To be Argued by:
CHAVA BRANDRISS
(Time Requested: 30 Minutes)

APL-2019-00145
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Appellate Division–Second Department Docket No. 2016-01722

Court of Appeals

of the

State of New York

US BANK NATIONAL ASSOCIATION, as Trustee for Deutsche ALT-A Securities Mortgage Loan Trust, Series 2007-2,

Plaintiff-Respondent,

– against –

KENYATTA NELSON and SAFIYA NELSON,

Defendants-Appellants,

– and –

MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., as nominee for Knightbridge Mortgage Bankers, NEW YORK CITY CRIMINAL COURT, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY PARKING VIOLATIONS BUREAU, NEW YORK CITY TRANSIT ADJUDICATION BUREAU, PEOPLE OF THE STATE OF NEW YORK, JANE DOE #1, JOHN DOE #1, KERRY NEWES, LAMEKA MATTHEWS, SHAINA NELSON and SHAUNA LEWIS,

Defendants.

BRIEF FOR PLAINTIFF-RESPONDENT

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Date Completed: February 6, 2020

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 500.1(f) of the Rules of Practice of the Court of Appeals, 22 NYCRR Part 500, counsel for Plaintiff-Respondent U.S. Bank National Association, as Trustee for Deutsche Alt-A Securities Mortgage Loan Trust Series 2007-2, discloses that U.S. Bank National Association acts in a representative capacity only as trustee for Deutsche Alt-A Securities Mortgage Loan Trust Series 2007-2. Deutsche Alt-A Securities Mortgage Loan Trust Series 2007-2 is a trust, the assets of which consist of mortgage loans; it has no parents, subsidiaries or affiliates. U.S. Bank National Association is a wholly-owned subsidiary of U.S. Bancorp, a publicly-held corporation.

Dated: February 6, 2020

Respectfully submitted,

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QUESTIONS PRESENTED

1. Is ownership of a mortgage note, or mortgage debt, a necessary element in a residential foreclosure cause of action?

   Because Defendants-Appellants did not raise this issue below, the Appellate Division, Second Department, did not rule on it.[1] The court did, however, observe that a "cause of action to foreclose a mortgage requires allegations regarding the existence of a mortgage, the unpaid note, and the defendant's default thereunder," A.874, excluding plaintiff's ownership of the note, or underlying mortgage debt, as an essential element.

2. Was Defendants-Appellants' mechanical and conclusory denial of knowledge of nearly all of the residential foreclosure complaint's factual allegations adequate to plead lack of standing as an affirmative defense?

   Although Appellants did not timely raise the issue in the trial court, the Appellate Division ruled that Defendants-Appellants' answers were inadequate to raise lack of standing as an affirmative defense.

[1] Thus, no citations to pages of the record or appendix where this question has been preserved for the Court's review are available, as Rule 500.13(a) of this Court requires.

INTRODUCTION

A defendant waives an affirmative defense if its answer does not place the plaintiff on notice it will be relying on that defense later in the litigation. That simple rule resolves this case.

Plaintiff-Respondent brought a foreclosure action against the Nelsons, who had defaulted on their mortgage loan payments. Years into the litigation, after summary judgment had already been granted to Plaintiff over the Nelsons' objections, the Nelsons argued for the first time that Plaintiff lacked standing to bring suit because it could not prove it owned the debt. Lack of standing is an affirmative defense, waived if not pled in a defendant's answer.

The Nelsons' answers here did not adequately plead lack of standing. Instead, the answers raised *other*, unrelated affirmative defenses and broadly denied, in a single sentence, knowledge of nearly all of the complaint's factual allegations. The Appellate Division held that was insufficient to put Plaintiff on notice that the Nelsons would be relying on a lack of standing defense.

The Nelsons present two legal questions for this Court to rule on. Both arguments were forfeited below. The Court therefore should not rule on them at all. And both arguments sharply depart from widely-accepted rules governing both pleading procedure and substantive foreclosure law. *First*, the Nelsons ask this Court to hold that "ownership of a mortgage note" is a necessary element of a

foreclosure claim. No court—ever—has so ruled. Nor did the Second Department even address the issue, since the Nelsons did not make the argument until they asked the Second Department to certify the case to this Court. Instead, ownership of mortgage debt relates to a foreclosure plaintiff's standing, which in New York is a waivable, affirmative defense that the defendant bears the burden to plead. Moreover, the Nelsons' proposed rule is unworkable. A mortgage debt's *owner* is sometimes distinct from the legal *holder* of the mortgage note under the New York Uniform Commercial Code, yet both have standing to foreclose on a defaulted mortgage. Under the Nelsons' proposal, mortgage note holders who are not also the underlying debts' owners would be barred from bringing suit—upending a *statutory* rule that note holders have long relied on.

Second, the Nelsons ask the Court to hold that their general denial, in a single sentence, of knowledge of nearly all of the complaint's factual allegations was sufficiently specific to plead a lack of standing defense. That is wrong. Notice is the lodestar for whether an affirmative defense is adequately pled. And in this case, offering a single, mechanical, and conclusory denial of knowledge of nearly every factual allegation did not put Plaintiff on notice that the Nelsons were relying on an otherwise unstated affirmative defense, lack of standing.

The rules the Second Department applied when it considered whether the Nelsons adequately pled a lack of standing defense are well-worn and widely relied upon. If the Court reaches the merits, it should affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Nelsons Default On Their Loan.*

In June 2007, the Nelsons obtained a loan from Knightbridge Mortgage Bankers in the original principal amount of $660,000.00 (the "Mortgage Loan"), secured by a mortgage on real property located at 740 East 88th Street, Brooklyn NY 11236 (the "Property"). R.25, 37, 124-148.[1] Soon after, the Mortgage Loan was sold, transferred and assigned to the Deutsche ALT-A Securities Mortgage Loan Trust, Series 2007-2, a residential mortgage loan trust for which Plaintiff US Bank National Association serves as trustee. R.25-26, 38, 189; A.120. Wells Fargo Bank, N.A. is loan servicer for the trust. A.120, 223-24. The Nelsons failed to make the payment due May 1, 2009 and have made no payments on their Mortgage Loan in over a decade. R.38, 112-13, 189-90. During that time, Plaintiff has advanced over $43,000 for property taxes and insurance, R.110, while the Nelsons likely collect rental income from several tenants residing in apartments at the Property, A.151-57, 345.

[1] Citations beginning with "R" are references to pages in the Record on Appeal filed in the Second Department. Citations beginning with "A" are to the Nelsons' Appendix filed in this Court.

B. ***Plaintiff Commences Foreclosure, And The Nelsons File Answers To The Complaint Pleading Several Affirmative Defenses—But No Lack Of Standing Defense.***

Plaintiff commenced this foreclosure action in the Kings County Supreme Court on September 15, 2009. R.26, 35-46; A.5-16. In total, the complaint contained seventeen separate allegations, several of which contained several distinct factual claims. *Id.* The first paragraph alleged: "Plaintiff is a national banking association duly organized and existing under and by virtue of the laws of the United States of America and having its principal place of business in Cincinnati, OH, and the owner and holder of a note and mortgage being foreclosed." A.7. The second stated: "On or about the 25th day of June, 2007, Kenyatta Nelson and Safiya Nelson duly executed and delivered an ajudstable rate note whereby Kenyatta Nelson and Safiya Nelson promised to pay the sum of $660,000 with interest on the unpaid balance of the debt." *Id.* (capitalization altered). The third paragraph alleged:

> As security for the payment of said note Kenyatta Nelson and Safiya Nelson duly executed and delivered a mortgage in the amount of $660,000 which mortgage was recorded as follows for mortgage tax paid thereon:
>
> Recording Date: July 9, 2007
> Instrument Number: 20007000348747
> County (or City Register of): Kings
>
> The mortgage was subsequently assigned to US Bank National Association, as Trustee for Deutsche ALT-A Securities Mortgage

> Loan Trust Series 2007-2 by assignment dated August 10, 2009 and sent for recording in the Office of the Kings County Clerk.

A.7-8 (capitalization altered). And the fourth stated: "The mortgaged premises are commonly known at 710 EAST 88TH STREET, BROOKLYN, NY 11236 and more fully described in 'Schedule A' attached to this complaint. The tax map designation is known as all or part of SBL; Block 8008 Lot 56." A.8. The complaint also alleged that the Nelsons promised to pay the sum of $660,000 plus interest and that they failed to do so. A.7-8.

The Nelsons filed separate, but identical, answers *pro se* in October 2009. A.18-19, 22-23. The answers admitted the allegations in paragraphs 2 (identifying th emortgage note) and 4 (identifying the mortgaged property). *See* A.18, 22. For every other paragraph (15 in total), the Nelsons stated, in a single sentence, that they lacked "knowledge or information necessary to form belief as to the truth of the allegation[ ]." *Id.* The answers did not specifically deny or otherwise address any of the complaint's allegations. *Id.* The answers also raised a number of affirmative defenses. Under the "Affirmative Defenses" heading, the answers asserted only: "Lack of proper service of summons and complaint and mortgage company pre qualified me (Defendant) for a loan modification and pressured to use the attorney they appointed and property value was inflated." *Id.*

C. *The Trial Court Awards Plaintiff Summary Judgment, Over The Nelsons' Objections—Which Did Not Include Standing Objections.*

Plaintiff moved for summary judgment against the Nelsons in April 2010. A.28-176. The Nelsons did not oppose the motion. While the motion was pending, the trial court scheduled mandatory foreclosure settlement conferences, which continued for several years. A.179-86, 384. Plaintiff withdrew the motion in November 2010. A.339-40, 384. Counsel appeared for the Nelsons, A.183, and when conferences concluded, apparently not realizing that Plaintiff withdrew the motion, the court provided additional time for the Nelsons to oppose Plaintiff's motion. A.187. The Nelsons still did not oppose. The court then denied Plaintiff's withdrawn motion without prejudice. A.197.

In February 2014, the Supreme Court, with Justice Noach Dear presiding, *sua sponte* dismissed the action without prejudice for failure to prosecute.[2] A.201; R.97-98, 254-255. A status conference was held in April 2014, this time with Justice Lawrence Knipel presiding. *See* A.386. Justice Knipel was unaware of the dismissal order, R.255 n.5, and gave Plaintiff 90 days to file its motion for summary judgment, R.255; *see also* A.386. Later that month, as directed by Justice Knipel, Plaintiff filed and served a second motion for summary judgment. *See* A.206-373; *see also* A.386.

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[2] That order was later vacated, *infra* 8.

