SUPREME COURT

OF THE

STATE OF CONNECTICUT

S.C. 20067

U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR THE HOLDERS OF THE FIRST FRANKLIN MORTGAGE LOAN TRUST MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2005-FF10

V.

ROBIN BLOWERS, ET AL.

BRIEF OF DEFENDANT-APPELLANT MITCHELL PIPER WITH ATTACHED APPENDIX

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TABLE OF CONTENTS

STATEMENT OF ISSUES

1. Did the Appellate Court properly hold that: **(a)** special defenses to a foreclosure action must "directly attack" the making, validity, or enforcement of the note or mortgage, and **(b)** counterclaims in a foreclosure action must also satisfy the "making, validity, or enforcement" requirement? See Practice Book § 10-10.

   Pages 5-24

2. If the Appellate Court properly addressed the issues in the first question, did it properly hold that alleged post-origination misconduct concerns a plaintiff's "enforcement" of a note or mortgage only if the plaintiff breaches a loan modification or other similar agreement that affects the enforceability of the note or mortgage?

   Pages 24-29

3. If the Appellate Court properly addressed the issues in the first and second questions, did it properly hold that the Defendant's allegations of the Plaintiff's misconduct and breach relating to a "received" "immediate modification" did not amount to an allegation that the Plaintiff had agreed to a "final, binding loan modification" that affected the Plaintiff's ability to enforce the note or mortgage?

   Pages 30-32

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Practice Book

Other Authorities

INTRODUCTION

In this foreclosure suit, homeowner Mitchell Piper alleges that the Plaintiff's inequitable conduct prior to and during the foreclosure, which included several broken promises and misleading loan modification agreements, resulted in both the foreclosure itself and in the Plaintiff seeking more money from him than he otherwise would have owed. In light of this misconduct, and in an attempt to save his home, Mr. Piper timely presented special defenses and counterclaims to the trial court for a decision on the merits.

The trial court denied Mr. Piper the opportunity to present his claims and defenses, and the Appellate Court erroneously upheld that denial based on common law which treats foreclosure defendants as an arbitrarily disfavored class of litigants. Under the Appellate Court's decision, to even raise a special defense or counterclaim in a foreclosure action, the homeowner must connect their allegations to the "making, validity, or enforcement of the note or mortgage." If the homeowner cannot do so, they forfeit their defenses or must initiate a separate damages suit for their counterclaims.

This procedural requirement finds no basis in statute, this Court's decisions, or Connecticut policy. Indeed, in *Thompson* v. *Orcutt*, 257 Conn. 301 (2001), this Court declined to adopt this requirement. Mr. Piper accordingly requests that the "making, validity, or enforcement" requirement be struck. He asks instead that courts review special defenses and counterclaims in foreclosure actions under the standard Practice Book rules, just like any other civil suit.

In the alternative, were this Court to find a "making, validity, or enforcement" requirement appropriate, Mr. Piper asks that "enforcement" be interpreted to include a wider range of post-origination conduct than the Appellate Court did below.

Finally, even if this Court agrees with the Appellate Court's procedural standard in full, it should reverse the decision below, as the Court construed Mr. Piper's allegations related to a breached loan modification against him, contrary to established practice.

STATEMENT OF FACTS AND NATURE OF THE PROCEEDINGS

In August 2005, Mitchell Piper[1] borrowed the residential mortgage loan at issue. After making timely mortgage payments for nearly five years, Mr. Piper's small business began losing money as a result of the Great Recession. First Special Defense ¶ 1 (A21).[2] This loss of income caused him to fall 30 days behind on his mortgage payments in January 2010. Id.

Shortly thereafter, the Plaintiff's servicing agent, Select Portfolio Servicing, reached out to Mr. Piper and offered him a "rate reduction." Id. ¶ 3 (A22). After initially enticing Mr. Piper with a modified monthly rate of $1,950, for which he successfully completed a three-month trial modification period, the Plaintiff reneged on its offer to modify Mr. Piper's loan. Id. ¶¶ 3-4 (A22). The Plaintiff proceeded to offer and then renege on no fewer than four more modifications after accepting trial payments from Mr. Piper; each successive modification sharply increased Mr. Piper's monthly payment, rising from the initial $1,950/month to over $3,345/month. See id. ¶¶ 5-11 (A22-23).

Facing a wrecked credit score, Mr. Piper contacted the Connecticut Department of Banking in April 2012. Id. ¶ 12 (A23). The Department of Banking's intervention quickly resulted in a loan modification "being received." Id. Within months, however, the Plaintiff demanded higher payments from Mr. Piper than the amount to which it had agreed, and then rejected Mr. Piper's subsequent payments for being "partial." Id. ¶¶ 13-16 (A23-24). Moreover, in late 2013 the Plaintiff erroneously told Mr. Piper's insurance company that Mr. Piper and his family were no longer living in their home. Id. ¶ 17 (A24). This mistake caused Mr. Piper's home insurance policy to skyrocket from $900 per year to $4,000 per year. Id.

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[1] Robin Blowers was the other borrower, but neither she nor the other named defendants are parties to this appeal. In this brief, we treat Mr. Piper as the sole defendant.

[2] This brief will interchangeably refer to allegations from the "First Special Defense" and the "First Counterclaim." For purposes of this appeal, the distinction is irrelevant, as all of Mr. Piper's special defenses and counterclaims rely on identical factual allegations.

Despite Mr. Piper's attempts to work with the Plaintiff on the miscalculations and mistakes in his account, the Plaintiff commenced a foreclosure action on February 8, 2014. Mr. Piper elected to enter into the Foreclosure Mediation Program and, in May 2014, mediation commenced. Id. ¶ 18 (A24); Dkt. No. 109.00 (A15).[3] During ten months of foreclosure mediation, the Plaintiff: regularly ignored agreed-upon deadlines; showed up late to mediation sessions; made duplicative, exhaustive, and ever-changing requests; and provided the Defendant with conflicting information. See First Special Defense ¶¶ 18-22 (A24-25). Thus, in spite of Mr. Piper's good-faith efforts to reach an amicable solution in both the years leading up to the foreclosure and in the ten months of foreclosure mediation, the Plaintiff sought to enforce its mortgage through a motion for judgment of strict foreclosure in April 2015. Id. ¶ 24 (A25-26). In so doing, Plaintiff sought to collect fees and interest that its own conduct had increased. See Dkt. No. 126.00 (Affidavit of Debt) (A16-19); Dkt. No. 127.00 (Affidavit Re: Attorney/Counsel Fees) (A39-40). Mr. Piper responded by filing an answer, counterclaims for negligence and violations of the Connecticut Unfair Trade Practices Act ("CUTPA"), and special defenses of equitable estoppel and unclean hands. The Plaintiff moved to strike each defense and counterclaim, arguing in relevant part they did not relate to the making, validity, or enforcement of the note or mortgage ("**MVE**").

The trial court granted the motion to strike on the basis that Mr. Piper's special defenses and counterclaims did not bear a "sufficient nexus" to the MVE of the note or mortgage. *U.S. Bank*, *N.A.* v. *Blowers*, Superior Court, judicial district of Hartford, Docket No. HHD-CV-14-6048825, 2015 WL 9911489, *5 (*Dubay, J.*, Dec. 28, 2015) (A128). The

[3] The Foreclosure Mediation Program differs from traditional mediation insomuch that, in order to ensure efficiency and accountability, mediators file publicly available reports following each mediation session. See Conn. Gen. Stat. § 49-31n(c)(2). The Foreclosure Mediation Program also operates under the "expectation that all parties shall endeavor to reach determination[s] with reasonable speed and efficiency by participating in the mediation process in good faith, but without unreasonable and unnecessary delays." Conn. Gen. Stat. § 49-31k(7).

trial court based its holding primarily on Mr. Piper's purported failure to allege that the Plaintiff breached a "proper modification agreement" that would affect the "enforceability" of the original note or mortgage. Id., *4, *6 (A128, A136).

Before striking the defenses on this procedural ground, the trial court stated that Mr. Piper's allegations were "sufficient to support a claim of equitable estoppel [and unclean hands]," and struck them solely because it found the alleged conduct underlying these special defenses "d[id] not relate to the making, validity, or enforcement of the note or mortgage." Id., *6, *8 (A131-32, A135). It did not opine as to the adequacy of the counterclaims. The trial court also did not consider whether equity counseled in favor of allowing Mr. Piper's defenses and counterclaims to move forward, or whether preserving them would impair judicial economy.

