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IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

Joanna Burke Plaintiff vs. Deutsche Bank National Trust Company, PHH Mortgage Corporation, AVT Title Services, LLC, Mackie Wolf Zientz & Mann, PC, Judge Tami Craft aka Judge Tamika Craft-Demming, Judge Elaine Palmer, Sashagaye Prince, Mark D Hopkins, Shelley L Hopkins, Hopkins Law, PLLC, John Doe, and/or Jane Doe Defendants	**CIVIL ACTION No. 4:24-cv-00897**

VERIFIED MOTION TO STRIKE DEFENDANTS RESPONSE TO PLAINTIFF'S RULE 59(e) MOTION

On Friday, May 2, 2025, at 14:35 hrs., Defendants through counsel Mark Hopkins and Shelley Hopkins of Hopkins Law, PLLC, filed a response to Plaintiff's motion. This filing continues a pattern of blatantly false assertions, ad hominem attacks, and unsupported allegations, which serve no purpose other than to unfairly prejudice the Plaintiff and mislead the Court.

This includes the false claim that Plaintiff ceased making payments on the loan, when in fact the lender was returning checks and refusing to accept payments to allow initiation of nonjudicial foreclosure by fraud and deception. This was a well-known "2008" lender tactic, and which has been discussed in a case involving Deutsche Bank during oral arguments at the Fifth

Circuit. See; Judge Owen "I have seen at least 50 of these claims…" – Oral argument audio (starts at 19.52); https://www.ca5.uscourts.gov/OralArgRecordings/15/15-41372_6-8-2016.mp3, - but inexplicably excluded from consideration in the final, curt opinion in *Diaz v. Deutsche Bank Nat'l Trust Co.,* 15-41372, **July 6, 2016**. Interestingly, this coincided with the timeline between the first 5th Circuit opinion in *Deutsche Bank v Burke*, 15-20201 (**June 9, 2016**, unpub.), and the amended opinion correcting Judge Higginson's error in naming Deutsche Bank as the mortgage servicer on **July 19, 2016**).

Confirmation of Defendants untruths are seared into the record: Hon. Stephen Wm. Smith's Findings of Fact and Conclusions of Law which rejected Deutsche Bank in favor of the Burkes as detailed in Dkt 76, March 13, 2015 in the *Deutsche Bank v. Burke* proceedings (4:11-cv-01658) stating at 18 "The Burkes made payments on the note through December 2009; the last time they attempted payment, the bank returned their check to them. (Tr. 37-38, 60-62)", and prior to this; "On June 15, 2009, plaintiff Joanna Burke filed a lawsuit in Harris County small claims court complaining about the conduct of IndyMac Federal", supporting the Burkes vigorous attempts to legally address Indymac's abuses at the earliest opportunity as unacceptable.

This should not be confused with the $1,000,000 Deutsche Bank (and counsel Mark Cronenwett) case where the loan was extinguished entirely as time-barred (EXHIBIT 2), as recorded on Aug. 10, 2016, despite the homeowners only making six mortgage payments. See; *Deutsche Bank National Trust Company v. Ketmayura* (1:14-cv-00931), District Court, W.D. Texas, Oct. 9, 2014.

Nor should these proceedings be confused with *Powell v. Cit Bank, N.A*., No. 14-15-00949-CV (Tex. App. June 8, 2017), where a stranger to the note and property, Amy Powell was granted

a "free home" valued at $800k by the Texas judiciary. As a non-borrower on a reverse mortgage originated by Freedom Mortgage, which Indymac owned, Amy Powell has been officially recognized as the owner of a property by Texas courts, which ruled the mortgage claim as time-barred. The loan was extinguished and the quantum meriut claim by the lender (CIT) was ultimately rejected, with over $83,000 in taxes and insurance costs also deemed irrecoverable (EXHIBIT 3).

Dispositively, Defendants fail to address why they wished to settle this long-term dispute by extinguishing the fraudulent and predatory mortgage loan in an offer transmitted by counsel for Defendants in 2023, whilst Plaintiff was – in part - litigating in Minnesota to obtain the 'missing' mortgage loan file. Clearly there is no loan paperwork, or it would have been presented by Defendants. Plaintiff makes this statement after witnessing Defendants and their attorneys unrelenting fraud on the court, deception, and lies – it is all on the record and either admitted by Defendants, or undisputed.

Relatedly, Wells Fargo has just extinguished a predatory financial crisis loan and eviction proceedings after intervention by news media. See; ""Pick-a-pay" mortgage left Massachusetts couple on brink of foreclosure. I-Team's Call For Action saved them." CBS News, May 2, 2025, https://www.cbsnews.com/amp/boston/news/lynn-home-foreclosure-iteam-call-for-action/ (EXHIBIT 1) and which involves both 2008 financial crisis predatory loans and the elderly, who were prosecuted instead of receiving relief from the billions in settlements, stolen by States and deposited into their general funds. See; LawsinUS, https://lawsin.us/video/the-national-mortgage-settlement-funds-were-stolen-by-your-state-government/, last visited May 3, 2025.

LEGAL STANDARD

Rule 8 requires that pleadings in federal court set forth "a short and plain statement of the claim showing that the pleader is entitled to relief..." Fed. R. Civ. P. 8(a)(2). Rule 12(f) correspondingly authorizes a court to strike pleadings that are "redundant, immaterial, impertinent, or scandalous." Fed. R. Civ. P. 12(f). See also, *In re Beef Indus. Antitrust Litig.,* 600 F.2d 1148, 1168 (5th Cir. 1979) (court possesses "ample discretion . . . to order stricken from the complaint any redundant or immaterial matter.").

The essential function of a Rule 12(f) motion is to "avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial." *Doe I v. Roman Catholic Diocese*, No. H-05-1047, 2006 U.S. Dist. LEXIS 58347, at *6 (S.D. Tex. Aug. 18, 2006) (quotations omitted).

"Immaterial" matter is defined as that which has "no essential or important relationship to the claim for relief or the defenses being pleaded." *Marceaux v. Lafayette Consol. Gov't*, No. 6:12-CV-01532, 2012 U.S. Dist. LEXIS 150922, at *4 (W.D. La. Oct. 18, 2012). Immateriality may be established by showing that the challenged assertions "have no possible bearing upon the subject matter of the litigation." *Bayou Fleet P'ship, LLC v. St. Charles Parish*, No. 10-1557, 2011 U.S. Dist. LEXIS 73867, at *16 (E.D. La. Jul. 8, 2011) (citations omitted).

"Impertinent" matter consists of "statements that do not pertain, and are not necessary, to the issues in question." *Marceaux,* 2012 U.S. Dist. LEXIS 150922, at *4.

Lastly, "scandalous" matter is that which "improperly casts a derogatory light on someone, most typically on a party to the action." Id. at *4.

Additionally, see; LR11.4 "Sanctions. A paper that does not conform to the local or federal

rules or that is otherwise objectionable may be struck on the motion of a party or by the Court."

ARGUMENT

The Defendants Bare and Conclusory Assertions Have No Support in Law

In summarizing the response, which is padded with legal citations rather than substantive arguments, can be whittled down to a few bare and conclusory assertions. The remaining arguments not already discussed above, include; at 4., "Plaintiff's arguments are not new and are not based upon manifest errors of law or fact or newly-discovered evidence."; at 6., "No manifest error of law or fact exists within the Court's grant of PHH's Motion for Summary Judgment, or its issuance of a Preclusion Order" (repeated at 8.); at 7., "PHH has a valid judgment for foreclosure...Plaintiff's motion presents no new evidence or error of law or fact that has not been addressed by this Court.".

Defendants Were 7-Year Court Losers

For seven years, the Defendants were federal court losers, only an erroneous Erie guess and failure by the Fifth Circuit to follow the law, binding precedent and rule of orderliness has propelled this litigation to where we unfortunately find ourselves today.

These statements would be presented in Hon. Smith's 2017 opinion and supported by legal titans including Steve Berman and Constance "Connie" Pfeiffer, wherein he concluded; ""Respectfully, this court concludes that the panel decision regarding the validity of the 2011 assignment is clearly erroneous. It contradicts binding authority from the Texas Supreme Court in violation of Erie, and disregards previous Fifth Circuit decisions, in violation of the circuit's rule of orderliness. The court further concludes that the panel opinion would work a manifest injustice to the Burkes and other Texas homeowners.".

Defendants Obstruction of Justice: Withholding a Mortgage File With No Loan Papers

As stated in the Plaintiff's motion, this baseless litigation should have ended in Judge Hughes court in 2011 when counsel at Akerman failed to present the correct mortgage paperwork. ("The Plaintiff has repeatedly highlighted how this litigation should have ended in 2011 before Judge Lynn Hughes, who initially retained the Burkes' case after admonishing Deutsche Bank's counsel for lacking the necessary paperwork to foreclose.").

As known and admitted by opposing counsel, Mark Hopkins maliciously and intentionally withheld the loan file in his possession "I've had the benefit of reviewing that closing file, which wasn't put in evidence before the court because the allegations were raised by the Burkes", which interpreted is an admission that there is no loan paperwork.

21 income. I've had the benefit of reviewing that closing
22 file, which wasn't put in evidence before the Court
23 because the allegations were raised by the Burkes. But

Jan 27, 2017: Status Conference (NO. H-11-CV-1658).

"Unlawful" obstruction or concealment in general. Rule 3.04(a) of the Texas Disciplinary Rules of Professional Conduct prohibits the unlawful obstruction, concealment, alteration or destruction of evidence. Rule 3.04(a) provides:

> "A lawyer shall not . . . unlawfully obstruct another party's access to evidence; in anticipation of a dispute unlawfully alter, destroy or conceal a document or other material that a competent lawyer would believe has potential or actual evidentiary value; or counsel or assist another person to do any such act."

