**Affirmative Defenses**

**Njoku-160941**

* Plaintiff lacks standing to bring this action
  + 26. Defendant’s first affirmative defense erroneously alleges that “Plaintiff lacks standing to bring this action.” *See* Def.[s’] Affirm, ¶ 9. This unsubstantiated, self-serving allegation is untenable.

27. Initially, it should be noted that Defendant has not offered any supporting facts or details capable of creating an issue of fact regarding Plaintiff’s standing and the defense must be stricken on that ground alone. *See Zuckerman*, 49 N.Y.2d at 562; *Fair*, 219 A.D.2d at 455; *Whelan by Whelan*, 182 A.D.2d at 449. Notwithstanding same, in New York, it is the note, and not the mortgage, that is the dispositive instrument to convey standing in a foreclosure action. *Aurora Loan Services, LLC v. Taylor*, 25 N.Y.3d 355, 361 (2015); *JPMorgan Chase Bank v. Kaba*, 145 A.D.3d 443, 443 (1st Dept. 2016). Once the note is transferred, the mortgage passes as incident thereto. *Id*.; *Wells Fargo Bank, N.A. v. Ndiaye*, 146 A.D.3d 684, 684 (1st Dept. 2017)’ *CitiMortgage, Inc. v. Parris*, 136 A.D.3d 592, 592 (1st Dept. 2016).

28. Here, as confirmed by the January 11, 2012 affidavit of Doug Battin of Acqua Loan Services, servicing agent for Plaintiff, and the copy of the Note annexed thereto, Plaintiff possessed standing to commence this action by virtue of its physical possession of the Note. *See* **Exhibit I**. Once the original/named plaintiff establishes its standing, an assignee may continue the action of the assignor under the name of the plaintiff or the assignee’s substituted name. *See, e.g., Hirschfeld v. Fitzgerald*, 157 N.Y. 166, 177-78 (1898); *Central Federal Sav., F.S.B. v. 405 W 45th St., Inc.*, 242 A.D.2d 512, 512 (1st Dept. 1997). Accordingly, SRMOF, as Plaintiff’s assignee, possessed standing to continue and maintain this action as it is currently in physical possession of the Note. *See* Zervlik Affidavit, ¶ 5; **Exhibit A**.

29. On the basis thereof, Defendant’s first affirmative defense is devoid of any merit whatsoever and must be stricken in its entirety.

* Plaintiff has failed to credit Defendant for all payments Defendant has made
  + Defendant’s second affirmative defense baselessly claims that “Plaintiff has failed to credit Defendant for all payments Defendant has made.” Def.[s’] Affirm, ¶ 12. This conclusory, self-serving claim fails under the applicable law.

31. Again, Defendant has not offered any supporting facts or details capable of creating an issue of fact regarding the application of any payments and the defense must be stricken on that ground alone. *See Zuckerman*, 49 N.Y.2d at 562; *Fair*, 219 A.D.2d at 455; *Whelan by Whelan*, 182 A.D.2d at 449. Furthermore, it is well-settled that summary judgment is not precluded by discrepancies in the amounts of money claimed to be outstanding. *1855 Tremont Corp. v. Collado Holdings LLC*, 102 A.D.3d 567, 568 (1st Dept. 2013). Instead, the proper procedure is an order of reference, to determine the “amount due and owing to the plaintiff.” *Id.*, *citing Johnson v. Gaughan*, 128 A.D.2d 756, 757 (2d Dept. 1987). Accordingly, Defendant’s second affirmative defense is devoid of any merit whatsoever and must be stricken in its entirety.

* Plaintiffs are attempting to collect fees and charges in excess of any they may be entitled
  + Defendant’s third affirmative defense, which is nearly identical to the second affirmative defense, baselessly alleges that “Plaintiffs are attempting to collect fees and charges in excess of any they may be entitled.” Def.[s’] Affirm, ¶ 14. As with Defendant’s second affirmative defense, this unsubstantiated allegation also fails under the same applicable law. *See 1855 Tremont*, 102 A.D.3d at 568. On the basis thereof, Defendant’s third affirmative defense is devoid of any merit whatsoever and must be stricken in its entirety.
* Plaintiff failed to provide the required pre-foreclosure notices, including the Notice of Default and the 90-Day Pre-Foreclosure Notice required by RPAPL § 1304
  + Defendant’s fourth affirmative defense erroneously asserts that Plaintiff failed to provide the required pre-foreclosure notices, including the Notice of Default and the 90-Day Pre-Foreclosure Notice required by RPAPL § 1304. This assertion is inaccurate and in direct conflict with the documentary evidence annexed hereto.

34. First, Notice of Default was sent to Defendant on March 3, 2011 via first class mail at the last known address provided by Defendant, 3025 Paulding Avenue, Bronx, New York 10469, pursuant to the terms of the Mortgage. *See* Zervlik Affidavit, ¶ 9; **Exhibit D**.

35. Second, Plaintiff fully complied with the requirements of RPAPL § 1304 by serving Defendant with 90-Day Pre-Foreclosure Notices, in at least 14-point type, with a list of at least five housing counseling agencies, via certified mail and also by first class mail at the Mortgaged Premises. *See* Zervlik Affidavit, ¶ 10; **Exhibit E**.

36. Finally, Plaintiff fully complied with the requirements of RPAPL § 1306 by filing the requisite information with the Superintendent of Banks within three business days of the date the 90-Day Notices were mailed. *See* Zervlik Affidavit, ¶ 11; **Exhibit F**.

37. Based on the foregoing, Defendant’s fourth affirmative defense is devoid of any merit whatsoever and must be stricken in its entirety.

* Plaintiff and its alleged Predecessor-in-Interest have failed to comply with loan disclosure requirements of Regulation Z, 12 CFR 226.9 *et seq*. and the Truth in Lending Act 15 U.S.C. § 1640(e)
  + Defendant’s fifth affirmative defense alleges that “Plaintiff and its alleged Predecessor-in-Interest have failed to comply with loan disclosure requirements of Regulation Z, 12 CFR 226.9 *et seq.* and the Truth in Lending Act 15 U.S.C. 1601 *et seq*.” *See* Def.[s’] Affirm, § 22. This bald, conclusory allegation is untenable under the relevant facts and applicable law.

39. As a preliminary matter, it should be noted that the statute of limitations for a claim under the Truth in Lending Act (hereinafter “TILA”) is one year. *See* 15 U.S.C. § 1640(e). Here, because Defendant obtained the subject mortgage loan on June 1, 2007 (*see* **Exhibit A** and **Exhibit B**), the applicable statute of limitations period expired more than eight years ago, on June 1, 2008. As such, Defendant’s TILA defense raised in the June 28, 2016 answer (*see* **Exhibit I**) is untimely. In any event, the defense fails on the merits since as part of the closing of the Mortgage Loan, Defendant was provided with and signed the requisite TILA Statement. *See* **Exhibit J**.

40. Accordingly, Defendant’s fifth affirmative defense is devoid of any merit whatsoever and must be stricken in its entirety

* This action is barred by the Statute of Fraud
  + 41. Defendant’s sixth affirmative defense baselessly asserts that “[t]his action is barred by the Statute of Fraud.” *See* Def.[s’] Affirm, ¶ 25. This assertion is meritless as the subject mortgage is a written instrument, which was clearly executed by Defendant as security for the underlying mortgage debt, and which was properly acknowledged and recorded. *See* **Exhibit A**; **Exhibit B**. As such, the Statute of Frauds is wholly inapplicable as a defense to this action and Defendant’s meritless sixth affirmative defense must be stricken in its entirety.
* The complaint fails to state a Cause of Action upon which relief may be granted
  + 42. Defendant’s seventh affirmative defense claims that “[t]he Complaint fails to state a Cause of Action upon which relief may be granted.” *See* Def.[s’] Affirm, ¶ 27. This claim is unsustainable as Plaintiff has not only stated a cause of action for foreclosure, but Plaintiff has established its *prima facie* entitlement to summary judgment.

43. A review of Plaintiff’s Complaint reveals that it meets the notice pleading requirements of CPLR 3103 in that it names the parties, the obligation, the default, and the remedy sought. *See* **Exhibit G**. Specifically, the Complaint included the dates and details of the execution and delivery of the Mortgage and Note. Additionally, the Complaint outlined the Defendant’s promise to pay and subsequent breach thereof. As such, Plaintiff sufficiently stated a cause of action in the Complaint and moreover, Defendant has failed to identify any purported defects or omissions therein.

44. Accordingly, Defendant’s seventh affirmative defense is devoid of any merit whatsoever and must be stricken in its entirety.

**Marino-160563**

* Recitation of general denials
  + Defendant’s first affirmative defense is a recitation of general denials of the paragraphs recited with the Complaint. This defense is unsustainable and should receive no consideration from this Court.

*i. Defendant’s Boilerplate Denials are Insufficient to Rebut Plaintiff’s Prima Facie Entitlement to Summary Judgment*

11. At the outset, it is important to note that Defendant fails to offer any evidence to support denial of the Summary Judgment Motion. Indeed, a review of the Answer makes it clear that Defendant simply denies some charges of the Complaint without any explanation for said denials and does not allege any defenses to those allegations. In order to defeat a motion for summary judgment, a defendant must present evidentiary facts sufficient to raise a triable issue in regard to his or her defense. *See Rambaut v. Reinhart*, 628 N.Y.S.2d 756 (1995); *Great Western Bank v. Terio*, 606 N.Y.S.2d 904 (1994); *Manufacturers & Traders Trust Co. v. Tommell*, 621 N.Y.S.2d 280 (1994). Where a defendant’s answer consists only of general denials or conclusions of law without support facts, same is insufficient to rebut a *prima facie* showing of entitlement to summary judgment. *See, e.g.*, *Born to Build LLC v. 1141 Realty LLC*, 963 N.Y.S.2d 29, 29 (2013); *see also Lowry v. B & B Realty Dev., LLC*, 932 N.Y.S.2d 761 (N.Y. Sup Ct. 2011).

*ii. Defendant Does Not Deny Default Under the Note and Mortgage*

12. Defendant fails to offer any evidence to rebut his default under the Note and Mortgage beginning on January 1, 2011. Where, there is un-contradictory proof of the existence of a mortgage, the mortgagors default, and written notice to him of the existing default, the mortgagee is entitled to a judgment of foreclosure as a matter of law. *Credit-Based Asset Servicing and Securitization, LLC v. Grimmer*, 750 N.Y.S.2d 673 (4th Dept. 2002); *see also Miles Home Div. of Insilco Corp. v. Green*, 522 N.Y.S.2d 262 (3d Dept. 1987) (finding that the mortgagee was entitled to summary judgment in an action to foreclose the mortgage since the mortgagor did not deny his failure to make payments and the mortgagor’s bald assertions without documentary proof could not defeat the plaintiff’s summary judgment motion). Accordingly, Plaintiff’s Motion for Summary Judgment should be granted as there is no triable issue of fact. *See Chase Lincoln First Bank, N.A. v. Dietrick*, 584 N.Y.S.2d 357 (4th Dept. 1992); *New York State Urban Development Corp. v. Marcus Garvey Brownstone Houses, Inc.*, 469 N.Y.S.2d 789 (2d Dept. 1983); *Country Trust Co. v. Moran*, 35 N.Y.S.2d 211 (2d Dept. 1942).

*iii. Plaintiff Possessed Standing to Commence and Maintain this Action*

13. It is well-settled that in order to commence a foreclosure action, a plaintiff must have either a legal or equitable interest in the subject mortgage. *See Bank of New York v. Silverberg*, 86 A.D.3d 274, 279 (2d Dept. 2011); *Rosenthal*, 88 A.D. 759, 761 (2d Dept. 2011). As a general matter, once a promissory note is tendered and accepted by an assignee, the mortgage passes as an incident to the note. *Silverberg*, 86 A.D.3d at 280; *Mortgage Elec. Registration Sys., Inc. v. Coakley*, 41 A.D.3d 674, 674 (2d Dept. 2007). Under New York law, it is the note, rather than the mortgage, which is the dispositive instrument to convey standing in a foreclosure action. *Aurora Loan*, 25 N.Y.3d at 361; *see Dyer Trust 2012-1 v. Global World Realty, Inc.*, 140 A.D.3d 827, 828 (2d Dept. 2016); *JPMorgan Chase, Nat. Ass’n v. Weinberger*, 142 A.D.2d 643, 644-45 (2d Dept. 2016). In *Weinberger,* the Appellate Division held that:

A plaintiff establishes its standing in a mortgage foreclosure action by demonstrating that, when the underlying action was commenced, it was the holder or assignee of the underlying note . . . [through] either a written assignment of the underlying note or physical delivery of the note prior to the commencement of the foreclosure action. *Id.*

14. Additionally, in *JPMorgan Chase Bank, N.A. v. Roseman*, the Appellate Division clarified that “**a copy of the note [annexed] to the complaint, established *prima facie* that the plaintiff had standing**” (emphasis added). 137 A.D.3d 1222, 1223 (2d Dept. 2016); *see Deutsche Bank Nat. Trust Co. v. Leigh*, 137 A.D.3d 841, 842 (2d Dept. 2016); *Nationstar Mortg., LLC v. Catizone*, 127 A.D.3d 1151, 1152 (2d Dept. 2015); *Mortgage Electronic Registration Systems, Inc. v. Coakley*, 41 A.D.3d 674, 674 (2d Dept. 2007). Here, like in *Roseman*, the named Plaintiff had standing to commence the action by virtue of its possession of the Note at the time of commencement, as confirmed by its annexation of the Note as an exhibit to the Complaint.[[1]](#footnote-1) A copy of the Complaint was annexed to the Summary Judgment Motion as Exhibit F.

15. It is further well-settled that an assignee to a mortgage may maintain and continue a foreclosure action commenced by an assignor under the name of the original plaintiff or under the assignee’s substituted name. *See, e.g., Hirschfeld v. Fitzgeral*, 157 N.Y. 166, 177-78 (1898); *HSBC Bank USA v. Hernandez*, 92 A.D.3d 843, 844 (2d Dept. 2012); *Citimortgage, Inc. v. Stosel*, 89 A.D.3d 887, 888 (2d Dept. 2011). That an assignment may occur after commencement creates no infirmity nor any issue of standing on the plaintiff party. *See* CPLR 1018; *Wells Fargo Bank, N.A. v. Hudson*, 98 A.D.3d 576, 577 (2d Dept. 2012). Thus, Plaintiff’s demonstration of possession of the Note at the time of commencement suffices, as a matter of law, to establish Plaintiff’s standing to maintain and continue the case at bar.[[2]](#footnote-2)

*iv. This Court Should Exercise its Discretion and Excuse Any Inadvertent Omission of a Power of Attorney Pursuant to CPLR 2001*

16. As detailed above, this action was not commenced by Trifera, but by the named Plaintiff who made a *prima facie* demonstration of its standing by virtue of its annexation of the Note to the Complaint. Regardless, if Trifera was required to submit a copy of a power or attorney or servicing agreement authorizing Clearspring to act on its behalf, such an inadvertent omission should be excused by this Court pursuant to CPLR 2001. A copy of the Power of Attorney is annexed hereto as **Exhibit C**.

17. CPLR 2001 permits a court, “[a]t any stage of an action,” to disregard a party’s mistake, omission, defect, or irregularity it a substantial right of a party is not prejudiced. Here, no substantial right of Defendant has been impaired by the omission. Accordingly, it is respectfully requested that this Court exercise its discretion under CPLR 2001 and allow Plaintiff to submit the annexed Power of Attorney, so that a decision on the underlying matter may be made on the merits. *See, e.g., Torres v. Board of Educ. of City of New York*, 137 A.D.2d 1256, 1257 (2d Dept. 2016); *Long Island Pine Barrens Society, Inc. v. County of Suffolk*, 122 A.D.3d 688, 691 (2d Dept. 2014); *Avalon Gardens Rehabilitation & Health Ctr., LLC v. Morsello*, 97 A.D.3d 611, 612 (2d Dept. 2012) (finding that although the initial moving papers inadvertently omitted an exhibit, the error was rectified in the reply papers, and the trial court acted within its discretion in considering the defendant’s summary judgment motion).

* Plaintiff’s action is barred by the Statute of Limitations
  + 18. Defendant’s second affirmative defense erroneously alleges that Plaintiff’s action is barred by the Statute of Limitations. The applicable statute of limitations for a mortgage foreclosure, as a breach of contract, is six years. *Buywise Holdings, LLC v. Harris*, 821 N.Y.S.2d 213 (2d Dept. 2006); CPLR 213(4). In this case, Defendant’s default on the mortgage contract was January 1, 2011, and Plaintiff commenced the instant foreclosure action on June 12, 2015, clearly within the applicable statute of limitations.

19. Notwithstanding, Defendant offers no evidence to support his claims. Instead, he makes only bald, conclusory, and unsubstantiated allegations that are insufficient to rebut Plaintiff’s entitlement to Summary Judgment. *See, e.g.*, *M & T Mortgage Corp. v. Ethridge*, 751 N.Y.S.2d 741 (2d Dept. 2002); *LBV Properties v. Greenport Development Co.*, 591 N.Y.S.2d 70 (2d Dept. 1992); *Federal Land Bank of Springfield v. Azapian*, 469 N.Y.S.2d 474 (2d Dept. 1983). Again, a mortgagee's motion for summary judgment should be granted where the mortgagor presents nothing more than conclusory and contradictory data to support his or her affirmative defenses. *See, e.g., Northeast Sav., F.A. Bailey*, 532 N.Y.S.2d 591 (3d Dept. 1988) (holding that the plaintiff was entitled to summary judgment to foreclose on real property where its motion was supported by affidavits and documentary evidence establishing facts underlying its action, while the defendant provided only conclusory allegations to support his affirmative defenses); *see also Azapian*, 469 N.Y.S.2d 474. Accordingly, this defense is devoid of any merit whatsoever and must be stricken in its entirety.

**WHEREFORE**, Plaintiff respectfully requests that the Court grant the relief as set forth in its Notice of Motion, to wit: (1) that the Answer of Defendant be stricken and dismissed and the appearance of such Defendant be limited to a notice of appearance and waiver of all papers and notices of all proceedings in said action except copies of a Referee’s Oath and Report of Amount Due, a copy of Judgment of Foreclosure and Sale, Notice of Entry of Judgment, Notice of Sale, a copy of the Referee’s Report of Sale, and notice of proceedings to obtain surplus monies; (2) that summary judgment pursuant to CPLR 3212, be granted in favor of the Plaintiff as to the facts and issues described in Plaintiff’s Complaint; (3) that default judgment be entered against all parties in default of answering the Complaint; (4) that a referee be appointed to compute the amount due

to Plaintiff; (5) that the caption be amended as set forth herein; and (6) for such other relief as the Court may deem just and equitable.

**Tsimmer-150137**

* Laches is Not a defense to a Timely Commenced Foreclosure Action
  + 25. Defendant’s first affirmative defense baselessly alleges that “Plaintiff is guilty of laches.” *See* Def.[’s] Answer, ¶ 3. This conclusory, self-serving allegation fails under the relevant facts and applicable law.

26. At the outset, it should be noted that laches is not a defense to a timely commenced foreclosure action, as is the present case. *See, e.g., Grosebeck v. Morgan*, 206 N.Y. 385, 389 (1912); *First Fed. Sav. & Loan Assn. of Rochester v. Capalongo*, 152 A.D.2d 833, 834 (3d Dept. 1989); *Reizel, Inc. v. Exxon Corp.*, 42 A.D.2d 500, 505-06 (2d Dept. 1973). The instant action was commenced and the mortgage debt accelerated less than two years ago, on July 29, 2015 (*see* **Exhibit F**), well within the six-year statute of limitations period applicable to foreclosure action. *See* CPLR 213(4); *CDR Creances S.A. v. Euro-American Lodging Corp.*, 43 A.D.3d 45, 51 (1st Dept. 2007); *Loiacono v. Goldberg*, 240 A.D.2d 476, 477-78 (2d Dept. 1997). Nevertheless, Defendant has failed to offer any details or evidence, admissible or otherwise, to support the propriety of the asserted laches defense and is thus incapable of raising a triable issue of fact. *See Zuckerman*, 49 N.Y.2d at 562; *Fair*, 219 A.D.2d at 455; *Whelan by Whelan*, 182 A.D.2d at 449.

27. Accordingly, Defendant’s first affirmative defense is utterly devoid of merit and should be stricken in its entirety.

* Plaintiff’s complaint stated a Cause of Action
  + 28. Defendant’s second affirmative defense erroneously contends that “Plaintiff has failed to state a cause of action cognizable at law.” *See* Def.[’s] Answer, ¶ 4. This self-serving contention is untenable.

29. Importantly, it is well settled that claims pertaining to a plaintiff’s failure to state a cause of action are not recognized as valid affirmative defenses and cannot be interposed in an answer. *Iannarone v. Gramer*, 256 A.D.2d 443, 445 (2d Dept. 1998). Regardless, a review of Plaintiff’s Complaint confirms that it definitively met the notice pleading requirements of CPLR 3013 in that it sufficiently alleged each and every material element necessary to sustain a foreclosure cause of action. Specifically, the Complaint alleged Plaintiff’s possession of the Note and Mortgage and identified the Note and Mortgage at issue, the Mortgage Premises, and the amount due and owing to Plaintiff. *See* **Exhibit E**. As such, Plaintiff sufficiently stated a cause of action in the Complaint and Defendant has not and cannot identified any defects or omission in the pleading.

30. On the basis thereof, Defendant’s second affirmative defense is devoid of any merit whatsoever and should be stricken in its entirety.

* Defendant is Precluded from Challenging any Assignments of Mortgage
  + 31. Plaintiff’s third and thirteenth affirmative defenses assert that “Plaintiff has assigned the mortgage contrary to law and public policy” and that “Plaintiff sold the mortgage without authority, contrary to law and express and implied agreements.” *See* Def.[’s] Answer, ¶¶ 5, 15. This baseless allegation is unsustainable under the applicable law.

32. Specifically, with respect to mortgage foreclosure actions, borrowers are not recognized as parties to an assignment (*see Mendel v. Henry Phipps Plaza W., Inc.*, 6 N.Y.3d 783, 786 [2006]) and are thus precluded from challenging an assignment’s validity (*Matter of Holden*, 271 N.Y. 212, 217 [1936]; *Jennings v. Foreemost Diaries, Inc.*, 37 Misc.2d 328, 333 [N.Y. Sup. Ct. 1962]).[[3]](#footnote-3) Nevertheless, despite the lack of any necessity to provide a full assignment chain, the full recorded assignment chain is recited above as well as in the accompanying Murphy Affidavit (*see* ¶ 8), all of which serves as documentary evidence of its validity. *See* **Exhibit C**.

33. Therefore, Defendant’s third and thirteenth affirmative defenses are devoid of any merit whatsoever and should be stricken in their entirety.

Plaintiff possessed standing at All Relevant Times in this Action

34. Plaintiff’s fourth and fourteenth affirmative defenses baselessly contend that “Plaintiff lacks standing to maintain this action” and that “Plaintiff has not been lawfully delegated the authority to commence this proceeding.” *See* Def.[’s] Answer, ¶¶ 6, 16. This bare, conclusory contention is disproven by the annexed documentary evidence.

35. Again, Defendant has not offered any supporting details or evidence, admissible or otherwise, capable of creating an issue of fact regarding Plaintiff’s standing and the defense must be stricken on that ground alone. *See Zuckerman*, 49 N.Y.2d at 562; *Fair*, 219 A.D.2d at 455; *Whelan by Whelan*, 182 A.D.2d at 449. Notwithstanding same, in New York, it is the note, and not the mortgage, that is the dispositive instrument to convey standing in a foreclosure action. *Aurora Loan Services, LLC v. Taylor*, 25 N.Y.3d 355, 361 (2015); *JPMorgan Chase Bank v. Kaba*, 145 A.D.3d 443, 443 (1st Dept. 2016). Once the note is transferred, the mortgage passes as incident thereto. *Id*.; *Wells Fargo Bank, N.A. v. Ndiaye*, 146 A.D.3d 684, 684 (1st Dept. 2017); *CitiMortgage, Inc. v. Parris*, 136 A.D.3d 592, 592 (1st Dept. 2016).

*i. Ventures Possessed Standing to Commence this Action*

36. The Court in *JPMorgan Chase Bank, Nat. Ass’n v. Weinberger* found that:

[A] plaintiff establishes its standing in a mortgage foreclosure action by demonstrating that, when the action was commenced, it was either the holder or assignee of the underlying note . . . [through] [e]ither a written assignment of the underlying note or the physical delivery of the note prior to the commencement of the foreclosure action. 142 A.D.3d 643, 644-45 (2d Dept. 2016); *see Ndiaye*, 146 A.D.3d at 684; *Dyer Trust 2012-1 v. Global World Realty, Inc.*, 140 A.D.3d 827, 828 (2d Dept. 2016); *Parris*, 136 A.D.3d at 592; *Taylor*, 25 N.Y.3d at 361.

35. Moreover, as confirmed by the Court in *JPMorgan Chase Bank, N.A. v. Roseman*, “a copy of the note was annexed to the complaint, establishing prima facie that the plaintiff had standing.” 137 A.D.3d 1222, 1223 (2d Dept. 2016); *see Deutsche Bank Nat. Trust Co. v. Leigh*, 137 A.D.3d 841, 842 (2d Dept. 2016). Here, Ventures, the originally plaintiff, by annexing a copy of the Note to the Complaint, made a *prima facie* demonstration of its standing to commence this action. *See* **Exhibit E**.

*ii. HMC Possessed Standing to Continue and Maintain this Action*

37. As explained above, although the Prior Motion was denied, it was denied with any prejudice to refile based on certain discrepancies in the supporting affidavit, all of which have been remedied in the instant submission. *See* **Exhibit I**. It is respectfully submitted that the instant affidavit of Karin Murphy, an Assistant Vice President of BSI Financial Services, attorney-in-fact for HMC and Ventures, remedies any and all of the aforementioned discrepancies. Significantly, the Murphy Affidavit (*see* ¶ 6), properly [[4]](#footnote-4) attests to and irrefutably confirms[[5]](#footnote-5) that:

[T]he original note was delivered to the Original Plaintiff, VENTURES, or its custodian/agent on or before November 1, 2014. Following commencement of the within action, the Original Plaintiff, VENTURES, physically delivered the Note, containing all above-reference endorsements and/or allonges to HMC. HMC, or its custodian/agent is currently in physical possession of the original Note, containing all of the above-referenced indorsements and allonges firmly affixed thereto.

38. Thus, in addition to being based on Karin Murphy’s own personal knowledge, the Murphy Affidavit is also based on (i) business records of both Ventures and HMC, (ii) maintained in the ordinary course of business, and (iii) created around the time of the subject occurrences, the physical obtainment of the Note by Ventures, the original plaintiff, and HMC, Ventures’ assignee/predecessor-in-interest and the current plaintiff. As such, the Murphy Affidavit is admissible as uncontroverted proof of the standing of both Ventures and HMC. *See* CPLR 4518(a).

39. In New York, it is well-settled that an assignee may continue the action of the assignor under the name of the plaintiff or the assignee’s substituted name. *See, e.g., Hirschfeld v. Fitzgerald*, 157 N.Y. 166, 177-78 (1898); *HSBC Bank USA v. Hernandez*, 92 A.D.3d 843, 944 (2d Dept. 2012); *Citimortgage, Inc. v. Stosel*, 89 A.D.3d 887, 888 (2d Dept. 2011); *Dumpson v. Cohen*, 14 A.D.2d 871, 871 (1st Dept. 1961). Thus, even overlooking the uncontroverted admissibility of the Murphy Affidavit, it is beyond dispute that HMC, as Ventures’ assignee/predecessor-in-interest and the current plaintiff, possessed standing to continue and maintain this action by virtue of Ventures, the original plaintiff, having annexed a copy of the Note to the Complaint.

40. Based on the foregoing, Defendant’s fourth affirmative and fourteenth affirmative defenses are devoid of any merit whatsoever and should be stricken in their entirety.

* Plaintiff fully complied all Applicable Disclosure Requirements, including the requirements of the Truth in Lending Act and 12 CFR §226.9
  + 41. Defendant’s fifth and seventh affirmative defenses assert that “Plaintiff has failed to disclose to defendant the terms of the mortgage loan in accordance with the Truth in Lending Act” and that “Plaintiff has failed to comply with the disclosure requirements of 12. C.F.R. Section 226.9.” Def.[’s] Answer, ¶¶ 7, 9. This false, self-serving assertion is disproven by the annexed documentary evidence.

42. As a preliminary matter, the instant defense is time barred as the statute of limitations for a claim under the Truth in Lending Act (hereinafter “TILA”) is one year. *See* 15 U.S.C. § 1640(e). Here, since Defendant executed the Note and Mortgage on August 22, 2007 (*see* **Exhibit A** and **Exhibit B**), Defendant was subsequently precluded from attempting to advance the instant claim more than eight years later in the September 21, 2015 Answer (*see* **Exhibit G**). In any event, the defense still must fail on the merits since it is beyond dispute that as part of the closing of the mortgage loan, Defendant was provided with and signed the requisite TILA statement disclosing the applicable annual percentage rate, finance charge, amount financed, among other information. *See* **Exhibit K**. Furthermore, the loan at issue is a closed-end mortgage rendering 12 CFR 226.9 wholly inapplicable.

43. Accordingly, Defendant’sfifth and seventh affirmative defenses are devoid of any merit whatsoever and should be stricken in their entirety.

* Plaintiff fully complied with All conditions Precedent, including the Requirements of RPAPL § 1304
  + 44. Defendant’s sixth and fifteenth affirmative defense baselessly allege that “Plaintiff has failed to plead the performance or occurrence of conditions precedent in accordance with law” and that “Plaintiff has not complied with RPAPL §1304.” *See* Def.[’s] Answer, ¶¶ 8, 17. This unsubstantiated allegation is untenable under the relevant facts and applicable law.

45. Again, Defendant has not offered any supporting details or evidence, admissible or otherwise, capable of creating an issue of fact regarding Plaintiff’s compliance with any conditions precedent, including RPAPL 1304, and the defense must be stricken on that ground alone. *See Zuckerman*, 49 N.Y.2d at 562; *Fair*, 219 A.D.2d at 455; *Whelan by Whelan*, 182 A.D.2d at 449. Notwithstanding same, Plaintiff has submitting a myriad of documentary evidence confirming, beyond a doubt, its compliance with every applicable condition precedent.

46. Indeed, as confirmed by the duly filed Affidavits of Service, Defendant was served with copies of the Summons and Complaint, bearing the index number and filing date endorsed thereon, along with RPAPL § 1303 Notice, on colored paper different than that of the Summons and Complaint titled “Help for Homeowners in Foreclosure,” through a person of suitable age and discretion on August 12, 2015 and also by first class mail on August 13, 2015. *See* **Exhibit F**. Indeed, a process server’s affidavit constitutes *prima facie* evidence of proper service, which Defendant has made no attempt to rebut. *See* CPLR 308(2); *Grinishpun v. Borokhovich*, 100 A.D.3d 551, 552 (1st Dept. 2012); *Fairmont Funding Ltd. v. Stefansky*, 235 A.D.2d 213, 214 (1st Dept. 1997).

47. Additionally, the Murphy Affidavit, which is based on the personal knowledge of Karin Murphy, an Assistant Vice President of BSI Financial Services, attorney-in-fact for Plaintiff HMC as well as for Original Plaintiff Ventures, as well as (i) business records of both Ventures and HMC, (ii) maintained in the ordinary course of business, and (iii) created around the time of the subject occurrence, the service of the RPAPL § 1304 90-Day Pre-Foreclosure Notices, remedies any potential, albeit non-existent, deficiencies regarding Plaintiff’s compliance. Specifically, Karin Murphy properly avers and irrefutably confirms (*see* ¶ 9) that:

According to the business records I have reviewed, in compliance with Real Property Actions and Proceedings Law Section 1304, a 90-day notice, in at least 14-point type, with a list of at least five (5) housing counseling agencies was served via certified mail and also by first class mail to the Mortgagor at the Mortgaged Premises. True and correct copes of the RPAPL 1304 Notices are annexed hereto as **Exhibit D**,

48. On the basis thereof, Defendant’ssixth and fifteenth affirmative defenses are devoid of any merit whatsoever and should be stricken in their entirety.

* Plaintiff Did not Engage in Any Fraudulent, Unconscionable, Predatory, or Misrepresentative Lending Practices
  + 49. Defendant’s eighth, ninth, and twelfth affirmative defenses baselessly contend that Plaintiff engaged in fraudulent, unconscionable, predatory, and misrepresentative lending practices. *See* Def.[’s] Answer, ¶¶ 10, 11, and 14. This unsubstantiated, self-serving contention is unavailing.

50. At the outset, it should be noted that the signer of a written agreement is conclusively bound by its terms unless there is a showing of fraud, duress, or other wrongful act. *South Street Ltd. Partnership v. Jade Sea Restaurant, Inc.*, 187 A.D.2d 396, 396 (1st Dept. 1992); *Bull & Bear Group, Inc. v. Fuller*, 170 A.D.2d 275, 278 (1st Dept. 1991); *see State Bank of India, New York Branch v. Patel*, 167 A.D.2d 242, 243 (1st Dept. 1990) (explaining that “[p]rocedurally, there is a ‘heavy presumption that a deliberately prepared and executed written instrument manifest[s] the true intention of the parties’ . . . and, a correspondingly high order of evidence is required to overcome the presumption”), *citing Chimart Associates v. Paul*, 22 N.Y.2d 570, 574 (1986). Here, Defendant has not offered any supporting details or evidence, admissible or otherwise, capable of creating an issue of fact regarding Plaintiff’s lending practices and the defense must be stricken on that ground alone. *See Zuckerman*, 49 N.Y.2d at 562; *Fair*, 219 A.D.2d at 455; *Whelan by Whelan*, 182 A.D.2d at 449.

