3d 895, 912 N.Y.S.2d 239 (App. Div. 2d Dep’t 2010), stands for the proposition that a court sitting in equity cannot toll interest. On the contrary, *Yano-Horoski* found that a specific remedy—cancellation of the mortgage and

note—was impermissible as a sanction for violation of CPLR 3408(f)'s good faith requirement. *Id.* at 896, 912 N.Y.S.2d at 240-41. The decision did not discuss tolling of interest or, more broadly, the range of permissible remedies for violation of CPLR 3408. *Id.* As to the lower court's equitable powers, this Court found only that "there was no acceptable basis" for canceling the mortgage and note, not that equitable powers are unavailable to enforce CPLR 3408(f).

Appellant then attempts to cobble together this Court's decision in *Meyers* with *Kolb v. Stroggh*, 158 A.D.2d 15, 558 N.Y.S.2d 549 (App. Div. 2d Dep't 1990), ignoring the clear incongruities in its analysis. (Appellant Br. 24-26.) *Kolb* did not arise out of a foreclosure action. 158 A.D. 2d at 16, 558 N.Y.S.2d at 549. Instead, it is a medical malpractice decision holding that courts are not authorized to sanction a party that violates a procedural statute requiring the filing of a certificate of merit within 90-days after service of the summons and complaint. *Id.* at 21, 558 N.Y.S.2d at 553.

This Court held in *Myers*:

[T]he courts must employ appropriate, permissible, and authorized remedies, tailored to the circumstances of each given case. What may prove appropriate recourse in one case may be inappropriate or unauthorized under the circumstances presented in another. Accordingly, in the absence of further guidance from the Legislature or the Chief Administrator of the Courts, the courts must prudently and carefully select among available and authorized remedies, tailoring their application to the circumstances of the case.

*Meyers*, 108 A.D.3d at 23, 966 N.Y.S.2d at 118. Appellant, invoking *Kolb*, claims

that there exist no “appropriate, permissible, and authorized remedies” to punish CPLR 3408(f) violations. CPLR 3408(f) itself specifically imposes an express duty upon Appellant to negotiate in good faith, rendering *Kolb* wholly irrelevant in this appeal.

More generally, Appellant’s argument that no remedies can be imposed for violations of CPLR 3408(f) because the Legislature failed to authorize sanctions for its violation is preposterous. (Appellant Br. 21-26.) Appellant relies chiefly on *Tewari v. Tsoutsouras*, 75 N.Y.2d 1, 550 N.Y.S.2d 572 (1989). The law applied in the *Kolb* medical malpractice case derives almost exclusively from *Tewari*. *Kolb*, 158 A.D.2d at 21, 558 N.Y.S.2d at 553. *Tewari* is also a medical malpractice case, and there the Court of Appeals held that dismissal could not be imposed as a remedy for the violation of a statutory notice requirement where (1) the “plain language of” the statute and “the rules promulgated thereunder do not provide any authority for the imposition of the sanction”; and (2) “the legislative history of the statute” does not suggest “that the Legislature intended that dismissal be an authorized sanction.” 75 N.Y.2d at 11, 550 N.Y.S.2d at 576. As discussed *supra*, the court rules promulgated under CPLR 3408(f) do in fact provide authority for the imposition of a remedy, requiring that courts “ensure that each party fulfills its obligation to negotiate in good faith.” 22 NYCRR § 202.12–a(c)(4). Furthermore, the Legislature clearly contemplated sanctions when it instructed the Chief



Administrator of the Courts to promulgate rules pertaining to CPLR 3408 settlement conference and expressly contemplated sanctions for egregious behavior. 2009 N.Y. Laws Ch. 507 (S. 66007).

The holdings of *Tewari* and *Kolb* are further distinguishable because the statutes the courts were seeking to enforce were procedural, and the courts were not sitting in equity. *Tewari*, 75 N.Y.2d at 7, 550 N.Y.S.2d at 574 (overruling the lower court's dismissal based on plaintiff's failure to timely file a "notice of dental, medical or podiatric malpractice action" under CPLR 3406(a)); *Kolb*, 158 A.D.2d at 22, 558 N.Y.S.2d at 553 (denying a motion to dismiss for violation of the CPLR 3012—a requirement that plaintiff timely file a certificate of merit).

CPLR 3408, by contrast, is a remedial statute. *Van Dyke*, 101 A.D.3d at 639, 958 N.Y.S.2d at 332. Authority for the interest tolling order did not arise solely from CPLR 3408, but also from the court's posture as a court sitting in equity. *See Mortg. Elec. Registration Sys., Inc. v. Horkan*, 68 A.D.3d 948, 948, 890 N.Y.S.2d 326, 326 (App. Div. 2d Dep't 2009) (observing that in the foreclosure context, "[o]nce equity is invoked, the court's power is as broad as equity and justice require") (internal quotations omitted).

