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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER: MANDATORY APPEARANCE FORECLOSURE CONFERENCE PART

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U.S. BANK N.A., NOT IN ITS INDIVIDUAL CAPACITY, BUT SOLELY AS LEGAL TITLE TRUSTEE FOR BCAT 2016-18TT,

Plaintiff,

DECISION AND ORDER
Index N[illegible]
Motion Seq. Nos. 2 and 3

-against-

[illegible]; JPMORGAN CHASE BANK, NA; NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE; "JOHN DOE #1" through "JOHN DOE #10" inclusive, the names of the ten last name Defendants being fictitious, real names unknown to the Plaintiff, the parties intended being persons or corporations having an interest in, or tenants or persons in possession of, portions of the mortgage premises described in the Complaint,

Defendants.

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DAVIDSON, J.

The following papers were read on the motion (Seq. No. 2) by defendant [illegible] for an order pursuant to CPLR 3124 to compel disclosure of documents and information requested at the examination before trial of plaintiff's representative held on January 3, 2018 and the notice of cross-motion (Seq. No. 3) by plaintiff denying defendant application and for a protective order pursuant to CPLR 3103:

Notice of Motion - Affirmation in Support -
Certification Pursuant to 22 NYCRR 130-1.1 -
Affirmation of Good Faith - Exhibits A-M
Notice of Cross-Motion -
Affirmation in Opposition to Motion and in Support of Cross-Motion - Exhibits A-L
Notice of Rejection of Plaintiff's Cross-Motion - Exhibit A(3)
Affirmation in Further Support of Motion - Exhibit A(2)

Upon the foregoing papers, these motion are consolidated for decision and determined as follows:

In this residential foreclosure proceeding, plaintiff seeks to foreclose a mortgage in the original sum of $456,000 plus interest executed by defendant on October 31, 2006 in favor of defendant JPMorgan Chase Bank, N.A.[1] Plaintiff asserts that on the same date, defendant executed a promissory note under which he was obligated to repay the entire indebtedness to the mortgage lender on or before November 1, 2036.[2] Plaintiff claims that on May 19, 2010, such mortgage was assigned to Chase Home Finance LLC. Plaintiff further claims that on July 26, 2011, defendant executed, acknowledged and delivered a mortgage modification agreement to the defendant JP Morgan Chase Bank, N.A., which among other things, modified the principal balance, interest rate and monthly payment of the original indebtedness.[3] Plaintiff asserts that the note and mortgage were ultimately assigned to plaintiff as evidenced by the allonges affixed to the note and later established by a written instrument dated December 6, 2016 and recorded in the Office of the County Clerk of Westchester on January 13, 2017, Control No. 570123197.[4] Plaintiff contends that defendant has defaulted in making timely monthly mortgage payments since July 1, 2016 and monthly thereafter.

Defendant now brings this motion pursuant to CPLR 3124 to compel discovery of certain documents and information requested at the examination before trial held on January 3, 2018 of a representative of plaintiff and by written letter of January 9, 2018.

In support of his motion, defense counsel asserts that at the deposition of plaintiff's representative and as reiterated by letter dated January 9, 2018[5], defendant made the following discovery demands for the production by plaintiff: (1) copies of all certified mail receipts, tracking reports, mailing commentaries and other information pertaining to the mailing of the default notices and 90-day notices; (2) copy of the fully executed Pooling and Servicing Agreement with all attachments and exhibits; (3) copy of the document that memorializes the exact date U.S. Bank National Association, as Trustee or document custodian for the trust, physically received the original collateral file containing the original wet ink note; (4) any allonges that mirror the allonges attached to the note with wet ink signatures by "A. Young"; (5) a certified copy of the power of attorney from the Bank of America to Selene Finance; (6) the tracking report that matches the bar code cipher that is displayed on the first page of defendant's Exhibit G-1; (7) the letter log report from MSP; (8) bank statements generated and sent for the months of November and December of 2016 if any exist; and (9) bailee letters witnessing the delivery of the original collateral file to U.S. Bank, when it first received physical delivery of the collateral file, if any exist.

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[1] Defendant's Exhibit B.

