NAME
ADDRESS
TELEPHONE
Defendant Pro Se

	: SUPERIOR COURT OF NEW JERSEY
	: CHANCERY DIVISION
	: _____ COUNTY
	:
Plaintiff,	: DOCKET NO. F- _____
	:
vs.	: Civil Action
	:
	:
	:
Defendant,	:
	:

DEFENDANT'S MEMORANDUM IN SUPPORT OF
MOTION TO VACATE JUDGMENT PURSUANT TO R. 4:50-1

Your Honor:

Please accept this letter brief in lieu of more formal submission in support of Defendant's motion to set aside default.

Procedural History and Statement of Facts

Defendant relies upon the attached Certification and incorporates it as if fully set forth herein.

Legal Argument

Relief from a final judgment or order – whether entered after trial, by consent order or by default – is available to a litigant pursuant to R. 4:50-1. Although a R. 4:50-1 application is addressed to the sound discretion of the court, when a judgment enters by default the court is required to exercise its discretion **"with great liberality, and every reasonable ground for indulgence is tolerated to the end that a just result is reached.**" Housing Authority of Morristown v. Little, 135 N.J. 274, 283-284 (1994) (emphasis added). This principle is so well

settled that the Appellate Division has recognized it as "axiomatic." Nowosleska v. Steele, 400 N.J. Super. 297, 303 (App. Div. 2008). Moreover, when the issue is relief from a default judgment, "**doubt should be resolved in favor of the party seeking relief**." Housing Authority of Morristown v. Little, supra, 135 N.J. at 284 (emphasis added).

A liberal review of a motion to vacate a judgment that enters by default is appropriate because our system of justice strongly favors the disposition of matters on their merits. See Crispin v. Volkswagenwerk, A.G., 96 N.J. 336, 338 (1984); Nowosleska v. Steele, supra, 400 N.J. Super. at 303 ("A court's liberality in vacating default judgments is justified, since a default judgment is based on only one side's presentation of the evidence without due consideration to any countervailing evidence of point of view, and, thus, may not be a fair resolution of the dispute"); Siwiec v. Financial Resources, Inc. 375 N.J. Super. 212, 220 (App. Div. 2005)("Where . . . the defendant's application to re-open the judgment. . . raise[s] sufficient question as to the merits of plaintiffs' case, courts may grant the application even where defendant's proof of excusable neglect is weak").

While the grant of relief under R. 4:50-1 is left to the sound discretion of the Court, the court's discretion is not unfettered. See Housing Authority of Morristown v. Little, supra, 135 N.J. at 283. "If the judge misconceives or misapplies the law, his discretion lacks a foundation and becomes an arbitrary act. When that occurs, the reviewing court should adjudicate the matter in light of the applicable law to avoid a manifest denial of justice." In re Presentment of Bergen County Grand Jury, 193 N.J. Super. 2, 9 (App. Div. 1984).

Where relief from the judgment is sought because the judgment is void, no issue of excusable neglect.

FAIR FORECLOSURE ACT

As set forth in the annexed certification, the plaintiff failed to serve a Notice of Intention to Foreclose ('NOI') that strictly complies with the statutory requirements of the New Jersey Fair Foreclosure Act, N.J.S.A. 2A:50-53 to -68 (FFA). As the Appellate Division recently recognized in the matter of Bank of New York v. Laks, ___ N.J. Super. ___, 2011 WL 3424983 (App. Div., Approved for Publication, August 8, 2011), complete and accurate compliance with this provision is a pre-condition to acceleration or foreclosure, absent which a foreclosure complaint must be dismissed.