In its motion for summary judgment, Plaintiff argued that "[i]t is well settled that in moving for Summary Judgment in an action to foreclose a mortgage, a plaintiff establishes its case as a matter of law through the production of the mortgage, the unpaid note, and evidence of default." A.214. Plaintiff attached that documentation, and on that basis argued it had "established prima facie proof of its right to summary judgment." A.216, 220. It then rebutted the Nelsons' first affirmative defense, "lack of personal jurisdiction," A.217, their "second defense," that the "mortgage company pre-qualified them for a loan modification," A.218, and their "final defense[ ]," that "they were pressured into using the appointed attorneys and the property value was inflated," A.219.

The Nelsons did not respond to this motion either. But the Supreme Court denied Plantiff's motion for summary judgment as moot, ruling that the case had already been dismissed, *see* A.375.

In September 2014, Plaintiff filed a motion asking the trial court to vacate the order of dismissal as improper, to restore the action to the calendar, to allow reargument of and grant its motion for summary judgment, and to appoint a referee to compute amounts due. A.377-639. In reponse, the Nelsons, through new counsel, argued that the court's *sua sponte* dismissal was justified. A.644-45. As for Plaintiff's motion for summary judgment, the Nelsons responded with just three sentences. A.645-46. They stated that because "the action was already

dismissed on February 26, 2014," Plaintiff's motion for summary judgment was moot. *Id.* The Nelson's did not raise the issue of Plaintiff's standing.

The Supreme Court granted Plaintiff's motion. R.100-01. It ruled that "[t]hough this case has dragged for nearly six years already, the Court will not assess any sanction against plaintiff as the delay was largely justifiable." A.678. The court granted Plaintiff's motion for summary judgment because "Defendants' sole ground" for opposing summary judgment "is that the case was dismissed." A.679. In doing so, the court "ordered[ ] that the plaintiff is awarded summary judgment and the Answers and Counterclaims of the defendants, Kenyatta Nelson and Safiya Nelson, are hereby stricken." A.667 (capitalization altered). Finally, the court appointed a referee to compute the amount the Nelsons owed Plaintiff. A.667-68, 679.

D. *The Supreme Court Awards Plaintiff A Final Judgment Of Foreclosure And Sale, And Denies The Nelsons' Cross-Motion To Dismiss.*

In July 2015, the referee executed his report, calculating that the Nelsons owed $877,248.08. R.27, 106-14.

Plaintiff then filed a motion for judgment of foreclosure and sale ("JFS Motion"), seeking the sum set out in the referee's report, and asking that the Property be sold to satisfy that sum. Roughly two months *after that*, the Nelsons opposed Plaintiff's JFS Motion and cross-moved to dismiss the Complaint. *See* R.155-69. The Nelsons argued—for the first time—that the complaint should be

dismissed because Plaintiff allegedly failed to comply with pre-foreclosure notice requirements, and failed to demonstrate standing to commence the action. R.159-69, 203-13.

The Supreme Court granted Plaintiff's JFS Motion and denied the Nelsons' cross-motion to dismiss. The court held "[b]oth of these defenses should have been raised previously when Plaintiff successfully sought summary judgment." R.17. "While Defendants did oppose that motion, they raised neither issue in response to Plaintiff setting forth its case for judgment—which explicitly included that Plaintiff has standing and the Defendants were [properly] served . . . ." R.17-18 (footnotes omitted). Further, the Supreme Court ruled that even "[i]f Defendant's answer were deemed to raise an issue of standing, the Court's grant of summary judgment resolved that issue." R.18 n.1. Because the court had already issued its summary judgment order, which resolved any defenses to foreclosure the Nelsons raised or were entitled to raise, the trial court ruled that it "cannot and will not revisit the issues of standing and [notice]." R.18.

E. *The Appellate Division Holds That The Nelsons' Answers Were Inadequate To Raise A Lack Of Standing Defense.*

The Nelsons appealed. Before the Second Department, they argued that "Plaintiff-Respondent lacked standing to commence the action." *See* A.766 (capitalization altered). The Nelsons argued "[w]here standing is put into issue by a defendant's answer, a plaintiff must prove its standing in order to be entitled to

relief." *Id.* Looking to that standard, the Nelsons argued their "Verified Answers" had "sufficiently put Plaintiff-Respondent's standing at issue" by denying knowledge of Plaintiff's allegation regarding its ownership of the note as part of a broad denial of knowledge of the complaint's allegations. A.767. Plaintiff, in response, argued that the answers were inadequate to raise a lack of standing defense and that even if they were adequate, the Nelsons forfeited the lack of standing defense by not timely raising it in opposition to Plaintiff's motions for summary judgment. A.802-04.

The Appellate Division rejected the Nelsons' arguments. It affirmed the Supreme Court's decision, without addressing Plaintiff's untimeliness argument. A.848-54. The question presented was: "[W]hether, in a mortgage foreclosure action in which the complaint alleges that the plaintiff is the owner and holder of the note and mortgage, the mere denial of that allegation in the answer, without more, is sufficient to assert that the plaintiff lacks standing, thereby preserving that issue for adjudication." A.847.

The court began by noting "[i]t is by now a firmly established principle that the issue of whether a plaintiff lacks standing to commence an action is waived unless it is raised in the answer or in a pre-answer motion to dismiss." A.846. It held whether "the issue of standing is waived" comes down to notice. A.851. The defense "is waived absent some affirmative statement on the part of a mortgage

foreclosure defendant . . . , which must clearly, unequivocally, and expressly place the defense of lack of standing in issue by specifically identifying it in the answer or in a pre-answer motion to dismiss. A mere denial of factual allegations will not suffice for this purpose." A.851. The answer or pre-answer motion to dismiss "need not invoke magic words or strictly adhere to any ritualistic formulation;" instead, it must alert plaintiff that "lack of standing" will be an issue in the litigation. *Id.*

The court concluded that "[s]ince the Nelson defendants made no pre-answer motion to dismiss, and merely denied the majority of the factual allegations in their answers without specifically raising a challenge to the plaintiff's standing, the issue of standing was waived." A.852-53. It reasoned that "[t]aken to its logical conclusion, the Nelson defendants' position would mean that their denials preserve all conceivable affirmative defenses that can be parsed from reading the factual allegations of the complaint in conjunction with their corresponding and conclusory denials, so that these defenses may be raised at some subsequent point in the case. Such a result would render the obligation under CPLR 3018(b) to specifically plead affirmative defenses in the answer meaningless . . . ." A.851-52.

Justice Duffy dissented in part. She agreed that "the defense of lack of standing is waiv[able]" and that the "crux of the dispute" was whether the Nelsons' answers had preserved the lack of standing defense. A.856. Justice Duffy also

agreed that whether the lack of standing defense is waived comes down to whether, based on the answer, the plaintiff would "reasonably have notice[d] that standing is in issue." A.866. Going against the majority, Justice Duffy stated that the answers here "are sufficiently specific to alert the plaintiff that standing is in issue." A.866. In Justice Duffy's view, the answers had "in effect, specifically denied the plaintiff's allegation that it was the owner and holder of the note at the time the action was commenced and, by doing so, put the plaintiff on notice that standing was in issue." A.867. Moreover, with standing having been put in issue, the dissent would have ruled that Plaintiff's evidence was insufficient to establish, prima facie, its standing to have commenced the action. A.867-68.

F. *The Appellate Division Certifies The Case For Review By This Court.*

The Nelsons filed a motion for reargument and alternatively for leave to appeal to the Court of Appeals. They made two arguments. The first one was new. They argued that "it was an error for the Court to construe U.S. Bank's ownership of the note as an issue of standing." A.913. According to the Nelsons, Plaintiff's "ownership allegation is an element of [its] prima facie case,"—not an affirmative "standing" defense that must be separately pled. A.913, 919. Their answers' general denial therefore "was sufficient to place the allegation at issue and avoid a waiver." A.919. Second, the Nelsons argued that even if the issue of ownership of the debt was part of a "standing affirmative defense," and not a

stand-alone element of a prima facie foreclosure claim, Justice Duffy was correct and their answers sufficed to raise it as an affirmative defense. A.920. In opposition, Plaintiff responded that these arguments were both wrong on the merits and unpreserved. A.1189-90.

The Second Department denied the Nelsons' motion for reargument, but granted them leave to appeal to this Court. A.1234.

Plaintiff filed a motion to dismiss the appeal for lack of jurisdiction, A.1235-79, aruging that because both of the Nelsons' arguments were unpreserved, this Court did not have jurisdiction over the appeal. A.1262-65. The Court denied the motion. A.1313-15.

ARGUMENT

The Nelsons raise two arguments. First, they assert that ownership of mortgage debt is not part of a lack of standing affirmative defense at all. Instead, it is a necessary element of a foreclosure claim. Accordingly, their answers' mere denial of Plaintiff's allegation that it owned the mortgage note was sufficient to place that matter at issue and preserve it for post-pleading development. *See* Opening Br. 23 ("[A] mere denial of one or more elements of the cause of action will suffice to place them in issue" (quoting A.848)).

Second, and alternatively, the Nelsons assert that if ownership of a mortgage debt is part of a lack of standing affirmative defense (as opposed to an element of a

foreclosure claim), the Nelsons' answers satisfied their burden to adequately plead it. Neither argument is preserved, and both lack merit.

POINT I

THE NELSONS' ARGUMENT THAT OWNERSHIP OF THE MORTGAGE NOTE IS AN ELEMENT OF A FORECLOSURE CLAIM IS UNPRESERVED AND WRONG.

When a borrower takes out a home loan, he or she usually executes two documents: (i) "[A] promissory note by which he agree[s] to repay the sum" he borrowed, plus interest, and (ii) a "mortgage" on the home, which serves as collateral for the promissory note. *Deutsche Bank Tr. Co. Americas v. Vitellas*, 131 A.D.3d 52, 54 (2d Dep't 2015); *see also, e.g., Wells Fargo Bank N.A. v. Ho-Shing*, 168 A.D.3d 126, 128 (1st Dep't 2019).

The Nelsons now contend that foreclosure plaintiffs are required to show they "own[]" the note to establish an essential "element of the foreclosure cause of action." Opening Br. 17. That argument is both forfeit and incorrect. Ownership of the note (or of the underlying debt) is treated as a lack of standing *defense* and only comes into play if a defendant specifically, and affirmatively, raises it.

A. The Nelsons Failed To Preserve Their Argument That Ownership Is An Element Of A Foreclosure Claim.

Neither the Appellate Division nor the trial court ruled on whether ownership of the note is an essential element of a foreclosure claim. For good

reason: The Nelsons did not raise this argument until their motion for reargument before the Appellate Division. This Court should therefore decline to decide it. *See* Arthur Karger, *The Powers of the New York Court of Appeals* § 17.2 (July 2019 update) ("Where the new question is raised for the first time on motion for reargument, the Court of Appeals appears to have applied a firm rule, save in exceptional circumstances, that such a motion is not an appropriate vehicle for raising new questions . . . which were not previously advanced either in this court or in the courts below." (internal quotation marks and footnotes omitted); *see also, e.g.*, *Salino v. Cimino*, 1 N.Y.3d 166, 173 (2003) (concerning an argument raised for the "first time" in petitioner's motion for reargument: "Neither court below having addressed [the issue], we will not be the first to do so.").

