



Melville D. Miller, Jr.
President and General Counsel

Vice Presidents and
Assistant General Counsel
Dawn K. Miller
Claudine M. Langrin

Legal Services of New Jersey
100 Metroplex Drive at Plainfield Avenue
Suite 402, P.O. Box 1357
Edison, New Jersey 08818-1357
Phone: (732) 572-9100
Fax: (732) 572-0066
www.lsnj.org
www.lsnjlaw.org

August 7, 2019

Sent Via New Jersey Lawyers Service

Heather Baker, Clerk
R.J. Hughes Justice Complex
Supreme Court Clerk's Office
25 Market Street
P.O. Box 970
Trenton, New Jersey 08625-0970

**Re: Investors Bank v. Javier Torres and Dora M. Dillman
Docket No. A-55-18 (082239)**

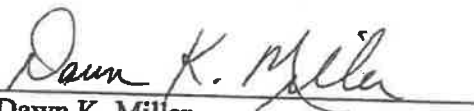
Dear Ms. Baker:

Enclosed please find an original and nine copies of a Notice of Motion for Leave to Appear as *Amicus Curiae*, to File a Brief, to Present Oral Argument, to Accept this Motion as Within Time, and Certification of Melville D. Miller, Jr. in support thereof, along with an original and nine copies of the Brief of *Amicus Curiae*, and original and one copy of Proposed Order and Certification of Service.

Kindly file these documents and return a copy to my office stamped "filed" in the enclosed reply envelope. Thank you for your attention to this matter.

Very truly yours,
LEGAL SERVICES OF NEW JERSEY

By:


Dawn K. Miller
Attorney ID 002521987

Enclosures

cc: Adam Deutsche, Esq., Counsel for Petitioner
Joshua N. Howley, Esq., Counsel for Respondent
Joseph Lubertazzi, Esq., Counsel for *Amicus Curiae* New Jersey Business & Industry Association
Linda E. Fisher, Esq., Counsel for *Amicus Curiae* Seton Hall Law School Center for Social Justice

Legal Services of New Jersey
Melville D. Miller, Jr., President
(ID No. 256481969)
Dawn K. Miller, Exec. Vice President
(ID No. 002521987)
100 Metroplex Drive Suite 402
Edison, New Jersey 08818
Attorneys for *Amicus Curiae* Legal Services of New Jersey

SUPREME COURT OF NEW JERSEY
Supreme Court Docket No A-55-18 (082239)

INVESTORS BANK,

Plaintiff-Respondent,

- v -

JAVIER TORRES; MRS. JAVIER
TORRES, *his wife*; DORA M.
DILLMAN,

Defendants-Petitioners

CIVIL ACTION

On Appeal from New Jersey
Superior Court
Appellate Division
Docket No. A-003029-16T4

SAT BELOW:

Hon. Jose L. Fuentes, P.J.A.D.
Hon. Allison E. Accurso, J.A.D.
Hon. Scott J. Moniyhan, J.A.D

**NOTICE OF MOTION FOR LEGAL
SERVICES OF NEW JERSEY TO
APPEAR AS *AMICUS CURIAE*, TO
FILE A BRIEF, TO PRESENT ORAL
ARGUMENT, AND TO ACCEPT THIS
MOTION AS WITHIN TIME**

TO: Heather Joy Baker, Clerk
R.J. Hughes Justice Complex
Supreme Court Clerk's Office
25 W. Market Street
P.O. Box 970
Trenton, N.J. 08625-0970

Adam Deutsche, Esq.
Northeast Law Group
P.O. Box 60717
Longmeadow, M.A. 01116
Attorney for Defendants-Petitioners

Joshua N. Howley, Esq.
Sills Cummins & Gross P.C.
One Riverfront Plaza
Newark, New Jersey 07102
Counsel for Plaintiff-Respondent Investors Bank

Linda Fischer, Esq.
Margaret Jurow, Esq.
Seton Hall Law School
833 McCarter Highway
Newark, New Jersey 07102
Counsel for Amicus Curiae Seton Hall Law School

Joseph Lubertazzi, Esq.
McCarter & English, LLP
Four Gateway Center
100 Mulberry Street
Newark, New Jersey 07102
Counsel for Amicus Curiae New Jersey Business & Industry
Association

PLEASE TAKE NOTICE THAT pursuant to Rule R. 1:13-9, Legal Services of New ("LSNJ") applies for leave to appear as *amicus curiae* in the above matter, to file the brief that accompanies this motion, to present oral argument, and to accept the filing of this motion as within time. In support of this motion, LSNJ submits its proposed brief and the accompanying Certification of Melville D. Miller, Jr.

Dated: August 7, 2019

Respectfully submitted,
LEGAL SERVICES OF NEW JERSEY, INC.

By: 

Melville D. Miller, Jr.
President and General Counsel
Legal Services of New Jersey

Legal Services of New Jersey
Melville D. Miller, Jr., President
(ID No. 256481969)
Dawn K. Miller, Exec. Vice President
(ID No. 002521987)
100 Metroplex Drive Suite 402
Edison, New Jersey 08818
Attorneys for *Amicus Curiae* Legal Services of New Jersey

SUPREME COURT OF NEW JERSEY
Supreme Court Docket No. A-55-18 (082239)

CIVIL ACTION

INVESTORS BANK,

Plaintiff-Respondent,

- v -

JAVIER TORRES; MRS. JAVIER
TORRES, *his wife*; DORA M.
DILLMAN,

Defendants-Petitioners

On Appeal from Superior Court
of New Jersey
Appellate Division
Docket No. A-003029-16T4

SAT BELOW:

Hon. Jose L. Fuentes, P.J.A.D.
Hon. Allison E. Accurso, J.A.D.
Hon. Scott J. Moniyhan, J.A.D.

**CERTIFICATION OF MELVILLE D.
MILLER, JR. IN SUPPORT OF
MOTION FOR LEGAL SERVICES OF
NEW JERSEY TO APPEAR AS *AMICUS
CURIAE*, TO FILE A BRIEF, TO
PRESENT ORAL ARGUMENT, AND TO
ACCEPT THIS MOTION AS WITHIN
TIME**

Melville D. Miller, Jr. does hereby certify:

1. I am an attorney at law in New Jersey and President of
Legal Services of New Jersey, Inc. ("LSNJ"). I make this
certification in support of LSNJ's motion pursuant to Rule R.
1:13-9 to appear as *amicus curiae* in the above matter, to file a

brief, present oral argument, and to accept this motion as within time.

