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MEMO DECISION & ORDER

COPY

INDEX No. 35426/12

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

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 7/24/15
SUBMIT DATE 5/12/17
Mot. Seq. # 001 - MotD
Mot. Seq. # 002 - XMD
CDISP Y____ N X
Pre-Trial Conf: 6/30/17

DEUTSCHE BANK NATIONAL TRUST CO., as Trustee of the Indymac Indx Mortgage Loan Trust 2005-AR29, Mortgage Pass-Through Certificates Series 2005-AR29 under the Pooling and Servicing Agreement dated November 1, 2005,

Plaintiff,

-against-

KATHRYN B. EINHORN a/k/a KATHRYN EINHORN, FORD MOTOR CREDIT COMPANY d/b/a LAND ROVER CAPITAL GROUP, METRO PORTFOLIOS, INC., CHASE BANK, USA, NA, "JOHN DOE #1" to "JOHN DOE #10", the last ten names being fictitious and unknown to plaintiff the persons or parties intended being the person or parties, if any, having or claiming an interest in or lien upon the mortgaged premises described in the verified complaint,

Defendants.

HOUSER & ALLISON, APC
Attys. For Plaintiff
60 E. 42nd St. - Ste. 1148
New York, NY 10165

CHARLES WALLSHEIN, ESQ.
Atty. For Defendant Einhorn
115 Broadhollow Rd. - Ste. 350
Melville, NY 11747

Upon the following papers numbered 1 to 10 read on this motion summary judgment, default judgment and appointment of a referee to compute, among other things and cross motion to compel discovery and summary judgment, among other things; Notice of Motion/Order to Show Cause and supporting papers 1 - 3; Notice of Cross Motion and supporting papers: 4-7; Opposing papers: ; Reply papers 8-9; Other 10 (affidavit of payment default); Other supplemental affirmation (not considered); ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that those portions of this motion (#001) by the plaintiff for an order awarding it summary judgment dismissing the affirmative defenses and counterclaims asserted in the answer served by defendant, Kathryn B. Einhorn (hereinafter "Einhorn") , is granted to the extent that the plaintiff is awarded partial summary judgment pursuant to CPLR 3212 dismissing all of the affirmative defense and counterclaims set forth in the answer served by Einhorn but not as to the unpleaded challenge to the plaintiff's compliance with the service of the ninety day notice requirements imposed upon it by RPAPL § 1304; and it is further

ORDERED that the remaining portions of the plaintiff's motion (#001) wherein it seeks summary judgment on its complaint against the answering defendant, default judgments against the remaining defendants served with process, the deletion of the unknown defendants and a caption amendment to reflect this change together with an order appointing a referee to compute is denied without prejudice; and it is further

ORDERED that the cross motion (#002) by Einhorn for, among other things, to compel discovery, summary judgment and a posting of a bond, is denied in its entirety, and it is further

ORDERED that pursuant to CPLR 3212(g), the court hereby declares that the issue of the plaintiff's standing to prosecute its claims for foreclosure and sale is resolved for all purposes in favor of the plaintiff; and is further

ORDERED that pursuant to CPLR 3212(g), the court hereby declares that the trial of this action, if any, shall be limited to the unresolved issue framed by the terms of this memo decision and order, namely, the plaintiff's compliance with the service of the ninety day notice requirements imposed upon it by RPAPL § 1304; and it is further

ORDERED that counsel for the respective parties shall appear for a pre-trial conference at 9:30 a.m. on **June 30, 2017**, in the courtroom of the undersigned located in the Annex Building of the Supreme Court at One Court Street, Riverhead, New York 11901, at which time, the court shall issue directives necessary to ready this matter for a trial on the limited, unresolved issue of the plaintiff's compliance with the ninety day notice requirements imposed upon it by RPAPL § 1304.

