To be Argued by:
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CTQ-2020-00001
U.S. Court of Appeals, Second Circuit Docket No. 18-3287

Court of Appeals

of the

State of New York

CIT BANK, N.A.,

Plaintiff-Respondent,

– against –

PAMELA SCHIFFMAN, JERRY SCHIFFMAN,

Defendants-Appellants,

JP MORGAN CHASE BANK, N.A.,
NEW YORK CITY PARKING VIOLATIONS BUREAU,

Defendants.

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September 17, 2020

CORPORATE DISCLOSURE STATEMENT

CIT Bank, N.A., hereby certifies that CIT Bank, N.A. is a national association wholly owned by CIT Group, Inc. No publicly-held corporation owns 10% or more of its stock.

TABLE OF CONTENTS

Page

CORPORATE DISCLOSURE STATEMENT i

TABLE OF AUTHORITIES iv

CERTIFIED QUESTIONS ACCEPTED FOR REVIEW 1

PRELIMINARY STATEMENT 1

STATEMENT OF FACTS AND NATURE OF THE CASE 4

I. Factual Background 4

II. Procedural Background 5

ARGUMENT 11

I. BECAUSE THE SCHIFFMANS HAVE NOT IDENTIFIED A MATERIAL DEFECT DIRECTLY RELATED TO CIT'S ACTUAL MAILING PROCESS, THEY HAVE NOT REBUTTED THE PRESUMPTIONS OF MAILING AND RECEIPT. 11

A. To rebut the presumption of receipt, a borrower must deny receipt and identify a material defect directly related to the office mailing process that would affect whether an RPAPL § 1304 notice was mailed or received. 13

B. The Schiffmans have not rebutted the presumption of receipt. 23

II. RPAPL § 1306 REQUIRES THAT A LENDER NEED ONLY LIST ONE BORROWER IN ITS NOTICE, EVEN FOR A MULTI-BORROWER LOAN 28

A. RPAPL § 1306, by its plain terms, requires a lender to list only the name of one "borrower." 29

B. Any error from the failure to list multiple borrowers on an RPAPL § 1306 notice is harmless and should be disregarded. 33

CONCLUSION 35

TABLE OF AUTHORITIES

Page

CASES:

Abuhamra v. New York Mut. Underwriters,
170 A.D.2d 1003 (4th Dep't 1991)....16

Aurora Loan Servs., LLC v. Weisblum,
85 A.D.3d 95 (2d Dep't 2011)....12

Badio v. Liberty Mut. Ins. Co.,
5 A.D.3d 170 (1st Dep't 2004), *vacated on other grounds*, 12 A.D.3d 229....22

Badio v. Liberty Mut. Fire Ins. Co.,
12 A.D.3d 229 (1st Dep't 2004)....14, 23

Bank of New York Mellon as Tr. for Certificateholders of the CWABS, Inc. Asset-Backed Certificates v. Vasquez,
63 Misc. 3d 1220(A), 114 N.Y.S.3d 822 (N.Y. Sup. Ct. 2019)....32, 33, 34

Barenboim v. Starbucks Corp.,
21 N.Y.3d 460 (2013)....24

Barile v. Kavanaugh,
67 N.Y.2d 392 (1986)....16

Bossuk v. Steinberg,
58 N.Y.2d 916 (1983)....13

Burr v. Eveready Ins. Co.,
253 A.D.2d 650 (1st Dep't 1998)....19

Citibank, N.A. v. Conti-Scheurer,
172 A.D.3d 17 (2d Dep't 2019)....2, 12

Citigroup v. Kopelowitz,
147 A.D.3d 1014 (2d Dep't 2017)....12

De Feo v. Merchant,
115 Misc. 2d 286 (City Ct. 1982)....17

Page

DeLuca v. Smith,
146 A.D.3d 732 (1st Dep't 2017) 19

Deutsche Bank Nat'l Tr. Co. v. Spanos,
102 A.D.3d 909 (2d Dep't 2013) 12

Diehl v. Becker,
227 N.Y. 318 (1919) 17, 21, 23

Elec. Servs. Int'l, Inc. v. Silvers,
233 A.D.2d 361 (2d Dep't 1996) 14

Engel v. CBS, Inc.,
93 N.Y.2d 195 (1999) 24

Engel v. Lichterman,
95 A.D.2d 536 (2d Dep't 1983), *aff'd,* 62 N.Y.2d 943 (1984) 15, 19, 23

HSBC Bank USA, N.A. as Tr. for Certificateholders of Ace Sec. Corp. Home Equity Loan Tr. v. Ahmad,
62 Misc. 3d 1225(A), 113 N.Y.S.3d 832 (N.Y. Sup. Ct. 2019) .... *passim*

Jericho Water Dist. v. One Call Users Council, Inc.,
10 N.Y.3d 385 (2008) 31

Johnson v. Lutz,
253 N.Y. 124 (1930) 21

JPMorgan Chase Bank, Nat'l Ass'n v. Skluth,
177 A.D.3d 592 (2d Dep't 2019) 12

Law v. Benedict,
197 A.D.2d 808 (3d Dep't 1993) 16

Liriano v. Eveready Ins. Co.,
65 A.D.3d 524 (2d Dep't 2009) 14

Matter of 5421 Sylvan Ave. Assocs. Corp. v. New York City Conciliation & Appeals Bd.,
100 A.D.2d 812 (1st Dep't 1984) 18, 19, 23

TABLE OF AUTHORITIES—Continued

Page

Matter of Holland v. New York City,
271 A.D.2d 609 (2d Dep't 2000) 17

Matter of Lower Manhattan Loft Tenants v. New York City Loft Bd.,
66 N.Y.2d 298 (1985) 32

Matter of Novick v. New York Comm'r of Motor Vehicles,
99 A.D.2d 811 (2d Dep't 1984) 17

Matter of T.J. Gulf, Inc. v. New York State Tax Comm'n,
124 A.D.2d 314 (3d Dep't 1986) 15, 16, 23

Matter of Union Indem. Ins. Co. of New York,
220 A.D.2d 341 (1st Dep't 1995) 18

McCormack v. Security Mut. Life Ins. Co.,
220 N.Y. 447 (1917) 21

Mishkind-Feinberg Realty Co. v. Sidorsky,
189 N.Y. 402 (1907) 13, 19

Nassau Ins. Co. v. Murray,
46 N.Y.2d 828 (1978) .... *passim*

New York & Presbyterian Hosp. v. Allstate Ins. Co.,
29 A.D.3d 547 (2d Dep't 2006) 19

News Syndicate Co. v. Gatti Paper Stock Corp.,
256 N.Y. 211 (1931) 15

Olesky v. Travelers Ins. Co.,
72 A.D.2d 924 (4th Dep't 1979) 16

Pardo v. Central Coop. Ins. Co.,
223 A.D.2d 832 (3d Dep't 1996) 16

Preferred Mut. Ins. Co. v. Donnelly,
111 A.D.3d 1242 (4th Dep't 2013), *aff'd*, 22 N.Y.3d 1169 (2014) 20, 21