Identity of Applicant

2. LSNJ is a non-profit corporation that supports and coordinates New Jersey's statewide Legal Services system, consisting of a network of five regional Legal Services programs in addition to LSNJ. The Legal Services system is New Jersey's primary provider of free legal assistance to low-income people in civil matters.

3. LSNJ frequently participates as *amicus curiae* in cases involving issues of major significance to the State's low-income population. In so doing, it presents perspectives of low-income people as a group rather than the views or interests of the individual litigants.

4. Since 2002, LSNJ has provided statewide representation in homeowner foreclosure defense cases through a specialized project concentrating on the full range of foreclosure-related issues. LSNJ's Foreclosure Defense Project (FDP) currently has four full-time attorneys and two paralegals.

Issues To Be Addressed

5. If granted leave to appear, LSNJ intends to address the certified question, analyzing the legal issues in the light

of our many years of extensive experience with foreclosure practice in New Jersey.

Public Interest

6. We believe that, from the perspective of low-income New Jersey homeowners, this appeal presents one of the most important issues to reach this Court in recent years.

7. If allowed to stand, we believe the Appellate Division's published decision threatens to cause substantial harm to homeowners and consumers. The decision not only misinterprets statutory language as it applies to mortgage foreclosures, but also suggests that a similar misinterpretation would be applied in a wide range of other consumer transactions involving negotiable instruments, with potentially devastating consequences for lower-income residents.

Special Expertise and Interest

8. I personally have nearly five decades of expertise in consumer matters and have participated in state level advocacy on such issues for my entire career, dating back to appearances before this Court in seminal consumer cases including *Olive v. Graceland Sales Corp.*, 61 N.J. 182 (1972); *Riley v. New Rapids Carpet Center*, 61 N.J. 218 (1972); *Chase Manhattan Bank v. Josephson*, 135 N.J. 209 (1994); *Lemelledo v. Beneficial Mgmt. Corp.*, 150 N.J. 255 (1997); and *Perez v. Rent-A-Center*, 186 N.J. 188 (2006).

9. Through its Foreclosure Defense Project, LSNJ is New Jersey's largest provider of free legal defense for families facing foreclosure. Through our hotline, website, and outreach, we have provided legal assistance in nearly 8,600 cases during the past 10 years. We have assisted even more residents through educational materials accessed through our website.

10. In 2010, LSNJ issued a detailed report to this Court concerning false statements and swearing in foreclosure proceedings by foreclosing plaintiffs. Based on the findings in this report, LSNJ petitioned for broad relief from abusive "robo-signing" and similar practices then prevalent in the state. This Court issued Orders to Show Cause and other directives which effectively resulted in a foreclosure moratorium, to begin to curb those abuses. LSNJ also represented foreclosure clients before this Court in *US Bank Nat. Ass'n v. Guillaume*, 209 N.J. 449, 38 A.3d 570 (2012). LSNJ recently was a member of the AOC's Special Committee on Residential Foreclosures. Additionally, LSNJ provided free legal services and representation to homeowners in the New Jersey Foreclosure Mediation Program for several years, in direct partnership with the New Jersey Judiciary and other stakeholders.

Request to Present Oral Argument

11. For more than three decades LSNJ traditionally has been granted permission to present oral argument to the Court in cases where it has been granted *amicus curiae* status. LSNJ has found that invariably oral argument affords an opportunity to assist the Court by offering both information and legal perspective on questions members of the Court may have after their review of the record and briefs. Since many of these questions do not become apparent until oral argument, frequently it is not possible for LSNJ to anticipate and address them fully in a brief. LSNJ believes oral argument will be especially important in this case, given its extensive and unique experience in foreclosure defense cases and on behalf of low-income consumers generally.

**SUPPORT FOR THE PART OF THIS MOTION THAT SEEKS ACCEPTANCE
OF THIS FILING AS WITHIN TIME**

12. While LSNJ's FDP is a substantial statewide factor in foreclosure defense, its modest staff size and high client demand for legal assistance have sharply limited its time to research and prepare this brief. LSNJ began its research promptly upon this Court's certification of this appeal, and conducted a thorough national review of all relevant case law and learned commentary, doing our best to balance caseload pressure and new clients' requests for assistance with the need

to complete this application and brief. Given LSNU's experience in consumer matters generally and foreclosures specifically, we ask the Court's leave in accepting the filing of this motion as within time.

I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

A handwritten signature in dark ink, appearing to read 'Melville D. Miller, Jr.', written over a horizontal line.

Melville D. Miller, Jr.
President and General Counsel

DATED: August 7, 2019

Legal Services of New Jersey
Melville D. Miller, Jr., President
(ID No. 256481969)
Dawn K. Miller, Exec. Vice President
(ID No. 002521987)
100 Metroplex Drive Suite 402
Edison, New Jersey 08818
Attorneys for *Amicus Curiae* Legal Services of New Jersey

SUPREME COURT OF NEW JERSEY
Supreme Court Docket No A-55-18 (082239)

INVESTORS BANK,

Plaintiff-Respondent,

- v -

JAVIER TORRES; MRS. JAVIER
TORRES, *his wife*; DORA M.
DILLMAN,

Defendants-Petitioners

CIVIL ACTION

On Appeal from New Jersey
Superior Court
Appellate Division
Docket No. A-003029-16T4

SAT BELOW:

Hon. Jose L. Fuentes, P.J.A.D.
Hon. Allison E. Accurso, J.A.D.
Hon. Scott J. Moniyhan, J.A.D

Order

THIS MATTER having been opened to this Court by Legal Services of New Jersey, *Amicus Curiae* Legal Services of New Jersey, for an application for leave to appear as *amicus curiae* in the above matter, to file the brief that accompanies this motion, to present oral argument, and to accept the filing of this motion as within time pursuant to R. 1:13-9;

IT IS on this _____ day of _____, 2019,

ORDERED that Legal Services of New Jersey is granted leave to appear as *amicus curiae* in this action, to file the brief that accompanies this motion, and to present oral argument; and it is further

ORDERED that a copy of this Order shall be served upon all parties within _____ days of the date hereof by attorneys for *Amicus Curiae* Legal Services of New Jersey.

