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Court of Appeals

STATE OF NEW YORK

US BANK NATIONAL ASSOCIATION, as Trustee for
DEUTSCHE ALT-A SECURITIES MORTGAGE LOAN TRUST, SERIES 2007-2,

Plaintiff-Respondent,

—against—

KENYATTA NELSON and SAFIYA NELSON,

Defendants-Appellants,

—and—

MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., as Nominee for Knightbridge Mortgage Bankers, NEW YORK CITY CRIMINAL COURT, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY PARKING VIOLATIONS BUREAU, NEW YORK CITY TRANSIT ADJUDICATION BUREAU, PEOPLE OF THE STATE OF NEW YORK, JANE DOE #1, JOHN DOE #1, KERRY NEWES, LAMEKA MATTHEWS, SHAINA NELSON and SHAUNA LEWIS,

Defendants.

BRIEF FOR *AMICUS CURIAE* NEW YORK STATE FORECLOSURE DEFENSE BAR IN SUPPORT OF DEFENDANTS-APPELLANTS

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October 5, 2020

CORPORATE DISCLOSURE STATEMENT
PURSUANT TO RULE 500.1(f)

Amicus New York State Foreclosure Defense Bar does not have any parents, subsidiaries, or affiliates.

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INTEREST OF THE AMICUS

New York State Foreclosure Defense Bar (NYSFDB) submits this amicus in the interest of working-family homeowners across New York State facing foreclosure. Generally speaking, these homeowners are median-income taxpayers who are above the income threshold for non-profit legal services, earning between 41% and 125% of the particular area median income (whom the public has come to regard as essential workers during the COVID-19 Pandemic).

Homeowners have been afforded fundamental protections in comprehensive, far-reaching homeownership protection and mortgage foreclosure laws, in Chapter 472 of the Laws of 2008 ("L 2008, Chapter 472"), as amended by Chapter 507 of the laws of 2009 ("L 2009, Chapter 507"), as further amended by Chapter 73 of the Laws of 2016 ("L 2016, Chapter 73), and as further amended by Chapter 739 of the Laws of 2019 ("L 2019, Chapter 739") -- "NYS homeowner protection laws." These laws are in addition to the due process and equal protection rights afforded them by New York State's Constitution.

L 2008, Chapter 472, and L. 2009, Chapter 507 were enacted on the heels of the mortgage and credit markets' meltdown, and the onset of the Great Recession ("[p]assed on a message of necessity pursuant to Article III, Section 14 of the Constitution") (L 2008, Chapter 472). At the time, the Legislature declared that an affirmative allegation of ownership of the note and mortgage (i.e. *standing*)

is required in commencing a foreclosure. Even though the 2008 requirement specifically addressed high-cost, subprime and nontraditional home loans[1], in 2009 the Legislature added the requirement that disclosure of the identity of the legal owner of the note is required for good faith participation by plaintiffs in foreclosure settlement conferences for all home loans.[2]

Nonetheless, in the past 10 years, courts across New York State shifted the burden of standing to homeowners, requiring their service of an affirmative defense in an answer or pre answer motion, to put plaintiffs to proof of ownership. These rulings impeded, and oftentimes negated, the opportunity for defendants to request or demand even a scintilla of information on the identity of the legal owner of the note and mortgage at judgment-application phase and in CPLR 3408 mandated settlement conferences, for meaningful negotiations to modify or restructure or workout the delinquencies on the mortgage loan. This occurs even in cases where it is clearly obvious to the court and the borrower that the plaintiff's parties participating in settlement conferences do not have "an actual financial stake in the

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[1] L 2008, Chapter 472 protections were tailored to remediate subprime, high, cost and nontraditional mortgage loans.

[2] For mandatory settlement conferences, the Legislature delegated certain regulatory powers to NYS Department of Financial Services ("DFS"), which noted in its publication with respect thereto, that '[t]his amendment is a reflection of the fact that many current foreclosures have as much to do with the economic downturn and job losses as with the subprime mortgage crisis" (DFS's Overview of the 2009 Mortgage Foreclosure Law at https://www.dfs.ny.gov/apps_and_licensing/mortgage_companies/mfl2009).

matter being adjudicated," and the only person with that undisclosed information is a loan-servicer representative (most of whom customarily appear without evidence of their authority to participate in the conference on behalf of the named plaintiff, or even a business card to confirm their agency or employment on behalf of the named plaintiff).

As significant is the fact that these rulings opened the floodgates for expeditious resolution of questionable, if not fraudulent foreclosures by the courts, in favor of the parties that are neither identified nor required to appear in the action. A large percentage of these foreclosures lingered in what became known as the Shadow Docket of the trial courts from 2011 to 2013, the period in which the plaintiffs' attorneys were required to certify that there were no irregularities or fraud in the plaintiffs' pleadings and papers (apparently because they were unable to do so). However, from 2014, a significant number of those cases moved forward to judgment and auction, or post-judgment deed transfer to an unidentified investor or real estate broker posing as a foreclosure rescue specialist, once the attorney certification requirement was lifted. Most significant is the fact that the rulings have resulted in extensive loss of homeownership by foreclosure judgment, deed theft and equity theft to sponsors of or investors in distressed mortgage loans in the secondary residential mortgage backed securities market ("RMBS") across the state

(oftentimes with flagrant violations of the Home Equity Theft Prevention Act of 2006).

