**NO. 01-21-00147-CV**

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**In the Court of Appeals**
**for the First Judicial District of Texas**
**at Houston**



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**LaTanya Thompson,**
**Appellant**

**v.**

**Yellowfin Loan Servicing Corp.,**
**As Successor in Interest to IndyMac Bank, F.S.B.,**
**Appellee**

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**Appeal from County Civil Court at Law No. 4**
**Harris County, Texas**
**Hon. Lesley Briones**

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# APPELLANT'S BRIEF

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**ORAL ARGUMENT REQUESTED**

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## STATEMENT OF THE CASE

This is the June 19, 2020, case to enforce the second loan in an 80/20 financing arrangement for Ms. Thompson's 2005 homestead after the first loan was foreclosed in 2007. CR.10. She filed a counterclaim on July 30, 2020. CR.23.

There was an oral hearing on the Plaintiff's Motion For Final Summary Judgment on December 15, 2020 but no immediate ruling. CR. 321. On December 21, 2020, the trial court signed the form of summary judgment that Yellowfin submitted. CR.332. On March 12, 2021, it denied Ms. Thompson's Plea to the Jurisdiction [CR.398] and her Motion For New Trial. CR.397.

## STATEMENT REGARDING ORAL ARGUMENT

Ms. Thompson requests oral argument be heard in this case as it will assist in the decisional process. This is important because Yellowfin has filed on the order of one hundred fifty similar cases throughout the state that are similarly defective. They are improperly using the judicial system to disrupt people's lives more than a decade after they lost their homes.

## ISSUES PRESENTED

1. Was there just a single transaction between IndyMac Bank, F.S.B. as the lender and Ms. Thompson as the borrower when both simultaneous loans between the parties were used to finance just one house?

2. Is the two-year limitations period in TEX. PROP. CODE §51.003 applicable to the Note when there was only one lender who financed the purchase of the property and the foreclosure of the First Loan by that lender voided the lender's lien for the Note?

3. Is the four-year limitations period in TEX. CIV. PRAC. & REM. CODE §16.004 applicable to the Note when the lender's cause of action contractually arose no later than the date of foreclosure of the First Loan in 2007?

4. Is a right that a lender gave itself to sue on a debt for a default on another debt waived if it is not exercised for thirteen years after the original lender contractually caused it to accrue when it foreclosed?

5. Is the Note still an obligation "secured by a real property lien" when it was acquired by a debt buyer twelve years after the lien against the property was voided by a foreclosure?

6. Where there are no servicing records for a 2005 loan can a guess by stranger to the loan in 2019 for the amount that might be owed by the borrower meet summary judgment standard in TEX. R. CIV. P. 166a?

7. Does the clear instruction in the Note requiring an undertaking by the borrower to "tell the Note Holder in a letter that I am doing so" before making a prepayment destroy its negotiability because it keeps the document from

meeting the definition of an "unconditional promise or order" required by TEX. BUS. & COM. CODE §§3.104(a) and 3.106?

## STATEMENT OF FACTS

Ms. Thompson purchased her homestead on May 20, 2005. She financed it through IndyMac Bank, F.S.B., the only lender, with two simultaneous loans in what is commonly referred to as an 80/20 transaction. They were each secured by their own Deed of Trust. CR.289 and 169 respectively.

The First Loan was evenly amortized over thirty years. The second, the Note that is the basis for this case, was not evenly amortized. It called for small monthly payments and then a very large balloon payment that came due in fifteen years. CR.164. The Note's original principal balance was $53,000.00 at 9.875 percent interest. The balloon, after fifteen years of monthly payments was $43,240.05. CR.225, line 180. That left eighty-two percent of the original loan unpaid (43,240.05 / 53,000 = .81585) after making all fifteen years of scheduled payments.

The Final Summary Judgment said "the accelerated principal amount due under the contract" was $44,333.62. CR.236. There are no servicing records from any entity that has owned the Note since its inception in 2005 through when Yellowfin says it acquired its interest in 2019. The number demanded in the Petition and awarded in the Summary Judgment is based on a guess by Yellowfin as set out below.

CR.157, ¶4.

Ms. Thompson became delinquent and the First Loan was foreclosed on July 3, 2007. CR.206.

The amount paid at the foreclosure was not enough to pay off both the First Loan and the Note. IndyMac had the right to sue for any unsecured amounts it was owed on the First Loan and on the Note after the foreclosure but it did not. Neither did any other entity until Yellowfin filed the Plaintiff's Original Petition on June 19, 2020, suing on the Note almost thirteen years after the foreclosure. CR.10.

Ownership of the Note was allegedly transferred away from IndyMac in a series of undated transactions. The first was an undated indorsement stamped on the Note itself from IndyMac Bank, F.S.B. to Trinity Financial Service, LLC, Without Recourse. CR.15. It was followed by an undated Allonge to the Note, also without recourse, from Trinity acting through RCS Recovery Service, LLC, as its attorney in fact, making the transfer to itself, RCS Recovery Services, LLC. CR.16. Next was the undated Allonge to the Note, on an identical form, also without recourse, from RCS Recovery Services, LLC, by Natalie Compas, Authorized Signer, to Yellowfin. CR.17.

The two allonges were identically formatted. Though RCS and Trinity are apparently different entities each Allonge gave the same number for the loan both

before and after the alleged transfer from the previous owner as if RCS and Yellowfin were the same entity. Each Allonge said the Previous Loan number ended in 4580 and the new Loan number ended in 9299 on each allonge. CR.16, 17.

The only date in the chain is August 29, 2019. It is on the Bill of Sale from RCS to Yellowfin. CR.220. It said the transfer was "executed without recourse and without representation or warranty, collectability or otherwise, expressed or implied except as set forth in the Mortgage Note and Sale Agreement."

The Bill of Sale was an exhibit to the Mortgage Note Purchase and Sale Agreement dated the same day. CR.216-219.