Mr. Piper timely appealed. In a 2-1 decision, the Appellate Court affirmed. It held that, unless a defendant can show that the plaintiff breached an agreement such as a "final, binding, loan modification," "all events" occurring "during the loan modification negotiation period or during foreclosure mediation" fail to satisfy the MVE requirement. *U.S. Bank National Assn.* v. *Blowers,* 177 Conn. App. 622, 629-30 (2017). Because Mr. Piper did not explicitly allege that "the parties agreed to [the Department of Banking] modification]" and because Mr. Piper's allegations otherwise "derived solely from the plaintiff's conduct during post-default mediation and loan modification negotiations," the Appellate Court held that Mr. Piper's special defenses and counterclaims could not proceed alongside the foreclosure action. Id., 632 (counterclaims); 630-31 (special defenses).

The Appellate Court majority also reaffirmed the MVE requirement. The Appellate Court majority reasoned that applying the standard transaction test in the foreclosure context "would unnecessarily convolute and delay the foreclosure process" and "would serve to deter mortgagees from participating in [mediation and loan modification negotiations]." Id., 634.

Judge Prescott dissented, labeling the majority's interpretation of the MVE requirement "overly broad" and opining that its interpretation of "enforcement" "would unnecessarily shield mortgagees or their agents from judicial scrutiny of potentially unscrupulous behavior that may have directly resulted in the foreclosure action." Id., 647-48 (*Prescott, J.*, dissenting). The dissent further contended that the Plaintiff's alleged misconduct held an "obvious and direct connection to the enforcement of the note and mortgage" because "the plaintiff engaged in dishonest and deceptive practices prior to it having initiated the foreclosure action," including "fail[ing] to honor the terms of a loan modification agreement." Id., 647. Finally, the dissent pointed out that, when the trial court held that the Department of Banking modification did not constitute a permanent modification, it erroneously "resolv[ed] a factual dispute [in the pleadings] . . . in favor of the plaintiff." Id.

On December 22, 2017, after his deadline for filing had been properly extended, Mr. Piper filed a Petition for Certification. This Court granted certification on January 31, 2018.

ARGUMENT

I. THE APPELLATE COURT ERRED IN CARVING OUT A SPECIAL TEST FOR SPECIAL DEFENSES AND COUNTERCLAIMS IN THE FORECLOSURE CONTEXT, INSTEAD OF APPLYING THE ORDINARY TEST APPLICABLE TO SPECIAL DEFENSES AND COUNTERCLAIMS IN CIVIL LITIGATION GENERALLY.

A. Standard of Review

Although trial courts enjoy broad discretion in considering whether to grant a mortgagee the remedy of foreclosure for the default of a mortgage loan, the trial court's interpretation of the MVE requirement and relevant Practice Book sections raises a question of law. Consequently, this Court's review is plenary. See *ARS Investors II 2012-1 HVB, LLC* v. *Crystal, LLC*, 324 Conn. 680, 685 (2017). When exercising plenary review, this Court "must decide whether [the lower court's] conclusions are legally and logically

correct and find support in the facts that appear in the record." *Tadros* v. *Middlebury Medical Center, Inc*., 263 Conn. 235, 240 (2003).

B. The Proper Standard for Reviewing Special Defenses in Foreclosure Actions Is Practice Book § 10-50's "Consistent-With-Liability-But-Defeats-Complaint" Test, As Elaborated in *Thompson* v. *Orcutt*.

The Practice Book states that special defenses must present "[f]acts which are consistent with [the plaintiff's] statements but show, notwithstanding, that the plaintiff has no cause of action." Practice Book § 10-50. This Court elaborated on this standard in the context of special defenses to a foreclosure proceeding in *Thompson*, supra*,* 257 Conn. 301, concluding that the special defense of unclean hands could apply "if a party's claim grows out of or depends upon or is inseparably connected with" its prior misconduct. Id., 312. This, and not the restrictive MVE requirement, is the proper standard for reviewing special defenses in a foreclosure action.

1. Thompson v. Orcutt *Considered and Rejected the MVE Requirement for Special Defenses in Foreclosure Actions.*

In *Thompson*, this Court addressed the question of whether the MVE requirement applies to the special defense of unclean hands in a foreclosure action. This Court decided that the MVE requirement would be inappropriately restrictive given the doctrine's equitable nature and purpose.

The defendants in *Thompson* brought a special defense of unclean hands, alleging that the plaintiff had committed fraud in a prior bankruptcy proceeding by making false representations that led the bankruptcy trustee to abandon the mortgage at issue. This Court rejected the plaintiff's argument that the defense of unclean hands should not be allowed unless the underlying wrongful conduct relates "to the making, enforcement, or validity of the mortgage note." *Thompson*, supra*,* 257 Conn. 304. Rather, the Court noted that it had held on numerous occasions that "the doctrine [may] preclude a litigant from recovering in equity if his or her conduct has been inequitable with respect to the subject of the action." Id., 312. Emphasizing the equitable nature of foreclosure and the "fundamental

principle of equity jurisprudence" that the unclean hands doctrine "exists to safeguard the integrity of the court," the Court held that the scope of unclean hands as a special defense should not be uniquely constricted in foreclosure proceedings. Id., 310. Instead, as in all other types of actions, the special defense of unclean hands may apply "if a party's claim grows out of or depends upon or is inseparably connected with his own prior fraud." Id.

This Court's holding in *Thompson* applies to other equitable special defenses asserted in foreclosure actions. *Thompson*'s reasoning rested primarily on the equitable nature of foreclosure and the doctrine of unclean hands (the one defense at issue). This could apply to any special defense. For instance, as its name suggests, the other special defense at issue in this case, equitable estoppel, is also "of equitable origin." *Union Carbide Corp.* v. *City of Danbury*, 257 Conn. 865, 872 (2001). Like the doctrine of unclean hands, the doctrine of equitable estoppel serves to "show what equity and good conscience require, under the particular circumstances of the case, irrespective of what might otherwise be the legal rights of the parties." Id. Therefore, principles of uniformity and precedent counsel in favor of adopting the *Thompson* standard for all special defenses in foreclosure actions.

2. *Practice Book §10-50 Appropriately Balances Concerns About Lender Misconduct and Judicial Economy.*

The standard articulated in Practice Book § 10-50 and elaborated in *Thompson* is both permissive enough and exacting enough to further judicial economy and safeguard the integrity of courts of equity in the face of mortgage company misconduct. Section 10-50 states that special defenses must present facts consistent with the plaintiff's statements but nevertheless demonstrate that the plaintiff has no cause of action. By its own terms, this standard requires that a special defense relate to the plaintiff's claim. Additionally, special defenses may only be raised in the same action they seek to oppose; unlike counterclaims, there is no way to bring an affirmative case consisting of special defenses.

Trial courts should be trusted to apply the Section 10-50 standard, rather than be relegated to using the MVE test as a rough proxy to ensure that frivolous special defenses are dismissed. As argued in the dissent, "courts will be able to discern efficiently between [special defenses] that are well pleaded and supported by specific factual allegations and those that are merely frivolous and intended only to create unneeded delay." *Blowers*, supra, 177 Conn. App. 649 (*Prescott, J.*, dissenting). Indeed, courts are quite capable of rejecting frivolous special defenses without resorting to MVE. See, e.g., *GMAC Mortg., LLC* v. *Ford*, 144 Conn. App. 165, 182 (2013) (affirming a lower court's decision to strike a special defense because the defense not only failed to implicate MVE, but because defendant did not "establish [his] equitable defense" and it therefore "failed as a matter of law").

Striking special defenses based on the MVE requirement also imperils the integrity of the court by obliging it to render an equitable decision with blinders on. Both special defenses at issue play a crucial role in preserving the integrity of a court of equity. The purpose of equitable estoppel is "to show what equity and good conscience require, under the particular circumstances of the case, irrespective of what might otherwise be the legal rights of the parties." *Union Carbide Corp*, supra, 257 Conn. 872. The doctrine of clean hands "is applied . . . for the protection of the court," *Eldridge* v. *Eldridge*, 244 Conn. 523, 536 (1998), and ensures that a plaintiff seeking equitable relief receives that relief only if "his conduct has been fair, equitable and honest as to the particular controversy in issue," *Bauer* v. *Waste Mgmt. of Conn., Inc.*, 239 Conn. 515, 525 (1996). Arbitrarily restricting a court's ability to consider special defenses such as unclean hands and equitable estoppel because the allegations do not "directly attack" the making, validity, or enforcement of the mortgage and note, *Blowers*, supra, 177 Conn. App. 629, undermines the authority of courts to act in equity. Lenders should not receive the benefit of courts of equity when their causes of action are enabled by their own misconduct, even if that misconduct falls outside the narrow bounds of the MVE requirement. Indeed, such a procedural bar is particularly

inappropriate for foreclosure proceedings, where this Court has emphasized the trial court's broad equitable discretion. See *Hamm* v. *Taylor*, 180 Conn. 491, 497 (1980) ("[A] trial court in foreclosure proceedings has discretion, on equitable considerations and principles, to withhold foreclosure or to reduce the amount of the stated indebtedness.").

