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COURT OF APPEALS
STATE OF NEW YORK

CIT BANK, N.A.,

Respondent,

-against-

SCHIFFMAN, et al.,

Appellants.

No. 11

20 Eagle Street
Albany, New York
February 9, 2021

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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Official Court Transcriber



1 CHIEF JUDGE DIFIORE: Good afternoon, everyone.
2 The first appeal on this afternoon's calendar is appeal
3 number 11, CIT Bank v. Schiffman.

4 Counsel?

5 (Pause)

6 MR. KATZ: May it please the court. My name is
7 Samuel Katz. I represent the defendants-appellants, Pamela
8 and Jerry Schiffman. May I reserve three minutes for
9 rebuttal, please?

10 CHIEF JUDGE DIFIORE: You may, sir.

11 MR. KATZ: Thank you, Your Honor. In this
12 appeal, I respectfully request that the court hold that a
13 lender's proof of compliance with RPAPL 1304, using a
14 standard office mailing procedure, be deemed deficient and
15 rebutted when the borrower denies receipts of the notice
16 and there's a proof that the lender's standard office
17 mailing procedure was not followed in a material manner.

18 In this case, the borrowers both denied receipt
19 of the 1304 notices and also proved that the lender's own
20 stated standard office mailing procedure was not followed.
21 The particular defect in this case revolves around the time
22 that the notices are created for purposes of mailing them
23 to the borrowers. The lender's affidavit stated that they
24 create these notices upon default - - -

25 JUDGE FEINMAN: I have a question, if I may. Mr.



1 Katz, I just want to be clear, are you taking the position
2 - - - have you conceded that the plaintiff is entitled to a
3 presumption of receipt and therefore the only question
4 that's really been certified to us, as I understand the
5 certified question, is whether the defendants have
6 sufficiently rebutted that presumption. Is that your
7 understanding of the posture?

8 MR. KATZ: Our position is that the - - - the
9 stated office mailing procedure presents a presumption of
10 mailing which then transfers the burden onto the defendant
11 to deny the presumption of receipt, but I don't - - -

12 JUDGE STEIN: Well, can I - - - can I ask the
13 question a little bit differently from Judge Feinman? Are
14 we bound by the - - - the federal court's determination
15 that there was sufficient, adequate proof of mailing in the
16 first instance? I know you refer to the problem of the
17 timing, and I - - - I think, at least arguably, there is
18 questionable proof about the - - - the practice, the
19 standard office practice of how these notices are actually
20 mailed, how they get to the post office, for example, would
21 be one part of that. So is - - - is that something that we
22 can consider here, or are we limited to looking at this - -
23 - this time gap that you refer to?

24 MR. KATZ: I don't think the court is limited at
25 all. I believe that the court has the ability to look at



1 the lender's prima facie burden, and this goes to the
2 lender's prima facie burden on summary judgment, to present
3 a proper mailing office procedure. On its face, it has to
4 be a proper and reliable mailing office procedure, which
5 our position is that the bank in this case did not present,
6 and therefore the court does have the ability to look
7 beyond what the - - - what the federal court - - - what the
8 federal court had said to see whether or not the lender
9 even - - - even satisfied their prima facie burden.

10 JUDGE FEINMAN: So that would be different than
11 what you said at page 22 and 23 of your brief where you
12 said CIT created only a rebuttable presumption of receipt
13 by the Schiffmans, which I took as a concession that they
14 had done that.

15 MR. KATZ: I don't think so, because I think the
16 concept is kind of a fluid concept, because it beings with
17 the proof of mailing which the - - - which the borrower
18 cannot - - - the borrower, under normal circumstances, has
19 no ability to - - - to impeach the - - - the lender's
20 standard mailing office procedure.

21 So the only way that the borrower can then, you
22 know, deny or object or raise an issue of fact as to that
23 is by saying, A, I didn't receive the notices, and B, the
24 notices were not even sent in the way that you say that
25 they were supposed to be sent because you didn't follow



1 your - - - your own stated office mailing procedure which,
2 in this case, actually, the lender admits that they didn't
3 follow. It's not a question of fact whether or not the
4 lender followed their stated office procedure.

