A Self-Help Guide to Saving Your Home

Written and Published by Legal Services of New Jersey
Foreclosure

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Preface

Legal Services of New Jersey (LSNJ) coordinates the statewide Legal Services system in New Jersey, providing free legal services to low-income people in civil matters. Part of Legal Services’ mission is to make people more aware of their legal rights and provide helpful information if they choose to pursue a legal case on their own. Awareness may allow you to resolve some problems on your own, without the need for a lawyer, or to make better use of a lawyer if you have one.

Getting a Lawyer

If you are facing foreclosure, it is best to try to get a lawyer. Defending yourself against a foreclosure is a complicated process. It requires more than just going to court. You must file papers with the court, respond quickly in writing to papers you receive from the lender’s attorney, and meet specific deadlines. And, if your case goes to trial, you may have to question witnesses and present evidence in court.

If you need an attorney but can’t afford one, you may be eligible for legal help from Legal Services of New Jersey or your regional Legal Services program. To find out if you are eligible and to apply for assistance, call LSNJ-LAW™, Legal Services of New Jersey’s statewide, toll-free legal hotline, at 1-888-LSNJ-LAW (1-888-576-5529).

If you are not eligible for free legal assistance, LSNJ may refer you to a private attorney who defends homeowners in foreclosure matters. You will probably have to pay legal fees. However, some attorneys may be willing to wait for all or some of their fees until your case is settled or decided by the court. This is because some of the laws of the foreclosure process require the lender to pay your attorney’s fees if you win your case.

Acknowledgments

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Comments or Suggestions

We hope that this manual will be helpful to you. Please let us know if you have comments or suggestions about how to make it better. You can email us at publications@lsnj.org or write to us at:

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Introduction

Foreclosure is the legal process where a court orders the sale of a home when the homeowner doesn’t pay the mortgage. Right now, many homeowners are having trouble making their mortgage payments. You need to know that the lender cannot take your house automatically, even if you have missed mortgage payments. The lender must take you to court, where you can defend yourself against foreclosure. You also need to know that, in certain circumstances, mortgage foreclosure can be prevented. The information in this manual is designed to help you understand the court process for foreclosure and the defenses you might have that may help you prevent foreclosure.

A. How to Use This Manual

This manual is designed to help you learn more about the process of foreclosure and what you need to do to avoid foreclosure. It is best to read the entire manual first and then go back to the section that is most helpful to you. From time to time, you will see references to laws and cases. These references are called legal citations or cites. They are meant help to explain foreclosure law and procedures. Take notes and write down any questions that you may have. In the back of this manual, there is a glossary of legal terms, a chart, and a several letters and forms for you to use if you decide to represent yourself in a foreclosure action. It is also a good idea to get a calendar to keep track of deadlines. Missing deadlines can cause you additional legal problems.

B. Ways to Avoid Foreclosure

1. Defend yourself in court
   This manual focuses on the foreclosure process and the steps that you can take in court to prevent foreclosure.

2. Mediation
   The State of New Jersey recently announced a court-run foreclosure mediation program. Mediation is an opportunity to try to negotiate a payment plan with the lender, with the assistance of a person appointed by the court. Under the state’s mediation program, mediation does not stop the foreclosure process from continuing. If the mediation is successful, and the parties come to an agreement, they may agree to stop the foreclosure. Remember: Unless there is a court order or a written agreement to stop the foreclosure, the foreclosure process will continue while the mediation is going on.

3. Bankruptcy
   Sometimes, a bankruptcy can help you save your home, whether or not you have claims and defenses against the mortgage company. For more information about bankruptcy see Chapter 4 of this manual, Other Ways to Protect Your Home From Foreclosure.
Chapter I
Getting Started

A. Gather Records and Identify Deadlines

1. Open mail as soon as it arrives
Open your mail and read it as soon as it arrives. If you ignore letters or court papers, you may lose your home without even having a chance to defend yourself. Be especially careful to look at papers that are hand-delivered or that require a signature from you. These papers usually have short deadlines and require you to do something quickly. Papers that come from your lender, your lender’s attorney, or the court are especially important.

2. Identify any deadlines
Check for deadlines on any written papers such as letters from the lender or the lender’s attorney or on any court papers. Mark these down on a calendar. Remember that a homeowner who acts within the deadlines is in a better position than one who is late to respond. Use the information in Chapter 3, The Foreclosure Process, to determine where you are in the foreclosure process and what you need to do as your next step.

3. Beware of scams (offers that sound too good to be true)
When you are in foreclosure, you may receive a lot of junk mail. This happens because court records are public and companies use lists of foreclosure filings to mail information about their services to people in foreclosure. Some companies may even visit your home to sell you their services. Beware of the offers from these companies. An offer to help you save your home from foreclosure that sounds too good to be true probably is too good to be true. Below are two common scams:

- **Convincing you to transfer the deed to your property to someone else.** A common scam (trick) is where you are told to transfer the deed to your property to someone else temporarily and then buy your house back in a year or two when your credit improves. It is very unlikely that you will ever get back the deed to your property. It is very likely that the new owner will try to evict you so the new owner can sell the house for a profit. Don’t do this!
- **Paying a fee to have your mortgage renegotiated.** Another common scam is where you are told that for a fee, a company will renegotiate your mortgage with your lender. You do not have to pay a fee for this type of service. A housing counselor can do this for you for free.

4. Get a copy of your mortgage documents
At a mortgage closing, a homeowner signs many documents in order to get a mortgage loan. The mortgage closing may take place in an office or it may even take place in your house or a public place. The documents you signed at the closing are very important. You must try to understand the mortgage documents in order to prepare a defense to foreclosure. You should have been given a copy of the documents at the closing. If not, or if you can’t find those documents, you can get a copy by writing a letter to your mortgage servicer.
5. Send a *Qualified Written Request*
If you can’t find your mortgage documents you are entitled to receive a copy of them from the mortgage servicer (the company collecting the payments from you) by writing a letter called a *Qualified Written Request* (QWR). See Appendix A for a sample QWR and instructions.

6. Other documents related to the mortgage
It is helpful to also have the following documents handy, especially if you disagree with the amount of money the lender claims that you owe.

- Your mortgage statements
- Proof of payment such as cancelled checks, money order stubs, and credit card statements
- Proof of homeowner’s insurance
- Proof of property tax payments

B. Evaluate Your Finances

1. Find out how much your house is worth
You can find out how much your property is worth by contacting a realtor and asking him or her to prepare a *certified market analysis*. Many realtors will do this at no charge. This will help you determine if you have any equity in your property. (Equity is the amount of money that would be left over if you subtract the amount of any liens—mortgages or loans—from the market value of your property.) Determining the market value of your home will help you make decisions about what to do, such as whether it is time to sell the property or whether a bankruptcy can help you save your home. For more information about bankruptcy see Chapter 4, *Other Ways to Protect Your Home From Foreclosure*.

2. Prepare a budget
To understand how much you can afford to pay for housing, prepare a budget showing your actual income and expenses for the past few months. A general rule of thumb is that your housing expenses (which include principal, interest, taxes, and insurance) should not be more than 38% of your gross (before tax) income. Your housing payment can be higher, but you need to have enough income to meet all of your other expenses, such as utilities, food, and transportation. This information is important so that you can make realistic decisions about what to do next.

A housing counselor is someone who can help you prepare a budget.

Be aware that lenders may use formulas different from this one to determine an affordable housing payment, and that lenders will also be interested in your other debts when they evaluate how much you can afford to pay.

3. Save your money
If your lender will not accept your mortgage payments, it is very important that you save all of the money that you would have spent on your monthly housing payment each month. If you cannot save this amount, put aside as much as you can afford. If possible, try to save at least 38% of your gross monthly income each month or enough to cover the taxes and homeowner’s
insurance, whichever is more. You may need this money to settle the foreclosure lawsuit with the lender or, in the worst case, use it to relocate (move into other housing).

C. Write Out Your Story

Writing out the story of what happened to you will help you, a housing counselor, an attorney and, eventually, a judge to understand your defenses. Many defenses to foreclosure involve looking back at the events that happened at the time the loan (or a series of loans) was made. In your story, try to explain how you got from a place where you could afford your property to a place where you cannot. Try to answer all of these questions:

- Did I buy or inherit the property?
- When did I buy or inherit the property?
- How many times have I refinanced the property?
- Why did I refinance each time?
- What happened to any cash I took out?
- How much was I earning at the time I got the loan?
- Was the loan affordable at that time?
- Did I have to borrow extra money just to make the mortgage payments?
- How did I come into contact with the mortgage broker or lender?
- What was I promised at the time I got the loan?
- What did I actually receive?
- When did I begin to have trouble making mortgage payments?
- Why did I begin to have trouble making mortgage payments?

D. Review and Understand Your Mortgage

At the mortgage closing, you signed many documents. Look for these documents that will help you understand your mortgage and prepare a defense:

- The mortgage
- The mortgage note
- Any riders to the note
- The Truth in Lending disclosure statement
- The itemization of amount financed (if any)
- All copies of the notice of right to cancel (if any)

1. What is a mortgage?
A mortgage is an agreement that a lender may use a house as collateral for a debt. Using the property as collateral means that, if the homeowner does not pay the debt, the lender can bring a foreclosure case in court so that the property can be sold to satisfy the debt.

After a homeowner signs a mortgage, the original mortgage is recorded with the County Clerk in the county where the house is located. You should be given a copy of the mortgage at the time
you sign it. After the mortgage is recorded, you should receive a second copy in the mail, stamped with the recording information.

2. What is a note?
When you sign your mortgage, you also sign a document called a note. The mortgage note is like an IOU. The note spells out the amount of money you borrowed and the terms for repayment, such as the interest rate and length of the loan. A loan default occurs when a borrower fails to do what the mortgage note requires. For example, a homeowner who misses a mortgage payment is in default.

It is important to identify and understand at least the following information from your mortgage note:

- **What is principal?** The principal is the total loan amount borrowed. In other words, it is the face value of the note.

- **What is the interest rate?** The interest rate is the amount that a borrower pays the lender for the use of the money, expressed as a percentage. There are two types of interest rates:
  - **Fixed interest rate:** A fixed interest rate is one that stays the same throughout the entire life of the loan.
  - **Adjustable rate mortgage:** An adjustable rate mortgage (also known as an ARM) is one where the interest rate changes periodically. The note will tell you how often the interest rate can change and the maximum rate that you can be charged. Many loans have a short time period during which the interest rate is fixed, such as two years. After that time period is over, the interest rate becomes adjustable for the rest of the loan term.

- **What is the loan term?** The loan term is the length of the loan. Most loans last for 30 years. A loan that lasts for 15 years will have higher monthly payments, but you will pay less interest over the life of the loan. A loan that lasts 40 years will have lower monthly payments but because you are paying for a longer time, you will pay a lot more interest over the life of the loan.

- **What are exotic loan products?** Some loans have more complicated features. These loans are sometimes called exotic loan products. If you received an exotic loan product, ask yourself whether it was unfair, not a good match for your needs, overly harsh, inevitably designed to lead to foreclosure, or not what you bargained for. If so, you may have been a victim of predatory lending. In your Answer to the Foreclosure Complaint, you should include specific information about the terms of the loan and why they are inappropriate for you. Below are some examples of unfair, harsh loans that are probably not what you bargained for:
  - **A loan with a low interest rate that lasts for a short period of time** (as little as one month or as much as a few years). This type of loan is referred to as a teaser rate loan. The note will not use the term “teaser rate” The only way to determine if you have a teaser rate is to look for the first interest rate change date in the note.
A loan where your monthly payments do not pay down any of the loan principal. This type of loan is referred to as an interest-only loan. With an interest-only loan, even if you make your mortgage payments on time each month, at the end of the loan term you will still owe the entire amount of the loan principal that you borrowed at the beginning of the loan. If you cannot pay the entire loan balance at that time, you would have to refinance the entire loan balance or sell the home at the end of the loan.

A loan set up so that the monthly payments do not cover the full amount of principal and interest that would be necessary to fully pay off the loan within the loan term. This type of loan is referred to as a negative amortization loan. When a loan negatively amortizes, your monthly payments do not reduce the total amount you owe on the loan. Instead, the principal of the loan actually gets bigger each month, so that you will owe more than you originally borrowed.

A loan where the monthly payments do not fully pay off the loan. If you have a loan referred to as a balloon loan and you make all monthly payments on time, you will still owe some portion of the loan at the end of the loan term. At that point, if you don’t have the funds to pay off the remaining loan balance, the loan would have to be refinanced or the house must be sold.

A loan that appears to give you the choice of three or four different monthly payments. This type of loan is referred to as a payment option ARM. A payment option ARM is a loan that appears to give the borrower a choice of three or four different monthly payments. The note sometimes identifies a loan as a payment option ARM, but sometimes it does not use that expression. In a payment option ARM, the homeowner has the choice of paying a monthly payment that will fully amortize the loan over the loan term, an interest-only payment, and a minimum payment. The minimum payment does not pay down any principal and only pays part of the interest that accrues for the month. The rest of the interest negatively amortizes and is added to the principal of the loan. The lowest payment option is usually based on a very low teaser rate, such as 1.9%, which does not last. The interest rate increases—usually within a few months of closing. When the loan has negatively amortized such that the borrower now owes a certain percentage of the loan, the borrower will lose the option to make any payment other than a payment that will fully amortize the loan. That percentage is identified in the note, and is usually around 115% to 125% of the original loan amount. These loans are especially dangerous when made to a homeowner who cannot afford anything other than the minimum payment.

No income, no asset verification loans and stated income loans. At the time you applied for the mortgage, you may have been told that the loan was a no income, no asset verification (NINA) loan, meaning that the lender may not even have asked you for your income, or a stated income, stated asset (SISA) loan, meaning that the lender
asked you how much you earn, but did not check with your employer. If the loan was based on a much higher income than you actually had, that may be a reason why the mortgage is unaffordable. That might be an important part of why you could not afford the mortgage payments, and how you ended up in foreclosure. Your loan documents may or may not contain this information.

To keep track of the details of your note and mortgage, see the Loan Terms and Worksheet form in Appendix B.
Chapter 2
Laws That Can Protect You From Foreclosure

There are many defenses to foreclosure. Most of them involve looking back at the events that happened at the time the loan was made. This manual focuses on two of the most important defenses available to homeowners: the New Jersey Consumer Fraud Act and the Federal Truth in Lending Act.

A. The New Jersey Consumer Fraud Act and Predatory Lending

The New Jersey Consumer Fraud Act (CFA) protects consumers—including homeowners—from unfair and deceptive acts by merchants, including lenders. The law prohibits the following:

The act, use, or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance of such person as aforesaid, whether or not any person has in fact been misled, deceived, or damaged thereby. . .

A court may find that the lender violated the New Jersey Consumer Fraud Act and that your mortgage is not valid if you were the victim of predatory lending. Predatory lending has been defined by the New Jersey courts as:

A “mismatch between the needs and capacity of the borrower…[T]he loan does not fit the borrower, either because the borrower’s underlying needs are not being met or the terms of the loan are so disadvantageous to that particular borrower that there is little likelihood that the borrower has the capability to repay the loan.” (Associates Home Equity Services v. Troup, 343 N.J. Super. 254, 267 (App. Div. 2000); Nowosleska v. Steele, 400 N.J. Super. 297 (App. Div. 2008).

These cases stand for the idea that some loans can be considered predatory because they are wrong for a particular borrower. For example, if a homeowner on a fixed income plans to stay in his or her home for a long period of time, an adjustable rate loan with a low introductory interest rate would be wrong for that particular borrower if the interest rate will increase the monthly payment to an unaffordable level in a short period of time.

Other loans can be considered predatory because the loan terms themselves are unfair. For example, some people argue that any loan that is based on the value of the property instead of on the borrower’s ability to repay the loan is inherently unfair.

Some examples of violations of the CFA that a court might consider to be predatory lending include:
• The loan payments were not affordable at the time the loan was made. For example, if a homeowner’s only income is Social Security of $1,200 a month and the lender sold the homeowner a loan where the monthly payments were $1,100 not including taxes or homeowner’s insurance, those payments were clearly not affordable.
• A lender lies to a homeowner and tells the homeowner that s/he doesn’t qualify for a fixed-rate mortgage. Instead, the broker sells the homeowner an adjustable rate mortgage and promises to refinance the loan on better terms in a few years. Then the lender fails to follow through on that promise.
• A homeowner wanted to consolidate debts to lower monthly payments but, instead of giving the homeowner a home equity loan, the lender refinanced a good, low-rate mortgage with a larger mortgage with a higher interest rate.
• A homeowner received an advertisement offering a low interest rate mortgage but received a mortgage that had a low teaser rate and then adjusted to a higher rate.
• A homeowner refinanced, but the current loan is worse than the one the homeowner had before.
• The terms of the loan are so bad, as is the case with many payment option ARMs, that foreclosure is inevitable.

