TESTIMONY OF KIMBERLY ALLMAN, DEPUTY DIRECTOR OF NEW YORK MORTGAGE COALITION, BEFORE NEW YORK CITY COUNCIL COMMUNITY DEVELOPMENT COMMITTEE SUPPORTING RESOLUTIONS ON THE MORTGAGE FORECLOSURE CRISIS

January 30, 2012

Good Afternoon. My name is Kimberly Allman and I am the Deputy Director of the New York Mortgage Coalition in New York City. Thank you for convening this hearing on the mortgage foreclosure crisis and its impact on New York City Neighborhoods.

New York Mortgage Coalition (NYMC) is a not-for-profit agency that creates and protects affordable, responsible homeownership for working families through its 11 non-profit housing counseling partners and 13 member banks. NYMC supports programs in pre-purchase counseling, foreclosure prevention counseling, neighborhood stabilization and financial literacy, especially for low to moderate income residents.

The Importance of Enacting Legislation to Create a Level Playing Field between Servicers and Homeowners

I would like to thank the City Council Committee on Community Development for addressing these issues which are crucial to New Yorkers. NYMC supports all of the Resolutions that are being considered here today and believes that these resolutions address many of the core issues that prevent homeowners from receiving fair treatment in the foreclosure process.

The codifying of the Chief Administrative Judge's rule which requires counsel to attest to the accuracy of foreclosure filings would force servicers and their counsel to act in an honest and fair manner. Allowing a servicer to misrepresent information regarding the homeowner is costly to New Yorkers and the homeowner and encourages unlawful and sloppy practices.

The Pooling and Service Agreement (PSA) provides important information with regard to how a mortgage is handled by the servicer. Without this information, the homeowner is placed at a great disadvantage. The lack of disclosure, clarity and transparency means that the homeowners may be fighting blind against a servicer. The requirement that the PSA be produced at the start of a mortgage foreclosure action protects homeowners who may not have legal representation that will request the document.

Legislation that would prohibit lenders from hiding mortgage assignments in MERS would also help to level the playing field on which homeowners must play to save their homes. This increased transparency is consistent with the attempt to provide homeowners with the same tools and information that the servicers possess.

NYMC also supports the call on the Federal Reserve Bank to preserve the right of rescission for homeowners. Homeowners deserve to be protected from predatory loans and should be given tools to fight violations of disclosure requirements.

Continuation of New York Foreclosure Prevention Services Program in the 2012-2013 Executive Budget

Resolution 872-A which supports the continuation of New York's Foreclosure Prevention Services Program in the 2012-2013 Executive Budget, is of particular importance to NYMC. The loss of funding to housing counseling agencies and legal services will leave homeowners without the expertise and representation that has helped numerous New Yorkers stay in their homes and avoid foreclosure. Because new funding has not been included in the 2012-2013 budget, many agencies have had to reduce the number of attorneys, paralegals and counselors who are working with homeowners. NYMC is among the agencies that have had to reduce staff as a result of this loss of funding. We are no longer able to employ an onsite foreclosure prevention counselor and without her assistance, we are no longer able to directly work with residents in the five boroughs.

I would like to highlight the work of housing counselors. Most of us are aware of the knowledge and expertise that attorneys bring to the table but many people are unaware of the skills that housing counselors bring to homeowners. Counselors are often the first people to provide a homeowner with information and guidance. They are financial first responders and work in tandem with legal services to assist homeowners in distress. Counselors help the homeowner craft a budget, understand and fill out paperwork, conduct a financial analysis, negotiate with their servicer and are experts in the various options and programs available to homeowners. All of these things are crucial in helping a homeowner avoid foreclosure.

NYMC works closely with the Center for New York City Neighborhoods to provide technical assistance to housing counseling agencies that provide foreclosure prevention counseling to homeowners. We help ensure a strong network of counselors that are experts in the work that they do. We help to maintain the high quality of counselors in New York City because we believe that our residents deserve the best advocates out there. But this is only possible if funding is available.

Less money means less people on the ground to address this crisis. Not funding the work of counselors assumes that the work of these counselors is not needed. And if people believe that to be true, it means that they don't truly understand what it means to be behind on their mortgage without the assistance of experts who will fight for them and help them navigate the process. Housing counselors are indispensable to this process.

Conclusion

NYMC is proud to support these resolutions and the protections they bring to the homeowners of New York City. The stability of our neighborhoods is crucial to the success of individuals and New York City, as a whole. When counselors, attorneys and homeowners are forced to fight an uphill battle to secure the homes of New Yorkers, everybody loses. If the servicers will not voluntarily provide this assistance to homeowners, legislation should require it.

Thank you for your attention to this important matter. I would be happy to answer any questions.

NYLAG
NEW YORK LEGAL ASSISTANCE GROUP

YISROEL SCHULMAN, ESQ.
President & Attorney-in-Charge

Testimony by the New York Legal Assistance Group (NYLAG)

Before the New York City Council Committee on Community Development

January 30, 2012

Chairman Albert Vann, Council Members, and staff, good afternoon and thank you for the opportunity to address the ongoing foreclosure crisis, its continuing adverse effects on New York City neighborhoods, and the steps that New York State can take to address the crisis. My name is Randal Jeffrey and I direct the General Legal Services Unit at the New York Legal Assistance Group, where my responsibilities include managing our Foreclosure Prevention Project. NYLAG is a nonprofit organization which provides free legal services in civil law matters to immigrants, seniors, the homebound, renters facing eviction, homeowners facing foreclosure, low income consumers, those in need of government assistance, children in need of special education, domestic violence victims, persons with disabilities, members of the LGBT community, and Holocaust survivors. While NYLAG supports all of the Resolutions before this Committee, this testimony focuses on Resolution 872-A, which calls on the New York State Legislature and the Governor to support the continuation of New York's Foreclosure Prevention Services Program.

NYLAG
NEW YORK LEGAL ASSISTANCE GROUP

YISROEL SCHULMAN, ESQ.
President & Attorney-in-Charge

NYLAG is testifying today as part of its efforts to ensure that the foreclosure crisis that still grips New York City and State does not spread into a crisis of homeowner representation as well. As discussed below, the foreclosure crisis is far from over. Without experienced legal and counseling staff working on behalf of those facing foreclosure, homeowners will be unable to navigate the complicated foreclosure prevention process and will unnecessarily lose their homes.

The legal services and housing counseling funded by the Foreclosure Prevention Services Program are critical to New York's ability to successfully emerge from the foreclosure crisis. This Program has had a huge impact already. It has saved more than 14,000 homes from foreclosure and has saved the State an estimated $3.4 billion in costs and lost tax revenues because of the avoided foreclosures. Every home saved benefits the owner struggling to avoid foreclosure, the community in which the home is located, and New York State as whole.

The legal services and housing counseling funded by the Foreclosure Prevention Services Program are necessary because the foreclosure process in New York is complicated and difficult to navigate. In every foreclosure action, the lender or servicer is represented by counsel. Yet, the vast majority of borrowers being sued in foreclosure are left to try and figure out the system on their own. Though the referees and judges do their best to assist the *pro se* litigants, the lenders and services have the advantage. Most of the individuals who enter the courtroom are nervous, perhaps even terrified, that if they say or do the wrong thing their homes are going to be lost. And in some cases that could be true. Many borrowers have trouble

understanding everything that is going on around them. The lender representatives use technical or banking terms. For some, English may not be their first language. For these individuals, having a legal representative may be the only way to save their home.

Our experience at NYLAG has proven that the chances of a modification being obtained are greatly enhanced when an experienced attorney or housing counselor prepares the application. There are different rules for homeowners in different financial situations, such as self-employed borrowers and borrowers who have other people contributing to paying the mortgage. Even when a modification is offered, there are often problems. Often, legal fees are inflated or miscellaneous fees which cannot be explained are added to the principal balance. In fact, the lenders often make mistakes as to how much the homeowner actually owes on the loan. As one may expect, the average homeowner is so happy to see the light at the end of the tunnel, that he or she will often just sign whatever the lender first offers without analyzing it further. However, if the individual has a legal advocate review and challenge the terms, it is almost always rectified.

Foreclosure Prevention Services Program funding has allowed legal service organizations and housing counseling agencies the ability to advise and represent thousands of needy homeowners. Whether it is by simply explaining the foreclosure process through educational seminars, advising individuals on their particular situations through free clinics at the courthouses, or providing full representation for clients in their foreclosure cases, these legal services have given homeowners the best chance to save their homes. Many people who had

been denied a loan modification repeatedly were then successful once a lawyer or housing counselor became involved in their cases. The lenders have been put on notice that their actions will be monitored and that they will be called to explain anything untoward that occurs. The courts are inundated with foreclosure cases and having legal advocates on both sides of the equation allows the court process to function in a smoother and fairer way.

The need for foreclosure prevention services is just as a great if not greater now than when New York State first funded the Foreclosure Prevention Services Program in 2008. With mortgage servicers working through their problems with foreclosure lawsuits and cases being reassigned from the now-closed Baum law offices in New York, it is expected that a wave of new foreclosure actions will be filed. At the same time, there are new opportunities for homeowners to remain in their homes as mortgage modification programs expand and the economy slowly improves.

The establishment of the Foreclosure Prevention Unit within the Department of Financial Services (DFS) will only increase the need for homeowner advocates, adding another layer of both opportunity and complexity to the process of foreclosure prevention. By adding the Department of Financial Services as a partner in achieving the best possible outcomes for homeowners, we envision New York will continue to lead the nation in creative approaches to moving us out of this crisis.

NYLAG
NEW YORK LEGAL ASSISTANCE GROUP

YISROEL SCHULMAN, ESQ.
President & Attorney-in-Charge

Unfortunately, the Governor's recently released budget failed to include funds for the Foreclosure Prevention Services Program. Without funding for the continuation of this Program, the established network of service providers that took years to build will not be able to continue. As a result, the vast majority New York's distressed homeowners will lose access to the legal assistance and housing counseling that has been available for the last four years.

With over 250,000 homes in New York State currently either in foreclosure or facing foreclosure, the loss of services if the Foreclosure Prevention Services Program is not funded will result in additional lost property values and the reduction in local tax bases. If nothing is done to save these homes, it is estimated that New York State will lose over $61 billion in property values and lost tax revenues. Clearly the elimination of New York's program to provide direct assistance to homeowners will result in more individuals losing their homes to foreclosure. An increasing number of homeowners are going to be left with few to no options for representation and will be forced to face the banks' attorneys unrepresented.

NYLAG's situation is typical of Program providers. Until December 2011, the Foreclosure Prevention Services Program supported four attorneys, two paralegals, and one financial counselor. NYLAG staff provided the full array of foreclosure prevention services throughout New York City, including representation at settlement conferences, submission of mortgage modification options, and counseling on budgeting to ensure success during trial modification periods. Already, NYLAG has had to reassign certain staff due to the loss of funding. Without continued Foreclosure Prevention Services Funding, NYLAG will be forced to reduce its

foreclosure prevention services further, depriving countless New Yorker of access to critical free legal services.

In addition to supporting Resolution 872-A, NYLAG supports the additional Resolutions before the Committee. These Resolutions call on the New York State Legislature, the Governor, and the Federal Reserve Bank to take actions to ensure that the foreclosure process is fairer, such that homeowners have the appropriate opportunity to defend against foreclosures. Combined with the continuation of the Foreclosure Prevention Services Program, these actions will put New Yorkers on a firmer fitting to remain in their homes, benefits not just themselves but also their communities and New York State as well.

Respectfully submitted,

Randal Jeffrey
Director, General Legal Services Unit
New York Legal Assistance Group

Mortgage Foreclosures in New York: An Evolving Crisis

Max Weselcouch
Data Manager and Research Analyst
New York University's Furman Center for Real Estate and Urban Policy

Testimony Before the New York City Council
Committee on Community Development

January 30, 2012

Chair Vann, I'd like to thank you for the opportunity to testify today. My name is Max Weselcouch and I am a Data Manager and Research Analyst at New York University's Furman Center for Real Estate and Urban Policy. With me is Jennifer Ilekis, the Fiscal and Grants Manager at The Furman Center. The Furman Center is a joint research center of the New York University School of Law and the University's Robert F. Wagner School of Public Service. Since its founding in 1995, the Furman Center has become a leading academic research center devoted to the public policy aspects of land use, real estate development, and housing. We provide objective academic and empirical research on affordable housing, housing finance and foreclosure, land use, and neighborhood change. We challenge assumptions and promote frank dialogue through our varied events and conferences, and regularly provide essential data and analysis on housing markets, demographic trends, and quality-of-life indicators to community-based organizations, policymakers, the real estate and finance industries, and the media. NYU's Furman Center has published over 15 rigorous empirical studies or policy analyses on the causes and consequences of the foreclosure crisis, focusing primarily on New York City.

I would like to make three key points today, based on our research in New York City. First, the foreclosure crisis is far from over. Second, foreclosures affect not only those homeowners who lose their homes, but also their tenants, their children, their neighbors, and local governments. Finally, our research indicates that foreclosure counseling does make a difference in outcomes for distressed borrowers.

The Crisis Continues

Since 2007, lenders have filed foreclosure notices on over 68,000 1- to 4-family homes in New York City.[1] These properties are concentrated in communities that had high levels of subprime lending in the mid-2000s, such as Southeast Queens and Central Brooklyn. These neighborhoods have foreclosure rates that rival severely economically depressed areas such as Detroit and "Sand Belt" cities like Salinas, CA or Jacksonville, FL.[2]

The number of new foreclosure filings in New York City slowed in 2011, compared to the two previous years: about 12,000 new foreclosures were initiated in 2011 compared to roughly 20,000 and 17,000 in 2009 and 2010, respectively.[3] While promising, this trend is not necessarily a sign that the crisis is easing.

This drop off coincides with the foreclosure moratoriums adopted by several large, national banks in the aftermath of the robo-signing scandals.[4] Although the moratoriums were lifted, Chief Judge Jonathan Lippman's October 2010 order that attorneys signing affidavits in foreclosure filings attest to the accuracy of the documents they submit[5] has continued to slow the pace of foreclosures.

Further, mortgage default rates, a precursor to later foreclosures, remain high. Statewide, nearly 10 percent of mortgages were 90 days past due at the end of the third quarter of 2011,

[1]NYU Furman Center analysis of data from Public Data Corporation.
[2]The annual foreclosure rates for 2010 were: 4.1 percent for Jamaica, Queens; 4.2 percent for Detroit, Jacksonville, and Salinas. Sources: NYU Furman Center analysis of data from Public Data Corporation and RealtyTrac.
[3]NYU Furman Center analysis of data from Public Data Corporation and NYC Department of Finance.
[4]Streitfeld, David. "Bank of America to Freeze Foreclosure Cases." *New York Times.* October 1, 2010.
[5] Administrative Order of the Chief Administrative Judge of the Courts, A0/431/11, March 2, 2011.

according to data made available by the Federal Reserve Bank of New York.[6] While this is lower than the nearly 12 percent of mortgages that were in default in early 2010, it is still very high relative to the average rate of less than two percent from 1999 through 2005.

Meanwhile, housing prices continue to decline or remain low in most parts of the city.[7] As a result, fewer homeowners are able to sell their properties to escape the foreclosure process. Ten percent of the properties that received a foreclosure notice in New York City in 2007 were sold to a third party within one year; but only five percent of the properties that received a foreclosure notice in 2010 did so. At the same time, the number of properties going to auction has increased. Of all of the properties that received a *lis pendens* filing in 2005, 10 percent eventually went to auction, but 20 percent of the properties that received a foreclosure notice in 2007 have gone to auction.[8]

Finally, changes to the laws governing the foreclosure process, combined with the sheer volume of foreclosure filings, have dramatically slowed the process of resolving these foreclosures. In 2007, the typical property that went to auction (the last stage in the foreclosure process) had received a foreclosure notice one year earlier; by 2010, that time period had doubled.[9] Properties going to auction now most likely received their foreclosure notices in 2009. Although some homeowners will be able to escape foreclosure early through modifications and short sales, many of the 12,000 foreclosure actions filed this year in New York City are likely to drag on at least until 2013.

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[6]Quarterly Report on Household Debt and Credit, August 2011. Federal Reserve Bank of New York. Accessed Nov. 2011 at: http://www.newyorkfed.org/research/national_economy/householdcredit/DistrictReport_Q32011.pdf

[7]NYU Furman Center analysis of New York City Department of Finance Automated City Register Information System data.

[8]Data current as of July 31, 2011. Source: NYU Furman Center analysis of data from New York City Department of Finance Automated City Register Information System and Public Data Corporation.

[9]NYU Furman Center analysis of data from Public Data Corporation and NYC Department of Finance.

In sum, even if the economy and housing prices were to recover sharply in the near future, the need for foreclosure mitigation services would be with us for at least a few more years, as the backlog of existing foreclosures and the number of people in default who may enter foreclosure soon, work through the system. And of course, if the economy and housing prices do not fully recover in the near future the need for foreclosure mitigation will be even greater.

Foreclosure impacts

Over the last several years, researchers at NYU's Furman Center have been studying the costs foreclosures impose on others, beyond the individual borrowers. Children for example, likely suffer as a result of foreclosure: more than 20,000 students lived in a building that entered foreclosure in the 2006-07 school year, and those students were considerably more likely to change schools than their peers by the following school year.[10] Further, the schools that they ended up attending were of poorer quality, on average, than the schools they attended previously. We are now studying how foreclosures, and the moves they precipitate, affect children's performance on standardized tests.

Tenants also suffer when their landlords are foreclosed upon, which may happen even though the tenant has paid the rent and has not contributed in any way to the landlord's default. More than half of all properties in New York City that enter foreclosure have more than one unit, and we estimate that since 2007, buildings entering foreclosure in New York City were home to over 100,000 renter households.[11] Since 2009, renters have been partially protected from immediate eviction by the federal Protecting Tenants in Foreclosure Act and a similar state law. But some

[10]Been, V., Ellen, I. E., Schwartz, A.E., Steifel, L., Weinstein, M. (2011). "Does Losing Your Home Mean Losing Your School? Effects of Foreclosures on the School Mobility of Children." *Regional Science and Urban Economics:* 41 (4).
[11]NYU Furman Center analysis of data from Public Data Corporation and NYC Department of Finance.

renters nevertheless are forced to move, even if current with their rent, because a financially distressed landlord misses utility payments or skimps on maintenance. Despite legal protections, parties buying the property out of foreclosure also sometimes bully tenants into leaving.

Foreclosures also affect neighboring property owners. Our research found that homes located in close proximity to foreclosed properties experience price declines, even after controlling for previous price trends in the neighborhood. A single foreclosure can reduce prices of homes within 250 feet by 1-2 percent. Concentrated foreclosures can affect surrounding property values in a larger area; three foreclosure filings within 500 feet of a home will depress its sale value by about three percent.[12] This can create a vicious cycle: concentrated foreclosures can drive down prices in a community, which in turn leads to additional foreclosures. In our study of subprime loans in New York City, we found that a foreclosure rate above three percent was associated with a 30 percent increase in the likelihood a borrower in that neighborhood will default, even after controlling for borrower risk, loan characteristics, and other characteristics of the neighborhood.[13]

At any point in the foreclosure process, the property may become vacant: owner occupiers may move out because they know they will eventually be evicted, and, as mentioned before, renters may move out because services or maintenance may decline. These vacant homes make a community less attractive, and can invite vermin or garbage, or – worse yet – crime. The Furman Center is now conducting a detailed study of the locations of every crime in New York City from

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[12]Schuetz, J., Been, V., and Ellen, I.G. (2008). "Neighborhood Effects of Concentrated Mortgage Foreclosures." *Journal of Housing Economics*: 17(4). Available at: http://www.sciencedirect.com/science/article/pii/S1051137708000338

[13]Chan, S., Gedal, M., Been, V., & Haughwout, A. (2011). The Role of Neighborhood Characteristics in Mortgage Defaults Risk: Evidence from New York City. *NYU Furman Center Working Paper.* Available at: http://furmancenter.org/files/publications/Pathways_1_Newest_with_Figures_Working_Paper.pdf

The views expressed in this paper are those of the authors alone and do not necessarily reflect those of the New York Federal Reserve Bank or the Department of the Treasury.

2004 to 2008, and matching those crimes to the location of every foreclosure. While our results are still preliminary, we find a significant association between increases in foreclosure activity on a city block and increases in crime on the same block.

Foreclosure Counseling and Mortgage Modifications

Since the start of the foreclosure crisis, New York City and State have been leaders in adopting reforms aimed at keeping homeowners in their homes when possible, ensuring tenants and homeowners are treated fairly in foreclosure proceedings, and mitigating the effects of unavoidable foreclosures. While we have not studied the effects of each initiative, our work sheds light on the efficacy of the city and state's investments in foreclosure counseling.

We studied nearly 29,000 mortgages issued in New York City from 2004 to 2008 that became delinquent between 2008 and 2010.[14] The mortgage data, accessed through a partnership with researchers at the Office of the Comptroller of the Currency, includes detailed information on the loan terms, the properties, and the borrowers. Additionally, we were able to match these loans to data about which borrowers received counseling through the Center for New York City Neighborhoods (CNYCN).