This foreclosure action was commenced by filing on November 21, 2012. The matter was reassigned to this Part pursuant to Administrative Order No. 52-17, dated May 5, 2017 and submitted

for decision on May 12, 2017. [1] In essence, on October 25, 2005, Einhorn borrowed $456,000.00 from the plaintiff's predecessor-in-interest, a federal savings bank, and executed a promissory note and mortgage promising to repay same. The note, indorsed in blank, was delivered to plaintiff's custodian on November 7, 2005. Since November 1, 2011, Einhorn has failed to pay the monthly installments due and owing. Only Einhorn has answered the action. In her answer, Einhorn alleged eighteen affirmative defenses and two counterclaims.

In the moving papers, plaintiff addresses its burden of proof on this summary judgment motion and refutes the affirmative defenses of the answer. Therefore, plaintiff has satisfied its prima facie burden on this summary judgment motion (*see* ***HSBC Bank USA, Natl. Assn. v Espinal***, 137 AD3d 1079, 28 NYS3d 107 [2d Dept 2016]; ***U.S. Bank Natl. Assn. v Cox***, 148 AD3d 692, 49 NYS3d 527 [2d Dept 2017]).

It was thus incumbent upon the answering defendant to submit proof sufficient to raise a genuine question of fact rebutting the plaintiff's prima facie showing or in support of the affirmative defenses and counterclaims asserted in the answer or otherwise available to her (*see* ***Flagstar Bank v Bellafiore***, 94 AD3d 1044, 943 NYS2d 551 [2d Dept 2012]; ***Grogg Assocs. v South Rd. Assocs.***, 74 AD3d 1021, 907 NYS2d 22 [2d Dept 2010]; ***Wells Fargo Bank v Karla,*** 71 AD3d 1006, 896 NYS2d 681 [2d Dept 2010]; ***Washington Mut. Bank v O'Connor***, 63 AD3d 832,880 NYS2d 696 [2d Dept 2009]; ***J.P. Morgan Chase Bank, NA v Agnello,*** 62 AD3d 662, 878 NYS2d 397 [2d Dept 2009]; ***Aames Funding Corp. v Houston,*** 44 AD3d 692, 843 NYS2d 660 [2d Dept 2007]).

Notably, affirmative defenses and counterclaims predicated upon legal conclusions that are not substantiated with allegations of fact are subject to dismissal (*see* CPLR 3013, 3018[b]; ***Katz v Miller***, 120 AD3d 768, 991 NYS2d 346 [2d Dept 2014]; ***Becher v Feller***, 64 AD3 672, 677, 884 NYS2d 83 [2d Dept 2009]; ***Cohen Fashion Opt., Inc. v V & M Opt., Inc.***, 51 AD3d 619, 858 NYS2d 260 [2d Dept 2008]). 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, 369 NYS2d 667 [1975]; *see also* ***Madeline D'Anthony Enter., Inc. v Sokolowsky***, 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012]; ***Argent Mtge. Co., LLC v Mentesana***, 79 AD3d 1079, 915 NYS2d 591[2d Dept 2010]). In addition, the failure to raise pleaded affirmative defenses or counterclaims 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, 969 NYS2d 796 [2d Dept 2013]; ***Starkman v City of Long Beach***, 106 AD3d 1076, 965 NYS2d 609 [2d Dept 2013]).

The Court rejects the Tenth, Eleventh, Twelfth, Thirteenth and Fourteenth Affirmative Defenses and First and Second Counterclaims (standing). One of the various ways standing may be

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[1] Contrary to Einhorn's counsel's representations in his correspondence dated April 21, 2017 and May24, 2017, this matter has only recently been reassigned to this Court and prior thereto had been assigned to the Hon. Daniel Martin.