Its Section 3.c. Representations, Warranties and Covenants of Seller and Buyer that document specified that the sale was made "with NO REPRESENTATIONS OR WARRANTIES and/or on "AS IS WHERE IS, WITH ALL FAULTS," basis with NO RECOURSE WHATSOEVER and, without in any way limiting the foregoing, WITH NO REPURCHASE OR BUY BACK OBLIGATIONS WHATSOEVER." Emphasis in the original. Plaintiff's Exhibit G. CR.216-217.

Section 5. Transfer of Servicing refers to a transfer of "(iii) such information in Seller's possession that may be necessary for the buyer to service the Mortgage Notes. Buyer shall bear the expenses of transportation and storage of such Transfer Documents and of other documents, instruments and files to be delivered to Buyer."

CR. 217.

Section 6. Nonperforming Mortgage Notes includes the caveat that "Buyer [Yellowfin] acknowledges that certain loans may have limited enforceablity due to characteristics including, but not limited to, bankruptcy, deceased and similar (sic)." CR.217.

The Mortgage Note Purchase and Sale Agreement was supported by a list of the loans allegedly included in the pool of roughly two hundred (200) redacted loans that it represented. CR.221-231. The only financial data was in a column labeled "Original Loan Amount." CR.221.

The only dollar amount on that page is "Original Loan Amount $53,000.00." There is no evidence from any previous owner of the Note to support the $44,333.62 claimed in Paragraph 12 of the Plaintiff's Original Petition. CR.11. Neither is there any evidence that any entity, including IndyMac, ever claimed actual knowledge of the exact amount owed on or after July 3, 2007, or made a representation to the next entity in the chain of even the approximate amount that was allegedly owed at the time of transfer.

The Affidavit in support of Yellowfin's motion for summary judgment admits that it has no records of how the loan was serviced since its inception in 2005. The amount of its claim in the case is based on a guess. The Affidavit of Matt Miller that

Yellowfin relies on includes "4. According to Plaintiff's records, Defendant owes a balance of $44,333.62...The balance owed was calculated by conducting an amortization of the original principal amount of the Note in accordance with the terms prescribed by the Note ... then assuming that each and every payment was timely made through June 1, 2019." CR.157.

There is no evidence that Yellowfin based its demand on an original amortization schedule made by IndyMac or from any entity that actually serviced the loan represented by the Note. It allegedly acquired its interest in the Note via the Bill of Sale dated August 29, 2019. CR.220. The footer on all four pages of the December 4, 2019 amortization schedule it used as Exhibit I in support to the Motion For Final Summary Judgment [CR.232-235] says "Powered by The Mortgage Office™." That was more than three months after Yellowfin allegedly acquired its interest in the Note and more than twelve years after the July 3, 2007, foreclosure.

The Mortgage Office is not a party to the case or a witness. There is no evidence that it reviewed any actual servicing records of the Note.

The first contact between Yellowfin and Ms. Thompson was the January 14, 2020, Notice Under Fair Debt Collection Practices Act letter saying "the amount of the debt as of 08/29/2019 is $46,194.41." CR.208. Though printed on Yellowfin stationery it was actually generated and mailed by Hatteras, Inc. in Dearborn MI.

CR.210.[1]

It was followed by the February 26, 2020, Notice of Intent to Accelerate letter [CR. 211] and the March 25, 2020 Re: Notice of Acceleration letter [CR.214] that were also generated on Yellowfin stationery and mailed by Hatteras. CR.213, 215.

There was no litigation to try to collect on the Note in the almost thirteen years between the July 3, 2007, foreclosure [CR.273] and June 19, 2020 when Yellowfin filed its petition. CR.10.

## SUMMARY OF THE ARGUMENT

Limitations expired because the cause of action accrued to the original lender in 2007 but suit was not filed by the alleged third subsequent assignee until 2020.

Yellowfin does not have standing because the Note was not a negotiable instrument and there is no evidence of a proper assignment.

Yellowfin says that in 2019 it became the fourth entity to own the Note that IndyMac originated in 2005, the third since IndyMac foreclosed in 2007. It did not loan any money to Ms. Thompson. Its rights are derivative of IndyMac's.

Any successor in interest to the original lender has only the rights in the loan

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[1]On April 21, 2021, the United States Court of Appeals for the Eleventh Circuit ruled that the disclosure of information of indebtedness to such a vendor is a violation of 15 U.S.C. §1692c(b) in the Fair Debt Collection Practices Act. *Hunstein v. Preferred Collection and Management Services, Inc.,* No. 19-14434.

that the original lender had. Since limitations expired for IndyMac no later than 2013, six years after its cause of action arose, it could not have sued Ms. Thompson in 2020. Neither could Yellowfin.

A successor to the original lender cannot wait until 2020 to enforce a contractual right that contractually accrued in 2007 any more than the original lender could have. Even if the right were technically still available in 2020 it had been consciously waived by four different entities since it accrued in 2007.

Nothing in the record shows why public policy upholding the purpose of statutes of limitation should be ignored.

Even if limitations and waiver did not matter, Yellowfin's claim is not based on the servicing records for the Note. It has absolutely no evidence of the amount allegedly owed. Its unsubstantiated guess does not meet the evidentiary requirement for summary judgment in TEX. R. CIV. P. 166a.

## ARGUMENT

### I. Assignees Do Not Have More Rights than the Original Lender Had and They Are Subject to All the Defenses the Borrower Has Against the Original Lender

This is a simple statute of limitations case that the debt collector's original counsel in San Antonio, a collection mill running a volume practice, should have known not to file in the first place. The proof is in the Plaintiff's self-chosen name

and status of "Yellowfin Loan Servicing Corp., As Successor in Interest to IndyMac Bank, F.S.B." CR.10. Yellowfin has filed roughly one hundred fifty similar cases in Texas as successor to various original lenders.