1. If you think you were the victim of predatory lending
If you think you were the victim of predatory lending, you may have a defense or a counterclaim under the New Jersey Consumer Fraud Act. You may also have claims against a mortgage broker or other people involved in selling you your mortgage loan. Victims of predatory lending can ask the court to prevent the lender from foreclosing if the lender violated the Consumer Fraud Act. If the court finds that the lender violated the Consumer Fraud Act, the homeowner can also ask the court for money damages in the amount of three times the amount that the homeowner lost.

2. How to describe violations of the CFA in an Answer
If you think that you were a victim of Consumer Fraud, you must give very specific, detailed facts in your Answer to explain what happened to you. If you wrote out your story and filled out the form called “Loan Terms” in Chapter 1 of this manual, those details can help you describe why your loan might be predatory. In the sample Answer provided in this manual, you must put those details in the section called Counterclaims.

B. Violations of the Federal Truth in Lending Act

The Truth in Lending Act (TILA) requires the lender to disclose the terms of the mortgage to the homeowner at the time a loan is made. TILA is designed to give homeowners an accurate explanation of the cost of the loan. 15 U.S.C. Section 1601 et seq.

1. Cancellation of the mortgage (rescission)

TILA provides extra protection for borrowers who are refinancing a mortgage. In a refinance, every borrower has three days to cancel the loan for any reason at all. When the lender misstates certain information, TILA extends the right to cancel the loan for up to three years. Cancellation
of the mortgage or rescission is very significant. It means that the mortgage is void and the lender cannot foreclose on the property.

If a homeowner has a right to rescind the mortgage and does so in writing, the lender must return to the homeowner all of the closing costs of the mortgage and all of the interest the borrower has paid on the mortgage. At that point, the homeowner must offer the lender the remaining balance of the loan. If the borrower has both TILA violations and claims under the Consumer Fraud Act, it is possible—in the best of circumstances—that the amount the borrower must offer can be very low or—less often—even nothing at all. The homeowner may be able to refinance the lower balance, or the court may order a fair repayment schedule.

2. Identifying violations of TILA

Some violations of TILA are easy to discover. For example, TILA requires the lender to give each homeowner two copies of a Notice of Right to Cancel. This notice explains the time limit for cancellation and where to send the cancellation notice. The lender must give two copies of the Notice of Right to Cancel to anyone whose name is on the deed, even if that person is not listed as a borrower on the mortgage.

TILA also requires the lender to list the deadline for cancellation on the Notice of Right to Cancel. Sometimes, the lender fails to do so or miscalculates the date.

If either of these things happened to you when you refinanced, you have the right to rescind (cancel) the loan for three years from the date of the loan.

Other violations of TILA are harder for most people to discover. These include inaccuracies in the finance charge, the annual percentage rate (APR), or the payment schedule. An attorney who specializes in this area of law can do the math to determine whether the lender violated the Truth in Lending Act.

3. Sending a letter canceling (rescinding) the mortgage

If you think your lender violated the Truth in Lending Act and you want to rescind the mortgage, you must send the lender a letter. If you have the legal right to cancel the mortgage and you do so, you may raise that as a defense to foreclosure. You can find a sample rescission letter and instructions in Appendix C.

C. Showing that the Lender Does Not Have the Right to Foreclose

1. Standing: Who has the legal right to foreclose on your property?

If you have been served with a foreclosure complaint, you may not recognize the name of the plaintiff. Chances are high that your original lender did not keep your loan. Your original lender may have sold your loan to another company. Often, mortgage loans are pooled together, and interests in the pools are sold as investment securities. The pool of loans is held in trust for the investors by a trustee. That trustee is often the plaintiff.
The company that has been collecting your mortgage payments is probably not the company that owns your mortgage. The company that collects your mortgage payments is usually a “servicer,” a company hired by the owner of your mortgage as a debt collector.

A court should not grant a foreclosure judgment to a company that cannot prove it owns your loan. In order for the lender to have the legal right to foreclose, it must be the “holder” of your note, and it must have received an “assignment” of the mortgage.

If you have never heard of the plaintiff before your received the foreclosure complaint, you should write that information in your Answer. You can ask the court to make the plaintiff prove that the mortgage debt belongs to that plaintiff, and that this plaintiff really has the right to foreclose.

2. The Fair Foreclosure Act

(a) The right to cure the default on your loan and reinstate your mortgage. One of the most important rights that New Jersey’s Fair Foreclosure Act gives the homeowner is that it requires the lender to give the homeowner the opportunity to cure a default at any stage of the foreclosure process up until entry of final judgment. Curing the default means paying the amount that you owe and reinstating the mortgage.

(b) Notice of Intention to Foreclose. One of the most important protections that the Fair Foreclosure Act gives the homeowner is that it requires the lender to send the homeowner a Notice of Intention to Foreclose before the lender can file a foreclosure complaint. The Notice of Intention to Foreclose advises the homeowner that he or she is behind with the mortgage payments and gives the homeowner at least 30 days to cure the default. The Notice of Intention to Foreclose must also give the homeowner some other important information that the borrower may need in order to resolve a dispute.

3. Checklist: Notice of Intention to Foreclose

If you did not receive a Notice of Intention to Foreclose, the court should deny the lender the ability to foreclose. If you did receive a Notice of Intention to Foreclose, check it against the list below. If the lender left out any of the required information, the court should deny the lender the ability to foreclose. If you think that the lender violated the Fair Foreclosure Act in either of these ways, you must tell the court in your written Answer.

If the court is made aware that the lender did not send the homeowner a Notice of Intention to Foreclose, or if the Notice of Intention to Foreclose did not meet the requirements of the law, then the court must dismiss the foreclosure complaint. If the Complaint is dismissed, the lender must comply with the law by sending the homeowner a proper Notice of Intention to Foreclose before it can file a new foreclosure Complaint.

If you did receive a Notice of Intention to Foreclose, the court should dismiss the foreclosure complaint if the Notice is missing any of these things:

- The particular obligation or security interest.
• The nature of the default: does the lender identify why it claims a right to foreclose (e.g., that you failed to make certain monthly payments)?
• That you have a right to cure the default.
• The amount that you have to pay in order to cure the default.
• The date by which you have to pay the arrears in order to avoid foreclosure proceedings.
• The name, address, and phone number where you should send your payment.
• A statement that, if you do not pay the amount that you owe, the lender can begin foreclosure proceedings against you in court.
• A statement that, if the lender does begin foreclosure proceedings, you will still have the right to cure, but you will also owe court costs and the lender’s attorney’s fees.
• Whether you have the right to transfer the property to someone else and have that person cure the default.
• That you are advised to seek an attorney.
• A statement that, if you are not able to find an attorney, you can call the New Jersey Bar Association or the Lawyer Referral Service in your county.
• A statement that, if you can’t afford an attorney, you can call your local Legal Services office.
• A statement that financial assistance might be available to help you cure the default.
• The name and address of the lender.
• The telephone number of a representative of the lender that you can contact if you don’t think you are in default or if you think you owe less than the amount the lender claims is due.

Note: The Notice of Intention to Foreclose should give you the name and address of the holder of the note and mortgage. It should also tell you the name and address of a representative of the holder whom you can contact in the event of a dispute. These will often be two different entities. If the plaintiff on the foreclosure complaint was not identified in the Notice of Intention to Foreclose, you should write that in your Answer.
Chapter 3
The Foreclosure Process

The term *foreclosure* refers to the court-ordered sale of property that was used as *collateral* for a debt. A lender cannot automatically take a house away from you, even if you have not paid the debt (mortgage) and are in default.

A. The Process Before Going to Court

**Step 1: You default on your loan**
You are considered to be in default as soon as you miss one loan payment (or if you break your loan agreement in some other way). The lender might contact you by letter or telephone after the first missed payment to remind you that a payment is due.

**Step 2: The lender sends you a Notice of Intention to Foreclose**
The lender usually waits until you have missed at least three mortgage payments before sending this notice. The New Jersey Fair Foreclosure Act requires the lender to send this notice to you. The law also requires certain information to be included in the notice. Use the checklist in Chapter 2 to make sure that the lender gave you all of the information that you are entitled to. If not, then you may include the lender’s failure to do so in your Answer or in a Motion (written request) to the court asking the court to dismiss the foreclosure action. The lender must send you this notice at least 30 days before the lender files a complaint.

If you can *cure* the default (make the payments you missed), the lender must accept your payment and cannot charge you attorney’s fees at this point.

B. The Process in the Office of Foreclosure

**Step 1: The plaintiff (lender) files a foreclosure complaint**
The court process of foreclosing on property begins no sooner than 30 days after you receive the Notice of Intention to Foreclose, when the *plaintiff* (the lender or company filing the complaint) files a complaint against you, the *defendant* (homeowner), with the Office of Foreclosure. The Office of Foreclosure is a part of the Superior Court of New Jersey, and it is located in Trenton. The Office of Foreclosure handles the foreclosure, and the foreclosure is never reviewed by a judge in your county unless you file an Answer.

The complaint for foreclosure must set out all the facts that would give the plaintiff the legal right to foreclose.

**Step 2: The plaintiff serves you with a Summons and Complaint**
The lender must have a copy of the Summons and Complaint hand-delivered to you. The lender also may send a copy of the Summons and Complaint to you by regular and certified mail. If the lender cannot reach you, the lender will ask the court for permission to serve you by publication. This means that important notices won’t be delivered to your house. Instead, they will only be published in the newspaper.
Notice of information about the state’s mediation program. Along with the Summons and Complaint, you should receive information about the state’s mediation program. **You must request mediation within 60 days of the date you receive the complaint. You must request mediation AND file an answer to the complaint if you want to fight the foreclosure.** If you fail to request mediation within 60 days, you will not be allowed to participate. If you miss the deadline, you may ask the court to allow you to participate, but you must be able to show “exceptional circumstances.” If you cannot show a very special reason you should be allowed a late chance for mediation, the court will deny your request. *Mediation will not stop the foreclosure process from continuing. It is important to file an Answer even if you request mediation.*

**Step 3: You file an Answer to the Complaint**
You, the homeowner, have the right to **defend** against the foreclosure lawsuit in court. To do so, you must present your defenses to the Complaint in a written Answer filed with the court. (An Answer is a written response from a defendant to a complaint). In your Answer to a foreclosure complaint you must explain to the court why the lender does not have the legal right to foreclose.

For a sample Contesting Answer With Defenses and Counterclaims, see Appendix D.

**Deadline for filing Answer.** You have 35 days from the date you received the Summons and Complaint to file a written Answer. *An Answer that is filed on time is the homeowner’s best opportunity to fight the mortgage foreclosure.*

**Step 4: The Office of Foreclosure reviews your Answer to determine if it is a Contesting or Non-Contesting Answer**
The Office of Foreclosure reviews every Answer to determine if it is a **Contesting Answer** or a **Non-Contesting Answer**. This is because the kind of Answer that you file determines how the case will proceed.

**Contesting Answer.** A **Contesting Answer** is one that questions whether the mortgage is legal or correct or questions whether the lender has a legal right to foreclose on your property.

**What must be included in a Contesting Answer?** In a Contesting Answer, you must include a response to each of the lender’s claims (admitting the lender’s claims are true, denying they are true, or stating that you do not have enough information to know whether the lender’s claims are true). Your Answer should also include **Defenses** (explanations about why you should not lose your home to foreclosure) and **Counterclaims** (your complaints against the lender claiming that the lender’s actions may have violated other laws). If other people were involved in making your loan a predatory loan, you may need to file a **Third-Party Complaint** and add those parties to the lawsuit.

*An Answer that admits all of the lender’s accusations or states that you do not have enough information to know whether the accusations are true for every paragraph may be deemed a Non-Contesting Answer. A Non-Contesting Answer will not be sent to a judge.*
For a more detailed description of defenses and counterclaims to foreclosure and an explanation of the laws that the lender may have violated, see Chapter 2, *Laws that Can Protect You from Foreclosure*.

For a sample Contesting Answer with Defenses and Counterclaims, see Appendix D.

**Step 5: The Office of Foreclosure transfers the court case to the county where the property is located**

If the Office of Foreclosure decides that you have filed a Contesting Answer, the Office of Foreclosure will transfer the case to the Superior Court in the county where the property is located, and the matter will be assigned to a judge.

**C. The Process in the Superior Court in the County Where the Property is Located**

After the case is transferred to a Superior Court judge in the county where the property is located, you must get ready to have a trial. The lender will try to convince the court either by a motion (written request) or at a trial that it has the right to foreclose on the property. You must convince the court that the lender does not have the right to foreclose on the property for the reasons you described in your Answer.

1. **Before trial**

   (a) **Motion for Summary Judgment**

   - **Lender’s Motion for Summary Judgment.** A *Motion for Summary Judgment* is a special kind of motion. In a Motion for Summary Judgment, the lender asks the court to decide the case in its favor without a trial or any further legal proceedings. Many times, the lender will file a Motion for Summary Judgment as soon as you file an Answer. To win a summary judgment motion, the lender must show the court that:
     - The lender and homeowner agree to all of the important facts that would affect the judge’s decision in the case, and
     - The law is completely on the lender’s side.

   - **Your Response to Motion For Summary Judgment.** The defendant/homeowner must file and serve a written response to the Motion for Summary Judgment. If the homeowner does not file and serve a written response to the Motion for Summary Judgment, then the lender will win automatically—whether the lender is right or wrong.

   - **Court’s decision on Summary Judgment Motion.** To decide a Summary Judgment Motion, the court looks at the lender’s motion and your response to decide whether or not you have any legal defenses to foreclosure. After the court receives the papers, the court may also decide to hold a hearing before making a decision.

   - **Decision for lender.** If the court decides that you do not have legal defenses to foreclosure, the court will usually decide the Summary Judgment in favor of the lender. This means that the lender now has the right to proceed to foreclose on your property.
• **Decision for you (homeowner).** If the court decides that the defendant homeowner does have legal defenses to foreclosure, the court will probably decide the motion in your favor and deny summary judgment to the lender. This means that you and the lender will now proceed towards a trial.

Sample forms for responding to a Summary Judgment Motion are available on the New Jersey Judiciary’s website: [www.judiciary.state.nj.us/prose/10556_response_to_a_motion_kit.pdf](http://www.judiciary.state.nj.us/prose/10556_response_to_a_motion_kit.pdf)

(b) **Discovery.** Discovery is another activity that takes place before the trial. Discovery is the process by which the parties (plaintiff and defendant) use several types of tools to ask for facts, documents, and other information before the trial takes place. In a foreclosure case, each may ask the other to provide information that may help prove or disprove the right to foreclose.

- **Demand for production of documents.** One of the most common types of discovery tools used in foreclosure cases is the Demand for Production of Documents (Document Demand). For a sample Demand for Production of Documents, see Appendix D. If you are a homeowner representing yourself, you may send the Document Demand to the lender’s attorney together with your Answer or as soon as possible after you file and serve your Answer. The lender then has 35 days to give you the documents you asked for. If the lender does not respond, you may file a written motion asking the court to order the lender to respond to the Document Demand or asking the court to dismiss the lender’s complaint for not responding. (See *What happens if a party does not provide discovery that is requested?* below)

- **Interrogatories and depositions.** If you do have an attorney, the attorney will make the Document Demand, and may also send the lender’s attorney a list of written questions (called interrogatories). Another way to get answers to questions is to ask the lender’s witnesses to answer questions (called a deposition) while under oath in the presence of a court reporter. The lender also has the right to ask you for information. Whether or not you are represented, the lender may also ask you to provide documents, answer written questions, or appear before a court reporter and give a deposition.

- **What happens if a party does not provide discovery that is requested?** Each party is responsible for making sure that it completes its own discovery. The court will not instruct the parties on this process or give a party forms to fill out in order to get the information that is needed. If either the lender or the homeowner fails to respond to the discovery requests of the other party, the lender or homeowner may make a motion to the court to force the other party to respond or face a penalty. For instance, if you are the homeowner and you fail to respond to the lender’s discovery request, the lender may make a motion to the court to ask the court to strike (disregard) your Answer. If the court strikes your Answer, the Complaint will be sent back to the Office of Foreclosure, and the foreclosure will proceed as if no Answer had been filed. Therefore, it is very important that you respond to any discovery requests that the lender makes of you.
Motion to Enforce Discovery. Sample forms and instructions for filing a Motion to
Enforce Discovery may be found on the New Jersey Judiciary’s website at:
www.judiciary.state.nj.us/prose/10555_motion_supct.pdf.

(c) Case management conference. The judge assigned to the case may write a letter to the
parties setting up a case management conference (CMC). A CMC is a meeting that will include
you (or your attorney), the judge, and the lender’s attorney. The main purpose of the CMC is to
set up a time schedule with deadlines for discovery. Remember to make sure that you ask for
enough time to get the information that you need. The court may also schedule a trial date at the
case management conference. The CMC is not an official hearing in the courtroom. No one will
be sworn in, and the judge will not make any decisions about whether the lender may foreclose.
At the meeting, the judge may ask some questions to get an idea of the issues involved in your
case. The judge may explore whether settlement (reaching an agreement without a trial) is
possible.

