CAUSE NO. 342-262692-12

HARRIET NICHOLSON, *Plaintiff,* v. THE BANK OF NEW YORK MELLON F/K/A THE BANK OF NEW YORK, as Trustee for the Certificateholders of CWMBS, Inc., CWMBS Reforming Loan Remic Trust Certificates Series 2005-R2, *et al.* *Defendants.*	§ § § § § § § § § §	IN THE DISTRICT COURT TARRANT COUNTY, TEXAS 342nd JUDICIAL DISTRICT

FILED
TARRANT COUNTY
10/13/2020 11:18 AM
THOMAS A. WILDER
DISTRICT CLERK

PLAINTIFF'S REPLY TO DEFENDANTS' RESPONSE TO PLAINTIFF'S AMENDED MOTION FOR SANCTIONS

TO THE HONORABLE COURT:

COMES NOW Harriet Nicholson and files this her Reply to Defendants' Response to Plaintiff's Amended Motion for Sanctions and would show unto the Court the following:

Defendants are judicially estopped from arguing it abandoned acceleration. **Indeed, it is counterintuitive to argue that BONYM abandoned acceleration when it actually foreclosed.** BONYM was granted Judgment of Possession by virtue of Substitute Trustee's Deed on November 1, 2012 from the County Court at Law.[1]

Secondly, Defendants' waiver argument conflicts with its judicial admission in its answer filed in this Court on September 7, 2018 which stated in relevant part:[2]

> 207. Should Plaintiff be awarded any damages, Defendants are entitled to offset and recoupment in the amount the funds due and owing at the time of the foreclosure sale plus reasonable market value rent from the date of foreclosure until the service release of the loan to non-party Nationstar Mortgage, LLC.

On November 16, 2018, Tatiana Alexander through McGuire Woods, Nationstar Mortgage's previous attorney in the instant case , argued in *Leff v. Nationstar Mortgage LLC*

[1] The Court may take judicial notice of the *County Court at Law's Judgment of Possession* because it is a court record and a matter of public record, and its authenticity cannot reasonably be disputed. *See* Tex. R. Evid. 201(d); *Freedom Comms.*, 372 S.W.3d at 623.

[2] The Court may take judicial notice of the *Defendants' Answer filed on September 7, 2018* because it is a court record and a matter of public record, and its authenticity cannot reasonably be disputed. *See* Tex. R. Evid. 201(d); *Freedom Comms.*, 372 S.W.3d at 623.

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d/b/a Mr. Cooper, et al., Cause No. D-1-GN-18-003076 [3]

Defendant Did Not Abandon Acceleration Because it Proceeded with Foreclosure.

15. Abandonment of acceleration is based on the law of waiver. *Farmehr v. Deutsche Bank Nat'l Trust Co.*, 2018 Tex. App. LEXIS 3949 *5 (Tex. App. – Dallas 2018, no pet.); *Bracken v. Wells Fargo Bank, N.A.*, 2018 WL 1026268, *5 (Tex. App. – Dallas 2018, no pet.); *accord NSL Prop. Holdings, LLC v. Nationstar Mortg., LLC*, 2017 WL 3526354, at *3 (Tex. App.—Fort Worth 2017, pet. denied). "Waiver's elements include (i) an existing right, benefit, or advantage held bya party, (ii) the party's actual knowledge of its existence, and (iii) the party's ***actual intent to relinquish the right or intentional conduct inconsistent with the right***." *Farmehr*, 2018 Tex. App. LEXIS 3949 *5. Waiver "is effective if and only if it is clear and unequivocal." *Shumway v. Horizon Credit Corp.*, 801 S.W.2d 890 (Tex. 1991)); *see also Parker v. Frost Nat. Bank of San Antonio*, 852 S.W.2d 741, 744 (Tex. App. – Austin 1993, no pet.); *Ogden v. Gibraltar Sav. Ass'n*, 640 S.W.2d 232, 234 (Tex. 1982). "A waiver is clear and unequivocal if it states specifically and separately the rights surrendered." *Shumway*, 801 S.W.2d at 893; *Mathis v. DCR Mortg. III Sub I, L.L.C.*, 389 S.W.3d 494, 505 (Tex. App. – El Paso 2012, no pet.). "The abandonment of acceleration…is very often a fact question concerning the conduct and understanding of the parties." *DeFranceschi v. Seterus, Inc., et al*., 2016 WL 6496319, at *3 (N.D. Tex. Apr.18, 2016).

