

MORTGAGE FORECLOSURE FROM THE DEFENDANT'S  
PERSPECTIVE

by

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## Mortgage Foreclosure from the Defendant's Perspective

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### I. Notice of Appearance and Waiver in Foreclosure

- Generally used by creditors or governmental agencies named as defendants who do not intend to defend against foreclosure, but merely seek their share of any surplus monies.
- A standard notice of appearance and waiver in foreclosure will state that said defendant waives service of all papers and notice of all proceedings except certain enumerated papers (such as amended complaints, notice of application for discontinuance of action, referee's report of computation, application for judgment of foreclosure and sale, and notice of proceedings to obtain surplus monies).
- If United States of America appears, it has a standard provision in its notices of appearance that the United States will object to any judgment of foreclosure and sale that does not provide the United States a period of 120 days from the date of sale to redeem the property (or a year if the United States' lien does not arise from a tax liability, which is not very common). 28 U.S.C. 2410(c).

### II. Answer with Affirmative Defenses

- As a general rule, a homeowner must answer the complaint within the statutory time period or else bear the risk of waiving affirmative defenses—most importantly, the defense of lack of standing.

#### A. Standing and Capacity Issues

##### *1. Standing in a Foreclosure Case*

- Foreclosing plaintiff must hold the note and the mortgage at the inception of the action. *Bank of New York v. Silverberg*, 86 A.D.3d 274, 279 (2d Dept. 2011) (collecting cases); *Kluge v. Fugazy*, 145 A.D.2d 537 (2d Dept. 1988).
- Note: represents contractual debt obligation  
Mortgage: represents collateral security for debt.

- Assignment of the mortgage without assignment of the debt, i.e. the note, is a nullity. *Silverberg, supra*, 86 A.D.3d at 280; *Merritt v. Bartholick*, 36 N.Y. 44, 45 (1867).
- For a party to hold the note, the UCC (UCC 1-201[20]) requires both:
  - That the note be indorsed to the foreclosing party (or indorsed in blank) – see examples of different types of indorsements in materials; and
  - That the note be in the physical possession of the foreclosing party
- A “red flag” that could indicate a lender’s lack of standing is the existence of contradictory indorsements and allonges.
- If the note is lost or destroyed, it is possible for a plaintiff to prosecute a foreclosure action, but only upon meeting the requirements of UCC § 3-804, which requires that the plaintiff post a bond for double the amount unpaid on the note to indemnify the defendant in case of a competing claim.
- It is not necessary that there be a written assignment of either the note or the mortgage—only that the note and mortgage have been physically delivered to the foreclosing party prior to the commencement of the foreclosure action; BUT
  - If an assignment of the mortgage (or note and mortgage) exists, the execution date of the assignment generally controls absent proof that physical delivery of the note and mortgage was previously effectuated. *LaSalle Bank, N.A. v. Ahearn*, 59 A.D.3d 911, 912 (3d Dept. 2009); *Wells Fargo v. Marchione*, 69 A.D.3d 204, 210 (2d Dept. 2009).
  - A conclusory affidavit devoid of factual details surrounding delivery of the note and mortgage to the foreclosing party is not sufficient to overcome the presumption that the date of the written assignment controls. *HSBC Bank USA v. Hernandez*, 92 A.D.3d 843, 844 (2d Dept. 2012).
  - However, if the plaintiff produces evidence that the note and mortgage was previously delivered on a particular date, such evidence is probably sufficient to overcome the presumption that the execution date of the assignment of mortgage controls. *Deutsche Bank Nat’l Trust Co. v. Whalen*, 107 A.D.3d 931 (2d Dept. 2013); *Aurora Loan Svces, LLC v. Taylor*, 114 A.D.3d 627 (2d Dept. 2014).
- Assignments of mortgage should be checked to ensure that the execution date is prior to the commencement date of the foreclosure action. If it is not, and if there is no evidence of prior delivery of the mortgage, then the plaintiff did not hold the mortgage when the action commenced and the action must be dismissed for lack of standing.

## 2. *Why Standing is so Often Questioned in Foreclosure Cases (Robo-Signing)*

- “Robo-Signing” is a broad term encompassing many different kinds of conduct on the part of lenders
  - The conduct that caused headlines in 2010 was the execution of affidavits, including questionable notarizations, by individuals who signed the affidavits without verifying that the content of the affidavits was true.
  - Also sometimes called “robo-signing” is the application of indorsements or the execution of assignments of mortgage by individuals without authority to do so.
    - Linda Tirelli’s discovery regarding the Wells Fargo Home Mortgage Foreclosure Attorney Procedure Manual
    - Steven J. Baum attorneys signing assignments of mortgage
    - Lenders Processing Services (Dakota County, Minnesota and Duval County, Florida)
- MERS – What It Is and What It Isn’t
  - MERS (Mortgage Electronic Registration System) originated to permit transfers of mortgages without paying county clerk’s recording fees.
  - MERS acts only as “nominee” for lender. It does not hold the note, though it may assign the mortgage.
  - MERS has tens of thousands of authorized signers.
  - While there is case law questioning the assignments of mortgages by plaintiff’s counsel who are MERS signatories, *see e.g. U.S. Bank, N.A. v Guichardo*, 22 Misc 3d 1116(A), 2009 NY Slip Op 50151(U) (Sup Ct, Kings County 2009) (Schack, J.), *rev’d on other grounds* by 90 A.D.3d 1032 (2d Dept 2011), there is no appellate court decision holding said assignments to be invalid. Similarly, there is no binding decision holding that assignments by the employees of the assignee, who happen to be signatories of MERS, are invalid.
  - Therefore, MERS is a “red flag” that a standing issue may exist, but it is not a “free pass” to a homeowner.
  - Nonetheless, assignment from MERS when MERS is designated merely as nominee of lender, and never owned note, is ineffective to confer standing on its assignee where there is no evidence that the note was effectively transferred by the lender. *Bank of New York v Silverberg*, 86 A.D. 3d 274,

926 N.Y.S. 2d 532 (2d Dep't 2011). See also *In re Lippold*, 457 B.R. 293 (Bankr. S.D.N.Y. 2011) (MERS, as assignor, could not legally assign the note as prior holder of note and mortgage only conferred legal rights with respect to the mortgage); *In re Agard*, 444 B.R. 231 (Bankr. S.D.N.Y. 2011) (mortgage naming MERS as nominee did not authorize it to assign)

- Remedies for Robo-Signing
  - As discussed previously, the Lippman/Pfau Affirmation and the Certificate of Merit are effective ways to prevent robo-signed documents from being used to foreclose, but it leaves open the issue of how to deal with orders that were granted upon robo-signed affidavits
  - Lower courts have held that such orders must be vacated because inability to verify an affidavit upon which an order was granted “calls into question the methodology used by the plaintiff to procure the order.” *US Bank Natl. Assn. v. Perez*, 2012 NY Slip Op. 31812[U] (Sup. Ct. Queens County 2012). Nonetheless, the Second Department has held that a trial court did not abuse its discretion in allowing an order to be corrected *nunc pro tunc*, rather than vacated, where there was no evidence that the order was procured by fraud. *U.S. Bank, N.A. v. Eaddy*, 109 A.D.3d 908 (2d Dept. 2013). This area of law is still developing.

### ***3. Difference between Standing and Capacity to Sue***

- Standing requires an inquiry into whether the litigant has an interest in the claim at issue that the law will recognize as a sufficient predicate for determining the issue at the litigant’s request. Is the relief sought in the case properly sought by *this* plaintiff.
- Capacity to sue goes to the litigant’s status, i.e., its power to appear and bring its grievance before the court. For example, a foreign corporation or LLC may not bring an action unless it is registered with the Secretary of State; minors lack legal capacity, etc.
- **Why this is important** – CPLR § 3211 expressly states that a defense based on the plaintiff’s lack of capacity to sue is waived if not raised in the answer or a pre-answer motion to dismiss. CPLR §§ 3211(a)(3), 3211(e). But the CPLR does not address a defense of lack of standing.
  - In foreclosure actions, it is rare that a defendant can claim that a plaintiff lacks capacity to sue (though some such cases will be discussed under Licensing). As discussed previously, the inquiry is whether the plaintiff possesses standing.

