

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CHERIE FOUNTAINE, *et al.*,

plaintiffs,

v.

U.S. BANK NATIONAL ASSOCIATION,
as indenture trustee for TOWD Point
Mortgage Trust 2019-4,

defendant.

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Case 4:23-cv-801

U.S. BANK'S MOTION FOR SUMMARY JUDGMENT

U.S. Bank National Association, as indenture trustee for TOWD Point Mortgage Trust 2019-4 (**U.S. Bank**), moves for summary judgment on plaintiffs' claims as follows:

I. SUMMARY

1. Plaintiffs' claims are legally and factually unsupported. They seek a judgment declaring U.S. Bank's "deed of trust is fully satisfied and is no longer an encumbrance on the property." When Cherie Fountaine and Hailey King purchased the subject property in December 2021, U.S. Bank's deed of trust was an existing lien against the property securing a loan of more than \$226,000. The title company closing the transaction, Maverick Title of Texas dba Texas Title wired U.S. Bank about \$189,000, more than \$36,000 short of a full payoff. Plaintiffs claim the short payment was based on a payoff statement Texas Title received on the letterhead of U.S. Bank's servicer, Select Portfolio Servicing, Inc. (SPS). The payoff statement was a forgery and was not provided to Texas Title by SPS. Texas Title even admits it did not request or receive the forged payoff statement from SPS in the manner required by law. U.S. Bank is not required to release its deed of trust based on a forged payoff statement SPS did not provide to Texas Title.

II. BACKGROUND

A. U.S. Bank's loan to Mr. Del Rosario secured by a deed of trust.

2. On August 24, 2006, Efrehem Del Rosario borrowed \$200,000 to purchase the property at 26814 Glenfield Hollow Lane, Cypress, Texas 77433. (Simon decl. at ¶ 6 (appx. 003-004), **ex. A**; deed (appx. 009), **ex. A-1**; note (appx. 013), **ex. A-2**.)¹ He executed a note promising to repay the loan, plus interest, and, together with Maricris Del Rosario, a deed of trust granting a lien against the property to secure repayment of the note. (Simon decl. at ¶ 6 (appx. 003-004), **ex. A**; note (appx. 013), **ex. A-2**; deed of trust (appx. 017), **ex. A-3**.)

3. The loan was modified twice, in 2008 and 2016. (Simon decl. at ¶ 7 (appx. 004), **ex. A**; 2008 mod. agrt. (appx. 037), **ex. A-4**; 2016 loan mod. agrt. (appx. 039), **ex. A-5**.) The 2016 modification stipulated the unpaid principal balance as of August 1, 2016 was \$190,753.94 and would accrue interest at 6.125%. (2016 loan mod. agrt. at ¶ 1 (appx. 039), **ex. A-5**.) Mr. Del Rosario was required to make monthly principal and interest payments of \$1,066.22, as well as escrow for property taxes and insurance premiums, beginning August 1, 2016 and continuing on the first day of each month thereafter until July 1, 2056. (*Id.* at ¶¶ 2-3 (appx. 039), **ex. A-5**.) Except as expressly modified, all other terms of the note and deed of trust remained in full force and effect. (*Id.* at ¶ 6(c) (appx. 040-041), **ex. A-5**.)

4. The deed of trust is assigned of record to U.S. Bank. (Simon decl. at ¶ 8 (appx. 004), **ex. A**; assigns. (appx. 045), **ex. A-6**.) SPS has serviced the loan since October 31, 2019. (Simon decl. at ¶ 8 (appx. 004), **ex. A**.)

¹ To the extent necessary, U.S. Bank requests the court take judicial notice of all publicly-recorded documents. *Sanders v. Univ. of Tex. Pan Am.*, 776 Fed. App'x 835, 837 (5th Cir. 2019) ("It is well settled that courts may take judicial notice of matters of public record.")

