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Appellate Division–Second Department Docket No. 2018-00886

Court of Appeals

of the

State of New York

BANK OF AMERICA, N.A.,

Plaintiff-Appellant,

– against –

ANDREW KESSLER,

Defendant-Respondent,

– and –

REIKO KESSLER and "JOHN DOE," said name being fictitious, it being the intention of Plaintiff to designate any and all occupants of premises being foreclosed herein, and any parties, corporations or entities, if any, having or claiming an interest or lien upon the mortgaged premises,

Defendants.

JOINT BRIEF FOR *AMICI CURIAE* AMERICAN LEGAL & FINANCIAL NETWORK NEW YORK MORTGAGE BANKERS ASSOCIATION AND NEW YORK BANKERS ASSOCIATION IN SUPPORT OF PLAINTIFF-APPELLANT

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STATEMENT OF IDENTITY AND INTEREST OF THE *AMICUS CURIAE*

The American Legal & Financial Network ("ALFN"), New York Mortgage Bankers Association ("NYMBA"), and New York Bankers Association ("NYBA") ("Joint Amicus") submit this Amicus Brief in support of the Plaintiff-Appellant, Bank of America N.A. ("Appellant") on its appeal from *Bank of Am., N.A. v. Kessler*, 202 A.D. 3d 10, 14 (2d Dept. 2021), which affirmed the dismissal of the underlying residential mortgage foreclosure action on the ground the Appellant violated the Real Property Actions and Proceedings Law ("RPAPL") §1304(2).

ALFN is a national network of legal and residential mortgage banking professionals which provides educational programs and training resources to its members, and is recognized as leading forum for the articulation of its members concerns and issues. Many ALFN members reside and conduct business in New York, and are directly impacted by the statutory interpretation, and case decisions rendered by the New York Courts.

The NYMBA provides advocacy and education to the mortgage banking industry. The organization helps those engaged in or affected by the mortgage business to be better informed and more knowledgeable, and is dedicated to the maintenance of a strong real estate finance system through a public-private partnership for the production and maintenance of single and multi-family homeownership opportunities and a strong secondary mortgage market. NYMBA

members include mortgage lenders and servicers as well as law firms that conduct business in New York.

NYBA is a not-for-profit association representing community, regional and money center commercial banks and thrift institutions in New York State. Founded in 1894, NYBA serves as New York State's preeminent provider of legislative and regulatory services to a unified banking industry, as well as a range of member services designed to enhance New York's banking industry, including educational programs and advocacy.

The Joint Amicus regularly file *amicus* briefs in cases that raise issues of concern to the mortgage banking industry and that are of importance to its members. To that end, the Joint Amicus and their members are concerned with the increasing number of cases which have been dismissed by New York courts on the ground the foreclosing party failed to comply with the pre-foreclosure notice requirement imposed by RPAPL §1304; specifically cases finding that the foreclosing party violated the RPAPL §1304(2) "separate envelope rule" as the basis to deny a Plaintiff's motion for summary judgment, judgment of foreclosure and sale, or dismiss a foreclosure. This case falls directly in that category.

STATEMENT PURSUANT TO 22 NYCRR §500.23(a)(4)

No party's counsel has contributed to the content of the Joint Amicus' brief or participated in the preparation in any other manner; no party or party's counsel has contributed money that was intended to fund the preparation or submission of the brief; and no person or entity, other than movant or movant's counsel, contributed money that was intended to fund preparation or submission of the brief.

PRELIMINARY STATEMENT

The Appellant appealed from a Decision & Order of the Appellate Division, Second Department dated and entered on December 15, 2021, which affirmed the dismissal of the underlying foreclosure action on RPAPL §1304 grounds. In a self-described case of first impression with a widespread impact on New York residential mortgage foreclosure actions, mortgage lending practices, and secondary mortgage market liquidity, the Second Department misconstrued the RPAPL §1304(2)'s "separate envelope rule" to prohibit a lender, assignee, or mortgage loan servicer from including *any* additional legally mandated consumer protection information in the same envelope as the RPAPL §1304(1) ninety-day pre-foreclosure notice. The intermediate appellate court's incorrect finding that Appellant violated RPAPL §1304(2) is inconsistent with federal and state law as well as the legislative intent of RPAPL §1304.

The Second Department's ruling is unprecedented under New York State law and adversely impacts all lenders, assignees, and loan servicers because, in a "home loan" mortgage foreclosure (*See* RPAPL §1304(5)), a lender, assignee, or loan servicer must send RPAPL §1304 pre-foreclosure notices ("§1304 Notice") to all natural person borrowers who executed the subject promissory note, mortgage, or modification agreement at least ninety days prior to commencement of mortgage foreclosure.

