SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SULLIVAN

U.S. BANK, NATIONAL ASSOCIATION, AS SUCCESSOR TRUSTEE TO BANK OF AMERICA, N.A., AS SUCCESSOR BY MERGER TO LASALLE BANK, N.A. AS TRUSTEE FOR THE CERTIFICATEHOLDERS OF THE MLMI TRUST, MORTGAGE LOAN ASSET-BACKED CERTIFICATES, SERIES 2006-WMC2,

Plaintiff,

- against -

Defendants.

DECISION & ORDER

Motion Return Date: March 13, 2017
RJI No.: 52-36633-15
Index No.: 1214-2014

Appearances:

For Plaintiff	*For Defendant*
Jeremy D. Kaufman, Esq.	R. David Marquez, Esq.
Ras Boriskin, LLC	R. David Marquez, P.C.
900 Merchants Concourse, Suite 106	170 Old Country Road, Suite 505
Westbury, NY 11590	Mineola, NY 11501

Schick, J.:

This matter comes before the Court by way of defendant , Notice of Motion for an Order pursuant to CPLR 3124 and 3126 striking plaintiff's complaint, or in the alternative, compelling plaintiff to respond to document demands and produce a witness to appear for deposition. Plaintiff has cross moved for summary judgment, default judgment against certain defendants, and dismissal of plaintiff's counterclaims.

I. BACKGROUND

This is an action to foreclose a mortgage upon 73 Mountain Road, Bloomingburg, NY 12721 given by defendant ; to plaintiff's predecessor in interest on or about January 25, 2006. Affirmation of Jeremy D. Kaufman dated October 31, 2016 ("Kaufman Aff.") at ¶¶ 2-4. Defendant defaulted on his payment obligation on September 1, 2008. *Id.* at ¶ 7. Bank of America, a previous servicer of the subject loan, allegedly sent plaintiff a "Notice of Intent to Accelerate" on September 20, 2011. *Id.* at ¶ 8. Bank of America allegedly sent a "90 Day Notice" in accordance with RPAPL 1304 on June 24, 2013, and made its filing with the New York State Department of Financial Services in accordance with RPAPL 1306 on June 25, 2013. *Id.* at ¶¶ 9-10. Plaintiff subsequently accelerated the loan. *Id.* at ¶ 12. The instant action was commenced on June 4, 2014. Defendant was served with supplemental summons and complaint by publication, and appeared in this action through counsel by filing a verified answer with counterclaims, along with discovery demands, on July 7, 2015. *Id.* at ¶¶ 18, 26. Plaintiff served a reply to defendant's counterclaims on January 13, 2016. *Id.* at ¶ 27. A preliminary conference was held by this Court on May 10, 2016, at which plaintiff's failure to respond to defendant's discovery demands was noted. Affirmation of R. David Marquez dated September 2, 2016 ("Marquez Moving Aff.") at ¶ 9, Ex. G. Plaintiff was ordered at that conference to file a note of issue within 90 days. *Id.* On June 7, 2016, plaintiff served responses and objections to only some of defendant's discovery demands, and filed its note of issue on August 8, 2016. Kaufman Aff. at ¶¶ 28-29. Defendant's counsel sent two letters to plaintiff's counsel objecting to the sufficiency of plaintiff's discovery responses. Marquez Moving Aff. at ¶¶ 11-12. Apparently receiving no response, on September 13, 2016, defendant filed the instant motion to strike plaintiff's complaint, or in the alternative, to compel production of documents and a witness for deposition.

Plaintiff cross moved on November 4, 2016 for summary judgment, default judgment against certain other defendants, and to dismiss defendant's counterclaims.

II. ANALYSIS

Because much of the instant dispute hinges upon plaintiff's standing to foreclose, and because this Court finds that there are triable issues of fact as whether plaintiff has such standing, the Court will address the cross motion for summary judgment first, and then each other motion in logical sequence.

