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.

REPLY BRIEF OF DEFENDANT-APPELLANT MITCHELL PIPER WITH ATTACHED APPENDIX

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THE DEFENDANT'S REPLY TO THE PLAINTIFF'S BRIEF

The Defendant Mitchell Piper asks this Court to subject his counterclaims and special defenses to the same Practice Book standards and limits that apply to other defendants in civil suits. If the Court is not so inclined, he asks that the Court find his allegations to be sufficiently related to the "enforcement" of his note and mortgage. And he asks that the Court construe his pleadings to include allegations about a breached loan modification. In opposing these requests, the plaintiff traffics in irrelevance and mischaracterizes the nature of Piper's pleadings and arguments. Because its arguments fall flat, Piper respectfully requests that this Court reverse the judgment of the Superior Court and remand this case for further proceedings.

1. This Is an Equitable Action and Not a Breach of Contract Action at Law.

The plaintiff erroneously claims a foreclosure action is, "in essence," a breach of contract case. Pl.'s Br., 8. The plaintiff's action would be, in essence, a breach of contract case were it merely a suit on the note, through an action at law. But the plaintiff chose to bring an equitable action, to foreclose on its mortgage and take Piper's home. *Hartford Fed. Sav. & Loan Assn.* v. *Lenczyk*, 153 Conn. 457, 463 (1966) ("Foreclosure is particularly an equitable action, and the court may entertain such questions as are necessary to be determined in order that complete justice be done."). The plaintiff has invited judicial scrutiny over a broader set of facts than a contract claim would invite. See *Goodwin* v. *Keney*, 49 Conn. 563, 569 (1882) (party applying for equitable relief "has exposed himself to the full force of the maxim" that "he who seeks equity must himself do equity").

Moreover, the "making, validity, or enforcement" requirement advanced by the plaintiff is inconsistent with the rule that "[e]quitable remedies are not bound by formula but are molded to the needs of justice." *Morgera* v. *Chiappardi*, 74 Conn. App. 442, 457 (2003); see also *Stolman* v. *Boston Furniture Co.*, 120 Conn 235, 240 (1935) ("Equity never does anything by halves.") To ensure that "complete justice is done" in an equitable proceeding,

"the trial court may examine all relevant factors . . . The determination of what equity requires in a particular case . . . is a matter of discretion for the trial court." *Ne. Sav., F.A.* v. *Hintlian*, 241 Conn. 269, 275 (1997) (internal citations and quotations omitted). A trial court that enters a judgment of foreclosure without hearing evidence to support a defendant's special defenses and counterclaims errs by failing to exercise this discretion. *Higgins* v. *Karp*, 243 Conn. 495, 504 (1998).

The "making, validity, or enforcement" requirement, an incantation with no explanation for its initial adoption by the Appellate Court,[1] runs afoul of our policy of "bring[ing] about a trial on the merits of a dispute whenever possible and . . . secur[ing] for the litigant his [or her] day in court . . . ." *In re Jose B.*, 303 Conn. 569, 579 (2012), superseded by statute on other grounds, General Statutes § 45a-608n. It stops real, legitimate special defenses and counterclaims from being heard. Given its background and the myriad ways it contradicts the ends of justice more generally, the "making, validity, or

[1] See *Southbridge Associates, LLC* v. *Garofalo*, 53 Conn. App. 11, 16, cert denied, 249 Conn 919 (1999) (adopting "making, validity, or enforcement" requirement for special defenses) and *New Haven Sav. Bank* v. *LaPlace*, 66 Conn. App. 1, 10, cert denied, 258 Conn. 942 (2001) (adopting requirement for counterclaims).

The plaintiff's summary of the requirement's history is inaccurate in at least two respects. In *Mechanics Sav. Bank* v. *Townley Corp.*, 38 Conn. App. 571 (1995) the plaintiff asked the Appellate Court to apply the "making, validity, or enforcement" requirement. The Court instead applied the transaction test without any further requirements. It did not "approve" of the "making, validity, or enforcement" requirement. Cf. Pl.'s Br., 7.