The FFA is remedial legislation that should be strictly construed. Atlantic Palace Dev. v. Robledo, 396 N.J. Super. 171, 178-179 (Ch. Div. 2007) (citing Service Armament Co. v. Hyland, 70 N.J. 550 (1976)). Even before the Laks case was decided, the Appellate Division consistently held that strict compliance with the FFA is required, and that substantial compliance or satisfying the spirit of the FFA is insufficient. EMC Mortgage Corp. v. Chaudhri, 400 N.J. Super. 126, 138 (App. Div. 2008) ("a lender's 'substantial compliance' with the contents of a notice of intent . . . was not authorized by the statute's terms"); Cho Hung Bank v. Kim, 361 N.J. Super. 331, 344-45 (App. Div. 2003) (Reversing the denial of a motion to vacate judgment where the NOI was defective); See also Bank of New York Mellon v. Elghossain, 419 N.J. Super. 336, 342 (Ch. Div. 2010) (Dismissing the complaint, the court held "Lenders' substantial compliance with the FFA is not enough; strict compliance is required" and that post-filing service of a corrected notice is not permitted "because this would eviscerate the statute's plain meaning"). The only point of departure in these cases is whether noncompliance must result in dismissal of the foreclosure complaint.

The plain language of the FFA unambiguously specifies the exact information that must be "clearly and conspicuously" set forth in the NOI. N.J.S.A. 2A:50-56(c)(1)–(11). The FFA

distinguishes between the lender and its representatives (such as a servicer) and requires identification of both. N.J.S.A. 2A:50-55. In Laks, The Appellate Division looked to the plain language of the Fair Foreclosure Act and concluded that "[i]n three different ways, the statutory language indicates that the Legislature intended for a lender to provide its name and address in order to satisfy its obligation pursuant to subsection (c)(11)." Laks. at *4.

> First, as a general rule a statutory "definition which declares what a term 'means,' excludes any meaning that is not stated. . . . The legislature declared what the term lender means in the context of the Act, and that meaning does not include servicers. . . . The definition is drafted to encompass only the entity that has standing to bring a foreclosure action.
>
> Second, if the legislature intended the name of a mortgage servicer to suffice, then the first appearance of the phase "of the lender" in subsection (c)(11) is meaningless. The statute requires "the name and address of the lender" and "the telephone number of a representative of the lender." If the Legislature did not deem the name and address "of the lender" important, then it could have excluded those words and required the lender provide "the name and address and the telephone number of a representative of the lender." Courts strive to avoid interpretations that treat statutory terms as "mere surplusage" . . . . We see no reason to disregard that guiding principle here.
>
> Third, if the Legislature wanted to let a lender's agent suffice under subsection (c)(11), it knew how to say so. Subsection (c)(5) requires that the notice of intention state 'the name and address and phone number of a person to whom payment or tender shall be made [to cure default]' without any requirement that the name and address be that of the lender. It could have used the same construction in subsection (c)(11) but did not. Courts also 'refrain from concluding . . . that the differing language in the two subsections has the same meaning in each.'"

Id. (citations omitted, emphasis in original).

With regard to remedy, the Appellate Division in Laks found that where a notice of intention to foreclose is deficient, dismissal of the foreclosure complaint without prejudice is required. Id. at *5-6. The Appellate Division's reasoning is sound because the FFA does not

authorize post-filing or post-judgment cures of deficient NOIs. To the contrary, the plain language of the FFA is clear that (1) the NOI must be served before commencement of a foreclosure action, at least 30-days in advance and (2) that compliance is a component of the residential mortgage foreclosure cause of action that must be pled. N.J.S.A. 2A:50-56(a) and (f).

Because the plaintiff failed to comply with the pre-filing notice requirements of the FFA, here, as in Laks, the plaintiff "is not entitled to accelerate the mortgage principal or maintain a foreclosure action" and as such default in this matter should be set aside. Laks at *6.

STANDING

To foreclose a mortgage, the plaintiff must demonstrate that it owns or controls the underlying debt. Wells Fargo Bank, N.A. v. Ford, 418 N.J. Super. 592, 597 (App. Div. 2011). See also Deutsche Bank National Trust Company v. Mitchell; ___ N.J. Super. ___, 2011 WL 3444223 (App. Div., Approved for Publication August 9, 2011); Bank of N.Y. v. Raftogianis, 418 N.J. Super. 323, 327-28 (Ch. Div. 2010); Cf. Kemp v. Countrywide Home Loans (In Re Kemp), 440 B.R. 624 (B.R. D. N.J. 2010) (Bank of New York's proof of claim disallowed where it did not have possession of the Note). "In the absence of a showing of such ownership or control, the plaintiff lacks standing to proceed with the foreclosure action and the complaint must be dismissed." Ford at 597. In addition, an assignee of a mortgage must produce a written assignment of mortgage in order to maintain a foreclosure action. Ford at 600, citing N.J.S.A. 46:9-9. The complaint fails to allege facts that support a conclusion that the plaintiff owns or controls the underlying debt.