2. Trial
At a trial, the lender must prove it has the right to foreclose. Then you must prove that the lender
should not be permitted to foreclose because of the defenses you have raised. Review the
defenses by examining Chapter II.

D. The Process After You File a Non-Contesting Answer or
   If You Do Not File an Answer at All

1. Lender’s request for entry of Default
If you miss the deadline to file an Answer, or file a Non-Contesting Answer, the lender will
probably file papers with the court asking the court to Enter Default (officially recognize that the
you did not file an Answer).

Your response: Motion to Set Aside (Undo) Default. New Jersey Court Rule 4:43-3 allows you
to file a written request with the court asking the court to cancel/undo the default and to give you
another chance to file an Answer. You must show good cause in order for the Court to give you a
second chance to file an Answer. The case of O’Conner v. Abraham Altus, 67 N.J. 106, 129
(1975) is an example of a case where a court set aside a default for good cause. Good cause
usually means that you have a defense to the mortgage foreclosure.

For a more detailed description of defenses and counterclaims to foreclosure and an explanation
of the laws that the lender may have violated, see Chapter 2, Laws that Can Protect You from
Foreclosure.

2. Lender’s request for entry of Final Judgment
If you do not respond to the lender’s request for entry of default, the lender may go forward and
ask the court to enter Final Judgment in the lender’s favor. The lender does this by making a
Motion for Entry of Final Judgment. However, before the lender may file this motion, the lender
must give you notice and one final chance to cure the default.
• **Lender’s Notice of Motion for Entry of Final Judgment.** Fourteen days before the lender asks for the court to enter Final Judgment, the lender must send you a notice in the form of a letter telling you this.

• **Your response: Good Faith Statement.** If you feel that there is a reasonable likelihood that you may be able to cure (pay what you owe and stop the foreclosure), you must respond with a Good Faith Statement within 10 days of receiving the Lender’s Notice. You will have 45 days from the date of receipt of the letter notice to cure the default. _Send your response by certified or registered mail, return receipt requested._

• **Your response: Bankruptcy.** If you intend to file for bankruptcy, it is a good idea to file before judgment enters against you in the foreclosure. Otherwise, you may have to ask the Superior Court to reopen the foreclosure case so that you can raise your defenses in either the Superior Court or in the Bankruptcy Court.

3. **Lender’s Motion for entry of Final Judgment**

   If you are unable to cure, the lender will file a Motion (request) to the court to enter Final Judgment in the lender’s favor. This is the court’s judgment that the lender is entitled to foreclose on the property. It sets forth the amount of money that the lender is entitled to receive when the property is sold at a Sheriff’s Sale.

   • **Your response: Objection to Lender’s Motion.** At this point, if you disagree with the amount of the judgment, you have 10 days to file an objection to the lender’s motion. This objection may alter the amount of the foreclosure judgment, but it will not prevent the foreclosure.

   • **Your response: Motion to Vacate (Undo) the Final Judgment.** After the court has entered Final Judgment in favor of the lender, you still have one last chance to undo the judgment, reopen the case, file an Answer, and perhaps prevent foreclosure. New Jersey Court Rule 4:50-1 permits you to file a _Motion_ (request) with the court to _Vacate_ (undo) _the Judgment_. You must include a copy of your Answer with the Motion to Vacate Judgment. You must also include a filing fee of $30.00 or an application for a fee waiver.

   For a sample Motion to Vacate Default or Default Judgment and instructions, see Appendix E. For a sample Answer, see Appendix C. For a sample Request for Waiver of Filing Fees, see Appendix D.

**E. The Sheriff’s Sale Process**

If the court grants final judgment to the lender, the court will also issue a _Writ of Execution_ directing the County Sheriff to sell your house to the highest bidder at an auction. You will receive a notice telling you when your house is scheduled to be auctioned. A notice also will be posted in a newspaper.

1. **Your response: Request to stay (delay) the Sheriff’s Sale—Sheriff’s office**

   If your home is scheduled for a Sheriff’s Sale, you may apply to the County Sheriff in person for two two-week delays of this sale. These delays are called _adjournments_ or _stays_. You must pay a
fee to the Sheriff’s office for this stay. You should be prepared to pay a fee of under $50 by cash or money order. You do not have to prove good cause or appear before a judge to get these stays.

2. **Your response: Request to stay (delay) the Sheriff’s Sale—in court**
   You may also apply for a stay at the Superior Court, Chancery Division, in the county where the property is located. Courts often will grant a stay to allow you to participate in the Court’s mortgage mediation program. However, courts rarely grant stays for any other reason, except in very compelling circumstances, such as to allow a homeowner to complete a sale or refinance of the property that is already in process.

   Forms to request a stay so that you can participate in Mediation are available on the New Jersey Judiciary website:
   
   www.judiciary.state.nj.us/forms.htm#foreclosure

   **Note:** These stays are temporary, and will not give you an opportunity to have any of your defenses heard by a judge. They only give you the opportunity to try to complete some other plan.

3. **Getting the property back after the Sheriff’s Sale**
   After the auction, you have 10 days to redeem (get back) the property. During this period of time, you can save the property by completing a refinance or sale of the property. A bankruptcy filed after Sheriff’s Sale extends the period of time in which you can redeem the property, but you will not be able to raise your defenses in bankruptcy court at this time.

   If the lender wins the court case, then the Sheriff sells the property. The money from the Sheriff’s Sale is paid to the lender to make up for the homeowner’s failure to pay. If the house sells for more than the amount of the mortgage, then the homeowner is entitled to the difference. If the house sells for less than the amount of the mortgage, then the lender has the right to sue the homeowner for the rest of the money that the homeowner owes, called the deficiency.

   After the Sheriff’s Sale, you will receive a Notice from the Sheriff telling you when you must vacate (move out) of the house. If you do not move out of the house by that date, then the Sheriff may come in to the property and remove you and your belongings.

   **Remember that it can take a year or more for an uncontested foreclosure to be final, from the date of the Notice of Intention to Foreclose through the date the Sheriff takes possession of the property.**

   Because it may be easier for you to understand the process if you see it in a different format, the chart below describes the same process explained above when a homeowner files a Non-contesting Answer or No Answer to a Foreclosure Complaint.
4. Foreclosure process when a homeowner files a Non-Contesting Answer or no Answer to a Foreclosure Complaint

<table>
<thead>
<tr>
<th>EVENT</th>
<th>TIME PERIOD</th>
<th>COMMENTS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Default on loan</td>
<td>Usually three months of missed mortgage payments</td>
<td>Lender may send a letter to the homeowner after the first missed payment to remind the homeowner that a payment is due.</td>
</tr>
<tr>
<td>Notice of Intention to Foreclose</td>
<td>Must be sent at least 30 days before the lender can file a complaint</td>
<td>Notice must contain the following:</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• A description of lender’s interest in the property (home). This means that the notice must tell the homeowner that the lender has a mortgage on the home.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• A statement about the nature of the default. In other words, the notice must tell you why the lender will try to foreclose (for example, that you missed payments).</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• A statement telling the homeowner that he/she has the right to cure, which means that you have the right to pay what you owe and stop the foreclosure.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• Information about how to cure.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• A statement of how much the homeowner needs to pay to cure.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• The date to pay to avoid foreclosure with name and phone number (must be at least 30 days).</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• What will happen if the homeowner does not cure.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• A statement that homeowner may stop the foreclosure process, even after the filing of the foreclosure complaint.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• A statement telling the homeowner that he/she may still transfer title to the property to someone else at this time.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• A statement advising the homeowner to get an attorney along with contact information for county lawyers referral and Legal Services.</td>
</tr>
<tr>
<td>EVENT</td>
<td>TIME PERIOD</td>
<td>COMMENTS</td>
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<td>----------------------------------------------------------------------</td>
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</tr>
<tr>
<td>Foreclosure Complaint filed in Trenton Foreclosure Office (received with fee)</td>
<td>Must be served on the homeowner (delivered to him or her by mail or in person) within 30 to 60 days of filing.</td>
<td>Homeowners usually unaware of the filing. As soon as a complaint is filed, the homeowner may also be responsible for additional expenses, such as the lender’s attorney’s fees and costs added to cure amount.</td>
</tr>
<tr>
<td>Complaint served (delivered to defendant homeowner by mail or in person)</td>
<td>35 days to answer. Answer to be filed in Trenton Foreclosure Office. 60 days to request mediation.</td>
<td>Service must comply with Court Rules and due process standards (due process refers to fair procedures—homeowner must actually receive a copy of the Complaint and a Summons, which informs homeowner of rights and responsibilities and deadlines). However, if the lender is unable to serve the homeowner personally, the court will grant the lender permission to serve the homeowner by publishing notices in a local newspaper. The homeowner will be able to ask the court to take actions against the lender if the court finds that the lender did not make certain that the homeowner received actual notice (actually knew) that the lender had filed a Complaint against him or her. Along with the Summons and Complaint, the homeowner will receive a notice with information on the state’s mediation program. A homeowner can request mediation at this point, or at any point after filing of the foreclosure complaint.</td>
</tr>
<tr>
<td>Answer: non-contesting</td>
<td>30 to 75 days</td>
<td>Foreclosure Unit sends no notice if it decides that the Answer is non-contesting.</td>
</tr>
<tr>
<td>EVENT</td>
<td>TIME PERIOD</td>
<td>COMMENTS</td>
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<tr>
<td>(does not say that the mortgage is not valid or that the lender doesn’t have a right to foreclose). If no Answer is filed, or if an answer is non-contesting, the lender can file a paper with the court clerk asking for entry of default. The lender can request entry of default as soon as 35 days have passed since the homeowner received the Summons and Complaint.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Notice of Entry of Final Judgment</td>
<td>14 days prior to filing Motion for entry of final judgment with the court</td>
<td></td>
</tr>
<tr>
<td></td>
<td>The lender must send the homeowner a letter offering the homeowner a final chance to cure the default. If there is a reasonable likelihood that homeowner can cure, he/she must respond with good faith statement within 10 days of receipt of Notice to gain 45 days from the date of the letter to cure the default. Response must be sent by certified or registered mail, return receipt requested.</td>
<td></td>
</tr>
<tr>
<td>Motion for Entry of Final Judgment</td>
<td>Any time after entry of default. However, the homeowner has 10 days to respond before final judgment is entered.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>The lender must file with the court and serve on the homeowner a motion (written request) to the court asking the court to enter a final judgment of foreclosure. The request must include the lender’s proofs and must give the homeowner 10 days to object to the entry of the order. At this time, if the homeowner thinks that the amount the lender claims due is wrong, the homeowner can file a written objection. Objecting may alter the amount of the foreclosure judgment, but will not prevent foreclosure. The homeowner’s right to pay the arrears only ends. The homeowner still has the right to redeem the property. (To redeem means to pay off the whole mortgage. This is usually done by refinancing the mortgage with a new loan.) Judgment in favor of the lender may be entered by the court in 10 days if there</td>
<td></td>
</tr>
<tr>
<td>EVENT</td>
<td>TIME PERIOD</td>
<td>COMMENTS</td>
</tr>
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<td>----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Writ of Execution</td>
<td>45 to 120 days</td>
<td>Sheriff’s Sale must be scheduled within 120 days of Sheriff’s receipt of writ.</td>
</tr>
<tr>
<td>Sheriff’s Sale Scheduled</td>
<td>28 days</td>
<td>Notice must be published (in a newspaper) pursuant to Statute (according to the law). If homeowner is considering Bankruptcy, he/she must file for bankruptcy prior to Sheriff Sale to preserve right of redemption.</td>
</tr>
<tr>
<td>Homeowner entitled to ask the Sheriff to adjourn (re-schedule) date of sale twice</td>
<td>14 days for each adjournment</td>
<td>An application for an adjournment (delay) must be made in person at the Sheriff’s office. Sheriffs will almost always allow two two-week delays. The Sheriff will charge a fee for this service.</td>
</tr>
<tr>
<td>Additional adjournments</td>
<td></td>
<td>Homeowner may make a motion (formal written request) to the court. A court order with a new date for the sale is required, even if the lender consents (agrees) to the new date.</td>
</tr>
<tr>
<td>Sheriff Sale</td>
<td>10 days left to redeem (pay everything, usually by refinancing with a new loan)</td>
<td>After the Sheriff sells the property, the homeowner has 10 days to try to get the property back by paying off the entire mortgage.</td>
</tr>
<tr>
<td>Deed Transfer</td>
<td>Two weeks from date of sale</td>
<td>The right to redeem ends.</td>
</tr>
</tbody>
</table>
Chapter 4
Other Ways to Protect Your Home From Foreclosure

A. Mediation

The State of New Jersey runs a free foreclosure mediation program. Mediation is an opportunity to try to negotiate a payment plan with the lender, with the assistance of a person who tries to help the parties reach a compromise. You must request mediation within 60 days of the date you receive the foreclosure complaint. If you do not request mediation quickly, you will lose the right to participate. If you miss the deadline, you may ask the court for permission to mediate, but you must be able to show “exceptional circumstances” or the court will deny your request. An exceptional circumstance might be an increase in income that did not exist during the 60-day period, or some other very special reason you missed the deadline.

**Under the state’s mediation program, mediation does not stop the foreclosure process from continuing.** If the mediation is successful, and the parties come to an agreement, they may agree to stop the foreclosure. **Remember that the foreclosure process will continue while the mediation is going on. The foreclosure process will not stop unless there is a court order or a written agreement to stop the foreclosure.**

In order to have a successful mediation, you need to know the terms of your mortgage and how much you can realistically afford to pay (see Chapter 1, *Getting Started*). A lower interest rate, a lower amount of principal, or a longer amount of time to pay could lower your monthly payments. Unfortunately, the State no longer provides housing counselors and attorneys to help homeowners in mediation.

B. Housing Counseling

Housing counselors are professionals who can help you with budget preparation, filling out forms, and negotiation with a lender. They are not lawyers, and they cannot tell you whether you may have a defense to foreclosure or whether you might be better off in bankruptcy. Be very careful about housing counselors who charge a fee. Many companies claim that they can help you, but they really cannot. Look for a free or low-cost housing counselor. Some housing counselors can help you prepare for mediation, but most will not attend mediation with you unless you applied for assistance before April 1, 2013.

C. Bankruptcy

Sometimes, bankruptcy can help you save your home, whether or not you have claims and defenses against the mortgage company. Bankruptcy may be especially helpful if you have more than one mortgage on the property or if you own a multi-family residence. In some instances, you may be able to *strip-off* (eliminate) second mortgages, such as home equity loans in bankruptcy or the 20 part of an 80-20 purchase money loan. If you have claims and defenses to the mortgage, these can be raised in bankruptcy to help reduce (or eliminate, less frequently) the amount that you owe.
As soon as you file a bankruptcy, all court actions against you are automatically stayed (stopped). Therefore, filing bankruptcy automatically stops foreclosure actions and sheriff’s sales. This stay gives you some temporary breathing room to try to sort things out. You are eligible for this automatic stay unless you have filed several bankruptcies recently that have been dismissed.

There are two types of consumer bankruptcies. One is called a Chapter 7 and the other is called a Chapter 13.

1. **Chapter 7 bankruptcy**
   In a Chapter 7 bankruptcy, the court will discharge (cancel) all of your unsecured debt. Unsecured debt means that there is no collateral for the debt. For example, credit card debt is usually unsecured—you have not promised the credit card company that they can take your property if you don’t pay your debt. On the other hand, mortgages are secured debt—you have promised the mortgage company that your home can be sold (through court action) if you do not pay your mortgage debt. Therefore, your mortgage will not be cancelled in a Chapter 7 bankruptcy.

2. **Chapter 13 bankruptcy**
   In a Chapter 13 bankruptcy, you will be required to pay your secured debt a little at a time, over no more than five years. If you have a good mortgage, but you had a temporary setback (such as an illness or temporary job loss), a Chapter 13 bankruptcy can help you get back on track. In order to qualify for a Chapter 13 bankruptcy, you must be able to afford to make your current mortgage payments. You must also have enough extra income to pay off the mortgage arrears a little bit at a time.

If there is any chance you might need to file bankruptcy, you should contact an approved credit counselor. A list of approved credit counselors can be obtained through the Bankruptcy Court’s website at [www.njb.uscourts.gov](http://www.njb.uscourts.gov). You must get a certificate showing that you completed credit counseling or the bankruptcy court will dismiss your bankruptcy. Your credit counseling certificate is good for six months.

You can file bankruptcy at any time, but it is best to file bankruptcy before final judgment enters against you in a foreclosure action. It is critical to file before Sheriff’s Sale, or you will lose the legal right to cure the default. You will still have the legal right to redeem the property as long as you file within the 10-day redemption period.
Glossary

Adjourn—To put off a court session, such as a hearing or a trial, until a later time.