It is undisputed that the Appellant sent the borrower a notice that included the RPAPL §1304(1) statutory-required content. Despite undisputed strict compliance with RPAPL §1304(1), the Second Department held Appellant violated RPAPL §1304(2) because it did not send the RPAPL §1304(1) notice to the borrower "in a separate envelope from any other mailing or notice". It included an Important Disclosures document in the same envelope providing borrower with required information concerning applicable federal consumer protection laws.

The Second Department inexplicably held the Appellant's adherence to federally mandated laws - including the Servicemembers Civil Relief Act ("SCRA"), United States Bankruptcy Code, and Fair Debt Collection Practices Act ("FDCPA") – violated RPAPL §1304 and warranted dismissal of the foreclosure. As such, the Decision & Order appealed is patently at odds with federal law and the

intent of the New York State Legislature to protect consumers and preserve home equity.

Additionally, the application of the RPAPL §1304 defense has been litigated since its enactment in part because the underlying courts have permitted borrowers to raise the defense at any point throughout an action rather than conforming to the longstanding Civil Practice Law and Rules. The result is a myriad of decisions that demonstrate inconsistent application and resulting uncertainty on how to effectively prosecute foreclosure actions. The *Kessler* decision merely confirms the need for this Court's intervention to provide effective guidance to all parties.

Thus, this Court must reverse the Second Department's Decision & Order. Alternatively, if this Court affirms *Kessler* notwithstanding the litany of reasons to reverse, then it should not be applied retroactively; rather, it should only be applied prospectively.

ARGUMENT

I. THE LEGISLATIVE INTENT OF RPAPL §1304 IS CONSISTENT WITH THE INTERPRETATION SOUGHT BY THE APPELLANT

RPAPL §1304 states in pertinent part that "at least ninety days before a lender, an assignee or a mortgage loan servicer commences legal action against the borrower, . . . including mortgage foreclosure, such lender, assignee or mortgage loan servicer shall give notice to the borrower." The statute further sets forth the

required content for the notice and provides that the notice must be sent by registered or certified mail and also by first-class mail to the last known address of the borrower. Strict compliance with RPAPL §1304 is a condition precedent to the commencement of a foreclosure action. *CitiBank N.A. v. Conti-Scheurer*, 172 A.D. 3d 17, 20 (2d Dept. 2019)

As noted in *First Natl. Bank of Chicago v. Silver*, the legislative intent behind the Home Equity Theft Prevention Act ("HETPA"), enacted effective September 1, 2008, was to provide greater protections to borrowers facing foreclosure. 73 A.D. 3d 162, 165 (2d Dept. 2010). The legislative history reflects that communication between distressed homeowners and their lenders prior to the commencement of litigation was often lacking, leading to needless foreclosure proceedings. *See Aurora Loan Services, LLC v. Weisblum,* 85 A.D. 3d 95, 107 (2d Dept. 2011). "The bill sponsor sought 'to bridge that communication gap to facilitate a resolution that avoids foreclosure' by providing a pre-foreclosure notice advising the borrower of 'housing counseling services available in the borrower's area' and an additional period of time ... to work on a resolution." *Id*.

RPAPL §1304(2) was amended effective January 14, 2010 to require that the notices required by this section be sent…in a separate envelope from any other mailing or notice. According to the New York State Assembly, one purpose of the amendment was to strengthen consumer protections. Since its enactment, the

state trial and intermediate appellate courts reviewed a myriad of cases addressing §1304 notices. In *CIT Bank, N.A. v. Schiffman*, 36 N.Y. 3d 550 (2021) - the lone RPAPL §1304 opinion by this Court - the "separate envelope rule" was a non-issue.

On December 15, 2021 - 4,352 days after the current RPAPL §1304(2) became effective - the Second Department in the case at hand held "that inclusion of any material in the separate envelope sent to the borrower under [RPAPL] §1304 that is not expressly delineated in these provisions constitutes a violation of the separate envelope requirement of [RPAPL] §1304(2)" and warrants dismissal of a foreclosure. *Kessler* at 14. In reaching this conclusion, the intermediate appellate court rejected the argument that courts should evaluate whether additional material contained in the envelope sent by the lender pursuant to RPAPL §1304 prejudices or assists the borrower when ascertaining the lender's compliance with the "separate envelope" requirement of RPAPL §1304, as well as whether the additional information in the envelope is included as a separately paginated sheet of paper or some other physical demarcation of the information exists. *Kessler* at 16-17. The *Kessler* majority rejected the dissenting opinion that the language of RPAPL §1304(1) is non-exclusive with respect to other information that may be included in the envelope as long as the information in the envelope contained the required language set forth in the statute. *Kessler*

at 16. The majority also dismissed the dissent's position that "clarifying language" that a plaintiff includes in the envelope with the requisite §1304 notice, such as language concerning the rights of a debtor in bankruptcy or in the military service, or any language that may be relevant to the warnings in RPAPL §1304, falls within the prescriptions of RPAPL §1304 and does not require a separate envelope. *Kessler* at 17.