It is axiomatic that the mortgage follows the Note. Thus, the principal thing that the Plaintiff must demonstrate is that the debt obligation underlying the mortgage was owed to the Plaintiff such that the Plaintiff has a right to resort to the collateral securing the debt:

> . . . [A]n effective transfer of a real estate mortgagee's interest ordinarily involves a transfer of both the secured obligation and the mortgagee's security interest in the land. If the secured obligation is a promissory note, the Uniform Commercial Code governs its transfer; in other cases, (e.g., bonds) the law of contracts will ordinarily apply. But since **the secured obligation is the principal thing and the mortgage that secures it is only "an incident which follows and attends the principal,"** an assignment of the bond or note evidencing the secured obligation operates as an assignment of the mortgage "in equity."

29 N.J. Prac., Law of Mortgages § 11.2 (2d ed.) (emphasis added), *citing inter alia* Stevenson v. Black, 1 N.J. Eq. 338, 343 (Ch. 1831); Morris Canal & Banking Co. v. Fisher, 9 N.J. Eq. 667, 696-97, 700, (E & A 1855); Dimon v. Dimon, 10 N.J.L. 156, 158 (Sup. Ct. 1828); Sayre v. Fredericks, 16 N.J. Eq. 205, 206 (Ch. 1863); Blue v. Everett, 56 N.J. Eq. 455, 458 (E & A 1897); Federal Reserve Bank of Phila. v. Welch, 122 N.J. 90, 92 (Ch. 1937). Assignment of the mortgage alone without transfer of the underlying obligation is ineffective. "[W]ithout the assignment of the debt, which is but evidence thereof, the assignment of the securities confers no rights." Johnson v. Clarke, 28 A. 558 (Ch. 1894).

Where the underlying debt is memorialized in a negotiable instrument, it is subject to the requirements of Article 3 of the Uniform Commercial Code (UCC), codified in New Jersey as N.J.S.A. 12A:3-101 -605. Plaintiff has the burden of demonstrating that it is entitled to enforce the note, by showing it is one of the following: (1) the holder of the note, (2) a nonholder in possession of the instrument who has the rights of a holder, or (3) a non-holder entitled to enforce an instrument that it possessed, but that has been lost, stolen or destroyed. See, e.g., Ford at 328 – 330. Plaintiff fails to allege **facts** that support a conclusion that it meets any of these criteria – most critically, it fails to allege physical possession of the note, a requirement for all three categories.

A person becomes the holder of an instrument when it is issued or later negotiated to that person. Ford at 330-332. Negotiation of an instrument first requires physical transfer of that instrument. A negotiable instrument is transferred "when it is delivered by a person other than its issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument," delivery being defined as a "voluntary transfer of possession." N.J.S.A. 2A:3-203(a); N.J.S.A. 2A:1-201(14). For bearer paper, any person in possession of the instrument is a "holder." However, for paper payable to the order of a specific person, a person is a "holder" only where the person in possession is the named payee. N.J.S.A. 2A:1-201(20).

As such, an instrument payable to a specific person must be indorsed by each successive payee. "Indorsement" means "a signature . . . made on an instrument for the purpose of negotiating the instrument." N.J.S.A. 12A:3-204. Without the indorsements of the prior payee(s), a transferee is not a holder and cannot enforce that instrument against the maker even if it has rights to that instrument as against the payee. "It is axiomatic that a suit cannot be prosecuted to foreclose a mortgage which secures the payment of a promissory note, unless the Plaintiff actually ***holds*** the original note." In re Development Group, Inc. 50 B.R. 588 (S.D. Fla. 1985) (emphasis added).