Amortization—The process of paying off a loan, such as a mortgage, gradually—usually by periodic payments of principal and interest.

Answer—A document filed by the defendant in response to the complaint filed by the plaintiff. The answer admits to the statements in plaintiff’s complaint that are true and denies the statements that are false. An answer may also include a counterclaim.

Answer to Counterclaim—The document filed by the plaintiff in response to the defendant’s counterclaim.

Arrears—A legal term for a type of debt which is overdue after missing an expected payment. It is also used (in the form in arrears) for payments that occur at the end of a period.

Collateral—The borrower's asset that is forfeited to the lender if the borrower is unable to pay a loan. In a home loan, the property is the collateral. If the borrower does not pay the debt, the lender can bring a foreclosure case in court and the property may be sold to satisfy the debt.

Complaint—The document that begins a lawsuit in the civil division of the New Jersey Superior Court. A complaint must set forth claims that give the party being sued a general idea about what he or she is being sued for. The party who files the complaint is known as the plaintiff.

Consolidate Debt—To replace multiple loans with a single loan, which often has a lower monthly payment and a longer repayment period. Also called a consolidation loan.

Cure (right to cure)—To cure means to pay the amount that you owe and reinstate the mortgage on the property.

Counterclaim—A complaint filed by the defendant against the plaintiff as a part of the defendant’s response to the plaintiff’s complaint. Usually filed with the defendant’s answer.

Defendant—The party sued by the plaintiff in a civil lawsuit (or by the state in a criminal lawsuit).

Defense—A defendant’s stated reason why the plaintiff (or, in a criminal case, the prosecutor) has no valid case.

Encumbrancer—A party holding a mortgage, lien, lease, or restrictions relating to property.

Equity—The amount of money left over if you subtract the amount of any liens (mortgages or loans) from the property value.
**Escrow/Escrowed**—Money in escrow is money placed into an account held by a lender into which the homeowner puts money to pay for taxes and insurance.

**Hearing**—A public proceeding in a court in which witnesses are heard, evidence is presented, and the parties to the lawsuit are present and have a right to be heard. There is no jury present. This proceeding is formal, but somewhat less formal than a trial.

**Judgment**—The court order that represents the court’s written decision in a lawsuit. A judgment should be signed and dated on the date that the case is decided.

**Litigants**—The name given to the parties involved in a lawsuit.

**Market value**—The going or current rate.

**Mediation**—The act of attempting to resolve a dispute or disputes with the help of a neutral third party before a trial or hearing.

**Motion**—An application to the court for some kind of legal relief. Motions are usually filed after an order has been entered in a lawsuit, although sometimes they can be filed at the beginning of a lawsuit in place of an answer to a complaint or with an answer to a complaint.

**Negotiate**—To communicate with another party for the purpose of reaching an understanding.

**Notice**—The word for the legal notification required by law or agreement.

**Note**—A legal document that is a written promise by one party to re-pay a loan or other sum of money to another party at a specific interest rate during a specific period of time.

**Order**—The court’s written decision in a lawsuit, signed and dated on the date that the case is decided. See also *judgment*.

**Plaintiff**—The party who begins a lawsuit by filing a complaint.

**Principal**—A sum of money owed as a debt; the total loan amount borrowed. The fact value of the *note*.

**Qualified Written Request**—A written request for mortgage documents made to the company collecting mortgage payments from you (your mortgage servicer).

**Real Estate Closing**—A real estate closing is the last step in the process of transferring ownership of real estate property from seller to buyer.

**Reinstating (the mortgage)**—To reinstate the mortgage and stop the foreclosure proceeding, the homeowner must pay the lender the total amount in default, plus interest, attorney’s fees, and any other costs incurred by the lender in connection with the foreclosure proceedings.
**Rescind**—To unmake or undo a contract between two parties.

**Rescission**—The act of unmaking of a contract between parties (the undoing of a transaction).

**Redeem/Redemption**—The statutory right of a defaulting mortgager to recover property, within a specific period of time after a foreclosure or tax sale, by paying the outstanding debt or charges. The purpose is to avoid selling property for less than its value.

**Refinance**—The process of paying off one loan with the proceeds from another loan, using the same property as security.

**Rider**—An amendment (addition or change) to a contract or a policy.

**Security Interest**—A property interest created by agreement or by law. Usually, this type of interest is created in order to make certain that the person responsible for repaying a debt actually repays the debt.

**Servicer/Mortgage Servicer**—A company responsible for collecting monthly payments and penalties, insurance and tax payments, and keeping records related to a mortgage loan.

**Service/Service of Process**—The legal term for the act of delivering to or leaving with a person who is a party to a lawsuit, a summons or writ, or other official court paper, which gives that party notice of the fact that someone has filed a lawsuit against him or her.

**Sheriff**—In New Jersey, an officer of the court who employs officers who perform official duties, such as providing security to the courthouse, serving process on litigants, and enforcing court judgments, such as writs of execution. Sometimes referred to, especially in other states, as a constable.

**Standing**—A party’s legal right to bring a legal claim (complaint) or to see a court’s enforcement of a right or duty.

**Stay**—The postponement or halting of a court proceeding.

**Summons**—The official notice to the defendant that someone has filed a lawsuit against him or her. It also tells the defendant where and how he or she must respond to the complaint and how long he or she has to respond.

**Third-Party Complaint**—A complaint filed by a defendant against a third party claiming that the third party is responsible for some or all of the damages that the plaintiff is trying to recover from the defendant.

**Trial**—A public proceeding in which witnesses may testify, evidence may be presented, and the parties to the lawsuit have a right to testify. In addition, a jury may be present at a trial. A trial is usually more formal than a hearing.
Unconscionable Commercial Practices—The term *unconscionable* means literally *without conscience*, or showing no regard for conscience, sense of decency, or justice. *Commercial practices* refer to the sale and distribution of goods and the financing of credit transactions on the goods sold.

Utilities—This term refers to services such as natural gas, electricity, water, and telecommunications and cable television.

Writ of Execution —A court order directing a sheriff or other officer to enforce a judgment, usually by seizing (taking) the judgment debtor’s property. In the case of a foreclosure action, the judgment debtor is the homeowner.
APPENDIX A1

Instructions for Completing Qualified Written Request (QWR)

Use this form if you never got copies of your loan documents at closing or if you cannot find your loan documents. Also use this form if you think the servicer made a mistake with your account. This form also asks the servicer to identify the current holder of the Note. This process comes from the Real Estate Settlement Procedures Act, 12 U.S.C. §2605(e).

1. On the top right of the form, fill in your address and the date.

2. In the spaces provides, fill in the number of the return receipt form from the post office that you will use with this letter.

3. Below the return receipt number, fill in the customer service address for the servicer, not the address where you send payments. If you do not have the customer service address, call the servicer and ask.

4. Below the line that says “QUALIFIED WRITTEN REQUEST,” fill in your account number, your name, and the property address.

5. If you think that the servicer made a mistake in your account—for example, by charging you fees you don’t owe, by failing to credit you for a payment, or by charging the wrong amount of interest—write your dispute on the blank lines provided. Be clear and specific.

6. Sign the letter.

7. Make a photocopy of the QWR for your records. A handwritten copy of the form is not enough.

8. Mail the original QWR form to the servicer by certified mail, return receipt requested.

9. Save your copy of the letter and your certified mail receipt in a safe place. When the green return receipt comes back to you in the mail, put it together with the letter and receipt.

10. Wait for the servicer to respond. The servicer has 20 days to let you know your request was received. The servicer has 60 days (not including Saturday, Sunday, or legal holidays) to investigate and send you documents and respond to your dispute.

11. When you receive the lender’s response, look through the documents to make sure you got everything you asked for. If anything is missing, write back to the servicer, telling the servicer that its response was incomplete and asking for the missing documents.

12. If the servicer fails to respond, you have the right to bring a lawsuit against the servicer for damages, costs, and reasonable attorney’s fees.
Re: QUALIFIED WRITTEN REQUEST

Account #: __________________________________________
Borrower(s): _________________________________________
Property Address: ______________________________________

Dear Sir/Madam:

I hereby request copies of the entire closing file for my loan. Please treat this letter as a “Qualified Written Request” under the Real Estate Settlement and Procedures Act, 12 U.S.C. 2605(e). Please send me the entire loan file, including but not limited to the documents listed below:

1) Loan Application
2) Commitment Letter
3) Note
4) Mortgage
5) HUD Settlement Statement
6) Good Faith Estimate of Closing Costs
7) TILA Disclosures
8) TILA Notices of Right to Cancel
9) Any other closing documents

I am also requesting a full payment history and any other documents showing loan disbursements, loan charges, payments made, and current principal balance due. Please include the date and purpose of any fees and costs that have been charged to my account. Please show the dates of my payments and the way they were applied or credited to my account.

I believe that there is an error in the servicing of my account. Specifically,

__________________________________________________________________________
__________________________________________________________________________
__________________________________________________________________________

Finally, please identify the current holder of the note and the address of same.

Please contact me if you have any questions with reference to the above. Thank you for your prompt attention to this matter.

Very truly yours,
APPENDIX B

Loan Terms Worksheet

Principal Amount: ______________

Interest Rate: _____% Fixed        OR        _____% Adjustable
    Starting interest rate: _____%        Current interest rate: _____%
    First interest rate change date: ________        How often does the interest rate adjust?
    First payment change date: ________        How often does the payment date change?
    Lowest possible interest rate: ________        Highest possible interest rate: _____%

Exotic Features:
    ___ Teaser rate        ___ Negative aAmortization
    ___ Balloon payment        ___ Interest only
    ___ Payment option        ___ No income no asset verification

Initial monthly payment: ________________        Current monthly payment: ________________

Are taxes and insurance escrowed?
    Taxes: __________________
    Insurance: __________________
APPENDIX C1

Instructions for Completing TILA Rescission Notice

Use this form (a) if your loan is a refinance (not the loan you used to buy your house), (b) if you signed the mortgage documents less than three years ago, and (c) you think the lender did not comply with the Truth in Lending Act.

To figure out whether the lender complied with the Truth in Lending Act, you or an attorney must review your mortgage documents.

Check whether the lender gave you:

___ A paper called a Truth in Lending Disclosure Statement.
___ A paper that says “Itemization of Amount Financed” listing the fees that the lender charged (not the Good Faith Estimate and not the Settlement Statement).
___ If there is no “Itemization of Amount Financed,” did the lender tell you in the mortgage documents that you have the right to request one?
___ Two copies of a Notice of Right to Cancel for each person whose name is on the deed (even if not all of the people signed the note and mortgage). If you did get Notices of Right to Cancel, do they contain all of the necessary information:
   ___ Is the date of the closing correct?
   ___ Is the date to cancel three business days later, including Saturdays but not including Sundays or legal holidays?

If any of the above are missing or incorrect, you may have the legal right to rescind (cancel) the loan.

You may also have the right to rescind the loan if the lender improperly failed to disclose finance charges. It is best to have an attorney review this issue for you. If you have no attorney, you can try to look for improper disclosures on your own.

___ Were you overcharged for recording fees? Check with the County Clerk to find out how much the lender paid to record your mortgage. Compare that number to the amount you were actually charged. That number is listed on the Settlement Statement that you receive when you got the loan.
___ Were you overcharged for title insurance? If this loan was a refinance, you should have been charged less than the cost of title insurance on a purchase.

To complete the sample rescission letter:

1. On the top right of the form, fill in your address and the date.

2. In the spaces provided, fill in the number of the return receipt form from the post office that you will use with this letter.
3. Below the return receipt number, fill in the address for the holder of the note if you have it. Otherwise, address the letter to the customer service address for the lender or to the attorney representing the lender if you are in foreclosure.

4. Below the line that says “TRUTH IN LENDING RESCISSION NOTICE,” fill in your name, the property address, and the account number.

5. On the lines provided in the first paragraph of the letter, fill in the name of the lender and the date you signed the loan papers.

6. Sign the letter.

7. Make a photocopy of the letter for your records. A handwritten copy of the form is not enough.

8. Mail the original letter by certified mail, return receipt requested.

9. Save your copy of the letter and your certified mail receipt in a safe place. When the green return receipt comes back to you in the mail, put it together with the letter and receipt.

10. You may or may not receive a response to your letter. If you do not receive a response, or if you receive a response denying you the right to rescind, put that information into your Answer, Defenses, and Counterclaims in the appropriate sections.
Date: ___________________________________

Via Regular and Certified Mail, Return Receipt Requested #__________________________

_______________________________
_______________________________
_______________________________
_______________________________

RE:    TRUTH IN LENDING ACT RESCISSION NOTICE

NAME: ______________________________________
ADDRESS: ___________________________________
ACCOUNT NO.: _______________________________

To Whom It May Concern:

I am writing to you about the above-referenced loan transaction, which I entered into with ______________________ on or about ____________________. Please be advised that I hereby rescind the transaction pursuant to the Federal Truth in Lending Act, 15 U.S.C. § 1635, Regulation Z § 226.23. I am entitled to rescind the loan because required material disclosures were not provided or were provided incorrectly.

If you are the servicer of the loan or another agent of the holder, please forward this notice to the holder of the note and mortgage. Please let me know right away if you are neither the holder nor the servicer.

The security interest granted as part of this transaction is void upon your receipt of this letter by operation of law. See 15 U.S.C. § 1635, Regulation Z § 226.23. Pursuant to the Regulation, the holder of the security interest has 20 days after receipt of this notice of rescission to return to me all monies paid and to take action necessary or appropriate to reflect termination of the security interest. Please be advised that if the security interest is not canceled and if all the consideration I paid is not returned to me as required by law, I will have no choice but to seek actual and statutory damages pursuant to 15 U.S.C. § 1640(a).

Kindly notify me in writing that the security interest has been canceled, and that the consideration paid will be returned immediately. Thank you for your attention and cooperation.

Very truly yours,
APPENDIX D1

Instructions for Filing an Answer with Defenses and Counterclaims

An Answer is your response to a Complaint. It is the first step in challenging a foreclosure. It must be filed within 35 days of the date you receive the Complaint. If you did not file an Answer within 35 days of receiving the complaint and a default or default judgment has entered against you, you must get a court order allowing you to file an Answer. Instructions for filing a Motion (request) to be permitted to file a late Answer are included in Appendix E to this manual. The completed Answer should be included with your Motion.

I. CONTESTING ANSWER, DEFENSES AND COUNTERCLAIMS

In order to prepare the Answer, you need to have a copy of the Complaint in front of you. You can use the sample in this manual or you can prepare your own. In this manual, it is Appendix D2, the document that says Contesting Answer, Defenses and Counterclaims.

A. Caption

Using the sample Answer in this manual, first prepare the top of the form, called the “caption.” You can find the information you need on the top of the foreclosure complaint.

- Fill in your name, address, and telephone number.
- Copy the name of the plaintiff from the foreclosure complaint.
- Copy the name of the defendant from the foreclosure complaint.
- Insert the name of the county.
- Copy the Docket Number from the foreclosure complaint.

B. Contesting Answer

You must answer each allegation (paragraph) in the foreclosure complaint one by one, by either admitting that the allegation is true, denying it, or stating that you don’t have enough information to answer. Read each paragraph of the Complaint carefully. In your Answer, admit those paragraphs that you are completely sure are totally true. Deny those that are totally false. You can admit some parts of a paragraph and deny other parts of the same paragraph. If you are not sure whether an allegation is true, say so. Do not simply admit or deny it.

C. Defenses

There are many defenses to a foreclosure. The sample Answer only contains a few of them. The defenses in the sample Answer may or may not apply to you. If any defense in the sample Answer does not apply to you, cross it out.

This manual explained the Truth in Lending Act and provided a sample letter for you to use (Appendix C2) in order to rescind your mortgage. If you think your lender violated the Truth in Lending Act and you used that letter, be sure to include the date of your letter in the space provided.
D. Counterclaims

Counterclaims are claims that you have against the lender. If you think that you are a victim of predatory lending, you can raise your predatory lending claims as counterclaims.

You should have written out your story, including details about the things that happened when you applied for the loan, the reasons why the loan you got was not appropriate for you, or why the loan itself is unfair. You should also have filled in the chart that explained the terms of the loan. Insert these into this section of the complaint. It is important to be very specific. Attach additional pages if you need more space.

In addition to the document titled “Contesting Answer, Defenses and Counterclaims,” (Appendix D2), you also need the Foreclosure Case Information Statement (Appendix D3), explained below.

