SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND JUDICIAL DEPARTMENT

CARL FANFAIR and **GLORIA ANTOINE,** on behalf of themselves and all others similarly situated,

Petitioners,

v.

HON. LAWRENCE KNIPEL, in his official capacity as the administrative judge and a Justice of the Supreme Court of the State of New York, Kings County; **HON. CENCERIA P. EDWARDS**, in her official capacity as a Justice of the Supreme Court of the State of New York, Kings County; and the **NEW YORK STATE OFFICE OF COURT ADMINISTRATION**,

Respondents.

For a Judgment Under Article 78 of the Civil Practice Law and Rules

Index No. 2023-05048

MEMORANDUM OF LAW IN SUPPORT OF THE PETITIONERS' MOTION FOR CLASS CERTIFICATION

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Dated: July 10, 2023
New York, New York

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes, Rules, and Regulations

Other Authorities

PRELIMINARY STATEMENT

Hundreds of families in Brooklyn who cannot afford legal representation face a heightened risk of losing their homes to preventable foreclosures because the respondents—justices of Kings County Supreme Court and the Office of Court Administration ("OCA")—are not complying with state laws intended to protect these families. Rule 3408 of the Civil Practice Law and Rules mandates that at the initial settlement conferences in residential foreclosure cases, judges must determine whether unrepresented homeowners should be granted "poor person" status and appointed counsel. Rule 3408 further requires courts to notify homeowners of their right to such a determination. And Rule 202.12-a (d) of the Uniform Civil Rules for the Supreme Court requires OCA to educate and train judges and court-appointed referees overseeing foreclosure settlement conferences on Rule 3408's requirements. Despite these clear statutory and regulatory mandates, Kings County Supreme Court justices consistently fail to make the determinations and provide the notices required by Rule 3408 and OCA has failed to adequately train court officials on that rule.

The petitioners move to certify a class challenging the respondents' failure to make the required appointed-counsel determinations for unrepresented homeowners, to notify homeowners of their rights, and to provide the required training to judges and referees. The proposed class consists of all homeowner defendants currently in pre-judgment residential foreclosure proceedings in Kings County Supreme Court who were unrepresented at their initial settlement conference held pursuant to Rule 3408.

This case is plainly appropriate for class-wide adjudication. Adjudicating this challenge would resolve claims common to at least 86 (and likely hundreds) of putative class members. Since the respondents' failure to comply with Rule 3408 and Rule 202.12-a affects all class members in the same way, the named petitioners' interest in pursuing their claims is closely aligned with those of the putative class. And given that it would be burdensome to courts and litigants alike for class

members to pursue their common claims in individual lawsuits, while also risking inconsistent rulings, a class action is the superior vehicle for resolving this matter. The petitioners thus satisfy the requirements of CPLR 901 (a) and 902, and the Court should certify the class.

FACTUAL BACKGROUND

I. THE LEGISLATURE ENACTED RULE 3408 TO HELP HOMEOWNERS AVOID PREVENTABLE FORECLOSURES.

In 2008, as tens of thousands of New Yorkers—disproportionately New Yorkers of color—were losing their homes to the mortgage foreclosure crisis,[1] the New York State Legislature enacted Rule 3408 to give "assistance to homeowners . . . by providing additional protections and foreclosure prevention opportunities" (Senate Introducer's Mem in Support of Senate Bill 8143A, Bill Jacket, L 2008, ch 472 at 9). In service of that goal, Rule 3408 requires a court at the beginning of a residential foreclosure action to convene a settlement conference to "determin[e] whether the parties can reach a mutually agreeable resolution to help the [homeowner] defendant avoid losing his or her home" (CPLR 3408 [a]).

The Legislature included in Rule 3408 procedural safeguards to help homeowners avoid losing their homes to preventable foreclosures. Most relevant here, Rule 3408 (b) mandates that if a homeowner appears *pro se* at the initial settlement conference, the court "shall . . . deem[]" the homeowner "to have made a motion to proceed as a poor person" and "shall determine whether such permission shall be granted"—including whether to "appoint[] defendant counsel" (CPLR 3408 [b]). Next, Rule 3408 (e) directs that upon the scheduling of the initial settlement conference, "[t]he court shall promptly send a notice to parties advising them of the time and place of the