Indeed, when Mark Hopkins arrived after the 2015 bench trial loss for the sole purposes of appealing the decision, his first act was to ask Hon. Smith to 'reopen the case' to allow him to introduce 'new evidence' *e.g.* fabricated documents, which would be vehemently rejected by the

judge as an *deus ex machina* maneuver. See Dkt 91-1, p. 15, 4:11-cv-01658, July 31, 2015;

> "There remains one additional matter. In the last sentence on the last page of its last brief to this court, Deutsche Bank asks to reopen the trial record to provide "the wet ink original of the Note or testimony affirming Deutsche Bank's status as holder of the Note." (Dkt. 90, at 7).
>
> No authority or excuse is offered for this breathtakingly late request. Even assuming such evidence exists, Deutsche Bank does not pretend that it is "newly discovered", nor that the bank was excusably ignorant about it until after trial despite using due diligence to discover it. See 11 WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE § 2808 (2012).
>
> After four years of litigation, including court-ordered mediation and trial on the merits, the time for such a *deus ex machina* maneuver has long since passed. The Burkes are entitled to the finality of judgment that our judicial process is intended to provide. The bank's request for a do-over is denied.".

Additionally, the Plaintiff's intervention in Florida (*Consumer Fin. Prot. Bureau v. Ocwen Fin. Corp*., No. 9:17-CV-80495-MARRA-MATTHEWMAN (S.D. Fla. 2017-2020)) adds credibility to the Plaintiff's notion, as the district court and ultimately the appellate court would deny intervention to prevent access to the loan file.

This, despite providing the Greens counsel (who were also litigating against foreclosure in this courthouse in *Green v. Ocwen Loan Servicing, LLC (In re Green),* Bankruptcy No. 12-38016 (13) (S.D. Tex. Aug. 26, 2019)) obtaining access to their file from Judge Marra in Florida, the same court where Plaintiff(s) intervened, as if knowing the mortgage file contains no loan paperwork.

> Judge Marra's opinion contradicted the Green case, in part; see (Doc. 411, p. 3);
>
> "In addition to the grounds stated in the Court's Order Denying Intervention (ECF No. 375), the Court notes that intervention is not permitted to allow a party to seek or obtain evidence for other litigation as asserted by the proposed Intervenors. (See ECF No. 408 at 4)."

Finally, during Plaintiff's federal court litigation in Minnesota (Case No. 23-cv-1119 (WMW/DTS)), which also sought to recover the 'missing' loan paperwork, Plaintiff was approached with a settlement offer by Defendants, again, indicating that they are fully aware of the fact that Plaintiff knows there is no loan paperwork and the lien should be extinguished in its entirety. In short, the Plaintiff has been thwarted by legal misconduct and judicial interference for many years by refusing her access to the loan file to prove her case and allegations. These actions by the Plaintiff were meritorious, and they should not have been included in the decision to enter a preclusion order.

Defendants and their Counsel Lack Any Credibility, and their Responses are Scandalous

Unconstitutional Preclusion Order: When Defendants' curtly address the preclusion order, their credibility is further undermined by their failure to rebut false claims already addressed in Plaintiff's Rule 59(e) motion.

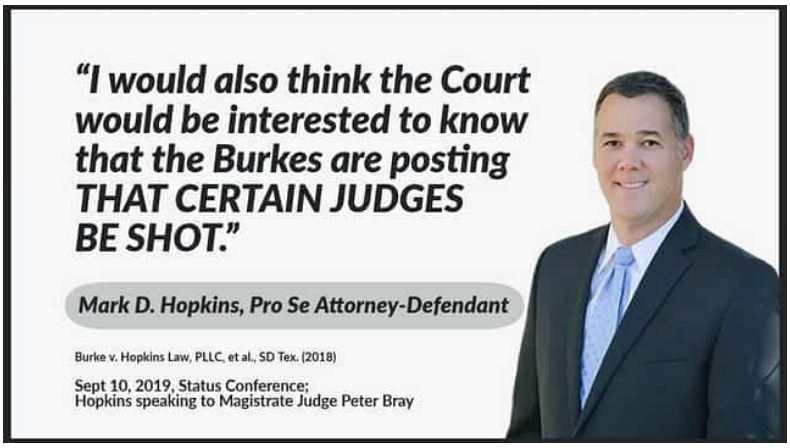
Despite being confronted with their unsubstantiated assertion that Plaintiff Joanna Burke owns and operates the website "Laws In Texas" for the purpose of harassing attorneys and judges, Defendants chose not to provide any evidentiary support for this claim — nor did they attempt to dispute Plaintiff's correction of the record. Defendants' failure to respond constitutes an admission by silence, effectively waiving any defense to their prior misrepresentation. Courts have long recognized that when a party neglects to rebut a material allegation, it may be treated as an implicit acknowledgment of its truth.

Here, Defendants' silence operates as a tacit concession, reinforcing that their response relies on fabrication rather than substantive legal argument and must therefore be stricken in its entirety. Such reckless misrepresentation is improper and immaterial, warranting relief under

Federal Rule of Civil Procedure 12(f).

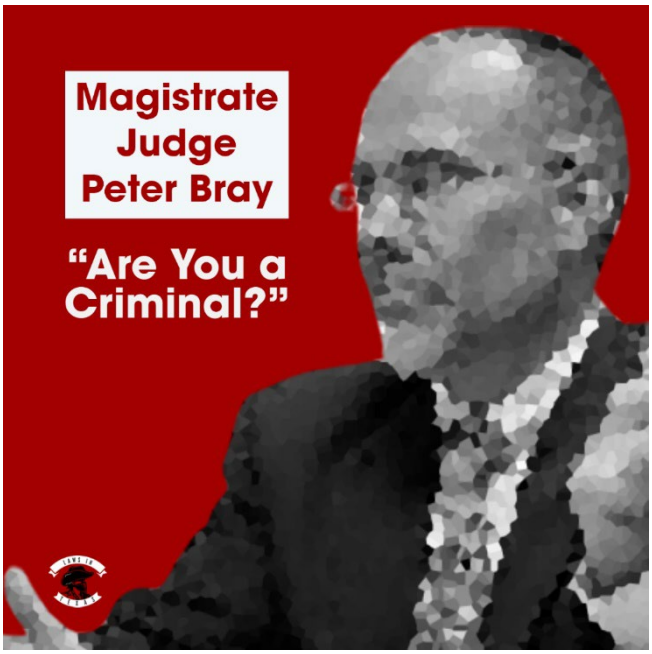
Withholding the Loan File: As discussed above, counsel Mark Hopkins' credibility is demonstrably lacking, as evidenced by his prior admissions before Hon. Stephen Wm Smith and Plaintiff's counsel Connie Pfeiffer of Beck Redden during a status hearing, where he admitted to withholding the loan file from the Burkes.

Admitted Lies with Serious and Scandalous Allegations: His unreliability is further reinforced by his self-admitted false and inflammatory accusation that John and Joanna Burke **"are posting that certain judges be shot": -**



— a reckless and baseless statement with no evidentiary support whatsoever and which alarmingly garnered no sanctions from the federal court.

The gravity of this deliberate falsehood was underscored when Magistrate Judge Peter Bray, visibly enraged, confronted John Burke with the accusation, demanding, **"Are you a criminal?"**



John Burke —a veteran who honorably served as a British Military Policeman and Paratrooper — was forced to defend his integrity, replying, **"No, Your Honor."**.

This shocking exchange exemplifies the destructive impact of Hopkins' fabricated claims, which not only poison the Court's perception but also violate fundamental principles of fairness and due process.

Defendants' reliance on counsel with a documented history of deceit and procedural misconduct only strengthens the need to strike this response in its entirety.

The Court must reject such blatant misrepresentation and prevent further abuse of the judicial process by enforcing Federal Rule of Civil Procedure 12(f), which expressly allows courts to remove filings that are redundant, immaterial, impertinent, or scandalous.

"'Scandalous' in Rule 12(f) 'generally refers to any allegation that unnecessarily reflects on the moral character of an individual or states anything in repulsive language that detracts from the dignity of the court.'" *J&J Sports Prods., Inc. v. Tawil*, No. SA-09-cv-327-XR, 2009 WL

3761766, at *4 (W.D. Tex. Nov. 9, 2009) (citing *Florance v. Buchmeyer*, 500 F.Supp.2d 618, 645 (N.D. Tex. 2007)). The Defendants admitted past lies in conjunction with their ongoing and latest lies are scandalous as interpreted in law and mandate they be stricken.

The Foreclosure Judgment is Void: Despite glaring evidence of the deficient, void and time-barred order of foreclosure issued by Judge David Hittner on November 29, 2018, the Defendants simply claim "PHH has a valid judgment for foreclosure" without addressing Plaintiff's arguments, mandating striking their [non] response.

The Rest of Plaintiff's Arguments are Discounted Entirely: The Defendants have failed to engage with the actual merits of Plaintiff's motion as summarized in their response at 4;

> "Plaintiff's most recent motion under Rule 59(e) takes issue with the Court's Final Judgment and Preclusion order, rehashing her several-decade vendetta about violations of due process and her disagreement with the court's application of the law on res judicata, jurisdiction, validity of the foreclosure judgment and the time allotted to conduct foreclosure under a judgment.".

