SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

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WELLS FARGO BANK, N.A.
3476 Stateview Boulevard
Ft. Mill, SC 29715,

Plaintiff-Respondent,

against

JUNE JOAN VAN DYKE, PATTI VAN DYKE,

Defendants-Appellants,

and

NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY PARKING VIOLATIONS BUREAU, NEW YORK CITY TRANSIT ADJUDICATION BUREAU, THOMAS WILLIAM WOLFE, JOHN DOE, (said name being fictitious, it being the intention of Plaintiff to designate any and all occupants of premises being foreclosed herein, and any parties, corporations or entities, if any, having or claiming an interest or lien upon the mortgaged premises),

Defendants.

----------X

Bronx County Clerk's
Index No. 382738/09

NOTICE OF MOTION FOR LEAVE TO FILE BRIEF AS PROPOSED *AMICI CURIAE*

PLEASE TAKE NOTICE, that upon the annexed affirmation of Jacob Inwald and upon all the proceedings herein, a motion will be made at a Motion Term of the Supreme Court, Appellate Division, First Department, located at 27 Madison Avenue, New York, New York 10010, on the 1st day of November, 2012,

at 10:00 AM, or as soon thereafter as counsel can be heard, for an order granting permission for Legal Services NYC, South Brooklyn Legal Services, Legal Services NYC-Bronx, MFY Legal Services, Inc., Staten Island Legal Services, Queens Legal Services, Bedford Stuyvesant Community Legal Services, JASA/Legal Services for the Elderly in Queens, Empire Justice Center and Neighborhood Economic Development Advocacy Project (NEDAP) to file a Brief as *amici curiae* on this appeal, on which oral argument is scheduled on November 8, 2012 at 2:00 PM, for the reasons fully set forth in the annexed affirmation, and why such other and further relief should not be granted as may be just.

Dated: October 22, 2012
New York, NY

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Bronx County Clerk's
Index No. 382738/09

AFFIRMATION IN SUPPORT OF MOTION FOR LEAVE TO FILE BRIEF AS PROPOSED *AMICI CURIAE*

Jacob Inwald, an attorney duly licensed to practice law in the Courts of the State of New York, hereby affirms the following facts under penalty of perjury.

1. I am Director of Foreclosure Prevention Litigation for Legal Services NYC, and I make this affirmation in support of the motion of proposed *amici*

curiae Legal Services NYC, South Brooklyn Legal Services, Legal Services NYC-Bronx, MFY Legal Services, Inc., Staten Island Legal Services, Queens Legal Services, Bedford-Stuyvesant Community Legal Services, JASA/Legal Services for the Elderly in Queens, Empire Justice Center and Neighborhood Economic Development Advocacy Project (NEDAP) for leave to file a brief as *Amici Curiae* herein. *Amici* have a demonstrated interest in the issues in this matter, and can be of particular assistance to the Court as it contemplates the issues raised by this appeal. A copy of *Amici's* brief is attached hereto as Exhibit A.

2. Proposed *Amici* are non-profit organizations that provide free legal services to distressed homeowners and low-income New Yorkers, and they also engage in public education and outreach and policy advocacy to protect homeowners' rights in the foreclosure process. *Amici* have collectively represented homeowners in thousands of foreclosure settlement conferences conducted pursuant to Rule 3408 of the Civil Practice Law and Rules ("CPLR") across New York City, and therefore possess extensive firsthand knowledge concerning implementation of the good faith negotiation standard embodied in CPLR 3408, which is the subject of this appeal.

3. Among the issues presented in this appeal, the Court is asked to consider an issue not heretofore addressed by any Appellate Division, namely the interpretation of the statutory obligation to negotiate in "good faith" at mandatory

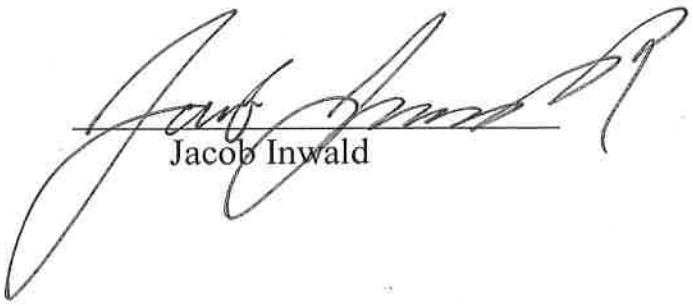
residential foreclosure settlement conferences pursuant to CPLR 3408. A*mici*'s collective unparalleled experience in representing homeowners in New York's mandatory settlement conferences can provide the Court with an informed perspective on the challenges homeowners face in defending foreclosure actions and participating in mandatory settlement conferences, the practices routinely engaged in by servicers, lenders, and plaintiffs' attorneys in the settlement conference process, and the proper scope of the legislature's directive that parties participate in settlement conferences in "good faith."

4. *Amici's* brief highlights the statutory intent behind the enactment and subsequent 2009 amendment of CPLR 3408, and also discusses the various indicia that trial courts have considered in evaluating the "good faith" of parties participating in the settlement conferences. *Amici* believe that their brief's discussion of the "good faith" negotiation standard will help explain why this Court should hold that the trial courts should be empowered with the latitude they require to assess the "good faith" of the parties and counsel appearing before them based on the conduct those courts have themselves observed, and why this Court should reject the narrow "bad faith" standard from other contexts urged by Plaintiff-Respondent.

5. Appellant's counsel has consented to the filing of this motion and *amicus* brief.

WHEREFORE, for all of the foregoing reasons, I respectfully request that the motion of the proposed *Amici Curiae* be granted and that the accompanying *amicus* brief be accepted and considered by this Court.