- BUT, the Second Department in *Wells Fargo Bank Minnesota, N.A. v. Mastropaolo*, 42 A.D.3d 239, 241-44 (2d Dept. 2007), while admitting that the case law was “unsettled” determined “that, for purposes of the waiver rule set forth in CPLR 3211 (e), standing and capacity to sue are sufficiently related that they should be afforded identical treatment.”
- For the time being, for practical purposes, therefore, the distinction between standing and capacity to sue is largely academic.

#### ***4. Waiver of Standing Defense and How to Circumvent Waiver***

- Multiple Second Department decisions have held that if lack of standing is waived if not asserted in the defendant’s answer or pre-answer motion to dismiss. *See, e.g., Wells Fargo Bank Minn., N.A. v. Mastropaolo*, 42 A.D. 3d 239 (2d Dep’t 2007) (standing waived where defendant raised lack of standing in opposition to Plaintiff’s motion for summary judgment without seeking to amend answer); *Countrywide v. Delphonse*, 64 A.D. 3d 624 (2d Dep’t 2009) (same); *HSBC v. Dammond*, 59 A.D. 3d 679, (2d Dep’t 2009) (standing waived where defendant did not answer and raised standing as a meritorious defense in an effort to vacate judgment of foreclosure and sale).
- Notwithstanding the above decisions, defendants may amend their answers (if no prejudice accrues to the plaintiff) to interpose the lack of standing defense, or move to compel a late answer (if a reasonable excuse for delay is shown) to interpose that defense.
- Amendment of Answers: Leave to amend should be freely given absent “significant prejudice” to opposing party. CPLR § 3025(b); *Edenwald Contracting Co., Inc. v. City of New York*, 60 N.Y.2d 957 (1983). In mortgage foreclosure context, “significant prejudice” is a high bar.
  - Leave to amend granted: *HSBC Bank v. Picarelli*, 110 A.D.3d 1031 (2d Dept. 2013); *U.S. Bank, National Association v. Sharif*, 89 A.D.3d 723 (2d Dept. 2011) (trial court abused its discretion in not granting defendants’ cross-motion to amend their answer interposed in response to plaintiff’s motion for summary judgment).
  - Leave to amend denied: *HSBC Bank USA v. Philistin*, 99 A.D.3d 667 (2d Dept. 2012) (affirming trial court’s decision denying leave to amend answer where motion was made seven months after plaintiff had obtained summary judgment).
- Compelling Late Answers: The court may compel the acceptance of a late answer “upon a showing of reasonable excuse for delay or default.” CPLR § 3012(d). “The determination of what constitutes a reasonable excuse lies within the sound discretion of the trial court.” *Maspeth Fed. Sav. & Loan Assn. v. McGown*, 77 A.D.3d 889 (2d Dept. 2010).

- Motion to Compel granted: *HSBC Bank USA, N.A. v. Cayo*, 34 Misc. 3d 850 (Sup. Ct., Kings County 2011); *Zara Realty Holding Corp. v. E & J Deli and Grocery*, 34 Misc. 3d 1234(A), 2012 NY Slip. Op. 50364(U) (Sup. Ct., Queens County 2012); *Scarlett v. McCarthy*, 2 A.D.3d 623 (2d Dept. 2003) (in personal injury action, trial court property vacated default where defendant showed that his insurance carrier was “actively engaged in settlement negotiations”)
- Motion to Compel denied: Three Second Department decisions have found that trial court did not abuse its discretion in denying motion to compel answer where defendants claimed delay based on good faith negotiations with lenders in foreclosure settlement conferences. *HSBC Bank USA, N.A. v. Lafazan*, 115 A.D.3d 647 (2d Dept. 2013) (261 days passed between expiration of time to answer and first settlement conference); *Deutsche Bank Nat’l Trust Co. v. Gutierrez*, 102 A.D.3d 825 (2d Dept. 2013) (Defendant’s reliance on loan modification negotiations was unsubstantiated); *Mannino Development, Inc. v. Linares*, 117 A.D.3d 995 (2d Dept. 2014) (Defendants appearance at settlement conferences do not provide a reasonable excuse for delay).

### ***5. Burden of Proof on Defense of Lack of Standing***

- Unlike other affirmative defenses upon which the burden of proof is entirely on the defendant (e.g. Statute of Limitations), the burden of proof on the defense of lack of standing shifts to the plaintiff to prove standing. The Second Department has stated, “[w]here, . . . , the issue of standing is raised by a defendant, a plaintiff must prove its standing in order to be entitled to relief.” *Bank of New York v. Silverberg*, 86 A.D.3d 274, 279 (2d Dept. 2011).
- Since, as noted above, a necessary element to prove standing is that the plaintiff physically possessed the note at the commencement of the action, Plaintiff bears the burden of producing evidence “from a person having knowledge of the facts,” CPLR § 3212(b), that the Plaintiff held the note at the relevant time.
- Where there has been a servicing transfer after the commencement of a foreclosure action, the statement of an employee of the new servicer is not admissible evidence as to whether the old servicer or the Plaintiff (not necessarily the same party) physically possessed the note at commencement of the action. *See Standard Textile Co. v. Nat’l Equip. Rental, Ltd.*, 80 A.D.2d 911 (2d Dept. 1981) (employee of one entity cannot testify as to the record keeping, under the business records hearsay exception, of another entity); *Residential Credit Sol’ns, Inc. v. Amsterdam*, 36 Misc. 3d 1234(A), 2012 NY Slip Op 51606(U) (Sup. Ct., Kings County 2012) (same in mortgage foreclosure context).
  - This same principle holds true for other defenses – such as mailing of the notice of default or the RPAPL § 1304 notice. An employee of a new servicer has no personal knowledge that such mailings were completed,



and cannot testify as to business records of the old servicer. This can be a very effective means for defense counsel to defend against a summary judgment motion or even a motion for order of reference.

- **PRACTICE POINT FOR LENDERS:** To avoid this problem, lenders counsel should probably obtain an affidavit of an employee of the servicer at the time the action was commenced when a servicing transfer is about to occur.

**B. Federal Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692-1692p**

***1. Scope of FDCPA Coverage***

a) Who is covered

- Applies to debt collectors. § 1692a(6)
- Debt collector is any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts
- For § 1692f(6) purposes, it also includes any business the principal purpose of which is the enforcement of security interests.
- Or, any person who regularly collects, directly or indirectly, debts owed or due or asserted to be owed or due another.
  - Includes debt buyers
  - Includes attorneys who regularly collect consumer debts.

b) Who is not covered

- Original creditors. § 1692a(6)(F)(ii)
  - It does include any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts. § 1692a(6)
- Creditors employees or agents collecting in the name of the creditor. § 1692a(6)(A)
- State and federal officials performing their duties, such as the IRS or U.S. Dept. of Education. § 1692a(6)(C)
- Persons collecting debts not in default, such as some servicers. § 1692a(6)(F)(iii)
- Process servers. §1692a(6)(D)
  - At least one court has held that they are covered if they are engaging in sewer service. *Mel Harris v. Sykes*, 757 F.Supp.2d 413 (2010)

c) What transactions are covered

- Consumer debts
  - Consumer is defined in § 1692a(3) as “any natural person obligated or allegedly obligated to pay any debt”
  - Does not apply to artificial entities, such as corporations
- Debts are defined in § 1692a(5) as any obligation of a consumer to pay money
  - underlying transaction must be for money, property, insurance, or services
  - must be primarily for personal, family or household purposes
  - no business debts or fines
- Communications - § 1692a(2)
  - Means the conveying of information regarding a debt directly or indirectly to any person through any medium
  - Also applies to statements and activities during the course of litigation. *Heintz v. Jenkins*, 514 U.S. 291 (1995)
    - Recent amendments to FDCPA clarify that a legal pleading cannot be considered an “initial communication” under FDCPA.
    - Note that this is a narrow amendment; other provisions of FDCPA still apply.