Only IndyMac and Ms. Thompson were involved in the original loan transaction in 2005. CR.164-165. Yellowfin was not. *Id*. Further, it had no direct connection to IndyMac; it was a complete stranger to the 2005 transaction. It never loaned Ms. Thompson any money. It did not enter the picture until the August 29, 2019 Mortgage Note Purchase and Sale Agreement [CR.216-219] and Bill of Sale [CR.220-231] at the end of a chain of alleged transfers of ownership of the Note [CR.167], some twelve years after the July 3, 2007 foreclosure of the related First Loan. CR.206.

When IndyMac's rights in the Note ran out, so did Yellowfin's. "When a claim is assigned, the assignee "steps into the shoes of the assignor and is considered under the law to have suffered the same injury as the assignor [] and have the same ability to pursue the claims." Sw. Bell Tel. Co. v. Mktg. on Hold Inc., 308 S.W.3d 909, 916 (Tex.2010)." *In Re Travelers Property Cas. Co. Of Am.*, 485 S.W.3d 921, 927 (Tex. App. - Dallas 2016, orig. proceeding)("*Travelers*").

"An assignee "takes the assigned rights subject to all defenses which the opposing party might be able to assert against his assignor." Burns v. Bishop, 48

S.W.3d 459, 466 (Tex. App.-Houston [14th Dist.] 2001, no pet.). Therefore, a claim otherwise barred by the applicable statute of limitations cannot be made viable by assignment." *Uddin v. Cunningham*, No. 01-18-00002-CV (Tex. App. - Houston [1st Dist.] August 29, 2019, mem. op. on rehearing)("*Uddin*").

Ms. Thompson disputes Yellowfin's standing, as set out below. However, as a matter of law, even if it had standing for the assigned claim, Yellowfin, at best, had only the same rights that IndyMac had to convey, not more rights. If IndyMac could not have sued under the Note contract in June 2020 then Yellowfin could not have sued under it in June 2020. As shown below, IndyMac could not have sued in June 2020, and the trial court had no jurisdiction for the case.

The inescapable conclusion is that the trial court lacked jurisdiction to hear Yellowfin's expired claim as a matter of law. The summary judgment in favor of Yellowfin in the court below should be reversed and judgment rendered in Ms. Thompson's favor that Yellowfin has no enforceable claim against her from her dealings with IndyMac. She should be allowed to pursue her counterclaim.

## II. Standard of Review

This Court reviews "a trial court's summary judgment de novo." *Lujan v. Navistar, Inc.* 555 S.W.3d 79, 84 (Tex. 2018). The county court's failure to recognize that Yellowfin's rights were no more than IndyMac's was a mistake of law and

therefore an abuse of discretion. "A trial court has no discretion in determining what the law is or in applying the law to the facts. Id. at 840.[2] Thus, a clear failure by the trial court to analyze or apply the law correctly will constitute an abuse of discretion. In re Allstate Cty. Mut. Ins. Co., 85 S.W.3d 193, 195 (Tex. 2002) (orig. proceeding)." *In Re Baileys, Relator*, No. 01-16-00830 (Tex. App - Houston [1st Dist.] November 9, 2017).

The trial court abused its discretion again when it granted summary judgment based on evidence that did not meet the standard in TEX. R. CIV. P. 166a(c).

The trial court further abused its discretion in denying Ms. Thompson's Plea To The Jurisdiction [CR.398] and granting summary judgment to Yellowfin where there was no proof that it had standing [CR.332-333], as will also be shown below.

The fact that any assignee's rights depended on IndyMac's rights was a constant all the way down the line each time the Note allegedly changed hands. Even presuming, arguendo, that the entire fourteen-year chain that began with the Note's 2005 origination by IndyMac, and continued through the undated transfer to buyer of defaulted debt Trinity Financial Services, LLC, [CR.165] then through the undated transfer to buyer of defaulted debt RCS Recovery Services, LLC, [CR.166] and ended in the August 29, 2019, transfer to buyer of defaulted debt Yellowfin [CR.167] were

[2]Referring to *Walker v. Packer*, 827 S.W.2d 833 (Tex. 1992)(orig. proceeding).

valid, Yellowfin only had the rights that IndyMac had to convey. *Travelers* at 927.

No alleged sale of the Note as a link in that disputed chain could have put Ms. Thompson in a contractually worse position than she was in with the original lender IndyMac in 2007.

It is instructive that the August 29, 2019, date of the alleged transfer to Yellowfin was on the very same day that this Court issued the memorandum opinion in *Uddin* above presaging that their claim here is not valid.

## III. There Was Only One Transaction Between Indymac and Ms. Thompson

It is undisputed that the First Loan and the Note [CR.14-15] were both loans from IndyMac to Ms. Thompson that she signed on May 20, 2005 as part of the same transaction to finance the acquisition of her homestead. Each was also secured by a Deed of Trust she signed in favor of IndyMac, CR.289 for the First Loan and CR.169 for the Note. There was only one lender and only one borrower and only one house. One transaction.

Even if the two notes did not refer to each other, which they did, and had not been executed at the same time at the same place, by the same parties, for just one purpose, which they were, the Court's relevant precedent shows they can be read together to describe a single transaction.

"To discern the contracting parties' intent, courts may properly consider

> all writings pertaining to the same transaction, even if the writings were executed at different times and do not expressly refer to one another. DeWitt Cnty. Elec. Coop., 1 S.W.3d at 102; see also Miles v. Martin, 159 Tex. 336, 341, 321 S.W.2d 62, 65 (1959) ("It is well settled that separate instruments executed at the same time, between the same parties, and relating to the same subject matter may be considered together and construed as one contract. This undoubtedly is sound in principle when the several instruments are truly parts of the same transaction and together form one entire agreement." (citation omitted))." *Pitts & Collard, LLP v. Schechter*, 369 S.W.3 301, 313 (Tex. App. - Houston [1st Dist.] 2011, no pet).

What also cannot be ignored is that the Deed of Trust for the Note, the security instrument for the Note that Yellowfin seeks to enforce, intentionally linked itself to the First Loan. It made a payment default on the First Loan an enforceable fatal default on the Note that immediately allowed IndyMac to call all remaining payments on the Note due years before they would otherwise mature. CR.188, ¶21. It was a very one-sided transaction that IndyMac required.