Dated: October 22, 2012
New York, NY



Jacob Inwald

EXHIBIT A

Bronx County Clerk's Index No. 382738/09

New York Supreme Court

Appellate Division—First Department

WELLS FARGO BANK, N.A.
3476 Stateview Boulevard
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– against –

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Defendants.

BRIEF FOR *AMICI CURIAE*

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INTERESTS OF *AMICI CURIAE*

Amici curiae Legal Services NYC, South Brooklyn Legal Services, Legal Services NYC-Bronx, MFY Legal Services, Inc., Staten Island Legal Services, Queens Legal Services, Bedford Stuyvesant Community Legal Services, JASA/Legal Services for the Elderly in Queens, Empire Justice Center, and Neighborhood Economic Development Advocacy Project (NEDAP) (collectively, "*amici*") join together in support of Defendant-Appellant June Van Dyke's appeal, insofar as the appeal implicates the legal standard applicable to the requirement codified in New York Civil Practice Law and Rules 3408(f) ("CPLR 3408" or "Rule 3408") that the parties negotiate in "good faith" in mandatory settlement conferences in residential foreclosure actions. *Amici* are organizations that provide direct legal services to distressed homeowners, and they also engage in legislative, educational and advocacy efforts to protect homeowners' rights in the foreclosure process. *Amici* have collectively represented homeowners in thousands of CPLR 3408 foreclosure settlement conferences across New York City and New York State, and therefore possess extensive firsthand knowledge concerning implementation of the good faith negotiation standard embodied in CPLR 3408. *Amici*'s extensive work representing homeowners in New York's settlement conferences offers this Court an informed perspective on the challenges homeowners face in defending foreclosure actions and participating in mandatory

settlement conferences, as well as the practices routinely engaged in by servicers, lenders, and plaintiffs' attorneys in the settlement conference process. Because any interpretation of the good faith standard embodied in CPLR 3408 will impact thousands of settlement conferences conducted daily in New York's courts, *amici* have a substantial interest in the outcome of this appeal, and offer a vital perspective that should be considered by this Court.

Legal Services NYC ("LSNYC") is the nation's largest provider of free civil legal services to the poor. For more than 40 years, LSNYC has provided expert legal assistance and advocacy to low-income residents of New York City. Each year, LSNYC's neighborhood offices across New York City serve tens of thousands of New Yorkers, including homeowners, tenants, the disabled, immigrants, the elderly, and children. LSNYC is also the oldest and largest provider of foreclosure prevention legal services in New York City. LSNYC's Foreclosure Prevention Project at South Brooklyn Legal Services, founded in 1998, is a widely recognized leader in consumer protection and fair housing and lending advocacy, having represented thousands of homeowners navigating the judicial foreclosure process and prosecuted numerous affirmative litigations challenging the array of predatory and discriminatory lending practices that precipitated New York's foreclosure crisis. LSNYC also maintains substantial foreclosure prevention practices at Legal Services NYC-Bronx, Staten Island Legal

Services, Queens Legal Services and Bedford-Stuyvesant Community Legal Services, all of which collectively have substantial experience representing distressed homeowners at mandatory foreclosure settlement conferences, and which join in this *amicus* brief. LSNYC's foreclosure prevention projects employ more than 50 attorneys and paralegals representing distressed homeowners and victims of predatory lending in neighborhoods decimated by foreclosures across Brooklyn, Queens, Staten Island, and the Bronx, and it has provided such assistance to more than 6,000 families to date.

MFY Legal Services, Inc. ("MFY") is a not-for-profit organization that has provided free civil legal services to poor and low-income New Yorkers for 50 years. MFY provides advice and representation to more than 7,600 New Yorkers each year, and initiates affirmative litigation that impacts thousands of people. MFY's client population includes people with mental and physical disabilities, seniors, and low-wage workers. MFY negotiates mortgage modifications in state court foreclosure conferences, defends foreclosure actions in litigation, brings affirmative litigation seeking redress for homeowners harmed by unfair debt collection practices related to foreclosure, and issues white papers exposing improper conduct of banks and servicers in prosecuting foreclosure actions in New York.

The mission of JASA/Legal Services for the Elderly in Queens ("LSEQ") is to sustain and enrich the lives of older persons so that they may remain living in the community with dignity and autonomy. LSEQ provides free legal services to Queens' residents sixty (60) and older who are in the greatest social and economic need on a wide variety of legal problems of critical importance to older people including: foreclosures, mortgage fraud and predatory lending; evictions; public benefits; healthcare and elder abuse. Many of LSEQ's clients have both physical and mental impairments which affect their ability to access the courts. Because of the direct and profound impact this case will have on LSEQ clients and Queens seniors, LSEQ has a substantial interest in the outcome of this appeal.

Empire Justice Center is a public interest law office that has been working on mortgage lending and foreclosure issues across New York State for over 20 years, and it has been representing homeowners in foreclosure since 2000. It played a leadership role in the advocacy that led to New York's settlement conference legislation, and it continues to work with the judiciary to ensure that avoidable foreclosures are prevented, thereby benefitting individuals, families and neighboring communities.

Neighborhood Economic Development Advocacy Project ("NEDAP") works with community groups to promote financial justice and to eliminate discriminatory economic practices that harm communities and perpetuate

inequality and poverty. NEDAP utilizes a variety of strategies, including litigation, policy advocacy, community education and outreach, coalition-building, and research and documentation.

PRELIMINARY STATEMENT

This appeal raises issues concerning the scope and substance of the good faith negotiation requirement of CPLR 3408, and accordingly, this appeal could impact thousands of New York homeowners facing foreclosure. CPLR 3408 was enacted as part of the New York Foreclosure Prevention and Responsible Lending Act of 2008, Chapter 471 of the Laws of New York, 2008, which now requires all residential foreclosure cases to go through a mandatory settlement conference process before proceeding further. The purpose of these settlement conferences is to determine whether the parties can reach a "mutually agreeable resolution to help the defendant avoid losing his or her home." CPLR 3408(a). Specifically, CPLR 3408(a) directs that such conferences are "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."

