

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

TERESA LOPEZ, WILFORD LONEY, JAMES
ROBINSON, BERTHA CLINTON, MARY
YOUNG, JUANITA EDWARDS, VIRGINIA
WILLIAMS, and MURRAY LOWE, on behalf of
themselves and all others similarly situated,

Plaintiffs,

- against -

DELTA FUNDING CORPORATION, DELTA
FINANCIAL CORPORATION, ALL STATE
CONSULTANTS, INC., a/k/a CITY MORTGAGE
BANKERS, DOE CORPORATIONS 1 through X,
DELTA FUNDING HOME EQUITY LOAN
TRUST, BANKERS TRUST COMPANY OF
CALIFORNIA, N.A., as trustee for the DELTA
FUNDING HOME EQUITY LOAN TRUST, and
NORWEST BANK MINNESOTA, NATIONAL
ASSOCIATION, also as trustee for the DELTA
FUNDING HOME EQUITY LOAN TRUST,

Defendants.

Index No. CV 98 7204 (CPS)

**DECLARATION OF JOSH
ZINNER, ESQ. IN SUPPORT OF
THE OBJECTIONS TO
APPROVAL OF THE
SETTLEMENT AGREEMENT
BY CLASS MEMBER-
OBJECTORS LUCILLE
HARDIN, ANNA MAE DAWSON,
CHRISTINE NICOLL,
PEARLINE BROWN, AND BY
THE NEW YORK ASSOCIATION
OF COMMUNITY
ORGANIZATIONS FOR
REFORM NOW (ACORN NY)**

1. South Brooklyn Legal Services (SBLS) is a non-profit organization that has been providing free civil legal services to Brooklyn residents for over 30 years. In 1998, SBLS founded the Foreclosure Prevention Project to address skyrocketing rates of foreclosures against low-income homeowners in Brooklyn and the rest of New York City. The Foreclosure Prevention Project has led advocacy efforts throughout New York State to stop abusive mortgage lending practices by subprime lending companies, and has represented and advised numerous borrowers at risk of foreclosure. As a result of this work, SBLS has detailed

knowledge of the array of predatory lending practices perpetrated by lenders, mortgage brokers, home improvement contractors, and secondary mortgage market players.

2. The Foreclosure Prevention Project has provided advice, referral services, and legal representation to over 1,000 at-risk homeowners. Borrowers are referred by community groups and other non-profit agencies; the offices of city, state, and federal elected officials; the courts; and city and state agencies such as the New York City Department of Consumer Affairs, the City Department for the Aging, the City Protective Services for Adults, the NYC Human Rights Commission, the City Department of Housing Preservation and Development, the Kings County District Attorney, and the State Attorney General.

3. A disproportionate number of the clients referred to SBLS have or have had Delta loans, most originated between 1992 and 1999, and many have fallen into foreclosure as a result of a Delta mortgage. Most Delta borrowers who have contacted SBLS are elderly couples or widows who purchased their homes decades ago, and were once the working poor but are now on Social Security. Most are financially unsophisticated, with minimal or limited education. Some are functionally illiterate; some are immigrant borrowers who speak little English. The overwhelming majority are African-American, Caribbean immigrant, or Latino. The majority are particularly vulnerable to abuse because they have difficulty comprehending both the loan documents and the particulars of the transaction, and are not represented by counsel at closing.

4. Delta borrowers contact SBLS at all stages: when they are current on their loans but struggling to make payments; after receiving a foreclosure complaint; after a foreclosure judgment has been entered against them because of their inability to afford an attorney; and often after their house has already been sold at a foreclosure auction.

5. SBLS has interviewed numerous borrowers with Delta loans which were originated between 1992 and 1999, and which involved various predatory and abusive practices. The most harmful of these practices is the extension of mortgage loans that are unaffordable from their inception, that are based on the equity of the home rather than on the ability of the borrower to pay. These loans are destined to fail with the inevitable result: default, and, often, foreclosure.

6. Other Delta mortgage transactions charge borrowers excessive closing costs, particularly highly inflated mortgage broker fees. On top of the brokers' fees, Delta often pays brokers yield spread premium payments for steering homeowners into higher interest loans than they would otherwise have qualified for.

