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Appellate Division–Second Department Docket No. 2019-00544

Court of Appeals

of the

State of New York

FEDERAL NATIONAL MORTGAGE ASSOCIATION ("FANNIE MAE"),
a corporation organized and existing under the laws of the United States of America,

Plaintiff-Appellant,

– against –

MAXI JEANTY a/k/a Maxi Jeanty, Jr. and SHERLEY JEANTY
a/k/a Sherley Adrien Jeanty,

Defendants-Respondents,

(For Continuation of Caption See Inside Cover)

BRIEF FOR *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

LEGAL SERVICES NYC
Attorneys for Amici Curiae Legal Services NYC, Access Justice Brooklyn, Brooklyn Legal Services Corporation A, CAMBA, Inc., The Center for Elder Law and Justice, The City Bar Justice Center, Empire Justice Center, The Frank H. Hiscock Legal Aid Society, Grow Brooklyn, Inc., JASA Legal Services for Elder Justice, The Legal Aid Bureau of Buffalo, Inc., The Legal Aid Society, The Legal Aid Society of Mid-New York, Inc., The Legal Aid Society of Rockland County, Inc., Legal Assistance of Western New York, Inc., Legal Services of the Hudson Valley, Long Island Housing Services, Mobilization for Justice, Inc., Nassau Suffolk Law Services Committee, Inc., New York Legal Assistance Group, Queens Volunteer Lawyer Project, Inc., Teamsters Local 237 Legal Services Plan, and The Western New York Law Center
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– and –

CITY OF NEW YORK ENVIRONMENTAL CONTROL BOARD, CITY OF NEW YORK PARKING VIOLATIONS BUREAU, CITY OF NEW YORK TRANSIT ADJUDICATION BUREAU and "JOHN DOE," said name being fictitious, it being the intention of Plaintiff to designate any and all occupants of the premises being foreclosed herein, and any parties, corporations or entities, if any, having or claiming an interest or lien upon the mortgaged premises,

Defendants.

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PRELIMINARY STATEMENT

In this appeal Plaintiff-Appellant seeks to evade the operation of longstanding statute of limitations principles by arguing that Defendants-Respondents' application for a modification of the mortgage loan under the Home Affordable Modification Program ("HAMP") was an acknowledgment of the debt or an unequivocal promise to pay the debt for purposes of resetting the statute of limitations. In fact, these applications are the very opposite of an acknowledgment of the debt and a promise to pay. Like all HAMP modifications, the modification application process required the borrowers to enter a trial modification plan whereby they agreed to make reduced payments for at least three months before they could be offered a permanent modification. Nothing about the process of applying for a permanent loan modification acknowledges the validity of the debt or a promise to pay in full.

One of the most common tools for resolving mortgage distress is a mortgage loan modification, which requires borrowers to submit applications with information about their household income, and, if approved, enter a trial modification under which they make trial payments in an amount that differs from the amount required by the underlying note and mortgage. After completing a trial modification, borrowers may be, but frequently are not, approved for a "permanent" modification of their mortgage loan, which finally resolves the

default and leads to a settlement and discontinuance of any pending foreclosure actions. It is a lengthy process with which foreclosure practitioners and the courts adjudicating residential foreclosure cases are well-familiar.

Treating trial modifications, or trial payments made under them, as having renewed the statute of limitations would undermine New York's comprehensive statutory and administrative framework that was developed over more than a decade to encourage home-saving, affordable loan modifications. It also would not reflect reality, because borrowers' applications to modify the terms of their mortgage loans are the very antithesis of acknowledgment of the existing debt or a promise to pay the debt in full.

The Appellate Division correctly determined in this case, as it has done in others, that entering and making payments under a trial modification is neither an acknowledgment of the debt nor an unequivocal promise to pay the debt for purposes of tolling the statute of limitations. Treating such agreements and corresponding payments as re-setting the limitations period would ignore how and why these agreements were entered into and subvert the intentions of the parties. Moreover, treating trial modifications or trial payments as resetting the statute of limitations undermines state laws and policy meant to preserve legal defenses, which explicitly prohibit conditioning loan modifications on a waiver of defenses such as the statute of limitations defense.

INTERESTS OF AMICI

Amici Legal Services NYC, Access Justice Brooklyn, Brooklyn Legal Services Corporation A, CAMBA, Inc., The Center for Elder Law & Justice, The City Bar Justice Center, Empire Justice Center, The Frank H. Hiscock Legal Aid Society, Grow Brooklyn, Inc., JASA/Legal Services for Elder Justice, The Legal Aid Bureau of Buffalo, Inc., The Legal Aid Society, The Legal Aid Society of Mid-New York, Inc., The Legal Aid Society of Rockland County, Inc., Legal Assistance of Western New York, Inc., Legal Services of the Hudson Valley, Long Island Housing Services, Mobilization for Justice, Inc., Nassau Suffolk Law Services Committee, Inc., New York Legal Assistance Group, Queens Volunteer Lawyers Project, Inc., Teamsters Local 237 Legal Services Plan and The Western New York Law Center are non-profit organizations that provide free legal services to distressed homeowners and low-income New Yorkers. They also engage in public education, outreach and policy advocacy to protect homeowners' rights in the foreclosure process.