5 JUDGE RIVERA: If I can ask, what - - - what is
6 their concession, specifically? What are you saying is the
7 part of the procedure that they did not follow?

8 MR. KATZ: The - - - the lender's affidavit
9 stated that, upon default, the lender creates the notices
10 and then mails them out in accordance with their standard
11 office mailing procedure. The - - - the affidavit
12 attempted to describe what the office mailing procedure is,
13 and then it went ahead and said that, in this case, based
14 on the business records that they - - - they have, you
15 know, she - - - she attests that the procedure was
16 followed. However, the procedure is contradicted by the -
17 - - by their own statement. In their own affidavit, the
18 procedure is contradicted by the fact that it was not
19 created upon default, and it was - - - and it was in fact
20 created - - -

21 JUDGE RIVERA: If I - - - if I can just interrupt
22 you, but could - - - could not one understand the
23 representations as meaning upon default when they have
24 notice of that default? I thought there was a question as
25 to whether or not at the moment of the default - - -



1 MR. KATZ: So - - -

2 JUDGE RIVERA: - - - they would have been able to
3 proceed because they're not the holders.

4 MR. KATZ: I'm not sure I follow your question,
5 Judge Rivera.

6 JUDGE RIVERA: Okay. So at - - - at - - - let me
7 ask it a different way. Who had control over - - - or who
8 had the responsibility of filing notices at the - - - at
9 the moment of default?

10 MR. KATZ: The lender.

11 JUDGE RIVERA: Yes, I'm - - - I'm asking, who was
12 the lender at that moment?

13 MR. KATZ: Well, I believe it was CIT - - - CIT
14 Bank's predecessor, perhaps.

15 JUDGE RIVERA: Okay. So that's what I'm saying.
16 Can we not interpret the representations as meaning upon
17 default, as long as they have notice of that default? So
18 if - - - if they now are holding the note after the
19 default, it's when they know of the default. Isn't that
20 the way one could interpret the representation?

21 MR. KATZ: I'm not sure I'm following completely,
22 but if I understand correctly, the - - - the lender, the
23 current lender, CIT Bank, stands in the shoes of the
24 predecessor. When it acquires ownership of the note, it
25 acquires all records related to the - - -



1 JUDGE RIVERA: No, I understand, but you're - - -
2 you're basically arg - - - if - - - if this representation
3 is as I suggest, then there is no defect. It's not the
4 defect that you refer to, let me just put it that way,
5 right? Once they - - - once they have the note, they - - -
6 they look at their records, they see there's a default, the
7 default may have been months ago, and now they act on it.

8 MR. KATZ: Okay. Yeah, so - - -

9 JUDGE RIVERA: That - - - that's their - - -
10 that's their process. Why - - - why are - - - is anything
11 that they have said in their representation - - - and I'll
12 ask your adversary the same question, is there anything
13 they have - - - they have represented at odds with that
14 understanding of the process?

15 MR. KATZ: Well, the implication from the words
16 "upon default" is that the - - - the event triggers the
17 creation of the notices, the event of default. And you
18 would expect that that - - - you know, that the creation of
19 notices actually occurs within a reasonable time frame,
20 either simultaneously with - - - with the event of the
21 default, or within a reasonable time frame. Nine months,
22 ten months is beyond a reasonable time frame, and therefore
23 it - - - it impeaches their own stated procedure.

24 JUDGE RIVERA: I know, but I'm just saying your
25 presumption is that they had the authority to issue those



1 notices at the - - - at the moment of default.