Kessler and caselaw preceding it noted the primary legislative objective of RPAPL §1304 was to provide a borrower, at least ninety days before a foreclosure lawsuit is filed, with written notice that, *inter alia*, the home loan is a certain number of days and dollars in default, the borrower is at risk of losing the home, and New York-based government approved housing counseling agencies in the area of the mortgaged premises provide free counseling and are trained to help homeowners who are having problems making their mortgage payments. *Weisblum* at 103. The Appellant's §1304 notices provided all this information, and the Respondent has not contended the §1304 notices sent to him violated the underlying purpose of RPAPL §1304 to afford greater protections to homeowners confronted with foreclosure.

II. A MORTGAGE LENDER, ASSIGNEE, OR LOAN SERVICER SHOULD BE REQUIRED TO SUBSTANTIALLY – RATHER THAN STRICTLY - COMPLY WITH RPAPL §1304

The majority in Kessler held that the Plaintiff has the burden of establishing "strict compliance" with RPAPL §1304, and that Plaintiff's inclusion of "any material in the separate envelope sent to the borrower under RPAPL §1304 that is not expressly delineated in these provisions constitutes a violation of the separate envelope requirement of RPAPL §1304(2)." *Kessler*, 202 A.D.3d at 14. Here, the court erred in interpreting a "bright-line rule" using a strict compliance standard, rather than strict interpretation.

Black's Law Dictionary defines the substantial-performance doctrine as, "(t)he rule that if a good-faith attempt to perform does not precisely meet the terms of an agreement or statutory requirements, the performance will still be considered complete if the essential purpose is accomplished, subject to a claim for damages for the shortfall." *Black's Law Dictionary* (11th ed. 2019). New York statutory law allows for substantial compliance if non-compliance is *de minimus* or impossible (specifically, CPLR § 2001 states, regarding mistakes, omissions, defects, and irregularities, "at any stage of an action…the court may permit a mistake, omission, defect or irregularity…if a substantial right of a party is not prejudiced, the mistake, omission, defect or irregularity shall be disregarded…" (CPLR § 2001)).

Additionally, this Court has previously applied a "flexible standard," which allowed a case-by-case, fact-specific analysis to evaluate evidence required to rebut a lender's proof of mailing an RPAPL §1304 notice. *CIT Bank, N.A. v. Schiffman*, 36 N.Y.3d 550 (2021).

In *Schiffman*, this Court stated, regarding the mailing of the RPAPL §1304,

> "What is necessary to rebut the presumption that a RPAPL § 1304 notice was mailed will depend, in part, on the nature of the practices detailed in the affidavit. Moreover, contextual considerations may also factor into the analysis. For example, here, CIT points out that residential notes and mortgages are negotiable instruments that often change hands at various points during their duration, which may impact the timing of the creation and mailing of RPAPL § 1304 notices—a contextual factor a court could consider in assessing whether a purported deviation from routine procedure was material. We reject defendants' argument that a single deviation from any aspect of the routine office procedure necessarily rebuts the presumption of mailing. Such a standard would undermine the purpose of the presumption because, in practice, it would require entities to retain actual proof of mailing for every document that could be potentially relevant in a future lawsuit. As we recognized almost a century ago, such an approach would be financially and logistically impractical given the reality that commercial entities create and process significant volumes of mail and may experience frequent employee turnover—circumstances that apply not only to banks, but many other businesses and government agencies."

Schiffman, 36 N.Y.3d at 557-558.

It is clear from the *Schiffman* decision that where strict compliance is frustrated, the servicer should be able to do what is practical to achieve the purposes

served by the statute. Here, should the Second Department's "bright line rule" regarding a separate envelope be upheld, strict compliance is impossible. Namely, the failure to include the FDCPA language, the "debt collector is attempting to collect a debt and that any information obtained will be used for that purpose," which is required in all communications sent to consumers per 15 USC § 1692e(11) would result in a violation of federal law by the debt collector. An identical outcome would result regarding the "Important Disclosures," as it advises the borrowers of their rights and protections while averting potential lender violations of federal law.

The result of following the Second Department's "bright line rule" in strict compliance would devastate the mortgage banking industry. If enforced as is, nearly every foreclosure action requiring a §1304 Notice would be subject to dismissal. As such, the only practical way for a lender to be able to comply with both RPAPL §1304 and federal law would be to adopt a substantial compliance standard, in which additional language to comply with federal law can be included and not violate the separate envelope rule with strict compliance.