Legal Services of New Jersey
Melville D. Miller, Jr., President
(ID No. 256481969)
Dawn K. Miller, Exec. Vice President
(ID No. 002521987)
100 Metroplex Drive Suite 402
Edison, New Jersey 08818
Attorneys for *Amicus Curiae* Legal Services of New Jersey

SUPREME COURT OF NEW JERSEY
Supreme Court Docket No: A-55-18(082239)

Investors Bank

CIVIL ACTION

Plaintiff-Respondent,

APPELLATE DIVISION

DOCKET NO. A-3029-16T4

- v -

Javier Torres and Dora M.
Dillman,

Sat Below:

Hon. Jose L. Fuentes, P.J.A.D.

Hon. Allison E. Accurso, J.A.D.

Hon. Scott J. Moniyhan, J.A.D.

Defendants-Petitioners

CERTIFICATION OF SERVICE

I, Dhairya Bhatia, of full age, upon my oath, do hereby certify:

1. I am an administrative assistant employed at Legal Services of New Jersey.

2. On August 8, 2019, I caused a copy of a Notice of Motion for Leave to Appear as *Amicus Curiae*, to File a Brief, to Present Oral Argument, and to accept as filed within time, along with Certification of Melville D. Miller, Jr., and Brief in support thereof, delivered, via New Jersey Lawyers Service, to:

Heather Joy Baker, Clerk
Supreme Court of New Jersey
R.J. Hughes Justice Complex

25 W. Market Street - 8th Floor, North Wing
Trenton, N.J. 08625-0970

2. On August 8, 2019, I caused two (2) copies of the within Notice of Motion for Leave to Appear as *Amicus Curiae*, to File a Brief, to Present Oral Argument, and to accept as filed within time, along with Certification of Melville D. Miller, Jr., and Brief in support thereof, delivered, via New Jersey Lawyers' Service , to:

Joshua N. Howley, Esq.
Sills Cummins & Gross P.C.
One Riverfront Plaza
Newark, New Jersey 07102
Counsel for Plaintiff-Respondent Investors Bank

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.


DHAIRYA BHATIA

DATED: August 8, 2019

Supreme Court of New Jersey

DOCKET NO. A-55-18 (082239)

INVESTORS BANK,

Plaintiff-Respondent,

v.

JAVIER TORRES; MRS.JAVIER
TORRES, *his wife*; DORA M.
DILLMAN.,

Defendants-Appellants

Civil Action

On Appeal from:

Superior Court of New Jersey

Appellate Division

Docket No. A-003029-16T4

SAT BELOW:

Hon. Jose L. Fuentes, P.J.A.D.

Hon. Allison E. Accurso, J.A.D.

Hon. Scott J. Moniyan, J.A.D

BRIEF AND APPENDIX OF AMICUS CURIAE LEGAL SERVICES OF NEW JERSEY

Legal Services of New Jersey
100 Metroplex Drive, Suite 402
P.O. Box 1357
Edison, New Jersey 08818-1357
Phone Number: (732) 572-9100
Fax Number: (732) 572-0066

On the Brief:

Melville D. Miller
DMiller@lsnj.org
Attorney ID No. 256481969

Dawn K. Miller
Dkmiller@lsnj.org
Attorney ID No. 002521987

Maryann Flanigan
MFlanigan@lsnj.org
Attorney ID No. 901332012

Robert Casagrand
RCasagrand@lsnj.org
Attorney ID No. 026892007

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INTRODUCTORY STATEMENT

The Court's decision in this case carries great portent for lower-income homeowners faced with foreclosure. The appellate opinion below ignores clear requirements of New Jersey's version of the Uniform Commercial Code, reverses long-settled aspects of common law and New Jersey foreclosure practice, and threatens to create the potential for harmful new loosening of standards of conduct for mortgage servicers and debt collectors. Drawing on its 17 years of experience in defending foreclosures through its Foreclosure Defense Project, in this brief Legal Services of New Jersey first offers a concise overview of how this decision can affect vulnerable homeowners and consumers more generally, and then presents a succinct analysis of how the appellate panel's decision contravenes law and would upend important legal protections.

CONTEXT - A CURRENT VIEW OF MORTGAGE ORGINATION, SERVICING AND FORECLOSURE IN NEW JERSEY

In 2002 Legal Services of New Jersey initiated its specialized statewide Anti-Predatory Lending Project, later renamed the Foreclosure Defense Project, to provide a focused and expert response to the explosion of "subprime" residential lending as well as the rampant abuses and tidal wave of foreclosures that followed in its wake. LSNJ's two decades of subsequent concentrated practice protecting homeowners afford

unique perspectives on foreclosures and issues such as those presented in this case.

A. New Jersey's secondary mortgage market.

Today almost all mortgages originated in New Jersey are comprised of a negotiable note evidencing the debt and a mortgage providing a security interest in the purchased home. 29 *N.J. Practice, Law of Mortgages* § 11.5, at 774 (Myron C. Weinstein) (2d. ed. 2001).

Since the 1990's most mortgage loans have not been retained by the originator, but instead have been bundled and sold into the secondary mortgage market soon after origination. Alan M. White, *Losing the Paper - Mortgage Assignments, Note Transfers and Consumer Protection*, 24 *Loyola Consumer L. Rev.* 468, 470-471 (2012). This process of selling bundles of loans into the secondary mortgage market is called securitization. *Id.*

Regardless of any economic benefits that may come from the securitization of mortgage loans, the past two decades reveal that the burgeoning secondary mortgage market has created a perverse incentive for mortgage originators. Dale A. Whitman, *How Negotiability Has Fouled Up the Secondary Mortgage Market, and What to Do About It*, 37 *Pepperdine L. Rev.* 737, 738-43 (2010). Securitization enabled loan originators to gain revenue and virtually eliminate their risk, by selling the loans into

the secondary mortgage market. Such sales had the three-part goal of raising capital, impeding consumer defenses, and insulating the originator from association with the business, human and societal costs of enforcing debt predicated on transactions laced too frequently by predatory and reckless lending practices. Mortgage originators lowered underwriting standards, made risky loans, and practiced a sell-to-distribute model of mortgage lending designed to feed the secondary mortgage market, "heedless of the poor quality of the underlying loans" and the systemic societal risks such behavior created. Whitman, *supra* at 739, Megan Wachspress, et al., *In Defense of "Free Houses"*, 125 *Yale L.J.* 1115, 1128 (2016).