**2. Substantive Consumer Protections:**

- Cease communications. § 1692c
- Dispute/verification. § 1692g
  - Notice within 5 days of initial communication
  - Right to dispute within 30 days of receiving notice
  - Once debt collector receives dispute in writing, must stop all debt collection activity (including filing a lawsuit) until it provides "verification" of the debt.
    - NOTE: Local NYC law expands these dispute rights. Under local law, consumers can request verification at any time. NYC Admin Code § 20-493.2.
    - Verification must include (1) copy of the contract or other agreement creating the obligation to pay (2) copy of final

account statement (3) an accounting itemizing the total amount do, specifying principal, interest, and other charges. For each additional charge, the debt collection must state the date and basis for the charge. See § 2-190 of the Rules of the City of New York.

### **3. *Prohibited Activities***

a) Communications. §§1692b & 1692c –

- Contacting consumer after consumer sends cease communication letter
- Contacting consumer who is represented by counsel
- Contacting third parties about a consumer's debt
- Contacting consumer at work if debt collector has reason to know that consumer's employer prohibits such communication
- Common scenario: Debt collector can't reach consumer, so calls consumer's neighbor/family member/employer and leaves telephone number and message for the consumer to call back about an important matter. This is a violation.

b) Harassment or Abuse. § 1692d

- Debt collector may not engage in conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with collection of debt
- Includes: threats of violence, use of profanity, repeated telephone calls for purpose of harassment, calling without disclosure of identity (e.g. threats to repossess property)

c) False or Misleading Representations. § 1692e

- False representation of character, amount, or legal status of any debt (e.g., suing for more interest and fees than is actually owed)
- Threat to take any action that cannot legally be taken or is not intended to be taken
- Implying that consumer could be arrested or children taken away for nonpayment of debt
- Pretending to be attorney, marshal
- Making false or inaccurate reports to credit reporting agencies

d) Unfair Practices. § 1692f

- Using unfair or unconscionable means to collect a debt Collection of any amount (including interest and fees) that is not actually owed
- Threatening to take or repossess property (a) without the right; (b) without the intent; (c) if property is exempt

#### **4. FDCPA Litigation and Remedies**

a) Statute of Limitations

- One year from the date on which the violation occurs - § 1692k(d)
- No continuing violations doctrine

b) Jurisdiction

- May bring in either state or federal court
- May also bring as a counterclaim in a debt collection suit

c) Construction

- Strict liability statute — proof of the debt collector’s intent is not required intent is a factor that can be used when calculating damages
- Courts apply a “least sophisticated consumer” standard to analyze violations

d) Remedies

- Up to \$1000.00 statutory damages
  - A majority of courts hold that capped at \$1,000 per action no matter how many violations are joined in the lawsuit
  - Per Plaintiff
  - Sometimes per Defendant, depending on the violation
- Factors used by courts in determining statutory awards:
  - Intent to commit the violation or evade the protections
  - Repetition of the violations
  - Timely correction of the violations
  - Multiple consumers affected by the violations
  - Prior violations by the collector for similar acts
- Actual damages
- Attorneys’ fees

- Declaratory relief
- No injunctive relief

## C. NYS Banking Law Defenses

### ***1. Banking Law 6-l***

- Applies to loans made after April 1, 2003.
- Covers "high-cost home loans": a first lien residential mortgage loan, not exceeding conforming loan size for a comparable dwelling as established by the Federal National Mortgage Association in which (1) the APR exceeds eight percentage points over the yield on Treasury securities having comparable periods of maturity; or (2) total points and fees exceed 5% of the total loan amount, excluding certain bona fide discount points if total loan is \$50,000 or more.
- Prohibits, inter alia, (1) lending without regard to a borrower's ability to repay; (2) financing of points and fees in excess of 3% of the loan; (3) loan flipping; (4) kickbacks to mortgage brokers; (5) points and fees when lender refinances its own high-cost loan; (6) balloon payments, negative amortization, and default interest rates.
- Provides private right of action with 6-year statute of limitations (from origination); actual and statutory damages; attorney fees; possible rescission of the loan.
- Intentional violation may result in voiding of the loan.

### ***2. Banking Law § 6-m***

- Covers "subprime home loan": a loan where the fully indexed APR for the first- lien loan exceeds by more than 1.75, or for a subordinate loan by more than 3.75, the average commitment rate for loans in the northeast region with a comparable duration as published in the Freddie Mac Primary Mortgage Market Survey (PMMS) in the week prior to the week in which the lender received a completed loan application.
- Lenders must take reasonable steps to verify that the borrower has the ability to repay the loan, including taxes and insurance.
- Prohibitions similar to those in Banking Law §6-1.
- Lenders must disclose charges for taxes and insurance and must escrow such payments after July 1, 2010.
- No private right of action, but borrowers can raise violations as defenses to foreclosure. Allows actual damages, injunctive or declaratory relief, and attorney fees.

## D. Licensing

- BCL § 1312 (prohibits lawsuits by foreign corporations not authorized to do business in NY)
- Exception for foreign banking corporations via BCL § 103(a) and Banking Law § 200(4).
- *Sutton Funding LLC v. Parris*, 24 Misc. 3d 889 (Sup. Ct. Kings County 2009) (dismissing foreclosure where plaintiff had not proved it was a foreign bank licensed by the Superintendent of Banking nor that it was a foreign corporation authorized to do business in NY)

## E. Equitable Defenses

- Foreclosure is an action in equity. *Norstar Bank v. Morabito*, 201 A.D.2d 545, 546 (2d Dept. 1994) (“Once equity is invoked, the court’s power is as broad as equity and justice require.”)
- Consider equitable defenses—unclean hands, waste, estoppel—when a mortgage modification is viable (affordable to the homeowner and more profitable to the holder than foreclosure), but the plaintiff:
  - refuses to offer a modification
  - has acted in violation of applicable servicing standards
  - has acted in violation of applicable loan modification programs, such as HAMP, FHA, or Fannie/Freddie guidelines
  - has not negotiated in good faith in mandatory foreclosure settlement conferences.
- Always consider whether the lender has violated its duty of contractual good faith and fair dealing.

## F. Other Statutory Defenses

### 1. *RPAPL § 1304*

- Sending of the 90-day notice (previously mentioned) is a mandatory precondition to foreclosure. *Aurora Loan Servs. v. Weisblum*, 85 A.D.3d 95 (2d Dept. 2011)

### 2. *RPAPL § 1303*

- Attaching the notice on colored paper stating “Help for Homeowners in Foreclosure” with the required statutory text and in the required print size

is a mandatory precondition to foreclosure. *First Nat'l Bank of Chicago v. Silver*, 73 A.D.3d 162, 169 (2d Dept. 2010).

- As a practical matter, it is difficult to prove that the homeowner did not receive this notice, since process servers' affidavits are accepted as *prima facie* evidence and the affidavits invariably state the summons and complaint were served with the RPAPL § 1303 notice.

### **3. NY General Business Law § 349 (Deceptive Practices Act)**

- Prohibits "deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state..."
- Plaintiff must show that (1) the defendant's deceptive acts were directed at consumers; (2) the acts were misleading in a material way; and (3) the plaintiff was injured as a result.
- No intent showing required.
- May cover violations of relevant statutes which do not have a private right of action (e.g. Real Estate Settlement Procedures Act; NY Banking Law §6-m; NY Dept. of Financial Services Business Conduct Rules for Servicing Mortgage Loans, 3 NYCRR 419.11)
- Statute of limitations is 3 years from when the plaintiff was injured by the violation.
- Remedies: injunctive relief actual damages; treble damages up to \$1,000 for willful or knowing violations; and attorney fees. A defendant whose deceptive conduct is perpetrated against an elderly person (65 years and older) may be liable for an additional civil penalty of up to \$10,000.00. N.Y. Gen. Bus. Law § 349- c(2)(a).