established is by due proof that the plaintiff or its custodial agent was in possession of the 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, 12 NYS3d 612 [2015]; ***U.S. Bank v Ehrenfeld***, 144 AD3d 893, 41 NYS3d 269 [2d Dept 2016]; ***JPMorgan Chase Bank, Natl. Ass'n v Weinberger***, 142 AD3d 643, 37 NYS3d 286 [2d Dept 2016]; ***Citimortgage, Inc. v Klein***, 140 AD3d 913, 33 NYS3d 432 [2d Dept 2016]; ***U.S. Bank Natl. Ass'n v Godwin***, 137 AD3d 1260, 28 NYS3d 450 [2d Dept 2016]; ***Wells Fargo Bank, N.A. v Joseph***, 137 AD3d 896, 26 NYS3d 583 [2d Dept 2016]; ***Emigrant Bank v Larizza***, 129 AD3d 904, 13 NYS3d 129 [2d Dept 2015]; ***Deutsche Bank Natl. Trust Co. v Whalen***, 107 AD3d 931, 969 NYS2d 82 [2d Dept 2013]).

Additionally, the plaintiff's attachment of a duly indorsed mortgage note to its complaint or to the certificate of merit required by CPLR 3012-b, coupled with an affidavit in which it alleges that it had possession of the note prior to commencement of the action, 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* ***JPMorgan Chase Bank, N.A. v Venture***, 148 AD3d 1269 [3d Dept 2017]; ***Deutsche Bank Trust Co. v Garrison***, 146 AD3d 185, 46 NYS3d 185 [2d Dept 2017]; ***Deutsche Bank Natl. Trust Co. v Logan***, 142 AD3d 861, 45 NYS3d 189 [2d Dept 2017]; ***Deutsche Bank Natl. Trust Co. v Umeh***, 145 AD3d 497, 41 NYS3d 882 [1st Dept 2016]; ***Nationstar Mtge., LLC v Weisblum***, 143 AD3d 866, 39 NYS3d 491, 494 [2d Dept 2016]; ***Deutsche Bank Natl. Trust Co. v Webster***, 142 AD3d 636, 37 NYS3d 283 [2d Dept 2016]; ***JPMorgan Chase Bank, Natl. Ass'n v Weinberger***, 142 AD3d 643, *supra*; ***Federal Natl. Mtge. Assn. v Yakaputz II, Inc.***, 141 AD3d 506, 507, 35 NYS3d 236, 237 [2d Dept 2016]; ***JPMorgan Chase Bank, Natl. Ass'n v Kobee***, 140 D3d 1622, 32 NY3d 767 [2d Dept 2016]; ***JPMorgan Chase Bank, N.A. v Roseman***, 137 AD3d 1222, 29 NYS3d 380 [2d Dept 2016]; ***Deutsche Bank Natl. Trust Co. v Leigh***, 137 AD3d 841, 28 NYS3d 86 [2d Dept 2016]; ***Nationstar Mtge., LLC v Catizone***, 127 AD3d 1151, 9 NYS3d 315 [2015]).

Appellate case authorities have repeatedly held that in determining the standing of a foreclosing plaintiff, it is the mortgage note that is the dispositive instrument, not the mortgage indenture. This result is mandated by the long standing principal incident rule which provides that because a mortgage is merely the security for the debt, the obligations of the mortgage pass as an incident to the passage of the note (*see* ***Aurora Loan Servs., LLC v Taylor***, 25 NY3d 355, *supra*; ***Wells Fargo Bank, N.A. v Charlaff***, 134 AD3d 1099, 24 NYS3d 317 [2d Dept 2015]; ***Emigrant Bank v Larizza***, 129 AD3d 904, *supra*). A foreclosing plaintiff has standing if it is either the holder or the assignee of the underlying note at the time that the action is commenced (*see* ***Aurora Loan Servs., LLC v Taylor***, 25 NY3d 355, *supra*; ***Loancare v Firshing***, 130 AD3d 787, 14 NYS3d 410 [2d Dept 2015]; ***Emigrant Bank v Larizza***, 129 AD3d 904, *supra*). "Either a written assignment of the underlying note or the physical delivery of it to the plaintiff prior to the commencement of the action is sufficient to transfer the obligation" (*see id.*, ***Wells Fargo Bank, NA v Parker***, 125 AD3d 8485 NYS3d 130 [2d Dept 2015]; ***U.S. Bank NA v Guy***, 125 AD3d 845, 5 NYS3d 116 [2015]).