Amici have collectively represented homeowners in thousands of foreclosure proceedings across New York State and regularly represent homeowners at settlement conferences conducted pursuant to Rule 3408 of the Civil Practice Law and Rules ("CPLR"). Additionally, they represent homeowners who have applied for loan modifications and who have made trial payments under trial modifications

which lenders fail to convert into permanent modifications, even after multiple trial payments were timely made. *Amici's* thousands of clients who have entered into trial modifications and made trial payments under trial modifications, but whose lenders failed to convert their trial modifications into permanent modifications will be impacted by the Court's decision in this case should the Appellate Division's decision be reversed.

ARGUMENT

I. Loan Modifications and the Home Affordable Modification Program: Trial Modifications Often Did Not Lead to Permanent Settlements and Left Foreclosure Actions Pending.

Facing the financial crisis of 2008 and the resulting implosion of the housing market, Congress enacted the Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343. The Act authorized the Secretary of Treasury to create an array of programs to "facilitate loan modifications to prevent avoidable foreclosures." *Id.* § 109; 12 U.S.C. § 5219(a). Central to that initiative was the Home Affordable Modification Program, commonly known as "HAMP." *Young v. Wells Fargo Bank, N.A.*, 717 F.3d 224, 228 (1st Cir. 2013). Under HAMP, "[t]he Secretary [of Treasury] negotiated Servicer Participation Agreements (SPAs) with dozens of home loan servicers . . . Under the terms of the SPAs, servicers agreed to identify homeowners who were in default or would likely soon be in default on their mortgage payments, and to modify the loans of those eligible under the

program. In exchange, servicers would receive a $1,000 payment for each permanent modification, along with other incentives." *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547, 556 (7th Cir. 2012).[1] HAMP accepted applications from April 2009 through December 2016. Making Home Affordable, https://home.treasury.gov/data/troubled-assets-relief-program/housing/mha (last accessed August 9, 2022).

When evaluating HAMP applications, after determining threshold eligibility criteria, servicers applied a "waterfall"—calculating the total amount owed, then determining which of the available modification terms would result in a new modified monthly payment at or below 31% of a borrower's gross monthly income. *U.S. Bank Nat'l Ass'n v. Sarmiento*, 121 A.D.3d 187, 198-99 (2d Dep't 2014). Under this process, servicers capitalized the outstanding arrears into a new modified principal balance, and then tried to achieve the target payment by reducing the interest rate to as low as 2%, then extending the term of the loan to as long as forty years, and then offering principal forbearance, where a percentage of the modified principal balance was deferred until either the property was sold or the loan satisfied. Jean Braucher, *Humpty Dumpty and the Foreclosure Crisis:*

[1] Mortgage servicers are intermediaries who process mortgage payments on behalf of lenders, but the complex and diffuse ownership structures caused by the securitization of mortgages into investment trusts gave mortgage servicers an outsized role in the modification process. Diane E. Thompson, *Foreclosing Modifications: How Servicer Incentives Discourage Loan Modifications*, 86 Wash. L. Rev. 755, 763-66 (2011).

Lessons from the Lackluster First Year of the Home Affordable Modification Program (HAMP), 52 Ariz. L. Rev. 727, 751 (2010). Upon determining that a borrower was facially eligible, the servicer conducted a Net Present Value ("NPV") test: a proprietary formula that compared the estimated value in modifying the loan with proceeding to foreclosure. *Id*., 750. In other words, the HAMP program permitted servicers to deny distressed homeowners loan modifications if their proprietary algorithms determined that it would be more profitable for them to proceed to a judgment of foreclosure and sale than to enter into a HAMP modification.

The HAMP guidelines required servicers, after determining that a borrower was eligible for a HAMP modification, to offer the borrower a Trial Period Plan, often referred to as a "trial modification." *Young*, 717 F.3d at 229. HAMP guidelines required the borrower to make three payments under the trial modification, after which, if the borrower remained eligible under the HAMP guidelines, the borrower and servicer would enter into a permanent modification agreement. *Id. See also* Home Affordable Modification Program Guidelines March 4, 2009, at 9, *available at* https://home.treasury.gov/system/files/136/archive-documents/modification_program_guidelines.pdf (last accessed August 9, 2022) ("Successful completion of the trial modification period and entry into program agreements between the servicer and Treasury's financial agent are prerequisites

for any payments to the lender/investor, servicer, or borrower."). While this seems straightforward enough, only 53% of borrowers who entered into trial modifications were successful in converting those trial modifications into permanent modifications. Sumit Agarwal *et al*, *Policy Intervention in Debt Renegotiation: Evidence from the Home Affordable Modification Program*, Journal of Political Economy, at 13 (2016) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2138314) (last accessed August 9, 2022).