51. It should additionally be noted that to succeed on a defense or claim of fraud, a party must plead and demonstrate (i) a misrepresentation or material omission of fact which was false and known to be false, made for the purpose of inducing reliance; (ii) justifiable reliance on the misrepresentation or material omission; and (iii) injury. *Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173, 178 (2011); *Lama Holding Co. v. Smith Barney Inc.*, 668 N.E.2d 413, 420 (1996); *Peach Parking Corp. v. 346 West 40th Street,* 42 A.D.3d 82, 86 (1st Dept. 2007).CPLR 3016(b) mandates that the circumstances surrounding the fraud must be stated with particularity and thus, Defendant’s conclusory allegations, unsupported by factual detail, are incapable of satisfying the heightened pleadings standard of CPLR 3016(b). *See N.Y. Univ. v. Cont’l Ins., Co.*, 87 N.Y.2d 308, 319 (1995); *Manda Intern. Corp. v. Yager*, 139 A.D.3d 594, 594-95 (1st Dept. 2016). Nevertheless, as Defendant executed the Note and Mortgage on August 22, 2007 (*see* **Exhibit A** and **Exhibit B**), any fraud based allegation is time-barred under the applicable six-year statute of limitations. *See* CPLR 213(8).

52. Furthermore, as detailed above, it is beyond dispute that as part of the closing of the loan, Defendant was provided with and signed the requisite TILA statement disclosing the applicable annual percentage rate, finance charge, amount financed, among other information. *See* **Exhibit K**. Accordingly, Defendant’seighth, ninth, and twelfth affirmative defenses are devoid of any merit whatsoever and should be stricken in their entirety.

* The documents Annexed to the Complaint are Complete and Admissible
  + 53. Defendant’s tenth affirmative defense erroneously alleges that “[t]he documents annexed for [sic] the Complaint are incomplete, defective and/or evidentiary inadmissible and therefore incompetent.” *See* Def.[’s] Answer, ¶ 12. This bare, conclusory allegation is unsustainable under the applicable law.

54. As an initial matter, this Court is respectfully reminded that yet again, Defendant has not offered any supporting details or evidence, admissible or otherwise, capable of creating an issue of fact regarding the purported incompleteness or inadmissibility of the documents annexed to the Complaint and the defense must be stricken on that ground alone. *See Zuckerman*, 49 N.Y.2d at 562; *Fair*, 219 A.D.2d at 455; *Whelan by Whelan*, 182 A.D.2d at 449. Regardless, it is beyond dispute that all of the exhibits annexed to the Complaint (*see* **Exhibit E**), the underlying Mortgage Recorded in the New York County Clerk’s Office, the complete Assignment Chain, including a recorded Assignment of Mortgage evidencing the transfer to Plaintiff, RPAPL § 1304 90-Day Pre-Foreclosure Notice, and RPAPL § 1306 Proof of Filing with the Superintendent of Banks, are accurate and admissible.

55. Therefore, Defendant’s tenth affirmative defense is devoid of any merit whatsoever and should be stricken in its entirety.

* Unjust Enrichment is Inapplicable as the Parties entered into an Express Contract

56. Defendant’s eleventh affirmative defense baselessly claims that “Plaintiff was unjustly enriched as a result of the mortgage at issue in this proceeding.” *See* Def.[’s] Answer, ¶ 13. This unsubstantiated, erroneous claim fails under the relevant facts and applicable law.

57. It is well-settled that unjust enrichment is a quasi-contractual claim which is unavailable where a dispute is governed by an express contract. *Scavenger, Inc. v. GT Interactive Software Corp.*, 289 A.D.2d 58, 59 (1st Dept. 2001); *G & G Invs. V. Revlon Consumer Prods. Corp.*, 283 A.D.2d 253, 253 (1st Dept. 2001). Here, there is an express contract between Plaintiff and Defendant – the mortgage loan agreement that is documented in the Note and Mortgage – which instruments are enforceable according to their terms and provide Plaintiff with the unequivocal right to commence a foreclosure action upon Defendant’s default. *See* **Exhibit A** and **Exhibit B**.

58. On the basis thereof, Defendant’s eleventh affirmative defense is devoid of any merit whatsoever and should be stricken in its entirety.

* Plaintiff Effectuated Proper Service and Personal Jurisdiction was obtained over Defendant
  + 59. Defendant’s sixteenth affirmative defenses asserts that “[n]either personal nor service upon a person of suitable age and discretion was effectuated upon Leo Tsimmer.” *See* Def[’s] Affirm, ¶ 18. This false, self-serving assertion is disproven by the annexed documentary evidence.

60. Initially, this Court is respectfully referred to **Exhibit F**, the process server’s sworn affidavit attesting to Defendant’s receipt of service via delivery to a person of suitable age and discretion and also by first class mail and reminded that such an affidavit constitutes *prima facie* evidence of proper service. *See* CPLR 308(2); *Grinishpun*, 100 A.D.3d at 551; *Fairmont Funding Ltd. v. Stefansky*, 235 A.D.2d at 214. As such, Defendant’s bare, conclusory, unsubstantiated denials of receipt of process are incapable of rebutting the presumption of proper service created by the process server’s sworn affidavit. *Pasanella v. Quinn*, 126 A.D.3d 504, 505 (1st Dept. 2015); *see Grnishpun*, 100 A.D.3d at 551 (finding that the failure of the listed recipient of service to submit an affidavit denying receipt of service was insufficient to rebut the presumption of proper service). Additionally, the failure of the listed recipient of service to submit an affidavit denying receipt of service is also incapable of rebutting the presumption of proper service created by the process server’s sworn affidavit.

61. Finally, it is beyond dispute that Defendant’s claim regarding Plaintiff’s purported inability to obtain personal jurisdiction must fail on procedural grounds. Pursuant to CPLR 3211(e), any objection to the service of a summons and complaint is waived unless the party moves for judgment based on lack of personal jurisdiction within sixty days after service of the Answer. *Addesso v. Shemtob*, 70 N.Y.2d 689, 690 (1987); *B.N. Realty Associates v. Lichtenstein*, 21 A.D.3d 793, 796 (1st Dept. 2005).

62. Accordingly, Defendant’s sixteenth affirmative defense is devoid of any merit whatsoever and should be stricken by this Court.

**Maggio-161118**

* Plaintiff is in violation of the New York Banking Law §§6-1(1)(g)(i) and (ii); (2)(m); and (2)(1)(i) and (ii)
  + 27. Indeed any claim against a lender or mortgage broker made that is pursuant to the New York Banking Law §6-1 must be commenced within six years of the origination of the high-cost home loan. *See* New York Banking Law §6-1. Here, Defendants attempt to assert such a claim approximately *eighteen years* after the origination of the loan. It is thus unquestionable that Defendant’s cause of action is time-barred as being brought nearly fourteen years following expiration of the six-year time period allowed. *See* *LaSalle Bank, N.A. v. Shearon,* 19 Misc. 3d 433, 436 (Sup Ct. 2008), *adhered to on rearg sub nom. LaSalle Bank, N.A. v. Shearon*, 23 Misc. 3d 959 (Sup. Ct 2009) (stating that the New York Banking Law §6-1 provides for a six year statue of limitations accruing form the origination of the loan).

28. Simply put, Defendants’ bald and conclusory claims are barred by the six-year statute of limitations set forth in New York Banking Law §6-1 and Defendants’ first affirmative defense/counterclaim should be stricken and dismissed accordingly.

* Bad Faith on behalf of the Plaintiff in attempting to settle, compromise or otherwise resolve payment of the alleged arrears and/or sums due.
  + 29. Defendants’ second affirmative defense/counterclaim alleges, in essence, bad faith on behalf of the Plaintiff in attempting to settle, compromise or otherwise resolve payment of the alleged arrears and/or sums due. As stated hereinabove, Plaintiff appeared for and participated in court mandated foreclosure settlement conferences pursuant to CPLR 3408, as amended, on January 18, 2017 and on April 5, 2017, on which date the court issues a Residential Foreclosure Conference Order releasing the matter from further conferencing. The order stated that this foreclosure matter did not meet the criteria of the Residential Foreclosure Part due to the fact that the Defendants do not reside at the Mortgaged Premises and because Defendants failed to demonstrate cure and thereby resume occupancy. *See* **Exhibit I.**

30. Notwithstanding the above, Defendants wholly fail to explain or otherwise expound upon how Plaintiff acted in bad faith. Instead, Defendants offer only bald, conclusory, and self-serving allegations. Accordingly, Defendants’ second affirmative defense and counterclaim must be disregarded and stricken in its entirety.

* Defendants should be given the opportunity to pay off and/or modify their mortgage in order to avoid foreclosure and keep their house.
  + 31. Defendants third affirmative defense/counterclaim alleges that because defendants should be given the opportunity to pay off and/or modify their mortgage in order to avoid foreclosure and keep their house. *See* Defendants’ answer ¶. As noted above, it has repeatedly been held that mere conclusions, hope, unsubstantiated allegations, and assertions **are incapable of raising a valid affirmative defense or triable issue of fact.** *Zuckerman v. City of New York,* 49 N.Y.2d 557, 562 (1980); *see New York Higher Educ. Servs. Corp v. Ortiz*, 104 A.D.2d 684, 685 (3d Dept. 1984); *State Bank of Albany v. McAuliffe,* 97 A.D.2d 607, 607-608 (3d Dept. 1983); *Stern v. Stern* 87 A.D. 2d 887, 888 (2d Dept. 1982).

32. As also noted above, the parties appeared at Foreclosure Settlement Conferences on January 18, 2017 and April 5, 2017. Pursuant to the FSC Order, the Court found that this case did not meet the criteria of the Residential Foreclosure Part because “Defendants/Borrowers do not reside at the subject property and failed to demonstrate cure and thereby resume occupancy.” The Order further directed Plaintiff to appear at a status conference on March 23, 2017.  *See* **Exhibit I**. As such, Defendants’ third affirmative defense should be disregarded and stricken accordingly.

* Court lacks Jurisdiction over the Defendants due to improper service.
  + 33. Defendants’ fourth affirmative defense alleges that this Court lacks jurisdiction over the defendants due to improper service. This defense is completely without merit and contradicted by documentary evidence. Despite their unsubstantiated allegations, Plaintiff properly served Defendants pursuant to the requirements of the CPLR. *See* **Exhibit G**

34. Notwithstanding the valid service that was effectuated upon Defendants, their claims still fail on procedural grounds. In that regard, CPLR 3211 (e), requires that an objection to the service of a Summons and Complaint is waived unless the party moves for judgement based on the lack on personal jurisdiction within sixty (60) days after service of the Answer. The Defendants’ clearly did not move for judgement based on lack of personal jurisdiction within the statutory period. Therefore, Defendants have waived any right to claim lack of personal jurisdiction at this juncture. Based on the foregoing, Defendants fourth affirmative defense should be stricken.

**Rey-150562**

* Standing at Commencement
  + Answering Defendant’s first affirmative defense appears to claim that plaintiff does not have standing in this action. This defense is as untenable as it is without merit.

It is well settled case law that in order to commence a mortgage foreclosure action, the Plaintiff must have either a legal or equitable interest in the mortgage. See Countrywide Home Loans, Inc. v. Gress, 68 A.D.3d 709, 888 N.Y.S.2d 914 (2nd Dept. 2009); Bank of New York v. Silverberg, 86 A.D.3d 274, 926 N.Y.S.2d 532 (2nd Dept. 2011); Citimortgage, Inc. v. Rosenthal, 88 A.D.3d 759, 931 N.Y.S.2d 638 (2nd Dept. 2011).

A plaintiff has standing where it is both the holder or assignee of the underlying note and mortgage at the time the action is commenced. See U.S. Bank, N.A. v. Collymore, 68 A.D.3d 752, 890 N.Y.S.2d 578 (2nd Dept. 2009); Bank of New York v. Silverberg, 86 A.D.3d 274, 926 N.Y.S.2d 532 (2nd Dept. 2011); Citimortgage, Inc. v. Rosenthal, 88 A.D.3d 759, 931 N.Y.S.2d 638 (2nd Dept. 2011); Federal National Mortgage Association v. Youkelsone, 303 A.D.2d 546, 755 N.Y.S.2d 730 (2nd Dept. 2003); Kluge v. Fugazy, 145 A.D.2d 537, 536 N.Y.S.2d 92 (2nd Dept. 1988).

Abundant case law further illustrates that, the physical delivery of the note is sufficient to transfer the obligation as the mortgage passes with the debt as an inseparable incident. LaSalle National Assn. v. Ahearn 59 A.D.3d 911, 912, 875 N.Y.S.2d 595; Mortgage Electronic Recording Systems*, supra* at 674; Flyer v. Sullivan, 284 A.D. 697,699, 134 N.Y.S.2d 521; In re Minbatiwalla, 424 B.R. 104, 109 (Bankr. S.D.N.Y. 2010); In Re Conde-Dedonato, 391 BR 247, 251 (Bankr. E.D.N.Y. 2008) (mortgage and note can be transferred by delivery and do not have to be evidence by written assignment); Wells Fargo Bank v. Perry, 875 N.Y.S.2d 853, 856 (Sup. Ct. Suffolk Cnty. 2009) (indorsement of a mortgage note that constitutes a negotiable instrument effectively transfers any mortgage given as security for said note as an incident thereof).

Physical possession of the Note by plaintiff’s assignee is confirmed by the attached Castillo Affidavit at ¶7.

Thus, Answering Defendant’s allegation that Plaintiff lacks standing is without merit and should be disregarded by the Court.

* Plaintiff’s complaint contained Affirmative Allegations of Standing
  + Defendant next argues that plaintiff’s complaint failed to include an affirmative allegation of standing demonstrating authority to foreclose.

The Court is respectfully referred to **“Exhibit A”** as proof that plaintiff’s complaint

contained affirmative allegations of standing. More specifically, paragraph 7 of the complaint specifically alleges that Plaintiff is the holder of the promissory note at issue in this proceeding and that said promissory note was indorsed in blank and delivered to Plaintiff prior to commencement of the instant action. Paragraph 7 further states that Plaintiff is the owner of the subject mortgage and recites the assignment chain.

Thus, Defendant’s second affirmative defense is without merit and should be disregarded by the Court.

* Plaintiff fully complied with the requirements of RPAPL §1304
  + Answering Defendant’s third affirmative defense claims that the 90-Day Pre-Foreclosure Notices, as required by RPAPL §1304, were inadequate in that 2 copies were not delivered and that while notice was delivered, it was defective in content because it did not list at least 5 housing counseling agencies within homeowner’s region. This defense is untenable.

Indeed, as indicated above, the 90 day notices were sent to the borrowers specifically pursuant to RPAPL §1304 on March 15, 2011. Said notices have not expired and were sent to the borrowers at least 90 days prior to the commencement of the instant action. The notices were in 14-point type, contained the statutorily dictated language and the address and phone numbers of at least five US Department of Housing and Urban Development approved housing counseling agencies in the region where the borrowers reside and were mailed by registered or certified mail and first class mail to the last known address of the borrower. A copy of the 90 Day Notice is attached hereto as **“Exhibit H”**.

Thus, Defendant’s third affirmative defense is without merit and should be disregarded by the Court.

* Plaintiff Complied with Complied §3408
  + Pursuant to the requirements of CPLR §3408, foreclosure settlement conferences were held on this matter on March 25, 2015 and June 8, 2015, at which time the matter was released from further conferencing and Plaintiff was permitted to proceed with the action. See attached E-Law Printout annexed hereto as **“Exhibit I”**.

Thus, Answering Defendant’s fourth affirmative defense is without merit and should be disregarded by the Court.

**Hill-M.1240**

* Plaintiff stated a Cause of Action in the Complaint
  + 24. Defendants’ first affirmative defense alleges that “the Plaintiff herein has failed to set forth a cause of action upon which relief can be granted.” *See* Def.[s’] Answer, ¶ 2. This unsubstantiated, self-serving allegation is untenable as Plaintiff has not only stated a cause of action for foreclosure, but Plaintiff has established its *prima facie* entitlement to summary judgment.

25. A review of Plaintiff’s Complaint reveals, beyond a doubt, that it meets the pleading requirements of CPLR 3013 in that it sufficiently alleges each and every material element necessary to sustain a foreclosure cause of action. *See* *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994); *Salvatore v. Kumar*, 45 A.D.3d 560, 563 (2d Dept. 2007) (explaining that “the pleading is to be afforded a liberal construction, the facts alleged in the complaint accepted as true, and the plaintiffs accorded the benefit of every possible favorable influence”).

26. Indeed, in the Complaint, Plaintiff specifically alleged that it is “in possession of the original note with a proper endorsement and/or allonge and is therefore, the holder of both the Note and Mortgage, which passes incident to the Note” and unambiguously identified the mortgage loan at issue, the subject Mortgaged Premises, and the amounts due and owing to Plaintiff (*see* **Exhibit E**), none of which Defendants have denied. Moreover, it is well-settled that the failure to state a cause of action upon which relief can be granted cannot be pled as an affirmative defense. *Torres v. Southside Hospital*, 84 A.D.3d 836, 836 (2d Dept. 1981), *citing* CPLR 3018(b).

27. On the basis thereof, Defendants’ first affirmative defense is devoid of any merit whatsoever and should be stricken by this Court in its entirety.

* + Plaintiff Possessed standing to Commence, Sustain, and Maintain this action.

28. Defendants’ second, third, sixteenth,[[6]](#footnote-6) and twentieth[[7]](#footnote-7) affirmative defenses allege that Plaintiff lacks standing to “sustain” and “maintain” the instant action. *See* Def.[s’] Answer, ¶¶ 6, 8. This conclusory allegation fails under the applicable facts and relevant law.

29. In order to commence a mortgage foreclosure action, a plaintiff must have either a legal or equitable interest in the subject mortgage. *See, e.g., U.S. Bank Nat. Ass’n v. Faruque*, 120 A.D.3d 575, 576 (2d Dept. 2014); *HSBC Bank USA v. Hernandez*, 92 A.D.3d 843, 843 (2d Dept. 2012); *Wells Fargo Bank, N.A. v. Marchione*, 69 A.D.3d 204, 207 (2d Dept. 2009). Under New York law, a mortgage passes as an incident to the note (*Bank of New York v. Silverberg*, 86 A.D.3d 274, 280 [2d Dept. 2011]; *Mortgage Elec. Registration Sys., Inc. v. Coakley*, 41 A.D.3d 674, 674 [2d Dept. 2007]), and it is the note, rather than the mortgage, which is the dispositive instrument to convey standing in a foreclosure action (*Aurora Loan Servs., LLC v. Taylor*, 25 N.Y.2d 355, 361 [2015]; *Dyer Trust 2012-1 v. Global Realty, Inc.*, 140 A.D.3d 827, 828 [2d Dept. 2016]; *JPMorgan Chase, Nat. Ass’n v. Weinberger*, 142 A.D.3d 643, 644-45 [2d Dept. 2016]).

30. In light thereof, the Second Department Court in *Weinberger* (*id*.) held that:

* A Plaintiff establishes its standing in a mortgage foreclosure action by demonstrating that, when the underlying action was commenced, it was the holder or assignee of the underlying note . . . [through] either a written assignment of the underlying note or physical delivery of the note prior to the commencement of the action

31. Additionally, the Second Department Court in *JPMorgan Chase Bank, N.A. v. Roseman* (137 A.D.3d 1222, 1223 [2d Dept. 2016]) confirmed that “**a copy of the note [annexed] to the complaint, established *prima facie* that the plaintiff had standing**” [emphasis added]. *See Deutsche Bank Nat. Trust Co. v. Leigh*, 137 A.D.3d 841, 842 (2d Dept. 2016); *Nationstar Mortg., LLC v. Catizone*, 127 A.D.3d 1151, 1152 (2d Dept. 2015); *Coakle*, 41 A.D.3d at 674. Thus, Plaintiff, by annexing a copy of the original note with a proper endorsement to the underlying Complaint, established *prima facie* that it had standing to commence this action. *See* **Exhibit E**. Furthermore, as confirmed by the Lefkaditis Affidavit (*see* ¶ 9), Plaintiff “has maintained continuous physical possession of the original Note since its execution date of January 24, 2008, through present” and had/has standing to sustain and maintain this action.

32. Moreover, in a mortgage foreclosure action, borrowers are not recognized as parties to assignments (*see Mendel v. Henry Phipps Plaza W., Inc.*, 6 N.Y.3d 783, 786 [2006]), and borrowers are precluded from challenging the validity of a assignment (*Matter of Holden*, 271 N.Y. 212, 217 [1936]; *Jennings v. Foremost Diaries, Inc.*, 37 Misc.2d 328, 333 [N.Y. Sup. Ct. 1962]). However, even if Defendants were permitted to challenge the validity of an assignment, it would be of no effect as the Mortgage has not been assigned at any point subsequent to its execution its execution on January 24, 2008.

33. Accordingly, Defendants’ second, third, sixteenth, and twentieth affirmative defenses are devoid of any merit whatsoever and should be stricken by this Court in their entirety.

* Plaintiff filed a CPLR 3012-B Certificate of Merit Simultaneously with the complaint and request for Judicial Intervention
  + 34. Defendants’ fourth affirmative defense erroneously claims, in essence, that the Complaint did not include a CPLR 3012-B Certificate of Merit. *See* Def.[s’] Answer, ¶ 9. This unsubstantiated, self-serving claim is disproven by the annexed documentary evidence of the duly filed CPLR 3012-B Certificate of Merit,[[8]](#footnote-8) which Plaintiff filed simultaneously with the Complaint and Request for Judicial Intervention on November 9, 2016. *See* **Exhibit E**. Thus, Defendants’ fourth affirmative defense is devoid of any merit whatsoever and should be stricken by this Court in its entirety.
* Defendants were properly served with the Summons and Complaint
  + 35. Defendants’ fifth affirmative defense alleges that “the Defendant was not properly served with a copy of the Summons and Complaint.”  *See* Def.[s’] Answer, ¶ 10. This unsubstantiated allegation is disproven by the annexed documentary evidence of the duly filed Affidavits of Service. *See* **Exhibit F**.

36. Initially, it should be noted that Defendants have not attempted to provide any details or evidence, admissible or otherwise, denying the receipt of service or explaining how service was improper. As such, Defendants’ mere conclusions, hope, unsubstantiated allegations, and assertions are incapable of raising a valid affirmative defense or creating a triable issue of fact. *Zuckerman*, 49 N.Y.2d at 562; *Ortiz*, 104 A.D.2d at 685; *McAuliffe*, 97 A.D.2d at 607-08; *Stern*, 87 A.D.2d at 887.

37. On the contrary, Plaintiff submitted duly filed Affidavits of Service on all defendants, which were sworn to by a licensed process server and constitute *prima facie* evidence of proper service, and which Defendants have made no attempt to rebut. *See Deutsche Bank Nat. Trust Co. v. Quinones*, 114 A.D.3d 719, 719 (2d Dept. 2014), *Emigrant Mtge. Co., Inc. v. Westervelt*, 105 A.D.3d 896, 897 (2d Dept. 2013); *Countrywide Home Loans Servicing, LP v. Albert*, 78 A.D.3d 983, 984 (2d Dept. 2010); *Wells Fargo Bank, NA v. Chaplin*, 65 A.D.3d 588, 589 (2d Dept. 2009). As confirmed by the unrebutted Affidavits of Service, (i) Defendant TONYA ARMSTRONG-GRANT was personally served with a copy of the Summons and Complaint bearing the index number and filing date endorsed thereon, along with RPAPL § 1303 Notice of Default on colored paper different than that of the Summons and Complaint, bearing the title “Help for Homeowners in Foreclosure,” via personal service on November 30, 2016 and by first class mail on December 1, 2016, and (ii) after five diligent attempts at personal service, Defendant KIM A. HILL was served by affixing a copy of the Summons and Complaint bearing the index number and filing date endorsed thereon, along with RPAPL § 1303 Notice of Default on colored paper different than that of the Summons and Complaint, bearing the title “Help for Homeowners in Foreclosure,” to the door of her residence on December 13, 2016 and by first class mail on December 15, 2016. *See* **Exhibit F**.

38. On the basis thereof, it is uncontroverted that Defendants were properly served with the Summons and Complaint. Thus, Defendants’ fifth affirmative defense is devoid of any merit whatsoever and should be stricken by this Court in its entirety.

* Plaintiff did not engage in any fraud
  + 39. Defendants’ sixth,[[9]](#footnote-9) seventh,[[10]](#footnote-10) ninth,[[11]](#footnote-11) tenth,[[12]](#footnote-12) eleventh,[[13]](#footnote-13) twenty-seventh,[[14]](#footnote-14) and twenty-eighth affirmative defenses and first,[[15]](#footnote-15) third,[[16]](#footnote-16) and fourth counterclaim[[17]](#footnote-17) baselessly contend that “[u]pon information and belief, the note and mortgage was procured by deceptive and fraudulent practices.” *See* Def.[s’] Answer, ¶¶ 12, 14, 16-18, 54. This unsubstantiated contention is fails under the relevant facts and applicable law.

40. The essential elements of a claim for fraudulent inducement are “the misrepresentation of a material fact, which was known by the Plaintiff, or its predecessor in interest, to be false and intended to be relied on when made, and that there was justifiable and resulting injury.” *Braddock v. Braddock*, 60 A.D.3d 84, 86 (1st Dept. 2009); *see Channel Master Corp. v. Aluminum Ltd Sales*, 4 N.Y.2d 403, 407 (1958); *Urstadt Biddle Properties, Inc. v. Excelsior Realty Corp.*, 65 A.D.3d 1135, 1136-37 (2d Dept. 2009).

41. Regardless of how it is presented, when fraud is alleged, specificity in pleading the cause of action or defense is required. CPLR 3106(b); *Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173, 178 (2011); *IndyMac Bank, F.S.B. v. Vincoli*, 105 A.D.3d 704, 707 (2d Dept. 2013) (noting that mere bare and conclusory allegations of fraud, without any supporting detail, are incapable of meeting the heightened pleading requirements of CPLR 3106[b]). Accordingly, Defendants’ bare and conclusory allegations that the Note and Mortgage were somehow procured by certain unidentified fraudulent practices, without any accompanying supporting details or facts, are incapable of meeting the heightened pleading requirements of CPLR 3106(b).[[18]](#footnote-18)

*i. Plaintiff Did Not Engage in Any Deceptive Practices*

42. General Business Law § 349 (hereinafter the “Deceptive Practices Act” or “DPA”) is a general New York Consumer statute that makes it unlawful to engage in deceptive acts or practices.[[19]](#footnote-19) Significantly, claims under the DPA are governed by a three-year statute of limitations. *Gaidon v. Guardian Life Ins. Co. of Am.*, 96 N.Y.2d 201, 210 (2001); *Pike v. N.Y. Life Ins. Co.*, 72 A.D.3d 1043, 1048 (2d Dept. 2010). In spite thereof, Defendants neglected to raise the instant claim prior to the Answer dated December 19, 2016 – nearly six years after the expiration of the applicable statute of limitations. *See* **Exhibit G**.

43. However, even if the instant defense was not time-barred, it still cannot be maintained. In order to assert a viable claim under the DPA, a party 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.” *Fitzpatrick*, 95 A.D.3d at 1172, *citing Sutman v. Chem. Bank*, 95 N.Y.2d 24, 29 (2000). As such, conclusory allegations of wrongdoing are insufficient as “[a] plaintiff must allege with some specificity the allegedly deceptive acts or practices that form the basis for the claim.” *Lava Trading Inc. v. Hartford Fire Ins. Co.*, 326 F.Supp.2d 434, 438 (S.D.N.Y. 2004); *see Fitzpatrick*, 95 A.D.3d at 1172; *Andre Strishack & Assoc. v. Hewlett Packard Co.*, 300 A.D.2d 608, 609 (2d Dept. 2002); *Stutman v. Chemical Bank*, 95 N.Y.2d 24, 29 (2000); *Oswego Laborers’ Local 214 Pension Fund v. Marine Midland Bank*, 85 N.Y.2d 20, 25 (1995).; *see Patterson v. Somerset Investors Corp.*, 96 A.D.3d 817 (2d Dept. 2012) (explaining that “the fact that the plaintiff sought and received a loan [that] he [allegedly] could not afford does not mean that he can now proceed on a [General Business Law] Section 349 claim against the party that made his [purported] mistake possible”). Thus, Defendants have not and cannot properly plead a viable claim under the DPA.

*ii. Plaintiff Did Not Violate the Truth in Lending Act*

44. Defendants’ claim that Plaintiff somehow violated the Truth in Lending Act (hereinafter “TILA”) is fatally vague. Significantly, Defendants neither identify any particular TILA provisions that were purportedly violated, nor specify which particular disclosures required by TILA that allegedly were not made to Borrower, [[20]](#footnote-20) which constitute fatal defects to Defendants’ claim. *See Cedeno v. IndyMac Bancorp, Inc.*, 2008 WL 3992304, \*4 (S.D.N.Y. 2008); *Aurora Loan Servs. v. Grant*, 17 Misc. 3d 1102(A), \*1 (N.Y. Sup. Ct. 2007), *citing Glassman v. Zoref*, 291 A.D.2d 430, 431 (2d Dept. 2002). Furthermore, the statute of limitations for a claim under TILA is one year. *See* 15 U.S.C. § 1640(e). However, Defendants neglected to raise the instant claim prior to the Answer dated December 19, 2016 – nearly eight years after the expiration of the applicable statute of limitations. *See* **Exhibit G**. Thus, Defendants have not and cannot properly plead a viable claim under TILA.

*iii. Plaintiff Did Not Violate New York Banking Law § 6-L(2)*

45. As a preliminary matter, Defendants have not offered any details or evidence, admissible or otherwise, to demonstrate how Banking Law § 6-L(2) is applicable and the defense must be stricken on that ground alone. *See Zuckerman,* 49 N.Y.2d at 562; *Ortiz*, 104 A.D.2d at 685; *McAuliffe*, 97 A.D.2d at 607-08; *Stern*, 87 A.D.2d at 887. Regardless, Banking Law § 6-L(2) provides for a six-year statute of limitations accruing from the origination of the loan. *LaSalle Bank, N.A. v. Shearon*, 19 Misc. 3d 433, 437 (N.Y. Sup. Ct. 2009), *citing* Banking Law § 6-I(6). Here, Defendants neglected to raise the instant claim prior to the Answer dated December 19, 2016 – nearly three years after the expiration of the applicable statute of limitations. *See* **Exhibit G**. As such, Defendants have not and cannot properly plead a viable claim under Banking Law § 6-L(2).

46. On the basis thereof, Defendants’ sixth, seventh, ninth, tenth, eleventh, twenty-seventh, and twenty-eighth affirmative defenses and first, third, and fourth counterclaims are devoid of any merit whatsoever and should be stricken and dismissed by this Court in their entirety.

* The Real Estate Settlement Procedures Act is not a defense to Foreclosure
  + 47. Defendants’ eighth affirmative defense baselessly contends that “Plaintiff’s predecessor of its intention to transfer the servicing of the loan and/or failed to inform the borrower of the actual transfer” pursuant to the Real Estate Settlement Procedures Act. *See* Def.[s’] Answer, ¶ 15. Overlooking the uncontroverted fact that Plaintiff has not transferred the mortgage loan at any point subsequent to its execution by Borrower on January 24, 2008, the Real Estate Settlement Procedures Act (hereinafter “RESPA”) is not a defense to foreclosure. *See* 12 U.S.C. §§ 2605,[[21]](#footnote-21) 2607, 2608.[[22]](#footnote-22) Therefore, Defendants’ eighth affirmative defense is devoid of any merit whatsoever and should be stricken by this Court in its entirety.
* Plaintiff did not overstate or exaggerate the amount owed by Defendants
  + 48. Defendants’ eleventh affirmative defense alleges that “Plaintiff has overstated and exaggerated the amount that it is owed.” *See* Def.[s’] Answer, ¶ 20. This conclusory, self-serving allegation fails as a matter of law.

49. It is well-settled that a defendant’s failure to identify the specific documentary evidence that forms the basis of a defense constitutes a fatal pleading defect. *Teitler v. Pollack & Sons*, 288 A.D.2d 302, 302 (2d Dept. 2001); *see Held v. Kaufman*, 91 N.Y.2d 425, 430-31 (1988). Here, Defendants have not provided any supporting evidence, such as copies of cancelled checks, wire transfer receipts, or bank records, and Defendants have failed to raise a triable issue of fact capable of defeating Plaintiff’s Summary Judgment Motion. On the contrary, the documentary evidence submitted by Plaintiff explicitly confirms the amounts due and owing, that the Mortgage is still of record, and that Defendants have failed to cure the Default. *See* Lefkaditis Affidavit, ¶ 8.

50. However, even if Defendants had provided sufficient supporting evidence, the potential misapplication of payments would not preclude an award of summary judgment. *See, e.g., 1855 Tremont Corp. v. Collado Holdings, LLC*, 102 A.D.3d 567, 568 (1st Dept. 2013); *Vermont Federal Bank v. Chase*, 226 A.D.2d 1034, 1037 (3d Dept. 1996); *Johnson v. Gaughan*, 128 A.D.2d 756, 757 (2d Dept. 1987); *Barclay’s Bank of N.Y., N.A. v. Smitty’s Ranch, Inc.*, 122 A.D.2d 323, 324 (3d Dept. 1986). In a foreclosure action, the proper procedure to remedy a misapplication of payments is the issuance of an order of reference to determine the actual amount due and owing. *Id*. Accordingly, Defendants’ eleventh affirmative defense is devoid of any merit whatsoever and should be stricken by this Court in its entirety.

* Plaintiff did not Assess Improper Late Charges against Defendants
  + 51. Defendants’ twelfth affirmative defense alleges that “[u]pon information and belief, plaintiff violated 254-b of Real Property Law by assessing improper late charges against defendants.” *See* Def.[s’] Answer, ¶ 20. This unsubstantiated allegation is unsustainable.

52. Again, Defendants have not attempted to provide any details or evidence, admissible or otherwise, identifying what late charges were assessed and explaining how the purported charges were improper. Defendants’ mere conclusions, hope, unsubstantiated allegations, and assertions are incapable of raising a valid affirmative defense or creating a triable issue of fact. *Zuckerman*, 49 N.Y.2d at 562; *Ortiz*, 104 A.D.2d at 685; *McAuliffe*, 97 A.D.2d at 607-08; *Stern*, 87 A.D.2d at 887. Moreover, Real Property Law § 254-b is only applicable in circumstances were mortgagors reside at the subject premises. *See Emigrant Funding Corp. v. Runcie*, 22 Misc. 3d 1113(A), \*2 (N.Y. Sup. Ct. 2009). Here, as provided in the Complaint, Defendants do not reside at the Mortgaged Premises, a fact which Defendants have made no attempt to dispute. Accordingly, Defendants’ twelfth affirmative defense is devoid of any merit whatsoever and should be stricken by this Court in its entirety.

