

March 28, 2007

**VIA HAND DELIVERY**

Honorable Eileen T. Gallagher  
Cuyahoga County Court of Common Pleas  
Justice Center, Room 23-C  
1300 Ontario Street  
Cleveland, Ohio 44113

Re: *State of Ohio, ex rel. Marc Dann Attorney General, et al. v.  
New Century Financial Corp., et al.*  
Cuyahoga County Court of Common Pleas Case No. 07-CV-618660

Your Honor:

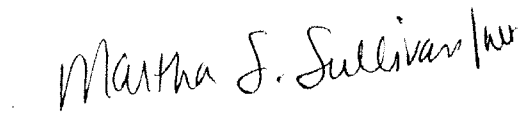
Enclosed is an *Amicus* Brief which is being filed in the captioned matter by the Securities Industry and Financial Markets Association.

It is our understanding that the Preliminary Injunction hearing set in this matter for March 28, 2007 is being postponed or cancelled, and that there is a Consent Judgment, negotiated between the parties, that will be presented to the Court this week. The Securities Industry and Financial Markets Association is concerned that the resolution negotiated by the parties may include provisions which restrict and/or delay New Century Financial Corporation's ability to service and foreclose on delinquent mortgage loans, or create an administrative oversight function pursuant to which the State or its designee will assist in determining whether, when and how delinquent loans will be serviced or foreclosed. Unfortunately, any such provisions may have consequences that will severely impact the rights of third-party lenders in Ohio, and the rights of those lenders in Ohio and beyond to originate mortgage loans through funding from the securitization markets. In short, any such provisions will adversely affect the public interest.

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We urge the Court to consider the information presented in the Amicus Brief, and to further hear from interested non-parties prior to entering any order in this case, agreed or otherwise, that addresses the conditions under which the defendants are permitted to service and foreclose on defaulted loans.

Very truly yours,

A handwritten signature in cursive script that reads "Martha S. Sullivan" followed by a small mark that appears to be "hr" or a stylized flourish.

Martha S. Sullivan

MSS/msl

Enclosure

cc: Donald S. Scherzer, Esq. (w/enc. via facsimile)  
Ed Kraus, Esq. (w/enc. via facsimile)

**IN THE COURT OF COMMON PLEAS  
CUYAHOGA COUNTY, OHIO**

<b>STATE OF OHIO, ex rel. MARC DANN</b>	)	<b>CASE NO. 07 CV 618660</b>
<b>ATTORNEY GENERAL, et al.,</b>	)	
	)	<b>JUDGE EILEEN T. GALLAGHER</b>
<b>Plaintiffs,</b>	)	
	)	
<b>v.</b>	)	
	)	
<b>NEW CENTURY FINANCIAL</b>	)	<b>AMICUS BRIEF OF THE</b>
<b>CORP., et al.,</b>	)	<b>SECURITIES INDUSTRY AND</b>
	)	<b>FINANCIAL MARKETS</b>
<b>Defendants.</b>	)	<b>ASSOCIATION</b>

**PRELIMINARY STATEMENT**

The Securities Industry and Financial Markets Association (SIFMA) counts among its members 650 financial services firms of all sizes, operating in all financial markets in the United States and around the world. SIFMA submits this Amicus Brief on behalf of its members, urging this Court to consider the impact that any injunction against the New Century Defendants will have on non-party financial services companies, the financial markets, and the public interest.

If the Court determines that some form of equitable relief is appropriate as to the New Century Defendants, SIFMA submits that any such order should protect the interests of innocent third-party investors in mortgage loans originated by the New Century Defendants, and should permit the New Century Defendants to continue servicing existing loans. As servicer, the New Century Defendants should be permitted to institute and proceed with foreclosure actions in accordance the terms and conditions set forth in the applicable loan agreements and the laws of the State of Ohio. It is imperative that any foreclosure proceedings occur without disruption or

delay. Alternatively, SIFMA asks this Court to permit the New Century Defendants to institute and proceed with foreclosure actions in instances where, as explained below, the New Century Defendants are prohibited by operation of law from transferring or otherwise assigning their servicing responsibilities to another servicer.<sup>1</sup>

### **FACTS**

The Modified Temporary Restraining Order (“Modified TRO”) in this action enjoins Defendants New Century Financial Corp., New Century Mortgage Corp., and Home123 Corp. (collectively the “New Century Defendants”) from mortgage origination activity in Ohio and significantly limits their mortgage loan servicing activity in Ohio. The Modified TRO apparently flows from allegations by the State of Ohio that the New Century Defendants have committed a variety of violations of the Ohio Consumer Sales Practices Act.

But the Modified TRO applies by its terms not only to the New Century Defendants acting on their own behalf and with respect to mortgages that they own. The order also applies to:

- (a) all non-parties who act in “concert or participation” with the New Century Defendants in a variety of mortgage related activities;
- (b) the New Century Defendants when they are acting as servicer on behalf of another non-party purchaser of loans; and
- (c) the New Century Defendants when they are acting as servicer on behalf of third-party noteholders and certificateholders in securitizations.