Instead, Defendants rely upon factually incorrect, prejudicial, and improper allegations or assertions, mandating the response must be stricken in its entirety. As detailed in Plaintiff's motion: "The proper role of the judiciary is one of interpreting and applying the law, not making it." (Sandra Day O'Connor).

The 10-year foreclosure after judgment ruling is absurd and makes a mockery of Texas law. The interpretation and case law presented relies upon erroneous Erie guesses and which mandates an answer by the Texas Supreme Court when Constitutionally protected Texas homesteads are at risk.

The Defendants are time-barred and the order relied upon is deficient and void, as defined in Texas law.

Finally, this court has continuously claimed jurisdiction which it does not have in these proceedings. This case still mandates dismissal and remand to state court.

The Defendants and Hopkins Documented Statewide Abusive Litigation Practices

Joanna Burke is not the only victim of these scandalous and scurrilous Defendants and their appointed counsel. As previously discussed in Plaintiff's pleadings, Deutsche Bank and PHH (ONITY) have been fined billions of dollars for abusive practices and predatory lending.

They have been caught in lies, cheating and deception in many legal cases in this state and beyond, resulting in multi-million to multi-billion-dollar settlements.

Mark Hopkins has been repelled by the Texas Supreme Court for arguments previously presented by Plaintiff in these proceedings, namely the *PNC v Howard* debacle.

Additionally, Deutsche Bank and PHH were publicly eviscerated by the state court Judge in the $4 million dollar judgment in the Jones case (EXHIBIT DBJONES-MSJ), in part: -

> **"Bank Defendants' Misconduct Across the Country:**
>
> 2. Deutsche Bank is one of the largest banks in the world, operating in 70 countries with over 91,000 employees. It has over $1.3 trillion dollars in assets and over $68 billion in equity.
>
> 3. Ocwen (which acquired Homeward in December 2012) is the largest non-bank servicer of U.S. mortgages, servicing over 1.5 billion mortgages and having a portfolio value of over $550 million in mortgages. Ocwen is the largest servicer of subprime loans in the United States.
>
> 4. Federal and state regulators and prosecutors have determined that Deutsche Bank, Ocwen, and Homeward have engaged in systematic mortgage fraud and abuse for years, before, during and after all relevant times to the claims made in the lawsuit. Despite multiple findings of fraud and abuse, and consent orders requiring future compliance, Bank Defendants have: failed and refused to correct their misconduct.
>
> 5. Plaintiffs Consuelo Jones and Gabriela Jones are victims of Bank Defendants' pattern of fraud and abuse."

In short, this 14-year abusive and fraudulent litigation is no different, and Joanna Burke's message is clear and obvious. Quoting Joseph Story:-

> "Without justice being freely, fully, and impartially administered, neither our persons, nor our rights, nor our property, can be protected. And if these, or either of them, are regulated by no certain laws, and are subject to no certain principles, and are held by no certain tenure, and are redressed, when violated, by no certain remedies, society fails of all its value; and men may as well return to a state of savage and barbarous independence.".

This is Premeditated Elder Abuse and a Crime Against Humanity

Joanna Burke will not be bullied by Texas house thieves, no matter their attire or purported position. Robert "Clay" Vilt, Andrew Lehman et al have already embarrassed the judiciary and the United States Government, as they continue to protect sanctioned attorneys, criminals and Texas felons over a law-abiding American Citizen. Rest assured, Wells Fargo, CBS and the world media are watching this ongoing travesty of justice in a case Defendants have both surrendered and lost, in law.

DECLARATION

Pursuant to Texas Civil Practice and Remedies Code Section 132.001 and "In lieu of a sworn affidavit, a litigant may submit an unsworn declaration as evidence against summary judgment. See 28 U.S.C. §1746.", I hereby provide my unsworn declaration. My name is Joanna Burke, my date of birth is Nov. 25, 1938, my address is 46 Kingwood Greens Dr, Kingwood, Texas, 77339, and I declare under penalty of perjury that all information herein is true and correct.

CONCLUSION

Relief Requested

Fifth Circuit [Chief] Judge Jennifer Walker Elrod provided written testimony to Congress on 26 October, 2021:

> "The fair and impartial adjudication of cases, in a transparent environment, is a fundamental duty of the federal Judiciary. An independent federal Judiciary is essential to the rule of law in our nation… I assure you the federal Judiciary takes these obligations seriously."

See; "Judiciary Takes Action to Ensure High Ethical Standards and Transparency" – https://2dobermans.com/woof/53.

Joanna Burke is yet to witness such a promise, and now requests this court apply Chief Judge Elrod's words when considering this motion. Namely, that the Defendants response is nothing more than scandalous material which fails to address the new arguments in Plaintiff's motion, and for the foregoing reasons, she respectfully requests the Court strike the Defendants response in its entirety. An order is provided separately.

RESPECTFULLY submitted this 5th day of May, 2025.

_____

Joanna Burke, Harris County
State of Texas / Pro Se

46 Kingwood Greens Dr
Kingwood, Texas 77339
Phone Number: (281) 812-9591
Fax: (866) 705-0576
Email: joanna@2dobermans.com

CERTIFICATE OF CONFERENCE

I, Joanna Burke, hereby certify that I emailed counsel for Defendants on Monday, May 5, 2025 advising of this motion to strike and that they are opposed to the motion.

CERTIFICATE OF WORD COUNT

I, Joanna Burke, hereby certify that PLAINTIFF'S VERIFIED MOTION TO STRIKE, submitted

on May 5, 2025, complies with the 5,000 word limit set by the court. The document contains a total of 3,411 words, as calculated by Microsoft Word.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served on May 5, 2025 as stated below on the following:

VIA U.S. Mail:

Nathan Ochsner
Clerk of Court
P. O. Box 61010
Houston, TX 77208

VIA e-Mail:

Shelley L. Hopkins
Mark D. Hopkins
HOPKINS LAW, PLLC
2802 Flintrock Trace, Suite B103
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PHH MORTGAGE CORPORATION

_____
Joanna Burke, Harris County
State of Texas / Pro Se

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Fax: (866) 705-0576
Email: joanna@2dobermans.com

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ORDER

Plaintiff Joanna Burke's VERIFIED MOTION TO STRIKE DEFENDANTS RESPONSE TO PLAINTIFF'S RULE 59(e) MOTION came on for hearing before this Court on _____.

After considering the Motion and all supporting and opposing documents, and having heard oral argument of counsel, and otherwise being duly advised on all matters presented on this cause, IT IS HEREBY ORDERED that PLAINTIFF'S Motion should be GRANTED. The court ORDERS,

PHH MORTGAGE CORPORATION'S RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION TO ALTER OR AMEND JUDGMENT is hereby STRICKEN.

;

IT IS SO ORDERED

Dated this____ day of_____, 2025

_____

United States District Charles Eskridge

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Joanna Burke Plaintiff vs. Deutsche Bank National Trust Company, PHH Mortgage Corporation, AVT Title Services, LLC, Mackie Wolf Zientz & Mann, PC, Judge Tami Craft aka Judge Tamika Craft-Demming, Judge Elaine Palmer, Sashagaye Prince, Mark D Hopkins, Shelley L Hopkins, Hopkins Law, PLLC, John Doe and/or Jane Doe Defendants	**CIVIL ACTION No. 4:24-cv-00897** **ORDER**

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PHH MORTGAGE CORPORATION'S RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION TO ALTER OR AMEND JUDGMENT is hereby STRICKEN.

;

IT IS SO ORDERED

Dated this____ day of_____, 2025

_____

United States District Charles Eskridge

EXHIBIT 1

LOCAL NEWS

"Pick-a-pay" mortgage left Massachusetts couple on brink of foreclosure. I-Team's Call For Action saved them.

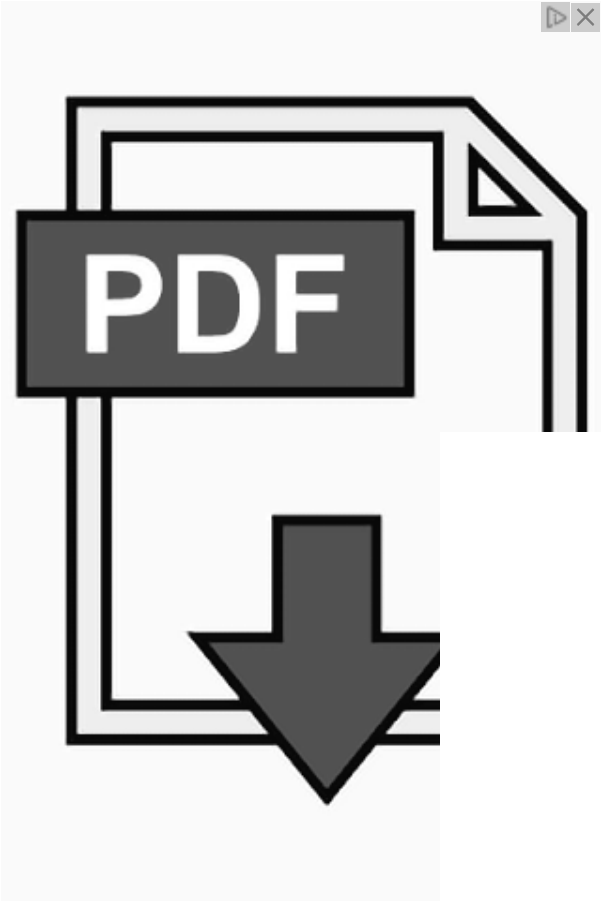
By **Cheryl Fiandaca**
Updated on: May 2, 2025 / 9:31 AM EDT / CBS Boston

An elderly couple in Lynn, Massachusetts was just days away from being evicted from their home after their bank foreclosed on it. They turned to the WBZ-TV I-Team's Call For Action for help.