On March 14, 2019, a joint session of the Legislature held a hearing, at Brooklyn Borough Hall, entitled the Crisis Facing Homeowners in Brooklyn, New York. Subsequently, on June 18, 2019, the Legislature enacted additional protections specifically designed to clarify its intent with respect to the issue of standing (i.e. that it is an essential element in a foreclosure action; the burden of disclosure and proof are on plaintiffs) (in S5160 and A5619 [i.e. L 2019, Chapter 739]).

The time has come for the courts to apply the law as intended by the Legislature in foreclosure actions. The time has come to reverse the trend in the law that contravenes with the letter and spirit of Legislature's intent as to standing. The interest of the amicus is the advancement of NYS homeowner protection laws, and the integrity of the courts, for the benefit of homeowners across New York State.

INTRODUCTION

In enacting L 2008, Chapter 472 (referred to as the "Subprime Lending Reform Bill" in 2008[3]), the Legislature was emphatic that its intent was saving homeownership; and entrusted that purpose to the Judiciary. Each provision of the Subprime Lending Reform Bill was carefully crafted with the aim of preventing

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[3] Refer to https://www.dfs.ny.gov/legal/industry/il080827.htm.

widespread foreclosure of one to four-family homes across New York State ("NYS"), to encourage what became known as loss mitigation prior to or during the course of foreclosure proceedings, and to prevent fraud in those proceedings. *See* Introducer's Memorandum in Support (S8143A), L 2008, Chapter 472, at http://public.leginfo.state.ny.us/navigate.cgi?NVDTO).

In subsection 1.C of the Memorandum, the Legislature spelled out its intent as to standing (that "this bill would require the plaintiff in a foreclosure action to make an affirmative allegation that it is the holder of the note and mortgage, or has been given the authority to commence the action by the holder of the note and mortgage"). In 2009, the Legislature expanded the protections by adopting L 2009, Chapter 507, and, subsequently, in 2016 and 2019, further amended the CPLR and RPAPL to clarify its intent with respect to mandatory settlement conferences and the plaintiff's affirmative obligation to establish ownership of the note, in L 2016, Chapter 73, and L 2019, Chapter 739, respectively.

The mandates and tenets of this body of statutory law are pertinent to the questions raised by Kenyatta Nelson and Safiya Nelson ("Nelson Appellants") in this appeal, including the following (Appellants' Brief ["App. Br."] at 9):

> Did the Second Department err in failing to conclude that U.S. Bank did not make a *prima facie* showing that it owned the Note and Mortgage?

Nelson Appellants correctly answered that question with a "yes," demonstrating that the Second Department erred. To this question, NYSFDB adds:

> Is the ruling below in contravention with the intent of the Legislature, that in a mortgage foreclosure action the plaintiff is required to affirmatively plead and prove its ownership of the mortgage note prior to being awarding a judgment of foreclosure, in order to preserve the integrity of the proceedings and the courts?

NYSFD respectfully submits that the answer to the foregoing question is also "yes"; that *U.S. Bank NA v Nelson*, 169 AD 3D 110 (2d Dept 2019) (the "Decision") contravenes the Legislature's intent in the body of laws concerning home-loan foreclosure actions.

This Court should now settle the question as to whether ownership of the mortgage note is an essential element in a mortgage foreclosure action. This Court should apply the Legislature's statutory mandate that standing is an essential element of a cause of action in foreclosure. This Court should not merely advance the Legislature's stated policy of saving the precious asset that is homeownership, by upholding and championing the Legislature's mandate that New York courts ensure, at every stage of foreclosure proceedings, that only those parties with "an actual legal stake in the matter being adjudicated" are appearing in the action, and being awarded judgments therein (s*ee Silver v Pataki*, 96 NY2d 532, 539 [2001]).

ARGUMENTS

I. THE LEGISLATURE HAS MANDATED THAT STANDING IS ESSENTIAL IN FORECLOSURE ACTIONS

(a) **The Question of Standing in Foreclosure New York Law**

In 2008, it became clear to the Legislature that a foreclosure crisis was looming over New York State. At the time, the Legislature's attention was drawn to the concern among regulators about the impact that foreclosures would have on New York homeowners and the overall economy. In adopting L 2008, Chapter 472, the Legislature's purpose was specific:

> "New York State faces a mortgage 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."

Thus, the Legislature intent focused on remediating the terms and effect of subprime loans on borrowers and the NYS economy. Towards that end, and with

the goal of ensuring the validity of claims against homeowners in foreclosure proceedings, the Legislature highlighted, at subsection 1(C) of Memorandum in Support of L 2008, Chapter 472 (under “Elements of legislation targeted to help homeowners currently at risk”), that:

> “Because of the practice of bundling and selling mortgages as investment products, often it is difficult to determine who owns the mortgage and note. In addition, mortgage loan servicers frequently change over time. To maintain the integrity of New York’s standing requirements, it is critically important to ensure that those who initiate a foreclosure action actually have standing to do so. Therefore this bill would require the plaintiff in a foreclosure action to make an affirmative allegation that it is the holder of the note and mortgage, or has been given the authority to commence the action by the holder of the note and mortgage. . . . “

The Legislature was obviously concerned about foreclosures brought by or on behalf of securitization trusts, as is apparent in the case at bar.