### **4. NY Judiciary Law § 487**

- Prohibits attorneys from engaging in acts of deceit or collusion with intent to deceive the court or any party.
- Relief includes treble damages

### **5. Truth in Lending Act 15 U.S.C. §1601 et seq; 12 C.F.R. §226 et seq. (Regulation Z)**

- The cost of credit (finance charge, amount financed, and APR) must be accurately disclosed to the borrower in a statement provide at closing
- Borrower has a right to rescind up to 3 business days after closing of a refinance loan, delivery of the notice of right to cancel or deliver of material disclosures, whichever is last.

- “Finance charge” is “any charge payable directly or indirectly by the consumer and imposed directly or indirectly by the creditor as an incident to or condition of the extension of credit.”
- Remedies: statutory damages up to \$2,000 per violation; actual damages; rescission (including against the holder); and attorney fees.
- Statute of limitations is 1 year, but can be raised in recoupment as a defense in foreclosure, and up to 3 years for rescission.

**6. *Homeownership and Equity Protection Act (HOEPA), 15 U.S.C. § 1639***

- Applies to “high-cost loans” a loan with an APR more than 8% over the yield on treasury securities of a comparable maturity, or where the total points and fees exceed 8% of the principal.
- Prohibits: negative amortization; some prepayment penalties; engaging in a pattern and practice of extending credit based on collateral without regard to borrower's ability to repay.
- Assignee liability.
- Remedies: rescission; actual damages; enhanced statutory damages; and attorney fees.

**7. *Real Estate Settlement Procedures Act (RESPA) 12 U.S.C. § 2601 et seq, 24 C.F.R § 3500 et seq.***

- Prohibits kickbacks and unearned fees in real estate closings.
- Is not a defense to foreclosure, but provides statutory damages of 3 times the settlement charge as a counterclaim.

**8. *Fair Housing Act, 42 U.S.C. §3604, 3605***

- Prohibits (1) refusing to sell, or otherwise making unavailable or denying housing because of race, color, national origin, gender, disability, or other protected class; (2) discriminating against any person in the terms, conditions, or privileges or sale or rental of a dwelling, or in the provision of housing because of race, color, national origin, gender, disability or other protected class.
- Reverse redlining put borrowers at risk of losing their property and can make housing unavailable within the meaning of the FHA. *Hargraves v. Capital City Mortgage*, 140 F.Supp.2d 7 (D.D.C. 2000). *Barkley v. Olympia Mortgage Co.*, 04-CV-0875, 2007 WL 2437810 (E.D.N.Y. Feb. 27, 2007).



- Remedies: actual damages; statutory damages; injunctive relief; and attorney fees.

### **9. *Equal Credit Opportunity Act (ECOA), 15 U.S.C. § 1691***

- Prohibits discrimination against applicants for credit in “any aspect of a credit transaction.”
- Applies to any entity or person that “regularly” extends, renews or continues credit, or arranges for the extension, renewal or continuation of credit.
- Applies to assignees.
- Requires a written notice of a counteroffer by a lender within 30 days of receiving a complete application, if the terms of the loan will differ from the terms applied for. Regulation B, 12 C.F.R. §202.9(a)(1)(i).
- Remedies: actual and punitive damages; and attorney fees.
- Statute of limitations is 2 years for affirmative claims.

## **III. Discovery**

- As a general rule, there is not very much discovery in foreclosure actions, but, to the extent that it is needed, discovery operates under CPLR article 31 the same way that it would for any other civil litigation.

### **A. Notice to Produce**

- For a foreclosure defense attorney, the one discovery device that is highly recommended is a Notice to Produce the “Wet Ink” note pursuant to CPLR § 3120(1) to verify that the Plaintiff, in fact, holds the original note. A sample is provided in the materials

### **B. Interrogatories, Demands for Bills of Particular, Requests for Documents, Depositions**

- Depending on the facts of the case, all these discovery devices may be used.
- Fact-specific to each individual case.
- Samples of interrogatories and request for production of documents included in materials.



If Lender requires immediate payment in full under this Section 18, Lender will give me a notice which states this requirement. The notice will give me at least 30 days to make the required payment. The 30-day period will begin on the date the notice is given to me in the manner required by Section 15 of this Security Instrument. If I do not make the required payment during that period, Lender may act to enforce its rights under this Security Instrument without giving me any further notice or demand for payment.

WITNESS THE HAND(S) AND SEAL(S) OF THE UNDERSIGNED.

(Seal) [Redacted Signature] (Seal)  
-Borrower [Redacted Name] -Borrower

ENDORSEMENT  
IN  
BLANK

(Seal) [Redacted Signature] (Seal)  
-Borrower [Redacted Name] -Borrower

(Seal) [Redacted Signature] (Seal)  
-Borrower [Redacted Name] -Borrower

(Seal) [Redacted Signature] (Seal)  
-Borrower [Redacted Name] -Borrower

(Sign Original Only)

WITHOUT RECOURSE,  
PAY TO THE ORDER OF

THE DIME SAVINGS BANK OF NEW YORK, FSB

By           A          

ANDREW GINGOLD  
ASST. SECRETARY

SPECIAL ENDORSEMENT

10. UNIFORM SECURED NOTE

This Note is a uniform instrument with limited variations in some jurisdictions. In addition to the protections given to the Note Holder under this Note, a Mortgage, Deed of Trust, or Security Deed (the "Security Instrument"), dated the same date as this Note, protects the Note Holder from possible losses which might result if I do not keep the promises which I make in this Note. That Security Instrument describes how and under what conditions I may be required to make immediate payment in full of all amounts I owe under this Note. Some of those conditions are described as follows:

Lender may require immediate payment in full of all Sums Secured by this Security Instrument if all or any part of the Property, or if any right in the Property, is sold or transferred without Lender's prior written permission. If Borrower is not a natural person and a beneficial interest in Borrower is sold or transferred without Lender's prior written permission, Lender also may require immediate payment in full. However, this option shall not be exercised by Lender if such exercise is prohibited by Applicable Law.

If Lender requires immediate payment in full under this Section 18, Lender will give me a notice which states this requirement. The notice will give me at least 30 days to make the required payment. The 30-day period will begin on the date the notice is given to me in the manner required by Section 15 of this Security Instrument. If I do not make the required payment during that period, Lender may act to enforce its rights under this Security Instrument without giving me any further notice or demand for payment.

WITNESS THE HAND(S) AND SEAL(S) OF THE UNDERSIGNED.

[Redacted Signature] (Seal)  
-Borrower

[Redacted Signature] (Seal)  
-Borrower

\_\_\_\_ (Seal)  
-Borrower

\_\_\_\_ (Seal)  
-Borrower

\_\_\_\_ (Seal)  
-Borrower

\_\_\_\_ (Seal)  
-Borrower

PAY TO THE ORDER OF  
COUNTRYWIDE BANK, N.A.  
WITHOUT RECOURSE  
APPROVED FUNDING CORP.  
BY: TIZIV RUNCAN; AVP

[Sign Original Only]

Loan Number: [REDACTED]

Servicing Number: [REDACTED]

Date: 08/04/06

**ALLONGE TO NOTE  
(INVESTOR)**

This allonge makes reference to the following Note:

Borrowers: [REDACTED]

Loan #: [REDACTED]

Property Address: [REDACTED]

Loan Amount: [REDACTED]

Note Date: 08/04/06

Therefore, in reference to the captioned note, the following applies:

Pay to the order of:

Without Recourse

Option One Mortgage Corporation  
A California Corporation

By: Madeline Cordero  
Madeline Cordero

Assistant Secretary



SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ROCKLAND

-----X

Plaintiff,

NOTICE FOR DISCOVERY  
AND INSPECTION

-against-

Index No. \_\_\_\_\_

Defendant,

-----X

Pursuant to CPLR 3120(a), the Defendant, \_\_\_\_\_, demands that Plaintiff, \_\_\_\_\_, produce and permit discovery by Defendant, his attorney, or another acting on his behalf, of the following documents and things for inspection:

Original "wet ink" Note allegedly executed by Defendant(s),  
\_\_\_\_\_  
referenced in the complaint.

