

SETON HALL UNIVERSITY SCHOOL OF LAW  
CENTER FOR SOCIAL JUSTICE  
CIVIL LITIGATION CLINIC  
833 McCarter Highway  
Newark, New Jersey 07102



Linda Fisher, Esq.  
Professor of Law

(973) 642-8700  
Fax (973) 642-5939  
Linda.Fisher@shu.edu

July 31, 2015

RECEIVED

JUL 31 2015

SUPREME COURT  
OF NEW JERSEY

VIA HAND-DELIVERY

Clerk of the Supreme Court of New Jersey  
Hughes Justice Complex  
25 W. Market St., 8<sup>th</sup> fl.  
P.O. Box 970  
Trenton, NJ 08625-0970

RE: GMAC MORTGAGE, L.L.C. v. TAMILYNN WILLOUGHBY,  
No. 076006

Dear Sir or Madam:

This office represents *Amicus Curiae*, Seton Hall Center for Social Justice in support of Defendant-Petitioner Tamilynn Willoughby in the above captioned matter. Enclosed please find for filing:

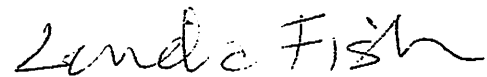
- Original and eight copies of Notice of Motion for Leave to Participate as *Amicus Curiae* in support of Plaintiffs-Petitioners;
- Certification of Linda E. Fisher, Esq. in Support of the Notice of Motion for Leave to Appear *Amicus Curiae*;
- Original and eight copies of Brief of *Amicus Curiae* in support of Plaintiffs-Petitioners;
- Original and one copy of Certification of Service;
- Stamped self-addressed envelope.

Kindly file same and return a stamped copy of the Certification of Service in the envelope provided.

New Jersey Supreme Court  
July 31, 2015  
Page Two

Thank you for your attention to this matter.

Very truly yours,

A handwritten signature in cursive script that reads "Linda E. Fisher". The signature is written in black ink and is positioned above the typed name.

Linda E. Fisher, Esq.

Enclosures

cc: Jaime Ackerman, Esq. (via New Jersey Lawyer's Service)  
Joshua Denbeaux, Esq. (via e-mail)

Linda E. Fisher, Esq.  
Seton Hall University, School of Law  
Center for Social Justice  
833 McCarter Hwy.  
Newark, New Jersey 07102  
(973) 642-8700 / Fax: (973) 642-5939  
*Amicus Curiae for Petitioner TamiLynn Willoughby*

**RECEIVED**

JUL 31 2015

SUPREME COURT OF NEW JERSEY  
No. 076006

**SUPREME COURT  
OF NEW JERSEY**

GMAC MORTGAGE, L.L.C.,

Plaintiff-Respondent,

v.

TAMILYNN WILLOUGHBY,

Defendant-Petitioner.

ON PETITION FOR CERTIFICATION OF  
THE FINAL ORDER OF  
THE SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION

Sat Below:

TRIAL COURT BELOW:

Judge Alexander P. Waugh, J.A.D.

Judge Harry G. Carroll, J.A.D.

A Civil Action

App. Div. #A-001294-13T3

**CERTIFICATION OF LINDA E. FISHER IN SUPPORT OF  
MOTION FOR LEAVE TO APPEAR AND ARGUE AMICUS CURIAE**

I, Linda E. Fisher, of full age and competence, hereby  
certify as truthful the following:

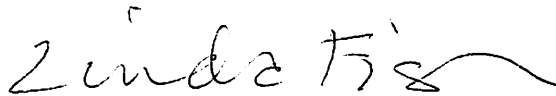
1. I am an attorney at law in the State of New Jersey.

2. I am a professor at Seton Hall University School of Law and the faculty director of the Center for Social Justice's Civil Litigation Clinic. The Center wishes to appear as *amicus curiae* for TamiLynn Willoughby ("Defendant-Petitioner").
3. I have been litigating predatory lending, mortgage fraud and foreclosure cases since 1999. I have also been heavily involved in legislative and policy advocacy on behalf of borrowers, in addition to researching issues related to the foreclosure crisis. I was a member of the Newark/Essex Foreclosure Task Force for many years and am otherwise involved in statewide networks of borrower advocates.
4. For years, I have heard hundreds of stories from other advocates, including lawyers and housing counselors, about mortgage servicer dysfunction in processing mortgage modification applications and general unwillingness to grant modifications - particularly permanent mortgage modifications. My own experience has been quite similar. Unfortunately, the situation has not appreciably improved over the years - most borrowers remain at a distinct disadvantage relative to lenders.

5. The facts contained in the Notice of Motion for Leave to Appear as *Amicus Curiae* are true to the best of my knowledge and information.

6. Included in the Appendix to the Center for Social Justice's Brief of Amicus Curiae are true and correct copies of the Exhibits to the brief.

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: July 30, 2015

---

Linda E. Fisher, Esq.

Linda E. Fisher, Esq.  
Seton Hall University, School of Law  
Center for Social Justice  
833 McCarter Hwy.  
Newark, New Jersey 07102  
(973) 642-8700 / Fax: (973) 642-5939  
*Amicus Curiae for Petitioner TamiLynn Willoughby*

**RECEIVED**

JUL 31 2015

**SUPREME COURT  
OF NEW JERSEY**

SUPREME COURT OF NEW JERSEY  
No. 076006

GMAC MORTGAGE, L.L.C.,  
Plaintiff-Respondent,

v.

TAMILYNN WILLOUGHBY,  
Defendant-Petitioner.

ON PETITION FOR CERTIFICATION OF  
THE FINAL ORDER OF  
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Sat Below:

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Judge Harry G. Carroll, J.A.D.

A Civil Action

App. Div. #A-001294-13T3

**NOTICE OF MOTION FOR LEAVE TO APPEAR AND ARGUE AMICUS CURIAE,  
AND TO FILE THE BRIEF ACCOMPANYING THIS MOTION**

PLEASE TAKE NOTICE THAT the Seton Hall University School of Law, Center for Social Justice, by its attorney Linda E. Fisher, Esq., hereby moves pursuant to R. 1:13-9 before the Supreme Court of New Jersey for an order permitting it to (1) appear as

Amicus Curiae in the above matter; (2) file the brief accompanying this motion; and (3) participate in oral argument.

#### IDENTITY OF THE APPLICANT

The Center for Social Justice at Seton Hall University School of Law ("the Center") is both a state-certified legal services program and a clinical legal education program where law students and professors work together on issues of public interest, including the rights of homeowners facing foreclosure. The Center has provided free legal assistance to lower-income New Jersey homeowners involved in predatory lending schemes, mortgage fraud, and foreclosure litigation and has advocated on their behalf for over fifteen years.