After nearly 10 years of fighting to save their home, the Cavalieres were ready to give up and began packing up.

"It's been a whole life in the last 23 years, 24 years," Kathy Cavaliere told the I-Team. "This has been the center of our

family. All holidays, all get togethers. And it was going to be gone within days."



The bank foreclosed on the couple's property and they were being evicted. Kathy's husband Joe Cavaliere is 85. He said they ran into financial trouble after he got sick several years ago.

"I was out of work for a little while and then I got laid off and we fell behind on the mortgage payments. So, we sent them $5,000 to catch up and they said they wanted the whole thing, which was somewhere around $400,000."

"Pick-a-pay" mortgage

The Cavalieres troubles started in 2006 when Joe took out what was called a "pick-a-pay" mortgage with World Savings Bank. He was told to pick how much money he wanted to pay every

continue to add up and pretty soon Joe and Kathy owed more than they could afford.

"It was insane as a product, and it was to get people lower on the economic scale to buy homes under predatory mortgages that would end up yielding profits to the lenders and honestly, foreclosure to the borrowers," said the Cavalieres attorney, Paul Collier.

Kathy and Joe Cavaliere.

CBS BOSTON

Shortly after Joe took out the mortgage, World Saving Bank's parent company merged with Wachovia Corporation. Wachovia later merged with Wells Fargo, which acquired Joe's mortgage loan.

Unable to make their mortgage payments, the bank foreclosed on the Cavalieres home, and they were being forced out.

"'It was really scary," Kathy said "I was afraid of what it might do to my husband."

Joe was worried too.

"We're living on Social Security I don't have a 401k. I got a little pension from the VA because I got hurt in the service," he said.

Desperate with nowhere else to turn and the clock ticking, Kathy contacted the I-Team's Call For Action. "Whenever you called me and said send the paperwork and when you got back to me, I cried," Kathy said.

I-Team gets involved

After the I-Team got involved, we contacted Wells Fargo, and the bank decided to give the property back to Joe and Kathy.

Kathy says they were shocked. Wells Fargo sent a letter to the Cavalieres saying they're going to receive the title to their home in May and that they once again own their house.

"This is what Cheryl Fiandaca has done for us. I don't know how, but she did," Kathy said.

In a statement Wells Fargo told the I-Team:

"We have been working with Mr. Cavaliere since 2011 to help him navigate this situation. We have been committed to finding a resolution and are pleased to have this resolved. Pick-a-pay loans were never offered by Wells Fargo. We inherited the Cavaliere loan as part of an acquisition in 2008."

View PDFs

Download

"It felt like a miracle"

"I don't believe in miracles, but it felt like a miracle. I could never have accomplished that result, and you folks did it in a matter of weeks," Collier said.

The Cavalieres are grateful to Call for Action, knowing that they will now be able to stay in their home as long as they want to.

In 2010, Wells Fargo agreed to a $50 million settlement in a class action lawsuit involving the "pick a pay" loans it acquired. The settlement did not include any admission of wrongdoing. As part of the foreclosure case, Joe also received a financial settlement from the bank.

If you have a consumer issue you need help with email Call for Action at wbzcallforaction@cbs.com.

EXHIBIT 2

ELECTRONICALLY RECORDED **2016130800**

TRV 1 PGS

Recording Requested By:
OCWEN LOAN SERVICING, LLC

When Recorded Return To:

LIEN RELEASE
OCWEN LOAN SERVICING, LLC
240 TECHNOLOGY DRIVE
IDAHO FALLS, ID 83401

RELEASE OF LIEN

OCWEN LOAN SERVICING, L.L.C. #:0706436169 "KETMAYURA" Lender ID:CO-2735 Travis, Texas
KNOW ALL MEN BY THESE PRESENTS that , for value received, Deutsche Bank National Trust Company, as Trustee for the registered holders of Morgan Stanley ABS Capital I Inc. Trust 2007-NC4 Mortgage Pass Through Certificates, Series 2007-NC4 by Ocwen Loan Servicing, LLC, its Attorney-in-Fact holder of the Deed of Trust, whose parties, dates and recording information are below, does hereby reconvey, without warranty, to the person or persons legally entitled thereto, the estate, title and interest now held by it under said Deed of Trust in Travis County, State of Texas.

Original Borrower: YING KANOKTIP KETMAYURA AND RA SURASAK KETMAYURA
Original Beneficiary: AMERICAN HOMEFRONT MORTGAGE FUNDING
Dated: 11/15/2006 Recorded: 11/21/2006 in Book/Reel/Liber: NA Page/Folio: NA as Instrument No.: 2006224908

Legal Description: As Referenced on Original Recorded Document

Property Address: 315 S. COMMONS FORD ROAD, AUSTIN, TX 78733

IN WITNESS WHEREOF, Deutsche Bank National Trust Company, as Trustee for the registered holders of Morgan Stanley ABS Capital I Inc. Trust 2007-NC4 Mortgage Pass Through Certificates, Series 2007-NC4 by Ocwen Loan Servicing, LLC, its Attorney-in-Fact , whose address is 1661 WORTHINGTON RD, SUITE 100, WEST PALM BEACH, FL 33409, by the officer duly authorized, has duly executed the foregoing instrument.

Deutsche Bank National Trust Company, as Trustee for the registered holders of Morgan Stanley ABS Capital I Inc. Trust 2007-NC4 Mortgage Pass Through Certificates, Series 2007-NC4 by Ocwen Loan Servicing, LLC, its Attorney-in-Fact POA: 04/08/2014 as Instrument No.: 214049904
On AUG 0 4 2016

By: _____
Jennifer Price, Authorized Signer

STATE OF Pennsylvania
COUNTY OF Montgomery

On AUG 0 4 2016, before me, ERIC STURGIS, a Notary Public in and for Montgomery in the State of Pennsylvania, personally appeared Jennifer Price, Authorized Signer, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity, and that by his/her/their signature on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal,

_____
ERIC STURGIS
Notary Expires: 01/11/2020 #1295560

COMMONWEALTH OF PENNSYLVANIA
NOTARIAL SEAL
Eric Sturgis
Upper Dublin Twp, Montgomery County
My Commission Expires 01/11/2020

(This area for notarial seal)

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FILED AND RECORDED
OFFICIAL PUBLIC RECORDS

DANA DEBEAUVOIR, COUNTY CLERK
TRAVIS COUNTY, TEXAS
August 10 2016 08:30 AM
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EXHIBIT 3

1/23/2019 10:26 AM
Marilyn Burgess - District Clerk Harris County
Envelope No. 30591908
By: Bonnie Lugo
Filed: 1/23/2019 10:26 AM

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CAUSE NO. 2013-44752

AMY POWELL,	IN THE DISTRICT COURT OF
PLAINTIFF	
VS.	HARRIS COUNTY, TEXAS
ONEWEST BANK, FSB,	
DEFENDANT	80TH DISTRICT COURT

FINAL JUDGMENT

This Court entered a previous judgment in this case on October 8, 2015. On June 8, 2017, the Fourteenth Court of Appeals reversed the portion of the judgment that granted declaratory relief to CIT Bank, formerly Onewest Bank. The Court of Appeals also remanded the case to this Court for trial on the bank's alternative quantum meruit claim.

On May 11, 2018, the Court conducted a trial on the quantum meruit claim. Counterplaintiff CIT Bank and Counterdefendant Amy Powell and their attorneys appeared. After hearing the evidence, the arguments of counsel, and the post-trial submissions, the Court has determined that judgment should be for Amy Powell and against CIT Bank. Accordingly,

IT IS ORDERED the CIT Bank take nothing on its quantum meruit action against Amy Powell.

This is a final judgment and is appealable.

SIGNED this 25th day of January, 2019.

JUDGE PRESIDING

Motion for Rehearing Granted in Part and Denied in Part; Affirmed in Part, Reversed and Rendered in Part, and Reversed and Remanded in Part; Memorandum Opinion of December 15, 2016 Withdrawn, and Substitute Opinion filed June 8, 2017.

In The

Fourteenth Court of Appeals

NO. 14-15-00949-CV

AMY POWELL, Appellant

V.

CIT BANK, N.A., F/K/A/ ONEWEST BANK, N.A., F/K/A ONEWEST BANK FSB, Appellee

On Appeal from the 80th District Court
Harris County, Texas
Trial Court Cause No. 2013-44752

S U B S T I T U T E O P I N I O N [1]

This appeal arises out of a dispute between a property owner and a bank seeking to foreclose its lien on the property. The bank's assignor acquired the lien

[1] We grant appellee's motion for rehearing in part, deny the motion in part, withdraw the memorandum opinion issued on December 15, 2016, and issue this substitute opinion.

in a reverse-mortgage transaction. The borrower later died. After his death, the property was transferred. The property owner asserted that the statute of limitations barred the bank's foreclosure action. On appeal, the property owner asserts that the trial court erred in granting declaratory relief that the bank is entitled to foreclose based on a theory that the bank abandoned its purported acceleration of the promissory note, thereby resetting the accrual date for the claim. We conclude that the trial court erred in granting declaratory relief because the claim accrued when all outstanding principal, accrued interest, and other charges became immediately due and payable upon the borrower's death, without any ability of the creditor to accelerate the debt. We reverse the portions of the trial court's judgment in which the trial court granted declaratory relief and dismissed as moot the bank's alternative quantum-meruit claim, and we affirm the remainder of the judgment. We render judgment denying the bank's requests for declaratory judgment, and we remand the bank's quantum-meruit claim.