* Plaintiff complied with every condition precedent in the Mortgage
  + 53. Defendants’ thirteenth affirmative defense falsely claims that “the plaintiff has failed to comply with a condition precedent of the mortgage.” *See* Def.[s’] Answer, ¶ 21. This claim is untenable under the relevant facts and applicable law.

54. In an action on a contract, the obligation to raise the issue of compliance with a condition precedent rests on the party disputing its performance or occurrence. CPLR 3015(a); *Karel v. Clark*, 129 A.D.2d 773, 773 (2d Dept. 1987); *1199 Housing Corp. v. International Fidelity Ins. Co.*, 14 A.D.3d 383, 384 (1st Dept. 2005) (holding that the burden to plead “specifically and with particularity” that any condition precedent has not been fulfilled rests on the party resisting enforcement of the contract). Here, Defendants have utterly failed to plead “specifically and with particularity” that any condition precedent has not been fulfilled.[[23]](#footnote-23)

55. Regardless, even if Plaintiff had not complied with a condition precedent in the Mortgage, it would not deprive this Court of jurisdiction to enter the judgment of foreclosure and sale. *Deutsche Bank Trust Co. Ams. v. Shields*, 116 A.D.3d 653, 654 (2d Dept. 2014), *citing Pritchard v. Curtis*, 101 A.D.3d 1502, 1504 (2d Dept. 2012); *Signature Bank v. Epstein*, 95 A.D.3d 1199, 1200 (2d Dept. 2012). Therefore, Defendants’ thirteenth affirmative defense is devoid of any merit whatsoever and should be stricken by this Court in its entirety.

* Plaintiff negotiated in good faith to reach a resolution of this Action
  + 56. Defendant’s fourteenth affirmative defense baselessly alleges that Plaintiff did not “fairly and reasonably consider modification efforts.” *See* Def.[s’] Answer, ¶ 26. This bald, conclusory allegation is unsustainable.

57. Again, it is important to note that a defendant’s failure to identify the specific documentary evidence that forms the basis of a defense constitutes a fatal pleading defect. *Teitler*, 288 A.D.2d at 302; *Held*, 91 N.Y.2d at 430-31. However, Defendants have not provided any documentary (or other) supporting the erroneous allegation that Plaintiff violated any HAMP regulations and guidelines that would constitute a failure to negotiate a failure to negotiate in good faith as required by CPLR 3408(f). *See PNC Bank, Nat. Ass’n v. Campbell*, 142 A.D.3d 1147, 1148 (2d Dept. 2016); *Onewest Bank, FSB v. Colace*, 120 A.D.3d 994, 995-96 (2d Dept. 2015); *Flagstar Bank, FSB v. Titus*, 120 A.D.3d 469, 470 (2d Dept. 2014).

58. In New York State, CPLR 3408 requires that mandatory settlement conferences be held in mortgage foreclosure actions involving any home loan[[24]](#footnote-24) in which the defendant is a resident of the subject property both parties must negotiate in “good faith” to reach a resolution of the action, including, if possible, a loan modification. *U.S. Bank Nat. Ass’n v. Sarmiento*, 121 A.D.3d 187, 199-200 (2d Dept. 2014); *see U.S. Bank Nat. Ass’n v. Smith*, 123 A.D.3d 914, 917 (2d Dept. 2014); *Wells Fargo Bank, N.A. v. Meyers*, 108 A.D.3d 9, 19 (2d Dept. 2013) (noting that CPLR 3408(f) does not set forth any specific remedy for a party’s failure to negotiate in good faith). In conjunction with CPLR 3408, the Chief Administrator of the Courts thereafter promulgated 22 NYCRR 202.12-a, a regulation setting forth the rules and procedures governing foreclosure settlement conferences. *Id*.

59. In *Campbell* (142 A.D.3d at 1148), the Second Department Court held that:

During settlement conferences, “[t]he court shall ensure that each party fulfills its obligation to negotiate in good faith and shall see that conferences not be unduly delayed or subject to willful dilatory tactics so that the rights of both parties may be adjudicated in a timely matter” (22 NYCRR 303.12-1[c][4]; *see US Bank N.A. v Sarmiento*, 121 AD3d 187, 200 [2014]; *Wells Fargo Bank, N.A. v Meyers*, 108 AD3d 9, 19 [2013]). CPLR 3408 “requires only that the parties enter into and conduct negotiations in good faith” (*US Bank v Sarmiento*, 121 AD3d at 200; *see Wells Fargo Bank, N.A. v Van Dyke*, 101 AD3d 638 [2012]). “[T]he parties cannot be forced to reach an agreement” (*Wells Fargo Bank, N.A. v Meyers*, 108 AD3d at 20; *see Flagstar Bank, FSB v Walker*, 112 AD3d 885 [2013]). To conclude that a party failed to negotiate in good faith pursuant to CPLR 3408(f), a court must determine that “the totality of the circumstances demonstrates that the party’s conduct did not constitute a meaningful effort at reaching a resolution” (*US Bank N.A. v Sarmiento*, 121 AD3d at 203; *see Wells Fargo Bank, N.A. v Miller*, 136 AD3d 1024 [2016]).

60. As such, to conclude that a party failed to negotiate in good faith pursuant to CPLR 3408(f), a court must determine that “the totality of the circumstances demonstrates that the party’s conduct did not constitute a meaningful effort at reaching a resolution.” *Sarmiento*, 121 A.D.3d 187, 203. Here, it is beyond dispute that Plaintiff acted in good faith while attempting to reach a resolution of this action, including, if possible, a loan modification. As confirmed by the accompanying Affirmation of Settlement Conference Compliance, although Defendants do not actually reside at the Mortgaged Premises, Plaintiff still appeared at Foreclosure Settlement Conferences on both February 28, 2017 and March 29, 2017 pursuant to the requirements of CPLR 3408. However, despite Plaintiff’s multiple good faith efforts to reach a resolution of this action, the parties were unable to reach an agreement and the matter was released from further conferencing.

61. On the basis thereof, Defendants’ fourteenth affirmative defense is devoid of any merit whatsoever and should be stricken by this Court in its entirety.

* Plaintiff joined all necessary Parties to this Action
  + 62. Defendants’ fifteenth and nineteenth affirmative defenses erroneously claim that “Plaintiff has failed to make parties to this action certain persons in the absence of which complete relief cannot be accorded between the parties to the action.” *See* Def.[s’] Answer, ¶ 26. This unsubstantiated, self-serving claim fails as a matter of law.

63. Again, it is important to note that a defendant’s failure to identify specific documentary evidence that forms the basis of a defense constitutes a fatal pleading defect. *Teitler*, 288 A.D.2d at 302; *see Held*, 91 N.Y.2d at 430-31. However, Defendants have not provided any documentary (or other) evidence supporting their conclusory contention that Plaintiff neglected to join any necessary parties to this action. On the contrary, it is submitted that all necessary, representative, and permissible parties have been properly named and served pursuant to RPAPL §§ 1311, 1312, and 1313. Nevertheless, even if Plaintiff had inadvertently omitted a necessary party from the Complaint, the proper remedy would merely be the issuance of an order requiring the joinder of any omitted necessary party. *Dime Sav. Bank v. Johneas*, 172 A.D.2d 1082, 1083 (4th Dept. 1991), *citing Polish Nat. Alliance of Brooklyn v. White Eagle Hall Co.*, 98 A.D.2d 400, 406 (2d Dept. 1983).

64. On the basis thereof, Defendants’ fifteenth affirmative defense is devoid of any merit whatsoever and should be stricken by this Court in its entirety.

* Defendant fully complied with every applicable section of New York’s Real Property and Proceedings Law
  + 65. Defendants’ seventeenth and twenty-fourth affirmative defenses baselessly allege that “Plaintiff failed [to] comply with NY Real Property Actions and Proceedings Law §§ 1301, 1302, 1303, 1304 and 1306.” *See* Def.[s’] Answer, ¶ 28. This bald, conclusory allegation is unsustainable.

*i. Plaintiff Was Not Obligated to Comply with RPAPL § 1301*

66. As with the majority of Defendants’ thirty-four boilerplate affirmative defenses and counterclaims, Defendants’ instant contention regarding Plaintiff’s purported non-compliance with RPAPL § 1301 is wholly inapplicable to the matter at hand. Indeed, RPAPL § 1301(1) is only applicable “[w]here a final judgment for the plaintiff has been rendered in an action to recover any party of the mortgage debt.” Here, as it is beyond dispute that no final judgment has been rendered, Plaintiff was not obligated to comply with RPAPL § 1301.

*ii. Plaintiff Fully Complied with RPAPL § 1302*

67. RPAPL § 1302(1) provides that:

Any complaint served in a proceeding initiated pursuant to this article relating to a high-cost or subprime home loan, as such terms are defined in sections six-l and six-m of the banking law, respectively, must contain an affirmative allegation that at the time the proceedings is commenced, the plaintiff:

(a) is the owner and holder of the subject mortgage and note, or has been delegated the authority to institute a mortgage foreclosure action by the owner and holder of the subject mortgage and note; and

(b) has complied with all of the provision of section five hundred ninety-five-a of the banking law and any rules and regulations promulgated thereunder, section six-l or six-m of the banking law, and section thirteen hundred four of this article.

68. This Court is respectfully referred to the annexed documentary evidence of the duly filed Complaint (*see* **Exhibit E**) which confirms, beyond a doubt, that Plaintiff fully complied with RPAPL § 1302. The Complaint, which constitutes irrefutable documentary evidence, explicitly states that: (a) “Plaintiff or its custodian/agent is in possession of the original note with a proper endorsement and/or allonge and is therefore, the holder of both the Note and Mortgage, which passes as incident to the Note” and (b) “Plaintiff has complied with all of the applicable provisions of Banking Law §§ 595-a and 6-l and 6-m.” Thus, it is beyond dispute that Plaintiff fully complied with RPAPL § 1302. *See* ¶¶ 5, 15.

*iii. Plaintiff Fully Complied with RPAPL § 1303*

69. RPAPL § 1303(2) mandates that along with the summons and complaint, notice must be provided to homeowners printed on a colored paper that is other than the color of the summons and complaint. This Court is respectfully referred to the annexed documentary evidence of the duly filed Affidavits of Service (*see* **Exhibit F**), which constitute *prima facie* evidence of Plaintiff’s effectuation of valid service of RPAPL § 1303 notice on Defendants. *See Quinones*, 114 A.D.3d at 719; *Westervelt*, 104 A.D.3d at 897; *Albert*, 78 A.D.3d at 984; *Chaplin*, 65 A.D.3d at 589. Accordingly, it is uncontroverted that Plaintiff fully complied with RPAPL § 1303.

*iii. Plaintiff Was Not Obligated to Comply with RPAPL § 1304*

70. It is well-settled that the notice requirements of RPAPL § 1304 are inapplicable to actions that do not involve home loans. *Fairmont Capital, LLC v. Laniado*, 116 A.D.3d 998, 999 (2d Dept. 2014); *Mendel Group, Inc. v. Prince*, 114 A.D.3d 732, 733 (2d Dept. 2014). Courts have repeatedly held that “RPAPL § 1304 is inapplicable where the borrower is deceased.” *See, e.g., U.S. Bank N.A. v. Levine*, 52 Misc. 3d 736, 738 (N.Y. Sup. Ct. 2016); *The Bank of New York Mellon v. Ana Roman as Ex’r of the Estate of Pablo Roman*, 2012 WL 2563828 (N.Y. Sup. Ct. 2012). Here, it is beyond dispute that Borrower is deceased and that Plaintiff was not obligated to comply with RPAPL § 1304.

*iv. Plaintiff Was Not Obligated to Comply with RPAPL § 1306*

71. RPAPL § 1306 mandates that:

[W]ithin three business days of the mailing of the 90-day pre-litigation notice to be given to a borrower of (i) a home loan (RPAPL § 1304[1]), or (ii) a loan covering a residential cooperative interest, the name, address, and telephone number of the borrower, the amount claimed to be due, and the type of loan at issue.

72. Accordingly, since the instant action does not involve a home loan (or a loan covering a residential cooperative interest), Plaintiff was not obligated to comply with RPAPL § 1306. Based on the foregoing, Defendants’ seventeenth and twenty-fourth affirmative defenses are devoid of any merit whatsoever and should be stricken by this Court in their entirety.

* Plaintiff adequately reviewed Defendant’s Files
  + 73. Defendants’ eighteenth affirmative defense claims that “Plaintiff has not obtained proper original signatures and notarizations to confirm that the Plaintiff’s officers and representatives adequately reviewed the Defendant’s files and accounting information.” *See* Def.[s’] Answer, ¶ 31. This claim is untenable under the relevant facts and applicable law.

74. Again, Defendants have not attempted to provide any details or evidence, admissible or otherwise, identifying which signatures and notarizations were improper and/or explaining how Plaintiff’s review of Defendants’ files and accounting information was inadequate. As such, Defendants’ mere conclusions, hope, unsubstantiated allegations, and assertions are incapable of raising a valid affirmative defense or creating a triable issue of fact. *Zuckerman*, 49 N.Y.2d at 562; *Ortiz*, 104 A.D.2d at 685; *McAuliffe*, 97 A.D.2d at 607-08; *Stern*, 87 A.D.2d at 887. To the extent that Defendants are attempting to preemptively argue that the accompanying affidavit of Vasilio Lefkaditis, a Managing Director of Shaw Funding, LP, is inadmissible, this Court is respectfully referred to CPLR 4518(a), the business records exception to the prohibition against hearsay, which provides that:

Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or even, shall be admissible in evidence in proof of that act, transaction, occurrence, or event, if the judge finds that it was made in the regular course of any business and that it was the regular course of such business to make it, at the time of the act, transaction, occurrence, or event, or within a reasonable time thereafter . . . All other circumstances of the making of the memorandum or record, including lack of personal knowledge by the mater, may be proved to affect its weight, but they shall not affect its admissibility.

75. Pursuant to CPLR 4518(a), a business entity may admit a business record through a person with personal knowledge of the document, its history, or its specific contents, whether that person is sufficiently familiar with the corporate records to aver that a record is what purports to be and that it came out of the entity’s files. *Deleon v. Port Auth.*, 306 A.D.2d 146, 146 (1st Dept. 2003). It is axiomatic that “an affidavit of a bank official [or servicer] in support of a motion for summary judgment is sufficient if based upon documentary evidence, even if he did not participate in the loan negotiations and had no personal knowledge of the facts.” *Bergman on New York Mortgage Foreclosures* § 21.03(2), 21-8.6 to 21-8.7; *see HSBC Bank USA, Nat. Ass’n v. Sage*, 112 A.D.3d 1126, 1127 (3d Dept. 2013); *Marine Midland Bank, N.A. v. Embassy East, Inc.*, 160 A.D.2d 420, 421 (1st Dept. 1990); *ECI Fin. Corp. v. Resurrection Temple of Our Lord, Inc.*, 43 Misc.3d 1220(A), \*2 (N.Y. Sup. Ct. 2012).

76. With respect to the duly signed and notarized Lefkaditis Affidavit, in addition to being based on the affiant’s own personal knowledge, it is properly based on (i) Plaintiff’s business records, (ii) maintained by Plaintiff in the ordinary course of business, and (iii) created at or around the time of the subject occurrences. Accordingly, Defendants’ eighteenth affirmative defense is devoid of any merit whatsoever and should be stricken by this Court in its entirety.

* Plaintiff has not received payments from any Insurance Policies
  + 77. Defendants’ twenty-first affirmative defense baselessly alleges that “[u]pon information and belief the subject loan was insured by a Primary Mortgage Insurance (“PMI”), Monoline Insurance, Credit Default Swap(s)” and that said insurance policies already “paid/reimbursed or settled” with Plaintiff. *See* Def.[s’] Answer, ¶¶ 41, 42. This conclusory, self-serving allegation is untenable. Again, this Court is respectfully reminded that Defendant’s failure to identify specific documentary evidence that forms the basis of a defense constitutes a fatal pleading defect. *Teitler*, 288 A.D.2d at 302; *see Held*, 91 N.Y.2d at 430-31. Here, as it is uncontroverted that Plaintiff has not received payments from any insurance policies, Defendants have not and cannot provide any documentary (or other) evidence to the contrary. Therefore, Defendants’ twenty-first affirmative defense is devoid of any merit whatsoever and should be stricken by this Court in its entirety.
* Plaintiff acted in Good Faith at all times
  + 78. Defendants’ twenty-second affirmative defenses alleges that “Plaintiff has breached its duty to act in good faith and fair dealing” and that Plaintiff failed “to take appropriate steps to avoid and/or mitigate its damages.” *See* Def.[s’] Answer, ¶¶ 45, 46. This unsubstantiated allegation fails as a matter of law.

79. Initially, it should be noted that, outside of the insurance context, a cause of action for bad faith does not exist under New York law. *See Pavia v. State Farm Mut. Auto. Ins. Co.*, 82 N.Y.2d 445, 455 (1993). To the extent that Defendants are attempting to argue that Plaintiff violated the implied covenant of good faith and fair dealing, the covenant is only breached in circumstances where one party to a contract seeks to prevent its performance by, or to withhold its benefits from the other. *Collard v. Incorporated Village of Flower Hill*, 75 A.D.2d 631, 632 (2d Dept. 1980); *see Michaan v. Gazebo Horticultural, Inc.*, 117 A.D.3d 692, 693 (2d Dept. 2014) (finding that the plaintiff could not state a cause of action for breach of the covenant of good faith and fair dealing without alleging how the defendants sought to prevent the performance of a contract or to withhold its benefits).

80. Here, since Defendants have not alleged how Plaintiff sought to prevent their performance of the mortgage agreement or to withhold its benefits, Defendants are incapable of obtaining any relief. Additionally, it should be noted that the failure to mitigate damages is not recognized as a defense to a mortgage foreclosure action. *See* RPAPL § 1321; *Crest/Good Mfg. Co. v. Baumann*, 160 A.D.2d 831, 831-32 (2d Dept. 1990). On the basis thereof, Defendants’ twenty-second affirmative defense is devoid of any merit whatsoever and should be stricken by this Court in its entirety.

* Plaintiff did not violate the Prohibition against Champerty
  + 81. Defendants’ twenty-third affirmative defense erroneously claims that “Plaintiff’s action cannot be maintained under the doctrine of Champerty as codified in NYS Judiciary Law §§488-489.” *See* Def.[s’] Answer, ¶ 47. This claim is untenable under the relevant facts and applicable law.

82. To fall within, Judiciary Law § 489, the statutory prohibition against champerty, a mortgagee must take an assignment for the very purpose of bringing suit and to the exclusion of any other purpose. *Fairchild Hiller Corp. v. McDonnell Douglas Corp.*, 28 N.Y.S.2d 325, 330 (1971); *Federal Deposit Ins. Corp. v. Suffolk Place Associates, Inc.*, 270 A.D.2d 304, 305 (2d Dept. 2000); *see Grid Realty Corp. v. Gialousakis*, 129 A.D.2d 768, 768 (holding that the defendant’s affirmative defense that the assignment to the plaintiff was champertous was not supported by admissible evidence and could not withstand the plaintiff’s motion for summary judgment).

83. Here, not only did Borrower execute the mortgage agreement directly to Plaintiff on January 24, 2008, but there has not been a single subsequent assignment thereof. *See* **Exhibit A** and **Exhibit B**. Thus, Defendants have not and cannot provide any details or evidence, admissible or otherwise, supporting the erroneous claim that Plaintiff took an assignment for the very purpose of bringing suit and for no other purpose. Therefore, Defendants’ twenty-third affirmative defense is devoid of any merit whatsoever and should be stricken by this Court in its entirety.

* None of the Defendants Meritless Defenses are based on Documentary Evidence
  + 84. Defendants’ twenty-fifth affirmative defense baselessly alleges that “one or more defenses are based on documentary evidence.” *See* Def.[s’] Answer, ¶ 50. This allegation is wholly without merit in that the Answer is devoid of any evidence in documentary form that “utterly refutes” and of Plaintiff’s factual allegations and/or “conclusively establish[es] a defense as a matter of law.” *See Stein v. Garfield Regency Condominiums*, 65 A.D.3d 1126, 1128 (2d Dept. 2009), *quoting Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 326 (2002). Thus, Defendants’ twenty-fifth affirmative defense is devoid of any merit whatsoever and should be stricken by this Court in its entirety.
* Plaintiff Complied with every applicable Common Law Doctrine
  + 85. Defendants’ twenty-sixth affirmative defense baselessly contends that “Plaintiff’s claims are barred by the doctrines of unclean hands, bad faith, unconscionability, laches, illegality, usury statute of frauds, collateral estoppels and judicial estoppels.” *See* Def.[s’] Answer, ¶ 51. This bare, conclusory contention is untenable.

86. As with the majority of Defendants’ thirty-four boilerplate affirmative defenses and counterclaims, Defendants’ instant contention regarding Plaintiff’s purported non-compliance with a seemingly random list of various common law doctrines is wholly irrelevant. Again, it is important to note a defendants’ failure to a defendant’s failure to identify the specific documentary evidence that forms the basis of a defense constitutes a fatal pleading defect. *Teitler*, 288 A.D.2d at 302; *see Held*, 91 N.Y.2d at 430-31. However, Defendants have not provided any supporting evidence, documentary or otherwise, that Plaintiff’s claims are barred by the doctrines of unclean hands, bad faith, unconscionability, laches, illegality, usury statute of frauds, collateral estoppels and judicial estoppels. Accordingly, Defendants’ twenty-sixth affirmative defense is devoid of any merit whatsoever and should be stricken by this Court in its entirety.

* The Complaint is not barred by the Statute of Limitations
  + 87. Defendants’ twenty-ninth affirmative defenses claims that “the causes of action asserted in the Plaintiff’s Complaint are, in whole or in part, barred by the applicable statute of limitations.” *See* Def.[s’] Answer, ¶ 55. This claim fails under the relevant facts and applicable law.

88. Pursuant to CPLR 213(4), foreclosure actions are subject to a six-year Statute of Limitations. *See Koeppel v. Carlandia Corp.*, 21 A.D.3d 884, 884 (2d Dept. 2005); *Federal Nat. Mortg. Ass’n v. Mebane*, 208 A.D.2d 892, 894 (2d Dept. 1994). In a foreclosure action, the statute of limitations period begins when the mortgage debt is affirmatively accelerated and the entire amount becomes due. *Lavin v. Elmakiss*, 302 A.D.2d 638, 639 (2d Dept. 2002); *EMC Mtge. Corp. v. Patella*, 279 A.D.2d 604, 605 (2d Dept. 2001). Where the acceleration of the maturity of a mortgage debt on default is made optional with the holder of the note and mortgage, some affirmative action must be taken evidencing the holder’s election to take advantage of the accelerating provision. *See Esther M. Mertz Trust v. Fox Meadow Partners*, 288 A.D.2d 338, 340 (2d Dept. 2001); *Ward v. Walkley*, 143 A.D.2d 415, 417 (2d Dept. 1998). The filing of a summons and complaint is an affirmative action that provides a borrower with notice of the lender’s decision to exercise its option to accelerate the debt and begin the Statute of Limitations period. *Clayton Natl. v. Guldi*, 307 A.D.2d 982, 982 (2d Dept. 2003); *Patella*, 279 A.D.2d at 605.

89. Here, the mortgage debt was affirmatively accelerated by Plaintiff’s filing of the Summons and Complaint less than six-months ago, on November 9, 2016, and Defendants have made no allegation to the contrary. *See* **Exhibit E**. Thus, under any potential interpretation of the underlying facts, this action was commenced more than six-years prior to the expiration of the applicable Statute of Limitations period. Therefore, Defendants’ twenty-ninth affirmative defense is devoid of any merit whatsoever and must be stricken by this Court in its entirety.

**Blades-160863**

* Defendants failed to meet the aforementioned minimum pleading requirement of CPLR 3013
  + 31. Here, Defendants fail to meet the aforementioned minimum pleading requirements of CPLR 1303, and the affirmative defenses asserted in Defendants’ Answer should be stricken on the that ground alone rendering any further analysis unnecessary. Nevertheless, should this Court remain unconvinced, each meritless defense raised is addressed at length herein below.

32. Defendants’ first and only affirmative defense alleges that the Defendants have fully performed all of their obligations under the Note and Mortgage. This defense is untenable.

33. Defendants’ bald and conclusory allegation which claims that Defendants have fully performed all of their obligations under the Note and Mortgage is insufficient to constitute as a defense to a foreclosure action. *See, e.g., N.Y. v. Grosfeld Realty Co.,* 173 A.D.2d 436, 437 (2d Dept. 1991); *Flintkote Co v. Bert Bar Holding Corp.,* 114 A.D.2d 400. 400 (2d Dept. 1985). Defendants fail to offer any facts, details, or evidence to contradict the fact that on September 1, 2015 Defendants defaulted under the Note and/or Mortgage as modified. *See* Hernandez Affidavit ¶13; *See Heller Fin., Inc. v. Apple Tree Realty Assocs.,* 238 A.D.2d 198, 198 (1st Dept. 1997); *Southold Savs. Bank v. Cutino*, 118 A.D.2d 555, 556 (2d Dept. 1986).

34. As such, Defendants’ first and only affirmative defense is without merit and should be stricken accordingly.

**Rinfret-150092**

* Defendants fail to meet the aforementioned minimum pleading requirements of CPLR 3013 (*See* Blades-160865)
* Court has Jurisdiction over case
  + Defendants’ first affirmative defense alleges that the Court lacks personal jurisdiction over the Estate of Kathleen Rinfret (hereinafter “Estate”) because the Estate does not exist as there is neither an administrator nor an executor of the Estate and because a personal representative of the Estate has not been appointed. Defendants’ first affirmative defense is moot as Plaintiff moves to dismiss the Estate of Kathleen Rinfret from the foreclosure action in the instant Summary Judgment Motion, and waives any deficiency it may have claimed against said Estate.[[25]](#footnote-25) Simply put, Defendants’ first affirmative defense should be disregarded and stricken by this Court as moot.
* Complaint states a cause of action, naming the parties, the obligation, the default thereon and the remedy sought.
  + Defendants’ second affirmative defense alleges that Plaintiff’s complaint fails to state a cause of action upon which relief can be granted. This defense is untenable. Here, the Complaint states a cause of action, naming the parties, the obligation, the default thereon and the remedy sought. The complaint includes the dates and details of the execution and delivery of the Mortgage and Note. It further outlined the Borrower’s promise to pay and the breach of that promise. This satisfies the criterion that a pleading states a cause of action if, from the four corners, factual allegations are discerned which taken together manifest a cause of action cognizable at law. *Foley v. D'Agostino*, 21 A.D.2d 60, 65 (1st Dept. 1964). As such, Defendant’s first affirmative defense should be stricken accordingly.
* Defendants offered no proof or evidence of Plaintiff’s failure to satisfy conditions precedent in the promissory note and security instrument.
  + Defendants’ third affirmative defense alleges that Plaintiff’s claims are barred due to Plaintiff’s failure to satisfy conditions precedent in the promissory note and security instrument. This defense is without merit and contradicted by documentary evidence.

This Court is respectfully referred to **Exhibit D**, the Notices of Default, which were served on May 6, 2015 via first class mail on the Borrower at the Mortgaged Premises. *See* Burke Affidavit ¶7. Despite the documentary evidence, Defendants have not offered any details or evidence explaining how Plaintiff failed to satisfy the conditions precedent in the promissory note and security instrument. As such, Defendant’s third affirmative defense is without merit and should be stricken accordingly.

* Plaintiff have documentary evidence of compliance with RPAPL §§1303, 1304, and 1306.
  + Defendants’ fourth affirmative defense alleges Plaintiff is barred from recovery due to its failure to comply with RPAPL §§1303, 1304 and 1306. This defense is also without merit and contradicted by documentary evidence.

This Court is respectfully referred to **Exhibit G**, the process server’s affidavit of service, as documentary evidence that all Defendants were separately served with the copies of the Summons and Complaint bearing the index number and filing date endorsed thereon, along with RPAPL §1303 Notice of Default on colored paper different than that of the Summons and Complaint, bearing the title “Help for Homeowners in Foreclosure.” It is well-settled that a process server’s affidavit of service creates a presumption of proper service which can only be overcome by a defendant swearing to specific facts rebutting the statements contained therein. *Scarano v. Scarano*, 63 A.D.3d 716, 716 (2009); *Simmons v. Grobman*, 227 A.D.2d 369, 370 (2d Dept. 2000). Here, Defendant has failed to not only swear, but allege any specific facts to overcome the presumption of proper service pursuant to RPAPL §1303.

Additionally, this Court is respectfully referred to **Exhibit E** as documentary evidence that on July 14, 2015, in compliance with RPAPL § 1304, 90-Day Notices in at-least 14-point type, with a list of at least five housing counseling agencies, were served on Mortgagors, separately via certified mail and also by first class mail. *See* Burke Affidavit ¶ 8. Moreover, on May 7, 2015, in compliance with RPAPL §1306, the requisite information was filed with the Superintendent of Financial Services within three days after the mailing of the aforementioned 90-Day Notices. *See* **Exhibit E**.

Despite the documentary evidence, Defendants have not offered any details or evidence explaining how Plaintiff failed to comply with the provisions of RPAPL §1303, §1304 and §1306.

* Conclusions, hope, unsubstantiated allegations, and assertions are incapable of raising a valid affirmative defense of triable issue of fact.
  + Defendants’ fifth affirmative defense alleges that Plaintiff’s claims are barred by Plaintiff’s bad faith and because Plaintiff failed to negotiate in good faith with Defendants during the mortgage modification process. These bald and conclusory contentions are untenable. Indeed, it has repeatedly been held that mere conclusions, hope, unsubstantiated allegations, and assertions **are incapable of raising a valid affirmative defense or triable issue of fact**. . *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980); *see New York Higher Educ. Servs. Corp. v. Ortiz*, 104 A.D.2d 684, 685 (3d Dept. 1984); *State Bank of Albany v. McAuliffe*, 97 A.D.2d 607, 607-08 (3d Dept. 1983); *Stern v. Stern*, 87 A.D.2d 887, 887 (2d Dept. 1982). Accordingly, Defendant’s fifth affirmative defense should be disregarded and stricken in its entirety.
* Plaintiff filed the Summons and Complaint, Notice of Pendency, and CPLR 3012-B Certificate of Merit in the Nassau County Clerk’s Office.
  + Defendants’ sixth affirmative defense alleges Plaintiff’s claims and the relief they seek are barred since Plaintiff by and through its attorneys failed to verify the accuracy of the facts that form the basis of the complaint pursuant to statute and administrative order. This contention is completely without merit and contradicted by the documentary evidence.

As demonstrated hereinabove, on May 5, 2016, Plaintiff filed the Summons and Complaint, Notice of Pendency, and CPLR 3012-B Certificate of Merit in the Nassau County Clerk’s Office. *See* **Exhibit F**. As such, any allegations to the contrary are completely without merit and should be stricken by this Court.

* Plaintiff had established Standing as the holder of the note and mortgage.
  + Defendants’ seventh affirmative defense alleges that the entity seeking to enforce the note and security instrument has no authority to act as an agent for the entity that is the person entitled to enforce the note. Defendants’ eighth affirmative defense alleges Plaintiff has no standing to enforce this action as Plaintiff has no interest in the underlying indebtedness. These defenses are completely without merit.

It is well settled that to commence a mortgage foreclosure action, the Plaintiff must have either a legal or equitable interest in the mortgage. *Bank of New York v. Silverberg*, 86 A.D.3d 274, 279 (2d Dept. 2011); *Citimortgage, Inc. v. Rosenthal*, 88 A.D.3d 759, 761 (2d Dept. 2011).

The Court of Appeals’ holding in *Aurora Loan Services, LLC v Taylor*, 25 N.Y.3d 355, 361 (2015), confirms that physical delivery of the note prior to commencement of the foreclosure action is sufficient to transfer the obligation and that the mortgage passes with the debt as an inseparable incident. In the case at bar, Plaintiff received physical possession of the Note indorsed in blank through two separate allonges firmly affixed thereto on December 11, 2013- nearly three years prior to commencement of this action. *See Burke Affidavit ¶ 9*.

Plaintiff’s standing is also made clear by its attachment of the note and allonges indorsing the note in blank, the mortgage, and the mortgage assignment to the summons and complaint at the time the action was commenced. (*See* **Exhibit F)**. In *JPMorgan Chase Bank, N.A. v Roseman*, 137 A.D.3d 1222, 1223 (2d Dept. 2016), the borrower defendants sought dismissal of a mortgagee’s complaint, alleging, *inter alia*, that the plaintiff lacked standing to commence the action. The lower court denied the defendants’ motion and they appealed. *Id*. The Second Department held, in pertinent part that “a copy of the note was annexed to the complaint, establishing prima facie that the plaintiff had standing.” *Id*. at 1223.

Similarly, in *Deutsche Bank Nat. Trust Co. v Leigh*, 137 A.D.3d 841, 842 (2d Dept. 2016), the Second Department held that “the plaintiff established its standing as the holder of the note and mortgage by demonstrating that the note was in its possession and the mortgage had been assigned to it prior to the commencement of the action, as evidenced by its attachment of the endorsed note, the mortgage, and the mortgage assignment to the summons and complaint at the time the action was commenced.”

Here, like in *Roseman* and *Leigh*, Plaintiff’s standing is evidenced by its attachment of the note with the indorsement of the note in blank, the mortgage, and the mortgage assignment to the summons and complaint at the time the action was commenced. (*See* **Exhibit F**; *see also* **Exhibit A**). Thus, in addition to receiving physical possession of the Note nearly three years prior to commencement, Plaintiff’s standing is also confirmed by the Note indorsed in blank as exhibited in its Complaint. *Nationstar Mortg., LLC v Catizone*, 127 A.D.3d 1151, 1152 (2d Dept. 2015); *Federal Natl. Mtge. Assn. v. Youkelsone,* 303 A.D.2d 546 (2d Dept. 2003); *First Trust Natl. Assn. v. Meisels,* 234 A.D.2d 414 (2d Dept. 1996).

As such, Defendants’ seventh and eighth affirmative defenses should be stricken accordingly.

* Plaintiff’s filing and commencement of action is applicable to the Statue of Limitations
  + Defendants’ ninth affirmative defense alleges Plaintiff is barred in whole or in part from recovery it seeks due to the statute of limitations. This contention fails under the relevant facts and applicable law.

