

Defendants are not liable to Plaintiff on the grounds that Plaintiff's damages, if any, were caused in whole or in part by Plaintiff's own conduct and/or negligence. Therefore, Defendants are entitled to a determination of proportionate responsibility under Chapter 33 of the Texas Civil Practice and Remedies Code and applicable Texas law.

Defendants deny responsibility or liability for any alleged damages sustained by Plaintiff. However, if Plaintiff sustained any damages, then such damages should be reduced by the amount that Plaintiff could reasonably have mitigated such damages and/or Plaintiff's failure to mitigate damages.

Plaintiff's claims are barred, in whole or in part, by the express or implied terms of the written agreement(s) between the parties.

Plaintiff's claims are barred by reason of Defendants' compliance with applicable loan documents, contracts, mortgage, agreements, statutes, and other provisions of law.

Defendants acted in good faith at all times, and Defendants did not knowingly, intentionally, or maliciously violate any laws.

Plaintiff's claims are barred, in whole or in part, by Plaintiff's lack of actual damages.

Plaintiff's claims are barred in whole or in part by the statute of frauds, parol evidence rule, and merger doctrine.

Plaintiff's claims are barred by unclean hands, laches, waiver, estoppel (in all its forms, including, but not limited to equitable estoppel and/or estoppel by contract), and other applicable concepts of law.

Plaintiff's claims are barred in whole or in part by the doctrines of accord and satisfaction, release and/or ratification.

Plaintiff's claims are barred in whole or in part by the doctrine of offset.

Plaintiff's claims are barred in whole or in part by the applicable statute of limitations.

Plaintiff's claims are barred in whole or in part by the doctrine of bona fide error.

Any claim for punitive or exemplary damages is subject to the limitations and constraints of Due Process found in the Fifth and Fourteenth Amendments to the United States Constitution and Article I, § 19 of the Texas Constitution.

Plaintiff has failed to state a claim for recovery of attorneys' fees and costs.

For further answer, if any is necessary, Defendants allege that Plaintiff is estopped from asserting the claims made the basis of Plaintiff's live petition pursuant to the doctrines/defenses of equitable estoppel, estoppel by contract, release, ratification, failure to mitigate, statute of frauds, lack of standing and waiver.

Defendants plead such other affirmative defenses which cannot be anticipated at this time, but which may become apparent and applicable during the pendency of this lawsuit, by reason of future discovery and by reason of allegations and answers of other parties. Defendants specifically reserve the right to amend or supplement these affirmative defenses at any time.

SPECIAL EXCEPTIONS

Defendants submit the following exceptions to Plaintiff's Live Petition in the instant case:

1. Plaintiff's allegations are so general that Defendants do not have fair notice of the claims being made;
2. Plaintiff has failed to state any claim upon which relief can be granted;
3. Plaintiff has plead no viable claim for damages and has stated no claim upon which she could recover damages;
4. Plaintiff's pleadings do not state the facts and elements necessary to support a cause of action; and

5. Plaintiff does not plead a damages amount.

REQUEST FOR INCREASE OF BOND

In the event the court extends any injunction prohibiting a non-judicial foreclosure sale of the property and/or any eviction, Defendants move that the court reset the bond amount in this case to a reasonable amount because the amount set is too low.

REQUESTS FOR MONTHLY PAYMENTS

Defendants further move that the court require the Plaintiff to make reasonable monthly payments into the registry of the court and that such payment obligation is continued until such time as this case is concluded.

**US BANK TRUST NATIONAL ASSOCIATION, AS TRUSTEE OF THE CABANA
SERIES IV TRUST COUNTERCLAIM FOR JUDICIAL FORECLOSURE AGAINST
RICHARD A. SCHLUTER, JR. AND TRACI Y SCHLUTER**

PARTIES

Counter-Plaintiff US Bank Trust, National Association (“US Bank”) is a national bank and is the trustee of CABANA SERIES IV TRUST. US Bank is, and at all times relevant to this action was, a national bank with its main office and principal place of business located in Wilmington, Delaware.

Counter-Defendant RICHARD A. SCHLUTER, JR. is a resident of Harris County, Texas and has made an appearance in the instant action. Accordingly, service against Counter-Defendant RICHARD A. SCHLUTER, JR is made according to Texas Rule of Civil Procedure 124 and 21a.

Counter-Defendant TRACI Y. SCHLUTER is a resident of Harris County, Texas and may be served with process by serving her at her residence located at 3423 Coltwood Drive, Sprint, Texas 77388-5163, or wherever she may be found.

DISCOVERY CONTROL PLAN LEVEL

Counter-Plaintiff US Bank intends that discovery be conducted under Discovery Level 3.