> "**21. Senior Liens.** Borrower shall perform all of Borrower's obligations under any deed of trust, security instrument or other security agreement, which has priority over this Security instrument, including Borrower's covenants to make payments when due. Borrower agrees that should default be made in the payment of any note secured by any prior valid encumbrance against the Property, or in the covenants of any prior deed of trust or other security agreement, then the Note secured by this Security Instrument, at the option of Lender, shall at once become due and payable..." Emphasis in the original. CR.188-190.

In that document IndyMac intentionally interlinked the two loans and gave itself the right to call the Note immediately "due and payable" in its entirety when

there was a default on the related First Loan. That applied even if Ms. Thompson were current on the Note. It is something the original lender put in that document that Ms. Thompson had to agree to.

Typically a note that calls for installments cannot be called due in its entirety until it is accelerated. The procedure involves sending a default letter, followed by the borrower's failure to cure the default, ending with an acceleration letter from the lender calling the entire amount due. "If a note or deed of trust secured by real property contains an optional acceleration clause, default does not ipso facto start limitations running on the note. Rather, the action accrues only 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). In the typical case, where there is only one Note and one Deed of Trust for the transaction, that makes sense and would control.

However, this is not a typical case. What is different here is that Paragraph 21 contractually added another way for the Note to immediately be called due in its entirety, aside from the Lender sending an acceleration letter.

An adhesion contract is one in which "one party has absolutely no bargaining power or ability to change the contract terms." *In re H.E. Butt Grocery Co.*, 17 S.W. 3d 360, 371 (Tex. App. - Houston [14th Dist.] 2000, orig. proceeding). The First Loan, the Note, and the Deeds of Trust for each of them were adhesion contracts and Ms.

Thompson was bound by their terms, as were IndyMac, the drafter, and its alleged successors. She did not chose to interlink the two obligations but IndyMac insisted on it.

No successor to IndyMac can ignore IndyMac's intention to have a default on the First Loan be treated as a default on the Note that immediately gave it the right to call the all remaining amounts on the Note due and payable. "In construing a written contract, the primary concern of the court is to ascertain the true intentions of the parties as expressed in the instrument. To achieve this objective, courts should examine and consider the entire writing in an effort to harmonize and give effect to all the provisions of the contract so that none will be rendered meaningless. Contract terms are given their plain, ordinary, and generally accepted meanings unless the contract itself shows them to be used in a technical or different sense." *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 662 (Tex. 2005, internal citations omitted)("*Valence*").

The Court is required to interpret contracts according to their plain meaning. *Id.* There is nothing in any document that permitted Yellowfin to ignore the effect of the right that the Deed of Trust for the Note awarded to the original lender.

Having gone out of its way to give itself the right against Ms. Thompson to enforce a default on the First Loan as a default on the Note that could make all the

Note's payments immediately due, the original lender could not deny that right's existence. Neither could any assignee, valid or not.

Even if Ms. Thompson were paid ahead on the Note when she defaulted on the First Loan, the plain meaning of the language in the Deed of Trust for the Note provided that a default on the First Loan still gave IndyMac the contractual right to call the entire remaining balance on the Note immediately due and payable.

The First Loan was clearly a "note secured by [a] prior valid encumbrance against the Property" as defined in Paragraph 21 of the Deed of Trust for the Note. CR.289. That fact is literally highlighted by the form of that document that proclaims its secondary status in large bold print, the largest on the page, centered near the top of the page:

**DEED OF TRUST**
**(Secondary Lien)**

CR.169. Emphasis in the original.

It was payment defaults on the First Loan, a note described in Paragraph 21 in the Deed of Trust for the Note, that led to the July 3, 2007 foreclosure. CR.206.

It was the payment defaults on the First Loan that contractually caused the accrual of IndyMac's cause of action to enforce both the First Loan and the Note and led to the July 3, 2007, foreclosure. That was as early as the default letter sent prior to the acceleration that led to the July 3, 2007 foreclosure.

The exact date in 2007 is unknowable[3] because Yellowfin was a stranger to the First Loan as well and it has no records from the servicing of the First Loan.

Regardless, it is therefore indisputable that IndyMac's cause of action based on its right to call the Note "at once due and payable" accrued no later than the date of the July 3, 2007, foreclosure on the First Loan.

## IV. All Possible Statutes of Limitation Expired Years Ago

### A. TEX. PROP. CODE §51.003 - Foreclosure Deficiency

The First Loan was made on May 20, 2005, in the amount of $212,000.00 CR. 290. The Note was made the same day, in the amount of $53,000.00 [CR.14], for a total indebtedness from Ms. Thompson to IndyMac, secured by the same real property, her homestead, of $265,000. Two years later the foreclosure only brought in $225,000.00, a net loss. CR.206.

On its face some of the excess from the First Loan should have been applied to the Note but there are no records.

Once IndyMac foreclosed on the First Loan under TEX. PROP. CODE §51.002 and wiped out the liens securing the First Loan and the Note, it guaranteed that its

---

[3] It actually had to be at least fifty-one days earlier than that because Paragraph 22 in the Deed of Trust for the First Loan required it to send a default letter by certified mail at giving at least thirty (30) days notice to cure the payment default [CR.300] and TEX. PROP. CODE §51.002(d) required another twenty-one (21) days notice after acceleration before a foreclosure sale could take place.

remaining claim for any unpaid amount on the Note after that date was nothing more than an unsecured deficiency from the single transaction it financed with Ms. Thompson. "Under Texas law, generally, if, after a valid foreclosure of a senior lien, a junior lien is not satisfied from the proceeds of a sale, then the junior lien is extinguished."*Kothari v. Oyervidez*, 373 S.W.3d 801, 807 (Tex. App - Houston [1st Dist.] 2012, pet. denied)(internal citations omitted).