**B. Tolling Interest is Within the Courts' Equitable Authority to Remedy Appellant's Failure to Negotiate in Good Faith**

Foreclosure is an equitable remedy, in which plaintiffs are required to come to court with "clean hands," and courts in foreclosure cases have always possessed considerable discretion to balance the equities and fashion appropriate relief based on case-specific circumstances. *See, e.g., Norwest Bank Minn., NA v. E.M V. Realty Corp.*, 94 A.D.3d 835, 943 N.Y.S.2d 113 (App. Div. 2d Dep't 2012) (foreclosure action is equitable in nature and triggers the equitable powers of the court, and in such actions the recovery of interest is within the court's discretion pursuant to CPLR § 5001(a)); *Horkan*, 68 A.D.3d at 948, 890 N.Y.S.2d at 326; *U.S. Bank, N.A. v. Mizell*, 40 Misc. 3d 1207(A), 2013 WL 3455774 at \*5 (Sup. Ct. Kings Cty.) (remedy of foreclosure is equitable in nature and may be denied in cases of estoppel, bad faith fraud, or oppressive or unconscionable conduct).

Because the most direct and tangible harm occasioned by plaintiffs' all-too-common failures to negotiate in good faith is the accrual of interest and other fees charged to defendants while the settlement conference process is delayed, many courts addressing violations of CPLR 3408 (f) have concluded that barring or tolling the collection of interest and fees is appropriate, permissible, and uniquely tailored to the circumstances. *See Izraelov*, 40 Misc. 3d 1238(A), 2013 WL 4799151 at \*9; *Shinaba*, 40 Misc.3d 1239(A), 2013 WL 4822396 at \*6, 9-10;

*McKenna*, 37 Misc. 3d at 914, 952 N.Y.S.2d at 767; *see also Kearney v. Kearney*, - -- N.Y.S.2d ----, 2013 WL 5992287 (Sup. Ct. Monroe Cty.) (considering CPLR 3408 case law and invoking foreclosure court's equitable authority in concluding that interest tolling was proper remedy for failure to serve RPAPL 1304 90-day notice).

Here, the Supreme Court properly exercised its authority to provide Smith a remedy for Appellant's failure to negotiate in good faith in violation of CPLR 3408(f). It was Appellant's repeated failures to comply with court and referee directives to supply documentation to support its claims that caused negotiations to drag on. Appellant could have addressed the court's concern at the outset of the first settlement conference, but instead chose to continue to disregard directives. Fault for delay lies solely with Appellant, and Smith should not bear the cost of Appellant's improper conduct.

### **III. THE COURT PROPERLY EXERCISED ITS DISCRETION IN TOLLING THE INTEREST FROM SEPTEMBER 2012 TO JULY 2013.**

"In an action of an equitable nature, interest and the rate and date from which it shall be computed *shall be in the court's discretion.*" CPLR §5001 (emphasis added). The exercise of that discretion is to be governed by the "particular facts in each case, including any wrongful conduct by either party." *Dayan v. York*, 51 A.D.3d 964, 965, 859 N.Y.S.2d 673, 674 (App. Div. 2d Dep't

2008). The court that has administered the conferences is able to assess who bears responsibility for the delay and can toll interest for an appropriately limited period of time directly tied to the conduct of the offending party—relief that comports with this Court's directive that relief for CPLR 3408 violations be “tailored to the circumstances of each given case.” *Meyers*, 108 A.D.3d at 23, 966 N.Y.S.2d at 118.

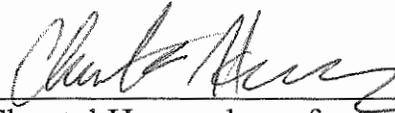
Here, the Supreme Court tailored the tolling of interest to address the harm caused by Appellant’s repeated failures to comply with the directives of the settlement conference referees. Appellant engaged in dilatory tactics that delayed the proceedings by not only failing to produce waiver letters, but also failing to produce the note, PSA, and other documentation ordered by the Court to facilitate negotiations. The court properly determined that tolling of interest from September 2012 to July 2013 was the proper duration to redress the harm caused to Smith. It was Appellant’s blatant disregard of court and referee directives that delayed negotiations and unfairly allowed interest to accrue on Smith’s loan. The court, in its discretion, determined that September 2012 to July 2013 was the proper duration for the interest tolling and this determination should be upheld.

## CONCLUSION

For the foregoing reasons, the Supreme Court's Order should be affirmed.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE  
PURSUANT TO 22 NYCRR § 670.10.3(f)**

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