……..

For example, in *Boren* the Fifth Circuit noted "a holder can abandon acceleration if the holder continues to accept payments ***without exacting any remedies available to it upon declared maturity***." *Boren v. U.S. Nat. Bank Ass'n*, 807 F.3d 99, 104 (5th Cir. 2015) (quoting *Wolf*, 44 S.W.3d at 566–67) (emphasis added).

……..

Moreover, Plaintiffs have not cited to a single case wherein the court found that statements amount to abandonment even where the lender or servicer actually proceeded with foreclosure. **Indeed, it is counterintuitive to argue that Nationstar abandoned acceleration when it actually foreclosed.**

[3] See Ex. A, The Court may take judicial notice of *DEFENDANT NATIONSTAR MORTGAGE'S RESPONSE TO PLAINTIFFS' TRADITIONAL AND NO-EVIDENCE MOTION FOR PARTIAL SUMMARY JUDGMENT*, Cause No. D-1-GN-18-003076; Leff v. Nationstar Mortgage LLC d/b/a Mr. Cooper, et al., because it is a court record and a matter of public record, and its authenticity cannot reasonably be disputed. *See* Tex. R. Evid. 201(d); *Freedom Comms.*, 372 S.W.3d at 623

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The courts cannot be made vehicles of fraud, and, when the attempt is made, the wrong should be righted whenever and however, within their jurisdiction, the fraudulent conduct of litigants is called to their attention. This case is so tainted with the odor of perjury. Edwards v. Edwards, 418 S.W.3d 757 (Tex. App. 2013). citing Dixie Gas & Fuel Co. v. Jacobs, 47 S.W.2d 457, 462 (Tex.Civ.App.-Beaumont 1932, writ dism'd w.o.j.)

WHEREFORE Plaintiff prays this Court grants her Motion for Sanctions.

.

Respectfully submitted,
/s/ Harriet Nicholson
Harriet Nicholson
2951 Santa Sabina Drive
Grand Prairie, Texas 75052
817-217-0245
harrietnicholson@yahoo.com

CERTIFICATE OF SERVICE
On October 13, 2020, I certify I served all counsel of record pursuant to TRCP 21.
/s/ Harriet Nicholson

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EX. A

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Travis County
D-1-GN-18-003076
Irene Silva

CAUSE NO. D-1-GN-18-003076

KIMBERLY LEFF and BEN LEFF,	§	**IN THE DISTRICT COURT**
	§	
***Plaintiffs*,**	§	
	§	
v.	§	
	§	**419TH JUDICIAL DISTRICT**
NATIONSTAR MORTGAGE, LLC d/b/a MR. COOPER; and HOMEROCK, LLC.	§	
	§	
	§	**TRAVIS COUNTY, TEXAS**
***Defendants*.**		

DEFENDANT NATIONSTAR MORTGAGE LLC D/B/A MR. COOPER'S RESPONSE TO PLAINTIFF'S TRADITIONAL AND NO-EVIDENCE MOTION FOR PARTIAL SUMMARY JUDGMENT

Defendant Nationstar Mortgage LLC d/b/a Mr. Cooper ("Defendant" or "Nationstar")[1] files this Response ("Response") to Plaintiffs Kimberly Leff ("Kimberly Leff") and Ben Leff (collectively, "Plaintiffs")' *Traditional and No-Evidence Motion for Partial Summary Judgment* ("Plaintiffs' Partial MSJ") and respectfully shows the Court as follows:

I. INTRODUCTION AND FACTUAL BACKGROUND

1. Plaintiffs contend that they are entitled to summary judgment because Defendant allegedly failed to comply with notice provisions under Texas law, which purportedly voids the foreclosure on the property located at 2403 Narrow Valley Drive, Cedar Park, Texas 78613 ("Property"). Nationstar, however, provided Plaintiffs with proper and timely notice; therefore, Plaintiffs' claims of breach of contract, quiet title, and declaratory relief based on the purported invalidity of the foreclosure are meritless and must be denied.