The discovery and inspection will be by means of physical inspection by Defendant, his counsel, or other agents, and by photography, and will be held at the following address: \_\_\_\_\_, on \_\_\_\_\_, 2013, and on each business day thereafter, between 10:00 a.m. and 5:00 p.m., until the inspection by Defendant is completed.

Dated: New City, New York  
\_\_\_\_\_, 2013

By: \_\_\_\_\_  
(Signature)

Defendant Name: \_\_\_\_\_  
(Printed Name), Pro Se Defendant,

\_\_\_\_\_

(Address)





**SAMPLE DEFENDANT DOCUMENT REQUEST**

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND

-----X  
[REDACTED] AS Index No.  
TRUSTEE FOR ...

Plaintiff,

-against-

**DEFENDANTS' FIRST  
REQUEST TO PLAINTIFF  
FOR PRODUCTION OF  
DOCUMENTS**

Defendants.

-----X

PLEASE TAKE NOTICE that, pursuant to Sections 3101 and 3120 of the New York Civil Practice Law and Rules, Plaintiff [REDACTED] as Trustee for ..... [REDACTED]”) is required to produce all documents and things responsive to the requests for inspection and copying in accordance with the definitions and instructions set forth herein. All responsive documents and things are required to be produced on or before September 4, 2012, during normal business hours at the office of the undersigned, [REDACTED] at which time they will be inspected and/or copied. In lieu of producing the originals of the documents requested at the specified date (unless originals are specifically requested), true copies may be delivered to the undersigned on or before the above date, at the address listed below.

PLEASE TAKE FURTHER NOTICE that this is a continuing demand. Pursuant to Section 3101(h) of the New York Civil Practice Law and Rules, you are required to amend or supplement any response previously given to these demands promptly upon obtaining information that the previous response was incorrect or incomplete when made, or that the previous response, though current and complete when made, no longer is correct and/or complete.

### **DEFINITIONS**

1. **Party to this Action.** The term “party to this action” means any person or entity named as a party to any unresolved judicial action concerning the subject property, including those designated by fictitious names.
2. **You/Your; [REDACTED].** The terms “you,” “your” or “[REDACTED]” mean Plaintiff U.S. Bank and the officers, directors, employees, corporate parents, subsidiaries, and affiliates thereof, and, unless stated otherwise, [REDACTED] and the officers, directors, employees, corporate parents, subsidiaries, and affiliates thereof.
3. **MERS.** The term “MERS” means Mortgage Electronic Registration Systems, Inc. and the officers, directors, employees, corporate parents, subsidiaries, and affiliates thereof.
4. **Defendants.** The terms “Defendant” or “Defendants” mean \_\_\_\_\_.
5. **Subject Property.** The term “subject property” means the property located at [address].
6. **Subject Loan.** The term “subject loan” means the mortgage loan originated on [date] between defendants and [REDACTED], concerning the property located at [address].

7. **Subject Note.** The term “subject note” means the promissory note executed by \_\_\_\_\_ in favor of [REDACTED] on [date] in the amount of \$\_\_\_\_\_.
8. **Subject Mortgage.** The term “subject mortgage” means the mortgage given by [defendants] to [REDACTED] on [date] securing the subject note.
9. **Agreement.** The term “agreement” means any formal, informal, oral or written contract between two or more parties.
10. **Communication.** The term “communication” shall include any transmission or transfer of information of any kind, whether orally, electronically, in writing, or in any other manner, at any time or place, and under any circumstances whatsoever.
11. **Document.** The term “document” shall mean the original and any nonidentical copy, regardless of origin or location, of correspondence, records, agreements, contracts, publications, periodicals, fliers or books produced or held by you, applications, manuals, tables, charts, graphs, schedules, reports, records, memoranda, notes, letters, emails, messages (including reports of telephone or other oral conversations and conferences), checks (front and back), check vouchers, check stubs or receipts, studies, analyses, journals, ledgers, circulars, bulletins, instructions, minutes or other communications, diaries, diagrams, photographs, recordings, tapes, microfilms, questionnaires, surveys and any other written or printed matter of any kind, including but not limited to any handwritten or machine-made copy and nonpaper storage, such as tape, film and computer memory devices, information stored in any internal, industry-specific software and metadata (including but not limited to any digital information stored in computers

used for administration and management of the computers, the telephones, the applications or individual records such as document properties, management data, hidden properties, access controls, activity logs, router logs, phone records in digital format and security permissions). All metadata in relevant digital files must be preserved and produced. A draft or nonidentical copy is a separate document within the meaning of the term.

12. **Parties.** The terms “Plaintiff” and “Defendants” as well as a party’s full or abbreviated name or a pronoun referring to a party means a party to this action and, where applicable, its officers, directors, partners, corporate parent, subsidiaries or affiliates.
13. **Person.** The term “person” is defined as any natural person or any business, legal or governmental entity or association.
14. **Employee.** The term “employee” means employee, independent contractor, representative or agent.
15. **Interrogatories.** The term “Interrogatories” refers to Defendants’ First Set of Interrogatories to Plaintiff [REDACTED] as Trustee ....., dated August 3, 2012.
16. The following rules of construction apply to all discovery requests:
  - i. **Concerning.** The term “concerning” means relating to, referring to, describing, evidencing or constituting.
  - ii. **Include/Including.** “Include” and “including” do not in any way limit a request to specific items or concepts listed, but rather shall be read to mean “including, but not limited to.”

- iii. **Each/Every and Any/All.** “Each” includes the word “every,” and “every” includes the word “each.” “Any” includes the word “all,” and “all” includes the word “any.”
- iv. **And/Or.** The connectives “and” and “or” shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the discovery request all responses that might otherwise be construed to be outside of its scope.
- v. **Number.** The use of the singular form of any word includes the plural and vice versa.
- vi. **Tense.** The use of the present tense includes the past and vice versa.

### **INSTRUCTIONS**

1. Documents covered by the document requests include all documents in the possession, custody, or control of [REDACTED] or any of its employees, officers, directors, agents, or other persons purporting to act on behalf of [REDACTED] and/or its employees.
2. Each document request requires production of all documents described therein and any attachments, appendices, or exhibits to such documents, and any file or other folders in which such documents are stored or filed, in the possession, custody, or control of each [REDACTED] employee or any of its attorneys, agents, or representatives, or which [REDACTED] or any of its attorneys, agents, or representatives has the legal right to obtain, or has the ability to obtain from sources under its respective control.

3. With respect to each document maintained in an electronic medium (i.e., a spreadsheet or an electronic mail message), produce the document on a CD-ROM, or ZIP cartridge (in each case in a format readable on a computer running the Microsoft Windows® operating system) and label the media appropriately. If it is impractical to copy the document onto electronic media as set forth in the preceding sentence, contact the undersigned in advance to arrange a solution to the technical issue.
4. If any document within the scope of this request has been lost, discarded, or destroyed, that document shall be identified, including identification of its author(s), intended or unintended recipient(s), addressee(s), intended or unintended recipient(s) of blind copies, date, and subject matter. The circumstances of its destruction shall be set forth, and any documents relating to such destruction shall be produced.
5. If it is claimed that any document called for in this discovery demand is subject to any applicable privilege, work product doctrine, or otherwise protected from disclosures, identify for each document the nature of the privilege (including work product) that is being claimed and the author of the document, the recipients of the document, the subject matter of the document and the date on which the document was created.
6. The fact that a document is produced by another party does not relieve ██████████ of its obligation to produce its copy of the same document, even if the two documents are identical.

