No. 18-50738

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
Appeal from Case No. 1:17-cv-292

WILLIAM GRAHAM and LISA GRAHAM,
Plaintiff – Appellants,

v.

U.S. BANK NATIONAL ASSOCIATION, as legal title trustee for Truman 2016 SC6 title trust,
Defendant – Appellee.

APPELLANTS' FRAP 40 PETITION FOR PANEL REHEARING

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ATTORNEY FOR PLAINTIFFS-APPELLANTS

TO THE HONORABLE FIFTH CIRCUIT COURT OF APPEALS:

Appellants William and Lisa Graham bring this Petition for Panel Rehearing pursuant to Federal Rule of Appellate Procedure 40 and would show this Court as follows:

This Court's opinion references Fifth Circuit Local Rule 47.6 which allows for the Court to issue an affirmance without opinion in five specific circumstances. Appellants would show this Court that this case does not fit into any of the five circumstances set forth in the rule.

47.6 Affirmance Without Opinion. The judgment or order may be affirmed or enforced without opinion when the court determines that an opinion would have no precedential value and that any one or more of the following circumstances exists and is dispositive of a matter submitted for decision: (1) that a judgment of the district court is based on findings of fact that are not clearly erroneous; (2) that the evidence in support of a jury verdict is not insufficient; (3) that the order of an administrative agency is supported by substantial evidence on the record as a whole; (4) in the case of a summary judgment, that no genuine issue of material fact has been properly raised by the appellant; and (5) no reversible error of law appears. In such case, the court may, in its discretion, enter either of the following orders: "AFFIRMED. See 5TH CIR.R. 47.6." or "ENFORCED. See 5TH CIR.R. 47.6."

1. The judgment of the district court was not rendered following a trial on the merits and did not include findings of fact, nor were any such findings issued after the judgment. Moreover, the Appellants' appeal is based upon

the fact that the opinion of the District Court entirely ignored the issue about which Appellants bring this appeal, viz. that Appellee abandoned acceleration of Appellants' Note.

2. There was no trial on the merits before a jury and no jury verdict in the district court.
3. There was no administrative agency involved in this matter.
4. Appellant raised the issues of material fact both in their response to Appellee's Motion for Summary Judgment (ROA 227-231) and their Objection to the Report and Recommendations of Magistrate Mark Lane (ROA 250-253). "While accrual is a legal question, whether a holder has accelerated a note is a fact question …" *Holy Cross Church of God in Christ v. Wolf*, 44 S.W.3d 562, 568 (Tex. 2001).
5. A reversible error of law exists in the District Court's judgment due to the Court's failure to address the dispositive issue of abandonment when issuing its Final Judgment that claims to dispose of all issues.

Appellants therefore move for Panel Rehearing on the single point of law they believe the Court overlooked regarding the issue of abandonment of acceleration raised in Appellants' Brief. It would ask this Court to rehear the issue as it relates to this Court's own ruling in *Boren v. United States Nat'l Bank Ass'n*, 807 F.3d 99,

104. (5th Cir. October 26, 2015) and how the *Boren* standard applies to the instant case.

PRAYER

Wherefore, premises considered, Appellants would respectfully move this court to grant their Petition for Panel Rehearing and issue an Opinion as to the question of abandonment defined by the *Boren* standard that Appellants raised in their district court filing of their Objection to the Report and Recommendations of Magistrate Mark Lane (ROA 250-253) and again in their Brief to this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been served upon all parties of record on this 13th day of March 2019.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. Civ. Proc. 32.2.7(c), the undersigned certifies this brief complies with the type-volume limitations of Fed. R. Civ. Proc. 32.2.7(b).

1. Exclusive of the exempted portions in Fed. R. Civ. Proc. 32.2.7(b)(3), appellant's brief contains 566 words

2. The brief has been prepared in proportionally spaced typeface using: Microsoft word 2011 for windows in times new roman 14 point.

3. If the court so requests, the undersigned will provide an electronic version of the brief and/or a copy of the word or line printout.

4. The undersigned understands a material misrepresentation in completing this certificate, or circumvention of the type volume limits in Fed. R. Civ. Proc. 32.2.7, may result in the court's striking the brief and imposing sanctions against the person signing the brief.

/s/ William B. Gammon
William B. Gammon

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-50738
Summary Calendar

United States Court of Appeals
Fifth Circuit
FILED
March 7, 2019
Lyle W. Cayce
Clerk

WILLIAM GRAHAM; LISA L. GRAHAM,

Plaintiffs-Appellants

v.

U.S. BANK NATIONAL ASSOCIATION, as legal title trustee for Truman 2016 SC6 title trust,

Defendant-Appellee

Appeal from the United States District Court
for the Western District of Texas
USDC No. 1:17-CV-292

Before SMITH, WIENER, and WILLETT, Circuit Judges.

PER CURIAM:*

AFFIRMED. See Rule 47.6.

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

IN THE UNITED STATE DISTRICT COURT
FOR THD WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

WILLIAM GRAHAM AND	§	
LISA L. GRAHAM,	§	
Plaintiff/Counter-Defendants	§	
	§	
v.	§	**CASE NO: 1:17-cv-292-LY**
	§	
U.S. BANK NATIONAL	§	
ASSOCITION AS LEGAL TITLE	§	
TRUSTEE FOR TRUMAN 2016 SC6	§	
TITLE TRUST; FAY SERVICING,	§	
LLC; AND MACKIE, WOLF &	§	
ZENTZ, P.C.	§	
Defendants.	§	

PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

COME NOW, Plaintiffs/Counter-Defendants (hereinafter the "Grahams" or "Plaintiffs"), by counsel, and file their Response to Defendant's Motion for Summary Judgment and respectfully request that this Court deny Defendant's motion. In support thereof, Plaintiffs would show the Court as follows:

