To be Argued by:
SUZANNE M. BERGER
(Time Requested: 30 Minutes)

APL-2022-00061
Westchester County Clerk's Index No. 54780/14
Appellate Division–Second Department Docket No. 2018-00886

Court of Appeals

of the

State of New York

BANK OF AMERICA, N.A.,

Plaintiff-Appellant,

– against –

ANDREW KESSLER,

Defendant-Respondent,

– and –

REIKO KESSLER and "JOHN DOE," said name being fictitious, it being the intention of Plaintiff to designate any and all occupants of premises being foreclosed herein, and any parties, corporations or entities, if any, having or claiming an interest or lien upon the mortgaged premises,

Defendants.

BRIEF FOR PLAINTIFF-APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Court of Appeals Rule of Practice 500.1(f), Appellant Bank of America, N.A., certifies that it is wholly owned by BAC North America Holding Company.

BAC North America Holding Company is a direct, wholly owned subsidiary of NB Holdings Corporation. NB Holdings Corporation is a direct, wholly owned subsidiary of Bank of America Corporation.

Bank of America Corporation is a publicly traded company whose shares are traded on the New York Stock Exchange. It has no parent corporation. Based on the U.S. Securities and Exchange Commission Rules regarding beneficial ownership, Berkshire Hathaway Inc., 3555 Farnam Street, Omaha, Nebraska 68131, beneficially owns greater than 10% of Bank of America Corporation's outstanding common stock.

NO RELATED LITGATION

Pursuant to Court of Appeals Rule of Practice 500.13(a), Bank of America, N.A., states that it is unaware of any litigation related to this appeal.

QUESTIONS PRESENTED

1. Whether including in the 90-day notice sent to Respondent in this foreclosure case helpful information relevant to the statutorily mandated language, in addition to the specific text prescribed by RPAPL § 1304(1), violated the "separate envelope" provision in RPAPL § 1304(2).

2. If so, whether the courts below should have exercised their discretion under CPLR § 2001 to consider the additional disclosures as a *de minimis* variance not material to consideration of Appellant's motion for summary judgment and granted the motion.

PRELIMINARY STATEMENT

This appeal seeks the reversal of a misinterpretation of a single statute affecting thousands of residential foreclosure actions throughout the State.

NY Real Property Actions & Proceeding Law § 1304(1) requires all lenders, assignees, and mortgage loan servicers to provide a notice to borrowers ninety (90) days before commencing any foreclosure action that "shall include" specified language advising borrowers of their rights and the availability of government-approved counseling agencies. RPAPL § 1304(2) provides that this notice "shall be sent … in a separate envelope from any other mailing or notice."

Although standard principles of statutory analysis counsel that supplemental information may be included in the same notice that contains the RPAPL § 1304(1) prescribed text, the Appellate Division, Second Department, in a split decision, held that only the text actually appearing in the statute could be included. In the majority's view, any additional information, even if helpful to the borrower, so materially violated the statute that the remedy was dismissal of the resulting foreclosure action.

Because for a decade most New York foreclosure plaintiffs used notices that included both the statutory text and bankruptcy disclaimers and/or federal Fair Debt Collection Practices Act warnings and/or military servicemembers' information, foreclosure actions are now being dismissed, regardless of whether

the borrower relied on or even read the information, the stage of litigation, or whether the borrower had preserved or raised the content of the notice in its answer or earlier motions.

The Appellate Division's ruling is not only stark, but also wrong. RPAPL § 1304 does not proscribe or limit the language that may supplement the statutorily-specified text. Indeed, the statute does the opposite. RPAPL § 1304(1) uses the expansive words "shall include" to require the specified text but not prohibit supplemental text. And for good reason: borrowers may have rights and options beyond those included in the required text.

Here, Appellant sent Respondent a 90-day notice with the requisite language. In accordance with long-standing practice among lenders and loan servicers, the last page of that seven-page notice included additional relevant, important, and helpful information. But the Second Department adopted what it termed a "bright-line rule" that

> inclusion of *any* material in the separate envelope sent to the borrower under RPAPL 1304 that is not expressly delineated in [its] provisions constitutes a violation of the separate envelope requirement of RPAPL 1304 (2).

(R. 378) (emphasis added).

This construction of RPAPL §1304(2) is wrong for several reasons.

First, based on its plain language, its legislative history, and rules of statutory construction, RPAPL § 1304 must be interpreted more broadly. Its

purpose is remedial: to provide borrowers with useful information in a time of potential crisis. Its plain, explicit, and unambiguous direction is that the 90-day notice "shall include" certain information. "Include" is a word of expansion, not limitation. Legislative history shows that the "shall include" language predates the "separate envelope" provision, was not altered by subsequent amendments, and retained its expansive meaning. Moreover, conventional rules of statutory construction require legislation such as RPAPL § 1304, which is in derogation of the common law right of foreclosure, to be interpreted with minimal impact on narrowing those common law rights.

Second, this new, judicially created stark "bright-line rule" conflicts with the federal Fair Debt Collection Practices Act, which requires additional information to be included with the RPAPL § 1304 notice in some circumstances. It also conflicts with New York State law. In 2021, the legislature amended Real Property Law § 280-d(2) to authorize the Department of Financial Services to issue rules requiring that, for "reverse" mortgages, RPAPL § 1304 notices "include additional information necessary to explain the mortgagor's rights in a foreclosure process." This legislative act was premised on the belief that additional information can and should be provided in or with the § 1304 notice. Likewise, COVID-19 moratorium legislation enacted in September 2021 required foreclosing parties to include additional information – an entirely separate form Hardship

Declaration – "with" 90-day notices issued before January 15, 2022. *See* COVID-19 Emergency Eviction and Foreclosure Prevention Act of 2020, ch. 381, L. 2020 (as amended September 2, 2021). This also confirmed that the Legislature intended to allow additional information in RPAPL § 1304 notices.

Third, the Second Department erred in finding that a duty of "strict compliance" with RPAPL § 1304 favors a restrictive and dismissal-triggering interpretation of its text. The majority justified its conclusion by reference to *Freedom Mortg. Corp. v. Engel*, 37 N.Y.3d 1, *reargument denied*, 37 N.Y.3d 926 (2021), claiming that this Court rejected the type of "judicial scrutiny" that a "flexible standard" could allow in foreclosure cases. However, *Engel* was not the last word on this question. After *Engel*, this Court applied just such a flexible standard in another foreclosure case, *CIT Bank, N.A. v. Schiffman*, 36 N.Y.3d 550 (2021). The Second Department chose not to address *Schiffman*, even though it is more closely on point with this case. (*Schiffman* concerned RPAPL § 1304 proof issues, while *Engel* addressed the foreclosure statute of limitations). *Schiffman* approved a flexible, case-by-case (or notice-by-notice) approach to resolving RPAPL § 1304 issues, which is the appropriate standard here.

The Second Department majority also misapplied *Engel* (as well as other Appellate Division precedent) in concluding that "strict compliance" with § 1304 means that its "separate envelope" rule must be "strictly interpreted" to preclude

any "additional material." In doing so, the Second Department improperly conflated "strict compliance" with "strict interpretation."

Finally, even if the statute's "shall include" language could be read to exclude any other information and require adherence to the literal words of the statute, the dismissal of this action based on the notice's helpful additional disclosures was still improper for at least two reasons. The inclusion of the disclosures was, at most, a *de minimis* variance, which the Second Department should have exercised its discretion under CPLR § 2001 to allow, thus averting the harsh remedy of dismissal. And any "bright-line rule," if adopted, should be given only prospective application because the issue is one of first appellate impression. Retroactive application of the stark "bright-line rule" will have a crushing impact on the courts as cases are dismissed without being adjudicated on their merits simply to be re-started, while also causing enormous prejudice to parties who relied on the well-established, decade-long practice and precedent allowing the inclusion of information now prohibited.

JURISDICTION

This Court has jurisdiction under CPLR 5602(a)(1)(i), because the Appellate Division, Second Department granted Bank of America's motion for leave to appeal. (R. 374).

STATEMENT OF THE CASE

A. Respondent's Mortgage Loan

On or about September 11, 2009, Respondent Andrew Kessler executed a $590,302.00 note in favor of MLD Mortgage, Inc., and a mortgage on residential property in Croton-On-Hudson to secure his indebtedness (R. 199 ¶ 4; R. 206-22). He did not pay the installments due on September 1, 2013 or thereafter. (R.200 ¶ 8; R. 225-238).

B. The RPAPL § 1304 Notice

On October 7, 2013, Appellant sent its standard RPAPL § 1304 notices to Respondent and his wife, separately, by certified and regular mail. (R. 202 ¶ 17; R. 282-313). Respondent concedes receipt of the notice. (R. 338-39 ¶¶ 4-5).

When the 90-day notice was sent – and now, with respect to the relevant italicized portion – RPAPL § 1304 provided in part that:

> (1) Notwithstanding any other provision of law, with regard to a home loan, at least ninety days before a lender, an assignee or a mortgage loan servicer commences legal action against the borrower or borrowers at the property address, and any other address of record, including mortgage foreclosure, such lender,

> assignee or mortgage loan servicer shall give notice to the borrower in at least fourteen-point type which *shall include the following* [specified language, along with a list of government approved housing counseling agencies in the recipient's area]
>
> * * *
>
> (2) The notices required by this section shall be sent by such lender, assignee or mortgage loan servicer to the borrower, by registered or certified mail and also by first-class mail to the last known address of the borrower, and if different, to the residence that is the subject of the mortgage. *The notices required by this section shall be sent by the lender, assignee or mortgage loan servicer in a separate envelope from any other mailing or notice*. . . .

(emphasis added).

Appellant's RPAPL § 1304 notice contained the text identified by the statute and the required list of regional counseling agencies. (R. 283-97). The notice also contained, on its final page (page 7), supplemental information in English and Spanish about the rights of borrowers in bankruptcy and military service under the heading "Important Disclosures." (R. 289; R. 297).

The supplemental information advised Respondent that if he was currently in a bankruptcy proceeding or if his debt had been discharged under federal bankruptcy law, then the 90-day notice was for information purposes only, and not an attempt to collect the debt:

> If you are currently in a bankruptcy proceeding, or have previously obtained a discharge of this debt under applicable bankruptcy law, this notice is for information only and is not an attempt to collect the debt, a demand

> for payment, or an attempt to impose personal liability for that debt. You are not obligated to discuss your home loan with us or enter into a loan modification or other loan-assistance program. You should consult with your bankruptcy attorney or other advisor about your legal rights and options.

(R.289; R. 297; bold typeface omitted).

The military service disclosure informed Respondent that, if he or his spouse were servicemembers, they might have special federal and state protections against foreclosure and be eligible for other benefits:

> MILITARY PERSONNEL/SERVICEMEMBERS**:** If you or your spouse is a member of the military, please contact us immediately. The federal Servicemembers Civil Relief Act and comparable state laws afford significant protections and benefits to eligible military service personnel, including protections from foreclosure as well as interest rate relief. For additional information and to determine eligibility please contact our Military Assistance Team toll free at 1-877-430-5434. If you are calling from outside the U.S. please contact us at 1-817-685-6491.

(*Id.*; bold typeface omitted).

C. This Foreclosure Action and The IAS Court Decision

Appellant commenced this foreclosure action in March 2014. (R. 16-28). In 2017, Appellant moved for summary judgment. (R. 54-320). Respondent cross-moved to dismiss on that ground that Appellant had not complied with RPAPL § 1304(2)'s provision that the 90-day notice "shall be sent . . . in a separate envelope from any other mailing or notice." (R. 320-43). Westchester Supreme

Court Justice Scheinkman, now retired, granted Respondent's cross-motion, holding, in relevant part, that by including the Important Disclosures about the rights of borrowers in bankruptcy and military service, Appellant materially violated RPAPL § 1304(2) and that dismissal was the proper remedy. (R. 5-13).

D. The Second Department Decision

Bank of America appealed. On December 15, 2021, a majority of the four-justice panel affirmed, finding "strict compliance" with RPAPL § 1304 called for an "exacting" interpretation of RPAPL 1304(2)'s "separate envelope" provision and adopting a "bright-line rule" that 90-day notices including any information not "expressly delineated" in RPAPL § 1304(1) materially violated the statute. (R. 375-91).

The majority found that the 90-day notice cannot include supplemental information, even if that information is helpful and relevant to the notice or, indeed, is warranted by federal law because – no matter the content – the "separate envelope" phrase must be "strict[ly] interpret[ed]." (R. at 378).

The majority thus established a new and very stark "bright-line rule" that "inclusion of *any* material in the separate envelope sent to the borrower under RPAPL 1304 that is not expressly delineated in [its] provisions constitutes a violation of the separate envelope requirement of RPAPL 1304(2)." *Id*. (emphasis added). The majority then found that Appellant's RPAPL § 1304 notice violated

this new rule because the notice included, on its last page, the additional explanations of rights recipients may have under federal bankruptcy and servicemember statutes.

In dissent, Justice Miller argued that the supplemental information did not violate the statute and invalidate the notice, given that RPAPL § 1304(1) provides only that the notice "shall include" certain language and its "plain language does not purport to restrict the content of a valid notice, or prohibit the inclusion of any other language beyond that which is explicitly required." (R. 388). The dissent reminded us that the word "include" is a term of enlargement and not a basis for reading into the statute a prohibition against other relevant language. (R. 388-89). Justice Miller observed:

> If it had been the Legislature's intent to restrict or proscribe additional language in a valid RPAPL 1304 notice, that intent "would have been expressed." The statute could have stated that a valid RPAPL 1304(1) notice shall *only* include certain language, but the Legislature chose not to employ any such words of limitation.

Id. at 389 (emphasis original; citations omitted). Further, "basic principles of statutory construction counsel against reading such a prohibition into the statute." *Id*.

The dissent aptly recognized that "[s]ince the additional language was relevant to, and in fact clarified, the warnings and instructions mandated by the statute, it did not constitute a separate 'mailing or notice . . . .'" (R. 383). It also

emphasized that the additional language did not "frustrate the statute's overarching purpose or intent." *Id*.

> Where, as here, the plain language of the statute has not been violated, and where the spirit and intent of the law has not been frustrated, the statute should not be extended in a way that transforms every inconsequential addition into a new dispositive issue.

(R. 391).

E. Aftermath

The Second Department granted Appellant's motion for leave to appeal to this Court. (R. 374). In the interim, several courts have criticized the rationale and holding of the majority opinion, and the United States District Court for the Southern District of New York has declined to follow it, seeing it as a misreading of New York law. *See CIT Bank, N.A. v. Neris*, 2022 WL 1799497, *4, 2022 U.S. Dist. LEXIS 99040, *9 (SDNY June 2, 2022, No. 18 Civ. 1511 (VM)); *Bank of New York Mellon f/k/a The Bank of New York, as Trustee v. Hershman*, Index No. 58666/2016, Ecker J. (Sup. Ct. Westchester County, May 18, 2022) ("Perhaps the Court of Appeals ... will adopt a case by case analysis when this issue arises, rather than a so-called 'bright line' test."); *see also BCMB1 Trust v. Kiely*, Index No. 618396/2020, Whelan, J. (Sup. Ct. Suffolk County Jan. 6, 2022); *Bank of New York Mellon v. Luria*, 2022 WL 1483870, *2, 2022 N.Y. Misc. LEXIS 1956, *3 (Sup. Ct. Putnam County May 11, 2022, No. 800018/2020 (VGG)).

F. Foreclosures in New York

This new rule will have broad application. Available data show that, from 2013 through 2019, over 200,000 foreclosure actions were filed statewide. Close to 50,000 were filed in 2018 and 2019 alone. As of October 2019, approximately 33,000 of these cases were pending. *See* State of New York, Unified Court System, *2019 Report of the Chief Administrator of the Court on the Status of Foreclosure Cases,* at 4-5 (2019), available at www.nycourts.gov/sites/default/files/document/files/2019-12/ForeclosureAnnualReport2019.pdf (last accessed July 18, 2022). In New York City alone, approximately 80,000 foreclosure cases involving one to four family homes and condominiums were filed between 2013 through 2019, and between 2013 and 2021 approximately 370,000 90-days notices were sent. *See* NYU Furman Center, *State of Homeowners and Their Homes*, (2020) available at https://www.furmancenter.org/stateofthecity/view/state-of-homeowners-and-their-homes-2020 (last accessed July 18, 2022); NYU Furman Center, *State of Homeowners and Their Homes*, (2021) available at https://www.furmancenter.org/stateofthecity/view/state-of-homeowners-and-their-homes (last accessed July 18, 2022). As reflected by numerous reported decisions, most servicers and lenders included additional information in the 90-day notices sent. *See* fn. 1 below and cases cited at pp. 42-43.

ARGUMENT

Point I shows that, under statutory interpretation principles, RPAPL § 1304 permits the inclusion of additional language beyond the text required by RPAPL § 1304(1).

Point I(A) explains that RPAPL § 1304, read as a whole and giving meaning to all parts – and taking the legislative history and rules of statutory interpretation into account – supports including supplemental information that is relevant to, and clarifies, the statutorily mandated language. Section 1304(1) provides only that the notice "shall include" the required information, and "include" is not a word of limitation. Because the Important Disclosures here are germane to, and included with, the statutory language, they are not a separate "mailing or notice" requiring a separate envelope, but instead are directly related to – and thus part of – the RPAPL § 1304 notice.

Point I(B) shows that the Second Department's new "bright-line rule" conflicts with other federal and state laws that reflect a legislative intent that RPAPL § 1304 notices can contain information helpful to borrowers beyond what the statute requires.

Point I(C) discusses the majority's conclusion that *Financial Freedom v. Engel*, 37 N.Y.3d 1, *reargument denied*, 37 N.Y.3d 926 (2021) favored a "bright-line rule" without accounting for this Court's later decision in *CIT Bank, N.A. v.*

Schiffman, 36 N.Y.3d 550 (2021), which allowed a case-by-case, fact-specific analysis in a foreclosure action to evaluate the evidence required to rebut a lender's proof of mailing of an RPAPL § 1304 notice.

Point II explains that, even if the Second Department's interpretation of RPAPL § 1304 were correct, dismissal was not warranted. Any variation from the statute was *de minimis* and should have been excused under CPLR § 2001. Further, as the majority acknowledged, the issue is one of first appellate impression and was resolved in a manner not clearly foreshadowed given the number of trial courts that had held otherwise. Thus, any new rule should be limited to prospective application. Retroactive application of the majority's "bright-line rule" will result in great taxation of judicial time and resources due to the number of cases that will be dismissed and then restarted after new and less informative 90-day notices are sent to the borrowers, as well as cause enormous expense and prejudice to lenders.