[1] Jennifer Lee, *Subprime Crisis Festers in New York*, The New York Times [Feb. 11, 2008], available at https://archive.nytimes.com/cityroom.blogs.nytimes.com/2008/02/11/subprime-crisis-festers-in-new-york/; Michael Powell & Janet Roberts, *Minorities Affected Most as New York Foreclosures Rise*, The New York Times [May 15, 2009], https://www.nytimes.com/2009/05/16/nyregion/16foreclose.html.

settlement conference, the purpose of the conference and the requirements of [Rule 3408]" (CPLR 3408 [e]). And the related Rule 202.12-a (d) of the Uniform Civil Rules requires OCA to ensure that "all judges and nonjudicial personnel" assigned by courts to oversee settlement conferences are "educat[ed] and train[ed]" on the Rule 3408 requirements (22 NYCRR 202.12-a [d]).

II. THE RESPONDENTS HAVE FAILED TO COMPLY WITH RULE 3408 AND RULE 202.12-A.

Contrary to the Legislature's command, the respondents have not enforced Rule 3408's protections for homeowners (Verified Class Petition ("VP") ¶ 19). In Kings County, courts ignore their duty to deem homeowners who appear unrepresented at their initial settlement conferences to have moved to proceed as a poor person and to determine whether those homeowners qualify for poor-person status and appointed counsel (*Id.*). For example, during a subset of foreclosure settlement conferences conducted over the past several months, observers saw at least 86 individuals appear without counsel at their initial settlement conferences; the court did not make the required Rule 3408 determinations in any of these cases (*see* Affidavit of Tiffany Muse ("Muse Aff.") ¶¶ 3–5, attached as Exhibit D to the Affirmation of Terry Ding ("Ding Affirmation"); Affidavit of Brianna Sturkey ("Sturkey Aff.") ¶¶ 3–7, attached as Exhibit E to the Ding Affirmation; Affidavit of Soleiman Moustafa ("Moustafa Aff.") ¶¶ 3–7, attached as Exhibit F to the Ding Affirmation).

Courts are also not providing notices that inform unrepresented homeowners of their rights under Rule 3408, as Rule 3408 (e) requires (VP ¶ 24). Most notably, the notices do not mention that unrepresented homeowners have a right to be considered for appointed counsel under Rule 3408 (b) (*Id.*). Nor do the notices advise homeowners of "the purpose of the conference" (CPLR 3408 [e]): to "determin[e] whether the parties can reach a mutually agreeable resolution to help the defendant avoid losing his or her home" (CPLR 3408 [a]; *see* VP ¶ 24). And OCA has not

ensured that court officials delegated to oversee settlement conferences are educated and trained on the mandates of Rule 3408 (b), as Rule 202.12-a (d) requires (VP ¶ 20).

As a result of the respondents' failure to comply with Rule 3408 and Rule 202.12-a, many homeowners go through their entire foreclosure cases without attorneys representing them in the complicated, confusing, and daunting process (*Id.* ¶ 26). For these homeowners, the difference between having a lawyer and not having one is often the difference between keeping and losing their homes (*Id.* ¶ 29). Mr. Fanfair, Ms. Antoine, and many similarly situated homeowners are harmed by the respondents' non-compliance with Rule 3408 and Rule 202.12-a (*Id.* ¶ 6).

III. PUTATIVE CLASS REPRESENTATIVES

The petitioners and putative class representatives Carl Fanfair and Gloria Antoine are Brooklyn homeowners currently in foreclosure proceedings in Kings County Supreme Court (*see* Affidavit of Carl Fanfair ("Fanfair Aff.") ¶¶ 1, 4; Affidavit of Gloria Antoine ("Antoine Aff.") ¶¶ 1, 4). Even though the Mr. Fanfair and Ms. Antoine appeared at their initial settlement conferences without legal representation, the court failed to deem them to have made motions to proceed as "poor persons," to determine whether such motions should have been granted and, if so, whether to appoint them counsel under Rule 3408 (b) (Fanfair Aff. ¶ 5; Antoine Aff. ¶ 5). This failure reflects that OCA had not trained the nonjudicial referee who presided over the conferences on the requirements of Rule 3408 (b). The court also failed to send the homeowners notices prior to their conferences that complied with Rule 3408 (e) (*Id.*).

A. Carl Fanfair

Putative class representative Carl Fanfair lives in a home in the Bedford-Stuyvesant neighborhood in Brooklyn that he and his wife purchased more than 20 years ago (Fanfair Aff. ¶ 1). Mr. Fanfair resides in his home with his wife, their four children, and his mother-in-law (*Id.*

¶ 2). He is deeply connected to his home and his neighborhood (*Id.*).