II. FORECLOSURE CASE INFORMATION STATEMENT

The court requires you to complete a Case Information Statement (CIS) and send it to the clerk with the first paper you file with the court. If you do not complete the form, the court may return your Answer to you. A sample is attached in Appendix D3. It can also be found on the New Jersey Judiciary’s Web site at: http://www.judiciary.state.nj.us/civil/forms/10169_foreclosure_cis.pdf

To complete the Foreclosure Case Information Statement, follow these instructions:

A. In the space marked caption, write the plaintiff’s name and your name, just as you did on the caption of your Answer.

B. Insert the county and Docket Number.

C. Insert your name under “Name of Filing Party.”

D. Check the box marked “Answer.”

E. Write your name, address, and telephone number in the spaces provided.

F. In the space for “Foreclosure Case Type Number” check the box for ORF “Residential Mortgage.”

III. FILING FEE OR FILING FEE WAIVER REQUEST

The court requires you to pay a fee to file an Answer. As of October 2015, the fee for filing an Answer is $175. The filing fee for an Answer with a Counter-Claim, Cross-Claim
and/or Third-Party Complaint is $250. It should be in the form of a check or money order payable to “Treasurer, State of New Jersey.” You must include the fee with your Answer or the court will send the Answer back to you. If you cannot afford to pay the filing fee, complete a “Filing Fee Waiver Request.” A sample is included here in Appendix D4. It can also be found on the New Jersey Judiciary’s Web site at:
http://www.judiciary.state.nj.us/civil/forms/11208_filingfeewaivreq.pdf

IV. DEFENDANT’S DEMAND FOR PRODUCTION OF DOCUMENTS

The Demand for Production of Documents (Appendix D5) is your request to the lender to send you all of the documents that it has about your loan. You will need these documents in order to prove your defenses and counterclaims. It is not necessary to file a copy with the court, but it is a good idea to serve it with your Answer.

A. Fill out the caption, just as you did in the Answer.

B. In the space that says “To:” write in the name and address of the plaintiff’s lawyer. This information can be found at the top left of the caption of the Complaint.

C. On the line on the first page, write in the address where the attorneys should send the documents.

D. Sign and date.

V. COVER LETTER

Your cover letter (Appendix D4) tells the court and your adversary (opposing party) that you are filing certain documents. The sample cover letter in these materials lists all of the things that you need to include. Use it as a checklist to make sure you have each item listed.

You must include a self-addressed, stamped manila envelope. It should have enough postage on it so that the Court Clerk can return a full copy of the package to you, stamped “filed.”

VI. FILING AND SERVICE

You must file all of the above documents with the court, and you must serve them all on the attorney for the lender. You can file and serve by certified mail, return receipt requested.

Make four copies of the entire package

• Original and one copy are for the Court Clerk – one for the Clerk to keep and one for the Clerk to stamp “filed” and return to you.
• One copy for the plaintiff’s lawyer.
• One copy to keep until you get your copy back from the Clerk stamped “filed.”
• One copy for the Attorney General’s Office.

Mail the Clerk’s copy to:

Office of Foreclosure
Superior Court of New Jersey
Office of the Clerk
Attn: Foreclosure Unit
Hughes Justice Complex,
25 West Market Street, CN 971
Trenton, New Jersey 08625

Mail the lender’s copy to the lender’s attorney. The address appears on the top left of the complaint.

Mail the Attorney General’s copy to:

Robert Lougy, Acting Attorney General
Office of the Attorney General
Hughes Justice Complex
P.O. Box 080
25 West Market Street
Trenton, New Jersey 08625-0080
CONTESTING ANSWER

Defendant by way of Answer to the Complaint in Foreclosure says:

AS TO THE FIRST COUNT:

Defendant admits the allegations in the following paragraphs of the first count of the complaint: ________________, except that defendant denies the following parts of these allegations: ____________________________.

Defendant denies the allegations in the following paragraphs of the first count of the complaint: ________________.

Defendant does not have enough knowledge or information to answer the following
AS TO THE SECOND COUNT

Defendant admits the allegations in the following paragraphs of the second count of the complaint:______________________, except that defendant denies the following parts of these allegations:____________________________________________________________________.

Defendant denies the allegations in the following paragraphs of the second count of the complaint:______________________.

Defendant does not have enough knowledge or information to answer the following paragraphs of the second count of the complaint:______________________________________.

DEFENSES

(INSTRUCTIONS: CROSS OUT ANY PARAGRAPHS UNDER “DEFENSES” THAT DO NOT APPLY TO YOU (DEFENDANT))

FIRST SEPARATE DEFENSE

(Fair Foreclosure Act)

1. Plaintiff’s Complaint seeks to foreclose upon a “residential mortgage” as defined by the New Jersey Fair Foreclosure Act, N.J.S.A. 2A:50-53 et. seq., and therefore Defendant is entitled to the protections and requirements set forth in the Fair Foreclosure Act.

2. Plaintiff failed to comply with the Fair Foreclosure Act in some or all of the following ways:

   (a) Plaintiff failed to serve Defendant with a proper Notice of Intent to Foreclose, by registered or certified mail, return receipt requested at least thirty (30) days in advance of the filing of the Complaint; and/or
(b) To the extent that a Notice of Intent to Foreclose was served upon Defendants, that Notice did not comply with the requirements of the Fair Foreclosure Act as enumerated in N.J.S.A. 2A:50-56(c).

3. Based on the foregoing, the court lacks subject matter jurisdiction to hear Plaintiff’s Complaint for Foreclosure.

WHEREFORE, Defendant demands judgment dismissing the Complaint without prejudice for lack of subject matter jurisdiction and/or failure to state a claim upon which relief may be granted.

SECOND SEPARATE DEFENSE

The alleged mortgage is void and unenforceable and Plaintiff’s claim is barred because the mortgage was procured by fraud and/or any alleged loss to the Plaintiff is caused by the fraud of the Plaintiff and/or the fraud of third parties over which the Defendant has no control.

THIRD SEPARATE DEFENSE

(Truth in Lending Act)

1. The transaction alleged in Plaintiff’s Complaint is a consumer transaction that involved a non-purchase money mortgage secured by Defendant’s primary residence.

2. At all times relevant hereto, Plaintiff or Plaintiff’s alleged assignor was a creditor under the federal Truth in Lending Act, 15 U.S.C.A. § 1601 et seq. (“TILA”) that was required to provide notices of the right to rescind the mortgage and deliver material disclosures to Defendant.

3. Plaintiff or Plaintiff’s alleged assignor failed to comply with TILA by failing to provide Defendant with proper and accurate written rescission notices and accurate material disclosures as required by TILA.

4. The TILA violations complained of herein were apparent on the face of the
assigned documents, resulting in assignee liability pursuant to 15 U.S.C. § 1641(e).

5. In light of these violations, Defendant was and is entitled to rescind the mortgage.

6. Defendant exercised his/her right to rescind the mortgage on or about ______________________ by sending a Notice of Rescission of Mortgage to Plaintiff, by certified mail, return receipt requested.

7. By virtue of the foregoing, the mortgage which is the basis of Plaintiff’s Complaint is rescinded, and Plaintiff’s alleged security interest in Defendant’s primary residence is void by operation of law.


FOURTH SEPARATE DEFENSE

The Plaintiff’s claim is barred because any alleged loss to the Plaintiff is caused by its own negligence, or the negligence of third parties over which the Defendant has no control.

FIFTH SEPARATE DEFENSE

The Plaintiff’s claim is barred because of the doctrine of unclean hands.

SIXTH SEPARATE DEFENSE

The Plaintiff's claim is barred because of the Plaintiff's failure to add indispensable parties.

SEVENTH SEPARATE DEFENSE

The Plaintiff’s claim is barred because the Plaintiff lacks standing and/or is not a real party in interest.
EIGHTH SEPARATE DEFENSE

The Plaintiff's claim is barred because of the Entire Controversy Doctrine.

NINTH SEPARATE DEFENSE

Defendant contests the amount Plaintiff claims is due for any or all of the following reasons:

1. Interest was not calculated in the manner prescribed by the note;
2. The amount claimed due does not account for payments made by Defendant;
3. The amount claimed due includes unreasonable and excessive fees not permitted by the note and/or not actually incurred by the Plaintiff.

COUNTERCLAIMS

(INSTRUCTIONS: CROSS OUT ANY PARAGRAPHS UNDER “DEFENSES” THAT DO NOT APPLY TO YOU (DEFENDANT))

FIRST COUNT
(Consumer Fraud)

1. Defendant repeats and realleges all paragraphs above as if fully set forth herein.
2. Plaintiff or Plaintiff’s predecessor in interest engaged in unconscionable commercial practices, deception, fraud, false pretense, false promise and/or misrepresentations with regard to the subject mortgage.
3. Alternatively, or in addition, Plaintiff or Plaintiff’s predecessor in interest engaged in acts of omission, including but not limited to knowing concealment, suppression and omissions of material facts in connection with the subject mortgage.
4. Specifically,

   (Insert specific and detailed facts about any unfair or deceptive action that you think made your loan unfair [predatory])
5. The foregoing acts of Plaintiff constitute violations of New Jersey’s Consumer Fraud Act, N.J.S.A. 56:8-2 et seq., as a result of which Defendant suffered ascertainable loss.

WHEREFORE, Defendant seeks judgment against Plaintiff as follows:

A. Declaratory and injunctive relief declaring the mortgage void and unenforceable;
B. Declaratory and injunctive relief rescinding and/or reforming the mortgage;
C. Awarding actual damages;
D. Awarding treble damages;
E. Awarding costs and attorneys fees; and
F. Granting such other relief as the court deems just and equitable.

SECOND COUNT
(Violations of the Truth in Lending Act)

1. Defendant repeats and realleges all paragraphs above as if fully set forth herein.

2. The transaction alleged in Plaintiff’s Complaint is a consumer transaction that involved a non-purchase money mortgage secured by Defendant’s primary residence.

3. At all times relevant Plaintiff or Plaintiff’s assignor was a creditor under the federal Truth in Lending Act, 15 U.S.C.A. § 1601 et seq. (“TILA”) that was required to provide notices of the right to rescind the mortgage and deliver material disclosures to Defendants.

4. Plaintiff or Plaintiff’s alleged assignor failed to comply with TILA by failing to provide Defendant with proper and accurate written rescission notices and accurate material disclosures as required by TILA.
5. The TILA violations complained of herein were apparent on the face of the assigned documents, resulting in assignee liability pursuant to 15 U.S.C. § 1641(e).

6. In light of these violations, Defendant was and is entitled to rescind the mortgage.

7. Defendant exercised his/her right to rescind the mortgage on or about ______________________________ by sending a Notice of Rescission of Mortgage to Plaintiff via regular and certified mail, return receipt requested.

8. Plaintiff failed to comply with its rescission obligations under TILA.

WHEREFORE, Defendant seeks a judgment as follows:

A. Declaratory and injunctive relief enforcing rescission of the mortgage, including a declaration that Defendant is not liable for any finance charge or other charge imposed in connection with the transaction;

B. Declaratory and injunctive relief voiding the mortgage;

C. Awarding actual damages;

D. Awarding statutory damages;

E. Awarding attorneys fees and costs; and

F. Granting such other relief as the court deems just and equitable.

Dated: _________________________         By:__________________________  
                     (Date on which defendant signs this document)                   (Defendant’s signature)    Defendant Pro Se  
                     (Defendant’s name printed)

CERTIFICATION PURSUANT TO RULE 4:5-1

The undersigned does hereby certify that the matter in controversy is not the subject of any other pending lawsuits, proceedings or arbitrations in existence or currently contemplated of which I am aware.
SERVICE UPON ATTORNEY GENERAL

Service of a copy of the Answer, Defenses, and Counterclaims in this matter is being made upon the Attorney General of the State of New Jersey, pursuant to the Consumer Fraud Act for the purpose of encouraging intervention, by mailing a copy of said complaint to Anne Milgram, Attorney General, Office of the Attorney General, Hughes Justice Complex, P.O. Box 080, 25 West Market Street, Trenton, NJ 08625-0080.

Dated: _________________________   By:__________________________  
(Date on which defendant signs this document)   (Defendant’s signature)  Defendant Pro Se

(Defendant’s name printed)
Use the Internet link below for this form:

www.judiciary.state.nj.us/civil/forms/10169_foreclosure_cis.pdf
Use the Internet link below for this form:

www.judiciary.state.nj.us/civil/forms/11208_filingfeewaivreq.pdf
SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION—___________ COUNTY

RE:

Dear Sir or Madam:

I am the defendant in the above-referenced matter. Enclosed for filing please find an original and one copy of the following documents:

1. Answer, Defenses and Counterclaims;
2. Case Information Statement;
3. Defendant’s Demand for the Production of Documents;
4. Certification of Service;
5. Filing Fee Waiver Request OR check for $175.00 payable to Treasurer, State of New Jersey

Please stamped these documents “filed” and return a copy to me in the enclosed self-addressed, stamped envelope.

Thank you for your assistance. Please contact me if you have any questions.

Very truly yours,

Signed: ________________________________

Print Name: ________________________________
Pursuant to Rule 4:18-1 *et seq.*, Defendants hereby demand that Plaintiff produce the documents called for by Schedule A and the annexed Definitions and Instructions hereto at

within 35 days after service of this request as prescribed by the Rules of Court.

Dated:                          BY:_____________________________

Print Name:
Defendant Pro Se
INSTRUCTIONS

1. Please furnish all documents within the possession, custody or control of the party to whom these requests are directed, including but not limited to all documents in the possession, custody or control of the party’s accountants, affiliates, auditors, agents, employees, officers, directors, shareholders, contractors, or other personnel.

2. Each request for a document calls for not only the final document, but also any drafts or non-identical versions of the document that exist within the possession, custody or control of the party to whom these requests are directed. A document with handwritten notes, editing marks, or any other notations or markings shall be deemed to be non-identical to any version of the document not bearing such modifications, and shall be produced.

3. If any document requested is withheld by reason of a claim of privilege or otherwise, please furnish the following information with regard to the withheld document:
   (a) The date of the document;
   (b) An identification of its author(s); and
   (c) An identification of each person who received a copy of the document, viewed the document, and/or has custody of the document.

4. In the event that any document covered by these requests has been misplaced, destroyed, erased, or cannot be located, identify each such document and provide the following additional information:
   (a) Set forth a detailed description of the contents of the document;
   (b) Identify each person who wrote or edited the document, and the employer, business, and title or position of each;
(c) Identify all intended recipients of the document, all other known recipients of the document, and the employer, business, title or position of each;

(d) State the last known location of the document;

(e) Set forth the due diligence undertaken by the party to whom these request are directed in order to obtain the document;

(f) Set forth the reason for the inability to produce the document;

(g) If the document was destroyed, state the date on which the document was destroyed, the reason why the document was destroyed, and identify the person(s) who authorized the document to be destroyed and/or who destroyed the documents.

5. Please identify the source of any document(s) that are produced.

6. These requests shall be deemed to be on-going and continuing in nature so as to require continuous supplemental responses if the party to whom they are addressed obtains further information between the time responses are served and the time of trial.

**DEFINITIONS**

1. "You," "your" and "yourself" refer to the party to whom the following requests are addressed, and its agents, representatives, officers, directors and employees.

2. "Person" means natural persons, firms, proprietorships, associations, partnerships, corporation, and every other type of organization or entity.

3. "Identify" means when used in reference to:

   (a) A document, to state separately (i) its description (e.g., letter, report, memorandum, etc.), (ii) its date, (iii) its subject matter; (iv) the identity of each author or signer, (v) its present location, and (vi) the identity of its custodian.
(b) An oral statement, communication, conference or conversation, to state separately
(i) its date and the place where it occurred; (ii) its substance; (iii) the identity of each person
making the statement or participating in the communication, conference or conversation; and (iv)
the present location and custodian of all notes, memoranda, or other documents memorializing,
referring to or relating to the subject matter of the statement, communication, conference or
conversation.

(c) a natural person or persons, to state separately (i) the full name of each such person;
(ii) his or her present, or last known business address and his or her present, or last known
residential address; and (iii) the employer of the person at the time to which the interrogatory
answer is directed and the person's title or position at that time;

(d) an organization or entity other than a natural person (e.g., a corporation, company,
firm, association, or partnership), to state separately (i) the full name and type of organization or
entity; (ii) the date and state of organization or incorporation; (iii) the address of its principal
place of business; and (iv) the nature of the business conducted.

4. "Document" means any written, typed, printed, recorded, computer generated, or
graphic matter, however produced or reproduced, of any type or description regardless of origin
or location (including but not limited to documents located on computer disks, drives, tapes, or
networks), including without limitation all correspondence, records, tables, charts, analyses,
graphs, schedules, reports, memoranda, notes, lists, calendar and diary entries, letter (sent or
received), telegrams, telexes, messages (including, but not limited to, reports of telephone
conversations or conferences), studies, books, periodicals, magazines, booklets, circulars,
bulletins, instructions, papers, files, minutes, other communications (including, but not limited to
inter and intra office communications), questionnaires, contracts, memoranda, agreements,
assignments, licenses, ledgers, books of account, orders, invoices, statements, bills, checks, vouchers, notebooks, receipts, acknowledgements, photographs, photographic negatives, tape or other mechanical recordings, transcripts or logs of any such recordings, all other data compilations from which information can be obtained, or translated if necessary, and any other tangible thing of a similar nature.