TABLE OF AUTHORITIES—Continued

Page

Preferred Mut. Ins. Co. v. Donnelly,
22 N.Y.3d 1169 (2014) 2, 12, 13

Rooney v. Tyson,
91 N.Y.2d 685 (1998) 24

Ruffin v. Lion Corp.,
15 N.Y.3d 578 (2010) 34

Savino v. Merchants Mut. Ins. Co.,
44 N.Y.2d 625 (1978) 16

Thibeault v. Travelers Ins. Co.,
37 A.D.3d 1000 (3d Dep't 2007) 16, 17

Tolbert v. Queens Coll.,
242 F.3d 58 (2d Cir. 2001) 26

United States v. Restrepo,
986 F.2d 1462 (2d Cir. 1993) 26

U.S. Bank Nat'l Ass'n v. DLJ Mortg. Cap., Inc.,
33 N.Y.3d 84 (2019) 26

Viviane Etienne Med. Care, P.C. v. Country-Wide Ins. Co.,
25 N.Y.3d 498 (2015) 14

Watt v. New York City Transit Auth.,
97 A.D.2d 466 (2d Dep't 1983) 17

Weiss v. Macy's Retail Holdings, Inc.,
741 F. App'x 24 (2d Cir. 2018) 14

Wells Fargo Bank Nat'l Ass'n v. Wolcott,
58 Misc. 3d 1215(A), 95 N.Y.S.3d 126 (N.Y. Sup. Ct. 2018) 14

RULE:

CPLR 2001 .... 4, 33, 34

TABLE OF AUTHORITIES—Continued

Page

STATUTES:

Gen. Constr. Law § 35 29

Gen. Constr. Law § 110 33

RPAPL § 1304 .... *passim*

RPAPL § 1304(1) 5, 11, 32

RPAPL § 1304(2) 5, 11

RPAPL § 1306 .... *passim*

RPAPL § 1306(1) 7, 28

RPAPL § 1306(2) .... *passim*

RPAPL § 1306(3) 29

RPAPL § 1306(4) 7, 28, 30, 34

OTHER AUTHORITIES:

45 A.L.R.4th 476 § 2[a] 22

58 Am. Jur. 2d Notice § 40 13

Governor's Program Bill Mem., Bill Jacket, L. 2009, ch. 507 .... 7, 30

Presumptions and inferences, Bench Book for Trial Judges-New York § 7:2 (March 2020) 13

Pre-foreclosure Information Form FAQs, DFS, https://on.ny.gov/3753YPA (last visited September 17, 2020) 29, 30, 31, 34

CERTIFIED QUESTIONS ACCEPTED FOR REVIEW

1. Where a foreclosure plaintiff seeks to establish compliance with RPAPL § 1304 through proof of a standard office mailing procedure, and the defendant both denies receipt and seeks to rebut the presumption of receipt by showing that the mailing procedure was not followed, what showing must the defendant make to render inadequate the plaintiff's proof of compliance with § 1304?

To rebut the presumption of receipt created by proof of a standard office mailing procedure, the borrower must both deny receipt and identify a material defect directly related to the office mailing process that would affect whether the RPAPL § 1304 notice was mailed or received.

2. Where there are multiple borrowers on a single loan, does RPAPL § 1306 require that a lender's filing include information about all borrowers, or does § 1306 require only that a lender's filing include information about one borrower?

Where there are multiple borrowers on a single loan, RPAPL § 1306 requires that a lender's filing only include information about one borrower.

PRELIMINARY STATEMENT

This case involves two different statutory-notice requirements applicable to mortgage-foreclosure cases, which serve two different aims. The first, Real

Property Actions and Proceedings Law (RPAPL) § 1304, requires a lender to notify a borrower in advance of initiating a foreclosure action, so that the borrower might have time to seek foreclosure-avoidance counseling. The second, RPAPL § 1306, requires a lender to notify the New York Department of Financial Services (DFS) that the lender intends to initiate a foreclosure action, so that DFS may more accurately track foreclosures State-wide and offer additional foreclosure-avoidance resources to borrowers. Both requirements are conditions precedent to a foreclosure action. And here, Plaintiff CIT Bank, N.A., complied with both.

First, RPAPL § 1304 requires a lender to notify a borrower of an impending foreclosure action 90 days in advance. As proof of compliance, the lender may rely on "proof of a standard office mailing procedure designed to ensure that items are properly addressed and mailed, sworn to by someone with personal knowledge of the procedure." *Citibank, N.A. v. Conti-Scheurer*, 172 A.D.3d 17, 20-21 (2d Dep't 2019). Proof of a standard office mailing procedure creates a presumption that the documents were mailed, and documents that have been mailed have long been presumed to be received. Thus, "evidence of a regular office practice" raises "the presumption that" an RPAPL § 1304 notice "was mailed to and received by the" borrower. *Preferred Mut. Ins. Co. v. Donnelly*, 22 N.Y.3d 1169, 1170 (2014).

To rebut the presumption, the borrower must both deny receipt and demonstrate that the "routine office [mailing] practice was not followed or was so

careless that it would be unreasonable to assume that the notice was mailed." *Nassau Ins. Co. v. Murray*, 46 N.Y.2d 828, 830 (1978). Although this Court has not yet said what evidence meets that standard in the RPAPL § 1304 context, cases applying the same office-mailing-procedure presumption in other contexts are instructive. Those cases teach that the recipient must identify a material defect directly related to the office mailing process that would affect whether the document was mailed or received. Evidence of only a slight deviation, a general issue of office procedure unrelated to the mailing process, or an immaterial defect that does not affect the probability of delivery does not suffice.

Second, RPAPL § 1306 requires that, within three business days of mailing a RPAPL § 1304 notice to a borrower, the lender must provide DFS with certain information about the defaulted loan, including the name of "the borrower," "the amount claimed as due and owing on the mortgage, and such other information as will enable [DFS] to ascertain the type of loan at issue." RPAPL § 1306(2). DFS uses this information to monitor and analyze foreclosure trends, and to provide resources for borrowers at risk of foreclosure.

This Court has not yet held whether the RPAPL § 1306 notice for a multi-borrower loan must list every borrower. But both the statute's text and purpose demonstrate that a lender need only name one borrower. RPAPL § 1306's point is to provide the *State* with enough information to locate a borrower; listing one

borrower is sufficient to accomplish that goal. And, as DFS has recognized, listing multiple borrowers would strain the State's limited resources.

If the Court holds that RPAPL § 1306 requires a lender to list every borrower on a multi-borrower loan—something that is not possible in the current DFS system—it should conclude that any error from failing to do so is harmless. *See* CPLR 2001. Because RPAPL § 1306 is for the *State's* benefit, a lender's failure to list additional borrowers on an RPAPL § 1306 notice does not deprive the non-listed borrowers of any right at all, let alone a substantial one.

STATEMENT OF FACTS AND NATURE OF THE CASE

I. Factual Background

In March 2008, Pamela Schiffman took out a home loan and executed a consolidated note payable to IndyMac Bank, F.S.B., in the principal amount of $326,000. R48. The note was secured by a mortgage in favor of IndyMac from Pamela and her husband Jerry Schiffman. *Id.* The mortgage was later assigned to OneWest Bank, F.S.B. ("OneWest"), which is now known as CIT. R81-83. The Schiffmans subsequently jointly entered into a loan-modification agreement, which increased the principal owed on the note to $406,481.10. R84-87.