7. Another typical abusive practice which Delta and its brokers engage in is "loan flipping," or frequent refinancing of mortgages that strips away home equity by repeatedly charging unnecessary and excessive closing costs. In addition, borrowers are often prodded into refinancing their unsecured debt, such as credit card or hospital bills, into a secured mortgage, exacerbating the risk that they will lose their home.

8. Some Delta borrowers unwittingly end up with balloon payments due at the end of the loan term, usually long after the borrower retires and will be unable to pay the enormous lump sum. Prepayment penalty clauses, through which Delta charges homeowners thousands of dollars when they refinance with a different lender, is another means by which Delta maximizes its return by penalizing the borrower. In addition, Delta regularly includes in its loan documents a "default interest" provision that traps borrowers who have fallen behind in their mortgage payments in financial quicksand by ratcheting the interest rate after default to 24%.

9. These and similar predatory lending practices increase the likelihood that Delta borrowers will be thrown into foreclosure, or be forced to lose even more home equity by refinancing with another lender. The United States Department of Justice (“DOJ”) and the New York State Attorney General (“AG”) made similar claims in complaints filed against Delta. In a complaint filed in March 2000, the DOJ claimed that Delta’s lending practices have “exposed borrowers to unwarranted risk of default and foreclosure.” See Complaint in [United States v. Delta Funding Corp.](#), 1872 CV 2000 (Sifton, J.) ¶ 17, annexed as Exhibit A. The New York Attorney General, in a complaint filed in August 1999, alleged that Delta and its brokers “have engaged in a pattern and practice of targeting low-income minority homeowners and inducing them into illegal, discriminatory, and fraudulent high-cost mortgage loans, which defendants have reason to know these borrowers either cannot repay or can repay only through extreme personal and financial privation.” See Complaint in [People of the State of New York v. Delta Funding Corp.](#), Civ. No. 99-4951 (Sifton, J.) ¶ 1, annexed as Exhibit B.

Delta’s Illegal Practices Entitle Borrowers to a Variety of Defenses to Foreclosure

10. Numerous legal claims and defenses are available to borrowers who have been targeted for these lending abuses. Because of our limited resources, SBLS focuses on cases in which homeowners have clear-cut legal claims, and where the borrower will likely be able to stay in her home if loan payments are made affordable. SBLS accomplishes this result in a variety of ways: through informal negotiations with mortgage lenders or servicers to modify loan terms or facilitate the acceptance of a payoff, or through litigation where necessary. In all cases, the goal is to prevent foreclosure.

11. Homeowners victimized by predatory lending practices have legal claims for substantial damages under federal and state laws, which can be raised either through an affirmative lawsuit or as defenses to foreclosure, as well as for rescission (which returns the borrower and the lender to the positions they would have occupied if the mortgage loan had not been entered). Some homeowners raise consumer protection claims under the federal Home Ownership and Equity Protection Act (“HOEPA”), 15 U.S.C. § 1639, a statute enacted by Congress in 1995 specifically to curb predatory mortgage lending practices. See, e.g., Newton v. United Companies Financial Co., 24 F.Supp.2d 444, 451 (E.D. Pa. 1998); Bankers Trust v. Payne, 188 Misc. 2d 726 (N.Y. Sup. Ct. 2001). Others rely on the Truth in Lending Act (“TILA”), 15 U.S.C. § 1601 et seq., which regulates disclosure of the cost of credit. Both HOEPA and TILA entitle borrowers to the remedy of rescission, which is a key tool in preventing the foreclosure of the borrower’s home.

12. Borrowers may also raise claims under the federal Real Estate Settlement Procedures Act (“RESPA”), 12 U.S.C. § 2601 et seq., which prohibits kickbacks and referral fees in the real estate industry. In addition, the federal RICO statute, 18 U.S.C. § 1961 et seq., is available to redress claims of conspiracy and illegal arrangements in mortgage lending. See, e.g., Weil v. The Long Island Savings, (E.D.N.Y., Dec. 15, 1999) (Platt, J.) (denying those parts of lender’s motion that sought to dismiss claims based on RICO, TILA, and the N.Y. State Consumer Protection Act).