POINT I

RPAPL § 1304 ALLOWS THE NOTICE TO INCLUDE ADDITIONAL INFORMATION BEYOND THE STATUTORILY PRESCRIBED TEXT

A. RPAPL § 1304 EXPLICITLY CONTEMPLATES THE INCLUSION OF ADDITIONAL INFORMATION WITH THE 90-DAY NOTICE

In the Second Department's view, including any language – no matter how mundane or helpful – that is not specifically required by RPAPL § 1304(1)

constitutes, as a matter of law, a separate "mailing or notice" forbidden by RPAPL § 1304(2) and is a defect so substantial that dismissal of the action is the only remedy. That conclusion is not supported by (1) the plain language of the statute, which uses the expansive word "include" to describe the contents of the RPAPL § 1304 notice, (2) the legislative history, or (3) statutory interpretation principles favoring narrow limitations on common-law rights.

1. The Plain Language of the Statute Permits Additional Information

The plain language of RPAPL § 1304(1) is inclusive and does not prohibit additional information in the 90-day notice beyond what the statute requires. "In matters of statutory interpretation, the primary consideration is to discern and give effect to the Legislature's intention" and "[w]hen the plain language of the statute is precise and unambiguous, it is determinative." (R. at 376-77) (citations omitted).

The majority interpreted the statute in a manner inconsistent with its plain meaning. The statute provides a "lender, assignee or mortgage loan servicer shall give notice to the borrower . . . which *shall include* the following …." RPAPL § 1304 (emphasis added). Its affirmative identification of language that must be included does not prohibit all other language. And RPAPL § 1304(2), in turn, prohibits only sending "any other mailing or notice" in the same envelope – not, as the majority would have it, any "additional material." (R. 378).

"Include" is "usually a term of enlargement, and not of limitation . . . [I]t therefore conveys the conclusion that there are other items includable, though not specifically enumerated by the [statute]." *Willow Wood Rifle & Pistol Club, Inc. v. Town of Carmel Zoning Bd. of Appeals*, 115 A.D.2d 742, 744 (2d Dept 1985), *quoting U.S. v. City of N.Y.*, 481 F. Supp. 4, 6 (SDNY), *aff'd*, 614 F.2d 1292 (2d Cir. 1979). "In definitive provisions of statutes and other writings, 'include' is frequently, if not generally, used as a word of extension or enlargement rather than as one of limitation or enumeration." *Am. Sur. Co. of N.Y. v. Marotta*, 287 U.S. 513, 517 (1933) (citation omitted); *see also Fed. Election Comm'n v. Mass. Citizens for Life, Inc.*, 769 F.2d 13, 17 (1st Cir. 1985), *aff'd*, 479 U.S. 238 (1986); *Winterrowd v. David Freedman & Co.,* 724 F.2d 823, 825 (9th Cir. 1984); *Matter of Maidman*, 2 B.R. 569, 575 (Bankr. SDNY 1980), *aff'd sub nom,* 668 F.2d 682 (2d Cir. 1982); 2A Sutherland, *Statutory Construction* § 47:25 (7th ed. 2017).

This Court has "recognized that '[i]ncluding' may be used to bring into a definition something that would not be there unless specified, or it may be used to show the meaning of the defined word by listing some of the things meant to be referred to, *but not by such listing excluding others of the same kind*." *Red Hook Cold Stor.Co. v. Dep't. of Labor of State of N.Y.*, 295 N.Y. 1, 8 (1945) (emphasis added). The majority did not address RPAPL § 1304's use of "shall include" or the meaning of "include" in holding that RPAPL § 1304(1)'s required language is

exclusive. Instead, it effectively re-wrote the statute to provide that the notice shall only include that language. However, as the dissent properly noted: "[t]here is no statutory basis to conclude that any language beyond that which is required by RPAPL 1304(1), however slight or innocuous, constitutes a separate 'mailing or notice' within the meaning of RPAPL 1304(2)." (R. 389) (citations omitted). *See also Citimortgage v. Bunger*, 58 Misc. 3d 333, 341 (Sup. Ct. Suffolk County 2017) ("The statute did not, and still does not require "only" the language contained therein to be in the notice.").

Here, the Important Disclosures provided information integral to the purpose of the statutorily-required content of the notice. The notice at issue here explains that borrowers in bankruptcy or military service have additional statutory protections or benefits. As the dissent noted – without needing to indulge the majority's feared "exploration of the lender's intent" and "'exhaustive examination' of the parties' conduct" – the Important Disclosures were "relevant to, and clarified, the statutorily mandated language." (R. 391). *See also JP Morgan Chase Bank v. Dedvukaj*, Index No. 63611/2014 at 3, Smith, J. (Sup. Ct. Westchester County Dec. 7, 2017) (the "additional information does not constitute illicit 'notices' prohibited by RPAPL § 1304(2), but rather merely clarification about housing counseling services and about the import of communication with the lender."); *U.S. Bank v. Nicosia*, Index No. 9057/15, Adams, J. (Sup. Ct. Nassau

County May 10, 2017), available at R. 356 ("inclusion of additional federally mandated beneficial information relevant to the [bankruptcy] discharges did not negate" plaintiff's compliance with RPAPL § 1304).

Because the Important Disclosures are germane to and included in the same document to supplement the statutory language, they are not a separate "mailing or notice" requiring a separate envelope, but instead are directly related to – and thus part of – the RPAPL § 1304 notice as sent. Examples of a presumably prohibited separate "mailing or notice" may include:

- The pre-acceleration notice of default required by paragraph 22 of most residential mortgages.
- Monthly mortgage statements. 12 CFR 1026.41.
- Annual escrow statements. 12 CFR 1024.17(i).
- Escrow shortage notices. 12 CFR 1024.17(f)(5).
- Interest rate change disclosures. 12 CFR 1026.20(c).
- Notices of servicing transfer. 12 CFR 1024.33(b).
- Notices related to insurance. 12 CFR 1024.37(c).
- Annual privacy notices. 12 CFR 1016.5.

2. Legislative History Does Not Support the Majority's "Bright-Line Rule"

The legislative history does not support the majority's "bright-line rule"; it supports the conclusion that RPAPL § 1304 permits the 90-day notice to include information beyond the required text. The majority wrote that its "strict interpretation of the 'separate envelope' requirement was consistent with the Legislature's intent" because that requirement was added to RPAPL § 1304(2) in 2009 and remains in the statute today. (R. 378-379). This overlooks that the "shall

include" language in RPAPL § 1304(1) was part of the statute since 2008, before the "separate envelope" requirement was added. Further, as the dissent noted, RPAPL § 1304(2) "does not purport to set any restrictions on the content of the" 90-day notices "[n]or does it define the facts or circumstances that would constitute a separate 'mailing or notice' for the purpose of the 'separate envelope' requirement." (R. 390).

As the dissent also noted, had the Legislature intended the "separate envelope" amendment to restrict 90-day notices to the limited text identified in RPAPL § 1304(1), that intent "would have been expressed." (R. 389, citing *Burnside v. Whitney*, 21 N.Y. 148, 149 (1860)). The Legislature could easily have added prohibitive language at that time to the already existing "shall include" language or provided in RPAPL § 1304(2) that the notice shall be sent in "a separate envelope from any other information provided." It did not. By retaining the phrase that the notice "shall include" the required information, the Legislature allowed for the possibility of additional information. This intention was confirmed by the later amendment of RPL § 280-d and the passage of the COVID 19 Emergency Eviction and Foreclosure Prevention Act of 2020. *See* Point I(B), *infra*.

RPAPL § 1304's purpose further supports the inclusion of additional beneficial information in the 90-day notice. The legislative history states that

RPAPL § 1304's purpose is to provide a "90-day time period during which the lender and the borrower may attempt to reach a mutually agreeable resolution without imminent threat of a foreclosure action." Governor's Program Bill Mem. No. 46R, Bill Jacket, L2009, ch. 507 at 10 available at https://digitalcollections.archives.nysed.gov/index.php/Detail/objects/22742 (last accessed July 18, 2022). The bill sponsor sought "to bridge that communication gap in order to facilitate a resolution that avoids foreclosure" by providing "a pre-foreclosure notice" advising the borrower of "housing counseling services available in the borrower's area" and an "additional period of time ... to work on a resolution." Senate Introducer Mem. in Support, Bill Jacket, L. 2008, ch. 472, at 10 available at https://digitalcollections.archives.nysed.gov/index.php/Detail/objects/23297 (last accessed July 18, 2022).

Appellant's inclusion of the Important Disclosures furthers these goals by providing borrowers with supplemental information integral to the purpose of the notice:

> In many cases, as in *Kessler***,** *supra,* the content of the additional paragraphs furthers that intent "to provide a homeowner with information necessary ... to preserve and protect home equity" (Real Property Law § 265–a[1][d]) by providing borrowers with additional contact options available to obtain information in connection with home retention options." With the proof of actual mailing of the required language of the notice, the

> legislative purpose of RPAPL § 1304 has been satisfied. The statutory opportunity to "bridge the communication gap" between the lender and the borrower has been fulfilled. To argue to the contrary is to read a new judicial interpretation into the statute, not the original intent as proposed in 2008.

BCMB1 Trust v. Kiely, Index No. 618396/2020, Whelan, J. (Sup. Ct. Suffolk County Jan. 6, 2022). The supplemental information also furthers the goal of the Home Equity Theft Protection Act (which enacted RPAPL § 1304) to "afford greater protections to homeowners confronted with foreclosure" by letting borrowers know their rights if the Important Disclosures apply. *First Nat'l Bank of Chicago v. Silver*, 73 A.D.3d 162, 165 (2d Dept 2010) (citations omitted).

Including the Important Disclosures does not eliminate, alter, or obscure any of the benefits and protections conveyed by the text that RPAPL § 1304(1) requires. It merely supplements that text – to the benefit of the borrower – by ensuring that eligible borrowers receive timely information about how to forestall foreclosure and their potential immunity from personal liability. That the Legislature intended a 90-day notice to provide such helpful information to borrowers in distress is also demonstrated not only by the legislative history and 2021 legislation requiring the notice to include additional information (*see* Point I(B), *infra*) but also by the 2018 amendments to RPAPL § 1304. As of April 12, 2018, the Legislature amended RPAPL § 1304 to extend the 90-day notice requirement to reverse mortgage borrowers. *See* New York L. 2018, Ch. 58, part

HH. This amendment provided for the RPAPL § 1304 notice to include "additional" detail about protections available "[i]f you are in default for failure to pay property charges"; "[i]f you are in default due to the death of your spouse"; and "[i]f you are over the age of 80 and have a long term illness." RPAPL § 1304(1-a).

These added disclosures are required for reverse mortgages whether or not these specific circumstances (*e.g.*, failure to pay taxes) apply to the particular borrower and to ensure that borrowers are aware of potentially available protections that the previously required minimalist text of RPAPL § 1304 did not sufficiently bring to borrowers' attention. *See* Jacob Inwald, Outside Counsel, *Residential Foreclosures: Reverse Mortgage Foreclosure Protections*, NYLJ Online, May 11, 2018.

The majority's view that its holding will not "undermine the legislative goal of providing information about additional protections and foreclosure prevention opportunities to homeowners" because the lender can separately mail "other notice[s] or information that may assist a homeowner to avoid foreclosure," (R. 382), would have us believe that disaggregated mailings, which will be patently confusing to borrowers, are preferable; it is also undermined by the COVID-19 Emergency Eviction and Foreclosure Prevention Act of 2020 Hardship Declaration requirement and the 2021 amendment of RPL § 280-d.

3. The Second Department's Construction of RPAPL § 1304 Does Not Comport With Established Rules of Statutory Interpretation

Although statutory interpretation principles require RPAPL § 1304 to be construed to limit as much as possible the impact on the common law right of foreclosure, the majority's "bright-line rule" does the opposite. *See* R. 389 (Dissent).

When a statute "is clearly in derogation of the common law and common right . . . [it is to] be strictly construed, and confined to [its] provisions and clear import." *Hayes v. Davidson*, 98 N.Y. 19, 22 (1885). "If the terms in which it is couched are susceptible of two interpretations, that one ought to be adopted which conforms most nearly to the rules of the common law and encroaches least upon the individual rights affected by it." *Id.* at 22-23; *see Oden v. Chemung Cnty. Indus. Dev. Ag*., 87 N.Y.2d 81, 86 (1995) ("[A] statute enacted in derogation of the common law . . . is to be construed in the narrowest sense that its words and underlying purposes permit."); *People v. Phyfe*, 136 N.Y. 554, 558-59 (1893) ("[I]f the terms of the statute will admit of two interpretations, that which will most nearly conform to the rules of the common law is in all cases to be adopted."); *Transit Comm'n v. Long Island R. Co*., 253 N.Y. 345, 355 (1930) ("Rules of the common law are to be no further abrogated than the clear import of the language used in the statute absolutely requires."). *See also* the Dissent to the Opinion & Oder (R. 389).

A mortgagee's right to foreclose on a mortgage securing repayment of a debt is a well-established common law right. *See, e.g., VNB N.Y. Corp. v. Paskesz,* 131 A.D.3d 1235, 1236 (2d Dept 2015) ("plaintiffs common-law right to pursue . . . foreclosure"); *Ditech Fin. LLC v. Sterly*, 2016 WL 7429439, *4, 2016 U.S. Dist. LEXIS 177934, 9 (NDNY Dec. 23, 2016, No. 15-cv-1455 (MAD/TWD)) ("Plaintiff has met the common law requirements to foreclose its mortgage").

RPAPL § 1304 imposes additional restrictions on the mortgagee's right to foreclose and therefore is in derogation of the common law right to foreclose. *See Taylor v. City of N Y*, 82 N.Y. 10, 19 (1880) ("At common law there would be a good right to bring and maintain an action on the debt, without a prior presentment and a waiting of thirty days for payment."). Thus, the requirements of RPAPL 1304 should be "construed strictly, and may not be taken to include that which is not within its terms." *Id*.

The majority's "bright-line rule" does not adhere to this important doctrine. To the extent that RPAPL § 1304 is capable of two interpretations – one permitting inclusion of additional language in the 90-day notice and one prohibiting it – the one that "most nearly conform[s] to the rules of the common law and encroaches least upon the individual rights affected by it" should be adopted. That means RPAPL § 1304(1) should be construed to allow the additional language.

B. THE OPINION & ORDER CONFLICTS WITH OTHER LAWS

The Opinion & Order should also be reversed because its "bright-line rule" conflicts with federal legislation, the 2021 amendment of RPL § 280-d, and COVID "moratorium" legislation, all of which required additional information to be included with the RPAPL § 1304 notice.

1. The Majority's "Bright-Line Rule" Conflicts with Federal Law

The Fair Debt Collection Practice Act ("FDCPA") applies to RPAPL § 1304 notices sent by debt collectors and requires that communications with consumers must state that the "debt collector is attempting to collect a debt and that any information obtained will be used for that purpose." FDCPA (15 USC) § 1692e(11). *See Cohen v. Rosicki,* Rosicki *& Assoc., P.C.*, 897 F.3d 75, 82 (2d Cir. 2018) (discussing with approval an 11th Circuit case holding that "letters threatening foreclosure are not exempt from the FDCPA because 'communication related to debt collection does not become unrelated to debt collection simply because it also relates to the enforcement of a security interest.'") (citation omitted); *see also Walker v. Pitnell*, 860 Fed. App'x. 210, 211 (2d Cir. 2021).

This conflict led one federal court to announce that, despite the usual practice of a federal court following a state court's view of its state law, it "would not follow the bright-line rule that the Second Department adopted in *Kessler*" because the *Kessler* majority "did not grapple with how the separate envelope rule

conflicts with a debt collector's obligations under the FDCPA." *See CIT Bank, N.A. v. Neris*, 2022 WL 1799497, *5, 2022 U.S. Dist. LEXIS 99040, *13 (SDNY June 2, 2022, No. 18 Civ. 1511 (VM)). As the federal court explained, compliance with the "bright-line rule" would require debt collectors to omit from 90-day notices the disclosure that the debt collector is attempting to collect a debt, which would "simultaneously violate the FDCPA." 2022 WL 1799497 at *5, 2022 U.S. Dist. LEXIS 99040 at *13.

> Put differently, debt collectors cannot simply mail a separate letter containing the FDCPA disclosure statement, as the *Kessler* court reasons, because the FDCPA requires the disclosure statement be <u>in</u> a debt collector's "initial" and "subsequent" communications.

Id. (emphasis in original).

The tension between the *Kessler* "bright-line rule" and the FDCPA results in conflict preemption. The FDCPA's requirements supersede any inconsistent requirement under RPAPL § 1304. "Conflict preemption occurs 'when compliance with both federal and state regulations is a physical impossibility or when state law is an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Town of Halfnoon v. Gen. Electric Co*., 105 F. Supp. 3d 202, 217 (NDNY 2015) (citation omitted). Under the Supremacy Clause of the U.S. Constitution (U.S. Const. art. VI, § 2) "state law is nullified to the extent that it actually conflicts with federal law." *Fidelity Fed. Sav. & Loan*

Assoc. v. Cuesta, 458 U.S. 141, 153 (1982); *see Guice v. Charles Schwab & Co.,* 89 N.Y.2d 31, 46–47 (1996) (SEC regulations preempted more stringent state law agency disclosure requirements); *see also Bank of New York Mellon v. Luria*, 2022 WL 1483870, *4, 2022 N.Y. Misc. LEXIS 1956, *9 (Sup. Ct. Putnam County May 11, 2022, No. 800018/2020 (VGG)) (questioning whether the majority's "'bright-line' rule is preempted by the FDCPA.").

The conflict between RPAPL § 1304 and the FDCPA underscores the problems with the majority's "bright-line rule." Not all foreclosing plaintiffs are debt collectors subject to the FDCPA. *See, e.g*., *Qurashi v. Ocwen Loan Servicing, LLC*, 760 F. App'x 66, 68 (2d Cir. 2019); *Zirogiannis v. Seterus, Inc.*, 221 F. Supp. 3d 292, 302 (EDNY 2016), *aff'd*, 707 F. App'x 724 (2d Cir. 2017). However, some are and even foreclosing plaintiffs who are not "debt collectors" often follow FDCPA requirements in their notices because borrowers regularly assert FDCPA claims against them without regard to their "debt collector" status. It is prudent to include the FDCPA disclaimer because the law is in flux concerning whether the FDCPA might apply to other foreclosing plaintiffs.

2. <u>The Majority's "Bright Line Rule" Conflicts with Other Legislation</u>

The majority's "bright-line rule" conflicts not only with federal law, but with legislation New York enacted in 2021. Effective April 14, 2021, reverse mortgage lenders "shall include in the" RPAPL § 1304 notices "any additional

information required by" the New York Department of Financial Services. Real Property Law § 280-d(2). The amendment permits the Department of Financial Services to "promulgate rules and regulations requiring that a notice issued pursuant to [RPAPL § 1304(1-a)] include *additional information necessary to explain the mortgagor's rights*" in a foreclosure involving a reverse mortgage. *Id.* (emphasis added); *see* Baum, Drussel, & Foran, *Special Notice and Filing Requirements in Reverse Mortgage Foreclosures*, 2 Mortgages and Mortgage Foreclosure in N.Y. § 33:3.65 (Aug. 2021). This amendment further confirms that additional information is permitted (and sometimes required) in § 1304 notices.