There were many reasons why the remaining 47% of trial modifications failed to convert to permanent modifications, but in individual cases, it was often hard for borrowers to know why the trial modification "failed." Some homeowners reported making three or more trial payments, at which point the servicer requested the homeowner to submit brand-new modification applications, without explaining why that was required. *E.g.* *Pandit v. Saxon Mortgage Services, Inc.*, 2012 WL 4174888 at *2 (E.D.N.Y. Sept. 17, 2012); *Stolba v. Wells Fargo & Co.*, 2011 WL 3444078 at *1 (D.N.J. Aug. 8, 2011). Other borrowers in trial modifications made trial payments for months before being told that their modification was denied because the borrower had not sufficiently proven a "hardship" justifying a modification. *Allen v. CitiMortgage, Inc.*, 2011 WL 3425665 at *2 (D. Md. Aug. 4, 2011). Sometimes servicing rights were transferred

during a trial modification, and the new servicer refused to honor trial modifications offered by prior servicers. *Gass v. CitiMortgage, Inc.*, 2012 WL 3201400 at * 2 (N. D. Ga June 25, 2012). Servicers frequently required borrowers to continue making "trial" modification payments for far longer than the three months mandated by HAMP guidelines. For example, in October 2012, there were more than 11,000 active trial modifications that had lasted for six months or longer, demonstrating that servicers regularly failed to promptly convert trial modifications to permanent modifications even when the borrowers exceeded what was required. Making Home Affordable Program Performance Report Through October 2012, at 10, available at https://home.treasury.gov/sites/default/files/initiatives/financial-stability/reports/Documents/October%202012%20MHA%20Report%20Final.pdf (last accessed August 9, 2022). *Amici* have also represented many homeowners who made payments under trial modifications for months, only to be ultimately denied a permanent modification because of various "title issues" belatedly identified by the servicer.

Regardless of the reasons for their failure, many foreclosure defendants who entered into (and fully performed under) HAMP trial modifications did not achieve permanent, home-saving loan modifications, and those homeowners remained defendants in ongoing foreclosure actions. As detailed below, homeowners who

entered into trial modifications in hopes of securing modified mortgage terms to permit them to avert foreclosure never understood their trial modifications as an unconditional promise to pay the full existing debt or an agreement to waive the statute of limitations. Rather, many of these homeowners, who were often defendants in pending foreclosure actions, had raised defenses to the foreclosure case yet applied for loan modifications in an effort to settle the underlying foreclosure case on mutually agreeable terms. Servicers insisted on treating trial modifications as unenforceable preliminary agreements, and courts denied enforcement of those agreements and declined to compel conversion of trial modifications into permanent modifications. *See, e.g.*, *Wells Fargo v. Meyers*, 108 A.D.3d 9 (2d Dep't 2013) (HAMP trial modification not enforceable as binding obligations); *Davis v. Citibank*, 116 A.D.3d 819 (2d Dep't 2014) (HAMP did not support private right of action for failure to convert trial modification to permanent modification).

II. New York State's Response to the Foreclosure Crisis Would Be Subverted if Trial Modifications or Trial Payments Renew or Waive the Statute of Limitations

A. New York's Response to the Foreclosure Crisis.

In addition to the federal response to the foreclosure crisis that began in 2008, New York also promulgated a comprehensive series of substantive measures to address the crisis. The primary legislation through which New York acted was

the Foreclosure Prevention and Responsible Lending Act, Laws of New York, 2008 ("FPRLA"), which enacted broad reforms to address the foreclosure crisis, amending New York's Real Property Actions and Proceedings Law, CPLR, Banking Law, General Obligations Law, Penal Law, Criminal Procedure Law, and Real Property Law, to address a range of mortgage lending and foreclosure practices. NY L. 2008 Ch. 472. The important issues of state policy, and New York's interest in establishing a "coherent policy" to address the foreclosure crisis, are clear from the legislative history of the FPRLA:

> New York State faces a foreclosure crisis of immense magnitude. Many families have lost their homes and entire neighborhoods have been devastated. In 2007, there were more than 52,000 foreclosure filings in the state – an increase of 10% from 2006 and 55% from 2005. These statistics, especially in light of inaction by the federal government, make clear the need for state action on this issue. This bill attempts to address the mortgage foreclosure crisis in two ways. First, this bill provides assistance to homeowners currently at risk of losing their homes by providing additional protections and foreclosure prevention opportunities for such homeowners. Second, this bill establishes further protections in the law to mitigate the possibility of similar crises in the future.

Senate Mem. in Support, L. 2008, Ch. 472. The FPRLA and other laws governing foreclosure actions on home loans have been amended several times to build upon its protections and increase the number of homes saved from foreclosure.