Shortly after CPLR 3408 was enacted, it was amended to include a new subsection (f), which states: "Both the plaintiff and defendant *shall negotiate in good faith* to reach a mutually agreeable resolution, including a loan modification, if possible." Foreclosure Prevention, Tenant Protection and Property Maintenance Act of 2009, Chapter 507 of the Laws of New York, 2009 (emphasis supplied). *Amici* have first-hand knowledge, derived from years of experience participating in thousands of settlement conferences, that foreclosing plaintiffs, their servicing agents and their counsel regularly engage in conduct that falls far short of the statutory obligation to negotiate "in good faith." With this brief, *amici* urge the Court to interpret CPLR 3408 expansively to permit the courts administering mandatory settlement conferences to effectively police violations of the good faith standard. More specifically, *amici* urge this Court to reject the narrow interpretation of CPLR 3408 advanced by Plaintiff-Respondent, which cannot be reconciled with CPLR 3408's explicit language or intent, and which would effectively conflate the affirmative duty to negotiate in good faith with the absence of "bad faith" or dishonest motives derived from contexts not germane to CPLR 3408 negotiations.

Because the express objective of CPLR 3408(f) is to promote loan modifications that can prevent the loss of homes to foreclosure, most settlement conferences conducted pursuant to CPLR 3408 have focused on efforts to obtain loan modifications under the most widely available loan modification program: the federal Home Affordable Modification Program, known as "HAMP." Accordingly, the guidelines governing the HAMP program, as well as mortgage servicing regulations administered by New York State's Department of Financial Services ("DFS"), among other sources of authority, govern the conduct of lenders and servicers participating in the settlement conference process. In spite of the existence of these rules and standards, foreclosing plaintiffs and their servicing agents and counsel routinely violate their duties by, among other abuses:

- using inaccurate (and verifiably improper) calculations of homeowners' income;
- failing to convert HAMP trial modifications into permanent modifications;
- breaching permanent modification agreements;
- charging impermissible fees;
- denying requests for loan modifications on improper or pretextual grounds;

- losing homeowners' documentation and loan modification submissions repeatedly;
- delaying without excuse or justification decisions on homeowners' applications for modifications and other loss mitigation requests (such as short sales), causing interest, arrears and other fees to swell loan balances, which in turn renders the requested modification economically impossible; and
- failing to properly credit or apply homeowners' payments.[1]

Foreclosing plaintiffs cause additional delay and inefficiency in the settlement conference process by appearing at settlement conferences through *per diem* counsel, who typically do not possess sufficient factual knowledge of the underlying matter, are unprepared and unauthorized to negotiate settlements, and even lack the ability to communicate with their clients concerning settlement negotiations, despite the CPLR 3408(c) directive that "plaintiff shall appear in person or by counsel, and if appearing by counsel, such counsel shall be fully authorized to dispose of the case."[2]

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[1] Adam Cohen, Mortgage Loan Modifications in New York Settlement Conference Parts Established by CPLR Rule 3408 and Funding for Non-Profit Foreclosure Prevention, testimony, Nov. 7, 2011, before the New York State Assembly Committees on Judiciary, Housing and Banks (*available at* http://www.mfy.org/wp-content/uploads/Funding-for-Non-Profit-Foreclosure-Prevention-Is-Essential.pdf) (last visited October 18, 2012).

[2] Rebecca Case-Grammatico, *et al.*, Mortgage Foreclosures in New York, testimony, Nov.7, 2011, before the New York State Assembly Committees on Judiciary, Housing and Banks

During settlement conferences, moreover, foreclosing plaintiffs often ask for documentation that has already been provided or is not required for their review.[3] Foreclosing plaintiffs routinely fail to provide complete explanations for loan modification denials, although required to do so,[4] and often assert "investor restrictions" as pretexts for unjustified denials of loan modifications, or as grounds for offering oppressive, unaffordable modifications.[5] All of this conduct has the effect of dragging out the settlement conference process, in some cases for as long as two years, and routinely for more than one year. *See* 2011 Report of the Chief Administrator of the Courts (*available at* www.courts.state.ny.us/publications/pdfs/ForeclosuresReportNov2011.pdf) (last visited October 18, 2012) (reporting to the New York State Legislature concerning the courts' administration of residential mortgage foreclosure actions and expressing concern about "the pace of settlement conferences").

Homeowners are tangibly harmed by such delay, because interest and fees continue accruing on their loans, rendering modifications more difficult when such "arrears" occasioned solely by plaintiffs' delay tactics are capitalized into modified principal balances. At the same time, the loan servicing industry profits from the

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(*available at* http://www.empirejustice.org/policy-advocacy/testimony/fc-funding-testimony-nov11.html) (last visited October 18, 2012).

[3] Betty Staton, *et al.*, Testimony of Legal Services NYC, testimony, Nov. 7, 2011, before the New York Assembly Committees on Judiciary, Housing and Banks (public record testimony not presently available online; if the Court requests, *amici* will supply a copy).

[4] Cohen, *supra* at fn 1.

[5] Staton, *supra* at fn 3.

lengthy foreclosure settlement conference process, because servicers receive more fees for prosecuting foreclosures through to auction than if they engage borrowers in loss mitigation. Perversely, the compensation structure of the loan servicing industry creates a disincentive for loan modifications.[6]

Although CPLR 3408(f) explicitly requires the parties to a foreclosure action to negotiate in good faith "to reach a mutually agreeable resolution, including a loan modification, if possible," the term "good faith" is not defined anywhere in the statute. Yet CPLR 3408 cannot be understood to circumscribe the courts' inherent equitable authority in foreclosure actions, in which plaintiffs are required to come to court with "clean hands," to afford relief or impose penalties for failure to negotiate in good faith.