5. Information "relates to" or "pertains to" a particular fact, matter or event when it tends to prove or disprove that fact, matter or event, or contains information concerning, explaining, relating, or providing a background for understanding that fact, matter, or event or could lead to additional relevant information concerning, explaining, relating or providing a background for understanding the fact, matter or event, or was produced, altered or signed as a part of or as a result of that fact, matter, or event.

6. The term "subject matter of this litigation" means any and all matters described or alleged in any complaint, answer, defense, or counterclaim, filed in this action by any party.

7. "Premises" refers to the property that is the subject of the above-captioned matter.

8. The singular shall be deemed to include the plural and vice versa. The feminine shall be deemed to include the masculine and vice versa. The word "and" shall be deemed to include the word "or" and vice versa.

9. “Party” means any person or entity specifically named in this matter, in addition to any known subsidiaries, affiliates, acceptance corporations, holding companies, parent companies or the like.
SCHEDULE A

1. Any and all documents that pertain to Defendant(s) and/or the mortgage loans at issue in this litigation, including without limitation all documents that were prepared, generated, and/or reviewed by Plaintiff in connection with the application, underwriting, review, credit assessment, approval, funding, closing, recording, collection, purchase, sale or assignment of the mortgage loan at issue in this litigation.

2. All documents in Plaintiff’s possession or available to Plaintiff that establish its standing to bring a foreclosure action or enforce a security agreement or mortgage, including but not limited to:
   a. Copies of all contracts, documents, agreements and other disclosure forms written communications, notes, memoranda and records concerning the note and mortgage that are the subject of this action, including attorney fee contracts.
   b. Copies of all receipts for payments made by or to and/or received by the plaintiff concerning the note and mortgage that are the subject of this foreclosure action.

3. All documents in Plaintiff’s possession or available to Plaintiff that establish that it is the legal, beneficial or equitable owner of the promissory note that is the subject of this foreclosure action.

4. All documents in Plaintiff’s possession or available to Plaintiff that identify what entity or entities are the beneficial owner of the subject promissory note that is this foreclosure action.

5. Any and all assignments of the mortgage at issue in this litigation, whether the assignment is recorded or unrecorded.

6. Documents related to the endorsement and/or negotiation of the Promissory Note which is the subject of this litigation.

7. The original Promissory Note and any and all allonges

8. Any and all documents related to the physical transfer of any Promissory Note.

9. The complete mortgage loan file including but not limited to any and all versions of the following:
   a. any and all applications made by or on behalf of Defendant(s) for a mortgage loan;
   b. any and all documents pertaining to credit worthiness of Defendant(s), including but not limited to any credit report(s) obtained as to Defendant(s);
c. any and all documents pertaining to title and lien searches and/or title insurance obtained or requested including but not limited to title insurance;
d. any and all document pertaining to the determination of the terms of the mortgage loans at issue in this litigation;
e. any and all agreements between any persons or entities that pertain to the mortgage loan at issue in this litigation;
f. any and all commitment letters;
g. copies of both sides of each and every check issued to any person or entity in connection with the mortgage loan at issue in this litigation, whether or not the subject payment was charged to Defendant(s), or financed by the loan proceeds;
h. any and all correspondence between and person or entity and Defendant(s), including proof of mailing and/or receipt where available;
i. any and all Good Faith Estimates;
j. any and all Truth in Lending Disclosure Statements;
k. any and all United States Department of Housing and Urban Development Settlement Statements (HUD 1);
l. any and all documents pertaining in any way to any determination of the value of the premises, including but not limited to appraisal reports;
m. copies of any proof of identification produced by Defendant(s);
n. any and all loan transaction histories, or other documentation of payments made by Defendant(s);
o. any and all loan telephone logs reflecting telephone communication between Plaintiff and/or its agents and/or servicers of the mortgage loan at issue and Defendant(s) and/or any person answering the Defendant(s)’s telephone; and
p. any and all memoranda, notes, worksheets, analyses or log entries prepared in connection with the mortgage loan at issue in this litigation.

10. All documents containing the statements, recollections, or impressions of witnesses with knowledge of any aspect of any mortgage loan made to Defendant(s).

11. Any and all documents that pertain to the mortgage loan at issue in this litigation and/or the subject matter of this litigation.

12. Any and all documents that pertain to real estate appraisals, broker price opinions and/or inspections of the premises.

13. Any and all documents that pertain to the title insurance policy issued in connection with the mortgage loan at issue in this litigation.
14. Any and all documents relied upon in determining the terms of the mortgage loans at issue in this litigation (including but not limited to the interest rate, prepaid finance charge, points, fees, and any other terms of the loans).

15. Any and all advertising documents used to advertise mortgage loans in at or around the time of the origination of the mortgage loan at issue in this litigation.

16. Any and all operating manuals, memoranda, instruction sheets, or other documents in effect at or around the time of the origination of the mortgage loan at issue in this litigation pertaining to internal procedures for soliciting, initiating, taking and/or processing applications for, underwriting, closing, purchasing, or performing due diligence for mortgage loans.

17. Any and all documents relating to any consideration, fees, commissions, bonuses, yield spread premiums or other payments made to any person or entity in connection with the loan.

18. Any and all guidelines, policies or procedures pertaining to consideration, fees, commissions, bonuses, yield spread premiums or other payments for mortgage loans at or around the time of the origination of the mortgage in the ordinary course of business.

19. Any and all telephone log sheets, recordings, internal memoranda, notes, and other documents pertaining to any communications in connection with any aspect of the mortgage loan at issue in this litigation.

20. Any and all documents pertaining in any way to any criteria, system, policy or procedure used to determine Defendant(s)’s creditworthiness.

21. Any and all documents pertaining in any way to any criteria, system, policy or procedure used to verify Defendant(s)’s income as part of the underwriting or purchase of the mortgage loan at issue in this litigation.

22. Any and all documents received from or provided to any federal government official or agency pertaining to compliance with the Real Estate Settlement Procedures Act at any time from January 1, 2000 to the present.

23. Any and all “warehouse agreements” and/or “pooling and servicing agreements” applicable to the mortgage loan at issue in this litigation.

24. Any and all documentary and/or tangible evidence intended to be relied upon at the time of trial.

25. Any and all training manuals for employees, representatives, agents or assigns pertaining in any way to the solicitation of home mortgage loans at or around the time of the origination of the mortgage loan at issue in this litigation.

26. Any and all documents pertaining to any other litigation to which Plaintiff was a party that involved any claims similar to those raised in this litigation.
27. Any and all complaints in foreclosure, filed or unfiled, default notices and/or Notice of Intent to Foreclose pertaining to the mortgage loan at issue in this litigation.

28. Any and all Mortgage Interest Statement(s) and/or IRS Form 1098 and/or IRS Form 1098 Substitute pertaining to the mortgage loan at issue in this litigation.

29. Any and all documents relied upon or reviewed by any expert who has or will render a report.

30. Any and all documents referred to in the Complaint.
NAME: ____________________________________
ADDRESS: ____________________________________

Defendant Pro Se

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
__________________ COUNTY

Plaintiff,

vs.

Defendant,

CERTIFICATION OF SERVICE

___________________________, of full age, hereby certifies as follows:

(Print name)

1. I am the pro se defendant in the above matter.

2. On __________________ the original and one (1) copy of an Answer, Defenses
and Counterclaims were sent by Certified Mail, Return Receipt Requested to:

   Superior Court of New Jersey
   Office of the Clerk
   Attn: Foreclosure Unit
   Hughes Justice Complex
   25 West Market Street, CN 971
   Trenton, New Jersey 08625

3. On __________________ a copy of the Answer, Defenses and Counterclaims was
sent by Certified Mail, Return Receipt Requested to:

   _________________________
   (Insert attorney for lender name and address)
I certify that the foregoing statements made by me are true to the best of
my knowledge, information and belief. I am aware that if any of the foregoing statements made
by me are willfully false, I am subject to punishment.

Signed:________________________________________

Print Name:
Defendant Pro Se

DATED:
Instructions for Filing a Motion to Set Aside a Default

Use these forms if all of the following are true:

- You are the defendant in a foreclosure action.
- You did not file an Answer and Default HAS entered against you.
- Final judgment has NOT entered against you.

Consult the Glossary of “Foreclosure: A Self-Help Guide to Saving Your Home” if you need an explanation of these terms.

Step 1: Overview

A motion is a request to the court asking the court to do something specific. In this motion, you are asking the court to set aside the default that entered against you when you did not answer the complaint on time. You are asking the court for a chance to file an Answer and fight the foreclosure. You must show two things: (1) that you have “good cause” for the default to be set aside (i.e., you were not served with the complaint or you have a defense to the foreclosure); and (2) that you did not fail to answer for a “contumacious” (bad faith) purpose. You must be prepared to explain why you did not answer the complaint on time.

A motion must be made in writing. A motion must have all of these forms:

- A Notice of Motion – this form lets the court and your adversary know that you are filing a motion, what you are asking the court to do, the date, time and location when the court will decide the motion;
- A Certification – this is your statement (which you certify to be truthful) in which you tell the court all of the facts that the court needs to have in order to make a decision about your motion;
- A Memorandum of Law – this form makes legal arguments that apply to your motion;
- Certification of Service – this is your statement (which you certify to be truthful) that you sent the plaintiff a copy of your motion
- Order – this is a blank form for the judge to fill out with the decision on your motion

The court requires you to pay a filing fee of $175.00 if this is the first pleading you are filing in this case. It should be in the form of a check or money order payable to “Treasurer, State of New Jersey.” If you cannot afford to pay the filing fee, complete a “Filing Fee Waiver Request.” A sample can be found on the New Jersey Judiciary’s website at www.judiciary.state.nj.us/civil/forms/11208_filingfeewaivreq.pdf.

You must also prepare the Answer and Case Information Statement that you will file if the Court grants your motion. A sample Answer and instructions for completing it can be found at Appendix D of “Foreclosure: A Self-Help Guide to Saving Your Home.”
Step 2: Check the status of the Foreclosure action

Start by making sure that default has entered but that final judgment has not entered. You can review the “docket” for your court file online at http://njcourts.judiciary.state.nj.us/web1/ACMSPA/. The “docket” is a list of pleadings that have been filed in your case. You will be able to see the list online, but you will not be able to view the actual documents online. It is easiest to find your case if you have your docket number, which is the number on your foreclosure complaint beginning with “F.” You can also find your case by your name alone. If you discover either that default has NOT been entered in your case yet or that final judgment HAS been filed, do not file this motion to set aside the default, but do not wait. Look in “Foreclosure: A Self-Help Guide to Saving Your Home” and find the pleading that is appropriate for your stage of the case.

Step 3: Complete the forms

1. For all five forms, fill in the top (“caption”).
   - The five forms are: Notice of Motion, Certification, Memorandum of Law, Proof of Mailing, and an Order.
   - Fill in your name, address and telephone number.
   - Copy the name of the plaintiff from the foreclosure complaint.
   - Copy the name of the defendant from the foreclosure complaint.
   - Insert the name of the County.
   - Copy the Docket Number from the Foreclosure Complaint.

2. Complete the Notice of Motion
   The Notice of Motion tells the plaintiff and the court that you are asking the court to set aside the default and to allow you to file a late Answer.

   A. Fill in the date that the court will decide the motion. The court has a schedule of dates when motions are decided. You can find the schedule on the court’s website at www.judiciary.state.nj.us/calendars.htm (look for “motion day schedule”). Motions are almost always decided on Fridays. Choose a date about three weeks after you will be filing and serving your motion – you must give your adversary at least 16 days advance notice of your motion.

   B. Fill in the county and address of the court that will decide the motion. You can find the addresses and phone numbers of each county’s court here: www.judiciary.state.nj.us/njcourts-10.htm. Be sure to put down the address of the “Chancery Division” of the court. Call the court if you do not know the address.
C. Decide whether you want to request oral argument and check the appropriate box. If you request oral argument, you are asking the court for the chance to tell the court in person why the entry of default should be set aside. Otherwise, the court will decide the motion “on the papers,” meaning that its decision will be based only on the papers that you and the plaintiff file with the court, and you will not have an opportunity to appear in court to explain why the entry of default should be set aside. Oral argument is not helpful unless you feel very confident making the legal arguments described in the brief. Whether or not you ask for oral argument, the court will decide whether or not to give you the chance to appear in person and tell your story, or whether to decide your motion based only on the papers.

D. Sign, date and print your name at the bottom of the Notice of Motion.

3. Complete the Answer and Case Information Statement
You are too late to file an Answer without a court order allowing you to do so, but you need to show the court the Answer you will file if the court grants your motion. Follow the instructions for completing these documents from Appendix D to “Foreclosure: A Self-Help Guide to Saving Your Home” (Instructions for Filing an Answer with Defenses and Counterclaims). You will attach a copy of the Answer and Case Information Statement to your Certification as Exhibit E.

4. Complete the Certification
This is your statement to the Court of the facts of the case. Read this form carefully, and cross out any paragraphs that do not apply to you. Remember that you are certifying that all of the statements you make in this form are true.

Paragraph 3: Paragraph 3 of the Certification asks you to explain whether you were served with the foreclosure complaint, and what you did when you received it.

In order for the court to have entered default, the plaintiff gave the court proof that you were served with the foreclosure complaint. Sometimes, the proof is the affidavit of a process server. Sometimes, it is a certification by an attorney. You can get a copy of the proofs the plaintiff filed with the court at the courthouse. If the proofs submitted to the court by the plaintiff are not accurate and you were not served with the complaint, check the first line. In that event, explain how you found out that a foreclosure complaint was filed (for example, if you saw something in the newspaper or if you were speaking with the mortgage servicer and someone told you). Also explain how you got a copy of the complaint (for example, if you went to the courthouse and requested a copy).

If you were served with the complaint, check the second line and explain what you did when you received the complaint. It is important to show that you did not fail to answer out of contempt for
the court, or for some improper purpose such as to get a delay. For example, if you tried to get a lawyer but could not, write out all of the steps that you took to try to get a lawyer. If you did not understand that the papers you received required a written answer, say so and explain how you found out that you had to file a written answer. If you were confused because of something the loan servicer told you, write those details in the space provided in paragraph 3 of the certification. Provide as much detail as possible.

5. **Attach your Exhibit(s) to your Certification**

Your Exhibits should be:

Exhibit A: The Answer you will file if the court grants your motion.

Anything else that demonstrates why you did not file your answer on time (for example, hospital records if you did not answer on time because you were hospitalized) and anything that demonstrates your defenses (for example, a copy of a loan modification agreement that the plaintiff has reneged on). Put a blank piece of paper in between the Exhibits so it’s easy to tell which Exhibit is which. Write the letter of the Exhibit on that blank paper.

6. **Read and sign the Memorandum of Defendant in Support of Defendant’s Motion to Set Aside Default Pursuant to R.**

This form is a letter to the judge making a legal argument why the Court should set aside the entry of default.

7. **Complete the Order**

The only part of the order you must fill out is the caption. Do not complete any other part of the order. The rest of the order will be completed by the judge.

8. **Complete the Proof of Mailing**

9. **Make three copies of everything**

You will send the originals to the court, along with one copy. You will send the second copy to the lawyer for the plaintiff. Keep the third copy for yourself.

**Step 4: File the motion**

You must file the entire motion (the notice of motion, the certification (with all Exhibits attached, including your Answer and Case Information Statement), the memorandum of law, the proof of service and the order) with the court in the county where the property is located, along with either your $175.00 filing fee or your motion to proceed without fees. A sample cover letter is provided. Use it to tell the court what you are filing, and also as a checklist to make sure that you have everything you need. You can file in person or by mail. If you do so in person, bring a second copy of the motion with you and ask the clerk.
to stamp your copy “filed.” Save this copy for your records. If you do so by mail, include a second copy and an envelope with enough postage so that the court can mail you a copy stamped “filed” for your records. This is your proof that you have filed a motion. Include another self-addressed, stamped envelope so that the court can send you a copy of the judge’s order when it is signed.

**Step 5: Serve the motion**
At the same time that you file the motion, you must also deliver a copy of the entire motion (an exact copy of everything you filed) to the plaintiff’s attorney. You can send the motion to the plaintiff’s attorney by regular mail. Make sure that you do so more than 16 days before the hearing date.

**Step 6: Appear in court on the hearing date**
If the court grants oral argument, you will be notified by mail or by telephone. In that event, you must appear in court on the hearing date. When your case is called, you will be sworn in. You will have a chance to speak to the judge and explain why the judgment should be vacated. You must be prepared to explain why the court should vacate the judgment — i.e., what is deficient or false regarding the papers filed with the court and why you did not answer sooner and what is your defense to the foreclosure. The plaintiff will have a chance to speak (usually through its attorney) and explain why the final judgment should not be vacated. The judge will usually make a decision on your motion that same day. The judge is supposed to say the reasons for the decision aloud and give you a written order with the court’s decision.