2. Plaintiffs executed a Texas Home Equity Note on August 3, 2004 in favor of First Magnus Financial Corporation in the amount of $198,000 ("Note") [2], the repayment of which is

[1] Nationstar is the current Loan servicer.
[2] *See* Plaintiff's Partial MSJ at Ex. B-1.

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secured by a Texas Home Equity Security Instrument ("Security Instrument")[3] granting Magnus Financial Corporation a lien on the Property. The Note and Security Instrument are collectively referred to herein as the "Loan."

3. Plaintiffs thereafter defaulted on the payments required on the Loan and a Notice of Default was sent on May 15, 2017 ("Notice of Default").[4] The Notice of Default informed Plaintiffs that "[u]nless we receive full payment of all past-due amounts by the date above [June 14, 2017], we will accelerate the entire sum of both principal and interest due and payable…This could result in the loss of your property."[5]

4. Plaintiffs failed to cure the required amount by the due date in the Notice of Default, and the Loan was properly accelerated on July 20, 2017 ("Notice of Acceleration").[6] The Notice of Acceleration informed Plaintiffs that "[s]ince the default was not cured, the Note has been accelerated and all unpaid principal, interest, fees and costs are now due. Although the Note has been accelerated, you have the right and opportunity to cure the default and reinstate the Loan under certain circumstances."[7] The Notice of Acceleration also informed Plaintiffs that "[i]f you're unable to make your loan payments you may qualify for a modification of your loan…if you are interested please contact…Loss Mitigation."[8] Plaintiffs did not request a loan modification following acceleration and have not alleged so.

5. Defendant timely filed an *Application for Expedited Order Under Rule 736 on Home Equity Loan* on August 30, 2017 ("Foreclosure Application").[9] The Court entered an Order

[3] *See id.* at Ex. A.
[4] *See id*. at Ex. B-1 at Affidavit in Support of Application for Expedited Order Under Rule 736 ("Nationstar Affidavit")
[5] *See id*.
[6] *See* Plaintiff's Partial MSJ at Ex. B-1 at Affidavit of Harvey Law Group in Support of Application for Foreclosure ("Harvey Law Group Affidavit").
[7] *See id.*
[8] *See id.*
[9] *See* Plaintiff's Partial MSJ at Ex. B-1, *In re: Order for Foreclosure Concerning 2403 Narrow Valley Drive, Cedar Park, Texas 78613*, Cause No. D-1-GN-17-004685, in the 345the Judicial District Court, Travis County, Texas.

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granting the Foreclosure Application on November 16, 2017 and Co-Defendant HomeRock, LLC ("HomeRock") purchased the Property at auction on January 2, 2018.[10]

6. As demonstrated herein, Plaintiffs are not entitled to summary judgment because: (1) Defendant provided Plaintiffs timely notice of default and notice of acceleration regarding the Loan; (2) Plaintiffs failed to cure the default; (3) the acceleration of the Loan was not rescinded before the foreclosure sale. The Court must, therefore, deny Plaintiffs' Partial MSJ because Plaintiffs cannot conclusively prove all essential elements of its breach of contract and quiet title claims as a matter of law, and Defendant's summary judgment evidence disproves one or more elements of the claims.

II. SUMMARY JUDGMENT STANDARD

7. The standard for reviewing a traditional motion for summary judgment is well-established. *See Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548 (Tex. 1985); *see also McAfee, Inc. v. Agilsys, Inc.*, 316 S.W.3d 820, 825 (Tex. App.—Dallas 2010, no pet.). The movant has the burden of showing that no genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c). When a party moves for summary judgment on their own claims, it must conclusively prove all essential elements of its causes of action as a matter of law. *See City of Houston v. Clear Creek Basin Authority*, 589 S.W.2d 671, 678 (Tex. 1979) ("The movant still must establish his entitlement to a summary judgment on the issues expressly presented to the trial court by conclusively proving all essential elements of his cause of action or defense as a matter of law."). "The nonmovant has no burden to respond to a summary judgment motion unless the movant conclusively establishes its cause of action or defense." *Rhone-Poulenc v. Steel*, 997 S.W.2d 217, 222-23 (Tex. 1999). In deciding whether summary

[10] *See* Plaintiff's Partial MSJ at Ex. C.