Despite the enactment of CPLR 3408 and the imposition of related mortgage servicing rules, discussed at length *infra*, servicers have continued to operate much as they always have, and homeowners continue to experience countless problems with unexplained fees, confusing payment histories, duplicative document requests, and improper loan modification denials. Homeowners bear the economically significant consequences of these servicing abuses, as arrears mount while the likelihood of affordable modifications decreases with every month that

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[6] *See* Diane E. Thompson, Why Servicers Foreclose When They Should Modify and Other Puzzles of Servicer Behavior, National Consumer Law Center (Oct. 2009) (*available at* http://digital.law.washington.edu/dspace-law/bitstream/handle/1773.1/1074/86WLR755.pdf?sequence=1) (last visited October 18, 2012).

the settlement conference process is delayed. Increasingly, courts have been called upon to address applications for relief for plaintiffs' failure to comply with their statutory obligation to negotiate in good faith pursuant to CPLR 3408(f).

Amici urge this Court to affirm, consistent with foreclosure courts' long-recognized equity jurisdiction, the broad discretion afforded trial courts to consider a range of factors when evaluating whether a party has complied with the good faith negotiation requirement of CPLR 3408(f). Plaintiff-Respondent wrongly urges this Court to interpret CPLR 3408(f) narrowly, based on authorities completely inapplicable to court-mandated mediation programs, in a way that would deprive the good faith requirement of any meaning.

Because CPLR 3408 is a remedial statute, designed to address and mitigate the effects of a foreclosure crisis largely brought about by the financial institutions now invoking the courts' jurisdiction to exercise the equitable remedy of foreclosure, it should be construed broadly so as to effect its remedial purpose. The courts conducting settlement conferences, who have the opportunity to observe and monitor the conduct of the parties, must not be left toothless by a constrained interpretation of CPLR 3408 that is not informed by its statutory purpose and the courts' inherent equitable authority. Moreover, because good faith is a subjective concept in the context of mediation and settlement negotiations, the courts require wide latitude to consider both the range of conduct presented at the

conferences and the various sources of authority governing mortgage servicing and loss mitigation.

While *amici* take no position with respect to the particular facts presented in this appeal, they urge this Court to interpret the good faith standard broadly, so that courts charged with policing mandatory settlement conferences remain able to effectively enforce the requirements of CPLR 3408.

ARGUMENT

CPLR 3408 IS A REMEDIAL STATUTE AND ITS REQUIREMENT OF GOOD FAITH NEGOTIATION SHOULD BE CONSTRUED BROADLY TO FURTHER THE LEGISLATURE'S GOAL OF PREVENTING AVOIDABLE FORECLOSURES

I. New York's Legislature Intended Rule 3408 to Help Homeowners Avoid Foreclosure Through Loan Modifications

In interpreting the good faith standard set forth in CPLR 3408(f), this Court should be guided by the legislative intent behind its enactment. *See Yatauro v. Mangano*, 17 N.Y.3d 420, 426-27 (2011) (in matters of statutory construction, "our primary consideration is to ascertain and give effect to the intention of the Legislature"). The starting point for discerning legislative intent is the text of the statute itself. *Id.*; *see also New York Skyline, Inc. v. City of New York,* 94 A.D.3d

23, 26-27 (1st Dep't 2012) (courts first look to the "plain meaning" of the words used).

The stated purpose of Rule 3408 is to promote negotiation to "reach a mutually agreeable resolution to help the defendant avoid losing his or her home." CPLR 3408(a). Both parties are required to negotiate in good faith in an effort to achieve this goal, and the statute makes it clear that the favored resolution is a loan modification. CPLR 3408(f). Although the rule does not define "good faith," judicial interpretation of that term must be informed by the national foreclosure crisis that prompted the statute's enactment and 2009 amendment.[7] *See ATM One v. Landaverde*, 2 N.Y.3d 472, 477 (2004) ("inquiry must be made of the spirit and purpose of the legislation, which requires examination of the statutory context"); *Flagstar Bank, FSB v. Walker*, 946 N.Y.S.2d 850, 852, 2012 NY Slip Op 22148 (Sup. Kings 2012) (analyzing the good faith standard in light of the foreclosure crisis); *BAC Home Loans Servicing v. Westervelt*, 29 Misc.3d 1224(A) at *4, 920 N.Y.S.2d 239 (Sup. Dutchess 2010) (same).

Because CPLR 3408 is a remedial statute, it should be construed liberally to "address the mischief and advance the remedy sought to be achieved." 97 N.Y. Jur. 2d Statutes § 203 (further noting that "the court should… take into account the

[7] CPLR 3408 was amended in 2009, in fact, to add the good faith requirement in order to "ensure that both plaintiff and defendant are prepared to participate in a meaningful effort at the settlement conference to reach a resolution" (Governor's Program Bill No. 46 RR, Memorandum, at 6 (2009)).

type of person for whose benefit the statute was enacted"). In interpreting the requirement of good faith negotiation, this Court should seek to give effect to the Legislature's goals of helping homeowners avoid losing their homes and promoting loan modifications. *See OneWest Bank, FSB v. Greenhut*, 36 Misc.3d 1205(A) at *4, 2012 NY Slip Op 51197(U) (Sup. Westchester 2012) (good faith is more than the absence of bad faith; it requires the parties to "actively work toward a settlement").