The Nelsons did not argue below that ownership of a mortgage note is an essential element of a foreclosure claim. Their ownership-related arguments were all presented to support their lack of standing affirmative defense. R.164 ("Plaintiff is not entitled to a judgment of foreclosure and sale as plaintiff lacked standing to commence the instant action."); A.735 ("defendants sufficiently raised plaintiff's lack of standing at issue in defendants' Verified Answer"), A.756 (same).

On reargument, by contrast, the Nelsons argued for the first time that they "do not dispute the general rule that an 'affirmative defense'—such as lack of

standing—is waived when it is not asserted in a responsive pleading or pre-answer motion to dismiss." A.913. Under their new theory, because "ownership . . . is an element of [Plaintiff's] prima facie case, . . . the denial was sufficient to place the allegation at issue and avoid a waiver." A.919. That is different from the Nelsons' second, alternative argument made on the next page: "[W]here, as here, [the] standing issue appears on the face of the pleading," it need not be separately and affirmatively pled to avoid waiver. A.920. And this second, alternative argument is the only one the Nelsons made in the trial court and in the Appellate Division before their motion for reargument. Accordingly, it is also the only question the Appellate Division ruled on. A.848-53; *see* A.1277-78.

Recognizing this vulnerability, the Nelsons point to three passages in their lower court briefing to assert they argued that ownership of the note is an element of a foreclosure claim. Opening Br. 46-47. These passages stated that ownership of the note is a part of plaintiff's "prima facie case." *See id.* (quoting R.165, A.766, A.768-69, A.812). But all of those passages discussed what a plaintiff's burden is if the defendant raises a lack of standing *affirmative defense*. They were part of the Nelsons' argument that "Plaintiff Must Prove Standing In Order To Be Entitled To Relief Where Standing Is Put Into Issue By A Defendant's Answer[A]nd Defendants-Appellants Sufficiently Put Standing Into Issue." A.766; *see* R.164 (same); R.165 (same). That simply reiterates the settled rule that

if—and only if—defendants place standing in issue, then the plaintiff must show that it has the right to sue for the mortgage debt. *See infra* 18-22 (collecting sources). The argument that ownership is an essential element of a foreclosure claim is different, was never raised below, and is thus unpreserved for this Court's review. *U.S. Bank Nat'l Ass'n v. DLJ Mortg. Capital, Inc.*, 33 N.Y.3d 84, 89 (2019) (for preservation on appeal, the appellant "must 'raise the specific argument[ ]' " in the lower court " 'and ask the court to conduct that analysis' in the first instance." (quoting *In re N.Y.C. Asbestos Litig.*, 27 N.Y.3d 1172, 1176 (2016)).

Plaintiff argued in its motion to dismiss the appeal that these deficiencies deprived this Court of jurisdiction to hear the Nelsons' "ownership" argument. A.1262-65, 1268-73. The Court denied that motion. A.1313-15. But simply because the Court determines that it has jurisdiction to hear an unpreserved argument, does not mean that it should. *Misicki v. Caradonna*, 12 N.Y.3d 511, 525 (2009) (Smith, J., dissenting) ("Our preservation rule is an important one—so important that we have occasionally referred to it as a matter of 'jurisdiction.' But it is not truly jurisdictional, in the sense of being a limitation on our power."). There is a "general" non-jurisdictional "rule" that this Court does not "resolve cases on grounds raised for the first time on appeal." *Id.* at 519 (majority op.). The Court may "dispens[e]" with that "preservation requirement" where it is

"unreasonable to expect [the argument] to have been preserved below," *id.* at 525-26 (Smith, J., dissenting). But that is a "rare[]" "exception," *id.* at 519 (majority op.), and the Nelsons offer no reason for why it applies here. Because the Nelsons never raised this question to the lower courts, and those courts never ruled on it, this Court should not decide—in the first instance—whether ownership is a necessary element of a foreclosure cause of action.[3]

B. Ownership Is Not An Element Of A Foreclosure Claim.

1. Case law, treatises, and recent legislation uniformly hold that "ownership" of mortgage debt is not an element of a foreclosure claim.

If the Court decides the issue, it should rule ownership of mortgage debt is not an element of a foreclosure claim. The legal authority is unanimous: To establish the "elements" of a foreclosure claim, the "plaintiff must produce the mortgage, the unpaid note, and evidence of default." *Deutsche Bank Nat'l Tr. Co. v. Matzen*, 174 A.D.3d 504, 505 (2d Dep't 2019) (quoting *US Bank N.A. v. Nelson*, 169 A.D. 3d 110, 114 (2d Dep't 2019), and citing *Aurora Loan Servs., LLC v. Vrionedes*, 167 A.D.3d 829, 830 (2d Dep't 2018); *JP Morgan Chase Bank, N.A. v. Weinberger*, 142 A.D.3d 643, 645 (2d Dep't 2016)). Literally hundreds of

[3] This argument is also unpreserved for reasons explained at *infra* 37-41. The Nelsons did not raise standing or "ownership" arguments at all until after the trial court had already granted summary judgment to Plaintiff, and, for that reason as well, the argument is unpreserved.

Appellate Division cases, from all four departments, follow that framework. *See, e.g.*, *Deutsche Bank Nat'l Tr. Co. v. Rasheed*, 169 A.D.3d 532, 532 (1st Dep't 2019); *Bank of N.Y. Mellon v. Simmons*, 169 A.D.3d 1446, 1446 (4th Dep't 2019) (citing several Fourth Department cases); *U.S. Bank Nat'l Ass'n v. Brjimohan*, 153 A.D.3d 1164, 1165 (1st Dep't 2017); *U.S. Bank Nat'l Ass'n v. Carnivale*, 138 A.D.3d 1220, 1220 (3d Dep't 2016) (citing several Third Department cases)); *71 Clinton St. Apts. LLC v. 71 Clinton Inc.*, 114 A.D.3d 583, 584 (1st Dep't 2014).

The leading mortgage and foreclosure treatises also universally agree. As *Bergman on New York Mortgage Foreclosures* states, "it is well settled that in moving for summary judgment in a mortgage foreclosure action, a plaintiff establishes its case as a matter of law through production of the mortgage, the unpaid note, and evidence of default." 2 Bruce J. Bergman, *Bergman on New York Mortgage Foreclosures* §21.01[1] & n.51 (Matthew Bender ed. 2019) (hereinafter, "*Bergman*") (citing over 100 cases); *see also* 78 N.Y. Jur. 2d Mortgages § 629 (Nov. 2019 update) (same); 2 Mortgages and Mortgage Foreclosures in N.Y. § 33.13 (2019) (same). Under this well-established framework, *ownership* of the mortgage debt is not an element of a foreclosure claim. *See, e.g.*, *JP Morgan Chase Bank v. Butler*, 129 A.D.3d 777, 780 (2d Dep't 2015) (plaintiff need not establish ownership "to demonstrate its prima facie entitlement to judgment as a matter of law" (citation omitted)); *see also Carnivale*, 138 A.D.3d at 1220-21;

CWCapital Asset Mgmt., LLC v. Great Neck Towers, LLC, 99 A.D.3d 850, 851 (2d Dep't 2012).

A foreclosure defendant may raise a defense based on standing. If the defendant does so, the foreclosure plaintiff will be required to prove its standing as part of its *prima facie* case on summary judgment. *See Vitellas*, 131 A.D.3d at 59.[4] That is where *ownership* might come in. A defendant may challenge a foreclosure plaintiff's standing by asserting plaintiff is "not the legal *owner* or holder of the underlying note." *Wells Fargo, N.A. v. Levin*, 101 A.D.3d 1519, 1521 (3d Dep't 2012) (emphasis added); *see also infra* 27-28 (collecting sources explaining standing is established where plaintiff is the owner (or assignee) of the mortgage debt or holder of the mortgage note).

Critically, lack of standing is treated as an affirmative defense under CPLR 3211(e). *See, e.g., Wells Fargo Bank Minn., Nat'l Ass'n v. Mastropaolo*, 42 A.D.3d 239, 242 (2d Dep't 2007); *see also* CPLR 3211, Practice Commentaries, C3211:13. And like other affirmative defenses, it is waived unless a party raises it

[4] Here, again, literally hundreds of cases and all the leading mortgage foreclosure treatises agree: Standing is a defense that a court decides *only* if the defendant makes it an issue. *See, e.g., U.S. Bank Nat'l Ass'n v. Cox*, 148 A.D.3d 962, 963 (2d Dep't 2017) (citing several cases); *Carnivale*, 138 A.D.3d at 1220-21 (same); *LNV Corp. v. Francois*, 134 A.D.3d 1071, 1071-72 (2d Dep't 2015) (same); *Deutsche Bank Nat'l Tr. Co. v. Islar*, 122 A.D.3d 566, 567-68 (2d Dep't 2014) (reassigning case to a "different Justice" because the first had "flagrantly ignore[d]" the rule that the standing defense is waived if not affirmatively raised by defendant); 82 N.Y. Jur. 2d Parties § 23 (Nov. 2019 update).

in their pleading or pre-answer motion to dismiss. *Fossella v. Dinkins*, 66 N.Y.2d 162, 167-68 (1985) (per curiam); *Dougherty v. City of Rye*, 63 N.Y.2d 989, 991-92 (1984); *see also South Point, Inc. v. Rana*, 139 A.D.3d 935, 935-36 (2d Dep't 2016) (same); *Butler*, 129 A.D.3d at 780 ("A party's alleged lack of standing to commence [an] action is a defense that is waived if not raised in an answer or in a pre-answer motion to dismiss the complaint" (quoting *Mastropaolo*, 42 A.D.3d at 240, and citing several sources)); *Bank of N.Y. Trust Co. v. Chiejina*, 142 A.D.3d 570, 572 (2d Dep't 2016) (same); 2 *Bergman* § 19.03.[5]

Until the Nelsons' motion for reargument to the Appellate Division, both parties and the Appellate Division's majority and dissenting opinion agreed that this framework governs. The majority opinion observed that "[a] facially adequate cause of action to foreclose a mortgage requires allegations regarding the existence of the mortgage, the unpaid note, and the defendant's default thereunder, which, if subsequently proven, will establish a prima facie case for relief." A.848. The dissent agreed, "[n]arrowing the [d]ispute" to clarify that there is "no dispute that the defense of lack of standing is waived when it is not asserted in a responsive pleading or pre-answer motion to dismiss." A.882 (Duffy, J., dissenting).

[5] The Nelsons do not dispute that lack of standing is an affirmative defense, waived if not raised in the answer or pre-answer motion to dismiss.