7. These document requests are continuing in character so as to require you to file prompt supplementary and amended answers or responses as required by the New York Civil Practice and Rules if you obtain further or different information relevant to any of these document requests prior to trial herein.

### **DOCUMENT REQUESTS**

1. The complete closing file from the origination of the loan concerning the subject note and subject mortgage, including all underwriting documentation.
2. The complete original custodial file loan file for the subject note and subject mortgage, including photocopies of the inside and outside of any physical file, as defined by the CSMC Mortgage-Backed Pass-Through Certificates, Series 2007-1 securitization documents, including but not limited to the pooling and servicing agreement.
3. Complete copies of all documents to which [REDACTED] is entitled that are in the possession of any third party document custodian and relate to the subject loan.
4. If any documents relating to this loan are in the possession of a third party document custodian, provide complete copies of the related Custodial Agreement, Master Document Custodial Agreement, and any other contract between you and any document custodian pertaining to custodial services. This includes but is not limited to all exhibits, schedules, or attachments referred to in those agreement(s).
5. All documents concerning the servicing history for the subject note and subject mortgage from the date of the loan origination to the date of this request, including receipts by way of payment or otherwise, any loan payment histories, and all charges to the loan in whatever form.

6. A complete copy of your consolidated notes log as well as your collection notes, servicing notes, correspondence and messages, incoming and outgoing, and all other documents and other entries relating to this loan in any files or data storage devices or services of any kind.
7. All documents and correspondence with or concerning the Defendant(s), including transcripts of any phone contacts, emails and mailed correspondence. This includes, but is not limited to, any communications regarding loss mitigation options or restrictions on loss mitigation options, made between you and a third party.
8. All documents and correspondence that constitute, describe, reflect, record, mention, comment upon or otherwise refer to the Defendant(s), including files (including copies of the front and back covers), notes, memoranda, emails, notices, reports, applications, letters, warnings, phone messages, notes, diaries, appointment books, or calendars.
9. All documents concerning any foreclosure expenses, late charges, NSF check charges, appraisal fees, broker price opinions, property inspection/preservation fees, force-placed insurance charges, legal fees, recoverable corporate advances, and other expenses or costs that have been charged and/or assessed in connection with the subject note or subject mortgage.
10. All documents indicating the identities, duties, functions, and responsibilities of all employees, agents, or representatives of [REDACTED] who were directly or indirectly involved with the defendant(s), any other party to this action, the subject property, the subject note or the subject mortgage. Limit your response to only those documents that were relevant or operative at the time of the person's involvement.



11. All documents concerning the CSMC Mortgage-Backed Pass-Through Certificates, Series 2007-1 securitization, including the pooling and servicing agreement, any documents identifying the loans held in CSMC Mortgage-Backed Pass-Through Certificates, Series 2007-1, any documents concerning the transfer of loans, notes, and/or mortgages in or out of CSMC Mortgage-Backed Pass-Through Certificates, Series 2007-1, and all documents concerning any person authorized to act on the behalf of CSMC Mortgage-Backed Pass-Through Certificates, Series 2007-1 and the scope of any such person's authority.
12. All documents detailing the complete chain of title of the subject note and subject mortgage from the originator through all subsequent owners and holders to the current owner and holder, including the original subject note, a true copy of the original subject note including any and all endorsements of the subject note and the back side of any allonge or endorsement page, a true copy of the subject mortgage, assignments of the subject mortgage, assignments of the subject note, assignments in blank, lost note affidavits, any and all digital records of the complete chain of title and any other records of the complete chain of title. Concerning the original subject note, because this document is an original, please contact the undersigned to set up a time for the original subject note to be inspected and copied at the undersigned's office on or before September 4, 2012.
13. All documents in [REDACTED] possession or available to [REDACTED] that establish that [REDACTED] is the legal and/or equitable owner of the subject note and the subject mortgage. This includes but is not limited to any asset purchase agreements, mortgage loan purchase agreements, or any other document, contract or agreement

detailing the transfer of the subject note and subject mortgage whether individually or as part of a transfer of a larger group of mortgage loans.

14. All powers of attorney or any other documents that purport to grant authority to any person to sign any of the documents requested herein, including but not limited to any powers of attorney to endorse the subject note and any powers of attorney to sign assignments of the subject note and/or subject mortgage.
15. The notary registration book for any public notary who certified the signature of any person on any document requested herein.
16. All powers of attorney or any other documents that purport to grant authority to MERS or any other entity to act on behalf of any holder of the subject note and subject mortgage in the chain of title, including but not limited to any powers of attorney or other document purporting to grant authority to assign, convey, and/or transfer the subject note and/or subject mortgage.
17. Copies of all receipts for payments made by and/or received by [REDACTED] concerning a transfer of the subject note and subject mortgage.
18. All documents concerning any payments received by [REDACTED] concerning the subject note or subject mortgage from any governmental entity pursuant to or in connection with any loan modification program.
19. All documents identifying the extent to which [REDACTED] ultimate liability in this matter, along with legal fees incurred, may be covered under an insurance policy, and any claims made under such policy.
20. Any and all documents containing [REDACTED] policies and procedures with respect to lost notes, lost or incomplete assignments, or other lost or incomplete documents related to a loan's chain of title.

21. All documents concerning any physical delivery or transfer of the subject note, including but not limited to all documents concerning and/or reflecting the physical delivery of the subject note to any person or entity, including but not limited to any delivery to [REDACTED].
22. All documents concerning any transfer of servicing rights concerning the subject note and the subject mortgage.
23. All documents in [REDACTED] possession, custody, or control that establish what entity or entities have serviced the subject loan since its origination.
24. All documents concerning [REDACTED] authority to sign the assignment dated August 6, 2008 that is referenced in Paragraph 3 of the complaint.
25. All documents concerning [REDACTED] review of the subject loan for modification, including but not limited to documentation of any investor restrictions.
26. All documents concerning your policies, guidelines, or criteria regarding loss mitigation, including but not limited to any restrictions on loan modification, from August 1, 2008 to the present.
27. All documents concerning the authority of the purported signatory to the endorsement on page 3 of the note attached to [REDACTED] Order of Reference.
28. Any documents used, referenced, or referred to when responding to Defendants' Interrogatories in this case.
29. Provide a glossary, legend, and/or detailed explanation in plain English sufficient to allow for a layman's full understanding of all the data reflected in each and every document provided in response to each of the Requests set forth above, including but not limited to all accounting and transaction codes, abbreviations, and acronyms displayed or used anywhere herein.

30. A privilege log of all documents requested to be produced herein which U.S. Bank did not produce because of a claim of privilege. The privilege log must include the title of each document, the date the document was created, the author(s) of the document, the recipient(s) of the document, an identification of each author or recipient who is an attorney for Plaintiff and a brief description of the content of the document in order to enable the undersigned to evaluate your claim of privilege.

Dated: August 3, 2012  
Staten Island, New York

---

[Redacted signature block]

*Attorneys for Plaintiff*

To:

*Attorneys for Plaintiff*



SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND

-----X  
[REDACTED] AS Index No.  
TRUSTEE FOR ....

Plaintiff,

-against-

**DEFENDANTS' FIRST SET OF  
INTERROGATORIES TO  
PLAINTIFF**

Defendants.

-----X

PLEASE TAKE NOTICE that, pursuant to Sections 3101, 3123, and 3130 through 3133 of the New York Civil Practice Law and Rules, Plaintiff [REDACTED] [REDACTED] as Trustee for ..... ("U.S. Bank"), or a duly-authorized representative thereof, is required to answer fully in writing the Interrogatories set forth herein on or before September 4, 2012.