New York courts are expressly charged with enforcing the statutory good faith requirement. Section 202.12-a(c)(4) of the Uniform Trial Court Rules imposes a duty on 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. Many courts have cited their affirmative obligation to oversee the settlement conference process when finding that a foreclosing bank has failed to negotiate with the homeowner in good faith. *See Westervelt*, 29 Misc.3d 1224(A) at *4 (court's oversight is designed to "avoid[] delays in the foreclosure context [which would] inevitably leave viable properties in a virtually ownerless limbo state and create the potential for a landscape filled with vacant, decaying edifices which could well invite further foreclosures and decreasing property values") (internal quotations omitted); *Bank of America, N.A. v. Lucido,* 35

Misc.3d 1211(A) at *6, 2012 NY Slip Op 50655(U) (Sup. Suffolk 2012) (the Uniform Rule "vests the Court with broad powers to assist the parties in reaching a settlement"); *US Bank, N.A. v. Padilla,* 31 Misc.3d 1208(A) at *2, 929 N.Y.S.2d 203 (Sup. Dutchess 2011).

Rule 3408's good faith negotiation requirement is in harmony with the traditional equitable powers accorded courts overseeing foreclosure actions. Under New York law, foreclosure is an equitable remedy, 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., Mtg. Elec. Registration Sys., Inc. v. Horkan*, 68 A.D.3d 948, 948 (2d Dep't 2009) ("Once equity is invoked, the court's power is as broad as equity and justice require") (quoting *Norstar Bank v. Morabito*, 201 A.D.2d 545, 546 (2d Dep't 1994)). Under the common law, an equitable obligation for mortgagees to pursue alternatives to foreclosure in good faith existed even before the enactment of CPLR 3408. *See Federal Nat'l Mtg. Assoc. v. Ricks,* 83 Misc.2d 814, 823 (Sup. Kings 1975) ("Courts do not favor oppressive acts on the part of mortgagees, even though claimed to be founded on strict legal rights"); *Aames Funding Corp. v. Dudley,* 25 Misc.3d 1234(A) at *1, 2009 NY Slip Op 52410(U) (Sup. Kings 2009) ("[f]oreclosure courts need not woodenly perpetuate the national tragedy surrounding quick foreclosures....but rather should apply a cardinal principle of

equity jurisprudence that he who seeks equity must do equity") (internal quotations omitted). Given its remedial purpose, CPLR 3408(f) should not circumscribe the equitable authority traditionally vested in courts adjudicating foreclosure actions. *See Wells Fargo Bank, N.A. v. Meyers*, 30 Misc.3d 697, 700 (Sup. Suffolk 2010).

II. The Narrow Construction of Good Faith Urged By Plaintiff-Respondent Cannot Be Reconciled With the Purpose of Rule 3408

Wells Fargo relies principally upon *Pavia v. State Farm Mut. Auto Ins. Co.*, 82 N.Y.2d 445 (1993), an automobile insurance case, to argue for a narrow reading of CPLR 3408's good faith requirement. *See* Plaintiff-Respondent's Brief at 18-19. The *Pavia* decision is inapposite. *Pavia* addressed the inherent conflict of interest when an auto insurer exercises complete control over the defense of claims against its insured (namely, that the insurer's interest in minimizing its ultimate payout does not always align with the insured's interest in avoiding liability beyond the policy limits), and it offers *no* instruction concerning good faith participation in court-mandated settlement conferences. In *Pavia*, the auto insurer's duty of good faith toward its insured was "an implied obligation derived from the insurance contract," rooted in common law agency principles requiring an agent to act in the best interests of its principal. *Id.* at 452. The Court in *Pavia* had to balance this common law duty of good faith against the "countervailing policy

consideration" that insurers should not be subjected to tort liability far beyond the policy limits for "conduct amounting to a mere mistake in judgment." *Id.* at 453.

The auto insurer's duty of good faith analyzed in *Pavia* is therefore completely different in origin and nature from the mortgagee's duty to negotiate in good faith under CPLR 3408, which was created by the Legislature in response to a national foreclosure emergency. Accordingly, the "gross disregard" standard articulated in *Pavia, id.* at 454, which Plaintiff-Respondent here urges this Court to adopt (see Respondent's Brief at 18-19), cannot be reconciled with the legislative history and remedial purposes of CPLR 3408.

The other decisions relied upon by Wells Fargo are equally inapposite. *Kalisch-Jarcho, Inc. v City of New York,* 58 N.Y.2d 377 (1983), for example, merely considered the common-law covenant of good faith and fair dealing implied in every contract. The Court considered the showing required to avoid a contractual provision based on the defendant's breach of the implied covenant of good faith and fair dealing, and concluded that a finding of bad faith in this context requires "conduct amount[ing] to gross negligence" *id.* at 385. But the *Kalisch-Jarcho* decision contains no discussion applicable to the duty of good-faith negotiation imposed by CPLR 3408. Similarly, *Mfrs. & Traders Trust Co. v Sapowitch*, 296 N.Y. 226 (1947) interpreted the meaning of good faith as it pertains to the "holder in due course" doctrine, by which a purchaser of

commercial paper may avoid assignee liability for claims against the assignor. *See id.* at 230. As in *Kalisch-Jarcho*, the dominant policy considerations for the *Sapowitch* court were those of promoting commerce by upholding the stability of bargained-for agreements, and its analysis has no applicability to the question of good faith negotiation at settlement conferences pursuant to CPLR 3408.