I. FACTUAL AND PROCEDURAL BACKGROUND

Patricia Siegel conveyed her interest in real property located at 11919 Cypress Park Drive, Houston, Texas (the "Property") to her husband, Irving Siegel, in July 2005, through a warranty deed. Irving obtained a reverse-mortgage loan in the amount of $273,079.50 from Financial Freedom Senior Funding Corporation ("Loan"). In connection with the Loan, Irving executed a promissory note in that amount ("Note"), secured by a Deed of Trust in which he granted a lien against the Property to Financial Freedom as security for repayment of the Note. Financial Freedom assigned the Note and Deed of Trust to appellee/defendant CIT Bank N.A., f/k/a OneWest Bank, N.A., f/k/a OneWest Bank, FSB ("CIT Bank"). Irving died in May 2008. Under the Note and Deed of Trust, all outstanding principal, accrued interest, and other charges became immediately due and payable when

Irving died.

Upon Irving's death in May 2008, title to the Property vested in his wife Patricia. Several months later, in September 2008, Financial Freedom sent a notice to Irving's estate, stating that the entire amount of the debt was due and payable because of Irving's death. The debt was not paid. In February 2009, Financial Freedom sent a letter to Irving's estate stating its intention to foreclose its lien on the Property. Over a year later, Patricia deeded her interest in the Property to appellant/plaintiff Amy Powell. Powell has not paid any entity any amount owing on the Note, nor has she paid taxes on the Property or insured the Property at any time.

CIT Bank filed suit against Powell in June 2011, seeking a declaratory judgment to reform the legal description in the Deed of Trust due to mutual mistake and to divest Irving's estate and his heirs of right, title, and interest in the Property. Powell filed a counterclaim against CIT Bank. Nearly two years later, in May 2013, CIT Bank and Powell signed a mutual motion for nonsuit. In it, CIT Bank states that it "no longer desires to pursue its claims," and Powell states that Powell "no longer desires to pursue her claims for affirmative relief" against CIT Bank. A few months later, in July 2013, Powell filed suit in this case against CIT Bank seeking to enjoin CIT Bank from foreclosing on the Property in the future. CIT Bank filed a counterclaim, seeking a declaratory judgment that:

(1) the Loan is a valid and enforceable contract;

(2) CIT Bank performed all of its obligations under the Loan;

(3) Powell and/or her predecessor in title failed to perform all of her obligations under the Loan;

(4) Powell's failure to pay the taxes and insurance on the Property constitutes a material breach of the terms of the Loan;

(5) Powell has not discharged the total balance of the Loan;

(6) CIT Bank is entitled to foreclose the Deed of Trust and sell the Property at a non-judicial foreclosure sale upon providing proper notice; and

(7) upon foreclosure, CIT Bank is entitled to possession of the Property within thirty days after the sale if CIT Bank purchases the Property.

In the alternative, CIT Bank sought judicial foreclosure and a writ of possession or recovery based upon a quantum-meruit claim.

Following a bench trial, the trial court signed a judgment in which the court made the following declarations:

(1) The Note and Deed of Trust are valid and enforceable instruments.

(2) The Note and Deed of Trust are in default, due both to the death of Irving Siegel and to the nonpayment of taxes and insurance for each of the years from 2009 through 2015.

(3) CIT Bank is the current servicer of the Loan.

(4) CIT Bank is the current mortgagee of the Deed of Trust.

(5) CIT Bank is entitled to proceed with foreclosure through any process permitted by Texas law.

(6) CIT Bank has standing to proceed for foreclosure both as the mortgagee of the Deed of Trust and as the servicer of the Loan.

(7) CIT Bank's right to foreclose is not barred by the statute of limitations nor otherwise constrained by any other defense under law or equity.

In addition to granting CIT Bank declaratory relief, the trial court ruled that Powell take nothing on her request for permanent injunctive relief. The trial court dismissed as moot CIT Bank's quantum-meruit claim, as well as CIT Bank's other alternative claims.

II. ISSUES AND ANALYSIS

Powell does not specifically address which rulings she is challenging on appeal. She argues that the trial court erred in concluding that CIT Bank's potential future foreclosure claim is not time-barred. According to Powell, the

statute of limitations bars the foreclosure claim. Liberally construing Powell's appellate brief, we conclude Powell is attacking the trial court's granting of declaratory relief. But, even if Powell's argument also could be construed as an attack on the trial court's denial of Powell's request for a permanent injunction, we conclude Powell cannot prevail on this point.

A. Permanent Injunction

A permanent injunction is appropriate if evidence shows: (1) the existence of a wrongful act, (2) the existence of imminent harm, (3) the existence of irreparable injury, and (4) the absence of an adequate remedy at law. *See Wiese v. Healthlake Comm'n Ass'n, Inc.*, 384 S.W.3d 395, 399 (Tex. App.—Houston [14th Dist.] 2012, no pet.). Powell has not addressed any of these elements, nor has Powell cited any legal authority in support of the proposition that the trial court abused its discretion in denying her request for a permanent injunction. By failing to articulate any argument in this regard, Powell has waived any complaint as to the trial court's denial of her request for a permanent injunction.[2] *See San Saba Energy, L.P.*, 171 S.W.3d 323, 337 (Tex. App.—Houston [14th Dist.] 2005, no pet.). Accordingly, to the extent Powell asserts a challenge to the permanent injunction, we overrule it.

B. Declaratory Judgment

We review declaratory judgments under the same standards as other judgments. *See Van Dam v. Lewis*, 307 S.W.3d 336, 339 (Tex. App.—San Antonio 2009, no pet.). We employ the same rules for interpreting a note that we use to interpret a contract. *Financial Freedom Sr. Funding Corp. v. Horrocks*, 294 S.W.3d 749, 753 (Tex. App.—Houston [14th Dist.] 2009, no pet.). In construing a

[2] Having concluded Powell did not sufficiently brief an attack on the trial court's denial of her request for a permanent injunction, we need not address CIT Bank's arguments that granting Powell a permanent injunction would be inequitable.

contract, our primary concern is to ascertain and give effect to the intentions of the parties as expressed in the contract. *Kelley-Coppedge, Inc. v. Highlands Ins. Co.*, 980 S.W.2d 462, 464 (Tex. 1989). To ascertain the parties' intentions, we examine the entire agreement in an effort to harmonize and give effect to all provisions of the contract so that none will be rendered meaningless. *MCI Telecomms. Corp. v. Tex. Utilis. Elec. Co.*, 995 S.W.2d 647, 652 (Tex. 1999). We give contract terms their plain, ordinary, and generally accepted meanings unless the contract itself shows them to be used in a technical or different sense. *Horrocks*, 294 S.W.3d at 753.

1. Accrual of Claim and Statute of Limitations

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 claim accrues. Tex. Civ. Prac. & Rem. Code Ann. § 16.035(a) (West, Westlaw through 2015 R.S.). A sale of real property under a power of sale in a mortgage or deed of trust that creates a real-property lien must be made not later than four years after the day the claim accrues. Tex. Civ. Prac. & Rem. Code Ann. § 16.035(b) (West, Westlaw through 2015 R.S.); *Holy Cross Church of God in Christ v. Wolf*, 44 S.W.3d 562, 567 (Tex. 2001). When the four-year limitations period expires, the real-property lien and the power of sale to enforce the lien become void. Tex. Civ. Prac. & Rem. Code Ann. § 16.035(d) (West, Westlaw through 2015 R.S.); *Holy Cross*, 44 S.W.3d at 567. Generally, if a note secured by a real-property lien is payable in installments, the statute of limitations does not begin to run until the maturity date of the last installment. Tex. Civ. Prac. & Rem. Code Ann. § 16.035(e) (West, Westlaw through 2015 R.S.); *Holy Cross*, 44 S.W.3d at 566. If a note or deed of trust contains an optional acceleration clause and the holder exercises its option to accelerate, the claim accrues when the holder

actually exercises the option to accelerate. Tex. Civ. Prac. & Rem. Code Ann. §16.035(e); *Holy Cross*, 44 S.W.3d at 566.

Powell asserts that the limitations period began to run on May 8, 2008, the date Irving died, and ended four years later on May 8, 2012. Paragraph three of the Note, entitled "Payment," provides: "I will pay principal and interest when an event described in Section 7 occurs." The Note provides in section 7(A) that, "All outstanding principal, accrued interest, and other charges shall be immediately due and payable if (i) all Borrowers die, or (ii) the Property is sold or otherwise transferred." Section 7(G) provides that if an event described by section 7(A) occurs, "the Note Holder will send me a written notice, as required by applicable law, telling me that I am required to pay immediately the full amount of principal, interest, and other charges I owe under this Note." The Deed of Trust provides that "[a]ll sums secured by this Security Instrument shall be immediately due and payable if . . . all Borrowers die."