A. Plaintiff's Cross Motion for Summary Judgment

1. Prima Facie Entitlement

Plaintiff has established its prima facie entitlement to summary judgment by submitting proof of the mortgage, unpaid note, and defendant's default. *Bank of New York Mellon v. McClintock*, 138 A.D.3d 1372, 1373 (3d Dep't 2016); Kaufman Aff. at ¶¶ 4, 7-8 Exs. A, B, E; Affidavit of Jerrell Menyweather dated June 30, 2015 ("Menyweather Aff."). Defendant has failed in response to raise a triable issue of fact concerning the existence of the mortgage and note, as well as his default thereunder.[1]

2. Standing to Foreclose

"[B]ecause defendant raised the issue of standing in [his] answer, plaintiff [bears] the additional burden of demonstrating that, 'at the time the action was commenced, [it] was the holder or assignee of the mortgage and the holder or assignee of the underlying note.'" *McClintock*, 138 A.D.3d at 1373-74 (quoting *Deutsche Bank Nat'l. Trust Co. v Monica*, 131

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[1] Although defendant argues that the amount currently due under the note is incorrect, this is an issue to raise before the referee ultimately assigned to compute the amount due, and does not in and of itself preclude entry of summary judgment. *See Long Island Sav. Bank of Centereach, F.S.B. v. Denkensohn*, 222 A.D.2d 659, 660 (2d Dep't 1995) ("the existence of . . . a dispute [as to the exact amount owed by the mortgagor] does not preclude the issuance of summary judgment directing the sale of the mortgaged property.").

A.D.3d 737, 738 (3d Dep't 2015)). It is, however, "the note, and not the mortgage, [that] is the dispositive instrument that conveys standing to foreclose under New York law," and "[o]nce a note is transferred . . . the mortgage passes as an incident to the note." *Aurora Loan Servs., LLC v. Taylor*, 25 N.Y.3d 355, 361 (2015) (quotation omitted). "Either a written assignment of the underlying note or the physical delivery of the note prior to the commencement of the foreclosure action is sufficient to transfer the obligation." *McClintock*, 138 A.D.3d at 1374 (quoting *Chase Home Fin., LLC v Miciotta*, 101 A.D.3d 1307, 1307 (3d Dep't 2012). Where plaintiff attempts to establish its standing by way of physical possession, it must show that it "possesses a note that, on its face or by allonge, contains an indorsement in blank or bears a special indorsement payable to the order of the plaintiff . . . ." *Wells Fargo Bank, NA v. Ostiguy*, 127 A.D.3d 1375, 1376 (3d Dep't 2015). "[A]n undated indorsement in blank from the original lender," however, "does not evidence plaintiff's possessory interest." *Deutsche Bank Nat'l. Trust Co. v. Monica*, 131 A.D.3d 737, 738-39 (3d Dep't 2015).

Here, plaintiff seeks to establish its standing by attempting to prove that it had physical possession of the note at the time the action was commenced. In support thereof, plaintiff proffers the Menyweather Affidavit, which states, in relevant part, that upon a "review and analysis of the relevant business records and other documents of Nationstar . . . . Plaintiff received the original Note on 2/21/2014 and said note is endorsed to Plaintiff. A true copy of the original Note in Plaintiff's possession is attached as Exhibit A. . . . The original Note endorsed in blank was transferred to Plaintiff prior to commencement of this action and Plaintiff continues to hold the original Note." Menyweather Aff. at ¶¶ 1, 2, and 4. While similar affidavits, post-dating the decision in *JP Morgan Chase Bank, N.A. v. Hill*, 133 A.D.3d 1057 (3d Dep't 2015), have recently been held by the Third Department to constitute sufficient prima facie evidence of a

plaintiff's standing to foreclose (*see McClintock* 138 A.D.3d at 1374; *U.S. Bank Nat'l Ass'n v. Carnivale*, 138 A.D.3d 1220, 1221 (3d Dep't 2016)), defendant here has offered evidence in opposition that raises triable issues of fact.