3. *Applying the Standard Articulated in Practice Book § 10-50 and Elaborated in* Thompson *to Foreclosure Suits Accords with the Foreclosure Jurisprudence of Other States.*

None of the twenty other judicial foreclosure states[4] limit affirmative defenses by their connection to the note and mortgage as a matter of common law.[5] Other states use an approach akin to § 10-50, i.e., whether a defense is legally viable on the merits, and, if so, whether it is supported by evidence or well-pled allegations. See, e.g., *Reverse Mortg. Solutions, Inc.* v. *Goldwyn*, 408 P.3d 497, 2017 WL 6625225, *6 (Kan. Ct. App. Dec. 29, 2017) (after reviewing case law from other states on whether non-compliance with HUD regulations can serve as an affirmative defense, concluding that, in most instances, it can). Here, Mr. Piper pled well-established equitable special defenses and the trial court would have allowed the defenses to advance but for Connecticut's MVE requirement. See *Blowers*, supra, 2015 WL 9911489, *6, *8 (A131-32, A135).

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[4] Besides Connecticut, the following twenty states predominantly use judicial foreclosure: Delaware, Florida, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, Vermont, and Wisconsin. See NOLO Legal Encyclopedia, "Judicial v. Nonjudicial Foreclosures," available at https://www.nolo.com/legal-encyclopedia/chart-judicial-v-nonjudicial-foreclosures.html (last visited Mar. 15, 2018).

[5] New Jersey, Pennsylvania, and Delaware are the only states that limit affirmative defenses under standards roughly approximating an MVE requirement. However, these states' foreclosure procedures are all distinguishable from Connecticut's: the legislatures in New Jersey and Pennsylvania enacted special procedural requirements for foreclosure actions, see infra Section I.C.3, and Delaware conducts foreclosure through writs of *scire facias*, rather than through the standard judicial foreclosure process, see, e.g., *Wells Fargo Bank, N.A.* v. *Nickel*, 2011 WL 6000787, *2 (Del. Super. Ct. Nov. 18, 2011).

Moreover, New Jersey's standard is broader than MVE. See *Joan Ryno, Inc.* v. *First National Bank*, 208 N.J. Super. 562, 570 (App. Div. 1986) (noting that "any conduct of a mortgagee known to the mortgagor prior to the institution of a foreclosure that could be the basis of an independent action for damages by reason of the mortgagee having brought the foreclosure could be raised as an equitable defense in the foreclosure").

To the extent this Court may be worried about mortgagors asserting frivolous defenses related to loan modifications and foreclosure mediation if not constrained by an MVE requirement, other states have demonstrated that lower courts can readily dispose of such defenses on the merits. See, e.g., *Bank of America* v. *Johnson*, 998 N.Y.S. 305, 2014 WL 4922276, *4 (N.Y. Sup. Ct. Sept. 17, 2014) (affirming lower court's decision to strike an affirmative defense related to bad behavior in New York's equivalent of mediation because borrower failed to raise a material question of fact); *SunTrust Mortg., Inc.* v. *Lane*, 351 Wis. 2d 681, 2013 WL 5567500 (Wis. Ct. App. Oct. 10, 2013) (affirming trial court's summary judgment ruling against a borrower's unclean hands defense related to an allegedly unfair loan because borrower failed to allege that conduct constituting unclean hands caused harm from which plaintiff sought relief); *CitiMortgage, Inc.* v. *Carpenter*, 2012-Ohio-1428, 2012 WL 1079807 (Ohio Ct. App. Mar. 30, 2012) (affirming trial court's summary judgment ruling because borrower could not base affirmative defense solely on Freddie Mac HAMP guidelines).

4. *Under the Appropriate Standard, Mr. Piper's Special Defenses Survive a Motion to Strike.*

Under the test in Practice Book § 10-50 as elaborated in *Thompson* v. *Orcutt*, Mr. Piper's special defenses should have survived the motion to strike. The special defenses allege that "the misleading conduct of the plaintiff's servicer was calculated to induce the defendants to believe that they were going to get a loan modification and the defendants acted upon [that] information." *Blowers*, supra, 2015 WL 9911489, *5 (A131). The Plaintiff's subsequent foreclosure is "inseparably connected" with this conduct in that Mr. Piper relied on the Plaintiff's statements in offering him four different trial modifications and breaching the modification that resulted from the Department of Banking's intervention. See, e.g., First Special Defense ¶¶ 3-16 (A22-24). Furthermore, Mr. Piper's special defenses allege that the Plaintiff's misleading conduct throughout the foreclosure and mediation process

needlessly increased the debt on which the foreclosure is based, including inflated accrued interest, escrow advances, attorney's fees, and other charges. Id.

The conduct underlying Mr. Piper's special defenses is "inseparably connected" with the foreclosure action, as required by *Thompson*, and the allegations meet the standard set out by Practice Book § 10-50. They allege "[f]acts which are consistent with [the plaintiff's] statements but show, notwithstanding, that the plaintiff has no cause of action." They should be allowed in the foreclosure proceeding.

C. The Proper Standard for Reviewing Counterclaims in Foreclosure Actions Is Practice Book § 10-10's Transaction Test.

With respect to counterclaims, the Appellate Court wrongly concluded that the MVE requirement constituted a "proper application of Practice Book § 10-10 in a foreclosure context." *Blowers*, supra, 177 Conn. App. 631-32. MVE is narrower than Practice Book § 10-10's transaction test, and is therefore not a "proper application" of the Practice Book. Because Mr. Piper's counterclaims should have been joined to the foreclosure complaint, he respectfully requests that this Court order the trial court to join the claims on remand.

1. *The Appellate Court's MVE Requirement Unnecessarily Constricts Practice Book § 10-10's Joinder Standard.*

"In any action for legal or equitable relief, any defendant may file counterclaims . . . provided that each such counterclaim . . . arises out of the transaction or one of the transactions which is the subject of the plaintiff's complaint." Practice Book § 10-10. In *Jackson* v. *Conland*, 171 Conn. 161 (1976), this Court set forth the prevailing definition of Section 10-10's "transaction test." First, the Court ruled that the purposes of this "practical" test are "judicial economy, avoidance of multiplicity of litigation, and avoidance of piecemeal disposition of what is essentially one action," and that "transaction is regarded as a word of flexible meaning." Id., 166-67. Second, in applying this test, "relevant considerations" for the trial court include "whether the same issues of fact and law are presented by the complaint . . . and whether separate trials on each of the respective

claims would involve a substantial duplication of efforts by the parties and the courts." Id., 166; see also *Town of Wallingford* v. *Glen Valley Associates, Inc.*, 190 Conn. 158 (1983).

In the res judicata context, this Court employs a similar "transaction test" to determine if a claim should have been raised in a prior action. It defines "transaction" as something "to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage." *Powell* v. *Infinity Ins. Co.*, 282 Conn. 594, 604 (2007).[6]

The Appellate Court described MVE as a "proper application of Practice Book § 10-10 in a foreclosure context." *Blowers*, supra, 177 Conn. App. 631-32. But pleading counterclaims "aris[ing] out of the transaction . . . which is the subject of the plaintiff's complaint," Practice Book §10-10, is not the same as pleading a counterclaim that "has some reasonable nexus to . . . the [MVE] of the mortgage or note." *Blowers*, supra, 177 Conn. App. 632. This Court has stated that "transaction" is to be given a "flexible," *Jackson*, 171 Conn. at 166, or "pragmatic," *Powell*, 282 Conn. at 604, meaning. MVE is neither. In a mortgage foreclosure suit, the transaction is generally considered "the execution of the note and mortgage, and the subsequent default." *U.S. Bank National Assn.* v. *Sorrentino*, 158 Conn. App. 84, 97 (2015). Rather than consider the individualized circumstances of a borrower's allegations, and how bank misconduct might have exacerbated or frustrated the borrower's attempt to cure the default, the MVE requirement only allows post-default counterclaims if the borrower can allege that the plaintiff breached a "final, binding loan modification." *Blowers*, supra, 177 Conn. App. 630. This categorical determination

[6] Despite the fact that Connecticut is a permissive counterclaim state, see Practice Book § 10-10 ("any defendant *may* file counterclaims . . ."), "the majority of [Connecticut] courts apply res judicata to permissive counterclaims [vis a vis the transaction test]," thus making counterclaims arising out of the same transaction as the complaint effectively compulsory. *Tanasi* v. *CitiMortgage, Inc.*, 257 F. Supp. 3d 232, 255 (D. Conn. 2017).

unreasonably limits a defendant's remedies, especially where loan modification applications and offers are regulated responses to a borrower's "default" on the loan. *Sorrentino*, supra, 158 Conn. App. 97; see also infra Sections I.D.3, II.B (describing contemporary state and federal foreclosure policies).