JURISDICTION AND VENUE

This Court has jurisdiction over this controversy because the amount at issue is within the jurisdictional limits of the Court.

Venue for this matter is proper in Harris County, Texas because the property which is the subject of this litigation is in Harris County, Texas.

FACTS

The foregoing paragraphs are incorporated by reference for all purposes.

On or about September 28, 2007, Counter-Defendants RICHARD A. SCHLUTER, JR. and TRACI Y. SCHLUTER a Note (the "Note") in the principal amount of \$264,600.00, originally payable to CitiMortgage, Inc., which is now held by US Bank. A true and correct copy of the Note into US Bank is attached hereto as **Exhibit "A"**.

Concurrently with the execution of the Note, Counter-Defendants RICHARD A. SCHLUTER, JR. and TRACI Y. SCHLUTER executed a Deed of Trust ("Deed of Trust") to secure the Note for the benefit of Mortgage Electronic Registration Systems, Inc. ("MERS"), acting solely as nominee for CitiMortgage, Inc. The Deed of Trust Instrument is recorded in the Real Property Records for Harris County, Texas as Instrument Number 20070599358. A true and correct copy of the Deed of Trust is attached hereto as **Exhibit "B"**.

The Deed of Trust was first transferred from Mortgage Electronic Registration Systems, Inc, acting solely as nominee for CitiMortgage, Inc. to Nationstar Mortgage, LLC ("Nationstar") via an Assignment of Deed of Trust dated August 26, 2011 and recorded on September 1, 2011 in the Real Property Records for Harris County, Texas as Instrument Number 20110368617. A true and correct

copy of the first assignment is attached hereto as **Exhibit “C”**.

On July 1, 2014, Nationstar foreclosed on the Property. A true and correct copy of the Substitute Trustee’s Deed, recorded on July 14, 2014 in the Real Property Records of Harris County, Texas as Instrument Number 20140305478, is attached hereto as **Exhibit “D”**. Nationstar subsequently rescinded the Substitute Trustee’s Deed on October 16, 2014. A true and correct copy of the Rescission of Substitute Trustee’s Sale and Cancellation of Substitute Trustee’s Deed, recorded on October 29, 2014 in the Real Property Records of Harris County, Texas as Instrument Number 20140487276, is attached hereto as **Exhibit “E”**.

The Note was modified per a Loan Modification Agreement made on November 7, 2016. A true and correct copy of the Loan Modification Agreement, recorded on February 7, 2017 in the Real Property Records of Harris County, Texas as Instrument Number RP-2017-53480, is attached hereto as **Exhibit “F”**.

The Deed of Trust was next transferred from Nationstar Mortgage, LLC to US Bank Trust National Association, as Trustee of the Igloo Series IV Trust via a Corporate Assignment of Deed of Trust dated September 13, 2019 and recorded on September 13, 2019 in the Real Property Records for Harris County, Texas as Instrument Number RP-2019-407837. A true and correct copy of the second assignment is attached hereto as **Exhibit “G”**. The Deed of Trust was finally transferred from US Bank Trust National Association, as Trustee of the Igloo Series IV Trust to US Bank National Association as Trustee of the Cabana Series IV Trust via an Assignment of Deed of Trust dated February 6, 2020 and recorded on March 10, 2020 in the Real Property Records for Harris County, Texas as Instrument Number RP-2020-107920. A true and correct copy of the third assignment is attached hereto as **Exhibit “H”**. US Bank National Association as Trustee of the Cabana Series IV Trust appointed A substitute trustee effective February 6, 2020. A true and correct copy of the

Appointment of Substitute Trustee filed on February 9, 2023 in the Real Property Records of Harris County, Texas as Instrument Number RP-2023-45151 is attached hereto as **Exhibit “I”**.

The Note was again modified per a Modification Agreement made on June 20, 2020. A true and correct copy of the Modification Agreement, recorded on July 20, 2020 in the Real Property Records of Harris County, Texas as Instrument Number RP-2020-320530 is attached hereto as **Exhibit “J”**.

A default occurred under the terms of the Note and Deed of Trust. Notice of default was sent to Counter-Defendants RICHARD A. SCHLUTER, JR. and TRACI D. SCHLUTER with an opportunity to cure the default. The default was not cured, and maturity under the Note was accelerated. More than \$515,242.29 is due as of February 7, 2023 under the terms of the Note and Deed of Trust.

CAUSE OF ACTION: JUDICIAL FORECLOSURE

The foregoing paragraphs are incorporated by reference for all purposes.