The Schiffmans failed to make the December 1, 2014 payment due on the note and every payment thereafter. R16, R285. CIT therefore notified the Schiffmans that they were in default, and provided the Schiffmans with a list of

housing counseling agencies serving the area where the property was located. CIT also filed with DFS information designed to help the agency identify the Schiffmans' loan, including Pamela Schiffman's name and contact information and the amount due on the mortgage. R122-154. But the Schiffmans did not cure their default, and CIT was forced to seek foreclosure in the United States District Court for the Eastern District of New York. R2.

II. Procedural Background

CIT's motion for summary judgment. CIT moved for summary judgment, and the District Judge referred the motion to a magistrate judge for a report and recommendation. R9. CIT's motion explained that it had proved its *prima facie* case, including compliance with RPAPL § 1304 and RPAPL § 1306.

Under RPAPL § 1304(1), "at least ninety days before a lender . . . commences legal action against the borrower, or borrowers at the property address . . . , including mortgage foreclosure, such lender . . . shall give notice to the borrower" that he or she is in default and provide a list of "government approved housing counseling agencies." The notice, sometimes called a 90 Day Notice, must be sent "by registered or certified mail and also by first-class mail to the last known address of the borrower, and to the residence that is the subject of the mortgage." *Id.* § 1304(2).

CIT accordingly supplied the affidavit of Rachel Hook, a CIT employee, who swore that she has received training in and has personal knowledge of "CIT's standard practices and procedures used to create, mail and store data regarding the 90 day pre-foreclosure notice." R18. These procedures "are designed to ensure that" the 90 Day Notice is "properly addressed and mailed and that data reflecting those events are stored in CIT's business records." *Id.*

CIT's "standard business practice and procedure" is to generate "the 90 Day Notice, a current list of at least five housing counseling agencies serving the county where the property is located, and envelopes for both certified and first-class mail . . . upon default." R19. The envelopes are addressed to "the borrower(s)' last known address and the address of the residence that is subject to the Mortgage." *Id.* After CIT encloses the 90 Day Notice and list of housing counseling agencies "in both the [prepaid] certified and first-class mail" envelopes, "[t]he envelopes are sealed and provided to the United States Post Office for mailing." *Id.*

Hook averred that CIT followed these practices after the Schiffmans defaulted. She explained that CIT mailed the 90 Day Notices and relevant list of housing counseling agencies to the Schiffmans on November 18, 2015. *Id.* CIT also provided copies of the 90 Day Notices that it sent to the Schiffmans. R106-121.

RPAPL § 1306, meanwhile, requires lenders to report information about RPAPL § 1304 notices to DFS "so that the State may effectively monitor distressed borrowers and target counseling help efficiently." Governor's Program Bill Mem., Bill Jacket, L. 2009, ch. 507, at 11. Within three business days of mailing a default notice to the borrower, the lender must file with DFS a notice that provides "the name, address, last known telephone number of the borrower, and the amount claimed as due and owing on the mortgage, and such other information as will enable [DFS] to ascertain the type of loan at issue." RPAPL § 1306(1)-(2). DFS will use that information to monitor and analyze statewide foreclosure trends. *Id.* § 1306(4). DFS may also share the information "with housing counseling agencies" and other resource providers to help "coordinat[e] or secur[e] help for borrowers at risk of foreclosure." *Id.*

Hook accordingly explained that the same day CIT sent the Schiffmans the 90 Day Notices under RPAPL § 1304, it submitted a proof of filing notice to DFS under RPAPL § 1306. R19; *see also* R16 (affidavit of Michelle Nicole Ray, a CIT assistant secretary). Hook attached a copy of the RPAPL § 1306 notice from DFS's webpage. R19; *see* R122. Under "Borrower's Name," it lists only Pamela Schiffman. *Id.*

The Schiffmans opposed summary judgment. They argued that CIT had to produce "an affidavit providing proof of an established office mailing procedure

and independent proof of actual mailing establishing that the NY RPAPL § 1304 notice was sent in the proper manner." R229. The Schiffmans claimed that Hook's affidavit did not satisfy this requirement, as it did not include an "affidavit of service . . . from the person who allegedly performed the mailing" or other independent proof of mailing and failed to describe the procedure "regarding when or by what process the[] envelopes [containing the 90 Day Notices] are ever mailed." R232-233. The Schiffmans also claimed Hook's affidavit was deficient because CIT did not attach certain business records. *Id.* The Schiffmans therefore contended that CIT's mailings were not entitled to a presumption of receipt under RPAPL § 1304. *Id.*

The Schiffmans did not argue, however, that they had rebutted the presumption of receipt. And although their opposition stated that neither Schiffman received the 90 Day Notice, only Jerry Schiffman's affidavit denied receipt. R238. Pamela Schiffman's affidavit was silent on that question. R236.

The Schiffmans further contended that because CIT's affidavits stated that *OneWest*, CIT's predecessor, had filed the RPAPL § 1306 notice with DFS, CIT itself had not satisfied RPAPL § 1306. R234. The Schiffmans also added—in a single sentence—that CIT "submit[ted] no copy whatsoever of any attempted proof of compliance with" RPAPL § 1306 with respect to the 90 Day Notice "allegedly served on Defendant Jerry Schiffman." *Id.*

The magistrate judge recommended granting CIT's motion. R249-264. The magistrate held that CIT had proved the existence of a loan obligation, that the obligation was secured by a mortgage assigned to CIT, and that the Schiffmans were in default. R254. The magistrate judge further found that CIT complied with RPAPL § 1304 because Hook's affidavit was "sufficient to create a presumption that the Notices were mailed, and [the Schiffmans'] conclusory denial of receipt does not, without more, create a triable issue of fact." R260. The magistrate likewise held that CIT had adequately complied with RPAPL § 1306 because it "submitted a [notice] . . . listing all of the required information." R261.

The Schiffmans' objections to the report and recommendation and the District Court's order. The Schiffmans objected to the magistrate judge's report and recommendation on two grounds. *First*, they reiterated their RPAPL § 1304 arguments, including their claim that Hook's affidavit was deficient because it stated that the envelopes for the 90 Day Notices "are purportedly created upon default, but no procedure is described regarding the time frame by when or by what process these envelopes are ever mailed," adding in a footnote that "the 1304 notice in this case was allegedly mailed nearly a year *after* the default." R268 & n.1. *Second*, they reiterated their RPAPL § 1306 arguments, again contending without analysis that CIT had not complied with RPAPL § 1306 with respect to Jerry Schiffman. R270.

The District Court adopted the report and recommendation "in its entirety" and granted CIT summary judgment. R273; R275-277.

The Second Circuit's certification order. The Schiffmans appealed to the Second Circuit, R279-280, which certified two questions to this Court, R284.

First, the Second Circuit held that the Schiffmans' arguments concerning CIT's alleged failure to "describe any procedure regarding when or by what process the[ ]" 90 Day Notices "are ever mailed" and the failure to attach certain exhibits to Hook's affidavit did "not raise triable issues." R290. But the Second Circuit believed that it was unclear under New York law whether the "nearly one-year gap" between when the Schiffmans defaulted and the date the 90 Day Notices were mailed was sufficient to rebut the presumption of receipt. R291. The court acknowledged CIT had good reason for its delay because it did not acquire the Schiffmans' mortgage until after they had defaulted. R292. But it could not locate a controlling decision about "whether the presumption of receipt is rebutted by *any* showing of a deviation from the assertedly routine office procedures for preparing and mailing § 1304 notices," or whether "a showing of deviations directly related to the mailing process" is necessary. R292.