#### ISSUE TO BE ADDRESSED

The issue to be addressed is as follows:

Whether this Court should require lenders and servicers to abide by foreclosure settlement agreements consummated during participation in the New Jersey Residential Foreclosure Mediation Program, or whether it is permissible for these financial institutions to unilaterally modify material terms of the agreement afterwards.

#### NATURE OF THE PUBLIC INTEREST

The public interest is heavily implicated when financial institutions refuse to uphold agreements entered into with

borrowers. It is implicated even more when the agreement was the result of mediation, as part of a State-sponsored program to alleviate the costs of foreclosure.

### SPECIAL EXPERTISE AND INTEREST

The Center is one of the few organizations in New Jersey that provides legal representation, advocacy, and scholarship on issues affecting homeowners and communities experiencing foreclosure. For over fifteen years, the Center has represented homeowners in foreclosure and those who have experienced mortgage fraud or predatory lending. During this period of time, the Center's students and faculty have litigated dozens of foreclosure cases in New Jersey. The Center's cases have frequently been mediated, often reaching successful resolutions. Center faculty have also conducted research on mortgage modifications and published on foreclosure delays.

### ARGUMENT

The standard for filing an amicus brief in this Court is governed by R. 1:13-9. Under R. 1:13-9, "The court shall grant the motion if it is satisfied under all the circumstances that the motion is timely, the applicant's participation will assist in the resolution of an issue of public importance, and no party to the litigation will be unduly prejudiced thereby."



R. 1:13-9. Amicus respectfully requests the Court find the timeliness of this filing satisfactory under R. 1:13-9.

First, this motion is timely. The Center filed a motion for extension of time, which was granted, with a filing deadline of July 31. Second, under New Jersey law, parties will be allowed to join as amicus if the Court is satisfied that "the applicant's participation will assist in the resolution of an issue of public importance . . ." R. 1:13-9; State v. Maguire, 84 N.J. 508 (1980) (granting leave to appear as amicus curiae due to public importance of the issues involved). Furthermore, the participation of amicus curiae is particularly appropriate in cases with "broad implications," Taxpayers Ass'n of Weymouth Township v. Weymouth Township, 80 N.J. 6, 17 (1976), cert. denied sub nom., Feldman v. Weymouth Township, 430 U.S. 977 (1977), or of "general public interest," Casey v. Male, 63 N.J. Super. 255, 258 (Cty. Ct. 1960).

In view of the applicable law, amicus should be granted leave to file because the Center for Social Justice will offer an important perspective on the policy and purpose behind New Jersey's Residential Mortgage Foreclosure Mediation Program. The Center seeks to appear as amicus to inform the Court how reversing the Appellate Division's decision and enforcing the mediated settlement agreement will uphold the long-standing

policies of New Jersey with respect not only to the Mediation Program itself, but also to promoting settlement of litigation.

The Center seeks to underscore the real world implications that this Court's decision in this case will have on the viability of State-sponsored alternatives to foreclosure. The Mediation Program was created to assist homeowners facing loss of their homes, but it cannot function when courts refuse to acknowledge settlements. In addition, allowing amicus to appear before the Court will not cause the prejudice proscribed by R. 1:13-9 to any party in this action.

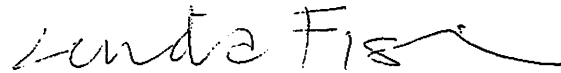
In short, as one of the few organizations providing legal representation and advocacy to lower-income New Jersey homeowners facing foreclosure, while also producing scholarship on the issues affecting this type of litigation, amicus is well-situated to aid the Court in its consideration of the issues raised in this Petition.

CONCLUSION

For the foregoing reasons, the Center respectfully requests leave to participate as Amicus Curiae in the above captioned matter.

Dated: July 31, 2015

SETON HALL SCHOOL OF LAW  
CENTER FOR SOCIAL JUSTICE  
Counsel for Amicus Curiae  
833 McCarter Highway  
Newark, New Jersey 07102  
(973) 642-8700  
On the brief:



---

Linda E. Fisher, Esq.

Linda E. Fisher, Esq.  
Seton Hall University, School of Law  
Center for Social Justice  
833 McCarter Highway  
Newark, New Jersey 07102  
(973) 642-8700 / Fax: (973) 642-5939  
*Amicus Curiae for Petitioner TamiLynn Willoughby*

**RECEIVED**  
JUL 31 2015  
SUPREME COURT  
OF NEW JERSEY

SUPREME COURT OF NEW JERSEY  
No.07006

GMAC MORTGAGE, L.L.C.,  
Plaintiff-Respondent,

v.

TAMILYNN WILLOUGHBY,  
Defendant-Petitioner.

ON PETITION FOR CERTIFICATION OF THE  
FINAL ORDER OF  
THE SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION

Sat Below:

Judge Alexander P. Waugh, J.A.D.

Judge Harry G. Carroll, J.A.D.

A Civil Action

App. Div. #A-001294-13T3

**PROOF OF SERVICE OF MOTION FOR LEAVE TO APPEAR AND ARGUE AMICUS CURIAE,  
AND TO FILE THE BRIEF ACCOMPANYING THIS MOTION**

I, **Ana Figueiredo**, hereby certify:

1. I am a paralegal at Seton Hall University, School of Law, Center for Social Justice, Civil Litigation Clinic. I work for Linda Fisher, an attorney of law. The Center wishes to appear as an amicus curiae for TamiLynn Willoughby ("Defendant-Petitioner").

2. On July 31, 2015, I forwarded for filing via Lawyers Service addressed to the MR. MARK NEARY, CLERK OF THE SUPREME COURT, OF NEW JERSEY Hughes Justice Complex, 25 W. Market Street, Trenton, NJ 08625-0970, the original and eight copies of the "NOTICE OF MOTION FOR LEAVE TO APPEAR AND ARGUE AMICUS CURIAE, AND TO FILE THE BRIEF ACCOMPANYING THIS MOTION" ("Notice").

3. Also on July 31, 2015, by Lawyers Service, I sent a true copy of the Notice to MR. JOSEPH H. ORLANDO, CLERK, APPELLATE DIVISION, Superior Court of New Jersey, Hughes Justice Complex, 25 W. Market Street, Trenton, NJ 08625-0006; and, on the same date, via New Jersey Lawyer's Service, I served a true copy of the Notice upon JAIME ACKERMAN, ESQ., Zucker Goldberg and Ackerman, LLC. at 200 Sheffield Avenue, Suite 101, Mountainside, NJ 07092, counsel for Plaintiff-Respondent GMAC MORTGAGE LLC.