Controlling for all known characteristics of the borrower (such as income, FICO score, and property type), the mortgage (terms and rates, debt-to-income ratio, loan-to-value ratio) and the neighborhood surrounding the property (demographics and market characteristics), we found that

[14]Been, V., Weselcouch, M., Voicu, I., & Murff, S. (2011). Determinants of the Incidence of Loan Modifications. *NYU Furman Center Working Paper*. Available at: http://furmancenter.org/files/publications/Determinants_of_Mods_October_2011_Final_1.pdf.
The views expressed in this paper are those of the authors alone and do not necessarily reflect those of the Office of the Comptroller of the Currency or the Department of the Treasury.

the nearly 700 delinquent borrowers who received CNYCN counseling were 30 percent more likely than those who did not receive counseling to obtain a modification. Again, our results are still under peer review, and are therefore preliminary.

Our study cannot determine whether CNYCN-funded counseling actually *caused* borrowers to be more likely to receive a modification. It may be, instead, that those who seek counseling have unobserved characteristics – like tenacity or ability to manage bureaucracy - that make it more likely that they will obtain modifications. But it does indicate that people with the same observable characteristics, such as credit score, income, and loan types, who decided to go to counseling were considerably more likely to end up in a modification. Further, those borrowers who received a modification after counseling were no more likely than other borrowers to re-default, after controlling for the modification terms, the borrowers' risk, and neighborhood factors.

In summary, our analyses of the housing and mortgage markets show that the foreclosure crisis likely will be with us for some time. We know that foreclosures impose substantial harms, not only on homeowners, but also on tenants, children, neighbors, and taxpayers. And finally, our findings make clear that the intervention of foreclosure counseling is associated with a greater likelihood that borrowers will receive modifications. Thank you and I would be happy to take any questions.

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Legal Services NYC

Hearing of the New York City Council Committee on Community Development

Oversight Hearing on Proposed Resolutions 871-A, 972-A, 988, 989, 990

Monday January 30, 2012
New York, New York

Testimony of Aisha Baruni and Alexis Lorenzo, Legal Services NYC

My name is Alexis Lorenzo and I am a staff attorney with the Foreclosure Prevention Unit at Legal Services NYC-Bronx. My name is Aisha Baruni and I am a staff attorney with the Foreclosure Prevention Project at Queens Legal Services. Legal Services NYC-Bronx and Queens Legal Services are two of the neighborhood offices of Legal Services NYC (LS-NYC). We present the following testimony on behalf of Legal Services NYC in connection with Resolutions 871-A, 872-A, 988, 989 and 990 proposed by the City Council as a legislative response to the ongoing mortgage foreclosure crisis in New York State.

Legal Services NYC is the nation's largest provider of free civil legal services to the poor. For more than 40 years, we have provided expert legal assistance and advocacy to low-income residents of New York City. Each year, our 19 neighborhood offices together serve tens of thousands of New Yorkers—including homeowners, tenants, the disabled, immigrants, the elderly and children.

Legal Services NYC is also the oldest and largest provider of foreclosure prevention legal services in New York. For more than a decade, we have challenged abusive lending and home sale schemes—from redlining to subprime lending to loan modification scams. We currently operate six dedicated foreclosure prevention projects with more than 45 attorneys and paralegals working in some of the hardest hit neighborhoods across the Bronx, Queens, Brooklyn, and Staten Island. To date, we have assisted more than 6,000 families at risk of losing their homes. We therefore, have an informed perspective on the challenges homeowners face in defending foreclosure actions and the practices engaged in by servicers, lenders and plaintiffs' attorneys. We are honored to be here today to testify about the grave issues facing distressed homeowners in New York and to support the Council's proposed resolutions.

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I. THE FORECLOSURE CRISIS CONTINUES TO JEOPARDIZE THE SAFETY AND STABILITY OF COMMUNITIES ACROSS OUR CITY AND STATE.

New York City neighborhoods continue to endure a catastrophe as record numbers of families face losing their homes. In NYC, the economic downturn and rising unemployment have deepened a crisis initially caused by subprime lending. For years, low-income communities and communities of color were aggressively targeted for abusive, unaffordable mortgages, including adjustable-rate mortgages, stated-income loans, payment-option adjustable rate mortgages and equity-based lending with exorbitant default rates. As the foreclosure crisis deepened, and the economy declined, record numbers of homeowners fell into foreclosure due to unemployment and underemployment. For most of our clients, the proximate cause of default is an **economic hardship** but the more fundamental problem is a **high-cost mortgage loan** that leaves little to no room for even a temporary setback. We now face a new wave of new foreclosures as the full impact of predatory loans made during the subprime boom of the last decade hits as families struggle with less income, higher debt and smaller safety nets.

As of March 2011, more than **69,000** New York City homeowners of owner-occupied, 1-4 family properties were in foreclosure or seriously delinquent on their loans. The Federal Reserve Bank recently reported that New York City had among the highest foreclosure rates in the United States, with 10% of all mortgages in foreclosure or seriously delinquent and an additional 4% between 30 and 90 days past due. **That rate is even higher in the Bronx, Queens and Brooklyn communities we serve, where we see rates as high as 1 in 3 homeowners in default in some areas.**

At our programs across New York City's low-income communities, we see both the terrible individual impact of foreclosures, as well as the disastrous consequences for the neighborhoods affected. **Over 90% of our clients are people of color—and many are elderly or single heads of household.** More often than not, multiple generations live within the home, as do tenants. One foreclosure—let alone thousands—creates a costly ripple effect. Walking through the formerly stable communities where families once pursued the American dream of buying homes in which to raise their families, we now see record vacancies, blight from bank-owned neglect, increased crime, drastic home value loss and disappearing affordable rental housing.

While it is difficult to quantify the full cost of foreclosure, we know that foreclosed homes sell about 25% or more below fair market value, negatively affecting neighboring property values. These lowered property values lead to significant losses to the tax base of counties, towns and cities. Our colleagues from the Empire Justice Center recently reported that, if foreclosures are not prevented, New York City will sustain a $7 billion decline in property values—and more than $133 million in reduced tax revenues—in the coming years.

This crisis is far from over, and its impacts are startling; indeed, the need is greater now than ever for stronger enforcement and fairer procedures that level the playing field for homeowners defending mortgage foreclosure actions often pursued by large foreclosure law firms with tremendous resources prosecuting thousands of cases a year. And it should be noted that, although the most notorious of those law firms—once it was subject to the scrutiny of law enforcement—recently announced that it will close its doors, the kinds of practices it engaged in are typical of the practices of the plaintiffs' foreclosure bar. The need for representation to combat those practices remains crucial.

II. THE CITY COUNCIL'S RESOLUTION NUMBER 872-A CALLING UPON THE NEW YORK STATE LEGISLATURE AND THE GOVERNOR TO SUPPORT THE CONTINUED FUNDING OF THE FORECLOSURE PREVENTION SERVICES PROGRAM WILL ENCOURAGE THE FUNDING OF THESE ESSENTIAL SERVICES.

The continued funding of the Foreclosure Prevention Services Program, and the non-profit network it supports, is critical to ensuring that New York homeowners are able to protect their homes from unlawful foreclosures and make use of the city, state, and federal programs intended to prevent unnecessary losses of homes. The Program funds more than 120 not-for-profit organizations across New York to provide a wide-range of critical foreclosure prevention services, including both legal representation and housing counseling. As a result of the Program, we now have a robust statewide network of homeowner advocates—counselors, lawyers and our colleagues all working together to stave off foreclosures and maintain affordable housing. Since its inception, Program-funded advocates have assisted more than 80,000 families and have averted approximately 14,000 foreclosures. Thousands of additional cases are still pending. Program-funded advocates have also engaged in mass public education efforts, dramatically raising the visibility of foreclosure-prevention resources, homeowner rights, and awareness of how to avoid foreclosure rescue scams. We have been active in local, regional and national legislative advocacy, and first exposed many of the practices now acknowledged as illegal—such as robo-signing and loan modification scams—that have shaped the foreclosure crises.

Though we are fortunate to have several protections for homeowners in New York State's judicial foreclosure process, homeowners cannot possibly navigate the judicial system and banks' complicated processes for applying for loan modifications without the expert assistance of an attorney or housing counselor. An informal survey of clients in one of our offices revealed that more than 79% had been working with their servicer for more than a year and had been denied a modification at least once before coming to us. Further, many foreclosures require complex solutions—whether they involve consideration of non-traditional income, write-down of a principal balance or a solution outside of the standard framework—that are practically impossible without an advocate. We have also seen a deluge of recent federal and state regulations in the banking and lending industry that provide numerous benefits to homeowners but are too complex and cumbersome for unaided homeowners to comprehend. Only advocates have the ability to invoke these regulations and challenge improper denials of loan modifications or other workouts through administrative channels, to say nothing of the expertise needed to protect homeowners' rights in judicial foreclosure proceedings.

Our services are helping to stabilize communities across the state. Without continued funding in the 2012-13 Budget, homeowners facing foreclosure will no longer have access to critical services and the network of service providers that the Program has developed will be decimated as programs around the state are forced to shut their doors. Just as dire, with nowhere left to turn, even more homeowners will fall prey to the ubiquitous mortgage rescue scammers that plague our communities, costing homeowners money and time that they certainly cannot afford to lose. We therefore support the Council's resolution urging the State not to eliminate the only state-wide source of funding for foreclosure prevention services while the State is in the midst of the worst foreclosure crisis since the Great Depression.

II. THE CITY COUNCIL'S RESOLUTIONS PROPOSING FAIRER PROCEDURES IN MORTGAGE FORECLOSURE ACTIONS WILL ENSURE A MORE STREAMLINED, LESS TIME-CONSUMING FORECLOSURE PROCESS AND WILL HELP RESTORE THE PUBLIC'S CONFIDENCE IN THE JUDICIARY FOLLOWING YEARS OF RUBBER STAMPING OF FRAUDULENT FORECLOSURE FILINGS.

1. The Passage of Resolution 0871-A—Calling on the State Legislature to Codify subdivision (f) of section 202.12-a of the Uniform Rules for the New York State Trial Courts, Addressing the Accuracy of Filings in Residential Foreclosure Actions—Will Deter Sloppy and Fraudulent Foreclosure Filing Practices and Avoid Needless Motion Practice Challenging Standing.

There has been considerable media attention recently on what, in fact, is nothing new: lenders seeking to foreclose and the factory-like law firms doing their bidding routinely file foreclosure actions without doing the most minimal due diligence required when an attorney commences a lawsuit. But the concern about "robo-signed" papers and fraudulent notarization of papers submitted to the courts in support of foreclosure cases is not, contrary to what some in the press report, just a matter of "sloppy paperwork" that can simply be rectified by going back and dotting some "i"s and crossing some "t"s. What is really at the heart of this issue is whether the party commencing a foreclosure action—an action invoking the court's jurisdiction in order to enforce a mortgage—has the legal right to do so.

In order to have the legal right to foreclose, a party must own not just the mortgage, which represents the security interest in the home provided by the homeowner as collateral for a loan, but the note representing the loan itself. A mortgage without the corresponding note carries with it no right to foreclose, and without the note there is no "standing" to prosecute a foreclosure case. This is not just a legal technicality thrown up by defendants to delay foreclosure—it goes to fundamental precepts of justice requiring that cases be brought only by those with a real interest in them. A serious problem may arise if a foreclosing plaintiff is permitted to proceed to foreclosure without demonstrating its ownership of the note (and not just the mortgage), because a homeowner could find herself being forced to pay the same debt twice. She could satisfy a debt by losing her home to foreclosure, and then down the road find herself facing a lawsuit seeking a money judgment on the note brought by the party who has the note.

We commend Chief Judge Lippman for his leadership in promulgating the recent court rule requiring plaintiffs' counsel in foreclosure cases to submit affirmations attesting to the accuracy of the contents of the pleadings that they file, and we believe that such a requirement should also be enacted by the Legislature. Further, we urge the Legislature to consider the complicity of the foreclosure mill law firms in pursuing foreclosure actions without the kind of minimal due diligence that lawyers in any other practice area would conduct before signing off on pleadings filed in court. It is not just employees of servicers who are "robo-signing" affidavits—foreclosure mill law firms are "robo-signing" literally thousands of complaints and summary judgment motion papers without any knowledge of the facts and without ever having even spoken to a client representative with knowledge—in flagrant violation of the ethical responsibilities of attorneys filing papers in court. Those same attorneys are signing the assignments of the mortgages on which they purport to foreclose, often based on spurious designations as officers of Mortgage Electronic Registration System (MERS). We believe that if

foreclosure litigation were held to the same standards that are applied to all other areas of practice, there would be no "robo-signing" crisis.

More importantly, if plaintiffs' foreclosure lawyers were held to the same standard of practice applicable to all other lawyers, lenders would have an incentive to negotiate reasonable loan modifications and other work-out arrangements—as it stands now, there is almost no incentive to negotiate alternatives to foreclosure because the lenders can proceed to judgment without doing any of their homework and without paying the real costs of litigating a foreclosure. Finally, plaintiffs' foreclosure attorneys continually evade their obligation to file the affirmation required by court rule by failing to file Requests for Judicial Intervention (RJIs) that the affirmation must accompany. This has created a shadow docket of homeowners in limbo, who do not receive court-mandated settlement conferences, and whose cases sit for months and in some cases over a year, without a plaintiff's attorney ever affirming that plaintiff has a right to bring the foreclosure. The passage of Resolution 871 will encourage legislation to codify the affirmation requirement, which will deter sloppy and fraudulent foreclosure filing practices and avoid needless motion practice challenging standing.

2. <u>The Passage of Resolution 989—Calling for the State Legislature and the Governor to Enact Legislation Prohibiting Lenders from Concealing Mortgage Assignments Through the use of the Mortgage Electronic Registration System, Inc. ("MERS")—Will Strengthen and Shorten the Foreclosure Process, Preserve Judicial Resources and Create Greater Transparency.</u>

The issue of standing in residential foreclosure cases, which is inextricably linked with "robo-signing" and the filing of fraudulent legal documents, is at issue in the vast majority of the cases seen by our offices. Ownership of the mortgage is in question for most of the homeowners who walk through our doors because ownership has been obscured by the securitization process and the highly prevalent use of Mortgage Electronic Registration Systems ("MERS") as a clearinghouse. The problems caused by the opacity of the MERS system are not just theoretical. If a bank is permitted to proceed to foreclosure without demonstrating its ownership of the note representing the debt, a homeowner could find herself being forced to pay the same debt twice. Additionally, our State's policy favors negotiated loan modifications over homes lost to foreclosure; when foreclosure actions are brought by parties whose ownership of the debt is in doubt, it is exceptionally difficult to negotiate an affordable loan modification.

The foreclosure plaintiff's ownership interest in the homeowner's loan is often not revealed in the initial court papers and when homeowners are unrepresented, this information can elude the homeowner for the life of a case. The identity of the true owner/investor in a homeowner's loan is extremely difficult to find even for an attorney and is often not publicly available. In instances where a plaintiff's standing should be challenged because of questionable title, the burden of identifying the error presently rests on homeowners who are very rarely in a position to discover this defense. For this reason, we need legislation that: 1) prohibits lenders from concealing mortgage assignments through the use of MERS; 2) forces the foreclosure mills to document the legal right to foreclose at the commencement of a foreclosure action; and 3) permits homeowners to raise these standing issues *at any point* in the foreclosure action.

When a mortgage loan is recorded as being held by MERS, Wall Street investors and banks transfer the mortgage without recording those transfers with the Office of the City Register. Typically, MERS will then record an assignment from MERS to a foreclosing plaintiff only just

prior to the commencement of a foreclosure lawsuit, without any further evidence showing how the loan was transferred from the original lender to the party that now claims ownership of the loan. This system is of questionable legality, and it conceals the chain of title of the loan from all parties involved. Further, concerns have been raised with respect to MERS' own ability to track these loans. Lenders' reliance on MERS to obscure the true ownership of mortgage debt is so pervasive, and the bundling of mortgage debt into securitization pools so common, that in almost every case we see it is exceptionally difficult to determine the real owner of our clients' loans. This lack of transparency makes achieving settlements and loan modifications that much more difficult.

We routinely see mortgages assigned just days before the foreclosure action is filed. Many of these mortgages are supposedly assigned by MERS, in assignments executed by individuals with doubtful authority. A significant number of assignments executed on behalf of MERS are made by attorneys employed by foreclosure mill law firms who then represent the plaintiff. Often these assignments purport to assign mortgages that are already in default into a securitization trust more than two years after the closing date of the trust has passed, in violation of both the governing Pooling and Servicing Agreement (PSA) as well as federal and state laws governing Real Estate Mortgage Investment Conduits (known as "REMICs").

Because MERS conceals loan ownership and creates a thicket of legal problems for all parties involved, we welcome the Council's support for legislation that prohibits MERS from operating in New York State.

The passage of legislation to rationalize and clarify the law on this subject, furthermore, is essential to bring greater efficiency to legal proceedings, avoid wasteful motion practice that has been consuming court resources, facilitate meaningful loan modification negotiations, and ensure that the homes that are lost to foreclosure do not suffer from clouds on their title.

3. The Passage of Resolution 988—Calling on the State Legislature and the Governor to Enact Legislation Requiring a Foreclosing Party to Produce the Pooling and Servicing Agreement at the Commencement of a Mortgage Foreclosure Action—Will Eliminate Hurdles in Learning Whether or not a Securitized Trust has Standing to Foreclose and Whether any Relevant Investor Restrictions Exist as a Barrier to Modification.

As we have mentioned, because of the prevalence of mortgage securitization, it is difficult to determine whether endorsements are proper and whether loans have been properly transferred to a securitized trust seeking to foreclose without first reviewing the documents governing the servicing of the trust, which are embodied in Pooling and Servicing Agreements (PSAs). Because it is necessary to review the PSA to assess whether the plaintiff in fact has the legal right, known as standing, to foreclose, we support legislation that requires the plaintiff in foreclosure actions, for mortgages that have been securitized, to produce the governing PSA at the commencement of foreclosure.

Additionally, PSAs sometimes contain restrictions on how loans can be modified, but just as often servicers invoke such "investor restrictions" as grounds for denying a loan modification when, in fact, the claimed restriction does not in fact bar modification. It is thus important for homeowner advocates to verify such claimed investor restrictions, both to counsel homeowners

on modification options and to challenge banks and servicers when they wrongfully deny modification based on purported investor restrictions.

Further, because it is virtually impossible at the commencement of a foreclosure action for a homeowner to determine whether the plaintiff owns the note and the mortgage, we also strongly support legislation that provides that only the owner and holder of a mortgage and note shall have standing to commence a mortgage foreclosure action and which clarifies that the defense of standing may be raised at any time in the foreclosure action. Such legislation is currently pending in the state legislature at Bill Number S.697/A.629.

The clarification that standing can be raised at any time is especially important because in any case involving a securitized loan or MERS – and this includes the vast majority of cases we see – it is not possible to discern whether the plaintiff actually has standing before the deadline for answering the complaint or moving to dismiss expires. Of course, this is particularly true for the majority of homeowners without access to legal counsel.

III. THE CITY COUNCIL'S PROPOSED RESOLUTION NUMBER 990 CALLING UPON THE FEDERAL RESERVE TO WITHDRAW ITS PROPOSED RULE EVISCERATING HOMEOWNERS' RESCISSION RIGHT WOULD PROTECT HOMEOWNERS' CRITICAL ABILITY TO UNWIND ILLEGAL AND PREDATORY LOANS.

We support the passage of Resolution 990, which calls upon the Federal Reserve Bank ("Federal Reserve") to rescind its proposed rule requiring homeowners to pay off the remaining principal on a mortgage before the lender is forced to cancel its security interest in the home if the homeowner exercises the right to rescind under the federal Truth in Lending Act (TILA).

In the midst of a foreclosure crisis nationally and here in New York, now is the time to reinforce the importance of rescission under TILA—not to weaken it. The proposed rule of the Federal Reserve would eviscerate the single most effective tool that homeowners have to stop foreclosure and avoid predatory loans: the extended right of rescission.

Under TILA, Congress has granted consumers the right to unwind an illegal loan through statutory rescission for up to three years after the consummation of the loan. The statute provides that if the proper disclosures were not provided to the homeowner at the loan closing, the homeowner can then rescind the loan by sending a notice to the creditor, requiring the creditor to cancel the security interest. [1] Only *after* the creditor has complied with its obligation to cancel its security interest is the homeowner required to pay back to the lender the amount still due on the loan.

The statute as passed by Congress is clear about the order for these events. The Federal Reserve's proposed rule, however, would upend this order, at borrowers' expense. The Board's proposed rule would require the homeowner to pay the entire amount demanded by the creditor *before* the creditor is required to cancel the security interest in the home. This will render the extended right of rescission useless. This proposed new order will undermine the primary

[1] TILA, section 1635(b), states: "When an obligor exercising his right to cancel . . . any security interest given by the obligor . . . becomes void upon such rescission. 15 U.S.C. § 1635(b).

purpose and power of TILA's extended right of rescission—the *mandatory* cancellation of the security interest by the creditor upon receipt of the homeowner's notice.