1. Defendant/Counter-Plaintiff U.S. Bank Association as Legal Title Trustee for Truman 2016 SC6 Title Trust (hereinafter "U.S. Bank" or "Defendant") has moved for summary judgment on its counterclaim for foreclosure, but has failed to bring sufficient admissible evidence before this Court to show that they are entitled to judgment as a matter of law.
2. Defendant relies on, *inter alia*, a promissory note U.S. Bank claims was executed by the Plaintiffs in 2007, (Defendant's Exhibit 1-B) and a Homestead Lien Contract and Deed of Trust (Defendant's Exhibit 1-C). Defendant asks this Court to grant Defendant summary judgment on their foreclosure action based on these two documents. However, both

reveal on their face that they were executed in favor of Bank of America N.A. as the lender. There are no supporting documents offered by Defendant that it has acquired the right to proceed under the document, no documents supporting a transfer or assignment from Bank of America to Defendant U.S. Bank. These deficiencies constitute the very gravamen of the complaint brought by Plaintiffs: U.S. Bank has no authority to do anything regarding Plaintiffs' home equity loan.

3. There is an unexplained gap of ten years between Plaintiff's note to Bank of America and the alleged transfer of that note to U.S. Bank from Christiana Trust that is unaccounted for in Defendant's timeline of events. Defendant's relied upon facts allege that the Grahams executed the promissory note and Homestead Lien Contract and Deed of Trust in 2007 and then magically claim a right to proceed with foreclose based on an assignment made ten years later, in 2017, from an entity called Christina Trust to Defendant. There is no evidence supporting any right of Christiana Trust to transfer Plaintiffs' Note and Deed of Trust to anyone.

4. Moreover, Defendant further offers the affidavit of Duane Thomas (Affidavit in Support of Motion for Summary Judgment, Defendant's Exhibit 1) in support of its motion which affidavit contains inadmissible evidence on account of its unreliabilty. While Mr. Thomas baldly asserts that the records attached to his affidavit ("Exhibits 1-A through 1-G") are "true and correct copies or the exact duplicates of the originals," nowhere in his affidavit does Mr. Thomas assert how he came about his personal knowledge that such is true. He never states, for instance, that he has reviewed the collateral file that would contain the originals of these documents. He therefore cannot state within his personal knowledge any of the assertions he makes in paragraphs 2 through 6 of his affidavit. Without some

statement on his part that he has reviewed the original documents in the collateral file, Mr. Thomas has no basis for stating it is in his personal knowledge that the Grahams acquired the property in question, executed a promissory note, executed a Homestead Lien Contract and Deed of Trust, that an assignment of the deed of trust was made from Christina Trust to U.S. Bank or that there is a default under the loan agreement.

5. Finally, Defendant improperly seeks an award of attorney's fees in the amount of $1,912.50. Any such award against the Grahams personally would be improper. In Texas, attorney's fees are only awardable to a party if authorized by statute or contract. *Akin, Gump, Strauss, Hauer & Filed, L.L.P. v. National Development & Research Corp.*, 299 S.W.3d 106, 119 (Tex. 2009). Home Equity loans authorized by the Texas Constitution, Section 50(a)(6) of Article XVI, as was the promissory note here, (see Defendant's Exhibit 1-B, p. 2), are *in rem* in nature and are, hence, nonrecourse loans which can only be enforced against the property itself, not personally against a borrower. See *Wells Fargo Bank N.A. v. Murphy*, 458 S.W.3d 912 (Tex. 2014). Therefore, any award of attorney's fees entered against the Grahams personally, would not be proper.
6. Christiana Trust can't file claims in federal court under TRCP 735 and 309. Those are rules of procedure applicable in Texas Court not federal court. Federal Court follows the federal rules of civil procedure not the Texas rules of civil procedure.
7. Paragraph 16 of Defendant's motion is a misstatement of the standard for MSJ.
8. *Marshall* and *Huston* cases as characterized do not accurately reflect the state of the law in view of the *Wood* and *Garofolo* cases decided by the Texas Supreme Court. The loan inherently must be foreclosure eligible in order for the lender to get a judgment of

foreclosure. It is not the homeowner's burden to prove the loan is foreclosure eligible, it is the lender's burden.

9. In order to be foreclosure eligible, the loan must be made on the terms found at Tex. Const. Art. XVI Sec. 50(a)(6)(A)-(P) and the conditions found at 50(a)(6)(Q)(x)-(xi). All of these terms cannot be found in the documents before the court.

10. Paragraphs 25, 28, 29, and 30 of Defendant's motion include or reference remedies the federal court cannot grant. A judicial foreclosure is followed by a sale by marshal not the sheriff or constable. Likewise TRCP 309 is not the applicable rule.

WHEREFORE, premises considered, Plaintiffs request that the motion for summary judgment be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 20, 2017 a true and correct copy of the foregoing document was served upon all counsel of record for all parties via this court's ECF system in accordance with FRCP 5 and all local rules.

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No. 18-50738 William Graham, et al v. U.S. Bank National Association
USDC No. 1:17-CV-292

Dear Mrs. Gibson, Mr. Hopkins, Ms. Hopkins,

The following pertains to your brief electronically filed on 01/09/2019.

You must submit the 7 paper copies of your brief required by 5TH CIR. R. 31.1 within 5 days of the date of this notice pursuant to 5th Cir. ECF Filing Standard E.1.

Sincerely,

LYLE W. CAYCE, Clerk

By: _____
Cindy M. Broadhead, Deputy Clerk
504-310-7707

cc:
Mr. William Bernell Gammon

Case No. 18-50738

WILLIAM GRAHAM; LISA L. GRAHAM,

Plaintiffs - Appellants

v.

