THE RISING TIDE – A FORECLOSURE EPIDEMIC ACROSS NEW YORK STATE - THE TARGETED DESTABLIZATION AND GENTRIFICATION OF BLACK AND BROWN COMMUNITIES HARDEST-HIT BY THE FALL OUT OF SUBPRIME LENDING AND UNFOUNDED DENIALS OF LOAN MODIFICATIONS IN THE STATE COURTS' ROCKET-DOCKET PROCEEDINGS.

Statement of Yolande I. Nicholson, Esq.,
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- March 15, 2019 -

Good afternoon, my name is Yolande Nicholson. I have been practicing in the area of foreclosure defense and prevention since 2010. I would like to first thank Senator Velmanette Montgomery, Assemblymember Tremaine Wright, Borough President Eric Adams, and the members of the New York State Legislature for this opportunity to testify on the crisis and epidemic facing our communities.

I would now like to inform you that yesterday – on March 14, 2019 – 64 properties in Brooklyn, New York were scheduled for auction by and in Kings County Supreme Court. I have included the listing of these properties in your packages. The list tells the story of your neighbors who are no longer able to live alongside you, or to send their children and grandchildren to local schools or attend churches in the neighborhoods where they previously lived; and where you represent. However, the list does not tell the stories of the families, children and seniors who have lived in or are a part of the legacy of the properties auctioned, or ushered to an elusive investor with a deed or equity theft transaction, or by a deed in lieu.

What may never be known is the number of those families who may have been able to remain in their homes if the Courts were not making a mockery of the protections adopted by this Legislature to save homeownership, whenever there is a possibility for a loan modification or reinstatement of the mortgage payments. What may never be known is whether or not the pleadings and affidavits on which the plaintiffs secured foreclosure judgments, and were granted the right to auction were fraudulent, or without any credible evidentiary basis.

What is public knowledge is that Black & Brown communities in New York City, in neighborhoods like Bedford-Stuyvesant and Canarsie in Brooklyn, like St. Albans in Queens, and Harlem in Upper Manhattan - once redlined and then targeted for subprime and predatory lending - are today's hot beds for gentrification. Your long-time neighbors and friends are being replaced with cash-rich investors, many of whom trade in foreclosure judgments and auctions behind the scenes. They then drive up the per-square foot cost of rentals, and the purchase price of homes for first-time buyers in the outer boroughs of New York City. Foreclosure judgments and auctions are thus part of the engine for displacement of people color from their New York City homes and their communities of many decades.

I here to report to you is that overall we no longer have a state court system that cares to inquire about or have evidence regarding which entity actually owns the mortgage note, or which entity actually advanced money to fund the loan being foreclosed on. The courts now care less about whether or not the actual creditor is before them in loan modification negotiations, or whether the entity requesting judgment and auction in foreclosure proceedings has legal standing, or whether the foreclosure auction is being published county wide, as required by law.

The well-kept secret is that foreclosure judgments are being "doled out" by our State's Supreme Courts across the Downstate, and in Kings County especially, to any warm body claiming to own the loan while presenting a photocopy of the note, oftentimes a poor photocopy. **Consequently, the foreclosure crisis has now steadily risen to epidemic levels, for communities of color across New York State.**

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Since 2009, borrowers who qualified for loan modifications were unfairly denied in high percentages by big-bank loan servicers like Wells Fargo Bank, CitiBank and JPMorgan Chase Bank and their back-end investors in subprime, residential mortgage-backed securities – investors like Fannie Mae and Freddie Mac. This is neither hearsay nor conjecture. This state of affairs was reported on in 2015 by the federal monitor appointed by Congress to oversee the use of the bailout funds handed to the financial market players in 2008, and to report on the loan modification program put in place by President Barack Obama in 2009, as a result.

Nonetheless, over the last decade, hundreds of thousands of homeowners who lived in Black and Brown communities - **from Buffalo to Brooklyn, from Eerie County to Suffolk County** - lost their property in foreclosure proceedings as a result, when oftentimes many of them could have afforded a loan modification. Today, in 2019, in the Downstate, the numbers of new foreclosures remain exponentially high in communities where hard-working families have called home since their migration to the North, by land, from the Jim Crow South, or by sea, from the colonized Caribbean Isles in the prior century, or by air, from the Middle East, Asia and Africa.

The New Economy Project recently reported that in 2017 almost two-thirds (65.4%) of all pre-foreclosure notices were sent to people living in New York City neighborhoods of color, and that the notices of imminent foreclosures concerned loans made in the subprime lending heyday (between 2002 and 2007). The Report noted that almost half of the notices went to New York City and Long Island homeowners; but that foreclosure risk was also high in Buffalo, Rochester, and parts of the Hudson Valley. **The Report highlighted that residents of New York City neighborhoods of color received pre-foreclosure notices more than twice as often as residents of other neighborhoods (controlling for the number of owner-occupied units); that NINE out of TEN zip codes with the highest number of pre-foreclosure notices are neighborhoods of color**.