B. Ms. Fountaine and Ms. King acquire the property; JJP Capital acquires a lien.

5. The Del Rosarios conveyed the property to Brandan Schild by separate deeds, the second of which was executed November 1, 2021. (McKleroy decl. at ¶ 3 (appx. 114-115), **ex. B**; Mr. Del Rosario deed (appx. 118), **ex. B-1**; Ms. Del Rosario deed (appx. 122), **ex. B-2**) On November 16, 2021, Mr. Schild entered into a contract to sell the property to JJP Capital for \$400,000. (McKleroy decl. at ¶ 5 (appx. 115), **ex. B**; contract at Texas Title 0049-0062 (appx. 188-194), **ex. B-4**.) JJP Capital assigned the contract to Ms. Fountaine and Ms. King and agreed to provide a loan for Ms. Fountaine and Ms. King to purchase the property from Mr. Schild. (assignment at Texas Title 0001-0007 (appx. 164-167), **ex. B-4**.)

6. Texas Title was the title company which closed the transaction on December 15, 2021. (May 1, 2023 transcript at 54:22-57:15 (appx. 292-295), **ex. C**.) After the transaction closed, Mr. Schild executed a deed conveying the property to Ms. Fountaine and Ms. King, and Ms. Fountaine and Ms. King executed a deed of trust granting JJP Capital a lien against the property. (McKleroy decl. at ¶ 3 (appx. 114-115), **ex. B**; deed (appx. 268), **ex. B-5**; deed of trust (appx. 275), **ex. B-6**.)

C. Status of loan when plaintiffs acquire their interest in the property.

7. The loan was current when SPS began servicing it. (Simon decl. at ¶ 9 (appx. 004), **ex. A**; pay. hist. at U.S. Bank 0484 (appx. 085), **ex. A-7**.) It was then paid through August 31, 2020 (due for September 1, 2020 payment). (Simon decl. at ¶ 9 (appx. 004), **ex. A**; pay. hist. at U.S. Bank 0483 (appx. 084), **ex. A-7**.) From September 1, 2020 through December 15, 2021, no valid payments were made on the loan; every attempted payment made on the loan during this period was returned for insufficient funds. (Simon decl. at ¶ 9 (appx. 004), **ex. A**; pay. hist. at U.S. Bank 0463-0483 (appx. 064-084), **ex. A-7**.)

8. On November 22, 2021, a \$32,236.29 payment was made on the loan. (Simon decl. at ¶ 10 (appx. 004), **ex. A**; pay. hist. at U.S. Bank 0468 (appx. 069), **ex. A-7**; loan notes at U.S. Bank 0386 (appx. 089), **ex. A-8**.) The \$32,236.29 payment was applied to the loan to bring it due for November 1, 2021. (Simon decl. at ¶ 10 (appx. 004), **ex. A**; pay. hist. at U.S. Bank 0468 (appx. 069), **ex. A-7**.) On November 29, 2021, the \$32,236.29 payment was returned for insufficient funds, it was reversed from the loan and the loan remained due for the September 1, 2020 payment. (Simon decl. at ¶ 10 (appx. 004), **ex. A**; pay. hist. at U.S. Bank 0467 (appx. 068), **ex. A-7**; loan notes at U.S. Bank 0384-0385 (appx. 087-088), **ex. A-8**.)

9. After the \$32,236.29 payment was applied, but before it was reversed, SPS generated a November 22, 2021 loan payoff statement and sent it to Mr. Del Rosario at 17515 Spring Cypress Road, Cypress, Texas 77429. (Simon decl. at ¶ 11 (appx. 004-005), **ex. A**; Nov. 22 payoff stmt. (appx. 091), **ex. A-9**.) The November 22 payoff statement reflects the status of the loan after the application of the \$32,236.29 payment and before it was reversed on November 29, 2021. (Simon decl. at ¶ 11 (appx. 004-005), **ex. A**; pay. hist. at U.S. Bank 0467-0468 (appx. 068-069), **ex. A-7**; Nov. 22 payoff stmt. (appx. 091), **ex. A-9**.)

10. Texas Title admits it neither requested nor received the November 22 payoff statement from SPS—Texas Title claims it received the November 22 payoff statement "via e-mail from the seller [Mr. Schild]." (May 1, 2023 transcript at 62:1-62:13 (appx. 296), **ex. C**.)