The Legislature was also forward-looking, in enacting a standard to ferret out irregularities and fraud in foreclosure cases. The Legislature highlighted the critical importance of maintaining “the integrity of New York’s [already-existing] standing requirements” in foreclosure actions brought by or on behalf of the name of trusts, trustees, sponsors, loan servicers, and other agents involved in securitization entities or vehicles. The Legislature deemed it necessary to underscore that a pleading and proof of ownership of the note was an essential

element of a foreclosure action, to advance its policy of reforming mortgage loans originated during the era of excessive predatory subprime, high-cost, non-traditional, predatory, reckless lending (imposing a pleading requirement on foreclosing plaintiffs, and affording homeowner defendants a defense as to plaintiffs' claims of ownership of the note and mortgage at commencement [*see* RPAPL § 1302]).

The 2008 legislative action was thus undertaken to, among other things, accentuate that the burden of demonstrating ownership lay squarely at the feet of those plaintiffs who seek to foreclose on mortgage notes that were bundled and sold as collateral in securitization transactions (presented *infra*). In such cases, as here (App. Br. 4-7), the plaintiff is not the actual originating lender, but is a trustee or agent of a securitization trust or special purpose entity claiming to have a right to enforce the particular note, with a mortgage loan servicer driving the litigation.

Subsequently, in 2009, the Legislature expanded the notice and mandatory settlement conference protections of L 2008, Chapter 472 to all home loans on 1-4 family residences, including condominium and cooperative residences, and, among other protections, sought to shore up the option of saving homeownership in mandatory settlement conferences before New York. In that regard, the amendments included the mandates of CPLR 3408(e)--that "(i)f the plaintiff is not the owner of the mortgage and note, the plaintiff shall provide the name, address and telephone number of the legal owner of the mortgage and note";

and CPLR 3408(f)--that "(b)oth the plaintiff and defendant shall negotiate in good faith to reach a mutually agreeable resolution, including a loan modification, if possible"). *See* § 9, L. 2009, Chapter, 507). In 2009, the Legislature was even more emphatic about its purpose:

> "The mortgage crisis of the past several years has uprooted families, devastated neighborhoods, and contributed to the collapse of our financial markets. In 2008, New York State had over 50,000 foreclosure filings – an increase of almost 30% from 2007. In response to this crisis, and in light of inaction by the federal government, New York enacted comprehensive subprime lending reform legislation in 2008. See Chapter 472 of the Laws of 2008. "That legislation was designed to accomplish two purposes – to protect borrowers at risk of losing their homes, and to prevent a similar crisis from occurring in the future. As the mortgage crisis has worsened, however, it has become evident that more must be accomplished to protect New Yorkers in these difficult times and beyond.
>
> "This bill will build upon the reforms enacted in the 2008 legislation. In particular, this build would: (1) allow a larger portion of distressed homeowners to benefit from consumer protection laws and foreclosure prevention opportunities currently available only to borrowers of 'high cost,' 'subprime,' and 'non-traditional home loans' make clear the need for state action on this issue."

Clearly the Legislature's intent was to provide protection for all borrowers whose home loans were securitized at or immediately after origination

thereof, and subsequently facing foreclosure.[4] Subsequently, in 2016, the Legislature further amended CPLR 3408 to, *inter alia*, direct courts' that a party's failure to provide accurate information during settlement conferences (which includes failure to provide the identity of the legal owner of the note and mortgage) are circumstances warranting a finding of lack of good-faith participation in conferences. *See* CPLR 3408(f)(3).

The Legislature's intent as to plaintiff's standing is consistent with the century-old, settled NYS law that a foreclosure action cannot be brought by a person or entity who does not have title to the debt (*see Kluge v Fugazy*, 145 AD2d 537 [1988] [citing to *Merritt v Bartholick*, 36 N.Y. 44, 45 (1867), and its progeny]). More recently, this Court articulated the fundamental of principle of standing in *Silver v. Pataki*, 96 NY2d 532, 539 (2001):

> "The test for determining a litigant's standing is well settled. A plaintiff has standing to maintain an action upon alleging an injury in fact that falls within his or her zone of interest. 'The existence of an injury in fact – an actual legal stake in the matter being adjudicated – ensures that the party seeking review has some concrete interest in prosecuting the action which casts the dispute `in a form traditionally capable of judicial resolution.'"

[4] By 2009 it became obvious that conventional (30-year amortizing) home loans were also securitized (*i.e.* bundled and sold as investment products), and presented similar risks of high delinquency, default and foreclosure rates during a downturn in the economy.