**Step 7: Understand the Court’s Order**
If your motion is “granted,” you were successful. The court is allowing you to file an answer and fight the foreclosure. If your motion was “denied,” the court did not excuse your lateness and did not give you permission to file an answer and fight the foreclosure.

If you are in court on the day the court decides the motion, ask the clerk to give you a copy of the court’s order before you leave. Otherwise, if you sent in a self-addressed stamped envelope, a copy of the court’s order will be mailed to you.

If you are successful:
Make two copies of the Order. File your Answer with the Court clerk along with a copy of the order and any filing fee required. Send the second copy to the plaintiff’s lawyer along with the Answer you are filing. You must do this within 7 days of the date you receive the order.

It is a good idea to try to get a lawyer to represent you for the rest of the case. If you cannot, instructions for representing yourself can be found in “Foreclosure: A Self Help Guide to Saving Your Home.”
If you are not successful:

**IF YOU ARE UNSUCCESSFUL, CALL LEGAL SERVICES AT 1-888-LSNJ-LAW (1-888-576-5529).** Even if Legal Services of New Jersey cannot represent you on your motion to set aside default, we may be able to help you with an appeal. If you cannot get an attorney, instructions for filing an appeal on your own can be found here: [www.judiciary.state.nj.us/appdiv/forms/10837_appl_prose_kit.pdf](http://www.judiciary.state.nj.us/appdiv/forms/10837_appl_prose_kit.pdf). An appeal must be filed within 45 days of the date final judgment enters. You should receive notice in the mail when the plaintiff files papers requesting entry of final judgment. The property cannot be sold at sheriff’s sale until after entry of final judgment. At that point, note that filing an appeal will not stop a sheriff’s sale. You must ask the trial court for a “stay pending appeal.” If the trial court denies the stay pending appeal, you must apply to the Appellate Division for the stay. If a stay is not granted, the sheriff’s sale can take place during the appeal.
NOTICE OF MOTION
TO SET ASIDE DEFAULT
PURSUANT TO R. 4:43-3

Plaintiff, : DOCKET NO. F- _______________

vs. : Civil Action

DEFENDANT, : NOTICE OF MOTION
TO SET ASIDE DEFAULT
PURSUANT TO R. 4:43-3

Defendant, : 

TO:

PLEASE TAKE NOTICE that on Friday, _________________ 20__, at 9:00 a.m. or as soon thereafter as the parties may be heard, the undersigned Defendant will move before the Superior Court of New Jersey, Chancery Division, ____________ County, ________________, New Jersey for an order (a) vacating entry of default pursuant to R. 4:43-3.

In support of the Motion, Defendant will rely upon defendant’s certification and the letter brief submitted herewith.

Pursuant to R. 1:6-2(d), Defendant

____ requests oral argument.

____ does not request oral argument.

Dated: __________________________

Signature: __________________________

Print Name: __________________________
CERTIFICATION IN SUPPORT OF DEFENDANT’S
MOTION TO SET ASIDE DEFAULT PURSUANT TO R. 4:43-3

1. I am a defendant in this matter. I have personal knowledge of the facts set forth herein.

2. The plaintiff filed a foreclosure complaint against me.

3. I did not file an Answer to the complaint because:
   _____ I was not served with the complaint. I learned about the complaint when:
   
   
   
   ___________________________________________________________________
   ___________________________________________________________________
   ___________________________________________________________________

   OR

   _____ I was served with the complaint on or about __________. I did not file an answer on time because:
   
   
   
   ___________________________________________________________________
   ___________________________________________________________________
   ___________________________________________________________________

4. Default entered against me.

5. Final judgment has not entered.
6. Good cause for setting aside the default exists because I have a defense to the foreclosure:

________________________________________________________________________
________________________________________________________________________
________________________________________________________________________

7. Attached as **Exhibit D** to this motion is a copy of the Answer and Case Information Statement that I will file if this motion is granted.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: ____________________________

Signature: ____________________________

Print Name: ____________________________

Pro Se Defendant
DEFENDANT’S MEMORANDUM IN SUPPORT OF
MOTION TO SET ASIDE DEFAULT

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

Entry of Default may be set aside pursuant to R. 4:43-3 “for good cause shown.” The New Jersey Supreme Court has held that “circumstances are sufficient to constitute ‘good cause’ within the contemplation of R. 4:43-3 and to justify the setting aside of the default and to warrant the case . . . being tried on the merits” where the defendant has a meritorious defense that is “at
least arguable” and an absence of “contumacious conduct.” O’Connor v. Altus, 67 N.J. 106, 129 (1975). The facts set forth in the certification show that the defendant meets both of these criteria.

In O’Connor v. Altus, supra, the Court recognized that the standard for setting aside a default under Rule 4:43-3 is less stringent than the standard for setting aside a judgment under R. 4:50-1. Id. at 129. In the context of a Rule 4:50-1 motion to set aside a judgment, 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”).
Default should be set aside to allow me to present my defense to the foreclosure action.

**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
THIS MATTER, having been opened to the Court by Pro Se Defendant on a Motion to Set Aside Default Pursuant to R. 4:43-3, and the Court having considered the moving papers and any response thereto, and the Court having heard oral argument, and the Court having considered the matter for good cause shown:

IT IS on this ___ day of ________, 20__, ORDERED THAT:

1. Defendant’s motion to set aside default is hereby granted;

2. Defendant may file the Answer, Affirmative Defenses, and Counterclaim submitted with this application within ___ days of the date hereof;

3. A copy of this Order be served on all counsel of record within ___ days of the date hereof.

Hon. Papers considered:
CERTIFICATION OF SERVICE

Defendant, ____________________________, of full age, hereby certifies as follows:

1. I am the defendant in the above-captioned matter.

2. On __________________, I sent copies of the following documents:
   _____ Notice of Motion to Set Aside Default
   _____ Certification of Defendant (with proposed Answer and Case Information Statement)
   _____ Memorandum of Law in Support of Motion to Set Aside Default
   _____ Order
   _____ Filing Fee Waiver Request

To: NAME OF PLAINTIFF’S ATTORNEY: _______________________________
ADDRESS OF PLAINTIFF’S ATTORNEY:

________________________________________________________________________
________________________________________________________________________

By: _____ Regular Mail
     _____ Certified Mail, Return Receipt Requested
     _____ Other: _____________________________________________________

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Signature: _______________________________
Print Name: _______________________________

DATED:
To Whom it May Concern:

I am a defendant in the above-referenced foreclosure action. Enclosed for filing please find an original and one copy of ALL of the following documents:

1. Notice of Motion to Set Aside Default;
2. Certification in Support of Motion – with proposed Answer and Case Information Statement attached as Exhibit A;
3. Memorandum of Law in Support of Motion;
4. Proposed form of Order; and
5. Certificate of Service.

I am also enclosing TWO self-addressed, stamped envelopes. Please stamp the copies “filed” and return them to me in one of the enclosed envelopes. Please return the Order to me in the other envelope after it is signed.

Last, I am also enclosing EITHER:

_____ A Money Order payable to Clerk, Superior Court for $175.00
OR
_____ A Motion for a Fee Waiver

Please contact me if you have any questions. Thank you for your attention.

Very truly yours,

Print Name: ____________________________
Instructions for Filing a Motion to Vacate a Judgment

Use these forms if all of the following are true:

- You are the defendant in a foreclosure action.
- Default HAS entered against you because you did not file an Answer.
- Final judgment HAS entered against you.
- Sheriff’s sale has NOT been scheduled or is more than three weeks away.

Consult the Glossary of “Foreclosure: A Self-Help Guide to Saving Your Home” if you need an explanation of these terms.

Step 1: Overview

A motion is a request to the court asking the court to do something specific. In this motion, you are asking the court to vacate (throw out) the judgment that entered against you when you did not answer the complaint or try to set aside the default. You are asking the court for a chance to file an Answer and fight the foreclosure.

There are many reasons why a court may vacate a judgment, but this sample motion is only for the situation where you want to show that the judgment is “void” (not valid) because one or both of the following is true: (1) the plaintiff did not comply with the Fair Foreclosure Act; and/or (2) the plaintiff has not proven that it is a proper party with the right to foreclose (“standing”).

A motion must be made in writing. A motion must have all of these forms:

- A Notice of Motion – this form lets the court and your adversary know that you are filing a motion, what you are asking the court to do, the date, time and location when the court will decide the motion.
- A Certification – this is your statement (which you certify to be truthful) in which you tell the court all of the facts that the court needs to have in order to make a decision about your motion.
- A Memorandum of Law – this form makes legal arguments that apply to your motion.
- Certification of Service – this is your statement (which you certify to be truthful) that you sent the plaintiff a copy of your motion.
- Order – this is a blank form for the judge to fill out with the decision on your motion.

The court requires you to pay a filing fee of $175.00 if this is the first pleading you are filing in this case. It should be in the form of a check or money order payable to “Treasurer, State of New Jersey.” If you cannot afford to pay the filing fee, complete a “Filing Fee Waiver Request.” A sample can be found on the New Jersey Judiciary’s website at www.judiciary.state.nj.us/civil/forms/11208_filingfeewaivreq.pdf.
You must also prepare the **Answer** and Case Information Statement that you will file if the Court grants your motion. A sample Answer and instructions for completing it can be found at Appendix D of “Foreclosure: A Self-Help Guide to Saving Your Home.”

**Step 2: Get a Copy of Your Court File**

Check to see whether final judgment has entered. You can review the “docket” for your court file online at [http://njcourts.judiciary.state.nj.us/web1/ACMSPA/](http://njcourts.judiciary.state.nj.us/web1/ACMSPA/). The “docket” is a list of pleadings that have been filed in your case. You will not be able to view the actual documents online. It is easiest to find your case if you have your docket number, which is the number on your foreclosure complaint beginning with “F.” You can also find your case by your name alone. If you discover that final judgment has NOT been entered in your case yet, do not file a motion to vacate judgment, but do not wait. Look in “Foreclosure: A Self-Help Guide to Saving Your Home” and find the pleading that is appropriate for your stage of the case.

If Final Judgment has entered, you need to get copies of the documents filed by the plaintiff in its application for entry of final judgment, commonly called the “final judgment package.” To view and print the actual documents, you must go to the courthouse. Every court has computers available to the public for this purpose. The application for entry of final judgment must include all of the proof that the plaintiff needs in order to be entitled to a foreclosure judgment. It should include at least these items:

- A “certification” or “affidavit” of amount due.
- The original of the mortgage or a copy of the mortgage with a certification that the copy is a “true copy.”
- The original proof that you owe a debt (usually the Note and sometimes a document called an “allonge”), or a copy of that proof along with a certification by an attorney that it is a “true copy.”
- One or more original “assignments” (written transfers) of the Mortgage, or copies of those assignments with a certification that they are “true copies.”
- Any other documents that prove that the plaintiff is entitled to what it is asking for, which may include other “affidavits” or “certifications” (sworn statements).

Make sure you get copies of everything the plaintiff filed.

Either together with these documents or separately, the plaintiff’s attorney must also file a “Certification of Diligent Inquiry.” If one was filed, you should get a copy of this, too. Because this is a new requirement, you may not find one in your court file. The plaintiff should not be permitted to have the property sold at sheriff’s sale without filing this new form.

You need copies of these documents to complete this motion. If you don’t have a copy of the Complaint, you should get a copy of that, too.
**Step 3: Research your loan**

In a foreclosure action, the plaintiff is claiming that it has the right to collect the debt and foreclose the mortgage. In order to prove it has those rights, the note must have been physically transferred to the plaintiff, and the mortgage must have been “assigned” to the plaintiff in writing. This is called “standing,” and is explained in more detail in Chapter 2 of “Foreclosure: A Self-Help Guide to Saving Your Home” and in the Memorandum of Law that is part of this motion package.

Sometimes you can find information about who has rights to your loan on the Internet. Two government agencies that sometimes own loans are Fannie Mae and Freddie Mac. Both agencies have websites where you can search for your loan. There is also a company known as MERS (Mortgage Electronic Registration System) that maintains information about some loans. Check these websites for information about your loan. Print out the results of your searches. You will use this information for your certification.

Fannie Mae: [www.fanniemae.com/loanlookup](http://www.fanniemae.com/loanlookup)

Freddie Mac: [https://ww3.freddiemac.com/corporate](https://ww3.freddiemac.com/corporate)

MERS: [https://www.mers-servicerid.org/sis/](https://www.mers-servicerid.org/sis/)

**Step 4: Complete the forms**

1. **For all five forms, fill in the top (“caption”)**
   - The five forms are: Notice of Motion, Certification, Memorandum of Law, Proof of Mailing, and an Order.
   - Fill in your name, address and telephone number.
   - Copy the name of the plaintiff from the foreclosure complaint.
   - Copy the name of the defendant from the foreclosure complaint.
   - Insert the name of the County.
   - Copy the Docket Number from the Foreclosure Complaint.

2. **Complete the Notice of Motion**
   This tells the plaintiffs and the court that you are asking the court to vacate the final judgment and to allow you to file a late Answer.

   A. Fill in the date that the court will decide the motion. The court has a schedule of dates when motions are decided. You can find the schedule on the court’s website at [www.judiciary.state.nj.us/calendars.htm](http://www.judiciary.state.nj.us/calendars.htm) (look for “motion day schedule”). Motions are almost always decided on Fridays. Choose a date about three weeks after you will
be filing and serving your motion – you must give your adversary at least sixteen days advance notice of your motion.

B. Fill in the county and address of the court that will decide the motion. You can find the addresses and phone numbers of each county’s court here: www.judiciary.state.nj.us/njcourts-10.htm. Be sure to put down the address of the “Chancery Division” of the court. Call the court if you do not know the address.

C. Decide whether you want to request oral argument and check the appropriate box. If you request oral argument, you are asking the court for the chance to tell the court in person why the final judgment should be vacated. Otherwise, the court will decide the motion “on the papers,” meaning that its decision will be based only on the papers that you and the plaintiff file with the court, and you will not have an opportunity to appear in court to explain why the judgment should be vacated. Oral argument is not helpful unless you feel very confident making the legal arguments described in the brief. Whether or not you ask for oral argument, the court will decide whether to give you the chance to appear in person and tell your story, or whether to decide your motion based only on the papers.

D. Sign, date and print your name at the bottom of the Notice of Motion.

3. **Complete the Answer and Case Information Statement**
You are too late to file an Answer without a court order allowing you to do so, but you need to show the court the Answer you will file if the court grants your motion. Follow the instructions for completing these documents from Appendix D to “Foreclosure: A Self-Help Guide to Saving Your Home” (Instructions for Filing an Answer with Defenses and Counterclaims). You will attach a copy of the Answer and Case Information Statement to your Certification as Exhibit E.

4. **Complete the Certification**
This is your statement to the court of the facts of the case. Read this form carefully, and cross out any paragraphs that do not apply to you. Remember that you are certifying that all of the statements you make in this form are true.

Paragraph 3: Paragraph 3 of the Certification asks you to explain whether you were served with the foreclosure complaint, and what you did when you received it.

In order for the court to have entered default, the plaintiff gave the court proof that you were served with the foreclosure complaint. Sometimes, the proof is the affidavit of a process server. Sometimes, it is a certification by an attorney. You can get a copy of the proofs the plaintiff filed
with the court at the courthouse. If the proofs submitted to the court by the plaintiff are not accurate and you were not served with the complaint, check the first line. In that event, explain how you found out that a foreclosure complaint had been filed (for example, if you saw something in the newspaper or if you were speaking with the mortgage servicer and someone told you). Also explain how you got a copy of the complaint (for example, if you went to the courthouse and requested a copy),

If you were served with the complaint, check the second line and explain what you did when you received the complaint. It is important to show that you did not fail to answer out of contempt for the court, or for some improper purpose such as to get a delay. For example, if you tried to get a lawyer but could not, write out all of the steps that you took to try to get a lawyer. If you did not understand that the papers you received required a written answer, say so and explain how you found out that you had to file a written answer. If you were confused because of something the loan servicer told you, write those details in the space provided in paragraph 3 of the certification. Provide as much detail as possible.

Paragraph 6: Paragraph 6 asks you whether or not you were served with a copy of the plaintiff’s request for entry of final judgment. If you were served with a copy, check the first line. Otherwise, check the second line.

Paragraph 9: Complete Paragraph 9 if the plaintiff has not proven that it has standing to foreclose. The judgment may be invalid if the plaintiff did not prove in its motion for entry of final judgment that it had possession of the note at the time the complaint was filed. To complete this paragraph you need to have the plaintiff’s motion for entry of final judgment (that you got from the courthouse) and the complaint in front of you. You must complete BOTH sections (A) and (B) of Paragraph 9.

Look at the Note. Fill in the first blank in Paragraph 9 with the name of the original lender. Next, look at the complaint. Fill in the second line of this paragraph with the name of the plaintiff.