III. *KESSLER'S* INTERPRETATION OF RPAPL §1304(2) IS PREEMPTED BY AND RUNS AFOUL OF FEDERAL LAW

The majority in *Kessler* recognized that a lender, assignee, or servicer may be required under federal law to send legal notices to a borrower. *Kessler* at 18-19. However, the majority summarily dismissed the Appellant's concerns that its

interpretation of the “separate envelope rule” created an unresolvable dilemma where an entity has to choose between complying with one or more federal laws or complying with RPAPL §1304(2).

When a conflict arises between state law and federal law, the Supremacy Clause, U.S. Const., Art. VI, cl. 2, nullifies the state law to the extent that it conflicts with the federal law. *Fidelity Fed. Sav. & Loan Assoc. v. Cuesta*, 458 U.S. 141, 153 (1982). Such a conflict arises when ‘compliance with both federal and state regulations is a physical impossibility,’… or when state law ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’ *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). "The importance to the State of its own law is not material when there is a conflict with a federal law, for the Framers of our Constitution provided that the federal law must prevail." *Free v. Bland*, 369 U.S. 663, 666 (1962).

It is well established that the FDCPA is the prevailing law if compliance with it conflicts with New York law. *Romea v. Heiberger & Assocs.*, 163 F. 3d 111, 118 (2d Cir. 1998) (if New York law and the FDCPA conflict, it would be New York law, *and not the FDCPA*, that would have to yield) (emphasis added). Within the Second Circuit, it is also established that residential mortgage foreclosure constitutes debt collection within the scope of the FDCPA. *Cohen v. Rosicki, Rosicki & Assocs.,*

P.C., 897 F. 3d 75, 84 (2d Cir. 2018)(holding a "foreclosure action is an 'attempt to collect a debt' as defined by the FDCPA"). Therefore, the consumer protections afforded by the FDCPA are necessary in a foreclosure action and any conflict between RPAPL §1304 and the FDCPA results the FDCPA trumping RPAPL §1304.

The FDCPA requires a debt collector – defined as "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collet, directly or indirectly, debts owed or due or asserted to be owed or due another" - to disclose, in the initial and subsequent communications with a consumer, that they are a debt collector that is attempting to collect a debt and information obtained will be used for that purpose. 15 U.S.C. §1692e(11). The FDCPA is a “strict liability statute”, and a debt collector’s failure to adhere to its text is a *per se* violation of the statute. *Vangorden v. Second Round, Limited Partnership*, 897 F. 3d 433, 438 (2d Cir. 2018). Such violations can result in significant fines, including an amount equal to the sum of any actual damages by such consumer as a result of such failure (15 U.S.C. §1692k(a)(1)), costs of an action including reasonable attorney's fees (15 U.S.C. §1692k(a)(3)), and/or the right to recover up to $1,000 in additional damages in the case of any action by an individual, or the lesser of $500,000 or 1 per centum of the net worth of the debt collector in the

case of a class action (15 U.S.C. §1692k(a)(2)). Thus, if a debt collector lender, assignee, or loan servicer violates the FDCPA by failing to disclose in all communications with a consumer - including a RPAPL §1304 notice - that it is a debt collector is attempting to collect a debt and the information obtained will be used for that purpose, then it has broken the law. *Romea* at 118.

Likewise, the SCRA provides for, strengthens, and expedites the national defense through extending protections to service members of the United States to enable such persons to devote their entire energy to the defense needs of the Nation. See 50 U.S.C. 50 §§3901-4043. As pertinent to this appeal, the SCRA protects service members against default judgments in certain mortgage foreclosures. If an entity violates the SCRA, it will be subject to fines and penalties as well as vacatur of any order or judgment entered during a statutory stay. *United States v. Bank of Am. Corp., et. al.*, 12-cv-0361 (D.D.C.); *also see* https://www.justice.gov/opa/pr/service-members-receive-over-123-million-unlawful-foreclosures-under-servicemembers-civil (Service members to Receive Over $123 Million for Unlawful Foreclosures Under the Servicemembers Civil Relief Act)

Moreover, the Bankruptcy Code and the law interpreting it require that correspondence to collect a debt be described as "informational" to avoid a violation of the 11 U.S.C. §362(a)(1) automatic stay or 11 U.S.C. §542(a)(2) discharge

injunctions. *See, e.g., Ho v. JPMorgan Chase Bank, N.A.*, 624 B.R. 748, 2021 Bankr. LEXIS 184 (Bankr. E.D.N.Y 2021); *In re Sharak*, 571 B.R. 13, 2017 Bankr. LEXIS 1373, (Bankr. N.D.N.Y. 2017). Failure to include the "informational" notice violates the bankruptcy laws. *Taggart v. Lorenzen*, 139 S. Ct. 1795, 1802 (2019); *Elliot v. PHH Mortgage Corp.*, 2017 U.S. Dist. LEXIS 131885, at *12 (N.D.N. Y. 2017); *In re Bell*, 2014 Bankr. LEXIS 4717, at *13 (Bankr. N.D.N.Y. 2014).