11. SPS also generated a November 24, 2021 "superseding" loan payoff statement and also sent it to Mr. Del Rosario at 17515 Spring Cypress Road, Cypress, Texas 77429. (Simon decl. at ¶ 12 (appx. 005), **ex. A**; Nov. 24 payoff stmt. (appx. 097), **ex. A-10**.) The November 24 superseding payoff statement also reflects the status of the loan after the application of the \$32,236.29 payment and before it was reversed on November 29, 2021. (Simon decl. at ¶ 12

(appx. 005), **ex. A**; pay. hist. at U.S. Bank 0467-0468 (appx. 068-069), **ex. A-7**; Nov. 24 payoff stmt. (appx. 097), **ex. A-10**.)

12. SPS did not receive a payment from Texas Title or anyone else for the payoff amounts stated in the November 22 or November 24 payoff statements. (Simon decl. at ¶ 13 (appx. 005), **ex. A**.)

D. Texas Title relies on forged payoff statement not requested or received from SPS.

13. On December 15, 2021, SPS generated a December 15, 2021 loan payoff statement (**legitimate December 15 payoff statement**) and sent it to Mr. Del Rosario via facsimile number 800-878-5776. (Simon decl. at ¶ 14 (appx. 005), **ex. A**; legitimate Dec. 15 payoff stmt. (appx. 103), **ex. A-11**.) The \$226,733.41 payoff amount stated in the legitimate December 15 payoff statement was the true amount due on the loan. (Simon decl. at ¶ 14 (appx. 005), **ex. A**; legitimate Dec. 15 payoff stmt. (appx. 103), **ex. A-11**.)

14. According to plaintiffs, Texas Title received a December 15, 2021 payoff statement which reflected a payoff in the amount of \$189,959.46 (**forged December 15 payoff statement**). (orig. pet. at ¶ 9 & ex. C, dkt. 1-2; May 1, 2023 transcript at 63:6-63:13 (appx. 297), **ex. C**; forged Dec. 15 payoff stmt. (appx. 306), **ex. D**.) The forged December 15 payoff statement was not generated by SPS, was not provided by SPS to Texas Title or anyone else and the payoff amount stated was not the true amount due on the loan. (Simon decl. at ¶ 15 (appx. 005), **ex. A**; forged Dec. 15 payoff stmt. (appx. 306), **ex. D**.)

15. Texas Title admits it did not request the forged December 15 payoff statement from SPS by mail, email or facsimile and did not receive it from SPS by mail or email. (May 1, 2023 transcript at 68:23-69:10 (appx. 299-300), **ex. C**.) The facsimile line at the top of each page of the forged December 15 payoff statement show it was transmitted by facsimile number

"18008785776" to Texas Title's facsimile number 18322244325. (forged Dec. 15 payoff stmt. (appx. 306), **ex. D.**)

16. 1-800-878-5776 is not a telephone or facsimile number which has ever been owned by, used by or associated with SPS. (Simon decl. at ¶ 16 (appx. 005-006), **ex. A.**)

17. According to plaintiffs and Texas Title, Texas Title relied on the forged December 15, 2021 payoff statement and wired \$189,959.46 to SPS on December 16, 2021. (orig. pet. at ¶ 9 & **ex. C**, dkt. 1-2; May 1, 2023 transcript at 63:6-64:17 (appx. 297-298), **ex. C.**)

E. Payment applied to bring loan current and reduce the unpaid principal balance.

18. On December 16, 2021, SPS received a telephone call from a man identifying himself as Mr. Del Rosario. (Simon decl. at ¶ 17 (appx. 006), **ex. A**; Dec. 16, 2021 recording (appx. 108), **ex. A-12.**) The man explained that he "sold a property so I had the title company just wire in a huge chunk of money to you guys for payment. I just wanted to make sure you got the wire or if you show it that way you could put it on the account." (Dec. 16, 2021 recording (appx. 108), **ex. A-12.**) After SPS advised the account did not yet reflect the payment, the man requested SPS put a note in its system to reflect that "you spoke to me and that a, let's just put the whole; if we could put like, I don't know, maybe like \$160,000 towards principal and the rest towards payments cause I think it was a total of like \$189,000." (*Id.* (appx. 108), **ex. A-12.**) SPS asked if this was a payoff and the man responded "no, no, no, no. I sold another property and I just wanted to use all the money to pay this down." (*Id.* (appx. 108), **ex. A-12.**)

19. What appears to be the same person called SPS back the following Monday, December 20, 2021. (Simon decl. at ¶ 18 (appx. 006), **ex. A**; first Dec. 20, 2021 recording (appx.