Mr. Fanfair lost his job during the COVID-19 pandemic because he was unable to work in-person due to the health risks posed to his wife, who has pre-existing health conditions that make her vulnerable to serious infection, and to his mother-in-law, who is elderly (*Id.* ¶ 3). As a result of losing his job, he fell behind on his mortgage payments, and his loan servicer initiated foreclosure proceedings (*Id.* ¶ 4). Mr. Fanfair was unrepresented at his initial settlement conference held pursuant to Rule 3408 on March 28, 2023 (*Id.* ¶ 5). The court—including the nonjudicial referee assigned to oversee the conference—did not deem Mr. Fanfair to have moved to proceed as a "poor person," did not determine whether such motion should have been granted, and did not determine whether he should have been appointed counsel (*Id.* ¶ 5). The notice he received from the court did not inform him that he had a right to be considered for poor-person status and appointed counsel (*Id.*; *see also* VP ¶ 24). Without legal representation, Mr. Fanfair has experienced immense confusion and frustration as he tries to navigate the foreclosure proceedings (Fanfair Aff. ¶ 6).

B. Gloria Antoine

Putative class representative Gloria Antoine is also a long-time resident of Brooklyn (Antoine Aff. ¶ 1). She purchased her home in the Canarsie neighborhood nearly 20 years ago (*Id*.). Ms. Antoine lives in her home with her brother and her son, and she is deeply embedded in her local community (*Id.* ¶ 2).

Ms. Antoine previously made mortgage payments with income from her two jobs and from her tenant's rental payments (*Id.* ¶ 3). During the COVID-19 pandemic, however, her employment income fell and her tenant stopped making rental payments, which caused Ms. Antoine to fall behind on her mortgage payments (*Id.*). Ms. Antoine's loan servicer initiated foreclosure

proceedings against her, and she was unable to afford an attorney (*Id.* ¶ 4). On February 28, 2023, Ms. Antoine appeared without representation at her initial settlement conference (*Id.* ¶ 5). The court—including the nonjudicial referee assigned to oversee the conference—did not deem Ms. Antoine to have moved to proceed as a "poor person," did not determine whether such motion should have been granted, and did not determine whether she should have been appointed counsel (*Id.*). The notice she received from the court did not inform her that she had a right to be considered for poor-person status and appointed counsel (*Id.*; *see also* VP ¶ 24). Without legal representation, Ms. Antoine has felt confused and frustrated as she tries to navigate the foreclosure proceedings (Antoine Aff. ¶ 6).

ARGUMENT

The petitioners move for certification of the following class: all homeowner defendants currently in pre-judgment residential foreclosure proceedings in Kings County Supreme Court who were unrepresented at their initial settlement conference held pursuant to Rule 3408."[2]

This Court should certify the class because it meets all the requirements of CPLR 901 (a), and all the factors enumerated in CPLR 902 weigh in favor of class certification. CPLR 901 (a) authorizes the certification of a class where:

> "(1) the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable; (2) questions of law or fact common to the class predominate over any questions affecting only individual members; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; (4) the representative parties will fairly and adequately protect the interests of the class; and (5) a class action is superior to other available methods for the fair and efficient adjudication of the controversy"

(CPLR 901 [a]).

In addition, CPLR 902 directs courts to "consider" the following factors "in determining

[2] For simplicity, this memorandum refers in places to the proposed class as the "class" and putative class members as "class members."

whether the action may proceed as a class action":

> "(1) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (2) the impracticability or inefficiency of prosecuting or defending separate actions; (3) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (4) the desirability or undesirability of concentrating the litigation of the claim in the particular forum; and (5) the difficulties likely to be encountered in the management of a class action"

(CPLR 902).