U.S. BANK NATIONAL ASSOCIATION, as legal title trustee for Truman 2016 SC6 title trust,

Defendant - Appellee

CASE NO. 18-50738

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

WILLIAM GRAHAM AND LISA L. GRAHAM,
Plaintiffs - Appellants,
v.

U.S. BANK NATIONAL ASSOCIATION, AS LEGAL TITLE TRUSTEE FOR TRUMAN 2016 SC6 TITLE TRUST,
Defendant - Appellee.

On Appeal from the United States District Court
For the Western District of Texas
Civil Action No. 1:17-CV-292

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

William Graham and Lisa Graham - Plaintiffs/ Appellants;

William B. Gammon of Gammon Law Office, PLLC, 111 Congress Avenue, Suite 400, Austin, Texas 78701 - Counsel for Appellants;

U.S. Bank National Association, as legal title trustee for Truman 2016 SC6 title trust - Appellee;

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Crystal G. Gibson of Barrett Daffin Frappier Turner & Engel, LLP, 4004 Belt Line Road, Suite 100 Addison, TX 75001 - Trial Counsel for Appellee.

/s/ Mark D. Hopkins
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STATEMENT CONCERNING ORAL ARGUMENT

Appellee U.S. Bank National Association, as legal title trustee for Truman 2016 SC6 title trust suggests that the issues presented can be determined upon the record and that oral argument would not benefit the panel. The parties' positions are clear and the record uncomplicated. *See* Fed. R. App. P. 34(a)(3). If, however, the Court determines oral argument would be helpful, Appellee requests the opportunity to participate equally in oral argument with Appellant.

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STATEMENT OF JURISDICTION

This is an appeal from a final judgment of the United States District Court for the Western District of Texas, Austin Division (the "Trial Court"). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1291 as a result of the Trial Court rendering a final judgment (ROA. 260-263), disposing of all of the claims in this matter in their entirety. Appellants William Graham and Lisa Graham subsequently filed a Notice of Appeal of the Trial Court's judgment.

STATEMENT OF THE ISSUES

I. DID APPELLEE ESTABLISH THROUGH ITS SUMMARY JUDGMENT EVIDENCE THAT IT WAS ENTITLED TO THE RELIEF REQUESTED?

II. DID APPELLANTS COME FORWARD WITH SUFFICIENT SUMMARY JUDGMENT EVIDENCE TO RAISE A FACTUAL DISPUTE WHEREBY PRECLUDING THE GRANT OF SUMMARY JUDGMENT IN FAVOR OF APPELLEE?

III. DID APPELLANTS ADEQUATELY PRESERVE AN ISSUE FOR APPELLATE REVIEW WHEN THEY RAISED AN OBJECTION, FOR THE FRIST TIME, WITHIN THEIR RESPONSE TO THE MAGISTRATE'S REPORT REGARDING SUMMARY JUDGMENT?

STATEMENT OF THE CASE

A. Statement of Facts.

Appellants William Graham and Lisa Graham ("Appellants" or the "Grahams") are the obligors on a Texas Home Equity Note ("Note") obtained on November 8, 2007. (ROA 182-184) in the principal amount of $250,000.00. *Id*. The original lender on the Note was Bank of America, N.A. ("Bank of America") *Id.* Bank of America indorsed the Note indorsed in blank. *Id.* U.S. Bank National Association, as legal title trustee for Truman 2016 SC6 title trust ("U.S. Bank") is the current holder of the Note. (ROA. 175). The Grahams ceased making payments on the Note and the Note is currently due for the February 2011 payment. (ROA. 175). As of December 15, 2017, the total amount due and owing on the Note was $430,762.99 with interest continuing to accrue at the rate of 6.540 percent as set forth in the Note. (ROA. 175).

In connection with obtaining the Note, the Grahams executed a Homestead Lien Contract and Deed of Trust ("Deed of Trust") which is recorded in the real property records of Travis County, Texas as Instrument No. 2007214642. (ROA. 79-86). The Deed of Trust grants a security interest in real property commonly known as 11013 Sierra Verde Trl, Austin, Texas 78759 (the "Property"), and legally described as:

> BEING LOT 10, BLOCK E OF SIERRA VISTA 1, A SUBDIVISION IN TRAVIS COUNTY, TEXAS ACCORDING TO THE MAP OR PLAT

THEREOF RECORDED IN BOOK 84, PAGE(S) 124B-124C, PLAT RECORDS, TRAVIS COUNTY, TEXAS.

The original beneficiary under the Deed of Trust was Bank of America. *Id.* Bank of America executed an assignment on December 9, 2014, whereby transferring its interest in the Deed of Trust to Christiana Trust. (ROA.88-90, 238-240).[1] Thereafter, on June 30, 2017, Christiana Trust executed an Assignment of the Deed of Trust transferring its interest in the Property to U.S. Bank. (ROA.195-196).

As a result of the Graham's default on the Note, the Grahams were each mailed a notice of default via certified mail to their last known address. (ROA.198-211). The Notices provided the Grahams with an opportunity to cure their default on the Note. *Id.* The Grahams failed to cure their default. (ROA.174-177). On July 12, 2016, a Notice of Acceleration of the debt was mailed to the Grahams via certified mail to their last known mailing address. (ROA.213-216).

B. Procedural Background.

The Grahams originally filed suit in the 201st Judicial District Court of Travis County, Texas on February 6, 2017. (ROA. 20). Defendants Christiana Trust (the Graham's mortgagee) and Fay Servicing (the mortgage servicer) timely removed the

[1] This assignment was mistakenly not included with U.S. Bank's evidence attached to its Motion for Summary Judgment. The assignment was subsequently provided to the district court as an exhibit to U.S. Bank's Summary Judgment Reply (ROA.238-240) and the District Court was requested to take judicial notice of the publicly recorded Assignment. (ROA.234).

case to the United States District Court for the Western District of Texas. (ROA.6). Thereafter Defendants Christiana Trust and Fay Servicing filed a Motion to Dismiss. (ROA.58-66). Christiana Trust also filed an Original Counterclaim against the Grahams seeking judicial foreclosure. (ROA.68-110). In response, the Grahams filed a Motion to Remand (ROA.111-115).