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<sup>1</sup> If a preliminary injunction is granted which precludes protection of SIFMA members’ interests, SIFMA reserves the right to file a Motion to Intervene. Pursuant to Ohio Civil Rule 24(A)(2), an intervenor must: (1) claim an interest relating to the property or transaction that is the subject of the action; (2) be so situated that the disposition of the action may, as a practical matter, impair or impede the intervenor’s ability to protect his or her interest; (3) demonstrate that his or her interest is not adequately represented by the existing parties; and (4) demonstrate that the motion to intervene is timely made. *Fairview General Hosp. v. Fletcher*, 69 Ohio App.3d 827, 831 (8<sup>th</sup> Dist. Ct. App. 1990). SIFMA would clearly meet these requirements, especially given that Ohio courts construe Rule 24 broadly and liberally to permit intervention. *See State ex rel. LTV Steel Co. v. Gwin*, 64 Ohio St.3d 245, 247 (1992); *Ohio Dept. of Adm. Serv., Office of Collective Bargaining v. State Emp. Relations Bd.*, 54 Ohio St.3d 48, 51 (1990); *State ex rel. Polo v. Cuyahoga County Bd. of Elections*, 74 Ohio St. 3d 143, 144 (8th Dist. Ct. App. 1995).

Thus, the impact of the Modified TRO's limitation on servicing activities and prohibition of foreclosure activities goes far beyond merely restraining the New Century Defendants.

The over-broad impact of the Modified TRO is due at least in part to the interplay between mortgage lending and the securitization market. The securitization market funds a tremendous number of mortgages nationally -- nearly \$2.4 trillion of mortgage backed securities were issued in 2006 alone. In these securitizations, the originator (here, the New Century Defendants) sells its rights in the mortgage loans but often continues to perform necessary loan servicing functions (collecting loan payments and enforcing other mortgage terms) on behalf of the debtholders whose funds have been used to purchase the mortgages. The New Century Defendants act as servicers on behalf of many securitization trusts and continue to service mortgages for which a variety of non-party financial institutions have provided funding. Thus, the number, variety and interests of non-party financial institutions that could be interpreted to be acting "in participation with" the New Century Defendants, and are therefore affected by restrictions like those contained in the Modified TRO, is significant.

## **LAW AND ARGUMENT**

### **A. A Preliminary Injunction May Not Unjustifiably Harm Third Parties**

In deciding whether to grant a preliminary injunction, the Court must consider whether (1) there is a substantial likelihood that the movant will prevail on the merits; (2) the movant will suffer irreparable injury if the injunction is not granted; (3) third parties will be unjustifiably harmed if the injunction is granted; and (4) the public interest will be served by granting the injunction. *Jacono v. Invacare Corp.*, 2006 Ohio 1596, P8-P9 (8<sup>th</sup> Dist. Ct. App. 2006); *Sinoff v. Ohio Permanente Med. Group*, 146 Ohio App. 3d 732, 740 (8<sup>th</sup> Dist. Ct. App. 2001).

Because a preliminary injunction is an extraordinary remedy, the moving party has a substantial burden to meet prior to issuance of the injunction. *Sinoff*, 146 Ohio App. 3d at 740. Indeed, the moving party must establish a right to the preliminary injunction by showing clear and convincing evidence of *each element* of the claim. *Id.* SIFMA's Amicus Brief is not intended to address the merits of the underlying lawsuit or whether Plaintiff has satisfied the first two elements necessary for granting a preliminary injunction. However, the Modified TRO reaches far beyond merely restraining the New Century Defendants and harms innocent third-party investors. Accordingly, any further order of this Court should take into consideration the concerns expressed by SIFMA herein.

**B. The Modified TRO and Relief Sought in the Motion for Preliminary Injunction Will Unjustifiably Harm Third Parties**

When an originator of mortgage loans (like the New Century Defendants) sells loans in the securitization market, they are generally sold to a trust that issues securities to a wide range of investors. The originator often continues to perform servicing functions relating to the mortgage loans, but as a result of the sale, the performance of the mortgage loans does not solely or significantly impact the originators. Indeed, it is the investors in the securitization that are most impacted by the performance of the mortgage loans.

If the New Century Defendants are prohibited from continuing to service loans at the point of foreclosure or servicing those loans currently in foreclosure, and the New Century Defendants are simultaneously precluded from transferring their servicing rights to another servicer, then investors having interests in defaulted loans in securitizations will be left without any means of enforcing the loans or collecting payments due to the investors that financed the loans in the first instance. A similar impact occurs where mortgage loans have been sold in the capital markets and non-party financial services companies for whom the New Century

Defendants are performing as servicer are precluded from initiating new foreclosures, continuing to prosecute existing foreclosures, and evicting defaulted mortgagors. The language in the Modified TRO (and presumably any similar preliminary injunction that may issue) which allows the New Century Defendants to transfer rights (including servicing rights up to the point of foreclosure), addresses some, but not all, of the non-party investors concerns.