LSNJ's practice experience corroborates such conclusions, and suggests that instead of following the requirements of New Jersey law, mortgage bundlers, transferees and servicers routinely failed to indorse or deliver notes, sometimes forged indorsements long after the transfers were supposed to have taken place, dealt with missing indorsements by obtaining or preparing indorsements on allonges whose legitimacy has been called into question, destroyed mortgage notes, and prepared lost note affidavits as a short cut to avoid the expense of retrieving notes. White, *supra*, at 475-76. These and other practices, such as robo-signing mortgage assignments, lost note

affidavits, and other documents, were born in part out of an attempt by the secondary mortgage market to circumvent the physical possession requirements required for transfer of enforcement rights, contained in the Uniform Commercial Code (U.C.C.) and required in New Jersey by N.J.S.A. §§ 3-203, 3-301, and 3-309. *Id.* at 471.

The practice of robo-signing indicates that the secondary mortgage market participants and their servicers "failed to allocate the necessary resources to maintain accurate records of homeowners' indebtedness while pursuing the profits of securitization." Wachspress, *supra*, at 1129. Most, if not all, of the secondary mortgage market's current problems with lost notes and documenting a right to enforce a particular mortgage are a crisis of the market participants' own doing. *Id.*¹ Most actors in the secondary mortgage market engage in a sufficient volume of transactions to enable them to allocate resources to due diligence review when portfolios or loans are bought and sold, obtain insurance to cover risks, and readily absorb the

¹ The requirements of N.J.S.A. §§ 3-203, 3-301, and 3-309 are central to the mortgage lending business. The reality of New Jersey's documentary requirements for pursuing foreclosures, the potential for loan defaults, and any risks or collection costs involved in prosecuting foreclosure actions should be priced accordingly into the initial cost of a mortgage. Wachspress, 125 *Yale L.J.* at 1127.

costs associated with an occasional loss. Whitman, 37
Pepperdine L. Rev. at 757.

The lack of concern for meeting legal requirements and maintaining accurate and adequate records is illustrated in a recently decided case with facts and circumstances similar to those experienced by many LSNJ clients. *Residential Mortgage Loan Trust 2013-TT2 v. Morgan Stanley Mortgage Capital*, 457 N.J. Super. 237, (App. Div. 2018), involved multiple foreclosure actions (often termed "serial foreclosures"), one of the worst potential outcomes whose future prevalence hinge on the decision in this case. The appellate court admonished the secondary mortgage investors because, during the course of several foreclosure actions, plaintiff and its predecessors presented contradictory evidence and claims concerning the chain of title to the mortgage. *Id.* As explained by the court, it could not "tell whether the assorted certifications were made in good faith reflecting the various entities' records at the time, or whether they were made with no concern for their accuracy." *Residential*, *supra* at 247. Despite recognizing and deploring such secondary mortgage industry practices, the Appellate Division in *Residential Mortgage Loan Trust* ruled in favor of the last purported mortgage assignee, even though plaintiff failed to prove its entitlement to enforce the mortgage note.

B. The resultant harm to low-income and other New Jersey homeowners and to the integrity of the judicial system.

1. Potential multiple actions arising from serial foreclosures and collection actions by commercial debt buyers.

Homeowners are at risk from at least two types of multiple collection actions. The first and more common - known as serial foreclosures - involves the filing of more than one lawsuit for foreclosure of the same premises concerning the same mortgage transaction. These foreclosure actions typically are filed by different plaintiff entities, and different attorney representatives. In LSNJ's experience, serial foreclosures have been a prevalent phenomenon for years, with no signs of waning, and their frequency is certain to be affected by the decision in this case. In addition to *Residential Mortgage, supra*, serial foreclosures and their impact on homeowners can be seen in other recent New Jersey cases. *See, for example, EMC Mortg. Corp. v. Chaudhri*, 400 N.J. Super. 126, 131 (App. Div. 2008) (noting that a prior foreclosure had been dismissed after presentation of proofs at trial without prejudice, in part because of issues with an assignment of mortgage).

LSNJ has encountered numerous cases involving lost note affidavits, missing or improper chains of title concerning assignments, and other similar scenarios. We have defended against multiple foreclosure plaintiffs and multiple foreclosure

attorneys in serial foreclosure cases, and in one such action are currently defending against the second attempt to foreclose upon an assignment of mortgage already held to be deficient by the trial court judge in a previous foreclosure.

The present case reveals such a serial foreclosure, commencing with CitiMortgage Inc.'s initial attempt to foreclose, followed by a second foreclosure action instituted by Investors Bank (respondent in the present matter pending before this Court). The respective pleadings contain contradictory facts as to the possession and alleged transfer of the underlying mortgage note.

The risk of multiple debt collection actions on the promissory note, fostered by the debt buying "industry" that consists of the bundling and bulk purchase of consumer debt, presents an additional, even more probable and ominous threat. *See Kemp v. Countrywide Home Loans, Inc., (In re Kemp)*, 440 B.R. 624, 633 (Bankr. D.N.J. 2010) (explaining "the purpose of the possession requirement in Article 3 is to protect the Debtor from multiple enforcement claims to the same note", and citing *Premier Capital, LLC v. Gavin*, 319 B.R. 27, 33 (1st Cir. 2004) (internal quotation marks omitted)). Such actions typically are premised on debts of very dubious enforceability, and on the likely absence of legal representation for debtors. The ever-

expanding debt buying market is fueled by the sale of bundles of such questionable claims. In LSNJ's experience, commonly they involve debts already discharged in bankruptcy, debts beyond the statute of limitations, debts that were paid off, and debts with no valid proof. See Lisa Stifler, *Debt in the Courts: The Scourge of Abusive Debt Collection Litigation and Possible Policy Solutions*, 11 Harv. L. & Pol'y Rev. 91, 100 (Spring 2007). The largest category of consumer debt collection complaints to the Consumer Financial Protection Bureau has been for "continued attempts to collect debt not owed." *Id.* (internal quotation marks and citation omitted).

Debt buyers pursue legally unenforceable "bad" debts because the acquisition costs are low, litigation and collection costs are minimal, and default judgments are the norm. *Id.* at 96-98. When a low income or otherwise vulnerable consumer receives collection notices for a legally unenforceable debt, the time, resources, and costs of contesting the matter are typically unaffordable, making attorney representation even more essential. Even if the consumer fights and wins, the battle often comes at a high financial and emotional cost. *Id.* When a debt buyer succeeds in resuscitating a previously unenforceable debt and obtains a default judgment, the consumer is then forced either to litigate the matter in an attempt to open and reverse

the judgment, or be subject to collection on the unlawful judgment. *Id.* ²

Crucially, in situations where the note is secured by but decoupled from an accompanying mortgage, the risk of multiple suits based on the same debt may be significantly enhanced, depending on the ruling in this appeal. Two separate streams of paper - note and mortgage - are likely to double the risk of serial collection actions, unless clearly curtailed consistent with statutory and common law.