Under the unambiguous language of the non-recourse, reverse-mortgage Note, no payments are due until an event described in section 7 occurs, and when such an event occurs, all outstanding principal, accrued interest, and other charges become immediately due and payable. Thus, the Note does not provide for installment payments whose maturity date may be accelerated. Neither the Note nor the Deed of Trust contains a clause giving the creditor the option of accelerating the indebtedness in the event that the sole borrower dies. Instead, under the plain terms of the Note and the Deed of Trust, all outstanding principal, accrued interest, and other charges under the Note and all sums secured by the Deed of Trust became immediately due and payable on May 8, 2008, when Irving — the only borrower under the Note — died. *See Horrocks*, 294 S.W.3d at 754 (noting that case involving note with acceleration clause was not on point because

the reverse-mortgage notes at issue in *Horrocks* did not provide for repayment through periodic installments or for acceleration in the event of default). As Financial Freedom stated in the September 4, 2008 notice that it sent to the Estate of Irving Siegel, "[u]pon the occurrence of a maturity event, of which the borrower's passing is one, the loan becomes due and payable."[3]

The trial evidence proved as a matter of law that the claim for foreclosure of the lien in the Property under the Deed of Trust and the claim for sale of the Property under the power of sale in the Deed of Trust accrued on May 8, 2008, when Irving died, more than four years before Powell filed this suit and CIT Bank filed its counterclaim.[4] *See Horrocks*, 294 S.W.3d at 754 (holding that the creditor's claim to enforce the deed-of-trust lien created in a reverse-mortgage transaction accrued when one or more of the conditions listed in the note occurred).

2. Alleged Abandonment of Acceleration

CIT Bank filed its first suit within the statute of limitations. But, CIT Bank nonsuited. Powell then filed this lawsuit in July 2013, more than four years after the statute of limitations began running. CIT Bank did not file its counterclaim

[3] In its motion for rehearing, CIT Bank asserts that this court's analysis centers on the fact that acceleration of the debt was mandatory upon the death of the borrower. In this statement, CIT Bank mischaracterizes the terms of the Note. The Note does not provide for any acceleration of the debt upon the death of the borrower; rather, all outstanding principal, accrued interest, and other charges under the Note became immediately due and payable on May 8, 2008, when the only borrower under the Note died.

[4] In an attempt to satisfy the requirements of article XVI, section 50(a)(7) of the Texas Constitution, the drafters of the Note included a provision that if the sole borrower dies, the holder of the Note is required to send a written notice that the full amount of principal, accrued interest, and other charges under the Note have become immediately due and payable. *See* Tex. Const. art. XVI, § 50(a)(7). Though the four-year limitations period to enforce the lien began running on May 8, 2008, rather than on the date of this notice, Financial Freedom sent this notice on September 4, 2008, more than four years before this lawsuit was filed in the trial court.

until September 2015. CIT Bank asserts that the statute of limitations was tolled because CIT Bank abandoned its acceleration of the Note. As discussed above, all outstanding principal, accrued interest, and other charges under the Note and all sums secured by the Deed of Trust became immediately due and payable on May 8, 2008, and neither CIT Bank nor any of its predecessors in interest had the option of accelerating the indebtedness in the event that the sole borrower died. Because neither CIT Bank nor its predecessors accelerated the Note, none of these entities could abandon an acceleration of the Note. *See id*. Therefore, the trial evidence proved as a matter of law that neither CIT Bank nor its predecessors could have avoided the bar of the statute of limitations by abandoning the acceleration of the Note.

CIT Bank argues that it could have abandoned the "acceleration" of the Note and that CIT Bank did abandon acceleration when CIT Bank and Powell signed and filed the mutual motion for nonsuit in the prior lawsuit. Though neither CIT Bank nor its predecessors could abandon an acceleration of the Note, even presuming for the sake of argument that CIT Bank could have abandoned acceleration, the trial evidence is legally insufficient to support the trial court's conclusion that the filing of the mutual motion for nonsuit effected an abandonment of the Note's acceleration with the consent of Powell and CIT Bank. *See Residential Credit Solutions v. Burg*, No. 01-15-00067-CV, 2016 WL 3162205, at *3–5 (Tex. App.—Houston [1st Dist.] Jun. 2, 2016, no pet.) (mem. op.). In the mutual motion for nonsuit, CIT Bank stated that it no longer desired to pursue its claims against Powell and requested the court to sign an order "nonsuiting" these claims without prejudice, and Powell stated that she no longer desired to pursue her claims against CIT Bank and requested the court to sign an order "nonsuiting" these claims without prejudice. The dismissal without prejudice

of these claims returned the parties to the positions they occupied before any suit was filed, as if the first suit had never existed. *See Cunningham v. Fox*, 879 S.W.2d 210, 212 (Tex. App.—Houston [14th Dist.] 1994, writ denied). By joining and agreeing to this motion neither CIT Bank nor Powell agreed that any alleged acceleration of the amounts due and owing under the Note would be abandoned. Each party agreed to nonsuit without prejudice the party's claims for affirmative relief.[5]

CIT Bank appears to argue that the mutual motion for nonsuit must be an abandonment of acceleration because the parties agreed that each nonsuit would be "without prejudice" and because, if the motion is not an abandonment of acceleration, the dismissal would be "with prejudice." Any such argument misconstrues the meaning of a voluntary dismissal without prejudice. The "without prejudice" denomination means that the dismissal of the claims does not prevent the re-filing of the claims; it does not mean that the pendency of the first suit tolled the statute of limitations as to a later suit or that any other party in the case waived any defenses to the voluntarily dismissed claims. *See id*.; *Hammonds v. Texas Dept. of Criminal Justice*, No. 04-11-00009-CV, 2011 WL 3610406, at *1–2 (Tex. App.—San Antonio Aug. 17, 2011, no pet.) (mem. op.).

Because the four-year limitations period expired before Powell filed this lawsuit in July 2013, the real-property lien and the power of sale to enforce the lien

[5] CIT Bank cites *Denbina v. City of Hurst* for the proposition that nonsuiting a foreclosure action constitutes an abandonment of acceleration. *See* 516 S.W.2d 460 (Tex. App.—Tyler 1974, no writ). The *Denbina* court did not hold that a nonsuit of a foreclosure action necessarily constitutes an abandonment of acceleration. *See id*. at 462–63. Rather, the *Denbina* court concluded that the City of Hurst exercised its option to accelerate the assessment obligation by means of its counterclaim in the first suit and that the City withdrew or abandoned its decision to accelerate by nonsuiting this counterclaim. *See id*. Because that fact pattern is not present in today's case, *Denbina* is not on point. *See id*.

became unenforceable.[6] Tex. Civ. Prac. & Rem. Code Ann. § 16.035(d). And, because CIT Bank's power to enforce the lien is unenforceable, the trial court erred in granting CIT Bank declaratory relief.[7] *See id*. Therefore, we sustain Powell's issue challenging the trial court's declarations, reverse the portion of the trial court's judgment granting CIT Bank declaratory relief, and render judgment denying CIT Bank's requests for declaratory relief.

C. Quantum-Meruit Claim

In the trial court, CIT Bank asserted, in the alternative, a quantum-meruit claim, seeking to recover from Powell more than $83,000 that CIT Bank advanced for taxes and insurance on the Property, plus reasonable attorney's fees, prejudgment and postjudgment interest, and costs of court. In its final judgment, the trial court granted CIT Bank declaratory relief and dismissed its alternative quantum-meruit claim as moot. In its appellee's brief, CIT Bank did not request any relief regarding the quantum-meruit claim in the event that this court were to reverse the trial court's judgment granting declaratory relief. In our opinion on original submission, we did not remand the quantum-meruit claim to the trial court. In its motion for rehearing, CIT Bank asserts that, unless this court changes its judgment reversing the trial court's granting of declaratory relief, the quantum-

[6] In its motion for rehearing, CIT Bank asserts that it had the right to extend the maturity date of the debt. Presuming for the sake of argument that CIT Bank had this right, the trial evidence is legally insufficient to support a finding that CIT Bank extended the maturity date of outstanding principal, accrued interest, and other charges due and payable under the Note on May 8, 2008, the date the sole borrower died.

[7] In its motion for rehearing, CIT Bank argues that this court's rulings are inconsistent because, after concluding that Powell failed to sufficiently brief a challenge to the trial court's denial of her request for a permanent injunction, this court then holds that CIT Bank is permanently enjoined from foreclosing on its lien. This argument is based on a false premise. This court does not hold that CIT Bank is permanently enjoined from foreclosing on its lien; rather, this court concludes that the trial court erred in granting CIT Bank declaratory relief because the limitations period has expired and because the real-property lien and the power of sale to enforce the lien have become unenforceable.

meruit claim no longer is moot and should be remanded to the trial court. We conclude that CIT Bank is not procedurally barred from asserting this argument in its motion for rehearing, even though CIT Bank did not file a notice of appeal and even though CIT Bank did not raise this point on original submission. *See Chesshir v. First State Bank*, 620 S.W.2d 101, 101–02 (Tex. 1981) (per curiam). Under the trial court's judgment, CIT Bank received relief it had requested on its primary claim, and CIT Bank apparently had no issue with the alternative quantum-meruit claim being dismissed as moot. Once this court reversed the trial court's judgment as to CIT Bank's primary claim, the trial court's basis for dismissing the quantum-meruit claim as moot disappeared, and CIT Bank was free to assert on rehearing that the quantum-meruit claim should be remanded to the trial court. *See id*.

In light of our reversal of the trial court's judgment granting CIT Bank declaratory relief and our rendition of judgment denying CIT Bank's requests for declaratory relief, the basis for the trial court's mootness determination as to the quantum-meruit claim is no longer present. We thus conclude that we should reverse the trial court's judgment dismissing the quantum-meruit claim as moot and remand the quantum-meruit claim to the trial court for further proceedings.[8] We grant CIT Bank's motion for rehearing to the extent CIT Bank seeks a remand of the quantum-meruit claim, and we deny the remainder of the motion.

III. CONCLUSION

The trial evidence proved as a matter of law that the claim for foreclosure of the lien in the Property under the Deed of Trust and the claim for sale of the

[8] We make no comment whatsoever on the merits of the quantum-meruit claim. It is for the trial court to determine on remand whether CIT Bank may recover under its quantum-meruit claim, and, if so, to what extent.