The aforementioned federal laws are but examples of the consumer protection laws that conflict with the majority's ruling in *Kessler* and thus runs afoul of the Supremacy Clause because a person cannot both comply with RPAPL §1304(2) as well as, *inter alia*, the FDCPA, SCRA, and Bankruptcy Code. Therefore, RPAPL §1304(2) "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *United States v. Locke*, 529 U.S. 89, 109 (2000); *Romea*, 163 F. 3d at 118; *Taggart*, 139 S. Ct. at 1802.

In *Kessler's* wake, the intermediate appellate court has issued numerous decisions, in which it found the foreclosing parties violated RPAPL §1304 when they included information mandated by or pertaining to federal laws and rules, including but not limited to the FDCPA, Bankruptcy Code, SCRA, and Real Estate Settlement Procedures Act ("RESPA"). *See, e.g., U.S. Bank v. Lanzetta*, 2022 N.Y. App. Div. LEXIS 4209, at *3 (2d Dept. 2022) (the envelope containing the requisite notice under RPAPL §1304 included notices pertaining to the FDCPA and

bankruptcy and, therefore, the plaintiff failed to establish, *prima facie*, its strict compliance with RPAPL §1304); *JPMorgan Chase Bank N.A. v. Dedvukaj*, 2022 N.Y. App. Div. LEXIS 4385, at *3-4 (2d Dept. 2022) (plaintiff failed to comply with RPAPL §1304 where the copies of the 90-day notice included a notice pertaining to the rights of a debtor in bankruptcy, a notice to those in military service, and a notice advising customers to beware of any organization that attempts to charge a fee for housing counseling or modification of a delinquent loan [in violation of federal and state consumer protection laws); *U.S. Bank N.A. v. Drakakis*, 165 N.Y.S 3d 745, 746 (2d Dept. 2022) (plaintiff failed to comply with the "separate envelope" mandate of RPAPL §1304(2) since the RPAPL §1304 notice included, in addition to the statutorily prescribed language, a document titled "Consumer Notice Pursuant to 15 U.S.C. §1692(G)); *Deutsche Bank Natl. Trust Co. v. Salva*, 203 A.D. 3d 700, 702 (2d Dept. 2022) (the inclusion of additional "Important Disclosures" regarding bankruptcy and rights for military personnel…violated RPAPL §1304(2)); *Ocwen Loan Servicing, LLC v. Sirianni*, 202 A.D. 3d 702, 705 (2d Dept. 2022) (plaintiff failed to strictly comply with the requirements of RPAPL §1304 because the envelope that it sent to the borrower also included information in two notices pertaining to the FDCPA and bankruptcy.); *Wells Fargo Bank, N.A. v. Bedell*, 186 A.D. 3d 1293 (2d Dept. 2022) (plaintiff failed to comply with RPAPL §1304(2) because it acknowledged that the envelopes it sent to the defendants also included a

separate notice pertaining to the rights of a debtor in military service and a debtor in bankruptcy, among others); *Wells Fargo Bank, N.A. v. DeFeo*, 200 A.D. 3d 1105, 1107 (2d Dept. 2021) (plaintiff failed to strictly comply with RPAPL §1304 because it acknowledged that the envelope that it sent to the defendant also included a separate notice concerning the [federal] Home Affordable Modification Program and bankruptcy issues.) These decisions also demonstrate the far-reaching impact of *Kessler* on pending foreclosure actions and the blatant disregard for federal laws.

Although the Second Department overlooked the applicability of the Supremacy Clause, several New York State Supreme Court Justices and United States District Judges correctly recognized that *Kessler's* rationale unnecessarily impedes a foreclosing party from complying with federal law. In *CIT Bank, N.A. v. Neris*, 2022 U.S. Dist. LEXIS 99040 (S.D.N.Y. 2022), Senior United States District Judge Victor Marrero disregarded *Kessler* based on "persuasive evidence that the New York Court of Appeals…would reach a different conclusion." *Neris,* at *12-13. The Senior District Judge opined,

> "[I]n reaching th[e] conclusion [that RPAPL §1304 did not prohibit a lender from mailing, in other envelopes, notices to a borrower – whether such notices be federally mandated or consist of any other notice or information that may assist a homeowner to avoid foreclosure], the *Kessler* court did not grapple with how the separate envelope rule conflicts with a debt collector's obligations under the FDCPA. In particular, section §1692e(11) of the FDCPA requires that an 'initial written communication with the consumer,' and any 'subsequent communications,' must

> state that the 'debt collector is attempting to collect a debt and that any information obtained will be used for that purpose.' In a mortgage foreclosure, to comply with the bright-line rule announced in *Kessler*, debt collectors would have to omit from their 'initial' and 'subsequent communications' (i.e., all communications) to a borrower that the debt collector is attempting to collect a debt. However, this requirement would simultaneously violate the FDCPA. Put differently, debt collectors cannot simply mail a separate letter containing the FDCPA disclosure statement, as the *Kessler* court reasons, because the FDCPA requires the disclosure statement to be in a debt collector's 'initial' and 'subsequent' communications."