2. *The human consequences of residential home foreclosures.*

As explained, foreclosure actions based upon incomplete or improper documentation are not uncommon in New Jersey. Any foreclosure filing, even if unsupportable, brings with it severe consequences, especially for low income, minority, and other vulnerable homeowners. This harm comes in many forms and is exacerbated by the fact that in over 94% of residential foreclosures, the process is concluded by a default, often sped

² In the context of residential mortgages, deficiency judgments obtained from the underlying promissory note are seldom sought in New Jersey due to the deficiency action protections contained in N.J.S.A. 2A:50-2, but such judgments are available to creditors. Despite the statutory protections, some foreclosed homeowners will not meet the requirements and will be subject to debt collectors chasing them for deficiency judgments after losing their home to foreclosure.

by a court designation made early in the judicial process that an action is "uncontested", and by the absence of attorney representation.

Legal Services clients frequently feel discouraged and disparaged by a foreclosure court process which seems impenetrable - hard to comprehend, not really open to their legal arguments. The very few homeowners who, lacking legal representation, somehow manage to defend themselves in foreclosure actions, typically feel dehumanized by typical creditor characterization that they are "deadbeats" who have not paid their mortgages for years, and who just want a "free house". Such derogatory and shaming caricatures do not comport with LSNJ's experience. To the contrary, we have seen hundreds of families facing foreclosure desperate for any glimmer of hope to save their homes. They would jump at the opportunity for an affordable loan modification or repayment plan. Many homeowners in foreclosure express feelings of severely elevated anxiety and persistent stress, and often suffer from insomnia, depression, and various health ailments. In cases of serial foreclosures, the impact and human toll is intensified.

Foreclosures . . . have significant effects on community members' physical and mental health, and correlate with increased rates of depression, anxiety, suicide, cardiovascular disease, and emergency-care treatment. In fact, scholars who track the health effects of the 2008 crisis found

that foreclosures might have even greater negative health effects than unemployment. Although these studies analyze the general phenomenon of foreclosures and do not specifically address how relitigation might impact homeowners or their neighbors, they make clear that prolonged foreclosures can have dire economic and social effects.

Wachspress, 125 Yale L.J. at 1125 (internal citations omitted).

3. The potential for harm and negative consequences likely will increase significantly if existing procedural and evidentiary requirements are lessened.

Assignments of mortgages were front and center in the robo-signing scandal, where purported assignees or their foreclosure attorneys executed assignments to themselves or on behalf of their clients. White, 24 Loyola Consumer L. Rev. at 487-88. In a significant number of cases, a mortgage's assignment history shows a contradictory trail of inconsistent assignments and representations.

Relaxation of evidentiary requirements for proving foreclosures, such as the statutory interpretation suggested by respondent and its aligned *amicus*, would simply exacerbate such harms and risks. If foreclosing secondary mortgage market servicers no longer had to produce the original note in order to enforce it in foreclosure, nor prove the legitimacy of a chain of transfer, or could rely solely on an assignment of mortgage to foreclose, the risk of multiple collection and lax business

practices will increase. If a plaintiff needs only produce a mortgage assignment to foreclose, then the plaintiff has no incentive to disclose that the note is lost. Secondary mortgage market purchasers would be encouraged to commit even less time to their "efforts" to locate the original note. White, 24 *Loyola Consumer L. Rev.* at 475-76.

Costly and threatening title issues could result for homeowners, especially those that paid off their mortgages. With such loose oversight of note location or destruction, homeowners may be less likely to receive a cancelled original mortgage note after paying off the mortgage.

Liberalizing evidentiary requirements and thereby making foreclosures cheaper and easier to prosecute potentially makes foreclosure more likely to be viewed by loan servicers as a preferable option to offering loan modifications. Wachspress, 125 *Yale L.J.* at 1126-27. Lowering collection costs and burdens in pursuing foreclosures may increase the profitability of originating and selling risky subprime mortgages, thereby providing incentive for lenders to return to offering riskier subprime loans or to engage in other unforeseen socially detrimental lending practices. *Id.* at 1127. Recent history has shown that reduced barriers to lending and document retention

tend to incentivize socially irresponsible and detrimental lending. *Id.*

4. The reliability and certainty of final judicial outcomes, already challenged by the limited amount of free legal representation for the indigent in foreclosures, inevitably will be further affected by any easing of proof requirements.

This last observation seems self-evident. In a legal area - foreclosures - historically riddled by lax and evasive practices by creditors, further lessening of rigor coupled with the lack of representation for defendants can over time undermine public confidence in the fairness and impartiality of judicial determinations. Much rests on the decision in this appeal.

LEGAL ARGUMENT

- I. UNDER THE UNIFORM COMMERCIAL CODE AS IMPLEMENTED IN NEW JERSEY, TO ENFORCE A NOTE A PARTY MUST BE IN POSSESSION OF THE NOTE OR HAVE BEEN THE LAST PARTY IN POSSESSION OF A LOST, DESTROYED OR STOLEN INSTRUMENT WITH A RIGHT TO COLLECT THE NOTE.

In New Jersey the enforcement of negotiable instruments, including negotiable mortgage notes, is closely governed by statute. For the most part, N.J.S.A. § 12A:3-101, *et seq.* follows the model Uniform Commercial Code provisions concerning negotiable instruments, although one key difference is crucial to this case. Tracking the U.C.C. and stated simply, New

Jersey's statutory scheme for enforcement of negotiable mortgage notes is based on physical possession - not ownership.