PLEASE TAKE FURTHER NOTICE that this is a continuing demand. Pursuant to Section 3101(h) of the New York Civil Practice Law and Rules, you are required to amend or supplement any response previously given to these Interrogatories promptly upon obtaining information that the previous response was incorrect or incomplete when made, or that the previous response, though current and complete when made, no longer is correct and/or complete.

**DEFINITIONS**

1. **Party to this Action.** The term “party to this action” means any person or entity named as a party to any unresolved judicial action concerning the subject property, including those designated by fictitious names.
2. **You/Your;** [REDACTED]. The terms “you,” “your” or “[REDACTED]” mean Plaintiff [REDACTED] and the officers, directors, employees, corporate parents, subsidiaries, and affiliates thereof, and, unless stated otherwise, [REDACTED] and the officers, directors, employees, corporate parents, subsidiaries, and affiliates thereof.
3. **MERS.** The term “MERS” means Mortgage Electronic Registration Systems, Inc. and the officers, directors, employees, corporate parents, subsidiaries, and affiliates thereof.
4. **Defendants.** The terms “Defendant” or “Defendants” mean ....
5. **Subject Property.** The term “subject property” means the property located at ....
6. **Subject Loan.** The term “subject loan” means the mortgage loan originated on [DATE] between defendants and [REDACTED], concerning the property located at ....
7. **Subject Note.** The term “subject note” means the promissory note executed by [mortgagor] in favor of [REDACTED] on [date] in the amount of \$[ ].
8. **Subject Mortgage.** The term “subject mortgage” means the mortgage given by [defendants] to [REDACTED] on [date] securing the subject note.
9. **Agreement.** The term “agreement” means any formal, informal, oral or written contract between two or more parties.



10. **Communication.** The term “communication” shall include any transmission or transfer of information of any kind, whether orally, electronically, in writing, or in any other manner, at any time or place, and under any circumstances whatsoever.
11. **Document.** The term “document” shall mean the original and any nonidentical copy, regardless of origin or location, of correspondence, records, agreements, contracts, publications, periodicals, fliers or books produced or held by you, applications, manuals, tables, charts, graphs, schedules, reports, records, memoranda, notes, letters, emails, messages (including reports of telephone or other oral conversations and conferences), checks (front and back), check vouchers, check stubs or receipts, studies, analyses, journals, ledgers, circulars, bulletins, instructions, minutes or other communications, diaries, diagrams, photographs, recordings, tapes, microfilms, questionnaires, surveys and any other written or printed matter of any kind, including but not limited to any handwritten or machine-made copy and nonpaper storage, such as tape, film and computer memory devices, information stored in any internal, industry-specific software and metadata (including but not limited to any digital information stored in computers used for administration and management of the computers, the telephones, the applications or individual records such as document properties, management data, hidden properties, access controls, activity logs, router logs, phone records in digital format and security permissions). All metadata in relevant digital files must be preserved and produced. A draft or nonidentical copy is a separate document within the meaning of the term.

12. **Identify.** When referring to a person, “identify” means to give, to the extent known, the person’s full name, present or last known address, and when referring to a natural person, additionally, the present or last known place of employment.
  - a. When referring to documents, “identify” means to give, to the extent known, the (i) type of document; (ii) general subject matter; (iii) date of the document; and (iv) author(s), addressee(s) and recipient(s).
  - b. When referring to an entity, “identify” means to give, to the extent known, the entity’s full name and present or last known contact address.
13. **Parties.** The terms “Plaintiff” and “Defendants” as well as a party’s full or abbreviated name or a pronoun referring to a party means a party to this action and, where applicable, its officers, directors, partners, corporate parent, subsidiaries or affiliates.
14. **Person.** The term “person” is defined as any natural person or any business, legal or governmental entity or association.
15. **Employee.** The term “employee” means employee, independent contractor, representative or agent.
16. **Document Requests.** The term “Document Requests” refers to Defendants’ First Request to Plaintiff for Production of Documents and Things, dated August 3, 2012.
17. The following rules of construction apply to all discovery requests:
  - i. **Concerning.** The term “concerning” means relating to, referring to, describing, evidencing or constituting.

- ii. **Include/Including.** “Include” and “including” do not in any way limit a request to specific items or concepts listed, but rather shall be read to mean “including, but not limited to.”
- iii. **Each/Every and Any/All.** “Each” includes the word “every,” and “every” includes the word “each.” “Any” includes the word “all,” and “all” includes the word “any.”
- iv. **And/Or.** The connectives “and” and “or” shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the discovery request all responses that might otherwise be construed to be outside of its scope.
- v. **Number.** The use of the singular form of any word includes the plural and vice versa.
- vi. **Tense.** The use of the present tense includes the past and vice versa.

### **INSTRUCTIONS**

1. Unless otherwise specified, the period of time covered by these Interrogatories is from the time in or around July 1, 2008, up to and including the date of these Interrogatories. The Defendants reserve their right to pose additional interrogatories or to extend this time period.
2. These Interrogatories are continuing in character, requiring the filing of prompt supplementary and amended answers if Plaintiff obtains further or different information relevant to any of these Interrogatories prior to trial pursuant to CPLR 3101(h).

3. If it is claimed that an answer to any Interrogatory calls for information or an identification of documents that are privileged, work product, or otherwise protected from disclosures and such privilege or work product is asserted, you must (a) identify the nature of the privilege (including work product) that is being claimed and (b) provide the following information (unless divulgence of such information would cause disclosure of the allegedly privileged information): (i) for documents: (1) the type of document (e.g., letter, memorandum, etc.); (2) the general subject matter of the document; (3) the date of the document; and (4) such other information as is sufficient to identify the document for a subpoena duces tecum, including, where appropriate, the author, addressee, and any other recipient to each other; (ii) for oral communications: (1) the name of the person making the communication and the names of persons present while the communication was made and, where not apparent, the relationship of the persons present to the person making the communication; (2) the date and place of communication; and (3) the general subject matter of the communication. Any part of an answer to which you do not claim privilege or work product should be given in full.
4. If any document required to be identified in these Interrogatories was at one time in existence, but has been lost, discarded or destroyed, identify such document by date, type and subject matter, and describe the circumstances under which the document was lost, discarded or destroyed.
5. Plaintiff must answer each Interrogatory separately and fully, unless it is objected to, in which event the reasons for the objections should be specifically and separately stated. Answers to these Interrogatories should set forth each question

before each answer. No part of an Interrogatory should be left unanswered merely because an objection is interposed to another party of the Interrogatory.

### **INTERROGATORIES**

1. Identify the current owner and holder of the subject note and subject mortgage.
2. Identify the date on which the current owner and holder obtained its interest in the subject note and subject mortgage and describe the transaction by which such interest was transferred to such current owner or holder, including but not limited to the consideration paid in connection with such transaction. If the subject note and subject mortgage were acquired on separate dates, please specify the date for each respectively.
3. Identify the terms on which the subject note and subject mortgage were sold or transferred to the current owner and holder. Indicate the total consideration paid to any other person or entity in connection with such purchase or transfer, any fees, charges, or discounts applied to the consideration and any other terms with which the current owner and holder was bound to comply as a condition of the transfer or sale.
4. Identify all entities that have held any type of ownership interest in the subject note and subject mortgage since their origination, identifying the date of transfer to each such entity, the prices paid for and terms of each transfer, and the documents that evidence the entity's legal title to the subject note and subject mortgage.
5. Identify all documents concerning the chain of title of the subject note and subject mortgage, including but not limited to any mortgage loan purchase agreements, asset purchase agreements, endorsed notes, allonges, assignments, and pooling and servicing agreements.