Most certainly, this report of an ever-increasing crisis must be read side by side with recent report from the Office of the New York State Comptroller entitled "Foreclosure Update - "Signs of Progress." The Office of the Comptroller reports that statewide foreclosure filings have been falling since 2013 (from 46,696 to 25,334 in 2018). I have submitted a copy of each report with my testimony.

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I am here to report to you that "The Signs of Progress" being heralded are not signs of progress for communities of color across the State, nor are they signs of progress for any working-family community in which foreclosure filings, and foreclosure judgments and auctions continue to rise or remain at an all-time high. Even though foreclosure filings dropped significantly in 2011[1], by the end of 2013 and into 2014, foreclosure filings jumped back immediately to its 2009-2010 levels after those requirements were lifted. This jump resulted from the fact that from August 1, 2013, foreclosure ("bank") attorneys were no longer required to swear to the courts that the foreclosure papers they are filing and presenting for judgments and auctions are in fact accurate and lacking of fraud.[2]

What the New York State Comptroller's report does not take into account is the fact that the sign of progress is the direct result of the shift of the burden of affirming that there is no fraud in the foreclosure filings away from the attorneys who make the filings of foreclosure actions, towards the employees or agents of mortgage loan servicers that are clients of these foreclosure law firms. Once the shift happened, and the spigot against fraud was removed, the floodgates for judgments and auctions opened up all across the State.

So, even though the Courts reported that the number of new foreclosure filings -- that is, new cases commenced across the State – had once again dropped down to 25,334 in 2018, this reported downward trend may need to be reconciled with the January 2019 report by the New Economy Project, in which we learned that more than 167,000 pre-foreclosure notices were filed with the New York State Department of Financial Services in 2017. For your communities, the celebration of a downtrend in pending foreclosure cases may need to be put on "pause".

In the meantime, I am here to report to you that the state of emergency facing homeowners continues to exist. This current state of emergency is the result of the 2016 change in the judicial climate towards homeowners – the tide has now risen in their disfavor, directly as a result of the policies and proceedings adopted by the Office of Court Administration for foreclosure cases pending before New York State trial and appellate courts, to move those cases expeditiously to auctions.

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[1] To 16,655 new cases filed (after the United States Justice Department opened its investigations of fraudulent foreclosure filings by the national banks, and after the Chief Justice of the New York State Court of Appeals required that every attorney filing a foreclosure action affirm that the papers being submitted into Court were neither false nor fraudulent). This drop – or pause in filings - resulted from the all-time foreclosure filing high of approximately 47,000 filings at the onset of the foreclosure crisis in 2009.

[2] To more than 47,600 new cases filed.

WHILE WE AWAIT THAT RECONCILIATION, HERE IS WHAT WE DO KNOW.

The 2019 Report of the Office of the New York State Comptroller is based in large part on the 2018 Report of the Chief Administrator of the New York State Supreme Courts, Hon. Larry Marks.[3] The Comptroller Reports that "[c]hanges to court system practices have improved efficiency, which has helped reduce the foreclosure caseload."

The Chief Administrator – the head of the Office of Court Administration -- has been championing steps taken by the Courts to speed up the resolution of foreclosure cases since 2016 with the award of foreclosure judgments to any "warm body" who shows up claiming to be a noteholder, oftentimes without proof or credible documentation in that regard. What is also obvious is that the courts have adopted the mantra of the financial industry to place the blame of what the industry referred to as a NYS-drawn-out foreclosure process at the feet of NY judicial proceedings and protections to save homeownership (although these protections are fundamental to the due process protections afforded every New Yorker under this State's Constitution).

THE QUESTION NOW IS: AT WHAT COST IS THIS DRIVE TO COURT EFFICIENCY TO YOUR COMMUNITIES? AND MORE IMPORTANTLY, ON WHAT STATUTORY AUTHORITY AND ON WHAT LEGISLATIVE POLICY?

I submit that there are none. The fact is that, since 2008, the Law of this State is that our courts are obligated to save homeownership whenever possible; to ensure that a good-faith effort is made by all parties to do so; and to apply the rules of evidence to verify that the legal owner of the mortgage note has presented itself. What those of us who represent homeowners on a daily basis can report – and that includes the attorneys funded by this Legislature to save homeownership – is that the Supreme Courts' move towards efficiency in foreclosure proceedings have compromised the application of due process.