13. Under New York state law, homeowners may also challenge predatory loans under the state Deceptive Practices Act, N.Y. General Business Law § 349, or through common law causes of action such as fraud and unconscionability.

14. The federal Fair Housing Act (“FHA”), 42 U.S.C. § 3601 et seq., and the Equal Credit Opportunity Act (“ECOA”), 15 U.S.C. § 1691 et seq., may provide additional remedies to Delta borrowers. Communities of color and non-white homeowners are sold subprime and predatory mortgage loans in hugely disproportionate numbers. Such patterns lead to an inference of deliberate racial targeting of credit products that do more harm than good, commonly known as “reverse redlining”. See, e.g., Hargraves v. Capital City Mortgage Corp., 140 F.Supp.2d 7, 20 (D.D.C. 2000); United Companies Lending Corp. v. Sargeant, 20 F.Supp.2d 192, 203 n.5 (D. Mass. 1998); Honorable v. Easy Life, 100 F.Supp.2d 885, 892 (N.D. Ill. 2000). The Department of Justice has claimed that Delta’s lending patterns and practices are sharply divided along racial lines, and that “Delta has subjected its African American borrowers to terms and conditions for home mortgage loans that resulted in those borrowers paying more for their loans than similarly situated white male borrowers.” United States v. Delta Funding Corp., 1872 CV 2000 (Sifton, J.) (Complaint at ¶19). These findings supported the DOJ’s claim that Delta violated the FHA and ECOA.

15. SBLS is deeply concerned that the proposed settlement will lead borrowers with substantial claims and defenses to inadvertently waive their rights to raise such claims and defenses, in exchange for a paltry sum which does not in any way reflect the value of their claims. With two exceptions, all of the dozens of class members who have approached South Brooklyn Legal Services thus far for advice about whether to accept the settlement have been offered sums between \$1.56 and \$23.76. (The two exceptions were classified as Disputed HOEPA Loans under the settlement and were offered less than \$1000 each — and one of those borrowers has already lost her home in a Delta foreclosure.) The following case examples

demonstrate why the Proposed Settlement is unfair and how it will hurt Delta homeowners:

16. **Anna Mae Dawson** is a widow and senior citizen who lives alone in the home she has owned her home at 211 Monroe Street in Bedford-Stuyvesant, Brooklyn 11216 for nearly 25 years. Her husband passed away in 1993, and she survives on the roughly \$700 per month that she receives from her husband's Social Security and pension survivor's benefits. She is highly vulnerable and financially unsophisticated.

17. In 1997, Ms. Dawson was induced by an unlicensed broker and a home improvement contractor named Di-Kell Corporation to sign a vastly-inflated, illegal home improvement contract, which was then parlayed into a \$99,000 mortgage with Delta Funding (Delta loan #3110016064). The monthly mortgage payments of \$1,017.57 exceeded her monthly income by more than \$300. Unbeknownst to Ms. Dawson, Delta had rolled pre-existing low interest, city-financed home repair loans into the new loan, thereby converting thousands of dollars of loans requiring less than 5% interest into a loan with an Annual Percentage Rate (“APR”) of over 13%.

18. The income information that the broker submitted to Delta included an employment letter from a non-existent business, which stated that Ms. Dawson was paid in cash to work as an Office Manager, and a fake lease with a forged signature that showed rental income Ms. Dawson did not receive. Ms. Dawson had no knowledge of the income information that was submitted by the broker, and was told that she would be able to afford the loan once her house was fixed up and an extra unit was rented out. Unable to make payments on the loan from its inception, Ms. Dawson went into default almost immediately.

19. Delta, as servicer for assignee Bankers Trust, subsequently filed a foreclosure

action and obtained a judgment of foreclosure against Ms. Dawson when she failed to answer. She was referred to our office, which petitioned the court for the appointment of a guardian ad litem to speak for Ms. Dawson in the action, based on our conclusion that Ms. Dawson did not possess the mental capacity to adequately defend her interests in the foreclosure action. The court appointed a guardian ad litem, relying on the recommendation of a psychiatrist from the New York City agency Protective Services for Adults. The court subsequently vacated the judgment of foreclosure against Ms. Dawson.