Paragraph 10: Paragraph 10 asks you for facts that show the court that the plaintiff failed to establish that it is a “holder.”

A. THE NOTE

Using the Note that the Plaintiff filed as part of its motion for entry of final judgment, look for an indorsement on the Note. An indorsement is almost always a stamp that contains the words “pay to the order of.” It can usually be found on the last page of the note. Sometimes it can be found on a piece of paper called an “allonge” that is supposed to be attached to the Note.
If there is no indorsement at all (that is, there is no stamp on the note and there is no allonge), check the first box.

If there is an indorsement, check to see who signed over the note to whom. If the indorsement says something like, “Pay to the Order of _____________________” and there is a blank line, it means that the Note is indorsed “in blank.” (The original lender’s name usually appears under the blank line). When a note is endorsed in blank, anyone who has physical possession of the Note may enforce it. If the line is not blank, it will have the name of the new payee stamped or written in. Check to see whether the name of the new payee is the same as the name of the plaintiff. If the Note is now payable to someone other than the plaintiff, then the plaintiff has not shown that it has the right to enforce the note, and you should check the second line.

If there is one or more indorsements on the Note, but the indorsements are not dated, also check the last box. Endorsements usually are not dated.

B. CERTIFICATION OR AFFIDAVIT OF AMOUNT DUE

Next, look at the plaintiff’s certification or affidavit of amount due. The law requires the plaintiff to show that it has physical possession of the note to prove either that the plaintiff is the holder of the note or has authority from the holder of the note to enforce it. The plaintiff is required to have possession of the note at the time the complaint was filed. Therefore, the certification or affidavit should state (1) that the plaintiff has possession of the note and (2) the date when the plaintiff got possession of the note. If either piece of information is missing from the certification, check the appropriate box.

In order for the plaintiff to prove that it is a non-holder in possession of the Note with the right to enforce it, the plaintiff must prove facts that show: (1) the plaintiff has physical possession of the Note; (2) who is the actual holder of the Note; (3) the actual holder gave the plaintiff the right to enforce the note (for example, if there is a contract between the holder and the plaintiff that allows the plaintiff to enforce the note); (3) the dates when these things happened was before the complaint was filed.

C. HEARSAY

The certification or affidavit of amount due should also explain how the signer knows the information, either because the signer was personally involved with the transfer or because he or she got the information by looking at “business records.” If the signer got the information by looking at “business records,” the certification should include information that explains what makes those records reliable, including things like when the writing was created and by whom. If it does not, then the information is “hearsay,” and the court should not rely on it. The memorandum of law explains this in more detail.
D. I HAVE REASON TO BELIEVE THAT THE PLAINTIFF IS NOT THE HOLDER OF THE NOTE

In this section, fill in the blanks with the information you got when checked the Fannie Mae, Freddie Mac, and MERS websites. If you searched a site but it did not show the name of the owner of your loan, leave the line blank or cross it out.

Paragraph 11: Did the Plaintiff serve you with a Notice of Intention to Foreclose?

The plaintiff is legally required by the Fair Foreclosure Act to send you this document, and must do so before it has the right to foreclose. The Fair Foreclosure Act and the requirements of the Notice of Intention to Foreclose are described in detail in Chapter 2 of “Foreclosure: A Self-Help Guide to Saving Your Home” (Laws that Can Protect You From Foreclosure) Note that the law requires the plaintiff to send the notice to you by certified mail. Even if you do not sign for the certified mail and never receive it, the plaintiff has fulfilled its legal obligation by sending you the notice. The plaintiff is not required to file a copy of the Notice of Intention to Foreclose with the court, and therefore you probably will not find a copy in your court file.

If you did not receive a Notice of Intention to Foreclose and you did not refuse any certified mail, check the first line.

If you did receive a Notice of Intention to Foreclose, use the checklist in Chapter 2 of “Foreclosure: A Self-Help Guide to Saving Your Home” to figure out if the notice you received is missing any required information. For example, the Notice of Intention to Foreclose might identify the loan servicer, but it might be missing the name of the plaintiff, or it might identify the servicer as the holder of the loan even though that it is not true.

Paragraph 12: A new requirement is that the plaintiff must now file a Certification of Diligent Inquiry before final judgment can be enforced. If the plaintiff’s final judgment packet has not been supplemented by a Certification of Diligent Inquiry as required by R. 4:64-2, check off the paragraph regarding the Certification of Diligent Inquiry.

5. Attach your Exhibits to your certification.

Your Exhibits should be:

Exhibit A: The foreclosure complaint

Exhibit B: The plaintiff’s motion for entry of final judgment, including all of the supporting documents, such as the note and the affidavit of amount due

Exhibit C: Printouts of your internet research from Fannie Mae, Freddie Mac, and MERS websites
Exhibit D: The Notice of Intention to Foreclose

Exhibit E: The Answer you will file if the court grants your motion.

Put a blank piece of paper in between the Exhibits so it’s easy to tell which Exhibit is which. Write the letter of the Exhibit on that blank paper.

6. **Read and sign the Memorandum of Defendant in Support of Defendant’s Motion to Vacate Judgment Pursuant to R. 4:50-1**
   This form is a letter to the judge making a legal argument why the Court should vacate the judgment that entered against you.

7. **Complete the Order**
   The only part of the order you must fill out is the caption. Do not complete any other part of the order. The rest of the order will be completed by the judge.

8. **Complete the Proof of Mailing**

9. **Make three copies of everything**
   You will send the originals to the court, along with one copy. You will send the second copy to the lawyer for the plaintiff. Keep the third copy for yourself.

**Step 4: File the motion**
You must file the entire motion (the notice of motion, the certification (with your Answer and Case Information Statement attached), the memorandum of law, the proof of service and the order) with the court in the county where the property is located, along with either your $175.00 filing fee or your motion to proceed without fees. A sample cover letter is provided. Use it to tell the court what you are filing, and also as a checklist to make sure that you have everything you need. You can file in person or by mail. If you do so in person, bring a second copy of the motion with you and ask the clerk to stamp your copy “filed.” Save this copy for your records. If you do so by mail, include a second copy and an envelope with enough postage so that the court can mail you a copy stamped “filed” for your records. This is your proof that you have filed a motion. Include another self-addressed, stamped envelope so that the court can send you a copy of the judge’s order when it is signed.

**Step 5: Serve the motion**
At the same time that you file the motion, you must also deliver a copy of the entire motion (an exact copy of everything you filed) to the plaintiff’s attorney. You can send the motion to the plaintiff’s attorney by regular mail. Make sure that you do so more than 16 days before the hearing date.
Step 6: Appear in court on the hearing date

If the court grants oral argument, you will be notified by mail or by telephone. In that event, you must appear in court on the hearing date. When your case is called, you will be sworn in. You will have a chance to speak to the judge and explain why the judgment should be vacated. You must be prepared to explain why the court should vacate the judgment – i.e., what is deficient or false regarding the papers filed with the court and why you did not answer sooner and what is your defense to the foreclosure. The plaintiff will have a chance to speak (usually through its attorney) and explain why the final judgment should not be vacated. The judge will usually make a decision on your motion that same day. The judge is supposed to say the reasons for the decision aloud and give you a written order with the court’s decision.

Step 7: Understand the Court’s Order

If your motion is “granted,” you were successful. The court is allowing you to file an answer and fight the foreclosure. If your motion was “denied,” the court did not find that the plaintiff has no standing to proceed and there were no deficiencies in the plaintiff’s pleadings and final judgment packet that would give rise to vacating the final judgment. The court did not excuse your lateness and did not give you permission to file an answer and fight the foreclosure.

If you are in court on the day the court decides the motion, ask the clerk to give you a copy of the court’s order before you leave. Otherwise, if you sent in a self-addressed stamped envelope, a copy of the court’s order will be mailed to you.

If you are successful:

Make two copies of the Order. File your Answer with the Court clerk along with a copy of the order and any filing fee required. Send the second copy to the plaintiff’s lawyer along with the Answer you are filing. You must do this within 7 days of the date you receive the order.

It is a good idea to try to get a lawyer to represent you for the rest of the case. If you cannot, instructions for representing yourself can be found in “Foreclosure: A Self Help Guide to Saving Your Home.”

If you are not successful:

IF YOU ARE UNSUCCESSFUL, CALL LEGAL SERVICES AT 1-888-LSNJ-LAW (1-888-576-5529). Even if Legal Services of New Jersey cannot represent you on your motion to set aside default, we may be able to help you with an appeal. If you cannot get an attorney, instructions for filing an appeal on your own can be found here: www.judiciary.state.nj.us/appdiv/forms/10837_appl_prose_kit.pdf. An appeal must be filed within 45 days of the date final judgment enters. You should receive notice in the mail when the plaintiff files papers requesting entry of final judgment. The property cannot be sold at sheriff’s sale until after entry of final judgment. At that point, note that
filing an appeal will not stop a sheriff’s sale. You must ask the trial court for a “stay pending appeal.” If the trial court denies the stay pending appeal, you must apply to the Appellate Division for the stay. If a stay is not granted, the sheriff’s sale can take place during the appeal.
NOTICE OF MOTION
TO VACATE JUDGMENT
PURSUANT TO R. 4:50-1

TO:

PLEASE TAKE NOTICE that on Friday, _________________________________ 2011, at 9:00 a.m. or as soon thereafter as the parties may be heard, the undersigned Defendant will move before the Superior Court of New Jersey, Chancery Division, ____________ County, ___________________________________________________________________________, New Jersey for an order (a) vacating the judgment pursuant to R. 4:50-1.

In support of the Motion, Defendant will rely upon defendant’s certification and the letter brief submitted herewith.

Pursuant to R. 1:6-2(d), Defendant

_____ requests oral argument.

_____ does not request oral argument.

Dated: Signature: __________________________

Print Name: __________________________
CERTIFICATION IN SUPPORT OF DEFENDANT'S
MOTION TO VACATE THE JUDGMENT PURSUANT TO R. 4:50-1

1. I am a defendant in this matter. I have personal knowledge of the facts set forth herein.

2. The plaintiff filed a foreclosure complaint. A copy is attached hereto as Exhibit A.

3. I did not file an Answer to the complaint because:
   _____ I was not served with the complaint. I learned about the complaint when:
   ________________________________
   ________________________________
   ________________________________
   I got a copy of the complaint from: ______________________________________

   OR

   _____ I was served with the complaint on or about __________. When I received the complaint, I took the following actions:
   ________________________________
   ________________________________
   ________________________________

4. Default entered against me.
5. Final Judgment entered against me by default.

6. _____ I was served with a copy of the plaintiff’s request for entry of final judgment.
   _____ I was not served with a copy of the plaintiff’s request for entry of final judgment.

7. I went to the courthouse and got a copy of the documents filed by the plaintiff in its request for entry of final judgment. A copy of everything I received is attached as **Exhibit B**.

8. I respectfully request that this court vacate final judgment for the reasons set forth herein.

9. **Pursuant to R. 4:50-1(d) the judgment or order is void because the plaintiff lacks standing to foreclose.** The plaintiff is not the original lender. The Note is payable to _______________________________________. The plaintiff is: _______________________________________.

10. The Plaintiff has not proven that it has been either the holder of the note or a nonholder in possession of the note with the right to enforce since the time the complaint was filed. Specifically:
    A. **THE NOTE:**
       A copy of a Note was included in the plaintiff’s request for final judgment. That copy of the Note:

       _____ is not indorsed;
       _____ is indorsed, but is not indorsed to the plaintiff or in blank;
       _____ is indorsed, but indorsements appearing on the note are not dated

    B. **THE CERTIFICATION OF AMOUNT DUE:**
       Plaintiff’s motion for entry of judgment was supported by a “Certification of Amount Due.” The certification or affidavit of amount due does not provide facts to show that the plaintiff either held the note or was a non-holder with authority to enforce the note at the time the complaint was filed because:

       _____ the certification of amount due does not state that the plaintiff has physical possession of the note;
       _____ the certification does not identify the actual holder of the note;
       _____ the certification does not set forth facts that show that the actual holder of the note gave the plaintiff the right to enforce it;
C. HEARSAY

The Certification of Amount due does not authenticate the note or establish that plaintiff is either a holder of the note or a non-holder with the authority to enforce the note because:

_____ it does not allege that the affiant has personal knowledge of transfer or possession of the note;
_____ it does not make out a business exception to the hearsay rule because it does not state:
____ what writing the affiant reviewed in order to determine the plaintiff is a holder;
____ who created the writing
____ when the writing was created
____ the normal practice for creating such a writing

D. I HAVE REASON TO BELIEVE THAT THE PLAINTIFF IS NOT THE HOLDER OF THE NOTE

_____ On ____________ I visited Fannie Mae’s website at www.fanniemae.com/loanlookup. According to the website, Fannie Mae owns my loan.

_____ On ____________ I visited Freddie Mac’s website at: https://ww3.freddiemac.com/corporate. According to the website, Freddie Mac owns my loan.

_____ On ____________ I visited the website of Mortgage Electronic Recording Systems (MERS) at: https://www.mers-servicerid.org/sis. According to the website __________________________ owns my loan.

A copy of my search results are attached as Exhibit C.

11. The judgment is void because the lender failed to serve me with a Notice of Intention to Foreclose (NOI) that meets the statutory mandates of the New Jersey Fair Foreclosure Act, N.J.S.A.2A:50-53 to 68 (FFA).
I did not receive a Notice of Intention to Foreclose at all and I did not refuse any certified mail.

The Notice of Intention to Foreclose fails to meet the statutory requirements. The Notice of Intention to Foreclose does not identify or does not identify correctly:

- the name and address of the plaintiff
- the name and telephone number of the servicer (or of another representative I could contact if I disagree that I am in default or if I disagree with the calculation of the amount required to cure the default)
- the amount of money I need to tender to cure the default because it includes fees other than the amount that would have been due in the absence of a default (i.e., principal and interest).
- Other:

A copy of the Notice of Intention to Foreclose is attached as Exhibit D.

12. The plaintiff’s attorney

- HAS
- HAS NOT

filed a Certification of Diligent Inquiry.

13. If this motion is granted, I intend to file the Answer attached as Exhibit E.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: ___________________________

Signature: ___________________________

Print Name: ___________________________

Pro Se 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:
... An 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.” \textit{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.” \textit{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
exception, \textit{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
ORDER GRANTING MOTION TO VACATE JUDGMENT PURSUANT TO R. 4:50-1

THIS MATTER, having been opened to the Court by pro se Defendant, on Motion to Vacate Judgment Pursuant to R. 4:50-1, and the Court having considering the moving papers and any response thereto, and the Court having heard oral argument, and the Court having considered the matter and for good cause shown:

IT IS on this day of , 2011 ORDERED,

THAT Defendant’s Motion to Vacate Judgment is hereby granted, and the judgment is hereby vacated;

THAT Defendant may file his responsive pleading within days of the date hereof;

IT IS FURTHER ORDERED, that a copy of this Order be served on all counsel of record within days of the date hereof.

______________________________
Hon.
Defendant Pro Se

: SUPERIOR COURT OF NEW JERSEY
: CHANCERY DIVISION
: _______________ COUNTY

Plaintiff, : DOCKET NO. F- _______________

vs. : Civil Action

CERTIFICATION OF SERVICE

Defendant, :

____________________, of full age, hereby certifies as follows:

1. I am the defendant in the above-captioned matter.

2. On __________________, I sent copies of the following documents:
   _____ Notice of Motion to Vacate Judgment
   _____ Certification of Defendant (with proposed Answer and Case Information Statement)
   _____ Memorandum of Law in Support of Motion to Set Aside Default
   _____ Order
   _____ Filing Fee Waiver Request

To: NAME AND ADDRESS OF PLAINTIFF’S ATTORNEY

By:
   _____ Regular Mail
   _____ Certified Mail, Return Receipt Requested
   _____ Other: ____________________________________________________________

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Signature: ______________________________
Print Name: ______________________________

DATED: ______________________________
DEFENDANT’S ADDRESS
DEFENDANT’S TELEPHONE NUMBER

Date:

ADDRESS

RE:

To Whom it May Concern:

I am a defendant in the above-referenced foreclosure action. Enclosed for filing please find an original and one copy of ALL of the following documents:

1. Notice of Motion to Vacate Judgment;
2. Certification in Support of Motion with Exhibits (proposed Answer and Case Information Statement attached as Exhibit E);
3. Memorandum of Law in Support of Motion;
4. Proposed form of Order; and
5. Certificate of Service.

I am also enclosing TWO self-addressed, stamped envelopes. Please stamp the copies “filed” and return them to me in one of the enclosed envelopes. Please return the Order to me in the other envelope after it is signed.

Last, I am also enclosing EITHER:

_____ A Money Order payable to Clerk, Superior Court for $175.00
OR
_____ A Motion for a Fee Waiver

Please contact me if you have any questions. Thank you for your attention.

Very truly yours,

Print Name:__________________________