Class actions are available in Article 78 proceedings (*see e.g. Matter of Holcomb v O'Rourke*, 255 AD2d 383 [2d Dept 1998]), and the CPLR 901 and 902 requirements are "to be liberally construed" with "any error . . . resolved in favor of allowing the class action" (*Wilder v May Dept. Stores Co*., 23 AD3d 646, 649 [2d Dept 2005] [internal citation omitted]).[3]

I. THE PETITIONERS MEET THE PREREQUISITES TO CLASS CERTIFICATION UNDER CPLR 901 (a).

A. The Proposed Class, Which Includes At Least 86 Individuals, Is Sufficiently Numerous.

The proposed class here satisfies the numerosity requirements because it contains well over 40 current members, as well as a significant number of future members, and is therefore "so numerous that joinder of all members . . . is impracticable" (CPLR 901 [a] [1]; *see Borden v 400 E. 55th St. Assocs., L.P.*, 24 NY3d 382, 399 [2014] [noting that sufficient "numerosity is presumed at a level of 40 members" (citation omitted)]).

Hundreds of homeowners go through foreclosure settlement conferences in Kings County each year, and OCA's own statistics show that a significant percentage of these homeowners—

[3] In interpreting the requirements of CPLR 901 (a), New York courts frequently look to federal caselaw applying Rule 23 of the Federal Rules of Civil Procedure (*see e.g. City of New York v Maul*, 14 NY3d 499, 510 [2010]; *Pruitt v Rockefeller Ctr. Properties, Inc*., 167 AD2d 14, 20–26 [1st Dept 1991]).

over 45% last year—appeared at their conferences without "assistance" from counsel[4] (VP ¶ 27). From January to June 2023, individuals observing a small subset of these Kings County conferences identified at least 86 people who appeared without representation and thus are putative class members (*see* Muse Aff. ¶¶ 3–5 [observing 56 initial settlement conferences in which the homeowner was unrepresented and the court did not make the Rule 3408 (b) determination]; Sturkey Aff. ¶¶ 3–7 [observing 21 such conferences]; Moustafa Aff. ¶¶ 3–7 [observing 9 such conferences]). The class is likely significantly larger than the baseline number of 86—in the hundreds—given that many more initial settlement conferences are conducted in Kings County Supreme Court than observers have been able to witness.[5] Thus, the proposed class is well above the presumptive 40-member threshold that is sufficient to establish numerosity (*see Borden*, 24 NY3d at 399; *see also Ramlochan v Westchester Shores Event Holdings, Inc.*, 67 Misc 3d 1208(A), *3 [Sup Ct, Westchester County 2020] [finding numerosity satisfied where "it [could] be easily inferred that far more than 40 individuals are members of the class"]).

Because the number of putative class members is far above 40, "joinder of all members" of the class "is impracticable" (CPLR 901 [a]; *see also Globe Surgical Supply v GEICO Ins. Co.*, 59 AD3d 129, 138 [2d Dept 2008] ["[T]he threshold for impracticability of joinder seems to be around forty." (quoting *Dornberger v Metro. Life Ins. Co.*, 182 FRD 72, 77 [SD NY 1998])]).

[4] The actual percentage of homeowners who are unrepresented is likely to be higher than 45% because, in counting homeowners who received legal "assistance," OCA may be including those who received less than full representation (VP ¶ 27; *see* New York State Unified Court System, 2021 Report of the Chief Administrator of the Courts on the Status of Foreclosure Cases [2022], at 7, available at https://www.nycourts.gov/legacyPDFS/publications/pdfs/ForeclosureAnnualReport2022.pdf).

[5] Because courts have not been complying with Rule 3408 (b) since it was enacted in 2008, there are likely many class members whose initial settlement conferences were held before petitioners' counsel began observing conferences in January 2023 (*see* VP ¶¶ 19–23, 27).

B. Questions of Law and Fact Common to the Proposed Class Predominate.

Next, the proposed class satisfies the requirement that "questions of law or fact common to the class . . . predominate over any questions affecting only individual members" (CPLR 901 [a] [2]). Every class member is subject to the same practices that the petitioners allege violate the requirements of CPLR 3408 and Rule 202.12-a (d). Resolution of the question whether these practices violate the law will determine in one stroke whether class members will prevail in their claims.

Predominance is the "linchpin" of the commonality requirement (*City of New York v Maul*, 14 NY3d 499, 514 [2010]). Whether common questions predominate is determined not by a "mechanical test" but based on whether class resolution "would achieve economies of time, effort, and expense, and promote uniformity of decisions as to persons similarly situated" (*Friar v Vanguard Holding Corp*., 78 AD2d 83, 97 [2d Dept 1980] (internal citation omitted)). "[T]he rule requires predominance, not identity or unanimity" (*Id.* at 98; *see also City of New York*, 14 NY3d at 512 [finding commonality satisfied even though "each of the plaintiffs and proposed class members possesse[d] his or her own unique factual circumstances and needs"]).