[2] Defendant's Exhibit A.

[3] Defendant's Exhibit E.

[4] Defendant's Exhibits A and C.

[5] Defendant's Exhibit L.

By Referee Report and Order dated January 11, 2018 and filed via NYSCEF on January 16, 2018, this Court directed plaintiff to serve responses to defendant's post deposition demands so as to be received by defendant on or before January 23, 2018.[6] By email dated January 23, 2018, plaintiff's counsel sought an adjournment to submit responses to defendant's demands until February 20, 2018. However, on January 24, 2018, plaintiff provided a response to defendant's demands with objections and attachments. While the attachments are not included in plaintiff's motion papers, it appears that plaintiff provided documents in response to Demand #1, 7 and 8.

It is defendant's position that without this discovery material, his ability to develop his defenses (inter alia, his defenses of standing, invalid assignments and/or transfers of the alleged mortgage and note, payment, fraud, violation of the statute of frauds and improper notice) has been impaired to his prejudice. Plaintiff counters that it has fully complied with defendant's post-deposition discovery demands with a response served on January 24, 2018.[7] Plaintiff further contends that defendant has failed to demonstrate that the documents sought in items 2, 3, 4, 5, 6,[8] and 9, particularly, the fully executed pooling and servicing agreement, are material and necessary. Plaintiff also asserts that it is not required to produce evidence of the factual description of the physical delivery of the original collateral file containing the original note and mortgage in addition the documents plaintiff has previously disclosed since it has already established it has standing to sue, the material sought is privileged or confidential, and it is thus entitled to a protective order pursuant to CPLR 3103.

Generally, parties to litigation are entitled to full disclosure of all evidence material and necessary in the prosecution or defense of an action, regardless of the burden of proof (CPLR 3101[a]). The words "material and necessary" as used in the statute have been interpreted liberally to require disclosure, upon request "of any facts bearing on the controversy which will assist [the parties'] in preparation for trial by sharpening the issues and reducing delay and prolixity" (*see Allen v Cromwell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]; *see also Hoenig v Westphal*, 52 NY2d 605 [1981]; *Yoshida v Hsueh-Chih Chin*, 111 AD3d 704 [2d Dept 2013]). CPLR 3101(a) requires "full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof." The phrase "material and necessary" is "to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason" (*Allen v Crowell-Collier Publishing Co.*, 21 NY2d 403, 406 [1968]; *see Foster v Herbert Slepoy Corp.*, 74 AD3d 1139 [2d Dept 2010]). The court has broad discretion to supervise discovery and to determine whether information sought is material and necessary in light of the issues in the matter (*Mironer v City of New York*, 79 AD3d 1106, 1108 [2d Dept 2010]; *Auerbach v Klein*, 30 AD3d 451, 452 [2d Dept 2006]).

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[6]Defendant's Exhibit L.

[7]Plaintiff's Exhibit L.

[8]Defendant's Exhibit S. NYSCEF Doc. No. 83 indicates that plaintiff has furnished defendant with the tracking report that matches the bar code cipher that is displayed on the first page of defendant's Exhibit G-1.

Material which is privileged, however, is not discoverable (CPLR 3101 [b]). The burden of establishing that certain documents are privileged and protected from discovery is on the party asserting the privilege, and the protection claimed must be narrowly construed (*Spectrum Sys. Intl. Corp. v Chemical Bank*, 78 NY2d 371 [1991]; *148 Magnolia, LLC v Merrimack Mut. Fire Ins. Co.*, 62 AD3d 486, 487 [1st Dept 2009]). The burden cannot be satisfied by counsel's conclusory assertions of privilege; rather, competent evidence establishing the privilege must be set forth by the party asserting the privilege (*see Robertson v Brookdale Hosp. Med. Ctr.*, 153 AD3d 743 [2d Dept 2017]; *Kneisel v QPH, Inc.*, 124 AD3d 729 [2d Dept 2015]; *Claverack Coop. Ins. Co. v Nielson*, 296 AD2d 789 [2002]; *Agovino v Taco Bell 5083*, 225 AD2d 569, 571 [2d Dept 1996]; *Martino v Kalbacher*, 225 AD2d 862 [3d Dept 1996]; *Smith v Ford Found.*, 231 AD2d 456 [1st Dept 1996]).