Specifically, N.J.S.A. § 12A:3-301 provides three categories of mortgage transferees that are entitled to enforce a negotiable mortgage note: (1) a "holder" of the note, which under N.J.S.A. § 12A:3-203 means a transferee that received actual physical possession of the note through negotiation by proper indorsement and a voluntary transfer of possession, or if payable to bearer, by negotiated transfer of possession alone; (2) a "non-holder in possession with rights of a holder," or, in relevant part, (3) a person not in possession that is entitled to enforce the note pursuant to N.J.S.A. § 12A:3-309, which controls enforcement of lost instruments:

- (a) A person not in possession of an instrument is entitled to enforce the instrument if the person was in possession of the instrument and entitled to enforce it when loss of possession occurred, the loss of possession was not the result of a transfer by the person or a lawful seizure, and the person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process.
- (b) A person seeking enforcement of an instrument under subsection a. of this section must prove the terms of the instrument and the person's right to enforce the instrument. If that proof is made, 12A:3-308 applies to the case as if the person seeking enforcement had produced the instrument. The court may not enter judgment in favor of the person

seeking enforcement unless it finds that the person required to pay the instrument is adequately protected against loss that might occur by reason of a claim by another person to enforce the instrument. Adequate protection may be provided by any reasonable means.

N.J.S.A. § 12A:3-309.

In passing N.J.S.A. § 12A:3-309, the New Jersey Legislature expressly repealed N.J.S.A. § 12A:3-804, which had as its central precept ownership, not possession:

The owner of an instrument which is lost, whether by destruction, theft or otherwise, may maintain an action in his own name and recover from any party liable thereon upon due proof of his ownership, the facts which prevent his production of the instrument and its terms.

N.J.S.A. § 12A:3-804 (repealed by L. 1995, c. 28, § 1, eff. June 1, 1995).

In enacting N.J.S.A. § 12A:3-309 and repealing N.J.S.A. § 12A:3-804, the New Jersey Legislature thus abrogated collection rights in a lost note by an "owner" and replaced it with a right of enforcement of lost notes to persons "in possession" of the instrument when the instrument was lost. N.J.S.A. § 12A:3-309, Official Comment 1.

Nothing in § 3-309 authorizes assignment of the right to enforce a lost, destroyed or stolen instrument. Rather, the section unambiguously - and narrowly - authorizes enforcement by the *last possessor*, if the critical requirement of possession has been met.

It bears emphasis that New Jersey has not adopted a 2002 amendment to the Model Uniform Commercial Code. The amendment would have retreated from the possession-not-ownership position of the U.C.C. and New Jersey's new § 3-309, by allowing enforcement by a person who has directly or indirectly acquired ownership of the instrument from a person who was entitled to enforce the instrument when loss of possession occurred. In effect, this proposed 2002 amendment by the commissioners on Uniform State Laws acknowledges that the original U.C.C. § 3-309 adopted in New Jersey does not authorize the transfer of lost instruments.

In interpreting statutes the Court applies established principles of statutory construction, which begins with the literal language of the statute, consistent with the Legislature's admonition that its words and phrases "shall be read and construed with their context, and shall, unless inconsistent with the manifest intention of the legislature or unless another or different meaning is expressly indicated, be given their generally accepted meaning, according to the approved usage of the language." N.J.S.A. § 1:1-1; *U.S. Bank, N.A. v. Guillaume*, 209 N.J. 449, 471 (2012).

To the extent possible, a statute's construction should be derived from the Legislature's plain language. *State v. Gandhi*,

201 N.J. 161, 176-77 (2010); *State v. Smith*, 197 N.J. 325, 332-33 (2009); *State v. Froland*, 193 N.J. 186, 193-94 (2007); *DiProspero v. Penn*, 183 N.J. 477, 492 (2005). If the language chosen by the Legislature is unambiguous, then the Court's "interpretive process is over." *Gandhi*, 201 N.J. at 177. Importantly, the Court will read particular statutory provisions in the context of the entire integrated statute to ensure that "a sensible meaning may be given to the whole of the legislative scheme." *Wilson ex rel. Manzano v. City of Jersey City*, 209 N.J. 558, 572 (2012); *In re Petition for Referendum on City of Trenton Ordinance 09-02*, 201 N.J. 349, 359 (2010). Here, New Jersey's language and intent in adopting the original § 3-309 is clear: it marked a move from ownership to possession of the note as the pivotal factor. The Appellate Division below was not free to ignore the plain statutory language and substitute its own desired rule, which in effect would adopt the U.C.C. model amendment by judicial fiat, not legislature action.

Nor was the Appellate Division free to conjure a new common law rule that in effect would trump § 3-309. While the New Jersey version of the U.C.C. preserves a range of common law rights in §§ 3-101 and 3-103 (b), it does not do so when those common law rights are "displaced by [a] particular provision" of the U.C.C. *Ads Assoc. Group, Inc. v. Oritani Savings Bank*, 219

N.J. 496, 516 (2014) (explaining that "[a]s a general rule, courts have read [the] principles of [statutory] construction to mean that the [U.C.C.] does not displace the common law . . . except insofar as reliance on the common law would thwart the purposes of the U.C.C.'" (quoting *N.J. Bank, N.A. v. Bradford Sec. Operations, Inc.*, 690 F.2d 339, 345-46 (3d Cir. 1982)); see also *Psak, Graziano, Piasecki & Whitelaw v. Fleet Nat'l Bank*, 390 N.J. Super. 199, 204 (App. Div. 2007). N.J.S.A. § 12A:3-101, et seq. governs the creation, transfer, and enforcement of negotiable instruments. As such, it displaces the common law with regard to that subject matter.

As explained by the Court in *City Check Cashing, Inc. v. Manufacturers Hanover Trust Co.*, 166 N.J. 49 (2001), in the context of apportioning risk allocation in check collection actions governed by N.J.S.A. § 12A:3-101, et seq. and N.J.S.A. § 12A:4A-101, et seq., "[c]ourts should be hesitant to improvise new remedies outside the already intricate scheme of Articles 3 and 4.'" (quoting *Girard Bank v. Mount Holly State Bank*, 474 F. Supp. 1225, 1239 (D.N.J. 1979)). "[O]nly in very rare instances should a court upset the legislative scheme of loss allocation and permit a common law cause of action." *City Check, supra*, at 416 (quoting *Bank Polska Kasa Opieki v. Pamrapo Savings Bank*, 909 F. Supp. 948, 956 (D.N.J. 1995)). Although *City Check*

Cashing addressed defensive application of the U.C.C. against the assertion of common law negligence claims against a bank, the reasoning applies equally to the issue of whether common law assignment and collection remedies should still apply when those rights are expressly provided for under the intricate statutory scheme of N.J.S.A. §§ 12A:3-203, 3-301, and 3-309. See *Cadle Co. of Conn., Inc. v. Messick*, 45 UCC Rep. Serv.2d 563, 2001 WL 822231, at *4 (Conn. Super. Ct. June 26, 2001).