Common questions predominate in this case and class resolution would promote economy and uniformity. Every class member has been or, to the best of the petitioners' knowledge, will be subject to the respondents' failure to adhere to Rule 3408 (b)'s command to make poor-person and appointed-counsel determinations; to Rule 3408 (e)'s command to notify class members of their rights under Rule 3408; and to Rule 202.12-a (d)'s command to train court officials to conduct settlement conferences in accordance with all the requirements of Rule 3408. This gives rise to determinative questions of law that are common to all class members, including: Does the respondent Justices' failure to deem unrepresented homeowners to have moved for poor-person

status and to make poor-person and appointed-counsel determinations violate Rule 3408 (b)? Does the respondent Justices' failure to notify homeowners of their rights under Rule 3408 violate Rule 3408 (e)? And does OCA's failure to adequately train court officials to conduct settlement conferences in full compliance with Rule 3408 violate Rule 202.12-a (d)? Answering these questions on a class-wide basis will promote efficiency and uniformity by resolving the lawfulness of the respondents' actions across initial settlement conferences in Kings County (*see e.g. City of New York*, 14 NY3d at 512–14 [affirming that commonality was satisfied where "plaintiffs' claims s[ought] to vindicate rights accorded them by statutes and regulations"]; *Vandee v Suit-Kote Corp.*, 162 AD3d 1620 [4th Dept 2018] [finding commonality satisfied in case alleging violations of state law that affected the whole class]; *Adams v Bigsbee Enterprises, Inc.*, 53 Misc 3d 1210(A) [Sup Ct, Albany County 2015] [finding commonality established where plaintiffs alleged that "each class member's claim [was] premised upon the same legal theory" that defendants had violated a provision of the Labor Law]; *see also Johnson v Nextel Communications Inc*., 780 F3d 128, 137 [2d Cir 2015] ["Where the same conduct or practice by the same defendant give rise to the same kind of claims from all class members, there is a common question."]).

Commonality is also satisfied here because "class members have suffered the same injury" (*Johnson*, 780 F3d at 137 [internal citation and quotation omitted]). The respondents' failure to comply with the requirements of Rule 3408 and Rule 202.12-a (d) denies all class members the same procedural rights as well as the opportunity to be appointed counsel. The relief that the petitioners seek would address the whole class's harm. And the petitioners are not seeking monetary or other relief that would require this Court to determine whether any class member suffered individualized injuries distinct from other class members' injuries.

C. The Claims of the Named Petitioners are Typical of Those of the Proposed Class.

The proposed class also satisfies the requirement that "the claims or defenses of the representative parties are typical of the claims or defenses of the class" (CPLR 901 [a] [3]). Typicality is satisfied where the petitioners' claims "arise from the same facts and circumstances as the claims of the class members" (*Globe Surgical Supply*, 59 AD3d at 143).

Here, for substantively similar reasons to those establishing commonality, the class representatives satisfy the typicality requirement (*see City of New York v Maul*, 59 AD3d 187, 190 [1st Dept 2009], *affd* 14 NY3d 499 [2010] [noting that "[p]laintiffs' claims meet the typicality requirement for the same reasons they satisfy the commonality test" where "plaintiffs' claims and the claims of the class generally flow from the same alleged conduct"]). Mr. Fanfair and Ms. Antoine's claims, like every other class member's claims, flow from the respondents' routine failure to comply with the requirements of Rule 3408 and Rule 202.12-a.

D. The Representative Parties Will Fairly and Adequately Represent the Class.

The proposed representative parties will also "fairly and adequately protect the interests of the class" (CPLR 901 [a] [4]). To determine whether representation is adequate, courts assess "potential conflicts of interest between the representative and the class members, personal characteristics of the proposed class representative," including their "familiarity with the lawsuit," and "the quality of the class counsel" (*Globe Surgical Supply*, 59 AD3d at 144; *see also Pruitt v Rockefeller Ctr. Properties, Inc*., 167 AD2d 14, 24 [1st Dept 1991] [same]).