Property under the power of sale in the Deed of Trust accrued on May 8, 2008, when Irving died, more than four years before Powell filed this suit and CIT Bank filed its counterclaim. The trial evidence also proved as a matter of law that, because the four-year limitations periods under subsections (a) and (b) of Civil Practice and Remedies Code section 16.035 expired before Powell filed this lawsuit, the real-property lien and the power of sale to enforce the lien became unenforceable before Powell filed this lawsuit. Thus, the trial court erred in granting CIT Bank declaratory relief. We reverse the portions of the trial court's judgment in which the trial court grants CIT Bank declaratory relief and in which the trial court dismisses as moot the quantum-meruit claim; we render judgment denying CIT Bank's requests for declaratory relief, remand the quantum-meruit claim to the trial court for further proceedings, and affirm the remainder of the trial court's judgment.

/s/ Kem Thompson Frost
Chief Justice

Panel consists of Chief Justice Frost and Justices Boyce and Christopher.

EXHIBIT DBJONES-MSJ

CAUSE NO. C-0453-17-B

CONSUELO JONES and GABRIELA JONES	§	IN THE DISTRICT COURT OF
	§	
	§	
v.	§	
	§	
AMERICAN HOME MORTGAGE SERVICING, INC., HOMEWARD RESIDENTIAL, INC, DEUTSCHE BANK NATIONAL TRUST COMPANY, AMERIQUEST MORTGAGE COMPANY, AMERIQUEST MORTGAGE SECURITIES INC., ASSET-BACKED PASS-THROUGH CERTIFICATES, SERIES 2004-R8, OCWEN LOAN SERVICING, LLC and MARCC REAL ESTATE INVESTMENT, LLC.	§	HIDALGO COUNTY, TEXAS
	§	
	§	93RD JUDICIAL DISTRICT

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON PLAINTIFFS' CLAIMS AGAINST BANK DEFENDANTS

On November 12, 2019, this cause came on to be heard for trial, and the Plaintiffs, Consuelo Jones and Gabriella Jones, appeared in person and by their attorney of record and announced ready. Defendants, Homeward Residential Inc. (f/k/a American Home Mortgage Servicing, Inc.) ("Homeward"), Deutsche Bank National Trust Company as trustee for Ameriquest Mortgage Securities, inc., Asset-Backed Pass-Through Certificates, Series 2004-R8 ("Deutsche"), and Ocwen Loan Servicing LLC ("Ocwen") (collectively the "Bank Defendants") appeared through their attorney of record and announced ready for trial. MARCC Real Estate Investment LLC d/b/a MARCC Real Estate ("MARCC") appeared by its designated representative and by its attorney of record and announced ready for trial.

A jury trial having been waived by the parties, the case and evidence were presented to the Court. The Court signed its judgment on March 23, 2023, and findings of fact and conclusions of law were requested by the Bank Defendants. The Court hereby renders its findings of fact and conclusions of law. Any finding of fact that is more properly considered as a conclusion of law should be so treated, and vice versa. All findings herein are based on the proper evidentiary standard, even if not expressly stated.

FINDINGS OF FACT

Procedural Matters

1. At the outset of the trial, Plaintiffs offered Exhibit 53, to which Bank Defendants asserted a relevance objection based on the partial summary judgment this Court granted on April 11, 2019 in favor of Plaintiffs. In response, Plaintiffs requested that the Court rescind the summary judgment granted on April 11, 2019, and the Court overruled Bank Defendants' objection. In so doing, the Court impliedly granted the request to rescind the summary judgment, and that was the Court's intent as is evident by the fact that all parties presented evidence on all questions of liability and damages.

Facts adduced at trial

Bank Defendants' Misconduct Across the Country

2. Deutsche Bank is one of the largest banks in the world, operating in 70 countries with over 91,000 employees. It has over $1.3 trillion dollars in assets and over $68 billion in equity.

3. Ocwen (which acquired Homeward in December 2012) is the largest non-bank servicer of U.S. mortgages, servicing over 1.5 billion mortgages and having a portfolio value of over $550 million in mortgages. Ocwen is the largest servicer of subprime loans in the United States.

4. Federal and state regulators and prosecutors have determined that Deutsche Bank, Ocwen, and Homeward have engaged in systematic mortgage fraud and abuse for years, before, during and after all relevant times to the claims made in the lawsuit. Despite multiple findings of fraud and abuse, and consent orders requiring future compliance, Bank Defendants have failed and refused to correct their misconduct.

5. Plaintiffs Consuelo Jones and Gabriela Jones are victims of Bank Defendants' pattern of fraud and abuse. In order to place the conduct involved in this wrongful foreclosure case in perspective to the timeframe involving Bank Defendants' established pattern of mortgage fraud and abuse, some relevant dates include:

06/21/04 Gabriela Jones and her father Edwin Jones submit a loan application for a home equity loan to Ameriquest Mortgage Company (the "Home Equity

Loan"), which was closed the same day with a lien on Plaintiffs' homestead (the "Homestead") to secure the loan.

01/29/09 Ameriquest Mortgage Company transfers and assigns the lien for the Home Equity Loan to Deutsche Bank.

04/12/11 American Home Mortgage Servicing, Inc., as servicing agent for Deutsche Bank, files Application for Order Permitting Foreclosure of Lien Created under Texas Constitution Article XVI, Section 50A(6) in C-964-11-B; 93rd District Court, Hidalgo County, Texas (the "Application for Order of Foreclosure").

11/30/11 Order for Foreclosure entered by this Court authorizing Applicant American Home Mortgage Servicing, Inc. to proceed with foreclosure of the Homestead (the "Order for Foreclosure").

12/27/12 Ocwen acquires Homeward.

02/05/13 Homeward forecloses on the Homestead. Deutsche Bank is the successful bidder.

02/03/15 Bank Defendants sell the property to MARCC, despite knowledge of the problems with the loan and foreclosure process.

01/24/17 Plaintiffs file this lawsuit asserting multiple claims.

6. In September 2011 (after the Application for Order of Foreclosure, but before the Order for Foreclosure was granted), Ocwen entered into an agreement with regulators which required Ocwen and Homeward to implement a system of robust internal controls and oversight with respect to mortgage servicing practices performed by its staff and third party vendors to prevent improper foreclosures and maximize struggling borrower's opportunities to keep their homes.

7. In early 2012, multiple government agencies, both federal and state, conducted examinations and investigations into Ocwen and identified substantial deficiencies, weaknesses and violations of laws and regulations relating to foreclosure governance, implementation of modification programs, record keeping, required notifications and charging of unallowable fees. States' attorneys general, and state and federal regulators, found that Ocwen pushed borrowers into foreclosure, deceived borrowers about foreclosure alternatives, improperly denied loan modifications, and engaged in illegal foreclosure practices.

8. In June 2012, regulators conducted a targeted examination of Ocwen to assess its compliance with the 2011 agreement. The examination found widespread non-compliance. Consequently, Ocwen entered into a Consent Order which required Ocwen to retain an independent compliance monitor for two years. The consent decree also covers Homeward Residential Holdings, Inc., which conducted the foreclosure of the Joneses' home.

9. The compliance monitor uncovered numerous and significant violations of the 2011 agreement and applicable laws. For example, the compliance monitor reviewed 478 loans that Ocwen foreclosed and found 1,358 violations, for an average of three violations per foreclosed loan. These violations include the failure to confirm that it had the right to foreclose before initiating foreclosure, the failure to ensure that its statements to the court in foreclosure proceedings were correct, and pursuing foreclosure even while modifications were pending.

10. The compliance monitor also identified inadequate and ineffective information technology systems and personnel, and widespread conflicts of interest with related parties. The compliance monitor determined that Ocwen's information technology systems are a patchwork of legacy systems and systems inherited from acquired companies, many of which are incompatible. As a result, Ocwen regularly gives borrowers incorrect or outdated information, sends borrowers backdated letters, and maintains inaccurate records. Ocwen's systems have been backdating letters for years, depriving borrowers of valuable rights and remedies. There are insufficient controls in place to catch these errors and resolve them. Ocwen's inadequate infrastructure and ineffective personnel have resulted in Ocwen's failure to fulfill its legal obligations. Prior to the compliance monitor's review, Ocwen did not take adequate steps to implement reforms that it was legally obligated to implement pursuant to the 2011 agreement.

11. Regulators also uncovered a "tangled web" of conflicts that could create incentives that harm borrowers and push homeowners into unnecessary and improper foreclosures. The conflicts of interest involved overlapping ownership and control of Ocwen, Altisource Portfolio Solutions, S.A., Altisource Residential Corporation, Altisource Asset Management Corporation, all of which were chaired by William C. Erbey, who is also the largest shareholder of each and the Executive Chairman of Ocwen. Ocwen's close business relationships with related companies is particularly evident in its relationship with Altisource Portfolio which has dozens of subsidiaries that perform fee-based services for Ocwen. Under its servicing agreements, Altisource provides, among other things, residential property valuation services, property

preservation services, inspection services, title services and even auction services through Hubzu, another subsidiary. Ocwen also received referral fees from Altisource that are paid out of the commission that would otherwise be paid to Altisource as the selling broker in connection with real estate sales of foreclosed properties. Ocwen's related companies host nearly all of Ocwen's online auction and handle all of Ocwen's post-foreclosure real estate transactions. These conflicts of interest created an incentive to push borrowers into more foreclosures than were required or justified in order to generate more fees.