2 MR. KATZ: At any time - - - at any time that
3 there is a default, there is a lender; whoever owns the
4 note has the authority. So if it - - - if it was CIT Bank,
5 then it was CIT Bank. If it was their predecessor, then it
6 was their predecessor. But it should have been complied
7 with within a reasonable time within the event of the
8 default, because if you have a stated procedure that
9 requires a triggering event to create the notices, they
10 have to happen within a reasonable time frame of each
11 other. Otherwise the procedure is not a reliable
12 procedure, and that is - - - that's what we're looking for
13 over here.

14 JUDGE FAHEY: Judge, may I ask a question?

15 CHIEF JUDGE DIFIORE: Yes, Judge Fahey.

16 JUDGE FAHEY: Thank you.

17 In another context, say, in an insurance
18 cancellation, which is a similar kind of problem to the
19 problem we have to deal with here today, what would be
20 required would be first for the person who was cancelling
21 the insurance to follow standard office mailing procedures
22 in both the preparation and in the mailing of the
23 particular notice that would be sent out. And then there's
24 a presumption of receipt by mail that's then created. The
25 way I understand your argument is that you didn't receive



1 it, and - - - and that the presumption of receipt by mail
2 was not properly created. Is that correct?

3 MR. KATZ: I - - - I'll try to explain it again,
4 but I believe that it's a - - - it's a - - -

5 JUDGE FAHEY: Well, stick with - - - stick with
6 my question.

7 MR. KATZ: Sure.

8 JUDGE FAHEY: Is what I just stated correct? Is
9 that what you're seeking to prove here?

10 MR. KATZ: It's - - - it's partially correct.

11 JUDGE FAHEY: All right. Then correct me or - -
12 - or add on whatever you feel needs to be added on.

13 MR. KATZ: Okay. So basically the way I
14 understand it is that the presumption of the mailing itself
15 cannot be rebutted by the borrower, or by the person that's
16 supposed to be receiving the notice, because they don't
17 have knowledge of whatever the lender - - -

18 JUDGE FAHEY: Let me stop you there. You have
19 the Hook affidavit; is that correct?

20 MR. KATZ: Correct.

21 JUDGE FAHEY: Right, and the Hook affidavit would
22 necessarily have to set out both the preparation of the
23 notice and the procedures by which the notice was mailed
24 out. Isn't that what would be required?

25 MR. KATZ: That's correct.



1 JUDGE FAHEY: All right. All right. So - - - so
2 you do have proof about how it was put together, and the
3 question is for us is was that sufficient, did the Hook - -
4 - was the Hook affidavit sufficient?

5 MR. KATZ: Correct.

6 JUDGE FAHEY: If it was sufficient, then the
7 burden shifts to you, right?

8 MR. KATZ: Correct.

9 JUDGE FAHEY: All right.

10 MR. KATZ: Yes.

11 JUDGE FAHEY: All right. Go ahead.

12 MR. KATZ: So what I'm saying is - - - what I'm
13 saying is that the Hook affidavit was not sufficient
14 because the procedure then was - - -

15 JUDGE FAHEY: All right. So let me stop you.

16 MR. KATZ: - - - prevented.

17 JUDGE FAHEY: Let me stop you. If you're saying
18 the Hook affidavit was insufficient, then you're saying
19 that the initial presumption of mailing was not properly
20 created, and that the defend - - - sorry, CIT, the
21 plaintiff, didn't meet their initial burden; is that right?

22 MR. KATZ: That's correct, Your Honor.

23 JUDGE FAHEY: Okay. Go ahead.

24 JUDGE FEINMAN: And here's, if I may, what I
25 don't understand. I thought that the Second Circuit



1 already resolved that question, factually, and said there
2 is a presumption of receipt, and what they're asking us is
3 not what do you have to do to establish a presumption of
4 receipt but, you know, what do you have to do to rebut that
5 presumption?