That framing follows naturally from this Court's foreclosure standing decision in *Aurora Loan Services, LLC v. Taylor*, 25 N.Y.3d 355 (2015). There, the defendant submitted a motion for summary judgment seeking dismissal of the foreclosure complaint, "asserting that [the plaintiff] did not have standing to bring this foreclosure action." *Id.* at 359. It argued that "an entity with a note but no mortgage lacks standing." *Id.* at 361. This Court rejected that. *Id.* In doing so, the Court's discussion of plaintiff Aurora's status as holder of the note was solely a discussion of standing—not a question of what elements a foreclosure cause of action contains. *Id.* at 361-62.

The legislature also recently reaffirmed that standing is an affirmative defense in foreclosure actions, not an element of the claim. As stated, courts have uniformly held that standing in foreclosure cases—like in all cases—is an affirmative defense that must be raised in defendant's pleading or pre-answer motion. *See supra* 18-21. On December 17, 2019, the legislature amended that rule *specifically for foreclosure actions*. It passed S.B. 5160, 2019-2020 Reg. Sess. (N.Y. 2019), adding a new code section entitled "Defense of Lack of Standing; Not Waived." The new law states: "Notwithstanding the provisions of subdivision (e) of rule thirty-two hundred eleven of the civil practice law and rules, any objection or defense based on the plaintiff's lack of standing in a foreclosure proceeding related to a home loan, as defined in paragraph (a) of subdivision six of

section thirteen hundred four of this article, shall not be waived if a defendant fails to raise the objection or defense in a responsive pleading or pre-answer motion to dismiss." *Id.* (capitalization altered). The law is to take effect "immediately," *id.*, and is codified at RPAPL §1302-a.[6]

This recent legislation reflects what the case law and treatises make clear: Standing is an affirmative defense. The only difference now is that residential foreclosure defendants do not waive the defense for failure to raise it in their answers or pre-answer motions to dismiss. Ownership is not an element of a foreclosure action. All relevant legal authority agrees.

2. Ownership cannot be an element because it would exclude mortgage note "holders," who may not own the underlying debts, but who are expressly permitted by the New York Uniform Commercial Code to sue on promissory notes.

The "holder" of a mortgage note under the New York Uniform Commercial Code (NYUCC) can be distinct from the owner (or assignee) of the underlying

[6] As Respondent explained in its response to the Nelsons' January 16, 2020 letter to this Court regarding the new law (filed January 28, 2020), this procedural legislation does not "affect proceedings previously taken" in this action. *Simonson v. Int'l Bank*, 14 N.Y.2d 281, 289 (1964); *see also* NY Statutes Law § 55. Because the Nelsons filed their answers over ten years ago, and they waived their lack of standing defense at that time (if the Court agrees with the Appellate Division, *see* below A.852-53), the statute does not affect those "previously taken" procedural actions.

mortgage debt.[7] Yet both have standing to enforce mortgage loan payment and, if needed, to foreclose. Therefore, the Nelsons' position—that only the note's *owner* can foreclose—is incorrect.

a. The NYUCC "holder" of a mortgage note may be distinct from the owner or assignee of the mortgage loan.

In the modern mortgage market, the lender that originates the mortgage loan often sells the loan to a third party. *See, e.g.*, *Nomura Home Equity Loan Inc., Series 2006-FM2 v. Nomura Credit & Capital, Inc.*, 30 N.Y.3d 572, 577-78 (2017) (explaining institutions that issue mortgage loans to "individual borrowers" often sell the loans to third parties that "pool" hundreds of loans together and re-sell portions of that pool to outside investors). In selling the mortgage loan, the loan originator *assigns* the associated rights, liabilities, and privileges to the loan's new owner. That new owner becomes the "assignee" of the original lender. An assignee "stands in the shoes" of the original owner. *Mason v. Caruana*, 177 A.D.3d 1295, 1296 (4th Dep't 2019); *see* NYUCC § 3-201 cmt. And to prove that it has the right to enforce the debt, the assignee need not prove possession of the

[7] Though "mortgage debt" or "mortgage loan" and "mortgage note" are often used interchangeably in the case law discussing foreclosure standing, it is important to recognize that it is the underlying mortgage *debt*—and the right to collect on it—that is sold and assigned to a new "owner;" not just the piece of paper memorializing the borrower's obligation. This is in contrast with the concept of a *note* "holder" under the New York Uniform Commercial Code—discussed further below.

physical note; rather, it must provide proof of the sale, transfer or assignment. *See, e.g.*, *HSBC Bank USA, Nat'l Ass'n v. Gilbert*, 120 A.D.3d 756, 757 (2d Dep't 2014) ("Written assignment of the underlying note," even without "physical delivery of the note," transfers the obligation and establishes standing).[8]

Mortgage note *holders* are different. "Holder" is a statutory concept governed by the NYUCC. Physical possession of the note is necessary to establish holder rights. Specifically, a "holder" is "the person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession." NYUCC §1-201(b)(21)(A); *see also Wells Fargo Bank, NA v. Ostiguy*, 127 A.D.3d 1375, 1376 (3d Dep't 2015) ("[h]older status is established where the plaintiff possesses a note that, on its face or by allonge, contains an indorsement in blank or bears a special indorsement payable to the order of the plaintiff" (citing NYUCC §§ 1-201, 3-202, 3-204)); *Bank of N.Y. Mellon v. McClintock*, 138 A.D.3d 1372, 1374 (3d Dep't 2016) (plaintiff "was the holder of

[8] When a mortgage loan is sold and assigned, a written assignment of the underlying mortgage—the security agreement through which the borrower pledges the property as collateral for the loan—is typically recorded in the public land records so that the public is on notice of the assignee's interest in the real property at issue. *See* NY Real Property Law §291. A publicly recorded assignment of mortgage often reflects only assignment of the security interest, and not of the underlying debt. *See, e.g.*, *MERSCORP, Inc. v Romaine*, 8 N.Y.3d 90, 96 (2006). This is why New York courts examining foreclosure standing, including this Court, so frequently observe that an assignment of mortgage "is irrelevant" to proving standing. *Taylor*, 25 N.Y.3d at 362.

the note" because it "had physical possession of the note at the time" the action "commenced"). The original lender, or a subsequent owner of the underlying mortgage loan, simply endorses the mortgage note and delivers it to a third party—who, upon taking physical possession, becomes the mortgage note "holder."[9]

b. Mortgage note holders, like owners or assignees, have the right to bring a foreclosure suit.

Under the NYUCC, mortgage note holders have standing to bring a foreclosure action even though they may not own the underlying mortgage debt. NYUCC § 3-301 ("The holder of an instrument whether or not he is the owner may . . . enforce payment in his own name."). *Wells Fargo Bank, NA v. Ostiguy*, 127 A.D.3d 1375 (3d Dep't 2015), is instructive. In *Ostiguy*, the named plaintiff, the mortgage loan servicer, argued that it was the lawful "holder" of the note under the NYUCC because it "physically possessed the note at the time the action was commended," but acknowledged that it was not the note's owner because it had sold all "beneficial interests of the note to Freddie Mac." 127 A.D.3d at 1377.[10]

[9] For context, mortgage notes are negotiable instruments like a personal or commercial check. *See* NYUCC § 3-104(2)(b), (d) (stating "check[s]" and "note[s]" are both "negotiable instrument[s]" within the NYUCC). Most check recipients endorse to themselves, but they have the option to endorse to a third party. A mortgage note operates in the same way. *Pross v. Jadam Equities Ltd.*, 134 A.D.2d 154, 155 (1st Dep't 1987) (noting "both the check and the promissory note were endorsed by plaintiff" to third party).

[10] In *Ostiguy*, the plaintiff Wells Fargo Bank, N.A. originated the loan, and then remained servicer of the loan once it sold the loan to Freddie Mac. Wells Fargo

The Supreme Court held that plaintiff "lacked standing" due to its "admitted sale of the loan to Freddie Mac." *Id.* at 1376. The Third Department reversed, holding that the "lawful holder of the note" has standing regardless of whether it owns the underlying debt. *Id.* The court relied on the NYUCC §3-301's plain meaning: "*whether or not [it] is the [note's] owner*," a plaintiff that *holds* the note has standing to bring a foreclosure suit. *Id.* (quoting NYUCC §3-301). The court emphasized that "[h]older status is established where the plaintiff possesses a note that, on its face or by allonge, contains an indorsement in blank or bears a special indorsement payable to" it. *Id.* (citing NYUCC §§ 1-201, 3-202, 3-204). So long as plaintiff satisfies that standard, it can sue in its "own name" to "enforce payment." NYUCC § 3-301. This Court held similarly in *Taylor*, where the loan servicer plaintiff had standing because it was in possession of the note, even though it was not the owner of the underlying debt. 25 N.Y.3d at 359.

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also retained physical custody of the note on Freddie Mac's behalf. *Ostiguy*, 127 A.D.3d at 1375, 1377. Such arrangements are standard practice. Under Freddie Mac and Fannie Mae's servicing guides, the loan servicer "obtain[s] physical possession of the original mortgage note," before initiating a "foreclosure" or "other legal proceeding." Fannie Mae, Fannie Mae Single Family 2012 Servicing Guide, at 102-39 (March 14, 2012), *available at* fanniemae.com/content/guide/svc031412.pdf. Servicing agent "holders" have standing to foreclose in their own names. *See, e.g.*, *CitiMortgage, Inc. v. Espinal*, 134 A.D.3d 876, 878 (2d Dep't 2015) (affirming ruling that "Citimortgage had standing to foreclose the mortgage as holder of the note, and servicer of the mortgage loan").

Here again, literally hundreds of New York cases affirm that a plaintiff has standing to bring a foreclosure suit if it can show "*either* a written assignment of the underlying note [i.e., ownership] *or* the physical delivery of the note prior to the commencement of the foreclosure action [i.e. NYUCC "holder" status]." *U.S. Bank N.A. v. Akande*, 136 A.D.3d 887, 890 (2d Dep't 2016) (emphases added) (quoting *U.S. Bank, N.A. v. Collymore*, 68 A.D.3d 752, 754 (2d Dep't 2009); *see also, e.g.*, *Citimortgage, Inc. v. Etienne*, 172 A.D.3d 808, 810-11 (2d Dep't 2019) (same) (collecting cases); *Deutsche Bank Nat'l Tr. Co. v. Idarecis*, 133 A.D.3d 702, 703 (2d Dep't 2015) (same); *Ho-Shing*, 168 A.D.3d at 131 (same); *Wells Fargo Bank, NA v. Gallagher*, 137 A.D.3d 898, 899 (2d Dep't 2016); 4C N.Y. Practice, Commercial Litigation in New York State Courts §83:53 (4th ed. Sept. 2019 update) (collecting sources).[11]

[11] The Nelsons ignore this governing standard. They argue that plaintiffs must "produce the original Note" to establish ownership. Opening Br. 14, 20. That is wrong. A plaintiff must produce proof that it was in possession of the note on the date it commenced the lawsuit to establish it is the NYUCC "holder". But an assignee need not produce the note itself to prove that it was assigned the mortgage loan by written assignment. *See, e.g.*, *Gilbert*, 120 A.D.3d at 757. It can simply produce the written assignment. *See, e.g.*, *Wilmington Tr. Co. v. Walker*, 149 A.D.3d 409, 410 (1st Dep't 2017) (plaintiff had standing as assignee where it "submitted a pooling and servicing agreement which shows that both the mortgage and the note were assigned to the Trust in June 2007")

"Ownership" of the note or underlying mortgage loan debt therefore cannot be an element of a foreclosure claim. If it were, NYUCC "holders" who are not owners would be barred from bringing suit—contradicting NYUCC 3-301.