As an initial matter, the Menyweather Affidavit appears to contradict itself. Mr. Menyweather attests that the original note received by Nationstar was both "endorsed to Plaintiff" and "endorsed in blank." Menyweather Aff. at ¶¶ 2, 4. *See Ostiguy*, 127 A.D.3d at 1377 ("[Affiant's] varying, and potentially inconsistent, statements do not definitively establish that plaintiff maintained physical possession of the note at the relevant time. . . ."). Furthermore, as revealed by defendant's opposition papers, three materially different versions of the same note have been produced in this litigation: (1) a note submitted by plaintiff in a 2009 action to foreclose the same mortgage on the subject premises containing no indorsement (Affirmation in Opposition of R. David Marquez dated February 19, 2017 ("Marquez Opposition Aff.") at ¶¶ 19, 28, Ex. N); (2) a note submitted by plaintiff to defendant in response to discovery demands containing an indorsement in blank (Marquez Opposition Aff. at ¶ 30, Ex. H, sub-exhibit A); and (3) a note submitted by plaintiff in connection with the instant cross motion for summary judgment containing a special indorsement payable to U.S. Bank (Kaufman Aff. at ¶ 3, Ex. A).[2] Both the note submitted to the Court in the previous foreclosure action, and the note submitted to the Court in the current action, contain stamped certifications on their first pages stating that they are true copies. Moreover, given the fact that the Menyweather affidavit attests to plaintiff's receipt of the original note on February 21, 2014, then plaintiff either didn't possess the note when it brought the 2009 foreclosure action, or if it did possess the note, then the Menyweather affidavit appears to be false.

[2] An original copy of one of these versions of the note was purportedly inspected by defendant's counsel, though it is not clear which one. Marquez Moving Aff. at ¶ 13; Marquez Opposition Aff. at ¶ 30.

The totality of this evidence warrants a deeper inquiry into "how plaintiff came into possession of the note." *Hill*, 133 A.D.3d at 1059; *see also McClintock* 138 A.D.3d at 1375 n. 3; *Carnivale*, 138 A.D.3d at 1222 n. 1. Specifically, there are triable issues of fact as to which copy or copies of the note produced in this litigation are in fact true copies of the original, when and how plaintiff came into possession of the original note, what indorsement it bore at the time, and when, why, and by whom any later indorsements were added.

3. Conditions Precedent

Defendant asserts that certain contractual and statutory conditions precedent to foreclosure have not been complied with.

Notice of Default

The subject mortgage requires that a notice of default be given before the loan may be accelerated. Kaufman Aff. at ¶ 4, Ex. B (Mortgage paragraph 22(b)). Although defendant has only generally, and not specifically, denied the performance of this condition precedent (Marquez Aff. at Ex. C, ¶ 6), plaintiff has nevertheless put its satisfaction of the condition precedent into issue on its cross motion for summary judgment by affirmatively pleading it in its Verified Amended Complaint (Kaufman Aff. at Ex. L, ¶ 10). *See Allis-Chalmers Mfg. Co. v. Malan Const. Corp.*, 30 N.Y.2d 225, 233 (1972) ("Instead of relying on the CPLR 3015(a) presumption of compliance with [contractual] conditions precedent, plaintiff in the case before us alleged in its complaint the performance or occurrence of certain conditions precedent . . . . Consequently, because the defendant's general denial is sufficient to place the plaintiff's allegations in issue, it was error to preclude defendants from offering proof under these issues."). Defendant has also argued in its opposition papers plaintiff's failure to provide proof of its mailing of notice of default. Marquez Opposition Aff. at ¶ 71-83. Accordingly, the Court will

consider whether plaintiff has established, prima facie, its mailing of a notice of default to defendant.