The order of obligation set forth in the statute is the core of the protection provided by the extended right of rescission and is one of the strongest tools to save homes from predatory loans and foreclosures. By cancelling the security interest, the homeowner then has a defense to foreclosure. It also means that the homeowner—who can strip away improper and excessive charges under rescission—has the means to obtain refinancing so as to be able to tender the amount due. Instead, if the Federal Reserve's proposed rule is enacted, the right of rescission will be *useless* to all but the wealthiest homeowners.

To be clear, the extended right of rescission does *not* mean that the homeowner does not have to repay the loan. *The balance is still due to the creditor*, although that balance is reduced by the finance charges, fees and amounts the homeowner has already paid. Once the creditor cancels its security interest, it will still have a loan that is unsecured. Being an unsecured creditor is very different from having the tender obligation wiped out entirely, as an unsecured creditor may have multiple avenues for collection.

The Federal Reserve comments that its proposed rule will reduce the compliance burden and litigation risk for creditors.[2] TILA, however, already permits creditors to provide disclosures that are inaccurate within certain specified tolerances. This protects creditors who try to comply with the statute. Moreover, creditors themselves have the most control over their own litigation risks and can minimize such risks by simply providing homeowners with the disclosures required by the statute. This is a fundamental point: if a creditor complies with the statute, a homeowner does not have an extended right of rescission. Thus, the Federal Reserve's proposed rule seeks to create protections to assist creditors who have committed a material violation of the statute.

To the extent that the Federal Reserve no longer has authority to withdraw its proposed rule, in light of the transfer of its rule-making authority to the Consumer Financial Protection Bureau (CFPB) under the Dodd-Frank Act, we support the CFPB's withdrawal of the proposed rule.

The Federal Reserve's proposed rule directly contradicts the unequivocal dictate of TILA, which requires the consumer to pay off or otherwise tender the remaining principal on a mortgage only *after* the creditor cancels the security interest. If such a rule is enacted, it will decimate TILA's right of rescission, taking away the primary protection homeowners currently have to escape abusive loans and avoid foreclosure, while minimizing the incentive creditors have to comply with the statute's requirements. The purpose of TILA is to protect consumers; Congress set out an order of procedures in the statute to further that purpose and that order should remain.

Thank you for the opportunity to present this testimony, and we look forward to working with the Council on these very important issues.

[2] 75 Fed. Reg. 58539, 58548 (Sept. 24, 2010).

FOR THE RECORD

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Oversight: Systemic Problems in the Ongoing Mortgage Foreclosure Crisis, and its Effect On New York City Neighborhoods
Public Hearing
250 Broadway, 14th Floor, Committee Room
New York, New York
1:00 p.m.

Urban Justice Center - Community Development Project

Testimony before the New York City Council Committee on Community Development

Good morning. My name is Edward W. De Barbieri. I am a staff attorney at the Community Development Project of the Urban Justice Center. The Community Development Project (www.cdp-ny.org) strengthens the impact of grassroots organizations in New York's low-income and other excluded communities. We achieve this through legal, technical, research and policy assistance in support of their work towards social justice. We partner with community organizations working on such issues as fair housing and anti-displacement, workers' rights, consumer justice, economic development, civic participation, access to affordable health care and environmental justice.

I am here to urge you to pass Resolutions 871-A, 988, 989, 990, and especially 872-A, which calls for the refunding of the State's Foreclosure Prevention Services Program in the FY2013 Budget. We at the Community Development Project support the Council's efforts to keep families in their homes by urging the State to adequately fund home loan counselors and legal service providers, and ensuring fairness in the mortgage foreclosure process of all New York City residents.

The facts are simple: few if any homeowners receive loan modifications without the assistance of a home loan counselor or attorney. Left to their own self-regulation, banks and servicers improperly deny homeowners loan modifications routinely under the federal HAMP program and in-house modification programs. We have yet to see a proper HAMP denial in our work since the program was implemented.

The funds previously allocated by the State have supported low-income homeowners directly by providing necessary support to community-based home loan counselors and legal service professionals. We work closely with Chhaya CDC, a HUD certified home loan counselor in Queens that provides counseling and assistance to homeowners facing foreclosure. With Chhaya's assistance, homeowners are able to advocate for their interests with lenders and obtain needed modification assistance.

When lenders initiate foreclosure actions, we work with Chhaya to represent homeowners in state court and advocate for their interests at settlement conferences. This model has been extremely effective in securing loan modifications for our clients. When banks do not honor their agreements under law we are able to represent homeowners in affirmative litigation and ensure banks do what they have agreed to do. All this work would not be possible without funding from the State. Again, this work would not get done, and families would be forced to leave their homes but for the financial support of the State.

In one case, a family in Queens came to meet with us a week before a scheduled foreclosure sale. Their home loan counselor at Chhaya made a referral to us because of the imminent sale date. Although the family had been placed into a Trial Period Plan by a large national bank, which guaranteed modification after making three monthly payments and maintaining their income, the bank had failed to issue a permanent modification even after the family made the three required payments and met other necessary conditions. Through our legal representation we were able to stay the foreclosure sale and negotiate a permanent modification allowing the family to keep their home. But for the involvement of Chhaya and our attorneys the family would have lost their home and been cast into unstable and vulnerable circumstances.

Without State funding this work would not have been possible. If families are not advised of their legal rights regarding the foreclosure process the result will be far less stability in the housing market and continued crises for New York families.

In conclusion, we urge the Council to pass these important pieces of legislation, in particular Res. 872-A, which will urge the State to continue funding this important work through the next fiscal year.

Thank you for calling this hearing today and giving me the opportunity to testify on this important issue.

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Testimony of
Mark Ladov and Nabanita Pal
The Brennan Center for Justice at NYU School of Law[1]

Before the
New York City Council Committee on Community Development

For the hearing on
Systemic Problems in the Ongoing Mortgage Foreclosure Crisis, and its Effect on New York City Neighborhoods

January 30, 2012

Councilman Vann, and members of the Committee on Community Development, thank you for this opportunity to testify in support of the foreclosure prevention resolutions being discussed today. We are here on behalf of the Brennan Center for Justice, a non-partisan public policy institute that works to increase low-income people's access to legal representation.

We support the Council's efforts to pass the following resolutions:

1. Resolution Number 872-A in support of continued funding for the New York Foreclosure Prevention Services Program.
2. Resolution Number 871-A in support of codifying an affirmation rule that ensures the accuracy of documents filed in court in foreclosure actions.
3. Resolution Number 998 in support of legislation that requires foreclosing parties to produce a pooling and servicing agreement at the commencement of a foreclosure action.
4. Resolution Number 989 in support of legislation that prohibits lenders from concealing mortgage assignments through MERS.
5. Resolution Number 990 in support of protecting a homeowner's right of rescission under the federal Truth in Lending Act.

We would like to limit our testimony today to the Brennan Center's research documenting the national crisis in foreclosure legal representation, research that supports the need for robust foreclosure prevention counseling and legal services in New York State. Over the past few

years, we have gathered data from court systems across the country and found that overwhelmingly, homeowners in foreclosure face complex legal proceedings without an attorney at their side. To ensure that these homeowners have a fair shot at justice – and every possible opportunity to avoid foreclosure – dedicated state funding for foreclosure assistance is critical.

New York's Foreclosure Prevention Services Program exemplifies the value of this assistance. The Program has assisted more than 80,000 homeowners and saved at least 14,000 homes from foreclosure. The Empire Justice Center estimates this investment saved New Yorkers billions of dollars by preventing families from slipping into homelessness, shoring up property values in struggling communities and preserving our state's property tax base.[2]

Legal services attorneys and housing counselors funded by this program help homeowners to defend their rights and negotiate more effectively with their lenders. Research shows that skilled counseling makes a significant difference. A 2010 study by the Urban Institute found that homeowners in a federal loan counseling program were 1.7 times more likely to avoid foreclosure than those who were not.[3] Homeowners with a counselor also secured better and more affordable loan modifications from their lenders. The study found that, on average, clients with a housing counselor lowered their monthly payments by $267 more than those who did not have a counselor.[4] Documented errors and abuses in the HAMP modification process further illustrate why homeowners need effective advocates at their side pressing for results from lenders.[5]

When homeowners are represented, their attorneys can make a significant difference in their individual cases – and by doing so, reform the process more broadly, even for homeowners without legal counsel. In *Foreclosures: A Crisis in Legal Representation*, a national report documenting the importance of legal assistance, the Brennan Center identified several ways in which lawyers assist homeowners:

- Raising claims that protect homeowners from lenders and servicers who broke the law;
- Helping homeowners renegotiate their loans;
- Helping ensure that the legal process is followed properly;
- Helping homeowners obtain protection of the bankruptcy law;
- Helping tenants when a landlord's property is foreclosed; and
- Giving those affected by foreclosure a voice in policy reform.[6]

In the two years since that report, we have seen continued evidence of the need to protect homeowners' rights, and the opportunities for abuse that arise when homeowners lack legal counsel. Government oversight agencies, judges, and attorneys general across the country have issued harsh criticism of the practices of lenders and foreclosure law firms. Perhaps most widely publicized was the nationwide "robo-signing" scandal, which revealed that many foreclosure actions have been brought on the basis of false affidavits and misleading legal documentation.[7] The right to adequate counsel is important in every litigation; it is only amplified in foreclosure cases by lenders' attorneys who often file cases in bulk and pay inadequate attention to the particular facts and needs of each individual case. The infamy surrounding Steven J. Baum, P.C. – New York's largest foreclosure plaintiffs' firm, which recently shut down after a string of

complaints and controversies including state and federal investigations and a class action suit brought by MFY Legal Services –illustrates the problems that can go unchecked for unrepresented homeowners.[8]

Moreover, as is recognized by the resolutions that are before the Council today, the problems with the foreclosure process are deeply rooted in the risky and predatory practices that led to our nation's financial crisis. Amid the frenzy to repackage mortgages into securitized assets that could be sold to investors, many mortgages were bought and sold multiple times.[9] The paperwork surrounding those sales is often faulty.[10] Further problems are raised by the use of MERS, an opaque database set up by the mortgage industry to avoid registration requirements and filing fees. As a result, it is not always clear that the party who claims to own a homeowner's loan really does; in legal parlance, this means that the lender may lack "standing" to bring the foreclosure. We applaud the Council's efforts to protect these basic legal principles – such as that only a party who actually owns a mortgage and note may bring a foreclosure action to take away a family's home.

The rules urged by these Resolutions would help protect homeowners' legal rights. But without a lawyer, a homeowner may not be able to defend those rights adequately. As a New York judge stated in one case:

> "It was only because this was one of the rare foreclosure cases where the defendant was represented by counsel that the fact that the Plaintiff did not own the note came to light. The Court can only speculate in how many other cases plaintiffs with no interest in mortgages wrongfully foreclose on them and collect proceeds to which they are not entitled."[11]

Lenders have also acknowledged the ways in which representation improves the mediation process. One bank representative, Michael Helfer, the General Counsel of Citigroup, testified in Chief Judge Lippman's hearings to Expand Access to Civil Legal Services in 2010:

> "We believe there is an important role for lawyers to assist borrowers in avoiding foreclosure in New York, especially in the context of the mandatory mediation programs that have been instituted in New York...lawyers can help facilitate communication and guide borrowers through the process to work out solutions more quickly and without the need for repeated sessions."[12]

Helfer noted that Citigroup's lawyers often have to reschedule mediation sessions because unrepresented homeowners are unaware of the documents they need or the procedure for modifying loans. Lawyers for homeowners not only benefit homeowners, they also ensure the entire mediation process works effectively, Helfer explained: "[I]f we could get lawyers, to a greater extent, to be involved in this mediation or settlement conference process...collectively, the system would work a lot better."[13]

Finally, we want to emphasize that foreclosure prevention services are a good investment for the State of New York. Every individual homeowner should have a fair shot at saving her home, as a matter of basic justice. But we also can't forget that this foreclosure crisis is, by all

accounts, an enormous barrier to our state and nation's economic recovery. Financial analysts have suggested that only a program of widespread mortgage modifications, including principal write-downs where appropriate, will stabilize our struggling housing market.[14] Indeed, just last week the Obama Administration announced changes to its struggling Home Affordable Modification Program (HAMP) to, among other things, encourage more effective loan modifications through greater principal reduction.[15] We also need creative solutions, such as "rent to own" opportunities for families who can't afford a mortgage modification now, to prevent bank-owned properties from sitting vacant – particularly in light of evidence that vacant properties lead to a drop in neighborhood property values and invite crime into already-struggling communities[16].

These and other policy suggestions offer solutions to our foreclosure crisis. But how are we to implement these policies? They must be implemented on a case-by-case basis. And without skilled and experienced lawyers and counselors involved, it is far more likely that families will slide into foreclosure than find an appropriate resolution that can save their home – even though there is undeniable evidence that identifying alternatives to foreclosure is in the best interest of families, communities and the lenders themselves.

In short, New York's foreclosure prevention services program is an important investment for the state of New York. It saves families the extraordinary financial and emotional costs of losing their home. It saves communities from dropping housing values and rising crime. And it saves our state money at a time of fiscal austerity. Therefore, we wholeheartedly endorse the Council's efforts to pass these resolutions and to encourage much-needed action by the State legislature.

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[1] Mark Ladov is Counsel in the Justice and Democracy Programs of the Brennan Center for Justice. He was previously a staff attorney in the foreclosure prevention program of Queens Legal Services. Nabanita Pal is a Research Associate in the Justice Program of the Brennan Center for Justice. She works with the Access to Justice Project in its efforts to improve the quality and availability of legal services, reform criminal justice policies and protect the rights of non-profit organizations working with low-income communities.

[2] *Empire Justice Testimony on Foreclosure Funding and Process: Hearing on Mortgage Foreclosures in New York Before the State Assembly Standing Comm. on Housing, Assembly Standing Comm. on Judiciary, Assembly Standing Comm. on Banks,* 2011 Leg. 235th Sess. (Nov. 7, 2011) (statement of Rebecca Case- Grammatico).

[3] Neil Mayer et al., *National Foreclosure Mitigation Counseling Program Evaluation: Preliminary Analysis of Program Effects September 2010 Update*, THE URBAN INSTITUTE 2 (2010), *available at* http://www.nw.org/network/nfmcp/documents/2010.12.14FINALModelingReport.pdf

[4] *Id.* at 3.

[5] OFFICE OF THE SPECIAL INSPECTOR GENERAL FOR THE TROUBLE ASSET RELIEF PROGRAM, QUARTERLY REPORT TO CONGRESS 172-75 (Oct. 26, 2010), *available at* http://www.sigtarp.gov/reports/congress/2010/October2010_Quarterly_Report_to_Congress.pdf.

[6] MELANCA CLARK AND MAGGIE BARON, BRENNAN CENTER FOR JUSTICE, FORECLOSURES: A CRISIS IN LEGAL REPRESENTATION 17-25 (2009), *available at* http://brennan.3cdn.net/a5bf8a685cd0885f72_s8m6bevkx.pdf.

[7] FEDERAL HOUSING FINANCE AGENCY OFFICE OF INSPECTOR GENERAL, FHFA OVERSIGHT OF FANNIE MAE'S DEFAULT-RELATED LEGAL SERVICES 23 (Sept. 30, 2011), *available at* http://mattweidnerlaw.com/blog/wp-content/uploads/2011/10/FHFAAUDIT.pdf.

[8] Peer Lattman, *Foreclosure Firm Steven J. Baum to Close Down,* N.Y. Times. (Nov. 21, 2011), http://dealbook.nytimes.com/2011/11/21/foreclosure-firm-steven-j-baum-to-close-down/; Andrew Keshner, *Suit Targets Lenders' Firm Over Foreclosure Filing Requirements,* N.Y. L.J., (Aug. 11, 2011), http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1202510824239.

[9] Thomas J. Miller, Att'y Gen, Iowa, Hearing Before the S. Comm. On Banking, Housing and Urban Affairs, 111th Cong. 3 (Nov. 16, 2010) (transcript available at http://banking.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=1feca776-9009-4d40-87d4-bd8f679061b1).

[10] Diane E. Thompson, Nat'l. Consumer Law Cntr., Before the S. Comm. On Banking, Housing and Urban Affairs, 111th Cong. 16 (Nov. 16, 2010) (transcript available at http://www.nclc.org/images/pdf/foreclosure_mortgage/mortgage_servicing/testimony-senate-banking.pdf).

[11] U.S. Bank v. Gonzalez., No. 4137/2009, slip op. at 7 (Sup. Ct. Kings Cnty. June 8, 2010).

[12] Michael Helfer, Gen. Counsel of Citigroup, First Dep't Civil Legal Servs. Hearing 27, 28 (Sept. 28, 2010) (transcript available at http://www.nycourts.gov/ip/access-civil-legal-services/PDF/1st-Dept-Hearing-Transcript.pdf).

[13] *Id.* at 29.

[14] Recent data suggests that 1 in 5 borrowers are at risk of foreclosure without an ambitious policy response, including principle write-downs for underwater mortgages. *See* LAURIE GOODMAN ET. AL, AMHERST SECURITIES GROUP LP, HOUSING CRISIS: SIZING THE PROBLEM, PROPOSING SOLUTIONS 1 (2010).

[15] David Dayen, *Treasury Announces New HAMP Changes With Greater Eligibility, More Principal Reduction Incentives* (January 27, 2012), http://news.firedoglake.com/2012/01/27/treasury-announces-new-hamp-changes-with-greater-eligibility-more-principal-reduction-incentives/.

[16] Research shows that one foreclosure can cause surrounding properties within 250 feet to decrease in value by 1-2 percent. A home that is within 500 feet of three foreclosure filings sees a three percent decline in property value. Jenny Schetz, Vicki Been and Ingrild Gould Ellen, *Neighborhood effects on concentrated mortgage foreclosure,* JOURNAL OF HOUSING ECONOMICS, Dec. 2008, at 4, 17. Crime rates also increase in neighborhood blocks with vacant, bank-owned properties. One vacant REO can lead to a 2.6 percent increase in crime overall, and a 5.7 percent increase in violent crime. INGRID GOULD ELLEN, JOHANNA LACOE AND CLAUDIA AYANNA SHARYGIN, FURMAN CENTER FOR REAL ESTATE & URBAN POLICY, DO FORECLOSURES CAUSE CRIME?, (2011), *available at* http://furmancenter.org/files/publications/Ellen_Lacoe_Sharygin_ForeclosuresCrime_June27_1.pdf.

FOR THE RECORD

Statement of Bill Beckmann
President and CEO of
MERSCORP, Inc. and Mortgage Electronic Registration Systems, Inc. ("MERS")
Presented in Lieu of Testimony
Before the New York City Council Committee on Community Development
Hearing on
Oversight: Systemic Problems in the Ongoing Mortgage Foreclosure Crisis, and its Effect On New York City Neighborhoods
January 30, 2012

Chairman Vann and members of the Committee, thank you for this opportunity to submit this statement in lieu of presenting testimony at the hearing on January 30, 2012.

SUMMARY STATEMENT:

We are a member-based organization made up of over 3,000 mortgage lenders, servicers and investors. MERSCORP maintains a nationwide database (MERS® System) that tracks changes in servicing rights and ownership interests in mortgage loans. Today, the MERS® System is keeping track of over 30 million active loans.

MERS performs a key function for the real estate finance industry: it serves as the mortgagee of record, or the holder of mortgage liens, on behalf of its members as a common agent. MERS is designated as the mortgagee by the borrower, in the mortgage document signed at loan closing, and then the mortgage is recorded in the appropriate local land records. Whenever a mortgage loan is sold or servicing rights are transferred between MERSCORP members, there is no need for an assignment of the mortgage lien because MERS then holds that lien for the benefit of the subsequent purchasers (and their servicers) as their agent. Serving as the mortgagee also enables MERSCORP to receive and

maintain updated information as loan servicers and note owners change over time because we are the central clearinghouse for receipt of mail as mortgagee.

The MERS® System is important to the mortgage industry because it is the only centralized registry in the industry that uniquely identifies each mortgage loan and reduces mortgage costs.

The MERS® System is important to individual borrowers because it provides a free and accessible resource where borrowers can locate and determine how to contact their servicers, and in some cases, learn who their note owner is, as they change over time. It should also be noted that federal law requires borrowers be notified of changes in the entity servicing the loan and the note-owner.

The MERS® System is important to title professionals and closing agents because the chain of title for liens is unbroken when the lien is in MERS' name and there is a reliable method to contact lenders and servicers for information related to closings of home sales.

The MERS® System is important to communities because housing code enforcement officers use it to identify who is responsible for maintaining vacant properties.

The MERS® System aids law enforcement detect mortgage fraud by tracking liens that use the same borrower name, social security number, or property address.

One thing that is always clear in a mortgage document is that if the borrower defaults on his obligation, the lender can foreclose. When MERS holds the mortgage lien and there is to be a foreclosure resulting from a borrower defaulting on the loan, the MERS mortgage interest is assigned in the land records to the lender holding the note (and this assignment is recorded in the county land records) and then the lender initiates the foreclosure action. (Sometimes the mortgage interest is assigned to one authorized by the

lender or note holder to foreclose, e.g., the servicer, who then forecloses in their name.) It should be noted, however, that in the past, foreclosures were sometimes done in the name of MERS, but as of July 22, 2011, our rules no longer permit members to commence foreclosures in the name of MERS.