4. PATRICIA D. CLEARY, P.J.CH. was also served via Lawyers Service at the Superior Court of New Jersey 1 East Main Street, Freehold, NJ, 07728 and upon Mr. JOSHUA DENBEAUX, counsel for the Defendant-Petitioner TAMILYNN WILLOUGHBY, who was served electronically at jdenbeaux@denbeauxlaw.com and via first class regular mail at Denbeaux & Denbeaux, 366 Kinderkamack Road, Westwood, NJ 07675.

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

DATED: July 31, 2015

*Ana Figueiredo*  

---

Ana Figueiredo  
Paralegal

SUPREME COURT OF NEW JERSEY  
No. 076006

RECEIVED

JUL 31 2015

SUPREME COURT  
OF NEW JERSEY

GMAC MORTGAGE, L.L.C.,  
Plaintiff-Respondent,

v.

TAMILYNN WILLOUGHBY,  
Defendant-Petitioner.

ON PETITION FOR CERTIFICATION  
THE FINAL ORDER OF  
THE SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION

Sat Below:

TRIAL COURT BELOW:

Judge Alexander P. Waugh, J.A.D.

Judge Harry G. Carroll, J.A.D.

A Civil Action

App. Div. #A-001294-13T3

APPENDIX OF AMICUS CURIAE  
SETON HALL LAW CENTER FOR SOCIAL JUSTICE

SETON HALL UNIVERSITY SCHOOL OF LAW  
CENTER FOR SOCIAL JUSTICE  
Civil Litigation Clinic  
833 McCarter Highway  
Newark, NJ 07102  
(973) 642-8700

Attorney for *Amicus Curiae* on behalf of  
Petitioner Tamilynn Willoughby  
Seton Hall University School of Law  
Center for Social Justice

On the Brief:  
Linda E. Fisher, Esq.

APPENDIX OF AMICUS CURIAE

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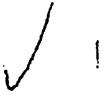
Willoughby Settlement Agreement .....Exhibit A  
Mediation Statistics .....Exhibit B



**EXHIBIT A**



DATE



MEDIATOR: COMPLETE THIS REPORT IMMEDIATELY FOLLOWING THE END OF THE FINAL MEDIATION SESSION IN A CASE. DO NOT COMPLETE THIS FORM IF THE MEDIATION PROCESS IS CONTINUING.

VICINAGE STAFF: ENSURE THAT THE MEDIATION PROCESS IS FINAL BEFORE SENDING TO: Civil Practice Division, P.O. Box 981, Trenton, NJ 08625.

SUPERIOR COURT OF NEW JERSEY  
CHANCERY DIVISION ~~Monmouth~~ COUNTY  
GENERAL EQUITY

DOCKET NO. F- 19159-06

SMAK  
Plaintiff,

v.  
Willoughby  
Defendant.

Civil Action 19159-06  
Foreclosure Mediation  
Completion Report

Date Mediation Scheduled: May 25, 2010

Mediation Outcome:

- CM  Foreclosure Action Resolved - Parties Reached Agreement (Case Dismissed)
- CJ  Foreclosure Action Resolved - Homeowner Not Retaining Property (Case Not Dismissed)
- NS  Foreclosure Action Unresolved - No Agreement Reached (Case Not Dismissed)
- PS  Provisional Settlement - No Need to Reschedule Mediation (Case Not Dismissed)
- FD  Further Discussions

[Signature]  
Mediator - Sign Above  
Anthony Scalias  
Mediator - Print Name Above

If CJ, CM or PS are selected, proceed and check all terms that apply:

For CM or PS (Homeowner to Remain in Property)

- Reinstatement
- Repayment Plan
- Forbearance Agreement
- Extension Agreement
- Waiver, Fees/Penalties
- Loan Modification
  - Interest Rate Reduction
  - ARM to Fixed Rate
  - Amortization Extended
  - Gov't Fund Incentive Applied
  - Principal Reduction

- Principal Forbearance
- Other \_\_\_\_\_

For CJ Only (Homeowner Not Retaining Property)

- Cash for Keys
- Voluntary Surrender/Graceful Exit
- Deed in Lieu of Foreclosure
- Short Sale

Comments: (Please note suggestions, concerns or other comments on the program)

[Empty box for comments]

SUPERIOR COURT OF NEW JERSEY  
CHANCERY DIVISION ~~Medm~~ COUNTY

GENERAL EQUITY

Docket No T- 1A15906

INTERIM PROVISIONAL SETTLEMENT

SMA  
Plaintiff,

v.

William H. ... et al  
Defendant.

The defendant has agreed to make probationary payments to the plaintiff for a period of 12 months.

Plaintiff does not consent to any further mediation sessions.

Date: May 25, 2010

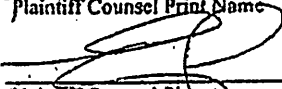
V  
Defendant Print Name

Defendant Signature

Defendant Counsel Print Name

Defendant Counsel Signature

Eric R. Parker  
Plaintiff Counsel Print Name

  
Plaintiff Counsel Signature

Eric R. Parker Esq  
w/ Zucker Golds  
Achorman LLC



Foreclosure Mediation Settlement Memorandum

DOCKET NO: F14154 06

Plaintiff's Name: GMA v. First Defendant's Name: willoughby

The terms of this settlement memorandum were arrived at through mediation conducted on May 25, 2010 in settlement of the foreclosure action initiated by GMA (herein lender) against willoughby (herein borrower).

The parties agree that the foreclosure action is resolved upon the following terms, conditions and covenants: Borrower is being offered a trial to permanent modification plan contingent on signed modification documents and an initial down payment.

Borrower must make a down payment of \$6,000.00 made payable to wealthbridge mortgage and delivered to the office of Zucker Goldberg Ackerman LLC in Montclair NJ on

2.00 before 11am Monday June 7 2010. At that point lender will adjourn sale for 6 weeks, lender to adjourn 28 days at a time as payments are made. All future payments are to be sent to the servicer. There are

3. No grace periods on any payments.

The loan will be amortized at 5.00 for 480 months making the new payment amount estimated at 1678.48

PITI. New payments start on July 6 2010 via certified funds and are to continue on 1st of each month thereafter. There are no grace periods.