Jerrell Menyweather, a document execution specialist at Nationstar Mortgage LLC, servicer for plaintiff, attests that "the servicing records show that a demand letter was mailed to Roger H. Delossantos [sic] ("Defendant") on September 20, 2011, which letter advised Defendant of the default." Menyweather Aff. at ¶ 6. A copy of that letter is attached to the Kaufman Affirmation. Kaufman Aff. ¶ 8, Ex. E.[3] This bare statement, without any detail as to how exactly the affiant's servicing records show the date of actual mailing of the notice of default, and without attaching relevant portions of those servicing records, fails to meet plaintiff's burden of establishing that the default letter was sent as required by the mortgage. *See, e.g., Nassau Ins. Co. v. Murray*, 46 N.Y.2d 828, 829 (1978) (requiring proof of "an office practice and procedure followed by the [plaintiff] in the regular course of their business, which shows that the notices . . . have been duly addressed and mailed . . . ."); *TD Bank, N.A v. Leroy*, 121 A.D.3d 1256, 1258 (3rd Dep't 2014) (rejecting as insufficient a mere statement by an affiant that she "confirmed [that] the notice of default, if required, was properly mailed prior to commencement of foreclosure."); *Wells Fargo Bank, N.A. v. Pinnock*, 55 Misc. 3d 1216(A) (Sup. Ct. Suffolk Cnty. 2017) (finding prima facie proof of mailing of default notice were affiants described "a dual tracking system maintained by the mortgage lender in the regular course of business referred to as 'Mailbook' and 'TrackRight', which required 10–digit specific and 20–digit specific tracking numbers affixed to the mortgage default notices" and where print-outs from said tracking systems were attached to their affidavits). The Court rejects plaintiff's

[3] Although the Menyweather Affidavit states that the default letter is attached as Exhibit D, it is clear from the date referenced in the Menyweather Affidavit and the Kaufman Affidavit that the default letter attested to by Mr. Menyweather is in fact attached as Exhibit E.

invitation to consider the numbered averments on the face of the Menyweather affidavit to be admissible in and of themselves as business records, which they clearly are not. *See* CPLR 4518(a). The actual business records reviewed by Mr. Menyweather that purportedly establish mailing of the notice of default are not attached to his affidavit. Had they been so, they may very well have been admissible. But as the record stands now, an issue of fact exists as to whether defendant was ever properly mailed a notice of default.

RPAPL 1303, 1304, and 1306

Defendant pleads, as an affirmative defense, plaintiff's failure to satisfy the statutory conditions precedent to foreclosure prescribed by RPAPL 1303, 1304, and 1306. Marquez Aff. at Ex. C, ¶17. Moreover, plaintiff has affirmatively pled its compliance with RPAPL 1304 and 1306. Kaufman Aff. at Ex. L, ¶¶ 8-9. Accordingly, plaintiff must now establish, prima facie, that it has complied with these conditions, or that such conditions do not apply to the subject loan. *See, e.g., Leroy*, 121 A.D.3d at 1257 (2014).

"[W]ith regard to a *home loan*, at least ninety days before a lender, an assignee or a mortgage loan servicer commences legal action against the borrower . . . such lender, assignee or mortgage loan servicer shall give notice to the borrower in at least fourteen-point type" in the form of a statutorily prescribed statement. RPAPL 1304(1) (version effective July 18, 2012 to December 19, 2016) (emphasis added). "Home loan" is in turn defined as "a loan . . . in which: (i) The borrower is a natural person; (ii) The debt is incurred by the borrower primarily for personal, family, or household purposes; (iii) The loan is secured by a mortgage . . . on real estate improved by a one to four family dwelling . . . used or occupied, or intended to be used or occupied wholly or partly, as the home or residence of one or more persons *and which is or will be occupied by the borrower as the borrower's principal dwelling*; and (iv) The property is

located in this state." RPAPL 1304(5) (version effective July 18, 2012 to December 19, 2016) (emphasis added).