Also noteworthy is this Court's holding in *Socy. of Plastics v. Suffolk* 77 NY 2d 761, 769 (1991) (that "[s]tanding is a threshold determination, resting in part on policy considerations, that a person should be allowed access to the courts to adjudicate the merits of a particular dispute that satisfies the other justiciability criteria . . ." and "a litigant must establish its standing in order to seek judicial review").

However, in the decade that followed the Legislature's enactment of NYS homeowner protection laws -- including the requirement of the affirmative allegation of ownership at commencement, and for the identity of the legal owner of the mortgage notes at issue during CPLR 3408 settlement conferences -- the Appellate Division, Second Department, moved away from the basic tenets of *Kluge* and *Bartholick*, and the statutory mandates of L. 2008, Chapter 472 and L. 2009, Chapter 507, embarking on an alternative direction. The alternative direction was that plaintiffs in foreclosure actions must only prove ownership of the mortgage note that they seek to enforce if defendant interposes an affirmative defense of standing. In that direction, many NYS courts have imposed the burden of pleading the issue of standing on defendants, to the prejudice of defendant homeowners, especially self-represented defendants.

The courts' alternative direction culminated in the Decision (*i.e. Nelson* at 114-115), in contravention with statutory law. Although the Second Department noted this Court's decision in *Fosella v. Dinkins*, 66 NY2d 162 (1985), this trend in

the law appears to have found its footing in the Second Department's decision in *Wells Fargo v. Mastropaolo*, 42 AD 3d 239, 243 (2d Dept. 2007). Prior to *Mastropaolo*, the Second Department consistently held that "ownership of the mortgage" was essential to a plaintiff pleading and presenting a *prima facie* cause of action in foreclosure. *See, e.g. Campaign v. Barba*, 23 AD3d 327 (2d Dept. 2005)(to establish a *prima facie* case in an action to foreclose a mortgage, the plaintiff must establish, among other element, ownership of the mortgage [*i.e.* ownership of the debt]). The *Mastropaolo* court did however view the law unsettled at the time (*Mastropaolo* 243), citing to *Stark v Goldberg,* 297 A.D.2d 203, 204 (1st Dept 2002); *Axelrod v New York State Teachers' Retirement Sys.,* 154 A.D.2d 827, 828 (3d Dept 1989); *Matter of Eaton Assoc. v Egan,* 142 A.D.2d 330, 334-335 (3d Dept 1988); and referring to *Security Pac. Natl. Bank v Evans,* 31 A.D.3d 278, 284 (1st Dept 2006)(Catterson, J., dissenting) (where there is no aggrieved party, there is no genuine controversy, and where there is no genuine controversy, there is no subject matter jurisdiction).

The latter decisions are consistent with the principles articulated by this Court in *Pataki* (*supra*) and *Soc. of Plastics (supra)*; and, in this case, in Duffy, J.'s dissent (*Nelson*, at 125), applying, however, the requirements of UCC § 3-202. *See Slutsky v Blooming Grove Inn*, 147 AD3d 208, 212 (2d Dept 1989). Any other line of application of the law is in direct contravention with the laws of the State of New

York. However, primarily because NYS courts veered away from its decades-old intent as to standing in foreclosure actions, the Legislature took up the issue again in 2019. NYSFDB submitted the following memorandum to both chambers of the Legislature, in support of the 2019 legislation to clarify standing (and was joined by leading nonprofit legal service providers in that effort):

> "[S5160/A5619] advance[s] the letter and spirit of Chapter 472 of the Laws of 2008, as amended in 2009 and 2016, to save homeownership whenever possible, and to ensure that local communities in New York State are not further destabilized by high foreclosure rates and auctions.
>
> Among other things, NYS Legislature made clear its intent as to standing, in the 2008 Sponsor's Memo: That "***it is critically important that those who initiate a foreclosure action actually have standing to do so,"*** when it codified the requirement that standing be affirmatively pled in the complaint commencing an action to foreclose a mortgage in section 1302 (1)(a) of the Real Property Actions & Proceedings Law ([citations omitted]). Despite this requirement, plaintiffs in foreclosure actions regularly fail to affirmatively plead the basis for their standing in the complaint (or plead their standing in the equivocal alternative, contrary to the intention of the New York State Legislature). Plaintiffs in foreclosure actions provide little or no specifics regarding the change of title or transfer to support their claims of legal ownership of promissory notes prior to the commencement of foreclosure actions, and, generally, the courts do not require them to provide such specifics.
>
> Additionally, the Appellate Division, Second Department, in *Citimortgage, Inc. v Etienne,* 2019 NY Slip Op 03564 (2d Dept 2019), reiterated that standing is not an essential element to a cause of action in foreclosure. As such, New York State Courts continue to veer away from this Legislature's intent that the burden of pleading and proof as

to standing should be affirmatively placed on the plaintiff seeking a judgment of foreclosure and sale in all residential mortgage foreclosure cases. This decision followed the Court of Appeals' 2015 decision in *Aurora v. Taylor*, 25 NY3d 355 (2015), following which plaintiffs are generally not held to any customary evidentiary standard by the courts in the Second Judicial Department to prove their standing at the interlocutory or final judgment phase of the litigation, with some notable exceptions. Even though the First Judicial Department applies well settled law when adjudicating summary judgment applications in foreclosure actions (*see Wells Fargo vs. Jones*, 138 AD3d 520 [1st Dept 2016], and its progeny), it is now imperative that the New York State Legislature clarify its intent as to standing.