3. The current legal framework is in line with the broader standing doctrine.

Ensuring that plaintiffs are either the owner of the debt or holder of the note confirms that they have "an interest . . . in the lawsuit." *Bank of N.Y. v. Silverberg*, 86 A.D.3d 274, 279 (2d Dep't 2011). That goes to standing, not the merits of whether defendant defaulted or the mortgage was valid. *See* 2 *Bergman* § 16.051[b] ("Nor does lack of standing effect the validity of the mortgage itself.").

Standing and capacity, a related concept, concern a *plaintiff*'s "right to sue." *In re World Trade Center Lower Manhattan Disaster Site Litig.*, 30 N.Y.3d 377, 384, 391 (2017) (citation omitted); *Soc'y of Plastics Indus. v. County of Suffolk*, 77 N.Y.2d 761, 769 (1991) (standing and capacity ensure that the "proper party" is bringing the claim). The inquiry turns on the "status" of the *plaintiff*. *See In re World Trade Center*, 30 N.Y.3d at 391; *Mastropaolo*, 42 A.D.3d at 242. That is "separate" from the *defendant*'s conduct and the question of whether he can be held liable for his actions. *Mastropaolo*, 42 A.D.3d at 243; *Schneiderman v. Credit Suisse Secs. (USA) LLC*, 31 N.Y.3d 622, 633 (2018) (noting it "undisputed that Executive Law § 63(12) gives the Attorney General standing to redress liabilities recognized elsewhere in the law").

Ownership of the mortgage loan speaks squarely to standing, not liability. It concerns the *plaintiff*'s "status" and its "right" to sue a defaulting mortgagee. *See Vitellas*, 131 A.D.3d at 62-64 (status as holder or owner concerns the "right to commence [a foreclosure] action"); *Citibank, N.A. v. Herman,* 125 A.D.3d 587, 589 (2d Dep't 2015) (status as holder or owner concerns a plaintiff's "right to foreclose"); *Mastropaolo*, 42 A.D.3d at 242 (ownership bears on "capacity," which "requires an inquiry into the litigant's status"). Whether the original mortgage debt owner decides to later sell the right to payment is independent from whether the defendant is liable for default. Those subsequent transactions have nothing to do with the *defendant*'s "underlying conduct," which determines his or her liability. *Calamari v. Panos*, 131 A.D.3d 1088, 1089 (2d Dep't 2015). Simply put, defaulting defendants are liable *regardless* of who owns the debt that they owe. Ownership, therefore, is not an element of a foreclosure claim. *See Gaidon v. Guardian Life Ins. Co. of Am.*, 96 N.Y.2d 201, 210 (2001) ("liability" is "created" when the "elements of the claim" are satisfied).

Other causes of action are in accord. For example, the four "essential elements" of a civil trespass action, another real property claim, are: (i) "the intentional" (ii) "entry into land" (iii) "of another" (iv) "without justification or permission." *Wheeler v. Del Duca*, 151 A.D.3d 1005, 1006-07 (2d Dep't 2017) (citing *Boring v. Town of Babylon*, 147 A.D.3d 892 (2017)). Ownership of the

property is an issue of plaintiff's standing, not an element necessary to establish defendant's liability for trespass on that property. *Id.* Plaintiffs have standing to bring a trespass action only if they own the subject property and are "entitled to possess" it. *Id.* at 1008. And, as with foreclosure actions, ownership is addressed as a standing issue "pursuant to CPLR 3211(a)(3)." *Id.* at 1006. Similarly, whether an insurance plaintiff owns the claim he is suing under is a question of standing—not a question of whether the defendant is liable. *Kruger v. State Farm Mut. Auto Ins. Co.*, 79 A.D.3d. 1519, 1520 (3d Dep't 2010) (whether plaintiff "assigned her right to payment" is "separate" from the merits (citation omitted)). The same goes for credit card repayment litigation. The question of whether the company had "ownership interest in the account" (rather than selling the debt before the suit) determines if it has "standing to sue to recover defendant's overdue credit card payments." *Am. Express Bank FSB v. Najieb*, 125 A.D.3d 470, 471 (1st Dep't 2015).

C. The Nelsons' Contrary Arguments Fail.

The Nelsons make a handful of counterarguments. *See* Opening Br. 18-22. None have merit. *First*, they assert courts have "repeatedly held" that ownership of the note is an element of a foreclosure claim. *Id.* at 18. The Nelsons' case law, however, is consistent with the hundreds of other New York cases holding that

ownership is not an element of a foreclosure claim, but relevant only if defendant challenges it.

The Nelsons start (at 18) with *Bank of New York v. Waters*, 39 Misc. 3d 1212(A), 2013 N.Y. Slip Op. 50585(U) (Sup. Ct., Kings County 2013), a trial court case. But the very first case *Waters* cites to is *Wells Fargo Bank, N.A. v. Cohen*, 80 A.D.3d 753 (2d Dep't 2011). There, the Second Department specifically held that a "plaintiff in an action to foreclose a mortgage establishes its case as a matter of law through the production of the mortgage, the unpaid note, and evidence of default." *Id.* at 755. Then, "[o]nce the plaintiff has made such a showing, it is then incumbent upon the defendant to assert any defenses." *Id.* The Nelsons next cite *Campaign v. Barba*, 23 A.D.3d 327 (2d Dep't 2005). But since 2005, when *Barba* was decided, the case has also been cited repeatedly to show that "[a] plaintiff in an action to foreclose a mortgage establishes its case as a matter of law through the production of the mortgage, the unpaid note, and evidence of default." *Cohen*, 80 A.D.3d at 755 (citing *Barba* for that proposition); *see also Zanfini v. Chandler*, 79 A.D.3d 1031, 1032 (2d Dep't 2010) (same).

The Nelsons then cite (at Br. 18) *Ocwen Federal Bank FSB v. Miller*, 18 A.D.3d 527 (2d Dep't 2005). That case, too, is cited to show, "[e]ntitlement to a judgment of foreclosure may be established, as a matter of law, where a mortgagee produces both the mortgage and unpaid note, together with evidence of the

mortgagor's default, thereby shifting the burden to the mortgagor to demonstrate, through both competent and admissible evidence, any defense which could raise a question of fact." *U.S. Bank, N.A. v. Sharif*, 89 A.D.3d 723, 723 (2d Dep't 2011) (citing *Ocwen*, among other cases). After articulating that standard, the *Sharif* court specifically noted that standing is a defense. *Id.* at 724.

Reaching further, the Nelsons (at 18) cite *Bank of New York v. Silverberg*, 86 A.D.3d 274 (2011). The defendants in *Silverberg*, however, specifically "moved pursuant to CPLR 3211(a)(3) to dismiss the complaint . . . for lack of standing;" in doing so, the defendant and court recognized that ownership is not an element of a foreclosure cause of action. *Id.* at 277; *see also id.* at 279. The Nelsons then cite *Witelson v. Jamaica Estates Holding Corp.*, 40 A.D.3d 284 (1st Dep't 2007), for the proposition that ownership of the note is, under some circumstances, part of a plaintiff's "prima facie showing to warrant summary judgment." Opening Br. 18. But that does not mean that ownership is an element of a foreclosure claim. As explained, if "a defendant challenges plaintiff's standing to maintain the action, the plaintiff must also prove its standing as part of its prima facie showing." *LNV Corp.*, 134 A.D.3d at 1071-72; *see also supra* 20 & n.4 (collecting sources). *Witelson* simply expresses that well-established rule.

Lastly, the Nelsons cite (at 18) *HSBC Bank USA National Ass'n v. Roumiantseva*, 39 Misc. 3d 1239(A), 2013 Slip Op. 50929(U), at *2 (Sup. Ct.,

Kings County 2013), which stated: "Plaintiff's ownership of the note is not an issue of standing but an element of its cause of action." But when the Second Department affirmed that decision, it expressly held: "Where the issue of standing is raised by a defendant, a plaintiff must prove its standing in order to be entitled to relief." *HSBC Bank USA, Nat'l Ass'n v. Roumiantseva*, 130 A.D.3d 983, 983 (2d Dep't 2015). The Appellate Division thus corrected the trial court's error.

At best, the Nelsons point to stray language in a handful of opinions—none of which addressed or ruled on the issue of what elements constitute a foreclosure cause of action. That language does not call into question the hundreds of appellate decisions that—uniformly—are contrary to the Nelsons' position. *See supra* 18-21.

Second, the Nelsons state that ownership must be an element to ensure that the plaintiff "has a stake in or connection to the loan that it is suing on." Opening Br. 19. That is the very definition of standing. *Ass'n for a Better Long Island, Inc. v. N.Y. State Dep't of Envtl. Conservation*, 23 N.Y.3d 1, 6 (2014) (standing "requirements ensure that the courts are adjudicating actual controversies for parties that have a genuine stake in the litigation"); *Consumers Union of U.S., Inc. v. State*, 5 N.Y.3d 327, 350 (2005) (same). Standing is separate from the elements of a cause of action. *See supra* 18-23. And the Nelsons' quoted language only reaffirms that ownership speaks to plaintiff's standing, not defendant's liability.

Third, the Nelsons cite to a number of debt collection cases, asserting they hold that "the plaintiff debt-buyer must prove that it owns the debt as part of its prima facie case." Opening Br. 19. That is incorrect. Like mortgage foreclosures, debt collection lawsuits deal with ownership through a separate standing requirement—not as one of the claim's required elements. *Cavalry Portfolio Servs., LLC v. DeFilippo*, 42 Misc. 3d 147(A), 2014 N.Y. Slip Op. 50361(U), at *1 (2d Dep't 2014) (with respect to assignment of credit card debt: "Defendant's claim that plaintiff lacks standing to sue was not asserted in defendant's answer or in a pre-answer motion to dismiss the complaint and, thus, this defense has been waived"); *Cadles of Grassy Meadows II, L.L.C. v. Lapidus*, 93 A.D.3d 535, 535 (1st Dep't 2012) (same for judgment debtor); *Palisades Collection, LLC v. Kedik*, 67 A.D.3d 1329, 1329 (4th Dep't 2009) ("To establish standing to sue, plaintiff was required to submit admissible evidence that Discover assigned its interest in defendant's debt to plaintiff.") (citing *Rockland Funding Corp. v. Waste Mgmt. of N.Y.*, 245 A.D.2d 779 (3d Dep't 1997)); *see also supra* 31 (discussing standing requirement in credit card debt and insurance causes of action).