Additionally, adjudicating counterclaims alongside the foreclosure complaint is generally beneficial to "judicial economy." *Jackson*, supra, 171 Conn. 167. It makes sense for state law claims like Mr. Piper's to be sorted out within the same case as the foreclosure. Moreover, the judge responsible for the property/foreclosure docket is often the most familiar with the parties and the latest developments with the state's foreclosure and mediation processes.

In sum, the transaction test, the standard that applies to all civil actions in Connecticut, should not be any different for homeowners in foreclosure.

2. *The Appellate Court's Arguments Against Applying the Standard Transaction Test to Foreclosure Suits Lack Merit.*

The Appellate Court contended that allowing counterclaims like Mr. Piper's would "convolute and delay the foreclosure process," *Blowers*, supra, 177 Conn. App. 634, and noted that homeowners are "not precluded from bringing a separate action for damages caused by [bank postdefault] conduct." Id., n.5. Neither consideration merits departure from Section 10-10.

First, concern about delay assumes that applying the transaction test in foreclosure actions would force trial courts to join virtually any counterclaim. Not so. Under Section 10-10, homeowners must connect their allegations to the "transaction" at issue. So the bank's misconduct should relate to the default on the subject mortgage, the alleged failure to cure such default, or the making of the note and mortgage (including any modifications thereto). Further, counterclaims are proper where "separate trials on each of the respective claims would involve a substantial duplication of efforts by the parties and the courts." *Jackson*, supra, 171 Conn. 166. As an example of a limiting principle, consider *Town of Wallingford*.

There, this Court applied the transaction test to a sewer lien foreclosure. The defendant brought a counterclaim seeking “monetary damages and an injunction against the plaintiff because of the alleged unlawful diversion of waters onto the subject property.” *Town of Wallingford*, supra, 190 Conn. 158. This Court rightly held that this counterclaim did not belong in the foreclosure action, as “unlawful diversion of waters” had little to do with the sewer tax debt at issue. Id.,161.

What is more, the notion that homeowners can always bring an affirmative suit for damages after the bank sells their home does not justify limiting the transaction test for foreclosure defendants. For one, given the res judicata principles noted above, an affirmative suit is not always available. That is, foreclosing banks have argued for a narrow interpretation of “transaction” when moving to strike a counterclaim in a foreclosure, but then argued for a broad interpretation of “transaction” when moving to dismiss an affirmative suit on res judicata grounds. Compare *Blowers*, supra, 177 Conn. App. 632 (agreeing with plaintiff bank that any claim related to “loan modification negotiations” could not be raised in the foreclosure) with *Tanasi*, supra, 257 F. Supp. 3d 259 (agreeing with defendant bank that claims concerning "loss mitigation and mortgage modification applications” *should* have been brought in the foreclosure). Such interpretive arbitrage can leave all but the most careful of homeowners remediless.

Even assuming an affirmative action remains viable, the vast majority of homeowners do not have the resources or energy to find counsel and bring suit after undergoing a foreclosure, no matter how meritorious their claims. Moreover, as noted above, allowing meritorious counterclaims to proceed alongside a foreclosure aids judicial economy.

3. *Applying the Transaction Test to Foreclosure Suits Accords with the Foreclosure Jurisprudence of Other States.*

Furthermore, as with special defenses, none of the twenty other judicial foreclosure states have adopted an MVE requirement for compulsory counterclaims. Although most of

these states' rules of procedure include a transaction test similar to Section 10-10, they generally do not read "transaction" as narrowly as Connecticut's lower courts do. For example, several courts have recognized that counterclaims alleging that a mortgagee's failure to deliver on its promises "le[d] to initiation of the foreclosure proceeding," constitute "compulsory counterclaims that should [be] raised as defenses to foreclosure." *Kendall Grp. Ltd.* v. *Fifth Third Bank*, 2010-Ohio-4733, 2010 WL 3821255, *7-8 (Ohio Ct. App. Sept. 30, 2010); accord *South Carolina Community Bank* v. *Salon Proz, LLC*, 420 S.C. 89, 97 (S.C. Ct. App. 2017) (finding an unfair trade practices counterclaim compulsory where mortgagor alleged the Bank "engaged in a pattern of reneging upon promises to modify or otherwise restructure loans, including, but [not] limited to, the loan subject of this case"); *Floridian Community Bank, Inc.* v. *Bloom*, 25 So. 3d 43 (Fla. Dist. Ct. App. 2009) (claims for breach of loan extension agreement involved parties, properties, facts, and circumstances identical to those in mortgage foreclosure proceeding and constituted compulsory counterclaims); *Heffern* v. *First Interstate Bank*, 99 N.M. 531, 534 (1983) (finding analogous counterclaim compulsory, and further noting that "allegations of creditor misconduct have been held to be compulsory counterclaims in foreclosure suits [in other jurisdictions]").

To the extent that some states curtail counterclaims in foreclosure actions, these limitations stem from targeted legislation, rather than from judicial fiat. New Jersey, for instance, narrowed its general counterclaim provision to provide that "only germane counterclaims . . . may be pleaded in foreclosure actions without leave of the court." N.J. Stat. Ann. § 4:64-5.[7] Pennsylvania similarly adopted a foreclosure-specific counterclaim rule of procedure, and its courts have developed a more exacting transaction test

[7] Still, "germane" may nonetheless encompass the kind of pre-filing misconduct alleged by Mr. Piper here. See, e.g., *Sheldrick* v. *Wells Fargo Bank, N.A.*, 2016 WL 7325473, *9 (D.N.J. Dec. 16, 2016) (dismissing homeowner's affirmative suit on res judicata grounds and noting that "the time and the place for Plaintiffs to bring their claims challenging the mortgage servicing practices of Defendants in the run up to Plaintiffs' foreclosure was Plaintiffs' state court foreclosure action").

jurisprudence in light of this rule. See, e.g., *Nicholas* v. *Hoffman*, 158 A.3d 675, 697 (Pa. Super. Ct. 2017) (noting that Pa. R. Civ. P. 1148 does not "permit counterclaims where the facts giving rise to the counterclaims occur after the creation of the mortgage and after the mortgagors were in default"). Here, by contrast, neither the Judicial Branch nor the General Assembly has narrowed the transaction test for foreclosure defendants.

Finally, to the extent this Court is worried about mortgagors asserting overbroad counterclaims related to loan modifications and foreclosure mediation, other states have dealt with unmeritorious counterclaims without resorting to MVE-esque requirements. See, e.g., *Federal National Mortgage Assn.* v. *Bartling*, 369 P.3d 341, 2016 WL 1614178 (Kan. Ct. App. Apr. 22, 2016) (rejecting a modification counterclaim where the homeowners plainly did not perform); *Nationstar Mortg., LLC* v. *Calkins*, 354 Wis. 2d 323, 2014 WL 1316615, *3 (Wis. Ct. App. Apr. 3, 2014) (dismissing borrower's counterclaim for failing to review him for modification under federal program called HAMP modification where borrower was not eligible for program); *Huntington National Bank* v. *Belcher*, 2012–Ohio–3731, 2012 WL 3548196 (Ohio Ct. App. Aug. 17, 2012) (ruling against borrower on summary judgment where borrower provided no support for her loan modification counterclaims other than "self-serving affidavits").

In sum, other states' foreclosure practices support the use of the standard transaction test here.

4. *Under the Appropriate Standard, Mr. Piper's Counterclaims Survive a Motion to Strike.*

Because Mr. Piper's counterclaims should have been joined to the Plaintiff's complaint under the transaction test, this Court should declare so in its decision, and then remand Mr. Piper's claims for a decision on the pleadings' sufficiency.[8] Cf. *CitiMortgage, Inc.* v. *Rey*, 150 Conn. App. 595, 607-08 (2014) (reversing an incorrect interpretation of

[8] Although the trial court determined that Mr. Piper's special defenses were adequately pleaded, it did not rule one way or the other on his counterclaims.

transaction test and ordering that defendant's counterclaims be joined on remand "because resolution of the issue require[d] no additional fact finding" and "because both parties ha[d] fully briefed the issue").