In this case, the Note was originally payable to the order of a different entity, not the Plaintiff. Therefore, in this case, to be a holder, Plaintiff is required to show that at the time the complaint was filed it had physical possession of the original note, and the original note was endorsed (either in blank or to the order of the plaintiff). See Bank of N.Y. v. Raftogianis, 13 A.3d 435 (Ch. Div. 2010). Plaintiff has not even alleged any such facts in its complaint.

Nor has Plaintiff alleged in its complaint that it is a nonholder in possession of the instrument who has the rights of a holder. More importantly, plaintiff has not alleged any facts

that would support any such conclusion. In particular, the complaint fails to allege any "transfer" of the note. Under the U.C.C., transfer of an instrument occurs "when it is **delivered** by a person other than the issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument." N.J.S.A. 12A:203(a). Here, there has been no allegation, much less proof of transfer, delivery or possession. There has also been no allegation or proof that the actual holder authorized the plaintiff to foreclose.

Even a non-holder not in possession of the instrument must show that it possessed the instrument at one time, before it was lost, stolen or destroyed. N.J.S.A. 12A:3-309 provides in part:

> A person not in possession of an instrument is entitled to enforce the instrument if the person was in possession of the instrument and entitled to enforce it when loss of possession occurred, the loss of possession was not the result of a transfer by the person or a lawful seizure, and the person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process.

No such facts have been alleged here.

Importantly, under the U.C.C., a mortgage assignment is insufficient to transfer the right to enforce a negotiable instrument against its maker -- even where the mortgage assignment purports to transfer the note itself. Kemp v. Countrywide, supra, at 633. [1] Under the U.C.C., "the recorded assignment of the mortgage does not establish the enforceability of the [negotiable] note." Id. In Kemp, Bank of New York produced an assignment of mortgage that purported to assign both the Note and the Mortgage, which had been recorded with the county clerk. The Kemp court recognized that the purported assignment of the note was ineffective to transfer the right to enforce the note. Because the note was a negotiable instrument, the court held that transfer and the right to enforce the instrument was governed by the Uniform Commercial Code,

[1] If the note were not a negotiable instrument, then the Uniform Commercial Code would not govern transfer. In that event, the note could be transferred by mere assignment together with the mortgage pursuant to N.J.S.A. 46:9-9.

which limits the right to enforce the debt to the three categories discussed: (1) the holder of the note, (2) a nonholder in possession of the instrument who has the rights of a holder, or (3) a person not in possession of the instrument who is entitled to enforce the instrument. As all three of those categories require a showing of possession of the note, and as all the evidence before the court showed that Bank of New York never had possession of the note (possession was at all times retained by Countrywide (the loan originator and servicer), the court disallowed Bank of New York's claim. Id.

Default should be set aside to ensure that the plaintiff has an enforceable right to prosecute this foreclosure action.

EVIDENCE

There is simply no credible, admissible evidence to show that Plaintiff had physical possession of the note at the time it filed the complaint – a condition that must be met in order to prove status either as a holder or status as a non-holder in possession with the right to enforce the instrument. Here, the critical **facts** the plaintiff must prove are (1) that it had possession of the note **at the time the complaint was filed**; and either (2) the note was either endorsed in blank or to the order of the plaintiff at that time; or (3) that the plaintiff has authority from the holder to enforce the note. The plaintiff has failed to prove any of these things.

Rule 1:6-6 provides that "[i]f a motion is based on facts not appearing of record or not judicially noticeable, the court may hear it on **affidavits made on personal knowledge setting forth only facts which are admissible in evidence to which the affiant is competent to testify**. . . ." Id. (emphasis added); see also, Wells Fargo v. Ford, 418 N.J. Super. 592, 600 (App. Div. 2011); Celino v. General Acc. Ins., 211 N.J. Super. 538, 544 (App. Div. 1986). Here, the plaintiff's motion for entry of final judgment was supported by an affidavit of amount due that

does not allege that the affiant has personal knowledge of the plaintiff's physical possession of the note, and as such the affiant's testimony is inadmissible hearsay.