The plaintiff may also establish its standing by demonstrating that it is the holder of the mortgage note within the contemplation of the Uniform Commercial Code. Holder status is

established where the plaintiff possesses a note that, on its face or by allonge, contains an endorsement in blank or bears a special endorsement payable to the order of the plaintiff (*see* UCC 1–201; 3–202; 3–204; ***Hartford Acc. & Indem. Co. v American Express Co.***, 74 NY2d 153, 159 [1989]). A "holder" is "the person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession" (UCC 1–201[b][21]). Notably, the holder of an instrument whether or not he is the owner may ... enforce payment in his own name (*see* UCC 3–301; ***Wells Fargo Bank, N.A. v Ostiguy***, 127 AD3d 1375, 8 NYS3d 669 [3d Dept 2015]). "'Bearer' means ... a person in possession of a negotiable instrument" (UCC 1–201[b][5]), and where the note is endorsed in blank, it may be negotiated by delivery alone (*see* UCC 3–202[1], 3–204[2]). "An endorsement in blank specifies no particular endorsee and may consist of a mere signature" and "[a]n instrument payable to order and endorsed in blank becomes payable to bearer and may be negotiated by delivery alone until specially endorsed (UCC 3–204[2])" (***JPMorgan Chase Bank, Natl. Assn. v Weinberger***, 142 AD3d 643, *supra*).

Under this statutory framework, it is clear that to establish its standing as the holder of a duly endorsed note in blank, a plaintiff is only required to demonstrate that it had physical possession of the note prior to commencement of the action (*see* ***Deutsche Bank Natl. Trust Co. v Brewton***, 142 AD3d 683, 37 NYS3d 25 [2d Dept 2016]; ***JPMorgan Chase Bank, Natl. Assn. v Weinberger***, 142 AD3d 643, 645, *supra*). In such cases "'it is unnecessary to give factual details of the delivery in order to establish that possession was obtained prior to a particular date'" since a plaintiff in possession of a note endorsed in blank is thus without obligation to establish how it came into possession of the instrument in order to be able to enforce it (*see* UCC 3–204[2]; ***Pennymac Corp. v Chavez***, 144 AD3d 1006, 42 NYS3d 239 [2d Dept 2016], *quoting* ***JPMorgan Chase Bank, Natl. Assn. v Weinberger***, 142 AD3d at 645, *supra*). In addition, because "a signature on a negotiable instrument 'is presumed to be genuine or authorized' (*see* UCC 3–307[1][b]), the plaintiff is not required to submit proof that the person who endorsed the subject note to the plaintiff on behalf of the original lender was authorized to do so" (***CitiMortgage, Inc. v McKinney***, 144 AD3d 1073, 42 NYS3d 302 [2d Dept 2016]). Moreover, the apparent invalidity of any written assignments of mortgage are thereby rendered irrelevant to the issue of standing (*see* ***Aurora Loan Servs., LLC v Taylor***, 25 NY3d 355, *supra*).

Indeed, the establishment of the plaintiff's actual possession of the mortgage note or its constructive possession through an agent on a date prior to the commencement of the action is so conclusive that it renders, unavailing, claims of content defects in allonges (*see* ***U.S. Bank v Askew***, 138 AD3d 402, 27 NYS3d 856 [1st Dept 2016]). It further renders unavailing, all claims of content defects in the chain of mortgage assignments (*see* ***Aurora Loan Servs., LLC v Taylor***, 25 NY3d 355, *supra*; ***CitiMortgage, Inc. v McKinney***, 144 AD3d 1073, *supra*; ***JPMorgan Chase Bank, Natl. Ass'n v Weinberger***, 142 AD3d 643, *supra*; ***Deutsche Flagstar Bank, FSB v Mendoza***, 139 AD3d 898, 32 NYS3d 278 [2d Dept 2016]; ***US Bank Natl. Trust v Naughton***, 137 AD3d 1199, 28 NYS3d 444 [2d Dept 2016]; ***Deutsche Bank Natl. Trust v Whalen***, 107 AD3d 931, *supra*).