The District Court denied the Graham's Motion to Remand (ROA.150-151) and granted Defendants' Motion to Dismiss whereby dismissing all of the Graham's affirmative claims for relief. (ROA.150-151). Thereafter Defendant Christiana Trust filed a Motion for Substitution of Party setting out that U.S. Bank had acquired Christiana Trust's interest in the Property and was now the real party in interest. (ROA.133-134). The District Court granted the substitution (ROA.160-161).

Next, U.S. Bank moved for summary judgment on its counterclaim for judicial foreclosure. (ROA.162-221). The Grahams filed a summary judgment response that made only legal argument and included no evidence. (ROA.227-231). U.S. Bank filed a Reply to the Graham's Response. (ROA.232-240). The Motion, Response and Reply were referred to the Magistrate for resolution. (ROA.226).

After due consideration, the Magistrate issued his Report and Recommendation that U.S. Bank's Motion for Summary Judgment should be granted. (ROA.241-249). The Graham's filed an Objection to the Magistrate's Report raising for the first time in connection with summary judgment, that the

Magistrate improperly ignored the Graham's defense of "abandonment." (ROA.250-253). U.S. Bank pointed out the untimeliness of the Graham's argument within U.S. Bank's Response to the Objection to the Magistrate's Report. (ROA.254-256).

The District Court thereafter undertook a *de novo* review of the entire record in the case and found no error within the Magistrate's Report. (ROA.257-259). The District Court granted U.S. Bank's Motion for Summary Judgment on August 7, 2018. (ROA.260-263). On September 6, 2018, the Grahams filed a Notice of Appeal of the District Court's Judgment. (ROA.264-265).

SUMMARY OF THE ARGUMENT

Once U.S. Bank established each element of it claim for judicial foreclosure the summary judgment, burden then shifted to the Grahams to respond with competent summary judgment evidence either creating a fact issue with U.S. Bank's proof or establishing each element of a matter of avoidance. The Grahams offered no evidence, instead relying on legal argument only.

The Grahams' single legal argument before the Trial Court was that U.S. Bank's summary judgment evidence was insufficient as it did not establish a complete chain of assignments of the Deed of Trust from the original beneficiary into U.S. Bank. The Grahams fail to appreciate that being the beneficiary of a deed of trust is but one way an entity may have standing to foreclose. The Grahams ignore Texas law that the holder of a note also has standing to foreclose the related deed of

trust. U.S. Bank's summary judgment evidence established that it is the holder of the Graham's Note.

After the Magistrate issued his Report and Recommendation that U.S. Bank's Motion for Summary Judgment should be granted, the Grahams argument changed. The Grahams then raised for the first time (in their objection to the Magistrate's Report) that summary judgment was improper given their defense of "abandonment of acceleration." On appeal, the Grahams' sole argument is that summary judgment was improper due to the alleged abandonment of U.S. Bank's acceleration. This argument fails on appeal given that the Grahams failed to introduce any summary judgment evidence establishing their affirmative defense of abandonment. Additionally, raising an issue for the first time in response to a Magistrate's Report is improper.

STANDARD OF REVIEW

"This court reviews a district court's grant of summary judgment de novo, applying the same standards as the district court." *Johnson v. World All. Fin. Corp.*, 830 F.3d 192, 195 (5th Cir. 2016). On appeal, this Court can affirm the district court's grant of summary judgment "on any legally sufficient ground, even one not relied upon by the district court." *BMG Music v. Martinez*, 74 F.3d 87, 89 (5th Cir. 1996). Summary judgment is appropriate where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R.

Civ. P. 56. "A genuine dispute of material fact exists 'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Johnson*, 830 F.3d at 195 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)).

ARGUMENT AND AUTHORITIES

I. DID APPELLEE U.S. BANK ESTABLISH THROUGH ITS SUMMARY JUDGMENT EVIDENCE THAT IT WAS ENTITLED TO THE REQUESTED RELIEF?

A. Judicial Foreclosure Cause of Action

The Texas Constitution requires a party to secure a court order to foreclose on a lien created by a home equity loan. *Steptoe v. JPMorgan Chase Bank, N.A.*, 464 S.W.3d 429 (Tex. App.—Houston [1st Dist.], 2015, no pet.); *Patton v. Porterfield*, 411 S.W. 3d 147, 157 (Tex. App.—Dallas 2013, pet. denied) and Tex. Const. art. XVI, § 50(a)(6)(D)). The Honorable Judge Gray Smith for the United States District Court for the Southern District of Texas, in applying Texas substantive law, has clearly set out the elements of a mortgagee's prima facia case for judicial foreclosure.

> To foreclose under a security instrument in Texas with a power of sale, the lender must demonstrate that: (1) a debt exists; (2) the debt is secured by a lien created under Art. 16, §50(a)(6) of the Texas Constitution; (3) plaintiffs are in default under the note and security instrument; and (4) plaintiffs are served notice of default and acceleration.