Second, the plaintiff's portrayal of the relationship of, and holding with respect to, *CitiMortgage* v. *Rey*, 150 Conn. App. 595 (2014) and the "making, validity, or enforcement" requirement is misleading. See Pl.'s Br., 7-8. *Rey* was solely about counterclaims, rendering anything it contained about defenses mere dicta. *Rey*'s dicta about defenses applied only to "legal" defenses, (i.e., those available at common law when foreclosures were "at common law") rather than defenses available in equity. See *Rey*, 603; see also *Petterson* v. *Weinstock*, 106 Conn. 436, 442 (1927). Furthermore, the notion that the Appellate Court in *Rey* "approvingly" cited the trial court's rationale for striking the defendant's counterclaims is perplexing. Pl.'s Br., 7. The Court reversed the trial court's holding and rejected the manner by which the trial court deployed the "making, validity, or enforcement" requirement. *Rey*, 602. The Court cited the trial court's rejected rationale when it described the case's procedural history. Id., 600-01.

enforcement" requirement is not some pillar of jurisprudence entitled to stare decisis protection. See, e.g., *Conway* v. *Town of Wilton*, 238 Conn. 653, 660 (1996).

The plaintiff offers no evidence to support this deviation from equity. It does not and cannot claim that any special emergency exists that would justify subjecting foreclosure defendants to a standard more limiting than what other defendants face. Cf. Conn. Const., art. 3, § 2. It offers only hyperbole, distortion, and an analogy to breach of contract claims that does not hold up in an equitable proceeding.

Piper respectfully requests that this Court eliminate the "making, validity, or enforcement" requirement.

2. This Court Has Never Implicitly or Explicitly Endorsed the "Making, Validity, or Enforcement" Requirement.

This is only the second case heard by this Court where the "making, validity, or enforcement" requirement is at issue. The plaintiff claimed that, during the first instance, this Court "implicitly affirmed the viability" of the "making, validity, or enforcement" requirement in *Thompson* v. *Orcutt*, 257 Conn. 301 (2001). Pl.'s Br., 14. But the plaintiff in *Thompson* v. *Orcutt* argued for the requirement. He lost. This Court did not endorse, adopt, or otherwise lend support to the "making, validity, or enforcement" requirement.[2]

Instead, this Court found the defendant's unclean hands defense was sufficiently developed such that the plaintiff's wrongful conduct had rendered the contract, a mortgage, invalid. But for its wrongful conduct, the plaintiff would have no way of bringing the foreclosure action. Here Piper's defenses go to the plaintiff's wrongful conduct both before

[2] The Appellate Court's decision in this matter was that Court's first time it grappled with *Thompson* v. *Orcutt*'s handling of the "making, validity, or enforcement" requirement.

The plaintiff is right in that, in two other decisions, the Appellate Court invoked the "making, validity, or enforcement" requirement in one part and cited *Thompson* v. *Orcutt* in some other part. See Pl.'s Br., 16, citing *Emigrant Mortgage Co.* v. *D'Agostino*, 94 Conn. App. 793 (2006) and *LaSalle Natl. Bank* v. *Meadows*, 69 Conn. App. 824 (2002). But, in both decisions, the Court only used *Thompson* v. *Orcutt* to analyze the unclean hands defenses at issue, see *Emigrant*, 823-24 and *LaSalle*, 836. It did not use *Thompson* v. *Orcutt* to support of the "making, validity, or enforcement" requirement.

and after the foreclosure commenced, during the process of enforcement, including its modification and subsequent unilateral attempts to further modify the note and mortgage. Were it not for the plaintiff's conduct here, Piper would be allowed to make payments on a modified note and mortgage. As in *Thompson* v. *Orcutt*, but for the plaintiff's wrongful conduct, it would have no way of bringing this foreclosure action. In other words, Piper's allegations and special defenses align with this Court's holding in *Thompson* v. *Orcutt*.