Id. at *13-14; *see also U.S. Bank N.A. v. McDermott*, 2022 U.S. Dist. LEXIS 116856, at *17-18 (S.D.N.Y. 2022) (referencing *Neris* in finding the foreclosing party's loan servicer's RPAPL §1304 notices complied with federal and state laws).

Not only federal courts, but state court judges have likewise rejected *Kessler's* holding. In *Bank of New York Mellon v. Luria*, 2022 N.Y. Misc. LEXIS 1956 and 2022 N.Y. Misc. LEXIS 3097 (Sup. Ct., Putnam Cty. 2022), the Supreme Court (Hon. Victor Grossman, J.S.C.), rejected a borrower's *Kessler*-predicated challenge to the propriety of a RPAPL §1304 notice that included information required by another consumer protection law - the FDCPA - in 15 U.S.C. §1692e(11). *Luria* at *7-8 (by its very nature [the consumer protection] advisory is not an "other notice"; it is, rather, wholly ancillary to the notice to which it is appended, functioning as a qualifier or disclaimer, which would never be independently given or "mail[ed]" in a "separate envelope.")

Accordingly, RPAPL §1304(2) cannot be construed to bar the Appellant or any lender, assignee, or loan servicer from complying with applicable federal or state law or rule. To allow such a result would run afoul of the Supremacy Clause.

IV. IF THIS COURT AFFIRMS *KESSLER*, THEN THE HOLDING SHOULD BE APPLIED PROSPECTIVELY

The *Kessler* majority considered the case one of first impression, which is destabilizing to mortgage foreclosure law in light of RPAPL §1304 being effective since September 1, 2008 and the "separate envelope rule" being in effect since January 14, 2010. As evidenced by the litany of the subsequent RPAPL §1304(2)-related cases referenced above, numerous lenders, assignees, and loan servicers did not contemplate that a court would prohibit a foreclosure party from including consumer protection information that advanced the HETPA legislative intent in a RPAPL §1304 notice.

Traditional common-law methodology contemplates that cases on direct appeal will generally be decided in accordance with the law as it exists at the time the appellate decision is made; it follows that judicial decisions should reveal or elucidate, rather than create, the law. *People v. Favor*, 82 N.Y. 2d 254 (1993) However, a new rule of state law need not automatically be applied to all cases currently in the direct pipeline. *Favor* at 261-262. As such, state courts generally

have the authority to determine the retroactivity of their own decisions. *Am. Trucking Ass'ns v. Smith*, 496 U.S. 167, 177 (U.S. 1990); *People v. Mitchell*, 80 N.Y. 2d 519, 526-528 (1992); *Favor* at 262.

In contrast to this view that decisional law can have a retroactive effect on a past occurrence or transaction, some scholars have recognized that "judges do in fact do something more than discover law", and that unwavering insistence on retroactivity is "out of tune with the actuality largely because judicial repetition ofttimes does 'work hardship to this who [had] trusted to its existence.'" *Favor* at 260-261; *Busa v. Busa*, 196 A.D. 2d 267 (1994) (appellate court declined to apply retroactively its holding that a judgment of divorce is ineffective to dissolve a marriage if it makes no equitable distribution of marital property because to destabilize divorce judgments which had long been considered final would wreak havoc on society).

Retroactivity analysis is required only where the court has enunciated a "new rule of law." *Favor* at 263. In *Luria*, Justice Grossman opined it "would appear to be indisputable that *Kessler* enunciated a new rule of law [because] [t]he *Kessler* majority acknowledged that it was overruling an array of lower court decisions that had interpreted RPAPL §1304 in a manner wholly at odds with *Kessler's* 'bright-line' rule", and "*Kessler's* shocking repercussions in the foreclosure arena – the potential dismissal of thousands of foreclosure actions on accordance of 90-day

notices which included language, any language at all, above and beyond that specified in RPAPL §1304 – evidenced that *Kessler* represents a dramatic shift away from customary practice that was not foreshadowed by prior case law or by the language of the statute." *Luria* at *12; *see also Favor* at 263 (a departure from the general rule of retroactive application may be warranted where a court's recent holding "represented a dramatic shift away from customary and established procedure"); *Mitchell* at 525 (same). As such, it is necessary to analyze whether this new rule of law should be given retroactive effect. A review of the factors pertaining to retroactivity demonstrates that the *Kessler* holding should only be applied prospectively.