- 5. The parties agree that when executed this mediation settlement memorandum shall be final, binding and enforceable upon all parties and resolves the lender's claim that the borrower's default under the terms of the note and mortgage permit the initiating of the foreclosure action. This memorandum shall be admissible in any action or legal proceeding to enforce its terms.
6. The pending foreclosure action will be dismissed without prejudice, subject, however, to the right of the lender, in the event that the borrower fails to fulfill the terms of this settlement memorandum, to move on or before one year from the date hereof to reinstate the complaint at the point previous processing ceased.
7. The parties agree that the terms of this mediation settlement memorandum are not confidential and will be filed with the foreclosure action and is, consequently, a public document pursuant to Rule 1:38. In the event any document is required for recordation with the county clerk, the lender shall prepare the same at no expense to the borrower, provided, however, that any term or provision which deviate from the terms and provisions herein shall be null and void.
8. The parties acknowledge that: (1) they have reviewed this memorandum and understand and agree with the terms and provisions contained herein and enter into it freely; (2) if applicable, the mediator has acted solely as the scrivener and not as the attorney or advisor for either party.

Signatures and dates for Lender's Representative (Eric L. Parker Esq) and Borrower (Brandon Willoughby) with dates 5/25/10 and 5/25/10.

P52



Foreclosure Mediation Settlement Memorandum

DOCKET NO: F 19159 06

Plaintiff's Name GMAC v. First Defendant's Name Willoughby 2010

The terms of this settlement memorandum were arrived at through mediation conducted on May 15, in settlement of the foreclosure action initiated by GMAC [herein lender] against Willoughby [herein borrower].

The parties agree that the foreclosure action is resolved upon the following terms, conditions and covenants:

1. The new ~~estimated~~ unpaid principal balance is \$215,365.30 after lender recast, 32,764.28 in negative escrows and 2. and corporate advances.

71,736.39 in arrears will be put into a non interest bearing ~~account~~ balloon that is payable upon maturity, refinance, or sale.

4. IF All trial payments are made lender will make modification permanent. If any payment is missed lender will continue with foreclosure.

- 5. The parties agree that when executed this mediation settlement memorandum shall be final, binding and enforceable upon all parties and resolves the lender's claim that the borrower's default under the terms of the note and mortgage permit the initiating of the foreclosure action. This memorandum shall be admissible in any action or legal proceeding to enforce its terms.
- 6. The pending foreclosure action will be dismissed without prejudice, subject, however, to the right of the lender, in the event that the borrower fails to fulfill the terms of this settlement memorandum, to move on or before one year from the date hereof to reinstate the complaint at the point previous processing ceased.
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- 8. The parties acknowledge that: (1) they have reviewed this memorandum and understand and agree with the terms and provisions contained herein and enter into it freely; (2) if applicable, the mediator has acted solely as the scrivener and not as the attorney or advisor for either party.

Lender's Representative Signature [Signature] Date 5/25/10  
 Borrower's Signature William Willoughby Date 5-25-10  
 Borrower's Signature \_\_\_\_\_ Date \_\_\_\_\_

**SIGN IN SUBJECT (PLEASE PRINT CLEARLY)**

Date: May 25 <sup>2010</sup> Time in: 4:50 <sup>PM</sup> Time out: 6:40 <sup>PM</sup>

CASE NAME: (Plaintiff) EMAC vs.

(Defendant) Willoughby

DOCKET NO: F-19159-06 Mediator: T. GARDNER

Phone: \_\_\_\_\_

1) Plaintiff's

Attorney: Eric Parker Tel. No. 908-233-8500 <sup>361</sup>  
Party Represented: EMAC Mortgage

2) Defendant's

Attorney: Jim Milano Tel. No. 856-667-1234  
Party Represented: W. Willoughby

3) Home Owners:

Tami June Willoughby  
Address: 710 Second St  
Union Beach NJ 07735  
Telephone No. 732-887-0070

4) HUD Counselor:

Flaine Moler Tel. No. 732-409-6281

Conference Memo

**EXHIBIT B**

# Foreclosure Mediation

	2009	2010	2011	2012	2013	2014	2015												2015 Total	GRAND TOTAL
	Total	Total	Total	Total	Total	Total	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC		
<b>New Scheduled</b>	2,596	4,886	3,664	1,933	1,634	1,731	155	134	142	141	337	195							1,104	17,548
<b>Total Activity (Settled+Not Settled+Other)</b>	4,603	10,970	10,176	9,601	7,467	6,772	612	552	624	560	475	543							3,366	55,955
<b>Total Completed Mediation (Settled+Not Settled)</b>	1,548	2,713	2,911	2,033	1,543	1,289	117	110	121	123	121	121							713	12,750
<b>Total Settled</b>	906	1,113	1,136	973	771	686	68	57	71	62	66	69	0	0	0	0	0	0	393	5,978
Settled Prior*	160	314	408	324	187	140	16	14	8	14	17	16							85	1,618
Settled by Mediation	269	271	338	249	247	281	28	19	33	26	28	37							171	1,826
Settled Provisional	475	528	390	400	337	265	24	24	30	22	21	16							137	2,532
Settled by Housing Cnslr	2	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	2
<b>Not Settled</b>	642	1,600	1,775	1,060	772	603	49	53	50	61	55	52							320	6,772
<b>Percent Settled</b>	58.5%	41.0%	39.0%	47.9%	50.0%	53.2%	58.1%	51.8%	58.7%	50.4%	54.5%	57.0%	#####	#####	#####	#####	#####	#####	55.1%	46.9%
<b>Total Other</b>	3,055	8,257	10,265	7,568	5,924	5,483	495	442	503	437	354	422	0	0	0	0	0	0	2,653	43,205
Cases Adjourned	1,254	2,426	2,585	2,239	1,906	1,910	203	187	216	154	115	155							1,030	13,350
Mediation Terminated	25	9	26	23	21	9	0	0	0	0	0	1							1	114
No Appearance Plaintiff	9	14	8	20	8	15	1	3	0	0	0	0							4	78
No Appearance Defendant	110	295	300	130	45	58	6	5	3	6	10	10							40	978
Continued	541	3,234	5,434	3,779	3,041	2,606	195	168	223	195	180	220							1,181	19,816
Pending	211	702	587	396	248	189	29	25	8	15	11	13							101	2,434
Canceled	277	745	795	573	376	368	22	25	25	18	21	0							111	3,245
Scheduled in Error**	228	372	437	362	212	239	31	19	18	32	6	13							119	1,969
Further Discussion***	400	392	44	15	9	3	1	0	0	0	1	0							2	865
Completed-Judgment Pend	0	68	49	31	29	28	1	3	4	4	5	1							18	223
Homeowner Rej Prov Settl	0	0	0	0	29	58	6	7	6	13	5	9							46	133
<b>Recommended for Mediation by Housing Counselor</b>	1,063	1,625	1,018	785	205	0	0	0	0	0	0	0	0	0	0	0	0	0	0	4,696
<b>Mediation Requests by Homeowner</b>	2,713	2,864	1,683	1,022	1,363	1,569	102	139	150	102	230	144							867	12,081

\* Scheduled for mediation but settles before the mediation occurs.