20. SBLIS is now litigating the foreclosure action against Delta and has sued the broker/contractor and the principals involved as third-party defendants. We have raised counterclaims, defenses, and third party claims under HOEPA, TILA, New York State General Business Law § 349, and common law fraud, unconscionability, and breach of fiduciary duty. The case is pending in Kings County Supreme Court.

21. Ms. Dawson has received a settlement notice offering her \$15.47, under Section III.D of the notice. (A copy of the Notice to Ms. Dawson is annexed hereto as Exhibit C.) When she called SBLIS regarding the notice, she had no understanding about its meaning, and no understanding of the import of the release provision contained in Section VI of the notice. Without our counsel, she would not have understood that she needed to respond to the notice and opt out to preserve her right to raise defenses to the foreclosure action. Had she remained in the class, Ms. Dawson would have inadvertently released her claims against Delta Funding and against the trust that subsequently acquired the loan, and released all of her claims against Di-Kell Corporation and its principals. Her defenses, counterclaims and third-party claims would have been stricken, and she would have lost her home in foreclosure and been evicted -- all for

\$15.47.

22. In fact, the relief offered to Ms. Dawson is incorrect even under the terms of the Proposed Settlement, since she was wrongly classified as a borrower under Section III.D of the notice (paragraph 4(c) of the proposed Settlement Agreement). Actually, Ms. Dawson qualifies for the relief described in paragraph 3(a) of the Settlement Agreement, since her loan is a “Disputed HOEPA Early Payment Default Loan” (“DHEPD”): her loan is a HOEPA loan if the closing fee charged by William J. Horan is counted as points and fees under 12 C.F.R. Sec. 226.32(b)(1); she defaulted within six months; and she is in foreclosure. But the settlement notice she received does not indicate that she is entitled to the relief provided for DHEPD class members.

23. Notably, the size of the pool of money accorded borrowers in the DHEPD class is dependent on the “aggregate amount required to make the payments and credits” to which DHEPD class members are entitled. See Settlement Agreement ¶ 3(b). In other words, the more homeowners that are found to fall within the DHEPD Class, the more money Delta must pay under the proposed Settlement Agreement (and theoretically, the “aggregate amount required” to pay DHEPD Class Members could be none). The misclassification by Delta of Ms. Dawson’s loan, whether inadvertent or otherwise, highlights why defendant Delta should not have unilateral control over the determination of the kind and amount of relief to be provided class members.

24. Finally, even if Ms. Dawson were accorded the relief that she should have been offered as a member of the DHEPD Class, this would not be sufficient to make her loan affordable on a monthly basis; and she would still lose her home in foreclosure. Even calculated

conservatively, the relief Ms. Dawson would be entitled to as a DHEPD Class Member would leave her with combined monthly payments (adjusted principal plus arrears) that exceed her original, unaffordable monthly payment.

25. **Eunice Owens** is another Delta borrower who received notice as a potential class member in the Lopez settlement. Ms. Owens is an 81-year-old widow who has owned her Bushwick, Brooklyn home for almost thirty years. Her sole income comes from Social Security and a pension. Ms. Owens' husband died last year. Ms. Owens has a ninth grade education, and she retired ten years ago from her job with the city.

26. In the summer of 1997, Ms. Owens and her husband were approached by a contractor called General Home Improvement ("GHI"), which offered to help them fix up their home so that they could get extra income by renting out the second floor. At the time, they had only approximately \$18,000 of debt remaining on their house. In violation of federal law (the "anti-spiking" provisions of the Truth in Lending Act), GHI began to work on the property before the Owens' loan closed, leading them to believe that they had no choice but to enter into the loan.