That the Legislature contemplated including additional explanatory information in the 90-day notice is reflected in the purpose of RPL § 280-d and its 2021 amendment to "protect vulnerable senior citizens from predatory reverse mortgages and abuses in foreclosure." *See* Sponsor Memo, Senate Bill S884 (New York 2021), available at https://www.nysenate.gov/legislation/bills/2021/s884 (last accessed July 18, 2022).

In addition, now-lapsed 2021 COVID-related legislation confirmed that the Legislature intended that other information and documents may be included with the 90-day notice without violating RPAPL § 1304(2). It shows that not all other language or information or documents are *per se* "mailings or notices" that must be sent in a separate envelope under RPAPL § 1304(2). The COVID-19 Emergency

Eviction and Foreclosure Prevention Act of 2020 ("CEEFPA") required that "[t]he foreclosing party *shall include* a 'Hardship Declaration' in 14-point type, with every notice provided to a mortgagor pursuant to sections 1303 and 1304 of the real property actions and proceedings law." Chapter 381 of the Laws of 2020, as amended on September 2, 2021 (emphasis added).

The words "shall include" and "with" required the Hardship Declaration to be mailed in the same envelope as the 90-day notice. If the Legislature intended otherwise, it would have provided for mailing this additional information in a separate envelope; but it did not.

Notably, the Legislature did not enact the amendment to RPL § 280-d or the CEEFPA Hardship Declaration as exceptions to RPAPL § 1304(2)'s "separate envelope" provision. It did not have to because, as discussed earlier, RPAPL § 1304(1) anticipates the possibility of additional information.

C. THIS COURT'S PRECEDENT DOES NOT SUPPORT A "BRIGHT-LINE RULE"

The majority held that this Court's *Engel* decision supports its "bright-line rule," construing Engel as favoring bright-line rules in all aspects of foreclosure litigation. *Engel* did not hold so broadly.

Moreover, in *Schiffman*, decided after *Engel*, this Court adopted a case-specific approach for a foreclosure case. In addition, the considerations underlying *Engel* – which involved the statute of limitations – do not justify a "bright-line

rule" here. Similarly, authority providing that RPAPL § 1304 must be "strictly complied" with does not support the majority's adoption of a "bright-line rule" that limits the content of the 90-day notice. Instead, strict compliance with RPAPL § 1304 means that no other mailings or notices can go in the same envelope as the § 1304 notice – as the statute states – not that the notice can contain no other information.

1. *Schiffman* Supports a Flexible Rule for the Content of the RPAPL § 1304 Notice

The majority erroneously relied on *Engel*, without consideration of *Schiffman*, to support its "exacting" construction of RPAPL § 1304(2)'s "separate envelope" requirement. (R. 379). The majority misused concerns articulated by this Court in *Engel* "when it '[a]dopt[ed] a clear rule that will be easily understood by the parties and can be consistently applied by the courts' in mortgage foreclosure cases involving the statute of limitations." *Id*. (quoting *Engel*). It similarly misused those concerns in rejecting a flexible approach to the 90-day notice, believing that such an approach "would require courts to engage in exactly the type of judicial scrutiny that the Court of Appeals has recently rejected in mortgage foreclosure cases." *Id.* at 381. In doing so, the majority failed to consider *Schiffman*'s notice-by-notice approach.

In *Schiffman*, this Court declined to adopt a "bright-line rule" for assessing what a borrower must show to rebut a lender's proof of a standard office procedure

to establish proper mailing of an RPAPL § 1304 notice. Instead, this Court adopted a case-specific, notice-by-notice approach, requiring courts to examine whether the borrower has "proof of a material deviation from an aspect of the office procedure that would call into doubt whether the [RPAPL § 1304] notice was properly mailed. . . ." 36 N.Y.3d at 557. The "crux of the inquiry" depends on what the evidence shows. *Id*. If it "casts doubt on the reliability of a key aspect of the process such that the inference that the notice was properly prepared and mailed is significantly undermined," then the borrower should prevail; but "[m]inor deviations of little consequence are insufficient." *Id.* This Court identified case-specific factors relevant to the determination, such as "the nature of the practices detailed in the affidavit" and even "contextual considerations," and refused to adopt a rule "that a single deviation from any aspect of the routine office procedure necessarily rebuts the presumption of mailing." 36 N.Y.3d at 557.

Thus, in stark contrast to adopting a "bright-line rule," *Schiffman* requires a discrete notice-by-notice analysis, in every case, of the evidence about the mailing of RPAPL § 1304 notices. *Schiffman* adopts the type of "flexible standard" that "would require courts to engage in exactly the type of judicial scrutiny" in foreclosure cases that the Second Department incorrectly believed this Court had "recently rejected in mortgage foreclosure cases." (R. 381).

2. *Engel* and the Majority's Other Cited Authorities Do Not Justify a "Bright-Line Rule" Here

Schiffman refutes the majority's conclusion that a "bright-line rule" is needed to "promote[ ] stability and predictability" in mortgage foreclosure cases generally. (R. 378). Equally important, however, is the reality that this Court applied a "bright-line rule" in *Engel* to a discrete and quite restricted context far different from the one presented here.

Under *Engel*, a noteholder's voluntary discontinuance of a foreclosure action "constitutes an affirmative act of revocation of … acceleration as a matter of law, absent an express, contemporaneous statement to the contrary by the noteholder." 37 N.Y.3d at 32. Thus, as the majority recognized (but then ignored), in that limited context, *Engel* "'[a]dopt[ed] a clear rule that will be easily understood by the parties and can be consistently applied by the courts' *in mortgage foreclosure cases involving statute of limitations issues*." (R. 379, quoting *Engel*) (emphasis added). A determination of when the foreclosure statute of limitations runs implicates concerns about finality that are not present here. *Engel* does not suggest, let alone hold, that its "bright-line rule" is generally applicable to all issues in all foreclosure cases – and this Court's holding in *Schiffman* confirmed that it is not.

Although the *Engel* Court observed that "the legislature has imposed exacting standards for bringing a foreclosure claim – *e.g.*, prescribing the precise

method of providing pre-suit notice to the borrower (see RPAPL 1304)," (R. 379), this does not mean that, by prescribing what RPAPL § 1304 notices "shall include," the Legislature intended to prohibit supplemental information in those notices. And as shown in Point I(B), *supra*, the Legislature has said otherwise. Instead, the "precise method for pre-suit notice" requires including the specified text and sending the notice at the time and in the manner specified.

Further, *Engel* arose from a concern that a standard requiring "an exploration of the lender's intent" and an "'exhaustive examination' of the parties' conduct" to determine whether the voluntary discontinuance of an action was an affirmative act of revocation of acceleration would be "unworkable from a practical standpoint." (R. 381, quoting *Engel*). That concern is not present when assessing the content of RPAPL § 1304 notices. The lender's subjective intent is irrelevant. The parties' conduct need not be examined. The inquiry is simple and practical. Only the 90-day notice itself, which is already part of a *prima facie* foreclosure case, needs to be examined. Even if a borrower could present a more than conclusory claim of confusion, at most this would create a question of fact. It does not warrant a "bright-line rule" demanding dismissal of any and all actions involving a notice that contains additional information.

Engel is also distinguishable because it did not involve legislation, but a common law rule created by a court acting "in a quasi-legislative capacity. In that

context, articulating a common law bright-line rule dictated by considerations of policy, practicality and prudence is well within the court's competence." *Bank of New York Mellon v. Luria*, 2022 WL 1483870, *3, 2022 N.Y. Misc. LEXIS 1956, *5 (Sup. Ct. Putnam County May 11, 2022, No. 800018/2020 (VGG)) (criticizing *Kessler*). But here, in interpreting legislation, "the court's role is not to make rules but to discern the intent of the Legislature guided by applicable principles of statutory construction. It is the Legislature's intent as expressed in the language of the statute that must prevail regardless of the court's notions of policy, practicality and prudence." *Id*.

The Second Department cited the following decisions in support of the idea that "strict compliance" with RPAPL § 1304 justifies its "bright-line rule:" *CV XXVIII, LLC v. Trippiedi,* 187 A.D.3d 847 (2d Dept 2020); *U.S. Bank v. Haliotis*, 185 A.D.3d 756 (2d Dept 2020); and *Tuthill Fin., a Ltd. Partnership v. Candlin*, 129 A.D.3d 1375 (3d Dept 2015).

Trippedi and *Haliotis* found that plaintiffs did not show strict compliance with RPAPL § 1304 because they did not present evidence that the 90-day notice listed five regional housing agencies. *Trippedi* did not even refer to the "separate envelope" requirement; *Haliotis* merely found a failure of proof because plaintiff's affidavit did not specify that the "notice was served in an envelope that was separate from any other mailing or notice." 185 A.D.3d at 758-59.

In *Tuthill*, the notice failed because it had "type that is smaller than the statutorily required 14-point type." 129 A.D.3d at 1376. (The Third Department stated in *dicta* that the record did "not clearly establish that the notice was, as required by statute, sent in 'a separate envelope from any other mailing or notice'." It did not state that this failure of proof was because the notice included language beyond that required. *Id*.).

In sum, these cases address strict compliance with RPAPL § 1304 to ensure that borrowers receive the benefit of the statutory notice. Thus, the notice must observe the statutory time requirements, contain the required information, and take the prescribed form. But none of these decisions suggests that the statute must be narrowly construed to exclude other helpful information. Further, on other occasions, even the Second Department acknowledged that "strict compliance" with § 1304 allows for variation. *See Citibank, N.A. v. Crick*, 176 A.D.3d 776, 778 (2d Dept 2019) ("Although the notice contained a factual inaccuracy, the inaccuracy did not involve information required under RPAPL 1304 and, on the record before this Court, the defendants did not otherwise establish, prima facie, that the notice failed to strictly comply with RPAPL 1304.").

In fact, as the dissent and Point I(A), *supra*, observe, strict construction of the statute's plain language, which provides that the notice "shall include" certain

information, means that the statute contemplates the possibility of additional information.

3. The Majority's Concerns Do Not Require a "Bright-Line Rule" Here

The majority expressed the ephemeral concern that, without a "bright-line rule," lenders could claim that any additional information was permissible if it was helpful and not prejudicial or deceptive, shifting the burden to defendants to object. (R. 378). But lenders have the burden of showing compliance with RPAPL § 1304. *See, e.g., CV XXVIII, LLC v. Trippiedi,* 187 A.D.3d 847, 848 (2d Dept 2020). A flexible approach to the notice's content does not change that burden.

Here, the Important Disclosures merely provided generic bankruptcy and servicemember advisories arising from federal law. That this information is beneficial to borrowers is self-evident. The text advises them of rights and protections they may have in foreclosure contexts while averting potential lender violations of federal law.

The bankruptcy disclaimer advises borrowers in bankruptcy or whose debt was discharged in bankruptcy that the notice is for information purposes only and not an attempt to collect the debt. *See* 1978 Bankruptcy Code (11 USC) § 524(a)(3) ("A discharge in a case under this title operates as an injunction against the commencement or continuation of an action, the employment of process, or an

act, to collect or recover from, or offset against, property of the debtor of the kind specified in section 541(a)(2) of this title….").

Including this helpful information in the 90-day notice is important to make the notice clear, complete, and not misleading. Lenders retain a right to foreclose *in rem* once a borrower is discharged from bankruptcy. *In re Ho*, 624 B.R. 748, 752–53 (Bkrtcy. EDNY 2021). The 90-day notice is a condition precedent in most foreclosure cases. The bankruptcy disclaimer informs discharged debtors that the foreclosing plaintiff is not seeking to collect the debt, *i.e.*, enforce the note. In holding that a 90-day notice did not violate an injunction against proceeding against discharged debt, *In re Ho* cited the inclusion of a bankruptcy disclaimer as a relevant factor. Had it been excluded, as the Second Department would require, the lender in that case may have violated the discharge injunction:

> Defendants did not seek to collect the discharged in personam liability of Debtor, and expressly included a bankruptcy disclosure on the [90-day] notice which stated, *inter alia*, that to the extent the original obligation was discharged, "this notice is for compliance and/or informational purposes only and does not constitute an attempt to collect a debt or to impose personal liability for such obligation." . . . Thus, when [the lender] provided the mandatory pre-foreclosure notice they did not violate the discharge injunction.

In re Ho, 624 B.R. at 753.

The military disclosure advises servicemembers and former servicemembers of their important rights under the Servicemembers Civil Relief Act ("SCRA").

See SCRA (50 USC) § 3953; Military Law § 312. The SCRA entitles eligible servicemembers and former servicemembers to a complete halt of any foreclosure efforts. *See* SCRA (50 USC) § 3953(c) ("A sale, foreclosure, or seizure of property for a breach of an obligation described in subsection (a) shall not be valid if made during, or within one year after, the period of the servicemember's military service," with limited exceptions). This information is thus crucial to alert eligible RPAPL § 1304 notice recipients of this significant federal protection.

The Consumer Financial Protection Bureau's mission includes ensuring that mortgage loan servicers communicate protections clearly to servicemembers. In December 2021, the CFPB and U.S. Department of Justice issued a joint letter to servicers about the importance of informing servicemember borrowers of their rights, stating that:

> it is critical that you ensure that servicemember and veteran mortgage borrowers' rights under federal law are diligently protected during the loss mitigation process
>
> * * *
>
> Mortgage servicers must comply with the SCRA regardless of whether their state law provides for judicial or non-judicial foreclosures.

See Letter from Rohit Chopra, Director, U.S. Bureau of Consumer Financial Protection and Kristen Clarke, Assistant Attorney General for Civil Rights U.S. Department of Justice, (December 2021) available at

https://files.consumerfinance.gov/f/documents/cfpb_military-homeowner-protections_doj-servicer-letter_2021-12.pdf (last accessed July 18, 2022).

The letter was issued in response to complaints from consumers, particularly servicemembers and veterans "who believe they entered into COVID-19 hardship forbearance," about (among other things) "[i]ncorrect or confusing communications" and "[r]equired lump sum statements for reinstatement." *Id*. *See also* Consumer Financial Protection Bureau, *CFPB and DOJ Put Landlords and Mortgage Servicers on Notice About Servicemembers' and Veterans' Rights* (Dec. 20, 2021) available at https://www.consumerfinance.gov/about-us/newsroom/cfpb-and-doj-put-landlords-and-mortgage-servicers-on-notice-about-servicemembers-and-veterans-rights/ (last accessed July 18, 2022). Supplementing the 90-day notice with the servicemembers disclosure, which advises servicemembers and eligible former servicemembers about protections from foreclosure and interest rate relief, addresses these concerns. Requiring lenders and servicers to instead send a separate notice with no independent significance in a different envelope (as the majority suggested) would be confusing and would render 90-day notices referencing only the lump sum payment for reinstatement incomplete and misleading.

Equally important, as the dissent observed,

> The additional language [of the bankruptcy and servicemember disclosures] included on page seven of

> the RPAPL 1304 notice that was received by the borrower in this case did not violate any of the content provisions of [RPAPL § 1304(1)]. Nor did the additional language frustrate the statute's overarching purpose or intent.

(R. 383).

4. The Majority's "Bright-Line Rule" Will Result in Non-Substantive Challenges to 90-Day Notices

While the majority's "bright-line rule" is not required or necessary for the reasons noted above, if not overturned, it will open the door to challenges to 90-day notices based on any inconsequential deviation from the statutorily required text. Under the majority's "construction of the statute, any language (*i.e.* any word, sentence or paragraph) that is not explicitly *required* by RPAPL 1304(1) constitutes, as a matter of law, a separate 'mailing or notice' within the meaning of RPAPL 1304(2)." (R. 383) (emphasis original). This could include such mundane matters as the borrower's address, if different from the mortgaged property address; versions of 90-day notices in languages other than English; typographic errors; and, of course, other language required by federal and/or state law.

One Suffolk County jurist warned that "defaulting borrowers will … seek to use public policy as a sword and not as the legislatively intended shield." *BCMB1 Trust v. Kiely*, Index No. 618396/2020, Whelan, J. (Sup. Ct. Suffolk County Jan. 6, 2022). As another judge warned, the "bright-line rule" will have "shocking repercussions in the foreclosure arena — the potential dismissal of thousands of

foreclosure actions on account of 90-day notices which included language, any language at all, above and beyond that specified in RPAPL § 1304." *Bank of New York Mellon v. Luria*, 2022 WL 1483870, *5, 2022 N.Y. Misc. LEXIS 1956, *12 (Sup. Ct. Putnam County May 11, 2022, No. 800018/2020 (VGG)).

As of this writing, the Second Department alone has dismissed at least a dozen cases, if not more, based on this "bright-line rule."[1] Other appeals, for now undecided, present RPAPL § 1304 notice issues. *See, e.g., The Bank of New York Mellon v. Haley,* Docket Nos. 2020-09661 & 2020-09662 (2d Dept). Moreover, other Departments must defer to the Second Department until or unless they issue a contrary ruling. *Mountain View Coach Lines, Inc. v. Storms*, 102 A.D.2d 663 (2d Dept 1984).[2]

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[1] *See U.S. Bank National Association v. Lanzetta*, 2022 WL 2443847, 2022 N.Y. App. Div. LEXIS 4209 (2d Dept July 6, 2022, No. 2018-04835 (MCD/BB/LC/JAZ)); *CitiMortgage, Inc. v. Dente*, 200 A.D.3d 1025 (2d Dept 2021), *Deutsche Bank Nat'l Trust Co., As Trustee v. Salva Jr., et. al*., 1203 A.D.3d 700 (2d Dept 2022); *U.S. Bank v. Kaplan*, 202 A.D.3d 1144 (2d Dept 2022); *U.S. Bank v. Hinds*, 203 A.D.3d 1210 (2d Dept 2022); *Wells Fargo v. Bedell*, 205 A.D.3d 1064 (2d Dept, 2022); *U.S. Bank v. Drakakis*, 205 A.D.3d 756 (2d Dept 2022); *Deutsche Bank v. Bancic*, 203 A.D.3d 1130 (2d Dept 2022); *Ocwen Loan Servicing, LLC v. Sirianni*, 202 A.D.3d 702 (2d Dept 2022); *Prof-2014-S2 Legal Title Trust II v. DeMarco*, 205 A.D.3d 943 (2d Dept 2022); *HSBC Bank v. Hibbert*, 205 A.D.3d 783 (2d Dept 2022) *see also HSBC Bank USA, N.A. v. Jahaly*, 204 A.D.3d 648 (2d Dept 2022) (affirming dismissal).

[2] The Third Department decision in *Tuthill* does not prohibit the inclusion of additional information in a 90-day notice (*see* Point I(C)(2)).

Because RPAPL § 1304 defenses can be raised at any time prior to judgment, all New York foreclosure actions requiring 90-day notices that have not yet reached final judgment and are not beyond any appeal or reargument period – including those in which lenders and servicers have been granted summary judgment or prevailed at trial – are at risk of dismissal, whether the defense has been previously raised or not. *See U.S. Bank N.A. v. Krakoff,* 199 A.D.3d 859 (2d Dept 2021); *Erick C. Peck, The Impact of Pre-Foreclosure Notices*, DSN News, January 5, 2022, available at https://dsnews.com/daily-dose/01-05-2022/pre-foreclosure-notices (last accessed July 18, 2022).