The activities of MERSCORP and MERS are in compliance with federal and New York State law.[1] For this reason, and taking into consideration all of the points made above, we urge the Committee not to recommend that the New York City Council approve Res. No. 989 - Resolution calling on the New York State Legislature and the Governor to enact legislation that would prohibit lenders from concealing mortgage assignments through the use of the Mortgage Electronic Registration System, Inc., known as MERS.

We all keenly understand that while owning a home is a dream, losing that home is a nightmare. As professionals who have dedicated ourselves to helping people realize their dream, we are deeply dismayed by the current foreclosure crisis. We take our role as a mortgagee very seriously and are working to be part of the solution. We see our database as a key to moving toward better access to information and transparency for consumers.

We are hopeful that as people understand more about MERS and the role we play, they will see that MERS adds great value to our nation's system of housing finance in ways that benefit not just financial institutions, the broader economy and the government, but—most of all—real people.

Thank you again for inviting us to participate in your hearing.

[1] See "Life on MERS: Mapping the Landscape," Allensworth, Forbes, Blase and Smerage, K&L Gates (pub.), June 17, 2011 (see Attachment A).

STATEMENT OF MR. BECKMANN

BACKGROUND

MERSCORP is owned by the mortgage industry[2] and operated as a membership organization. Almost all mortgage lenders, servicers and investors (over 3,000) are members of the MERS® System, though not all members register all the loans they originate on the MERS® System.[3] The organization derives its revenue from its members.[4] It charges no fees for (and makes no money from) the securitization of mortgages, or from foreclosures done in its name (when that practice was permitted).

The primary functions carried out by the organization are twofold. MERSCORP maintains a database or registry of mortgage loans, keeping track of changes in servicing rights and ownership interests over the life of the loan. MERS is designated by its members to serve as the mortgagee, or the holder of the mortgage lien, in the public land records as the common agent for all MERSCORP members.

MERS AND YOUR MORTGAGE

The mortgage loan process can be confusing and complex to consumers. There is a lot of paperwork generated and many documents to be signed. However, two pieces of paper stand out from the rest as the most important pieces needed so that the consumer

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[2] MERS is a subsidiary of MERSCORP, Inc. MERSCORP, Inc. is a privately held stock company. Its principal owners are the Mortgage Bankers Association, Fannie Mae, Freddie Mac, Bank of America, Chase, HSBC, CitiMortgage, GMAC, American Land Title Association, and Wells Fargo. The company is headquartered in Reston VA.

[3] Members tend to register only loans they plan to sell.

[4] MERSCORP makes its money through an annual membership fee (ranging from $264 to $7,500) based on organizational size, and through loan registration and servicing transfer fees. MERSCORP charges a one-time $11.95 fee to register a loan and have Mortgage Electronic Registration Systems, Inc. serve as the common agent (mortgagee) in the land records. Transactional fees (ranging from $1.00 to $11.95) are charged to update the database when servicing rights on the loan are sold from one member to another.

can obtain a mortgage loan to purchase a home: (1) the promissory note, which is a promise by the borrower to repay the loan amount to the lender or note holder; and (2) the mortgage, which establishes a lien against the property as collateral for the loan and allows the lender (or note holder) to foreclose on the property if the borrower does not repay the loan according to the terms of the promissory note. The person who borrows the money is called the "mortgagor" and the holder of the mortgage is called the "mortgagee." Once the borrower signs both pieces of paper, the borrower receives the money to buy the house. As part of terms and conditions necessary to obtain a mortgage loan, the borrower must agree that the mortgagee has the right to foreclose and sell the collateral if there is a default in the repayment of the loan.

Another important party in the life of a mortgage loan is the loan servicer. The servicer is a company named (by the note owner) to be the interface between the note owner and the borrower to collect payments and remit them to the note owner. It may become the note holder for purposes of enforcing the terms of the note and mortgage on behalf of the note owner.[5]

MERS acts as the designated "common agent" for the MERSCORP member institutions in the land records, which means that MERS holds the mortgage lien on behalf of its members and acts on their behalf as mortgagee. To accomplish this, at the time of the closing, the borrower and lender appoint MERS to be the mortgagee. The designation of MERS is prominently displayed on the mortgage document, and at closing, it is affirmatively approved by the borrower by signing his or her name and initialing each page at closing. After the borrower executes the mortgage document, it is recorded in the public

[5] The originating lender may be the servicer in some cases.

land records with MERS noted as the mortgagee in the index prepared by the county clerk. Mortgage loan information is then registered on the MERS® System, which tells us that we are serving as mortgagee for that loan.

These two key pieces of paper in a mortgage loan transaction follow very different paths after they are signed. The mortgage is recorded in the county land records where an imaged copy is stored.[6] The original mortgage document, with recording data added by the county recorder, is returned to the servicer and goes into the servicer's master loan file. The note is sent to a custodian (usually a regulated depository institution) and is typically bought and sold (and thus trades hands) in the normal course of financial activity.[7] The servicer undertakes the obligations to service the loan, but servicing rights also may move from one servicing business to another because servicing rights are contract rights, which are bought and sold independent of any sale of the promissory note. Neither MERSCORP nor MERS receive or maintain either the mortgage or the promissory note.

Every time a note or servicer changes hands, a notation of that change is made (electronically) on the MERS® System by the members involved in the sale. In this way, changes in servicing rights and beneficial ownership interest in the promissory note are tracked over the life of the loan.

A fundamental legal principle in New York is that the security follows the debt, which means that as the note changes hands, the loan remains secured even though the mortgage is not physically attached. In other words, the promissory note is enforceable as a

[6] This action tells the world that there is a lien against the property. This is done to protect the creditor's interest. The recording of the mortgage puts future purchasers on notice of any outstanding claims against the property.

[7] The promissory note is not (and never has been) recorded or stored with the county land records office. The note is a negotiable instrument that can be bought and sold by endorsement and delivery from the seller to the note purchaser. Article 3 of the Uniform Commercial Code (UCC) governs this activity in all fifty states.

secured obligation, but the mortgage instrument itself is not independently enforceable as a debt. This fundamental and longstanding principle is not changed when MERS is the mortgagee because of the agency relationship between MERS and the lender. An agency relationship arises where one party is specifically authorized to act on behalf of another in dealings with third persons, and the legal definition of a "nominee" is a "party who holds bare legal title for the benefit of others." Here, the language of the mortgage appoints MERS as nominee, or agent, for the lender and its successors and assigns for the purposes set forth therein. The mortgage also grants MERS broad rights, again as nominee for the lender and the lender's successors and assigns, "to exercise any or all" of the interests granted by the borrower under the mortgage, "including but not limited to, the right to foreclose and sell the property; and to take any action required of the lender." Thus, the language of the recorded mortgage authorizes MERS to act on behalf of the lender in serving as the legal titleholder under the mortgage and exercising any of the rights granted to the lender there under.

MERSCORP members affirm this agency relationship with MERS in their membership agreements, which provide that MERS "shall serve as mortgagee of record" with respect to each mortgage loan that the MERS member registers on the MERS® System and provide that "MERS shall at all times comply with the instructions of the holder of mortgage loan promissory notes."

THE MECHANICS OF THE MERS® SYSTEM

The MERS® System tracks mortgage loans through an 18-digit identification number called the Mortgage Identification Number (MIN). With one notable exception, the MIN is to

a specific home loan what the VIN (Vehicle Identification Number) is to an individual automobile. Like the VIN, the MIN can be assigned at the earliest stage of the product's creation and stays with it for its entire life. However, unlike cars which all get a VIN, not all loans get MINs and are registered on the MERS® System. This is because some loan originators do not use MERS. About 30 million loans (more than half of all outstanding mortgage loans in the United States) are active on the MERS® System.

As the mortgagee of record, MERS receives all notices, including legal pleadings on actions pertaining to the property such as foreclosure notices and complaints, tax sales and eminent domain actions, among the many other types of mail. MERS forwards those documents electronically to the relevant servicer who will then take the appropriate action to respond on behalf of the note owner and MERS.

MERS plays an important role for borrowers as the permanent link between borrowers and their servicers. If servicers change or if they declare bankruptcy, the borrower always has a knowledgeable point of contact in MERS. A toll free number, the unique Mortgage Identification Number (MIN) and mailing address are prominently included on the first page of the mortgage document. MERSCORP also maintains a website, which serves as another free resource for homeowners to obtain information about their servicer. The MERS® System is also a means by which the homeowner can easily identify the note owner in most cases.[8]

It is sometime said that the use of MERS prevents the homeowner from learning who owns the loan secured by his or her home, but to the contrary (as noted in the

[8] The design of the MERS® System always anticipated and required that homeowners and the public would be able to access the system to determine the servicer of their loans. Providing such information to MERS is a requirement of membership and loan registration.

preceding paragraph), MERS is a reliable source of that information. Reliance on the public land records to obtain loan ownership information has not been practical for the last 30 years, primarily because these owners and note holders have chosen not to be disclosed in that manner. Before MERS, it was the servicer that mostly appeared in the land records on behalf of these owners. As a reaction to this situation, federal law was recently updated. In 2009, the Truth in Lending Act (TILA) was modified to provide that each time a mortgage loan was sold, the homeowner must receive written notice from the purchaser disclosing that the loan was sold, the name and address of the purchaser, and—if there is a servicing agent—that party's name and address, within 30 days of the sale. Then in 2010, the Dodd Frank Act clarified the Real Estate Settlement Procedures Act (RESPA) so that the name and address of the owner of the loan must be disclosed to the homeowner within ten days of the receipt of a written request for that information from that homeowner.

MERSCORP and MERS are not part of the decision-making process as to which mortgage loans the lenders make to borrowers, nor are they part of the decision of which mortgage loans get securitized. It is the note owner who decides whether a note should be sold, or transferred to a trust, or ultimately securitized with a pool of other loans.[9] Loans were securitized long before MERS became operational, and in fact, there are numerous loans in securities today that do not name MERS as the mortgagee. What MERS does is eliminate the expense of intervening assignments, resulting in lower cost for lenders when they sell the loans (represented by the promissory note) to investors. When the note is

[9] The issue of whether transfers of residential mortgage loans made in connection with securitizations are sufficient to transfer title and foreclosure rights is the subject of a "View Point" article entitled "Title Transfer Law 101" by Karen Gelernt, *American Banker*, Oct 19, 2010 (see Attachment B).

sold, MERS continues to act as the mortgagee for the new note holder because the secured interest follows the debt when the note changes hands.

OTHER FACTS ABOUT MERS

The number of loans registered on the MERS® System is substantial. Since its establishment in 1997, about 72 million loans have been registered and tracked on the MERS® System.

Measured by direct employment, MERSCORP is a relatively small organization. Currently, 74 people work for MERSCORP, Inc., mainly in our Reston, Va. office. We outsource some of our functions to Hewlett-Packard (who hosts our application and member network) and Genpact (who operates our mail room and help desk functions) with an additional 150 people.

In some ways, MERSCORP is analogous to the Depository Trust and Clearing Corporation (DTCC) that electronically records the assignment of stock and bond certificates, thus eliminating the need to create a new certificate each time a security is bought or sold. The benefit of MERS is similar to that of the DTCC: it reduces the errors associated with paper processes and increases system efficiency. Also like the DTCC, the MERS® System is adjacent to the systems that create the data it tracks; it is integrated with, but independent of, its member organizations. The two primary differences between the organizations are that the DTCC holds title to the financial instrument and that it clears trades between its participants (including the exchange of funds between the counter-parties).

COMMON QUESTIONS ABOUT MERS STRUCTURE AND ROLE IN MORTGAGE MARKETS

When servicing rights or promissory notes are sold for loans where MERS is not the mortgagee, the usual practice is for the seller to execute and record an instrument assigning the mortgage lien to the purchaser (commonly referred to as an "assignment"). Assignments are not required by law to be recorded in the land records. The primary reason assignments are recorded (in cases where MERS is not the mortgagee), stems from the appointment of servicers to administer the loan on behalf of the mortgage loan owner. In which case, the servicer will be assigned the mortgage lien (thus becoming the mortgagee) in order to receive the service of process related to that mortgage loan. When MERS is the mortgagee (i.e., holds the legal title to the mortgage lien), there is no need for an assignment between its members because when MERS is the mortgagee, the company then acts as the common agent for them. It is not the case that the assignments are now being done electronically through the MERS® System instead of being recorded in the land records. The need for an assignment is eliminated because title to the mortgage lien has been grounded in MERS. Moreover, transfers of mortgage notes and servicing rights are not recordable transactions (and have never been reflected in the land records) because they are not a conveyance of an interest in real property that is entitled to be recorded; only the transfer of the lien is a conveyance. A promissory note is sold by endorsing the note, and delivering it to the purchasers. Servicing rights are non-recordable contracts rights. MERS remains the mortgagee regardless of the number of these non-recordable transfers that may occur during the life of the loan. Upon such sales, the seller and purchaser update the MERS® System of the transfer with an "electronic handshake." If the purchaser does not confirm the transaction, it is flagged by the MERS® System for follow-up. MERSCORP also

audits its members for the accuracy of the information members provide to the MERS® System.

The primary reason servicers needed to appear in the county land records before MERS was so they could receive legal notices pertaining to the property. That role is now played by MERS as their common agent. MERS runs a massive mailroom and help desk operation to handle millions of legal notices for its members, which makes it far more efficient and certain that mail will go to the correct place. Today, if a servicer "boxes up" in the middle of the night and disappears, the homeowner can have confidence that legal notices will be delivered to the correct successor company without delay.

The chain of title starts and stops with MERS, which as the agent for the note owner can hold legal title for the note owner in the land records.[10] The basic concept of a recording statute is that a person or company claiming an interest in land protects its interest by recording that interest at the county recorder of deeds office. The recorded document provides constructive notice to the world of the claim. In many states (including New York), there is no requirement that a conveyance of real estate must be recorded in the land records. The concept of nominees appearing in the land records on behalf of the true owner has long been recognized. It has never been the case that the true owners of interests in real estate could be determined using the land records.

The use of MERS is in compliance with the statutory intent of the state recording acts. When MERS is the mortgagee, the mortgage is recorded at the county land records, thereby putting the public on notice that there is a lien on the property. At certain times in

[10] The essential elements of the legal principles underlying MERS can be found in "MERS Under Attack: Perspective on Recent Decisions from Kansas and Minnesota," an article by Barkley and Barbara Clark in the February 2010 edition of *Clark's Secured Transactions Monthly* (see Attachment C).

the past, the flow of assignments were overwhelming the county recorder system, resulting in long backlogs, and in some cases, taking the county recorder over a year to record an assignment. Now that assignments are eliminated because a common agent like MERS is holding the mortgage lien, the land records can operate more efficiently. Multiple assignments can lead to errors and uncertainty in the chain of title because assignments were often missing, incomplete, inaccurate, or misfiled. In situations where the recorded assignment identified the wrong property, the lender had not perfected its lien on the right property but had clouded the title for some unrelated third party.

The MERS® System also complements the county land records by providing additional information that was never intended to be recorded at the county level, namely the information about the mortgage loan servicer (publically available to all without cost), and the name of the owner of the loan, which is accessible by the homeowner without cost.

Some have raised questions about the reduction of recording fees that has accompanied the elimination of assignments, and there have been suggestions that assignments still need to be done or are being done, but just not recorded, so that these fees are somehow owed or outstanding. Fees are paid for a service performed, and if a document is eliminated because it is no longer legally necessary, no fee is due and owing because there is nothing to record. Another way to look at it is that, because MERS greatly reduces the workload of county recorders, the lower operating expenses of the county recorder's office offsets the loss in fee income. Moreover, it would be the homeowner, and not the lender, who ultimately pays the costs of recording assignments, either directly or indirectly.

The use of MERS is based on sound legal principles. Various courts in New York, including the New York State Court of Appeals[11], have upheld its legal validity. While there is much support in the New York courts for the MERS role as a common agent, there have been cases where there have been evidentiary issues, which have resulted in outcomes that do not always allow MERS, or members, foreclose without going back and proving their right to take action. States have laws that govern foreclosures[12] and when the process is not followed, it can, and should result in a court not allowing it to go forward. In some of these cases, judges wanting more evidence or information about MERS have made comments about MERS. In light of the recent foreclosure crisis, it is probable that MERS will continue to be challenged. But we are confident that when courts are provided with all of the facts, MERS will continue to prevail.[13] A MERS case law outline is available upon request.

MERS CONTINUES TO IMPROVE ITS PROCESSES

[11] In a unanimous decision, the New York Court of Appeals ruled in ***MERSCORP, Inc. v. Romaine*** (Dec. 19, 2006) that clerks in New York are required by statute to record MERS mortgages and mortgage assignments regardless of MERS' status as nominee for the lender. The court also ruled that clerks must record MERS mortgage discharges. It is the law of New York that clerks must record all MERS documents presented for recording with the appropriate filing fee.

[12] Individual states handle real estate foreclosures differently. In some states (like New York) the foreclosure process is judicial, and in some states it is non-judicial. Under both systems, time frames and terms vary widely from state to state.

[13] Some important recent cases upholding the rights of MERS include:

- ***Saxon Mortgage v. Coakley*** (April 26, 2011); the 2nd Dept. of the Appellate Division held that MERS as mortgagee had the authority to assign the mortgage to the foreclosing lender, Saxon Mortgage.
- ***Deutsche Bank v. Pietranico*** (July 27, 2011); the New York Supreme Court (Suffolk County) found that MERS is the mortgagee of the borrower's mortgage and that the borrower transferred rights to the property to MERS, subject to the terms of the mortgage, which then made the MERS assignment of mortgage to the foreclosing lender Deutsche Bank proper.
- ***In re Escobar*** and ***In re Frederick*** (Aug. 2011); the federal bankruptcy court for New York's Eastern District granted the lenders' motions for relief from stay and rejected the trustee's argument that somehow the lenders did not have standing to foreclose because they were both assignees of MERS mortgages. The court dismissed this argument because the lenders had standing as the holders of the notes. The court also found no merit to the trustee's claims that the lenders lacked standing because the use of MERS-as-mortgagee separated the mortgage from the note. The court also noted that the trustee did not demonstrate how the MERS mortgages and notes were split.

The MERSCORP management team is committed to the highest standards; we believe that the MERS® System process adds great value to our nation's system of housing finance in a way that benefits financial institutions, borrowers and the government. There are many benefits derived from the MERS process:

- With MERS, lien releases occur quickly at the time of payoff for borrowers because there can be no break in the chain of title with MERS.
- The MERS® System database is available to borrowers (and the public in general) to locate the servicers, and in most cases, to identify note owners for homeowners.
- For local communities, MERS® System has become a much-needed link between code enforcement officers and the servicing community to help combat the blight that vacant properties bring to neighborhoods. Over 600 government institutions (cities, municipalities and states) utilize the MERS® System for free to look up the property preservation contacts for loans registered on the system. This helps save the code enforcement officers much needed time in searching for the company directly responsible for the upkeep of that vacant property.
- For law enforcement agencies, MERS® System aids in combating mortgage fraud through the detection of undisclosed multiple liens taken out by fraudsters for the same social security number or property.

On April 13, 2011, a consent decree was signed by MERSCORP, MERS, OCC, Federal Reserve, FDIC, OTS and FHFA, which cited concerns by the regulators related to "appropriate oversight" and "adequate internal controls". As a result of signing the consent decree, MERSCORP and MERS agreed to a required "Action Plan" with a focus on signing

officers, data integrity/quality assurance, legal communications and board and management supervision. All key deliverables under the plan have been submitted to the regulators with ongoing plan implementation underway. Major servicers signed similar consent decrees requiring a "MERS Plan" with annual review by the regulators. It is important to note, however, nothing in the consent decree changed the core services provided to members by MERSCORP or MERS.

In summary, the business model used by MERSCORP and MERS is compliant with New York state laws and regulations and provided a wide range of benefits to both homeowners and the public at large. MERSCORP provides transparency to borrowers of their servicer, and in most cases, their investor. For these reasons, and taking into consideration all of the points made above, we urge the committee not to recommend that the New York City Council approve Res. No. 989 - Resolution calling on the New York State Legislature and the Governor to enact legislation that would prohibit lenders from concealing mortgage assignments through the use of the Mortgage Electronic Registration System, Inc., known as MERS.

Thank you Chairman Vann and members of the Committee for the opportunity to submit this statement in lieu of testimony at you hearing on January 30, 2012.

ATTACHMENTS:

A) "Life on MERS: Mapping the Landscape," Allensworth, Forbes, Blase and Smerage, K&L Gates (pub.), June 17, 2011

B) "Title Transfer Law 101," Karen Gelernt, *American Banker*, Oct 19, 2010.

C) "MERS Under Attack: Perspective on Recent Decisions from Kansas and Minnesota," Barkley and Barbara Clark, *Clark's Secured Transactions Monthly*, Feb. 2010.