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judgment is precluded because an issue of material fact is genuinely disputed, evidence favorable to the non-movant is taken as true. *Nixon*, 690 S.W.2d at 548-49; *In re Estate of Berry*, 280 S.W.3d 478, 480 (Tex. App.—Dallas 2009, no pet.). Every reasonable inference must be indulged in favor of the non-movant and any doubts resolved in its favor. *See City of Keller v. Wilson*, 168 S.W.3d 802, 824 (Tex. 2005).

III. SUMMARY JUDGMENT EVIDENCE

8. In support of this Response, Defendant relies on the below Affidavit, and incorporates by reference all pleadings and motions filed in this case and respectfully requests that the Court take judicial notice of same. Defendant also relies on and incorporates by reference the pleadings and motions filed in the Foreclosure Application, and requests that the Court take judicial notice of same.

Exhibit A-1. November 15, 2017 Nationstar letter to Kimberly Leff

IV. ARGUMENTS & AUTHORITIES

A. Summary Judgment Must be Denied as to Breach of Contract.

9. To prevail on a breach of contract claim, a plaintiff must demonstrate: (1) the existence of a valid contract; (2) performance or tendered performance by the plaintiff; (3) breach of the contract by the defendant; and (4) damage resulting to the plaintiff from the breach. *See Worldwide Asset Purchasing, L.L.C. v. Rent-A-Ctr. E., Inc*., 290 S.W.3d 554, 561 (Tex. App.–Dallas 2009, no pet.) (emphasis added). In this case, the relevant contract is the Security Instrument. Summary judgment must be denied because Plaintiffs cannot prove that no issue of material fact exists with respect to the essential elements of (i) a breach of the Security Instrument by Defendant and (ii) Plaintiffs' performance or tendered performance of its obligations under the Loan.

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i. Plaintiffs Did Not Perform Under the Loan Agreement.

10. Plaintiffs fail to establish as a matter of law the breach of contract element of "performance or tendered performance" because Plaintiffs failed to pay or attempt to pay the amount due and owing under the Loan once Defendant provided timely notice of default and notice of acceleration. Plaintiffs plead that their "alleged default…is in dispute,"[11] but this statement is wholly without evidentiary support. In fact, Plaintiffs' own summary judgment evidence demonstrates their default. For instance, the Foreclosure Application states that "[a]s of July 06, 2017, five (5) monthly payments have not been paid."[12] Moreover, in the Order granting foreclosure, the Court held:

> [Defendant] has established the basis for the foreclosure and that: (1) the following material facts establishing the basis for foreclosure are as follows: [i] **a monetary default of the subject Note exists**; [ii] on May 15, 2017, [Defendant] gave [Plaintiffs] proper Notice of Default; [iii] **the default was not cured** and the Note was accelerated on July 20, 2017; and [iv] **the [L]oan is due for the March 1, 2017 payment and all subsequent payments.**[13]

11. A borrower's failure to make all payments when due under the Note and Deed of Trust is a material breach of the loan under Texas law. *See Horne v. Bank of Am., N.A.,* 2013 WL 765312, at *5 (N.D. Tex. Feb. 28, 2013); *Torres v. Bank of Am., N.A.,* 2012 2012 WL 4718368, at *5 (S.D. Tex. Sept. 10, 2012). Defendant established in its Foreclosure Application that Plaintiffs defaulted on the Loan and the default was not cured,[14] and therefore Plaintiffs failed to perform or tender performance under the Loan. Moreover, Plaintiffs do not provide any evidence to support the element of "performance or tendered performance" on Plaintiffs' part.[15]

12. In deciding whether summary judgment is precluded because an issue of material

[11] Plaintiffs' Partial MSJ at para. 15.
[12] *Id.* at Ex. B-1, Foreclosure Application, ¶ E(i).
[13] Order, Plaintiffs' Partial MSJ at Ex. C thereto (emphasis added).
[14] Order, Plaintiffs' Partial MSJ at Ex. C thereto.
[15] Plaintiffs' Partial MSJ at FN. 1.