Here, plaintiff argues that it "was not required to send Defendant 90-Day Pre-Foreclosure Notices pursuant to RPAPL 1304 because the underlying loan is not a home loan, as the Subject Premises is not occupied by the Defendant as his principal residence." Kaufman Aff. at ¶¶ 9 & 64.[4] As evidentiary support for this assertion, plaintiff points to an affidavit of service of a debt validation letter, which states that defendant resides at 454 Effingham Avenue #B, Bronx, New York. Kaufman Aff. at ¶ 11, Ex. T. This process server's affidavit, however, indicates that the date of service upon defendant in the Bronx was April 25, 2014. This action was commenced on June 4, 2014. The 90-day notice, therefore, would have had to have been served on or before March 6, 2014. That defendant was found residing in the Bronx on April 25, 2014 says nothing of where he was residing on March 6, 2014 and earlier. Moreover, there is filed in this action a Guardian Ad Litem Report that indicates "[t]he address of 454 Effingham Avenue #B, Bronx . . . turned out to be 'vacant and boarded up' according to Plaintiff's process server." Report of Frances S. Clemente, dated June 12, 2015, at ¶ 8. Thus, there is a triable issue of fact as to what constituted defendant's "principal dwelling" during the relevant time period.

Moreover, the conclusory Menyweather Affidavit, which attests to mailing of the 90-day notice on the basis of a review of servicing records alone (Menyweather Aff. at ¶ 7) fails to establish, prima facie, that such mailing was in fact made. *See, e.g.*, *Tuthill Fin. v. Candlin*, 129 A.D.3d 1375, 1376 (3d Dep't 2015) ("Although plaintiff submitted an affidavit from one of its partners stating that the [90-day] notice had been properly mailed, such individual did not purport to have personal knowledge of such fact nor is a contemporaneous affidavit of service

[4] RPAPL 1304 90-day notices were nevertheless purportedly mailed on June 24, 2013. Kaufman Aff. at ¶ 9, Ex. F; Menyweather Aff. at ¶ 7.

included in the record."). Accordingly, there is a triable issue of fact as to whether the 90-day notice, if required, was in fact ever mailed in accordance with statutory requirements.

While defendant also claims that the form of the 90-day notice sent was defective, in that it did not give him 90-days in which to cure his default (Marquez Opposition Aff. at ¶ 87), the version of the statute in effect in 2014 did not explicitly require a 90-day cure period, only a 90-day forbearance in initiating legal proceedings after having served the statutory notice. *See* RPAPL 1304 (version effective July 18, 2012 - December 19, 2016).

To the extent that RPAPL 1306 applies, plaintiff has presented prima facie proof of its compliance with this provision. Kaufman Aff. at ¶ 10, Ex. G. Defendant has presented no contrary evidence.

RPAPL 1303 requires that a certain statutorily prescribed "Help for Homeowners" notice be included along with the service of a summons and complaint in a foreclosure action involving "residential real property" where the subject premises is "an owner-occupied one-to-four family dwelling." Here, for the same reasons discussed above, there is a triable issue of fact as to when defendant "occupied" (as his "principal dwelling" or otherwise) the subject premises. Additionally, plaintiff has presented no proof whatsoever of having served the Help for Homeowners notice along with the summons and complaint. Preceding the original summons and complaint, attached as Exhibit A to the Marquez Moving Affirmation, is a copy of a Help for Homeowners notice. Preceding the supplemental summons, which was the one actually served on defendant by publication, there is no copy of the Help for Homeowners notice. Marquez Moving Aff. at Ex. B; Kaufman Aff. at Ex. L. Accordingly, there also exists a triable issue of fact as to whether the Help for Homeowners notice was served upon defendant by publication along with the supplemental summons.

4. Affirmative Defenses

Affirmative Defenses 10-11 and 13
(Failure to State a Cause of Action)

Failure to state a cause of action is not an affirmative defense, but rather "harmless surplusage." *Citibank (S.D.) N.A. v. Coughlin*, 274 A.D.2d 658, 660 (3d Dep't 2000). Affirmative defenses 10-11 and 13 are therefore not stricken. *See Riland v. Frederick S. Todman & Co.*, 56 A.D.2d 350, 353 (1st Dep't 1977) ("The assertion of [the defense of failure to state a cause of action] in an answer should not be subject to a motion to strike or provide a basis to test the sufficiency of the complaint.").