N.J.S.A. § 3-301 describes with particularity the parties that may enforce a mortgage note and provides that lost, stolen, or destroyed negotiable notes may be enforced when a party satisfies the requirements of N.J.S.A. § 3-309(a).

Likewise, N.J.S.A. § 3-203 unambiguously requires transfer of physical possession to "vest [] in the transferee any right of the transferor to enforce the instrument." It does not permit the assignment of enforcement rights in a lost instrument. Finally, N.J.S.A. § 3-309 expressly limits enforcement to the prior possessor.

II. UNDER NEW JERSEY LAW, BOTH THE NOTE AND THE ACCOMPANYING MORTGAGE ARE NECESSARY TO SECURE FORECLOSURE.

Despite the certified question of whether the right to enforce a lost promissory note can be transferred to a third party, both respondent and the allied *amicus* New Jersey Business

& Industry Association (BIA) urge this Court to side step the question by instead ruling that the physical possession of a note is not needed to foreclose, and that rather an assignment of a mortgage alone is sufficient to confer standing to foreclose. In effect, both ask this Court to uphold certain recent Appellate Division rulings on standing requirements in foreclosure cases. LSNJ urges this Court to decline this invitation, and instead clarify that such appellate decisions are inconsistent with the law governing mortgages and the requirements of N.J.S.A. §§ 12A:3-203, 3-301, and 3-309.

It is settled law in New Jersey that in foreclosing mortgages "[a]s a general proposition a party seeking to foreclose a mortgage *must own or control* the underlying debt." *Wells Fargo Bank, N.A. v. Ford*, 418 N.J. Super. 592, 597 (App. Div. 2011); *Bank of N.Y. v. Raftogianis*, 418 N.J. Super. 323, 327-28 (Ch. Div. 2010); *Great Falls Bank v. Pardo*, 263 N.J. Super. 388, 397 (Ch. Div. 1993).

Despite this settled principle, in 2011 an appellate panel opined in dictum that standing to foreclose does not require possession of the note. *Deutsche Bank Nat. Trust Co. v. Mitchell*, 422 N.J. Super. 214, 225 (App. Div. 2011). The *Mitchell* panel declared that the plaintiff lacked standing because it had neither possession of the original note nor a

valid assignment of mortgage when it filed the foreclosure. *Id.* The *Mitchell* decision, however, in its dictum suggested a new rule diverging sharply from settled law: that secondary mortgage industry participants could obtain foreclosure standing either by possession of the original note or by a valid assignment of mortgage. It asserted that the plaintiff could have (but did not) establish standing to foreclose as a mortgage assignee under N.J.S.A. § 46:9-9, independent from it having possession of the note as required by Article 3. *Id.*

Mitchell's suggested divergence from prior law was clear. See 30 *N.J. Practice, Law of Mortgages* § 28.9A (Myron C. Weinstein) (Oct. 2018 Update) (declaring that *Mitchell* and subsequent cases "enunciate[ed] the incorrect standard", and reasoning that if a foreclosure plaintiff did not have possession of the secured note at the time of judgment "the judgment most certainly would be void and not voidable"); Myron C. Weinstein, *Has Standing to Foreclose Become a Moot Question?*, 224 *N.J.L.J.* 3459, at 47 (Dec. 3, 2018) (declaring the rule espoused in *Mitchell* that the physical possession of the note was not required to enforce the mortgage was "based on a mistake" and "violates the law of negotiable instruments and mortgages"). Weinstein indicates New Jersey's law regarding negotiable notes in N.J.S.A. §§ 12A:3-203, 3-301 and 3-309

simply does not support the either/or standard espoused in *Mitchell*, and that N.J.S.A. § 46:9-9 does not apply to mortgages given to secure debt embodied in negotiable instruments. *Id.*

N.J.S.A. § 46:9-9 provides:

All mortgages on real estate in this State, and all covenants and stipulations therein contained, shall be assignable at law by writing, whether sealed or not, and any such assignment shall pass and convey the estate of the assignor in the mortgage premises, and the assignee may sue thereon in his own name, but, in any such action by the assignee, there shall be allowed all just set-offs and other defenses against the assignor that would have been allowed in any action brought by the assignor and existing before notice of such assignment.

In *Carnegie Bank v. Shalleck*, 256 N.J. Super 23, 46 (App. Div. 1992), the Appellate Division held that "N.J.S.A. § 46:9-9 applies only to mortgages given to secure a debt embodied in a non-negotiable instrument such as a bond," and does not control or eclipse the enforcement of instruments secured by mortgages. Under both *Shalleck* and N.J.S.A. 12A:3-301, standing to foreclose on a negotiable mortgage note cannot arise independently from possession of a negotiable note, and cannot arise from an authenticated assignment of mortgage alone. Although an assignment of mortgage may show an intention to assign ownership rights in a negotiable note, it cannot transfer possession of the note. *In re Kemp*, 440 B.R. at 633 (explaining that it is possession and not ownership of a secured negotiable

mortgage note that establishes the right to enforce the note and foreclose under the U.C.C.).

As explained in the Restatement (Third) of Property (Mortgages):

[I]t is nearly always sensible to keep the mortgage and the right of enforcement of the obligation it secures in the hands of the same person. This is so because separating the obligation from the mortgage results in a practical loss of efficacy of the mortgage. . . . When the right of enforcement of the note and the mortgage are split, the note becomes, as a practical matter, unsecured. This result is economically wasteful and confers an unwarranted windfall on the mortgagor.

Restatement (Third) of Prop. (Mortgages) § 5.

Based upon the holding in *Shalleck*, the statutory language of N.J.S.A. §§ 12A:3-203, 3-301, and 3-309, and the long recognized requirement that a party seeking to foreclose a mortgage must own or control the underlying debt, the rule announced in *Mitchell* should have been that standing to foreclose requires *both* possession of the secured note *and* a valid assignment of mortgage on the date a foreclosure action is filed. Weinstein, 224 N.J.L.J. *supra* at 47.