POINT II

EVEN IF THE 90-DAY NOTICE SHOULD HAVE BEEN LIMITED TO THE TEXT PRESCRIBED BY RPAPL § 1304(1), DISMISSAL WAS NOT WARRANTED

RPAPL § 1304 notices should not be strictly limited to the language required by RPAPL § 1304(1); but even if this Court disagrees, the Second Department's Opinion & Order should be reversed because dismissal was not warranted.

The inclusion of the Important Disclosures was only a *de minimis* variance from the statutorily prescribed language, did not prejudice Respondent, and should have been excused under CPLR § 2001. And, in any event, the "bright-line rule" should have been given prospective application only. The Second Department

resolved this issue of first appellate impression in a manner that was contrary to more than a decade of practice and the decisions of many trial courts on which lenders and servicers had relied. Retroactive application of this new rule is flooding our courts with a tidal wave of motions seeking dismissal – which in turn, will negate years of judicial labor only to result in thousands of new notices and new lawsuits. This will burden the courts, further delay actions – many of which have been pending for years – and prejudice lenders and servicers, as well as borrowers, who will see an increase in their indebtedness because of additional accrued advances and interest and additional litigation expenses.

A. THE CLAIMED VIOLATION OF RPAPL § 1304 WAS *DE MINIMIS* AND SHOULD HAVE BEEN EXCUSED

Even if RPAPL § 1304 prohibited inclusion of the Important Disclosures in the 90-day notice, the Second Department should have exercised its discretion under CPLR § 2001 to avoid dismissal given that that inclusion was minimal and not prejudicial. Its decision not to invoke CPLR § 2001 was an abuse of its discretion. *See, e.g., Cardo v. Bd. of Managers, Jefferson Village Condo 3*, 29 A.D.3d 930, 931 (2d Dept 2006) (dismissal of complaint was an improvident exercise of discretion "[i]n the absence of any showing of confusion [or] prejudice to the defendant").

CPLR § 2001 provides in relevant part that "if a substantial right of a party is not prejudiced, [a] mistake, omission, defect or irregularity shall be disregarded

…." Prior to the decision below, CPLR § 2001 had been applied many times to RPAPL § 1304 issues. *See, e.g., Bank of America, N.A. v. Montagnese*, Index No. 64253/2014 at 6, Heckman. Jr., J (Sup. Ct. Suffolk County Jan. 11, 2018), *aff'd*, 198 A.D.3d 350 (2d Dept 2021); *Deutsche Bank Nat'l Trust v. Bonal*, Index No. 61217/2017 at 2, Heckman Jr., J (Sup. Ct. Suffolk County Oct. 23, 2017), *rev'd,* 205 A.D.3d 884 (2d Dept 2022); *Deutsche Bank Nat'l Trust Co. v. DeLisser*, Index No. 8685/2013 at 5, Heckman Jr., J (Sup. Ct. Suffolk County Sept. 14, 2017); *Citibank v. Feustel*, 59 Misc. 3d 1223(A), (Sup Ct. Suffolk County 2018); *Citimortgage v. Bunger*, 58 Misc. 3d 333, 343 (Sup. Ct. Suffolk County 2017).

The courts have also applied CPLR § 2001 to similar RPAPL notice provisions. *See, e.g., JPMorgan Chase Bank, N.A. v. Lebovic*, 61 Misc. 3d 1215(A) (Sup Ct. Suffolk County 2018) (disregarding error in RPAPL § 1303 notice in which "the name of the Banking Dept. incorrectly appeared rather than DFS and … the web address was for the Banking Dept., not DFS"); *Castle Peak 2012-1 Loan Trust Mortg. Backed Notes,* 2018 WL 2976055, 4, 2018 N.Y. Misc. LEXIS 2242, 14 (Sup. Ct. Suffolk County June 06, 2018, No. 4481/2013 (RFQ)) (error in RPAPL § 1306 filing not shown to affect any substantial right of defendant).

Bunger is illustrative. There, the trial court rejected defendant's claim that a 90-day notice violated RPAPL § 1304 by, among other things, including separate

notices in the same envelope (such as a bankruptcy disclaimer) and referring to the New York State Department of Financial Services instead of the New York State Banking Department. In addition to finding that the notice did not violate the "separate envelope" requirement of RPAPL § 1304, *Bunger* found that an incorrect reference to the name of the department was an "irregularity…so minimal and inconsequential that it calls out for the court to exercise its discretion and ignore this defect pursuant to CPLR § 2001." 58 Misc. 3d at 343 (citation omitted).

Indeed, even in the context of proof of the condition precedent of mailing RPAPL § 1304 notices, which requires strict compliance, this Court stated that "[m]inor deviations of little consequence are insufficient" to rebut the proof. *Schiffman*, 36 N.Y.3d at 557. Thus, strict compliance with the "separate envelope" requirement does not prohibit every item of supplemental information or mean that minor deviations from the statutorily required language should dictate the dismissal of complaints.

Here, the RPAPL § 1304 notice sent to Respondent did everything the legislature intended it to do, *i.e.*, provide a "90-day time period during which the lender and the borrower may attempt to reach a mutually agreeable resolution without imminent threat of a foreclosure action." Governor's Program Bill Mem. No. 46R, Bill Jacket, L2009, ch. 507 at 8. The notice informed Respondent of his default, contained a warning about the impending foreclosure, and included

information concerning the mortgagors' right to cure the default and access counseling agencies. (R. 282-313.)

As shown above, the Important Disclosures were included for Respondent's protection. They appeared on page seven, after the statutorily required text. They were directly related to the required language of the 90-day notice and did not conceal or distract from its content. The Important Disclosures did not prejudice Respondent's rights with respect to foreclosure in any manner.

To the extent there may be concern about whether the Important Disclosures or any other additional information confuses the borrower or overshadows the language required by RPAPL § 1304(1), a simple analysis of the text will resolve that concern; no inquiry into the sender's subjective intentions is necessary. As Justice Ecker (now retired) of the Westchester County Supreme Court recently wrote in reluctantly dismissing a case based on the Second Department's "bright-line rule:" "That the borrower ... an attorney, would be misled by the information in the supplementary notice defies logic." *Bank of New York Mellon f/k/a The Bank of New York, as Trustee v. Hershman*, Index No. 58666/2016, Ecker J. (Sup. Ct. Westchester County, May 18, 2022). *See also Hudson City Savings Bank, FSB v. D'Ancona*, 2017 WL 4127842, 7, 2017 Misc. LEXIS 3433 at 20 (Sup. Ct. Suffolk County Sep. 4, 2017, No. 33035/2013 (HHH)) (defining 'strict compliance" to preclude the inclusion of "federally mandated" information to veterans "would

defy common sense and logic, and lead to an absurd result of rewarding mortgagors, who obviously were cognizant of the fact that they were in default for nearly two years at the time of mailing . . .").

Even in cases where the borrower claims actual confusion, at most this would raise a question of fact and does not warrant automatic dismissal. Further, just as a conclusory denial of receipt is not sufficient to justify dismissal, *Wilmington Sav. Fund Soc'y. v. Theagene*, 201 A.D.3d 1015 (2d Dept 2022); *5421 Sylvan Ave. Associates Corp. v. New York City Conciliation and Appeals Board*, 100 A.D.2d 812, 813 (1st Dept 1984), a conclusory statement of confusion as to an RPAPL § 1304 notice should not be sufficient to defeat summary judgment.

Here, Respondent – who, according to the Office of Court Administration's publicly available website, is an active member of the Bar of the State of New York – made a conclusory assertion that he "was confused by the notice as [he] was never in bankruptcy nor did [he] serve in the military." (R. 339 ¶ 6). Particularly when the plain language of the Important Disclosures is written in the contingent – "If you are currently in a bankruptcy proceeding, or have previously obtained a discharge of this debt under applicable bankruptcy law…." (R. 268); "If you or your spouse is a member of the military…." (*Id*.) – this is insufficient to raise a question of fact as to whether the additional information prejudiced Respondent. And Respondent's conduct shows he was well aware of and

understood his default and his rights in connection with his default. *See Bunger*, 58 Misc. 3d at 343 ("defendants, who understood the notices and came into compliance with their default by making payment, have shown no prejudice by what may be considered typographical or minor errors"). For example, in 2015, Respondent applied for a loan modification and was granted a trial period plan. (R. 200 ¶ 11; *see also* R. 58 ¶ 13.) He did not, however, accept the proffered modification that Appellant offered. (*Id.*) Respondent also explored a short sale in 2014.

The Important Disclosures are included for *all* borrowers because a lender has no way of determining whether a borrower's bankruptcy and/or military service status will change on or after the date of preparing and mailing the 90-day notice.

It would also be counterproductive (and wasteful to all concerned) to mail the Important Disclosures in a separate envelope. They are simply advisories supplemental to the 90-day notice itself. If not sent in conjunction with the notice, standing alone these supplements would only confuse and thus prejudice borrowers because the information would be provided without any context.

B. IF THE MAJORITY'S "BRIGHT-LINE RULE" IS NOT REVERSED, IT SHOULD ONLY BE APPLIED PROSPECTIVELY

The Court should also reverse because, even if correct, the "bright-line rule" should have been given only prospective application. The Second Department decided "an issue of first [appellate] impression whose resolution was not clearly foreshadowed." *Hilton Hotels Corp. v Commissioner of Finance of City of New York*, 219 A.D.2d 470, 477 (1st Dep't 1995).

This Court has discretion to determine whether to apply the "bright-line rule" prospectively, which it should exercise here. *See People v. Mitchell*, 80 N.Y.2d 519, 528 (1992) (court may directly prospective application if "retroactive application threatens to 'wreak more havoc in society than society's interest in stability will tolerate' ") (citation omitted).

The "bright-line rule" represents "a dramatic shift away from customary practice that was not foreshadowed by prior case law or by the language of the statute." *Bank of New York Mellon v. Luria*, 2022 WL 1483870, *5, 2022 N.Y. Misc. LEXIS 1956, *12 (Sup. Ct. Putnam County May 11, 2022, No. 800018/2020 (VGG)). The majority "overrul[ed] an array of lower court decisions that had interpreted RPAPL § 1304 in a manner wholly at odds with *Kessler's* "bright-line" rule." *Id*.; *see also U.S. Bank National Association as Trustee for RMAC Trust, Series 2016-CTT v. DeJesus*, 75 Misc.3d 1211(A) (Sup. Ct. Putnam County 2022) (granting renewal based on the majority opinion); *U.S. Bank v. Karnaby*,

2022 WL 1909572 (Sup. Ct. Kings County May 27, 2022, No. 513122/2015 (CPE)) (same) *Bank of New York Mellon f/k/a The Bank of New York, as Trustee v. Hershman*, Index No. 58666/2016, Ecker J. (Sup. Ct. Westchester County, May 18, 2022) (same).

Retroactive application of the "bright-line rule" would "gravely prejudice[s] parties who reasonably relied on prior § 1304 jurisprudence" and "create[] chaos in the administration of justice by unsettling numerous settled cases . . . without demonstrably advancing the Legislature's purpose in enacting the 'separate envelope' requirement in the first place." *Luria,* 2022 WL 1483870, *6, 2022 N.Y. Misc. LEXIS 1956, *13.

The avalanche of motions seeking dismissal, notices that will be reissued, and lawsuits that will be restarted will not increase the availability of information to borrowers and will instead disaggregate important information; further delay resolution of the actions; heavily burden the courts, lenders, and servicers; and increase loan balances and litigation expenses for borrowers. The burden on the courts will undoubtedly impact non-foreclosure cases too, which are likely to suffer delays given the diversion and taxation of judicial resources caused by the motions, dismissals, and re-filings the "bright-line rule" will generate.

Localities will also suffer fallout. Properties abandoned post-default will remain vacant longer, given the delay resulting from the filing and hearing of

dismissal motions and the refiling of actions. A Department of Financial Services' survey of mortgage servicers in New York State found that "[a]pproximately 31% of homes in the foreclosure process upstate started out vacant or became vacant at some point during foreclosure." Office of the New York State Comptroller, Division of Local Government and School Accountability, *Foreclosure Update from a Local Government Perspective* at 8 (April 2016) available at www.osc.state.ny.us/files/local-government/publications/pdf/foreclosure0416.pdf (last accessed July 18, 2022).

These abandoned properties, which often fall into disrepair, blight neighborhoods and often harbor illicit activity, adversely impacting home values and neighbors' enjoyment of their properties. *See, e.g.,* New York Department of Financial Services, *Vacant and Abandoned Properties: What You Need to Know,* available at www.dfs.ny.gov/consumers/help_for_homeowners/vacant_property (last accessed July 18, 2022); s*ee also* Senate Bill S4190, 2019-2020 (New York 2021) available at www.nysenate.gov/legislation/bills/2019/s4190 (last accessed July 18, 2022) ("Zombie properties put all neighborhoods at risk because abandoned homes invite crime, lower property values and place an undue burden on local governments.…")

These vacant properties also burden local governments, which can incur (and may not be able to fully recover) costs related to these properties, including

"costs for code enforcement, delinquent taxes, unpaid water/sewer bills, and, in the case of abandoned buildings that burn down or otherwise become a safety hazard, demolition costs" as well as "increase[d] municipal costs for policing and fire prevention." *See Foreclosure Update from a Local Government Perspective* at 10.

CONCLUSION

For these reasons, Appellant Bank of America, N.A., respectfully requests that this Court:

(i) reverse the Opinion & Order, or modify it to apply prospectively; and

(ii) provide such other, further, and different relief as this Court deems just and proper.

Dated: July 18, 2022
New York, New York

BRYAN CAVE LEIGHTON PAISNER LLP

By: _____

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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.

Type. A proportionally spaced typeface was used, as follows:

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Dated: July 18, 2022

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Compendium of Authorities
Cited in Appellant's Brief

Short Form Order

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SUPREME COURT - STATE OF NEW YORK
IAS PART 18 - SUFFOLK COUNTY

PRESENT:
HON. HOWARD H. HECKMAN JR., J.S.C.

INDEX NO.: 64253/2014
MOTION DATE: 11/14/2017
MOTION SEQ. NO.: 002 MG

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BANK OF AMERICA, N.A.,

Plaintiffs,

-against-

VINCENT MONTAGNESE, DIANE MONTAGNESE,

Defendants.

----------X

PLAINTIFF'S ATTORNEY:
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Upon the following papers numbered 1 to 45 read on this motion ; Notice of Motion/ Order to Show Cause and supporting papers 1-33 ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 34-37 ; Replying Affidavits and supporting papers 38-43 ; Other 44-45 ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by plaintiff Bank of America, N.A. seeking an order: 1) granting summary judgment striking the answer and counterclaims asserted by defendant Diane Montagnese; 2) discontinuing the action against defendants designated as "John Doe #1" through "John Doe #12"; 3) deeming all appearing and non-appearing defendants in default; 4) amending the caption; and 5) appointing a referee to compute the sums due and owing to the plaintiff in this mortgage foreclosure action is granted; and it is further

ORDERED that plaintiff is directed to serve a copy of this order amending the caption upon the Calendar Clerk of the Court; and it is further

ORDERED that plaintiff is directed to serve a copy of this order with notice of entry upon all parties who have appeared and not waived further notice pursuant to CPLR 2103(b)(1)(2) or (3) within thirty days of the date of this order and to promptly file the affidavits of service with the Clerk of the Court.

Plaintiff's action seeks to foreclose a mortgage in the original sum of $356,000.00 executed by defendants Vincent Montagnese and Diane Montagnese on January 30, 2003 in favor of Countrywide Home Loans, Inc. On the same date defendant Vincent Montagnese executed a promissory note promising to re-pay the entire amount of the indebtedness to the mortgage lender. Both defendants subsequently executed a consolidation extension and modification mortgage agreement dated March 8, 204 creating a single lien in the sum of $333,700.00. The mortgage was assigned to plaintiff's predecessor by merger on January 11, 2010. Plaintiff claims that the

defendants defaulted under the terms of the mortgage and note by failing to make timely monthly mortgage payments beginning May 1, 2009 and continuing to date. Plaintiff commenced this action by filing a summons, complaint and notice of pendency in the Suffolk County Clerk's Office on June 3, 2014. Defendant Diane Montagnese served an answer containing twenty five affirmative defenses and six counterclaims on July 10, 2014. Plaintiff's motion seeks an order granting summary judgment striking defendant's answer and for the appointment of a referee.

In opposition to plaintiff's motion, defendant Diane Montagnese claims that: 1) plaintiff has failed to submit sufficient admissible evidence to prove a default in making payments required under the consolidated note; 2) plaintiff has failed to prove that it complied with the service and filing requirements set forth pursuant to RPAPL 1304 & 1306; 3) plaintiff lacks standing to maintain this action; and 4) plaintiff has violated Judiciary Law 489 known as the defense of champerty.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material question of fact from the case. The grant of summary judgment is appropriate only when it is clear that no material and triable issues of fact have been presented (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 (1957)). The moving party bears the initial burden of proving entitlement to summary judgment (*Winegrad v. NYU Medical Center*, 64 NY2d 851 (1985)). Once such proof has been proffered, the burden shifts to the opposing party who, to defeat the motion, must offer evidence in admissible form, and must set forth facts sufficient to require a trial of any issue of fact (CPLR 3212(b); *Zuckerman v. City of New York*, 49 NY2d 557 (1980)). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (*Friends of Animals v. Associated Fur Manufacturers*, 46 NY2d 1065 (1979)).

Entitlement to summary judgment in favor of the foreclosing plaintiff is established, prima facie by the plaintiff's production of the mortgage and the unpaid note, and evidence of default in payment (*see Wells Fargo Bank N.A. v. Erobobo*, 127 AD3d 1176, 9 NYS3d 312 (2nd Dept., 2015); *Wells Fargo Bank, N.A. v. Ali*, 122 AD3d 726, 995 NYS2d 735 (2nd Dept., 2014)). Where the plaintiff's standing is placed in issue by the defendant's answer, the plaintiff must also establish its standing as part of its prima facie showing (*Aurora Loan Services v. Taylor*, 25 NY3d 355, 12 NYS3d 612 (2015); *Loancare v. Firshing*, 130 AD3d 787, 14 NYS3d 410 (2nd Dept., 2015); *HSBC Bank USA, N.A. v. Baptiste*, 128 AD3d 77, 10 NYS3d 255 (2nd Dept., 2015)). In a foreclosure action, a plaintiff has standing if it is either the holder of, or the assignee of, the underlying note at the time that the action is commenced (*Aurora Loan Services v. Taylor, supra.; Emigrant Bank v. Larizza*, 129 AD3d 94, 13 NYS3d 129 (2nd Dept., 2015)). Either a written assignment of the note or the physical transfer of the note to the plaintiff prior to commencement of the action is sufficient to transfer the obligation and to provide standing (*Wells Fargo Bank, N.A. v. Parker*, 125 AD3d 848, 5 NYS3d 130 (2nd Dept., 2015); *U.S. Bank v. Guy*, 125 AD3d 845, 5 NYS3d 116 (2nd Dept., 2015)). A plaintiff's attachment of a duly indorsed note to its complaint or to the certificate of merit required pursuant to CPLR 3012(b), coupled with an affidavit in which it alleges that it had possession of the note prior to the commencement of the action, has been held to constitute due proof of the plaintiff's standing to prosecute its claims for foreclosure and sale (*JPMorgan Chase Bank, N.A. v. Weinberger*, 142 AD3d 643, 37 NYS3d 286 (2nd Dept., 2016); *FNMA v. Yakaputz II, Inc.*, 141 AD3d 506, 35 NYS3d 236 (2nd Dept., 2016); *Deutsche Bank National Trust Co. v. Leigh*, 137 AD3d 841, 28 NYS3d 86 (2nd Dept., 2016); *Nationstar Mortgage LLC v. Catizone*, 127 AD3d 1151, 9 NYS3d 315

(2nd Dept., 2015)).