Plaintiff's attachment of the note endorsed in blank to the complaint filed at the commencement of this action together with the affidavit of merit and the allegations asserted in the complaint furnished sufficient proof of the plaintiff's possession of the note at the time of the

commencement of this action. The affidavit of Sandra Lyew, a Senior Loan Analyst, employed by the loan servicer, avers that, based upon her review of the records maintained by the servicer, with which she is personally familiar, and kept and relied upon as a regular business practice and in the ordinary course of the loan servicing business, the Power of Attorney and upon her training, the note was delivered to a custodian for the plaintiff on November 7, 2005, before the commencement of the action. Here, plaintiff has demonstrated its possession of the note prior to the commencement of the action (*see* ***Aurora Loan Servs., LLC v Taylor***, 25 NY3d 355, *supra*; ***Hudson City Sav. Bank v Genuth***, __ AD3d __, 2017 WL 776890 [2d Dept 2017]; ***HSBC Bank USA v Espinal***, 137 AD3d 1079, *supra*; ***LNV Corp. v Francois***, 134 AD3d 1071, 22 NYS3d 543 [2d Dept 2015]).

Therefore, the Tenth, Eleventh, Twelfth, Thirteenth and Fourteenth Affirmative Defenses and First and Second Counterclaims are dismissed. Pursuant to CPLR 3212(g), the court hereby declares that the issue of the plaintiff's standing is hereby resolved in favor of the plaintiff for all purposes of this action.

Defendant's challenge to the assignment of the mortgage is without merit since it is the note that is the controlling document for standing purposes (*see* ***Aurora Loan Servs., LLC v Taylor***, 25 NY3d 355, *supra*; *see also* ***Deutsche Bank Natl. Trust Co. v Pietranico***, 32 Misc3d 528, 928 NYS2d 818 [Sup. Ct. Suffolk County 2011], *affd*. 102 AD3d 724, 957 NYS2d 868 [2013]). Therefore, the Sixteenth Affirmative Defense and First and Second Counterclaims are dismissed.

As for the claim, which asserts a lack of compliance with the Pooling and Service Agreement (PSA), by the transfer of the promissory note into the Trust, such must be dismissed since it is clear that a mortgagor lacks standing to assert noncompliance with the PSA (*see* ***Bank of America Natl. Assn. v Patino***, 128 AD3d 994, 9 NYS3d 656 [2d Dept 2015]; ***Wells Fargo Bank, N.A. v Erobobo***, 127 AD3d 1176, 9 NYS3d 312 [2d Dept 2015]; ***Bank of New York Mellon v Gales***, 116 AD3d 723, 982 NYS2d 911 [2d Dept 2014]).

Therefore, the Eleventh and Twelfth Affirmative Defenses and First and Second Counterclaims are dismissed. All other affirmative defenses and counterclaims are dismissed as abandoned since no opposition was timely offered.

The Court finds numerous errors set forth in the opposition offered in the cross motion, with references to irrelevant affidavits, unrelated nonparty plaintiffs and servicers and a long discussion on MERS' authority, all irrelevant to this matter. However, buried in the 184 paragraph affirmation from Einhorn's counsel, one finds a single reference challenging the mailing of the RPAPL § 1304 notice (*see* par. 88, Wallshein aff., July 10, 2015). In essence, Einhorn challenges the plaintiff's proof as procedurally defective by reason of its failure to comport with the requirements of the business records exception to the hearsay rule.