3. Practice Book § 10-10 Requires Trial Courts Apply Equitable Principles in Equitable Actions.

Thompson v. *Orcutt* applies to special defenses. With respect to counterclaims, Practice Book § 10-10 reads in relevant part:

> Supplemental pleadings showing matters arising since the original pleading may be filed in actions for equitable relief by either party. In any action for legal or equitable relief, any defendant may file counterclaims against any plaintiff . . . provided that each such counterclaim . . . arises out of the transaction or one of the transactions which is the subject of the plaintiff's complaint;

Section 10-10 explicitly permits, in equitable actions like foreclosures, a defendant to assert counterclaims based on post-complaint activity. In a foreclosure action, a court may, on the basis of post-complaint activity and other "equitable considerations and principles," withhold such relief or reduce the amount of claimed indebtedness. *Hamm* v. *Taylor*, 180 Conn. 491, 497 (1980). Practice Book § 10-10 requires a trial court to account for equitable considerations when applying the transaction test in a foreclosure. The "making, validity, or enforcement" requirement hamstrings a trial court's ability to account for equity.[3]

Piper made this point to the Appellate Court. Def.'s Br., 17. The Court claimed that applying the transaction test in this manner[4] would lead to a "flood of counterclaims and

[3] This is why the plaintiff's assertion that § 10-10 is "actually more restrictive" than the requirement, Pl.'s Br., 28, is unfounded.

[4] Piper had asked the Appellate Court to apply a "straightforward version of the transaction test with allowances for equitable considerations," *U.S. Bank, N.A.,* v. *Blowers*, 177 Conn. App. 622, 625-26 (2017), an admittedly ineloquent description of Practice Book § 10-10, i.e., the transaction test. The Appellate Court described and then rejected this

special defenses that would unnecessarily convolute and delay the foreclosure process."[5] *U.S. Bank, N.A.,* v. *Blowers*, 177 Conn. App. 622, 634 (2017). But the alternative left in place by the Court – the "making, validity, or enforcement" requirement with allowance for some (but apparently not all) situations when the defendant pleads that the note and mortgage are subject to a "binding" agreement and some situations (as in *Thompson* v. *Orcutt*) where "traditional notions of equity would not be served by [the requirement's] strict application," id., 633-634 – is too nebulous to guide any trial court.

Any requirement that goes beyond the transaction test would (1) undermine judicial economy by forcing mortgagors to file separate actions against the foreclosing plaintiffs even though there may be similar facts between the foreclosure and the separate action (i.e., the transaction test would otherwise be satisfied), thereby frustrating the purpose of the transaction test, or (2) discourage homeowners from filing suit at all. Neither would be a laudable result.

The plaintiff argued that, regardless, Piper's counterclaims would not survive the transaction test even if the "making, validity, or enforcement" requirement were eliminated. Pl.'s Br., 29. It cited three decisions for this proposition. But two were from actions seeking solely legal relief, and so in neither was the court required to adhere to Practice Book § 10-10's accounting for equitable considerations. See *Yorktown Heights, Inc.* v. *Rothman*, 2017 WL 5641546 (Oct. 23, 2017); *Bracken* v. *Welty*, 2011 WL 2150573 (May 5, 2011). In the third, *S. Windsor Cemetery Assn.* v. *Lindquist*, 114 Conn. App. 540, 548 (2009), the struck counterclaims – regarding damage done to the defendants when the plaintiff repaired some

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"straightforward" test in favor of its own formulation. *Blowers*, 634. The plaintiff's description about this interaction is inaccurate. See Pl.'s Br., 18 n. 17.

[5] While "flood" could be understood to be an acknowledgment of extensive misconduct within the mortgage industry, see Def.'s Br., 20-21, and potential grist for special defenses and counterclaims, the use of the term "unnecessarily" prejudges the merits of such defenses and counterclaims. Furthermore, it runs contrary to public policy in favor of protecting homeowners from such misconduct. See id., 20-23.

potholes – were too far afield to relate to the issue in the complaint, the status of a certain right-of-way. That decision has no persuasive value here.