Here, Mr. Piper's counterclaims plainly "ar[o]se out of the transaction . . . which is the subject of the plaintiff's complaint." Practice Book § 10-10. In its complaint, the Plaintiff relied on Mr. Piper's purported "failure" and "neglect" to "cure the default" on his note and mortgage. Compl. ¶ 6 (A7). In his counterclaims, Mr. Piper pleaded misconduct and misrepresentations related to the Defendant's "attempts to cure the default alleged in the complaint." See, e.g., First Counterclaim ¶ 27 (A32). Mr. Piper also directly attack the debt at issue, alleging that the Plaintiff's conduct "unnecessarily increased the amount sought by the Plaintiff in connection with its foreclosure action." Id. ¶ 26 (A32). That is, the Plaintiff sought to collect accrued interest, escrow advances, attorney's fees, and other charges that the Plaintiff's repeated breaches of agreement in the run-up to the foreclosure and other misconduct had artificially inflated.

Furthermore, unlike the counterclaim in *Town of Wallingford*, common issues of law and fact bind the complaint and Mr. Piper's counterclaims, such that "judicial economy" would be "served by the filing of the claim[s]." *Jackson*, supra, 171 Conn. 167. Both claims involve the same parties, property, mortgage loan, and time period (at least with respect to the allegations preceding the filing of the complaint). Although litigating Mr. Piper's counterclaims would entail discovery beyond what would be necessary to prosecute the foreclosure, the fact that both the complaint and the counterclaim request similar equitable relief (i.e., possession of the property) augurs in favor of resolving the foreclosure and the counterclaim in the same action. Compare Compl. Prayer for Relief (A10) with Defendant's Prayer for Relief (A37).

D. Public Policy Favors Holding Foreclosure Plaintiffs Accountable to the Same Extent as Any Other Plaintiff.

To justify MVE, the Appellate Court relied on policy considerations. Were it to "dispose of the [MVE] requirement," the Court contended, "a flood of counterclaims and special defenses" would follow. *Blowers*, supra, 177 Conn. App. 634. The Appellate Court expressed the concern that, without MVE, banks and mortgage servicers would be "deterr[ed] from participating in" Connecticut's foreclosure mediation program and loan modification processes sponsored by the federal government. Id. These concerns are outweighed by the modification and mediation processes, which are today part and parcel of a regulated foreclosure framework. Allowing meritorious counterclaims and defenses like Mr. Piper's accords with public policy.

1. *The Nature of Equitable Relief Demands a Higher—Not Lower—Standard for Foreclosure Plaintiffs.*

Foreclosure is an equitable proceeding. In *Petterson* v. *Weinstock*, 106 Conn. 436 (1927), this Court found that "long-recognized" equitable considerations controlled a foreclosure case rather than restrictions imposed by the "arbitrary and unjust dogmas of the common law." Id. at 442. This Court reiterated its preference for equity in foreclosure proceedings in *Thompson*, where it reaffirmed the "fundamental principle[s] of equity jurisprudence." *Thompson*, supra, 257 Conn. 313.

This equitable approach is sensible. A mortgage is a low-income person's "most important interaction . . . with strangers." David A. Super, *A New New Property*, 113 Colum. L. Rev. 1773, 1840 (2013). It is also "an extremely perilous one, for . . . the home will also be worth a great deal, albeit much less, to strangers. Thus . . . mortgagees . . . may have strong incentives to try to pry the home away from the resident." Id.

Compared to damages, plaintiffs face a higher standard to get equitable relief. Oftentimes, "[i]n equity cases, a higher burden of proof is imposed to justify the availability of broader remedies than those available in an action at law for damages." *Kilduff* v. *Adams, Inc.*, 219 Conn. 314, 327 n.14 (1991). The MVE requirement is contrary to this

principle. It allows foreclosure plaintiffs to secure equitable relief more easily than would a plaintiff in a suit for damages, where the normal Practice Book rules apply.

2. *The MVE Requirement Is Not Well-Established Law; in Fact, the Opposite Is True.*

MVE is a judicial invention. At best, MVE has its roots in an interpretation of the transaction test that this Court long ago abandoned. The requirement has never been adopted by this Court.

The Appellate Court stated that trial courts may reject counterclaims and special defenses in foreclosure actions if those claims or defenses did not satisfy the MVE requirement for the first time in *Southbridge Associates, LLC* v. *Garofalo*, 53 Conn. App. 11, 16 (1999) (special defenses); *New Haven Sav. Bank* v. *LaPlace*, 66 Conn. App. 1, 10 (2001) (counterclaims). The Appellate Court affirmed the trial court's use of this requirement without citing precedent or explaining its reasoning.

The phrase first appeared in *Connecticut Savings Bank* v. *Reilly,* 12 Conn. Supp. 327 (1944), where the court used MVE to strike a tort counterclaim in a mortgage foreclosure proceeding. Id., 329. The Superior Court did not cite precedent for MVE. Instead it cited an earlier Supreme Court case, *Shaeffer* v. *O.K. Tool* Co., 110 Conn. 528 (1930), which applied a narrow version of the transaction test, stating that a tort counterclaim cannot be brought in a contract action. This narrow concept of "transaction" was later abandoned. See, e.g., *Nw. Elec., Inc.* v. *Rozbicki,* 6 Conn. App. 417, 426 (1986) ("[A] counterclaim sounding in tort could be filed in a contract action . . . ." (internal citations and quotations omitted)).

After *Reilly*, the MVE requirement vanished for more than 45 years. It reappeared in 1990. See *Citytrust* v. *Kings Gate,* Superior Court, judicial district of Stamford, Docket No. CV-90-0106448-S, 1990 WL 283771, *1 (Oct. 18, 1990) (*Lewis, J.*). In that case, the court cited a single authority: *Town of Wallingford*, supra, 190 Conn. 161. But *Town of*

Wallingford applied a straightforward version of the transaction test and did not mention MVE.

Devising a foreclosure-specific common-law pleading standard is anomalous. See, e.g., *Paradigm Healthcare Center of Torrington* v. *Coole*, Superior Court, judicial district of Hartford, HHD-CV15-6061109S, 2016 WL 6120629 (*Elgo, J*., Sep. 7, 2016) (applying Practice Book § 10-10 to strike counterclaims in breach of contract action); *Roller* v. *McFadden*, Superior Court, judicial district of Hartford, No. HHD-CV14-5037957, 2016 WL 1315152 (*Elgo, J*., Mar. 7, 2016) (applying Practice Book § 10-50 to strike special defenses in a vexatious litigation action). It is not justified by the Practice Book. The Practice Book contains several foreclosure-specific rules. See, e.g., Practice Book § 10-8 (providing 15 rather than 30 days for advancement of pleadings in foreclosure actions); Practice Book § 23-18 (allowing a foreclosing plaintiff to establish the existence of a debt via affidavit rather than live testimony). The Practice Book could specify if a different pleading standard for counterclaims and special defenses in foreclosure were intended. It does not. Differing applications depending on the suit's subject matter "would lead to a case-by-case analysis by the courts, which would lead to uncertainty of application." *Pitchell* v. *City of Hartford*, 247 Conn. 422, 436 (1999) (interpreting Practice Book § 10-30's filing requirement in accordance with the rule's plain text). If the Plaintiff wishes to change these rules, "[its] request is more properly directed to the Rules Committee of the Superior Court." *State* v. *Jennings*, 216 Conn. 647, 665 n.11 (1990). Cf. *Connecticut National Mortg. Co.* v. *Knudsen*, 23 Conn. 684, 687 (2016) (recognizing recent foreclosure-specific rule change that limited ability of foreclosure defendants to file more than two motions to open judgment) (citing Practice Book § 61-11(g)).