Hearsay is defined as a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.J.R.E. 801(c). Hearsay is not admissible except under an enumerated exception to the hearsay rule, such as the "business records exception." N.J.R.E. 802. Where an exception to the hearsay rule requires specific conditions to be satisfied, hearsay evidence cannot be deemed competent unless the proponent presents proof by which the court determines that those conditions have been satisfied. Jeter v. Stevenson, 284 N.J. Super. 229 (App. Div. 1995). The business records exception, N.J.R.E. 803(c)(6), provides that the following types of document or records are not excluded by the hearsay rule:

> A statement contained in a writing or other record of acts, events, conditions, and, subject to Rule 808 opinions or diagnoses, made at or near the time of observation by a person with actual knowledge or from information supplied by such a person, if the writing or other record was made in the ordinary course of business and it was the regular practice of that business to make it, unless the sources of information or the method, purpose or circumstances of preparation indicate that it is not trustworthy.

Stated another way, the exception provides five pre-conditions to admissibility: (1) that the statement be contained in a writing or other record reflecting acts, events, conditions, or certain opinions or diagnoses; (2) that a person with actual knowledge recorded those acts, events, conditions, opinions or diagnoses or supplied the information; (3) that they were recorded at or near the time of observation; and (4) that the writing was made in the regular course of

business and it was the regular practice of the business to make it.[2] The affidavit of amount due does not address any of these requirements. The affiant merely states the legal conclusion that the plaintiff is the "holder/owner" of the note and mortgage. The affiant does not identify any specific writing that the affiant reviewed, who created that writing, or how and when the writing was created. Most significantly, it says nothing about any endorsements on the Note.

As the New Jersey Supreme Court has reiterated, in order to make out a business records exception to the hearsay rule, the plaintiff must set forth **facts** that demonstrate that (1) the record was recorded pursuant to the regular practice of the business, (2) the information was recorded shortly after the related event occurred, and (3) the source of the information and the method and circumstances of preparation of the writing must justify allowing it into evidence. State v. Matulewicz, 101 N.J. 27, 30 (1985). Here, the affidavit does none of those things. Merely invoking the words "maintained in the ordinary course of business" in the certification does not make it so.

"The basic theory of [the business records exception to the hearsay rule] is that records which **are properly shown to have been kept as required** normally possess a circumstantial probability of trustworthiness." Mahoney v. Minsky, 39 N.J. 208, 218 (1963) (emphasis added). See also State v. Matulewicz, 101 N.J. 27, 30 (1985); Liptak v. Rite Aid, 289 N.J. Super. 199 (App. Div. 1996).

[2] Even when those conditions are satisfied, if (5) the sources of information or the method, purpose or circumstances of preparation indicate that it is not trustworthy, then the evidence must be excluded.

This certification is not much different – and certainly no better -- than the certification that the Appellate Division found insufficient to establish holder status and sustain entry of summary judgment in the matter of Wells Fargo v. Ford, supra, 418 N.J. Super. 592. In Ford, Wells Fargo relied on a certification that stated that Wells Fargo is "the holder and owner of the said Note/Bond and Mortgage" at issue, and that the exhibits attached to the certification were "true copies." Ford, 418 N.J. Super. at 594-595. However, as here, the source of the affiant's purported knowledge was not identified. The Appellate Division noted that the "certification does not allege that [the affiant] has personal knowledge that Wells Fargo is the holder and owner of the note. In fact, the certification does not give any indication how [the affiant] obtained this alleged knowledge. The certification also does not indicate the source of [the affiant's] alleged knowledge that the attached mortgage and note are 'true copies.'" Ford 418 N.J. Super. at 599-600. This is exactly the same in the case at hand.

Conclusion

Based upon the above, Defendant respectfully requests that this Court enter an order setting aside entry of default and permitting the defendant to file an answer.

Respectfully Submitted,

Signature: _____
Print Name: _____
Pro Se Defendant