4. Connecticut Is an Outlier in How Far It Tilts Joinder Rules to Foreclosing Plaintiffs.

In his initial brief, Piper explained that, with the exception of a few states, Connecticut treats foreclosure defendants' counterclaims and, especially, special defenses worse than do other states.[6] Def.'s Br., 9-10, 14-16. The plaintiff does not disagree but believes that some judicial foreclosure states' rules are not comparable to Connecticut's.

The plaintiff first argues that other states have different standards regarding what constitutes a valid defense. Pl.'s Br., 18-19. However, what constitutes a valid defense is not at issue in this case – at issue is the scope of otherwise valid defenses that can be brought in a foreclosure. The plaintiff also claims an example of another state's favorable treatment of foreclosure defendants is "irrelevant" because the decision involved "HUD-based defenses." Id., 18 n. 19. It offers no explanation, because none exists, that would explain why this Court should disregard a decision involving a foreclosing plaintiff's failure to follow mortgage servicing regulations. See *Reverse Mortgage Solutions, Inc.* v. *Goldwyn*, 408 P.3d 497 (Kan. App. 2017). And, although the plaintiff suggests that New York and Vermont would allow Piper's defenses to proceed, at least so far as his post-foreclosure, during-mediation allegations are concerned, the suggestion is based on foreclosing plaintiffs' statutory obligation to negotiate in good faith in those states. See Pl.'s Br., 19 n. 20. Connecticut has a "good faith" obligation, too; its homeowners have equally valid reasons to bring defenses. General Statutes § 49-31k(7); see also Def.'s Br., 3 n. 3.

The plaintiff then claims that states with compulsory counterclaims are irrelevant to a joinder discussion here because Connecticut has permissive counterclaims. Pl.'s Br., 32 n. 36. Connecticut is indeed a permissive state, but the plaintiff's point misconstrues the

[6] Pennsylvania, admittedly, presents a mixed bag in that its courts have been unwilling to extend counterclaims beyond those related to origination but are more generous than Connecticut with respect to special defenses.

compulsory counterclaim analysis. In determining the compulsory nature of a counterclaim, a court must first ask "can this claim be joined to the action?" To survive a motion to strike or dismiss for misjoinder, homeowners in all judicial states, compulsory or not, must answer that joinder question "yes." In other words, any state can find that a homeowner's counterclaims against their mortgage company did not arise out of the transaction or occurrence that is the subject matter of the mortgage company's complaint.

The plaintiff's characterization of four compulsory counterclaims states' joinder rules as "completely different" because they all have transaction tests based on Fed. R. Civ. P. 13 in contrast to Practice Book § 10-10 is curious. See. Pl.'s Br., 32 n. 36. Rule 13(a)(1) reads in relevant part:

> …A pleading must state as a counterclaim any claim that—at the time of its service—the pleader has against an opposing party if the claim (A) arises out of the transaction or occurrence that is the subject matter of the opposing party's claim.

Practice Book § 10-10 provides in relevant part that a counterclaim can be joined if: "each such counterclaim . . . arises out of the transaction or one of the transactions which is the subject of the plaintiff's complaint." The only difference between these states and a "permissive" jurisdiction like Connecticut is that, in states with a compulsory counterclaim rule, claims that can be joined but are not, are lost.

In any event, given (1) the discretion trial courts have to apply the transaction test and determine whether the counterclaims arise out of the same transaction or transactions, and (2) the Appellate Court's vague guidance that counterclaims could be asserted whenever "traditional notions of equity" would be inconsistent with the "making, validity, or enforcement" requirement, Connecticut homeowners are still worse off than other states' homeowners. Furthermore, they remain vulnerable to a *Tanasi*-like decision that applies res judicata to their "permissive" counterclaims. See § 5 of this brief.

5. Reliance on the "Making, Validity, or Enforcement" Requirement Leaves Connecticut Homeowners Vulnerable to Res Judicata Rulings.