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fact is genuinely disputed, evidence favorable to Defendant in this case is taken as true. *Nixon*, 690 S.W.2d at 548-49. Under this standard, traditional summary judgment as to Plaintiff's breach of contract claim must be denied, as Plaintiff has failed to establish as a matter of law the element of "performance or tendered performance" necessary to prevail on breach of contract.

13. Similarly, Plaintiffs' no-evidence motion for summary judgment must also be denied because Defendant has provided more than the "scintilla of evidence" required to defeat this motion. The Court granting the Foreclosure Application held that a "material fact establishing the basis for foreclosure" was "a monetary default on the subject Note." [16] This evidence of Plaintiffs' default provides evidence of their failure to meet the "performance or tendered performance" element of breach of contract.

ii. Defendant Provided Proper and Timely Notices.

14. Plaintiffs further ask the Court to excuse their material breach of the Loan based on a non-existent breach of the Security Instrument by Defendant. Defendant did not in fact breach the Security Instrument as alleged in Plaintiffs' Partial MSJ, and summary judgement should be denied. Specifically, Plaintiffs claim that Defendant breached the "acceleration and sale provisions of the Security Instrument,"[17] purportedly by "failing to accelerate the Loan prior to conducting the January 2, 2018 foreclosure sale."[18] Yet, Plaintiffs' summary judgment evidence shows Nationstar sent proper and timely notices, and Plaintiffs (1) do not dispute that they received either the May 15, 2017 Notice of Default or the July 20, 2017 Notice of Acceleration, (2) do not dispute that the notices were sent timely; and (3) do not dispute that the notices otherwise comply with the requirements of the Texas Property Code and the Loan agreement.[19] Thus, there is no

[16] Order, Plaintiffs' Partial MSJ at Ex. C thereto (emphasis added).
[17] Plaintiffs' Partial MSJ at para. 14, 15.
[18] Plaintiffs' Partial MSJ at para. 14.
[19] *See generally* Plaintiffs' Partial MSJ.

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genuine issue of fact that Defendant provided proper notices and failure of notice will not support Plaintiffs' breach of contract claim.

iii. *Defendant Did Not Abandon Acceleration Because it Proceeded with Foreclosure.*

15. Plaintiffs allege that monthly loan statements sent to them after the July 20, 2017 Notice of Acceleration constitute unilateral abandonment of the acceleration by Defendant, and therefore the January 2, 2018 foreclosure sale purportedly proceeded without proper acceleration.[20]

Under Texas law, a secured lender "must bring suit for … the foreclosure of a real property lien not later than four years after the day the cause of action accrues." TEX. CIV. PRAC. & REM. CODE § 16.035(a). If a note or deed of trust secured by real property has an acceleration clause, the cause of action accrues "when the holder actually exercises its option to accelerate." *Holy Cross Church of God in Christ v. Wolf*, 44 S.W.3d 562, 566 (Tex. 2001). Acceleration of a note can be abandoned by agreement of the parties or other unilateral actions of the lender, such as sending a notice of default requesting less than the full amount of the loan or accepting payments without exacting any available remedies. *Boren v. U.S. Nat'l Bank Ass'n*, 807 F.3d 99, 105 (5th Cir. 2015) (emphasis added).