Pursuant to CPLR 213(4), foreclosure actions are subject to a six-year Statute of Limitations. *See Koeppel v. Carlandia Corp.*, 21 A.D.3d 884, 884 (2d Dept. 2005); *Federal Nat. Mortg. Ass’n v. Mebane*, 208 A.D.2d 892, 894 (2d Dept. 1994). The Statute of Limitations period begins when the mortgage debt is affirmatively accelerated and the entire amount becomes due. *Lavin v. Elmakiss*, 302 A.D.2d 638, 639 (2d Dept. 2002); *EMC Mtge. Corp. v. Patella*, 279 A.D.2d 604, 605 (2d Dept. 2001). Where the acceleration of the maturity of a mortgage debt on default is made optional with the holder of the note and mortgage, some affirmative action must be taken evidencing the holder’s election to take advantage of the accelerating provision. *See Esther M. Mertz Trust v. Fox Meadow Partners*, 288 A.D.2d 338, 340 (2d Dept. 2001); *Ward v. Walkley*, 143 A.D.2d 415, 417 (2d Dept. 1998). The filing of a summons and complaint is one such affirmative action which, while revocable, provides the borrower with notice of the holder’s decision to exercise its option to accelerate the debt and begin the Statute of Limitations period. *Clayton Natl. v. Guldi*, 307 A.D.2d 982, 982 (2d Dept. 2003); *Patella*, 279 A.D.2d at 605.

Here, the mortgage debt was affirmatively accelerated by Plaintiff’s filing of the Summons and Complaint approximately ten months ago, on May 5, 2016. *See* **Exhibit F**. Under any potential interpretation of the underlying facts, this action was commenced more than six-years prior to the expiration of the applicable Statute of Limitations period. Accordingly, Defendants’ ninth affirmative defense is devoid of any merit whatsoever and must be stricken in its entirety.

**Sookhai 161088**

* Defendants’ have failed to meet the aforementioned pleading requirements under CPLR 3013. (*See*, Rinfret-150092, Blades-160863)
* Plaintiff established its standing in this mortgage foreclosure action.
  + 24. Defendants’ first affirmative defense alleges, in essence, that the Plaintiff lacks standing to commence this action. (*see* Defs. Answer at para. 13) Despite Defendant’s bald allegations to the contrary, Plaintiff’s standing at commencement is unequivocally established herein.

25. A plaintiff establishes its standing in a foreclosure in a mortgage foreclosure action by demonstrating that it was either holder of, or the assignee of, the underlying note when the action was commenced. *DLJ Mortg. Capital, Inc. v. Pittman,* 2017 WL 1903183, at \*1 (N.Y. App. Div. May 10, 2017) citing *LGF Holdings, LLC v. Skydel,* 139 A.D.3d 814; *Wells Fargo Bank, .A. v. Rooney*, 132 A.D.3d 980, 981.

26. “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, and the mortgage passes with the debt as an inseparable incident.” *Pittman,* 2017 WL 1903183, at \*1 citing *U.S. Bank, N.A. v. Collymore*, 68 A.D.3d 752, 754*; see LGF Holdings, LLC v. Skydel,* 139 A.D.3d at 814; *Deutsche Bank Trust Co. Ams. V. Vitellas,* 131 A.D.3d 52, 59.

27. As recently confirmed by the Court of Appeals, a transfer of the note automatically transfers the mortgage as well unless the parties agree that the transferor is to retain the mortgage. *Aurora Loan Servs., LLC v. Taylor*, 25 N.Y.3d 355, 361-62 (2015) *citing Restatement (Third) of Property (Mortgages) § 5.4, Reporter’s Note, Comment b.* Once a note is transferred ‘the mortgage passes as an incident to the note.” *Taylor*, 25 N.Y.3d at 361 quoting *Bank of N.Y. v. Silverberg,* 86 A.D.3d 274, 280, (2d Dept. 2011)

28. Further, “any disparity between the holder of the note and the mortgagee of record does not stand as a bar to a foreclosure action because the mortgage is not the dispositive document of title as to the mortgage loan; the holder of the note is deemed the owner of the underlying mortgage loan with standing to foreclose” *Taylor,* 25 N.Y.3d at 362. (internal quotations omitted).

29. Indeed the physical delivery of the note to the plaintiff from its owner prior to commencement of a foreclosure action is sufficient to transfer the mortgage obligation and create standing to foreclose*. Taylor*, 25 N.Y.3d citing *Bank of N.Y. Mellon Trust Co. NA v. Sachar,* 95 A.D.3d 695 (1st Dept. 2012); *Deutsche Bank Natl. Trust Co. v. Pietranico,* 33 Misc.3d 528, 535, 928 N.Y.S.2d 818 (Sup. Ct., Suffolk County 2011); *In re Escobar*, 457 B.R. 229,240 (E.D.N.Y.2011).

30. In the case at bar, Plaintiff’s standing at commencement is unequivocally established by virtue of: (1) Plaintiff’s physical possession of the original Note prior to commencement of this action, and; (2) the annexation of the Note, properly indorsed to blank, as exhibited in the Plaintiff’s Complaint.

31. More specifically, the Bell Affidavit, which is based on a review of the relevant business records, states that Plaintiff received physical possession of the Note on January 1, 2016, over one year prior to commencement of the within action. (*See* O’Brien Affidavit ¶9); *Wells Fargo Bank, N.A. v. Arias,* 121 A.D.3d 973 (2d Dept. 2014) (“The plaintiff met its prima facie burden of establishing its entitlement to judgement as a matter of law dismissing the appellants’ affirmative defense of lack of standing by submitting the affidavit of … a vice president for the plaintiffs loan servicer, who stated that he had examined the records of the servicer and that of the plaintiff and determined that the subject note was delivered to the plaintiff”).

32. In addition to possession of the Note prior to commencement, Plaintiff’s standing is further conclusively established by its attachment of the note to the summons and complaint. Indeed, the Second Department has made it abundantly clear that Plaintiff conclusively establishes standing to foreclose ‘by demonstrating that it had physical possession of the note prior to the commencement of the action, as evidenced by its attachment of the note to the summons and complaint.” *Deutsche Bank v. Logan*, 146 A.D.3d 861 (2d Dept. 2017)(citing *JPMorgan Chase Bank N.A. v. Weinberger,* 142 A.D.3d 643 (2d Dept. 2016) (emphasis added); *see also Deutsche Bank Natl. Trust Co. v. Leigh,* 13 A.D.3d 841,842; *Nationstar Mtge,, LLC v. Catizone,* 127 A.D.3d 636 (2d Dept. 2016). “Further, where the note is affixed to the complaint, ‘it is unnecessary to give factual details of the delivery in order to establish that possession was obtained prior to a particular date.” *Logan* 146 A.D.3d 861 (citing *Weinberger*, 142 A.D.3d at 645).

33. Based on the foregoing, Plaintiff’s standing to commence the within action has been unequivocally demonstrated warranting this Court to strike Defendants’ first affirmative defense.

* Plaintiff complied with all requirements of RPAPL § 1304
  + 34. Defendants’ second affirmative defense alleges that Plaintiff failed to comply with the notice provision of RPAPL § 1304. This defense is untenable as compliance with the statute is clearly demonstrated herein.

35. “Proper service of RPAPL 1304 notice on the borrower or borrowers is a condition precedent to the commencement of a foreclosure action, and the plaintiff has the burden of establishing satisfaction of this condition*” Wells Fargo Bank N.A. v. Trupia,* 2017 WL 2125719, at \*1 (N.Y. App Div. May 17,2017) citing *Aurora Loan Servs., LLC, v. Weisbaum,* 85 A.D.3d 95, 106; see *CitiMortgage Inc. v. Pappas,* 147 A.D.3d 900.

36. The statute requires that such notice must be sent by registered or certified mail, and also by first-class mail, to the last known address of the borrower (*see* RPAPL 1304(2)). By requiring the lender or mortgage loan servicer to send RPAPL 1304 notice by registered or certified mail and also by first-class mail, the Legislature implicitly provided the means for the plaintiff the demonstrate its compliance with the statute, i.e., by submission of proof of mailing by the post office. *CitiMortgage Inc. v. Pappas*, 147A.D.3d 900.

37. Here, Defendants failed to make the payment due on December 20, 2008, placing them in default under the express terms of the Note and Mortgage. (See O’Brien Affidavit ¶7, Exh. D). In accordance with RPAPL § 1304, Plaintiff notified Defendant via certified and first class mail that the loan was 2736 days in default by letter dated June 15, 2016 (“90 Day Notice”). (*See* O’Brien Affidavit ¶8 and Exh. D). The 90 Day Notice further explained that the total amount of delinquency through September 18, 2016, legal action may be commenced then. The Notice also included a list of government approved housing counseling agencies in Defendants’ area. *Id*.

38. In addition thereto, Plaintiff fully complied with the temporal requirements of RPAPL §1304 as notices were sent to Defendants by first class and certified mail on June 15, 2016, well over ninety (90) days prior to the commencement of this action. (*See* O’Brien Affidavit ¶8 and Exh. D). Defendant’s claims that the Plaintiff failed to issue the pre-action ninety day notice as required by RPAPL § 1304, is unavailing, as the record is replete with due proof that Plaintiff satisfied the ninety-day notice requirements by its issuance and service by first class, regular, and certified mail of a notice addressed to the Defendant at the mortgaged premises and to a last known address. *Deutsche Bank Natl. Trust Co. v. Quinn,* 120 A.D.3d 609, 990 N.Y.S.2d 885 (2d Dept. 2014).

39. Notwithstanding Plaintiff’s demonstrated compliance with the statute, the absence of any affidavit from Defendants denying receipt of such notices is fatal to their counsel’s claim that the Plaintiff failed to comply with this statutory condition precedent*. Grogg v. South Road Assoc*., L.P., 74 A.D.3d 1021, 1021-1022, 907 N.Y.S.2d 22,23 (2d Dept. 2010).

* No evidence to prove charges of defective processing in loan payments
  + Defendants’ third affirmative defense alleges that Plaintiff has willfully overstated the amount of the obligation owed. This defense is meritless because Defendants fail to provide any documentary evidence in support of a charge of any defective processing in their loan payments. Nevertheless, a challenge to the amount of damages has been held insufficient to defeat a motion for summary judgement. *Shufelt v. Bulfamante*, 92 A.D.3d 936, 937 (2d Dept. 2012); *Long Island Sav. Bank of Centereach, F.S.B. v. Denkensohn,* 222 A.D.2d 659, 635 (2d Dept. 1995); *GMAC Mortg., LLC v. Paez,* 2013 WL 5574535, 3 (N.Y. Sup.2013); *Bank of New York Mellon FKA the Bank of New York v. Obi,* 2014 WL 534582 (N.Y. Sup. 2014).

41. Further, resolution of Plaintiff’s motion for summary judgement in its favor will include the appointment of a Referee who, by order of the Court, will continue the amount due to Plaintiff. Crest/Good Mfg., 160 A.D.2d 831, 554 N.Y.S.2d at 265; Long Island Sav. Bank, 222 A.D.2d at 635 N.Y.S.2d at 684 (“a dispute as to the exact moment owed by the mortgagor to the mortgagee may be resolved after a preference pursuant to RPAPL 1321, and the existence of such a dispute does not preclude the issuance of summary judgement directing the sale of the mortgaged property”). Accordingly, Defendants’ third affirmative defense is, in addition to being not ripe, insufficient to defeat the instant motion, and should be dismissed.

* Doctrine of Unclean Hands is not a valid defense in a foreclosure action
  + Defendants’ fourth affirmative defense alleges, “upon information and belief,” that the action is barred by the unclean hands and equitable estoppel. The Doctrine of Unclean Hands is used only to bar the grant of equitable relief to a party who is “guilty of immoral, unconscionable conduct*.” Green v. Le Beau,* 281 A.D. 836, 11 N.Y.S.2d 585 (2d Dept. 1953). Regardless, the Court of Appeals *in Jo-Ann Homes v. Dworetz,* 25 N.Y.2d 112, 302 N.Y.S.2d 799, 250 N.E.2d 214 (1969) rejected the Doctrine of Unclean Hands as a defense to a mortgage foreclosure action. As such, Defendant’s vague and conclusory allegations of unclean hands is factually insufficient and should be dismissed.

43. Defendants’ claims regarding equitably estoppel similarly lacks merit. Under New York law, an equitable estoppel argument should not be lightly presumed, and conclusory and unsubstantiated allegations of conduct constituting an alleged estoppel is alone insufficient*. Carver Fed. Sav. Bank v. Redeemed Christian Church of God, Intl. Chapel, HHH Parish, Long Is., N.Y., Inc*., 35 Misc. 1228 (A), 954 N.Y.S.2d 758 (N.Y. Sup. Suffolk Cty. 2012).

44. The elements of a cause of action based upon promissory estoppel are a clear and unambiguous promise, reasonable and foreseeable reliance by the party to whom the promise is made, and an injury sustained in reliance on that promise.” *Agress v. Clarkstown Cent. School Dist*., 69 A.D.3d 769, 771, 895 N.Y.S.2d 432 (2d Dept. 2010). The requirement that there be a clear and unambiguous promise is not met by references to a course of conduct between the parties. *Carver,* 35 Misc. 3d 1228 (A), 954 N.Y.S.2d 758. In addition, the conduct relied upon to establish estoppel must not be otherwise compatible with the agreement between the parties as written. Id. To establish a claim of equitable estoppel, three elements must be established: (1) conduct which amounts to a false representation or concealment of material facts; (2) intention to such conduct will be acted upon by the other party; and (3) knowledge of the real facts. *River Seafoods, Inc. v. JPMorgan Chase Bank,* 19 A.D.3d 120, 796 N.Y.S.2d 71 (1st Dept. 2005). Simply put, in the case at bar, Defendants’ vague and conclusory allegations of estoppel is factually insufficient, defeated by the documentary evidence, and should be dismissed.

* Note and Mortgage have been memorialized in writing
  + Defendants’ fifth affirmative defense alleges, “upon information and belief,” that the action is barred by the statute of frauds. The defense is unsustainable as the Note and the Mortgage that are the subject of the action have been memorialized in writing and are annexed to the underlying motion. Here, because the Note and Mortgage are in writing and not performable within one year of the defense of Statute of Frauds is not applicable herein*. JPMorgan Chase Bank v. White*, 44 Misc. 1225 (A), 997 N.Y.S.2d 669 (Sup. Ct. 2014)
* Defendants’ have no evidence to prove the action is barred by the Statute of Limitations
  + Defendants’ sixth affirmative defense alleges, “upon information and belief,” that the action is barred by the statute of limitations. Defendants fail to provide any evidence to substantiate their defense. It is respectfully submitted that as a result thereof, Defendants’ unequivocally fail to meet the minimum pleading requirements of CPLR 3013 and thus fail to establish, *prima facie*, that this action is time-barred*. See, e.g., Nationstar Mortg., LLC v. Weisblum*, 143 A.D.3d 866, 867-68, (2d Dept. 2016)
* Doctrine of Champerty is inapplicable to this action
  + Defendants’ seventh affirmative defense alleges, “upon information and belief,” that Plaintiff acquired the note and mortgage for the purpose of commencing this action and that as a result thereof, the action is barred by the equitable doctrine of champerty. The doctrine of champerty currently codified in NYS Judiciary Law §§ 488-489. However, the doctrine of champerty is inapplicable to the instant action.

48. “When a mortgagor defaults on loan payments, even if only for a day, a mortgagee may accelerate the loan, require that the balance be tendered or commence foreclosure proceedings, and equity will not intervene.” *Home Sav. of Am., FSB v. Isaacson*, 240 A.D.2d 633, 633, 659 N.Y.S.2d 94 (2d Dept. 1997). Importantly, the defense of champerty does not apply to the subject loan nor the instant action. See, Judiciary Law § 489 if, *inter alia*, the primary purpose of the transaction is to enforce a legitimate claim). Moreover, in this case, the Plaintiff was free to transfer the note and mortgage, absent any language which expressly prohibited the assignment. *Matter of Stralem,* 303 A.D.2d 120, 758 N.Y.S.2d 345 (2d Dept. 2003); See also *Bank of Am., N.A. v. Rodomista*, 47 Misc. 3d 1228 (A), 18 N.Y.S.3d 577 (N.Y. Sup. Ct. 2015)

49. Based on the foregoing, Defendants’ seventh affirmative defense is without merit and should be stricken by the Court.

**Harmon-150849**

* Plaintiff have provided sufficient evidence to show a cause of action in which relief may be granted.
  + Defendants’ first affirmative defense alleges that the Plaintiff’s complaint fails to state a cause of action upon which a relief may be granted. When considering a claim alleging a failure to state a cause of action which relief can be granted, the court must search the complaint in depth and with liberality to ascertain whether a cause of action is suggested by the facts. R 4:6-2(e); Rezem Family Associates, LP v. Borough of Millstone, 423 N.J. Super. 103, 113 (App. Div. 2011); *see also* Liberman v. Port Authority of New York and New Jersey, 132 N.J. 76 (1993). In essence, the party against whom relief is sought must be put on adequate notice and allege facts which give rise to the cause of action. Glass v. Suburban Restoration Co., 31 N.J. Super. 574, 592 (App. Div. 1982).

Dismissal of a complaint is only mandated where the factual allegations are properly insufficient to support a claim upon which relief can be granted. Reider v. State Department of Transportation, 221 N.J. Super. 547, 552 (App. Div. 1987). A court can only consider the facts on the face of the complaint when deciding whether or not the plaintiff has met its burden. Printing Mart-Morristown v. Sharp Electronics, 116 N.J. 739, 746 (1989).

A review of the underlying complaint makes clear that Plaintiff alleged sufficient facts setting forth a clear and proper claim for foreclosure. The complaint alleges that on January 18, 2008, Defendants executed subject Note and/or Mortgage, that on January 30, 2008 the Mortgage was recorded in the Morris County Clerk’s Office, and that on December 1, 2009 the Defendants defaulted thereunder. Moreover, the Complaint contains an affirmative allegation of Plaintiff’s standing as well as an acknowledgment of compliance with all pre-commencement condition precedents, statutory and otherwise. (*See* Exhibit E and Exhibit F).

* Defendant has no evidence that the Plaintiff comes to court with Unclean Hands (Doctrine of Unclean Hands) (Sookhai 161088)
  + Defendants’ second affirmative defense contends that Plaintiff’s claim is barred because of the doctrine of unclean hands is to be evaluated and applied in the court’s discretion, not to punish plaintiffs, but rather to ensure a balancing of the equities. *See* New Jersey Bank v. Azco Realty Co., 148 N.J. Super. 159, 166 (App. Div.). certif. denied, 74 N.J. 280 (1977). In essence, the doctrine seeks to prevent lenders from benefiting from their own inequitable conduct. Heritage Bank N.A. v. Ruh, 191 N.J. Super, 53, 71 (Ch. Div. 1983). To establish the defense of the unclean hands, a defendant must prove inequitable conduct by the lender at the inception of the loan. Leisure Tech.-Ne., v. Klingbeil Holding Co., 137 N.J. Super 353, 356 (App. Div. 975); Central Penn Nat’l Bank v. Stonebridge Ltd., 185 N.J. Super 289, 302 (Ch. Div. 1982).

Here, Defendants fail to provide any evidence, documentary or otherwise, to establish Plaintiff’s purported unclean hands. Furthermore, Defendants fail to allege with any particularity how Plaintiff comes to this court with unclean hands. As such, Defendants’ second defense amounts to nothing more than self-serving, bald and conclusory allegation that must be disregarded by this Court and stricken accordingly. *See* Old Republic Ins. Co. v. Currie, 248 N.J. Super. 571, 574 (Ch. Div. 1995).

* Defendants’ have no proof that the damages were caused by the Plaintiff or a third party
  + Defendants’ third affirmative defense alleges that Plaintiff’s claims are barred as Plaintiff’s damages, if any, were caused by the Plaintiff’s own acts, omissions and/or acts of omissions of third parties over whom Defendants have no control.

Defendants may not rest upon mere allegations or denials in is pleading, but must produce sufficient evidence to reasonably support a verdict. Triffin v. Am. Int’l Group, Inc., 372 N.J. Super 517, 523 (App. Div. 2004); R 4:46-5(a). Here, Defendants offer only bald, conclusory and unsubstantiated allegations without factual support in tendered affidavits. See Gherardi. Trenton Board of Education, 53 N.J. Super. 349, 358 (App. Div. 1958). Indeed, Defendants fail to provide any affidavit to support meritless claims alleged in their third defense, which should be stricken accordingly.

* Defendants’ allegations of Plaintiff’s claims being barred under the doctrine of estoppel, laches, and waiver are untenable.
  + Defendants fourth affirmative defense alleges that Plaintiff’s claims are barred under the doctrine of estoppel, laches, and waiver. Defendants’ vague allegations are untenable.
    - *Estoppel*

The doctrine of estoppel potentially provides that one may not take a position inconsistent with that previously assumed and intended to influence the conduct of another, if such repudiation would not be responsive to the demands of justice and good conscience, in that it would work prejudice and injury to the other. West Jersey Title and Guar. Co. v. Indus. Trust Co., 27 N.J. 144, 153 (1958); *see also* Aron v. Rialto Realty Co., 100 N.J. Eq. 513, 517 (Ch. 1927), aff’d, 102 N.J. Eq. 331 (E. &A. 1928).

*Laches*

To establish the defense of laches, defendant must assert more than mere delay; the borrower must also prove negligence on the part of the creditor, good faith on the part of the borrower and prejudice resulting from the creditor’s failure to promptly exercise its rights. Wilson v. Stevens, 105 N.J. Eq. 377, 387 (Ch. 1929). In the case at bar, Defendant fails to allege any specific facts as to sustain its burden in establishing the defense of laches. Instead, Defendant offers only a bald and conclusory defense without factual support in tendered affidavits. See Gherardi v. Trenton Board of Education, 53 N.J. Super. 349, 358 (App. Div. 1958).

*Waiver*

Waiver is the intentional relinquishment of a known right and it implies an election by a party to forego some advantage which the party might have demanded. See Old Republic Ins. Co. v. Currie, 284 N.J. Super. 571, 574 (Ch. Div. 1995); Triffin v. Am. Int’l Group, Inc., 372 N.J. Super. 517, 523 (App. Div. 2004); See R 4:46-5(a). As such, Defendants’ fourth affirmative defense should be stricken accordingly.

* Plaintiff has standing to bring forth this action
  + Defendants’ fifth and thirteenth affirmative defenses allege that Plaintiff lacks standing to bring this action. This defense in untenable because Plaintiff’s standing is evidenced by virtue of Plaintiff’s present possession of the original Note. (*See* Johnson Affidavit ¶5) and by a duly recorded assignment of mortgage.

In a mortgage foreclosure action, a mortgagee seeking to foreclose a mortgage must establish ownership or control of the underlying debt at the time complaint was filed. Wells Fargo Bank, N.A. v. Ford, 418 N.J. Super. 592, 597 (App. Div. 2011); *see also* Bank of New York v. Raftogiannis, 418 N.J. Super. 323, 327-328 (Ch. Div. 2010). Where the foreclosing mortgagee is not the original lender, a mortgagee may establish ownership or control by demonstrating that it is a “person entitled to enforce” the instrument within the meaning of N.J.S.A. 12S 3:301

Ownership or control of the underlying debt can be established by a showing of negotiation or transfer of the instrument of accompanies by physical delivery of the instrument to the mortgagee (*See* N.J.S.A. 12A 3:301, N.J.S.A. 12A 3:203). A person may enforce an instrument if it is the holder of the instrument, a nonholder in possession of the instrument who has the rights of a holder, or a person not in possession of the instrument who is entitled to enforce the instrument pursuant to 12A 3:309 or subsection d. of 12A:3-418 N.J.S.A. 12A:3-301.

In the case at bar, Plaintiff’s standing is demonstrated by virtue of its physical possession of the original Note indorsed in blank at commencement of the action. More specifically, prior to commencement of the instant action, the Note was indorsed to Blank, (*See* **Exhibit** A) making the Note payable to bearer and providing its holder with the power to enforce said instrument. See article 3 of the UCC, codified in the state as N.J.S.A. §§12A:3-101-605. Thus, standing here is demonstrated by virtue of the fact that Plaintiff, or its custodian/agent was in physical possession of the original Note made payable to the bearer on or before September 4, 2013, prior to the commencement of the instant foreclosure action, and maintains possession of the original Note. (See Johnson Affidavit ¶9). Based on the foregoing, Plaintiff has demonstrated standing to commence and continue the instant foreclosure action based on its physical possession of the original Note prior to commencement of this action.

Furthermore, the requisite ownership or control of the underlying debt can be demonstrated by proffering a properly authenticated assignment demonstrating that the note and mortgage was assigned to the mortgagee before the complaint was filed. N.J.S.A. 46:9-9; Deutsche Bank Nat’l Trust Co. v. Mitchell, 422 N.J. Super 214, 225 (App. Div. 2011). Here, Plaintiff’s standing is further demonstrated by a recorded and properly authenticated assignment of mortgage prior to commencement of the within action.

More specifically, said assignment was executed on January 30, 2014 and recorded in the Morris County Clerk’s office on February 7, 2014 in book 22492, Page 383 *et. Seq*. A copy of the aforesaid assignment of mortgage is annexed as part of **Exhibit C**. Therefore, to suggest that Plaintiff lacks standing when the aforementioned assignment was duly executed and recorded long before commencement of the foreclosure action is not only wrong, but wrong-headed and should receive no consideration by this Court.

* Defendants allegations that claims are barred by the Statute of Frauds is contradicted by evidence.
  + Defendants’ sixth affirmative defense alleges Plaintiff’s claims are barred by the virtue of the Statute of Frauds. This defense is without merit and contradicted by documentary evidence.

New Jersey’s Statute of Frauds provides that where the amount of a mortgage loan exceeds $100,000.00 and the obligation is not personal or household debt, an agreement between lender and a borrower to loan money must be in writing. N.J.S.A. 25:1-5(f) (“a contract, promise, undertaking a commitment to loan money or to grant, extend or renew credit, in an amount greater than $100,000, not primarily for personal, family, or household purposes, made by a person engaged in the business of lending or arranging for the lending of money or extending credit” shall be in writing).

Here, the mortgage at issue is a written instrument which was clearly executed by the Defendants as security for the underlying debt, and is properly acknowledged and recorded. *See* **Exhibit B**. Therefore, the statute of frauds is wholly inapplicable as a defense to this action. Therefore, Defendants’ sixth affirmative defense should be disregarded by this Court and stricken accordingly.

* Defendants allegations that Plaintiff failed to comply with the Fair Foreclosure Act are contradicted by evidence.
  + Defendants’ seventh and tenth affirmative defenses allege that Plaintiff failed to comply with the Fair Foreclosure Act, N.J.S.A. 2A:50-56 notice requirements (hereinafter referred to as the “Act”). This defense is completely without merit and contradicted by documentary evidence.

The Act’s provisions notice provisions apply only to “debtors” and “residential mortgage debtors.” See N.J.S.A. 2A:50-54-57. A “debtor” or “residential mortgage debtor” is defined as “any person shown on the record of the residential mortgage lender as being obligated to pay the obligation secured by the residential mortgage.” N.J.S.A. 2A:50-55. An “obligation” is defined as “a promissory note, bond or other similar evidence of a duty to pay.” As such, the Act only requires that the notice be given to the debtor of a residential mortgage. N.J.S.A. 2A:50-58.

Contrary to Defendants’ contentions, on January 20, 2010, proper Notices of Intention to Accelerate and Foreclose were sent via Certified Mail, Return Receipt Requested, and by first class mail to the debtor, Marlene A. Harmon’s last known address. A review of the notices makes clear that same comply with all relevant provisions of N.J.S.A. 2A:50-56(c). *See* **Exhibit D.**

It follows, that Defendants’ contentions regarding Plaintiff’s purported failure to comply with the Fair Foreclosure Act are wholly without merit, and should be disregarded and stricken by this Court.

* Defendants fail to provide any evidence demonstrating lack of consideration/privity between Defendant and Plaintiff.
  + Defendants’ eight affirmative defense asserts that Plaintiff’s claims are barred due to lack of consideration/privity between Plaintiff and Defendant Robert Harmon. This defense is completely without merit.

The burden of proving failure of consideration is upon the mortgagor. R 4:5-4; Wilson v. Stevens, 105 N.J. Eq. 377, 383 (Ch. 1929). (“the denial that the mortgagor was indebted to the mortgagee-often referred to as want of consideration or failure of consideration. Nevertheless, Plaintiff respectfully refers the Court to the Mortgage, which was duly executed by the Defendants, notarized and recorded in the County Clerk’s Office. *See* Exhibit B.

Duly executed, notarized, and recorded mortgage instruments are presumptively valid and enforceable, and are presumed to have been made for good and valuable consideration. Weinberg v. Weinberg, 118 N.J. Eq. 97, 98 (Ch. 1935) (“the mortgage was under seal; therefore, consideration was implied. The seal, however, is nothing more than presumptive evidence of a sufficient consideration, which may be rebutted. But neither courts of law or equity will allow the consideration to be inquired into for the sake of declaring the instrument void for want and consideration; but they will, for the purpose of ascertaining what is due upon it”); In re Shaw, 51 F. Supp. 566, 568 (D.N.J. 1943) (“the seal upon the real estate mortgage imports consideration and raises a presumption that it was present”). Moreover, a spouse will be deemed to have received adequate consideration if such consideration was received by the other spouse. JHM Acquisitions, L.P. v. Winkler, DDS# 15-2-6561 (App. Div. 2001); *see also* Citizens First Nat’l Bank v. Brierley, 98 N.J. Super. 497 (App. Div. 1968).

Therefore, Defendant’s tenth affirmative defense should be disregarded and stricken accordingly.

* Defendants’ have no factual support or evidence that the Plaintiffs’ did not offer mortgage modifications
  + Defendants’ ninth affirmative defense contends that Plaintiff’s claims are barred because Plaintiff failed to offer a mortgage modification and other relief mandated by Federal Law. Defendants may not rest upon mere allegations or denials in their pleading, but must produce sufficient evidence to reasonably support a verdict. Triffin v. Am. Int’l Group, Inc., 372 N.J. Super. 517, 523 (App. Div. 2004); R 4:46-5(a). Here, Defendants offer only bald, conclusory, and unsubstantiated allegations without factual support in tendered affidavits*. See* Gherardi v. Trenton Board of Education, 53 N.J. Super. 349, 358 (App. Div. 1958). In addition, Defendants fail to state the law or statute on which Defendants base their affirmative defense. Simply, because Defendants fail to provide any affidavit to support the meritless claims, their ninth defense should be stricken accordingly.
* Defendants’ have no evidence to support their claims of any loss to Plaintiff is caused by fraud or third parties
  + Defendants’ eleventh affirmative defense alleges that Plaintiff claim is barred because any alleged loss to Plaintiff is caused by fraud of the Plaintiff or third parties over which Defendants had no control.

Once again, Defendants fail to offer any facts, details, or evidence to support its self-serving, conclusory, and false claims as to the purported fraud. As such, Defendants’ eleventh affirmative defense also amount to nothing more than self-serving, bald and conclusory allegations that must be disregarded by this Court and stricken accordingly. *See* Old Republic Ins. Co. v. Currie, 284 N.J. Super. 571, 574 (Ch. Div. 1995).

* Defendant’s time to assert violation of Truth in Lending Act claims have long expired
  + Defendants’ twelfth defense alleges that Plaintiff failed to comply with the Truth in Lending Act (hereinafter referred to as “TILA”) by failing to provide Defendants with proper and accurate written rescission notices and accurate disclosures as required by TILA.

At the outset, Defendants’ TILA claims are time barred. More specifically, any action or claim alleging TILA violation(s) expires three years after the loan closes or upon the sale of the mortgaged property, whichever date is earlier. 15 U.S.C. §1635(f); Burnham v. WMC Mortg. Corp., 2010 WL 2560657. At \*1 (D.N.J. June 21, 2010). The underlying loan was originated on January 18, 2008. Therefore, the Defendants’ time to assert any TILA violation claim have long since expired.

R 4:5-4 requires all affirmative defenses set forth specifically and separately a statement of facts constituting such defense. See Old Republic Ins. Co., v. Currie, 284 N.J. Super 571, 574 (Ch. Div. 1995). A bare legal conclusion constituting an affirmative defense will not suffice and a plaintiff may move to strike an answer pursuant to R 4:6-5 on the ground that the answer presents no question of fact or law. *See* Id; *see* R 4:5-4. Here, Defendants unequivocally fail to provide any evidence – documentary or otherwise – to support their claims regarding the Plaintiff’s purported violations of TILA. As such, Defendants’ twelfth affirmative defense should be stricken.

* Defendants’ claims cannot be sufficient enough to create a question of material fact
  + Defendants’ fourteenth affirmative defense contests the amount of Plaintiff’s claims for the following reasons: (1) interest was no calculated in a manner prescribed by the Note; (2) the amount claimed due does not account for payments made by Defendant; and (3) the amount claimed due includes unreasonable and excessive fees not permitted by the Note and/or actually incurred by Plaintiff.

It is important to note that Defendants offer no information or details with respect to how the amount claimed due is incorrect. Indeed, parties must respond with affidavits meeting the requirements of R 1:6-6 and R 4:46-2(b), setting forth specific facts showing that there is a genuine issue for trial. See Triffin v. Am. Int’l Group, Inc., 372 N.J. Super 517, 523 (App. Div. 2004); *See* R 4:46-5(a). Defendants’ complete failure to expand on their claims is fatal to the defense asserted.

Nevertheless, where a defendant does not deny that an amount is due, and instead only issues general denials as to the amount, it has been held to be insufficient to create a question of material fact, which would preclude summary judgement. Trap Rock Indus., Inc. v. Local 825, Int’l Union of Operating Engr’rs., 982 F.2d 884 (3d. Cir. 1992). As such, Defendants’ fourteenth defense should be stricken.

* Defendants’ offer no evidence as to how the Doctrine of Dower and Curtesy bars Plaintiff’s foreclosure action.
  + Defendants’ fifteenth affirmative defense alleges that Plaintiff is unable to foreclose upon the interest of Defendant Robert Harmon is the subject premises under dictates of common law, including Dower and Curtesy. This defense is untenable.