In his initial brief, Piper explained that, even though Connecticut is a permissive counterclaim state, homeowners may find themselves exposed to a res judicata ruling if they try to file claims outside of their foreclosure action, citing *Tanasi* v. *CitiMortgage, Inc. et al.*, 257 F. Supp. 3d 232 (D. Conn. 2017). Def.'s Br., 12, 14. The court in *Tanasi* had combed through relevant caselaw and found this Court's opinion in *Weiss* v. *Weiss*, 297 Conn. 446, 459-61 (2010), to be controlling and persuasive. *Tanasi*, 257 F. Supp. 3d 255-56. The plaintiff nevertheless claimed *Tanasi* was Piper's "sole authority" and that *Tanasi* is "contrary to Connecticut appellate authority." Pl.'s Br. 30-31.

The plaintiff also falsely claimed that *Tanasi* "has been repudiated by other District Courts." Pl.'s Br., 31. In support, the plaintiff names the one recent decision that cited to the Appellate Court's holding in this matter while analyzing a res judicata argument: *Bailey* v. *Interbay Funding, LLC*, 2018 WL 1660553 at *9-*10 (D. Conn. Apr. 4, 2018), C.A. 55-72. But the court in *Bailey* never cited, nor otherwise "repudiated," *Tanasi*.[7] *Tanasi* remains an example of the pitfalls for homeowners created by the "making, validity, or enforcement" requirement.

Situations where counterclaims are dismissed under Practice Book § 10-10 are easy calls for a trial court hearing the homeowner's affirmative claims against their mortgage company. Cf. Pl.'s Br., 31. The harder calls are those like *Tanasi*, when the homeowner could have legitimately tried to bring counterclaims in a foreclosure but did not – perhaps because they worried about spending time and money in return for a *Blowers*-esque dismissal. But they still have to convince a subsequent court that their claims would have been struck for misjoinder by the court that heard the foreclosure action.[8] And, in such a

[7] The parties in *Bailey* did not invoke *Tanasi* in their papers, either, even though the mortgage company's counsel was the same in both actions and even though the mortgage company had obtained a ruling in its favor in *Tanasi* on res judicata.

[8] In situations where the foreclosure remains pending, the homeowners might face motions to dismiss based on the *Colorado River* abstention doctrine.

scenario, they are likely to face a mortgage company suddenly portraying the foreclosure joinder standard in *Blowers* as broad and permissive, complete with cites to the amorphous "making, validity, or enforcement" requirement replete with an exception for "traditional notions of equity." *Blowers*, 177 Conn. App. 633.

Given the uncertainty in res judicata analysis and permissive counterclaims, Piper's original point remains intact: because of the Appellate Court's opinion, and because of the muddled nature of the "making, validity, or enforcement" requirement, homeowners may be whipsawed by interpretative arbitrage and left with nothing. See Def.'s Br., 14.

6. The Plaintiff's Misconduct Falls Under "Enforcement."

Besides being inequitable and unduly harsh to homeowners, the "making, validity, or enforcement" requirement is too flimsy and unreliable. The plaintiff demonstrates the fuzziness of the "making, validity, or enforcement" requirement when it tries to explain what sorts of defenses would fall under "enforcement." See Pl.'s Br., 10-11. In doing so, the plaintiff conflates something more akin to the "validity" of the note and mortgage - their "enforceability" – with the actual word "enforcement," a separate concept involving "process." See Def.'s Br., 25 (Black's Law Dictionary's definition of "enforcement"), 27-29.