Attachment A

June 17, 2011

Mortgage Banking & Consumer Financial Products

Life on MERS: Mapping the Landscape

Introduction

Over the past several years there have been increasing attacks by anti-home foreclosure advocates on the role played by the Mortgage Electronic Registration System ("MERS") in the residential mortgage market. As we discussed in an earlier client alert, a substantial body of case law had developed confirming the validity of MERS's role as nominee of the lender and any assignee on a mortgage or deed of trust.[1]

Recently, a few courts have issued decisions that have led commentators to suggest that the direction of judicial opinions recognizing the validity of the so called "MERS system" may be reversing course. This is not, however, the first time the mortgage lending and servicing community has heard such suggestions. While some would portray these recent decisions as raising concerns with the role MERS plays in the lending industry and foreclosure process, these decisions are generally limited in scope, are dependent upon state-specific law, or simply offer non-binding judicial commentary. Although a few courts may identify perceived deficiencies with the use of MERS in certain contexts, the majority of courts presented with questions regarding the validity of the MERS system continue to accept and uphold MERS's role as a legitimate cog in the mortgage lending industry.

Cases in the Headlines

In the last few weeks, decisions from the state courts in New York and Michigan and federal courts in Oregon have garnered much attention in the media. Upon closer examination, however, these decisions may not be quite as earth-shattering as first reported.

On June 7, 2011, the Appellate Division of the New York Supreme Court issued a decision in *Bank of New York v. Silverberg*,[2] in which the court considered whether MERS had the right to assign a "consolidation agreement" that purported to merge a first and second position note and mortgage into a single obligation.[3] In that case, the borrowers were obligated on first and second position notes to Countrywide Home Loans, Inc. MERS was identified as the lender's nominee on both mortgages. The "consolidation agreement" stated that MERS was acting as the lender's nominee for the purpose of recording the consolidation agreement. Notably, Countywide, the originator of both loans, was not a party to the consolidation agreement. Later MERS recorded a document that purported to assign the consolidation agreement. Under this peculiar set of facts, the appellate court considered "whether a party has standing to commence a foreclosure action when that party's assignor – in this case, ... MERS[ ] – was limited in the underlying mortgage instruments as a nominee and mortgagee for the purpose of recording, but was never the actual holder or assignee of the underlying notes."[4] The appellate court reversed the decision of the Supreme Court (the trial court in New York), which had denied the defendant borrowers' motion to dismiss the plaintiff's foreclosure action, because the "consolidation agreement" "did not give MERS title to the note, nor [did] the record show that the note was physically delivered to MERS."[5] The court reasoned that although the loan agreements "gave MERS the right to assign the mortgages themselves, it did not specifically give MERS the right to assign the underlying notes, and the assignment of the notes was thus beyond MERS's authority as nominee or agent of the lender."[6] Absent from the record before the appellate court was any evidence that the trustee for the securitization trust (the foreclosing plaintiff) was the noteholder, either by physical possession of the note or otherwise.

Life on MERS: Mapping the Landscape

In *Residential Funding Co., LLC v. Saurman*,[7] the Michigan Court of Appeals resolved a pair of consolidated cases that addressed "whether MERS is an entity that qualifies under [the Michigan non-judicial foreclosure statute] to foreclose by advertisement . . ., or if it must instead seek to foreclose by judicial process."[8] Under the relevant Michigan statute, only three classes of entities are authorized to foreclose by advertisement: an owner of the debt, an owner of an interest in the debt, and a servicing agent.[9] As MERS did not contend it owned the debt or was a servicing agent, the question before the court was whether MERS owned an interest in the debt. Reasoning that "in order for a party to own an interest in the indebtedness, it must have a legal share, title, or right in the note," the court concluded MERS did not own any such interest because "MERS, as mortgagee, only held an interest in the *property* as security for the note, not an interest in the note itself."[10] As a result, the court held that MERS was not authorized under the Michigan statute to initiate foreclosure-by-advertisement and voided the two foreclosure sales at issue.[11] The court also rejected the argument that MERS could serve as the agent for the owner of the debt or the owner of an interest in the debt, because the statute specifies certain agents – namely, servicing agents – that are authorized to foreclose by advertisement.[12] Notably, the court did not address whether MERS, as nominee on a security instrument, may *assign* a mortgage or deed of trust to the noteholder prior to the institution of non-judicial foreclosure proceedings.

The impact of the Michigan Court of Appeals' decision in *Saurman* is already being felt. A recently-filed class action in federal court in Detroit seeks to capitalize on the *Saurman* decision by challenging non-judicial foreclosures in Michigan undertaken in the name of MERS.

In Oregon, a series of recent decisions have added to the confusion regarding MERS's role in assigning residential deeds of trust. For example, in *Hooker v. Northwest Trustee Services, Inc.*,[13] the borrowers challenged the foreclosure of their property under the Oregon Trust Deed Act, arguing that the defendants failed to properly record assignments of the deed of trust and appointments of successor trustees prior to recording the notice of default required by the non-judicial foreclosure statute.[14] The only assignment recorded prior to the institution of foreclosure proceedings was by MERS as nominee. The court noted that "the Oregon Trust Deed Act requires the recording of *all* assignments by the beneficiary."[15] The court reasoned that the MERS MIN Summary contemplated several "intermediary" assignments (i.e. from originator to depositor, and from depositor to trustee). Based on this observation, the court concluded that the defendants had failed to record each assignment of the deed of trust, which, according to the court, violated the state's non-judicial foreclosure statute.[16]

It should be noted that much of the *Hooker* court's apparent criticism of MERS is dicta (non-binding commentary), as the judge himself recognized.[17] Indeed, the *Hooker* court acknowledges that the mere fact that "MERS was the agent or nominee of the beneficiary does not mean the non-judicial foreclosure proceedings necessarily violated Oregon law."[18] It should also be noted that *Hooker* did not directly involve allegations regarding MERS's legitimacy, but was instead a case about the validity of assignments in general.

Nevertheless, the *Hooker* decision joins a number of federal decisions in Oregon that seem to read Oregon's non-judicial foreclosure statute as requiring the recording of any intermediary assignments (regardless of whether the deed of trust named MERS as nominee) that may be contemplated by the pooling and servicing agreements.[19]

Thus, while these decisions have attracted attention for their occasional critical language of MERS, none of the cases holds that MERS cannot assign a deed of trust or that its existence is somehow unlawful. Nowhere in *Silverberg*, for example, does the New York court find that MERS cannot assign a mortgage, but rather, the court appears to merely clarify MERS's status as a noteholder or

assignee of the note.[20] Indeed, several of the Oregon decisions *affirm* MERS's ability to assign a deed of trust. For example, in *Bertrand v. SunTrust Mortgage Inc.*,[21] an Oregon federal district court recently held that MERS could act as a beneficiary under the deed of trust and could also assign its beneficial rights.[22] Because all necessary assignments were recorded (at least as far as the court was concerned), the *Bertrand* court confirmed the validity of the non-judicial foreclosure brought by the noteholder.[23]

To be sure, the *Saurman* decision and certain of the Oregon decisions rely upon the nuances of the particular state non-judicial foreclosure statute involved and, therefore, have limited application beyond their jurisdictional confines.[24] Nevertheless, the actual holdings of these cases have not prevented the foreclosure defense bar from misinterpreting their import.

The Majority of Decisions Are Rejecting Challenges to MERS

Despite the publicity cases such as *Silverberg*, *Saurman*, and *Hooker* have received in recent weeks, courts around the country continue to reject borrower challenges to the role of MERS.

For example, less than three weeks before the issuance of the *Hooker* opinion, the Oregon Circuit Court for Deschutes County *granted* MERS's motion to dismiss an action to stop foreclosure, because the "[p]laintiff designated [MERS] as the beneficiary when she accepted the benefits of the loan."[25] The court stated that it was "unpersuaded that [MERS] cannot act in that capacity, even if it is not the holder of the note."[26] The court also declined the borrower's invitation to require the recording of multiple intermediary assignments, as has been required by some federal court judges in Oregon.[27]

Similarly, the California Court of Appeal for the Second District recently issued a decision rejecting a challenge to a non-judicial foreclosure sale where MERS assigned the deed of trust to the foreclosing entity.[28] The court found that there was no defect in the foreclosure proceedings where the deed of trust "explicitly provided MERS with the authority to" act as the nominee of the lender and its assigns.[29] The court held that MERS and its appointed foreclosure trustee may initiate foreclosure proceedings, even where MERS is not the holder of the original promissory note. Notably, the court also held that MERS and its appointed foreclosure trustee may raise the borrower's failure to tender the outstanding loan amount as a defense to a wrongful foreclosure suit under California law, even though MERS only holds legal title to the deed of trust.[30]

The Bankruptcy Court for the District of Kansas issued a decision concluding that the MERS process, whereby the note and mortgage may be split, does not defeat the enforceability of either instrument.[31] In the decision, the court distinguished a pair of Kansas state court decisions that had been viewed as calling MERS's authority into doubt and reasoned that "the agreement between [MERS and its member] could . . . result in a scenario where [the member] could assign the Note to MERS, and MERS (as the new holder of the Note) could bring the foreclosure action on [the member's] behalf."[32] The court concluded that MERS had presented sufficient evidence of an agency relationship by which it acted on behalf of its member and, therefore, could proceed with enforcing the mortgage through foreclosure.[33] The U.S. Bankruptcy Court for the Southern District of Georgia similarly found that "the designation of MERS as nominee and its powers and duties was explicit," because "[t]he language used in the Security Deed [was] sufficient to create an agency relationship."[34] Like other courts before it, the Georgia bankruptcy court rejected the argument that the splitting of the security instrument from the note through the MERS system effectively leaves the promissory note unsecured.[35]

Such rulings have not been limited to the bankruptcy courts. For example, some courts have dismissed claims that MERS was not authorized to foreclose or that the use of the MERS system rendered the debt and security instruments unenforceable.[36] Others have rejected tort claims

against MERS and its members, often arising in cases where foreclosure is imminent and the plaintiff asserts any and all claims that can be thought of to try to stop the sale.[37]

The MERS MDL: New Developments

As noted in a previous K&L Gates alert, the Judicial Panel on Multidistrict Litigation has formed a multidistrict litigation proceeding in the United States District Court for the District of Arizona, styled *In re Mortgage Electronic Registration Systems, Inc. (MERS) Litigation* (the "MERS MDL").[38] The proceedings before Judge James A. Teilborg are designed to address pre-trial matters with respect to federal cases that either allege "that 'the various participants in MERS formed a conspiracy to commit fraud and/or that security instruments are unenforceable or foreclosures are inappropriate due to MERS's presence as a party' or that otherwise concern the 'formation and operation' of MERS."[39]

Having already granted motions to dismiss in six putative class actions in September 2010, in January of this year, Judge Teilborg granted another forty motions to dismiss filed in fourteen other individual actions that had become part of the MERS MDL.[40] In so doing, Judge Teilborg concluded that plaintiffs had failed to state claims for wrongful foreclosure, conspiracy to commit wrongful foreclosure, fraud in the inducement, conspiracy to commit fraud, intentional/negligent misrepresentation, slander of title, quiet title, and unjust enrichment.[41] The court rejected plaintiffs' prayers for injunctive and declaratory relief, rescission, and reformation of contract as those forms of relief rested upon the failed claims.[42] Nevertheless, the court did provide all plaintiffs leave to amend in order to file a consolidated complaint.[43] Indeed, in a recent order, the court stated that "[u]nless the common allegations of every member case in this MDL can be stated with sufficient plausibility to survive *Twombly* and *Iqbal*, every claim transferred to this MDL will fail. This consolidated complaint should be a good test of whether or not this can be done."[44] Plaintiffs filed their consolidated amended complaint on June 4, 2011. The court is set to hear argument on defendants' motions to dismiss the consolidated amended complaint in Phoenix later this summer.

Other Challenges to MERS

As noted in our prior client alert, borrowers have filed complaints alleging that the formation and operation of MERS constitutes an unlawful enterprise under civil racketeering laws. To date, these cases have gained little traction.[45]

In other cases, plaintiffs in California and elsewhere filed lawsuits under state false claims act statutes alleging that the MERS system is designed to unlawfully avoid county recording fees and other taxes payable upon the recording of instruments in local land registries. While many of these cases are still in their incipient stages, in at least one early filed action, a California federal court dismissed a false claims act lawsuit against MERS and others where the alleged "fraudulent scheme" to deprive local county government of fees and taxes based on the designation of MERS as a nominee on deeds of trust was information already available to the public and that the plaintiff relator was not the original source of the information.[46]

Conclusion

Read in their proper context, decisions such as *Silverberg*, *Saurman*, and *Hooker* merely confirm that in certain jurisdictions, MERS and its members may need to take a few extra steps to comply with applicable non-judicial foreclosure procedures. At most, these cases serve as a reminder that MERS-related jurisprudence continues to develop. And while the legal landscape may seem uncertain (including conflicting intra-jurisdictional outcomes), these decisions do not support the unfounded conclusion that in all cases, the identification of MERS as nominee on a deed of trust or mortgage prohibits the proper assignment of the deed of trust or mortgage to the noteholder, or that the MERS system is flawed or corrupt. To the contrary, a majority of courts across the country continue to

recognize the valid and beneficial role MERS serves in the mortgage industry.

Notes:

[1] *Loan Holders are from Venus and Plaintiffs are from MERS*, Mortgage Banking & Consumer Financial Products Alert, by R. Bruce Allensworth, Brian M. Forbes, Gregory N. Blase, October 15, 2010, *available at* http://www.klgates.com/newsstand/Detail.aspx?publication=6709. MERS serves "to streamline the mortgage process by using electronic commerce to eliminate paper." *See also* http://www.mersinc.org/about/index.aspx. To facilitate this process, MERS acts as a nominee of mortgage lenders and their assignees. *Id.* MERS's status as nominee for the mortgagee remains fixed while the servicing rights on a mortgage loan are assigned and transferred. *Id.*

[2] --- N.Y.S.2d ----, 2011 WL 2279723 (N.Y. App. Div. Jun. 7, 2011). The Appellate Division is the intermediary appellate court of the New York State Unified Court System.

[3] *Silverberg*, slip op. at 1-2.

[4] *Id.*

[5] *Id.* at 8.

[6] *Id.* at 7. Nevertheless, the court did reject the borrowers' theory that the foreclosing entity was required "to provide *proof of recording* of the ... assignment of the mortgage prior to the commencement of the [foreclosure] action" in order to establish ownership of the note, because "an assignment of a note and mortgage need not be in writing and can be effectuated by physical delivery." *Id.*

[7] --- N.W.2d ----, 2011 WL 1516819 (Mich. Ct. App. Apr. 21, 2011).

[8] *Saurman*, slip op. at 1. The other case in the consolidated appeal was styled *Bank of New York Trust Co. v. Messner*, Appeal No. 291443.

[9] *Saurman*, slip op. at 4; *see* Mich. Comp. Laws § 600.3204(1)(d).

[10] *Saurman*, slip op. at 5 (emphasis in original).

[11] *Id.* at 11. As a result of the *Saurman* ruling, and in order to ensure good and marketable title, it has been reported that the U.S. Department of Housing and Urban Development is now requiring re-foreclosures on Michigan real-estate owned properties in which MERS had foreclosed by advertisement under Michigan's non-judicial foreclosure statute. *See* Austin Kilgore, *HUD to Redo Michigan MERS Foreclosures*, American Banker, May 31, 2011, *available at* http://www.americanbanker.com/issues/176_103/hud-to-redo-michigan-mers-foreclosures-1038176-1.html.

[12] *Saurman*, slip op. at 7-8.

[13] Civ. No. 10-3111-PA, 2011 U.S. Dist. LEXIS 57005 (D. Or. May 25, 2011).

[14] *Id.* at *2-3.

[15] *Id.* at *9 (emphasis added).

[16] *Id.* at *8-12.

[17] *Hooker*, 2011 U.S. Dist. LEXIS 57005, at *19 ("[a]lthough the concerns raised in this order appear in many foreclosure cases pending before me, I resolve the current controversy on narrow grounds").

[18] *Id.* at *8.

[19] *See, e.g., McCoy v. BNC Mortgage, Inc. (In re McCoy)*, 446 B.R. 453, 457 (Bankr. D. Or. 2011) (concluding that "the [c]omplaint sets out a plausible claim that one or more assignments from [the originator] were unrecorded"); *Ekerson v. Mortgage Elec. Registration Sys.*, No. 3:11-cv-178, 2011 WL 597056, at *3-4 (D. Or. Feb. 11, 2011) (entering TRO where plaintiff alleged that MERS has failed to record all assignments); *Barnett v. BAC Home Loan Servicing, L.P.*, --- F. Supp. 2d ----, 2011 WL 723046, at *4-6 (D. Or. Feb. 23, 2011) (court issued TRO where it determined that complaint stated plausible claim that intermediate assignments had not been recorded); *Burgett v. Mortgage Elec. Registration Sys., Inc.*, No. 6:09-cv-6244, 2010 WL 4282105, at *2-3 (D. Or. Oct. 20, 2010) (affirming MERS's ability to assign a deed of trust, but denying defendants' motion for summary judgment upon court's conclusion that the record did not reflect that all required assignments had been recorded).

[20] *Silverberg*, slip op. at 6-9 ("[i]n a mortgage foreclosure action, a plaintiff has standing where it is both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note at the time the action is commenced").

[21] No. 09-875-JO, 2011 WL 1113421 (D. Or. Mar. 23, 2011).

[22] *Id.* at *3-6 (granting defendants' motion for summary judgment and holding that MERS was a proper beneficiary under the Oregon Trust Deed Act and affirming challenged non-judicial foreclosure where summary judgment record reflected all necessary recorded assignments).

[23] *Id.* at *6.

[24] This is made clear in the *Saurman* decision, where the Michigan Court of Appeals rejected the foreclosing parties' reliance upon a Minnesota case that approved of and affirmed MERS's role in foreclosure proceedings. *Saurman*, slip op. at 8 ("the Minnesota statute specifically provides for foreclosure by advertisement by entities that stand in the exact position that MERS does here").

[25] *See Spencer v. Guaranty Bank, FSB*, No. 10CV0515ST, slip op. at 2 (Or. Cir. Ct. May 5, 2011).

[26] *Id.*

[27] *Id.*

[28] *Ferguson v. Avelo Mortgage, LLC*, --- Cal. Rptr. 3d ----, 2011 WL 2139143, at *1, *3 (Cal. Ct. App. Jun. 1, 2011).

[29] *Id.* at *4-5. Further, the borrowers had conceded "that MERS had the authority to assign its beneficial interest to" the defendant. *Id.* at *5.

[30] *Id.* at *5 (quotations and formatting omitted).

[31] *See Martinez v. Mortgage Elec. Registration Sys., Inc. (In re Martinez)*, Adv. No. 10-7027, 2011 Bankr. LEXIS 493, at *31-33 (Bankr. D. Kan. Feb. 11, 2011).

[32] *Id.* at *30.

[33] *Id.* at *33-36.

[34] *Drake v. Citizens Bank of Effington (In re Corley)*, Adv. Proc. No. 10-4033, 2011 Bankr. LEXIS 807, at *11 (Bankr. S.D. Ga. Feb. 7, 2011).

[35] *Id.* at *15-16. *But see In re Agard*, No. 10-77338-REG, 2011 Bankr. LEXIS 488, at *29-59 (Bankr. E.D.N.Y. Feb. 10, 2011) (court concluded that *Rooker-Feldman* doctrine prevented adversary proceeding to challenge foreclosure sale, but stated, in dicta, that MERS lacked authority under New York law to assign a security instrument).

[36] *See, e.g., Wade v. Meridias Capital, Inc.*, No. 2:10CV998 DS, 2011 U.S. Dist. LEXIS 28414, at *6-8, *9-10 (D. Utah Mar. 17, 2011) ("[u]nder the plain terms of the Trust Deed, which [plaintiff] signed, MERS was appointed as the beneficiary and nominee for the Lender and its successors and assigns and granted power to act in their stead, including making assignments and instituting foreclosure"); *Selby v. Bank of Am., Inc.*, No. 09cv2079 BTM(JMA), 2011 U.S. Dist. LEXIS 25427, at *20 (S.D. Cal. Mar. 14, 2011) ("[t]here is no merit to Plaintiff's theory that assignment of the note nullifies MERS's status as a nominee for the holder of the note"); *Karl v. Quality Loan Serv. Corp.*, 3:10-cv-00473-RCJ-VPC, 2010 U.S. Dist. LEXIS 137841, at *14-15 (D. Nev. Dec. 29, 2010) ("[t]here is no question of fact that QLS filed the NOD as the agent of MERS, who was the agent of the beneficiary UAMC, and the foreclosure was therefore not improper"); *Kane v. Bosco*, No. 10-CV-01787-PHX-JAT, 2010 U.S. Dist. LEXIS 128746, at *31-32 (D. Ariz. Nov. 23, 2010) ("the Court fails to see how the MERS system lacks authority as a nominee of lenders to assign deeds of trust, and how, in assigning deeds of trust, commits fraud or records forged or false documents"); *Richardson v. CitiMortgage, Inc.*, No. 6:10cv119, 2010 U.S. Dist. LEXIS 123445, at *13-15 (E.D. Tex. Nov. 22, 2010) ("[t]he role of MERS in this case was consistent with the Note and Deed of Trust"); *Kiah v. Aurora Loan Servs., LLC*, No. 10-40161-FDS, 2010 U.S. Dist. LEXIS 121252, at *9-11, *17 (D. Mass. Nov. 16, 2010) ("the mortgage explicitly granted MERS the power that plaintiff claims it did not have").