3. *MVE Is Inconsistent with Post-Great Recession Connecticut and Federal Foreclosure Policy.*

Contrary to the goals of recent state and federal foreclosure policy, a strict MVE requirement "unnecessarily shield[s] mortgagees or their agents from judicial scrutiny of

potentially unscrupulous behavior that may have directly resulted in the foreclosure action." *Blowers*, 177 Conn. App. At 648 (*Prescott, J.*, dissenting). Such behavior is distressingly common. See, e.g., E. Scott Reckard*, Regulators: Wells Fargo, Chase, U.S. Bank Still Fail Mortgage Service Tests*, L.A. Times (June 17, 2015) (discussing the Office of the Comptroller of the Currency's decision to restrict mortgage servicing operations at several large U.S. financial institutions because of failure to comply with federal customer-service standards) (A250-53). For example, the Consumer Financial Protection Bureau ("CFPB") recently sued a mortgage servicer for repeatedly providing homeowners false information, making accounting errors, and mishandling insurance. See Yuka Hayashi, *CFPB Sues Mortgage Servicer Ocwen, Alleging Botched Services*, Wall St. J. (Apr. 20, 2017) (A254-55). A year prior, a federal court in Florida approved a settlement of a class action alleging that a servicer – incidentally, the Plaintiff's agent here[9] – fraudulently profited from forced-place insurance. See Order Granting Final Approval to Class Action Settlement, *Almanzar* v. *Select Portfolio Servicing, Inc.*, 14-CV-22586, Dkt. No. 113 (S.D. Fla. Mar. 25, 2016) (A256-74); see also First Special Defense ¶ 17 (alleging that Plaintiff's misreporting caused Mr. Piper's insurance rate to increase significantly) (A24). All this behavior could cause a mortgagor to fall behind or fail to cure a default. None of it would satisfy the MVE requirement. Unfortunately, in an industry fixated on "short-term profitability," this misbehavior is not exceptional. See Super, *A New New Property*, 113 Colum. L. Rev. at 1845.

Banks must therefore have incentives for good behavior. But the MVE requirement provides the opposite, leaving mortgagors at the mercy of their mortgage companies. Mortgagors have no other opportunity to raise special defenses to save their homes. Few will hire an attorney to pursue claims outside of a foreclosure proceeding. See State of Connecticut Judicial Branch, Foreclosure Mediation Program: Report to the Banking

[9] See First Special Defense ¶ 3 (A22).

Committee of the General Assembly 11 (Mar. 1, 2018) (showing at least one self-represented party appeared in 73% of statewide foreclosure mediation cases) (A275-76).[10]

Such limitations are inconsistent with state and federal post-Great Recession policy. For instance, the General Assembly adopted Connecticut's mortgage foreclosure mediation statute with the goal of "protecting borrowers from unscrupulous lenders and brokers who act against consumers' best interests." Joint Standing Committee Hearings, Banks, 2008 Sess., p. 587 (testimony of Sen. Donald Williams). The federal Home Affordable Modification Program (HAMP) also promoted resolutions that allowed borrowers to remain in their homes. HAMP required that servicers make loan workout "eligibility determinations in a timely manner, and convert eligible borrowers into permanent HAMP modifications." Dept. of the Treasury, Making Home Affordable Supplemental Directive 09-10 (A277). Under Dodd-Frank, the CFPB largely adopted HAMP's standards in Regulation X,[11] which requires mortgage servicers to correct errors and review loss mitigation options. See 12 C.F.R. § 1024.41 ("[A] servicer shall: (i) Evaluate the borrower for all loss mitigation options available to the borrower; and (ii) Provide the borrower with a notice in writing stating the servicer's determination of which loss mitigation options, if any, it will offer . . . ."). Further, Freddie Mac and Fannie Mae have issued guidance requiring that servicers of federally-insured, guaranteed, or owned mortgages review homeowners in default for loan workouts. See Freddie Mac Single-Family Seller/Servicer Guide § 9102.4(b) (2016) (A278-83); Fannie Mae Single Family Servicing Guide §§ D2-1-01; D2-3.1-01 (2018) (A284-88). The MVE requirement first arose prior to this wave of homeowner-protection laws. It is not consistent with policy today.

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[10] Also available at www.jud.ct.gov/statistics/fmp/FMP_Report_bank_2018.pdf.

[11] In adopting final Regulation X rules "to serve as national mortgage servicing standards," the CFPB noted that most large servicers were already subject to HAMP and other requirements, but that the Financial Stability Oversight Counsel and Government Accountability Office recommended a uniform set of residential mortgage servicing rules. See Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X), 78 Fed. Reg. 10,696, 10,815 (Feb. 14, 2013).

Applying the standard Practice Book rules to foreclosure cases will not "deter mortgagees from participating" in mediation or loan modification negotiations. *Blowers*, supra, 177 Conn. App. 634. Mortgagees' participation in such processes is required by state law. See, e.g., Conn. Gen. Stat. § 49-31*l*(c)(1) (requiring that "the mortgagee shall give notice to the mortgagor of the foreclosure mediation program"). Participation is often required by federal law. See 12 C.F.R. § 1024.41; Freddie Mac Single-Family Seller/Servicer Guide § 9102.4(b) (A278-83); Fannie Mae Single Family Servicing Guide §§ D2-1-01; D2-3.1-01 (A284-88). In addition, foreclosure litigation is stayed for up to eight months of mediation. See Conn. Gen. Stat. § 49-31*l*(c)(6). As a result, mortgagees who wish to expedite a foreclosure proceeding are incentivized to participate in good faith and reach resolution. Mortgagees who deal fairly with their customers can even avoid commencing foreclosure actions and therefore reduce the burden on our court system.

Further, mediation is only valuable for homeowners if servicers have incentives to participate in good faith. Special defenses and counterclaims arising from post-origination behavior may be the only way to encourage such behavior. Otherwise, sanctions remain the only judicial oversight of mediation. See Conn. Gen. Stat. § 49-31n(b)(2) ("The court may impose sanctions on any party or on counsel to a party if such party or such counsel engages in intentional or a pattern or practice of conduct during the mediation process that is contrary to the objectives of the mediation program."). Sanctions could not redress the harms Mr. Piper alleges were caused by servicer misconduct prior to foreclosure, when mediation was not available. Further, the scope of sanctions available under the statute is limited. As a result, the MVE requirement may shield post-origination servicer misconduct.

4. *Applying the 10-10 and 10-50 Tests Would Not Cause a Flood of Frivolous Claims.*

As in non-foreclosure cases, "our courts will be able to discern efficiently between claims that are well pleaded and supported by specific factual allegations and those that are merely frivolous and intended only to create unneeded delay." *Blowers*, supra, 177

Conn. App. 649 (*Prescott, J.*, dissenting). Experience supports this claim. Trial courts have routinely applied Practice Book standards to strike special defenses and counterclaims in foreclosure actions, without reference to MVE. See, e.g., *GMAC Mortg., LLC* v. *Tornheim*, Superior Court, judicial district of New London, Docket No. CV-09-6001296, 2010 WL 1551332 (*Devine, J.*, Mar. 24, 2010) (applying Practice Book § 10-50 to strike two special defenses); *Chase Manhattan Bank Mortg. Corp.* v. *Saraceni*, Superior Court, Docket No. CV-99-0335972S, 2000 WL 297737 (*Moraghan, J.*, Mar. 8, 2000) (applying Practice Book § 10-10 to strike two out of three counterclaims). Put simply, MVE is a hammer; a judicial scalpel is more appropriate.

II. EVEN IF AN MVE REQUIREMENT APPLIES, "ENFORCEMENT" INCLUDES CONDUCT BY A BANK TO ENFORCE THE MORTAGE.

Even if counterclaims and special defenses must relate to the MVE of a note or mortgage, the Appellate Court interpreted the word "enforcement" too narrowly.[12] The Appellate Court held that "the plaintiff's alleged conduct does not relate to the enforcement of the note or mortgage because no binding modification was reached between the parties that rendered the original note and mortgage unenforceable." *Blowers*, supra, 177 Conn. App. 635. However, by creating a de facto "binding modification" test, the Appellate Court stripped the word "enforcement" of substance, instead conflating it with "validity." Indeed, one cannot "enforce" a note or mortgage unless it were already "made" and "valid." See *People's United Bank* v. *E2A, LLC*, Superior Court, judicial district of New London, Docket No. KNL-CV13-6016368, 2013 WL 6978827 (*Cosgrove, J.*, Dec. 12, 2013) ("By definition the 'enforcement' of a mortgage may involve conduct occurring after the execution of the mortgage."). A binding modification renders the original note and mortgage unenforceable precisely because modification renders the originals invalid. The MVE requirement, as applied, effectively shields post-origination behavior from judicial oversight.

[12] As with the prior question, the Court's review of this legal issue is plenary. See *ARS Investors II 2012-1 HVB, LLC*, supra, 324 Conn. 685.