Proper service of RPAPL 1304 notices on borrower(s) are conditions precedent to the commencement of a foreclosure action, and the plaintiff has the burden of establishing compliance with this condition (*Aurora Loan Services, LLC v. Weisblum*, 85 AD3d 95, 923 NYS2d 609 (2nd Dept., 2011); *First National Bank of Chicago v. Silver*, 73 AD3d 162, 899 NYS2d 256 (2nd Dept., 2010)). RPAPL 1304(2) provides that notice be sent by registered or certified mail and by first-class mail to the last known address of the borrower(s), and if different, to the residence that is the subject of the mortgage. The notice is considered given as of the date it is mailed and must be sent in a separate envelope from any other mailing or notice and the notice must be in 14-point type.

At issue is whether the evidence submitted by the plaintiff is sufficient to establish its right to foreclose. The defendant does not contest her failure to make timely payments due under the terms of the promissory note and mortgage agreements. Rather, the issues raised by the defendant concern whether the proof submitted by the mortgage lender provides sufficient admissible evidence to prove its entitlement to summary judgment based upon defendant's continuing default, plaintiff's compliance with statutory pre-foreclosure notice and filing requirements, plaintiff's standing to maintain this action, and plaintiff's claimed violation of the champerty statute.

CPLR 4518 provides:

Business records.

(a) Generally. Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible in evidence in proof of that act, transaction, occurrence or event, if the judge finds that it was made in the regular course of any business and that it was the regular course of such business to make it, at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter.

The Court of Appeals in *People v. Guidice,* 83 NY2d 630, 635, 612 NYS2d 350 (1994) explained that "the essence of the business records exception to the hearsay rule is that records systematically made for the conduct of business... are inherently highly trustworthy because they are routine reflections of day-to-day operations and because the entrant's obligation is to have them truthful and accurate for purposes of the conduct of the enterprise." (quoting *People v. Kennedy,* 68 NY2d 569, 579, 510 NYS2d 853 (1986)). It is a unique hearsay exception since it represents hearsay deliberately created and differs from all other hearsay exceptions which assume that declarations which come within them were not made deliberately with litigation in mind. Since a business record keeping system may be designed to meet the hearsay exception, it is important to provide predictability in this area and discretion should not normally be exercised to exclude such evidence on grounds not foreseeable at the time the record was made (*see Trotti v. Estate of Buchanan,* 272 AD2d 660, 706 NYS2d 534 (3rd Dept., 2000)).

The three foundational requirements of CPLR 4518(a) are: 1) the record must be made in the regular course of business- reflecting a routine, regularly conducted business activity, needed and relied upon in the performance of business functions; 2) it must be the regular course of business to make the records– (i.e. the record is made in accordance with established procedures for the routine,

systematic making of the record); and 3) the record must have been made at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter, assuring that the recollection is fairly accurate and the entries routinely made (*see People v. Kennedy, supra* @ pp. 579-580)). The "mere filing of papers received from other entities, even if such papers are retained in the regular course of business, is insufficient to qualify the documents as business records." (*People v. Cratsley,* 86 NY2d 81, 90, 629 NYS2d 992 (1995)). The records will be admissible "if the recipient can establish personal knowledge of the maker's business practices and procedures, or that the records provided by the maker were incorporated into the recipient's own records or routinely relied upon by the recipient in its business." (*State of New York v. 158th Street & Riverside Drive Housing Company, Inc.,* 100AD3d 1293, 1296, 956 NYS2d 196 (2012); *leave denied,* 20 NY3d 858 (2013); *see also Viviane Etienne Medical Care, P.C. v. Country-Wide Insurance Company,* 25 NY3d 498, 14 NYS3d 283 (2015); *Deutsche Bank National Trust Co. v. Monica,* 131 AD3d 737, 15 NYS3d (3rd Dept., 2015); *People v. DiSalvo,* 284 AD2d 547, 727 NYS2d 146 (2nd Dept., 2001); *Matter of Carothers v. GEICO,* 79 AD3d 864, 914 NYS2d 199 (2nd Dept., 2010)). In this regard, with respect to mortgage foreclosures, a loan servicer's employee may testify on behalf of the mortgage lender and a representative of an assignee of the original lender can rely upon business records of the original lender to establish its claims for recovery of amounts due from the borrowers provided the assignee/plaintiff establishes that it incorporated the original records into its own records and relied upon those records in the regular course of business (*Landmark Capital Inv. Inc. v. Li-Shan Wang,* 94 AD3d 418, 941 NYS2d 144 (1st Dept., 2012); *Portfolio Recovery Associates, LLC. v. Lall,* 127 AD3d 576, 8 NYS3d 101 (1st Dept., 2015); *Merrill Lynch Business Financial Services, Inc. v. Trataros Construction, Inc.,* 30 AD3d 336, 819 NYS2d 223 (1st Dept., 2006)).

The statute (CPLR 4518) clearly does not require a person to have personal knowledge of each and every entry contained in a business record (*see Citibank N.A. v. Abrams,* 144 AD3d 1212, 40 NYS3d 653 (3rd Dept., 2016); *HSBC Bank USA, N.A. v. Sage,* 112 AD3d 1126, 977 NYS2d 446 (3rd Dept., 2013); *Landmark Capital Inv. Inc. v. LI-Shan Wang, supra.*)). As the Appellate Division, Second Department recently stated in *Citigroup v. Kopelowitz,* 147 AD3d 1014, 48 NYS3d 223 (2nd Dept., 2017): "There is no requirement that a plaintiff in a foreclosure action rely on a particular set of business records to establish a prima facie case, so long as the plaintiff satisfies the admissibility requirements of CPLR 4518(a) and the records themselves actually evince the facts for which they are relied upon." Decisions interpreting CPLR 4518 are consistent to the extent that the three foundational requirements: 1) that the record be made in the regular course of business; 2) that it is in the regular course of business to make the record; and 3) that the record must be made at or near the time the transaction occurred. – if demonstrated, make the records admissible since such records are considered trustworthy and reliable. Moreover, the language contained in the statute specifically authorizes the court discretion to determine admissibility by stating "*if the judge finds*" that the three foundational requirements are satisfied the evidence shall be admissible.

With respect to the issue of standing, paragraph 11 of plaintiff's banking officer's affidavit states the following:

> "11. BANA (and its predecessor BAC..) directly or through its agent/custodian (and attorneys) has had continuous possession and/or custody and/or control over the "wet-ink" Note since June 1, 2012 through the present date. Specifically, BANA was in possession of the original Note endorsed in blank and the holder of the Note and Mortgage at the time this action was commenced on June 3, 2014."

This sworn statement (which is admissible as proof pursuant to CPLR 4518) together with the documentary proof submitted by the plaintiff provides relevant, admissible evidence to establish plaintiff's standing to maintain this foreclosure action since submission of an affidavit from the mortgage lender's agent attesting to plaintiff's mortgage lender's agent's possession of the note at or prior to the commencement of the action is sufficient to establish the plaintiff's standing (*see HSBC Bank USA, N.A. v. Armijos,* 151 AD3d 943, 57 NYS3d 205 (2nd Dept., 2017); *Central Mortgage Co. v. Davis,* 149 AD3d 898, 53 NYS3d 325 (2nd Dept., 2017); *Wells Fargo Bank, N.A. v. Ostiguy,* 127 AD3d 1375, 8 NYS3d 669 (3rd Dept., 2015); *U.S. Bank, N.A. v. Cruz,* 147 AD3d 1103, 47 NYS3d 459 (2nd Dept., 2017)). Any alleged issues surrounding the mortgage assignment are irrelevant in this case concerning the issue of standing since the plaintiff has established possession of a duly indorsed promissory note with an indorsement in blank prior to commencing this action (*FNMA v. Yakaputz II, Inc.,* 141 AD3d 506, 35 NYS3d 236 (2nd Dept., 2016); *Deutsche Bank National Trust Co. v. Leigh,* 137 AD3d 841, 28 NYS3d 86 (2nd Dept., 2016)). In addition, plaintiff has further established standing by attaching a copy of the indorsed in blank promissory note to the complaint, together with the certificate of merit (CPLR 3012-b) attesting to plaintiff's possession of the note prior to commencement of this action (*JPMorgan Chase Bank, N.A. v. Weinberger, supra.; Nationstar Mortgage LLC v. Catizone, supra.*).

With respect to the issue of the defendants' default in making payments, paragraph 15 of plaintiff's mortgage servicer's officer's affidavit states the following:

> "15. Mortgagors defaulted on the loan by failing to make a payment due on May 1, 2009 for principal and interest, plus amounts due for taxes and insurance."

In order to establish prima facie entitlement to judgment as a matter of law in a foreclosure action, the plaintiff must submit the mortgage, the unpaid note and admissible evidence to show default (*see PennyMac Holdings, Inc. V. Tomanelli,* 139 AD3d 688, 32 NYS3d 181 (2nd Dept., 2016); *North American Savings Bank v. Esposito-Como,* 141 AD3d 706, 35 NYS3d 491 (2nd Dept., 2016); *Washington Mutual Bank v. Schenk,* 112 AD3d 615, 975 NYS2d 902 (2nd Dept., 2013)). Plaintiff has provided admissible evidence in the form of a copy of the note and mortgages, and an affidavit attesting to the defendants' undisputed default in making timely mortgage payments sufficient to sustain its burden to prove defendants have defaulted under the terms of the parties agreement by failing to make timely payments since May 1, 2009 (CPLR 4518; *see Wells Fargo Bank, N.A. v. Thomas, supra.; Citigroup v. Kopelowitz, supra.*)). Accordingly, and in the absence of any proof to raise an issue of fact concerning Montagnese's continuing default, plaintiff's application for summary judgment against the defendants based upon their breach of the mortgage agreement and promissory note must be granted. Tellingly, in attempting to assert a champerty defense, defense counsel concedes defendants' continuing breach of the mortgage agreements by stating that the mortgage loan "became non-performing on May 1, 2009."

With respect to service of the pre-foreclosure mortgage RPAPL 1304 90-day notices, the proof required to prove strict compliance with the statute can be satisfied: 1) by plaintiff's submission of an affidavit of service of the notices (*see CitiMortgage, Inc. v. Pappas,* 147 AD3d 900, 47 NYS3d 415 (2nd Dept., 2017); *Bank of New York Mellon v. Aquino,* 131 AD3d 1186, 16 NYS3d 770 (2nd Dept., 2015); *Deutsche Bank National Trust Co. v. Spanos,* 102 AD3d 909, 961 NYS2d 200 (2nd Dept., 2013)); or 2) by plaintiff's submission of sufficient proof to establish proof of

mailing by the post office (*see HSBC Bank USA, N.A. v. Ozcan*, 2017 WL 4657992, __ NYS3d __ (2nd Dept., 10/18/17); *CitiMortgage, Inc. v. Pappas, supra pg. 901; see Wells Fargo Bank, N.A. v. Trupia*, 150 AD3d 1049, 55 NYS3d 134 (2nd Dept., 2017)). Once either method is established a presumption of receipt arises (*see Viviane Etienne Medical Care, P.C. v. Country-Wide Insurance Co., supra.; Flagstar Bank v. Mendoza*, 139 AD3d 898, 32 NYS3d 278 (2nd Dept., 2016); *Residential Holding Corp. v. Scottsdale Insurance Co.*, 286 AD2d 679, 729 NYS2d 766 (2nd Dept., 2001)).

In this case, defendant does not and could not contest the undisputable fact that RPAPL 90-day pre-foreclosure notices were timely served in compliance with statutory requirements based upon the evidence submitted by the plaintiff which includes business records tracking the mailings and copies of certified mailing receipts signed by both mortgagors. Rather, defendant's claims raise two additional issues concerning: 1) the accuracy of the computations contained in the 90-day notices; and 2) the inclusion of two notices in the 90-day notice envelope advising defendant of her rights with respect to bankruptcy law and military membership. The issue presented is the degree to which a court is to interpret "strict compliance", as that term is defined in the seminal case of *Aurora Loan Services, LLC v. Weisblum*, 85 AD3d 95, 923 NYS2d 609 (2nd Dept., 2011).

With respect to the accuracy of plaintiff's computations as to the correct "cure amount" and "number of days in default" set forth in plaintiff's initial 90-day notice dated June 10, 2013 and plaintiff's subsequent "breach letter" dated June 24, 2013, a review of the evidence submitted, including the affidavit from the mortgage servicer's assistant vice president dated October 23, 2017 (which is admissible as proof pursuant to CPLR 4518), reveals that the mortgage lender's "cure amount" and "number of days in default" calculations were correctly computed as of the date that each was notice was sent. Defendant's contention that the computations were inaccurate is therefore not valid and provides no legal basis to dismiss the complaint.

With respect to the inclusion of two additional notices in the 90-day notice envelope, this court does not deem the two paragraphs of information contained in the notice concerning bankruptcy law and military membership as a violation of the "strict compliance" requirements set forth in the "*Weisblum*" decision. Such an interpretation would negate the intent of the statute and would result in a drastic, unwarranted and inequitable remedy of dismissal In fact, the "*Weisblum*" court went so far as to recognize that there may be instances where a court is authorized to use its discretion (pursuant to CPLR 2001) where a "defect of irregularity in the content of an RPAPL 1304 notice might be so minimal" as to warrant such discretion (*Weisblum at pg.* 108).

With respect to defendant's remaining arguments claiming a violation of RPAPL 1306 filing requirements and a violation of Judiciary Law 489, there is insufficient evidence to sustain either claim. RPAPL 1306 does not require separate filings for each mortgagor and in this case the plaintiff has submitted sufficient proof of filing with the New York State Department of Financial Services. Moreover there is no admissible proof submitted to show that the plaintiff obtained ownership of the promissory note and mortgage for the express purpose of commencing this action or to show that plaintiff obtained ownership of the mortgage for any reason other than a legitimate business purpose (*see Red Tulip, LLC v. Neiva*, 44 AD3d 204, 842 NYS2d 1 (1st Dept., 2007)).

Finally, defendant Montagnese has failed to raise any admissible evidence to support any of her remaining twenty-five affirmative defenses and six counterclaims in opposition to plaintiff's

motion. Accordingly those defenses and counterclaims must be deemed abandoned and are hereby dismissed (*see Kronick v. L.P. Therault Co., Inc.*, 70 AD3d 648, 892 NYS2d 85 (2nd Dept., 2010); *Citibank, N.A, v. Van Brunt Properties, LLC*, 95 AD3d 1158, 945 NYS2d 330 (2nd Dept., 2012); *Flagstar Bank v. Bellafiore*, 94 AD3d 0144, 943 NYS2d 551 (2nd Dept., 2012); *Wells Fargo Bank Minnesota, N.A. v. Perez*, 41 AD3d 590, 837 NYS2d 877 (2nd Dept., 2007)).

Accordingly plaintiff's motion seeking summary judgment is granted. The proposed order of reference has been signed simultaneously with execution of this order.

Dated: January 11, 2018

J.S.C.

Short Form Order

SUPREME COURT - STATE OF NEW YORK
IAS PART 18 - SUFFOLK COUNTY

PRESENT:
HON. HOWARD H. HECKMAN JR., J.S.C.

INDEX NO.: 061217/2013
MOTION DATE: 10/12/2016
MOTION SEQ. NO.: 001 MG

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DEUTSCHE BANK NATIONAL TRUST CO.,

Plaintiffs,

-against-

KENNETH BONAL,

Defendants.

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PLAINTIFF'S ATTORNEY:
BRYAN CAVE LLP
1290 AVENUE OF AMERICAS
NEW YORK, NY 10104

DEFENDANT'S ATTORNEY:
CHARLES WALLSHEIN, ESQ.
115 BROADHOLLOW RD., STE. 350
MELVILLE, NY 11747

Upon the following papers numbered 1 to 38 read on this motion ; Notice of Motion/ Order to Show Cause and supporting papers 1-31 ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 32-34 ; Replying Affidavits and supporting papers 35-38 ; Other ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by plaintiff Deutsche Bank National Trust Co. seeking an order: 1) granting summary judgment striking the answer and counterclaims asserted by defendant Kenneth Bonal; 2) discontinuing the action against defendants designated as "John Doe #1" through "John Doe # 10"; 3) deeming all appearing and non-appearing defendants in default; 4) amending the caption; and 5) appointing a referee to compute the sums due and owing to the plaintiff in this mortgage foreclosure action is granted; and it is further

ORDERED that plaintiff is directed to serve a copy of this order amending the caption upon the Calendar Clerk of the Court; and it is further

ORDERED that plaintiff is directed to serve a copy of this order with notice of entry upon all parties who have appeared and not waived further notice pursuant to CPLR 2103(b)(1)(2) or (3) within thirty days of the date of this order and to promptly file the affidavits of service with the Clerk of the Court.

Plaintiff's action seeks to foreclose a mortgage in the original sum of $528,000.00 executed by defendant Kenneth Bonal on November 30, 2006 in favor of Geneva Mortgage Corp. On the same date the defendant also executed a promissory note promising to re-pay the entire amount of the indebtedness to the mortgage lender. Plaintiff obtained ownership of the note and mortgage as a result of an assignment dated April 4, 2012. Plaintiff claims that defendant defaulted under the terms of the mortgage and note by failing to make timely monthly mortgage payments beginning January 1, 2011 and continuing to this day. Plaintiff commenced this action by filing a summons, complaint and notice of pendency in the Suffolk County Clerk's Office on June 5, 2013. Plaintiff's motion

seeks an order granting summary judgment striking defendant's answer and for the appointment of a referee. Defendant's sole opposition to plaintiff's motion concerns plaintiff's inclusion of a bankruptcy/military service notice on the second page of the RPAPL 90-day notice and a claim that RPAPL 1303 notice (which defendant concedes was served) was deficient based upon counsel's interpretive measurements and therefore plaintiff's complaint must be dismissed.