\*\* E.g., scheduled for mediation then discovered the defendant is not the homeowner, or that the property is not the homeowner's principal residence.

\*\*\* Case not settled but agreed to further discussion.



# Foreclosure Mediation

Jan2009 - Jun2015

	ATL	BER	BUR	CAM	CPM	CUM	ESX	GLO	HNT	HUD	MER	MID	MON	MRS	OCN	PAS	SLM	SOM	SSX	UNN	WRN
<b>New Scheduled</b>	592	1662	1024	915	181	194	1713	546	171	842	795	1560	1610	793	1474	1277	92	513	349	1058	187
<b>Total Activity</b> (Settled+Not Settled+Other)	1823	5030	3022	2632	534	596	6375	1616	710	3033	2007	4437	6062	3135	4350	3185	278	1944	1170	3232	677
<b>Total Completed Mediation</b> (Settled+Not Settled)	373	1137	780	642	134	147	1172	436	135	498	517	1144	1399	458	1168	925	71	367	259	762	119
<b>Total Settled</b>	171	587	371	300	67	78	534	223	50	210	278	526	816	162	570	361	32	161	121	302	58
Settled Prior*	42	151	135	93	25	36	300	70	21	86	52	42	116	25	144	113	12	57	19	55	24
Settled by Mediation	49	157	55	99	17	16	84	74	13	27	79	148	312	97	210	165	6	44	70	89	15
Settled Provisional	80	279	180	108	25	26	150	79	16	96	147	336	388	40	216	83	14	60	32	158	19
Settled by Housing Counselor	0	0	1	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0	0	0
<b>Not Settled</b>	202	550	409	342	67	69	638	213	85	288	239	618	583	296	598	564	39	206	138	460	61
<b>Percent Settled</b>	45.8%	51.6%	47.6%	46.7%	50.0%	53.1%	45.6%	51.1%	37.0%	42.2%	53.8%	46.0%	58.3%	35.4%	48.8%	39.0%	45.1%	43.9%	46.7%	39.6%	48.7%
<b>Other</b>	1450	3893	2242	1990	400	449	5203	1180	575	2535	1490	3293	4663	2677	3182	2260	207	1577	911	2470	558
Cases Adjudged	307	1038	762	1072	159	158	1902	432	198	923	206	767	1106	645	1062	658	67	532	218	931	207
Mediation Terminated	5	17	4	3	1	0	3	1	4	1	9	0	16	2	8	5	1	16	2	7	9
No Appearance Plaintiff	0	4	5	18	0	4	2	4	0	4	6	0	11	1	13	3	1	0	0	0	2
No Appearance Defendant	55	134	47	76	2	16	58	25	5	94	14	75	118	63	86	45	2	18	22	13	10
Continued	547	2008	934	351	140	220	2335	532	262	1133	739	1887	2634	1160	1546	1009	109	684	324	1041	221
Pending	138	246	172	126	49	15	152	23	24	36	347	112	421	98	106	148	5	95	34	53	34
Canceled	312	241	145	137	34	14	350	37	30	183	67	232	122	435	175	241	4	86	210	159	31
Scheduled in Error**	22	68	84	68	6	15	307	81	36	111	52	123	117	228	162	82	11	108	76	181	31
Further Discussion***	58	93	74	133	8	5	52	40	10	31	27	74	70	22	15	47	5	22	15	57	7
Completed-Judgment Pending	2	25	13	5	1	2	28	3	2	8	16	20	33	13	8	14	0	9	5	13	3
Homeowner Rej Prov Settl	4	19	2	1	0	0	14	2	4	11	7	3	15	10	1	8	2	7	5	15	3
<b>Recommended for Mediation by Housing Counselor</b>	222	267	459	416	47	106	430	253	47	167	250	244	581	101	509	222	45	104	42	147	37
<b>Mediation Requests by Homeowner</b>	334	1394	520	500	129	86	1119	308	130	648	448	1118	912	654	807	1097	46	406	292	980	153

\* Scheduled for mediation but settles before the mediation occurs.

\*\* E.g., scheduled for mediation then discovered the defendant is not the homeowner, or that the property is not the homeowner's principal residence.

\*\*\* Case not settled but agreed to further discussion.

<b>TOTAL</b>
17,548
55,848
12,643

5,978
1,618
1,826
2,532
2

6,665
-------

47.3%
-------

43,205
13,350
114
78
978
19,816
2,434
3,245
1,969
865
223
133

4,696
12,081

Foreclosure Mediation

Jan2015 - Jun2015

	ATL	BER	BUR	CAM	CPM	CUM	ESX	GLO	HNT	HUD	MER	MID	MON	MRS	OCN	PAS	SLM	SOM	SSX	UNN	WRN	TOTAL
New Scheduled	29	115	65	56	8	10	110	20	10	52	42	89	62	53	149	85	6	34	19	70	20	1104
Total Activity (Settled+Not Settled+Other)	114	737	369	238	35	21	640	82	58	322	227	361	447	340	780	548	20	224	131	228	97	6019
Total Completed Mediation (Settled+Not Settled)	10	101	39	34	1	3	64	12	6	14	29	51	49	32	112	72	2	20	17	40	5	713

Settled	6	73	12	21	1	1	42	4	1	10	14	26	26	15	56	40	0	7	12	23	3	393
Settled Prior*	2	0	7	10	0	1	36	1	0	7	1	0	12	0	0	3	0	1	0	4	0	85
Settled by Mediation	1	32	1	3	1	0	2	2	1	0	12	0	4	15	37	36	0	5	12	4	3	171
Settled Provisional	3	41	4	8	0	0	4	1	0	3	1	26	10	0	19	1	0	1	0	15	0	137
Settled by Housing Counselor	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0

Not Settled	4	28	27	13	0	2	22	8	5	4	15	25	23	17	56	32	2	13	5	17	2	320
-------------	---	----	----	----	---	---	----	---	---	---	----	----	----	----	----	----	---	----	---	----	---	-----