[37] *See, e.g., Peelua v. Impac Funding Corp.*, No. 10-00090 JMS/KSC, 2011 U.S. Dist. LEXIS 29013, at *12-14 (D. Haw. Mar. 18, 2011) (granting dismissal on breach of fiduciary duty claim against MERS); *Gomez v. World Sav. Bank FSB*, 1:10-cv-01463-OWW-DLB, 2010 U.S. Dist. LEXIS 131674, at *11 (E.D. Cal. Dec. 13, 2010) (rejecting MERS conspiracy claim); *Josephson v. EMC Mortgage Corp.*, 2:10-CV-336 JCM (PAL), 2010 U.S. Dist. LEXIS 128053, at *6 (D. Nev. Nov. 19, 2010) (same); *Anderson v. Deutsche Bank Nat'l Trust Co.*, No. 2:10-CV-1443 JCM (PAL), 2010 U.S. Dist. LEXIS 120865, at *9 (D. Nev. Oct. 29, 2010) (same); *Gomes v. Countrywide Home Loans, Inc.*, 192 Cal. App. 4th 1149, 1157 (2011) (upholding MERS's authority to foreclose because plaintiff consented to such by signing deed of trust). For additional cases concerning MERS see our earlier client alert at http://www.klgates.com/newsstand/Detail.aspx?publication=6709.

[38] K&L Gates LLP represents certain defendants in the MERS MDL.

[39] MERS MDL, No. 09-2119-JAT, 2010 WL 2266663, at *1 (D. Ariz. Jun. 4, 2010).

[40] MERS MDL, No. 09-2119-JAT, 2011 WL 251453, at *1 (D. Ariz. Jan. 25, 2011).

[41] *Id.* at *4-10.

[42] *Id.* at *11.

[43] *Id.*

[44] MERS MDL, No. 09-2119-JAT, slip op. at 2:4-7 (Doc. No. 1413) (D. Ariz. May 6, 2011).

[45] For example, in *Foster v. Mortgage Electronic Registration Systems Inc.*, No. 10-cv-611 (W.D. Ky.), a putative class action alleging violations of civil RICO filed last fall in Kentucky -- a case that attracted media attention at the time of its filing -- the class action complaint was voluntarily dismissed by the named plaintiffs before any defendant was formally served.

[46] *California ex rel. Bates v. Mortgage Elec. Registration Sys., Inc.*, 2:10-cv-01429-GEB-CMK, 2011 WL 892646, at *3-5 (C.D. Cal. Mar. 11, 2011).

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Attachment B

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VIEWPOINT

Title Transfer Law 101

BY KAREN GELERNT

Recently, commentators have raised questions about whether certain transfers of residential mortgage loans (made in connection with secondary market transactions such as securitizations) were sufficient to transfer title to the new owner of the mortgage loans and whether such transfers of rights were sufficient to allow the new owner of the mortgages to commence foreclosure, where appropriate.

To better understand these issues, they must be put in their proper perspective based upon the law that underlies transfers of mortgage loans. The underlying tenet, however, is that residential mortgage notes are negotiable instruments which, by their nature, are intended to be liquid and easily transferable by certain key actions outlined in the law. Challenging this notion, irresponsibly questions a well-established body of law affecting trillions of dollars of mortgage loans as well as trillions of dollars of other types of negotiable instruments.

A mortgage loan consists of two important documents: the mortgage note, which constitutes the obligation of the mortgagor to pay its loan; and the mortgage, that constitutes the lien on the real property that secures the note. The note is a promissory note and notes secured by homes are typically negotiable instruments under law. Negotiable instruments have certain special characteristics under law. First, they are easily transferable (typically by endorsement).

Second, a holder in due course of a negotiable instrument takes the instrument free of most defenses to payment, thereby permitting the holder prompt payment. The intent behind the law of negotiable instruments was to enable such instruments to be as liquid as possible, to encourage commerce and lending. As such, residential mortgage loans are intended to be relatively liquid assets, easily transferred and easily realized upon.

In this way, a residential mortgage note is analogous to a check. In the case of the mortgage note, it is payable to the order of a mortgagee. Similar to a check, which is transferred by endorsement, a mortgage note is also transferred by endorsement. An endorsement can be specific (such as "Pay to the order of Joe Smith") or can be blank (such as "Pay to the order of _____"). When a note is endorsed in blank, it becomes bearer paper (in other words, the bearer, or holder, is presumed to be the owner). The analogy would be a check made out to "cash." In both instances, the instrument can be physically transferred multiple times without the requirement of additional endorsements. If you presented a bank with a check made out to "cash" the bank should not question your ownership. Similarly, the ownership by an entity of a mortgage note endorsed in blank should not, in the ordinary course, be challenged.

In other words (and aside from the separate issue of whether the circumstances that are required to commence foreclose exist with respect to the mortgage loan), mere possession of a promissory note endorsed in blank (whether a check or a mortgage note) should provide the presumption of ownership of that promissory note by the current holder. So for example, a trustee for a securitization that has physical possession of the mortgage note, should be the presumed owner of that note. Any other outcome would put at risk the entire premise and foundation of negotiable instruments law.

In the end, an endorsement in blank does not, and should not, raise a question of ownership of the instrument.

The second component of a mortgage loan is the mortgage. The mortgage and the transfer of mortgage is governed by real property law. The mortgage must be recorded to put third parties on notice of the lienholder. This protects the mortgagee as well as other parties that might assert an interest in the property, like other lenders, judgment creditors or potential purchasers of the property. It protects the mortgagee because, if a third party were to assert an interest in the real property it would be required to give notice to all the interested parties of record, including the mortgagee of record under the mortgage. If an assignee did not record an assignment of mortgage, then the assignee would not be put on notice. However, this would be a risk borne by the assignee.

Historically, when a mortgage loan was transferred it was accompanied by an assignment of mortgage, oftentimes in blank. Because the secondary market was so active, buyers of mortgage loans frequently did not record the assignments in blank and merely delivered the assignments with the related mortgage notes endorsed in blank to the subsequent buyer. Frequently, the servicer of the mortgage loans remained the mortgagee of record and would receive any important notices regarding the related mortgaged properties. However, in order to facilitate easy transfers of mortgage loans, and to ease the burden of multiple recordations of assignments of mortgage in an active secondary market, MERS systems was developed. MERS is basically an agent for the mortgagee of record. So while a mortgage note may be transferred several times the mortgagee of record remains MERS and MERS tracks the intended mortgagee in its systems.

But at the end of the day, it is the owner of the mortgage note that dictates ownership of the mortgage (a premise commonly referred to as "the mortgage follows the note") as evidenced by Article 3 and Article 9 of the Uniform Commercial Code, in effect in all states.

Ideally, at foreclosure, the mortgagee of record should correspond to the holder of the note. However, any disparity should not be an acceptable basis to bar foreclosure, since the mortgage should not be the document that is dispositive of title to the mortgage loan. The holder of the note should be deemed the owner of the mortgage loan with standing and right to foreclose.

The chain of assignment of the mortgage may for various reasons be defective, or in the case of MERS, an agent for the holder may be identified as the mortgagee, but the principles of commercial law and negotiable instruments, if applied correctly, should ultimately prevail and allow the holder of the note to foreclose to the extent permitted by the mortgage loan documents and applicable state law. Any other outcome would call into question the foundations and liquidity of negotiable instruments and severely obstruct what was always intended as a relatively liquid market.

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Attachment C

CLARKS'
SECURED TRANSACTIONS MONTHLY
Documentation • Bankruptcy • Regulation

MERS Under Attack: Perspective on Recent Decisions from Kansas and Minnesota

by Barkley and Barbara Clark

February 2010

Due to the economic downtown, the business of securitizing loans into secondary markets has come under intense scrutiny. This is particularly true in the real estate area, where loans are routinely bundled into mortgage-backed securities and sold to investors. Since the original lender contemplates the immediate sale of the loan, it is common practice for originators to appoint a nominee, as third-party agent, who remains as mortgagee in the land records throughout the life of the loan. MERSCORP, INC., a privately held shareholder Delaware Corporation, operates the nationwide electronic registry for tracking interests in mortgage loans as they move through the securitization pipeline.

Mortgage Electronic Registration Systems, Inc. (MERS), a wholly owned subsidiary of MERSCORP, Inc. that serves as mortgagee in a nominee capacity for the lender and subsequent assignees—upfront and for the life of the loan---is generating nationwide litigation. Distressed borrowers are seizing on the fact that the name of the recorded mortgagee, and the identity of the investor as the beneficial owner of the mortgage loan, do not match. Borrowers (and some bankruptcy judges) are using the mismatch as ammunition for challenging foreclosure actions and avoiding mortgage obligations.

The legal issues have recently come to a head in significant decisions by the Kansas and Minnesota supreme courts. These cases are high-stakes challenges to the MERS registration system. We think the Kansas Supreme Court misconstrued the law in reaching its decision, but the Minnesota Supreme Court got it right.

MERS loses in Kansas. The Kansas case, decided on August 28, is *Landmark National Bank v. Kesler*, 216 P.3d 158 (Kan. 2009). The Kansas high court recently denied motions for reconsideration. There is a possibility that MERS will take the case to the U.S. Supreme Court in an effort to bolster its position as mortgagee and the mortgage showed an address for MERS on millions of recorded mortgages.

In *Landmark*, MERS was the mortgagee as the nominee for the beneficial owner of the junior mortgage loan. When the first mortgagee foreclosed, it did not notify MERS even though MERS was the recorded mortgagee. A default judgment wiped out the second mortgage and the property sold to a third party. The court did not decide the issue of whether MERS was entitled to notice and service of process in the initial foreclosure action, an issue fundamental to the MERS business model. Instead, it narrowly held that the trial court did not abuse its discretion in denying MERS' motion to vacate a default judgment and require joinder of MERS. Under the court's analysis, even if MERS was technically entitled to notice and service in the initial foreclosure action, MERS would not have had a "meritorious defense."

MERS is interpreting the Kansas court's holding narrowly, based on its procedural posture (the difficulty of overturning a judgment under the "abuse of discretion standard"), and is suggesting that the holding is limited because the court did not want to vacate a default judgment. Nevertheless, consumer advocates and some commentators are reading the decision as challenging MERS' basic right to notice of foreclosure actions. For example, Dan Schechter, a law professor at Loyola Law School in Los Angeles, suggests that the case "deprives the assignee of all economic benefit from the mortgage due to

the involvement of MERS." He finds it "hard to quarrel with Kansas law" and posits that the law of "most states would be similar." Ominously, Professor Schechter concludes that dicta in the decision call into question "whether millions of MERS-administered mortgages are really enforceable." See 2009 Comm. Fin. News 72 (available on Westlaw).

MERS wins in Minnesota. *Jackson v. MERS*, 770 N.W. 2d 487 (August 13, 2009) is the Minnesota case. It came to the supreme court of Minnesota by way of a certified question from the federal district court. Borrowers facing foreclosure brought the lawsuit. Purporting to act on behalf of a class, they challenged MERS' right to proceed under Minnesota's foreclosure-by-advertisement statute, arguing that MERS had failed to comply with the statutory provisions requiring recording of an assignment of the underlying indebtedness. Minn. Stat. §§ 590.02 and 580.04 (2006). MERS serves as mortgagee for the lender as well as lender's assigns.

The Minnesota case turned on the legal question of what constitutes an assignment of a mortgage within the meaning of the foreclosure statute. The court answered the certified question in MERS' favor, holding that "transfers of the underlying indebtedness do not have to be recorded to foreclose a mortgage" under the foreclosure-by-advertisement statute. Therefore, MERS had no reason to re-record, and MERS was the proper mortgagee, with standing to bring the non-judicial foreclosure. Although the certified question focused on Minnesota's non-judicial foreclosure statute, the court's interpretation of the general law applicable to assignments of beneficial ownership interests is important.

How MERS works. Some background about how MERS works helps to put into context the legal issues before both courts. MERSCORP, Inc. tracks changes in the beneficial interests in mortgage loans in the secondary markets. MERSCORP, Inc. is similar to the book-entry systems used by the securities industry since the 1970s. A consortium of key players in the real estate financing industry developed MERSCORP, Inc. and MERS, including the GSEs (Fannie Mae, Freddie Mac, and Ginnie Mae) and the Mortgage Bankers Association; their purpose was to facilitate the operation of the mortgage markets. MERS registers about two-thirds of all residential loans in the secondary market--approximately 62 million mortgages. In a nutshell, MERS is mega.

Typically, the parties use the Fannie Mae/Freddie Mac Uniform Security Instrument. It is a three-party agreement among the borrower, lender, and MERS. The mortgage form names MERS as mortgagee of record in a nominee capacity for the original lender and lender's successors and assigns. The interest conveyed to MERS is "legal title." The document explicitly grants MERS the right to act on behalf of the lender as required by law or custom, including the right to foreclose and sell the property. Under the mortgage, the lender (and its assigns) retain "beneficial" title.

Put another way, the MERS' system intentionally names MERS as the original mortgagee while the originating lender remains as the payee on the note. When beneficial ownership interests transfer in the secondary market from one MERS member to another, (e.g. the note is negotiated and servicing rights are sold), MERSCORP, Inc. tracks these transfers electronically. The idea behind MERS is that the efficiency of the mortgage markets is vastly improved by maintaining MERS as the mortgagee on public records (in a nominee capacity for the lender and assigns) when transfers of mortgage interests (for mortgage loan sellers, warehouse lenders, mortgage investors, documents custodians, and mortgage servicers) are transacted privately pursuant to clearinghouse rules.

The MERS operating agreement also stipulates that MERS will act on behalf of the beneficial owner according to instructions from that member. Rules governing these agency relationships are set forth in member agreements. As a matter of contract, MERS becomes the agent for a new principal, the next purchasing member, each time there is a transfer. Special rules govern situations where parties that are not members of MERS purchase loans. Under these circumstances, the non-member can choose to keep using the MERS system if the servicer is a MERS member, or de-register the loan. When a non-member removes the loan from the MERS system, there is a recorded assignment of the mortgage to the new note holder.

MERS model relies on fundamental legal principles. Looking at the MERS system as a whole, it relies on well-recognized principles of real property law, the law of negotiable instruments, and basic contracts law. Important analogies in the UCC rules governing security interests in personal property also support the legal model. Here are the essential elements:

- **Use of a nominee on a security instrument is well established:** Both real estate law and the UCC recognize the validity of using a nominee. UCC § 9-502 (a) (2) states that a financing statement is sufficient if it provides the name of the secured party "or a representative of the secured party." This section codifies the holding of *In re Cushman Bakery*, 526 F2d 23 (1st Cir. 1975), cert. denied, 425 U.S. 937 (1976). That case also recognizes the validity of using a nominee as mortgagee on the mortgage for recording purposes on behalf of the note holder. See generally, 59 C.J.S. Mortgages § 80 at 116 (mortgages are valid even if the mortgagees of record are nominees or straw persons); 2 Milton R. Friedman, Friedman on Contracts & Conveyances of Real Property, § 6:1:3 (James Charles Smith ed., 7th ed. 2007). In addition, by private contract parties can establish agency

relationships. UCC § 1-103(b) provides that common law agency principles may always supplement the rules governing secured transactions.

- **Article 9 rules apply even though note is secured by a mortgage.** UCC § 9-109(b) provides that "the application of this article to a security interest in a secured obligation is not affected by the fact that the obligation is itself secured by a transaction or interest to which this article does not apply." In other words, perfection of a security interest or the outright transfer of a note is not affected by the fact that the note is secured by a mortgage. The comments clearly state that "the security interest in the promissory note is covered" by Article 9 "even though the note is secured by a real-property mortgage."

- **Under Article 9, there is no need to record a mortgage assignment when the note is transferred.** The clear rules of Article 9 provide that when a note transfers, the security interest in the real estate securing the note also transfers. The principle that the "mortgage follows the note" is a common law principle that is codified in UCC § 9-203(g). UCC § 9-308(e) is the analogous rule for perfection. A promissory note evidences the underlying indebtedness. Negotiation occurs when the new note holder takes possession. There are complicated UCC rules that apply regarding the rights of holders, but the basic rule is that there is no requirement to file assignments of the document evidencing the debt.

- **A mortgagee can remain in place even though there are subsequent assignments of the note in accordance with private contractual agreements.** Under UCC § 9-310(c), if a secured party assigns a perfected security interest, an Article 9 filing is not required to continue the perfected status of the security interest against creditors from the original debtor. The original filing provides sufficient notice that there is a lien. Under real estate law, legal title can remain in a mortgagee without invalidating the security instrument even though the beneficial note holder is another party. Here again, the original mortgage does the trick. Both the UCC filing system and real property recordation statutes provide notice to creditors of the original debtor that there is a security interest or lien on the property. Even if the assignee takes no steps to record a new assignment of the mortgage so that it reflects the name of the new assignee, the security interest remains perfected against creditors and transferees of the original debtor. The comments to UCC § 9-310(c) and longstanding case law support this basic principle.

The basic legal model for MERS is a sound one. MERS' operational model relies on the rules set forth in so-called member agreements. In order for MERS to operate as a reliable and accurate registry, members are responsible for notifying MERS each time there is an event that occurs involving a registered loan in accordance with member rules. For detailed discussion of the relevant law, see Clark and Clark, *The Law of Secured Transactions under the UCC*, ¶ ¶ 1.08[10][a][iv] and 2.09[2].

A closer look at the Kansas case. The Kansas dispute dates back to 2004, when a borrower named Boyd Kesler took out a first mortgage on a piece of real property in Kansas. Landmark was the original lender on a $50,000 first mortgage. About a year later, Kesler took out a second mortgage. The second mortgage secured a loan for $93,100 from Millennia Mortgage Corp. Millennia was a MERS member; the parties used a MERS mortgage form identifying MERS as mortgagee. The structure of the deal indicates that Millennia contemplated selling the loan but intended to retain MERS as the mortgagee of record. The court assumes that this is exactly what happened. In hindsight, we know that the original lender on the second mortgage did, indeed, sell the loan to Sovereign Bank. Subsequently, the borrower filed for bankruptcy. Landmark got relief from the stay, and then filed a foreclosure action, eventually obtaining a default judgment.

Crucial facts turn on notice. The first-mortgage lender notified the original second-mortgage lender, named as lender in the mortgage and a MERS member. In other words, Landmark notified Millennia; however, Landmark did not notify MERS even though MERS was on the mortgage as nominee for the lender. Millennia failed to appear as a party, and apparently failed to notify MERS of the lawsuit. Compounding the notice problems, Millennia did not notify Sovereign, even though Sovereign purchased the loan from Millennia.

MERS tries to intervene after new buyers purchased the property. Landmark sold the property without anyone appearing to enforce the second lien. The sales price was enough to pay off Landmark's first lien and left a surplus of $37,000. The borrower tried to grab these funds, thinking it had the right to the money since the default judgment had effectively wiped out the second mortgage. At some point, Sovereign, as the beneficial owner of the second mortgage, learned what was happening and attempted to assert its rights. MERS also learned about the mess and filed motions to intervene, contending that it was a necessary party to the foreclosure action.

The district court denied both parties the right to intervene. The Kansas Court of Appeals affirmed the district court. 40 Kan.App.2d. 325, 192 P23d 177 (2008). The Supreme Court took the case on a petition to review, as a matter of first impression in Kansas. The question before the court

came down to a determination of whether the trial court had "abused its discretion" by refusing to permit MERS to join the litigation as a necessary party. Did MERS have a "meritorious defense" or a sufficient property interest to require joinder?

Reading between the lines: the court had trouble with the facts. Reflecting back on the court's description of the factual scenario, a couple of points jump out:

- The court spends a lot of time wrestling with the language used in the mortgage document and grapples with its terms, finding the document confusing and conflicting with respect to how it described MERS' role. Under the terms of the mortgage, the lender retains the right to enforce the mortgage but if "necessary to comply with law or custom," the mortgage provides that MERS can enforce the interests of the lender and assigns.

- Even though the mortgage gave MERS the right to foreclose, the mortgage directed that Millennia, as lender, receive notice. The court had a hard time reconciling the notice provision with MERS' argument that it was entitled to notice as mortgagee of record.

- The court seems to have trouble sympathizing with MERS, given the facts. MERS is trying to set aside a default judgment after the sale of the property. The way the court tells the story, there are hints that MERS waited too long to object because MERS' own rules and procedures malfunctioned.