US Bank is the current legal owner and holder of the Note and the mortgagee of record who has the right to enforce the Note and Deed of Trust. US Bank has fully performed its obligations under the Note & Deed of Trust; however, Counter-Defendants RICHARD A. SCHLUTER, JR. and TRACI Y. SCHLUTER did not comply with the terms of the Note & Deed of Trust by failing to substantially perform material obligations required under its terms (principally, the payment of amounts due under the contract, among others).

US Bank seeks to judicially foreclose the lien of the Deed of Trust against the Property, in accordance with the terms of the Note and the Deed of Trust and applicable Texas and Federal law. The indebtedness represented by the Note as it pertains to the Deed of Trust and the Property should be declared to be a first and prior lien upon the Property. Any other claims and liens, if

any, should be declared inferior to the Deed of Trust lien held by US Bank and eliminated by US Bank's foreclosure under the Note & Deed of Trust. Counter-Defendants RICHARD A. SCHLUTER, JR. and TRACI Y. SCHLUTER and all persons taking an interest in the encumbered Property should be divested of all right, title, and interest in the Property after the foreclosure sale, and a writ of possession should issue and Counter-Defendants RICHARD A. SCHLUTER, JR. and TRACI Y. SCHLUTER and anyone taking an interest under Counter-Defendants RICHARD A. SCHLUTER, JR. and TRACI Y. SCHLUTER should be dispossessed of possession of the Property.

All necessary pre-conditions to foreclosure have been complied with by US Bank as it relates to the Note & Deed of Trust.

DAMAGES & ATTORNEY'S FEES

The foregoing paragraphs are incorporated by reference for all purposes.

Based on the breach of the Note, US Bank has been damaged in an amount within the jurisdictional limits of the Court and seeks the recovery of damages against Counter-Defendants RICHARD A. SCHLUTER, JR. and TRACI Y. SCHLUTER, personally.

US Bank has been required to retain the undersigned attorneys to seek judgment for amounts due and an order allowing foreclosure as a result of the delinquency under the Note & Deed of Trust. US Bank is therefore entitled to and seeks judgment against for its reasonable attorneys' fees in this action, both through trial and in the event of a subsequent appeal, as provided by the Note & Deed of Trust signed by Counter-Defendants RICHARD A. SCHLUTER, JR. and TRACI Y. SCHLUTER. US Bank seeks an award of attorneys' fees as a further obligation on the Note and as a money judgment against Counter-Defendants RICHARD A. SCHLUTER, JR. and TRACI Y. SCHLUTER personally.

PRAYER

WHEREFORE, DEFENDANTS pray the Court, after notice and hearing or trial, enter judgment in favor of Defendants, including, but not limited to the costs of court and attorney's fees. Defendants further pray that Plaintiff in this suit take nothing by way of their claims and that all of the Plaintiff's claims are dismissed with prejudice. Defendants further pray that Plaintiff's requests for declaratory and injunctive relief are all denied, and such other and further relief to which Defendants may be justly entitled.

COUNTER-PLAINTIFF US Bank further prays that after notice and hearing or trial on their Counterclaims for Judicial Foreclosure, the Court enter judgment in favor of US Bank, including:

1. damages for the unpaid amounts owing to US Bank under the Note and the Deed of Trust/Security Interest, which amounts are within the jurisdictional limits of the Court;
2. prejudgment interest as provided by law;
3. attorney's fees as set forth above;
4. costs of court;
5. post judgment interest on the judgment from its date until paid;
6. establishment that the indebtedness due to the US Bank be declared to be a first lien upon the Property as against all Counter-Defendants RICHARD A. SCHLUTER, JR. and TRACI Y. SCHLUTER and foreclosure of the Deed of Trust/Security Instrument lien against the Property, the elimination of all inferior liens and for order of sale against the Property; and such other and further relief to which US Bank may be justly entitled.

Respectfully submitted,

/S/RICHARD E. ANDERSON

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**COUNSEL FOR US BANK AND SN
SERVICING CORPORATION**

CERTIFICATE OF SERVICE

I certify that on this the 8th day of March, a true copy of the above document has been delivered to the following pursuant to the Texas Rules of Civil Procedure for each party listed below.

John G. Helstowski
J. GANNON HELSTOWSKI LAW
FIRM
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Colleyville, TX 76034
(817) 382-3125

VIA E-FILING SERVICE AND/OR
VIA E-MAIL: jgh@jghfirm.com

By: /s/ Richard E. Anderson
RICHARD E. ANDERSON

Automated Certificate of eService

This automated certificate of service was created by the eFiling system. The filer served this document via email generated by the eFiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

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Status as of 3/8/2023 12:33 PM CST

Case Contacts

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