Other	52	318	165	102	17	9	288	35	26	154	99	155	199	154	334	238	9	102	57	94	46	2653
Cases Adjourned	13	126	91	42	8	0	107	11	6	63	22	40	93	52	155	80	3	32	25	48	13	1030
Mediation Terminated	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	1
No Appearance Plaintiff	0	0	1	2	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	4
No Appearance Defendant	0	1	5	8	0	1	4	2	0	4	1	2	0	0	7	2	1	0	2	0	0	40
Continued	11	161	56	35	1	6	143	14	13	65	57	88	98	70	118	118	5	47	19	34	22	1181
Pending	23	3	0	2	4	1	0	5	3	1	12	1	0	6	10	8	0	14	0	2	6	101
Canceled	4	6	3	8	4	1	17	0	0	14	3	13	1	5	5	17	0	2	6	1	111	
Scheduled in Error**	0	9	9	2	0	0	10	3	1	4	0	7	7	15	38	7	0	2	2	2	1	119
Further Discussion***	0	0	0	2	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	2
Completed-Judgment Pending	0	2	0	0	0	0	2	0	1	0	1	2	0	1	1	2	0	0	2	3	1	18
Homeowner Rej Prov Settl	1	10	0	1	0	0	5	0	2	3	3	2	0	5	0	3	0	5	1	4	1	46

Recommended for Mediation by Housing Counselor	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Mediation Requests by Homeowner	27	88	42	40	8	10	86	20	8	35	30	63	55	38	134	73	5	22	16	56	11	867

\* Scheduled for mediation but settles before the mediation occurs.

\*\* E.g., scheduled for mediation then discovered the defendant is not the homeowner, or that the property is not the homeowner's principal residence.

\*\*\* Case not settled but agreed to further discussion.

RECEIVED

JUL 31 2015

SUPREME COURT OF NEW JERSEY  
No. 076006

SUPREME COURT  
OF NEW JERSEY

GMAC MORTGAGE, L.L.C.,  
Plaintiff-Respondent,

v.

TAMILYNN WILLOUGHBY,  
Defendant-Petitioner.

ON PETITION FOR CERTIFICATION OF  
THE FINAL ORDER OF  
THE SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION

Sat Below:

TRIAL COURT BELOW:

Judge Alexander P. Waugh, J.A.D.

Judge Harry G. Carroll, J.A.D.

A Civil Action

App. Div. #A-001294-13T3

**BRIEF OF AMICUS CURIAE**  
**SETON HALL LAW CENTER FOR SOCIAL JUSTICE**

SETON HALL UNIVERSITY SCHOOL OF LAW  
CENTER FOR SOCIAL JUSTICE  
Civil Litigation Clinic  
833 McCarter Highway  
Newark, NJ 07102  
(973) 642-8700

Attorney for *Amicus Curiae* on behalf of  
Petitioner Tamilynn Willoughby  
Seton Hall University School of Law  
Center for Social Justice

On the Brief:  
Linda E. Fisher, Esq.

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### Other Authorities

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## STATEMENT OF INTEREST OF AMICUS CURIAE

The Center for Social Justice at Seton Hall University School of Law ("the Center") is both a state-certified legal services program and a clinical legal education program where law students and professors work together on issues of public interest, including the rights of homeowners facing foreclosure. The Center has provided free legal assistance to lower-income New Jersey homeowners involved in predatory lending schemes, mortgage fraud, and foreclosure litigation for more than fifteen years. Mediation is a frequent avenue for successful resolution of the Center's cases.

Additionally, the Center is one of the few organizations in New Jersey that provides advocacy and scholarship for issues that affect homeowners, as well as entire communities that experience foreclosure. Among other foreclosure related issues, Center faculty are conducting research on mortgage modifications and have published on the topics of mortgage fraud and foreclosure delays. See, e.g., Linda E. Fisher, Shadowed by the Shadow Inventory: A Newark, New Jersey Case Study of Stalled Foreclosures and Their Consequences, 4 UC Irvine L. Rev. 1265 (2014).



STATEMENT OF FACTS AND PROCEDURAL HISTORY

Amicus relies primarily on the Statement of Facts and Opinion Below sections of Defendant Willoughby's Petition for Certification, providing here only a succinct recitation of the most immediately relevant facts. First, the full text of the mediated settlement agreement is as follows (with emphasis added in bold; strike-throughs appear in the original):

Foreclosure Mediation Settlement Memorandum (Page 1)  
Docket No: F19159-06

<u>GMAC</u>	v.	<u>Willoughby</u>
Plaintiff's Name		First Defendant's Name

The terms of this settlement memorandum were arrived at through mediation conducted on May 25, 2010 in settlement of the foreclosure action initiated by GMAC [herein lender] against Willoughby [herein borrower].

The parties agree that the foreclosure action is resolved upon the following terms, conditions and covenants:

1. Borrower is being offered a trial to permanent modification plan contingent on signed modification documents and an initial down payment. Borrower must make a down payment of \$6,000.00 made payable to Wealthbridge Mortgage and delivered to the office of Zucker Goldberg Ackerman LLC in Mountainside, NJ on or before 11am Monday June 7, 2010.
2. At that point lender will adjourn sale for 6 weeks, Lender to adjourn 28 days at a time as payments are made. All future payments are to be sent to the Servicer. There are no grace periods on any payment.
3. The loan will be amortized at 5% for 480 months making the new payment amount estimated at 1,678.48 PITI.
4. New payments start on July 6, 2010 in certified funds and are to continue on or before the 1st of each month thereafter. There are no grace periods.



The parties agree that the foreclosure action is resolved upon the following terms, conditions and covenants:

1. The new estimated unpaid principal balance is \$215,365.30 after lender recapitalizes 32,764.28 in negative escrows and corporate advances.
2. 71,736.39 in arrears will be put into a non interest bearing balloon that is payable upon maturity, refinance, or sale.
3. If all trial payments are made lender will make modification permanent.
4. If any payment is missed, lender will continue with foreclosure.
5. The parties agree that when executed this mediation settlement memorandum shall be final, binding and enforceable upon all parties and ~~resolves the lender's claim that the borrower's default under the terms of the note and mortgage permit the initiating of the foreclosure action.~~ This memorandum shall be admissible in any action or legal proceeding to enforce its terms.
6. ~~The pending foreclosure action will be dismissed without prejudice, subject, however, to the right of the lender, in the event that the borrower fails to fulfill the terms of this settlement memorandum, to move on or before one year from the date hereof to reinstate the complaint at the point previous processing ceased.~~
7. The parties agree that the terms of this mediation settlement memorandum are not confidential and will be filed with the foreclosure action and is, consequentially, a public document pursuant to Rule 1:38. In the event any document is required for recordation with the county clerk, the lender shall prepare the same at no expense to the borrower, provided, however, that any term or provision which deviate from the terms and provisions herein shall be null and void.
8. The parties acknowledge that: (1) they have reviewed this memorandum and understand and agree with the terms and provisions contained herein and enter into it freely; (2) if applicable, the mediator has acted solely as the scrivener and not as the attorney or advisor for either party.