6. Identify each person having knowledge of the chain of title or any transfers or assignments of the subject note and/or subject mortgage. For each such person, identify his or her area of knowledge, including but not limited to information concerning any endorsements of the subject note, any assignments of the subject note and/or subject mortgage, and/or any transfers of the subject note and/or subject mortgage.
7. Identify each person who has knowledge of the assignment transferring the subject mortgage and note from MERS as nominee for ██████████ to ██████████ executed on August 6, 2008 and recorded in the office of the county clerk, Richmond County, State of New York on September 5, 2008, and for each such person, identify the area of his or her knowledge.
8. Identify the basis and/or source of MERS's authority to transfer the subject note and subject mortgage to ██████████ and identify all documents concerning such authority.
9. Set forth the basis and/or source of ██████████ authority to sign the August 6, 2008 assignment on behalf of MERS and identify all documents concerning such authority.
10. List the name, business and residence address, business and residence telephone number, employer, title, email address and job description for the purported signatory to an alleged endorsement on page 3 of the note that was attached to Plaintiff's Order of Reference.
11. Identify the date that the purported signatory signed and/or stamped his signature on page 3 of the note that was attached to Plaintiff's Order of Reference.

12. Identify each person or entity who is or has been responsible for the servicing of the subject loan since its origination to the present and for each, identify the time period during which such person serviced the loan, his or her responsibilities concerning the servicing of the subject loan, and any actions he or she has taken in regards to the subject loan, including but not limited to reviewing the loan for qualification for loss mitigation programs.
13. Identify each person at [REDACTED] with knowledge and information concerning the subject loan, including but not limited to all persons involved in reviewing the loan for loss mitigation programs, overseeing the loan during the loss mitigation process, making approval and denial decisions regarding loss mitigation, and initiating and prosecuting this foreclosure action.
14. Identify all correspondence, internal memoranda, analyses, and communications concerning the loss mitigation options considered for the subject loan, including but not limited to loss mitigation options available pursuant to the federal Home Affordable Modification Program or the National Mortgage Servicing Settlement.
15. State the name(s) of any securitization and/or loan pool in which the subject note and subject mortgage have ever been held since origination of the mortgage loan.
16. List the name, business and residence address, business and residence telephone number, employer, title, email address and job description for [REDACTED] whose name appears on an alleged assignment dated August 6, 2008 that is referenced in [REDACTED] the complaint. Identify her present employer and her employer at the time her name was placed on the above-referenced assignment.

17. List the name, business and residence address, business and residence telephone number, employer, title, and job description for all persons beyond [REDACTED] and the purported signatory to the alleged endorsement on [REDACTED] [REDACTED] the note that was attached to Plaintiff's Order of Reference who are believed or known by [REDACTED] to have knowledge of any facts that establish the plaintiff's ownership of the subject note and subject mortgage and specify the facts about which each person has knowledge.
18. For each of the persons listed in response to the above Interrogatory, please state their employment history (attach pages if necessary) and whether they have personal knowledge regarding the subject loan transaction.
19. Where are the original subject note and original subject mortgage signed by Defendants? Give details of their physical location including the address, the person or entity that is currently in possession of the original subject note and original subject mortgage and whether any person or entity is holding the subject note and/or subject mortgage as a custodian or trustee.
20. List the name, business and residence address, business and residence telephone number, employer, title, email address, and job description of the person who delivered the original subject note to [REDACTED] along with the date of delivery, provided such delivery was ever made. If [REDACTED] subsequently delivered the original subject note to a third party, state to whom the original note was delivered, along with such person's or entity's address.
21. List the name, business and residence address, business and residence telephone number, employer, title, email address, and job description for all persons who are



believed or known by [REDACTED] to have knowledge of any facts concerning the delivery of the original subject note to and/or by [REDACTED] provided such delivery was ever made.

22. Set forth the total amount currently alleged to be due on the subject loan (including all fees and charges resulting from this proceeding), an itemization of the amounts included in such total, the method of calculating this debt, and identify all documents that [REDACTED] will rely upon to establish such amounts.
23. Identify each person with knowledge of the recordkeeping system utilized by [REDACTED] [REDACTED] from August 1, 2008 to the present and for each such person, identify his or her area of knowledge, including but not limited to the receipt and recordation of written correspondence, and the receipt and application of payments.
24. Identify each person with knowledge of [REDACTED] loss mitigation programs and procedures from August 1, 2008 to the present and for each such person, identify his or her area of knowledge.
25. State whether the subject loan is eligible for the Home Affordable Modification Program, including all stated limitations on [REDACTED] participation in the Home Affordable Modification Program.
26. State whether the subject loan is eligible for modification pursuant to the National Mortgage Servicing Settlement, including all stated limitations on [REDACTED] ability to modify loans pursuant to the National Mortgage Servicing Settlement.
27. State whether any limitations exist regarding the ability of [REDACTED] to modify the subject loan.
28. Identify all documents and/or communications concerning any limitations on [REDACTED] [REDACTED] ability to modify mortgage loans.

29. Describe the results of any loss mitigation review concerning the Defendant(s), including the reasoning for any denial of a loan modification.
30. Identify all persons with knowledge of the mortgage loans included in CSMC Mortgage-Backed Pass-Through Certificates, Series 2007-1.
31. Identify all persons with knowledge of the loss mitigation policies, procedures, and/or restrictions applicable to loans governed by the pooling and servicing agreement of CSMC Mortgage-Backed Pass-Through Certificates, Series 2007-1.
32. State whether the subject note and/or subject mortgage is subject to the pooling and servicing agreement of CSMC Mortgage-Backed Pass-Through Certificates, Series 2007-1.
33. If U.S. Bank is not able to produce the original subject note pursuant to Defendants' First Request to Plaintiff for Production of Documents and Things dated August 3, 2012, then state who had possession of the original subject note before it was lost, when it was lost, who discovered it was lost, what type of report was prepared at that time, when U.S. Bank requested the original subject note, when any lost note affidavit was prepared, who prepared it and who ordered it.
34. Identify when precisely [REDACTED] began (and ended, if applicable) servicing the loan at issue and describe each agreement, guide, document, or other authority under which you have serviced the loan. If [REDACTED] has begun or ended servicing the loan at issue more than once, identify each start and end date and describe the agreements, guides, documents, and other authority under which you have serviced the loan for each period.

35. State whether [REDACTED] is entitled to keep any payments made pursuant to the subject note and subject mortgage if the loan is brought current, not including any fees for servicing the loan. If the answer is no, state who is entitled to the payments.
36. State whether [REDACTED] has ever been entitled to keep any payments made pursuant to the subject note and subject mortgage, not including any fees for servicing the loan. If the answer is no, state who was entitled to the payments.
37. Do you agree that the Single Family Servicing Guides posted by Fannie Mae and Freddie Mac are the industry standards for the servicing of mortgage loan accounts securing 1-4 unit residential properties? If you disagree, please state which mortgage servicing guidelines you recognize as the industry standard and explain why you believe that they are the industry standard.
38. Identify any industry standards you recognize that govern your accounting procedures and practices with respect to the mortgage loans that you service.
39. Identify all documents that you intend to introduce at trial.
40. Identify any person you may call as a witness.
41. Identify any person whose affidavit you may use to support a summary judgment motion.
42. Identify any person you have communicated with and/or may communicate with to determine if he or she:
- a. personally reviewed Plaintiff's documents and records relating to this case for factual accuracy; and
  - b. confirmed the factual accuracy of the allegations set forth in the complaint and any supporting affirmations filed with the Court, as well as the accuracy of the notarizations contained in the supporting documents filed therewith.

43. Identify each expert whom you intend to call as a witness at trial.
44. If you or your expert witnesses intend to rely upon or offer into evidence any textbook, paper, journal, treatise, or other authority to substantiate any opinions and conclusions, state the exact title and author of each textbook, paper, journal, treatise, or authority.
45. State the name, employer, and job title of every person who assisted in the preparation of the answers to these Interrogatories or the responses to Defendants' First Request to Plaintiff for the Production of Documents and Things dated August 3, 2012.

Dated: August 3, 2012  
Staten Island, New York

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[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

*Attorneys for Plaintiff*

To:

*Attorneys for Plaintiff*