In the case at bar, Defendants allege bald and conclusory claims without any specific facts or details as to how the doctrine of Dower and Curtesy bars Plaintiff’s foreclosure action. Nevertheless, both Defendants, Marlene A. Harmon and Robert Harmon are party defendants to this action by virtue of the fact they are mortgagors of the mortgages premises. Defendants have not presented any evidence to demonstrate the contrary. *See* Exhibit B.

Notwithstanding, the doctrines of dower and curtesy were generally abolished in New Jersey in 1980. Girard Acceptance Corp. v. Stoop, 177 N.J. Super. 193 (Ch. 1980). Based on the foregoing, Defendants’ fifteenth affirmative defense should be stricken accordingly.

* Defendants have no evidence to prove a failure of compliance between Bank of America and the United States Department of Justice.
  + Defendants’ sixteenth affirmative defense alleges Plaintiff’s claims are barred due to Plaintiff’s failure to comply with the dictates of a “Settlement Agreement between Bank of America and the United States (sic) Department of Justice including… Plaintiff’s failure to provide Defendants with certain required notifications and/or opportunity for modification.” *See* Defendants’ Answer at 6.

Here, Defendants unequivocally fail to provide any evidence to support their vague and convoluted allegations. R 4:5-4 requires all affirmative defenses set forth specifically and separately a statement of facts constituting such defense*. See* Old Republic Ins. Co. v. Currie, 284 N.J. Super. 571, 574 (Ch. Div. 1995). Here, Defendants offer only bald, conclusory and unsubstantiated allegations without factual support in tendered affidavits. *See* Gherardi v. Trenton Board of Education. 53 N.J. Super. 349, 358 (App. Div. 1958). Yet again, Defendants fail to provide any affidavit to support the meritless claims alleged in their sixteenth defense, which should be stricken accordingly.

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* Lewis’ First, Third, Nineteenth, Twenty-Second, Twenty-Seventh, Twenty-Ninth, Thirtieth and Thirty-First Affirmative Defenses and Fifth Counterclaim are Vague, Conclusory and Must be Stricken and Dismissed.
  + Lewis’ first, third, nineteenth, twenty-second, twenty-seventh, twenty-ninth, thirtieth, and thirty-first affirmative defenses and fifth counterclaim allege in generic terms only that: Plaintiff’s complaint fails to state a cause of action (s*ee* **Exhibit H** ¶2); that Plaintiff failed to comply with modification programs (*see* **Exhibit H** ¶4); that Plaintiff has failed to join a necessary party (*see* **Exhibit H** ¶26); that Plaintiff has utilized “Robo-Signers” (*see* **Exhibit H** ¶29-32); that Plaintiff’s claims are barred by the Champerty (*see* **Exhibit H** ¶47-48); that a defense exists based on documentary evidence (*see* **Exhibit H** ¶50); that Plaintiff is guilty of unclean hands, bad faith, unconscionability, laches, illegality, usury, statute of frauds, collateral estoppel and judicial estoppel (*see* **Exhibit H** ¶51-52); that Plaintiff failed to conduct due diligence (*see* **Exhibit H** ¶53) and; that Lewis is entitled to a permanent injunction to reinstate the Loan (*see* **Exhibit H** ¶77-79).
  + One opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim and mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient. *See Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980). Affirmative defenses that merely plead conclusions of law without any supporting facts must be dismissed. *See* *Fireman's Fund Ins. Co. v. Farrell*, 57 A.D.3d 721 (2d Dept. 2008). CPLR 3013 requires that statements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense.
  + Here, Lewis fails to provide a single detail or any evidence to substantiate the above boilerplate affirmative defenses. Therefore, these affirmative defenses are insufficient to deny summary judgment. *See* *e.g.* *Farrell*, 57 A.D.3d 721. Accordingly, Lewis’ first, third, nineteenth, twenty-second, twenty-seventh, twenty-ninth, thirtieth, and thirty-first affirmative defenses and fifth counterclaim must be stricken and dismissed.
* Lewis’ Second, Seventh, and Twenty-Fourth Affirmative Defenses That Plaintiff Does not Have Standing Must be Stricken
  + Lewis’ second, seventh, and twenty-fourth affirmative defenses all erroneously assert that Plaintiff does not have standing to foreclose. *See* **Exhibit H ¶** 3; 8; 39-40.
  + A plaintiff has standing where it is both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note at the time the action is commenced. *See* [Kondaur Capital Corp. v. McCary, 115 A.D.3d 649, 650 (2d Dept. 2013](https://a.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2032826694&pubNum=0000602&originatingDoc=I302b33d4f3e711e4a807ad48145ed9f1&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=%28sc.Keycite%29)). 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 and the mortgage passes with the debt as an inseparable incident. *See* *Aurora v. Taylor*, 25 N.Y.3d 355 (2015) (“To have standing, it is not necessary to have possession of the mortgage at the time the action is commenced. This conclusion follows from the fact that the note, and not the mortgage, is the dispositive instrument that conveys standing to foreclose under New York law”). Furthermore, "any disparity between the holder of the note and the mortgagee of record does not stand as a bar to a foreclosure.” *Id* at 361-362.
  + The Court of Appeals confirmed that an affidavit submitted by Plaintiff’s loan servicer, based on a review of the business records, is sufficient to establish that the note was physically delivered to Plaintiff. *See* *Taylor*, 25 N.Y.3d at 361-362; *see also* *Wells Fargo Bank, N.A. v. Arias*, 121 A.D.3d 973 (2d Dept. 2014) (“[T]he plaintiff met its prima facie burden of establishing its entitlement to judgment as a matter of law dismissing the appellants' affirmative defense of lack of standing by submitting the affidavit of … a vice president for the plaintiffs loan servicer, who stated that he had examined the records of the servicer and that of the plaintiff and determined that the subject note was delivered to the plaintiff”).
  + Additionally, the Second Department has repeatedly held that Plaintiff conclusively establishes standing to foreclose “by demonstrating that it had physical possession of the note prior to the commencement of the action, **as evidenced by its attachment of the note to the summons and complaint**.” *Deutsche Bank v. Logan*, 146 A.D.3d 861 (2d Dept. 2017)(citing *JPMorgan Chase Bank, N.A. v Weinberger,*142 A.D.3d 643 (2d Dept. 2016) (emphasis added); *see also* [*Deutsche Bank Natl. Trust Co. v Leigh,*137 A.D.3d 841](http://www.courts.state.ny.us/reporter/3dseries/2016/2016_01635.htm), 842;  [*Nationstar Mtge., LLC v Catizone,*127 A.D.3d 1151](http://www.courts.state.ny.us/reporter/3dseries/2015/2015_03510.htm), 1152 (2d Dept. 2015); [*Deutsche Bank Natl. Trust Co. v. Webster,*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2038432313&pubNum=0007980&originatingDoc=Ie6b373ed69eb11e6a807ad48145ed9f1&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) 142 A.D.3d 636 (2d Dept. 2016). “(F)urther, where the note is affixed to the complaint, ‘it is unnecessary to give factual details of the delivery in order to establish that possession was obtained prior to a particular date.” *Logan*, 146 A.D.3d 861 (citing *Weinberger,*142 A.D.3d at 645).
  + Here, despite Lewis’ bald allegations to the contrary, Plaintiff has conclusively established that it had standing to foreclose by annexing a properly endorsed note to the Complaint. *See* **Exhibit F**.*See e.g. Logan*, 146 A.D.3d 861. Additionally, Lars Bell, Managing Member for Plaintiff testified that Plaintiff holds the original indorsed Note and that the Note was delivered to Plaintiff on July 31, 2015, prior to the commencement of this action. *See* Bell Affidavit ¶9.Therefore,Plaintiff has conclusively established its standing to foreclose. *See* [*Taylor*,](https://a.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2032661281&pubNum=0000602&originatingDoc=I2a8d0c696a4d11e49488c8f438320c70&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Keycite)) 25 N.Y.3d 355; *Logan*, 146 A.D.3d 861; [*Weinberger*, 142 A.D.3d 643](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2039642326&pubNum=0007049&originatingDoc=I3831c4e569ed11e6b86bd602cb8781fa&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Keycite)).
  + Also, Lewis’ allegation that the assignments of mortgage were defective (*See* **Exhibit H ¶**8) is diversionary and absolutely irrelevant to the issue of standing because the note is the dispositive instrument that conveys standing in a foreclosure. *See* *Taylor*, 25 N.Y.3d at 362. Given the foregoing, the second, seventh, and twenty-fourth affirmative defenses must be stricken.
* Lewis’ Fourth and Twenty-First Affirmative Defenses are Without Merit Because Plaintiff Complied with RPAPL 1303
  + Lewis’ fourth and twenty-first affirmative defenses erroneously assert that Plaintiff failed to comply with RPAPL 1303 by failing to serve the Help for Homeowners notice. *See* **Exhibit H ¶** 5; 28.
  + The law is clear that an affidavit of service constitutes *prima facie* proof of proper service of the notice required by RPAPL 1303 and the unsubstantiated claims of improper service of the notice are insufficient to rebut the presumption of proper service. *See Deutsche Bank Natl. Trust Co. v Martinez*, 2016 NY Slip Op 32163(U) (Sup. Co. Queens Co. 2016)(citing *PHH Mortg. Corp. v Israel*, 120 A.D.3d 1329 [2d Dept. 2014]; *U.S. Bank N.A. v Tate*, 102 A.D.3d 859 [2d Dept. 2013]).
  + In the case at bar, Lewis alleges in conclusory terms only, that Plaintiff failed to serve the Help for Homeowners notice pursuant to RPAPL 1303. *See* **Exhibit H**. ¶5; 28. These vague and self-serving statements are insufficient to rebut the *prima facie* evidence of proper service of the RPAPL 1303 notice created by the affidavit of service. *See e.g.* *Martinez*, 2016 NY Slip Op 32163(U). Annexed hereto as **Exhibit G** is a copy of the affidavit of service from Plaintiff’s process server averring to the service of the RPAPL 1303 notice on Lewis. Accordingly, the fourth and twenty-first affirmative defenses must be stricken.
* Lewis’ Fifth and Seventeenth Affirmative Defenses That Plaintiff Failed to Provide a Notice of Default Pursuant to the Mortgage is Without Merit
  + Lewis’ fifth and seventeenth affirmative defenses allege that Plaintiff failed to provide a notice of default pursuant to the mortgage and failed to provide the necessary thirty (30) days to cure the default. *See* **Exhibit H** ¶6; 21.
  + The Second Department has held that “(a)s a general rule of evidence, proof that an item was properly mailed gives rise to a rebuttable presumption that the item was received by the addressee.”  *Rodriguez v. Wing*, 251 A.D.2d 335, 336 (2d Dept. 1998) (citing *Rosa v. Board of Examiners*, 143 A.D.2d 351, 352 [2d Dept. 1998]); *see also Matter of T.E.A. Mar. Automotive Corp. v. Scaduto*, 181 A.D.2d 776, 779, (2d Dept. 1992).  In *Rodriguez*, the Court held that the affidavit of the agency that mailed the letter creates a presumption of delivery.  *See* *Rodriguez*, 251 A.D.2d at 336.
  + Notices of Default were mailed to Lewis on November 3, 2016 via regular mail at the Mortgaged Premises and at the last known address provided by Lewis, which was 108 Wyona Street, Brooklyn, New York 11207. A true and correct copy of the Notices of Default are annexed hereto as **Exhibit D**. Also, an affidavit of mailing was executed contemporaneously, confirming the mailing of these notices. *See* **Exhibit D**.
  + Contrary to Lewis’ assertion, Plaintiff did not commence this action until December 12, 2016 (*see* **Exhibit F**), after the thirty-day period to cure had expired. *See* **Exhibit D**. Accordingly, the fifth and seventeenth affirmative defense must be stricken.
* Lewis’ Sixth, Twenty-First and Twenty-Eighth Affirmative Defenses That Plaintiff Failed to Provide a Proper Pre-Foreclosure Notice Pursuant to RPAPL 1304 Must be Stricken
  + Lewis incorrectly alleges in the sixth, twenty-first and twenty-eighth affirmative defenses that Plaintiff failed to provide a proper 90-day pre-foreclosure notice pursuant to RPAPL 1304 and there is no proof of delivery. *See* **Exhibit H** ¶7; 28; 49. Although Lewis was not entitled to a 90-day notice because the property is an investment property and not occupied by Lewis, Plaintiff still delivered a fully compliant 90-day notice to Lewis. Therefore, these affirmative defenses must be stricken.
  + As mentioned previously, “proof that an item was properly mailed gives rise to a rebuttable presumption that the item was received by the addressee.”  *Rodriguez v. Wing*, 251 A.D.2d 335, 336 (2d Dept. 1998) (citing *Rosa v. Board of Examiners*, 143 A.D.2d 351, 352 [2d Dept. 1998]); *see also Matter of T.E.A. Mar. Automotive Corp. v. Scaduto*, 181 A.D.2d 776, 779, (2d Dept. 1992).  In *Rodriguez*, the Second Department held that the affidavit of the agency that mailed the letter creates a presumption of delivery.  *See* *Rodriguez*, 251 A.D.2d at 336.
  + Compliance with RPAPL 1304 and the delivery of the 90-day can be established by submitting an affidavit, copies of certified mail receipts, as well as proof of filing pursuant to requirements of RPAPL 1306. *See* [PHH Mortgage Corp v. Muricy, 135 A.D.3d 725 (2d Dept. 2016)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2037986833&pubNum=0007049&originatingDoc=I308e8ed0976c11e69e6ceb9009bbadab&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Keycite)).
  + [RPAPL 1304](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000130&cite=NYRAS1304&originatingDoc=I14291ddf576111e3a341ea44e5e1f25f&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.DocLink)) defines a qualifying home loan as one in which, inter alia, the home “will be occupied by the borrower as the borrower's principal dwelling.” [RPAPL 1304(5](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000130&cite=NYRAS1304&originatingDoc=I14291ddf576111e3a341ea44e5e1f25f&refType=SP&originationContext=document&transitionType=DocumentItem&contextData=(sc.DocLink)#co_pp_927d00002c422))(a).[[26]](#footnote-26) Where the mortgaged premises is not a home loan, the mandates of RPAPL 1304 cease to apply. *See* *Mendel Group, Inc. v. Prince*, 114 A.D.3d 732, 733 (2d Dept. 2014); *Fairmont Capital, LLC v. Laniado*, 116 A.D.3d 998 (2d Dept. 2014).
  + If the mortgagor does not reside at the property the 90-day notice ceases to apply. *See* *Newbury Place Reo II. LLC v. Henry*, 45 Misc. 3d 1225(A) (N.Y. Sup. Ct. Richmond Co. 2014) ("it is undisputed that [RPAPL 1304] ... cease[d] to apply ... if the borrower no longer occupies the residence as the borrower's principal dwelling"); *Summitbridge Credit Inv., LLC v. FT, LLC*, 2013 NY Slip Op 30876(U) (N.Y. Sup. Ct. Suffolk Co. 2013) (“Thus, as it is admitted that the [property] is a vacation home, [defendants] were not entitled to the RPAPL 1304 notice”).
  + Here, on June 24, 2016, in compliance with RPAPL 1304, 90-day notices, in at least 14-point type, with a list of at least five (5) housing counseling agencies were served via certified mail and also by first class mail to Lewis at the Mortgaged Premises and at the last known address provided by Lewis, which was 108 Wyona Street, Brooklyn, New York. *See* Bell Affidavit ¶ 8. True and correct copies of the 90-day notices, United States Postal Service (“USPS”) tracking information and certified mailing receipts for the 90-day notice confirming service, and proof of filing of the 90-day pursuant to RPAPL 1306 are annexed hereto as **Exhibit E**.
  + Although Plaintiff served the RPAPL 1304 notice on Lewis, Plaintiff was not required to do so. Lewis does not even own the property as of 2013 (*see* **Exhibit M**) and resides at 108 Wyona Street, Brooklyn, New York 11207 and not the Mortgaged Premises (*see* **Exhibit G**). Accordingly, the mandates of RPAPL cease to apply. *See* *Henry*, 45 Misc. 3d 1225(A); *Summitbridge Credit Inv., LLC,* 2013 NY Slip Op 30876(U). For the above reasons, the sixth, twenty-first and twenty-eighth affirmative defenses must be stricken.
* Lewis’ Eighth and Twentieth Affirmative Defenses That Plaintiff Failed to Provide a Proper Certificate of Merit is Without Merit
  + Lewis’ eighth and twentieth affirmative defenses allege that Plaintiff failed to provide a proper Certificate of Merit pursuant to CPLR 3012-b. *See* **Exhibit H** ¶9; 27
  + CPLR 3012-b provides that:

In any residential foreclosure action involving a **home loan**, as such term is defined in section thirteen hundred four of the real property actions and proceedings law, **in which the defendant is a resident of the property which is subject to foreclosure**, the complaint shall be accompanied by a certificate, signed by the attorney for the plaintiff, certifying that the attorney has reviewed the facts of the case and that, based on consultation with representatives of the plaintiff identified in the certificate and the attorney's review of pertinent documents, including the mortgage, security agreement and note or bond underlying the mortgage executed by defendant and all instruments of assignment, if any, and any other instrument of indebtedness including any modification, extension, and consolidation, to the best of such attorney's knowledge, information and belief there is a reasonable basis for the commencement of such action and that the plaintiff is currently the creditor entitled to enforce rights under such documents. **If not attached to the summons and complaint** in the action, a copy of the mortgage, security agreement and note or bond underlying the mortgage executed by defendant and all instruments of assignment, if any, and any other instrument of indebtedness including any modification, extension, and consolidation shall be attached to the certificate…, (emphasis added)

* + Annexed hereto as part of **Exhibit F** is a copy of a fully compliant Certificate of Merit that was served and filed in this action with the supporting loan documents included with the Summons and Complaint. Therefore, Plaintiff complied with CPLR 3012-b. In any event, Plaintiff was not required to provide a Certificate of Merit because Lewis is not a “resident of the property which is the subject to foreclosure.” CPLR 3012-b; *see* **Exhibit M**; **Exhibit G.** Lewis’ remaining allegations in the twentieth affirmative defense that Plaintiff failed to provide legible documents showing Plaintiff’s standing to foreclose are illogical and belied by the documentary evidence (*see* **Exhibit F**). Therefore, the eighth and twentieth affirmative defenses lacks merit.
* Lewis’ Ninth Affirmative Defense That the Court Lacks Jurisdiction and Plaintiff Failed to Serve the Summons and Complaint Must be Stricken
  + Lewis’ ninth affirmative defense alleges, without any evidence or detail, that Plaintiff failed to properly serve Lewis with the Summons and Complaint and thus, the Court does not have jurisdiction. *See* **Exhibit H** ¶10. Lewis was duly served with the Summons and Complaint. Therefore, the Court has jurisdiction over Lewis. Furthermore, Lewis waived any objection to jurisdiction in this action pursuant to CPLR 3211(e) and this claim must be denied as a matter of law because
  + A process server’s affidavit of service constitutes *prima facie* evidence of proper service of the summons and complaint and a defendant’s bare and unsubstantiated denial of receipt is insufficient to rebut the presumption of proper service. *See U.S. Bank N.A. v. Tate*, 102 A.D.3d 859 (2d Dept. 2013). Moreover, CPLR 3211(e) states that “an objection that the summons and complaint…was not properly served is waived if, having raised such an objection in a pleading, the objecting party does not move for judgment on that ground within sixty days after serving the pleading.” *See also Worldcom, Inc. v. Dialing Loving Care*, 269 A.D.2d 159 (2d Dept. 2000); *B.N. Realty Assoc. v. Lichtenstein*, 21 A.D.3d 793, 796, (1st Dept. 2005); *Fleet Bank, N.A.v. Riese*, 247 A.D.2d 276 (1st Dept. 1998).
  + Here, Lewis was duly served at her residence through a person of suitable age and discretion. *See* **Exhibit G**. Accordingly, the Court has jurisdiction over Lewis. Furthermore, Lewis waived any objection to jurisdiction by filing an answer on February 14, 2017 (*see* **Exhibit H**), and failing to move to dismiss this action within sixty days in accordance with CPLR 3211(e). Thus, the ninth affirmative defense must be stricken.
* Lewis’ Tenth Affirmative Defense and First Counterclaim Alleging Predatory Lending Must be Stricken and Dismissed
  + Lewis’ tenth affirmative defense and first counterclaim allege, without any evidence or facts, that Plaintiff is guilty of “predatory lending.” *See* **Exhibit H** ¶11-12; 57-59
  + A mortgagor cannot simply allege “predatory lending” without providing further facts regarding the claim. *See* *Aurora Loan Servs. v. Grant*, 17 Misc. 3d 1102(A), 851 N.Y.S.2d 56 (Sup Ct. Kings Co. 2007) (citing *Gasman v. Zoref*, 291 A.D.2d 430, 737 N.Y.S.2d 537 (2d Dept. 2002) (“These assertions fail to allege sufficient facts to establish that Mortgagor has a cause of action to recover damages for….predatory or discriminatory lending practices…The allegations as set forth in Mortgagor's pleading are purely conclusory and are devoid of any specific facts”); *Sutherland v. Remax 2000,* 20 Misc.3d 1131(A) (Sup. Ct. Nassau Co. 2008) (“[Defendant] fails to provide any additional non-conclusory allegations to substantiate a claim that [plaintiff’s] conduct constituted predatory lending practices”); *Frank v. N. Am. Foreclosure Solutions,* 12 Misc.3d 1191(A) (Sup. Ct. Queens Co. 2006) (dismissing “predatory lending” claim and noting that mortgagor “does not allege that the [mortgagee] violated any statutory lendingprovisions… [and] has failed to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact which requires a trial of the action”).
  + Here, Lewis fails to provide any evidence or details to substantiate the allegation that Plaintiff is guilty of “predatory lending” and instead provides conclusory and boilerplate allegations in the answer. *See* **Exhibit H** ¶ 11-12; 57-59. Accordingly, this “predatory lending” claim must be denied. *See* CPLR 3013; *see also. Grant*, 17 Misc. 3d 1102(A); *Sutherland,* 20 Misc.3d 1131(A). Given the foregoing, the tenth affirmative defense and first counterclaim must be stricken and dismissed,
* Lewis’ Eleventh Affirmative Defenses and Second Counterclaim That Plaintiff Violated TILA is Without Merit
  + Lewis’ eleventh affirmative defense and second counterclaim erroneously asserts that Plaintiff violated the Truth in Lending Act (“TILA”) by not providing disclosures and by not notifying Lewis regarding the service transfer of the Loan. *See* **Exhibit H** ¶13-14; 63-68.
  + A claim under TILA “shall expire three years after the date of the consummation of the transaction or upon the sale of the property, whichever occurs first, notwithstanding the fact that the information and forms required under this section or any other disclosures required under this part have not been delivered to the obligor. *See* 15 U.S.C. 1635(f); *Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 411-12 (1998); *Figueroa v. HSBC Bank USA, N.A*. 1:16-CV-0893, 2017 WL 1185263 (N.D.N.Y 2017).
  + Further, “(p)rivate actions for damages based upon TILA violations are subject to a one-year statute of limitations.” *Grimes v. Fremont Gen. Corp.*, 785 F. Supp. 2d 269, 285 (S.D.N.Y. 2011). *See also* 15 U.S.C. 1640(e). In the mortgage context, courts consider the date of violation to be the date of the closing when the transaction was consummated, that is when “a consumer becomes contractually obligated on a credit transaction.” *see Johnson v. Scala,* No. 05–CV–5529, 2007 WL 2852758, at \*3, 2007 U.S. Dist. LEXIS 73442, at \*10 (S.D.N.Y. 2007) (“the statute of limitations for TILA claims does not start running upon the discovery of the non-disclosure, but, rather, upon the funding of the loan”).
  + Here, Lewis alleges that Plaintiff violated disclosure requirements under TILA. However, this claim is time-barred by the three-year (15 U.S.C. 1635[f]) and one-year statute of limitations (15 U.S.C. 1640[e]) pursuant to TILA. Lewis’ loan originated on September 8, 2006. *See* **Exhibit A**; **Exhibit B**. Lewis did not assert this claim until eleven (11) years later in the answer. *See* **Exhibit H**.
  + Also, contrary to Lewis’ contention, she received notices of the servicing transfer for this Loan. True and correct copies of the Notice of Servicing Transfer are annexed hereto as **Exhibit N**. Given the foregoing, the eleventh affirmative defense and second counterclaim must be stricken and dismissed.
* Lewis’ Twelfth Affirmative Defense That Plaintiff Violated the Real Estate Settlement Procedures Act (“RESPA”) is Baseless and Must be Stricken
  + Lewis alleges that Plaintiff violated RESPA by not providing notice of the servicing transfer of the Loan. As discussed above, this allegation has no merit.
  + It is well settled law that a disclosure violation of RESPA does not constitute a valid defense to a mortgage foreclosure action. *See* [12 USC 2615](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=12USCAS2615&originatingDoc=I660cc874fc5f11de8bf6cd8525c41437&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search));  *Fremont Inv. and Loan v. Haley*, 23 Misc.3d 1138(A) (Sup. Ct. Queens Co. 2009); *Fremont Inv. & Loan v. Laroc*, 21 Misc.3d 1124(A), (Sup. Ct. Queens Co. 2008); [*Deutsche Bank Nat'l Trust Co. v. Campbell*, No. 17216/08, 26 Misc.3d 1206(A) (Sup. Ct., Kings Co. 2009)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2021065044&pubNum=0000999&originatingDoc=I2cdf41d7065211e28757b822cf994add&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Keycite)); *Deutsche Bank Natl. Trust Co. v Francis*, 2017 NY Slip Op 31113(U) (Sup. Court, Suffolk Co. 2017); *Deutsche Bank Natl. Trust Co. v* Persad, 2016 NY Slip Op 32125(U) (Sup. Ct. Queens Co. 2016).
  + Here Lewis alleges that Plaintiff violated RESPA by failing to provide notice of the servicing transfer of the loan (*see* **Exhibit H** ¶15). Annexed hereto as **Exhibit N** are the notices of servicing transfer. Notwithstanding, a disclosure violation under RESPA does not constitute a valid defense to a mortgage foreclosure action. *See e.g.* *Haley*, 23 Misc.3d 1138(A). Accordingly, this affirmative defense must be stricken.
* Lewis’ Thirteenth and Fourteenth Affirmative Defenses That Plaintiff Violated Banking Law 6-L Must Be Dismissed
  + Lewis’ thirteenth and fourteenth affirmative defenses alleging that Plaintiff violated Banking Law 6-L must be stricken. *See* **Exhibit H** ¶16-17. This affirmative defense is unsubstantiated, time-barred and must be dismissed.
  + New York Banking Law 6–L prohibits certain practices by lending institutions when offering High Cost Loans. However, the statute provides for a six-year statute of limitations accruing from the origination of the loan. *See* Banking Law [6](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000055&cite=NYBKS6&originatingDoc=I3ec0a745019711e4b86bd602cb8781fa&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))–[1(6)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000055&cite=NYBKS1&originatingDoc=I3ec0a745019711e4b86bd602cb8781fa&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)); *LaSalle Bank, N.A. v. Shearson*, 19 Misc.3d 433 (Sup Ct. Richmond Co. 2008); *see also Feliciano v. U.S. Bank Nat. Ass'n*, No. 13-CV-5555 KBF, 2014 WL 2945798 (S.D.N.Y. 2014); *McLean-Laprade v. HSBC*, No. 12-CV-1774, 2013 WL 3930565, (N.D.N.Y. 2013).
  + Also, affirmative defenses that merely plead conclusions of law without any supporting facts must be dismissed. *See Fireman's Fund Ins. Co. v. Farrell*, 57 A.D.3d 721 (2d Dept. 2008).
  + Here, Lewis fails to provide any evidence or details to support that Plaintiff violated Banking Law 6-L (*see* **Exhibit H** ¶16-17) and therefore, these affirmative defenses must be stricken. *See* *Farrell*, 57 A.D.3d 721. Additionally, this claim is time-barred by the six-year statute of limitations because this loan originated on September 8, 2006 (*see* **Exhibit A)** and Lewis did not assert this claim in the answer until eleven years later on February 14, 2017 (*see* **Exhibit H**). *See Shearson*, 19 Misc.3d 433; Banking Law [6](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000055&cite=NYBKS6&originatingDoc=I3ec0a745019711e4b86bd602cb8781fa&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))–[1(6)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000055&cite=NYBKS1&originatingDoc=I3ec0a745019711e4b86bd602cb8781fa&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)). Accordingly, the thirteenth and fourteenth affirmative defenses are unsubstantiated, time-barred and must be stricken.
* Lewis’ Fifteenth and Sixteenth Affirmative Defenses That Plaintiff has Added Improper Fees and Charges to the Total Amount Owed Must Be Stricken
  + Lewis alleges in the fifteenth and sixteenth affirmative defenses that Plaintiff has added improper fees and charges to the total debt owed on the Loan. *See* **Exhibit H** ¶18-20.
  + It is well accepted law that any dispute as to the amount owed to plaintiff is an insufficient basis to deny summary judgment because the total amount owed to plaintiff will be determined after a referee is appointed. *See* *e.g.* [*Crest/Good Mfg. Co., Inc. v. Baumann*, 160 A.D.2d 831 (2d Dept.1990](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1990067489&pubNum=0000155&originatingDoc=I13301e8c1f4311e79822eed485bc7ca1&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Keycite))); *Long Island Savings Bank v. Denkensohn*, 222 A.D.2d 659 (2d Dept. 1995).
  + Lewis’ argument that Plaintiff added improper fees and charges to the total amount owed is completely unsubstantiated (*see* **Exhibit H** ¶18-20) and fails to raise a triable issue. *See* *generally* *Zuckerman* 49 N.Y.2d 557. Nevertheless, any dispute Lewis may have about supposed improper charges and the total amount owed on the Loan is irrelevant at the summary judgment stage as the total amount owed to Plaintiff will be determined by a duly appointed referee. *See Baumann*, 160 A.D.2d 831. Given the foregoing, the fifteenth and sixteenth affirmative defenses must be stricken.
* Lewis’ Eighteenth Affirmative Defense That Plaintiff has Failed to Properly Review Lewis for a Modification is Meritless
  + Lewis alleges in the eighteenth affirmative defense that Plaintiff has failed to properly review Lewis for a modification. *See* **Exhibit H** ¶23-25.
  + It is well settled that a foreclosing plaintiff has no obligation to modify the terms of its loan before or after a default in payment. *See* [*Graf v. Hope Bldg. Corp.,* 171 N.E. 884 (1930);](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1930101164&pubNum=577&originatingDoc=I14321db4880c11e287a9c52cdddac4f7&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) *Wells Fargo Bank, N.A. v. Van Dyke,* 101 A.D.3d 638 (1st Dept. 2012); *Wells Fargo Bank, N.A. v. Meyers,* 108 A.D.3d 9, 20 (2d Dept. 2013) (“it is obvious that the parties cannot be forced to reach an agreement, [CPLR 3408](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000059&cite=NYCPR3408&originatingDoc=Ic22ccd6f815011e4b86bd602cb8781fa&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Keycite)) does not purport to require them to, and the courts may not endeavor to force an agreement upon the parties). Consequently, a failure to modify or forbear does not constitute bad faith or unclean hands or other conduct upon which a mortgagor defendant may predicate a cognizable defense to foreclosure. *See Onewest Bank, FSB v. Davies,* 38 Misc.3d 1230(A) (Sup Ct. Suffolk Co. 2013); *Bank of N.Y. Mellon v Frazier*, 54 Misc.3d 1217(A) (Sup. Ct. Orange Co. 2017)*.*
  + Here, Lewis fails to substantiate the boilerplate affirmative defense that Plaintiff failed to properly review Lewis for a modification. *See* **Exhibit H** ¶23-25. Therefore, this allegation must be stricken. *See* *Zuckerman* 49 N.Y.2d 557. Furthermore, Plaintiff has no obligation to modify the terms of its loan and this allegation is not a defense to a foreclosure action. *See e.g. Van Dyke,* 101 A.D.3d 638; *Frazier*, 54 Misc.3d 1217(A)*.*
  + Additionally, Lewis is incapable of modifying the subject loan because Lewis does not have title to the Mortgaged Premises. *See* **Exhibit M**. Based on the foregoing, this affirmative defense must be stricken.
* Lewis’ Twenty-First Affirmative Defense That Plaintiff has Violated the RPAPL Must be Stricken
  + Lewis alleges in the twenty-first affirmative defense that Plaintiff has violated RPAPL 1301, 1302, 1303, 1304 and 1306. Several of these allegations have already been refuted above. The remaining allegations lack any merit whatsoever.
  + RPAPL 1301 provides that:

(1)*Where final judgment for the plaintiff has been rendered* in an action to recover any part of the mortgage debt, an action shall not be commenced or maintained to foreclose the mortgage…(2) *The complaint shall state whether any other action has been brought to recover any part of the mortgage debt*, and, if so, whether any part has been collected. (3)*While the action is pending* or after final judgment for the plaintiff therein, *no other action shall be commenced or maintained to recover* any part of the mortgage debt, without leave of the court in which the former action was brought.

* + RPAPL 1302 requires that:

*Any complaint* served in a proceeding initiated pursuant to this article relating to a high-cost home loan or a subprime home loan, as such terms are defined in section six-l and six-m of the banking law, respectively, *must contain an affirmative allegation that at the time the proceeding is commenced, the plaintiff: (a) is the owner and holder of the subject mortgage and note, or has been delegated the authority to institute a mortgage foreclosure action* by the owner and holder of the subject mortgage and note; *and (b) has complied with all of the provisions of section five hundred ninety-five-a* of the banking law and any rules and regulations promulgated thereunder, *section six-l or six-m of the banking law, and section thirteen hundred four* of this article.