Second, the Second Circuit could not identify a New York case about whether a § 1306 notice must include all borrowers, or whether including one borrower is sufficient. R294-295. It acknowledged that two trial court

decisions post-dating the District Court's ruling had "held that § 1306 does not require compliance with respect to all borrowers on a loan." R296. And it noted that there are good policy reasons for that conclusion, including that DFS "has declined to interpret the provision as requiring compliance with respect to all borrowers on a loan." *Id.* Nevertheless, given "the lack of guidance from either the Court of Appeals or the Appellate Division," the Second Circuit certified a question to this Court asking whether "RPAPL § 1306 require[s] that a lender's filing include information about all borrowers" or whether "§ 1306 require[s] only that a lender's filing include information about one borrower." R297-298.

This Court agreed to answer both questions.

ARGUMENT

I. BECAUSE THE SCHIFFMANS HAVE NOT IDENTIFIED A MATERIAL DEFECT DIRECTLY RELATED TO CIT'S ACTUAL MAILING PROCESS, THEY HAVE NOT REBUTTED THE PRESUMPTIONS OF MAILING AND RECEIPT.

RPAPL § 1304 requires that, "with regard to a home loan, at least ninety days before a lender . . . commences legal action against the borrower, or borrowers at the property address," including a foreclosure action, the lender "shall give notice to the borrower." RPAPL § 1304(1). The notice must be sent to the borrower "by registered or certified mail and also by first-class mail." *Id.* § 1304(2). "[P]roper service of RPAPL 1304 notice on the borrower or borrowers

is a condition precedent to the commencement of a foreclosure action, and the plaintiff has the burden of establishing satisfaction of this condition." *Deutsche Bank Nat'l Tr. Co. v. Spanos*, 102 A.D.3d 909, 910 (2d Dep't 2013) (quoting *Aurora Loan Servs., LLC v. Weisblum*, 85 A.D.3d 95, 106 (2d Dep't 2011)).

"There is no requirement that a plaintiff in a foreclosure action rely on any particular set of business records to establish" RPAPL § 1304 compliance. *JPMorgan Chase Bank, Nat'l Ass'n v. Skluth*, 177 A.D.3d 592, 594 (2d Dep't 2019) (quoting *Citigroup v. Kopelowitz*, 147 A.D.3d 1014, 1015 (2d Dep't 2017)). Thus, mailing may be proved in any number of ways, including "proof of a standard office mailing procedure designed to ensure that items are properly addressed and mailed, sworn to by someone with personal knowledge of the procedure." *Conti-Scheurer*, 172 A.D.3d at 20-21. And a document presumed to be mailed is also presumed to be received. *Donnelly*, 22 N.Y.3d at 1170. For both presumptions, once the plaintiff has provided prima facie evidence of compliance, the burden shifts to the defendant to rebut. *See Conti-Scheurer*, 172 A.D.3d at 23-24.

The question here is what evidence rebuts the presumptions of mailing and receipt. Both practical considerations and the purpose behind the office-mailing-procedure rule provide the answer: The recipient must both deny receipt and identify a material defect directly related to the office mailing process that would

affect whether a notice was actually mailed or received. Evidence of an immaterial deviation, a general issue in office procedure unrelated to the mailing process, or an immaterial defect that would not suggest nonreceipt is not enough.

A. To rebut the presumption of receipt, a borrower must deny receipt and identify a material defect directly related to the office mailing process that would affect whether an RPAPL § 1304 notice was mailed or received.

Proof of an office procedure followed in the regular course of business creates a presumption a document was properly addressed and mailed. *E.g.*, *Donnelly*, 22 N.Y.3d at 1170; *Bossuk v. Steinberg*, 58 N.Y.2d 916, 919 (1983); *see Presumptions and inferences*, Bench Book for Trial Judges-New York § 7:2 (March 2020) (collecting cases). And this Court has long held that "[i]t is to be presumed that the papers mailed . . . were received." *Mishkind-Feinberg Realty Co. v. Sidorsky*, 189 N.Y. 402, 407 (1907). "[E]vidence of a regular office practice to ensure the proper mailing of notifications" therefore raises "the presumption that [the] notification was mailed to and received by the" recipient. *Donnelly*, 22 N.Y.3d at 1170; *accord, e.g.*, *Murray*, 46 N.Y.2d at 829. Although courts sometimes refer to this as a "presumption of receipt," *e.g.*, *Murray*, 46 N.Y.2d at 829, the real question is whether the sender demonstrated that it mailed the notice such that receipt may be presumed, *see, e.g.*, 58 Am. Jur. 2d Notice § 40 ("In order for the presumption to arise that notice was *received*, office practice must be geared so as to ensure the likelihood that a notice is always properly addressed and

mailed.") (emphases added); *see also, e.g.*, *Viviane Etienne Med. Care, P.C. v. Country-Wide Ins. Co.*, 25 N.Y.3d 498, 508-509 (2015) ("[A]s plaintiff was able to demonstrate [its] office mailing practices and procedures, a presumption arises that those notices have been received.") (internal quotation marks omitted).

A recipient cannot rebut the presumption of receipt created by a routine office mailing practice merely by saying she never got the mailing. *E.g.*, *Murray*, 46 N.Y.2d at 829-830; *Badio v. Liberty Mut. Fire Ins. Co.*, 12 A.D.3d 229, 231 (1st Dep't 2004). Rather, the recipient can rebut the presumption in one of two ways. *First*, she may provide what the cases call a "forceful denial of receipt." *Elec. Servs. Int'l, Inc. v. Silvers*, 233 A.D.2d 361, 362 (2d Dep't 1996). A forceful denial typically requires an affidavit describing the recipient's "regular practices and procedures in retrieving, opening, and indexing its mail and in maintaining its files." *Liriano v. Eveready Ins. Co.*, 65 A.D.3d 524, 524-525 (2d Dep't 2009); *see, e.g.*, *Weiss v. Macy's Retail Holdings, Inc.*, 741 F. App'x 24, 28 (2d Cir. 2018) (presumption rebutted where individual "provided evidence of his family's regular procedure for reviewing with him the mail he received and asserted, with sworn support, that the relevant mailings did not arrive and go through that process"); *Wells Fargo Bank Nat'l Ass'n v. Wolcott*, 58 Misc. 3d 1215(A), 95 N.Y.S.3d 126 (N.Y. Sup. Ct. 2018) (similar). A forceful denial does not address whether the document was properly mailed in compliance with routine office procedures;

rather, it rebuts the longstanding assumption that something mailed is properly processed and delivered, such that its receipt can be presumed. *See, e.g.*, *News Syndicate Co. v. Gatti Paper Stock Corp.*, 256 N.Y. 211, 214 (1931) ("The mailing of the bill created a presumption that it reached its destination" because courts may assume "officers of the government" at the Postal Service "will do their duty [in] the usual course of business.") (internal quotation marks omitted).