However, not a single Affirmative Defense in the answer sets forth a challenge to the RPAPL §1304 notice. Nevertheless, the court finds merit in Einhorn's challenge to the quality of the plaintiff's proof with respect to the service of the RPAPL §1304 statutory notice. Due proof of the mailing of the RPAPL § 1304 notice is established by submission of an affidavit of service (*see*

JPMorgan Chase Bank, N.A. v Schott, 130 AD3d 875, 15 NYS3d 359 [2d Dept 2015]; ***Wells Fargo v Moza***, 129 AD3d 946, 13 NYS3d 127 [2d Dept 2015]), or through business records that detail a standard of office practice or procedure designed to ensure that items are properly addressed and mailed (*see* ***Nassau Ins. Co. v Murray***, 46 NY2d 828, 414 NYS2d 117 [1978]; ***Flagstar Bank v Mendoza***, 139 AD3d 898, 32 NYS3d 278 [2d Dept 2016]; ***Cenlar FSB v Censor***, 139 AD3d 781, 32 NYS3d 228 [2d Dept 2016]; ***Viviane Etienne Med. Care, P.C. v Country-Wide Ins. Co.***, 114 AD3d 33, 977 NYS2d 292 [2d Dept 2013], *aff'd*. 25 NY3d 498, 14 NYS3d 283 [2015]; ***Presbyterian Hosp. v Allstate Ins. Co.***, 29 AD3d 547, 814 NYS2d 687 [2d Dept 2006]; ***Residential Holding Corp. v Scottsdale Ins. Co.***, 286 AD2d 679, 729 NYS2d 766 [2d Dept 2001]). In either case, a presumption of receipt arises (*see* ***Viviane Etienne Med. Care, P.C. v Country Wide Ins. Co.***, 25 NY3d 498, 14 NYS3d 283 [2015]; ***Flagstar Bank v Mendoza***, 139 AD3d 898, *supra*; ***Presbyterian Hosp. v Allstate Ins. Co.***, 29 AD3d 547, *supra*; ***Residential Holding Corp., v Scottsdale Ins. Co.***, 286 AD2d 679, *supra*; *see also* ***American Tr. Ins. Co. v Lucas***, 111 AD3d 423, 974 NYS2d 388 [1st Dept 2013]; ***Triple Cities Constr. Co., Inc. v State of New York***, 161 AD3d 868, 555 NYS2d 916 [3d Dept 1990]).

The Court of Appeals in ***Bossuk v Steinberg***, 58 NY2d 916, 919, 460 NYS2d 509 (1983) held that there was no need to produce the person who did the actual mailings since "[t]he proof of the Sheriff's regular course of business in this regard sufficed." In ***Hospital for Joint Diseases v Elrac, Inc.***, 11 AD3d 432, 433, 783 NYS2d 612 (2d Dept 2004), the Second Department held that an affidavit based upon records maintained by an insurer in the ordinary course of business did constitute admissible evidence ("Personal knowledge of such documents, their history, or specific content are not necessarily required of a document custodian"). Various cases, particularly in the Second Department, have held that such business records are admissible (*see* ***Citimortgage, Inc. v Espinal***, 134 AD3d 876, 23 NYS3d 251 [2d Dept 2015]; ***Olympus Am., Inc. v Beverly Hills Surgical Inst.***, 110 AD3d 1048, 974 NYS2d 89 [2d Dept 2013]; ***Burrell v Barreiro***, 83 AD3d 984, 922 NYS2d 465 [2d Dept 2011]; ***DeLeon v Port Auth. of N.Y. & N.J.***, 306 AD2d 146, 761 NYS2d 54 [1st Dept 2003]; ***We're Assocs. Co. v Rodin Sportswear Ltd.***, 288 AD2d 465, 734 NYS2d 104 [2d Dept 2001]; ***Spangenberg v Chaloupka***, 229 AD2d 482, 645 NYS2d 514 [2d Dept 1996]).