6 MR. KATZ: Right, that's - - - the Second
7 Circuit's question does appear - - -

8 JUDGE FEINMAN: You're not asking us to - - - to
9 reframe the question; you haven't done that, have you?

10 MR. KATZ: We have not done that, but of course
11 the Court of Appeals is more than - - - you know, is more
12 than - - - you know, has more than the requisite authority
13 to reframe - - -

14 JUDGE FEINMAN: Why would we do that if - - - if
15 the Second Circuit has already made its factual findings,
16 you know, the affidavits and whatever they had in front of
17 them sufficiently establishes the presumption? I mean,
18 we're not - - - because we're not resolving this appeal,
19 all right? So this is not a matter of us correcting a
20 factual mistake by the, you know, Second Circuit on that,
21 assuming they made a mistake. I'm - - - I'm not sure I
22 think they did. We're just being asked to answer a
23 question of law and they'll decide the appeal.

24 MR. KATZ: That's correct, but I think it goes
25 hand in hand because if you have - - - because the



1 presumption of mailing, again, as I tried to explain
2 before, the presumption of mailing itself shifts the burden
3 to the borrower to - - - to rebut. But the way to do that
4 is by - - - is by rebutting the receipt of the mailing and
5 then by presenting some kind of a - - - a defect in the
6 procedure. So - - -

7 JUDGE FEINMAN: I think we're going round and
8 round on this. I didn't know if there was anything you
9 wanted to say about 1306 and the second question that they
10 certified to us.

11 MR. KATZ: Yes, Your Honor. Our argument on 1306
12 is very simple. 1306 and 1304 go hand in hand. The
13 requirements of 1306 are that all the notices that are - -
14 - that are sent to borrowers, pursuant to 1304, are then
15 recorded in a statement - - -

16 JUDGE STEIN: But don't those two statutes serve,
17 at least in part, very different purposes? I mean, the
18 ultimate goal clearly is the same, but it appears, you
19 know, pretty clearly that 1306 is for the purpose of - - -
20 of getting general information on the types of loans that
21 are going into foreclosure, and where they are, and where
22 to put resources into helping homeowners prevent that. And
23 - - - and why - - - why is it necessary for every - - -
24 every borrower, who's presumably often in the same
25 household, why - - - why would it be necessary to have



1 every single borrower listed on that filing?

2 MR. KATZ: Well, it - - - there's evidence in the
3 record that the Department of Financial Services, aside
4 from being a statistical function, they also have the
5 ability to reach out to borrowers who are in default, who
6 are at risk of losing their home, and to help them get back
7 on their feet if they can. There is a double function over
8 there. It's not only the statistical data that they
9 collect, and that goes hand in hand with 1304, which is to
10 provide notices to the borrowers, to each of the borrowers.

11 JUDGE STEIN: Do we owe any deference at all to
12 DFS, which is - - - which is implementing this whole scheme
13 of 1306 and - - - and what they think?

14 MR. KATZ: I'm sorry; I missed the first part of
15 your question.

16 JUDGE STEIN: Do we owe any deference to what DFS
17 thinks?

18 MR. KATZ: I do not think so. DFS only provides
19 guidance, and it's not binding on - - - on the court or,
20 you know, on anyone. But you know, the court can look to
21 the legislative intent of 1306, and I think here you have
22 both the statistical data and the - - - the purpose of
23 trying to assist borrowers, trying to reach out to
24 borrowers and trying to see if they can avoid a borrower
25 losing their home.



1 CHIEF JUDGE DIFIORE: Thank you, Mr. Katz.
2 Counsel?

3 MR. MAROTTA: Thank you, Your Honor, and may it
4 please the court. Sean Marotta for the respondent, CIT
5 Bank.

6 On the 1304 issue, let me be clear. The argument
7 that Mr. Katz has been making is quite different than the
8 one that this case has been certified to this court for or
9 even that he says in his own brief. As noted at page 22
10 and 23 of his own brief and in the certification order - -
11 -

12 JUDGE STEIN: Well, counsel, can I just interrupt
13 you on that point because, you know, I think it's - - -
14 it's a significant issue for our consideration, but if - -
15 - as I look at - - - at the bank's standard operating
16 procedure or office procedure, as set forth in the
17 affidavits and - - - and everything else, there's nothing
18 in there that says how these - - - it - - - it talks a lot
19 about how the notices were created and what went - - -
20 where the information came from and what went on the
21 envelopes and what went in the envelopes and all that. But
22 I don't see anything, other than a very conclusory
23 statement that "and then they're mailed" or "then they're
24 sent for mailing".