III. Good Faith Is Measured Based On The Totality of The Circumstances and is a Subjective Concept

Courts that have considered applications for relief against mortgagees for failure to negotiate in good faith have considered a wide range of factors to determine whether the CPLR 3408 standard has been met. As discussed at length below, such factors include – but are not limited to – compliance with federal programs such as the Home Affordable Modification Program ("HAMP"), mortgage servicing regulations issued by the New York State Department of Financial Services ("DFS"), and other case-specific indicia of dilatory tactics and abusive servicer conduct that work to frustrate the mandate of Rule 3408. As courts of equity, the courts overseeing foreclosure settlement conferences are to examine "the totality of the circumstances" in order to judge whether a party has failed to act in good faith. *Emigrant Mtg. Co., Inc. v. Corcione*, 28 Misc.3d 161, 168 (Sup. Suffolk 2010), *vacated on consent* 2010 WL 7014850 (Sup. Suffolk

2010); *see also Aurora Loan Services, LLC v. Dunning*, 2012 NY Slip Op 31483(U), 2012 WL 2091127 (Sup. Suffolk 2012); *Westervelt*, 29 Misc.3d 1224(A).

As the growing body of case law confirms, CPLR 3408(f) does not limit the courts' pre-existing powers to manage the mandatory settlement conference process. Trial courts and personnel conducting the conferences are best situated to observe the conduct of the parties firsthand, make case-specific fact findings concerning the parties' good faith, and tailor appropriate relief in individual cases. *See generally HSBC Bank USA v. McKenna*, 2012 NY Slip Op 22285 at *15, 2012 WL 4738861 (Sup. Kings 2012) (collecting cases).

Judicial assessment of good faith participation in settlement conferences involves, to some degree, subjective determinations of intangible qualities that have no technical meaning or statutory definition. Courts should weigh "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." *McKenna, id.* at *14 (internal citations omitted).

Surveying the case law on CPLR 3408, the court in *McKenna* (decided October 3, 2012) observed that, "[f]or the most part, findings of lack of good faith

have been based upon descriptions of the plaintiff/mortgagee's conduct during mandated settlement conference proceedings. Conduct such as providing conflicting information, refusal to honor agreements, unexcused delay, unexplained charges, and misrepresentation have been held to constitute bad faith." *Id.* at *16. The *McKenna* decision concluded that, in light of CPLR 3408(f)'s very explicit goals and purpose, a constrained interpretation of settlement conference good faith is inappropriate, because "understandings of good faith in contractual or other transactional contexts generally, or as required as part of general court-ordered mediation programs, do not necessarily apply to limit the meaning of 'good faith' where, as here, imposed to achieve a particular statutory purpose." *Id.* at *17.

A. Courts Have Identified Many Different Types Of Servicer Misconduct That May Demonstrate A Failure To Negotiate In Good Faith

Trial courts applying the good faith requirement of CPLR 3408 have found that a wide range of abusive servicer conduct can violate the statute, but the overarching theme of the cases finding an absence of good faith is an unwillingness to engage in a meaningful effort to reach a home-saving solution. "Since an unreasonable, arbitrary, or even unexplained refusal to consider alternatives to foreclosure is not consistent with 'meaningful effort' to reach

resolution, substantive consideration of the plaintiff/mortgagee's action or inaction with respect to alternatives is consistent with, if not required by, the statutory purpose." *McKenna*, *id.* at *17.

Among the most typical misconduct is "inordinate delay... in failing to process the defendants' loan modification application promptly and efficiently." *Dunning*, 2012 NY Slip Op 31483(U) at *5. A servicer's failure to process homeowner applications has the effect of "racking up interest, fees, and penalties to plaintiff's benefit and the homeowner's detriment," and such an increase in arrearage can cause an otherwise eligible homeowner to become ineligible for a loan modification. *Padilla,* 31 Misc.3d 1208(A) at *3. There are many ways in which servicers cause undue delay during settlement conferences. In *US Bank, NA v. Sarmiento*, NYLJ 1202538984195, at *23 (Sup. Kings 2011), plaintiff lost the homeowner's financial paperwork and insisted that the homeowner begin the application process anew. In *Countrywide Home Loans, Inc. v. Roman*, NYLJ 1202566228306 at *7 (Sup. Bronx 2012), plaintiff made misleading and self-contradictory representations concerning the homeowner's eligibility for a loan modification. In *Padilla,* 31 Misc.3d 1208(A) at *3, plaintiff made piecemeal document requests at successive conferences rather than advising the homeowner at the outset of all documents needed. And in *McKenna, id.* at *20, the plaintiff unreasonably refused to agree to a short sale, delaying its review process by

obtaining successive appraisals that became the basis for increased demands, without making any showing that the alternative of an auction sale was likely to yield a higher net return.

Another example of misconduct held to violate the duty of good faith is a plaintiff's failure to send a representative to settlement conferences who has authority to settle the case, as is expressly required by CPLR 3408(c). *See Greenhut*, 36 Misc.3d 1205(A) at *5-6 (CPLR 3408(f) requires the attendance of a representative with "substantial and actual authority to bind the plaintiff to a [reasonable] range of settlement options"). In the same vein, when plaintiff defaults in appearance on a conference date without an adequate excuse, the default is a factor to be considered in evaluating good faith. *See Westervelt*, 29 Misc.3d 1224(A) at *3-4 (in addition to wasting the homeowner's time, plaintiff's default had the effect of increasing the mortgage arrears).

Courts have also held that inconsistent or unexplained denials of modification applications demonstrate a failure to negotiate in good faith. *See, e.g. Deutsche Bank Trust Co. of Am. v. Davis*, 32 Misc.3d 1210(A) at *2, 934 N.Y.S.2d 33 (Sup. Kings 2011) (plaintiff denied homeowner four times for contradictory reasons, including one nonsensical denial for homeowner's failure to document self-employment income, when homeowner was not self-employed). Likewise, where a servicer contends that the homeowner does not qualify for any loan

modification, but refuses to divulge the figures used in reaching that determination, good faith is absent. *See Roman*, supra, NYLJ 1202566228306 at *3. The converse can also show a lack of good faith: where servicer extends a "take it or leave it" modification offer, but refuses to reveal the essential terms of the proposed modification, the homeowner is unfairly put in a position in which he cannot properly assess the affordability of the offer. *See HSBC Mtg. Corp. v. Gigante*, 2011 NY Slip Op 33327(U) at *8-9, 2011 WL 6738623 (Sup. Richmond 2011).