"Accordingly, the foreclosure sale of the senior lien extinguished the junior lien." *Diversified Mortgage Investors v. Lloyd D. Blalock General Contractor, Inc.*, 765 S.w.2d 794, 806 (Tex. 1978).

The failure to receive enough from the foreclosure of the First Loan to pay off both the First Loan and Note that were both secured by the same property before the foreclosure left IndyMac with a deficiency claim against Ms. Thompson for the money she owed from the purchase of the property; the security was gone. The deficiency claim on the Note is what IndyMac had left. That is what it sold, and that is what Yellowfin allegedly bought many years later and is trying to enforce.

IndyMac's right to sue for the unsecured deficiency due on the Note accrued no later than the date of the July 3, 2007 foreclosure. CR.206. It started the special two year limitations period set by TEX. PROP. CODE §51.003.

Sec. 51.003. DEFICIENCY JUDGMENT. (a) If the price at which real

> property is sold at a foreclosure sale under Section 51.002 is less than the unpaid balance of the indebtedness secured by the real property, resulting in a deficiency, any action brought to recover the deficiency must be brought within two years of the foreclosure sale and is governed by this section.

The Court is required to "construe [a] statute's words according to their plain and common meaning, unless a contrary intention is apparent from the context, or unless such a construction leads to absurd results." *Youngkin v. Hines*, 546 S.W.3d 675, 680 (Tex. 2018). (citations omitted). The plain meaning of the statutory language "any action" is all encompassing and means what it says. Any means any. It is not restricted and does not only apply to just one loan where the same lender made two loans to the same borrower at the same time to finance a single home and the two loans were linked to each other.

The plain meaning of "The indebtedness secured by the real property" language in the statute applies to the one piece of real property, the First Loan, and the Note in the transaction between Ms. Thompson and IndyMac. The statute neither says nor implies that it excludes from coverage by §51.003 a second loan made by the same lender to the same borrower at the same time for the same purpose.

"Section 51.003 was added to the Property Code in 1991. No doubt it is intended to protect borrowers and guarantors. When lenders are the sole bidders at a foreclosure sale, they can control the foreclosure sale price and by implication the

deficiency judgment. There is little incentive for them to bid high when a low bid preserves the amount they might get in a judgment against the borrower. Thus the nonjudicial foreclosure sale often does not directly represent what a buyer might pay in the market." *Moayedi v. Interstate35/Chisam Road, LP*, 438 SW.3d 1, 4-5 (Tex. 2014).

The public policy purpose behind the shortened post-foreclosure limitations period is there for a reason. The statute was not added to confer a hidden benefit on the lender for breaking the transaction for one house into two notes with different maturity dates. The statute specifically sets a short time to act on a deficiency claim so the post-foreclosure threat of litigation after the borrower has lost the property will not linger into the distant future, as Yellowfin has made it do here. It does not give the lender the right to a longer period of time to sue on a second loan made at the same time as the first after specifically setting the short limitations period that exists only for enforcing a deficiency on a home loan. It is the shortest debt collection statute in Texas for a reason.

Neither IndyMac nor anyone else filed suit within the two years after the foreclosure and the special limitations period for the deficiency claim expired as a matter of law on or about July 3, 2009.

There is no good faith argument that IndyMac could have sued on the Note

more than two years after the foreclosure of the First Loan. It could also not have passed on a right that it did not have and Yellowfin cannot enforce a non-existent right.

Yellowfin's pleadings below attempted to cloud that issue by relying on a distinguishable case and its progeny where the second loan in a commercial lending situation, not purchase money for a homestead, was neither made by the same lender nor part of the same original transaction. There argument is unspersuasive.

### B. TEX. CIV. PRAC. & REM. CODE §16.004 - Debt

Even if the claim on the Note could be ignored as a deficiency claim after the foreclosure, and considered as only a claim for debt, the cause of action still contractually accrued no later than the July 3, 2007 foreclosure. The statute of limitations for enforcing a debt claim under TEX. CIV. PRAC. & REM. CODE §16.004 therefore expired no later than four years after that accrual.

> Sec. 16.004. FOUR-YEAR LIMITATIONS PERIOD. (a) A person must bring suit on the following actions not later than four years after the day the cause of action accrues:
> ...
> (3) debt;

That expiration date was no later than July 3, 2011, four years after the July 3, 2007, foreclosure and accrual date. Again, neither IndyMac nor any other party filed suit on the Note before July 3, 2011, and the time to have done so expired almost nine

years before the Plaintiff's Original Petition was filed on June 19, 2020. CR.10.

IndyMac could not have sued on the debt in 2020 and neither could anyone else. The suit was barred by limitations.

### C. TEX. CIV. PRAC. & REM. CODE §16.035 - Real Property Secured by a Lien

Yellowfin cannot rely on the apparent safe harbor in TEX. CIV. PRAC. & REM. CODE §16.035 (e) that requires actual acceleration before limitations begins.

> Sec. 16.035. LIEN ON REAL PROPERTY. (a) A person must bring suit for the recovery of real property under a real property lien or the foreclosure of a real property lien not later than four years after the day the cause of action accrues.
> ...
> (e) If a series of notes or obligations or a note or obligation payable in installments is secured by a real property lien, the four-year limitations period does not begin to run until the maturity date of the last note, obligation, or installment.

By the plain meaning of its own terms §16.035(e) is inapplicable. Following the July 3, 2007, foreclosure the Note was no longer "secured by a real property lien" and Yellowfin did not sue here to recover the real property. The Plaintiff's Reply In Support Of Summary Judgment made that inapplicability abundantly clear in Yellowfin's excuse to avoid the applicability of federal loan servicing rules for loans secured by real estate. To wit, "Yellowfin's Note is not "secured by" anything and has not been since the July 3, 2007, foreclosure sale. RESPA and its regulations are

inapplicable under the plain meaning of the words in the statute and Defendant has presented no authority that contradicts that plain language." CR.315, ¶18.

The Note cannot be both secured and unsecured at the same time; secured when it helps Yellowfin with limitations, unsecured when they say that would let them dodge federal regulation related to "loan servicing," which is literally part of Yellowfin Loan Servicing Corp.'s self-chosen name.