Second, a recipient may overcome the presumption of mailing and receipt by both denying receipt and demonstrating that the "routine office [mailing] practice was not followed or was so careless that it would be unreasonable to assume that the notice was mailed" in the first place. *Murray*, 46 N.Y.2d at 830. New York courts have interpreted the term "mailing" to refer to both the addressing and the mailing processes. *See Matter of T.J. Gulf, Inc. v. New York State Tax Comm'n*, 124 A.D.2d 314, 315 (3d Dep't 1986). This category of evidence speaks to whether the document in question was properly mailed and addressed, such that the court may fairly presume that it was delivered to the intended addressee. *See Engel v. Lichterman*, 95 A.D.2d 536, 544 (2d Dep't 1983) ("The presumption of receipt from mailing does not bar the acceptance of competent evidence to establish that there was not, in fact, proper mailing.") (internal quotation marks omitted), *aff'd,* 62 N.Y.2d 943 (1984).

Evidence of only a "slight deviation[] . . . of little consequence" will not rebut the presumption, so long as the mailing process "evinces a method of ensuring that notices are properly addressed and mailed." *T.J. Gulf, Inc.*, 124 A.D.2d at 316. That is true even where the law requires strict compliance with a notice requirement as a condition precedent to filing suit, as RPAPL § 1304 does here. *See, e.g.*, *Barile v. Kavanaugh*, 67 N.Y.2d 392, 399 (1986) (cancellation of auto insurance); *Savino v. Merchants Mut. Ins. Co.*, 44 N.Y.2d 625, 629 (1978) (cancellation of insurance contract). Even then, the intended recipient must provide evidence of a defect that "cast[s] doubt" on a key aspect of the actual mailing process, like whether the notice was mailed "to the proper address." *Law v. Benedict*, 197 A.D.2d 808, 810 (3d Dep't 1993).

For example, misspelling a recipient's name, "standing alone, is not sufficient to rebut the presumption" of receipt. *Abuhamra v. New York Mut. Underwriters*, 170 A.D.2d 1003, 1004 (4th Dep't 1991). Nor is it generally enough to show that the sender omitted part of the mailing address, like the post office box number or zip code, absent evidence that the missing information would prevent delivery. *See Pardo v. Central Coop. Ins. Co.*, 223 A.D.2d 832, 833 (3d Dep't 1996) (post office box number); *Olesky v. Travelers Ins. Co.*, 72 A.D.2d 924, 925 (4th Dep't 1979) (zip code); *cf. Thibeault v. Travelers Ins. Co.*, 37

A.D.3d 1000, 1001 (3d Dep't 2007) (address was so "incomplete" that the mailing "would not be delivered . . . due to United States Postal Service practices").

By contrast, evidence that the notice was "mailed to the wrong address," *Matter of Holland v. New York City*, 271 A.D.2d 609, 610 (2d Dep't 2000), or that it was not properly stamped, *Diehl v. Becker*, 227 N.Y. 318, 324 (1919), will rebut the presumption, as will "evidence of" "recurring problems with mail delivery" substantiated by "correspondence from other parties," *Matter of Novick v. New York Comm'r of Motor Vehicles*, 99 A.D.2d 811, 812 (2d Dep't 1984); *see also De Feo v. Merchant*, 115 Misc. 2d 286, 289-290 (City Ct. 1982) (similar). Likewise, where an affiant states that she mailed a document to the defendant and two other recipients, but later admits that she did not mail it to one of the other recipients, that raises sufficient doubts about whether the document was also mailed to the defendant. *Watt v. New York City Transit Auth.*, 97 A.D.2d 466, 466-467 (2d Dep't 1983).

The upshot of these cases is that rebutting the presumption of receipt requires sufficient evidence to doubt whether—in a particular case—the document was actually mailed or received. *See Diehl*, 227 N.Y. at 324. It is not enough to baldly deny receipt, to point to some general issue with office procedure unrelated to the mailing process, or even to point to a defect with the specific mailing that would not affect its chances of delivery.

The Schiffmans acknowledge that "a defendant can only rebut a presumption of mailing to the extent they can highlight a *clear deficiency*" in the mailing process itself. Schiffman Br. 18 (emphasis added). They also recognize that, to rebut the presumption of receipt, the recipient must provide both a "sworn denial of receipt" and show that the office "*mailing* practices" that gave rise to the presumption "were not followed." *Id.* at 19-20 (emphasis added). Yet the Schiffmans separately insist that "where a plaintiff submits an affirmation of familiarity with office mailing records and procedures the rebuttable presumption is not that it was *mailed*, but that it was *received*." *Id.* at 18 (emphases added). And they later contend—without citing any cases in support—that a recipient can rebut the presumption of *receipt* by "showing that *any part* of an office mailing process and procedure was not followed," whether it relates to "the actual mailing process[]" or another "part of [the] mailing routine." *Id.* at 20 (emphasis added).

The Schiffmans are wrong twice over. *First*, proof of a regular office mailing practice shows that the sender's mailing routine is so consistent that the court may reasonably "assume that the notice was *mailed*." *Murray*, 46 N.Y.2d at 830 (emphasis added); *see also, e.g.*, *Matter of Union Indem. Ins. Co. of New York*, 220 A.D.2d 341, 341 (1st Dep't 1995) ("The mailing presumption did not apply in the absence of testimony by a person with knowledge of claimant's regular office practice."); *Matter of 5421 Sylvan Ave. Assocs. Corp. v. New York City*

Conciliation & Appeals Bd., 100 A.D.2d 812, 813 (1st Dep't 1984) ("Office practices followed in the regular course of business, showing that a notice has been mailed, give rise to a presumption of mailing."). And it has long been the case that something mailed may be presumed received. *See, e.g.*, *Sidorsky*, 189 N.Y. at 407. Thus, "[t]estimony as to an office practice or procedure in the regular course of business is sufficient to establish a presumption of mailing and receipt." *E.g.*, *Burr v. Eveready Ins. Co.*, 253 A.D.2d 650, 651 (1st Dep't 1998); *cf., e.g.*, *DeLuca v. Smith*, 146 A.D.3d 732, 732 (1st Dep't 2017) (where defendant failed to describe "standard office practice or procedure designed to ensure that items are properly addressed and mailed," evidence did not "give rise to a presumption of proper mailing or receipt"); *New York & Presbyterian Hosp. v. Allstate Ins. Co.*, 29 A.D.3d 547, 547-548 (2d Dep't 2006) (same). That is why, where a party denies receipt but does not present any evidence "suggest[ing] . . . that [the document] was not mailed," the party has not rebutted the presumption of receipt. *Engel*, 95 A.D.2d at 538; *id.* at 544, 551 (rejecting dissent's position that "if a letter were not received, then it should be presumed not to have been properly mailed"). The two presumptions travel together, but are analytically distinct.

The Schiffmans do not explain why proof of a standard office procedure does not give rise to a presumption of mailing. Rather, they simply recite snippets from the Second Circuit's certification order and *Murray*. Schiffman Br. 18. But,

as explained, courts sometimes use the presumption of receipt as a shorthand for the combined presumptions of mailing *and* receipt. *Supra* pp. 13-14, 18-19. And even *Murray* acknowledged that for the presumption of *receipt* to arise, "office practice must be geared so as to ensure the likelihood that a notice of cancellation is always properly addressed and *mailed*." 46 N.Y.2d at 830 (emphasis added). In other words, when a proponent relies on evidence of a routine office procedure, the presumption of receipt first requires there to be a presumption of mailing. *See id.* Even under the Schiffmans' rule, only a "clear defec[t]" in a routine office mailing procedure can rebut the presumption of mailing and thus the presumption of receipt. Schiffman Br. 18.