For a document to be privileged as an attorney-client communication pursuant to CPLR 4503 (a), the document must be primarily or predominantly a communication of a legal character, for the purpose of obtaining or rendering legal advice or services, and intended to be confidential (*People v Osorio*, 75 NY2d 80, 84 [1989]). Communications between counsel and client which are voluntarily shared with third-parties are generally not privileged (*People v Osorio*, 75 NY2d at 84; *People v Harris*, 57 NY2d 335, 343 [1982]; *Sieger v Zak*, 60 AD3d 661, 662 [2d Dept 2009]). An exception, however, exists for communications made by or in the presence of "one serving as an agent of either attorney or client" (*Robert v Straus Prods. v Pollard*, 289 AD2d 130, 131 [1st Dept 2001]; *Delta Fin. Corp. v Morrison*, 13 Misc3d 441 [Sup Ct, Nassau County 2006, Warshawsky, J.]), since a client has a reasonable expectation that such communications will remain confidential (*People v Osorio*, 75 NY2d at 84; *Hudson Ins. Co. v Oppenheim*, 72 AD3d 489 [1st Dept 2010]).

With regard to matters claimed to be of a confidential nature, there is a presumption of openness and the burden is on the party seeking to establish otherwise, with the court having to balance the interests of the parties with the interests of the public (*see, e.g., Mancheski v Gabelli Group Capital Partners*, 39 AD3d 499 [2d Dept 2007]). When the burden is met, pursuant to CPLR 3103(a), "[t]he court may at any time on its own initiative, or on motion of any party... make a protective order denying, limiting, conditioning or regulating the use of any disclosure device," including confidentiality orders (*Finch, Pruyn & Co. v Niagara Paper Co.*, 228 AD2d 834 [3d Dept 1996]). A confidentiality order may be issued where a party establishes that there is a legitimate concern for exposure of trade secrets (*Camenos v F.W. Woolworth Corp.*, 233 AD2d 212 [1st Dept 1996]).

A trade secret is defined as "any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it" (*Ashland Management v Janien*, 82 NY2d 395 [1993], *citing* Restatement of Torts §757, comment b; *Mann v Cooper Tire Co.*, 33 AD3d 24 [1st Dept 2006], *lv denied* 7 NY3d 718, *rearg denied* 8 NY3d 956 [2007]). In deciding a trade secret claim several factors should be considered, including but not limited to: (1) the extent to which the information is known outside of the business; (2) the extent to which it is known by employees and others involved in the business; (3) the extent of measures taken by the business to guard the secrecy of the information; (4) the value of the information to the business and its competitors; (5) the amount of

effort or money expended by the business in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others (*see Ashland Management v Janien, 82 NY2d 395, citing* Restatement of Torts §747, comment b).

Here, plaintiff has not established that any of the documents it has refused to provide are privileged. Moreover, plaintiff has failed to demonstrate that any of the disputed documents contain any trade secrets, proprietary business information or competitively sensitive information. Plaintiff's counsel's bare, conclusory assertions, recited in boilerplate fashion, that such documents are privileged or somehow confidential are insufficient to satisfy plaintiff's burden. Further, plaintiff has refused or failed to properly assert any privilege by producing a detailed privilege log (*see Park Assocs. v N.Y. State Ag (In re Subpoena Duces Tecum to Jane Doe)*, 99 NY2d 434 [2003]; *Schindler v City of New York*, 134 AD3d 1013 [2d Dept 2015]).