Here, the class representatives and class counsel all satisfy the adequacy requirement. There are no foreseeable conflicts of interest between the named representatives and the proposed class; the respondents are subjecting Mr. Fanfair, Ms. Antoine, and the class members to the same unlawful practices (*see Marcondes v Fort 710 Assoc., L.P.*, 75 Misc 3d 1214(A), *2–

3 [Sup Ct, NY County 2022] [finding "no conflict between the representatives and class members because the class representatives are experiencing the type of [harm] that are emblematic of the systematic deprivation" perpetrated by the defendants]; *see also Gen. Tel. Co. of Sw. v Falcon*, 457 US 147, 157 n 13 [1982] [explaining that both the "commonality and typicality requirements . . . . serve as guideposts for determining . . . whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected"]). Moreover, Mr. Fanfair and Ms. Antoine are familiar with the lawsuit and are able and willing to serve as class representatives and help counsel litigate this matter (Fanfair Aff. ¶¶ 7–11; Antoine Aff. ¶¶ 7–11; *see Hurrell-Harring v State*, 81 AD3d 69, 73 [3d Dept 2011] [holding that named plaintiffs were adequate class representatives because "they [were] familiar with the litigation and underst[ood] the issues involved"]).

Additionally, class counsel will adequately represent the interests of all class members because they have years of experience litigating class actions and have sufficient resources to vigorously pursue this action (Ding Affirmation ¶¶ 4–9). The NYCLU attorneys litigating this matter have served as class counsel in numerous federal and state lawsuits, including *Lino v City of New York*, 101 AD3d 552 [1st Dept 2012], *M.C. v Jefferson County*, 2022 WL 1541462 [ND NY May 16, 2022, No. 6:22-cv-190], *Abdi v Duke*, 323 FRD 131 [WD NY 2017], and *Peoples v Annucci*, 180 F Supp 3d 294 [SD NY 2016] (*see* Ding Affirmation ¶ 6). Likewise, both Mehri & Skalet, PLLC and Valli Kane & Vagnini LLP have served as lead and co-lead counsel in numerous class action cases, with collective recoveries of hundreds of millions of dollars for class members, and Yolande I. Nicholson. P.C. practices exclusively on behalf of homeowners in foreclosure and related civil rights litigation (Ding Affirmation ¶¶ 7–9; *id.*, Exhibits A–C).

E. A Class Action is the Superior Vehicle for Adjudicating this Controversy.

The class action device "is superior to other available methods for the fair and efficient adjudication of [this] controversy" because adjudicating this matter as a class action instead of as hundreds of individual suits over identical legal issues will promote efficiency and uniformity (CPLR 901 [a] [5]).

CPLR 901's superiority requirement is satisfied where many individual actions would be costly or inefficient (*see Pruitt*, 167 AD2d at 24 [stating that a class action was both "superior" and "practical" where individual actions were "cost prohibitive[] and the large number of class members render[ed] consolidation unworkable"]; *Ackerman v Price Waterhouse*, 252 AD2d 179, 202 [1st Dept 1998] [holding that class action "is clearly the superior method" where "adjudication of the common issues in this case . . . would dispose of most if not all of the issues in the case"]; *see also Onadia v City of New York*, 56 Misc 3d 309, 321–22 [Sup Ct, Bronx County 2017] [finding relevant to superiority both "the possibility of excessive costs and delays resulting from multiple lawsuits seeking the same or similar relief"]). A class action is clearly the superior method for resolving the issues here because litigating the same challenged conduct that affects scores, if not hundreds, of people in as many individual lawsuits would be costly, duplicative, and inefficient for the parties and the courts. Moreover, uniformly resolving the common issues here on a class-wide basis would "avoid . . . inconsistent rulings" arising from different courts adjudicating class members' claims in separate lawsuits (*Burdick v Tonoga, Inc.*, 179 AD3d 53, 60 [3d Dept 2019] (quoting *Hurrell-Harring*, 81 AD3d at 75)).

Superiority is also shown where, as here, in the absence of a class action, the individual "members of the class . . . may be unaware of their rights" (*Maddicks v Big City Properties, LLC*, 163 AD3d 501, 504 [1st Dept 2018], *affd* 34 NY3d 116 [2019] (citing *Borden*, 24 NY3d at

399)). Not only are the class members, by definition, unlikely to be able to afford and access legal support, most are not even aware that they are entitled to be considered for appointed counsel under Rule 3408 (b)—in part because the respondents are not properly notifying class members of their rights as required by Rule 3408 (e)—and therefore have no idea that their rights are being violated (*see* VP ¶¶ 46, 56). Thus, without a class action to protect their rights, class members would not be able to bring individual lawsuits to vindicate their procedural rights in foreclosure proceedings.