/s/ Eric R. Parker, Esq. 5/25/10

Lender's Representative Signature

Eric R. Parker, Esq.

Zucker Goldberg Ackerman LLC

/s/ Tami Lynn Willoughby 5/25/10

Borrower's Signature

Date

[Da 0044-45] See also Appendix, Exhibit A; Certification of Linda E. Fisher in Support of Motion to Appear as Amicus, para. 6.

As is evident from the face of the settlement agreement, Defendant and Plaintiff executed both pages of the agreement on May 25, 2010. Nonetheless - and inexplicably - the Chancery Court found that no permanent mortgage modification existed because Willoughby supposedly had failed to sign the implementing documents [Da 0459]. The Appellate Division affirmed the Chancery Court's glaring factual error, stating: "Willoughby never accepted GMAC's offer of a permanent loan modification ... [because] [s]he never signed the documents tendered by GMAC to implement its offer ..." [Da 0462].

Defendant Willoughby also signed subsequent modification documents from Plaintiff GMAC and timely made all requisite payments. She made the \$6,000.00 down payment on June 7, 2010, and both parties executed an acknowledgement, which required the "[l]ender or servicer to send trial plan documents within two days of today's date" [Da 0049-50]. On June 25, 2010, Defendant executed the "trial plan documents," styled as a "forbearance agreement," sent from Wealthbridge on Plaintiff's behalf [Da 0017]. Pursuant to this agreement, Defendant Willoughby was required to make trial payments for eleven months. Although Plaintiff may not have countersigned this agreement, Defendant made all eleven trial

payments in full and on time, thereafter continuing to make timely monthly payments for an additional 16 months after the trial plan period had concluded, with all payments totaling \$58,790.69 [Da 0049, 0287, 0289, 0300, 0456]. She only stopped paying once Plaintiff began rejecting her payments [Da 0289, 0300].

Plaintiff confirmed Defendant Willoughby's satisfactory compliance with the trial period requirements three times [Da 0059, 0067, 0072]. Nonetheless, the terms of the permanent loan modification documentation subsequently tendered by Plaintiff to Defendant differed substantially and materially from those agreed upon in mediation. [Da 0062, 0067, 0072]. The June 7, 2011, offer increased monthly payments and shortened the loan term by about fourteen years [Da 0062]. The December 5, 2011 and May 23, 2012 offers also raised the interest rate by .5% [Da 0067, 0072]. Ms. Willoughby rejected these offers, since she had already accepted and executed the mediated agreement.

#### ARGUMENT

- I. THIS PETITION PRESENTS AN IMPORTANT ISSUE FOR THIS COURT'S RESOLUTION CONCERNING RESPECT FOR SETTLEMENT AGREEMENTS REACHED IN THE NEW JERSEY FORECLOSURE MEDIATION PROGRAM.

This Petition for Certification concerns a foreclosure matter that was settled via the New Jersey Judiciary's Foreclosure Mediation Program (hereinafter "Mediation Program").

Notwithstanding the existence of an enforceable contract, Plaintiff GMAC Mortgage LLC (hereinafter "GMAC") reneged, refusing to honor the settlement and thereby undermining the Mediation Program. Created in 2008 to assist the Chancery Courts and Office of Foreclosure to resolve foreclosure cases, the Mediation Program has successfully mediated 17,548 cases, from its inception through June of 2015. See Notice to the Bar: Residential Mortgage Foreclosure Mediation Program - Rule Relaxation Order, dated Nov. 17, 2008, Glenn A. Grant, J.A.D.<sup>1</sup>; see also, Foreclosure Mediation Statistics Collected by the New Jersey Judiciary, January 2009 to June 2015, included in the Appendix as Exhibit B; see also Certification of Linda E. Fisher in Support of Motion to Appear as Amicus, para. 6.

To a fair degree, the Mediation Program has been achieving its stated purpose:

Whereas, a residential mortgage foreclosure mediation program will provide a neutral forum for certain residential borrower-homeowners in foreclosure and their lenders to work out new mortgage terms or other agreements mutually acceptable to both the borrower-homeowners and the lenders so that, where possible, residential borrower-homeowners may remain in their homes . . .

See Notice, supra.

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<sup>1</sup>Available at <https://www.judiciary.state.nj.us/notices/2008/n081120a.pdf> (last accessed July 29, 2015).

An effective mediation program is needed now more than ever, as New Jersey continues to lead the nation in foreclosure. According to RealtyTrac, "New Jersey foreclosure activity in the first half of 2015 increased 24 percent from a year ago, boosting the state's foreclosure rate to second highest nationwide."<sup>2</sup> The Chancery Courts and the Office of Foreclosure have struggled for years to handle the constant and growing influx of foreclosure cases, and there is no end in sight. A fully functioning foreclosure alternative, such as the Mediation Program, can help courts manage their foreclosure dockets, while also benefitting borrowers, lenders, communities, and the housing market in this State. See Lydia Nussbaum, ADR's Place in Foreclosure: Remediating the Flaws of A Securitized Housing Market, 34 Cardozo L. Rev. 1889, 1953 (2013).

The Program can only work effectively, however, if parties abide by commitments entered into during mediation sessions. In the matter at hand, this was not the case, as Plaintiff GMAC repeatedly and unilaterally altered the material terms of the settlement agreement.

Inexplicably, the lower courts overlooked the existence of the fully executed mediation agreement (as well as performance by the homeowner) and found none existed. Had the lower courts

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<sup>2</sup>Available at <http://www.realtytrac.com/news/foreclosure-trends/midyear-2015-foreclosure-market-report/>.

accurately apprehended the facts, they might have reached a different result, but the broader, unfortunate consequence of their erroneous decisions is subversion of the Mediation Program. This Court should grant certification because doing so would fortify the Mediation Program and signal to the lower courts that it is vital to support the Program through upholding its processes to enable mortgage modifications.