25 How could a borrower rebut the standard office



1 procedure regarding mailing when there is no procedure
2 that's set forth by the bank?

3 MR. MAROTTA: Well - - -

4 JUDGE STEIN: How would that be possible?

5 MR. MAROTTA: I guess a borrower in those
6 circumstances, if you were to think it was conclusory,
7 could say that what you have set out is not a standard
8 office procedure such the presumption never arises. But
9 the Schiffmans have never argued that in this case. To the
10 contrary, they have always conceded that that affidavit is
11 sufficient to create the presumption and constitutes a
12 standard office mailing procedure.

13 And I think that that concession is important
14 because if they had made that objection in the district
15 court, perhaps we would have come back and said, okay,
16 well, if your problem is you haven't explained how the mail
17 gets from, you know, the guy in the mailroom to the
18 postman, we'll give you more information. But now with the
19 Second Circuit, and now in this court, for the first time,
20 there is the suggestion raised that that line isn't doing
21 enough. And I think that's far too late to spring that
22 kind of objection.

23 JUDGE FAHEY: Well, here's the problem - - -

24 Judge, can I - - - is it all right if I ask?

25 Okay.



1 The problem with that is that we don't really
2 decide the factual issues here, and one of the things we
3 would have to be concerned about is not so much the facts
4 in this case and how the Second Circuit will resolve it,
5 because that's really up to them, it really isn't up to us;
6 you're right about that.

7 But Judge Stein's point, and I agree with it, is
8 that we have to lay out for them the way we understand the
9 law, and then they have to apply it. And so if we look at
10 it, and not to say that, respectfully, of course, that the
11 Second Circuit misperceived the law, but - - - but that our
12 understanding of the law requires them to look at that
13 initial presumption and then see if the burden was met in
14 response to that, lay it out for them, and then they look
15 at the facts, because they're an appellate court, subject -
16 - - subject to factual review, which we really aren't, and
17 they can decide if their understanding of the facts fit
18 within our understanding of what the law is.

19 And I think that would be the only reason for us
20 to address it. The - - - the factual determinations, one
21 way or the other, of course it would be up to them. But if
22 we didn't address it, I think, as a public policy matter,
23 we would be, perhaps, creating a situation in other areas,
24 like I referred to, like insurance law, where we could
25 create problems for ourselves if we didn't clearly set out



1 what the rules are. That - - - that's why I think it's
2 important.

3 MR. MAROTTA: So Judge Fahey, I think you can do
4 two things in response to that concern, which I agree is a
5 real concern. As we lay out in our brief, this case kind
6 of comes to this court - - - the Second Circuit
7 certification order maybe made the record seem a little bit
8 clearer than it was.

9 So first you could perhaps say that maybe the
10 first question that was certified isn't actually
11 dispositive of the case because there is this concern about
12 whether the presumption arose in the first instance, and
13 maybe the question wasn't properly certified in that case.

14 Or second, what you can do is you say, look, we
15 take - - - we take the case as it comes. We will assume,
16 without deciding, that the presumption was created, and
17 here's what you have to do to rebut it. Whether there are
18 concerns or not about whether, you know, at a different
19 procedural posture you would think the presumption is
20 created or not.

21 I think you could go either way. But I don't
22 think what you can do, at this late date, is say, oh, wait,
23 no, what we're actually contending is that there was no
24 presumption in the first place. But I think it's telling
25 that the Schiffmans move in that direction because when you



1 actually get to what comes to rebutting the presumption,
2 once created, you have to show that something went wrong
3 with the mailing.