For instance, although Piper agrees that a loan from an unlicensed lender may be unenforceable, a loan from an unlicensed lender is void upon its making, and a mortgage for a void loan has no validity. See Pl.'s Br., 10, citing *Solomon* v. *Gilmore*, 248 Conn. 769, 785 (1999). Likewise, a mortgagor who alleges that the note or mortgage has been abandoned, discharged, released, or satisfied is claiming such instrument is no longer valid. The mortgagor is not claiming the enforcement process is flawed; they are claiming the documents are unenforceable. Similarly, mortgagors who alleged that the note and mortgage have been modified – and a new obligation made – as did Piper and as did the defendants in *T.D. Bank, N.A.* v. *M.J. Holdings, LLC*, 143 Conn. App. 322 (2013), are claiming that the original note and mortgage are no longer valid or enforceable because

they have been modified. See Def.'s Br., 24. The decisions cited by the plaintiff contain no analysis or explanation as to what "enforcement" is supposed to mean in a joinder context. See Pl.'s Br., 10, 12-13; see, e.g., *Bank of N.Y. Mellon* v. *Mauro*, 177 Conn. App. 295, 319 (2017); *Aurora Loan Servs., LLC* v. *Condron*, 181 Conn. App. 248, 276 (2018); *Nationstar Mortgage, LLC* v. *Mollo*, 180 Conn. App. 782, 784 (2018).

Rather than indulge more muddled analysis, this Court should eliminate the "making, validity, or enforcement" requirement. What would be left is the standard applicable to all civil cases: if a special defense contains the requisite elements and satisfies Practice Book § 10-50, it is allowed. If a counterclaim contains the requisite elements and satisfies Practice Book § 10-10, it is allowed.

Should the Court nevertheless wish to maintain the "making, validity, or enforcement" requirement in some form, Piper's defenses and counterclaims all relate to "enforcement." Def.'s Br., 24-29. In a foreclosure action, the parties' acts during the process of enforcement[9] are relevant for determining if the plaintiff is entitled to an equitable remedy as a result of the defendant's alleged default on the mortgage. Prejudgment matters[10] – e.g., whether the homeowner is in default and the parties' attempts to cure such default – should fall within "enforcement"[11] of the note and mortgage.

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[9] Foreclosure Mediation is part of the process of enforcement. See Pl.'s Br., 21.

[10] On the other hand, matters arising post-judgment are subject to General Statutes §§ 49-15, 52-212, and 52-212a, by the standards applicable to writs of audita querela, and by equitable considerations and principles. See *Wells Fargo Bank, N.A.* v. *Melahn*, 148 Conn. App. 1 (2014); *Bank of N.Y. Mellon* v. *Caruso*, 2015 WL 5626420 (*Ecker, J.*, Aug. 21, 2015).

[11] Incidentally, if this Court finds that a plaintiff's participation in foreclosure mediation is not part of "enforcement" or does not otherwise relate to the complaint in a foreclosure action, this Court should disallow future plaintiffs from recovering fees for any attorney time relating to foreclosure mediation sessions, as such time would not relate to enforcing the note and mortgage or otherwise obtaining a judgment of foreclosure per General Statutes § 52-249(a). The plaintiff here claimed no attorney fees for mediation.

7. Defenses and Counterclaims Going to the Amount Sought by the Plaintiff Are Directly Related to Its Foreclosure Action.

Practice Book § 23-18(a) contemplates situations where mortgagors interpose defenses going to the amount of the debt:

> In any action to foreclose a mortgage where no defense as to the amount of the mortgage debt is interposed, such debt may be proved by presenting to the judicial authority the original note and mortgage, together with the affidavit of the plaintiff or other person familiar with the indebtedness, stating what amount, including interest to the date of the hearing, is due, and that there is no setoff or counterclaim thereto.

A defense that challenges an aspect of the sought-after debt is inherently permitted in a foreclosure action.

The Plaintiff cited *New Haven Sav. Bank* v. *LaPlace*, 66 Conn. App. 1, 10-11 (2001) for the proposition that defenses relating to the amount of the debt (improperly rejecting payments, miscrediting payments, and failing to properly compute the interest due), however, did not relate to the "making, validity, or enforcement" of a note and mortgage. See Pl.'s Br., 16 n. 9. The Appellate Court categorized these as "fiduciary duty defenses," *LaPlace*, 11, and, therefore, not of the sort of inflated debt and improper charge allegations Piper makes here. Nevertheless, to the extent that *LaPlace* stands for the proposition that the amount of the debt sought by a foreclosing plaintiff and the complaint are not related, such a decision runs contrary to Practice Book § 23-18(a).