Affirmative Defenses 1-4, 6-9, 14, and 18
(Lack of Standing to Sue)

For the reasons discussed above, issues of material fact exist as to plaintiff's standing. Affirmative defenses 1-4, 6-9, 14, and 18 are therefore not stricken.

Affirmative Defense 15
(Fraud)

Fraud requires proof of "a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury." *Lama Holding Co. v. Smith Barney Inc.*, 88 N.Y.2d 413, 421 (1996). Defendant does not plead facts sufficient to satisfy these elements, nor does defendant allege any facts sufficient to put plaintiff on notice as to what defendant intends to prove at trial. CPLR 3013, 3018(b). Affirmative defense 15 is therefore legally infirm and is stricken. *Id.* Moreover, plaintiff asserts that the subject loan is not "high-cost" or "subprime" in accordance with Banking Law 6-l or 6-m (although defendant never explicitly pleads or argues that the loan is "high-cost" or "subprime"). Kaufman Aff. at ¶ 88. Defendant does not address plaintiff's contentions in his

opposition, or otherwise seek to provide additional support for his affirmative defense of fraud, and has therefore both conceded plaintiff's arguments and failed to raise a triable issue of fact as to whether plaintiff engaged in fraud. Affirmative defense 15 is also stricken for these reasons.

Affirmative Defenses 5 and 12
(Incorrect Computation of Amount Due)

The amount due under the defaulted loan is a matter to be taken up with the appointed referee if and when an order of reference is issued. Affirmative defenses 5 and 12 are therefore not stricken.

Affirmative Defense 17
(Failure to Comply with RPAPL 1303, 1304, and 1306)

For the reasons stated previously, there are triable issues of fact as to whether RPAPL 1303 and 1304 apply to the subject loan, and if so, whether they have been complied with. Affirmative defense 17 is therefore not stricken.

Affirmative Defense 19
(Failure to Join a Necessary Party)

Defendant does not identify, either in his answer or in his papers on the instant motions, the necessary party that plaintiff has failed to join. All necessary parties appear to be joined at this time. Affirmative defense 19 is therefore stricken.

Affirmative Defense 16
(Laches)

This defense is without legal merit. *First Fed. Sav. & Loan Ass'n of Rochester v. Capalongo*, 152 A.D.2d 833, 834 (3d Dep't 1989) ("the doctrine of laches is no defense to a foreclosure action."). In any event, defendant has failed to plead or show that he changed his position to his detriment in reliance upon plaintiff's delay in bringing the instant action. *Id.* Affirmative defense 16 is therefore stricken.

B. Plaintiff's Cross Motion to Dismiss the Counterclaims

Counterclaims 1-2
(Predatory Lending/N.Y Gen. Bus. Law 349)

As to the counterclaim for predatory lending, defendant does not plead how the subject loan violates Banking Law 6-l, or any other "predatory lending" statute. The mere claim that defendant "did not qualify for the loan" that was given to him (i.e. "reverse redlining") does not state a cause of action. *See EquiCredit Corp. of N.Y. v. Turcios*, 300 A.D.2d 344, 346 (2d Dep't 2002). As to the counterclaim for violation of General Business Law § 349, "[t]o assert a viable claim under General Business Law § 349(a), a plaintiff must plead that (1) the challenged conduct was consumer-oriented, (2) the conduct or statement was materially misleading, and (3) [he or she sustained] damages." *Emigrant Mortg. Co. v. Fitzpatrick*, 95 A.D.3d 1169, 1172 (2d Dep't 2012). Defendant fails to plead any materially misleading conduct by plaintiff. Defendant does not present any arguments in support of these counterclaims in his opposition papers. Counterclaims 1 and 2 are therefore dismissed for failure to state a cause of action.