Huston v. U.S. Bank Nat. Ass'n, 988 F. Supp.2d 732, 739 (S.D. Tex. 2013); also see *Thomas v. Ocwen Loan Serv. LLC,* 2013 WL 30653 (N.D. Tex. 2013)(applying same factors); *U.S. Bank, N.A. v. Moore,* 2015 WL 11120972 (N.D. Tex. 2015)(holding the same); *Ortiz v. U.S. Bank Nat. Ass'n*, 2016 WL 6125491 (S.D. Tex. 2016)(holding the same); *Wells Fargo Bank v. Mata,* 2016 WL 7616627 (W.D. Tex. 2016)(holding the same); *Singleton v. U.S. Bank Nat. Ass'n.,* 2016 WL 1611378 (N.D. Tex. 2016)(holding the same); *Molina v. DLJ Mortgage Capital, Inc.*, 2015 WL 12552014 (S.D. Tex. 2015)(holding the same); *Bernal v. The Bank of New York Mellon*, 2015 WL 8207498 (S.D. Tex. 2015)(holding the same); *Jones v. Bank of New York Mellon*, 2015 WL 5714636 (S.D. Tex. 2015)(holding the same); *Milligan v. CitiMortgage,* 2015 WL 3523054 (E.D. Tex. 2015)(holding the same); *Pettit v. U.S. Bank Nat. Ass'n*, 2014 WL 11515732 (N.D. Tex. 2014)(holding the same); *Kyle v. Countrywide Home Loans, Inc.*, 232 S.W.3d 355, 362 (Tex. App.— Dallas 2007, pet. denied).

B. Summary Judgment Evidence Introduced by U.S. Bank.

In applying the elements of U.S. Bank's judicial foreclosure claim to the facts of this case, the summary judgment record supports U.S. Bank's requested relief. The summary judgment record reveals the following:

(1) A debt exists. On November 8, 2007, the Grahams executed a Promissory Note ("Note") in the principal sum of $250,000.00, with an initial rate of 6.540%

percent per annum. A true and correct copy of the Promissory Note was attached to U.S. Bank's Motion for Summary Judgment. [ROA.182-184]. The Note obligated the Grahams to make payments beginning December 29, 2007 and continuing each month thereafter until it matured on November 29, 2032.

(2) The debt is secured by a lien created under Art. XVI, §50(a)(6) of the Texas Constitution. In connection with obtaining the Note, the Grahams executed a Homestead Lien Contract and Deed of Trust ("Deed of Trust'). The Deed of Trust pledged the Property as collateral for repayment of the Note. (ROA.186-193). A true and correct copy of the Deed of Trust was attached to U.S. Bank's Motion for Summary Judgment. The Deed of Trust specifically sets out in all caps at the top of the document, " This extension of credit evidenced by this homestead lien contract and deed of trust is the type of credit defined by section 50(a)(6), Article XVI, Texas Constitution." (ROA.186).

(3) The Grahams are in default under the Note and Deed of Trust. Under the terms of the Note and related Deed of Trust, the Grahams promised to make monthly payments in the amount of $1,699.42, which consists of principal and interest only. (ROA.182). The affidavit testimony attached to U.S. Bank's Motion for Summary Judgment provides, "The indebtedness evidenced by the Note and secured by the Deed of Trust is in default under the terms of the loan agreement ... The loan agreement is due and owing for February 2011." (ROA.174-177). This failure by

the Grahams to make payments since February of 2011 constitutes a breach of the terms of the Note and Deed of Trust.

(4) The Grahams were served notice of default and acceleration. Notice is deemed sufficient when notice of default and acceleration are sent by certified mail to the borrowers. *See Gossett v. Federal Home Loan Mortg. Corp*, 919 F. Supp. 2d 852 (S.D. Tex. 2018). Service of a notice under Tex. Prop. Code § 51.002 by certified mail is complete when the notice is deposited into the U.S. Mail, postage prepaid and addressed to the debtor at the debtor's last known address. Tex. Prop. Code. §51.002(e); *See also Onwuteaka v. Cohen,* 846 S.W.2d 889, 892 (Tex. App.-Houston [1st Dist.] 1993, no pet.); *WMC Mortgage Corp. v. Moss,* No. 01–10–00948–CV, 2011 WL 2089777, *7 (Tex. App.-Houston [1st Dist.] May 19, 2011).

In applying the above-stated standard of proof to the facts of this case, U.S. Bank met its burden. Specifically, a Notice of Default sent to both William Graham and Lisa Graham on September 21, 2013. (ROA.198-212). The Notices were sent via certified mail as reflected on the face of each notice. *Id.* The Notices were included within U.S. Bank's summary judgment evidence. (ROA. 198-212). After the Grahams failed to cure their default, they were each sent a Notice of Acceleration of Loan Maturity. (ROA.213-216). The Notices of Acceleration were sent via certified mail as reflected on the face of those notices. *Id.*

As addressed in more detail below, upon establishing the four elements of U.S. Bank's claim for judicial foreclosure, the burden of proof then shifted to the Grahams to establish a matter of avoidance against U.S. Bank's claim.

II. DID APPELLANTS INTRODUCE SUFFICIENT SUMMARY JUDGMENT EVIDENCE TO RAISE A FACTUAL DISPUTE WHEREBY PRECLUDING THE GRANT OF SUMMARY JUDGMENT IN FAVOR OF APPELLEE?

The Grahams elected to forego introducing any summary judgment evidence in opposition to U.S. Bank's motion. (ROA.227-231). Instead, the Grahams sought to establish that U.S. Bank "[F]ailed to bring sufficient admissible evidence before this Court to show that they are entitled to judgment as a matter of law." (ROA.232). Specifically, the Grahams allege that the Note, Deed of Trust, and the Assignment of the Deed of Trust are all in favor of Bank of America, and not U.S. Bank. In short, the Graham's allege,

> There are no supporting documents offered by Defendant that it has acquired the right to proceed under the document, no documents supporting a transfer or assignment from Bank of America to Defendant U.S. Bank. These deficiencies constitute the very gravamen of the complaint brought by Plaintiffs: U.S. Bank has no authority to do anything regarding Plaintiffs' home equity loan.