* + Here, Plaintiff complied with RPAPL 1301 because no other action is pending and Plaintiff has pled such in the Complaint (*see* **Exhibit F** ¶24). Plaintiff also complied with the pleading requirements of RPAPL 1302 (*see* **Exhibit F** ¶7; 24). Accordingly, this generic and boilerplate affirmative defense must be stricken.
* Lewis’ Twenty-Third Affirmative Defense Alleges That Plaintiff did not Comply With the Terms of the Pooling and Servicing Agreement. This Allegation is Baseless and Must be Stricken
  + Lewis erroneously asserts in the twenty-third affirmative defense that Plaintiff breached the terms of the governing pooling and servicing agreement (“PSA”) and that the transfer of the Loan into the Trust violated the terms of the PSA. *See* **Exhibit H** ¶ 33-38. Even if this nonsensical allegation by Lewis had any merit, which it does not, the law is clear that Lewis lacks standing to assert this defense.
  + Both New York federal and state courts have consistently held that a mortgagor lacks standing to assert noncompliance with a pooling and servicing agreement as a claim or defense to foreclosure because the mortgagor is not a party to, or third-party beneficiary of, the pooling and servicing agreement. *See* [*Karamath v*. *U*.*S*. *Bank, N*.*A*., No. 11 Civ. 1557(RML), 2012 WL 4327613, at 7(E.D.N.Y. 2012)](https://a.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2028675730&pubNum=0000999&originatingDoc=Iab36e8adb4f011e39ac8bab74931929c&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=%28sc.DocLink%29) (holding that mortgagor “is not a party to the PSA or to the Assignment of Mortgage, and is not a third-party beneficiary of either, and therefore has no standing to challenge the validity of that agreement or the assignment.”); *Rajamin v*. *Deutsche Bank Nat Trust Co*., [757 F.3d 79, 87 (2d Cir. 2014)](https://a.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2033731304&pubNum=0000506&originatingDoc=Ibcde6d04d3fc11e4a807ad48145ed9f1&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=%28sc.Keycite%29) (holding that mortgagors “lacked standing to enforce the agreements to which they were not parties and of which they were not intended beneficiaries.”); [*Bank of N*.*Y*. *Mellon v*. *Gales,* 116 A.D.3d 723](https://a.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2033138887&pubNum=0000602&originatingDoc=Ie9ad929b2e0811e490d4edf60ce7d742&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Keycite)), 725 (2d Dept. 2014) (holding that mortgagors "do not have standing to assert noncompliance with the lender's pooling and service agreement.”); *[Wells Fargo Bank, N.A. v. Erobobo,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2035822060&pubNum=0007049&originatingDoc=I56840347dbdf11e590d4edf60ce7d742&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Keycite))* [127 A.D.3d 1176, 1178 (2d Dept. 2015](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2035822060&pubNum=0007049&originatingDoc=I56840347dbdf11e590d4edf60ce7d742&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Keycite))) (“mortgagor whose loan is owned by a trust, does not have standing to challenge the plaintiff's possession or status as assignee of the note and mortgage based on purported noncompliance with certain provisions of the PSA.”). Moreover, where the challengers to a trustee's actions are not beneficiaries, and hence lack standing, the court “need not decide whether the conduct of the trustee comported with the terms of the trust.” [[Matter of the Estate of McManus, 390 N.E.2d 773 (1979)](https://a.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1979118598&pubNum=0000578&originatingDoc=If648d6ca003611e4b86bd602cb8781fa&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=%28sc.Keycite%29)](https://a.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1979118598&pubNum=0000578&originatingDoc=If648d6ca003611e4b86bd602cb8781fa&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=%28sc.Keycite%29)*;* *see also* [Rajamin, 757 F.3d at 88](https://a.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2033731304&pubNum=0000506&originatingDoc=Ibcde6d04d3fc11e4a807ad48145ed9f1&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=%28sc.Keycite%29).
  + In the case at bar, even if Lewis had presented any admissible evidence that Plaintiff did not comply with the terms of the PSA, which Lewis did not, the law is well-settled that mortgagors such as Lewis lack standing to assert any claim for non-compliance with the PSA because they are not parties to nor intended third party beneficiaries of the PSA. *See e.g.* [Rajamin, 757 F.3d at 88](https://a.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2033731304&pubNum=0000506&originatingDoc=Ibcde6d04d3fc11e4a807ad48145ed9f1&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=%28sc.Keycite%29) Therefore, this twenty-third must be stricken.
* Lewis’ Twenty-Fifth Affirmative Defense Alleges That Plaintiff has Been Compensated for its Loss as a Result of Defendant’s Default on the Loan. This Affirmative Defense is Baseless
  + Lewis alleges in the twenty-fifth affirmative defense that Plaintiff has not suffered a loss as a result of Lewis’ default and has been paid by an insurance policy. *See* **Exhibit H** ¶ 41-44. Lewis fails to provide any support for this red-herring allegation and it must be stricken. *See* *Zuckerman* 49 N.Y.2d 557. Further, Plaintiff is entitled to pursue its contractual right to foreclosure pursuant to the Note and Mortgage (*see* **Exhibit A**; **Exhibit B)** as a result of Lewis’ default (s*ee* Bell Affidavit ¶ 7). Accordingly, this generic and unsubstantiated affirmative defense must be stricken.
* Lewis’s Twenty-Sixth Affirmative Defense That Plaintiff Breached the Covenant of Good-Faith Must be Stricken
  + Lewis erroneously asserts in the twenty-sixth affirmative defense that Plaintiff breached the covenant of good-faith. *See* **Exhibit H** ¶45-46.
  + Every contract contains an implied covenant of good faith and fair dealing, that "neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." *Sec. Pac. Nat. Bank v Evans*, 62 A.D.3d 512, 514 (1st Dept. 2009). To establish this claim. the record must support that the party frustrated or wrongfully interfered with another party’s ability to perform under the contract. *See* [*Pike Realty Co., LLC v. Cardinale*](https://1.next.westlaw.com/Document/I1677dcbbc22711ddb77d9846f86fae5c/View/FullText.html?listSource=Search&navigationPath=Search%2fv3%2fsearch%2fresults%2fnavigation%2fi0ad6ad3e0000015c7efbd4155f143217%3fNav%3dCASE%26fragmentIdentifier%3dI1677dcbbc22711ddb77d9846f86fae5c%26startIndex%3d1%26contextData%3d%2528sc.Search%2529%26transitionType%3dSearchItem&list=CASE&rank=6&listPageSource=414231cf2d1c17974c564129d14c0b64&originationContext=docHeader&contextData=(sc.Search)&transitionType=Document&needToInjectTerms=False&enableBestPortion=True&docSource=d90db8936d284a3db3ccb1b2275f7220), 21 Misc.3d 1139(A) (Sup. Ct. Suffolk Co. 2008); *CitiMortgage, Inc. v Hodgson*, 2016 NY Slip Op 31739(U)(Sup. Ct. Kings Co. 2016).
  + In the case at bar, Lewis fails to provide any evidence to substantiate the claim that Plaintiff breached the covenant of good-faith or frustrated Lewis’ ability to perform under the mortgage contract (*see* **Exhibit H** ¶45-46). Therefore, this claim must be stricken. *See e.g.* [*Cardinale*](https://1.next.westlaw.com/Document/I1677dcbbc22711ddb77d9846f86fae5c/View/FullText.html?listSource=Search&navigationPath=Search%2fv3%2fsearch%2fresults%2fnavigation%2fi0ad6ad3e0000015c7efbd4155f143217%3fNav%3dCASE%26fragmentIdentifier%3dI1677dcbbc22711ddb77d9846f86fae5c%26startIndex%3d1%26contextData%3d%2528sc.Search%2529%26transitionType%3dSearchItem&list=CASE&rank=6&listPageSource=414231cf2d1c17974c564129d14c0b64&originationContext=docHeader&contextData=(sc.Search)&transitionType=Document&needToInjectTerms=False&enableBestPortion=True&docSource=d90db8936d284a3db3ccb1b2275f7220), 21 Misc.3d 1139(A).
* Lewis’ Thirty-Second Affirmative Defense and Fourth Counterclaim Alleging Fraud, Fraudulent Inducement and Material Misrepresentation is Without Merit and Must be Stricken and Dismissed
  + Lewis alleges in this thirty-second and fourth counterclaim, without any details or specificity, that there was fraud, fraudulent inducement and material misrepresentation with respect to this Loan. *See* **Exhibit H** ¶54; 74-76. These assertions are unsubstantiated, time-barred and must be stricken and dismissed by the Court.
  + A partyseeking to repudiate a contract procured by fraud must act promptly or they will be deemed to have chosen to affirm the contract, and ratification of the agreement bars the defense of fraud. *See Chalos v*. *Chalos*, 128 A.D.2d 498 (2d Dept. 1987).  Failure to plead the specific facts underlying the claim for fraudulent misrepresentation is fatal to this claim. *See* [CPLR 3016 (b](https://a.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000300&cite=NYCPR3016&originatingDoc=Ia6660960d97b11d9bf60c1d57ebc853e&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation))); [Thaler & Gertler v. Weitzman, 282 A.D.2d 522](https://a.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2001304920&pubNum=602&originationContext=document&transitionType=DocumentItem&contextData=(sc.Keycite)) (2d Dept. 2001). Finally, fraud is subject to a six-year statute of limitations. *See* CPLR 213.
  + Here, Lewis alleges, without any details or specificity, that there was fraud, fraudulent inducement and misrepresentation at origination of the Loan. *See* **Exhibit H** ¶54; 74-76. Lewis has not pled this claim for fraud with the necessary specificity and detail and therefore this claim should be stricken as a matter of law. *See* [CPLR 3016 (b](https://a.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000300&cite=NYCPR3016&originatingDoc=Ia6660960d97b11d9bf60c1d57ebc853e&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation))); [CPLR 3013](https://a.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000300&cite=NYCPR3016&originatingDoc=Ia6660960d97b11d9bf60c1d57ebc853e&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)); Weitzman, 282 A.D.2d 522.
  + Moreover, Lewis would have ratified the Loan and any purported fraud by making payments towards this Loan and failing toseek repudiation of the Loan.  *See Chalos*, 128 A.D.2d 498. Finally, Lewis’ answer was interposed on February 14, 2017. (*see* **Exhibit H**), approximately eleven (11) years after the Note and Mortgage were executed. *See* **Exhibit A**; **Exhibit B**. Therefore, this fraud claim is now time-barred by the six-year statute of limitation. *See* CPLR 213. Given the foregoing, this thirty-second and fourth counterclaim should be stricken and dismissed.
* Lewis’ Thirty-Third Affirmative Defense That This Action is Time-Barred is Without Merit and Must be Stricken
  + Lewis erroneously asserts that this foreclosure action is time-barred by the six-year statute of limitations. *See* **Exhibit H** ¶55.
  + The statute of limitations for a foreclosure action is six years. *See* CPLR 213(4). “The six-year statute of limitations in a mortgage foreclosure action begins to run from the due date for each unpaid installment unless the debt has been accelerated.” Lavin v. Elmakiss,[302 A.D.2d 638, 639 (3d Dept. 2003)](#co_pp_sp_155_639).  In the case at bar, Lewis fails to provide any facts to support that the statute of limitations has expired and therefore, this affirmative defense must be stricken. *See* *generally* *Zuckerman* 49 N.Y.2d 557. Therefore, the six-year statute of limitations has not expired. Accordingly, this affirmative defense must be rejected.
* Lewis’ Third Counterclaim That Plaintiff Violated General Business Law 349 Must be Dismissed
  + Lewis’ third counterclaim alleges that Plaintiff violated General Business Law 349 (“GBL 349”). *See* **Exhibit H** ¶ 69-72. This claim is unsubstantiated and time-barred.
  + “To assert a viable claim under [General Business Law 349](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000081&cite=NYGBS349&originatingDoc=I000c64414a9911e280719c3f0e80bdd0&refType=SP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_8b3b0000958a4), a [party] must plead that (1) the challenged conduct was consumer-oriented, (2) the conduct or statement was materially misleading, and (3) damages.” [*Lum v. New Century Mortg. Corp*., 19 A.D.3d 558, 559](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2006843249&pubNum=7049&originatingDoc=I000c64414a9911e280719c3f0e80bdd0&refType=RP&fi=co_pp_sp_7049_559&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_7049_559) (2d Dept. 2005)(citing [*Stutman v. Chemical Bank*, 95 N.Y.2d 24 [2000])](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2000357334&pubNum=605&originatingDoc=I000c64414a9911e280719c3f0e80bdd0&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)).
  + A claim under GBL 349 is subject to a three-year statute of limitations. *See* CPLR 214(2); *Corsello v. Verizon New York, Inc*., 18 N.Y.3d 777, 787 (2012); *Gaidon v Guardian Life Ins. Co. of America,* 96 N.Y.2d 201 (2001). In the context of a foreclosure action, the claim accrues at origination of the loan. *See Deutsche Bank Natl Trust Co. v Russell*, 2013 N.Y. Slip Op 31932(U)(Sup Ct. Queens Co. 2013).
  + Here, Lewis fails to substantiate the claim that Plaintiff violated GBL 349. *See* **Exhibit H** ¶69-73. Accordingly, they have failed to assert a viable claim pursuant to this statute. *See* [*Lum* 19 A.D.3d at 559](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2006843249&pubNum=7049&originatingDoc=I000c64414a9911e280719c3f0e80bdd0&refType=RP&fi=co_pp_sp_7049_559&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_7049_559). In addition, this claim is time-barred by the three-year statute of limitations because this loan originated on September 8, 2006. (*see* **Exhibit A**) and Defendants did not assert this claim in the answer until February 14, 2017 (*see* **Exhibit H**). *See* CPLR 214(2); *Corsello* 18 N.Y.3d at 787; *Gaidon,* 96 N.Y.2d 201. Based on the foregoing, this counterclaim must be dismissed.
* Lewis’ Sixth Counterclaim That Plaintiff Failed to Respond to a Qualified Written Request Must Be Dismissed
  + Lewis’ sixth counterclaim alleges, without any evidence or facts, that Plaintiff failed to properly respond to a Qualified Written Request in violation of RESPA. *See* **Exhibit H** ¶80-84.
  + Here, Lewis fails to provide any evidence or details to substantiate that Plaintiff failed to respond to an alleged Qualified Written Request. Accordingly, this conclusory and boilerplate claim and must be dismissed. *See* CPLR 3013; *see* *generally* *Zuckerman* 49 N.Y.2d 557. Also, a disclosure violation of RESPA does not constitute a valid defense to a mortgage foreclosure action. *See e.g.* *Haley*, 23 Misc.3d 1138(A). Given the foregoing, this sixth counterclaim must be dismissed.

**Sanchez-Gomez 150039**

* Plaintiff’s commencement of instant action of foreclosure is not barred by the statute of limitations.
  + 24. Defendant’s first affirmative defense baselessly contends that the instant action is time barred by the applicable Statute of Limitations. This unsubstantiated, self-serving contention fails as a matter of law.
  + 25. Under CPLR 213(4), an action to foreclose a mortgage is subject to a six-year Statute of Limitations period (*see LaPlaca v. Schell*, 68 A.D.3d 1478, 1479 [3d Dept. 2009]) commencing when the mortgage debt is affirmatively accelerated and the entire amount becomes due. *Lavin v. Elmakiss*, 302 A.D.2d 638, 639 (2d Dept. 2002); *EMC Mtge. Corp. v. Patella*, 279 A.D.2d 604, 605 (2d Dept. 2001); *Federal Natl. Mtge. Assn. v. Mebane*, 208 A.D.2d 892, 894(2d Dept. 1994).
  + 26. Where the acceleration of the maturity of a mortgage debt on default is made optional with the holder of the note and mortgage, some affirmative action must be taken evidencing the holder’s election to take advantage of the accelerating provision. *See Esther M. Mertz Trust v. Fox Meadow Partners*, 288 A.D.2d 338, 340 (2d Dept. 2001); *Ward v. Walkley*, 143 A.D.2d 415, 417 (2d Dept. 1998). The filing of a summons and complaint is an affirmative action that provides the borrower with notice of the holder’s decision to exercise its option to accelerate the debt. *Clayton Natl. v.* Guldi, 307 A.D.2d 982, 982 (2d Dept. 2003); *Patella*, 279 A.D.2d at 605.
  + 27. Here, as alluded to in the Answer, Plaintiff’s predecessor-in-interest may have accelerated Defendant’s debt upon its filing of a prior summons and complaint on April 20, 2010. If so, the resulting six-year Statute of Limitations period would have expired on April 20, 2010.
  + 28. However, Plaintiff’s commencement of the instant action upon its filing of a summons and complaint on April 18, 2016 occurred prior to the expiration of the Statute of Limitations period. As such, the instant action is not time barred by the applicable six-year Statute of Limitations.
  + 29. Accordingly, Defendant’s first affirmative defense is devoid of any merit whatsoever and be stricken by this Court.
* Defendant has not provided evidence capable of raising a triable issue and rebutting plaintiff’s *prima facie* entitlement to summary judgement
  + 30. Defendant’s second affirmative defense asserts that “I have been trying for many years to get the bank to work with me with no response. . . . I put everything I had into the home and the market crashed taking all my investments.” This unsubstantiated, self-serving assertion also fails as a matter of law.
  + 31. Initially, and dispositively, it should be noted that Defendant has not provided a scintilla of evidence in admissible form, merely conclusions, hope, unsubstantiated allegations and assertions, incapable of raising a triable issue of fact and rebutting a plaintiff’s *prima facie* entitlement to summary judgment. *See Zuckerman*, 49 N.Y.2d at 562; *Ortiz*, 104 A.D.2d at 685; *Stern*, 87 A.D.2d at 887. Furthermore, it is well-settled that in circumstances where a defendant’s failure to pay a mortgage debt is not based on any errors or negligence, a court is not empowered to provide relief from the consequences of his or her own action. *Ferlazzo v. Riley*, 16 N.E.2d 286 (1938); *Graf v. Hope Building Corp.*, 171 N.E. 884 (1930); *see Shell Oil Co. v. McGraw*, 48 A.D.2d 220, 222 (4th Dept. 1975). Here, Defendant attributes the Default to unspecified, albeit independent market conditions, not any errors or negligence. Thus, Defendant is not entitled to relief from the consequences of her own action in failing to pay the mortgage debt.

32. Accordingly, Defendant’s second affirmative defense is devoid of any merit whatsoever and must be stricken by this Court.

**Cancro 160176**

* Defedant’s provides not information or evidence that is capable of raising a valid affirmative defense or triable issue of fact. (Sanchez-Gomez 150039)
  + 25. Defendant’s sole purported affirmative defense asserts that “DUE TO MEDICAL PROBLEMS + HIGH COSTS I HAVE NOT BEEN ABLE [TO] PAY MORTGAGE FOR THIS PROPERTY” (no emphasis added). *See* Def.[’s] Answer, p. 1. This unsubstantiated, self-serving assertion fails as a matter of law.
  + 26. Initially, and dispositively, it should be noted that Defendant fails to provide a scintilla of evidence in admissible form, only mere conclusions, hope, unsubstantiated allegations, and assertions, **which are incapable of raising a valid affirmative defense or triable issue of fact**. *See* *Zuckerman*, 49 N.Y.2d at 562; *Ortiz*, 104 A.D.2d at 685; *Stern*, 87 A.D.2d at 887. Regardless thereof, it is well-settled that in circumstances where a defendant’s failure to pay a mortgage debt is not based on any errors or negligence by the plaintiff, courts are not empowered to provide the plaintiff relief from the consequences of his or her own actions. *Ferlazzo v. Riley*, 16 N.E.2d 286 (1938); *Graf v. Hope Building Corp.*, 171 N.E. 884 (1930); *see Shell Oil Co. v. McGraw*, 48 A.D.2d 220, 222 (4th Dept. 1975).
  + 27. Here, Defendant, without providing any evidentiary support, attributes the Default to unrelated medical conditions, and not on any errors or negligence by Plaintiff. As such, although your affirmant is sympathetic to Defendant’s condition, this Court is not empowered to provide Plaintiff relief from the consequences of her own action in failing to pay the mortgage debt.
  + 28. Accordingly, Defendant’s sole affirmative defense is devoid of any merit whatsoever and must be stricken by this Court in its entirety.

**Messerschmitt 160622**

* Defendant does not explain or provide evidence to show Plaintiff purportedly failed to comply with contractual conditions
  + Defendants’ first affirmative defense alleges that Plaintiff failed to comply with a contractual condition precedent by failing to provide each Defendant with a Notice of Default. Defendants do not explain or otherwise expound on how Plaintiff purportedly failed to comply with any applicable contractual condition precedent relevant herein. Notwithstanding Defendants’ lack of factual detail, their contentions are completely without merit and contradicted by the documentary evidence.
  + First, as confirmed by paragraph nine of the Iannuzzi Affidavit, proper Notices of Default were mailed to Defendants on January 27, 2016. Second, the Court is respectfully referred to **Exhibit D** as documentary proof that Notices of Default were sent to the Defendants, in compliance with any and all relevant contractual provisions. As such, Defendants’ first affirmative defense is without merit and should be stricken accordingly.
* Defendants allegations that Plaintiff breached its duty of good faith cannot be proven
  + Defendants’ second affirmative defense alleges that Plaintiff breached its duty of good faith and fair dealing by rejecting multiple offers to cure the arrearage, become current in their payments, and continue to pay the monthly mortgage payments. These bald and conclusory contentions are untenable. Indeed, it has repeatedly been held that mere conclusions, hope, unsubstantiated allegations, and assertions **which are incapable of raising a valid affirmative defense or triable issue of fact**. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980); *see New York Higher Educ. Servs. Corp. v. Ortiz*, 104 A.D.2d 684, 685 (3d Dept. 1984); *State Bank of Albany v. McAuliffe*, 97 A.D.2d 607, 607-08 (3d Dept. 1983); *Stern v. Stern*, 87 A.D.2d 887, 887 (2d Dept. 1982). Accordingly, Defendant’s second affirmative defense should be disregarded and stricken in its entirety.
* Plaintiff has not failed to join any and all necessary parties and has not named improper parties to this action
  + Defendant’s third affirmative defense alleges that Plaintiff failed to join any and all necessary parties to this action or has named improper parties to the action. This baseless contention fails as a matter of law and fact. Defendants’ conclusory, self-serving claim regarding the purported failure to join certain, unidentified necessary parties fails as a matter of law. Defendants neglect to identify any necessary party to this action that was not named in the Complaint and as such, their allegation is incapable of constituting a viable defense. *See* CPLR 3013. Nonetheless, it is beyond dispute that Plaintiff has joined each and every necessary party with an interest in the Mortgaged Premises pursuant to RPAPL § 1311. However, even if Plaintiff had inadvertently omitted a necessary party from the Complaint, which it did not, the proper remedy would merely be the issuance of an order requiring the joinder of any omitted, necessary party. *Dime Sav. Bank v. Johneas*, 172 A.D.2d 1082, 1083 (4th Dept. 1991), *citing Polish Nat. Alliance of Brooklyn v. White Eagle Hall Co.*, 98 A.D.2d 400, 406 (2d Dept. 1983). It follows that Defendants’ third affirmative defense is completely without merit and should be stricken and disregarded by this Court.
* Defendant has no evidence Plaintiff came to court with unclean hands (Doctrine of Unclean Hands)
  + Defendants’ fourth affirmative defense alleges that the Plaintiff comes to the Court with unclean hands by failing to comply with material terms of the mortgage and note. Once again, Defendants offer only bald, conclusory, and self-serving allegations that are devoid of any merit whatsoever. Defe
  + The doctrine of unclean hands applies when the complaining party demonstrates that the “offending party is guilty of immoral, unconscionable conduct directly related to the subject matter in litigation and which conduct injured the party seeking to invoke the doctrine.” *Columbo v. Columbo*, 50 A.D.3d 617, 619 (2d Dept. 2008). Here, Defendants fail to allege any facts or details, or present any evidence—documentary or otherwise—to show that Plaintiff is guilty of immoral, unconscionable conduct and that such conduct injured Defendants. *See* Id.
  + Simply put, because Defendants fail to provide any factual support as to how Plaintiff comes to this Court with unclean hands, Defendant’s fourth affirmative defense should be disregarded and stricken accordingly.
* Defendants have no way to prove that the Plaintiff failed to mitigate damages
  + Defendant’s fifth affirmative defense alleges that Plaintiff failed to mitigate damages. This vague contention is without merit. Defendants fail to explain, much less prove, how Plaintiff purportedly failed to mitigate damage. As such, Defendant’s fifth affirmative defense should be disregarded and stricken accordingly.
* Plaintiff stated a cause of action within the complaint
  + Defendant’s sixth affirmative defense alleges that Plaintiff’s complaint fails to state a cause of action upon which relief may be granted. This defense is untenable. Here, the Complaint states a cause of action, naming the parties, the obligation, the default thereon and the remedy sought. The complaint included the dates and details of the execution and delivery of the Mortgage and Note. It further outlined the mortgagors’ promise to pay and the breach of that promise. This satisfies the criterion that a pleading states a cause of action if, from the four corners, factual allegations are discerned which taken together manifest a cause of action cognizable at law. *Foley v. D'Agostino*, 21 A.D.2d 60, 65 (1st Dept. 1964).
* Statute of Limitations fails as a defense under the relevant facts and applicable law
  + Defendants’ seventh affirmative defense alleges that Plaintiff’s lawsuit was not commenced within the time prescribed by law and the Plaintiff is therefore barred from recovery. To the extent Defendants allege Statute of Limitations as a defense, this contention fails under the relevant facts and applicable law.
  + Pursuant to CPLR 213(4), foreclosure actions are subject to a six-year Statute of Limitations. *See Koeppel v. Carlandia Corp.*, 21 A.D.3d 884, 884 (2d Dept. 2005); *Federal Nat. Mortg. Ass’n v. Mebane*, 208 A.D.2d 892, 894 (2d Dept. 1994). The Statute of Limitations period begins when the mortgage debt is affirmatively accelerated and the entire amount becomes due. *Lavin v. Elmakiss*, 302 A.D.2d 638, 639 (2d Dept. 2002); *EMC Mtge. Corp. v. Patella*, 279 A.D.2d 604, 605 (2d Dept. 2001). Where the acceleration of the maturity of a mortgage debt on default is made optional with the holder of the note and mortgage, some affirmative action must be taken evidencing the holder’s election to take advantage of the accelerating provision. *See Esther M. Mertz Trust v. Fox Meadow Partners*, 288 A.D.2d 338, 340 (2d Dept. 2001); *Ward v. Walkley*, 143 A.D.2d 415, 417 (2d Dept. 1998). The filing of a summons and complaint is one such affirmative action which, while revocable, provides the borrower with notice of the holder’s decision to exercise its option to accelerate the debt and begin the Statute of Limitations period. *Clayton Natl. v. Guldi*, 307 A.D.2d 982, 982 (2d Dept. 2003); *Patella*, 279 A.D.2d at 605.
  + Here, the mortgage debt was affirmatively accelerated by Plaintiff’s filing of the Summons and Complaint approximately six months ago, on August 4, 2016. *See* **Exhibit F**. Under any potential interpretation of the underlying facts, this action was commenced more than six-years prior to the expiration of the applicable Statute of Limitations period. Accordingly, Defendants’ seventh affirmative defense is devoid of any merit whatsoever and must be stricken in its entirety.
* Plaintiff properly serviced the Defendants with a summons and a complaint, and the Court has jurisdiction over this matter
  + Defendant’s eighth affirmative defense alleges that this Court lacks jurisdiction over the Defendants. Defendants’ ninth affirmative defense alleges that Plaintiff failed to properly serve the Defendants with a summons and complaint. Both defenses are completely without merit.
  + Despite their unsubstantiated allegations, Plaintiff properly served Defendants pursuant to the requirements of the CPLR. *See* **Exhibit G**. Notwithstanding the valid service that was effectuated upon Defendants, their claims still fail on procedural grounds. In that regard, CPLR 3211(e), requires that an objection to the service of a Summons and Complaint is waived unless the party moves for judgment based on the lack of personal jurisdiction within sixty (60) days after service of the Answer. The Defendants clearly did not move for judgment based on lack of personal jurisdiction within the statutory period. Therefore, Defendants have waived any right to claim lack of personal jurisdiction at this juncture. Based on the foregoing, Defendants’ eighth affirmative defense should be stricken.
* Plaintiff has standing to bring forth this action
  + Defendant’s tenth affirmative defense alleges Plaintiff lacks standing to bring the instant action because Plaintiff is not the true holder of the subject note and because the note was improperly assigned to the Plaintiff. This defense is without merit.
  + It is well settled that to commence a mortgage foreclosure action, the Plaintiff must have either a legal or equitable interest in the mortgage. *Bank of New York v. Silverberg*, 86 A.D.3d 274, 279 (2d Dept. 2011); *Citimortgage, Inc. v. Rosenthal*, 88 A.D.3d 759, 761 (2d Dept. 2011).
  + The Court of Appeals’ holding in *Aurora Loan Services, LLC v Taylor*, 25 N.Y.3d 355, 361 (2015), confirms that physical delivery of the note prior to commencement of the foreclosure action is sufficient to transfer the obligation and that the mortgage passes with the debt as an inseparable incident. In the case at bar, Plaintiff received physical possession of the Note indorsed in blank through two separate allonges firmly affixed thereto on August 20, 2015- nearly one year prior to commencement of this action. *See Iannuzzi Affidavit ¶ 10.*
  + Plaintiff’s standing is also made clear by its attachment of the note and allonges indorsing the note in blank, the mortgage, and the mortgage assignment to the summons and complaint at the time the action was commenced. (*See* **Exhibit F)**. In *JPMorgan Chase Bank, N.A. v Roseman*, 137 A.D.3d 1222, 1223 (2d Dept. 2016), the borrower defendants sought dismissal of a mortgagee’s complaint, alleging, *inter alia*, that the plaintiff lacked standing to commence the action. The lower court denied the defendants’ motion and they appealed. *Id*. The Second Department held, in pertinent part that “a copy of the note was annexed to the complaint, establishing prima facie that the plaintiff had standing.” *Id*. at 1223. Similarly, in *Deutsche Bank Nat. Trust Co. v Leigh*, 137 A.D.3d 841, 842 (2d Dept. 2016), the Second Department held that “the plaintiff established its standing as the holder of the note and mortgage by demonstrating that the note was in its possession and the mortgage had been assigned to it prior to the commencement of the action, as evidenced by its attachment of the endorsed note, the mortgage, and the mortgage assignment to the summons and complaint at the time the action was commenced.”
  + Here, like in *Roseman* and *Leigh*, Plaintiff’s standing is evidenced by its attachment of the note and allonges indorsing the note in blank, the mortgage, and the mortgage assignment to the summons and complaint at the time the action was commenced. (*See* **Exhibit F**; *see also* **Exhibit A**). Thus, in addition to receiving physical possession of the Note nearly one year prior to commencement, Plaintiff’s standing is also confirmed the Note indorsed in blank through a series of allonges, all of which were firmly affixed thereto and exhibited in its Complaint. *Nationstar Mortg., LLC v Catizone*, 127 A.D.3d 1151, 1152 (2d Dept. 2015); *Federal Natl. Mtge. Assn. v. Youkelsone,* 303 A.D.2d 546 (2d Dept. 2003); *First Trust Natl. Assn. v. Meisels,* 234 A.D.2d 414 (2d Dept. 1996).
* Plaintiff complied with RPAPL 1303 and 1304
  + Defendants’ eleventh affirmative defense alleges that the Plaintiff failed to comply with RPAPL §1303 and §1304. As demonstrated below, these contentions are completely without merit and contradicted by the documentary evidence.
  + This Court is respectfully referred to **Exhibit D**, the process server’s affidavit of service, as documentary evidence that the Defendants were separately served with the copies of the Summons and Complaint bearing the index number and filing date endorsed thereon, along with RPAPL §1303 Notice of Default on colored paper different than that of the Summons and Complaint, bearing the title “Help for Homeowners in Foreclosure.” It is well-settled that a process server’s affidavit of service creates a presumption of proper service which can only be overcome by a defendant swearing to specific facts rebutting the statements contained therein. *Scarano v. Scarano*, 63 A.D.3d 716, 716 (2009); *Simmons v. Grobman*, 227 A.D.2d 369, 370 (2d Dept. 2000). Here, Defendants have failed to not only swear, but allege any specific facts to overcome the presumption of proper service pursuant to RPAPL §1303.
  + Additionally, this Court is respectfully referred to **Exhibit E** as documentary evidence that on January 27, in compliance with RPAPL § 1304, 90-Day Notices in at-least 14-point type, with a list of at least five housing counseling agencies, were served on Defendants, separately via certified mail and also by first class mail. *See* Iannuzzi Affidavit ¶ 9. Despite the documentary evidence, Defendants have not offered any details or evidence explaining how Plaintiff failed to comply with its “contractual condition precedent” (*see* Defendants Answer ¶ 2).
  + As such, Defendants’ eleventh affirmative defense is without merit and should be stricken accordingly.
* Statute of Frauds is inapplicable as a defense
  + Defendants’ twelfth affirmative defense alleging that Plaintiff’s claims are barred by the statute of frauds or by the principles of waiver/estoppel is equally untenable.
  + With respect to Defendant’s statute of frauds claim, the Mortgage at issue is a written instrument which was clearly executed by the Defendants as security for the underlying debt, and is properly acknowledged and recorded. Therefore, the statute of frauds is wholly inapplicable as a defense to this action.
  + Second, Defendants’ bald and conclusory allegations which claim that Plaintiff is barred by the doctrine of waiver is insufficient to constitute as a defense to a foreclosure action. *See, e.g., City of N.Y. v. Grosfeld Realty Co.*, 173 A.D.2d 436, 437 (2d Dept. 1991); *Flintkote Co. v. Bert Bar Holding Corp.*, 114 A.D.2d 400, 400 (2d Dept. 1985). Defendants fail to offer any facts, details, or evidence to demonstrate that Plaintiff intentionally promised to relinquish a known right, as is required to establish the defense of waiver. *See Heller Fin., Inc. v. Apple Tree Realty Assocs.*, 238 A.D.2d 198, 198 (1st Dept. 1997); *Southhold Savs. Bank v. Cutino*, 118 A.D.2d 555, 556 (2d Dept. 1986).
  + Defendants’ allegation regarding estoppel claim are equally without merit. A party relying on the estoppel doctrine must demonstrate that the party sought to be estopped engaged in (1) conduct which amounts to a false representation or concealment of material facts; (2) intention that such conduct will be acted upon by the other party; (3) and knowledge of the real facts. *First Union Natl. Bank v. Tacklenburg*, 2 A.D.3d 575, 577 (2d Dept. 2003); *Airco Alloys Div. v. Niagara Mohawk Power Corp.*, 76 A.D.2d 68, 81-82 (4th Dept. 1980); *see Matter of Benicasa v. Garrubbo*, 141 A.D.2d 636, 638 (2d Dept. 1988). The party asserting an estoppel claim must further show, with respect to him or herself: (1) lack of knowledge of the true facts; (2) reliance upon the conduct of the party estopped; and (3) a prejudicial change in his or her position. *Id*. Here, Defendants have not pled (and have not certainly failed to prove) any of the aforementioned requisite elements of an estoppel defense. Defendants have not pled any false representation or concealment of material facts by Plaintiff, much less attempted to explain how they relied thereon to their detriment. As such, Defendants’ twelfth affirmative defense is without merit and should be stricken in its entirety.