B. New York CPLR 3408 Settlement Conferences.

Perhaps the most critical protection established by the FPRLA was CPLR 3408, which established a mandatory court-supervised settlement conference

process for foreclosure actions involving "home loans."[2] N.Y. C.P.L.R. Rule 3408. The conferences are "for the purpose of holding settlement discussions pertaining to the relative rights and obligations of the parties under the mortgage loan documents, including but not limited to determining whether the parties can reach a mutually agreeable resolution *to help the defendant avoid losing his or her home*, and evaluating the potential for a resolution in which payment schedules or amounts may be modified or other workout options may be agreed to, and for whatever other purposes the court deems appropriate." N.Y. C.P.L.R. Rule 3408(a) (emphasis added).

In 2009, CPLR 3408 was amended to add a substantive obligation to "negotiate in good faith to reach a mutually agreeable resolution, including a loan modification, if possible," thereby strengthening substantive protections for borrowers and expressing the legislature's preference for affordable loan modifications. N.Y. C.P.L.R. Rule 3408(f). The legislative history of this amendment made clear that its purpose was "to ensure that both plaintiff and

[2] As first enacted, CPLR 3408 limited mandatory conferences to foreclosure actions involving "high-cost" or "sub-prime" home loans, but 2009 amendments broadened the scope to include all conforming loans (except reverse mortgages) taken on the principal residence of an individual on a one to four family property for primarily personal, family of household purposes. Subsequent amendments extended the protections to reverse mortgages and made these conferences a permanent feature of the judicial foreclosure process in New York. Part HH, 2018 Sess. Laws of N.Y., Ch. 58 (A. 9508-C).

defendant are prepared to participate in a meaningful effort at the settlement conference." Senate Mem. in Support, L. 2009, Ch. 507, at 1(B).

The rollout of New York's mandatory settlement conference coincided with the advent of HAMP. Accordingly, while HAMP was in existence, in most CPLR 3408 conferences the required "good faith" negotiation focused on defendants' HAMP applications and the lenders' and mortgage servicers' compliance with the mandates of that program. Many courts established specialized foreclosure settlement conference parts and developed considerable subject matter expertise on HAMP and other mortgage loss mitigation programs. New York courts developed a body of case law interpreting CPLR 3408, under which compliance with the requirements of HAMP became one of the primary indicia of a foreclosing plaintiff's compliance with the statutory duty to negotiate in good faith at settlement conferences. *E.g.*, *Onewest Bank, FSB v. Colace*, 130 A.D.3d 994 (2d Dep't 2015) (Reversing summary judgment and remitting for hearing to determine whether alleged violations of HAMP guidelines violated good faith requirement of CPLR 3408); *U.S. Bank N.A. v. Smith*, 123 A.D.3d 914 (2d Dep't 2014) (Affirming finding of failure to negotiate in good faith pursuant to CPLR 3408 based, in part, on failure to comply with HAMP guidelines and failure to seek waiver of investor restriction).

In 2016, additional amendments to CPLR 3408 addressed abuses associated with plaintiffs' participation in the settlement conference process and emphasized New York's keen interest in ensuring good faith negotiation at foreclosure settlement conferences and its clearly articulated desire to prevent foreclosure cases from proceeding on default. The 2016 amendments specified substantive criteria for evaluating good faith negotiation at settlement conferences and mandated statutory remedies when plaintiffs fail to negotiate in good faith. Among the specified criteria for evaluating plaintiffs' good faith negotiation is "[c]ompliance with applicable mortgage servicing laws, rules, regulations, investor directives, and *loss mitigation standards or options concerning loan modifications*, short sales, and deeds in lieu of foreclosure." N.Y. C.P.L.R. Rule 3408 (f)(2) (emphasis added). The remedies contemplated by amended CPLR 3408 include interest tolling, an award of actual damages, attorneys' fees and expenses to the defendant and a civil penalty payable to the State of New York, sufficient to deter repetition of the conduct but not to exceed $25,000. N.Y. C.P.L.R. Rule 3408 (i)-(k); N.Y. L. 2016, Ch. 73, Part Q, § 2.

The 2016 amendments also imposed obligations on the courts to provide information to homeowners appearing at their first settlement conferences about the need to answer foreclosure complaints and mandated a second opportunity for defendants to serve and file answers to foreclosure complaints within 30 days of

the first settlement conference. N.Y. C.P.L.R. Rule 3408(l)-(n). This provision reflects New York's policy to avert defaults in foreclosure actions and to preserve defendants' defenses to foreclosure actions, in recognition of the general policy favoring resolution of foreclosure actions on the merits. The inclusion of this provision mandating this second chance for defendants to answer the complaint in the very statute providing for foreclosure settlement conferences signaled the legislature's desire that efforts to negotiate loan modifications or other foreclosure avoiding solutions not be at the expense of defendants' rights to assert defenses and to contest foreclosure actions on the merits. That policy is undermined if trial modifications or trial payments are deemed to restart the statute of limitations.