(ROA.233).

It is true that a,

> "nonmovant is not required to respond to a motion for summary judgment until the movant first meets its burden of demonstrating that there are no factual issues warranting trial." *Ashe v. Corley*, 992 F.2d

> 540, 543 (5th Cir.1993). But, "once the movant has shown the absence of material fact issues ... the opposing party has a duty to respond, via affidavits or other means, asserting specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(c).

Imperium(IP) Holdings, Inc. v. Apple, Inc. 920 F.Supp. 2d 747, 753 (E.D. Tex. 2013). The Grahams' analysis of how U.S. Bank derived its authority to act under the Note and Deed of Trust to bring its judicial foreclosure claim is flawed.

The Grahams focus their argument solely on the fact that the summary judgment evidence does not contain a complete chain of assignments of the Deed of Trust through which U.S. Bank may have become the beneficiary under that instrument.[2] The Grahams completely miss the reality that foreclosure can be pursued by *either* a *beneficiary* under a Deed of Trust or the *holder* of the Note. As provided by the United States District Court for the Southern District of Texas, "One way the foreclosing party can do this is by showing that it is the "holder" of the note secured by the deed of trust." *Miller v. Homecomings Financial LLC,* 881 F.Supp. 2d 825, 829 (S.D. Tex. 2012). As provided by the Houston Court of Appeals, "A holder is "the person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession." *Martin v. New*

[2] The Assignment attached to U.S. Bank's summary judgment motion (ROA.194) only shows the assignment of the deed of trust from Christiana Trust into U.S. Bank and does not include the first assignment in the chain, that being from Bank of America into Christiana Trust. Notwithstanding U.S. Bank's accidental omission of the assignment within its summary judgment motion, the assignment from Bank of America into Christiana Trust exists and was executed on December 9, 2014 and recorded in the real property records of Travis County, Texas under instrument No. 2014192568. (ROA 238).

Century Mortg. Co., 377 S.W.3d 79, 84 (Tex. App. - Houston [1st Dist.] 2012); Tex. Bus. & Com. Code Ann. §1.201(21)(a).

Identical to the Houston Court of Appeals, the Austin Court of Appeals has also held that the entity holding a note, that is endorsed in blank, is the "holder" of that note and may proceed with foreclosure of the related deed of trust. In *Bierwirth v. BAC Home Loan Servicing, Inc.*, the Austin Court held,

> Finally, even if we were persuaded that BAC's right to foreclose hinged on establishing itself as a holder of Bierwirth's note, it made that showing below. A "holder" is defined in the Texas Business and Commerce Code as "the person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession." Tex. Bus. & Com. Code Ann. § 1.201(b)(21)(A)(West 2009) .... An instrument containing a blank endorsement is payable to the bearer and may be negotiated by transfer of possession alone. See Id. § 3.205 (West 2002). Accordingly, in addition to BAC being a statutory "mortgagee" authorized to conduct foreclosure under chapter 51 of the property code (after the assignment from MERS), BAC was also the "holder" of Bierwirth's note because it was in possession of the note, a negotiable instrument that was endorsed payable to its bearer.

Bierwirth v. BAC Home Loans Servicing, L.P., 2012 WL 3793190, *5 (Tex. App. – Austin 2012)(pet. denied).

In short, "When indorsed in blank, an instrument becomes payable to bearer and may be negotiated by transfer of possession alone until specially indorsed." *Green v. JPMorgan Chase Bank, N.A.*, 937 F.Supp. 849, 860 (N.D. Tex. 2013). "These rules, as the Fifth Circuit has observed in an unpublished opinion, apply to notes secured by mortgages." *Id.* Under Texas law, the mortgage follows the Note.

Id. As holder of the Note, U.S. Bank has authority to foreclose pursuant to the terms of the Deed of Trust. *Nguyen v. Federal Nat. Mort. Ass'n.*, 958 F.Supp. 781, 788 (S.D. Tex. 2013).

In line with *Miller, Martin, Bierwirth* and *Green*, U.S. Bank's summary judgment evidence clearly established that U.S. Bank was the holder of the Grahams' Note. The affidavit testimony attached to U.S. Bank's Motion for Summary Judgment provided, "U.S. Bank is the holder and owner of the Note." (ROA.175). Additionally, the Note itself depicts that it is endorsed in blank and payable to the bearer. (ROA.182-184).

The Grahams are incorrect that U.S. Bank failed to carry its summary judgment burden. The uncontradicted summary judgment evidence establishes: (1) the existence of a note, (2) the Note is secured by the Deed of Trust, (3) the Note is default, and (4) the Grahams were provided proper notice of default and notice of acceleration.

III. DID APPELLANTS ADEQUATELY PRESERVE AN ISSUE FOR APPELLATE REVIEW WHEN THEY RAISED AN OBJECTION, FOR THE FIRST TIME, WITHIN THEIR RESPONSE TO THE MAGISTRATE'S REPORT REGARDING SUMMARY JUDGMENT?

The Graham's Response to U.S. Bank's Motion for Summary Judgment exclusively focused on whether or not U.S. Bank had the right to proceed with foreclosure as the beneficiary under the Deed of Trust. The Graham's Response

failed to allege or establish any affirmative defense in opposition to U.S. Bank's claim. It was not until after the Magistrate issued his Report and Recommendation (ROA.241-249), recommending that U.S. Bank's motion be granted, that the Grahams objected to the Report asserting the affirmative defense that U.S. Bank had abandoned its acceleration. (ROA.250-253). Despite failing to introduce any controverting summary judgment evidence, the Grahams argue that the "[R]eport entirely ignores the issue of abandonment of acceleration complained of in paragraphs 13 and 14 of Plaintiffs' Original Petition." (ROA.251).