Curiously, Yellowfin took the complete opposite position on the applicability of §16.035 in Paragraphs 37 and 38 in the Motion For Final Summary Judgment saying the Note was "secured by a real property lien." CR.154-155.

The Court is required to apply the "plain meaning" rule to statutory interpretation. By admitting that the Note was not secured Yellowfin has precluded itself from being able to rely on §16.035. It has exercised its option to plead itself out of court for any defense under §16.035 by pleading facts which affirmatively negate that section. *Khan v. GBAK Properties, Inc*., 372 S.W.3d 347, 357 (Tex. App. - Houston [1st Dist. - Houston] 2012, citations omitted, no pet.).

Summary judgment in Yellowfin's favor was not possible as a matter of law where its contradictory positions were based on opposing sides of the same issue. Yellowfin's filings are inconsistent with the requirement to prove that "there is no genuine issue as to any material fact and the moving party is entitled to judgment as

a matter of law on the issues expressly set out in the motion or in an answer or any other response." TEX. R. CIV. P. 166a(c).

### D. TEX. BUS. & COM. CODE §3.118 - Negotiable Instrument

Even if the Note were a negotiable instrument, which it is not, and the six year limitations period in TEX. BUS. & COM. CODE §3.118 were applicable, it still expired on July 3, 2013, six years after the July 3, 2007, foreclosure, when the claim accrued.

Six years is the longest possible applicable statutory limitations period. The ones for ten, fifteen, and twenty-five years are all related to adverse possession, and clearly inapplicable since possession of the property was lost in 2007. The Property is in Tomball, TX 77377 [CR.14] and Ms. Thompson was served where she lives in Houston, TX 77085. CR.22.

### E. The Remaining Installments Due in the Future

Yellowfin's only remaining argument is that the there had to be an actual acceleration for the unmatured installments to come due. That also fails.

If the Note had been a stand alone transaction then perhaps Yellowfin would have a point. It could argue that because the payments with a future due date had not come due then limitations had not expired on them. It could then argue that the waiver of collecting on the payments due from 2007 through 2020 could be ignored and there was still a right to payments due after 2020.

However, the Note's link to Paragraph 21 in the Deed of Trust, as described above, cannot be ignored. It is reinforced by language in Paragraph 5 of the Note itself:

> **5. THIS NOTE SECURED BY A DEED OF TRUST**
> In addition to the protections given to the Note Holder under this Note, a Deed of Trust, dated May 20, 2005, protects the Note Holder from possible losses which might result if I do not keep the promises which I make in this Note. That Deed of Trust describes how and under what conditions I may be required to make immediate payment in full of all amounts that I owe under the Note. Emphasis in the original. CR.15.

As shown above, Paragraph 21 in that Deed of Trust gave IndyMac the right to call the entire amount of the loan due, and make the cause of action accrue, as early as July 3, 2007. That was "in addition to the protections given to the Note Holder under this Note." Harmonizing the two document means that additional right cannot be ignored. *Valence* at 662.

As to the waiver argument, it is dealt with below.

## V. Public Policy on Limitations Should Be Respected

The summary judgment below cites no valid reason for ignoring the applicable limitations periods in either TEX. PROP. CODE §51.003 or TEX. CIV. PRAC. & REMEDIES CODE §16.004 or any other statute. Neither does it hold that there should be a change in the long standing public policy behind limitations that goes back to at least the nineteenth century. "We have long recognized the salutary purpose of

statutes of limitations. In Gautier v. Franklin, 1 Tex. 732, 739 (1847), we wrote that statutes of limitations

> are justly held "as statutes of repose to quiet titles, to suppress frauds, and to supply the deficiencies of proof arising from the ambiguity, obscurity and antiquity of transactions. They proceed upon the presumption that claims are extinguished, or ought to be held extinguished whenever they are not litigated in the proper forum at the prescribed period. They take away all solid ground of complaint, because they rest on the negligence or laches of the party himself; they quicken diligence by making it in some measure equivalent to right...." [Joseph P. Story, Conflicts of Law 482.]" *SV v. RV*, 933 S.W.2d 1, 3 (Tex. 1996).

There is nothing in the record that supports Yellowfin's ability to disrupt people's lives and undo the progress they have made restoring their financial situation more than a decade after the original lender took their house.

## VI. Waiver

Even if everything above could be ignored, the summary judgment below is still defective as a matter of law because of the thirteen years of wavier by all the alleged owners for their collective failure to enforce the right that contractually accrued on July 3, 2007.

Ms. Thompson raised waiver as a defense in the Answer. CR.31-32. She raised it again in the Defendant's First Amended Plea to the Jurisdiction, Answer, and Counterclaim. CR.91-92. She raised it again in "Thirteen Years of Waiver" in her

Response to the Motion For Final Summary Judgment. CR.245 and 267-269.

Yellowfin's Motion For Final Summary Judgment admitted there was waiver of collection efforts from 2007 though 2019 by the previous alleged owners. It then itself waived the amounts due through June 1, 2019, where it said "the new post waiver balance, as of July 1, 2019, was $44,333.62." CR.143, ¶6.

It later says "Waiver occurs when a party intentionally relinquishes a known right. In re Epic Holdings, Inc., 985 S.W.2d. 353, 358 (Tex. 1971)" CR. 149.

The line before that in the Motion included the assertion that "[c]ontractual rights can be waived. *Johnson v. Structured Asset Services,* LLC, 148 S.W. 3d 711, 711 (Tex. App. - Dallas 2004, no writ)." That was the first line in the cited paragraph and potentially, and hopefully inadvertently, misleading by omission. Yellowfin left out the relevant point from near the end of that same paragraph that said "A party's silence or inaction for a period of time long enough to show an intention to yield the know right can establish a waiver. Tenneco[4] Inc., 925 S.W.2d at 643."

Thirteen years of inaction on statutes of limitation ranging from two to four to six years was enough to show and establish waiver.