27. The Owens entered into a \$108,500 mortgage with Delta with an APR of 13.65%, which included a broker's fee of \$8,680 to a mortgage broker called Atlas Funding, and an additional \$2,170 "yield spread premium" payment to Atlas. The yield spread premium was paid by Delta to Atlas Funding in exchange for Atlas bringing the loan to Delta at a higher interest rate than the Owens were qualified for. The Owens had no knowledge that Atlas was involved, nor did they know that they could have qualified for a loan at a lower interest rate. Atlas shared a Queens address with GHI, which received \$42,500 out of the proceeds of the loan,

even though it did little work and left the house in shoddy repair. Atlas brought an attorney to the closing to purportedly represent the Owens. That attorney did nothing to protect their interests and was paid a fee out of the proceeds of the Owens' loan, which was financed over the life of the loan.

28. The Owens fell behind on their mortgage after about a year and a half, after which Delta as servicer, acting on behalf of assignee Bankers Trust, filed a foreclosure action. City agency Protective Services for Adults subsequently petitioned the court to appoint a guardian to represent Ms. Owens' interests in the action, on the basis that she does not possess the mental capacity to protect her own interests. Once a guardian is appointed, SBLS will represent Ms. Owens in the foreclosure action, and will raise defenses under HOEPA, TILA, RESPA, ECOA, New York State General Business Law § 349, and common law fraud and unconscionability.

29. Ms. Owens contacted this office after she received the notice for the Lopez settlement. She had no understanding of what relief she was entitled to, the fact that she would release all her claims by not opting out, or the fact that she even could opt out. The settlement notice indicates that the Owens' loan is a HOEPA loan. It further indicates that as member of the HOEPA subclass, Ms. Owens is entitled to \$16.96 under the settlement. Pursuant to Section III.A of the notice (and paragraph 1 of the Settlement Agreement), Delta can still charge Ms. Owens an elevated rate of interest on her loan after default, since she is more than 120 days delinquent on her mortgage. (This provision gives Delta license to continue to violate federal law, which mandates that in no instance may a HOEPA borrower be charged an elevated rate of interest after default.) Had Ms. Owens' case not come to the attention of this office, she would not have understood that she should opt out of the settlement, and would inadvertently have

waived all of her substantial claims and defenses against Delta, Atlas, Bankers Trust, and GHI — in exchange for \$16.96.

30. **Christine Nicoll** is a disabled woman who lives with her elderly mother and teenage niece at 338 Van Brunt Street in Red Hook, Brooklyn, 11231. Ms. Nicoll suffers from serious physical and cognitive disabilities due to a car accident when she was a child. In 1993, Ms. Nicoll received a settlement for the injuries she had sustained in the accident. She used the money to buy the Red Hook house for herself and her family. She paid cash and owned the house free and clear.

31. In September 1998, Ms. Nicoll entered into an unaffordable, \$98,000 mortgage loan with Delta (Delta loan #3110128968). Ms. Nicoll did not receive the disclosures required by federal law before the closing, and was unaware that the monthly payments would be \$870.91 per month, which was far beyond her means. The loan was arranged by a broker named Royce Equities, and refinanced a problematic home improvement loan which had been set up by Royce Equities only a month before the Delta loan. Royce Equities was paid nearly \$8000 in broker fees on the Delta loan, in addition to nearly \$3000 it had taken in connection with the first loan “flip”.

32. Royce Equities had a long-standing business relationship with Delta, whereby it brokered a significant portion of its loans to Delta. Delta’s relationship with Royce Equities continued despite the 1995 guilty plea of Royce Equities’ principal, John Gizze, to federal charges of financial fraud. A significant portion of the proceeds of Ms. Nicoll’s loan were taken by a Royce Equities employee and never returned to Ms. Nicoll.

33. Ms. Nicoll quickly went into default on the loan, and in August 1999, Delta as

servicer, acting on behalf of plaintiff Bankers Trust, filed a foreclosure action against Ms. Nicoll. SBLS filed an answer on behalf of Ms. Nicoll and a third-party complaint against Royce Equities and its employee who was involved in the transaction. The answer and third-party complaint alleged claims and defenses under HOEPA, TILA, RESPA, New York State General Business Law § 349, and common law fraud and unconscionability.