Finally, plaintiff's claim that such documents are not relevant or material since plaintiff has demonstrated its standing is not persuasive. Generally, a plaintiff establishes its prima facie case through the production of the mortgage, the unpaid note, and evidence of default (*Plaza Equities, LLC v Lamberti*, 118 AD3d 688, 689 [2d Dept 2014]). Where, as here, standing is put into issue by a defendant, the plaintiff must prove its standing in order to be entitled to relief (*see Deutsche Bank Trust Co. Ams. v Garrison*, 147 AD3d 725 [2d Dept 2017]). A plaintiff in a mortgage foreclosure action has standing where it is the holder or assignee of the underlying note at the time the action is commenced (*see Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355, 361 [2015]). Either a written assignment of the underlying note or the physical delivery of the note, properly endorsed, is sufficient to transfer the obligation, and the mortgage passes with the debt as an inseparable incident (*see Bank of Am., N.A. v Martinez*, 153 AD3d 1219 [2d Dept 2017]). In this instance, plaintiff attached copies of the endorsed note, mortgage and attendant documents to the complaint.[9] Moreover, it is undisputed that plaintiff produced the original note, mortgage and assignments of mortgage for inspection. Plaintiff argues that it has demonstrated its standing by also producing its representative, Peter Josyln, who testified at an examination before trial, that plaintiff is the owner of the note and mortgage and was so on the date that the action was commenced.

However, there has been no judicial determination of plaintiff's standing to date. Notably, plaintiff has withdrawn its motion for summary judgment. Therefore, plaintiff cannot be heard to complain that it must provide discovery relating to the issue of standing when its actions have contributed to the procedural posture of this case. Consequently, defendant is entitled to the outstanding discovery items he seeks related to his affirmative defenses.[10]

Accordingly, it is

ORDERED that defendant's motion is granted to the extent that, on or before March 30,

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[9]NYSCEF Doc Nos. 1, 2, 4, 5, 6, 7, 8 ,9, 10.

[10]Defendant's Exhibit S, NYSCEF Doc. No. 83.

2018, plaintiff shall produce the documents demanded by defendant on January 9, 2018, to the extent not previously provided, as follows: (1) copies of all certified mail receipts, tracking reports, mailing commentaries and other information pertaining to the mailing of the default notices and 90-day notices; (2) copy of the fully executed Pooling and Servicing Agreement with all attachments and exhibits; (3) copy of the document that memorializes the exact date U.S. Bank National Association, as Trustee or document custodian for the trust, physically received the original collateral file containing the original wet ink note: (4) any allonges that mirror the allonges attached to the note with wet ink signatures by "A. Young"; (5) a certified copy of the power of attorney from the Bank of America to Selene Finance; (6) the tracking report that matches the bar code cipher that is displayed on the first page of defendant's Exhibit G-1; (7) the letter log report from MSP; (8) bank statements generated and sent for the months of November and December of 2016 if any exist; and (9) bailee letters witnessing the delivery of the original collateral file to U.S. Bank, when it first received physical delivery of the collateral file, if any exist; and it is further

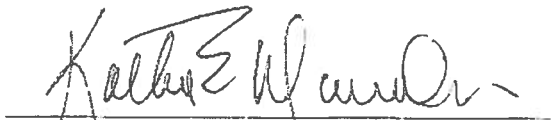
ORDERED that plaintiff's cross-motion for a protective order pursuant to CPLR 3103 is denied; and it is further

ORDERED that if plaintiff fails to produce the discovery as ordered herein, defendant shall file on NYSCEF on or before April 3, 2018, an affirmation of noncompliance and a proposed order precluding plaintiff from introducing at trial or otherwise, those documents which have not been produced; and it is further

ORDERED that counsel shall appear in the Mandatory Appearance Part - Foreclosure, Courtroom 800 on April 5, 2018 at 2:00 p.m., at which time it is contemplated that a trial readiness order shall issue and the matter shall be certified as trial ready.

The foregoing constitutes the Decision and Order of this Court. All other arguments raised and evidence submitted by the parties have been considered by this Court notwithstanding the specific absence of reference thereto.

DATED: White Plains, New York.
March 21, 2018



HON. KATHIE E. DAVIDSON, AJSC

TO:

Knuckles, Komosinski & Manfro, LLP
Attorneys for Plaintiff
565 Taxter Road
Suite 590
Elmsford, New York 10523

BY NYSCEF

R. David Marquez, P.C.
Attorneys for Defendant
170 Old Country Road
Suite 505
Mineola, New York 11501
BY NYSCEF