A reading that gives "enforcement" independent meaning must recognize that enforcement of a note or mortgage is a multi-step process, regulated by both contract and statute. See Black's Law Dictionary (10th ed. 2014) (defining enforcement as "[t]he act or *process* of compelling compliance with a law, mandate, command, decree, or agreement" (emphasis added). For instance, Mr. Piper's note and mortgage each require notice by the Plaintiff of its intent to accelerate the debt and provide a thirty day cure period before which acceleration may not occur. See Affidavit in Support of Motion for Summary Judgment Ex. A-B (A144-67); accord *Wells Fargo Bank, N.A.* v. *Strong*, 149 Conn. App. 384, 392 (2014) ("In order to establish a prima facie case in a mortgage foreclosure action, the plaintiff must prove . . . the defendant mortgagor has defaulted on the note and that any conditions precedent to foreclosure, as established by the note and mortgage, have been satisfied."). Because failure to satisfy these conditions is a bar to enforcement, a borrower's attempts to cure their default before the foreclosure action may relate to the "enforcement" of the note or mortgage.

Further, even after a foreclosure action is filed, the statutorily defined Foreclosure Mediation Program introduces a number of additional steps that must be taken before a mortgagee can secure judgment. These contractual and statutory barriers to enforcement cannot be ignored in favor of a strict "binding modification" test.

A. Misconduct That Stymies a Borrower's Attempts to Cure a Default Relates to Enforcement.

Under the terms of Mr. Piper's mortgage, before the lender may accelerate the debt secured by the mortgage, it must provide notice of the default, the action required to cure the default, a date at least thirty days after the notice by which the default must be cured, and that failure to cure may result in acceleration and foreclosure. See Affidavit in Support of Motion for Summary Judgment Ex. B (A153-67). To accelerate or foreclose without such notice would constitute breach of contract and a failure to satisfy a condition precedent to commencing a foreclosure. See *Bank of America, FSB* v. *Hanlon*, 65 Conn. App. 577, 582

(2001). The various components of the notice requirement do not just "relate" to enforcement. Rather, they are a checklist of requirements to begin enforcement. Notice is part of enforcement itself. See Compl. ¶ 6 ("The Plaintiff has provided written notice in accordance with the Note and Mortgage to the Defendant(s) of the default . . . . The Plaintiff has elected to accelerate the balance due on said Note, to declare said Note to be due in full and to foreclose the Mortgage securing said Note.") (A7).

As explained in the dissent, "enforcement" could be understood only as "the ability or a mortgagee to enforce the note or mortgage, or, more broadly, to include a mortgagee's actions related to such enforcement." *Blowers*, supra, 177 Conn. App. 648 n.7 (*Prescott, J.*, dissenting). The narrow understanding boils down to the "enforceability" of the note or mortgage, the meaning of which is indistinguishable from validity. Only the broader understanding is consistent with an independent meaning for enforcement. The use of "enforcement" in Mr. Piper's mortgage makes it clear that enforcement extends after the initial execution. Under its terms, the borrower "shall have the right to have enforcement of this Security Instrument discontinued" if the borrower pays off the entirety of the debt, including accrued fees, before the earlier of five days before the sale of the property or entry of judgment enforcing the mortgage. See Affidavit in Support of Motion for Summary Judgment Ex. B (A153-67). In other words, not only does enforcement extend beyond execution, but under the plain language of the mortgage, the borrower may prevent enforcement by reinstating up until judgment of foreclosure is entered.

Logically, actions taken by a lender after default relate to enforcement if they relate to a borrower's attempt to cure, since curing the default prevents enforcement from continuing. As the dissent noted, the majority's understanding of enforcement shields mortgagees and their agents from judicial oversight of "potentially unscrupulous behavior that may have directly resulted in the foreclosure action." *Blowers*, supra, 177 Conn. App. 648 (*Prescott, J.*, dissenting). This Court need not decide exactly what post-origination conduct falls under the definition of enforcement. However, a pleading test that

categorically excludes all conduct arising out of a lender's attempt to negotiate a post-default modification misunderstands the process of enforcement as establish by the plain language of the note and mortgage.

B. Because Mediation Is an Element of Enforcing a Note and Mortgage, Conduct Arising During Mediation Relates to Enforcement As Well.

The statewide Foreclosure Mediation Program, discussed supra I.D.3, is designed to address "all issues of foreclosure." Conn. Gen. Stat. § 49-31m. If the mortgagor opts to pursue mediation within the statutory timeline, the mortgagee must participate. See id. § 49-31*l*(c)(4). While the parties are in mediation, "no judgment of strict foreclosure nor any judgment ordering a foreclosure sale shall be entered." Id. § 49-31*l*(b)(6). And while mediation normally lasts for three sessions or seven months after the return date, whichever is shorter, id. § 49-31n(b)(1), any party or the mediator may move to extend mediation for an additional session, which the court may grant if it believes an agreement is "highly probable" or if either party has engaged in conduct "contrary to the objectives of the mediation program." Id. § 49-31n(b)(9)(A). There is no statutory limit for the number of extensions a court may grant. And so the mortgagee can be prevented from enforcing the note and mortgage for as long as the court permits.

The Foreclosure Mediation Program, as designed by the General Assembly, is in effect no different than a mandatory clause for all notes and mortgages on residential properties that meet the statutory standards. See Conn. Gen. Stat. § 49-31n(b)(8). Common sense dictates that a mediation period that can temporarily postpone judgment relates to the enforcement of a note or mortgage because it delays the plaintiff's ability to exercise the legal right to foreclosure it would otherwise have.

The mediation program represents a substantial change in law. For example, in *LaPlace*, supra, 66 Conn. App. 10, the Appellate Court rejected, on MVE grounds, the defendant's special defenses and counterclaims because the note and mortgage did not "require the trustee to negotiate with the defaulting defendant prior to bringing a foreclosure

action." Mediation, on the other hand, prevents the court from entering judgment because it creates a duty to negotiate. This change must play a part in the litigation of such matters. To be clear, Mr. Piper does not argue that all conduct in mediation would satisfy the MVE requirement. For example, there may be lenders who cannot or choose not to offer a loan modification. See Conn. Gen. Stat. § 49-31o (clarifying that a mortgagee is never required to modify a mortgage). The range of potential conduct in mediation is wide and the application of the definition of enforcement to mediation should be determined by the trial courts. That is why special defenses or counterclaims under 10-10 and 10-50 must be left to the trial court without artificial limitations.

C. Under Any Reasonable Interpretation of Enforcement, Mr. Piper's Counterclaims and Special Defenses Should Have Survived a Motion to Strike.

The Plaintiff's alleged misconduct in this case fits into any understanding of the word "enforcement," which necessarily includes some conduct after origination.[13] Here, Mr. Piper has alleged that the Plaintiff's post-origination misrepresentations, miscalculations, and repeated breaches of modification agreements occurred while the Plaintiff was "enforc[ing] the subject note and mortgage" and while Mr. Piper was attempting to cure the default thereon. See, e.g., First Special Defense ¶ 27 (the Plaintiff's acts and omissions "related to both (1) the Plaintiff's enforcement of the subject note and mortgage and (2) [the] Defendant's attempts to cure the default alleged in the complaint") (A26). The Plaintiff was offering an avenue to cure the default when it solicited Mr. Piper to modify his mortgage, repeatedly breached modification agreements related to the mortgage, miscalculated debts

[13] Indeed, even under a narrow interpretation of "enforcement," courts have recognized that enforcement includes events that occur after origination. See, e.g., *Bank of America* v. *Criscitelli*, Superior Court, judicial district of Hartford, Docket No. CV-13-6038369-S, 2015 WL 5806294, *3 (*Sheridan, J.*, Aug. 31, 2015) (holding that counterclaims based on breach of unwritten modification agreement bore "substantial nexus" to enforcement of mortgage); *Patriot Nat. Bank* v. *Bobbi*, *Inc.*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-08-5009026-S, 2009 WL 1958956, *7-8 (*Mintz, J.*, June 9, 2009) (holding that alleged misrepresentations during post-default period related to enforcement of mortgage).

related to the mortgage, and proffered out-of-date modification offers during court-supervised mediation.

Mr. Piper has alleged that Plaintiff's conduct drove him further into debt at the same time he was attempting to cure the default. See, e.g., First Counterclaim ¶ 17 (alleging that Plaintiff's servicer erroneously told the Mr. Piper's insurance company that he was not living in the house, leading to a several thousand dollar increase in his insurance premium) (A30-31). When bringing this foreclosure action, the Plaintiff relied on Mr. Piper's purported "failure" and "neglect" to cure the default on his note and mortgage, though the Plaintiff's behavior diminished the likelihood of such cure. See Compl. ¶ 6 ("The Plaintiff has provided written notice in accordance with the Note and Mortgage, but said Defendant(s) have failed and neglected to cure the default.") (A7).