34. Ms. Nicoll did not contact this office when she received her notice under the Lopez settlement, as she did not realize the significance of the document. When we contacted her about the notice, she was totally unable to ascertain from the notice what type of relief she was entitled to, and did not understand that she would be releasing all of her claims against Delta if she did not opt out. The notice indicates that Ms. Nicoll is entitled to \$15.32 under the settlement. Despite SBLS's contention that her loan violates HOEPA, her loan is not classified as either a HOEPA loan or a disputed HOEPA loan under the terms of the settlement.

35. If SBLS had not contacted Ms. Nicoll, she would have never opted out of the settlement, and would inadvertently have waived her rights to raise substantial claims and defenses against Delta, Bankers Trust, Royce Equities, and even against the employee of Royce Equities who apparently absconded with her money. She would have lost her foreclosure case, lost her home, and she and her family would have been evicted.

36. **Pearline Brown** is a 71-year-old widow and mother of 11 who resided at 100-20 34th Avenue Corona, Queens, 11368, who worked as a home health attendant until she retired in 1998. She was recently evicted from the home that she had lived in since 1975, after she was foreclosed on by Delta. In that foreclosure action, she also lost two other homes that she had purchased as investment properties to sustain her in her old age. She now receives Social

Security and a pension totaling less than \$400, and sleeps on her daughter's couch.

37. In 1996, Ms. Brown was approached by a broker named All State Consultants, a named defendant in this class action, about doing a refinance. She agreed, as she needed money to do work on several of the rental units in the investment properties. She was told by the broker that it was not necessary for her to bring an attorney to the closing. All State was to be paid a broker fee of \$15,900 on the loan, a figure that was later changed to a still excessive \$8,356. The interest rate on Ms. Brown's Delta loan was 14.99% (Delta loan #22864). Ms. Brown was told that the loan would be secured by her two investment properties. To her great shock, she discovered well after closing that the loan had been secured by all three properties, including her long-time home.

38. When Ms. Brown was unable to keep up with the high monthly payments under the loan, all three of her properties were sold in foreclosure in 1999. She did not receive a notice in the Lopez settlement because she no longer lives in her home. Because she had previously contacted SBLS about her problem, this office contacted her regarding the settlement, and she chose to opt out. If she had not been in touch with SBLS, she would not have responded to the notice and would have waived her right to sue Delta for damages resulting from the loss of all three of her properties, including her home. Under the terms of the settlement, Ms. Brown is not entitled to a refund of any of the "foreclosure profits" on the sale of her three homes. See Settlement Agreement ¶ 5 (refund of "net foreclosure profits" to foreclosed homeowners limited to those class members that Delta classifies as HEPD or DHEPD Class Members).

39. **Lucille Hardin** is an 84-year-old widow who has owned her home at 145 East 38th Street in Flatbush, Brooklyn 11203 since the 1960s. She worked in a clothing factory until

her retirement in 1985; her current income consists of veterans' benefits and Social Security. After her husband's death, Ms. Hardin entered into a series of mortgages with Delta. Her final Delta loan, in October 1995, was for \$109,000, at an 11.8% interest rate and a final balloon payment of over \$94,000 (Delta loan #20374). A broker named Richmint Funding (which was sued as a co-defendant of Delta by the New York State Attorney General in September 1999) was paid a broker fee of \$8,100 on the loan. Although the loan was barely affordable, Ms. Hardin managed to stay current on the loan by neglecting to pay other household bills. Recently, when she could no longer afford to make payments, Ms. Hardin refinanced the Delta loan through a reverse mortgage in order to save her home.

40. Ms. Hardin never received a settlement notice for this class action, but is objecting as a member of the defined putative class.

The Settlement Notice is Incomprehensible to Delta Borrowers

41. Since the settlement notices came out, SBLS has received numerous phone calls and visits from current and former clients asking for help in interpreting the dense four-page notice. In addition, SBLS wrote a letter regarding the notice to each borrower who has contacted this office in the past for counsel and advice about a Delta loan, out of concern that borrowers would not understand the implications of the release. Not one of the several dozen borrowers to whom SBLS has spoken about the notice has had any understanding at all that they would be releasing their right to raise claims and defenses against Delta (or against the mortgage broker and other parties, for that matter) if they did not opt out. Virtually none of the borrowers could understand what relief they would be entitled to under the proposed settlement.