Kansas court misapplies the law. Notwithstanding the tough facts, we think the court should have ruled in MERS favor on the law. The court ruled that MERS, as straw man nominee, essentially lost the power to act for the lender when the note transferred to a new note holder. The court mistakenly failed to recognize that a mortgagee, holding "legal" title under the terms of the mortgage, retains a sufficient interest in the property to act on behalf of a subsequent assignee of the note. Essentially, the court lost sight of long-standing principles regarding the use of nominees on security instruments and ignored fundamental common law principles of agency law. It misconstrued the principle that "the mortgage follows the note." It wrongly interpreted the maxim as standing for the proposition that when a separation occurs between the note and holder of the legal title to the mortgage, the mortgage lien is wiped out. To the contrary, under Article 9, a new assignment of the mortgage is not required and the original mortgagee continues to act as a vehicle for the purpose of notice for recording purposes. The mortgage remains in place and is just fine.

A closer look at the Minnesota case. This principle that "the mortgage follows the note," construed correctly, saved the day for MERS in the Minnesota case. In Jackson, the borrowers facing foreclosure argued that the assignees of their mortgage interests were required to record new mortgage assignments in the land records before they had the authority to foreclose under the Minnesota foreclosure-by-advertisement statute. According to the borrowers, subsequent assignments of the underlying debt required recording of new mortgage assignments under Minnesota law.

The Minnesota supreme court properly rejected these arguments, relying on: (a) longstanding rules sanctioning the use of nominees; (b) the principle that since "the mortgage followed the note," new mortgage assignments were not required in order to keep the mortgage alive and perfected; and (c) a literal reading of the plain language used in Minnesota's non-judicial foreclosure statutes. This language requires recording of mortgage assignments when there is a change in mortgagees. Since the parties had retained MERS as mortgagee down the assignment line, the court was able to conclude that there had been no assignment of mortgage rights. We agree with the court's decision and its reasoning.

Damage control. Without doubt, MERS is unhappy with the Kansas situation, both the Supreme Court decision and the way notice of the foreclosure suit escaped detection in the MERS system for too long. To prevent another fiasco, MERS is reminding its members:

- Notify MERS when it is named as a defendant in a foreclosure case even though the member no longer has any ownership interest in the mortgage loan.

- In the situation where there are multiple mortgage holders and the mortgage holders are MERS members, MERS will be wearing multiple hats in any foreclosure action, acting as nominee for the plaintiff and nominee for the defendant. Under these circumstances, the foreclosing party should notify MERS and name it as a defendant. This creates the strange situation where MERS is both plaintiff and defendant.

- Be certain that recorded mortgages reflect MERS as mortgagee and the indexing system reflects MERS as mortgagee.

(MERS Announcement Number 2009-06, dated October 1, 2009, posted on the MERS website).

Bottom line. Given the fallout from the Kansas case, it is not surprising that MERS is looking seriously at an appeal to the United States Supreme Court. We suspect that borrowers will rely inappropriately on *Landmark* as authority for wiping

out mortgage liens in foreclosure cases and will use the case to challenge MERS' ability to enforce liens in bankruptcy court using standing and real party in interest arguments. *Jackson* is the better precedent. Even with *Jackson* in hand, there may be times when the simple fact that MERS is the mortgagee of record is not enough. Depending on the jurisdiction and posture of the litigation, MERS may need to connect the dots for the court by coming prepared with evidence documenting its agency relationship with the investor as owner of the underlying debt. Documenting the link, however, is an evidentiary matter. It does not change the law.

Note: One of the editors of this newsletter, Barkley Clark, is a partner in the firm of Stinson Morrison Hecker LLP, which represented MERS in the Kansas case. He did not participate in the case.

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STATEMENT OF ALEXIS IWANISZIW, NEDAP

NYC COUNCIL COMMITTEE ON COMMUNITY DEVELOPMENT

Oversight: Systemic Problems in the Ongoing Mortgage Foreclosure Crisis, and its Effect on New York City Neighborhoods

January 30, 2012

Thank you, Chairman Vann and other members of the Community Development Committee, for holding today's hearing and for inviting me to testify. I am a Senior Program Associate at NEDAP, a non-profit resource and advocacy center that works with community groups in New York City and State to promote economic justice and to eliminate discriminatory economic practices that harm communities and perpetuate inequality and poverty.

NEDAP has been at the forefront of fighting abusive lending and foreclosure in New York City and State since the mid-1990s, using a variety of strategies, including policy advocacy, community education and outreach, coalition-building, and research and documentation. NEDAP convenes New Yorkers for Responsible Lending (NYRL), a state-wide coalition of 159 affordable housing, seniors, consumer, civil rights, and legal services organizations, along with community development financial institutions, that are dedicated to combating predatory and abusive financial services practices. NEDAP also runs the NYC Foreclosure Prevention Gap Loan Program, which provides low-cost loans to lower income New Yorkers to prevent foreclosure.

Foreclosure risk remains disturbingly high in New York, especially in lower income neighborhoods and communities of color. As documented in a report released today, NEDAP found that 94,890 mortgages were in default or delinquent in 2011, based on its analysis of new data on 90-day pre-foreclosure notices sent to homeowners in New York City. This staggering number indicates severe mortgage distress and risk of foreclosure and destabilization for a huge number of families and communities throughout the city. As the attached maps demonstrate, mortgage defaults and delinquencies as well as foreclosures have had devastating effects on communities of color. The same New York City communities that lenders targeted for high cost and abusive subprime loans -- such as Bedford Stuyvesant, Flatbush, and East New York in Brooklyn, and Jamaica, St. Albans, and Springfield Gardens in Southeast Queens – are now being significantly destabilized by high concentrations of mortgage defaults and foreclosures.

There are fundamental and well-documented problems with the mortgage servicing industry that are greatly exacerbating these problems, and present real obstacles to foreclosure prevention. Servicers are failing to get borrowers into affordable loan modifications, even where that would be the best outcome for both the investor and the borrower. Servicers have been causing extreme frustration and distress for homeowners and advocates by repeatedly losing paperwork, denying modification requests with no basis, misapplying payments, and plowing through with foreclosures even while homeowners are working on a loan modification. While the Obama Administration's Home Affordable Modification Program (HAMP) was supposed to help ease some of these problems, it has largely been a disappointment because it continues to rely on voluntary action by servicers. Further, although it creates a uniform structure for affordable modifications, it increases rather than reduces the debt burden of distressed homeowners.

The mortgage securitization structure has given servicers a disincentive to work with borrowers and seek sustainable loan modifications. It costs servicers money to complete a loan modification, while servicers receive substantial fees for foreclosures. Unfortunately, the rather modest incentives that HAMP offers to servicers have failed to alter this balance and incentivize modifications. For years servicers made a lot of

money aggressively collecting from borrowers and gouging borrowers for fees, rather than working on modifications -- they have been unable to change this culture, or to hire and train the staff needed to handle modifications.

Although the "robo-signing" scandal -- in which servicers were caught filing false affidavits with the courts in foreclosure cases – received a lot of media attention, the problems are long-standing. There are several key points worth highlighting. The false affidavits do not represent a "mere technicality," as the industry would have us believe. Instead, the false affidavits constitute a fraud on the courts, and often mask fundamental defects in the chain of ownership of the note and mortgage, as well as problematic accounting about what a borrower actually owes. The robo-signing must be seen as a continuation of a much bigger chain of fraud and abuse by the industry that runs through the whole process, from origination, to securitization, to servicing—and it is critical that the industry be held accountable for this history and pattern of broad abuse.

It is a fundamental concept of foreclosure law, and of due process itself, that a lender cannot take someone's home in a foreclosure action unless they own the note and mortgage. As recognized in City Council's proposed Resolution 989, the byzantine securitization process and the industry's widespread use of Mortgage Electronic Recording Systems (MERS) have clouded the chain of ownership in a great many cases. MERS made the industry billions in the short term by helping to avoid recording fees and facilitating shortcuts on the chain of assignment of mortgages, but these shortcuts are causing increasing problems for the industry.

Advocates from all over the State report problems with lenders filing foreclosure actions where they cannot properly document the chain of ownership of the mortgage note. There is also a growing body of decisions from NYS Supreme Court judges who are denying lenders the right to foreclose because they cannot produce proof of ownership. In New York and around the country, lenders' inability to establish ownership of the note, and thus legally foreclosure, appears more and more widespread as scrutiny increases.

We sincerely hope that the new investigative task force announced last week by President Obama, to be headed by Attorney General Schneiderman, will act aggressively to hold banks accountable for the litany of abuses in the origination, securitization, and servicing of mortgages. At this stage, a vigorous investigation by Schneiderman's task force may be the best way to ensure comprehensive relief for homeowners and communities. Such an investigation must lead to enforceable servicing standards that compel servicers to do loan modifications wherever warranted, and that include systematic principal reduction.

Recommendations:

Both the City and State should maintain funding for legal services and counseling

The funding that the City Council and State Legislature have provided for the past three years for foreclosure prevention counseling and legal services has been absolutely invaluable to New Yorkers who were targeted by abusive loans, or who have been adversely affected by the economic crisis and recession.

Although the foreclosure crisis is acute, New Yorkers at least have a fighting chance because there is a strong and well-trained group of counselors and legal services attorneys throughout the City who are providing high quality and compassionate assistance to New Yorkers in need. This network has been helping large numbers of New Yorkers at risk of foreclosure to keep their homes, and owes its existence almost completely to the funding provided by the City Council and Legislature.

As the sponsors of proposed Resolution 872-A have recognized, if this funding is not renewed, most of the advocates and programs around the City that are helping at risk homeowners will be unable to sustain their work. It will be very difficult to hold the industry accountable, and to save homes, without continued funding.

Pass S.8174/ A.11465 to require lenders to establish ownership of the note and mortgage in order to foreclose

The legislature should pass S.8174/ A.11465, which would help resolve the problem of a wrongful party bringing a foreclosure action against a New York homeowner. In order for a foreclosing plaintiff to have standing to sue, the plaintiff must be the owner of the mortgage and the holder of the note. Homeowners know the name of their mortgage servicer, but typically do not know who owns their loan. Thus, when a foreclosure is filed, often in the name of a trustee of a securitization pool, neither the homeowner nor the court has any independent basis to know whether the plaintiff is the rightful party.

The proposed legislation would address this problem in several key ways. First, the legislation would the existing common law that a foreclosing plaintiff must be the owner and holder of the subject mortgage and note. Second, the legislation provides that the plaintiff must affirmatively state in the complaint that they are the owner and holder, or have delegated authority to sue in foreclosure, and that they are in possession of the mortgage and note.

Most important, the proposed legislation seeks to avoid potential litigation regarding ownership of the loan with a simple requirement that upon filing a foreclosure, the plaintiff provide to the court copies the mortgage, note, and proof of ownership, including endorsements, assignments and transfers.

Finally, the legislation provides that a homeowner does not waive the defense of lack of standing if it is not raised in a responsive pleading. At the time the answer is due, defendants typically lack information or reason to challenge whether the plaintiff is the rightful owner. Homeowners filing answers *pro se,* without the assistance of legal counsel, rarely have the wherewithal to challenge standing to sue in their answer. Cases have proceeded to sale in which the plaintiff did not even own and hold the mortgage and note, because the defendant did not have the awareness or information to raise a defense of standing up front – the proposed legislation would correct these injustices.

By requiring foreclosing plaintiffs to plead and demonstrate proof of ownership upon filing, the law would preclude the need for extensive litigation regarding ownership later in the foreclosure proceeding. Furthermore, as courts increasingly conduct their own queries regarding standing, providing validation of the foreclosing plaintiff's ownership interest with the filing will bring efficiency to the process and preserve courts' resources.

Codify by statute Chief Judge Lippman's 2010 court rule

To address the pervasive problems with foreclosure filings, the foreclosure mill law firms must be held accountable for the papers that they file. For too long, the foreclosure mills have been held to a different standard than other lawyers, and allowed to file cases, and obtain judgments, without even minimal verification that they have the basis to bring a case.

Chief Judge Lippman's October 2010 court rule, which requires that foreclosure counsel file an affidavit certifying that they have taken "reasonable steps" to verify the accuracy of documents filed in support of residential foreclosures, is a very positive step. The rule requires foreclosure counsel to carefully review papers in the case and make inquiries to the lender to ensure that foreclosures are not wrongly filed, and requires foreclosure counsel to actually perform due diligence about the chain of ownership and other key facts prior to filing.

As recommended by proposed Resolution 871-A, the legislature should codify this important court rule by statute, and prescribe specific penalties for attorneys who violate the statute.

Codify by statute a duty of loss mitigation and duty of good faith and fair dealing for servicers, as well as other key provision of the Banking Department's recent Business Conduct Rules for Mortgage Servicing

The NYS Department of Financial Services has introduced Business Conduct Rules for Mortgage Servicing, which contain several strong provisions, including a duty of good faith and fair dealing, and a duty of loss

mitigation, which would require servicers to attempt to modify a borrower's loan through HAMP or a HAMP-like test before proceeding to foreclosure. The rules contain other strong provisions, such as a prohibition on excessive fees. The rules are some of the strongest state rules in the country.

The legislature should codify by statute the two servicer duties, as well as other key provisions of the Business Conduct Rules. The statute should provide that material violations of the statute will give borrowers a defense to foreclosure, and should result a civil penalty, as well as actual and statutory damages for borrowers.

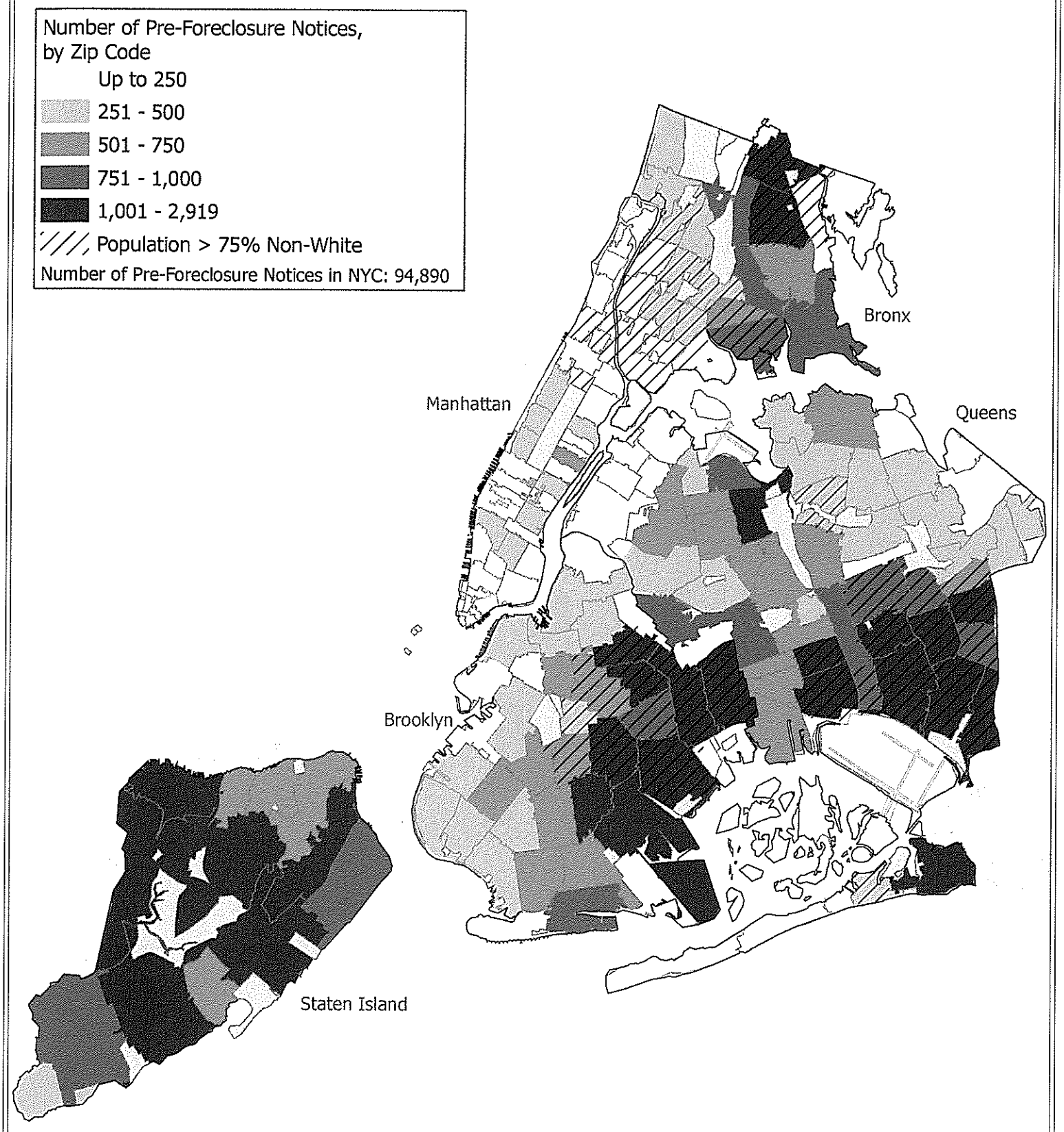
Prohibit the collection of deficiencies and deficiency judgments after a foreclosure sale

Many New York borrowers are under water in their mortgages— they owe more on their mortgage loan or loans than their property is worth. After a foreclosure, the lender on a first or second mortgage is able to collect a deficiency, which is the amount above what the lender was able to recover in the foreclosure sale. Lenders can collect these deficiencies through wage garnishment or other methods that cause great economic hardship for people who have already lost their homes in foreclosure.

California has a statute that prohibits the collection of deficiencies post-sale. In addition to protecting vulnerable residents, it greatly increases the leverage that borrowers have in negotiating a short, reasonable payoff on a mortgage (usually a second mortgage) that is underwater, since the lender will not be able to collect anything post-foreclosure. A similar statute in New York would help prevent foreclosures by incentivizing more settlements on second liens, and would provide economic protection for vulnerable New Yorkers who have just lost their homes.

Thank you again for the opportunity to testify.

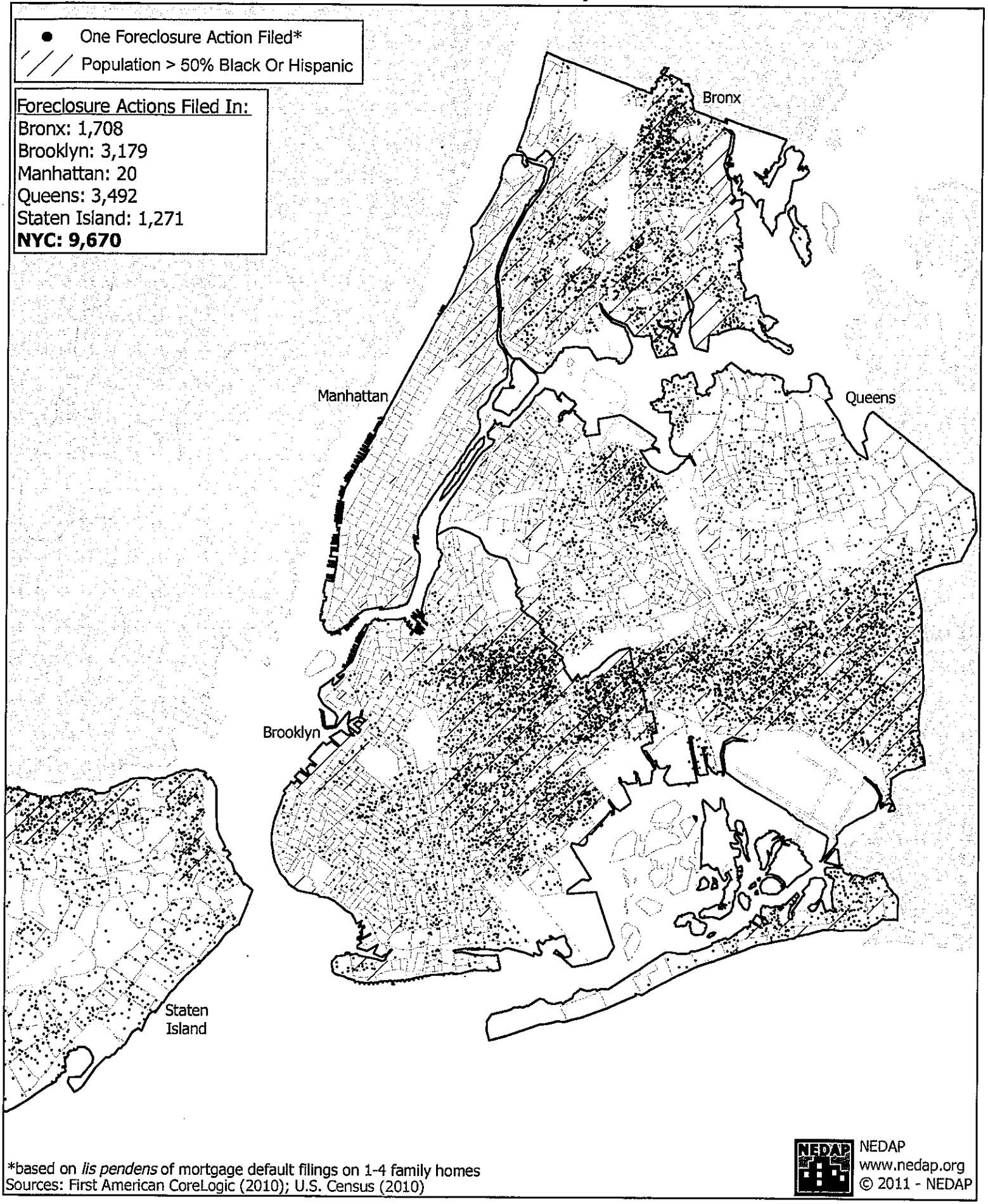
90-Day Pre-Foreclosure Notices
New York City, 2011



This map displays 90 day pre-foreclosure notices on 1-4 family homes, co-ops, and condos (duplicate notices excluded).