4 And I think this gets to your - - - your question
5 a little bit, Judge Rivera. You know, the Hook affidavit
6 said we create the notices upon default. As the Second
7 Circuit noted, default here means because CIT Bank was not
8 the owner of this loan when it went into default, it was
9 most, I think, best understood to say once we got the loan
10 and realized it was in default, we created the notice and
11 then sent it out. And of course it's notable that no one
12 thinks that this notice was - - -

13 JUDGE RIVERA: If I - - - if I can just interrupt
14 you there. I think this is the point, yes, your argument
15 that it means upon default, if you're the holder of the
16 note, and otherwise, upon acquisition of a loan that's in
17 default once you realize it's in default. That is your
18 procedure.

19 Now, why - - - why the affidavits don't make that
20 distinction, I can't say, but I understood that that was
21 what you're arguing is the procedure to address what your
22 adversary calls the defect in the procedure, right? He's
23 working from the assumption you waited eleven months after
24 the default to mail this, which may suggest that the rest
25 of your process is one that's not followed. And it puts in



1 question the reliability of the rest of your assertions
2 regarding the process.

3 MR. MAROTTA: I think that's right, and even if
4 you think it's the defect, it's not a defect as to mailing.
5 I mean, no one questions that this notice was generated.
6 We have the notice in the record. And the Second Circuit
7 has rejected the arguments that, you know, the notice
8 attached to it wasn't properly verified or something like
9 that.

10 So really it's a question of has it been mailed.
11 And what my adversary says is, well, there's no way you
12 could show - - - you could actually rebut the presumption.
13 But of course you can, and cases are legion where people
14 have. For instance, the envelope is in the record, the
15 scan. They could look at that and say, well, the way that
16 letter is addressed, there's no way it's getting to us
17 because it's on the wrong street, or you've addressed it in
18 such a way that the post office wouldn't deliver it to us.

19 JUDGE RIVERA: Well, that - - - if I can
20 interrupt there. Well, that - - - that goes to the
21 reliability of the process to actually achieve the purpose,
22 right, that they get the mailing, that they receive it,
23 right? You don't want to create a process which is so
24 flawed that no one's ever going to receive the notice,
25 right? So that goes to - - - to that.



1 But I think Judge - - - Judge Stein and others
2 are asking about what in the process confirms the way one
3 mails? And that is what the Second Circuit is asking
4 about. Is any defect - - - right? Sort of the question
5 is: Is any defect enough to rebut the presumption, or does
6 it have to go to the mailing itself? Certainly the Court
7 of Appeals could clarify you must explain not only how you
8 created the notices, how you generated the envelopes, how
9 you ensured you got the right address and the name of the
10 borrower, that you ensured the envelopes were stuffed, and
11 then this is what you did to make sure - - - and you put a
12 prepaid stamp. I notice you have that on the envelope,
13 you've got the bar code. And then they walked it over to
14 the post office. Or then they put it in the outgoing mail
15 pile which is collected every day at X hour, whatever that
16 is. I'm not going to make up your process, but - - -
17 right? We - - - we could certainly clarify that. Whether
18 or not you meet that is another story.

19 MR. MAROTTA: I would actually disagree, Judge
20 Rivera, because I think all of that goes to what
21 constitutes a reliable office practice. What I understand
22 the Second Circuit to be asking is if you have an affidavit
23 that constitutes a reliable office practice, what do you
24 have to show? How much deviation?

25 In other words, if your normal office practice is



1 that, you know, Mr. Marotta walks it over to the outgoing
2 mail pile, but on the particular day in question, Mr. Katz
3 walked it over to the outgoing mail pile, that's a
4 deviation from the process because it's not what I - - -
5 our normal process. But you would say it's an immaterial
6 deviation because it doesn't matter who does the walking.

7 JUDGE RIVERA: No, sure, but the process is
8 someone walked it over - - -

9 MR. MAROTTA: Right, right. And of course - - -

10 JUDGE WILSON: If I might, Chief?

11 CHIEF JUDGE DIFIORE: Yes.

12 JUDGE WILSON: Isn't the problem here, though,
13 that unless you know, with some specificity, what the
14 process is, you can't measure the deviation from the
15 process?