New York also sought to protect against dual tracking—the practice of subjecting borrowers to a lengthy loan modification process while simultaneously proceeding to judgments of foreclosure and sale—by holding motion practice in abeyance during the mandatory settlement conference process. N.Y. C.P.L.R. Rule 3408(n) and 22 N.Y.C.R.R. § 202.12-a(c)(7). While this delay of motion practice is a crucial consumer protection for defendants because it protects against "dual tracking," it also means that homeowners who have asserted defenses to the foreclosure action must decide whether to accept modification offers before the court has adjudicated their defenses. The benefits to both lenders and homeowners of resolving these cases before protracted litigation would be reduced if the

execution of a trial modification or making payments thereunder were to be considered an express promise to pay the debt under the General Obligations Law. Instead, they should be considered what they are: steps made under an extended, and heavily supervised, settlement process.

C. The Department of Financial Services Regulations Governing Loss Mitigation.

In 2010, the New York State Banking Department, now known as the Department of Financial Services, promulgated emergency regulations under New York Banking Law Article 12-D to address the foreclosure crisis and establish greater consumer protections. Among other things, the regulations required that servicers "shall make reasonable and good faith efforts" to engage in loss mitigation to avoid foreclosure, and included provisions governing loan modifications, borrower counseling, escalation processes, alternative loss mitigation options, and foreclosure notification and compliance with CPLR 3408. 3 N.Y.C.R.R. § 419.7(a). The regulations also provided direction for day-to-day dealings between servicers and borrowers.[3]

As originally promulgated, Part 419 also specified that a "servicer shall not require a homeowner to waive legal claims and defenses as a condition of a loan

[3] DFS also maintains an administrative process whereby borrowers can file complaints when mortgage servicers violate the DFS mortgage servicing standards. *See* http://www.dfs.ny.gov/consumer/fileacomplaint.htm.

modification, forbearance or repayment plan." 3 N.Y.C.R.R. § 419.11(h) (2010). Accordingly, interpreting entry into a trial modification or making trial payments, as resetting the statute of limitations would effectively condition loss mitigation on waiver of legal claims and defenses in violation of this specific prohibition.

Although the Part 419 rules were originally promulgated as emergency regulations, on June 15, 2020 they were amended and adopted permanently through the formal rulemaking process. 3 N.Y.C.R.R. § 419. The prohibition against conditioning modifications on a waiver of claims was renumbered and adopted at 3 N.Y.C.R.R. § 419.7(j).

When viewed together, CPLR 3408 and the Part 419 Rules demonstrate that the State of New York seeks to encourage robust settlement discussions to avoid foreclosures and preserve homeownership, especially through mortgage modifications, wherever possible while also prioritizing disposition of foreclosure actions on the merits without conditioning loss mitigation options on borrowers' waiver of claims and defenses. Those policies would be undermined were this Court to rule that a borrower's entry into a trial modification or making of trial payments has the effect of depriving the borrower of the statute of limitations defense.

III. Trial Modifications Do Not Renew the Statute of Limitations.

A. Signing a Trial Modification Is Not an Express Promise to Pay the Full Debt.

Just like all borrowers who sought HAMP modifications, Mr. Jeanty submitted a loan modification application, and was required to sign a trial modification and make trial modification payments in order for his mortgage lender to consider him for a permanent modification. The agreement that Fannie Mae asserts was an express promise to repay the debt for purposes of resetting that statute of limitations was a HAMP trial modification: a form document supplied by the mortgage servicer to the homeowner whereby trial payments were to be made as a mandatory prerequisite to a permanent modification, which would alter the terms of the original loan agreement in order to reach affordable payments for the homeowner. Fannie Mae contends that by entering into this form agreement—effectively a contract of adhesion supplied by the lender as a condition for consideration for a permanent home-saving loan modification—Mr. Jeanty expressly and unconditionally promised to pay the underlying mortgage debt in full and agreed to waive the statute of limitations.

As a threshold matter, this Court must disentangle Fannie Mae's conflation of two separate statutory provisions, General Obligations Law § 17-101 and § 17-105. Recently this Court held that Section 17-101, which allows for the statute of limitations to be reset by a writing merely acknowledging the debt, does not apply

to mortgage foreclosures. *Batavia Townhouses, Ltd. v. Council of Churches Housing Development Fund Company, Inc.*, __ N.Y.3d __, 2022 N.Y. Slip Op. 03361, at *2 (May 24, 2022). Instead, "General Obligations Law § 17-105, by its express terms, is the sole statute governing the tolling or revival of the statute of limitations to foreclose a mortgage." *Id*. Accordingly, this Court has already rejected Fannie Mae's argument that the trial modification was an acknowledgement of the debt under § 17-101 that renewed the limitations period. (App. Br. 16, 21-22.)

> General Obligations Law § 17-105 provides, in relevant part that
>
> a promise to pay the mortgage debt, if made after the accrual of a right of action to foreclose the mortgage and made . . . by the express terms of a writing signed by the party to be charged is effective . . . to make the time limited for commencement of the action run from the date of the waiver or promise.

N.Y. Gen. Oblig. Law § 17-105(1). Trial modifications are not an express promise to pay the underlying debt. By their very terms, they are a temporary agreement whereby the lender and borrower agree to a test-run to see whether a borrower can afford to make different payments under a forthcoming possible permanent modification.