The undisputed facts show that defendant entered into a mortgage agreement in which he promised to make timely monthly payments for a total period of thirty years in repayment for a sum of money loaned in the amount of $528,000.00. Defendant does not contest the fact that he has defaulted in making payments for the past 82 months but asserts defenses based upon plaintiff's alleged failure to comply with statutory notice requirements.

Defendant's defenses are not however premised upon never having been served with state required RPAPL1303 & 1304 notices. Defendant concedes that the notices (dated February 6 &7, 2013 with respect to the RPAPL 1304 notices, and dated June 28, 2013 with respect to the RPAPL 1303 notice) were timely served. Rather, defendant claims that the envelope containing the RPAPL 1304 90-day notice contained what defense counsel describes as "additional notices" in the form of a bankruptcy notice and military service notice which was included on page two of the 90-day notice, and that the RPAPL 1303 notice was deficient in font size as measured by counsel's "transparent ruler". Counsel claims that the two paragraph addition to the 90-day notice invalidates the contents of the entire envelope so much so that the entire action must be dismissed and further that his "transparent ruler" provides sufficient, admissible evidence of non-compliance with RPAPL 1303 statutory requirements also mandating dismissal of the complaint.

While New York case law clearly provides that service of RPAPL 1303 & 1304 notices are conditions precedent to the commencement of a foreclosure action, neither statute requires that plaintiff's complaint be dismissed based upon the frivolous claims asserted by the defendant in this action. With respect to the claimed RPAPL 1304 "violation", plaintiff's inclusion of two additional paragraphs in its 90-day notice does not violate the "strict compliance" requirements for service of the notice. The seminal case igniting this type of motion practice is *Aurora Loan Services LLC v. Weisblum,* 85 AD3d 95, 923 NYS2d 609 (2nd Dept., 2011) in which the appellate court required that the mortgage lender prove strict compliance with the statute (RPAPL 1304). In this instance, counsel seeks to take "strict compliance" to an absurd level, to require that a foreclosure action be dismissed based upon plaintiff's claimed incorporation of two paragraphs in the notice itself detailing borrower's rights who have filed petitions in bankruptcy and who were members of the military. While clearly *Weisblum* mandates compliance with the statute's important notice requirements, it cannot and should not be interpreted to provide a mechanism to dismiss a complaint under these circumstances. The *Weisblum* decisions itself went so far as to recognize that there may be instances where a court is authorized to use its discretion (pursuant to CPLR 2001), where "a defect or irregularity in the content of an RPAPL 1304 notice might be so minimal" as to warrant exercise of that discretion (*see Weisblum* @ pg. 108). Clearly this is one such instance.

With respect to defense counsel's claim of an RPAPL 1303 notice violation, the idea that through the use of a "transparent ruler" introduced by submission of an attorney's affirmation, that sufficient admissible evidence is submitted to prove that the 1303 notice was deficient is absurd. If, in fact, there is a genuine issue of fact to be raised concerning the deficiency of the notice, it cannot be raised by submission of an attorney's affirmation through the use of a "transparent ruler", but can

only be supported by relevant, admissible evidence introduced by submission of an affidavit of an expert witness or otherwise competent individual, who can testify about the accuracy of the measurements claimed to be deficient. Based upon the evidence submitted by the plaintiff, sufficient admissible proof has been submitted to show compliance with the requirements of RPAPL 1303 and no legal basis exists to deny plaintiff's summary judgment motion.

Finally, as the defendant has failed to address any of his remaining eighteen affirmative defenses and four counterclaimns asserted in his answer in opposition to plaintiff's motion, those remaining affirmative defenses and counterclaims must be deemed abandoned and are hereby dismissed (*Citibank, N.A. v. Van Brunt Properties, LLC*, 95 AD3d 1158, 945 NYS2d 330 (2nd Dept., 2012); *Wells Fargo Bank Minnesota, N.A. v. Perez*, 41 AD3d 590, 837 NYS2d 877 (2nd Dept., 2007)).

Accordingly plaintiff's motion seeking an order granting summary judgment is granted. The proposed order of reference has been signed simultaneously with execution of this order.

Dated: October 23, 2017

Howard H Heckler Jr
J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

PRESENT:
HON. MARY H. SMITH
JUSTICE OF THE SUPREME COURT

JPMorgan Chase Bank, National Association, successor in interest by purchase from the Federal Deposit Insurance Corporation as receiver of Washington Mutual Bank f/k/a Washington Mutual Bank, FA,

Plaintiff(s),

- against -

Violeta Dedvukaj; Victor Dedvukaj; JBBNY, LLC; Howard Distafana c/o Leonard Falcone, Esq.; Approved Oil Co.; Workers Compensation Board of the State of New York; Round Hill Pools LLC; American Express Centurion Bank; Nature's Trees Inc. d/b/a Savalawn; New York State Department of Taxation & Finance; Town/Village of Harrison; Mercedes-Benz Financial Services USA, LLC; Equable Ascent Financial, LLC; Boardwalk Regency Corporation; Marukaj Dedvukaj; Ronald H. Parlato; Shell Builders Corp.; and Selvin Morel Alvarez,

Defendant(s).

DECISION & ORDER
Index No.: 63611/2014
Motion Date: 10/27/17

Plaintiff moves (#006) for a judgment of foreclose and sale. Defendants Violeta Dedvukaj and Victor Dedvukaj (defendants) cross move to dismiss the action.

The following papers were read:

Notice of Motion (#006), Affirmations (3), Exhibits (7), Proposed Judgment	1-12
Notice of Cross-Motion (#007), Affirmation, Affidavit, and Exhibits (5)	13-20
Affirmation in Opposition and Reply	21-22

By way of background, plaintiff commenced this action to foreclose a mortgage on real property known as 8 Old Woods Drive, Harrison, New York and defendants interposed an answer. Subsequently, plaintiff moved for summary judgment and the appointment of a referee to compute, which was granted on April 27, 2017. That order provided, among

other things, that "if required and/or needed, the Referee appointed herein shall take testimony pursuant to RPAPL || § 1321." Plaintiff now moves to confirm the referee's report and for a judgment of foreclosure and sale. Defendants cross move to dismiss the complaint.

In support of its motion, plaintiff proffers, among other things, the referee's report. In opposition, defendants contend that they were entitled to a hearing prior to computation. In addition, defendants assert that plaintiff's prior counsel has been accused of a "complex scheme to defraud" plaintiff and "[i]t is likely that JPMorgan Chase has assessed costs against the defendant's [sic] escrow balance based upon legal fees which were falsely billed to them as the client." Further, defendants contend that the referee lacks sufficient evidentiary support. Defendants also contend that the notice that they received from plaintiff pursuant to RPAPL § 1304 was facially defective. Specifically, defendants note that, in addition to the language required by RPAPL § 1304, the provided notice alerted defendants about potential scams from housing counselors, directed defendants to call plaintiff about loan modification assistance, informed defendants that plaintiff is a debt collector, and provided that, if this obligation were discharged by or subject to a bankruptcy proceeding, the notice did not constitute an attempt to collect a debt. Defendants contend that this additional information constituted additional "notices" in violation of RPAPL § 1304 (2), which provides that the RPAPL §1304 notice "shall be sent . . . in a separate envelope from any other mailing or notice."

Defendants have failed to present any basis to deny plaintiff's motion. Unless the Court orders otherwise, it would be an error for a referee to compute the amount due without holding a hearing on notice to defendants (*see* CPLR 4313; *Aurora Loan Services, LLC v Taylor*, 114 AD3d 627, 629 [2d Dept 2014], *affd*, 25 NY3d 355 [2015]). As noted above, the Court dispensed with the need for a hearing in the order of reference. Regardless, the Court is the ultimate arbiter of the dispute and has the power to reject the referee's report and make new findings in order to consider evidence from defendants as to the proper calculation of the amount due (*see Adelman v Fremd*, 234 AD2d 488, 489 [2d Dept 1996]). Here, defendants' vague assertion that plaintiff's prior counsel may have defrauded plaintiff in another matter not before this Court is no evidence of impropriety in this matter. As such, defendants do not present any evidence, which, if considered, would alter the referee's report nor do defendants dispute the accuracy of any of the figures. The referee avers that she relied, in part, on the affidavit of Mimoza Petreska who is employed by plaintiff. Having reviewed that affidavit, the Court finds sufficient evidence to support the referee's findings (*see* CPLR 4403).

Defendants' contention that the RPAPL § 1304 notice contains additional "notices" is unavailing. The legislative history makes plain that the intent of RPAPL § 1304 was to provide the borrower with, among other things, certain information about housing counseling services in the area and to facilitate communication between the lender and the borrower with a view to avoiding needless foreclosure proceedings (Senate Introducer

Mem. in Support, Bill Jacket, L. 2008, ch. 472, at 10; *see also Aurora Loan Services, LLC v Weisblum*, 85 AD3d 95, 107 [2d Dept 2011]). Here, defendants do not dispute that the subject notices provided the required statutory language. Rather, defendants contend that the notices contained additional "notices" about potential scams from housing counselors, directed defendants to contact plaintiff about loan modification assistance, informed defendants that plaintiff is a debt collector, and clarified the import of the notice in the presence of a bankruptcy discharge or stay. This additional information does not constitute illicit "notices" prohibited by RPAPL § 1304 (2), but rather merely clarification about housing counseling services and about the import of communication with the lender.

Based upon the foregoing, plaintiff's motion is granted and defendants' cross-motion is denied. Contemporaneously herewith, the Court will sign plaintiff's proposed judgment.

Dated: December 7, 2017
White Plains, New York

HON. MARY H. SMITH
Justice of the Supreme Court

SUPREME COURT - STATE OF NEW YORK
IAS PART 18 - SUFFOLK COUNTY

PRESENT:
HON. HOWARD H. HECKMAN JR., J.S.C.

INDEX NO.: 8685/2013
MOTION DATE: 05/09/2017
MOTION SEQ. NO.: 001 MG
002 MD

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DEUTSCHE BANK NATIONAL TRUST CO.,

Plaintiffs,

-against-

MICHELLE DELISSER,

Defendants.

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PLAINTIFF'S ATTORNEY:
PARKER IBRAHIM & BERG, LLC
5 PENN PLAZA, STE. 2371
NEW YORK, NY 10001

DEFENDANT'S ATTORNEY:
CHARLES WALLSHEIN PLLC
115 BROADHOLLOW RD., STE. 350
MELVILLE, NY 11747

Upon the following papers numbered 1 to 54 read on this motion : Notice of Motion/ Order to Show Cause and supporting papers 1-37 (#001) ; Notice of Cross Motion and supporting papers 38-51 (#002) ; Answering Affidavits and supporting papers ; Replying Affidavits and supporting papers 52-54 ; Other ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by plaintiff Deutsche Bank National Trust Co. seeking an order: 1) granting summary judgment striking the answer and counterclaims of defendant Michelle DeLisser; 2) discontinuing the action against defendants designated as "John Doe"; 3) deeming all appearing and non-appearing defendants in default; 4) amending the caption; and 5) appointing a referee to compute the sums due and owing to the plaintiff in this mortgage foreclosure action is granted; and it is further

ORDERED that the cross motion by defendant Michelle DeLisser for an order pursuant to CPLR 3212 denying plaintiff's summary judgment motion based upon plaintiff's alleged failure to comply with RPAPL 1304 requirements is denied; and it is further

ORDERED that plaintiff is directed to serve a copy of this order amending the caption upon the Calendar Clerk of the Court; and it is further

ORDERED that plaintiff is directed to serve a copy of this order with notice of entry upon all parties who have appeared and not waived further notice pursuant to CPLR 2103(b)(1)(2) or (3) within thirty days of the date of this order and to promptly file the affidavits of service with the Clerk of the Court.

Plaintiff's action seeks to foreclose a mortgage in the original sum of $584,000.00 executed by defendant Michelle DeLisser on December 31, 2004 in favor of Washington Mutual Bank, FA. On the same date defendant DeLisser executed a promissory note promising to re-pay the entire amount of the indebtedness to the mortgage lender. Under the terms of a Pooling and Servicing

Agreement effective July 1, 2005 the mortgage loan became an asset of Washington Mutual Mortgage Securities Corp. The mortgage loan was subsequently modified by a loan modification agreement dated December 6, 2008 creating a single lien in the sum of $641,532.13. The mortgage was thereafter transferred to plaintiff Deutsche Bank National Trust Co. by assignment dated February 19, 2013. Plaintiff claims that DeLisser has defaulted under the terms of the mortgage and note by failing to make timely monthly mortgage payments beginning July 1, 2009 and continuing to date. Plaintiff commenced this action by filing a summons, complaint and notice of pendency in the Suffolk County Clerk's Office on March 26, 2013. Plaintiff's motion seeks an order granting summary judgment striking defendant's answer and for the appointment of a referee.

In support of her cross motion and in opposition to plaintiff's motion, defendant submits an affidavit and an attorney's affirmation and claims that plaintiff failed to strictly comply with RPAPL 1304 requirements since the 90-day notices defendant concedes were served upon her were defective. Defendant claims the notice envelopes contained additional notices which are not permissible under the terms of the statute. Defendant also claims that a decision rendered by Supreme Court Justice Asher in a foreclosure action entitled *U.S. Bank, N.A. v. Arens* (Index # 151-2013) dismissing a foreclosure complaint based upon plaintiff's failure to comply with RPAPL 1304 requirements, mandates and requires that this Court dismiss this foreclosure action based upon the doctrine of res judicata, since the identical issues raised and determined in the *Arens* action have been again raised in this action thereby necessitating the same result.

In opposition to the cross motion and in further support of its motion, plaintiff claims RPAPL 1304 requirements do not apply in this action based upon the defendant's concession in her verified answer that she did not reside in the mortgaged premises. Plaintiff claims that RPAPL 1304 90-day notice requirements only apply to "home loans" and therefore DeLisser's admission that she did not reside in the premises renders any discussion concerning RPAPL 1304 requirements irrelevant and moot. Plaintiff also asserts that even if the defendant resided in the premises, the evidence submitted provides adequate proof of compliance with RPAPL Section 1304 requirements. Plaintiff also claims that the doctrine of res judicata does not apply in this case and there is no binding precedent set by Justice Asher's determination dismissing an unrelated foreclosure proceeding which precludes this court from making its own determination based upon the underlying facts presented by the parties.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material question of fact from the case. The grant of summary judgment is appropriate only when it is clear that no material and triable issues of fact have been presented (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 (1957)). The moving party bears the initial burden of proving entitlement to summary judgment (*Winegrad v. NYU Medical Center*, 64 NY2d 851 (1985)). Once such proof has been proffered, the burden shifts to the opposing party who, to defeat the motion, must offer evidence in admissible form, and must set forth facts sufficient to require a trial of any issue of fact (CPLR 3212(b); *Zuckerman v. City of New York*, 49 NY2d 557 (1980)). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (*Friends of Animals v. Associated Fur Manufacturers*, 46 NY2d 1065 (1979)). Entitlement to summary judgment in favor of the foreclosing plaintiff is established, prima facie by the plaintiff's production of the mortgage and the unpaid note, and evidence of default in payment (*see Wells Fargo Bank N.A. v. Erobobo*, 127 AD3d

1176, 9 NYS3d 312 (2nd Dept., 2015); *Wells Fargo Bank, N.A. v. Ali*, 122 AD3d 726, 995 NYS2d 735 (2nd Dept., 2014)).

Proper service of an RPAPL 1304 notice on borrower(s) is a condition precedent to the commencement of a foreclosure action, and the plaintiff has the burden of establishing compliance with this condition (*Aurora Loan Services, LLC v. Weisblum*, 85 AD3d 95, 923 NYS2d 609 (2nd Dept., 2011); *First National Bank of Chicago v. Silver*, 73 AD3d 162, 899 NYS2d 256 (2nd Dept., 2010)). RPAPL 1304(2) provides that notice be sent by registered or certified mail and by first-class mail to the last known address of the borrower(s), and if different, to the residence that is the subject of the mortgage. The notice is considered given as of the date it is mailed and must be sent in a separate envelope from any other mailing or notice and the notice must be in 14-point type. The statute only applies to "home loans" which is defined as premises "which is or will be occupied by the borrower as the borrower's principal dwelling." (RPAPL 1304(5)(b)(iv); *see Wells Fargo Bank, N.A. v. Berkovits*, 143 AD3d 696, 38 NYS3d 579 (2nd Dept., 2016); *Mendel Group, Inc. v. Prince*, 114 AD3d 732, 980 NYS2d 519 (2nd Dept., 2014)).

With respect to plaintiff's summary judgment application, by defendant's failure to oppose the evidence submitted by the mortgage lender, the defendant has conceded that she was loaned the sum of $641,532.13 in December, 2008 on condition that she make timely monthly mortgage payments for a period of thirty six years. She admits that she breached the promise she made after making a total six payments: She has continued to be in default for more than eight years without making any payments.

The issues raised in these motions therefore does not concern defendant's more than eight year continuing failure to make mortgage payments, but rather whether the terms of a New York State statute (RPAPL 1304) enacted to promote efforts for lenders and borrowers to engage in settlement discussions prior to the commencement of a foreclosure action * (FN-1), apply to a mortgagor who has admitted in her verified answer that she does not reside in the mortgaged premises and, if so, whether the mortgage lender's inclusion of an additional one page notice addressed to service members and customers so violates the statute as to require the foreclosure action's dismissal.

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*1- The sponsorship letter memorandum in support of this July 31, 2008 legislation highlighted the three reasons for enacting the bill: 1) to promote efforts to encourage lenders and borrowers to reach a resolution to avoid foreclosure; 2) to combat fraudulent lending practices; and 3) to create new standards and protections for consumers related to sub-prime loans. The bill jacket makes clear that the intent was to provide a *preliminary* mechanism for defaulting homeowners to become more aware that legal action was about to be initiated against them by the mortgage lender should payments not be forthcoming and to introduce a compulsory court settlement conference program whereby the defaulting parties could meet with representatives of the mortgage lender and court personnel to resolve the borrowers' breach and to avoid foreclosure. In January, 2010 the statute was extended to include all "home loans".

With respect to the applicability of the notice requirements set forth in RPAPL 1304, defendant's verified answer contains a sworn denial conceding that she does not reside in the premises located at 7 Bender Court, Dix Hills, New York 11746-- which is the address of the mortgaged premises. Such denial constitutes a judicial admission which removes the mandates imposed by RPAPL 1304, since those mandates apply only to "home loans". As the defendant has admitted in her pleadings that she does not reside in the mortgaged premises there can be no reason to dismiss this action on the basis that the plaintiff violated RPAPL 1304 requirements since such requirements do not apply (*see Wells Fargo Bank, N.A. v. Berkovits, supra.*)). Accordingly defendant's cross motion must be denied in its entirety.

Moreover, even were this Court to determine that defendant's sworn denial has been somehow overcome by her own counsel's claim that she "moved out of the premises for a short time", or by her own belated assertion (contradicting counsel's claim) that: "My home is and always has been occupied by my family and me" (presumably, although not strictly defined in her affidavit, defendant is referring to the Dix Hills mortgaged premises), there remains no legal basis to dismiss the complaint based upon a failure to comply with the statute.