While "the mere filing of papers received from other entities is insufficient to qualify the documents as business records, such records may be admitted into evidence 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" (***Deutsche Bank Natl. Trust Co. v Monica,*** 131 AD3d 737, 15 NYS3d 863 [3d Dept 2015]; *quoting* ***State v 158th St. & Riverside Dr. Hous. Co., Inc.***, 100 AD3d 1293, 956 NYS2d 196 [3d Dept 2012] *citing* ***People v Cratsley***, 86 NY2d 81, 90–91, 629 NYS2d 992 [1995]).

Here, the affidavit of merit relied upon by the plaintiff contains averments by the servicer's affiant that, based upon her review of the books and records maintained by the servicer, the statutory ninety day notices were mailed to Einhorn on December 14, 2011. There is no mention "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" (***Deutsche Bank Natl. Trust Co. v Monica,*** 131 AD3d 737,

supra). In light of the denial of receipt by Einhorn, as set forth in her affidavit in opposition, these conclusory averments are, however, insufficient to establish due proof of the mailing of such notices as there were no averments regarding a standard of office practices or procedures or documentary proof of same. The affidavit is just too simple and conclusory (*see* ***Central Mtge. Co. v Abraham***, __ AD3d __, 2017 WL 2126376 [2d Dept 2017]; ***JPMorgan Chase Bank, Natl. Assn. v Kutch***, 142 AD3d 536, 36 NYS3d 235 [2d Dept 2016]; ***Cenlar FSB v Censor***, 139 AD3d 781, *supra*; ***Cenlar FSB v Weisz***, 136 AD3d 855, 25 NYS3d 308 [2d Dept 2016]). The plaintiff's reply papers fail to adequately address this issue.

The Court denies Einhorn's cross motion (#002) seeking dismissal since a single issue still stands before this Court. Also denied is the request for discovery, which is unnecessary in light of this Court's finding and declaration as to standing. There is no showing as to how such discovery would have helped to defeat plaintiff's motion for summary judgment (*see* ***JPMorgan Chase Bank, Natl. Ass'n v Weinberger***, 142 AD3d *at* 645-6, *supra*; ***American Prescription Plan, Inc. v American Postal Workers Union***, 170 AD2d 471, 565 NYS2d 830 [2d Dept 1991]). The request for a bond is meritless.

The Court further rejects Einhorn's attempt to submit a supplemental memorandum of law, nearly two years after the return date, without Court approval or stipulated consent from opposing counsel. Such is not part of this record before the Court and is marked "not considered." The Court has set this matter down for trial on the limited issue noted above, upon the rule that "[w]hile this result might at times seem harsh, there must be an end to lawsuits..." (***Matter of Huie*** (***Furman***), 20 NY2d 568, 572, 285 NYS2d 642 [1967]).

The court thus finds that the plaintiff failed to demonstrate its entitlement to full summary judgment, even though the Court has dismissed all the Affirmative Defenses and Counterclaims. [2] The only outstanding issue is the unplead claim of lack of compliance on the part of the plaintiff regarding service of the RPAPL §1304 statutory notice. Summary judgment is thus granted in part but denied as to plaintiff's demands for summary judgment on its complaint against Einhorn. Also denied are the remaining portions of the plaintiff's motion wherein it seeks default judgments against all other defendants served with process, including one served as John Doe and a caption amendment to reflect the true name of said defendant pursuant to CPLR 1024 and the deletion of the remaining defendants. All such denials are without prejudice to a new application for the same or similar relief in the future. Einhorn's cross motion is denied in its entirety.

Dated: June 1, 2017

THOMAS F. WHELAN, J.S.C.

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[2] While such a result may seem antipodal, that is the current state of foreclosure litigation, where certain unpleaded defenses are not deemed waivable.