As part of the trial modification that is the subject of this appeal, the only express promise made by Mr. Jeanty was to make three monthly payments that were in a different amount than the monthly payments required under the terms of

his mortgage. (R. 178, ¶ 2.) The trial modification itself indicates that the trial payments are "an *estimate* of the payment that *will be* required under the modified loan terms, which *will be finalized*" later. (R. 178, ¶ 2.) This language, part of the form agreement drafted by the lender, is far from an "express promise to pay" the full underlying debt. The lender was merely predicting what the new modified payment might be if a permanent modification were ultimately offered and accepted.

The trial modification goes on to say that in exchange for the trial payments,

> the Lender will suspend any scheduled foreclosure sale, provided I continue to meet the obligations under this Plan, but any pending foreclosure action will not be dismissed and may immediately be resumed from the point at which it was suspended if this Plan terminates, and no new notice of default, notice of intent to accelerate and notice of acceleration or similar notice will be necessary to continue the foreclosure action.

(R. 178 ¶ 2(B).) As if it were not already abundantly clear that the trial modification is just a test run for a potential permanent settlement, the trial modification continues by saying that the borrower "understand[s] that this Plan is not a modification of the Loan Documents and the Loan Documents will not be modified unless and until" the plan is completed and both parties execute a permanent modification agreement. (R. 179 ¶ 2(G).)

At best, any reference to a permanent modification was simply discussion of a possible future event. *Freedom Mortgage Corp. v. Engel*, 37 N.Y.3d 1, 26-27

(2021). As this Court recently held in *Freedom Mortgage Corporation v. Engel*, evaluating whether an event has an effect on the statute of limitations must serve the objectives of "'finality, certainty and predictability' to the benefit of both borrowers and noteholders" and "should not turn on courts' after-the-fact analysis of the significance of subsequent conduct and correspondence between the parties occurring months, if not years" after the event in question. *Id.* at 32. Here, the four corners of the trial modification make clear that the agreement between the parties was merely to start a trial modification in the hopes that both parties would ultimately agree to a permanent modification. The Appellate Division correctly held that "any condition to repay the debt was conditioned on the parties reaching a permanent agreement." (R. 315.)

Absent an express promise to pay in the trial modification itself, Fannie Mae argues that a single paragraph acknowledging that the terms of the underlying note and mortgage remain in effect renewed Mr. Jeanty's promise to pay contained in the underlying note and mortgage. (App. Br. 18-19.) This circular argument cannot be reconciled with the very purpose of trial modifications, with other language in the trial modification agreement, or with common sense. Mr. Jeanty entered into the trial modification with the express purpose of *modifying* or changing the terms of the underlying note and mortgage, not to continue making payments under their original terms.

There is no reasonable reading of the trial modification which requires borrowers to waive every conceivable defense to foreclosure and to make an express and unqualified promise to repay the full debt, but which allows the lender unfettered discretion to deny a permanent modification for any reason or no reason at all. Trial modifications, accordingly, cannot be deemed express promises to pay under General Obligations Law § 17-105.

B. Making Payments Under a Trial Modification Does Not Reset the Statute of Limitations.

New York's General Obligations Law also provides that a partial payment on a mortgage loan that is "effective to revive an action to recover such indebtedness . . ." also extends the statute of limitations to six years from the date of the payment. N.Y. Gen. Oblig. Law. § 17-107(1). However, it is well settled that in order to toll a statute of limitations, it must be shown that there was payment of an "admitted debt, made and accepted as such, accompanied by circumstances amounting to an absolute and unqualified acknowledgment by the debtor of more being due, from which a promise may be inferred to pay the remainder.'" *Lew Morris Demolition Co. v. Board of Educ. Of City of N.Y.*, 40 N.Y.2d 516, 521 (1976) (internal citations omitted). *See also Nationstar Mortgage, LLC v. Dorsin*, 180 A.D.3d 1054, 1056 (2d Dep't 2020) (Trial payments "were made for the purpose of reaching an agreement to modify the terms of the parties' contract, and any promise to pay the remainder of the debt that

could be inferred in such circumstances would merely be a promise conditioned upon the parties reaching a mutually satisfactory modification agreement."). *Cf.* *U.S. Bank National Association v. Martin*, 144 A.D.3d 891, 892-93 (2d Dep't 2016) (Payment "made as a condition to receiving an extension of the bankruptcy stay . . . did not constitute an unqualified acknowledgement of the debt or manifest a promise to pay the remainder").

When a borrower makes payments under a HAMP trial modification, as described above, the trial payments are made in furtherance of settlement. Since the payments are temporary, the loan has not yet been modified, and final mortgage modification terms are not set, with the borrower's payments being entirely conditional. Instead of an "absolute and unqualified acknowledgment . . . of more being due," each trial payment is an act of good faith focused on an achieving a possible, but not guaranteed, settlement by way of a permanent modification.