As provided by this Court, issues raised for the first time in objections to the report of a magistrate judge are not properly before the district judge for review. *See, Finley v. Johnson,* 243 F.3d 215, 218 n.3 (5th Cir. 2001) ("We have held that issues raised for the first time in objections to the report of a magistrate judge are not properly before the district judge.")(citing *United States v. Armstrong,* 951 F.2d 626, 630 (5th Cir.1992); *Imperium (IP) Holdings, Inc. v. Apple, Inc.,* 920 F.Supp.2d 747, 752 (E.D.Tex.2013) ("[E]vidence and arguments presented for the first time upon objection to a report and recommendation need not be considered."); *Slape v. United States,* 2018 WL 5921150 (E.D. Tex. 2018).

Even if the District Court had considered the Grahams' abandonment argument, the Grahams were required to come forward with sufficient summary judgment evidence to put the issue in contention. Instead, the Grahams were content

to simply point to their Original Petition for support of their argument. (ROA.251). However, relying on pleadings alone is legally insufficient to establish any factual matter.

Once U.S. Bank had established a prima facie case of judicial foreclosure, it was the Grahams burden to then come forward with sufficient summary judgment evidence to support their affirmative defense of abandonment. The Fifth Circuit succinctly explained a nonmovant's burden in responding to a summary judgment motion. In *Rizzo v. Children's World Learning Centers*, this Court stated,

> Summary judgment is proper if the movant demonstrates that there is an absence of genuine issues of material fact. Such a showing entitles the movant to summary judgment as a matter of law. The movant accomplishes this by informing the court of the basis for its motion, and by identifying portions of the record which highlight the absence of genuine factual issues. Once the movant produces such evidence, the nonmovant must then direct the court's attention to evidence in the record sufficient to establish that there is a genuine issue of material fact for trial—**that is, the nonmovant must come forward with evidence establishing each of the challenged elements of its case for which the nonmovant will bear the burden of proof at trial.**
>
> The nonmovant can satisfy its burden by tendering depositions, affidavits, **and other competent evidence to buttress its claim**.... Summary judgment is appropriate, therefore, if the nonmovant fails to set forth specific facts, by affidavits or otherwise, to show there is a genuine issue for trial.

Rizzo v. Children's World Learning Centers, 84 F.3d 758 (5th Cir. 1996)(emp. added); relying on *Topalian v. Ehrman*, 954 F.2d 1125, 1131–31 (5th Cir. 1992), *cert. denied*, 506 U.S. 825, 113 S.Ct. 82, 121 L.Ed.2d 46 (1992) (internal citations

omitted). As provided by the U.S. Supreme Court, "Rule 56(e) permits a proper summary judgment motion to be opposed by any of the kinds of evidentiary materials listed in Rule 56(c), except the mere pleadings themselves..." *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

Had the District Court reviewed the substance of the Graham's objection to the Magistrate's Report (that being that the Graham's affirmative defense of abandonment), the District Court would have observed a complete absence of proof on the Grahams' affirmative defense. The Graham's pleadings alone did nothing to support their defense.

CONCLUSION

For the foregoing reasons, the District Court's final judgment granted in favor U.S. Bank National Association should be affirmed in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of January, 2019 a true and correct copy of the foregoing Brief has been filed with the Court using the CM/ECF filing system who will forward a copy of same to the following CM/ECF users:

/s/ Mark D. Hopkins
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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed R. App. P. 32(a)(7)(B) because, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), it contains 3,880 words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in proportionally-spaced typeface, including serifs, using Microsoft Word 2010, in Times New Roman 14-point font, except for the footnotes, which are in proportionally-spaced typeface, including serifs, using Microsoft Word 2010 in Times New Roman 12-point font.

s/ Mark D. Hopkins
Mark D. Hopkins

No. 18-50738

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
Appeal from Case No. 1:17-cv-292

WILLIAM GRAHAM; LISA L. GRAHAM,
Plaintiffs – Appellants,

v.

U.S. BANK NATIONAL ASSOCIATION, as legal title trustee for Truman 2016 SC6 title trust,
Defendant – Appellee.

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ORAL ARGUMENT NOT REQUESTED

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Defendant – Appellee.

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in 5TH CIR. R. 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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No. 18-50738

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Defendant – Appellee.

STATEMENT REGARDING ORAL ARGUMENT

The Plaintiffs/Appellants suggest that the issues presented can be determined solely upon the record and that oral argument would not benefit the panel.

/s/ William B. Gammon
William B. Gammon

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JURISDICTION

1.01 This is an appeal from a Final Judgment[1] entered on August 7, 2018 granting Appellee U.S. Bank National Association's motion for summary judgment and for judicial foreclosure, in which the U.S. District Court, Lee Yeakel presiding, granted Appellee authorization to judicially foreclose and ordered that the Final Judgment have the force and effect of a writ of possession and awarding Appellee attorney's fees. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1291.

[1] ROA.260-263

STATEMENT OF THE ISSUE

2.01 Did the district court err in failing to address the issue of abandonment of acceleration?

STATEMENT OF THE CASE

3.01 On September 2, 2016 Defendant Christiana Trust filed an "Application for an Expedited Order Under Rule 736 on a Home Equity Loan" in Travis County, Texas seeking judicial foreclosure of a home equity loan executed by Plaintiffs on November 13, 2007.