This is primarily because a large number of the plaintiffs or investors seeking foreclosure judgments and auctions are servicers for residential mortgage backed security (RMBS) investors or distressed mortgage loan buyers that cannot submit this evidentiary verification. This is also because since 2016, New York State judicial regulators that are charged with advancing the Legislature's policy to save homeownership have steered foreclosure proceedings towards a different resolution (towards judgments and auctions). After permitting foreclosing plaintiffs to effectively shut down meaningful loan modification and settlement conference proceedings in the years that foreclosing attorneys could not verify the lack of fraud in their filings, OCA and our Courts then revved up foreclosure proceedings to full steam – in the name of the efficiency – to clear their dockets.

At the same time, instead of placing the blame for the backlog of cases in the courts where it rightfully belonged – at the front door of the foreclosure law firms and at the halls of the foreclosing investors and their mortgage loan servicers - the courts instead increased the burden on working

[3] Hon. Marks is required to submit annual reports pursuant to the Laws of the State of New York passed by your body in 2009 to advance the State's policy of saving homeownership.

families to prove their right to remain in their homes; legislating from the Bench in favor of foreclosing parties who oftentimes cannot verify or testify that there was no fraud in their filings, or who refused to negotiate in good faith with hard working heads of household, especially African-Americans heads of household.

OCA and a handful of State Supreme Court judges selected by OCA have implemented expedited foreclosure proceedings and faulty decision making, unduly and unlawfully that significantly infringe on defendant homeowners' due process and foreclosure prevention rights. These types of proceedings are known nationwide as Rocket Docket Proceedings. In Rocket Docket Foreclosure Proceedings, homeowners encounter disregard for due process, a lowering of the bar when applying the standards of civil procedure in foreclosure cases to award judgments, and a mockery of their efforts to secure loan modifications when they qualify therefor.

In Rocket Docket Foreclosure Proceedings, unlawful foreclosure practices employed by banks, other financial institutions and investors in distressed mortgage loans are allowed by many courts – with a downplay of the consumers' right to question who owns their mortgage loans -- and in Kings County, foreclosure auctions are advertised in limited and specialized publications. Affidavits have been accepted even at the New York State Court of Appeals level that clearly erode the integrity of the appellate courts, and call into question their independence. Generally speaking – and there are exceptions – the courts have adopted their own policy: That it is not their job to save homeownership and advance well-settled consumer protection law to protect a borrower in default. This all contravenes New York State's Laws.

What must not be left untold is the fact that the implementation of Rocket Docket Foreclosure Proceedings coincided with OCA's disclosure of improper and unethical communications and meetings between OCA's senior policy personnel and representatives of the Federal National Mortgage Association (Fannie Mae), and its sister entity Freddie Mac, throughout 2015 and early 2016. Fannie Mae also appeared alongside OCA and other judicial court personnel, under the color of title, position and authority of OCA and County Court administrators, in settlement conferences and at motion calendars or hearings, in courtrooms in which no disclosure was made to the defendant-litigants in appearance, or to their counsels, that a party with a financial interest in foreclosure cases was in the room or at the table.

Fannie Mae, a private, publicly-traded company, is the primary decision-maker on subprime loans that were originated in New York State (and across the country) prior to the 2008 financial crisis, as the holder of the Triple A bonds that were securitized with subprime loans. A significant percentage of the foreclosure cases in Rocket Docket Foreclosure Proceedings involves Fannie Mae and Freddie Mac loans. In the high-volume of cases, Fannie Mae is the party named as the plaintiff; where Fannie Mae is not, it or Freddie Mac drives the decision to deny loan modifications and push the actions forward to judgments and auctions (or behalf of itself or related investors), on reasons for denials that belie common sense.

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Ostensibly, OCA embarked on the Rocket Docket Foreclosure Proceedings approach to achieve judicial efficiency for foreclosure cases on the courts' dockets. However, these Rocket Docket Proceedings have accomplished little more than placing the brunt and burden of the financial industry's misdeeds in foreclosure proceedings on New York homeowners, years after the banks, Fannie Mae, Freddie Mac, and their loan servicers allowed foreclosure cases to languish in what is referred to as Supreme Courts' Shadow Docket. This languishing scheme resulted primarily from the fact that the foreclosing plaintiffs lacked standing to foreclose (that is, had no proof of ownership of the mortgage loans), or lacked good faith in loan modification negotiations in court (that is, lacked the willingness to modify the loans).

With the Rocket Docket Foreclosure Proceedings, OCA and courts have now rewarded the foreclosing plaintiffs (and Fannie Mae and Freddie Mac) by fast-tracking sizable numbers of cases that might have otherwise been modified, worked out or dismissed, instead of being permitted to languish in the Shadow Dockets of the Supreme Courts. Foreclosing plaintiffs and cash-rich investors are now being rewarded with foreclosure judgments and auctions from the Shadow Dockets.

