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February 18, 2022

The Honorable Kumar Barve, Chairman
House of Delegates Environment and Transportation Committee
House Office Building, Room 251
Annapolis, MD 21401

**RE: Testimony of Maryland Legal Aid in Support of House Bill 803 – Residential
Property Foreclosure – Filing and Adjudication of Counterclaims**

Dear Chair Barve and Members of the Committee:

Thank you for the opportunity to testify in favor of HB 803. Maryland Legal Aid (MLA) is a non-profit law firm that provides free legal services to the State's low-income and vulnerable residents, including abused and neglected children, nursing home residents, and veterans. With 12 offices serving residents in each of Maryland's 24 jurisdictions, MLA handles civil legal cases involving a wide range of issues, including family law, housing, public benefits, consumer law, and criminal record expungements to remove barriers to obtaining child custody, housing, driver's licenses, and employment. MLA submits this written testimony on SB 197 at the request of Delegate Nicole Williams. MLA supports this Bill and asks that the Committee give it a favorable report.

MLA's view is that HB 803 would clarify existing Maryland law regarding the civil procedure for homeowners, attorneys, and courts and make plain for all that a homeowner in foreclosure has the right to assert any claim against any opposing party, just like any other civil litigant. In addition, HB 803 reinforces Maryland law that there shall be one form of action known as "civil action." Finally, HB 803 upholds the right to a jury trial in cases where issues of law and equity may be combined, such as in a foreclosure case.

The intent of HB 803 is "to affirm the holdings of the Court of Appeals in *Fairfax Savings, FSB v. Kris Jen Limited Partnership et al.* ², and *Higgins v. Barnes* ¹". In these two cases and the many others that have since followed, the courts sought to clarify a lingering uncertainty in civil legal procedure that continues to persist since the state's 1984 merger of law and equity procedure. In Maryland, foreclosure cases are equitable proceedings decided by a judge and distinct from actions at law. However, foreclosure

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cases also present legal issues beyond those in an equitable proceeding, such as breach of contract, fraud, and violation of fiduciary duties. These legal proceedings grant the right to a jury trial, which is not afforded in equitable proceedings. The uncertainty that persists is whether separate proceedings are required to address common issues that arise in both law and equity. Although the *Higgins* case outlined the ground rules for resolving common issues raised in law and equity claims, there is still a need for specific guidance. HB 803 provides this necessary clarification.

Among the goals of the 1984 merger was to address this dichotomy of "two courts" and allow a litigant the opportunity to address all legal and equitable remedies suited to a particular case into a single court action. This bill would allow Marylanders to fight for their homes, raise defenses, challenge the right to foreclose, and try any legal claims before a jury without the need for a separate court action. HB 803 states clearly and plainly that a homeowner has the right to file a counterclaim, to address legal claims and seek relief, and to request a trial by jury, which is a long-recognized right in Maryland. Furthermore, HB 803 instructs courts to resolve legal claims before equitable claims, which is already within their power.

Homeowners will benefit from having the right to file a counterclaim preserved until after foreclosure mediation occurs and have the counterclaim adjudicated before a foreclosure sale occurs. The foreclosure mediation may be the first time the homeowner has the opportunity to speak to the mortgage lender/servicer, learn the final decision of loss mitigation efforts, and receive discoverable information that may support a counterclaim.

Mortgage servicers also change accounts very frequently, at times, right in the middle of working with a homeowner on a loan modification or other possible solution, while the homeowner is often the last to know that the loan was sold and the new loan servicer will not honor the agreement. Allowing the homeowner to file a counterclaim after a foreclosure mediation would allow them to litigate against an uncooperative successor mortgage servicer they were unaware of before the mediation.

The opportunity to file a counterclaim in the foreclosure case after a mediation would also allow homeowners to pursue damages against foreclosure servicers that abuse the foreclosure process. A recent MLA client made every mortgage payment, but her loan servicer wrongly filed a foreclosure case against her. Eventually, the servicer agreed to dismiss the case, but the whole situation caused the homeowner a great deal of distress and confusion. Under the proposed law, the homeowner is informed that she can pursue a counterclaim and damages in the foreclosure case filed against her without filing a

separate independent affirmative claim. Under the current practice, it is not clear that she could bring a counterclaim within the case itself.

This law also would provide more opportunities for homeowners to litigate issues about charges on their mortgage and verify the calculation of arrears. Currently, if the homeowner is in default, litigating the default amount in the foreclosure case is not helpful because an incorrect amount is not grounds for a stay or dismissal. Right now, homeowners would have to file a Chapter 13 bankruptcy case in federal court and a formal objection to the accounting calculation to contest these issues. There is no relief under Maryland law. Under HB 803, however, the incorrect calculation of arrears may be grounds for a counterclaim, which would allow a homeowner to litigate these issues.

This law would help homeowners in the fight to save their homes and clearly state the rights that individuals have in foreclosure cases. It settles the confusion over how to handle common issues that arise in both law and equity claims for attorneys and courts. These are both significant benefits to Marylanders and MLA clients. Thank you for considering this written testimony. For the reasons stated above, **Maryland Legal Aid urges a favorable report on House Bill 803.**

/s/ William F. Steinwedel

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