110), **ex. A-13.**) SPS advised the man it received payoff proceeds from Texas Title² but the funds "were short \$36,008.42." (first Dec. 20, 2021 recording (appx. 110), **ex. A-13.**) The man responded "no, no, no, no, no. Its not a, its not a payoff. I just wanted to wire in money to get my house out of foreclosure, so that's not a payoff." (*Id.* (appx. 110), **ex. A-13.**)

20. The call dropped and the same person called SPS again and spoke to a different representative. (Simon decl. at ¶ 19 (appx. 006), **ex. A;** second Dec. 20, 2021 recording (appx. 112), **ex. A-14.**) SPS asked if the prior representative made him aware the payoff funds being short and the man responded "yeah, see that's the problem, that's not a payoff. I sold one of my other properties and I had the title company wire in all my proceeds to this account but I'm not trying to pay it off." (second Dec. 20, 2021 recording (appx. 112), **ex. A-14.**) He requested the funds be applied to bring the past due payments and escrow current, \$120,000 of the remaining applied to principal and the remaining \$10,000 or so be applied to future payments. (*Id.* (appx. 112), **ex. A-14.**)

21. SPS applied the funds to the loan resulting in an unpaid principal balance of \$39,730.35 and a due date of March 1, 2022. (Simon decl. at ¶ 20 (appx. 007), **ex. A;** pay. hist. at U.S. Bank 0463-0465 (appx. 064-066), **ex. A-7.**) Following the application of these funds, no valid payments have been made on the loan; any attempt to make payment on the loan after applying the funds were returned for insufficient funds. (Simon decl. at ¶ 20 (appx. 007), **ex. A;** pay. hist. at U.S. Bank 0462-0463 (appx. 063-064), **ex. A-7.**)

² SPS stated Maverick Title of Texas in the phone call. Texas Title is a dba of Maverick Title of Texas. (Texas Title 0176 (appx. 252), **ex. B-4.**)

F. Plaintiffs make claim to Texas Title pursuant to title insurance policy.

22. When Ms. Fountaine and Ms. King purchased the property, they purchased title insurance. (May 1, 2023 transcript at 75:23-75:25 (appx. 301), ex. C.) When they discovered U.S. Bank still had a lien against the property, they made a claim to their title insurer. (*Id.* at 76:19-76:22 (appx. 302), ex. C.) The title insurer assigned plaintiffs with counsel and they filed suit against U.S. Bank. (*Id.* at 76:23-76:25 (appx. 302), ex. C.)

G. Plaintiffs claim U.S. Bank's loan was fully satisfied by insufficient payment.

23. Plaintiffs sued U.S. Bank for a judgment declaring its deed of trust "is fully satisfied and no longer an encumbrance on the property" and to enjoin it "from directly or indirectly selling or attempting to sell the property under the power of sale contained in" its deed of trust." (orig. pet. at prayer.) Plaintiffs do not allege the loan secured by U.S. Bank's deed of trust was actually paid in full, but claim they are entitled to rely upon the forged December 15 payoff statement:

On December 15, 2021, the title company received an updated payoff which was good until December 31, 2021 ("Second Payoff Statement.") A true and correct the [*sic*] Second Payoff Statement is attached as Exhibit C. The stated payoff in the second payoff statement was \$189,859.46. On December 15, 2021, the transaction closed. The transaction was funded the following day on December 16, 2021. On that date, the title company wired \$189,859.46 to defendant's loan servicer pursuant to the Second Payoff Statement.

(orig. pet. at ¶ 9 & ex. C, dkt. 1-2.)