Three post-*Mitchell* Appellate Division decisions nonetheless sought to discard the settled law that the "debt" is the 'principal' thing and the 'mortgage' a mere 'accessory' which follows the debt." 30 N.J. Practice, Law of Mortgages § 28.9A, *supra*. The dissonant trio includes *Capital One, N.A. v.*

Peck, 455 N.J. Super. 254, 256, 258 (App. Div. 2018) (agreeing that one entity owned the note and another the mortgage but upholding the foreclosure "in spite of certain irregularities" in the plaintiff's proofs because a foreclosure plaintiff "need not actually possess the original note at the time of filing in order to have standing to file a foreclosure complaint"); *Deutsche Bank Nat. Trust Co. v. Angeles*, 428 N.J. Super. 315, 318 (App. Div. 2012) (holding "that either possession of the note or an assignment of the mortgage that predated the original complaint conferred standing"); and *Deutsche Bank Nat. Trust Co. v. Russo*, 429 N.J. Super. 91, 101 (App. Div. 2012) (same).

III. THE FACTS OF THIS CASE UNDERSCORE THE DANGERS THAT WOULD ACCOMPANY EROSION OF LEGAL AND EVIDENTIARY REQUIREMENTS FOR FORECLOSURES.

This appeal typifies a serial foreclosure case; the contradictory assertions by plaintiffs in the two foreclosures highlight the importance of the choice before this Court. Based on the record, in November 2005, petitioners executed a note with ABN AMRO Mortgage ("ABN"), which was secured by a residential mortgage. Thereafter in September 2007, ABN purportedly merged with CitiMortgage, Inc. ("Citi"). In September 2008, petitioners signed a loan modification agreement with Citi but thereafter defaulted on the loan in February 2010.

DA042 to DA046. Based on this default, Citi filed a foreclosure against petitioners with Docket Number F-54827-10 ("First Foreclosure"), alleging it was the "holder" of the note and mortgage. DA066 to DA072. Respondent contested the First Foreclosure, contending Citi was not able to meet its burden of showing it was entitled to enforce the note. A trial was scheduled specifically to make this determination. DA076. On the eve of trial, Citi sought a voluntary dismissal of the First Foreclosure. DA079. Despite the dismissal, petitioners bore the physical, financial and mental strains caused by more than a year of litigation.

Thereafter, in October 2013, a representative of Citi executed a "Lost Note Affidavit" claiming it lost the "properly indorsed" note, remained "the lawful owner of the note," but that its only copy of the note was made before the indorsement was affixed. DA014. Subsequently, Citi executed an Assignment of Mortgage to Respondent, Investors Bank, on November 20, 2014. DA026.

In January 2015, respondent filed the foreclosure action at issue here against petitioners, Docket Number F-1463-15 ("Second Foreclosure"). DA082 to DA088. In the Second Foreclosure complaint respondent asserted its right to foreclose arose solely from the November 20, 2014 Assignment of Mortgage, and

made no mention of the fact that the note had been lost and was not in Respondent's possession. DA082 to DA088. Petitioners filed a contesting answer to respondent's Second Foreclosure. The Chancery Division ultimately dismissed petitioners' answer and defenses and entered a final judgment in foreclosure, which was upheld by the Appellate Division in *Investors Bank v. Torres*, 457 N.J. Super 53 (App. Div. 2016). In ruling in favor of respondent, the Appellate Division gave the benefit of the doubt to Investors Bank in rejecting petitioners' challenge to the admissibility of the Lost Note Affidavit, opining "[t]here was no reason for a representative of Citi - considering the terms of 3-309 - to make the statements set forth in the affidavit, if said statements were not true." *Id.* at 63.

Respondent expressly contradicted the representations it made to the Chancery and Appellate Division in another action filed by petitioners against respondent in the United States District Court, District of New Jersey, Docket Number 2:15-cv-01637. Specifically, in the District Court action, Investors Bank represented in a letter to the court submitted by its counsel that the Torres note had been indorsed to Investors Bank no later than August 2007.³

³ Available through the official court website, *Torres v. Investors Savings Bank, et al.* (U.S.D.N.J.) Civil Action No. 15-1637, Document 22 Filed 03/11/16 Page 1 of 3 Page ID: 148.

If the representations made to the District Court were true, as opposed to the representations made to the Chancery Division, then Citi was not entitled to payment under the note when it filed its First Foreclosure against Petitioners. This may explain why Citi sought dismissal on the eve of trial that would have determined whether Citi was entitled to enforce the Torres note. DA079. Likewise, if the Torres note was indorsed over to Investors Bank on or before August 2007, as was represented to the District Court, then the Lost Note Affidavit executed by Citi in October 2013 was a misrepresentation.

Because failed foreclosure actions are dismissed without prejudice there is very little risk to secondary mortgage industry participants when they file a foreclosure complaint with incomplete or improper proofs.⁴ *See Residential Mortgage Loan Trust, supra* 457 N.J. Super. at 247. In foreclosure actions, secondary mortgage industry participants can have as many bites at the apple as they want or need. *See, e.g. Id.* at 247.

<https://ecf.njd.uscourts.gov/doc1/119110708926>. *See also*, DA 132-133.

⁴ Further lowering the risk of coming to court with incomplete or improper evidentiary support, an estimated ninety-four percent of New Jersey foreclosure actions are uncontested. Linda E. Fisher, *Shadowed By the Shadow Inventory: A Newark, New Jersey, Case Study of Stalled Foreclosures and Their Consequences*, 4 UC Irvine L. Rev. 1265, 1270 (Dec. 2015).

If, as argued by respondent and the BIA, the Court were to decide that physical possession of the original mortgage note is not important in foreclosure, and that all that is needed to foreclose on a residential mortgage is the mortgage or an assignment of the mortgage, then it is evident that the First Foreclosure would have been completed. If the representations made by Investors Bank to the District Court were in fact correct, then hindsight shows that a party without any right to enforce the note would have successfully foreclosed on the petitioners.

Such possible risks, harms and consequences to New Jersey homeowners arising from serial foreclosure and multiple collection actions are at stake in this case. They will be minimized by a holding that only an entity in physical possession of the original note or an entity that held a lost note when it was lost can enforce a mortgage, and that foreclosure cannot be based on holding a mortgage alone. Such a holding will also avoid creating incentives for the secondary mortgage industry to engage in socially irresponsible practices or to destroy or to not keep original mortgage notes properly

secured. Legal Services of New Jersey respectfully submits that this holding is compelled by applicable law and public policy.

Legal Services of New Jersey,



Melville D. Miller, Jr.
President and General Counsel



Dawn K. Miller
Executive Vice President and Assistant
General Counsel



Maryann Flanigan
Chief Attorney, Foreclosure Defense
Project



Robert Casagrand
Staff Attorney, Foreclosure Defense
Project