This is particularly true when the homeowner is in foreclosure. Under almost every industry mortgage modification program, including HAMP, the borrower does not agree to "pay the remainder" of the debt in anticipation of the trial. Instead, each payment is made to facilitate settlement. Should the lender decide not to offer a permanent modification, both parties have preserved their legal claims; a foreclosing lender may proceed to prosecute its action, and the borrower may

proceed on their defenses and counterclaims. It would be odd indeed for the Court to rule that payments on trial modifications reset the statute of limitations when New York State banking regulations explicitly prohibit conditioning the offer of even a trial modification on a waiver of any legal claims or defenses by the borrower. *See* 3 N.Y.C.R.R. § 419.7(j).

So, too, in this case. Mr. Jeanty made seven trial payments in anticipation of settlement. When his trial modification did not convert into a final modification both parties proceeded to litigate the foreclosure action. In fact, the lender continued to litigate the action for an additional five years before eventually discontinuing it.

Because trial modification payments—and in particular the trial payments made by Mr. Jeanty in this case—are made in hope of settlement, this Court's holding in *Petito v. Piffath*, 85 N.Y.2d 1 (1994), is instructive. In *Petito*, this Court held that a payment the defendant made in settlement of a foreclosure action was not a partial payment sufficient to reset the statute of limitations. *Id.* at 9. The defendant had previously been sued in foreclosure for failure to pay a secured debt. The parties settled that case by agreeing that Piffath would make a payment and that the creditor in that first action would transfer the mortgage securing the remaining debt to a third party. Piffath made the payment, and the mortgage debt

was subsequently assigned to Petito, who then sued to recover the remainder of the debt more than six years after the first foreclosure had been commenced.

In determining whether the payment made to settle the prior foreclosure reset the statute of limitations under § 17-107, this Court held that defendant's payment represented a new obligation in exchange for the foreclosing plaintiff's promise to terminate the foreclosure action and assign the mortgage, not a "promise to pay the mortgage debt," and therefore it was not an acknowledgment of the debt sufficient to satisfy the requirements of GOL § 17-107. *Id.* at 9. This Court, accordingly, held that amounts paid to settle a foreclosure are not acknowledgments of the debt under the General Obligations Law and do not restart the statute of limitations.

Contrary to Plaintiff-Appellant's contention (App Br. 26-29.), that the trial payments were held in suspense and eventually applied towards past-due monthly installments does not change this analysis. This standard provision in trial modifications simply meant that the trial payments would not be returned to Mr. Jeanty if the trial modification failed. How the lender chose to apply those payments administratively did not alter the fact that Mr. Jeanty was seeking a modification and did not unequivocally acknowledge the debt under circumstances suggesting an intent to pay it in full.

This Court's precedents in *Lew Morris Demolition* and *Petito* make clear that payments made under trial mortgage modifications—like the ones Mr. Jeanty made in 2009 and 2010 in an attempt to settle the prior foreclosure lawsuit—do not restart the statute of limitations under the General Obligations Law.

IV. Trial Modifications are a Central Feature of Loss Mitigation Across the Industry.

A. Trial Modifications Across the Industry.

Although HAMP ended in 2016, the issues presented here are common to New York residential mortgage foreclosures that involve many other modification programs beyond HAMP. Almost every loan modification program conditions a permanent modification offer on successful completion of a trial modification. Since HAMP's inception in 2009, trial modifications have become an industry standard. Servicers, judges, court attorney-referees, and borrowers are familiar with the concept of a trial modification as an essential stage in the settlement negotiation process, and all concerned recognize that they are neither permanent, enforceable agreements nor express agreements to pay the full amount of the debt. In fact, they are the opposite of an express agreement to pay the full amount of the debt because, by definition, they are agreements to pay different amounts than those required if the loan remains unmodified. A brief survey of existing loan modification programs reveals the widespread use of trial modifications in the residential foreclosure landscape.

The Federal Housing Administration (FHA) insures approximately 8% of all newly originated residential mortgages in the U.S.[4] With FHA loans, the lender buys mortgage default insurance from the FHA to protect against any loss the lender is unable to recover in the event of a borrower's default, which is conditioned on servicer compliance with FHA guidelines. At the same time that the Treasury Department established HAMP, FHA established the FHA-HAMP program, which remains in effect as FHA's principal loan modification program.[5] If a servicer determines that a borrower is eligible for an FHA-HAMP modification, the servicer must first offer the borrower a three-month trial modification, completion of which is a pre-requisite to an FHA-HAMP permanent modification. *See* U.S. Department of Housing and Urban Development, Handbook 4000.1: FHA Single Family Housing Policy Handbook, § III(A)(2)(k)(v)(G), available at https://www.hud.gov/sites/dfiles/OCHCO/documents/4000.1hsgh-062022.pdf ("The Mortgagee must ensure that the Borrower successfully completes a TPP prior to executing any FHA-HAMP Option.").