A court may direct that a change in decisional law be applied only prospectively based on three considerations: (1) the purpose of the new rule, (2) the extent of reliance on the old rule, and (3) the effect of the administration of justice of retroactive application. *Favor* at 262. Applying these factors to the *Kessler* decision yields the result that *Kessler* should not be applied retroactively.

First, according to *Kessler*, the "strict approach precluding any additional material in the same envelope as the requisite RPAPL §1304 notices [] comports with the statutory language, [and] provides clarity as a bright-line rule to plaintiff lenders and "promotes stability and predictability." *Freedom Mtge. Corp. v. Engel*, 37 N.Y. 3d 1, 20 (2021) However, this approach runs afoul of the HETPA legislative

intent to protect consumers by facilitating communication with lenders and loan servicers regarding applicable federal laws and rules.

Second, there was extensive reliance on the decade-long "old" interpretation of RPAPL §1304(2) given the numerous post-*Kessler* intermediate appellate decisions in which this Court held the foreclosing party failed to comply with the "separate envelope rule." *See e.g., Bedell* at 1295 (the plaintiff failed to demonstrate that the RPAPL §1304 notice was "served in an envelope that was separate from any other mailing or notice"); *PROF-2014-S2 Legal Tit. Trust II v. DeMarco*, 2022 N.Y. App. Div. LEXIS 3199 (2d Dept. 2022) (the content of the 90-day notices did not strictly comply with RPAPL §1304); *Deutsche Bank Natl. Trust Co. v. Bonal*, 2022 N.Y. App. Div. LEXIS 3185 (2d Dept. 2022); *HSBC Bank USA, N.A. v. Hibbert*, 2022 N.Y. App. Div. LEXIS 3026 (2d Dept. 2022); *U.S. Bank N.A. v. Drakakis*, 2022 N.Y. App. Div. LEXIS 2927 (2d Dept. 2022); *HSBC Bank USA, N.A. v. DiBenedetti*, 2022 N.Y. App. Div. LEXIS 2924 (2d Dept. 2022); *Bank of N.Y. Mellon v. Govan*, 164 N.Y.S. 3d 840, 841 (2d Dept. 2022) (plaintiff failed to establish its entitlement to judgment as a matter of law, as it failed to show its strict compliance with RPAPL §1304(2)); *HSBC Bank USA, N.A. v. Jahaly*, 163 N.Y.S. 3d 843 (2d Dept. 2022) The sheer number of these decisions likely factored into this Court's determination to consider *Kessler*.

Third, the consistently adverse post-*Kessler* decisions on construing RPAPL §1304(2) illustrate that the administration of justice was significantly impacted by *Kessler* because countless otherwise meritorious residential mortgage foreclosures of "home loans" are subject to dismissal. Of import is the fact that New York foreclosure timelines are already among the longest in the country - taking more than 4 ½ years, or 1,691 days to complete. Applying *Kessler* to pending actions will result in further delaying foreclosures as defendants proceed to litigate the §1304 notice issues that were not previously raised. The problem is further complicated when the issue is raised by defendants who are in default. It places needless strain on an already over-taxed court system, creates a further backlog of foreclosures, and already has forced hundreds, if not thousands, of cases to be dismissed and restarted. Further, if nearly completed foreclosures must be restarted, it will impose inordinate burden on the mortgage lenders and servicers who bear the cost of re-foreclosing, tax disbursements, and hazard insurance payments, all of which ultimately harms the borrowers who are contractually responsible for the lender's costs. Finality is critical to the parties, the mortgage lending community and courts.

As noted Justice Grossman in *Luria,*

> "[i]f *Kessler's* 'bright-line' rule were integral to carrying out the Legislature's intent in enacting [RPAPL] §1304's 'separate envelope' requirement, then a strong case could be made for retroactivity. However, the *Kessler* majority was unable to discern the Legislature's intent: the purpose of the 'separate envelope' is nowhere stated in its

> decision, and the majority is forced at one point to guess that it may have been 'to obviate a borrower becoming confused or distracted by extraneous information.' Hence, it appears that the primary purpose of *Kessler's* 'bright-line' rule, like that of all 'bright-line' rules (as the *Kessler* majority is at pains to point out), is to impose a standard that is - prospectively applied - easy to follow in practice and easy to adjudicate in court. Retroactively applied, however, the *Kessler* 'bright-line' rule gravely prejudices parties who reasonably relied on prior [RPAPL] §1304 jurisprudence (Factor No. 2), and creates chaos in the administration of justice by unsettling numerous settled cases (Factor No. 3) without demonstrably advancing the Legislature's purpose in enacting the 'separate envelope' requirement in the first place (Factor No. 1)."