Permitting foreclosing lenders to disregard voluntary settlements incentivizes servicing banks' dysfunction, stalling, and gaming of the system. Servicers demonstrate disrespect towards the mediation process in multiple ways, ranging from losing documents and requiring repeated resubmissions, see National Consumer Law Center, Survey Reveals Ongoing Problems with Mortgage Servicing (May 2015), available at [http://www.nclc.org/images/pdf/foreclosure mortgage/mortgage servicing/ib-servicing-issues-2015.pdf](http://www.nclc.org/images/pdf/foreclosure_mortgage/mortgage_servicing/ib-servicing-issues-2015.pdf); John W. Schoen, CNBC, Banks Slow to Clean Up the Mortgage Mess, (June 14, 2103), available at <http://www.cnbc.com/id/100807444>; Center for Responsible Lending, Top Ten Servicing Abuses, available at [http://www.responsiblelending.org/mortgage-lending/tools-resour-ces/top-ten-mortgage-servicing-abuses.html](http://www.responsiblelending.org/mortgage-lending/tools-resources/top-ten-mortgage-servicing-abuses.html), to assigning insufficiently trained employees to evaluate borrowers' eligibilities, see Note 3, infra, declining to make trial modifications permanent when borrowers comply with all conditions, see infra at 11-12, and - as occurred here - failing



to honor settlement agreements. Similar practices occur across the country, as exemplified by the Consumer Financial Protection Bureau's database of mortgage complaints, available at <http://www.consumerfinance.gov/complaintdatabase/>; the New Jersey experience is no different. Id. Foreclosure defense attorneys and housing counselors in New Jersey have been sharing these experiences for many years. See Certification of Linda E. Fisher in Support of Motion to Appear as Amicus, paras. 3-4.

Even though modifications enable borrowers to get back on track with payments, and simultaneously help investors by preventing costly foreclosures, see Center for Responsible Lending Report, Fix or Evict? Loan Modifications Return More Value than Foreclosures (Mar. 23, 2011), available at <http://www.responsiblelending.org/mortgage-lending/research-analysis/fix-or-evict.html>, the servicer banks that handle mortgage defaults frequently have little interest in facilitating modifications. Reasons for this disinterest include: that servicers often make more money by foreclosing rather than modifying, see Diane Thompson, Foreclosing Modifications: How Servicer Incentives Discourage Loan Modifications, 86 Wash. L. Rev. 755 (2011), that cost-cutting measures have resulted in untrained employees regularly committing errors in handling

modifications<sup>3</sup>; that the dysfunction of the mortgage servicing industry creates systemic gridlock, and that financial institutions' excessive focus on short-term result often ignores the interests of borrowers, homeowners and communities. See Adam J. Levitin and Tara Twomey, Mortgage Servicing, 28 Yale J. on Reg. 1 (2011); see generally Lynne Dallas, Short-Termism, the Financial Crisis, and Corporate Governance, 37 J. of Corporation Law 264 (2011).

Of particular relevance are cases concerning servicers' refusals to make trial modifications permanent, even when borrowers have complied with all conditions and the trial modification contracts specify that modifications shall be made permanent.

Recently, in Arias v. Elite Mortgage Service, 439 N.J. Super. 273 (App. Div. 2015), the Appellate Division held that language in a trial modification plan required the lender to make the modification permanent once the borrower complied with the requisite conditions, such as timely payment. The relevant language included:

If I am in compliance with this Trial Period Plan (the "Plan") and my representations in Section 1 continue to be true in all

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<sup>3</sup>The "Burger King Kids" - employees who process documents and handle customer service at servicing banks - frequently lack the education, training and time to accurately process mortgage documents. See Eric Dash and Nelson D. Schwartz, Bankers Ignored Signs of Trouble on Foreclosures, New York Times, Oct. 13, 2010.

material respects, then the Servicer will provide me with a Home Affordable Modification Agreement ("Modification Agreement"), as set forth in Section 3.

In turn, Section 3 provides, in pertinent part, that the Servicer will determine the amounts of unpaid interest and other charges to be added to the loan balance and determine "the new payment amount." This section then repeats that:

*If I comply with the requirements in Section 2 and my representations in Section 1 continue to be true in all material respects, the Servicer will send me a Modification Agreement for my signature (emphasis added).*

Id. at 278.

See also Wigod v. Wells Fargo Bank, NA, 673 F.3d 547 (7<sup>th</sup> Cir. 2012) (language in trial modification agreement and satisfaction of trial plan conditions may require lender to offer permanent modification).

Similarly, the settlement agreement here specifies in paragraph 3 on the second page that, "If all trial payments are made lender will make modification permanent," and in paragraph 5 that, "The parties agree that when executed this mediation settlement memorandum shall be final, binding and enforceable upon all parties." [Da 0044-46].

In cases involving a mediated agreement, such as the case at bar, the deleterious effects of refusal to honor the agreement expand to encompass the mediation process itself, resulting in utter disregard and disrespect for the Foreclosure Mediation Program. This, notwithstanding the policy and purpose behind New Jersey's Mediation Program to assist homeowners who face loss of

their homes and to achieve a workout agreement benefitting all stakeholders.

Moreover, honoring mediated agreements furthers the strong New Jersey policy of favoring dispute resolution. See Willingboro Mall, Ltd. v. 240/242 Franklin Ave., L.L.C., 215 N.J. 242, 253-4 (2013); see also State v. Williams, 184 N.J. 432, 441, 446 (2005). Here, no compelling circumstances exist to dishonor the agreement. See Nolan v. Lee Ho, 120 N.J. 465, 472 (1990). To the contrary, compelling circumstances exist to honor it, and thereby buttress the Mediation Program. This case thus presents an important issue for this Court's certification.

## II. FORECLOSURE MEDIATION PROGRAM FORMS SHOULD BE RESTYLED.

An additional issue merits consideration: the Mediation Program Completion Report in this case includes a checked-off box entitled "Provisional Settlement - No Need to Reschedule Mediation (Case Not Dismissed)." See Appendix, Exhibit A; Certification of Linda E. Fisher in Support of Motion to Appear as Amicus, para. 6. This boilerplate nomenclature is incoherent and not entirely applicable to cases such as Ms. Willoughby's. The form therefore should be revised to include, at a minimum, an additional option entitled "Final Settlement (Case Not Dismissed)." The latter option would have been appropriate here, since the terms indicate

a final settlement was reached, but the case was not dismissed, pending Ms. Willoughby's compliance with and performance of additional conditions, which indeed occurred. Amicus proposes the addition of a control date to monitor continuing compliance by all parties with settlement terms, and to require final action by a specified time; failure to comply would permit dismissal for lack of prosecution under New Jersey Rule of Court 4:64-8.

CONCLUSION

For the foregoing reasons, this Court should accept Certification in this matter and reverse the opinion of the Appellate Division.

Respectfully submitted,

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