The proposed legislation will resolve the problem of a wrongful party bringing a foreclosure action against a homeowner, securing a judgment and auction, advancing the fundamental policy that standing is critical to the proper functioning of the judicial system (*Saratoga County Chamber of Commerce Inc. v. Pataki*, 100 NY2d 801, 802 [2003]) and "the law's policy to allow only an aggrieved person to bring a lawsuit" (*see* Professor Seigel (NY Prac, § 136, at 232 [5th ed]). Homeowners may know the name of their current mortgage servicer, but typically do not know which entity claims or will claim to own their mortgage note, and certainly do not know whether the entity before the court or in contact with their housing counselor is the party with an actual financial stake in their mortgage loan. The proposed legislation will thus also affirm NYS Legislature's intent that strict compliance with the notice and workout requirements of Article 13 of the Real Property Actions & Proceedings Law is required; that, the burden of proof is on the filing party in all instances, and not as held in *Flagstar Bank, FSB v. Jambelli*, 140 AD3d 829 (2d Dept 2016). Without the proposed amendments being adopted into law, the chaos and destabilization of communities, that have resulted from the fact that neither the homeowner nor the court had any independent basis to know whether the plaintiff is the rightful party, will continue.

* * *

> The lack of transparency lengthens the foreclosure process in courts for all parties, reduces the likelihood of an affordable workout for borrowers, and threatens the very integrity of the courts and judicial process. Wrongful-party foreclosures result in lack of confidence by borrowers in the court system, present serious concerns for insurers of the chain of title, and plague county clerks' offices with inconsistent mortgage recording data across the state. …
>
> [S5160] will . . . ensure that the devastating impact of the foreclosure crisis which this Legislature sought to preempt is attended to by the courts, as mandated by law."

L. 2019, Chapter 739 was adopted as clarifying provisions with respect to the affirmative allegation of ownership, with the Legislature specifying the following justification therefor.

> "Beginning with the financial crisis in 2007 and in the subsequent decade, there has been a significant nationwide increase in foreclosures. However, in foreclosure actions initiated by lenders and trusts based upon securitized debt obligations, some have called into question the legality of the proceedings due to the plaintiffs' lack of standing and, in many cases, the ambiguity regarding who actually owns the mortgage or debt. Despite the fact that in order to have an appropriate foreclosure proceeding the filing party must legally have 'standing to commence a foreclosure action' against a mortgagor or borrower, many lenders and trusts alike continue to move forward with a legal action against borrowers when they don't even own the debt.
>
> "In New York, numerous court decisions have held that if the borrower doesn't raise standing upon answering the foreclosure action, the defense of standing is waived for the borrower. See, HSBC Bank USA v Dammond, 59 AD3d 679 (2nd Dept 2009). Unfortunately, the borrower often has no way

> of knowing who owns the loan, and despite the clear requirement that the plaintiff own the note, if the defendant borrower does not raise the issue initially in an answer or pre-answer motion to dismiss up front, they may never be able to raise it again. In this situation, an entity can foreclose on a home they lack any legal right to foreclose on.
>
> "The proposed bill provides that the defense of standing is not waivable and can be raised throughout the foreclosure process. Absent the clarification provided under this proposal, mortgagees will continue to be able to foreclose solely because an otherwise viable standing defense was not timely raised."

In this regard, the undersigned requests that this Court take judicial notice of the statement in the NYS Senate Report dated August 28, 2019 (which is posted at https://www.nysenate.gov/newsroom/articles/2019/velmanette-montgomery/legislative-report-hearing-regarding-crisis-facing).

> "The efforts to improve efficiency in foreclosure proceedings and eliminate massive backlogs have had unintended consequences on homeowners' due process. Foreclosure judgements have been awarded to parties without credible documentation to prove they are the noteholder. Many plaintiffs seeking judgements are distressed mortgage loan buyers or servicers for residential mortgage backed security investors who may not have the necessary evidence to prove they own the mortgage loans. * * * [S5160] Would place the burden of proving the right to foreclose on banks and investors by allowing homeowners to raise the issue of who owns their loan throughout the foreclosure process. Currently, [in some jurisdictions] this defense is waived if not brought in a pre-answer motion or responsive pleading."

The NYS nonprofit legal service provider Empire Justice Center put it best (in correspondence to Governor Andrew Cuomo on 12/17/2019 as to L. 2019,

Chapter 739): "It is in everyone's interest to ensure by all means possible that foreclosing plaintiffs truly have legal standing." L 2009, Chapter 739 was signed into law and became effective immediately on 12/23/2019. Now, without question, the debate in the Decision has been resolved by the Legislature. RPAPL § 1302-A mandates:

> Notwithstanding the provisions of subdivision (e) of rule thirty-two hundred eleven of the civil practice law and rules, any objection or defense based on the plaintiff's lack of standing in a foreclosure proceeding related to a home loan, as defined in paragraph (a) of subdivision six of section thirteen hundred four of this article, shall not be waived if a defendant fails to raise the objection or defense in a responsive pleading or pre-answer motion to dismiss. A defendant may not raise an objection or defense of lack of standing following a foreclosure sale, however, unless the judgment of foreclosure and sale was issued upon defendant's default.