Luria at *13, Based on this painstaking analysis, Justice Grossman suggested if *Kessler* is not reversed by the Court of Appeals, then it should be applied prospectively. S*ee also U.S. Bank NA v. Wahl,* 2022 N.Y. Misc. LEXIS 4128 at *3-4, 2022 NY Slip Op 50762(U), 2022 WL 3453364 ((Sup. Ct. Suffolk Cnty 2022). As demonstrated, each of the three considerations set forth in *Favor* supports prospective application of *Kessler*. Therefore, this Court should refrain from applying *Kessler* retroactively.

V. A BORROWER SHOULD NOT BE PERMITTED TO RAISE A RPAPL §1304 DEFENSE "AT ANY TIME"

RPAPL §1302(2) provides that a violation of RPAPL §1304 shall be a defense to an action to foreclose a mortgage. Intermediate appellate court have held that "a

defense based on non-compliance with RPAPL §1304 may be raised at any time in the action." *Wells Fargo Bank, N.A. v. DeFeo*, 200 A.D. 3d 1105 (2d Dept. 2021); *U.S. Bank N.A. v. Krakoff*, 199 A.D. 3d 859 (2d Dept. 2021) Specifically, the defense can be raised in an answer via defense or general denial (*U.S. Bank Trust, N.A. v. Sadique*, 178 A.D. 3d 984 (2d Dept. 2019)), and in connection with a motion for summary judgment (*Weisblum* at 109-110). Decisional law also provides that the issue can also be raised in opposition or cross-motion to the foreclosing party's motion for a judgment of foreclosure and sale. *CitiMortgage, Inc. v. Dente*, 200 A.D. 3d 1025 (2d Dept. 2021). But a RPAPL §1304 defense cannot be raised sua sponte by the Court (*U.S. Bank, N.A. v. Carey*, 137 A.D. 3d 894, 895-896 (2d Dept. 2016)), a borrower who is in default in answering the complaint (*TD Bank N.A. v. Spector*, 114 A.D. 3d 933, 934 (2d Dept. 2014)), after entry of the final judgment (*Signature Bank v. Epstein*, 95 A.D. 3d 1199, 1201 (2d Dept. 2012), for the first time on appeal (*PHH Mtge. Corp. v. Celestin*, 130 A.D. 3d 703 (2d Dept. 2015)), when it is barred by the law of the case doctrine (*U.S. Bank N.A. v. Ramanababu*, 202 A.D. 3d 1139 (2d Dept. 2022)), or by a non-borrower (*CitiMortgage, Inc. v. Etienne*, 172 A.D. 3d 808 (2d Dept. 2019)).

Permitting a defendant to raise a RPAPL §1304 defense at any time undermines the function and purpose of these laws and rules. Under Civil Practice Law and Rules (CPLR) Rule 3211(e), "an objection or defense based upon a ground

set forth in paragraphs one, three, four, five and six of subdivision (a) of this rule is waived unless raised either by such motion or in the responsive pleading." A RPAPL §1304 defense regarding whether the ninety-day notice violated the RPAPL §1304(2) "separate envelope rule" is akin to one founded upon documentary evidence under CPLR §3211(a)(1) because the RPAPL §1304 notice is documentary evidence. *LNV Corp. v. Allison*, 2022 N.Y. App. Div. LEXIS 3637, at *4 (2d Dept. 2022). In the case of a RPAPL §1304 defense, the defense does not fall within the category of CPLR Rule §§3211(a)(2), (7), or (10). As such, there is nothing in RPAPL §1304 that gives a right to raise a defense "at any time."

Moreover, it is axiomatic that the notice requirements of RPAPL §1304 are a condition precedent to a foreclosure suit. As such, a violation of RPAPL §1304 is not a jurisdictional defense, but rather a subject matter defense (*See Pritchard v. Curtis*, 101 A.D.3d 1502 (3rd Dept. 2012); *U.S. Bank N.A. v. Carey,* 137 A.D.3d 894 (2nd Dept. 2016); *Citmortgage, Inc. v. Pembelton*, 39 Misc.3d 454 (Sup. Ct., Suffolk County, 2013). Because it is not a jurisdictional defense, RPAPL §1304 must be timely raised or else it is waived.

Since the ruling in *Kessler* was issued by the intermediate appellate court, the lower courts have seen an influx of litigation challenging the validity of the §1304 notices, even if a defendant was in default. In light of this, it is the right time for this Court to issue guidance and standards regarding this defense both in the interests of

judicial economy and for clarity for litigants. Because there is no exception to raise RPAPL §1304 as a defense "at any time" under either CPLR §3211(a) or RPAPL §1304, if it is not timely raised under CPLR §3211(e), it is waived.

CONCLUSION

For the foregoing reasons, this Court should reverse so much of the order appealed from as found the Appellant violated RPAPL §1304(2), and reinstate the Appellant's Complaint.

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Respectfully submitted,

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NEW YORK STATE COURT OF APPEALS
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