16 MR. MAROTTA: I agree with that, Judge Wilson,
17 but I think as this case comes to the court, there has been
18 an assumption that has been conceded that a sufficiently
19 reliable process has been set forth.

20 JUDGE WILSON: Yes. Yes, but we don't know what
21 that process is. You're saying we could say what - - -
22 you're saying what we're being asked is how much of a
23 deviation constitutes a significant enough one to rebut the
24 presumption. And what I'm asking is if we don't know what
25 the process is, how can we answer the second question, even



1 if the process has been determined by the Second Circuit to
2 be one that's viable?

3 MR. MAROTTA: You know - - - you know, Your
4 Honor, I don't want to fight too hard on the suggestion
5 that maybe this question isn't quite the one that you
6 should be answering. You know, as a respondent, we didn't
7 ask, necessarily, to be here. So, you know, if the court
8 were to say that the question were improperly certified, I
9 think that's a result that is, you know, understandable on
10 the unusual facts of this case and how it came to the
11 court.

12 If I could address 1306 real quickly, unless the
13 court has questions on 1304, on 1306, the simple fact of
14 the matter is that in 1306 the question is does borrower,
15 which is what the statutes use, mean borrowers. And
16 there's a general rule of construction that singular means
17 plural unless the context and circumstances suggest
18 otherwise.

19 For all of the reasons set out in our brief and
20 the DFS itself has laid out, the context suggests
21 otherwise, given that the purpose of this is primarily to
22 track loans, and to the extent it's to help borrowers, DFS
23 itself has said we can't draw distinctions between multiple
24 borrowers who live at a single address. For that reason,
25 we view it as - - -



1 JUDGE RIVERA: Counsel, if I can just ask this
2 question. I thought that DFS does - - - on the form here,
3 does allow for two borrowers. Am I incorrect?

4 MR. MAROTTA: It does allow for two borrowers,
5 Your Honor.

6 JUDGE RIVERA: Okay. So why didn't they just
7 fill out the two borrowers?

8 MR. MAROTTA: I can't speak to why on this case
9 two borrowers weren't on the - - - on the form, but what I
10 would say is, for the statutory construction that's before
11 Your Honor, which is does borrower mean borrowers, there is
12 no basis to say more than one but less than all. So if
13 there's three borrowers - - -

14 JUDGE RIVERA: No, but I - - - but here's my
15 concern. If DFS has itself thought that there is some
16 value to both borrowers being listed, why are we not
17 deferring to that?

18 MR. MAROTTA: Well - - -

19 JUDGE RIVERA: Are you saying, as a pure
20 statutory interpretation, they're wrong, they should only
21 be asking for one and if they ask for two that's above and
22 beyond - - - that's above and beyond - - - sorry - - -
23 what's - - -

24 MR. MAROTTA: No, that's okay.

25 JUDGE RIVERA: - - - necessary?



1 MR. MAROTTA: What I would say, Your Honor, is
2 that DFS allows two borrowers to be listed because I think
3 many homes are owned by married couples, Your Honor. If
4 you look at what their - - -

5 JUDGE RIVERA: Is there not some value in them
6 being able to track that?

7 MR. MAROTTA: Well, what DFS says is that for - -
8 - when it's the principal dwelling of multiple borrowers,
9 they have the same interests, and even if their interests
10 differ, we really can't direct more resources to them.
11 That applies whether it's one borrower or four borrowers.
12 I think they allow two as a matter of custom, but there is
13 nothing in the purposes that DFS has told you that would
14 suggest - - -

15 JUDGE RIVERA: But doesn't the two borrower - - -

16 MR. MAROTTA: - - - two is the limit.

17 JUDGE RIVERA: Doesn't the two borrowers, if
18 they're multiple borrowers - - - maybe they're more than
19 two, but if you've got two, doesn't - - - doesn't listing
20 both ensure that if one is an absentee, right, is an
21 absentee borrower that DFS at least, if they wish, can
22 reach out to the other person?