(b) **Reversal of Contravening Case Law**

The Legislature's intent as to standing is now clear. L 2019, Chapter 739 specifically reversed the Appellate Division Second Department's 2019 decision in *CitiMortgage v Etienne,* 172 A.D.3d 808, 810 (2nd Dept. 2019), its precedents and its progeny, including the Decision.

NYSFDB respectfully submits that this Court should rule that a presentation or pleading of the mere existence of the note and mortgage is <u>not</u> a facially adequate cause of action to foreclose on a mortgage; that the Majority's

ruling that the only proof that is required is to establish a prima facie case for relief is proof of default (*Nelson* at 114) is reversible error; and reverse the Decision.

This Court should uphold the Legislature's mandate that the issue of ownership of the note (i.e. the debt) is an essential element of a foreclosure case. In so doing, this Court will afford working families facing foreclosure equal protection in the application of the laws of the State of New York, as the Legislature has intended since 2008. *See* Article I, § 10, of the Constitution of the State of New York.

II. POLICIES UNDERPINNING STATUTORY PROTECTIONS OF HOMEOWNERSHIP & TO PRESERVE THE INTEGRITY OF STANDING IN FORECLOSURE CASES

Participation in homeownership increased exponentially prior to 2008 following the development and seasoning of the private-label (non-government sponsored) mortgage market, with excessive and aggressive marketing and origination of variations of subprime, high-cost and non-traditional loans by subprime, predatory lenders on Main Street; of subprime or non-traditional loans that were crafted by Wall Street RMBS investment bankers, to leverage billions of dollars in the pipeline of institutional investors worldwide that financed the market.

(a) **Securitization**

Generally speaking, securitization of mortgage loans is a capital-markets financing (Wall Street investment banking) transaction that converts a pool

of home loans into an investment portfolio of a special purpose entity ("SPE"). At the time of the SPE's creation, structuring and sponsorship -- customarily by a Wall Street investment bank -- SPE bonds or certificates are sold to institutional investors on ratings from a credit rating agency. The sale proceeds are used to purchase a pool of loans for the SPE's portfolio. The securities issued by the SPE are RMBS. As long as the SPE's investment grade ratings remain in place, its primary asset to meet its obligation to the RMBS investors is the income stream from monthly payments on the home loans in the pool.

Securitizations are more specifically described and depicted in the Congressional Oversight Panel November 2010 Report ("Examining the Consequences of Mortgage Irregularities for Financial Stability and Foreclosure Mitigation"), at https://www.govinfo.gov/content/pkg/CPRT-111JPRT61835/pdf/CPRT-111JPRT61835.pdf). Pertinent to the presentations herein is the description of the sale of loans into what is known as "a secondary market" in the report; that the loans must be "properly transferred" into the SPE, in order for the SPE to have a right of enforcement. The undersigned request that this Court take judicial notice of the report, and in particular the descriptions pages 13-17, and 19-20:

> ". . . in order to convey good title into the trust and provide the trust with both good title to the collateral and the income from the mortgages, each transfer in this process required particular steps.[footnote omitted] . . . if the transfer for the notes and mortgages did not comply with the PSA [the pooling and service agreement], the transfer would be void, and the assets would not have been transferred

to the trust. Moreover, in many cases the assets could not now [after the fact] be transferred to the trust.[footnote omitted] . . .

"[The question is] whether the poor recordkeeping and error-filled work exhibited in foreclosure proceedings … is likely to have marked earlier stages of the process as well. If so, the effect could be that rights were not properly transferred during the securitization process such that title to the mortgage and the note might rest with another party in the process other than the trust. [footnote omitted]

* * *

". . . If, during the securitization process, required documentation was incomplete or improper, then ownership of the mortgage may <u>not</u> have been conveyed to the trust. This could have implications for the PSA—inasmuch as it would violate any requirement that the trust own the mortgages and the notes— as well as call into question the holdings of the trust and the collateral underlying the pools under common law, the UCC, and trust law.[footnote omitted] The trust in this situation may be unable to enforce the lien through foreclosure because only the owner of the mortgage and the note has the right to foreclose. If the owner of the mortgage is in dispute, no one may be able to foreclose until ownership is clearly established."

The undersigned submits that the Legislature has delegated the duty of guarding against the type of foreclosure irregularities described *supra*, and advancing its policy of saving homes whenever possible. The irregularities, and indicia of fraud in the case at bar, is now before this Court for application of the Legislature's mandate as to the issue of plaintiff's standing (or lack thereof at commencement).