The Nelsons' debt collection cases (at Br. 19-20) are not to the contrary. *Midland Funding, LLC v. Giraldo* concerns whether a debt-buyer could be sued for "deceptive business practices" for falsely claiming that it owns the debt for which it seeks repayment. 961 N.Y.S.2d 743, 750-52 (Dist. Ct., Nassau County 2013). It

does not decide the requirements to bring a debt collection suit in the first place. Similarly, *Midland Funding LLC v. Wallace* concerned the imposition of sanctions for making statements that were "disingenuous, misleading and false." 34 Misc. 1206(A), 2012 N.Y. Slip Op. 50008(U), at *3 (City Ct., Mt. Vernon 2012). And in *DNS Equity Group Inc. v. Lavallee*, defendants submitted an affidavit stating that a third party—not the plaintiff—"is *now* the owner of said account." 26 Misc. 3d 1228(A), 2010 N.Y. Slip Op. 50298(U), at *2 (Dist. Ct., Nassau County 2010). That sheds no light on the present question.

More to the point, the Nelsons' reliance on ten-year-old, trial court *debt-collection* cases to show that ownership is an element in *foreclosure* actions shows that literally no case law supports their position. For foreclosure actions, this Court's decision in *Aurora,* hundreds of Appellate Division cases, leading treatises, and the legislature's recent enactments universally agree to the same rule: Ownership is an issue of standing that only comes into play if defendants specifically challenge it. It is not a necessary element of a foreclosure claim, and the Court should not create a new rule establishing it as one. *See White v. Farrell*, 20 N.Y.3d 487, 499 (2013) (after noting agreement among all four departments, "reject[ing] the . . . invitation to put aside settled law and adopt a new rule").

POINT II

THE NELSONS' ANSWERS FAILED TO PLACE PLAINTIFF ON NOTICE THAT THEY WERE RELYING ON AN AFFIRMATIVE LACK OF STANDING DEFENSE, AND DEFENDANTS FORFEIT THEIR CONTRARY ARGUMENT.

A. The Nelsons Failed To Preserve This Argument Because They Did Not Raise It Until After the Trial Court Ruled On Their Answers At Summary Judgment.

Like their ownership argument, the Nelsons also failed to preserve their argument that they raised the lack of standing defense in their answers. As explained in Plaintiff's motion to dismiss, to preserve an argument on appeal, it must be *timely* raised before the Supreme Court. A.1263-64 (citing cases). Here, Defendants failed to timely raise their lack of standing argument because they did not press it until the trial court *already ruled on summary judgment*. A.1265-73; *see also supra* 8-9. That was too late. *See Sager Spuck Statewide Supply Co. v. Meyer*, 273 A.D.2d 745, 746 (3d Dep't 2000) (arguments not presented in "opposition to plaintiff's [summary judgment] motion" are unpreserved for appellate review); *County of Orange v. Greier*, 30 A.D.3d 556, 556 (2d Dep't 2006) (same); *Levin*, 101 A.D.3d at 1519-21 (holding that any arguments opposing

foreclosure plaintiff's motion "for summary judgment and an order of reference" must be made *before* the Supreme Court rules on that motion).[12]

Even if Defendants' answers were adequate to raise a lack of standing defense, they failed to timely make any standing-related arguments at the summary judgment phase, and are thus barred from making standing-related arguments before this Court. *N.Y. Commercial Bank v. J. Realty F Rockaway, Ltd.*, 108 A.D.3d 756, 756-57 (2d Dep't 2013) (failure to raise pleaded affirmative defenses in opposition to a motion for summary judgment renders those defenses abandoned and waived).[13] The Nelsons had three opportunities to timely raise their purported defense that Plaintiff lacked standing—since Plaintiff moved for summary judgment three times—but failed to do so. A.28, 206, 377.

The Nelsons contend this argument is not waived because the trial court had the power to rule on untimely arguments—even after it had issued summary judgment. For support, the Nelsons cite Arthur Karger's *The Powers of the New York Court of Appeals* §21:11 (July 2019 update), which stated that an argument is reviewable on appeal if the objection was made "at any subsequent time when the

[12] Here, too, although the Court denied Plaintiff's motion to dismiss the appeal for lack of jurisdiction, that does not mean that the Court *should* decide this unpreserved issue. *See supra* 17-18.

[13] Plaintiff raised this argument to the Appellate Division, A.802-03, but the court did not discuss the issue.

court had an opportunity of effectively changing" its ruling. Opening Br. 40. That language is taken directly from New York Criminal Procedure Law § 470.05, which makes sense given the section of the Karger treatise the Nelsons cite is entitled "Review in Criminal Cases: Preservation Requirement." *See* Karger, §21:11. Not only is that procedural rule inapplicable to civil proceedings, but courts have interpreted it to require *timely* objections for preservation on appeal. *People v. Then*, 128 A.D.3d 864, 865 (2d Dep't 2015) (relying on NYCPL 470.05 to hold "the untimely defense motion for a mistrial failed to preserve the contention for appellate review").

Next, the Nelsons cite (at Br. 41-43) *Wells Fargo Bank, N.A. v. Merino*, 173 A.D.3d 491 (1st Dep't 2019) and *Emigrant Mortgage Co. v. Lifshitz*, 143 A.D.3d 755 (2d Dep't 2016). These cases, however, each concern RPAPL 1303 and 1304, which are subject to different, less stringent waiver requirements. *See First Nat'l Bank of Chicago v. Silver*, 73 A.D.3d 162, 163, 165 (2d Dep't 2010) (defenses relating to the "requirements added to foreclosure proceedings by RPAPL 1303" may be raised "at any time"); *Citimortgage, Inc. v. Pembelton*, 960 N.Y.S.2d 867, 874 (Sup. Ct., Suffolk County 2013) ("[A] failure to comply [with RPAPL 1303 and 1304] gives rise to a heightened or 'super' defense to the plaintiff's claim. . . . [I]t is not subject to waiver if it is not asserted in a pre-answer motion to dismiss or in an answer.").

Finally, the Nelsons cite (at Br. 43-44) *National Mortgage Consultants v. Elizaitis*, 23 A.D.3d 630 (2d Dep't 2005). This case states that a trial court has jurisdiction to "review a previously decided matter" or "entertain[] [a party's] second summary judgment motion." *Id.* at 630. But simply because the trial court has discretion to hear untimely arguments (or call for a second round of summary judgment briefing), does not mean untimely arguments are automatically preserved for appeal. *Bank of N.Y Mellon Tr. Co., Nat'l Ass'n v. Balash*, 156 A.D.3d 1203, 1204 (3d Dep't 2017) (affirming Supreme Court's grant of plaintiff's motion for final judgment of foreclosure and sale and denial of defendants' motion to reargue because defendants lacked justification for failing to bring arguments and facts to Supreme Court's attention sooner). Moreover, that discretion is constricted. For a trial court to "relieve" a party of a summary judgment order, that party must show "excusable default," "newly-discovered evidence," or misconduct by the adverse party. CPLR 5015(a); *see also OCI Mortg. Corp. v. Murphy*, 258 A.D.2d 633, 633 (2d Dep't 1999) (affirming Supreme Court's denial of motion to vacate prior summary judgment order "[d]ue to the failure of the appellant to offer any reasonable excuse for having failed to oppose the plaintiff's motion for summary judgment"). Here, the Nelsons offered no justification or excuse for why the trial court should have considered their standing defense, including the issue of waiver,

after they failed three times to raise the issue in opposition to Plaintiff's summary judgment filings. This argument is forfeit, and the Court should decline to hear it.

B. The Nelsons' Blanket Denial Did Not Give Plaintiff Notice Standing Would Be A Contested Issue.

The Nelsons' argument fails on the merits, too. If a defendant does not adequately plead an affirmative defense, it is waived. CPLR 3211(e); *see also Fossella*, 66 N.Y.2d at 167-68. To avoid waiver, the answer or pre-answer motion to dismiss must place plaintiffs on *notice* of the defense, and underlying facts, defendants plan to rely on. *See* CPLR 3018(b); CPLR 3013 ("Statements in a pleading shall be sufficiently particular to give the court and parties notice . . . ."); *Micallef v. Miehle Co.*, 39 N.Y.2d 376, 382 (1976) (ruling CPLR 3018 requires affirmative defenses to be "specifically pleaded"); *Scholastic Inc. v. Pace Plumbing Corp.*, 129 A.D.3d 75, 79 (1st Dep't 2015) (whether affirmative defenses are adequately pled turns on whether the defendant's pleading provides the "requisite notice"); *Saks v. Franklin Covey Co.*, 316 F.3d 337, 350 (2d Cir. 2003) (affirmative defenses must be clearly raised in defendant's pleading to "protect the plaintiff from being ambushed" later in the proceedings).

A defendant can provide the requisite notice in one of three ways. They can (1) offer "specific denials in [their] answer[s]," (2) "rais[e] lack of standing as an affirmative defense," or (3) "mak[e] a pre-answer motion to dismiss based on lack of standing." *South Point, Inc.*, 139 A.D.3d at 935-36 (citing CPLR 3018(b));

HSBC Bank USA, NA v. Halls, 136 A.D.3d 752 (2d Dep't 2016); *Butler*, 129 A.D.3d at 779-80; *Mastropaolo*, 42 A.D.3d at 240); *see also Citibank, N.A. v. Gentile*, 156 A.D.3d 859, 860 (2d Dep't 2017); *Emigrant Bank v. Marando*, 143 A.D.3d 856, 857 (2d Dep't 2016).

The Nelsons failed to do any one of these. For starters, they did not affirmatively raise lack of standing in their answers or file pre-answer motions to dismiss. That is telling: The Nelsons did expressly raise *other* affirmative defenses. The answers expressly raised "lack of proper service of summons and complaint." A.18, 22. They also raised affirmative defenses related to the origination of the Mortgage Loan. A.18, 22. The Nelsons' decision to list a number of *other* waivable affirmative defenses, while broadly denying knowledge of the complaint's factual allegations, gave no notice that they would also be relying on additional unstated—and unrelated—affirmative defenses.