Remembering that Yellowfin only ever had IndyMac's rights to begin with, as did any other entity in the disputed chain, and that IndyMac waived its right to sue

[4]Referring to *Tenneco Inc. v. Enterprise Products Co.* 925 S.W.2d 640, 642 (Tex. 1996).

on the Note starting in 2007, the defense has been established against all entities, including Yellowfin for thirteen years. The previous years of waiver were not reset with each alleged transfer of ownership. They were cumulative. Trying to enforce the long waived right to sue on the Note is just another "claim otherwise barred by the applicable statute of limitations [that] cannot be made viable by assignment." *Uddin, supra.*

*Uddin's* proposition that a claim cannot be revived by transfer is impliedly for one that was made based on a valid transfer. An assignee has even less ability to revive a claim where the alleged transfer was defective, as it was here.

## VII. The Summary Judgment Failed to Meet the Requirements in TEX. R. CIV. P. 166a

Yellowfin has no admissible proof of the amount of its alleged claim because it has absolutely no records of any servicing of the loan represented by the Note and its claim on the amount allegedly owed is a naked guess. According to the Affidavit of Matt Miller "The balance owed was calculated by conducting an amortization of the original principal amount of the Note in accordance with the terms prescribed by the Note (ie: an amortization of $53,000.00 over fifteen years with interest accruing at a rate of 9.875%, and a final balloon payment of $43,595.95) then assuming that each and every payment was timely made through June 1, 2019." CR.157, ¶4.

There is no evidence that IndyMac ever provided a payment history for the Note. There is no evidence of an original amortization schedule made by IndyMac. The only financial information in the Bill of Sale is "Original Loan Amount $53,000.00" and "Loan Date 5/20/2005." CR.221.

The evidence does show that the amortization schedule Yellowfin used as Exhibit I in support to the Motion For Final Summary Judgment [CR.232] and Mr. Miller's Affidavit, was generated on December 4, 2019 but not by IndyMac, or Yellowfin, or anyone else in the alleged chain of ownership. There is a footer at the bottom of every page says "Powered by The Mortgage Office™." CR.232-235.

That was more than three months after the August 29, 2019, Mortgage Note Purchase and Sale Agreement [CR.350-353] and Bill of Sale [CR.354] and more than twelve years after the July 3, 2007, foreclosure. CR.206. That entity is not a party to the case and it was not a witness. There is no evidence that it reviewed any actual servicing records of the Note.

The first of the five prongs in the definition of "business record" requires it to be a record that "was made at or near the time by – or from information transmitted by -- someone with knowledge." TEX. R. EVID. 803(6)(A). The amortization schedule does not meet that definition and it is not a business record because it fails all three conditions. It was not generated until twelve years after the 2007 foreclosure, it was

not made by someone with knowledge, and Mr. Miller admitted he did not have knowledge.

The record was also controverted by Ms. Thompson because "the source of information or method or circumstances of preparation indicate a lack of trustworthiness." TEX. R. EVID. 803(b)(E). It is a document generated for litigation. It was only generated to provide the basis for a guess for the amounts demanded in the presuit letters to Ms. Thompson. CR.208, 211, and 214.

As the amount demanded by Yellowfin is admittedly a guess with no foundation. That does not meet the requirements for summary judgment in TEX. R. CIV. P. 166a(c) that include it be based on uncontroverted testimonial evidence.

**VIII. Yellowfin Had No Standing and the Court Had No Jurisdiction**

The Court has a duty to confirm its own jurisdiction and the trials court's. "Subject matter jurisdiction is essential to the authority of a court to decide a case," and "[s]tanding is implicit in the concept of subject matter jurisdiction." Tex. Ass'n of Bus. v. Tex. Air Control Bd., 852 S.W.2d 440, 443 (Tex.1993). "An opinion issued in a case brought by a party without standing is advisory because rather than remedying an actual or imminent harm, the judgment addresses only a hypothetical injury." Id. at 444. We "have no jurisdiction to render such opinions." Id. Courts cannot presume or create standing and jurisdiction, even for equitable reasons." *State*

*v. Naylor*, 466 S.W.3d 783, 796 (Tex. 2015).

As was set out in the Plea To The Jurisdiction [CR.336], that the trial court denied [CR.398], Ms. Thompson contends that Yellowfin did not have standing at the time the case was filed. CR.336.

The Note was a financial obligation but it is not a negotiable instrument because Paragraph 6 included an instruction by the lender, the person ordering payment, imposing an undertaking on the borrower, the person promising payment, in the form of "an express condition to payment" that "When I make a prepayment, I will tell the Note Holder in a letter that I am doing so." CR.346.

That conflicted with the highlighted plain language in TEX. BUS. & COM. CODE §3.104:

> NEGOTIABLE INSTRUMENT. (a) Except as provided in Subsections (c) and (d), **"negotiable instrument" means an unconditional promise or order to pay a fixed amount of money,** (emphasis supplied) with or without interest or other charges described in the promise or order, **if it:** (emphasis supplied)
>
> (1) is payable to bearer or to order at the time it is issued or first comes into possession of a holder;
>
> (2) is payable on demand or at a definite time; **and**
>
> **(3) does not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money**, (emphasis supplied) but the promise or order may contain:

> (A) an undertaking or power to give, maintain, or protect collateral to secure payment;
>
> (B) an authorization or power to the holder to confess judgment or realize on or dispose of collateral; or
>
> (C) a waiver of the benefit of any law intended for the advantage or protection of an obligor.

"Unconditional" is a statutorily defined term in §3.106(a).

> UNCONDITIONAL PROMISE OR ORDER. (a) Except as provided in this section, for the purposes of Section 3.104(a), a promise or order is unconditional unless it states (i) an express condition to payment,...

The clear instruction in the Note that results in requiring an undertaking by the Borrower to "tell the Note Holder in a letter that I am doing so" before making a prepayment destroyed its negotiability because it kept the document from meeting the definition of an "unconditional promise or order" required by §3.104(a).