**Jeffrey 160519**

* Plaintiff did not misapply any payments
  + Defendants’ first,[[27]](#footnote-27) third,[[28]](#footnote-28) and fourth[[29]](#footnote-29) affirmative defenses ambiguously allege that certain payments were made by Defendants and subsequently misapplied by Plaintiff. This unsubstantiated allegation is devoid of any legal or factual merit.
  + 33. It is well-settled that a defendant’s failure to identify specific documentary evidence that forms the basis of a defense is fatal to the defense. *Teitler v. Pollack & Sons*, 288 A.D.2d 302, 302 (2d Dept. 2001); *see Held v. Kaufman*, 91 N.Y.2d 425, 430-31 (1988). Thus, if any payments had in fact been made by Defendants and misapplied by Plaintiff or the Mortgage had been satisfied, Defendants are required to proffer specific documentary evidence to support the instant defense. However, as Defendants do not include or even reference any specific documentary evidence, such as copies of cancelled checks, wire transfer receipts, or bank records, they are precluded from raising a triable issue of fact capable of defeating Plaintiff’s Summary Judgment Motion. Furthermore, the documentary evidence submitted by Plaintiff confirms the amounts due and owing, that the Mortgage is still of record, and that Defendants have failed to cure the Default, and said evidence conclusively rebuts Defendants’ instant allegation. *See* Hernandez Affidavit, ¶¶ 10-11.
  + 34. Moreover, even if Defendants were capable of proving the instant allegation, it is well-settled that a defense regarding the misapplication of payments will not preclude an award of summary judgment in a foreclosure action. *See, e.g., 1855 Tremont Corp. v. Collado Holdings, LLC*, 102 A.D.3d 567, 568 (1st Dept. 2013); *Vermont Federal Bank v. Chase*, 226 A.D.2d 1034, 1037 (3d Dept. 1996); *Johnson v. Gaughan*, 128 A.D.2d 756, 757 (2d Dept. 1987); *Barclay’s Bank of N.Y., N.A. v. Smitty’s Ranch, Inc.*, 122 A.D.2d 323, 324 (3d Dept. 1986). Instead, the proper procedure to remedy a misapplication of payments in a foreclosure action is the issuance of an order to determine the amount due and owing to the plaintiff. *Id.* Accordingly, Defendants’ first, third, and fourth affirmative defenses are devoid of any merit whatsoever and must be stricken in their entirety.
* Plaintiff stated a cause of action in the complaint
  + 35. Defendants’ second affirmative defense alleges that “[t]he Complaint fails to state a cause of action upon which relief may be granted.” *See* Def.[s’] Answer, ¶ 7. This defense is untenable as Plaintiff has not only stated a cause of action for foreclosure, but Plaintiff has established its *prima facie* entitlement to summary judgment.
  + 36. A review of Plaintiff’s Complaint reveals that it meets the notice pleading requirements of CPLR 3013 in that it sufficiently alleges each and every material element necessary to sustain a foreclosure cause of action. Here, the Complaint specifically alleges that Plaintiff is “the holder of both the Note and Mortgage” and further identifies the Mortgage Loan at issue, the Subject Property, and the amounts due and owing to Plaintiff. *See* **Exhibit K**. As such, Plaintiff sufficiently stated a cause of action in the Complaint and Defendants have utterly failed to identify any defect or omission therein. Therefore, Defendants’ second affirmative defense is devoid of any merit whatsoever and must be stricken in its entirety.
* Plaintiff complied with sections 6-I and 6-M of New York Banking Law
  + 37. Defendants’ fifth affirmative defense alleges that “Plaintiff, its agents, servants and/or employees violated the statutes of the New York Banking Law §6-I or §6-M.” *See* Def.[s’] Answer, ¶ 10. This conclusory, self-serving allegation is untenable.
  + 38. As an initial matter, it is important to note that Defendants do not offer any details or evidence, admissible or otherwise, to expound upon how the aforementioned statutes are applicable and thus the unsubstantiated defense must be stricken on that ground alone. *See Zuckerman,* 49 N.Y.2d at 562; *Ortiz*, 104 A.D.2d at 685; *McAuliffe*, 97 A.D.2d at 607-08; *Stern*, 87 A.D.2d at 887. Regardless thereof, neither Banking Law § 6-I[[30]](#footnote-30) nor Banking Law § 6-M[[31]](#footnote-31) are even applicable to the subject Mortgage Loan. Accordingly, Defendants’ fifth affirmative defense is devoid of any merit whatsoever and must be stricken in its entirety.
* Plaintiff complied with section 349 of the General Business Law
  + Defendants’ sixth affirmative defense alleges that “Plaintiff, its agents, servants and/or employees violated General Business Law §349.” *See* Def.[s’] Answer, ¶ 11. This conclusory, self-serving allegation is unsustainable under the applicable law.
  + 40. It should be noted, yet again, that Defendants do not offer any details or evidence, admissible or otherwise, as to how the aforementioned statute is even applicable to the matter at hand and thus the defense is subject to dismissal on that ground alone. *See Zuckerman,* 49 N.Y.2d at 562; *Ortiz*, 104 A.D.2d at 685; *McAuliffe*, 97 A.D.2d at 607-08; *Stern*, 87 A.D.2d at 887. Moreover, any alleged violations of New York General Business Law Section 349 (hereinafter the “Deceptive Practices Act” or “DPA”) in connection with the origination of the May 22, 2007 Mortgage Loan are time-barred under the applicable three-year Statute of Limitations. *See* CPLR 214(2); *Pike v. N.Y. Life Ins. Co.*, 72 A.D.3d 1043, 1048 (2d Dept. 2010).
  + 41. In any event, Defendants do not plead and cannot prove any facts that are capable of establishing a DPA violation under the present circumstances. To state a claim under the DPA, Defendants would need to allege (i) a consumer-oriented deceptive act or practice, and (ii) a resulting injury to the consuming public resulting from such an act or practice. *Stutman v. Chemical Bank*, 95 N.Y.2d 24, 29 (2000); *Oswego Laborers’ Local 214 Pension Fund v. Marine Midland Bank*, 85 N.Y.2d 20, 25 (1995); *Andre Strishack & Assoc. v. Hewlett Packard Co.*, 300 A.D.2d 608, 609 (2d Dept. 2002). In the Answer, Defendants make no attempt at identifying either a consumer-oriented deceptive act or practice or any resulting injury to the public. Thus, Defendants’ sixth affirmative defense is devoid of any merit whatsoever and must be stricken in its entirety.
* Plaintiff’s claims are timely under the applicable Statute of Limitations
  + 42. Defendants’ seventh affirmative defense alleges that “Plaintiff’s claims are barred in whole or in part by the applicable Statute of Limitations.” *See* Def.[s’] Answer, ¶ 12. This claim fails under the relevant facts and applicable law.
  + 43. Pursuant to CPLR 213(4), foreclosure actions are subject to a six-year Statute of Limitations. *See Koeppel v. Carlandia Corp.*, 21 A.D.3d 884, 884 (2d Dept. 2005); *Federal Nat. Mortg. Ass’n v. Mebane*, 208 A.D.2d 892, 894 (2d Dept. 1994). In a foreclosure action, the Statute of Limitations period begins when the mortgage debt is affirmatively accelerated and the entire amount becomes due. *Lavin v. Elmakiss*, 302 A.D.2d 638, 639 (2d Dept. 2002); *EMC Mtge. Corp. v. Patella*, 279 A.D.2d 604, 605 (2d Dept. 2001). Where the acceleration of the maturity of a mortgage debt on default is made optional with the holder of the note and mortgage, some affirmative action must be taken evidencing the holder’s election to take advantage of the accelerating provision. *See Esther M. Mertz Trust v. Fox Meadow Partners*, 288 A.D.2d 338, 340 (2d Dept. 2001); *Ward v. Walkley*, 143 A.D.2d 415, 417 (2d Dept. 1998). The filing of a summons and complaint is an affirmative action which provides the borrower with notice of the holder’s decision to exercise its option to accelerate the debt and begin the Statute of Limitations period. *Clayton Natl. v. Guldi*, 307 A.D.2d 982, 982 (2d Dept. 2003); *Patella*, 279 A.D.2d at 605.
  + 44. Here, the mortgage debt was affirmatively accelerated by Plaintiff’s filing of the Summons and Complaint less than ten-months ago, on May 13, 2016. *See* **Exhibit K**. Under any potential interpretation of the underlying facts, this action was commenced more than six-years prior to the expiration of the applicable Statute of Limitations period. Accordingly, Defendants’ seventh affirmative defense is devoid of any merit whatsoever and must be stricken in its entirety.
* Plaintiff’s claims are not barred by either the Doctrine of Waiver or Estoppel
  + 45. Plaintiff’s eighth and twenty-second affirmative defenses contend that “Plaintiff’s claims are barred by the doctrines of waiver and/or estoppel.” *See* Def.[s’] Answer, ¶¶ 13, 27. This bald, conclusory contention is untenable.
  + 46. Such bare allegations that a plaintiff waived its right to foreclose are insufficient to constitute a defense to a foreclosure action. *See, e.g., City of N.Y. v. Grosfeld Realty Co.*, 173 A.D.2d 436, 437 (2d Dept. 1991); *Flintkote Co. v. Bert Bar Holding Corp.*, 114 A.D.2d 400, 400 (2d Dept. 1985). Regardless, Defendants have offered no details or evidence, admissible or otherwise, to demonstrate that Plaintiff intentionally promised to relinquish a known right, as is required to establish a waiver defense. *See Heller Fin., Inc. v. Apple Tree Realty Assocs.*, 238 A.D.2d 198, 198 (1st Dept. 1997); *Southhold Savs. Bank v. Cutino*, 118 A.D.2d 555, 556 (2d Dept. 1986).
  + 47. Furthermore, the requisite elements of an estoppel claim are, with respect to the party to be estopped, (1) conduct which amounts to a false representation or concealment of material facts; (2) intention that such conduct will be acted upon by the other party; (3) and knowledge of the real facts. *First Union Natl. Bank v. Tacklenburg*, 2 A.D.3d 575, 577 (2d Dept. 2003); *Airco Alloys Div. v. Niagara Mohawk Power Corp.*, 76 A.D.2d 68, 81-82 (4th Dept. 1980); *see Matter of Benicasa v. Garrubbo*, 141 A.D.2d 636, 638 (2d Dept. 1988). The party asserting an estoppel claim must further show, with respect to himself: (1) lack of knowledge of the true facts; (2) reliance upon the conduct of the party estopped; and (3) a prejudicial change in his position. *Id*. Here, Defendants have not pled (and cannot prove) any one of the aforementioned requisite elements of an estoppel claim. Defendants have not pled any false representation or concealment of material facts by Plaintiff, much less attempted to explain how they relied thereon to their detriment.
  + 48. On the basis thereof, Defendants’ eighth and twenty-second affirmative defenses are devoid of any merit whatsoever and must be stricken in their entirety.
* Plaintiff has standing and all necessary parties to this action have been joined
  + 49. Defendant’s ninth, fifteenth, and twenty-third affirmative defenses contend that “Plaintiff is not the real party in interest and lacks standing to sue; all necessary parties have not been joined.” *See* Def.[s’] Answer, ¶ 14. This baseless contention fails as a matter of law and fact.
  + 50. It is well-settled that in order to commence a foreclosure action, the plaintiff must have either a legal or equitable interest in the subject mortgage. *See Bank of New York v. Silverberg*, 86 A.D.3d 274, 279 (2d Dept. 2011); *Rosenthal*, 88 A.D. 759, 761 (2d Dept. 2011). As a general matter, once a promissory note is tendered and accepted by an assignee, the mortgage passes as an incident to the note. *Silverberg*, 86 A.D.3d at 280; *Mortgage Elec. Registration Sys., Inc. v. Coakley*, 41 A.D.3d 674, 674 (2d Dept. 2007). Thus, under New York law, it is the note, rather than the mortgage, which is the dispositive instrument to convey standing in a foreclosure action. *Aurora Loan*, 25 N.Y.3d at 361; *see Dyer Trust 2012-1 v. Global World Realty, Inc*., 140 A.D.3d 827, 828 (2d Dept. 2016); *JPMorgan Chase, Nat. Ass’n v. Weinberger,* 142 A.D.2d 643, 644-45 (2d Dept. 2016). The Second Department court in *Weinberger* found that:
    - A Plaintiff establishes its standing in a mortgage foreclosure action by demonstrating that, when the underlying action was commenced, it was the holder or assignee of the underlying note . . . [through] either a written assignment of the underlying note or physical delivery of the note prior to the commencement of the foreclosure action. *Id.*
  + 51. In *JPMorgan Chase Bank, N.A. v. Roseman,* the Second Department clarified that “**a copy of the note [annexed] to the complaint, established *prima facie* that the plaintiff had standing**” (emphasis added). 137 A.D.3d 1222, 1223 (2d Dept. 2016); *see Deutsche Bank Nat. Trust Co. v. Leigh*, 137 A.D.3d 841, 842 (2d Dept. 2016); *Nationstar Mortg., LLC v. Catizone*, 127 A.D.3d 1151, 1152 (2d Dept. 2015); *Mortgage Electronic Registration Systems, Inc. v. Coakley*, 41 A.D.3d 674, 674 (2d Dept. 2007). Here, like in *Roseman*, the named Plaintiff had standing in this action by virtue of its possession of the Note at the time of this action’s commencement, as confirmed by its annexation of the Note as an exhibit to the Complaint. *See* **Exhibit K**.
  + 52. It is well-settled that an assignee of a mortgage may maintain and continue a foreclosure action commenced by an assignor under the name of the original plaintiff or under the assignee’s substituted name. *See, e.g., Hirschfeld v. Fitzgerald*, 157 N.Y. 166, 177-78 (1898); *HSBC Bank USA v. Hernandez*, 92 A.D.3d 843, 844 (2d Dept. 2012); *Citimortgage, Inc. v. Stosel*, 89 A.D.3d 887, 888 (2d Dept. 2011). That an assignment may occur after commencement creates no infirmity nor raises any issue with regard to a party’s standing to continue and maintain a foreclosure action. *See* CPLR 1018; *Wells Fargo Bank, N.A. v. Hudson*, 98 A.D.3d 576, 577 (2d Dept. 2012). Accordingly, Plaintiff’s uncontroverted demonstration of its possession of the Note at the time of commencement suffices, as a matter of law, to establish Plaintiff’s standing to initiate this action as well as AJAX’s standing to continue and maintain this action.
  + 53. Furthermore, Defendants’ conclusory, self-serving claim regarding the purported failure to join certain, unidentified necessary parties also fails as a matter of law. Defendants neglect to identify any necessary party to this action that was not named in the Complaint and as such, their allegation is incapable of constituting a viable defense. *See* CPLR 3013. In any event, it is beyond dispute that Plaintiff has joined each and every necessary party with an interest in the Mortgaged Premises pursuant to RPAPL § 1311. However, even if Plaintiff had inadvertently omitted a necessary party from the Complaint, which it did not, the proper remedy would merely be the issuance of an order requiring the joinder of any omitted, necessary party. *Dime Sav. Bank v. Johneas*, 172 A.D.2d 1082, 1083 (4th Dept. 1991), *citing Polish Nat. Alliance of Brooklyn v. White Eagle Hall Co.*, 98 A.D.2d 400, 406 (2d Dept. 1983).
  + 54. Accordingly, Defendant’s ninth, fifteenth, and twenty-third affirmative defenses are devoid of any merit whatsoever and must be stricken in their entirety.
* Defendants’ damages were caused entirely by Defendants’ default
  + 55. Defendants’ tenth, eleventh, and thirteenth affirmative defenses allege, without any explanation, that Plaintiff’s damages were caused “by the conduct of the Plaintiff and/or third parties [which] constitute superseding or intervening causes.” *See* Def.[s’] Answer, ¶¶ 15, 16. This bald, conclusory claim is untenable.
  + 56. Defendants have pled no details as to any alleged wrongdoing by Plaintiff.[[32]](#footnote-32) As detailed above, such conclusory statements unsupported by any competent evidence are of no effect, and are thus insufficient to defeat a motion for summary judgment. *See Zuckerman,* 49 N.Y.2d at 562; *Ortiz*, 104 A.D.2d at 685; *McAuliffe*, 97 A.D.2d at 607-08; *Stern*, 87 A.D.2d at 887. On the contrary, Plaintiff has proffered uncontroverted evidence demonstrating Defendants’ Default under the terms of the Note and Mortgage and their subsequent failure to cure the Default. More specifically, Plaintiff has submitted a copy of both the Note (*see* **Exhibit A**) and the Mortgage (*see* **Exhibit B**) as proof that Defendants executed same evidencing their unconditional promise of repayment, which instruments are the subject of this foreclosure action. Additionally, Plaintiff has demonstrated the existence of Defendants’ continued default under the Note commencing with the September 1, 2015 non-payment. *See* Hernandez Affidavit, ¶ 11. On the basis thereof, Defendants’ tenth, eleventh, and thirteenth affirmative defenses are devoid of any merit whatsoever and must be stricken in their entirety.
* Unjust enrichment does not apply to this case
  + 57. Defendants’ twelfth affirmative defense alleges that “Plaintiff would be unjustly enriched if allowed to recover all or any part of the damages or remedies alleged in the Complaint.” *See* Def.[s’] Answer, ¶ 17. Unjust enrichment is a quasi-contractual claim which is unavailable as a defense where a dispute is governed by an express contract. *See Nugent v. Hubbard*, 130 A.D.3d 893, 896 (2d Dept. 2015); *Scavenger, Inc. v. GT Interactive Software Corp.*, 289 A.D.2d 58, 59 (1st Dept. 2001). Here, there is an express contract between Plaintiff and Defendants – the Mortgage Loan that is documented in the Note and Mortgage – which instruments are enforceable according to their terms and provide Plaintiff with the unequivocal right to commence a foreclosure action upon Defendants’ default. *See* **Exhibit A** and **Exhibit B**. Accordingly, Defendants’ twelfth affirmative defense is devoid of any merit whatsoever and must be stricken in its entirety.
* Section 291 of New York Real Property Law does not apply here
  + 58. Defendants’ fourteenth affirmative defense alleges that “Plaintiff’s claims are barred pursuant to New York Real Property Law §291.” Def.[s’] Answer, ¶ 19. The New York Recording Act protects a good faith purchaser for value from a prior unrecorded interest in real property provided that the subsequent purchaser’s interest is the first to be duly recorded. *Sprint Equities (N.Y.) Inc. v. Sylvester*, 71 A.D.3d 664 665 (2d Dept. 2010); *Yen-Te Hsueh Chen v. Geranium Dev. Corp.*, 243 A.D.2d 708, 709 (2d Dept. 1997). The status of a good faith purchaser for value cannot be maintained by a purchaser with either notice or knowledge of a prior interest or equity in the property, or one with knowledge of facts that would lead a reasonably prudent purchaser to make inquiries concerning such. *Id.* Here, overlooking the undisputed fact that the Mortgage Loan documents were duly recorded in the Suffolk County Clerk’s Office (*see* Hernandez Affidavit, ¶¶ 5-10), Defendants have not established their status as good faith purchasers as is required under Real Property Law § 291. Therefore, Defendants’ fourteenth affirmative defense is devoid of any merit whatsoever and must be stricken in its entirety.
* The Fair Debt Collection Practices Act and New York’s Usury Laws do not apply here
  + 59. Defendants’ sixteenth and twentieth affirmative defenses ambiguously allege that “the underlying claim violates the usury laws and/or the Fair Debt Collection Practices Act, 15. U.S.C. §1601.” Def.[s’] Answer, ¶ 21. This claim fails under both the relevant facts and applicable law.
  + 60. With regard to Plaintiff’s alleged usury, Section 14-A of New York’s Banking Law mandates that “[t]he maximum rate of interest provided for in section 5-501 of the general obligations law shall be sixteen per centum per annum.” Here, the Note provides for an interest rate of 8.750% per annum (*see* **Exhibit A**), a rate which is substantially lower than the aforementioned maximum rate of interest that constitutes usury.
  + 61. With regard to Plaintiff’s alleged violations of the Fair Debt Collection Practices Act (hereinafter the “FDCPA”), it should be noted that the statute only applies to debt collectors and not to creditors, such as Plaintiff, who are seeking to enforce debts that they themselves hold. *Pirelli v. OCWEN Loan Servicing, LLC*, 129 A.D.3d 689 (2d Dept. 2015), *citing* 15 U.S.C. § 1692a(6)(B); *see United Cos. Lending Corp. v. Candela*, 292 A.D.2d 800, 801 (4th Dept. 2002). Here, because Plaintiff is the assignor and AJAX is the assignee and holder of the Mortgage Loan, and neither entity is a debt collector, the FDCPA has no application.
  + 62. Based on the foregoing, Defendants’ sixteenth and twentieth affirmative defenses are devoid of any merit whatsoever and must be stricken in their entirety.
* The Complaint set forth the applicable terms of the contract entered into between the Plaintiff and Defendants
  + 63. Defendants’ seventeenth affirmative defense contends that “upon information and belief, no contract ever existed with the Defendant in accordance with the terms that were set forth in the Complaint.” *See* Def.[s’] Answer, ¶ 22. This baseless contention is disproven by the documentary evidence annexed hereto.
  + 64. Here, it is beyond dispute that there is an express contract between Plaintiff and Defendants – the Mortgage Loan that is documented in the Note and Mortgage – which instruments are enforceable according to their terms and provide Plaintiff with the unequivocal right to commence a foreclosure action upon Defendants’ default. *See* **Exhibit A** and **Exhibit B**. It is additionally beyond dispute that the applicable terms thereof were unambiguously set forth in the Complaint. *See* **Exhibit K**. In spite thereof, Defendant offers no details or evidence, admissible or otherwise, to the contrary, and is thus incapable of defeating Plaintiff’s *prima facie* entitlement to summary judgment. *See Zuckerman,* 49 N.Y.2d at 562; *Ortiz*, 104 A.D.2d at 685; *McAuliffe*, 97 A.D.2d at 607-08; *Stern*, 87 A.D.2d at 887. Accordingly, Defendants’ seventeenth affirmative defense is devoid of any merit whatsoever and must be stricken in its entirety.
* Plaintiff did not violate the Truth in Lending Act
  + 65. Defendants’ eighteenth affirmative defense claims that “Plaintiff is in violation of the Truth in Lending Act, 15 U.S.C.A §1601 et. seq., since the required disclosure were not made at the time of the closing of the loan.” Def.[s’] Answer, ¶ 23. This unsubstantiated, self-serving claim is unsustainable.
  + 66. As a preliminary matter, this claim is fatally vague. Defendants neither identify any particular Truth in Lending Act (hereinafter “TILA”) provisions that they believe were violated, nor specify the particular disclosures required by TILA that allegedly were not made to them. These are fatal defects. *See Cedeno v. IndyMac Bancorp, Inc.*, 2008 WL 3992304, \*4 (S.D.N.Y. 2008); *Aurora Loan Servs. v. Grant*, 17 Misc. 3d 1102(A), \*1 (N.Y. Sup. Ct. 2007). Additionally, the Statute of Limitations for a claim under TILA is one year. *See* 15 U.S.C. § 1640(e). Here, because Defendants obtained the Mortgage Loan on May 22, 2007 (*see* **Exhibit A** and **Exhibit B**), the applicable Statute of Limitations period expired more than eight years ago, on May 22, 2008. Thus, Defendants’ TILA claim raised in their September 15, 2016 Answer is untimely and must be stricken.
  + 67. In any event, this claim must fail on the merits because as part of the closing of the Mortgage Loan, it is beyond dispute that Defendants were provided with and signed the requisite TILA statement, which disclosed to Defendants the Mortgage Loan’s annual percentage rate, finance charge, amount financed, and total payments, among other information. *See* **Exhibit J**. Based on the foregoing, Defendants’ eighteenth affirmative defense is devoid of any merit whatsoever and must be stricken in its entirety.
* The Real Estate Settlement Procedures Act does not apply here
  + 68. Defendants’ nineteenth affirmative defense alleges that “Plaintiff is in violation of the Real Estate Settlement Procedures Act, 12 U.S.C. §2601 et. seq., because there were certain facts that were important to the closing of the original loan that were not disclosed to the Defendants by the mortgage representative who was acting as an agent for the Plaintiff.” *See* Def.[s’] Answer, ¶ 24. This conclusory, self-serving claim fails on its face.
  + 69. The applicable Statute of Limitations for a claim under the Real Estate Settlement Procedures Act (hereinafter “RESPA”) is three years. *See* 12 U.S.C. § 2605; *Freemont Inv. & Loan v. Edwardson*, 20 Misc. 3d 1114(A), \*2 (N.Y. Sup. Ct. 2008). In addition to being time-barred, Defendants’ RESPA defense must additionally fail because a purported RESPA violation is not a valid defense to a mortgage foreclosure action. *See* 12 U.S.C. § 2615; *Freemont Inv. & Loan v. Haley*, 23 Misc. 3d 1138(A), \*5 (N.Y. Sup. Ct. 2009); *Freemont Inv. & Loan v. Laroc*, 21 Misc. 3d 1124(A), \*6 (N.Y. Sup. Ct. 2008). Therefore, Defendants’ nineteenth affirmative defense is devoid of any merit whatsoever and must be stricken in its entirety.
* Defendants received consideration for mortgage loan
  + 70. Defendants’ twenty-first affirmative defenses alleges that “there was a lack of consideration when the supposed contract was entered into.” *See* Def.[s’] Answer, ¶ 26. This erroneous, self-serving allegation is unsustainable. Here, Defendants do not dispute that they received $319,500.00 in funds in exchange for agreeing to a 30-year Mortgage Loan at an interest rate of 8.750% per annum. In any event, Defendants signed the Note (*see* **Exhibit A**), which is a valid and binding obligation, so there is no legal or factual basis to assert an affirmative defense based on lack of consideration. *See Gould McBride*, 26 A.D.2d 706, 707 (1st Dept. 1971) (finding that “recitals of consideration in [Note and Mortgage being foreclosed upon] *prima facie* establish consideration. A bare denial, unsupported by evidence to the contrary, is insufficient to create a factual issue”). Accordingly, Defendants’ twenty-first affirmative defense is devoid of any merit whatsoever and must be stricken in its entirety.
* No Fiduciary relationship exists between the parties
  + 71. Defendants’ twenty-fourth affirmative defense alleges that upon information and belief, the bank had information about the Note, Mortgage, and/or closing that was not made available to the Defendants at the time of the closing or before, and therefore they have breached their fiduciary duty to the Defendant.” *See* Def.[s’] Answer, ¶ 29. This baseless claim is belied by the applicable law.
  + 72. At the outset, it should be noted that Defendants neglect to identify any purported information that was not made available to them at or before the time of the closing. As detailed above, such conclusory statements unsupported by any competent evidence are of no effect and are insufficient to defeat a motion for summary judgment. *See Zuckerman,* 49 N.Y.2d at 562; *Ortiz*, 104 A.D.2d at 685; *McAuliffe*, 97 A.D.2d at 607-08; *Stern*, 87 A.D.2d at 887. Regardless, it is well-settled that the legal relationship between the parties to a mortgage loan transaction is a contractual one of debtor and creditor and is not a fiduciary relationship, as erroneously alleged by Defendants. *Marine Midland Bank, N.A. v. Yoruk*, 242 A.D.2d 932, 933 (4th Dept. 1997); *see Nathan v. J & I Enterprises, Ltd.*, 212 A.D.2d 667, 677 (2d Dept. 1995). As such, Defendants’ twenty-fourth affirmative defense is devoid of any merit whatsoever and must be stricken in its entirety.
* Plaintiff fully complied with sections 1303 and 1304 of New York’s RPAPL
  + 73. Defendants’ twenty-fifth affirmative defense alleges that “Plaintiff failed to provide notice of the impending default and/or foreclosure to the Defendant pursuant to RPAPL §1303-04.” *See* Def.[s’] Answer, ¶ 30. This contention fails as it is contradicted by the documentary evidence.
  + 74. This Court is respectfully referred to **Exhibit L**, the process server’s affidavit of service, as documentary evidence that Defendants were separately served with copies of the Summons and Complaint bearing the index number and filing date endorsed thereon, along with RPAPL § 1303 Notice of Default on colored paper different than that of the Summons and Complaint, bearing the title “Help for Homeowners in Foreclosure,” via personal service on June 1, 2016 and also by first class mail on June 3, 2016. It is well-settled that a process server’s affidavit of service creates a presumption of proper service which can only be overcome by a defendant swearing to specific facts rebutting the statements contained therein. *Scarano v. Scarano*, 63 A.D.3d 716, 716 (2009); *Simmons v. Grobman*, 227 A.D.2d 369, 370 (2d Dept. 2000). However, here, Defendants have failed to swear to any specific facts capable of overcoming the presumption of proper service pursuant to RPAPL § 1303.
  + 75. Additionally, this Court is respectfully referred to **Exhibit I** as documentary evidence that on February 9, 2016, in compliance with RPAPL § 1304, 90-Day Notices in at-least 14-point type, with a list of at least five housing counseling agencies, were served on Defendants, separately via certified mail and also by first class mail. *See* Hernandez Affidavit, ¶ 13. In spite thereof, Defendants have not offered any details or evidence, admissible or otherwise, as to how Plaintiff did not comply with RPAPL § 1304 and cannot overcome Plaintiff’s *prima facie* entitlement to summary judgment. *See Zuckerman,* 49 N.Y.2d at 562; *Ortiz*, 104 A.D.2d at 685; *McAuliffe*, 97 A.D.2d at 607-08; *Stern*, 87 A.D.2d at 887.
  + 76. On The basis thereof, Defendants’ twenty-fifth affirmative defense is devoid of any merit whatsoever and must be stricken in its entirety.