8. Piper Adequately Pleaded That the Plaintiff Breached a Modification.

Piper pleaded that he received a modification and that the plaintiff unilaterally elected to demand more each month than what was contemplated in the modification. See A23-A24, ¶¶ 12-16. Even if the pleadings were phrased to satisfy the plaintiff's suggestions, the ultimate meaning of the allegations would remain the same. There is hardly any possible alternative meaning to Piper's allegations. Which other party could have received a modification besides Piper? Which other party could have agreed to modify the loan

besides the plaintiff? Why would the plaintiff's demand for higher payments be relevant, and tortious, if the loan had not been modified?

Even if the plaintiff could claim that Piper's pleadings were ambiguous, it should have either filed a request to revise or answered and conducted discovery as to the nature of Piper's allegations. Instead, the plaintiff chose to move to strike notwithstanding the deference in interpretation due to a non-moving party. Because Piper's allegations should have been read in the manner most favorable to the non-moving party, and because his allegations can only be interpreted in one reasonable way, he asks that his claims be allowed to proceed.

9. The Plaintiff Mischaracterized Piper's Allegations and the Foreclosure Mediation Program.

Piper's claims and defenses focus on three categories of wrongdoing: (1) acts relating to the plaintiff's breach of a modification and its failure to convert other trial modifications on which Piper performed into permanent modifications[12] that took place before the foreclosure began, (2) acts relating to the plaintiff's failure to mediate in good faith or otherwise rectify its past failures while the foreclosure was pending, and (3) the plaintiff's wrongful imposition of costly force-placed insurance. Each is valid and relates to the acts alleged in the complaint.

In order to make its arguments, however, the plaintiff repeatedly omits one or two of these categories when referencing Piper's claims and defenses. See, e.g., Pl.'s Br., 2-3 (omitting pre-foreclosure allegations), 12 (only discussing allegations regarding plaintiff's

[12] The plaintiff claims that, following a homeowner's successful completion of a trial plan, a "mortgagee may (but is not required to) offer a binding agreement to permanently modify the mortgage." Pl.'s Br., 5 n.8. However, under many of the programs in which the plaintiff's agent and servicer participated during the relevant period, and under the conditions of the offers contained in such programs' trial plans, mortgage companies are required to offer homeowners binding agreements so long as the homeowner remains in compliance with the trial plan's requirements. See, e.g., *Wigod* v. *Wells Fargo Bank, N.A.*, 673 F.3d 547, 563 (7th Cir. 2012) (analyzing HAMP trial modifications).

failure to mediate in good faith), and 19-20, 26 (omitting force-placed insurance claims). The plaintiff also mischaracterizes Piper's allegations, misrepresenting them as "failing to offer [Piper] a permanent modification in the Foreclosure Mediation Program," id., 2-3, and misrepresents the nature of the Foreclosure Mediation Program, calling it a forum for "settlement discussions."[13] Id., 4, 12.

The plaintiff also argues that the Foreclosure Mediation Program offers protection to defendants whose claims and defenses do not satisfy the "making, validity, or enforcement" requirement. Pl.'s Br., 34 n. 40. Even if that argument had merit, the Program is scheduled to sunset in less than a year, on June 30, 2019. See, e.g., General Statutes § 49-31n(c)(7). As a result, homeowners who enter foreclosure after that date will have even less protection from unscrupulous mortgage companies.