23 MR. MAROTTA: Well, but I think that's contrary
24 to what DFS has said which is they - - - which is - - -

25 JUDGE RIVERA: Well, but not - - -



1 MR. MAROTTA: - - - and they acknowledge - - -

2 JUDGE RIVERA: - - - asking for both.

3 MR. MAROTTA: I - - - I don't think they're
4 asking for both, Your Honor. I think they have two blanks
5 for both, which I think is different. But there is no
6 suggestion on that website that, for instance, one - - - a
7 form that only lists one is insufficient or inadequate.

8 JUDGE RIVERA: So - - - so then help me here.
9 What - - - since you're - - - I think now you're arguing
10 it's - - - it's to the lender's discretion, so how would
11 that discretion be exercised to choose whether or not to
12 list both?

13 MR. MAROTTA: Well, I think a form suffices - - -

14 JUDGE RIVERA: As for DFS, how does that
15 discretion get its - - -

16 MR. MAROTTA: Well, I don't think it's a matter
17 of discretion, Judge Rivera. I think it's that one is
18 sufficient. If you put both on, that's fine, but it - - -
19 it's not - - - it's not required by the statute. What we
20 are asking is: Is it required by the statute? And the
21 answer is no.

22 CHIEF JUDGE DIFIORE: Thank you, counsel.

23 MR. MAROTTA: Thank you, Your Honor.

24 CHIEF JUDGE DIFIORE: Mr. Katz, rebuttal?

25 MR. KATZ: I'm sorry, Your Honor. I'm going to



1 be brief about this. On the 1304, I just want to go back
 2 to the reliability aspect of the - - - of the procedure
 3 and, you know, the - - - the fact that the statute is a
 4 strict compliance statute. I want to emphasize that the -
 5 - - the method by which the lender in this case elected to
 6 approve compliance with 1304 is a less probative method
 7 because it - - - it leaves the borrower without any real
 8 ability to contest the actual mailing because there isn't a
 9 person that's swearing in an affidavit that says on this
 10 and this day I mailed out this and this affidavit - - - you
 11 know, this and this notice to the borrower or to the
 12 borrowers. So because it's a less probative method of - -
 13 -

14 JUDGE RIVERA: But Mr. Katz, if I can just ask
 15 you, if they said - - - if they had an affidavit that said
 16 on this day I mailed it in the following way, and then
 17 explained the way they did that, would that be sufficient?

18 MR. KATZ: That would be sufficient, and the only
 19 way the borrower - - -

20 JUDGE RIVERA: If - - - if they said - - - if all
 21 it said is I mailed it on this day, would that be
 22 sufficient - - - without explaining what they did, would
 23 that be sufficient?

24 MR. KATZ: Well, it would have to be a detailed
 25 affidavit that says that they actually deposited and, you



1 know, put the notice into an envelope, and it was mailed to
2 the person that's listed on the affidavit and, you know,
3 they would have to have some details there, and that would
4 only be able to be - - - to be rebutted by a borrower with
5 also a more detailed affidavit denying receipt, so - - -
6 such as I have a system in my house where every time we
7 receive mail we put it down on a piece of paper and we
8 record it.

9 But here, in this case, because they're using the
10 less probative value and the statute is a - - - is a strict
11 compliance statute, I present to the court that the court
12 should - - - should use a heightened standard when
13 evaluating the - - - the burden of the - - - of the lender
14 in proving compliance with 1304 using this method.

15 CHIEF JUDGE DIFIORE: Thank you, counsel.

16 MR. KATZ: Thank you, Your Honor.

17 CHIEF JUDGE DIFIORE: You're welcome.

18 (Court is adjourned)

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C E R T I F I C A T I O N

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the court of Appeals of CIT Bank v. Schiffman, et al., No. 11, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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