That leaves only the third option—specifically denying allegations in the complaint. The entire basis of the Nelsons' argument is that their broad denial of "knowledge or information" (DKI) for 15 of the complaint's 17 factual allegations was specific enough. *See* Opening Br. 33 ("By the denials in their Answer, the Nelson Defendants expressly put standing at issue."). But for a denial to provide notice, it must be accompanied by some "affirmative statement" to "place the defense of lack of standing in issue." A.877. In other words, it has to be *specific.*

See Gibson v. Air & Liquid Sys. Corp., 173 A.D.3d 519, 520 (1st Dep't 2019) (denial of factual allegations must be "specific" to "put plaintiff on notice" of the asserted defense).

The answers' single-sentence statement "that defendant(s) lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph(s) 1, 3, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17" was anything but specific. A.18, 22.

First and most simply, the Nelsons' denials of the complaint's first and third allegations did not specifically provide Plaintiff notice that they were relying on a lack of standing defense. *See* Opening Br. 25 (relying on denial of these allegations). As the McKinney commentary explains, when allegations are purely factual, "[t]o argue that a mere 'D' in response to an allegation qualifies as an affirmative defense is problematic, and if adopted would wreak havoc upon practitioners and courts." CPLR 3211, Practice Commentaries, C3211:53. Reflexive, rote denials, like those in the Nelsons' answers, make it "impossible for the plaintiff or the court to know what, if any, affirmative defense is supposedly and implicitly invoked by the defendant's responsive denial of the paragraph." *Id.*[14]

[14] As the Appellate Division noted, that might be different if a complaint alleged legal conclusions, such as "the plaintiff has standing to commence this action." A.873 n.1. In that instance, a mere denial could perhaps put the plaintiff on notice

The complaint's allegations, and the Nelsons' corresponding denials, prove that point. The first paragraph states: "Plaintiff is a national banking association duly organized and existing under and by virtue of the laws of the United States of America and having its principal place of business in Cincinnati, OH, and the owner and holder of a note and mortgage being foreclosed." R.37. Several distinct allegations, and possible affirmative defenses, are embedded in that paragraph. The first sentence is designed to comply with CPLR 3015(b), which requires corporate parties to plead and specify the "state, country or government by or under whose laws the party was created." The Nelsons' one word denial of the entire paragraph could be read as an attack on the complaint's compliance with CPLR 3015(b). *See European Am. Bank & Tr. Co v. Boyd*, 131 A.D.2d 629, 630 (2d Dep't 1987) ("[T]he plaintiff alleged that it was a corporation organized under the laws of the State of New York or the United States. . . . Thus, the first affirmative defense alleging that those allegations are insufficient must be dismissed."); *Valley Nat'l Bank v. Chaim*, 42 Misc.3d 1207(A), 2014 N.Y. Slip Op. 50008(U), at *4-5 (Sup. Ct., Kings County 2014) (same). Alternatively, the Nelsons' denial could be read as an attack on Plaintiff's status as a holder of the note, *or* Plaintiff's ownership, which as described, are distinct bases for standing,

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that standing is in dispute. But when the allegation is *factual*, something more than a mere denial is needed to show that defendant is relying on an affirmative *legal* defense.

see supra 26-28.

The same goes for Paragraph 3, which alleges *both* that "as security for payment of said note KENYATTA NELSON and SAFIYA NELSON duly executed and delivered a mortgage," and that the mortgage was subsequently assigned to Plaintiff. A.7-8. Denial of that paragraph could be a challenge to the mortgage's subsequent assignment (i.e., standing), *or* to whether the Nelsons executed a mortgage in the first place (i.e., forgery or mistake). *Bus. Loan Ctr., Inc. v. Wagner,* 31 A.D.3d 1122, 1123 (4th Dep't 2006) (in foreclosure action, noting defendant raised "statute of limitations and forgery" as "affirmative defenses"). Like McKinney says, the Nelsons' series of one-word denials make it "impossible" to know what affirmative defenses they were intending to raise. CPLR 3211, Practice Commentaries, C3211:53.

Put differently, plaintiffs are not "required to sift through . . . boilerplate" statements "to divine which defenses might apply" to a given case. *Scholastic Inc.*, 129 A.D.3d at 79. In *Scholastic Inc.*, the First Department held that pleading a boilerplate "laundry list" of affirmative defenses does not provide plaintiffs with the "requisite notice" of which defenses will actually be relied on—and are thus inadequate. *Id.* The same applies here. As the Appellate Division explained: "[T]he Nelson defendants' position would mean that their denials preserve all conceivable affirmative defenses that can be parsed from reading the factual

allegations of the complaint in conjunction with their corresponding and conclusory denials . . . ." A.851.[15] The Nelsons' sweeping denial of knowledge of nearly every one of the complaint's allegations did not alert Plaintiffs as to which of those denials would form the basis for which affirmative defenses.

Second, the denial was indisputably "general." "A general denial [in contrast with a 'specific' denial] is a denial of *several,* or all, of the allegations of the complaint . . . ." 5A Carmody-Wait 2d New York Practice § 30:22 (Nov. 2019 update) (emphasis added)). Here, the answers offered a general denial of all the complaint's allegations save two. A.18, 22. Those scant admissions do not transform the Nelsons' otherwise general denial into a series of *specific* denials. *See Cibro Petroleum Prods., Inc. v. East Schodack Fuel & Contracting Corp.*, 135 A.D.2d 947, 948 (3d Dep't 1987) ("In a verified answer defendants made a general denial, except for admitting that plaintiff supplied defendant with fuel and that Hamilton executed a guarantee."); *Bernstein v. Birch Wathen School*, 71 A.D.2d 129, 131 (1st Dep't 1979) (same); *Marine Midland Servs Corp. v. Samuel Kosoff*

[15] As the Appellate Division noted, the Nelsons' proposed rule does not limit the number or types of affirmative defenses that a series of mere denials could be sufficient to plead—the antithesis of notice. For example, complaints often include allegations that certain events took place on specific dates. Under the Nelsons' rule, the mere denial of such an allegation could be sufficient to raise a statute of limitations defense. And the conceivable affirmative defenses go far beyond those listed in CPLR 3018(b) and 3211. *See Hoffman v. New York City Hous. Auth.*, 187 A.D.2d 334, 338 (1st Dep't 1992) (discussing affirmative defense based on plaintiff's alleged failure to appear at a § 50–h hearing).

& Sons, Inc., 60 A.D.2d 767, 768 (4th Dep't 1977) (same); *Simchick v. I.M. Young & Co.*, 47 A.D.2d 549, 549 (2d Dep't 1975) (same).

And general denials are insufficient to place plaintiffs on notice that defendants are relying on a particular affirmative defense. 84 N.Y. Jur. 2d Pleading § 129 ("While denials are not required to be in any particular form, they must express the facts they are intended to put in issue."); *Parvi v. City of Kingston*, 41 N.Y.2d 554, 557 (1977) ("general denial[s]" do not satisfy defendant's burden to "plead[]" affirmative defenses); *Iandoli v. Lange*, 35 A.D.2d 793, 793 (1st Dep't 1970) ("General denials in an answer are insufficient to raise triable issues." (collecting sources)); *see also Bank of Am., N.A. v. Cudjoe*, 157 A.D.3d 653, 653-54 (2d Dep't 2018) ("Here, the defendant's mere general denial of the allegations in the complaint did not raise the issue of the plaintiff's standing, so the defense of lack of standing was waived . . . ."); *Wells Fargo Bank, N.A. v. Erobobo*, 127 A.D.3d 1176, 1177-78 (2d Dep't 2015) (with respect to defendant's "general denial of all allegations": "Even affording a liberal reading to [defendant]'s pro se answer, there is no language in the answer from which it could be inferred that he sought to assert the defense of lack of standing." (internal citations omitted)); *Butler*, 129 A.D.3d at 779-81 (standing defense was waived despite the answer's "general denial").

That is true even if, as here, some of the complaint's allegations are relevant

to a potential affirmative defense. *See e.g., BAC Home Loans Servicing, LP v. Alvarado*, 168 A.D.3d 1029, 1030 (2d Dep't 2019) (pro se defendants' "general denial" of allegation that plaintiff was the "owner and holder of the note" was not enough to place standing in issue). The lodestar is notice, and with only a general denial of all or nearly all of the allegations in a complaint, it is "likely difficult or impossible for the plaintiff's attorney or the court to discern what affirmative defense(s) the general denial is intended to convey." CPLR 3211, Practice Commentaries, C3211:53.

Finally, the Nelsons' denial of "knowledge or information" ("DKI"), in contrast with a flat-out denial, is "[e]ven more problematic." *Id.* The McKinney commentary explains, "if a defendant responds to an allegation using a 'DKI,' the defendant is saying in good faith that he or she does not know whether to admit or deny the allegation." *Id.* But "[i]f the defendant does not know whether to admit or deny because sufficient information is lacking," they cannot "simultaneously" be asserting an affirmative defense based on the "same allegation." *Id.* "The two concepts are irreconcilable . . . ."[16] *Id.* Yet that is the Nelsons' precise argument.

[16] McKinney explains, "while CPLR 3018(a) provides that a 'DKI' 'shall have the effect of a denial,' that statutory provision should be interpreted as meaning that 'D' and 'DKI' are treated the same only in regard to issues of proof at trial, and not be used as a substitute for the separate requirement of CPLR 3018(b) that affirmative defenses be expressly pleaded as such at the outset of the litigation." CPLR 3211, Practice Commentaries, C3211:53.

Opening Br. 23 ("The Nelson Defendants stated that they lacked 'knowledge or information sufficient to form a belief as to the truth of the allegations in paragraphs(s) 1, [and] 3 . . .' thereby placing the question in issue." (internal citation omitted)).

Look no further than Plaintiff's summary judgment filings to see that Plaintiff lacked notice the Nelsons were relying on a lack of standing defense. A.214-217. Plaintiff's summary judgment briefing argued that it had met the three elements of a foreclosure action, A.214-16, and then rebutted the Nelsons' "first affirmative defense," (lack of proper service), A.216-17, "second defense," A.218-19, and "final defenses," A.219. Plaintiff's briefing never mentioned lack of standing *because* the Nelsons' answers never alluded to it. Nor did Plaintiff's briefing address any of the other potential defenses that, by the Nelsons' reasoning, their rote denial of other allegations in the complaint could be said to have raised. *See supra* 44-45 (e.g., forgery, insufficient pleading of corporate status).

To be clear: Plaintiff does not suggest a per se rule. Rather, Plaintiff agrees with Justice Duffy that each complaint and each answer is "sui generis" and must be evaluated on its own terms. A.859 (Duffy, J., dissenting in part and concurring in part). The Appellate Division agreed as well, "reaffirm[ing]" what New York courts have long held—that an answering pleading "need not invoke magic words or strictly adhere to any ritualistic formulation" to raise an affirmative defense.

A.851. But the Nelsons' answers in *this* case were not, as Justice Duffy would have held, "sufficiently specific to alert the plaintiff that standing is in issue." A.866 (Duffy, J., dissenting in part and concurring in part).