The extent to which the improper, *ex parte* meetings resulted in the "streamlining" of foreclosure proceedings and the thwarting of foreclosure-specific due process protections has yet to be investigated by any state or federal authority. The primary question and concern is whether the Rocket Docket [Expedited] Foreclosure Parts are courts that are "***Bossed and Bought***!" (**Rather than being what courts are supposed to uphold, being "*Unbossed and unbought!*" – Shirley Chisholm)**. Nonetheless, what Fannie Mae executives and their friends left behind after being shepherded around the State by the Office of Court Administration is a judicial climate that adopted proceedings to lead to a precipitous and accelerated loss of homeownership in counties across Downstate New York.

According to the New Economy Project Report, **"THOUSANDS OF NEW YORKERS OF COLOR CONTINUE TO BEAR THE BRUNT OF THE SUBPRIME LENDING CRISIS."** I am here to report, on behalf of my colleagues in the private bar, that our State Supreme Courts are failing to keep borrowers and their families in their homes in large numbers; they are failing to keep children in their local school districts; they are failing to keep tenants on two- to four-family property owners in foreclosure out of the homeless shelters that spread across this City.

Not surprisingly, we now have the highest percentage of African-American and Hispanic-American children sleeping in New York City's homeless shelters every night.

The problem will only worsen if left unnoticed and unchecked by the legislative bodies and regulatory agencies charged with oversight of the courts. African-American, Hispanic-Americans, immigrants and elderly homeowners are facing a disproportionate dislocation from their place in local communities, pilfering of their investment and equity in their properties, and a historic loss in personal and family wealth, and economic stability.

In 2011, I, along with my colleagues in the foreclosure defense bar, started sounding the alarm that without the good-faith implementation of the standards enacted to save homeownership by our state courts, foreclosing plaintiffs, and their loan services and government-sponsored entities like Fannie Mae and Freddie Mac may secure favorable decisions and garner an unfair advantage to profit from the sale or flip of a mortgage loan while a foreclosure action involving that note is moving through the courts, or while the borrower is trying to secure a loan modification with the party that appears in court without authority to modify, or while the "real parties in interest" continue to engage in transactions and shenanigans that are specifically designed to frustrate or upend those procedures. This game has now been played out with mortgages financed by what has been referred to by the GSEs Private Label Mortgage Market – and by Fannie Mae and Freddie Mae – while they have undermined New York Law, especially CPLR 3408(e) in open court and behind closed door meetings with court administration and personnel.

In 2013, now deceased Hon. Arthur Schack, the matter of ***JPMorgan Chase vs. Butler*** (Kings County Supreme Court) ordered an evidentiary hearing to determine whether a fraud had been committed on the Kings County State Court by JPMorgan's attorneys and Fannie Mae. Prior to that decision, in 2012, now deceased Hon. Herbert Kramer referred the matter of ***HSBC vs. Sene*** to investigative authorities, including the Brooklyn District Attorney's Office, for an investigation into what he referred to as obvious defects in the note assignments presented to him for foreclosure. By 2014, the Appellate Division, Second Department reversed Judge Schack in the *JPMorgan* matter, and continued to scold him in other decisions for questioning whether the parties before the Court were the actual creditors or were fraudsters. Still today, the District Attorney's Office has yet to issue a written result to the homeowner of its investigation in the *HSBC* matter.

WHAT WE DO KNOW WITH CERTAINTY IS THAT TODAY, DESTABILIZATION OF BLACK & BROWN COMMUNITIES ACROSS THE STATE ACCELERATES! BLACK & BROWN FAMILIES ARE BEING DISPLACED, AND THEIR TENANTS EVICTED! SENIORS FALL VICTIM TO DEED AND EQUITY THEFT! LOSS OF $$ BILLIONS IN AFRICAN-AMERICAN GENERATIONAL WEALTH IS THE NEW NORM! THE TIME HAS COME FOR IMMEDIATE CHANGES + LEGISLATIVE ACTION! THE TIME HAS COME FOR A MORATORIUM ON ALL FORECLOSURES! THE TIME HAS COME TO SAVE HOMEOWNERSHIP IN COMMUNITIES OF COLOR!

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At this point, I'd like to share with or submit to you the travails of Ms. Mohansingh to secure a loan modification and save her home since 2010 in the case study attached. Ms. Mohansingh has lived in fear of loss of her home for close to 10 years now because, as she believes, **"*They want my house because it's in Greenwood Heights, Brooklyn*."**

I would also like to introduce to Ndukwe D. Agwu, Esq., Deputy Director, Consumer and Economic Advocacy Program of Brooklyn Legal Services Corporation A who will present to you a statement on his program's efforts to secure loan modifications for families in Brooklyn and Queens.

I would also like to present to you Mr. Joseph Redhead, who has also been trying to save his home from foreclosure for years, along with his attorney Alice Nicholson. Once again, I thank you for this opportunity to bring this epidemic to your attention in this forum.

Yolande I. Nicholson, Esq.

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