These allegations form the factual basis of Mr. Piper's counterclaims and special defenses. All these allegations arise from the Plaintiff's attempt to comply with the contractual requirements of the note and mortgage and the requirements of the Foreclosure Mediation Program, which are elements of the enforcement process. As such, each of Mr. Piper's counterclaims and special defenses would satisfy an MVE requirement that gives an independent effect to the term "enforcement."

The Appellate Court's decision limits any such pleadings to binding modifications. . See *Blowers*, supra, 177 Conn. App. 635. But the Plaintiff's negligent behavior occurred during the course of its enforcement of the mortgage and note, which included efforts to induce Mr. Piper to cure the default both before and after the filing of the foreclosure action (i.e., the Plaintiff sought to collect the money Mr. Piper allegedly owed them and offered modifications to receive that money). All told, Mr. Piper's counterclaims and special defenses fall squarely within the enforcement prong of any MVE requirement.

III. IN ANY EVENT, THE APPELLATE COURT ERRED IN FAILING TO CONSTRUE THE PLEADINGS IN THE LIGHT MOST FAVORABLE TO THE NON-MOVANT.

The standard of review on a motion to strike is "well established*." Connecticut Coalition for Justice in Education Funding, Inc.* v. *Rell*, 295 Conn. 240, 252 (2010) (internal quotation marks and citations omitted). "Because a motion to strike challenges the legal sufficiency of a pleading and, consequently, requires no factual findings by the trial court, [the Court's] review of the court's ruling . . . is plenary." Id. The reviewing court must "take the facts to be those alleged in the complaint that has been stricken and . . . construe the complaint in the manner most favorable to sustaining its legal sufficiency." Id. Therefore, "if facts provable in the complaint would support a cause of action, the motion to strike must be denied." Id. "Indeed pleadings must be construed broadly and realistically, rather than narrowly and technically." Id., 253.

As Judge Prescott recognized below, the Appellate Court improperly resolved a factual dispute in favor of the Plaintiff. See *Blowers*, supra, 177 Conn. App. 647 (*Prescott, J.*, dissenting). Specifically, a factual question existed as to whether the parties agreed to a formal modification, as alleged in Mr. Piper's answer. See, e.g., First Special Defense ¶ 12 (A23). The trial court resolved this dispute by ruling that the parties did not agree to a permanent modification, and the Appellate Court affirmed. Both courts misapplied the legal standard, which requires a court to construe the factual allegations in the complaint in the most favorable to sustaining its legal sufficiency. See *Rell*, supra, 295 Conn. 252. Had this standard been properly applied, Mr. Piper's special defenses and counterclaims would have met even the Appellate Court's MVE requirement. See *Blowers*, supra, 177 Conn. App. 630 (alleging a breach of a "final, binding loan modification" "relate[s] to the enforcement of the mortgage").

In addition to facts alleged regarding the four different trial modifications and the Plaintiff's servicer offering to modify the loan, Mr. Piper relevantly alleged that in April 2012, he contacted the Department of Banking which "result[ed] in an immediate modification

being received." First Special Defense ¶ 12 (A23). Mr. Piper further alleged that the Plaintiff breached this modification, to wit, "Defendants received notice that the monthly payment on the modified loan was [mistakenly] increasing by nearly 20%," a condition that had not been agreed upon. Id. ¶ 13 (A23). Mr. Piper therefore continued to make payments under the May 2012 modification until he was informed his payments would not be accepted because they were "partial" payments. Id. ¶¶ 13-16 (A23-24).

The trial court found that Mr. Piper did "not allege that the parties entered into a modification which made the original loan agreement unenforceable or which changed the circumstances under which the plaintiff could enforce its authority to seek a foreclosure under the original note or mortgage." *Blowers*, supra, 2015 WL 9911489, *6 (A132). The Appellate Court upheld these findings, adding that "[n]owhere do the defendants allege that the parties agreed to this modification and therefore that it was final and binding on them." *Blowers,* supra, 177 Conn. App. 637.

The facts as alleged—that the Department of Banking's intervention resulted in an "immediate modification"—support Mr. Piper's counterclaims and special defenses in a manner sustaining their legal sufficiency. An appropriately broad reading, i.e., one that is neither narrow or technical, would construe an alleged "immediate modification" to be a permanent modification. Furthermore, as Judge Prescott noted in his dissent, "[r]ather than accepting the defendants' allegation as true for purposes of evaluating the legal sufficiency of the defendants' pleading, the [majority] did the opposite." *Blowers*, supra, 177 Conn. App. 647 (*Prescott, J.*, dissenting). In other words, the Court "apparently attempt[ed] to resolve a factual dispute as to whether a modification had occurred, and did so in favor of the plaintiff." Id.

This Court has reversed when the Appellate Court divined facts not alleged in the complaint. In *Rowe* v. *Godou*, 209 Conn. 273 (1988), for instance, this Court reversed the granting of a motion to strike after the Appellate Court found, without foundation, that a plaintiff's actions were brought pursuant to a statute, despite the fact that the complaint did

not indicate that the claim was proceeding under that statute, and that his complaint failed to comply with the notice requirements of that statute. "In order, to arrive at its conclusion, therefore, the Appellate Court had either to speculate or to resort to information outside the complaint. In ruling on the motion to strike, however, the Appellate Court was limited to the facts alleged in the plaintiff's complaint." Id., 278.

This same reasoning is applicable here. In order to come to the conclusion that the modification that resulted from the Department of Banking's intervention was non-binding, the lower courts resorted to speculation. In so doing, they improperly strayed from the facts alleged in the complaint.

In its statement in opposition to certification, rather than defend the lower court's reading of the pleadings, the Plaintiff raised a novel argument. The Plaintiff claimed that Mr. Piper conceded that the parties never reached a binding loan modification in his trial level brief in opposition to the motion to strike. See Cert. Opp. at 9 (A233).[14] This argument is misleading, and wrong. Mr. Piper did indeed desire to receive a loan modification directly from the Plaintiff – however, he received one following the intervention of the Department of Banking instead. And the "failure" mentioned in Mr. Piper's opposition brief references the failure to enter into a modification through the mediation process – after the Department of Banking's intervention and the Plaintiff's breach of the resulting modification.

If this Court upholds the Appellate Court's interpretation of the MVE requirement in full, Mr. Piper respectfully requests that it nonetheless reverse the Appellate Court's improper resolution of this factual dispute in favor of the Plaintiff.

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[14] In making this contention, the Plaintiff relies on the following excerpt from Mr. Piper's trial level brief in opposition: "The delay, the misrepresentations, and the failure of Plaintiff to conduct itself in an equitable manner consistent with its duty to Defendants are all raised in their Special Defenses and Counterclaims. Refusing to give them a loan modification is not. While Mr. Piper and Ms. Blowers wish they could have received a loan modification from the Plaintiff, **their pleadings are based on the Plaintiff's conduct and not on the failure to enter into a modification;** nowhere do they request court-ordered modification of their loan." (emphasis included in the Plaintiff's brief in opposition to certification) (A73-74).

CONCLUSION & RELIEF SOUGHT

For the foregoing reasons, the Defendant-Appellant Mitchell Piper respectfully requests that this Court reverse the decision of the Appellate Court and remand this action for proceedings consistent with its decision: (1) allow Mr. Piper's special defenses to proceed along with the complaint; (2) allow Mr. Piper's counterclaims to be joined to the complaint, and (3) evaluate the sufficiency of Mr. Piper's counterclaims.

Respectfully Submitted,

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CERTIFICATION PURSUANT TO SECTIONS 62-7 AND 67-2

I hereby certify that this brief and the appendix thereto are in compliance with all the provisions of Sections 62-7 and 67-2 of the Rules of Appellate Procedure.

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CERTIFICATION PURSUANT TO SECTION 67-2

I hereby certify pursuant to Section 67-2 of the Rules of Appellate Procedure that on the 13th day of April, 2018, (1) the foregoing document and any attachments thereto have been redacted or do not contain any names or other personal identifying information that is prohibited from disclosure by rule, statute, court order, or case law; (2) the brief and the appendix thereto being filed with the appellate clerk are true copies of the brief and the appendix thereto that were submitted electronically; and (3) a copy of this brief and the appendix thereto was delivered electronically to the last known email address of each counsel of record for whom an email address has been provided.

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CERTIFICATION PURSUANT TO SECTION 67-2(i)

I hereby certify pursuant to Section 67-2(i) of the Rules of Appellate Procedure that on this 13th day of April, 2018, a copy of this brief and the appendix thereto has been sent to each counsel of record, in compliance with Section 62-7 of the Rules of Appellate Procedure, and to any trial judge who rendered a decision that is the subject matter of the appeal, as follows:

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