**The Right to Transfer Servicing.** Indeed, in many instances transferring servicing from one servicer to the next disrupts servicing functions, reduces collectable payments, adds unnecessary costs, causes customer confusion, and ultimately results in a bigger loan deficiency for the borrower. Thus, it is preferable that the New Century Defendants be permitted to continue to service those mortgage loans for which they are currently the servicer.

In addition, while the Modified TRO permits the New Century Defendants to transfer servicing responsibilities, there may be any of a number of circumstances (beyond this Court's control) under which the New Century Defendants are prohibited from transferring their servicing rights. For instance, the terms of the servicing contract with the borrower may preclude the transfer of servicing, or perhaps an order from another court of competent jurisdiction (i.e. a bankruptcy court) may preclude transfer. In those instances, the New Century Defendants are precluded from transferring servicing responsibilities and thus must be permitted to perform the full array of servicing activities, including prosecuting foreclosures, in order to protect the non-party investors' rights.

**The Right to Foreclose.** To the extent that the New Century Defendants have originated loans in Ohio that were subsequently sold into securitizations, but the New Century Defendants remain as servicers on the loans, restrictions like those in the Modified TRO unjustifiably harm non-party investors. When one of these mortgage loans is delinquent to the point that

foreclosure would be appropriate, any significant delay or disruption in commencing the foreclosure process harms the non-party investors. If the New Century Defendants continue to be enjoined (or even significantly delayed) from commencing appropriate foreclosure proceedings, investors in the underlying securitizations may be injured in a number of ways:

- a) the value of the property in question may decline during the time between the borrower's default and when (i) foreclosure by the New Century Defendants/ Servicer is permitted, or (ii) the delinquent loan is removed from the securitization and transferred to a non-party that is permitted to foreclose;
- b) the servicer may continue to advance on the loan, and such advances, to the extent the property value declines, may further increase the extent of the deficiency on the loan. This could adversely affect investors to the extent collections from other securitized mortgage loans are used to repay any such unreimbursed servicing advance rather than being available for payments to investors.

**The Right to Continue With Pre-Existing Foreclosure Proceedings.** The value of any loan in foreclosure is typically measured via the following:

- (a) the likelihood of the resumption of performance by the borrower;
- (b) the timeline to liquidation and expected severity of the defaulted loan;
- (c) the likelihood of the resumption of performance by the borrower; and
- (d) the timeline to liquidation and expected severity of the defaulted loan.

Where the New Century Defendants have already commenced foreclosure, to the extent New Century is now forced to rescind or otherwise abandon foreclosure proceedings, the value of the loan as measured by the criteria above will diminish. To the extent that foreclosure is delayed, severity of loss on the defaulted loan is likely to increase. Because the foreclosure



timeline will be incrementally longer, foreclosure will, on a present value basis, be a less economic solution for the defaulted borrower<sup>2</sup> and investors.

### **CONCLUSION**

As demonstrated above, the Modified TRO and any similar order this Court might enter would have an unjustified impact on non-party financial services companies that have funded the purchase of mortgage loans originated and/or serviced by the new Century Defendants. This unintended consequence will severely impact the ability of third-party lenders in Ohio and beyond to originate mortgages through funding from the securitization markets, adversely affecting the public interest.

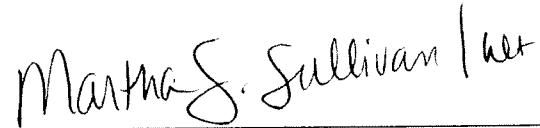
For all of the foregoing reasons, SIFMA urges this Court to consider its concerns in crafting any injunction or other order in this matter. If the Court determines that some measure of equitable relief is appropriate, SIFMA submits that the New Century Defendants should be permitted to continue servicing all existing loans, and that their servicing function should extend to all aspects of foreclosure proceedings against defaulting borrowers thereby protecting the interests of innocent non-party investors. It is imperative that any foreclosure proceedings occur without disruption or delay. Alternatively, SIFMA asks this Court to permit the New Century Defendants to institute and proceed with foreclosure actions in instances where the

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<sup>2</sup> Even the defaulting borrower can be harmed by delay in commencing foreclosure proceedings once the loan reaches the point that foreclosure is appropriate or necessary. In these instances the borrower has demonstrated that its loan has repayment terms that the borrower is not able to meet. Thus the borrower's circumstances are not improved if foreclosure is delayed – indeed, the borrower is better off if a foreclosure sale occurs expeditiously so that to the extent the borrower has any equity in the property, it can be captured to pay down the borrower's debt before that equity is eroded.

New Century Defendants are prohibited by operation of law from transferring or otherwise assigning its rights to another servicer to pursue the defaulting party.

Respectfully submitted,

Handwritten signature of Martha S. Sullivan in cursive script, with a horizontal line drawn underneath.

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**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing **AMICUS BRIEF OF THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION** was served upon the following by first-class U.S. Mail this 28th day of March, 2007:

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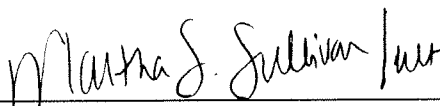
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