A compelling narrative of servicer misconduct found to violate CPLR 3408 is described in *Lucido, supra*, 35 Misc.3d 1211(A). The court had conducted 17 settlement conferences over a 34-month period, yet no person with authority to settle the matter had *ever* appeared on plaintiff's behalf. *Id.* at *2. During the proceedings, the plaintiff made a modification offer without disclosing any of its material terms. *Id.* In response, the homeowner provided a detailed written counterproposal including a principal reduction component. *Id.* After taking six months to review the counterproposal, plaintiff's counsel appeared at conference and falsely represented to the court that the homeowner had never submitted supporting financial documents to plaintiff. Counsel further misrepresented that plaintiff was prohibited from considering principal reduction under any

circumstances by the loan's Pooling and Servicing Agreement ("PSA").[8] *Id.* at *3. The court thereupon directed plaintiff to produce a copy of the PSA, but plaintiff delayed doing so for five months. *Id.* at *3-4. When plaintiff finally produced the PSA for a court-ordered hearing, an extraordinary colloquy resulted between plaintiff's counsel and the court, during which plaintiff conceded that the PSA did – after all – permit principal reduction on the subject loan. *Id.* at *4-5. Incensed by the bank's pattern of dilatory behavior, disregard of judicial directives, and outright misrepresentations, the *Lucido* court found that the bank had violated its duty of good faith under CPLR 3408.

Because the range of conduct presented at CPLR 3408 conferences is ever-expanding, and because there is an unavoidably subjective component to any determination of good faith, it is essential that courts administering settlement conferences retain the flexibility to consider all of the observed behavior that may demonstrate a party's good faith participation (or lack thereof) in settlement conferences.

[8] As relevant here, for securitized mortgage loans, a PSA is a contract that is sometimes a source of restrictions on loan modification options.

B. New York's Mortgage Loan Servicing Regulations Provide Standards of Conduct Relevant To Evaluating Good Faith

All mortgage loan servicers operating within New York State are subject to New York State Department of Financial Services ("DFS") regulations detailing procedural requirements governing loss mitigation review. *See generally* 3 NYCRR Part 419. Among other things, the regulations specify factors for the servicer to consider during loan modification review (3 NYCRR § 419.11(b)); set deadlines for servicers to complete review of homeowner applications (3 NYCRR § 419.11(d)); require servicers to state in writing the specific basis for any denial (3 NYCRR § 419.11(d)); and require servicers to state in writing all material terms and costs of any modification offer (3 NYCRR § 419.11(d)). They also prohibit conditioning loan modification or other loss mitigation options on waiver of borrowers' legal defenses (3 NYCRR § 419.11(h)).

The DFS regulations are therefore a logical source to consult for standards of servicer conduct, and courts should treat violations of these regulations as evidence of a failure to negotiate in good faith under CPLR 3408(f). *See Yatauro,* 17 N.Y.3d at 427 (related regulatory provisions should be read together and harmonized)*; Padilla,* 31 Misc.3d 1208(A) at *3 (ordering a Rule 3408 hearing based in part on foreclosure plaintiff's apparent violations of the DFS regulations).

The DFS regulations recognize that home value is a factor relevant in loan modification review, and Section 419.11(b) explicitly directs loan servicers to consider modifying the loan when two conditions are met: (1) the borrower is in default or imminent default due to a financial hardship; (2) the net present value ("NPV") of the income stream expected of a modified loan is greater than the NPV of the expected recovery via a foreclosure sale. Naturally, this NPV analysis turns on the fair market value of the home that secures the loan. Thus, a foreclosing plaintiff's refusal to consider a loan modification proposal that accounts for home value – which often may be less costly to plaintiff than foreclosing on the home – is indicative of a failure to negotiate in good faith. *See Westervelt,* 29 Misc.3d 1224(A) at *5 ("This court is hard-pressed to comprehend why plaintiff would rather seize the property in foreclosure than work out a loan modification, as required by statute, with a homeowner who is gainfully employed"). *See also McKenna,* 2012 NY Slip Op 22285 at *20 (plaintiff's review process for requested short sale characterized by shifting demands and appraisals and ultimately an unexplained refusal to agree to short sale at price previously demanded by plaintiff).

C. The Federal HAMP Program Is An Additional Source of Substantive Rules and Standards of Conduct That Apply To Participating Servicers

The HAMP guidelines published by the United States Department of the Treasury ("Treasury")[9] are the standards of servicer conduct that have received the most discussion in case law to date, although (unlike the DFS regulations) they apply only to servicers who have voluntarily signed a participation agreement opting into the program.[10] *See generally Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547, 556-557 (7th Cir. 2012). In practical terms, the HAMP rules are important because many of the nation's largest mortgage loan servicers – including Wells Fargo – have opted into the program and thereby agreed to abide by Treasury's rules.

What is unique about HAMP is that it provides substantive criteria by which a homeowner's eligibility for a loan modification can be measured. *See Wigod, id.; see generally* HAMP Handbook Ch. II, §§ 1, 6-9 (the full text of HAMP rules on eligibility, underwriting, and final approval of loan modifications). For a

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[9] The most current version of the HAMP guidelines can be found in Chapter II of the Making Home Affordable Handbook, version 4.0 (revised August 17, 2012), available online at https://www.hmpadmin.com/portal/programs/hamp.jsp (last visited October 17, 2012) (hereinafter, the "HAMP Handbook").