Sources: New York State Department of Financial Services (2011); U.S. Census (2010)

Foreclosure Patterns - 2010
New York City



*based on *lis pendens* of mortgage default filings on 1-4 family homes
Sources: First American CoreLogic (2010); U.S. Census (2010)

NEDAP
www.nedap.org

Foreclosure Funding Testimony

I. PACC Overview

PACC is a 46 year old community development corporation committed to maintaining a diverse and thriving community in Central Brooklyn. Our areas of activity include economic development and commercial revitalization, affordable housing development, home buyer and home owner counseling, and community and tenant organizing. Our Home Services department first became involved in the mortgage foreclosure issue in 1993 when a homeowner had lost his home in Clinton Hill over a $75,000 low doc/no doc loan. Since then we have been active in both providing individual counseling for those facing default or foreclosure and advocating on behalf of our community to support legislation and other initiatives to save people's homes. PACC was a founding member of the Committee for Sound Lending in 1996 which became the Citywide Task force on Foreclosure Prevention where practitioners shared experiences as we all learned about predatory lending. In 2000, a statewide initiative, New Yorkers for Responsible Lending, was launched to work toward legislative change which led to the passage of the Responsible Lending Act of 2004 with revisions in 2006 and the settlement conference solution in 2009.

II. How Foreclosure Funding Program has worked for us: (outreach, foreclosure prevention counseling),

Foreclosure Funding enabled us to employ a Foreclosure Counselor and an Assistant Counselor. Prior to the funding, we had only one counselor and the client load was overwhelming.

Foreclosure prevention counseling is very long process. Most clients work with a counselor for an average of one year. PACC counsels at least 3 new clients daily, so the work load is tremendous. The process begins with a verbal intake over the phone, followed by the initial counseling session where the budget is taken for an evaluation for the HAMP program and

other bank modification programs. The bank is also contacted and provided with an updated budget so that the client can be reviewed for a modification. Additionally, we educate the homeowner about their loan closing documents or refinance documents. Most clients were not aware of the types of mortgages that they were given. We then gather all required documents and send it out to the bank. If the client was served with a summons; the client has to respond in 20 days. We then refer them to the court on Adams Street. They will be instructed on how to file a Pro Se answer by personnel from South Brooklyn Legal Services. This will enable the homeowner to be eligible for a settlement conference. Based on our experience this process can take 7-10 Months. Banks rarely process a modification quickly, so our job includes **advocating, re-applying for a modification, follow up calls, escalating and referrals to needed resources (SBLS, NEDAP for the gap loan, CNYCN for MAP or Escalating etc.)**

AS COUNSELORS, WE DO MORE THAN JUST COUNSELING FOR MODIFICATIONS. At PACC, we advised our clients of all available services to homeowners. We advise them of property tax reductions through the Department of Finance's programs: STAR, ENHANCED STAR, SCHE, DISABILITY,CLERGY AND MILITARY.

e.g. One client who is disabled received a property tax reduction. Her annual taxes were $3000.00 but because of the program, her annual taxes were reduced to $1300.00.

We also contact DEP and National Grid and advocate for our homeowners.

e.g. One of our senior clients was behind in her water bill. DEP had a debt forgiveness program and the client was able to have the debt suspended. It will be paid if the client refinances or sells the home.

e.g. A homeowner did not know she could apply for HEAP. She was very proud and had worked all her life but she is now experiencing a hardship. She did not know this program existed and the PACC counselor advised her to apply. She did apply and once she received it, she was eligible for National Grid's On Track Program which can further reduce your bill by $400.00

We advise seniors of SCHAP loans –deferred or low interest loans for repairs and refer seniors to HUD approved counselors regarding reverse mortgages.

Additionally, we advised clients of the yearly tax lien sales. Most clients were unaware.

WE LIKE TO THANK COUNCILMAN AL VANN AND OTHERS FOR THE NEW LEGISLATION.

-number of favorable outcomes and examples of what those would be

Counseled in 2011 – 177

Brought Mortgage Current -2

Counseled and Referred to legal Services – 9

Modified –52

Short Sale – 1

Refinanced – 1

Withdrew From Counseling -33

Funding is Fundamental:

More and more families are losing income through job loss and tenant income and need counseling for steps going forward. Some clients may be eligible for HAUP. (Hamp Unemployment program) and may not be aware of this program.

With any income, they may be able to get a forbearance agreement which will decrease the monthly payment for approximately six months.

Clients have problems filling out the required forms for the modifications. Thus any missing item, will delay the modification request.

Clients need empathy not sympathy. Clients need advocates.

Funding is essential because homeowners who received NON-HAMP mods prior to 2009 and they are now falling behind again.

Homeowners will resort to scam artists for assistance.

Counselors are passionate about what they do.

Testimony of The Legal Aid Society Before a Hearing on Proposed Legislation: Res. 872-A, 0871-A, 0988, 0989, 0990

January 30, 2012

New York City Council

Committee on Community Development

Our Experience

We want to thank the Committee on Community Development, Chairperson Vann, and the sponsors of the proposed resolutions for giving The Legal Aid Society the opportunity to testify today. The Legal Aid Society is excited to speak about the topics contained within the resolutions, especially because they concern issues our clients, who are among the thousands of homeowners subjected to foreclosure actions in the New York Courts, face on a regular basis. We are also grateful to the sponsors for introducing these timely resolutions.

My name is Nick Kennedy and I am an attorney for the Foreclosure Prevention Project of the Legal Aid Society from the Queens Neighborhood Office. The Legal Aid Society, the largest not-for-profit law firm in the City of New York, represents thousands of low income New Yorkers who are coping with their legal problems, ranging from emergency evictions to domestic violence and a host of other life threatening issues. As part of its comprehensive citywide Civil Practice, The Legal Aid Society's Predatory Lending and Foreclosure Prevention Unit provides direct representation and advice to low income homeowners who are facing foreclosure.

Resolution 872-A

Despite the end of federal stimulus funding, our advocacy remains cutting edge in the world of foreclosure prevention. In December, the Queens County Pilot Project began as the result of the efforts of the Chief Judge Jonathan Lippman, the Unified Courts System, The Legal Aid Society, and other public service providers. The Pilot Project is the first of its kind and is aimed at innovating the mandatory settlement conference part, whose creation was itself an

immensely important stride by the Legislature and the Judiciary. Although we are not funded for this Pilot Project, The Legal Aid Society has devoted significant resources to it because we see it as significant step towards ending the foreclosure crisis.

The Pilot Project's goal is to resolve foreclosures cases efficiently, while reaching a conclusion that preserves homeownership for the greatest number of New York homeowners. It came about because although the court rules require that parties or counsel who attend the settlement conferences have authority to settle the case and are expected to negotiate and attempt to resolve all matters in good faith,[1] quite often the Legislature's requirements are not met. Most often, the foreclosing plaintiffs send per diem (temp) attorneys to the settlement conferences who have no authority to settle or knowledge about the case. Furthermore, mortgage servicers are constantly losing documents, requesting duplicative loan modification applications, and arbitrarily denying loan modifications in violation of the court's requirement to negotiate in good faith and guidelines under the federal Home Affordable Modification Program ("HAMP"). This leads to undue delay and repeated adjournments of the conferences (sometimes up to two years) while interest continues to accrue, inflating the unpaid principal balance of the mortgage. Additionally, the Pilot Project seeks to remedy the fact that homeowners are often tasked with navigating through the confusing world of mortgage modifications without representation. As a result of the Pilot Project, all homeowners in four critically affected zip codes in Queens (11368, 11420, 11422, 11434) are guaranteed a consultation with The Legal Aid Society, and representation if they intend to live in the home and meet our eligibility criteria.

In addition to mortgage foreclosure issues, our Predatory Lending and Foreclosure Prevention Unit addresses other related issues that low income homeowners in financial distress face as well, including deed theft, fraud related to property ownership, debt collection problems,

[1] *CPLR* § 3408

and identity theft, which are often targeted at communities of color. We represent homeowners in all phases of foreclosure, whether it be in the Pilot Project, settlement conference part, or litigation. Through our efforts, we help stabilize homeownership, which has been shown to positively impact communities as a whole, as the Council has recognized in acknowledging the Furman Center study findings.

In order to continue to help at risk homeowners and their families from losing their homes and to hold lenders, servicers, and the attorneys who represent them accountable for abusive practices, continued foreclosure funding is essential. We recognize that the State is under financial pressures, but not replacing previous levels of stimulus-funded assistance leaves homeowners vulnerable. Without legal representation or advocacy, many homes would be unnecessarily lost to the unscrupulous practices of mortgage servicers. The communities at large are also negatively affected because blocks of boarded up houses lower property values in surrounding areas, erode the tax base, and become magnets for crime. Providing legal representation and advocacy for homeowners not only levels the playing field for homeowners, but gives them a real opportunity to save their homes. We thank you for your advocacy on behalf of continued foreclosure funding. Resolution 872-A is an import step towards ensuring that the rights of New York homeowners will continue to be protected.

Resolution 871-A

We commend the Council on its recognition that "slipshod work" has real consequences for homeowners and that the important court rule promulgated under Chief Judge Lippman's leadership has gone a long way toward rectifying the imbalance. The words of Chief Judge

Lippman as reiterated by a Supreme Court Judge[2] tell the whole story: "The Courts cannot allow itself...'to stand by idly and be party to what we know is a deeply flawed process, especially when that process involves basic human needs - such as a family home - during this period of economic crisis.'" We support the codification of the court rule, and also urge the Council to support the passage of Bill #A00629B regarding standing to bring foreclosure actions, sponsored by Assemblymember Weinstein of Brooklyn.

Resolution 988

The Legal Aid Society believes that the changes proposed in Resolution 988 would make the modification procedure more transparent and greatly benefit New York homeowners whose mortgages are currently securitized. Numerous times we have encountered individuals who have fallen behind on their mortgages through no fault of their own, but who cannot make progress towards modifying their mortgages because of alleged "investor restrictions" contained in the Pooling and Servicing Agreements ("PSAs").

Servicers often invoke "investor restrictions" in modification denials. This convenient blanket statement, often incorrect, provides homeowners with absolutely no insight into what, if any, real restrictions prevent them from modifying their loans. Quite often the only place to see if a servicer is truly restricted from modifying is in the PSA for the trust in which the homeowner's mortgage resides. Locating the PSA is quite complicated for a legal professional, let alone a lay person. Once located, the text is vitally important because it can provide the language necessary to challenge a servicer's denial.

For instance, when Mr. S. sought assistance from The Legal Aid Society, he had already been denied on several occasions for a loan modification. His servicer only provided him with a

[2] *HSBC Bank USA, N.A. v. Taher*, 932 N.Y.S.2d 760 (N.Y. Sup. 2011)

one sentence explanation, citing investor restrictions on their contractual authority to modify. Extremely frustrated, and with interest continuing to accrue on his mortgage, Mr. S. came to us for assistance. From talking to Mr. S., we found out that he had been working with a government approved housing counselor. His housing counselor dutifully submitted modification package after modification package, and yet they still received the same denial. Mr. S. and his housing counselor were discouraged because they expended so many resources only to reach the same dead end. Thankfully, we located the PSA, which contained no language absolutely restricting the ability of the servicer to modify mortgages within the pool. Through our efforts, Mr. S. was able to challenge the servicer using the language of their own agreements.

Resolution 989

We think it is laudable to confront the holding pen known as MERS. Any effort the State can make through the Department of Financial Services or otherwise to curb servicer abuses through the use of the MERS system would be welcome. As noted in *Bank of New York v. Silverberg*, 926 N.Y.S. 2d 532, 539-40 (2d Dept. 2011), "the law must not yield to expediency and the convenience of lending institutions. Proper procedures must be followed to ensure the reliability of the chain of ownership, to secure the dependable transfer of property, and to assure the enforcement of the rules that govern real property."

Resolution 990

The Legal Aid Society strongly believes in preserving the continued right of consumers to have rescission through the Truth in Lending Act ("TILA") 15 U.S.C. §1601 available as a remedy. We appreciate the resolution and respectfully suggest an amendment, directing the

resolution to the Consumer Financial Protection Bureau, which is the agency now charged with TILA rulemaking.

Rescission is an important tool that can protect homeowners from predatory lending, fraud, and many other issues that can arise during a mortgage transaction. We have encountered a number of situations where a homeowner was pressured or rushed during the loan closing, only to discover after returning home that the terms were not the same as originally agreed upon.

For instance, when Mr. D. sought our assistance he faced foreclosure of the home that his father had built from the ground up 40 years earlier. The cause of the foreclosure was a mortgage refinance that greatly increased the debt on his house, while providing negligible if any benefit to Mr. D. Mr. D. entered into the transaction with the assistance of a "friend" who falsely induced him to refinance. Prior to the closing, Mr. D. and his "friend" discussed terms for the refinance with which Mr. D. was comfortable. At the closing, Mr. D. realized that the terms they had discussed were not the same as those in the closing documents. He expressed his concern, but was reassured by his "friend," and rushed through the rest of the transaction. When Mr. D. had a chance to reflect on the transaction in the next few days he realized that the deal was not as promised. Acting within the statutory timeframe, Mr. D. faxed rescission notices to the parties involved. His rescission notices were ignored, leaving him with a mortgage he could not afford. He later came to The Legal Aid Society and we were able to bring the parties involved to the negotiating table, in large part because TILA rescission is such a powerful and necessary remedy.

Once again, we thank you for this opportunity to testify. The Resolutions presented here show that our representatives take the rights of New York homeowners seriously, and your dedication to ending the foreclosure crisis.

Respectfully submitted,

Nicholas Kennedy
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The Legal Aid Society
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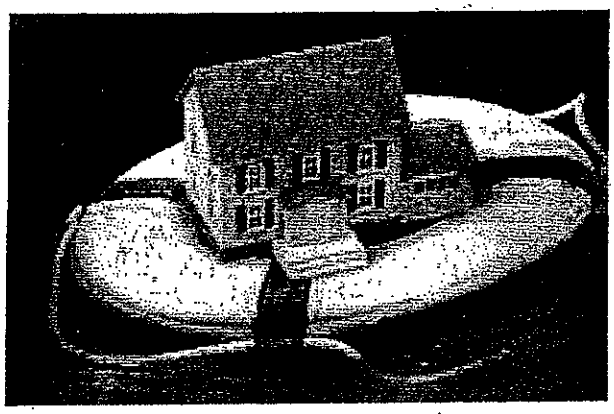

FORECLOSURE PREVENTION COURT CLINIC

Are you a homeowner in Queens at risk of losing your home or in foreclosure?

We may be able to help you!

THE LEGAL AID SOCIETY
JASA/ LEGAL SERVICES FOR THE ELDERLY IN QUEENS
&
QUEENS LEGAL SERVICES
provide

free legal advice to homeowners*

Please visit our walk-in clinic located at:

Queens Civil Court
89-17 Sutphin Boulevard, Room 160
Jamaica, New York

Office Hours:	**Thursdays**	**4:30 p.m. → 7:00 p.m.**
	Fridays	**9:30 a.m. → 3:15 p.m.**

***Bring all of your documents – Se habla Español.**

THE COUNCIL
THE CITY OF NEW YORK

Appearance Card

I intend to appear and speak on Int. No. _____ Res. No. _____
☐ in favor ☐ in opposition

Date: _____

(PLEASE PRINT)

Name: Electra Scott-Cook

Address: 2034 Gleason Ave #1 Bx NY 10472

I represent: West Bronx Housing

Address: 3176 Bainbridge Ave Bx NY 10467

THE COUNCIL
THE CITY OF NEW YORK

Appearance Card

I intend to appear and speak on Int. No. _____ Res. No. _____
☑ in favor ☐ in opposition

Date: _____

(PLEASE PRINT)

Name: CHRISTIE PEALE

Address: 74 Trinity Pl #1302 NY NY 10006

I represent: CNYCN

Address:

THE COUNCIL
THE CITY OF NEW YORK

Appearance Card

I intend to appear and speak on Int. No. _____ Res. No. _____
☐ in favor ☐ in opposition

Date: 1/30/2012

(PLEASE PRINT)

Name: Mary Weselcouch

Address: 139 MacDougal St. Floor 2

I represent: Furman Center

Address: 139 MacDougal St. Floor 2

Please complete this card and return to the Sergeant-at-Arms

THE COUNCIL
THE CITY OF NEW YORK

Appearance Card

I intend to appear and speak on Int. No. _____ Res. No. 871-A 872-A 988 989 990

☒ in favor ☐ in opposition

Date: 1/30/12

(PLEASE PRINT)

Name: Elizabeth Lynch/Lilla Roberts

Address: _____

I represent: MFY Legal Services

Address: 299 Broadway, 4th Floor, NY

THE COUNCIL
THE CITY OF NEW YORK

Appearance Card

I intend to appear and speak on Int. No. _____ Res. No. 872-A plc

☑ in favor ☐ in opposition

Date: 1/30/12

(PLEASE PRINT)

Name: Nick Kennedy

Address: 120-46 Queens Blvd. Kew Gardens, NY

I represent: The Legal Aid Society

Address: _____

THE COUNCIL
THE CITY OF NEW YORK

Appearance Card

I intend to appear and speak on Int. No. _____ Res. No. 872-A

☐ in favor ☐ in opposition

Date: 1/30/2011

(PLEASE PRINT)

Name: Alexis Iwaniszin, NEDAP

Address: 176 Grand St, Suite 300

I represent: NEDAP

Address: as above

Please complete this card and return to the Sergeant-at-Arms

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THE CITY OF NEW YORK

Appearance Card

I intend to appear and speak on Int. No. _____ Res. No. 872A

☒ in favor ☐ in opposition

Date: 1/30/2012

(PLEASE PRINT)

Name: BERNELL K GRIER

Address: CEO, Neighborhood Housing Services of NYC, Inc

I represent: 307 W 36th Street, 12th Fl

Address: New York, NY 10018

THE COUNCIL
THE CITY OF NEW YORK

Appearance Card

I intend to appear and speak on Int. No. _____ Res. No. _____

☒ in favor ☐ in opposition

Date: 1/30/12

(PLEASE PRINT)

Name: Mark Ladov

Address: 161 Ave of the Americas, 12th Fl

I represent: Brennan Center for Justice

Address: _____

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THE CITY OF NEW YORK

Appearance Card

I intend to appear and speak on Int. No. _____ Res. No. _____

☒ in favor ☐ in opposition

Date: 1/30/12

(PLEASE PRINT)

Name: Alexis LORENZO

Address: _____

I represent: LEGAL SERVICES NYC

Address: 579 COURTLANDT AVE
BRONX, NY 10451

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THE COUNCIL
THE CITY OF NEW YORK

Appearance Card

I intend to appear and speak on Int. No. _____ Res. No. 871A, 872A
988-989

☒ in favor ☐ in opposition

Date: 1/30/12

(PLEASE PRINT)

Name: Aisha Baruni - Legal Services NYC

Address: 89-00 Sutphin Blvd Jamaica NY 11435

I represent: Legal Services NYC

Address: 89-00 Sutphin Blvd Jamaica NY 11435

THE COUNCIL
THE CITY OF NEW YORK

Appearance Card

I intend to appear and speak on Int. No. _____ Res. No. 871-A, ~~872-A~~ 988+989 +990

☒ in favor ☐ in opposition

Date: 1/30/12

(PLEASE PRINT)

Name: Cilla Roberts

Address: 171-13 140th Ave, Jamaica, NY 11434

I represent: _____

Address: _____

THE COUNCIL
THE CITY OF NEW YORK

Appearance Card

I intend to appear and speak on Int. No. _____ Res. No. _____

☒ in favor ☐ in opposition

Date: 1/30/2012

(PLEASE PRINT)

Name: Bonita Dowling

Address: _____

I represent: Pratt Area Community Council

Address: 1224 Bedford Ave Bklyn

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THE CITY OF NEW YORK

Appearance Card

I intend to appear and speak on Int. No. _____ Res. No. 872-A

☒ in favor ☐ in opposition

Date: 1/30/12

(PLEASE PRINT)

Name: Randal Jeffrey

Address: 7 Hanover Square NYC 10004

I represent: New York Legal Assistance Group

Address: 7 Hanover Sq. 10004

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THE CITY OF NEW YORK

Appearance Card

I intend to appear and speak on Int. No. _____ Res. No. _____

☒ in favor ☐ in opposition

Date: 1/30/12

(PLEASE PRINT)

Name: Kimberly Allman

Address: 147 Montague St, Apt 6, BK, NY

I represent: New York Mortgage Coalition

Address: 50 Broad St, Ste 1125, NY NY

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