III. ARGUMENTS & AUTHORITIES

A. Summary judgment standard.

24. Summary judgment is proper when the pleadings and evidence show no genuine issue of material fact exists, and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. Summary judgment is particularly appropriate when the questions to be decided are issues of law. *Bumstead v. Jasper Cty.*, 931 F. Supp. 1323, 1328 (E.D. Tex. 1996). After the

movant carries its burden to identify issues where there is no genuine issue of material fact, the non-moving party must produce evidence upon which a jury could reasonably base a verdict in its favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). If the nonmoving party bears the burden of proof at trial, the moving party need only point to the absence of any evidence in the record, and the evidentiary burden shifts to the non-moving party to show with "significant probative" evidence a triable issue of fact exists. *Id.* at 256; *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986) ("the burden on the moving party may be discharged by 'showing'—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case.") It does not need to negate the elements of the nonmovant's case. *Boudreaux v. Swift Transp. Co.*, 402 F.3d 536, 540 (5th Cir. 2005) (citation omitted).

25. To "avoid a summary judgment, the nonmoving party must adduce admissible evidence which creates a fact issue concerning the existence of every essential component of that party's case." *Thomas v. Price*, 975 F.2d 231, 235 (5th Cir. 1992). "[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson*, 477 U.S. at 249. Evidence that "is merely colorable, or is not significantly probative," is not "sufficient evidence" to prevent summary judgment. *Id.* (internal citations omitted); *see also Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) ("summary judgment is appropriate in any case where critical evidence is so weak or tenuous on an essential fact that it could not support a judgment in favor of the nonmovant." (internal quotations omitted)).

B. No evidence U.S. Bank's loan was fully satisfied or its lien is unenforceable.

(i) The total amount due on U.S. Bank's loan was not fully paid.

26. Plaintiffs seek a declaration that U.S. Bank's "deed of trust . . . is fully satisfied and is no longer an encumbrance on the property," but do not allege any facts suggesting they paid the

\$226,733.41 owed on U.S. Bank's loan as of December 16, 2021. (Simon decl. at ¶ 14 (appx. 005), **ex. A**; legitimate Dec. 15 payoff stmt. (appx. 103), **ex. A-11**.) They admit Texas Title only wired \$189,959.46. (orig. pet. at ¶ 9 & **ex. C**, dkt. 1-2; May 1, 2023 transcript at 63:6-64:17 (appx. 297-298), **ex. C**.)

27. A mortgagee is only required to release its lien after it "receives the correct payoff amount for a home loan from a mortgagor." Tex. Fin. Code § 343.108(b) Any agreement by U.S. Bank or SPS to discharge the debt and/or release the deed of trust for anything less than the full amount due would have to be in writing and signed by the parties to be enforceable. *McEvoy v. Select Portfolio Servicing, Inc.*, No. 3:16-CV-2296-B, 2017 U.S. Dist. LEXIS 77118, at *6 (N.D. Tex. May 22, 2017) (collecting cases). Plaintiffs have not alleged, or presented evidence, any such agreement exists. Because the uncontroverted evidence shows the amount owed was \$226,733.41 and plaintiffs only paid \$189,959.46, and because there is no evidence U.S. Bank or SPS agreed to accept the lesser amount, U.S. Bank is entitled to summary judgment on this claim. *Celotex Corp.*, *supra*, 477 U.S. at 325 ("the [summary judgment] burden on the moving party may be discharged by "showing"—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case.")

(ii) **U.S. Bank not required to release its deed of trust because of forged payoff.**

28. Plaintiffs instead appear to contend U.S. Bank is required to release its deed of trust even if it was owed \$226,733.41 because Texas Title relied on the forged December 15, 2021 payoff statement when it wired the \$189,959.46. This theory also fails as a matter of law. A mortgagee may only be compelled to release its deed of trust after receiving payment from a title company based on an incorrect payoff statement if the title company requested and received the incorrect payoff statement from the mortgage servicer in compliance with Texas Finance Code

section 343.106 and its implementing rules at Title 7, Texas Administrative Code chapter 155.³ Tex. Fin. Code § 343.106(g).