16. Abandonment of acceleration is based on the law of waiver. *Farmehr v. Deutsche Bank Nat'l Trust Co.*, 2018 Tex. App. LEXIS 3949 *5 (Tex. App. – Dallas 2018, no pet.); *Bracken v. Wells Fargo Bank, N.A.,* 2018 WL 1026268, *5 (Tex. App. – Dallas 2018, no pet.); *accord NSL Prop. Holdings, LLC v. Nationstar Mortg., LLC,* 2017 WL 3526354, at *3 (Tex. App.—Fort Worth 2017, pet. denied). "Waiver's elements include (i) an existing right, benefit, or advantage held by

[20]Plaintiffs' Partial MSJ at para. 8.

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a party, (ii) the party's actual knowledge of its existence, and (iii) the party's ***actual intent to relinquish the right or intentional conduct inconsistent with the right***." *Farmehr*, 2018 Tex. App. LEXIS 3949 *5. Waiver "is effective if and only if it is clear and unequivocal." *Shumway v. Horizon Credit Corp.,* 801 S.W.2d 890 (Tex. 1991)); *see also Parker v. Frost Nat. Bank of San Antonio,* 852 S.W.2d 741, 744 (Tex. App. – Austin 1993, no pet.); *Ogden v. Gibraltar Sav. Ass'n,* 640 S.W.2d 232, 234 (Tex. 1982). "A waiver is clear and unequivocal if it states specifically and separately the rights surrendered." *Shumway,* 801 S.W.2d at 893; *Mathis v. DCR Mortg. III Sub I, L.L.C.*, 389 S.W.3d 494, 505 (Tex. App. – El Paso 2012, no pet.). "The abandonment of acceleration…is very often a fact question concerning the conduct and understanding of the parties." *DeFranceschi v. Seterus, Inc., et al*., 2016 WL 6496319, at *3 (N.D. Tex. Apr.18, 2016).

17. While monthly statements requesting less than the full amount due *may* evidence an intent to abandon, these statements do not constitute a clear and unequivocal intent to abandon because Nationstar, in fact, proceeded with foreclosure. For example, in *Boren* the Fifth Circuit noted "a holder can abandon acceleration if the holder continues to accept payments ***without exacting any remedies available to it upon declared maturity***." *Boren v. U.S. Nat. Bank Ass'n*, 807 F.3d 99, 104 (5th Cir. 2015) (quoting *Wolf*, 44 S.W.3d at 566–67) (emphasis added). Here, the statements do not evince unequivocally Nationstar's intent to abandon acceleration because – after the acceleration – Defendant: (1) filed the Foreclosure Application; (2) prosecuted the Foreclosure Application and obtained an Order granting foreclosure; and (3) proceeded with the foreclosure sale. Put more simply, Defendant's conduct in pursuing the foreclosure order – and, ultimately, the foreclosure sale – demonstrated the opposite of intent to abandon acceleration and, certainly, is contrary to a clear and unequivocal intent to abandon. Moreover, Plaintiffs were notified in the July 20, 2017 Notice of Acceleration that "[a]lthough the Note has been accelerated,

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you have the right and opportunity to cure the default under certain circumstances."[21] Plaintiffs took no such action, and Defendant (contrary to an intent to abandon) thereafter pursued the remedies available to it under the Deed of Trust and filed the August 30, 2017 Foreclosure Application. Moreover, Plaintiffs have not cited to a single case wherein the court found that statements amount to abandonment even where the lender or servicer actually proceeded with foreclosure. Indeed, it is counterintuitive to argue that Nationstar abandoned acceleration when it actually foreclosed.

18. A November 15, 2017 letter from Defendant to Kimberly Leff provides additional evidence that Defendant did not intend to abandon the July 20, 2017 Notice of Acceleration.[22] In this letter, Defendant notified Kimberly Leff of an opportunity enter into a Trial Period Plan for a Flexible Modification ("Flex Mod"), under which she could potentially qualify for a loan modification after making the required trial payments.[23] Specifically, Defendant informed her that:

> Prior to your acceptance of this offer as specified…below, **we are not required to halt pending foreclosure proceedings or refrain from referring your mortgage to foreclosure. However, if you contact us by 11/29/2017 to notify us of your intent to accept the Flex Modification Trial Period Plan offer**, either by calling us at 866-316-2432 or writing us at P.O. Box 619097, Dallas, TX 75261-9741, **we will place the foreclosure on hold from the time you contact us**. **If you timely contact us to notify us of your intent, the foreclosure will remain on hold unless and until you fail to make timely Trial Period Plan payments in accordance with the chart above.**
>
> **The foreclosure process will also be suspended if you make your first Trial Period Plan payment by 11/29/2017** which is earlier than the scheduled due date described in the table above.
>
> **If you do not contact us or make your first Trial Period Plan payment by 11/29/2017, pending foreclosure proceedings will continue or foreclosure processes may be initiated which could result in a foreclosure sale.**[24]

19. Despite being offered a Flex Mod as a means of potentially avoiding foreclosure,

[21] *See* Plaintiffs' Partial MSJ at Ex. B-1, at Notice of Acceleration.
[22] *See* Affidavit of Nationstar Mortgage LLC d/b/a Mr. Cooper ("Nationstar Affidavit"), Ex. A hereto at Ex. A-1.
[23] Ex. A-1.
[24] Ex. A-1. (emphasis added)

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Kimberly Leff did not take the actions necessary to accept the offer, and the foreclosure proceedings continued, culminating with the HomeRock's purchase of the property at auction. Plaintiffs' traditional motion for summary judgment as to breach of contract must be denied because "abandonment of acceleration" (the alleged breach of contract by Defendant) is a question of fact, and as such, in this case it is not ripe for summary judgment. Even if the question were ripe, Plaintiff fails to meet its burden to establish its claim for breach of contract as a matter of law. Plaintiffs' no-evidence motion for summary judgement as to breach of contract must likewise be denied. The Substitute Trustee's Deed to HomeRock and the November 15, 2017 letter to Kimberly Leff establishes well in excess of a "scintilla of evidence" that Defendant did not intend to abandon the July 20, 2017 acceleration and that the Security Instrument was not breached. *King Ranch*, 118 S.W.3d at 751.

B. <u>Summary Judgment Must be Denied as to Declaratory Relief.</u>

20. Plaintiffs' request for declaratory relief premised on a breach of contract claim must likewise be denied, as declaratory judgement is not an independent cause of action but rather a procedural device dependent on another cause of action. *See Kreway v. Countrywide Bank FSB et al*., 2015 WL 11622495 at *6 (W.D. San Antonio, July 21, 2015) (Court found that Plaintiff's request for declaratory relief is "inseparably connected with his other claims;" since the Court recommended that the claims be dismissed, so should the Plaintiff's request for declaratory relief). As Plaintiffs cannot prove that no material facts exist as to all elements of their breach of contract claim, their request for summary judgment as to declaratory relief must also be denied.

C. <u>Summary Judgment Must Be Denied as to Quiet Title</u>.

20. "Under Texas law, to prevail in a suit to quiet title, the plaintiff must prove: (1) his right, title, or ownership in real property; (2) that the defendant has asserted a 'cloud' on his

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property, meaning an outstanding claim or encumbrance valid on its face that, if it were valid, would affect or impair the property owner's title; and (3) that the defendant's claim or encumbrance is invalid." *Warren*, 566 F. App'x at 382 (citing *Gordon v. W. Houston Trees, Ltd*., 352 S.W.3d 32, 42 (Tex.App.-Houston [1st Dist.] 2011, no pet.). Texas law also requires that Plaintiffs must prove and recover only on the strength of its own title, not the weakness of Defendant's. *Id.*

21. Plaintiffs' failure to make all payments due and owing under the Loan undermines any claim they could have to the superiority of their title to the Property. *See Cook–Bell v. Mortg. Elec. Reg. Sys., Inc.*, 868 F.Supp.2d 585, 591 (N.D. Tex. 2012) ("Texas courts have made clear that 'a necessary prerequisite to the recovery of title...is tender of whatever amount is owed on the note.'") (quoting *Fillion v. David Silvers Co.*, 709 S.W.2d 240, 246 (Tex. App.–Houston [14th Dist.] 1986, writ ref'd n.r.e.))). As discussed previously herein, the Order allowing the foreclosure sale established as a "material fact" that "a monetary default" exists on the Note.[25] Plaintiffs therefore cannot prevail on a quiet title claim.