The plaintiff also misrepresents mortgage companies' obligations to their customers, both within and outside of the Foreclosure Mediation Program. Despite the plaintiff's demagoguery about the potential consequences of a reversal,[14] Pl.'s Br., 20 n. 23 (imagining that a rejected job application could provide grounds for a defense to a foreclosure), 21, 35, mortgage companies will not react to a decision in favor of Piper by

[13] Foreclosure mediation discussions are not confidential primarily because bona fide "settlement" discussions about defenses or claims are rare. Instead parties usually discuss homeowners' applications for loan workout programs. Parties and mediators file detailed public reports about mediation discussions and the loan workouts discussed. See General Statutes §§ 49-31n(c)(3), (4) (initial and final reports), id. § 49-31n(c)(2) (detailed reports of mediation sessions). Parties must demonstrate good cause in order to extend or terminate mediation. Demonstrating good cause means describing the substance of mediations publicly in hearings or in filings. See General Statutes § 49-31n(c)(1). In sum, foreclosure mediation is quite different than traditional mediation or other types of settlements or negotiations about which evidence can be excluded.

[14] The plaintiff's parade of horribles ignores considerations like its ability to recover the litigation costs through deficiency proceedings, financially distressed homeowners' weakened ability to engage in protracted litigation or benefit from limited nonprofit representation, and the courts' ability to eliminate meritless claims and defenses through devices like summary judgment as recognized by Judge Prescott in his dissent.

taking their ball and going home.[15] Along with their statutory obligation to participate in foreclosure mediation in good faith, mortgage companies are usually subject to one or more federal requirements that obligate them to solicit their customers for, and engage their customers in discussions about, loan workouts.[16] Taking the plaintiff at its word means that it is willing to breach these obligations, and commence and complete unnecessary and improper foreclosures.

10. The Plaintiff Cannot Ask for Alternative Grounds for Affirmance.

The plaintiff suggests that it wants alternative grounds for affirmance, claiming that neither Piper's counterclaims nor his special defenses constitute valid claims or defenses, Pl.'s Br., 31 n.34 (counterclaims); id., 17 n.1, 19-20 (special defenses), and that the Statute of Frauds is somehow relevant, id., 23. The trial court, however, already found that Piper's defenses were sufficient; its basis for striking the defenses was its "making, validity, or enforcement" analysis. *U.S. Bank, N.A.* v. *Blowers*, 2015 WL 9911489, *6 (equitable estoppel), *8 (unclean hands) (Dec. 28, 2015). If the plaintiff disagreed with the trial court regarding the special defenses, or if it wanted this Court to examine the adequacy of the counterclaims' allegations or the relevancy of the Statute of Frauds, it should have provided notice of this alternative grounds for affirmance by filing its own preliminary statement of

[15] One recent study does suggest that mortgage companies do take their ball and go home more often in judicial foreclosure states than in non-judicial states. Feinstein, Brian, "Judging Judicial Foreclosure," *Journal of Empirical Legal Studies*, Vol. 15, No. 2 (last revised Jan. 10, 2018). Specifically, mortgage companies issue somewhat fewer subprime loans in judicial foreclosure states than in non-judicial states, presumably because subprime loans are more likely to go into foreclosure and because such foreclosures cost more in judicial foreclosure states. Were a ruling in Piper's favor to somehow have a significant effect on the mortgage industry, a similar result of "fewer foreclosures because lenders underwrite fewer risky mortgages" would be a welcome development.

[16] See, e.g., Def.'s Br., 23. These are requirements. These are not "strong encouragements." Cf. Pl.'s Br., 34.

issues pursuant to Practice Book § 63-4(a)(1). It did not. Its arguments are not ripe for debate.[17]

CONCLUSION & RELIEF SOUGHT

For the foregoing reasons, the Defendant-Appellant Mitchell Piper respectfully requests that this Court reverse the judgment of the Superior Court and remand this action for proceedings consistent with its decision.

Respectfully Submitted,

THE DEFENDANT-APPELLANT
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[17] Should the Court wish to delve into either point, Piper (1) requests the opportunity to provide supplemental briefing and (2) with respect to his negligence and CUTPA counterclaims, refers the Court to the briefing in the pending matter *Cenatiempo* v. *Bank of Amer.*, A.C. 40707 (motion to transfer sub judice as of June 25, 2018).

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.

By: /422009/
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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 July, 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 July, 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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