C. The Nelsons' Counter-Arguments Lack Merit.

The Nelsons assert that their answers' boilerplate denials were sufficient to plead a lack of standing affirmative defense. They were not. First, Appellants assert that CPLR 3018(b), the procedural rule governing affirmative defenses, says their general denial is specific enough. Opening Br. 30-33. As long as they deny an allegation that "appear[s] on the face" of the complaint, they have satisfied their burden to plead any related affirmative defenses, the Nelsons contend. *Id.* at 30 (quoting CPLR 3018(b)). Because Plaintiff pled, as part of the allegations contained in the first paragraph of the Complaint, that it was "owner and holder of a note and mortgage being foreclosed," R.37, and as part of the third paragraph of the Complaint, that the "mortgage was subsequently assigned" to Plaintiff, R.38, the Nelsons argue, the issue of standing "appear[s] on the face of a prior pleading," and thus under CPLR 3018(b), they needn't have specifically pled anything other than a denial to put Plaintiff's standing in issue. *See* Opening Br. 30.

The Nelson's misunderstand CPLR 3018(b). CPLR 3018 governs responsive pleadings generally, and it is divided into two subsections, one providing when a party must assert a denial to put a fact in issue, and the other

providing what sort of "matters" a party must specifically plead as affirmative defenses. By providing for denials in CPLR 3018(a), and for affirmative defenses in CPLR 3018(b), the statute makes clear by its plain language and structure that pleading an affirmative defense requires something more than the simple denial provided for in CPLR 3018(a). Section 3018(b) further defines the term "[a]ffirmative defense" by (1) describing affirmative defenses generally as "matters which if not pleaded would be likely to take the adverse party by surprise or would raise issues of fact not appearing on the face of a prior pleading"; and (2) referring to a non-exhaustive list of items that are examples of affirmative defenses that fit the general description. CPLR 3018(b). Other affirmative defenses—such as standing—are enumerated in CPLR 3211(a).[17]

By stating that affirmative defenses are "matters which if not pleaded . . . would raise issues of fact not appearing on the face of a prior pleading," CPLR 3018(b), the statute does not suggest, as the Nelsons argue, that the Nelsons need not specifically plead that they intend to put standing in issue just because *some* of Plaintiff's factual allegations address Plaintiff's standing. Rather, the descriptive language in CPLR 3018(b) simply "offers a sturdy guidepost to the kind of thing that would constitute an affirmative defense when it is not on the specific list of

[17] CPLR 3211(a) also repeats some, but not all of the affirmative defenses listed in CPLR 3018(b).

defenses contained in CPLR 3018(b)." CPLR 3018, Practice Commentaries, C3018:13. Here, although lack of standing is not included in the non-exhaustive list of affirmative defenses identified in CPLR 3018(b), it *is* one of the waivable, affirmative defenses expressly identified under Section 3211(a)(3). *See supra* 20-21. A CPLR 3018(b) analysis is thus inapplicable. Rather, the only question is whether Defendants' untargeted denials gave Plaintiff the "requisite notice" that lack of standing would be a contested defense. *Scholastic Inc.*, 129 A.D.3d at 79.

Next, the Nelsons cite David Siegel's *New York Practice* to assert that where a matter is "introduce[d]" in the complaint, "defendant's omission to plead [an affirmative defense] should not be held a forfeiture." Opening Br. 30 (citing David D. Siegel, *New York Practice* § 223 (6th ed. Dec. 2018 update)). But the treatise was not stating the law; it was stating one interpretation of the holding in *Green Bus Lines, Inc. v. Consolidated Mutual Insurance Co.*, 74 A.D.2d 136, 142-43 (2d Dep't 1980). *See New York Practice* § 223 (citing *Green Bus* as the only support for that statement). As explained below, *Green Bus* is cabined to its unusual facts; its statements do not represent what the law on waiver is, or ever has been. *See infra* 53-54.

Retreating further, the Nelsons assert that they actually did make a "specific denial" with respect to Plaintiff's alleged ownership. Opening Br. 31. That is false. As explained, the Nelsons DKI'ed the complaint's allegations regarding

assignment and holdership as part of a broader boilerplate single-sentence denial of nearly all of the complaint's allegations. That is a general denial, insufficient to provide notice of any affirmative defenses. *See supra* 47-48.

Next, the Nelsons point to decades-old Appellate Division case law to show that some courts, in some decisions, have ruled one-word denials of factual allegations can be sufficient to raise an affirmative defense. *See* Opening Br. 31 (citing *Green Bus*, 74 A.D.2d at 142-43; *Stevens v. N. Lights Assocs.*, 229 A.D.2d 1001, 1001 (4th Dep't 1996)). As the Second Department noted, those decisions involved "highly unusual circumstances," where the "complaints actually set forth the facts supporting the defenses subsequently relied upon." A.852 n.2. Given those unusual facts, lower courts had never looked to *Green Bus Lines* or *Stevens* for guidance. Indeed, in the last *twenty years*, the Appellate Division has cited *Green Bus Lines* only four times—including Justice Duffy's dissent below.[18] *See Gibson*, 173 A.D.3d at 519-20; *Bank of N.Y. Mellon v. Gordon*, 171 A.D.3d 197, 203 (2d Dep't 2019); *Garcia v. Utica First Ins. Co.*, 7 A.D.3d 665, 666 (2d Dep't 2004); A.862-63.

And none of those cases support the Nelsons' narrow construction of the pleading requirements. *Gibson* cites *Green Bus* to note "denial of [the complaint's] allegations may be sufficient to preserve defendant's jurisdictional defense." 173

[18] Similarly, the last time the Appellate Division cited to *Stevens* was 2003.

A.D.3d at 519-20. But on the very next page, the court held that only "specific denial[s]" suffice to "put plaintiff on notice" of the chosen defense. *Id.* at 520. In *Gordon*, the Second Department cited *Green Bus Lines* for the undisputed proposition that "under CPLR 3018(b) a defendant must affirmatively plead lack of standing as an affirmative defense in the answer in order to properly raise the issue in its responsive pleading." 171 A.D.3d at 203. And in that case, the defendant had "asserted standing as an affirmative defense in his answer," as the Nelsons should have done here. *Id.* Finally, *Garcia* does not involve affirmative defenses at all. *See generally* 7 A.D.3d at 824-26. The decision below did not "upend[]" New York case law, Opening Br. 31; it more precisely stated what the law has always been.

In a last ditch effort, the Nelsons invoke, for the first time, CPLR 3026 and 3013. Opening Br. 36. Sections 3026 and 3013 protect a party from the harsh consequences of a pleading's technical shortcomings. *See, e.g., Korff v. Corbett*, 155 A.D.3d 405, 409 (1st Dep't 2017) (noting under CPLR 3026's "liberal pleading policy," parties need not "cite the statute" under which an affirmative defense is brought). They are designed to prioritize "notice" over formality. CPLR 3013. That is exactly Plaintiff's point: The Nelsons' answers failed to provide notice they were relying on the lack of standing defense, regardless of pleading requirements' formalities. *See supra* 41-50.

Section 3026's requirement for "prejudice[]" is similarly unhelpful to the Nelsons. Opening Br. 36-37. A plaintiff "suffer[s] undue prejudice as the result of the defendant's unexplained [years-long] delay" when the "delay deprived the plaintiff of an opportunity to promptly investigate the defense of lack of standing." *Wells Fargo Bank, N.A. v. Morgan*, 139 A.D.3d 1046, 1048 (2d Dep't 2016); *see also Deutsche Bank Nat'l Tr. Co. v. James*, 164 A.D.3d 467, 469 (2d Dep't 2018) ("defendant's extensive delay" in pleading lack of standing defense "would have resulted in unfair surprise and prejudice to the plaintiff" (citing several sources)). That standard is met here. The Nelsons even make the argument *for* Plaintiff, asking the Court to affirmatively hold that Plaintiff can't ever prove standing now, because, given the Nelsons' delay in pleading lack of standing: "[I]t is impossible for anyone at Wells Fargo Bank, which was not appointed attorney-in-fact until May 31, 2012, to have personal knowledge of the delivery of the Note and allonges prior to September 15, 2009, when the foreclosure action was commenced." Opening Br. 26.[19] That, alone, amounts to unfair prejudice to Plaintiff.

The Nelsons also claim that their "only option" was to assert denials, rather

[19] The Nelsons are also wrong on the facts. Wells Fargo has serviced the Nelsons' loan since Plaintiff acquired it in 2007, A.120, and operated under a prior power of attorney from April 2009, A.115-16.

than affirmative defenses, because they used "court-issued forms"[20] that didn't allow for defenses. *Id.* at 39. That is wrong. The forms had a *specific* space—indeed nearly half the form—to list affirmative defenses and counterclaims. And the Nelsons used that space to list *other* defenses. A.18, 22.

Finally, the Nelsons argue, in a single sentence, that as pro se litigants their answers "should be afforded and granted a liberal and broad interpretation." Opening Br. 39. But answers submitted by pro se defendants that were even more detailed failed to raise a standing defense. *See HSBC Mortg. Corp. (USA) v. Johnston*, 145 A.D.3d 1240, 1241 (3d Dep't 2016); *Erobobo*, 127 A.D.3d at 1177-78.

The Nelsons' answers were inadequate to provide notice that they were relying on a lack of standing defense. This Court should affirm.

POINT III

IF THE NELSONS PREVAIL ON EITHER ARGUMENT, REMAND FOR ADDITIONAL FACT-FINDING IS APPROPRIATE.

The Nelsons contend that "[i]issues of fact remain[] on the question of ownership of the Note." Opening Br. 28. Accordingly, they ask that the case be "remanded for trial on the question of ownership of the Note and Mortgage." *Id.* at

[20] The forms were not "court issued;" they were "Blumberg" forms. *See* A.18, 22.

48. That plea echoes their Motion for Reargument. A.909; *see also* A.895 (Duffy, J., dissenting in part and concurring in part) (same).

As explained, the Nelsons waived a lack of standing defense. But the Nelsons agree that if the Court holds that the Nelsons did *not* waive that defense, remand for additional fact-finding is appropriate. Opening Br. 28, 48. That is especially appropriate where, as here, neither the trial court nor the Appellate Division ruled on the sufficiency of Plaintiff's evidence of standing, and where Plaintiff did not have the opportunity to lay bare its proof of standing at the summary judgment stage—since the Nelsons did not question Plaintiff's standing at that time. Upon remand, Plaintiff would offer proof that it was both "holder" of the Note under the NYUCC when it commenced this action, and that it is and was assignee of the mortgage debt.

CONCLUSION

For the foregoing reasons, the Second Department's decision should be affirmed.

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February 6, 2020

NEW YORK STATE COURT OF APPEALS
CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR PART 500.1(j) that the foregoing brief was prepared on a computer using Microsoft Word 2010.

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Dated: February 6, 2020

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