42. This widespread misunderstanding is likely the result of the fact that the settlement notice is extremely difficult to read and understand, and that Delta borrowers are typically financially unsophisticated, with limited education.

43. SBLS's experience demonstrates that the preservation of legal claims is vital to halting foreclosure and to keeping victimized borrowers in their homes, whether through litigation or informal negotiation. In cases that SBLS has settled involving Delta loans, Delta has requested that borrowers sign a confidentiality agreement that prohibits disclosure of the terms of settlement. Therefore, SBLS is obligated not to reveal the nature of its settlements with Delta. However, results obtained by SBLS in litigation with other lenders prove that homes can be saved when the legal defenses described above are available.

44. In one case involving a prominent subprime lender, SBLS raised defenses based on HOEPA, TILA, New York State General Business Law § 349, and common law fraud and unconscionability. The mortgage holder agreed to "write down" the loan principal by \$38,000, preventing the client from losing her home in foreclosure. In another foreclosure case involving a different subprime lender, SBLS raised defenses of unconscionability, fraud, and wrongdoing under the New York State General Business Law § 349, ECOA, RESPA, HOEPA and TILA. The plaintiff agreed to write down the client's mortgage debt by over \$50,000, enabling her to avoid foreclosure.

45. To understand the full impact of the releases contained in the proposed settlement, it is critical to recognize that many parties beyond the original mortgage lender are implicated in allegations of predatory lending. The mortgage brokers who serve as middlemen between borrowers and lenders often engage in misrepresentation and other deceptive practices

in order to induce homeowners to enter into a mortgage loan. In litigation, the lenders who profit from these practices virtually always respond that the broker is liable and not the lender. The sweeping settlement release would force borrowers to waive all claims against any mortgage broker involved in a Delta transaction.

46. Without question, the most important entities in a foreclosure action are the current noteholder and the loan servicer, which “services” the loan by collecting payments, sending default notices, and instigating and prosecuting foreclosures. In the subprime market, where loans change hands rapidly and frequently, the noteholder is usually a secondary market purchaser (“assignee”) or a securitization trust that packages mortgages for sale on the open market. The current note holder, not the originating lender such as Delta, is the plaintiff in a foreclosure action — thus to prevent foreclosure and keep her home, a homeowner must be able to raise defenses against the assignee.

47. Especially in light of these multiple and shifting parties, it is surprising that Delta — and only Delta — has contributed to the proposed settlement. Through the proposed settlement, Delta is attempting to eliminate liability not only for itself, but also for secondary market purchasers/foreclosure plaintiffs, and any mortgage brokers involved in any challenged transaction. The settlement even eliminates liability for parties not named in the plaintiffs’ complaint! By making negligible cash payments to thousands of borrowers, Delta is attempting to protect every mortgage transaction it closed over a seven-year period from all legal scrutiny.

48. If approved, this settlement will leave homeowners who have been victimized by predatory lending schemes, and who have claims that would entitle them to rescission and substantial damages, wholly without defenses, and it will force them to surrender their homes to

Delta.

Class Counsel Is Inadequate to Represent the Class Members

49. After reviewing the proposed settlement and several settlement notices, SBLS was shocked to realize the danger to homeowners of the proposed settlement. We therefore contacted plaintiffs’ counsel Curt Beck of Abbey Gardy to discuss our concerns. When pressed about the fairness of requiring class members to release their rights to defend a foreclosure action even if they would receive only a few dollars from the settlement, Beck replied that he did “not have any sympathy for people who did not make payments on their loans.”

50. That plaintiffs’ counsel would make such a statement is shocking, particularly given the allegations contained in the complaint and the purpose of this litigation, which was to halt Delta and other defendants from “systematically and continuously target[ing] low-income minority and/or elderly homeowners, fraudulently inducing those homeowners to enter into illegal and exorbitantly priced mortgage loan transactions,” thereby “plac[ing] all class members in jeopardy of losing their homes” Third Amended Complaint at ¶¶ 1, 3.

Dated: May 10, 2002
Brooklyn, New York

JOSH ZINNER, ESQ.