[4] In 2021, FHA mortgages constituted 8.17% of all conventional and government residential forward originations in the U.S. by dollar volume. At their recent peak in 2009, FHA mortgages accounted for 17.90% of all originations. FHA, Office of Risk Management and Regulatory Affairs, Office of Evaluation, Reporting and Analysis Division, FHA Single Family Market Share, 2021 Q4, p. 2, Table 1, available at https://www.hud.gov/sites/dfiles/Housing/images/FHASFMarketShare2021Q4.pdf.

[5] Other than a confusingly similar name, FHA HAMP and the HAMP administered by the Treasury Department had little in common and no real overlap.

Almost 60% of the residential mortgages in the U.S. are originated or underwritten by the Plaintiff-Appellant, Fannie Mae, or its counterpart, the Federal Home Loan Mortgage Corporation (Freddie Mac) (collectively, the Government-Sponsored Entities, or GSEs).[6] Both Fannie Mae and Freddie Mac have servicing guides specifying the procedures that servicers of Fannie Mae and Freddie Mac loans must follow when negotiating loan workouts with homeowners. The GSEs adopted their own versions of the HAMP program in 2009, which required borrowers to complete a three-month trial modification. With the phaseout of HAMP in 2016, Fannie Mae and Freddie Mac established a new loan modification program, the Flex Modification, to replace them. Like its predecessors, Flex Modifications require borrowers to complete a trial modification in order to be eligible for a permanent modification. *See* Fannie Mae Single Family Servicing Guide, § D2-3.2-07, available at https://servicing-guide.fanniemae.com/THE-SERVICING-GUIDE/Part-D-Providing-Solutions-to-a-Borrower/#Offering.20a.20Trial.20Period.20Plan.20and.20Completing.20a.20Fannie.20Mae.20Flex.20Modification ("The servicer must communicate with the borrower that the mortgage loan modification will not be binding, enforceable, or

[6] Urban Institute, Housing Finance Policy Center, Housing Finance at a Glance: A Monthly Chartbook, Feb. 2021, at 8 *available at* https://www.urban.org/sites/default/files/publication/103746/housing-finance-at-a-glance-a-monthly-chartbook-february-2021_0.pdf (last accessed August 9, 2022).

effective unless . . . the borrower has satisfied all the requirements of the Trial Period Plan."); Freddie Mac Single-Family Seller-Servicer Guide, § 9206.11, available at https://guide.freddiemac.com/app/guide/section/9206.11 ("A Borrower who is evaluated and determined to be eligible for a Freddie Mac Flex Modification® must enter into a Trial Period Plan under which the Borrower will be required to remit three monthly payments at an estimated modified payment amount.").

In addition to the GSE loans described above, the balance of the market consists of loans in none of the above categories. These are generally known as non-GSE loans. They include portfolio loans (where the same private entity both owns and services the loan); loans that are owned by a private trust or other private investor; and loans that are owned by a securitized trust, which issues residential mortgage-backed securities to investors. Servicers of non-GSE loans are free to condition loan modifications upon the completion of trial modifications or similar agreements and often do so.

In *amici's* experience, most private-investor lenders require borrowers to complete trial modifications, often of longer duration than the three-month trial modifications required by HAMP or GSE guidelines. Such plans may be denominated as "forbearance agreements" rather than trial modifications. Under such an agreement, a borrower may make payments for six or twelve months, with

the lender essentially offering nothing in return but a pause in the foreclosure action and the possibility of a permanent modification.

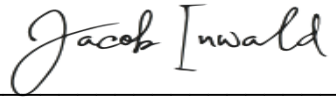
B. Treating Any Trial Modification as Having Renewed the Statute of Limitations Will Hinder Settlement Across the Industry.

Because the vast majority of servicers condition loan modifications on successful completion of a trial modification, the Court's determination of this appeal will have repercussions for all mortgage loss mitigation, and not just for HAMP modifications (for which new applications have not been accepted since 2016). Almost every single homeowner who seeks to modify their residential mortgage loan will be required to successfully complete a trial modification before the lender will permit that homeowner to modify their loan. If this Court were to adopt Fannie Mae's argument that those trial modifications reset the statute of limitations, the result would be that homeowners would face the impossible dilemma that participating in the trial modification programs which are a condition of settling their cases means abandoning any statute of limitations defenses, without any guarantee that their loan will be permanently modified. This result would be starkly at odds with New York policy, as expressed through CPLR 3408 and elsewhere, which seeks to encourage homeowners and lenders to resolve mortgage delinquencies quickly through loan modifications wherever possible, but which also seeks to ensure that homeowner foreclosure defenses are not waived as a condition to loss mitigation.

CONCLUSION

For the foregoing reasons, *Amici* respectfully request that the Court affirm the decision of the Appellate Division, Second Department.

Dated: August 16, 2022
New York, NY



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I hereby certify pursuant to NYRCRR Part 500.1(j) that the foregoing brief was prepared on a computer using Microsoft Word.

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Dated: August 16, 2022
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I, Tyrone Heath, 2179 Washington Avenue, Apt. 19, Bronx, New York 10457, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above or at

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