Counterclaim 3
(Intentional Delay)

Defendant claims that plaintiff intentionally delayed bringing the instant action, which has caused defendant to incur more interest, fees, and charges than he otherwise would have, had the foreclosure action been brought sooner. Paragraph 12(b) of the subject mortgage provides that "[e]ven if Lender does not exercise or enforce any right of Lender under this Security Instrument or under Applicable Law, Lender will still have all of those rights and may exercise and enforce them in the future." Kaufman Aff. at Ex. B. Defendant does not present any arguments in support of this counterclaim in his opposition papers. Counterclaim 3 is therefore dismissed for failure to state a cause of action.

Counterclaims 4-6
(Standing to Sue)

Counterclaims 4-6 each relate in some way to plaintiff's standing. Because triable issues of fact exist as to plaintiff's standing, as explained previously, these counterclaims are not dismissed.

C. Defendant's Motion to Strike the Complaint or Compel Discovery

The Court declines defendant's invitation to strike plaintiff's complaint pursuant to CPLR 3126. Marquez Moving Aff. at ¶ 19. The Court will, however, entertain defendant's motion to compel responses to its Notice to Produce and Notice of Deposition. *Id.* at ¶ 20.[5]

Pursuant to CPLR 3124 and defendant's July 7, 2015 Notice of Deposition (Marquez Moving Aff. at Ex. D), the Court hereby orders plaintiff to produce, within 30 days of the date of this order, a witness or witnesses who can testify at deposition as to all facts material to the issue of plaintiff's standing, including but not limited to, which copy or copies of the note produced in this litigation are in fact true copies of the original, when and how plaintiff came into possession of the original note, what indorsement it bore at the time, and when, why, and by whom all indorsements to the original note were added. Counsel shall cooperate in the scheduling of a time and place for said deposition(s). At least 10 days before the date scheduled for deposition, plaintiff shall produce responses to the following requests in defendant's Notice to Produce dated July 7, 2015 (Marquez Moving Aff. at Ex. D), which are relevant to the issue of standing: 1, 3, 7, 8, and 15.

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[5] It appears that defendant served both a "Notice to Produce" and a more limited "Notice of Discovery and Inspection" upon plaintiff, both dated July 7, 2015. Plaintiff only responded to the latter. Marquez Moving Aff. at ¶ 10 and Ex. H.

D. Plaintiff's Cross Motion for Default Judgment

Plaintiff's papers indicate that the Unites States, MERS, WMC Mortgage Corp, Bank of America, and Nationstar were each served on June 16, 2014. Kaufman Aff. at Ex. J. There is no affidavit of service upon defendant State of New York. *Id.* Plaintiff's papers indicate that the United States, MERS, and WMC Mortgage Corp have appeared in this action. *Id.* at Ex. N-O. Plaintiff's attorney attests to the default of Bank of America and Nationstar. Kaufman Aff. at ¶ 131. Nationstar were served pursuant to Business Corporation Law 306(b), and accordingly, additional notice pursuant to CPLR 3215(g)(4) is required before a default judgment may be entered against it. Plaintiff's papers do not contain proof of this additional notice. The motion for default judgment against Nationstar is therefore denied.[6]

As to plaintiff's request for a default judgment against Bank of America, plaintiff has failed to comply with CPLR 3215(f), in that it has not presented proof of any cognizable claim against Bank of America. Plaintiff only makes a single mention of an erroneous assignment to Bank of America and asks that this assignment be extinguished from the record. Kaufman Aff. at ¶ 16. This allegedly erroneous assignment is purportedly attached as Exhibit I. Exhibit I, however, does not show any assignments to Bank of America, but rather an assignment from WMC Mortgage Corp to plaintiff U.S. Bank, and an assignment from Bank of America to Nationstar. No other elaboration or proof of plaintiff's conclusory claim is presented. The motion for default judgment against Bank of America is therefore denied.

[6] It is not clear to this Court why plaintiff has named Nationstar—the servicer of the subject loan—as a defendant, or what relief plaintiff is seeking against Nationstar. Plaintiff therefore also fails to satisfy the requirements of CPLR 3215(f) to present "proof of the facts constituting the claim."