In this respect the defendant does not contest service of the 90-day pre-foreclosure notices and even admits that she received those notices in September, 2012. Rather, her defense is premised upon the fact that included within the 90-day notice envelopes, was a one page notice which defendant contends violated the "strict compliance" requirements imposed by interpretations of the statute by recent case law.

Since 2011, New York appellate courts have interpreted RPAPL 1304 as a defense (albeit not a jurisdictional defense) which requires service of a 90-day pre-foreclosure notice upon a borrower as a "condition precedent" to commencement of the foreclosure action with the mortgage lender having the burden of "strict compliance" of the notice requirements (*see Aurora Loan Services, LLC v. Weisblum, supra.; First National Bank of Chicago v. Silver, supra.; TD Bank, N.A. v. Leroy,* 121 AD3d 1256, 995 NYS2d 625 (3rd Dept., 2014)). Although the great majority of decisions interpreting the statute deal with the quantum of proof required to prove service of the notices, in this instance the issue raised by the defendant concerns "strict compliance" about the contents of the 90-day mailing notices. More specifically defendant claims that plaintiff's inclusion of a one page notice containing information addressed to service members and their dependents (required by the federal Service-members Civil Relief Act) together with two additional paragraphs (on the same page) informing "customers" about the federal "Homeowner Affordability and Stability" plan and about bankruptcy protections afforded pursuant to Title 11 of the United States Code, violates the statute's prohibition requiring a 'separate mailing" and therefore upon such violation this court is required to dismiss the action.

In the seminal case of *Aurora Loan Services, LLC v. Weisblum, supra.*, the appellate court held that the plaintiff was "required to prove ... strict compliance with RPAPL 1304" *(Id @ 106)* and that the lender failed to comply with the statute: 1) by failing to serve one of the borrowers with a 90-day notice; 2) by failing to submit an affidavit of service to establish proper service on both borrowers; and 3) by failing to include the list of counseling agencies in the notices which were sent. More importantly for purposes of this foreclosure action, the *Weisblum* decision recognized that there would be instances where a court may be authorized to exercise its discretion pursuant to CPLR 2001, in cases where "a defect or irregularity in the content of an RPAPL 1304 notice might

be so minimal as the warrant the exercise of the court's discretion under CPLR 2001 to avoid dismissal of the action." (*Id @ 108*). This is one such case.

The statute does indeed state that the 90-day notice "must be sent in a separate envelope from any other mailing or notice" and requires that the notice "be in 14-point type". But the issue presented is the extent to which "strict compliance" of the statute is to be amplified (*2). The rationale recited by the court in the *Arens* decision states that the "stand alone" notice provision is necessary to avoid "confusion in whom the borrower should contact" and that all defaulting borrowers, both sophisticated and most importantly the unsophisticated, shall be "prejudiced by the plaintiff's conduct" if they are not able to raise this objection. The *Arens* decision goes on to state that "the only way to assure compliance with RPAPL 1304 on a *large scale* is for the courts of this state to continue to hold that RPAPL 1304 is a strict compliance statute as the court set forth in *Weisblum* (supra.), and to require plaintiffs to strictly comply with RPAPL 1304 or face dismissal of their cases."

But where is the prejudice? The underlying facts are undisputed. The defendant concedes that she had not made a payment since July 1, 2009 and that she was served with the 90-day notices more than 39 months later on September 13, 2012. The defendant also concedes that the notice itself complied with the statute and provided her with adequate notice of an impending foreclosure action unless she took affirmative steps to address her default. Defendant's affidavit acknowledges receipt of those notices containing all the required information which would enable her to communicate with either the lender or counseling agencies, yet fails to indicate that she took any action and or to indicate that she was in any sense "confused". Indeed the record is clear that the defendant did nothing, resulting in commencement of the action in March, 2013. More importantly, there is no evidence that inclusion of the one page notice resulted in any prejudice to the defendant's ability to take affirmative steps to address her default which is the purpose of the statute.

Under these circumstances, the inclusion of a one page, federally mandated notice to veterans (with two additional brief paragraph statements to lender customers informing them of their consumer rights under federal law) does not violate the "strict compliance" requirements stated in recent case law and clearly does not provide legal grounds for dismissing the complaint based upon any failure to strictly comply with RPAPL 1304. The one page notice constitutes merely a defect in the content of the envelope containing the required 90-day notice and it is this Court's inherent discretionary authority to determine that there is no violation of the statute by its inclusion with the 90-day notice (CPLR 2001). Defining "strict compliance" in the manner advocated by the defendant would defy common sense and logic, and lead to an absurd result of rewarding a mortgagor (be she sophisticated or unsophisticated), who was obviously cognizant of the fact that she was in default for more than three years at the time she concedes she received the mailing, and of the fact that such default would have consequences including the lender's right to foreclose, particularly in this instance where five years after receipt of the notice her breach has continued.

*2- This court assumes that it is not defense counsel's position that "strict compliance" includes a violation of every possible technical detail set forth in the statute such as advocating dismissal based upon a 13.95 or 13.99-point type (not 14-point as set forth in the statute) through counsel's testimonial use of a ruler or micrometer and that only significant statutory deviations are relevant.

As to defendant's remaining argument that this Court is somehow bound to follow a ruling in an unrelated Supreme Court foreclosure action pursuant to the doctrine of res judicata, such contention is absurd. The doctrine of res judicata prevents a party from litigating a claim which has already been litigated or which ought to have been litigated and is premised upon the principle that once a person is afforded a full and fair opportunity to litigate a particular issue, that person may not be permitted to do so again (*Gramatan Homes v. Lopez*, 46 NY2d 484, 414 NYS2d 308 (1979); *Matter of JPMorgan Chase Bank*, 135 AD3d 762, 24 NYS 667 (2nd Dept., 2016)). This Court is not bound by a decision made by another Supreme Court Justice in a wholly unrelated foreclosure action and to suggest res judicata applies in this case is not worthy of further discussion.

Finally, as the defendant has failed to raise any evidence to address her remaining affirmative defenses (of the remaining 18 asserted in her answer) and 4 counterclaims in opposition to plaintiff's motion, those affirmative defenses and counterclaims must be deemed abandoned and are hereby dismissed (*see Kronick v. L.P. Therault Co., Inc.*, 70 AD3d 648, 892 NYS2d 85 (2nd Dept., 2010); *Citibank, N.A. v. Van Brunt Properties, LLC*, 95 AD3d 1158, 945 NYS2d 330 (2nd Dept., 2012); *Flagstar Bank v. Bellafiore*, 94 AD3d 1044, 943 NYS2d 551 (2nd Dept., 2012); *Wells Fargo Bank Minnesota, N.A v. Perez*, 41 AD3d 590, 837 NYS2d 877 (2nd Dept., 2007)).

Accordingly, the defendant's cross motion is denied in its entirety. Plaintiff's motion seeking summary judgment is granted in its entirety. The proposed order of reference has been signed simultaneously with execution of this order.

Dated: September 14, 2017

J.S.C.

Hon. Howard H. Heckman Jr.

2017 SEP 26 A 10:01

SUFFOLK COUNTY CLERK

To commence the statutory time for appeals as of right (CPLR 5513[a), you are advised to serve a copy this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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BANK OF NEW YORK MELLON f/k/a THE BANK OF NEW YORK, AS TRUSTEE FOR THE CERTIFICATE HOLDERS OF CWALT, INC., ALTERNATIVE LOAN TRUST 2005-48T1, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2005-48T1,

Plaintiff,

-against-

RICHARD K. HERSHMAN, UTE HERSHMAN, JPMORGAN CHASE, N.A., WORKERS COMPENSATION BOARD OF STATE OF NEW YORK,

Defendants.

----------X

Index No. 58666/2016

DECISION/ORDER

Mot. Seq. 7
Submit Date: 4/13/22

Ecker, J.

Upon consideration of the parties' submissions (NYSCEF Doc. No. 220-229), relative to Richard K. Hershman and Ute Hershman's (defendants) motion, made pursuant to CPLR 2221, for an order granting renewal of plaintiff's motion for summary judgment, and upon renewal, effectively vacating those parts of court's prior order, which denied plaintiff summary judgment and the appointment of a referee, and directed the parties to appear at the Settlement Conference Part (NYSCEF Doc. No. 212), and finding summary judgment in favor of defendants and dismissing the action, the court determines as follows:

According to the complaint in this foreclosure action, filed on June 22, 2016, defendants have been in default in the payment of their mortgage obligations, which at the commencement of this action, showed an outstanding unpaid balance of principal in the amount of $1,013,073.44. This is the seventh motion sequence to be considered by the court. Defendants now seek to renew the prior motion for summary judgment, which was denied, upon the grounds that a recent pronouncement by the Appellate Division Second Department affects the merits of the prior motion.

The case in question is *Bank of America, N.A. v Kessler* (202 AD3d 10 [2d 2021]), which deals with the RPAPL 1304 separate envelope/supplementary advisement of debtors' rights language many mortgage lenders or servicers have used. By a 3 to 1 majority, the Appellate Division ruled that strict construction of RPAPL 1304 mandates that the inclusion of the supplementary advisement in the same envelope as the RPAPL 1304 notice negates the legal effect of the notice. This court has in the past disagreed with what is here argued by borrowers, and what is now the law in the Second Department. That the borrower, Richard Hershman, an attorney, would be misled by the information in the supplementary notice defies logic. Perhaps the Court of Appeals, or the Appellate Division Second Department, will adopt a case by case analysis when this issue arises, rather than a so called "bright line" test.

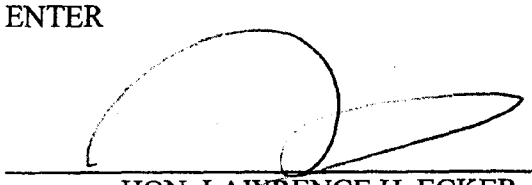
Unlike the United States Supreme Court, this court is an adherent to *stare decisis* (*see Maple Med., LLP v Scott,* 191 AD3d 81 [2d Dept 2020]). In the May 17, 2022, New York Law Journal, my colleague, Hon. Victor Grossman, in dealing with the *Kessler* issue, adjourned the borrower's similar motion to renew, pending further argument and consideration. This court finds no reason to do so. The court is sympathetic to the argument that *Kessler* is "simply wrong". However, that argument is not sufficient to convince this court to disregard the binding decision from the appellate court. But in these, my last days on the bench, I will say that I too vigorously disagree with the majority decision, as did Justice Miller, who has not always agreed with me.

The court is reluctantly constrained to grant defendants' motion to renew, and upon so doing, to vacate that part of its prior decision that ordered a trial, and granting that part of the prior decision that denied summary judgment to defendants, for the reasons stated in *Wells Fargo Bank, N.A. v Gerrato* (2022 NY Slip Op 22012 [Sup Ct, Suffolk County 2022]), and specifically, CPLR 3212 [b]). Accordingly, it is hereby

ORDERED that the motion to renew, made pursuant to CPLR 2221, is granted, and upon so doing, defendants' motion for summary judgment is granted, and the complaint is dismissed.

Dated: White Plains, New York
May 18, 2022

ENTER



HON. LAWRENCE H. ECKER

To: All parties via NYSCEF

MEMO DECISION & ORDER

INDEX No. 618396/2020

SUPREME COURT - STATE OF NEW YORK
IAS PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 1/6/22
XMOTION DATE 2/3/22
SUBMIT DATE 2/4/22
Mot. Seq. #001 - MG
Mot. Seq. #002 - XMD
CDISP Y ____ N X

BCMB1 TRUST, Plaintiff, -against- MICHAEL A. KIELY A/K/A MICHAEL A. KILEY, MARIE J. KIELY, VIVINT SOLAR DEVELOPER, LLC and "JOHN DOE No. 1 through JOHN DOE No. 99", said names being fictitious, parties intended being possible tenants or occupants of premises, and corporations, other entities or persons who claim, or may claim a lien against the premises, Defendants.	RICHLAND & FALKOWSKI, PLLC Attys. for Plaintiff 28-07 Jackson Ave., 5th Fl. Long Island City, NY 11101 FRED M. SCHWARTZ, ESQ. Atty. for Defendants Kiely 317 Middle Country Road, Suite 5 Smithtown, NY 11787

Upon the following papers numbered 1 to 10 read on this motion for summary judgment and to appoint a referee to compute, among other things; Notice of Motion/Order to Show Cause and supporting papers 1 - 4; Notice of Cross Motion and supporting papers: 5 - 7; Opposing papers: 8; Reply papers 9; Other Letter dated March 11, 2022 (not considered); ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that the motion (#001) by the plaintiff for, among other things, summary judgment, striking the answer of the defendants and the appointment of a referee to compute, is granted in its entirety; and it is further

ORDERED that the cross motion (#002) by the defendants for, among other things, dismissal of the complaint and vacatur of the notice of pendency, or alternatively, granting defendants leave to amend the answer to include an additional affirmative defense, is denied in its entirety; and it is further

ORDERED that the proposed Order submitted by plaintiff, as modified by the court, is signed simultaneously herewith; and it is further

ORDERED that plaintiff is directed to file a notice of entry within five days of receipt of this Order pursuant to 22 NYCRR § 202.5-b(h)(2).

This is an action for foreclosure on property situate in Bay Shore. In essence, on September 20, 2006, defendant Michael A. Kiely borrowed $174,500.00 from the plaintiff's predecessor in interest and executed a promissory note and a mortgage, with the defendant, Marie J. Kiely. The borrowers failed to pay the monthly installments due and owing as of November 1, 2008, over 13 years ago. This action was commenced by filing on November 27, 2020. On May 14, 2021, defendants filed an answer through counsel, alleging thirty-five affirmative defenses. On July 27, 2021, the matter was released from the foreclosure settlement conference. What followed was this instant motion (#001) for summary judgment, default judgments against the non-answering defendants, and the appointment of a referee to compute, and the cross motion (#002) by the defendants.

After the submission of the motions, defendants' counsel forwarded a letter to the Court citing to a Second Department decision (misnamed in the letter), that is, ***Bank of America, N.A. v Kessler***, __ AD3d __, 2021 WL 5913148 (2d Dept Dec. 15, 2021) (3-1 dissent). That decision was issued prior to the submission of the cross motion on January 6, 2022 and not mentioned in the affirmation of counsel or the reply affirmation of February 1, 2022. Most importantly, for matters of due process, counsel for the defendants failed to raise a single issue in the cross motion or in any affidavit or affirmation, which addressed, in any way, a challenge to RPAPL §1304. Defendants' opposition and cross motion are solely addressed to the issue of plaintiff's standing and the request to add an affirmative defense of "champerty."

Procedurally, for purposes of this summary judgment motion, defendants' counsel, an experienced foreclosure attorney, waived any argument concerning RPAPL §1304 by failing to raise the issue in opposition to the summary judgment motion. Where a defendant fails to oppose some or all matters advanced on a motion for summary judgment, the facts as alleged in the movant's papers may be deemed admitted as there is, in effect, a concession that no question of fact exists (*see* ***Kuehne & Nagel, Inc. v Baiden***, 36 NY2d 539 [1975]; *see also* ***Madeline D'Anthony Enter., Inc. v Sokolowsky***, 101 AD3d 606 [1st Dept 2012]; ***Argent Mtge. Co., LLC v Mentesana***, 79 AD3d 1079 [2d Dept 2010]). In addition, the failure to raise pleaded affirmative defenses in opposition to a motion for summary judgment renders those defenses abandoned and thus without any efficacy (*see* ***New York Commercial Bank v J. Realty F Rockaway, Ltd.***, 108 AD3d 756 [2d Dept 2013]; ***Starkman v City of Long Beach***, 106 AD3d 1076 [2d Dept 2013]).

In essence, defendants are in motion default on the issue of RPAPL §1304 by failing to even address the issue in any of its cross moving papers. Just as one must move to vacate a default before they can raise the RPAPL §1304 defense (*see* ***Wells Fargo Bank, N.A. v Calvin***, __ AD3d __, 2022 WL 791380 [2d Dept, March 16, 2022[; ***Citimortgage, Inc. v Pierce***, __ AD3d __, 2022 WL 791208 [2d Dept, March 16, 2022]; ***JPMorgan Chase Bank, Nat. Assn. v Bracco***, 200 AD3d 765 [2d Dept 2021]), defendants will be required to demonstrate a reasonable excuse for the default in raising the issue in the motion papers (*see generally,* ***MTGLQ Investors, L.P. v Goddard***, __ AD3d __, 2022 WL 697415 [2d Dept, March 9, 2022]; ***U.S. Bank Nat. Assn. v Pierce***, __ AD3d __, 2022 WL 697443 [2d Dept, March 9, 2022]). It will be hard to argue the concept of "newly discovered evidence which was in existence but undiscoverable" with regard to an appellate holding that was issued two months prior to defendants' submissions (*see generally,* ***JPMorgan Chase Bank, Nat. Assn. v Borukhov***, __ AD3d __, 2022 WL 697429 [2d Dept 2022]).

This case is identical to that of ***Selene Fin., L.P. v Firshing***, __ AD3d __, 2022 WL 697472 (2d Dept, March 9, 2022), where the Court "properly declined to consider" an attempt to raise RPAPL §1304 for the first time in reply papers. Here, the issue is raised not in reply papers but in an after-submission letter.

In any event, 22 NYCRR 202.8-c does not support counsel's actions, since such is only to be used for "citation of any post-submission court decision" and as detailed above, counsel submitted the cross motion and reply papers two months after the issuance of the court decision.

Apart from the procedural issue noted above, if the Court were to address the letter submission of the ***Kessler*** opinion, the Court would reject the implication it offers. The Court recognizes that, in response to the reversal of numerous Second Department holdings by the Court of Appeals, in ***Freedom Mortgage Corp. v Engel***, 37 NY3d 1 (2021), the Second Department, by a split decision, has now imposed a bright-line, strict compliance standard in foreclosure actions, which it claims is consistent with the ***Engel*** holding.

This judicial re-interpretation of a judicial decision concerning a 13-year-old statute has moved the caselaw far afield from the original intent of the state legislators who drafted RPAPL §1304. As James Wilson, one of the original Supreme Court Justices, noted:

> "The first and governing maxim in the interpretation of a statute is to discover the meaning of those who made it."[1]

Additionally, Joseph Story, who wrote a majority of the Supreme Court opinions during his time on the bench and who is regarded as the "Father of American Jurisprudence," instructed:

> "The first and fundamental rule in the interpretation of all

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[1] JAMES WILSON, LECTURES ON LAW, 1790, https://jameswilsoninstitute.org/ (last visited March 23, 2022).