(b) **Indicia of Fraud**

Plaintiff U.S. Bank National Association is presented as trustee in the caption for Deutsche ALT-A Securities Mortgage Loan Trust, Series 2007-

2, 3476 Stateview Boulevard, Ft. Mill, SC 29715 (the "trust").(A 5) U.S. Bank National Association was not the originating lender of the home loan at issue. (A-394-402); the Nelson Defendants' home loan and promissory note were apparently securitized. The irregularities in this action are spelled out in App. Br. 4-7, 11-14 (plaintiff's affiant was a Wells Fargo Bank employee). Plaintiff's counsel requested an amendment of the trust's named in the caption, with no supporting factual affidavit that the name was originally incorrect. (A-1090)

More pertinent is the fact that the assignment of mortgage on which the courts awarded plaintiff judgments is captured by the NYS Attorney General's 2012 finding of fraudulent mortgage assignments and recordings by Steven J. Baum, his law firm and its affiliate Pillar Processing LLC ("Pillar" or "Baum's firms") to commence foreclosure actions across New York State. The assignment purported that Mortgage Electronic Recording System ("MERS") (not the originating lender) was the assigning entity to U.S. Bank National Association immediately prior to commencement (on 8/10/2009). However, the assignment was recorded after commencement (on 9/25/2009). The purported MERS assignment was made returnable to Pillar.

NYS Attorney General found that Baum's firms routinely brought foreclosure proceedings without taking appropriate steps to verify the accuracy of the allegations or the plaintiff's right to foreclose; that from at least 2007 through

sometime in 2009, Baum-firm attorneys repeatedly verified complaints in foreclosure actions stating that the plaintiff was the owner and holder of the note and mortgage being foreclosed, when, in many securitized loan cases, the firm did not have documentary proof that the plaintiff was the owner and holder of the note and mortgage. The undersigned request that this Court take judicial notice of NY A.G. Schneiderman's press release announcing the settlement with Baum's firms and Pillar on 3/22/2012, at https://ag.ny.gov/press-release/2012/ag-schneiderman-announces-4-million-settlement-new-york-foreclosure-law-firm.

Nonetheless, purported assignment of mortgages prepared by Baum's firms, and similar purported assignments by MERS, continue to be the basis on which the plaintiffs, including the plaintiff in this case, are awarded judgments in mortgage foreclosure cases (*see* Nelson, at 112). This is also alarming, because, since 2011, settled law is that a purported MERS assignment of this ilk is unenforceable as a matter of law. *See Bank of New York v. Silverberg*, 86 AD3d 279 (2nd Dept. 2011).

Also important is the disregard for Wells Fargo Bank's duty to submit evidence in the proceedings pursuant to the Consent Decree it entered into with NYS Attorney General's Office on 4/4/2012 (in the action captioned *United States of America vs. Bank of America, et al, Civil Action No. 12-00361, U.S.*

Dist. Ct., Dist. of Columbia[5]). Wells Fargo's agreement that it shall ensure that "factual assertions made in pleadings ... declarations, affidavits and sworn statements filed by or on behalf of a servicer in judicial foreclosures ... are accurate and complete and are accompanied by competent and reliable evidence;" that "it has a documented enforceable interest in the promissory note and mortgage (or deed of trust) under state law, or is otherwise a proper party to the foreclosure action"; and that it "shall include a statement in a pleading, affidavit of indebtedness or similar affidavit in court foreclosure proceedings setting forth the basis for asserting that the foreclosing party has a right to foreclose remain unenforced in this case (the Wells Fargo, Chad Stone affidavits in the record were not based on or accompanied by competent or reliable evidence).

The trend in the law that afforded plaintiff the judgments in this case has resulted in tens of thousands of New York adults and children becoming homeless or displaced, having lost equity and their families' investment in properties and communities, to parties that are not required to prove their standing to foreclose pursuant to New York evidentiary rules. The Decision flies the face of the Legislature's mandate as to standing and New York law. Respectfully, the Decision must be reversed.

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[5] The undersigned requests that this Court take judicial notice of subsections I.A.1, C.1 and C.2 of the Settlement Term Sheet, C.2 of the Consent Decree, at http://www.nationalmortgagesettlement.com/files/Consent_Judgment_WellsFargo-4-11-12.pdf.

III. THE ONGOING FORECLOSURE CRISIS AND STANDING

Since 2009, borrowers who qualified for loan modifications were denied in high percentages by big-bank loan servicers of RMBS investors in, and sponsors of, residential mortgage-backed securities (oftentimes unfairly). This state of affairs was reported on in 2015 by Neil Barofsky, the Special Inspector General for TARP (*i.e.* the federal monitor appointed by Congress to oversee the use of funds allocated to bailout RMBS investment banks, sponsors and investors, and assist homeowners).

NYSFDB's members' experience in courts across the state is that loan modification applications demonstrating sufficient household income are denied on the basis of "investor restrictions" when no written evidence thereof exists (while at the same time the plaintiffs, their attorneys and their servicing agents categorically refuse to disclose the legal owner of the note and mortgage, and the courts, even when sympathetic or well meaning, believe that their hands are tied because of the court's position that proof or identify of the legal owner of the note and mortgage is not an essential element in the case, in contravention with the Legislature's mandate).