III. CONCLUSION

The Court has considered all other arguments of the parties and found them to be without merit. Accordingly, it is hereby **ORDERED** that:

(1) Plaintiff's cross motion for summary judgment is **GRANTED IN PART** to the extent that affirmative defenses 15, 16, and 19 are stricken. Plaintiff's cross motion for summary judgment is otherwise **DENIED**.

(2) Plaintiff's cross motion to dismiss the counterclaims is **GRANTED IN PART** to the extent that counterclaims 1-3 are dismissed. Plaintiff's cross motion to dismiss the counterclaims is otherwise **DENIED**.

(3) Defendant's motion to strike plaintiff's complaint is **DENIED**.

(4) Defendant's motion to compel production of a witness for deposition is **GRANTED**. Plaintiff shall produce, within 30 days of the date of this order, a witness or witnesses who can testify at deposition as to all facts material to the issue of plaintiff's standing, including but not limited to, which copy or copies of the note produced in this litigation are in fact true copies of the original, when and how plaintiff came into possession of the original note, what indorsement it bore at the time, and when, why, and by whom all indorsements to the original note were added. Counsel shall cooperate in the scheduling of a time and place for said deposition(s). At least 10 days before the date scheduled for deposition, plaintiff shall produce responses to the following document requests in defendant's Notice to Produce dated July 7, 2015, which are relevant to the issue of standing: 1, 3, 7, 8, and 15.

(5) Plaintiff's cross motion for default judgment is **DENIED**.

(6) Both parties shall appear, by their trial counsel, for a status conference on **September 7, 2017 at 1:30 p.m.** at the Lawrence H. Cooke Sullivan County Courthouse, 414

Broadway, Monticello, NY 12701. Counsel appearing at this conference must have full knowledge of the proceedings and papers filed to date, and be fully authorized to settle the matter or set a trial date. *Per diem appearances will not be accepted and will constitute a default.* The purpose of this status conference shall be: (a) to determine whether the action can be settled, and (b) to schedule a date for immediate trial of the issues of whether plaintiff has standing to foreclose, whether plaintiff mailed notice of default in accordance with the requirements of the mortgage, and whether RPAPL 1303 and 1304 apply to the subject loan, and if so, whether plaintiff complied therewith. Alternatively, if both parties agree at the conference that no triable issues of fact remain as to these issues, and can agree to a stipulated set of facts, the Court will allow renewed briefing as to each party's entitlement to judgment as a matter of law on these issues.

This shall constitute the Decision and Order of the Court. The original Decision and Order, along with all papers submitted for consideration, are being forwarded to the Sullivan County Clerk's Office for filing. Counsel are not relieved from the provisions of CPLR 2220 regarding service with notice of entry.

Dated: Monticello, New York
July 21, 2017

ENTER

HON. STEPHAN G. SCHICK, JSC

Papers considered: Notice of Motion; Affirmation in Support of Motion by R. David Marquez dated September 2, 2016 and all exhibits thereto; Affirmation of Good Faith Pursuant to 22 NYCRR 202.7 by R. David Marquez dated September 2, 2016; Notice of Cross-Motion for Summary Judgment, Default Judgment, Dismissal of Defendant's Counterclaims and Appointment of Referee, and Opposition to Defendant's Motion; Attorney Affirmation in

Support of Cross Motion by Jeremy D. Kaufman dated October 31, 2016 and all exhibits thereto; Attorney Affirmation by Jeremy D. Kaufman Regarding CPLR 3408 Settlement Conferences dated October 31, 2016; Affidavit by Jerrell Menyweather dated June 30, 2015; Affirmation in Opposition to Cross Motion by R. David Marquez dated February 19, 2017 and all exhibits thereto; Affidavit in Opposition to Cross Motion by dated February 22, 2017; Reply Affirmation in Further Support of Cross Motion by Jeremy D. Kaufman dated March 9, 2016.