[10] There are exceptions to this general rule: for example, non-participating servicers are bound by HAMP rules with respect to the servicing of any loans owned by the Federal National Mortgage Association ("Fannie Mae") or the Federal Home Loan Mortgage Corporation ("Freddie Mac"). *See also* HAMP Handbook Ch. II, § 1.4 (HAMP-eligible loans transferred to non-participating servicers remain HAMP-eligible).

homeowner who meets all criteria, passes all underwriting tests and completes all prescribed steps, HAMP also dictates the essential terms[11] of the modification that must then be offered. *See Wigod, id.* at 557. The substantive nature of the HAMP servicing guidelines makes HAMP a powerful tool in CPLR 3408 settlement conferences, as homeowners and courts are able to "do the math" themselves and check their own HAMP eligibility against any adverse determinations made by the foreclosing plaintiff.

There is widespread agreement among the courts conducting settlement conferences that a participating servicer's failure to comply with HAMP guidelines is evidence of a failure to negotiate in good faith under CPLR 3408. *See, e.g., Sarmiento*, NYLJ 1202538984195 at *25 (Wells Fargo "repeatedly failed to comply with requests for very basic information... related to the [HAMP] review," which data "the defendant is entitled to obtain under the guidelines"); *Greenhut*, 36 Misc.3d 1205(A) at *5; *Walker*, 946 N.Y.S.2d at 852. While compliance with the HAMP guidelines may not be the sole measure of good faith in settlement conferences, this Court should recognize that, in practice, because so many home loans are subject to the program, HAMP is an important guidepost for the courts overseeing settlement conferences.

[11] The essential terms being the new interest rate, maturity date, and percentage of the principal balance that will be forgiven or deferred interest-free.

D. Other Mortgage Servicing Rules And Standards

Other sets of rules apply to particular types of mortgage loans and individual servicers, and the CPLR 3408 good faith standard logically must allow for consideration of such rules, when applicable. For example, servicers of home loans insured against default by the federal government (commonly referred to as "FHA loans") are subject to mandatory loss mitigation rules set forth in regulations of the United States Department of Housing and Urban Development ("HUD"). *See generally* 12 U.S.C. § 1715u; 24 C.F.R. §§ 203.500 – 203.616. Since FHA mortgagees are guaranteed to suffer no loss in the event of homeowner default, the federal government has established loss mitigation rules to ensure that mortgagees exhaust all alternatives before foreclosing and filing a claim with HUD for any unrecovered balance. *See Ricks*, *supra*, 83 Misc.2d at 818. To the extent that the FHA program imposes standards of conduct on loan servicers, courts considering applications for relief under CPLR 3408 should take account of the servicer's violation of those standards as they weigh the "totality of the circumstances."

Another example of loan-specific servicing rules comes from the national settlement, announced in February 2012 by 49 state attorneys general and the federal government, of multistate and federal foreclosure misconduct claims against the five largest mortgage servicers in the country: namely, Wells Fargo, JPMorgan Chase, Citi, Bank of America, and Ally/GMAC (the "National

Mortgage Settlement").[12] The National Mortgage Settlement, among other things, implemented comprehensive reforms of mortgage loan servicing covering all aspects of mortgage servicing, including rules governing loss mitigation. For covered loans, the National Mortgage Settlement's loan servicing rules are yet another governing standard of conduct whose violation is relevant to determining whether foreclosing plaintiffs have complied with their statutory duty to negotiate in good faith.

Rule 3408's good faith standard, accordingly, must be flexible enough to allow courts to consider all applicable sources of authority, including those which continue to evolve as New York and the country move through the foreclosure crisis. For example, the federal Consumer Financial Protection Bureau ("CFPB") has proposed mortgage servicing regulations pursuant to its authority under the federal Dodd-Frank legislation; once finalized, these regulations will also govern foreclosure and loss mitigation practices, and their violation will likely be implicated in applications for relief under CPLR 3408. Similarly, state regulatory agencies including New York's Department of Financial Services have reached independent settlements with certain servicers, which include reforms to servicing

[12] The settlement administrator has established a website with information about the settlement, *available at* www.nationalmortgagesettlement.com (last visited October 18, 2012).

practices.[13] Finally, servicers of loans owned by Fannie Mae or Freddie Mac are required to follow the uniform loss mitigation programs[14] established by Fannie Mae and Freddie Mac, and any violation of those programs would likewise be indicative of a failure to negotiate in good faith.

CONCLUSION

The question before this Court is one of statutory interpretation, and its analysis must therefore begin by recognizing that the Legislature intended CPLR 3408 to help homeowners avoid foreclosure through loan modifications where possible. To give effect to the statute's remedial goals, this Court should follow the basic framework that the lower courts have established, and hold that a party's good faith negotiation—to some extent a subjective determination—should be judged on the totality of the circumstances, with no single factor being dispositive. The Court should further recognize that the various mortgage servicing standards, whether set forth in agency regulations, Treasury guidelines or the National Mortgage Settlement, all provide useful guidance in determining whether a foreclosing plaintiff has negotiated in good faith at settlement conferences. Most importantly, interpretation of the good faith negotiation requirement must not

[13] One example is the DFS settlement with Ocwen Loan Servicing, the terms of which are available at www.dfs.ny.gov/about/press/clocwen.pdf (last visited October 18, 2012).
[14] Commonly referred to as the "Servicing Alignment Initiative." More information is available at www.freddiemac.com/singlefamily/service/servicing_alignment.html (last visited October 18, 2012).

interfere with the ability of the courts conducting mandatory settlement conferences to effectively police the conduct that they are best situated to assess, and should afford them maximum flexibility to do so in light of the core purpose of CPLR 3408.

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