By late 2010, reports of widespread fraud in foreclosure papers and proceedings became common place. On October 20, 2010, the Chief Administrative Judge of the Courts (Hon. Jonathan Lippman) found that conditions warranted the

issuance of Administrative Order 548/10, as amended by AO/431/11 on 3/2/2011 (the "Lippman Affirmation"). The Lippman Affirmation required the filing of an attorney affirmation, in a specific form, in foreclosure actions, pursuant to CPLR 2106. The Lippman Affirmation was the mechanism by which the courts at the time sought to ferret out fraudulent filings and irregularities from their proceedings, by requiring plaintiffs' attorneys of record to confirm the accuracy of plaintiffs' papers; to confirm for the Court that none of the signatures in such papers were *"robo signatures*"; and to confirm that there are no false attestations in plaintiff's papers and pleadings. The advent of fraudulent or improper foreclosure filings was ever present in court proceedings across New York State, as it was across the U.S. *See*, *for e.g. Wells Fargo Bank v. Jones*, 139 A.D.3D 520, 521 (1st Dept. 2016) (addressing a foreclosing plaintiff's claim, in a 2007 action, of its status as holder of the note via a submission of copies of the note and undated allonges, along with conclusory statements that it is in possession of the note, and the attempt, towards that end, to swap affidavits for its counsel to comply with the Lippman Affirmation requirement); *also*, *HSBC vs. Sene*, 2012 NY Slip Op 50352 (U), Kings Cty. Sup. Ct. ("It is clear in this case, without further hearings, that a fraud has been committed upon this Court"); *JPMorgan vs. Butler*, 2013 NY Slip Op 51050(U), Kings Cty. Sup. Ct. ("CHASE, in the instant action, committed a fraud upon the Court by claiming to be the plaintiff"); *and also U.S. Bank National Association v. Ibanez*,

941 N.E.2d 400 (2011)("a judge is entitled to ask for proof that the foreclosing entity was the mortgage holder at the time of the notice of sale and foreclosure, or was one of the parties authorized to foreclose under [the mortgage and note]").

Foreclosure filings decreased significantly in 2011 and 2012 ("as new court rules were issued requiring lenders to affirm their claim to the property"), but in the subsequent years climbed to the 2009-foreclosure filing levels after the Lippman-Affirmation requirement was lifted (reported by NYS Office of the State Comptroller, in the Local Government Snapshot dated 8/15/2015).

In January 2019, the New Economy Project reported that 167,848 pre-foreclosure notices were sent to homeowners across New York State (a level that matched the 2009 crisis). The undersigned requests that this Court take judicial notice of the report ("Foreclosure Risk in New York State, January 2019," at https://www.neweconomynyc.org/resource/foreclosure-risk-in-new-york-state-january-2019/). The Report highlighted that almost half of the notices went to New York City and Long Island homeowners; but that foreclosure risk was also high in Buffalo, Rochester, and parts of the Hudson Valley.

Against this backdrop, RPAPL § 1302-A was enacted.

IN CONCLUSION

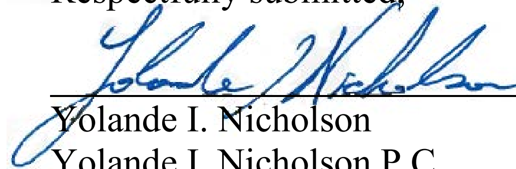
Equity also demands that the Decision be reversed.

Since 2008, the Legislature has declared that the identity of the specific legal owner of the debt is a threshold issue in a mortgage foreclosure action -- whether to facilitate an actual loan modification, to prevent fraud in the proceedings or to facilitate the NYS Constitution's due process and equal protection tenets -- especially because more often than the plaintiff parties before the court seeking to collect on such debt are not the originating lenders, but are likely a securitization sponsor or facilitator thereof or equity/hedge fund investor in delinquent mortgage debt, on a claim that it or the trust was a transferee of the loan and note. For that entity to have standing to foreclose and awarded judgments, the submission of reliable evidence in that regard is required as a matter of law.

What is clear from the record in this case, and in the Decision, is that the actual party with a stake in the litigation was not before the Court for the past 10 years. NYSFDB thus implores this Court to advance the Legislature's statutory mandates on the issue of standing, and the principles on which they were adopted, sounding the clarion call for NYS' appellate and trial courts.

DATED: Brooklyn, New York
October 5, 2020

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 500.13(c)(1) that the foregoing brief was prepared on a computer using Microsoft Word.

A proportionally spaced typeface was used, as follows:

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The total number of words in this brief, inclusive of point headings and footnotes and exclusive of pages containing the corporate disclosure, table of contents, table of citations, proof of service, certificate of compliance, or any authorized addendum containing material required by subsection 500.1(h), is 6,971.

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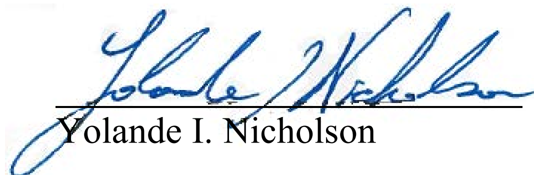
October 5, 2020



Yolande I. Nicholson