II. THE CPLR 902 FACTORS WEIGH DECISIVELY IN FAVOR OF CLASS CERTIFICATION.

The factors enumerated in CPLR 902 confirm that the class in this case should be certified (*see* CPLR 902 [1]–[5]). Although courts routinely certify classes without requiring that every CPLR 902 factor favor certification (*see e.g. Lavrenyuk v Life Care Services, Inc*., 198 AD3d 569, 570 [1st Dept 2021], *lv to appeal dismissed*, 38 NY3d 1021 [2022]), each of these factors weighs decisively in favor of class certification here.

First, "the interest of members of the class in individually controlling the prosecution . . . of separate actions" (CPLR 902 [1]) weighs in favor of class certification because "there is no indication that the members of the class have expressed any interest in controlling the prosecution of their own claims" (*Krebs v Canyon Club, Inc*., 22 Misc 3d 1125(A), *19 [Sup Ct, Westchester County 2009]).

Second, adjudicating this matter as a class action will avoid the impracticability and inefficiency of tens or hundreds of separate lawsuits asserting virtually identical claims (*see* CPLR 902 [2]). Prosecuting separate actions would be both impracticable and inefficient because the putative class members have common claims related to the respondents' lack of compliance with Rule 3408 and Rule 202.12-a (d) (*see* CPLR 902 [2]; *see also* CPLR 3408 [mandating

certain determinations courts must make for every individual who is unrepresented at their initial settlement conference]; *Lavrenyuk*, 198 AD3d at 570 [holding that the CPLR 902 factors favored class certification where "the burden on litigants and on courts would likely be significantly increased if aggrieved [class members] were forced to pursue individual lawsuits"]). And past litigation shows how important it is to resolve the petitioners' claims on a class-wide basis. The question whether a court violates Rule 3408 (b) by failing to make poor-person and appointed-counsel determinations was already raised by two individual foreclosure defendants in *Carrington Mortgage Services, LLC v Fiore*, 198 AD3d 1106 [3d Dept 2021]. Even though the Third Department answered that question in the affirmative and remanded the case for the Rule 3408 (b) determinations to be conducted (*id.* at 1108–09), practices in Kings County—and, to the best of the petitioners' knowledge, throughout the State—have not changed. Thus, a class action is necessary to bring about conformity with Rule 3408.

Third, given the lack of similar challenges against the respondents for their failure to comply with Rule 3408, "the extent and nature of any litigation concerning [this] controversy already commenced by or against members of the class" weighs in favor of litigating this matter as a class action (CPLR 902 [3]; *see Jones v Bd. of Educ. of Watertown City School Dist.*, 6 Misc 3d 1035(A), *9 [Sup Ct, Jefferson County 2005], *affd as mod* 30 AD3d 967 [4th Dept 2006] [noting in finding the CPLR 902 requirements satisfied that "[e]xcept for one other action by another potential class member . . . the Court is unaware of any other litigation concerning this controversy before it"]).

Fourth, it is desirable to concentrate this litigation in this Court because this is the Appellate Division for the county in which the respondents and class members are located and where the relevant foreclosure settlement conferences occur (*see* CPLR 902 [4]; *Fleming v*

Barnwell Nursing Home & Health Facilities, Inc., 309 AD2d 1132, 244 [3d Dept 2003] [holding under CPLR 902 that "it [was] desirable to concentrate the litigation in the county where the [respondent] is located"]).

Finally, this lawsuit presents "no apparent difficulties" in manageability (*Fleming*, 309 AD2d at 1134; *see* CPLR 902 [5]). Because this action challenges the respondents' failure to adhere to statutory and regulatory mandates and involves no claims for damages, it is markedly different from cases in which courts have hesitated to manage classes that would have required large numbers of individualized damages determinations.

CONCLUSION

For the foregoing reasons, the petitioners respectfully request that this Court grant this motion for class certification, certify the class, appoint Mr. Fanfair and Ms. Antoine as representatives of the class, and appoint the undersigned counsel as class counsel.

Dated: July 10, 2023
New York, NY

Respectfully Submitted,

NEW YORK CIVIL LIBERTIES UNION FOUNDATION

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CERTIFICATE OF COMPLIANCE WITH 22 NYCRR §202.8-b

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/s/ Ifeyinwa K. Chikezie
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