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* Plaintiff establishes standing, defendant’s allegations lack merit
  + Defendant’s first affirmative defense incorrectly alleges that Plaintiff lacks standing. *See* **Exhibit J**. Plaintiff conclusively established its standing to foreclose by its possession of a properly endorsed Note at commencement of this action. Accordingly, the first affirmative defense must be stricken.
  + A plaintiff has standing where it is both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note at the time the action is commenced. *See* [Kondaur Capital Corp. v. McCary, 115 A.D.3d 649, 650 (2d Dept. 2013](https://a.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2032826694&pubNum=0000602&originatingDoc=I302b33d4f3e711e4a807ad48145ed9f1&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=%28sc.Keycite%29)). 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 and the mortgage passes with the debt as an inseparable incident. *See* [*Aurora Loan Servs., LLC v. Taylor*,](https://a.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2032661281&pubNum=0000602&originatingDoc=I2a8d0c696a4d11e49488c8f438320c70&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Keycite)) 25 N.Y.3d 355 (2015)(holding that “to have standing, it is not necessary to have possession of the mortgage at the time the action is commenced. This conclusion follows from the fact that the note, and not the mortgage, is the dispositive instrument that conveys standing to foreclose under New York law”).
  + The Second Department has made it abundantly clear that Plaintiff conclusively establishes standing to foreclose “by demonstrating that it had physical possession of the note prior to the commencement of the action, **as evidenced by its attachment of the note to the summons and complaint**.” *Deutsche Bank v. Logan*, 146 A.D.3d 861 (2d Dept. 2017)(citing *South Point Inc. v Weinberger,*142 A.D.3d 643 (2d Dept. 2016) (emphasis added); *see also* [*Deutsche Bank Natl. Trust Co. v Leigh,*137 A.D.3d 841](http://www.courts.state.ny.us/reporter/3dseries/2016/2016_01635.htm), 842;  [*Nationstar Mtge., LLC v Catizone,*127 A.D.3d 1151](http://www.courts.state.ny.us/reporter/3dseries/2015/2015_03510.htm), 1152 (2d Dept. 2015); [*Deutsche Bank Natl. Trust Co. v. Webster,*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2038432313&pubNum=0007980&originatingDoc=Ie6b373ed69eb11e6a807ad48145ed9f1&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) 142 A.D.3d 636 (2d Dept. 2016).
  + “(F)urther, where the note is affixed to the complaint, ‘it is unnecessary to give factual details of the delivery in order to establish that possession was obtained prior to a particular date.” *Logan*, 146 A.D.3d 861 (citing *Weinberger,*142 A.D.3d at 645).
  + Here, despite Defendant’s bald allegations to the contrary, Plaintiff has conclusively established that it had standing to foreclose by annexing a properly endorsed Note to the Complaint. *See* **Exhibit H**.*See e.g. Logan*, 146 A.D.3d 861. Therefore,Plaintiff has irrefutably established its standing to foreclose. *See* [*Taylor*,](https://a.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2032661281&pubNum=0000602&originatingDoc=I2a8d0c696a4d11e49488c8f438320c70&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Keycite)) 25 N.Y.3d 355; *Logan*, 146 A.D.3d 861; [*Weinberger*, 142 A.D.3d 643](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2039642326&pubNum=0007049&originatingDoc=I3831c4e569ed11e6b86bd602cb8781fa&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Keycite)). Given the foregoing, the first affirmative defense must be stricken.
* Plaintiff complied with Pre-Foreclosure Notice Requirements of RPAPL 1304
  + Defendant incorrectly alleges, in generic terms only, that Plaintiff failed to comply with the 30-day pre-foreclosure notice requirements pursuant to the Mortgage and the 90-day pre-foreclosure notice requirements of RPAPL 1304. *See* **Exhibit J**.
  + The Appellate Division, Second Department, has held that, “(a)s a general rule of evidence, proof that an item was properly mailed gives rise to a rebuttable presumption that the item was received by the addressee.”  *Rodriguez v. Wing*, 251 A.D.2d 335, 336 (2d Dep’t 1998) (citing *Rosa v. Board of Examiners*, 143 A.D.2d 351, 352 (2d Dep’t 1998)); *see also Matter of T.E.A. Mar. Automotive Corp. v. Scaduto*, 181 A.D.2d 776, 779, (2d Dep’t 1992).  In *Rodriguez*, the Second Department held that the affidavit of the agency that mailed the letter creates a presumption of delivery.  *Rodriguez*, 251 A.D.2d at 336*.*
  + RPAPL 1304 requires that a 90 day pre-foreclosure notice be sent by Plaintiff prior to foreclosure. However, the requirements of [RPAPL 1304](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000130&cite=NYRAS1304&originatingDoc=Iecbe58db07ec11e2b66bbd5332e2d275&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) do not apply pursuant to RPAPL 1304(3) if the borrower “has filed an application for the adjustment of debts of the borrower or an order for relief from the payments of debts.” *See Onewest Bank, FSB v Baccigaluppi*. 2014 N.Y. Slip Op 33827(U)(Sup. Ct Westchester Co. 2014) (“plaintiff in any event had not been required to send defendant a RPAPL §1304 notice because defendant previously had filed for an adjustment of [his] debts ... and indeed had received same”); *U.S. Bank Nat’l v. Hemerling*, 2015 WL 1607312 (Sup. Co. N.Y. Co 201)(index# 850244/2013) (holding that RPAPL 1304 was inapplicable due to the bankruptcy filed by defendant);*see* *also* [*Bank of America v. Maharaj,* 958 N.Y.S.2d 306 (Sup. Ct. Suffolk Co. 2010)](https://a.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2023170937&pubNum=0000602&originatingDoc=I030675c0e4eb11e4815bfad867ab3d62&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=%28sc.Search%29) (“the requisite 90–day notice does not apply if the borrower has filed an application for the adjustment of debts of the borrower or an order for relief from the payment of debts”); *Credit Based Asset Servicing v. Stokes*, 37 Misc. 3d. 1202(A) (Sup. Ct. Kings Co. 2012) (“RPAPL 1304(1) does not apply if the borrower has filed an application for the adjustment of debts of the borrower or an order for relief from the payments of debts”).
  + Here, a fully compliant Notice of Default was mailed to the Defendant on August 15, 2014, via first class mail at the Mortgaged Premises (**Exhibit F)**. *See* Berrios Affidavit ¶ 10. In addition, fully compliant 90 Day Notices were served via certified mail and also by first class mail to Defendant at the Mortgaged Premises on August 15, 2014. True and correct copies of the 90 Day Notices are annexed hereto as **Exhibit G**. *See* Berrios Affidavit ¶ 11
  + In any event, the notice requirements of RPAPL 1304 ceased to apply because Defendant filed for bankruptcy twice in 2010 and sought the adjustment of debts. A true and correct copy of the Bankruptcy Dockets are annexed hereto as **Exhibit K**. Therefore, Plaintiff was not required to send a notice pursuant to RPAPL 1304. *See Hemerling*, 2015 WL 1607312; [*Maharaj,* 958 N.Y.S.2d 306](https://a.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2023170937&pubNum=0000602&originatingDoc=I030675c0e4eb11e4815bfad867ab3d62&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=%28sc.Search%29). Accordingly, the second and third affirmative defenses must be stricken.
* Defendant’s have no evidence to show Plaintiff violated General Business Law 349
  + Defendant’s fourth affirmative defense alleges that Plaintiff violated General Business Law 349 (“GBL 349”). This claim is unsubstantiated and time-barred.
  + “To assert a viable claim under [General Business Law 349](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000081&cite=NYGBS349&originatingDoc=I000c64414a9911e280719c3f0e80bdd0&refType=SP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_8b3b0000958a4), a [party] must plead that (1) the challenged conduct was consumer-oriented, (2) the conduct or statement was materially misleading, and (3) damages.” [*Lum v. New Century Mortg. Corp*., 19 A.D.3d 558, 559](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2006843249&pubNum=7049&originatingDoc=I000c64414a9911e280719c3f0e80bdd0&refType=RP&fi=co_pp_sp_7049_559&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_7049_559) (2d Dept. 2005)(citing [*Stutman v. Chemical Bank*, 95 N.Y.2d 24 [2000])](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2000357334&pubNum=605&originatingDoc=I000c64414a9911e280719c3f0e80bdd0&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)).
  + A claim under GBL 349 is subject to a three-year statute of limitations. *See* CPLR 214(2); *Corsello v. Verizon New York, Inc*., 18 N.Y.3d 777, 787 (2012). In the context of a foreclosure action, the claim accrues at origination of the loan. *See Deutsche Bank Natl Trust Co. v Russell*, 2013 N.Y. Slip Op 31932(U)(Sup Ct. Queens Co. 2013).
  + Here, Defendant fails to substantiate her claim that Plaintiff violated GBL 349. *See* **Exhibit J**. Accordingly, she has failed to assert a viable claim pursuant to this statute. *See* [*Lum* 19 A.D.3d at 559](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2006843249&pubNum=7049&originatingDoc=I000c64414a9911e280719c3f0e80bdd0&refType=RP&fi=co_pp_sp_7049_559&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_7049_559). In addition, this claim is time-barred by the three-year statute of limitations because this loan originated on September 25, 2006 (*see* **Exhibit A**) and Defendant did not assert this claim until ten years later, on December 21, 2016 (*see* **Exhibit J)**. Therefore, this claim is time-barred. *See* CPLR 214(2); *Corsello* 18 N.Y.3d at 787. Based on the foregoing, this affirmative defense must be stricken.
* Plaintiff’s have personal knowledge of the Certificate of Merit
  + Defendant’s fifth purported affirmative defenses falsely claims that Plaintiff’s representative who signed the Certificate of Merit does not have personal knowledge. *See* **Exhibit J**.
  + Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient to defeat entitlement to summary judgment. *See* [*Zuckerman v*. *City of New York,* 49 N.Y.2d 557 (1980).](https://a.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1980113707&pubNum=605&fi=co_pp_sp_605_562&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_605_562)
  + Here, Defendant fails to provide any evidence or details to support that Plaintiff’s representative who signed the Certificate of Merit did not have personal knowledge. Therefore, this generic and unsubstantiated affirmative defense should be stricken. *See* [*Zuckerman,* 49 N.Y.2d 557.](https://a.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1980113707&pubNum=605&fi=co_pp_sp_605_562&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_605_562)
* Defendant’s have no evidence to show Plaintiff violated Banking Law 6-L
  + Defendant’s sixth affirmative defense alleges in vague and conclusory terms only, that Plaintiff violated Banking Law 6-l because this was a high cost home loan. *See* **Exhibit J**.
  + [New York Banking Law 6–l](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000055&cite=NYBKS6-L&originatingDoc=I4a58bc5ab0ed11ddb5cbad29a280d47c&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) prohibits certain practices by lending institutions when offering High Cost Loans. The statute provides for a six-year statute of limitations accruing from the origination of the loan. *See* Banking Law [6](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000055&cite=NYBKS6&originatingDoc=I3ec0a745019711e4b86bd602cb8781fa&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))–[1(6)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000055&cite=NYBKS1&originatingDoc=I3ec0a745019711e4b86bd602cb8781fa&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)); [*LaSalle Bank, N.A. v. Shearson*, 19 Misc.3d 433 (Sup Ct. Richmond Co. 2008)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2014991719&pubNum=601&originatingDoc=I4a58bc5ab0ed11ddb5cbad29a280d47c&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)); *see also Feliciano v. U.S. Bank Nat. Ass'n*, No. 13-CV-5555 KBF, 2014 WL 2945798 (S.D.N.Y. 2014); *McLean-Laprade v. HSBC*, No. 12-CV-1774, 2013 WL 3930565, (N.D.N.Y. 2013).
  + Defendant fails to provide any evidence or details to support that Plaintiff’s violated 6-l and this affirmative defense must be stricken. *See* [*Zuckerman,* 49 N.Y.2d 557.](https://a.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1980113707&pubNum=605&fi=co_pp_sp_605_562&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_605_562) In any event, this claim is time-barred by the six-year statute of limitations because this loan originated on September 25, 2006 (*see* **Exhibit A**) and Defendant did not assert this claim until ten years later, on December 21, 2016 (*see* **Exhibit J)**. *See* [*Shearson*, 19 Misc.3d 433](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2014991719&pubNum=601&originatingDoc=I4a58bc5ab0ed11ddb5cbad29a280d47c&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)); Banking Law [6](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000055&cite=NYBKS6&originatingDoc=I3ec0a745019711e4b86bd602cb8781fa&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))–[1(6)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000055&cite=NYBKS1&originatingDoc=I3ec0a745019711e4b86bd602cb8781fa&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)). Accordingly, this affirmative defense must be stricken.
* Defendant is not entitled to Attorney’s fees under Real Property Law 282
  + Defendant erroneously asserts that she is entitled to attorney’s fees. *See* **Exhibit J**.
  + [Real Property Law 282](https://a.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000129&cite=NYRLS282&originatingDoc=I71fd51482b2c11e5b4bafa136b480ad2&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=%28sc.Keycite%29) provides for attorney fees to the mortgagor “in the successful defense of any action or proceeding commenced by the mortgagee against the mortgagor *arising* out of the contract.” [*DKR Mortg*. *Asset Trust 1 v*. *Rivera*](https://a.next.westlaw.com/Document/I71fd51482b2c11e5b4bafa136b480ad2/View/FullText.html?listSource=RelatedInfo&navigationPath=%2fRelatedInfo%2fv1%2fkcCitingReferences%2fnav%3fdocGuid%3dN7E1856A0024811E090D1F444517E7F8E%26midlineIndex%3d1%26warningFlag%3dX%26planIcons%3dNO%26skipOutOfPlan%3dNO%26sort%3ddatedesc%26filterGuid%3dh562dbc1f9a5f4b0c9e54031a19076b9c%26category%3dkcCitingReferences&list=CitingReferences&rank=1&originationContext=docHeader&contextData=%28sc.Keycite%29&transitionType=Document&needToInjectTerms=False&docSource=372b5697d5ff4a15a19803283c21b4ec), 130 A.D.3d 774 (2d Dep’t 2015).
  + Here, as delineated above, Defendant cannot successfully defend against the within foreclosure. Further Defendant is *pro se* and has not retained an attorney in this action. Therefore, this affirmative defense is completely inapplicable. For these reasons, this affirmative defense should be stricken.

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* Defendants allegation that Plaintiff has not failed to cause a state of action is completely meritless
  + Defendant’s first affirmative defense alleges that Plaintiff has failed to state a cause of action upon which relief may be granted. This defense is completely without merit. When considering a claim alleging a failure to state a cause of action upon which relief can be granted, the court must search the complaint in depth and with liberality to ascertain whether a cause of action is suggested by the facts. R 4:6-2(e); Rezem Family Associates, LP v. Borough of Millstone, 423 N.J. Super. 103, 113 (App. Div. 2011); *see also* Liberman v. Port Authority of New York and New Jersey, 132 N.J. 76 (1993). In essence, the party against whom relief is sought must be put on adequate notice and allege facts which give rise to the cause of action. Glass v. Suburban Restoration Co., 31 N.J. Super. 574, 582 (App. Div. 1982).
  + Dismissal of a complaint is only mandated where the factual allegations are properly insufficient to support a claim upon which relief can be granted. Reider v. State Department of Transportation, 221 N.J. Super. 547, 552 (App. Div. 1987). A court can only consider the facts on the face of the complaint when deciding whether or not the plaintiff has met its burden. Printing Mart-Morristown v. Sharp Electronics, 116 N.J. 739, 746 (1989).
  + A review of the underlying complaint makes clear that Plaintiff alleged sufficient facts setting forth a clear and proper claim for foreclosure. The complaint alleges that on April 21, 2004, Mortgagors executed subject Note and/or Mortgage, that on May 7, 2004 the Mortgage was recorded in the Cape May County Clerk’s office, and that on June 8, 2010 the Mortgagors defaulted thereunder. Moreover, the Complaint contains an affirmative allegation of Plaintiff’s standing as well as an acknowledgement of compliance with all pre-commencement condition precedents, statutory and otherwise. See Exhibit F. Based on the foregoing, the Complaint clearly sets forth a viable claim and a right to foreclose against all named parties. As such, defendant’s first affirmative defense should be stricken.
* Defendant’s allegations stating Plaintiff is barred from relief under Statute of Limitations is contradicted by applicable law
  + Defendant’s second affirmative defense alleges that Plaintiff is barred from relief under the applicable Statute of Limitations. This defense is untenable and contradicted by applicable law.
  + An action to recover amounts due under a promissory note containing a maturity date must be commenced within six years of the maturity date. An action to foreclosure a residential mortgage must be commenced: (1) within six years from the maturity date set forth in the mortgage or the note; (b) within thirty-six years from the date of execution, so long as the mortgage itself does not provide for a period of repayment in excess of 30 years; or (c) within twenty years from the date on which the mortgagor defaulted on any of the obligations or covenants contained in the mortgage or the note. N.J.S.A. 2A:50-56-1-.
  + In the case at bar, on June 8, 2010, Mortgagors defaulted under the Note and Mortgage. See Davis Affidavit ¶8. As a result of Mortgagors failing to cure the default, the summons and complaint were filed on July 26, 2016. *See* **Exhibit F**. Therefore, Plaintiff commenced the foreclosure action well within the twenty years from the date on which Defendant defaulted on the obligations contained in the mortgage and/or note. Defendant’s allegation that Plaintiff’s complaint is barred by the Statute of Limitations is completely without merit and should be disregarded and stricken by this Court.
* Plaintiff’s claims are not barred under the doctrine of estoppel.
  + Defendant’s third defense alleges that Plaintiff’s claim is barred under the doctrine of estoppel. This defense is completely without merit. The doctrine of estoppel essentially provides that one may not take a position inconsistent with that previously assumed and intended to influence the conduct of another, if such repudiation would not be responsive to the demands of justice and good conscience, in that it would work prejudice and injury to the other. West Jersey Title & Guar. Co. v. Indus. Trust Co., 27 N.J. 144, 153 (1958); *see also* Aron v. Rialto Realty Co., 100 N.J. Eq. 513, 517 (Ch. 1927), aff’d. 102 N.J. Eq. 331 (E & A. 1928).
  + In the case at bar, Defendant fails to allege any specific facts, particular instances or transactions for which the doctrine of estoppel may be invoked and his third affirmative defense amounts to nothing more than a bald and conclusory allegation that must be disregarded by this court and stricken immediately. *See* Old Republic Ins. Co., v. Currie, 284 N.J. Super. 571, 574 (Ch. Div. 1995); Triffin v. Am. Int’l Group, Inc., 372 N.J. Super 517, 523 (App. Div. 2004); *See* R 4:46-5(a).
* Defendant alleges Plaintiff’s claim is barred under the doctrine of waiver
  + Defendant’s fourth defense alleges that Plaintiff’s claim is barred under the doctrine of waiver. This defense is similarly without merit. Waiver is the intentional relinquishment of a known right and it implies an election by a party to forego some advantage which the party might have demanded. *See* West Jersey Title & Guaranty Co. v. Industrial Trust Co., 27 N.J. 144, 152 (1958); *see also* George F. Malcolm, Inc. v. Burlington City Loan & Trust Co., 115 N.J. Eq. 227 (Ch. 1934). Here, Defendant fails to allege any specific facts, particular instances or transactions for which the defense of waiver may be invoked. Defendant’s fourth affirmative defense amounts to nothing more than a bald, conclusory allegation and must be stricken accordingly.
* Plaintiff’s claims are not barred under the doctrine of laches.
  + As stated above, parties cannot rely on bare legal conclusions and must respond with affidavits meeting the requirements of R. 1:6-6 and R. 4:46-2(b), setting forth specific facts showing that there is a genuine issue for trial. *See* Triffin v. Am. Int’l Group, Inc., 372 N.J. Super. 517, 523 (App. Div. 2004); *See* R 4:46-5(a).
  + Nevertheless, to establish the defense of laches, a defendant must assert more than mere delay, the borrower must also prove negligence on the part of the creditor, good faith on the part of the borrower and prejudice resulting from the creditor’s failure to promptly exercise its rights. Wilson v. Stevens, 105 N.J. Eq. 377, 387 (Ch. 1929). Defendant fails to allege any specific facts as to sustain its burden in establishing the defense of laches and offers only a bald and conclusory defense without factual support in tendered affidavits. *See* Gherardi v. Trenton Board of Education, 53 N.J. Super. 349, 358 (App. Div. 1958). As such, Defendant’s fifth affirmative defense should be stricken.
* Plaintiff’s claims are not barred by the virtue of the Statute of Frauds
  + Defendant’s sixth affirmative defense alleges Plaintiff’s claims are barred by the virtue of the Statute of Frauds. This defense is without merit. New Jersey’s Statute of Frauds provides that where the amount of a mortgage loan exceeds $100,000.00 and the obligation is not personal or household debt, an agreement between lender and a borrower to loan money must be in writing. N.J.S.A. 25:1-5(f) (“a contract, promise, undertaking, or commitment to loan money or to grant, extend or renew credit in an amount greater than $100,000, not primarily for personal, family or household purposes, made by a person engaged in the business of lending or arranging for the lending of money or extending credit” shall be in writing).
  + The Mortgage at issue is a written instrument which clearly executed by the Mortgagors as security for the underlying debt. The Mortgage is properly acknowledged and recorded. See Exhibit B. Therefore, the statute of frauds is wholly inapplicable as a defense to this action. As such, Defendant’s sixth affirmative defense should be disregarded by this Court and stricken accordingly.
* Plaintiffs’ claims are not barred by lack of privity or by the doctrine of payment and release
  + Defendant’s eight defense alleges that Plaintiff’s claims are barred by lack of privity of contract. Defendant’s ninth defense alleges that Plaintiff’s claims are barred by the doctrine of payment and release.
  + Where the duty violated is created solely by a contract, a cause of action arising out of such a violation is limited strictly to the parties in the contract and those in privity with them. Swenson v. Nairn, 30 A.2d 897, 899 (N.J. Sup. Ct. 1943). Nevertheless, in a foreclosure action, Plaintiff must name all parties whose rights would be affected by the judgement. *See* Provident Mut. Life. Ins. Co. of Philadelphia v. Doughty, 126 N.J. Eq. 262, 264 (1939); Indiana Inv. Co. v. Evans, 121 N.J. Eq. 72, 77 (1936) (stating that a foreclosure action is a single cause of action and all parties claiming rights under the mortgage, together with subsequent purchasers and encumbrancers are necessary parties to the suit). In the case at bar, Plaintiff named Defendant to the action because Defendant has title and is in present possession of the Mortgaged Premises by virtue of a Deed executed in his favor. *See* **Exhibit E**.
  + Defendant further alleges that Plaintiff’s claim is barred by the doctrine of payment and release. Generally, a security such as a mortgage, cannot be considered released or surrendered in absence of any payment, until proof of some act or word of creditor manifesting an intention of relinquishing or foregoing his right. Sixteenth Ward Bldg. & Loan Ass’n of Newark v. Reliable Loan, Mortg. & Sec. Co., 125 N.J. Eq. 340, 345, 5 A.2d 753, 756 (1939). Contrary to Defendant’s claims, the subject mortgage was not released or surrendered. Here, Defendant fails to provide any proof demonstrating Plaintiff’s intention to relinquish the mortgage or forego its right. Instead, Defendant merely offers a bald and conclusory allegations without any details or evidence with respect to his payment and release defense. Defendant’s complete failure to expound on his claims is fatal to the defenses asserted. Indeed, parties must respond with affidavits meeting the requirements of R 1:6-6 and R 4:46-2(b), setting forth specific facts showing that there is genuine issue for trial. *See* Triffin v. Am. Int’l Group, Inc., 372 N.J. Super. 517, 523 (App. Div. 2004); See R 4:46-5(a). Therefore, Defendant’s eighth and ninth affirmative defenses should be disregarded and stricken accordingly.
* Defense of Accord and Satisfaction
  + Defendant next alleges the defense of accord and satisfaction. This defense is untenable. Accord and satisfaction requires a clear manifestation that both debtor and creditor intend payment to be in full satisfaction of entire indebtedness. Zeller v. Markson Rosenthal & Co., 299 N.J. Super. 461, 463 (App. Div. 1997). Here, once again, Defendant fails to offer any facts, details or evidence to support his self-serving, conclusory, and false claims as to the purported accord and satisfaction. Accordingly, Defendant’s tenth affirmative defense should be stricken by this Court.
* “set-off” is not a defense to foreclosure cases
  + Defendant’s eleventh defense pleads the existence of setoff and/or recoupment. While “set-off” is occasionally referred to as a defense, courts have found that claiming an entitlement to a “set-off” is not a defense at all because it either destroys the plaintiff’s rights of action nor denies that the amount claimed is due. (*see* Guarantee Co. of N. America v. Tandy & Allen Constr. Co., 76 N.J. Super. 274, 279 (1962); *see* Naylor v. Smith 63 N.J.L. 596, 597 (1899).
  + Moreover, a bare legal conclusion constituting an affirmative defense will not suffice and a plaintiff may move to strike an answer pursuant to R 4:6-5 on the ground that the answer presents no question of fact or law. See Old Republic Ins. Co. v. Currie, 284 N.J. Super. 571m 574 (Ch. Div. 1995). Here, defendant fails to present an affirmative defense so as to challenge Plaintiff’s right to foreclose. As such, Defendant’s eleventh affirmative defense should be disregarded and stricken accordingly.

1. As the named Plaintiff annexed a copy of the Note to the Complaint and thus made a *prima facie* demonstration of its standing to commence this action, the exact date that it came into possession of the Note is of no effect. [↑](#footnote-ref-1)
2. By virtue of the named Plaintiff having annexed a copy of the Note to the Complaint, the exact date that the named [↑](#footnote-ref-2)
3. [↑](#footnote-ref-3)
4. Under CPLR 4518(a), a business entity may admit a business record through a person with personal knowledge of the document, its history, or its specific contents where that person is sufficiently familiar with the corporate records to aver that a record is what it purports to be and that it came out of the entity’s files. *Deleon v. Port Auth.*, 306 A.D.2d 146, 146 (1st Dept. 2003). It is axiomatic that such an affidavit of a bank official “is sufficient if based upon documentary evidence, even if he [or she] did not participate in the loan negotiations and had no personal knowledge of the facts.” *Bergman on New York Mortgage Foreclosures* § 21.03(2), 21-8.6 to 21-8.7; *see HSBC Bank USA Nat. Ass’n v. Sage*, 112 A.D.3d 1126, 1127 (3d Dept. 2013); *Marine Midland Bank, N.A. v. Embassy East, Inc.*, 160 A.D.2d 420, 421 (1st Dept. 1990). Moreover, a review of CPLR 4518(a) confirms that:

   Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible in evidence in proof of that act, transaction, occurrence or event, if the judge finds that it was made in the regular course of any business and that it was the regular course of such business to make it, at the time of the act, transaction, occurrence or even, or within a reasonable time thereafter. . . . **All other circumstances of the making of the memorandum or record, including lack of personal knowledge by the maker, may be proved to affect its weight, but they shall not affect its admissibility**. (Emphasis added). [↑](#footnote-ref-4)
5. In conformity with CPLR 4518(a), the Murphy Affidavit states, in pertinent part, that:

   I am an Assistant Vice President of BSI Financial Services (hereinafter “BSI”), attorney-in-fact for the original Plaintiff, VENTURES TRUST 2013-I-H-R BY MCM CAPITAL PARTNERS LLC, ITS TRUSTEE (hereinafter “Original Plaintiff” or “Ventures”), as well as attorney-in-fact for the assignee of the Original Plaintiff, HMC ASSETS, LLC SOLELY IN ITS CAPACITY AS SEPARATE TRUSTEE OF CAM XV TRUST (hereinafter “HMC”)

   In that capacity, I am responsible for the maintenance and review of internal foreclosure and loan specific documents, as well as the maintenance of original collateral documents such as original promissory notes. As such, I am fully familiar with the facts and circumstances set forth herein and am authorized to sign this affidavit on Plaintiff’s behalf. A copy of a Limited Power of Attorney between BSI Financial Services and Plaintiff is attached hereto.

   BSI Maintains business records for the subject loan on behalf of the original Plaintiff as well as HMC. As part of my job responsibilities for BSI, I am personally familiar with the type of records maintained by BSI on behalf of the Original Plaintiff and HMC. The information contained in this Affidavit is taken from BSI’s business records. I have personal knowledge of BSI’s procedures for creating and maintaining these records. Such records are: (a) made at or near the time of the occurrence of the matters set forth therein by persons with personal knowledge of the information in the business record, or from the information transmitted by persons with knowledge; (b) are kept in the course of BSI’s regular conducted business activities; and (c) it is the regular practice of BSI to make such records. These records include data compilations (including the date certain original documents, such as original promissory notes and allonges, were received), electronic images of documents and a wide array of supplemental documentation. Where applicable, the records include documentation obtained and maintained by BSI, on behalf of the Original Plaintiff and HMC, from prior servicers or note holders, as relating to the loan hereinafter described.

   I make this Affidavit in support of the underlying Motion for, *inter alia*, Summary Judgment, based on my own personal knowledge of how BSI’s business records are kept and maintained and based upon personal knowledge that I have acquired by personally reviewing the specific business records as they relate to the loan of Defendant LEO E. TSIMMER (hereinafter “Defendant”).

   According to the business records I have reviewed, the original Note was delivered to the Original Plaintiff, VENTURES, or its custodian/agent on or before November 1, 2014. Following commencement of the within action, the Original Plaintiff, VENTURES, physically delivered the Note, containing all above-referenced endorsements and/or allonges to HMC. HMC, or its custodian/agent, is currently in physical possession of the original Note, containing all of the above-referenced indorsements and allonges firmly affixed thereto. [↑](#footnote-ref-5)
6. Defendants’ sixteenth affirmative defense erroneously claims that “Plaintiff fails to establish a chain of title pursuant to Civil Practice Laws and Rules §3012-b.” *See* Def.[s’] Answer, ¶ 27. [↑](#footnote-ref-6)
7. Defendants’ twentieth affirmative defense alleges that “[u]pon information and belief, the subject loan is no longer in the Trust and the Plaintiff has no standing to commence the instant action.” *See* Def.[s’] Answer, ¶ 40. [↑](#footnote-ref-7)
8. On March 2, 2011, Administrative Order 548/10 was replaced by Administrative Order 431/11, retroactively effective November 18, 2010, which revised the form for the required attorney affirmation. On August 1, 2013, the Chief Administrative Judge issued Administrative Order 208/13, which directed that the provisions of Administrative order 431/11 shall not apply to residential mortgage foreclosure actions commenced on or after August 30, 2013. In actions commenced prior to August 30, 2013, where no affirmation has been filed pursuant to AO/431/11,” Administrative Order 208/13 states that the plaintiff’s counsel may either (1) comply with AO/431/11, or (2) file with the court at the time of the Request for Judicial Intervention a certificate of merit whose contents are described in section 3012-b(a) of the Civil Practice Law and Rules. CPLR 3012-b, effective August 30, 2013 (*see* L 2013, ch 306, § 1), provides, in relevant part, that “the complaint shall be accompanied by a certificate, signed by the attorney for the plaintiff, certifying that the attorney has reviewed the facts of the case and that, based on consultation with representatives of the plaintiff identified in the certificate and the attorney’s review of pertinent documents, . . . to the best of such attorney’s knowledge, information and belief there is a reasonable basis for the commencement of such action and that plaintiff is currently the creditor entitle to enforce rights under such documents.” *Bank of New York Mellon v. Izmirligil*, 144 A.D.3d 1063, 1064-66 (2d Dept. 2016). [↑](#footnote-ref-8)
9. Defendants’ sixth affirmative defense falsely alleges that “[u]pon information and belief, the note and mortgage was procured by deceptive and fraudulent Practices constituting ‘predatory lending’ . . . specifically, Plaintiff intentionally exercised, improper, inadequate or nonexistent due diligence regarding Defendant’s ability to repay the amounts due under the note and mortgage.” *See* Def.[s’] Answer, ¶ 11. [↑](#footnote-ref-9)
10. Defendants’ seventh affirmative defense erroneously claims that Plaintiff failed to provide “Truth-In-Lending documents (‘TILA disclosures’).” *See* Def.[s’] Answer, ¶ 14. [↑](#footnote-ref-10)
11. Defendants’ ninth affirmative defense baselessly contends that “Plaintiff violated New York Banking law § 6-L(2)(m), in that the amount finance to cover the costs of the loan were in excess of 3 percent of the principal amount of the loan.” *See* Def.[s’] Answer, ¶ 16. [↑](#footnote-ref-11)
12. Defendants’ tenth affirmative defense erroneously alleges that “Plaintiff failed to provide a list of credit Counselors as contemplated under New York State Banking Law §6-L(2)(1)(1).”  *See* Def.[s’] Answer, ¶ 17. [↑](#footnote-ref-12)
13. Defendants’ eleventh affirmative defense baselessly claims that “Plaintiff has overstated and exaggerated the amount that it is owed, including predatory fees and charges not authorized by the terms of the subject note and mortgage.” *See* Def.[s’] Answer, ¶ 18. [↑](#footnote-ref-13)
14. Defendants’ twenty-seventh affirmative defense alleges that “[u]pon information and belief, prior to making the loan, Plaintiff failed to conduct a proper and diligent investigation into Defendant’s creditworthiness or repayment ability.” *See* Def.[s’] Answer, ¶ 53. [↑](#footnote-ref-14)
15. Defendants’ first counterclaim falsely claims that “Plaintiff and/or its agents have committed numerous acts that constitute, by themselves or in conjunction with their course of conduct, predatory lending.” *See* Def.[s’] Answer, ¶ 59. [↑](#footnote-ref-15)
16. Defendants’ third counterclaim contends that “Plaintiff and/or its predecessors and/or its agents violated the Deceptive Practices Act by engaging in acts and practices that were misleading in a material way, unfair, deceptive, and contrary to public policy and generally recognized standards of business.”  *See* Def.[s’] Answer, ¶ 70. [↑](#footnote-ref-16)
17. Defendants’ fourth counterclaim incorrectly alleges that “Plaintiff and/or its predecessors and/or its agents fraudulently and knowingly induced defendant to enter into the subject transaction by making intentional misrepresentations and/or failing to provide material information." *See* Def.[s’] Answer, ¶ 74. [↑](#footnote-ref-17)
18. As Defendants’ instant allegation relates entirely to facts and circumstances that only Borrower could possess personal knowledge of, Defendants cannot rely on the hearsay claims of Defendants’ attorney and Defendant KIM A. HILL to defeat Plaintiff’s *prima facie* showing of its entitlement to summary judgment. *See Schultz*, 86 N.Y.2d at 866; *Indig*, 23 N.Y.2d at 729. [↑](#footnote-ref-18)
19. To the extent that Defendants are attempting to argue that Plaintiff violated Banking Law § 6-m (4), which imposes limitations on subprime home loans, the subject mortgage loan, issued on January 24, 2008, does not fall under the purview of Banking Law § 6-m (4), which applies only to subprime and high-cost loans issued on or after September 1, 2008. *See Emigrant Mtge. Co., Inc. v. Fitzpatrick*, 95 A.D.3d 1169, 1171 (2d Dept. 2012). [↑](#footnote-ref-19)
20. As Defendants’ instant allegation relates entirely to facts and circumstances that only Borrower could possess personal knowledge of, Defendants cannot rely on the hearsay claims of Defendants’ attorney and Defendant KIM A. [↑](#footnote-ref-20)
21. For violations of 12 U.S.C. § 2605, there is a three-year statute of limitations. *See Deans v. Bank of America*, NYLJ 12025327765787 (SDNY 2010), *citing Johnson v. Scala*, 2007 WL 2852758, \*2 (SDNY 2007). [↑](#footnote-ref-21)
22. For violations of 12 U.S.C. §§ 2607 and 2608, there is a one-year statute of limitations. *See id.* [↑](#footnote-ref-22)
23. [↑](#footnote-ref-23)
24. [↑](#footnote-ref-24)
25. It is important to note that the estate of a deceased signatory to note is not automatically considered a necessary party to a mortgage foreclosure action. *NC Venture I, L.P. v. Complete Analysis, Inc.,* 22 A.D.3d 540 (2d Dept. 2005). [↑](#footnote-ref-25)
26. RPAPL 1304 was subsequently amended following the commencement of this action on December 20, 2016. *See* <https://www.nysenate.gov/legislation/laws/RPA/1304> [↑](#footnote-ref-26)
27. The one-sentence first affirmative defense consists entirely of the unsupported claim that “Plaintiff misapplied payments made by Defendant.” *See* Def.[s’] Answer, ¶ 6. [↑](#footnote-ref-27)
28. The two-word third affirmative defense ambiguously alludes to a “Partial Payment,” without offering any further details. *See* Def.[s’] Answer, ¶ 8. [↑](#footnote-ref-28)
29. The two-word fourth affirmative defense ambiguously alludes to a “Full Payment,” without offering any further details. *See* Def.[s’] Answer, ¶ 9. [↑](#footnote-ref-29)
30. Banking Law § 6-I imposes limitations and prohibits certain “practices for high-cost home loans.” *Aries Financial, LLC v. 12005 142nd Street, LLC*, 127 A.D.3d 900, 901 (2d Dept. 2015); *see Lewis v. Wells Fargo Bank, N.A.*, 134 A.D.3d 777, 778 (2d Dept. 2015) (explaining that a high-cost home loan as defined by Banking Law § 6-I cannot exceed the statutory maximum of $300,000.00). [↑](#footnote-ref-30)
31. Banking Law § 6-M imposes limitations and prohibits certain subprime home loans, in which, for a first lien mortgage loan, the annual percentage rate exceeded three percentage points over the yield on treasury securities, or for a subordinate mortgage lien, the annual percentage rate exceeded five percentage points over the yield on treasury securities. *See Aurora Loan Services, LLC v. Weisblum*, 85 A.D.3d 95, 105 (2d Dept. 2011). [↑](#footnote-ref-31)
32. Overlooking the falsity of Defendants’ instant claim, it should be noted that any allegations of culpable conduct by Plaintiff are tort concept that have no application under the present circumstances where Defendants’ breach – and the resulting damage – are undisputed. *See Five Towns College v. Citibank, N.A.*, 108 A.D.2d 420, 425 (2d Dept. 1985) [↑](#footnote-ref-32)