3.02 On December 2, 2016 Christiana Trust's application was granted.

3.03 On February 6, 2017 Appellants filed suit for declaratory judgment and breach of contract.[2]

3.04 On April 5, 2017 Defendants Christiana Trust and Fay Servicing LLC removed the matter to the Western District of Texas.[3]

3.05 On May 2, 2017 Appellants filed a motion to remand the matter back to state court.[4]

[2] ROA.21-30
[3] ROA.6-16
[4] ROA.111-115

3.06 On August 10, 2017 Magistrate Judge Mark Lane issued his report and recommendations that the motion to remand be denied and that defendants Christiana Trust and Fay Servicing's motion to dismiss be granted with prejudice.[5]

3.07 On August 30, 2017 Judge Lee Yeakel adopted the magistrate's recommendations.[6]

3.08 On November 29, 2017 Judge Lee Yeakel ordered defendant Christiana Trust be substituted by U.S. Bank National Association as ownership of the promissory note at issue had been sold to U.S. Bank by Christiana Trust in the intervening time since suit was filed.[7]

3.09 On December 6, 2017 Appellee U.S. Bank National Association filed its motion for summary judgment.[8]

3.10 On December 20, 2017 Appellants filed their response to Appellee's motion and on January 2, 2018 Appellee filed its reply to the response.[9] [10]

3.11 On July 16, 2018 Magistrate Judge Mark Lane issued his report and recommendations that U.S. Bank's motion be granted.[11]

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[5] ROA.137-149
[6] ROA.150-151
[7] ROA.160-161
[8] ROA.162-225
[9] ROA.227-231
[10] ROA.232-240
[11] ROA.241-249

3.12 On July 30, 2018 Appellants objected to the magistrate's report and recommendations and on August 2, 2018 Appellee responded to Appellants objections.[12] [13]

3.13 On August 7, 2018 Judge Lee Yeakel entered his order adopting the report and recommendations and entered the Final Judgment from which Appellants now appeal.[14]

[12] ROA.250-253
[13] ROA.254-256
[14] ROA.260-263

SUMMARY OF THE ARGUMENT

4.01 The lender's demand for payment of less than the full amount of the debt following the acceleration of Appellants' loan constituted abandonment of the acceleration and precluded the holder of the Note from seeking judicial foreclosure until such time as the debt had been properly reaccelerated.

ARGUMENT AND AUTHORITIES

A. Standard of Review

5.01 "Summary judgments are reviewed de novo." *Moussazadeh v. Tex. Dep'T of Criminal Justice*, 703 F.3d 781, 787 (5th Cir. 2012). Summary judgment may be granted where, taking the evidence in the light most favorable to the nonmovant, there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

B. Defendant's continued demand of less than the full accelerated amount of the debt constituted abandonment of acceleration.

7.01 Appellants received a mortgage statement dated November 10, 2016 from Fay Servicing, acting as mortgage servicer on the lender's behalf, and in that statement the amount due was stated as $148,038.41 to be paid by November 28, 2016.

7.02 Appellants received a mortgage statement dated December 10, 2016 from Fay Servicing acting as mortgage servicer on the lender's behalf and in that statement the amount due was stated as $151,417.61 to be paid by December 28, 2016.

7.03 Appellants continued to receive regular, monthly mortgage statements through 2017 and the entirety of 2018 demanding payment of less than the full, accelerated amount of the debt.

7.04 "Texas common law imposes notice requirements before acceleration. In Texas, "[e]ffective acceleration requires two acts: (1) notice of intent to accelerate, and (2) notice of acceleration." *Wolf,* 44 S.W.3d at 566. "Both notices must be 'clear and unequivocal.'" *Id*. (quoting *Shumway v. Horizon Credit Corp*., 801 S.W.2d 890, 893 (Tex. 1991))." *Wilmington Trust, N.A. v. Rob*, 891 F.3d 174, 176. (5th Cir. May 21, 2018)

7.05 The magistrate's report entirely ignored the issue of abandonment of acceleration complained of in paragraphs 13 and 14 of Plaintiffs' Original Petition. "[W]hether a holder has accelerated a note is a fact question." *Holy Cross Church of God in Christ v. Wolf*, 44 S.W.3d 562, 568 (Tex. 2001). This issue precluded the granting of summary judgment.

7.06 "The acceleration of a note can be abandoned "by agreement or other action of the parties." *Khan v. GBAK Props*., 371 S.W.3d 347, 353 (Tex. Ct. App. 2012). *Boren v. United States Nat'l Bank Ass'n*, 807 F.3d 99, 104. (5th Cir. October 26, 2015)

7.07 "Abandonment of acceleration has the effect of restoring the contract to its original condition," thereby "restoring the note's original maturity date" for purposes of accrual. *Khan*, 371 S.W.3d at 353 (citations omitted)." *Id.*

7.08 The issue of abandonment of acceleration had been consistently raised in this case. Appellants pointed out specific notices sent to them following the acceleration of the debt, which notices demanded payment of less than the full, accelerated amount. "A lender waives its earlier acceleration when it "put[s] the debtor on notice of [**12] its abandonment . . . by requesting payment on less than the full amount of the loan." *Leonard v. Ocwen Loan Servicing, L.L.C.*, 2015 U.S. App. LEXIS 9827, 2015 WL 3561333, at *3 (5th Cir. Jun. 9, 2015) (per curiam) (unpublished)." *Boren at* 106.

7.09 The abandonment of acceleration by the lender precluded the state court from granting the lender's 736 Application in 2016 and the federal court from ordering that its Final Judgment serve as an Order authorizing judicial foreclosure and possession of the debtor's property in 2018.

CONCLUSION

For the foregoing reasons, Appellants William Graham and Lisa Graham respectfully request that the Court reverse the judgment of the District Court for the Western District of Texas and remand the matter for further action consistent with its opinion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been served upon all parties of record on this 18th day of December 2018.

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CERTIFICATE OF COMPLIANCE

Pursuant to 5th Cir. R. 32.2.7(c), the undersigned certifies this brief complies with the type-volume limitations of 5th Cir. R. 32.2.7(b).

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