22. Summary judgment must be denied also because Plaintiffs cannot establish as a matter of law that Defendant asserted a "cloud" on the Property.[26] In the Partial MSJ, Plaintiffs challenge the Substitute Trustee's Deed ("Trustee's Deed"), in which title to the Property was conveyed to the foreclosure sale purchaser, HomeRock.[27] Any claim for quiet title therefore must be brought against Homerock and not Defendant.

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[25] Order, Plaintiffs' Partial MSJ at Ex. C thereto.

[26] "A 'cloud' on legal title includes any deed, contract, judgment lien or other instrument, not void on its face, which purports to convey an interest in or makes any charge upon the land of the true owner, the invalidity of which would require proof." *Airvantage LLC v. TBAN Properties #1, Ltd*., et al., 269 S.W.3d 254 (Tex.App.-Dallas 2008, no pet.) (mem. op.). Plaintiffs do not contest that the Trustee's Deed is facially valid. *See generally* Plaintiffs' Partial MSJ.

[27] Plaintiffs' Partial MSJ at Ex. C thereto.

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21. Even if Defendant was the proper subject of a quiet title action by Plaintiffs, such action would fail because Plaintiffs cannot establish as a matter of law that the Trustee's Deed is invalid. *See Warren*, 566 F. App'x at 382. Plaintiffs argue that the Trustee's Deed is invalid because it results from an "unlawful foreclosure."[28] As discussed previously herein, Defendant properly accelerated the Loan on July 20, 2017 and filed the Foreclosure Application on August 30, 2107. On November 16, 2017, an Order was entered granting the foreclosure. At no time before the January 2, 2018 foreclosure sale of the Property did Defendant waive or abandon the July 20, 2017 acceleration. As a result, the foreclosure of the Property was valid. In a traditional summary judgment, the Court must view all facts in a light most favorable to Defendant, and Plaintiffs have not met their burden to show that no genuine issue of material fact exists. Traditional summary judgement must, therefore, be denied as to quiet title. Plaintiff's motion for no-evidence summary judgment also fails, as the Order granting foreclosure provides substantially "more than a scintilla of evidence" that "[Defendant] has established the basis for foreclosure."[29] *King Ranch*, 118 S.W.3d at 751.

22. Finally, Plaintiffs claim for declaratory relief premised on quiet title must likewise be denied, as declaratory judgement is not an independent cause of action but rather a procedural device dependent on another cause of action. *See Kreway v. Countrywide Bank FSB et al*., 2015 WL 11622495 at *6 (W.D. San Antonio, July 21, 2015) (Court found that Plaintiff's request for declaratory relief is "inseparably connected with his other claims;" since the Court recommended that the claims be dismissed, so should the Plaintiff's request for declaratory relief).

D. <u>Plaintiffs Are Not Entitled to Attorney' Fees</u>.

23. Plaintiffs' request for attorneys' fees should be denied because they have failed to

[28]Plaintiffs' Partial MSJ at para. 16.
[29] Order, Plaintiffs' Partial MSJ at Ex. C thereto.

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prove as a matter of law that they are entitled to summary judgment as to the causes of action in their Partial MSJ.

V. PRAYER

Based on the arguments and evidence set forth herein, and in light of the rule that a reasonable inference must be indulged in favor Defendant and any doubts resolved in its favor, Defendant respectfully requests that the Court determine that Plaintiffs are not entitled to summary judgment on any of the claims or causes of action against Defendant as set forth in their Partial MSJ. *See City of Keller*, 168 S.W.3d at 824. Defendant therefore respectfully prays that the Court deny Plaintiffs' Partial MSJ in its entirety and grant Defendant any further relief, at law or in equity, to which the Court may find it justly entitled.

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Dated: November 16, 2018

Respectfully submitted,

/s/ Tatiana Alexander

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CERTIFICATE OF SERVICE

I hereby certify that on November 16, 2018, a copy of the foregoing was served via the Court's electronic filing system, as follows:

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