29. This claim fails because it is undisputed Texas Title did not receive the forged December 15 payoff statement from SPS. (Simon decl. at ¶ 15 (appx. 005), **ex. A.**) The only payoff statement SPS generated for this loan on December 15, 2021 was the legitimate December 15 payoff statement sent to Mr. Del Rosario via facsimile number 800-878-5776. (Simon decl. at ¶ 14 (appx. 005), **ex. A**; legitimate Dec. 15 payoff stmt. (appx. 103), **ex. A-11.**) The forged payoff statement was then faxed to Texas Title from that same facsimile number. (forged Dec. 15 payoff stmt. (appx. 306), **ex. D.**) That facsimile number is not a telephone or facsimile number which has ever been owned by, used by, or associated with SPS. (Simon decl. at ¶ 16 (appx. 005-006), **ex. A.**) There is no evidence to the contrary.

30. Even if SPS had faxed the forged December 15 payoff statement to Texas Title, U.S. Bank would still not be compelled to release its deed of trust because Texas Title did not request or receive the forged December 15 payoff statement in compliance with the statute and rules governing payoff statements. Texas Finance Code section 343.106 requires the finance commission to "adopt rules governing requests by title insurance companies for payoff information from mortgage servicers related to home loans and the provision of that information, including

³ Without any authority, plaintiffs contend "Texas Administrative Code chapter 155 is irrelevant . . . as the applicable standards are fully set forth in the statute." (reply br. at ¶ 10, dkt. 13.) This is plainly incorrect. Finance Code section 343.106(b) expressly requires the finance commission adopt rules for requesting and receiving payoff statements because they are not "fully set forth" in the statute. Compare Tex. Fin. Code § 343.106 with Title 7, Tex. Admin. Code § 155.2. "Valid agency rules and regulations, promulgated within the agency's authority, have the force and effect of law." *Kinnard v. Homann*, 750 S.W.2d 30, 31 (Tex. App.—Austin 1988, writ denied) (citing *Lewis v. Jacksonville Bldg. & Loan Ass'n*, 540 S.W.2d 307, 310 (Tex. 1976)). The Texas Administrative Code is the official compilation of those agency rules. Tex. Gov't Code ch. 2002.

rules prescribing a standard payoff statement form that must be used by mortgage servicers to provide those payoff statements." Tex. Fin. Code § 343.106(b). "In adopting [those rules], the finance commission shall require a mortgage servicer who receives a request for a payoff statement with respect to a home loan from a title insurance company to deliver the requested payoff statement on the prescribed form within a time specified by finance commission rule, which must allow the mortgage servicer at least seven business days after the date the request is received to deliver the payoff statement." *Id.* at § 343.106(c).

31. A title company's request for a payoff statement "shall be in writing and submitted to the mortgage servicer by mail, email, or fax." Title 7, Tex. Admin. Code § 155.2(a). "Requests for a payoff statement shall, at a minimum, include the following (1) name of the mortgagor, (2) physical address of the underlying collateral of the loan, or a legal description of the property, and (3) proposed closing date of the loan." *Id.* "Upon receipt of a valid request made under subsection (a) of this section, a mortgage servicer shall provide, in writing, by mail or email, the payoff statement information for the home loan specified in the request which must be provided on the prescribed payoff statement form [] or in a substantially similar format which contains all elements not indicated as optional on the prescribed payoff statement form." *Id.* at § 155.2(b).

32. Subject to certain exceptions, "if the mortgage servicer provides a completed payoff statement form that meets the requirements of this section and rules adopted under this section in response to a request for a payoff statement, the mortgage servicer or mortgagee may not, on or before the proposed closing date, demand that a mortgagor pay an amount in excess of the payoff amount specified in the payoff statement." *Id.* at § 343.106(e). "If a mortgage servicer submits an incorrect payoff statement to a title insurance company that results in the mortgage servicer requesting an amount that is less than the correct payoff amount, the mortgage servicer or

mortgagee does not deliver a corrected payoff statement in accordance with subsection (f), and the mortgage servicer receives payment in the amount specified in the payoff statement, the difference between the amount included in the payoff statement and the correct payoff amount (1) remains a liability of the former mortgagor owed to the mortgagee, and (2) if the payoff statement is in connection with (A) the sale of the real property, (i) the deed of trust or other contract lien securing an interest in the property is released." *Id.* at § 343.106(g).