Second, even assuming the Schiffmans are correct that evidence of a routine office mailing procedure creates only a presumption of receipt, they are wrong to suggest that this presumption can be overcome by "showing that *any part* of an office mailing process and procedure was not followed." Schiffman Br. 20 (emphasis added). New York courts have repeatedly held that there *can* be defects in the mailing process—including omitting the zip code or misspelling the recipient's name—without those defects rebutting the presumption. *Supra* pp. 16-17. So long as there is sufficient evidence of "office practices geared toward ensuring the likelihood that the notices were always properly *addressed and mailed*," the presumption is unrebutted. *Preferred Mut. Ins. Co. v. Donnelly*, 111

A.D.3d 1242, 1244-45 (4th Dep't 2013), *aff'd*, 22 N.Y.3d 1169 (2014); *see also id.* (presumption not rebutted despite no evidence of "a practice to ensure that the number of envelopes delivered to the mail room corresponded to the number of envelopes delivered to the post office"); *cf. McCormack v. Security Mut. Life Ins. Co.*, 220 N.Y. 447, 455 (1917) (explaining that "[e]verything of substance must be stated, but there is no requirement of literal adherence to one invariable form" (citation omitted)).

That makes sense. A categorical rule requiring strict compliance with all aspects of an office mailing procedure would be strange given this Court's longstanding recognition that "the presumption of its receipt is one of fact based upon the circumstances of the particular case." *Diehl*, 227 N.Y. at 324. Moreover, allowing a party to rebut the presumption of receipt by showing that *any part* of a routine office practice was not followed would undermine the presumption's purpose. New York enacted the business-records exception to the hearsay rule—of which the proof of a routine office mailing procedure is a part—to "afford a more workable rule of evidence in the proof of business transactions under existing business conditions." *Johnson v. Lutz*, 253 N.Y. 124, 127 (1930). Permitting a sender to introduce evidence of a regular office mailing practice, rather than proof that a particular document was actually mailed, comports with that aim; "direct

proof of the mailing of a particular letter is [often] impractical"—particularly in "large offices which handle a volume of mail." 45 A.L.R.4th 476 § 2[a].

But if a recipient need only point to *any* deviation from any *part* of the routine office procedure, that scheme would come unraveled. Imagine the office's practice is to address mailings using the address on file. Under the Schiffmans' rule, a missing comma (Albany New York), an errant space (AlbanyNew York), or a misspelled name (Jon versus John) on the mailing would be sufficient to rebut the presumption, and thus require the sender to produce direct proof of mailing. *But see, e.g.*, *Badio v. Liberty Mut. Ins. Co.*, 5 A.D.3d 170, 171 (1st Dep't 2004) (evidence that the intended recipient's "name and address appeared on the mailing list below that of a bank, but without a space between them" was insufficient), *vacated on other grounds*, 12 A.D.3d 229. So too if the sender's usual practice was to mail documents on Mondays, but the recipient pointed out that on the Monday in question, the Post Office was closed for a federal holiday. Or if the office deviated from its routine by printing the 90 Day Notice on white paper instead of green paper, by generating the 90 Day Notice after the envelope, or by listing twenty counseling agencies instead of its usual ten—all parts of a potential office routine unrelated to the mailing process.

The consequences would not be limited to foreclosure. Courts routinely rely on the presumptions of mailing and receipt in a wide range of contexts, including

cases involving insurance cancellations, *e.g.*, *Badio*, 12 A.D.3d at 231; court orders, *e.g.*, *Engel*, 95 A.D.2d at 538; trusts and estates, *e.g.*, *Diehl*, 227 N.Y. at 324; tax law, *e.g.*, *T.J. Gulf*, 124 A.D.2d at 316; and landlord-tenant disputes, *e.g.*, *5421 Sylvan Ave.*, 100 A.D.2d at 813. Allowing proof of *any* deviation from *any* part of an office mailing routine to rebut the presumption of mailing would require businesses to produce direct proof of mailing in any number of cases.

For all these reasons, this Court should hold that, to rebut the presumptions of mailing and receipt established by proof of a standard office mailing procedure, a party must both deny receipt and present evidence of a material deficiency directly related to the mailing process used in that particular case. In other words, the recipient must introduce sufficient evidence to doubt whether the document was actually mailed or received.

B. The Schiffmans have not rebutted the presumption of receipt.

Although the Second Circuit certified only the question of what showing is required to rebut the presumption of receipt established by a routine office mailing procedure, the Schiffmans urge this Court to hold that the District Court erred in granting summary judgment for CIT. Schiffman Br. 22-23. The Court need not reach that question. But if it does, it should hold that the Schiffmans have not rebutted the presumptions of mailing and receipt.

The answer this Court gives in response to a certified question "should be dispositive of the precise law query." *Rooney v. Tyson*, 91 N.Y.2d 685, 690 (1998). "Everything else—including especially the relevant application and actual decision of the case—is . . . within the exclusive juridical competence of the Second Circuit Court of Appeals." *Id.*; *see also, e.g.*, *Barenboim v. Starbucks Corp.*, 21 N.Y.3d 460, 473-474 (2013) (after answering a dispositive question of law, this Court "leave[s] it to the federal courts to apply these principles to the" case at hand). That is particularly true where the case involves a "question of summary judgment," because this Court may only rely "on the facts presented by the certified question," but "[o]ther averred allegations or facts, not before this Court, may have a bearing on this determination." *Engel v. CBS, Inc.*, 93 N.Y.2d 195, 207 (1999); *id.* (leaving "the final resolution of the summary judgment motion to the Second Circuit in light of the legal standard set forth in this opinion"). In keeping with this practice, this Court should leave it to the Second Circuit to decide whether the District Court correctly granted summary judgment.

But even if the Court were to consider this case's facts, the Schiffmans' arguments fail. The magistrate judge, the District Court, and the Second Circuit all concluded that CIT submitted enough evidence to prove that CIT presumptively mailed and that the Schiffmans presumptively received the 90 Day Notices. R260 ("The affidavit of mailing is sufficient to create a presumption that the Notices

were mailed . . . ."); R276 ("[t]he Hook affidavit meets the requirements" to prove a standard office mailing procedure); R291 (suggesting "the Schiffmans may have rebutted the presumption of receipt," but not that the presumption never arose). The Schiffmans do not dispute those conclusions here. Schiffman Br. 22-23 (conceding that "CIT created . . . a rebuttable presumption of receipt by the Schiffmans"). The only question is whether the Schiffmans have rebutted the presumption.

They have not. As an initial matter, the argument the Schiffmans now press—that they have rebutted the presumption by showing that CIT deviated from its own procedures by mailing the Schiffmans' 90 Day Notices several months after the date of default—was not preserved for review. The Schiffmans did not raise that argument in their opposition to CIT's motion for summary judgment. And in their objection to the magistrate judge's report and recommendation, they claimed that Hook's affidavit was deficient because it stated that the envelopes for the 90 Day Notices "are purportedly created upon default," but failed to describe a procedure "regarding the time frame by when or by what process these envelopes are ever mailed." R268. As for the timing of the mailing, they noted that only once—in a footnote. R268 n.1. It was not until their opening Second Circuit brief that the Schiffmans argued that this question of timing "contradict[s] and undermine[s]" the "Hook Affidavit's description of CIT's mailing practices and

procedures." Schiffman C.A.2 Br. at 12, No. 18-3287, Dkt. #52. And even then, they claimed that the evidence demonstrated CIT had failed to create a presumption of receipt—not that the presumption had been rebutted. *Id.* at 13.