> documents is, to construe them according to the sense of the terms, and the intention of the parties."[2]

One of the Founding Fathers, James Madison warned about straying from the original intent of a statue:

> "What a metamorphosis would be produced in the code of law if all its ancient phraseology were to be taken in its modern sense."[3]

Here, the expressed public policy of the State of New York, as continuously set forth in various legislative enactments since the financial crisis of 2008 and as expressed in RPAPL §1304, is clear. By way of background, the Second Department noted, in ***First Natl. Bank of Chicago v Silver***, 73 AD3d 162, 165 (2d Dept 2010), *citing* Senate Introducer Mem. in Support, Bill Jacket, L. 2006, ch. 308, at 7–9, that the legislative intent behind the Home Equity Theft Prevention Act (Real Property Law § 265–a, or "HETPA"), as a result of which RPAPL § 1304 was enacted, was to provide greater protections to borrowers facing foreclosure. RPAPL § 1304 was thereafter enacted in 2008 "to aid the homeowner in an attempt to avoid litigation" (***Aurora Loan Services, LLC v Weisblum***, 85 AD3d 95, 107 [2d Dept 2011]). "The legislative history noted a typical lack of communication between distressed homeowners and their lenders prior to the commencement of litigation, leading to needless foreclosure proceedings" (*id.*).

Specifically, "[t]he bill sponsor sought 'to bridge that communication gap in order to facilitate a resolution that avoids foreclosure' by providing a pre-foreclosure notice advising the borrower of 'housing counseling services available in the borrower's area' and an 'additional period of time ... to work on a resolution'" (*id.* at 107, citing Senate Introducer Mem. in Support, Bill Jacket, L. 2008, ch. 472, at 10).

To achieve this end, the statute requires that the lender/servicer mail a notice containing "specific, mandatory language" to the borrower at least 90 days prior to commencement of an anticipated foreclosure filing (RPAPL § 1304[1]). The content requirements of the notice support the "underlying purpose of HETPA to afford greater protections to homeowners confronted with foreclosure" (***Aurora Loan Services, LLC v Weisblum***, 85 AD3d 95, 103, *supra*, *citing* ***First Natl. Bank of Chicago v Silver***, 73 AD3d 162, 165 [2d Dept 2010]). The statute further provides that the mailing should take place "in a separate envelope from any other mailing or notice" (RPAPL §1304[2]). If the lender/servicer knows that the borrower has limited English proficiency, the notice "shall be in the borrower's native language (or a language in which the borrower is proficient), provided that the language is one of the six most common

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[2]JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, 1833, https://www.belcherfoundation.org/joseph_story_on_rules_of_constitutional_interpretation.htm (last visited March 23, 2022).

[3]Letter from James Madison to Henry Lee (June 25, 1824), *The James Madison Papers*, THE LIBRARY OF CONGRESS, https://www.loc.gov/item/mjm019419/ (last visited March 23, 2022).

non-English languages spoken by individuals with limited English proficiency in the state of New York" (RPAPL §1304[5]).

In ***Citibank, N.A. v Crick***, 176 AD3d 776, 778 (2d Dept 2019), the Second Department refused to dismiss an action with a defective RPAPL §1304 notice holding:

> "Although the notice contained a factual inaccuracy, the inaccuracy did not involve information required under RPAPL 1304 and, on the record before this Court, the defendants did not otherwise establish, prima facie, that the notice failed to strictly comply with RPAPL 1304 (citations omitted)."

The ***Crick*** court went on to note that given the notice:

> "... contained the contact information for the loan servicer, it furthered the statutory purpose of HETPA to 'preserve and protect home equity for the homeowners of this state' (Real Property Law § 265-a [1][d]), and the purpose of RPAPL 1304 to 'bridge [the] communication gap [between distressed homeowners and lenders] in order to facilitate a resolution that avoids foreclosure' (Senate Introducer's Mem in Support, Bill Jacket, L 2008, ch 472 at 10)."

With the ***Crick*** decision, the statutory intention and purpose supporting RPAPL §1304 was clearly stated, that is, to facilitate communication between distressed homeowners and lenders and/or servicers in an effort to avoid litigation and "a factual inaccuracy" would not hinder the legislative intent, as long as the required language was present (*see also*, ***JPMorgan Chase Bank, N.A. v Condello***, 59 Misc3d 427 [Sup Ct, Suffolk County 2018).

Recently, the Second Department looked to the legislative intent by examining the Legislative Bill Jacket in addressing the 2013 amendments to CPLR 4106, which allows trial courts to substitute a regular juror with an alternate juror even after deliberations have begun, in ***Caldwell v New York City Transit Auth.***, 203 AD3d 6 (2d Dept 2021) (Barros J.).

In ***Kessler***, *supra*, the borrower challenged the plaintiff's inclusion of certain information in the mailing, including "the rights of a debtor in bankruptcy and in military service." The borrower contended that the extra notices in the same envelope demonstrated that plaintiff did not strictly comply with RPAPL § 1304. The split appellate court agreed apparently in response to the reversal of numerous Second Department holdings by the Court of Appeals, in ***Freedom Mortgage Corp. v Engel***, 37 NY3d 1 (2021). The Second Department has now imposed a new "strict compliance" component to the language of the RPAPL § 1304 notice, which the majority claimed is consistent with the ***Engel*** holding, which concerns a lender's voluntary discontinuance of an action as constituting a revocation of the election to accelerate the debt.

In keeping with the original intent of the legislation, that is, "to aid the homeowner in an

attempt to avoid litigation, and to facilitate communication between distressed homeowners and lenders and/or servicers" and to "bridge that communication gap in order to facilitate a resolution that avoids foreclosure," there is no showing how this newly created strict compliance rule, with regard to the language in a RPAPL §1304 notice, is in keeping with the original legislative intent detailed above.

One could easily argue that the additional information provided in the mailing of plaintiff's notice does not alter any of the protections provided by the statute. The purpose of and intent behind RPAPL § 1304 was to facilitate communication between the plaintiff and the borrower. In many cases, as in ***Kessler***, *supra*, the content of the additional paragraphs furthers that intent "to provide a homeowner with information necessary ... to preserve and protect home equity" (Real Property Law § 265–a[1][d]) by providing borrowers with additional contact options available to obtain information in connection with home retention options. With the proof of actual mailing of the required language of the notice, the legislative purpose of RPAPL §1304 has been satisfied. The statutory opportunity to "bridge the communication gap" between the lender and the borrower has been fulfilled. To argue to the contrary is to read a new judicial interpretation into the statute, not the original intent as proposed in 2008.

This new argument by borrowers raises an additional issue that courts have often faced in such statutory interpretation cases. For instance, in ***People ex rel. Baez v Superintendent, Queensboro Corr. Facility***, 127 AD3d 110, 119 (2d Dept 2015), the Second Department proclaimed, in examining the Drug Law Reform Act, "[t]his Court will not permit the petitioner to convert a shield into a sword." The same court, in interpreting General Municipal Law §50-e, in ***Se Dae Yang v New York City Health & Hosps. Corp.***, 140 AD3d 1051,1052 (2d Dept 2016), held that the statute "was not meant as a sword to cut down honest claims, but merely as a shield to protect municipalities against spurious ones." Finally, as the Court of Appeals stated in ***Benjamin v Koeppel***, 85 NY2d 549, 553 (1995), "the courts are especially skeptical of efforts by clients or customers to use public policy 'as a sword for personal gain rather that a shield for public good,'" quoting ***Charlebois v Weller Assn.***, 72 NY2d 587, 595 (1988).

It appears that with the ***Kessler*** holding, defaulting borrowers will similarly seek to use public policy as a sword and not as the legislatively intended shield. In light of the ever-changing interpretations from the Second Department on various aspects of foreclosure law, that then are applied retroactively to determinations in the appellate pipeline, lower court judges, who deal with thousands upon thousands of foreclosure cases, year after year,[4] are especially well-positioned to offer a rare statement of reconsideration as to the precedent they must apply.

Apropos are the words of another Founding Father, Thomas Jefferson, who advised on questions of construction:

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[4]Statistics compiled by the New York State Comptroller show that in 2014 there were 16,905 foreclosure actions pending in Suffolk County (*see* OFF. OF THE N.Y. STATE COMPTROLLER, FORECLOSURE UPDATE: SIGNS OF PROGRESS, [March 2019]. In 2021, the number was reduced to under 4,000 actions after the creation of a three Justice Foreclosure Unit, according to Suffolk County Court records.

> "[O]n every question of construction, carry ourselves back to the time when the [statute] was adopted, recollect the spirit manifested in the debates, and instead of trying what meaning may be squeezed out of the text, or invented against it, conform to the probable one in which it was past."[5]

As to the merits of the motions before the Court, defendants' submission only challenges plaintiff's standing and alternatively, seeks to add an additional affirmative defense. The Court notes that the defense of standing has lost its significance and vitality with the advent of CPLR 3012-b. One of the various methods standing may be established is by due proof that the plaintiff or its custodial agent was in possession of the endorsed note prior to the commencement of the action. The production of such proof is sufficient to establish, prima facie, the plaintiff's possession of the requisite standing to prosecute its claims for foreclosure and sale (*see* ***Aurora Loan Servs., LLC v Taylor***, 25 NY3d 355 [2015]; ***Wells Fargo Bank, NA v Frankson***, 157 AD3d 844 [2d Dept 2018]; ***U.S. Bank v Ehrenfeld,*** 144 AD3d 893 [2d Dept 2016]; ***JPMorgan Chase Bank, Natl. Assn. v Weinberger***, 142 AD3d 643 [2d Dept 2016]; ***Citimortgage, Inc. v Klein***, 140 AD3d 913, [2d Dept 2016]; ***U.S. Bank Natl. Assn. v Godwin***, 137 AD3d 1260 [2d Dept 2016]; ***Wells Fargo Bank, N.A. v Joseph***, 137 AD3d 896 [2d Dept 2016]; ***Emigrant Bank v Larizza***, 129 AD3d 904 [2d Dept 2015]; ***Deutsche Bank Natl. Trust Co. v Whalen***, 107 AD3d 931 [2d Dept 2013]).

The plaintiff's attachment of a duly indorsed mortgage note to its complaint or to the certificate of merit required by CPLR 3012-b has been held to constitute due proof of the plaintiff's possession of the note prior to the commencement of the action and thus its standing to prosecute its claim for foreclosure and sale (*see* ***Green Tree Servicing, LLC v Molini***, 171 AD3d 880 [2d Dept 2019]; ***U.S. Bank N.A. v Offley***, 170 AD3d 1240 [2d Dept 2019]; ***Nationstar Mtge LLC v Balducci***, 165 AD3d 959 [2d Dept 2018]; ***HSBC Bank USA, NA v Oscar***, 161 AD3d 1055 [2d Dept 2018], citing ***US Bank NA v Cohen***, 156 AD3d 844 [2d Dept 2017]; ***US Bank NA v Saravanan,*** 146 AD3d 1010, 1011 [2d Dept 2017]; ***JPMorgan Chase Bank, NA v Weinberger***, 142 AD3d 643, 645 [2d Dept 2017]; ***Deutsche Bank Natl. Trust Co. v Leigh***, 137 AD3d 841, 842 [2d Dept 2016]; ***Emigrant Bank v Larizza***, 129 AD3d 904 [2d Dept 2015]; ***Nationstar Mtge., LLC v Catizone***, 127 AD3d 1151, 1152 [2015]; *see also* ***HSBC Bank USA v Ozcan***, 154 AD2d 822 [2d Dept 2017]).

Here, the plaintiff alleged in its complaint that it was the current holder of the note and attached a copy of the note, with an allonge bearing an endorsement in blank, to the complaint. Plaintiff's counsel has submitted an attorney certification copy of the Note as Exhibit 15. Importantly, the attorney, at par. 29, states:

> "I further affirm that the Note consists of three pages, firmly held

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[5]Letter from Thomas Jefferson to William Johnson (June 12, 1823), *Founders Online*, NATIONAL ARCHIVES, https://founders.archives.gov/documents/Jefferson/98-01-02-3562 (last visited March 23, 2022).

> together by a staple on the upper left-hand corner of the pages, and that the two endorsements are on the back of the third page of the Note, i.e., the page containing the allonge to Countrywide Bank, N.A. *Id.*"

Here, the attorney asserts personal knowledge of the facts in his affirmation, to which he has annexed the Note as an exhibit. Such satisfies the requirements of CPLR 3212 (*see* ***Branch Servs. Inc. v Cooper***, 102 AD3d 645, 648 [2d Dept 2013]).

The Court finds that plaintiff has demonstrated that the endorsement is located on the page firmly affixed to the note. "[W]here the note is affixed to the complaint, 'it is unnecessary to give factual details of the delivery in order to establish that possession was obtained prior to a particular date'" (***U.S. Bank N.A. v Henry***, 157 AD3d 839, 841 [2d Dept 2018] [citations omitted]).

Additionally, the Court of Appeals has held that inspection of the original note is not necessary for purposes of establishing standing (*see* ***JPMorgan Chase Bank, N.A. v Caliguri***, 36 NY3d 953 [2020]; ***Bayview Loan Ser. LLC v Freyer***, 192 AD3d 1421 [2d Dept 2021]; ***Deutsche Bank Nat. Trust Co. v Auguste***, 185 AD3d 657 [2d Dept 2020]). Contrary to defendants' contention, there is no need to inspect the original note.

Based on the above, the plaintiff, through its submissions, has demonstrated the requisite possession of the note prior to the commencement of the action (*see* ***Nationstar Mtge LLC v Balducci***, 165 AD3d 959, *supra*; ***HSBC Bank USA, NA v Oscar***, 161 AD3d 1055, *supra;* ***Wells Fargo Bank, NA v Frankson***, 157 AD3d 844, *supra;* ***US Bank Natl. Assn. v Richards***, 151 AD3d 1001 [2d Dept 2017]; ***Silvergate Bank v Calkula Prop., Inc.***, 150 AD3d 1295 [2d Dept 2017]; ***Central Mtge. Co. v Jahnsen***, 150 AD3d 661 [2d Dept 2017]; ***Bank of America, N.A. v Barton***, 149 AD3d 676 [2d Dept 2017]). As the defendants have failed to raise an issue of fact with regard to same, the court hereby declares, pursuant to CPLR §3212(g), that the issue of the plaintiff's standing is resolved in favor of the plaintiff for all purposes of this action.

As to the second branch of defendants' cross motion, the defendants contend that plaintiff, BCMB1TRUST, a foreign corporation, lacks proper authorization to do business in New York and therefore fails to demonstrate the capacity to maintain an action in New York pursuant to Business Corporation Law §1312(a). "[T]he party relying upon this statutory barrier bears the burden of proving that the corporation's business activities in New York were not just casual or occasional, but so systematic and regular as to manifest continuity of activity in the jurisdiction" (***JPMorgan Chase Bank, N.A. v Didato***, 185 AD3d 801, 802-03 [2d Dept 2020], citing ***S&T Bank v Spectrum Cabinet Sales***, 247 AD2d 373, 373 [1998] [citation and internal quotation marks omitted]). "[A]bsent proof establishing that the plaintiff is doing business in New York, it is presumed that the plaintiff is doing business in its state of incorporation and not in New York" (***Airline Exch., Inc. v Bag***, 266 AD2d 414, 415 [2d Dept 1999], citing ***S & T Bank v Spectrum Cabinet Sales***, 247 AD2d at 374, *supra*; ***Construction Specialties v Hartford Ins. Co.***, 97 AD2d 808 [1983]). This presumption is one that must be overcome by the movant.

Here, the movants allege that plaintiff incorporated for the purpose of engaging in litigation in New York. No business is alleged to have been transacted in New York.

The Court finds that defendants have failed to demonstrate that plaintiff is "doing business" in New York. There is no indication that plaintiff "maintained an office, a telephone, or a sales representative in New York. Nor did it do any advertising in New York. Under these circumstances, 'there is no showing that plaintiff conducted continuous activities in [New York] essential to its corporate business'" (***S & T Bank v Spectrum Cabinet Sales, Inc.***, 247 AD2d at 374, *supra, citing* ***Von Arx A.G. v Breitenstein***, 52 AD2d 1049, 1050, *affd.* 41 NY2d 958 [1977]). This branch of defendants' motion is therefore denied.

Finally, the Court denies the request to amend the answer to allege an affirmative defense of champerty (*see* ***G.G.F. Dev. Corp. v Andreasis***, 251 AD2d 624 [2d Dept 1998]). In any event, defendants failed to attach a copy of the proposed amendment with their cross motion (*see* CPLR 3025[b]) and submission of one by way of a reply affidavit is improper with a cross motion.

The plaintiff's moving papers have established all of the elements necessary for the fixation of the remaining defendants' default in answering and the appointment of a referee to compute amounts due under the subject note and mortgage as contemplated by RPAPL §1321 (*see* CPLR §3215; RPAPL §1321; ***Todd v Green***, 122 AD3d 831, 832 [2d Dept 2014]; ***US Bank v Razon***, 115 AD3d 739 [2d Dept 2014]). The moving papers further established the plaintiff's entitlement to an order amending the caption (*see* CPLR §1024; ***Deutsche Bank Natl. Trust Co. v Islar***, 122 AD3d 566 [2d Dept 2014]; ***Flagstar Bank v Bellafiore***, 94 AD3d 1044, 1046 [2d Dept 2012]; ***Neighborhood Hous. Servs. of NY City, Inc. v Meltzer***, 67 AD3d 872, 873-74 [2009]).

The Court notes that since this loan has been in default since 2008 and this action was not commenced until November 27, 2020, plaintiff will only be able to collect on the unpaid mortgage payments for the six years prior to commencement (*see* ***EMC Mtge. Corp. v Cielo***, 49 AD3d 592 [2d Dept 2008]; *see also* ***Wells Fargo Bank, N.A. v Cohen***, 80 AD3d 753, 754 [2d Dept 2011], ***Loiacono v Goldberg***, 240 AD2d 476, 477 [2d Dept 1997]; ***Sce v Ach***, 56 AD3d 457 [2d Dept 2008]).

Accordingly, plaintiff's motion (#001) is granted and defendants' motion (#002) is denied. The proposed order of reference, as modified by the court, has been signed simultaneously with this Memorandum Decision and Order.

DATED: 3/25/22

THOMAS F. WHELAN, J.S.C.

STATE OF NEW YORK)		**AFFIDAVIT OF SERVICE**
)	ss.:	**BY OVERNIGHT FEDERAL**
COUNTY OF NEW YORK)		**EXPRESS NEXT DAY AIR**

I, Tyrone Heath, 2179 Washington Avenue, Apt. 19, Bronx, New York 10457, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above or at

On July 20, 2022

deponent served the within: **Brief for Plaintiff-Appellant**

upon:

THE LAW OFFICE OF CHARLES WALLSHEIN ESQ.
Attorneys for Defendant-Respondent
35 Pinelawn Road, Suite 106E
Melville, New York 11747
(631) 824-6555

the address(es) designated by said attorney(s) for that purpose by depositing **3** true copy(ies) of same, enclosed in a properly addressed wrapper in an Overnight Next Day Air Federal Express Official Depository, under the exclusive custody and care of Federal Express, within the State of New York.

Sworn to before me on July 20, 2022

Mariana Braylovskiy

MARIANA BRAYLOVSKIY
Notary Public State of New York
No. 01BR6004935
Qualified in Richmond County
Commission Expires March 30, 2026

T. Heath

Job# 313650