33. In summary, the law requires U.S. Bank to release its lien, even if the payoff is incorrect, if and only if Texas Title requested the payoff statement from SPS "in writing and submitted to the mortgage servicer by mail, email, or fax" and received it from SPS "by mail or email." Texas Title admits it did not comply with either requirement when it obtained the forged December 15 payoff statement from someone other than SPS. (May 1, 2023 transcript at 68:23-69:10 (appx. 299-300), **ex. C**) ("Q. Ms. Thompson, can you turn to plaintiff's exhibit 2. Did you request this payoff statement from Select Portfolio in writing by mail, e-mail or fax? . . . A. No. Q. Did you receive this payoff statement from Select Portfolio by mail or e-mail? A. No.")

34. Because it is undisputed Texas Title did not request or receive the forged December 15, 2021 payoff statement from SPS in accordance with Texas Finance Code section 343.106 and Title 7, Texas Administrative Code section 155, there is no genuine issue of material fact that U.S. Bank is not required to release its deed of trust after receiving less than the total amount due on the loan. U.S. Bank is entitled to summary judgment on this claim as a matter of law.⁴

⁴ Although not pleaded, plaintiffs appear to also want to argue Texas Title relied on the November 22 payoff statement. This argument fares no better as Texas Title admits it neither requested nor receive the November 22 payoff statement from SPS at all. (May 1, 2023 transcript at 62:1-62:13 (appx. 296), **ex. C**) ("Q. Tell us what we see here on exhibit 1. A. A written payoff statement from SPS dated November 22nd, 2021 . . . Q. Did you request this payoff statement? A. No. Q. How did you receive this payoff statement? A. I received this via e-mail from the seller [Mr. Schild].") The November 22 payoff statement is further irrelevant because plaintiffs admitted in

IV. CONCLUSION

U.S. Bank has a valid and enforceable deed of trust against the property. When plaintiffs purchased the property, U.S. Bank was owed more than \$226,000 but was only paid just over \$189,000. There is no evidence of any agreement by U.S. Bank or SPS to release the deed of trust for less than what was due. Nor can plaintiffs rely on the forged December 15 payoff statement that Texas Title obtained from someone other than SPS. U.S. Bank is not responsible for Texas Title's failure to properly do its job. If plaintiffs have a claim, it is against Texas Title or their title insurer, not U.S. Bank. U.S. Bank is entitled to summary judgment on plaintiffs' claims.

Date: October 5, 2023

Respectfully submitted,

/s/ Michael J. McKleroy

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ATTORNEYS FOR U.S. BANK

their petition and at the May 1, 2023 preliminary injunction hearing that Texas Title's payment was based on the forged December 15 payoff statement. (orig. pet. at ¶ 9 & ex. C, dkt. 1-2; May 1, 2023 transcript at 26:1-26:24, 31:3-31:7 (appx. 290-291), ex. C) ("THE COURT . . . from the plaintiff's perspective, on the table at closing was the second December the 15th statement and that is what the payoff was based upon; correct? MR. KELLER: Correct, Your Honor.")

CERTIFICATE OF SERVICE

A true and correct copy of this document was served on October 5, 2023 as follows:

Michael E. Keller
The Keller Firm
5540 Harvest Hill Road, Suite 233
Dallas, Texas 75230
VIA CM/ECF SYSTEM

/s/ Michael J. McKleroy, Jr.
Michael J. McKleroy, Jr.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CHERIE FOUNTAINE, *et al.*,

plaintiffs,

v.

U.S. BANK NATIONAL ASSOCIATION,
as indenture trustee for TOWD Point
Mortgage Trust 2019-4,

defendant.

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Case 4:23-cv-801

ORDER GRANTING U.S. BANK'S MOTION FOR SUMMARY JUDGMENT

On this day came on to be heard U.S. Bank's motion for summary judgment. Upon consideration of U.S. Bank's motion, any timely response thereto, the arguments of counsel and applicable law, this court finds the motion should be GRANTED.

IT IS THEREFORE ORDERED, ADJUDGED and DECREED that U.S. Bank's motion for summary judgment is granted and plaintiffs' claims are dismissed with prejudice.

This judgment disposes of all claims against all parties and is a final judgment for all purposes, including appeal.

Dated: _____, 2023.

ALFRED H. BENNETT
UNITED STATES DISTRICT JUDGE