"To preserve an argument for review by this Court, a party must raise the *specific argument* in [trial court] and ask the court to conduct that analysis in the first instance." *U.S. Bank Nat'l Ass'n v. DLJ Mortg. Cap., Inc.*, 33 N.Y.3d 84, 89 (2019) (internal quotation marks omitted and emphasis added). Similarly, in the Second Circuit, "issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived." *Tolbert v. Queens Coll.*, 242 F.3d 58, 75 (2d Cir. 2001) (internal quotation marks omitted). Indeed, the Second Circuit "do[es] not consider an argument mentioned only in a footnote to be adequately raised or preserved for appellate review." *United States v. Restrepo*, 986 F.2d 1462, 1463 (2d Cir. 1993). Because the Schiffmans did not sufficiently raise this argument below, it is not preserved for review by this Court or the Second Circuit.

But even if this Court were to reach the merits, the Schiffmans cannot succeed. To rebut the presumptions of mailing and receipt established by evidence of a routine office mailing procedure requires both a "sworn denial of receipt" and evidence of a material deficiency directly related to the mailing procedure that raises sufficient doubts about whether the document was mailed or received.

Supra pp. 15-23. The Schiffmans can do neither. As to the first, Jerry Schiffman provided a sworn statement merely denying receipt of the 90 Day Notice, but Pamela Schiffman did not. R238; R236. Pamela Schiffman has therefore not rebutted the presumptions of mailing and receipt.

Nor have the Schiffmans satisfied the second requirement. Hook averred that CIT's standard business practice is to create the 90 Day Notices upon a borrower's default. R19. She did not state that it is standard business practice to *mail* that Notice immediately upon default. Rather, she stated that once the 90 Day Notice was *created*, it would be placed in a separate, sealed envelope, "and provided to the United States Post Office for mailing." *Id.* Although CIT may have deviated from its usual 90 Day Notice *creation* procedure,[1] the Schiffmans have not presented any evidence that CIT deviated from its 90 Day Notice *mailing* procedure. *See* R292 ("We recognize that the delay in creating the Schiffmans' § 1304 notices does not necessarily imply that CIT otherwise failed to follow its routine procedures for addressing and mailing notices."). That is, the Schiffmans have not identified any defect directly related to CIT's usual practice of, upon creating a 90 Day Notice, "enclos[ing]" it, "separate from any notice, in both the certified and first-class mail, postage prepaid envelopes," "seal[ing]" those

[1] The Schiffmans defaulted in December 2014 and the 90 Day Notices were generated in November 2015. As the Second Circuit acknowledged, this delay is likely because CIT acquired the Schiffmans' loan over eight months after they defaulted. R291-292; *see supra* pp. 4, 10.

envelopes, and "provid[ing] [them] to the United States Post Office for mailing." R19. The Schiffmans accordingly have not raised sufficient doubt about whether these notices were mailed or received and have not rebutted the presumptions.

II. RPAPL § 1306 REQUIRES THAT A LENDER NEED ONLY LIST ONE BORROWER IN ITS NOTICE, EVEN FOR A MULTI-BORROWER LOAN.

RPAPL § 1306 requires that, within three business days of sending the 90 Day Notice, the lender must inform DFS of "the name, address, last known telephone number of the borrower, and the amount claimed as due and owing on the mortgage, and such other information as will enable the superintendent [of DFS] to ascertain the type of loan at issue." RPAPL § 1306(1)-(2). DFS uses that information to create a statewide database of foreclosure information, which allows it to monitor and analyze foreclosure trends across the State, and to help "coordinat[e] or secur[e] help for borrowers at risk of foreclosure." *Id.* § 1306(4). Like RPAPL § 1304, compliance with RPAPL § 1306 is a condition precedent for a lender to seek foreclosure. *Id.* § 1306(1).

The Schiffmans do not deny that CIT filed a RPAPL § 1306 notice with DFS. Rather, they contend that CIT's notice was deficient because it lists only Pamela Schiffman, and not Jerry Schiffman, under "Borrower's Name." Schiffman Br. 24-25 (citing R122).

That argument "exalts form over compliance with the intent and purpose of the statute." *HSBC Bank USA, N.A. as Tr. for Certificateholders of Ace Sec. Corp.*

Home Equity Loan Tr. v. Ahmad, 62 Misc. 3d 1225(A), 113 N.Y.S.3d 832, at *6 (N.Y. Sup. Ct. 2019). The text and purpose of RPAPL § 1306 require only that the lender list the name of one "borrower." And any error from a lender's not listing every borrower on a multi-borrower loan is harmless.

A. RPAPL § 1306, by its plain terms, requires a lender to list only the name of one "borrower."

Under RPAPL § 1306, the lender need only list the name "of the *borrower*." RPAPL § 1306(2) (emphasis added). As DFS has explained, "RPAPL § 1306 requires the reporting of the name of 'the Borrower'. It does not specifically anticipate multiple borrowers." Pre-foreclosure Information Form FAQs, DFS, https://on.ny.gov/3753YPA (last visited September 17, 2020). And although New York generally interprets "[w]ords in the singular number [to] include the plural," Gen. Constr. Law § 35, that rule is not applicable if the "general object, or the context of the language construed, or other provisions of law indicate that a different meaning or application was intended," *id.* § 110.

RPAPL § 1306's purposes would not be served for a suit to be dismissed when a lender lists only one of two borrowers on its notice. After all, "it is totally irrelevant" to RPAPL § 1306's purposes "whether both borrower defendants had separate filings made." *Ahmad*, 113 N.Y.S.3d 832, at *7. RPAPL § 1306 allows DFS to create a statewide "database" of defaulted loans. RPAPL § 1306(3). Using the database, DFS can monitor "the state of defaults and foreclosures of mortgages

in New York" and "direct available foreclosure prevention resources" to borrowers. Pre-foreclosure Information Form FAQs, *supra*; *see* RPAPL § 1306(4). The legislative history reflects the same aims; the Governor's Program Bill Memorandum explains that RPAPL § 1306 is meant to allow "the State [to] effectively monitor distressed borrowers and target counseling help efficiently." Governor's Program Bill Mem., Bill Jacket, L. 2009, ch. 507, at 11.

Listing only one borrower on a RPAPL § 1306 notice "d[oes] not deprive the State of the information it need[s]." *Ahmad*, 113 N.Y.S.3d 832, at *6. A one-borrower notice allows DFS to monitor foreclosures throughout the State by tracking them at the residence level. And a one-borrower notice allows DFS to direct resources to the family facing foreclosure by sending a mailer to the residence. Finally, DFS itself has acknowledged that there is no need to report multiple borrowers on an RPAPL § 1306 notice to fulfill these aims. Pre-foreclosure Information Form FAQs, *supra*. As DFS has said, "[t]he purpose of the borrower information on the Disclosure Form is to assist mortgage counselors working with the Department to contact the Borrower." *Id.* A single-borrower RPAPL § 1306 notice does that by identifying someone at the residence that the mortgage counselor can send a mailing to.