It further destroyed its being considered as "unconditional" under §3.104(a) because it includes a condition that is precisely one that is prohibited under §3.106(a) – "an express condition to payment."

"The negotiability of an instrument is a question of law." *Guniganti v. Kalvakuntla*, 346 S.W.3d 242, 248 (Tex. App.- Houston [14th Dist.] 2011, no pet.) (citing *FFP Mktg. Co. v. Long Lane Master Trust IV,* 169 S.W.3d 402, 407 (Tex. App.- Fort Worth 2005, no pet.)" ("*FFP*").

The applicable standard for interpreting the words in a statute is their plain meaning. "Our primary objective in construing statutes is to give effect to the Legislature's intent. The plain meaning of the text is the best expression of legislative intent unless a different meaning is apparent from the context or the plain meaning leads to absurd or nonsensical results." *Molinet v. Kimbrell*, 356 S.W.3d 407, 411 (Tex. 2011)( citations omitted).

The plain meaning here is that the Note is not a negotiable instrument. It could have been contractually assigned, but it could not have been negotiated by an indorsement under Chapter 3 TEX. BUS. & COM CODE. The indorsement on the Note itself [CR.165] and the Allonges To The Note [CR.166, 167] supporting the alleged subsequent transfers are irrelevant. They are insufficient as a matter of law to establishing Yellowfin's right to enforce the Note.

"A person not identified in a note who is seeking to enforce it as the owner or holder must prove the transfer by which he acquired the note." *Leavings v. Mills*, 175 S.W.3d 301, 309 (Tex. App. - Houston [1st Dist.] 2004, no pet.). Yellowfin has no such proof that goes back to IndyMac.

"While negotiation or assignment can change ownership of a promissory note, the endorsement of a non-negotiable promissory note does not create a presumption of ownership in the transferee. Thus, to recover on a non-negotiable promissory note,

the holder must establish his status as the instrument's legal owner... A general denial is sufficient to raise the issue of legal ownership and places the burden on the plaintiff to prove his status." *FFP* at 409, citations omitted.

This Original Answer met the *FFP* standard because it contained a general denial in addition to the other more specific objections. CR.29.

The alleged indorsements on the disputed allonges are moot. They are not sufficient to transfer the ownership of a non-negotiable note. Yellowfin has not met its burden of proving a valid chain of contractual assignments of the Note since its inception with IndyMac in 2005. Even if limitations had not expired it has no standing and the Court lacks jurisdiction. The case should have been dismissed as a matter of law.

## PRAYER

Ms. Thompson prays that the Court reverse the decision below and render judgment that Yellowfin has no claim against her based on the Note because it had no proof it owned the Note. Should the Court find Yellowfin had ownership rights in the Note she further prays that the Court find that limitations expired before 2019 and that neither Yellowfin nor any other entity could have ever have standing to enforce the Note after limitations expired, and remand the case for such further proceedings as are appropriate, and for such further relief that she may be entitled to

at law or in equity.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I certify that this Brief complies with TEX. R. APP. P. 9 because it is printed in a minimum of 14 point type and contains 8,525 words.

/s/ Ira Joffe
Ira Joffe

## CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served via the ECF system on June 7, 2021.

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/s/ Ira Joffe
Ira Joffe

## APPENDIX

Page Document

39 Final Summary Judgment signed on December 21, 2020. CR.332-333.

CAUSE NO. 1156055

| | | |
|---|---|---|
| YELLOWFIN LOAN SERVICING CORP., AS SUCCESSOR IN INTEREST TO INDYMAC BANK, F.S.B., *Plaintiff, Counter Defendant* | § | IN COUNTY CIVIL COURT |
| | § | |
| | § | |
| | § | AT LAW NO. 4 |
| | § | |
| | § | |
| vs. | § | |
| | § | |
| LATANYA THOMPSON, *Defendant, Counter Plaintiff* | § | HARRIS COUNTY, TEXAS |

## FINAL SUMMARY JUDGMENT

Upon consideration of Plaintiff's Motion for Summary Judgment, the Court has determined that it has jurisdiction over the subject matter and the parties in this proceeding and, having considered the pleadings and official records on file in this cause, the evidence, and the arguments of the parties and/or their counsel (if any), finds that there is no genuine issue as to any material fact, and that Plaintiff is entitled to judgment as a matter of law. The note on which this cause is based is attached hereto as Exhibit A, and incorporated in this judgment by reference herein.

The Court hereby RENDERS judgment for Plaintiff, Yellowfin Loan Servicing Corp.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Plaintiff, Yellowfin Loan Servicing Corp., recover from Defendant, Latanya Thompson, judgment for the following:

1. $44,333.62 as the accelerated principal amount due under the contract;
2. $3,217.50 in reasonable and necessary attorney's fees for the prosecution of this case through this judgment;
3. All costs of court; and
4. Post-judgment interest on all of the above amounts at the contractual rate of 11.25% compounded annually, from the date this judgment is rendered until all amounts are paid in full;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that if Defendant unsuccessfully appeals this judgment to an intermediate court of appeals, Plaintiff will additionally recover from Defendant the amount of $7,000.00, representing the anticipated reasonable and necessary attorney fees that would be incurred by Plaintiff in defending the appeal.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that if Defendant unsuccessfully appeals this judgment to the Texas Supreme Court, Plaintiff will additionally recover from Defendant the amount of $12,000.00, representing the anticipated reasonable and necessary fees that would be incurred by Plaintiff in defending the appeal.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendant, Latanya Thompson, take nothing by way of her counterclaims.

This judgment disposes of all claims and all parties, is a final judgment, and is appealable. All relief not expressly granted in this judgment is denied.

It is further ORDERED, ADJUDGED, and DECREED that execution and such other writs or process as are necessary to enforce this judgment immediately issue.

SIGNED on _____, 2020

.

JUDGE PRESIDING

Judge Lesley Briones

Signed on: December 21, 2020

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County Clerk
Harris County, Texas
ashapiro

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