In fact, requiring a lender to list every borrower could actually *undermine* the legislature's goals. DFS has explained that although it assumes multiple

borrowers living in the same residence "have the same interest in seeking counseling to avoid foreclosure, . . . even if their interests differ, it is difficult for New York to allocate resources to more than one borrower in a household." *Id.* Requiring DFS to provide information to each borrower at the same residence could make it more difficult for the State to provide resources to others. DFS's conclusion that a one-borrower notice satisfies RPAPL § 1306 warrants "respectful attention." *Jericho Water Dist. v. One Call Users Council, Inc.*, 10 N.Y.3d 385, 391 (2008).

To be sure, DFS's system technically allows a lender to input up to two borrowers. *See* Pre-foreclosure Information Form FAQs, *supra*. But the Schiffmans' argument does not stop at two borrowers; under their logic, *any* number of borrowers would have to be entered, even though DFS's system does not allow it. And it is no answer to say that the lender could send multiple RPAPL § 1306 notices. DFS tracks *loans* in default, not *borrowers* in default, so multiple forms for multiple borrowers would gum up the system. *Id.* For that reason, too, the Court should decline to hold that RPAPL § 1306 requires a notice to list *all* borrowers on a loan.

The Schiffmans counter that the Court should import RPAPL § 1304's requirement to send a 90 Day Notice to all borrowers into RPAPL § 1306's DFS-filing requirement. Schiffman Br. 25. But the two statutes use different language:

RPAPL § 1304 requires notice be given to "the borrower, or borrowers," while RPAPL § 1306 requires notice to be given only to "the borrower." *Compare* RPAPL § 1304(1), *with* RPAPL § 1306(2). And the two statutes, enacted at two different times, serve two different goals: A RPAPL § 1304 90 Day Notice notifies the *borrowers* that the lender intends to foreclose and provides them with a list of potentially useful resources, while a RPAPL § 1306 notice notifies *the State* that the lender intends to foreclose so that the State may track potential foreclosures and help defaulted borrowers as it sees fit. There is no reason to read one statute into the other. *See Matter of Lower Manhattan Loft Tenants v. New York City Loft Bd.*, 66 N.Y.2d 298, 304 (1985).

Indeed, the Schiffmans do not explain what, if any, benefit Jerry Schiffman would have received from the filing of a separate RPAPL § 1306 notice. That is not surprising; as one court has explained, "[s]uch a 'second filing' . . . would have provided no new information to satisfy the purposes of the RPAPL § 1306 filing." *Bank of New York Mellon as Tr. for Certificateholders of the CWABS, Inc. Asset-Backed Certificates v. Vasquez*, 63 Misc. 3d 1220(A), 114 N.Y.S.3d 822, at *5 (N.Y. Sup. Ct. 2019). In contrast, adopting the Schiffmans' position and requiring lenders to list multiple borrowers may *undermine* the statutory goals by straining the State's limited resources, thereby potentially depriving *other* borrowers of state assistance.

The Schiffmans also contend that because a lender must prove "strict compliance" with RPAPL § 1306, "incomplete compliance" cannot be enough. Schiffman Br. 26. But that is question begging; it assumes that RPAPL § 1306 requires the notice to list all borrowers. RPAPL § 1306 actually requires only one borrower to be listed, and so a notice that lists only one borrower strictly complies with the statute.

In the end, reading the singular statutory term "borrower" to require a RPAPL § 1306 notice for all borrowers on a given loan would not serve the statute's "general object." Gen. Constr. Law § 110. The Court should therefore hold that, when dealing with a multi-borrower home loan, a lender need only file a RPAPL § 1306 notice naming one borrower.

B. Any error from the failure to list multiple borrowers on an RPAPL § 1306 notice is harmless and should be disregarded.

Even if this Court holds that RPAPL § 1306 requires a lender to list multiple borrowers on its disclosure form, a lender failing to do so is harmless. If a party makes a "mistake" or "omission" that does not "prejudice[]" the "substantial right of a party," the mistake "shall be disregarded." CPLR 2001.

So it is here. A lender's failure to list additional borrowers on a RPAPL § 1306 notice does not "prejudice" the non-listed borrower "by depriving her of any substantial right." *Ahmad*, 113 N.Y.S.3d 832, at *6; *accord Vasquez*, 114 N.Y.S.3d 822, at *5. In fact, it does not deprive the non-listed borrower of any

right at all. "RPAPL § 1306 . . . was not intended to, nor does it, confer any notification of information, assistance, benefits or rights to the now defendant mortgagors." *Vasquez*, 114 N.Y.S.3d 822, at *4. Rather, as the statute recognizes, the information contained in a RPAPL § 1306 notice is "exclusively" for DFS's use. RPAPL § 1306(4); *see* Pre-foreclosure Information Form FAQs, *supra* ("The information filing is designed to provide the *superintendent* [of DFS] with information . . . . ") (emphasis added); *see also Vasquez*, 114 N.Y.S.3d 822, at *4 (RPAPL § 1306 "was only to be a source of statistics for the state"). And although the State's rights are irrelevant because it is not a party, *see* CPLR 2001, listing only one borrower does not deprive the State of anything, either. *See supra* p. 30.

And even if each borrower on a loan has the "right" to be listed on an RPAPL § 1306 filing notice, a lender failing to list one of several joint borrowers does not "prejudice" that right. CPLR 2001. By listing one of the borrowers, the lender provides the State all the information it needs to identify the loan and provide information to the borrowers at their home address. A lender's omission is accordingly, at most, a technical defect—precisely what CPLR 2001 tells courts to ignore. *See, e.g.*, *Ruffin v. Lion Corp.*, 15 N.Y.3d 578, 582 (2010) (CPLR 2001's purpose is "to allow courts to correct or disregard technical defects . . . that do not prejudice the opposing party"). As a result, even if this Court holds that RPAPL § 1306 requires a notice listing every borrower on a multi-borrower loan, it should

also hold that any failure to comply with that requirement is harmless as a matter of law.

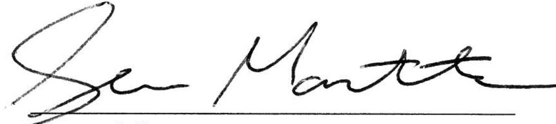
CONCLUSION

For the foregoing reasons, Court should answer the certified questions as follows:

(1) Where a foreclosure plaintiff seeks to establish compliance with RPAPL § 1304 through proof of a standard office mailing procedure, and the defendant both denies receipt and seeks to rebut the presumption of receipt by showing that the mailing procedure was not followed, the defendant must identify a material defect related to the office mailing process that would affect whether the RPAPL § 1304 notice was mailed or received.

(2) Where there are multiple borrowers on a single loan, RPAPL § 1306 requires that a lender's RPAPL § 1306 notice include information about only one borrower.

Respectfully submitted,



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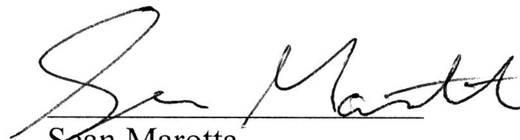

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