12. Bank Defendants' foreclosure counsel testified he was not aware of *anything* Ocwen did with respect to the Joneses' case to make sure these problems did not occur. The foreclosure made the basis of this lawsuit falls squarely into the pattern of mortgage fraud and abuses for which Bank Defendants have been repeatedly investigated and found to have engaged in. This case involves the wrongful foreclosure of an unconstitutional home equity loan, and the evidence clearly indicates that Bank Defendants deliberately and maliciously engaged in conduct designed to unlawfully and unjustly profit from this and other foreclosures by exploiting these Plaintiffs and other distressed homeowners.

The Joneses fall victim to the Bank Defendants' misconduct.

13. Plaintiff Consuelo Jones is the mother of Plaintiff Gabriella Jones. Consuelo resides at 2028 East 28th Street in Mission, Texas, which is the property that is the subject of this litigation. The legal description of that property is:

> ALL OF LOT 56, COUNTRY ESTATES AN ADDITION TO THE CITY OF MISSION, HIDALGO COUNTY, TEXAS ACCORDING TO THE MAP THEREOF IN VOLUME 28, PAGE 48A OF THE MAP RECORDS, HIDALGO COUNTY, TEXAS."

14. Consuelo Jones and Edwin Jones, Consuelo's then-husband and Gabriella's father, purchased the property in 1995. The note associated with the purchase of this property was not offered or admitted in evidence at trial. A deed of trust and loan addendum were admitted into evidence, which shows that the lender of the purchase money was Valley Mortgage, Inc. There is no evidence in the record of the interest rate on the original note or the payments made toward that note by Consuelo Jones and Edwin Jones.

15. In 2004, Edwin Jones and Gabriella Jones obtained a home equity loan for the property. Edwin asked for Gabriella's help, and she agreed, although at the young age of 20 years old, she did not really understand what she was signing.

16. The loan application was signed by Edwin Jones and Gabriella Jones on June 21, 2004. While the Bank Defendants suggested that maybe Edwin Jones had previously submitted another application prior to June 21, 2004, Gabriella had never seen such an application, and none was ever produced in discovery or offered into evidence by the Bank Defendants. Defendants admitted that the only loan application they possessed was dated June 21, 2004. The loan application says on its face that an interview occurred and the application was taken on June 21, 2004. Even if Edwin Jones had previously applied for a home equity loan on his own, however, that would be irrelevant because the application for the loan that was actually made—by both Edwin Jones and Gabriella Jones—was indisputably signed and submitted on June 21, 2004. Bank Defendants admitted that they had no documentation showing that at some time prior to June 21, 2004, Edwin or Gabriella submitted any information for verification that could constitute a prior application, and they admitted they had no verification documentation.

17. The note bears a date of June 19, 2004 at the top. But Gabriella testified that she signed the note on June 21, 2004—the same day as the loan application was signed (and the same day that the loan ultimately closed).

18. Consuelo Jones did not sign the note. Consuelo Jones understood that Gabriella's name was on the note, instead of hers, because her credit was better.

19. A Texas Home Equity Affidavit and Agreement (First Lien) was signed by Consuelo Jones, Edwin Jones, and Gabriella Jones in favor of Ameriquest Mortgage Company on June 21, 2004 and was notarized on that date.

20. A Texas Home Equity Security Instrument (First Lien) was also signed by Consuelo Jones, Edwin Jones, and Gabriella Jones in favor of Ameriquest Mortgage Company on June 21, 2004 and was notarized on that date.

21. A HUD Settlement Statement was issued with a settlement date of June 21, 2004. Thus, as stated above, the loan was applied for and closed on the same day. The settlement statement was signed by Edwin Jones and Gabriela Jones, but not Consuelo Jones. The settlement statement falsely recites that both Edwin Jones and Gabriella Jones were "unmarried."

22. Bank Defendants admitted that they did not possess a copy of the notice of rights under the Texas Constitution that was required to be provided to the borrowers under Texas Constitution article XVI, § 50(g). The Court finds such notice was not provided.

23. The home equity loan amount was $111,000. Of that amount, Gabriella testified she received "nothing." The HUD settlement statement shows Edwin received $10,859. Edwin's various creditors received $23,792.32. It further shows a payment to Bank of America for $75,817.72. A release of lien admitted in evidence shows that Bank of America released a lien on the property on September 14, 2004. As stated above, however, neither the actual note nor the assignment to Bank of America was offered into evidence; thus, Bank Defendants provided nothing to demonstrate that the lien released by Bank of America was valid.

24. On November 30, 2005, AMC Mortgage Services, Inc. d/b/a Delaware AMC Mortgage Services, Inc., "servicing agent for Deutsche Bank National Trust Company, as Trustee of Ameriquest Mortgage Securities, Inc., Asset-Backed Pass Through Certificates, Series 2004-R8" obtained an order of foreclosure on the purported home-equity lien in Cause No. C-2333-05-B, in the 93rd District Court. Consuelo Jones had no knowledge of this foreclosure proceeding.

25. On February 2, 2009, Deutsche Bank National Trust Company, as Trustee, in Trust for the Registered Holders of Ameriquest Mortgage Securities, Inc. Asset Backed Pass Through Certificates, Series 2004-R8, filed another application to foreclose the purported home-equity lien in Cause No. C-282-090C, in the 139th District Court. No order of foreclosure was offered into evidence relating to this case. Consuelo Jones was not aware of this filing either.

26. Thereafter, American Home Mortgage Servicing began servicing the note. American Home Mortgage Servicing later changed its name to Homeward Residential, Inc. on May 30, 2012, and was acquired as a subsidiary of Ocwen in 2012.

27. By 2009, problems in the marriage between Consuelo and Edwin Jones arose, and the couple stopped communicating. In April 2011, Edwin and Consuelo Jones separated, and Edwin moved out of the home. Edwin stopped making mortgage payments, without telling Consuelo Jones he had done so. After Consuelo and Edwin divorced, on November 19, 2011, Edwin quitclaimed his interest in the property to Gabriella.

28. On April 12, 2011, American Home Mortgage Servicing, Inc., "as servicing agent for Deutsche Bank National Trust Company, as Trustee for Ameriquest Mortgage Securities, Inc., Asset-Backed Pass-Through Certificates, Series 2004-R8 ('Noteholder')" filed another application to foreclose the lien on Plaintiffs' property. This case was docketed in the 93rd District Court as Cause No. C-964-11-B. The application for foreclosure states that American Home Mortgage Servicing, Inc. accelerated the debt on February 23, 2011.

29. On August 29, 2011, American Home Mortgage Servicing, Inc. filed a motion for entry of default judgment in Cause No. C-964-11-B. The file stamp indicates the motion was filed at 1:31 p.m. This filing contains a page attached—the last exhibit to the motion—containing a certificate of last known address giving the Joneses' addresses.

30. Consuelo testified that she did not receive any certified mail relating to this foreclosure. She denied receiving any certified mail that she did not claim. She had no knowledge of any forwarding of mail from her home to any other address. Gabriella likewise testified that she had never received any certified mail relating to the loan or left any mail "unclaimed."

31. At some point Consuelo became aware of the foreclosure proceeding, and on August 29, 2011, Consuelo sought help from Texas Rio Grande Legal Aid, who helped file her "Response to American Home Mortgage Servicing, Inc.'s Application for Order Permitting Foreclosure of Lien Under Texas Constitution Article XVI, §50(a)(6)" in Cause No. C-964-11-B in the 93rd District Court. The fax stamp at the top shows that it was faxed to "9563834688" at 3:19 p.m. on August 29, 2011.

32. On September 8, 2011, American Home Mortgage Servicing, Inc. sent a letter addressed to Gabriella and Edwin Jones. It states: "As your mortgage servicer, we want to help you stay in your home. We want you to know there is a program that may help you. If you qualify under the federal government's Home Affordable Modification (HAMP) program and comply with the terms of the Home Affordable Modification Program Trial Period Plan, we will modify your mortgage loan and you can avoid foreclosure." It expressly states that "[d]uring the HAMP evaluation we will not refer your home to foreclosure." It further states that "[w]hile we will take steps to ensure that no foreclosure sale will be conducted so that you will not lose your home during the HAMP evaluation, please note that the court having jurisdiction or the public official charged with carrying out the foreclosure may fail or refuse to halt that sale." But just two weeks earlier, Bank Defendants had sought entry of a default order of foreclosure. Gabriella did, in fact, start the process to apply for a modification. On October 25, 2011, she signed and submitted a Financial Analysis form.

33. Nevertheless, and despite their promise to stop foreclosure proceedings, the Bank Defendants pressed forward. No Court or public official forced the Bank Defendants to do so. For example, on October 17, 2011, the Bank Defendants filed a business records affidavit in Cause No.

C-964-11-B, purporting to prove up the default on the loan, and representing that the principal balance due was $119,692.40.

34. The same day, the Bank Defendants filed *another* certificate of last known address, as a stand-alone document, that falsely lists the address of Shapiro Schwartz, LLP, counsel for American Home Mortgage Servicing, Inc., as the last known address of respondents. Notably, the certificate does not even identify the Joneses by name.

35. Kirk Schwartz, foreclosure counsel for the Bank Defendants, admitted that the purpose of filing a certificate of last known address in a default case is so that the district clerk can send notice of the judgment to the defaulting parties. But because the certificate gave Schwartz's office address as the last known address for respondents, if the clerk were to send notice of a default judgment to the parties, that notice would not have gone to the Joneses—it would have gone straight back to the Bank Defendants' lawyers. *See* TEX. R. CIV. P. 239a ("Immediately upon the signing of the judgment, the clerk shall mail written notice thereof to the party against whom the judgment was rendered at the address shown in the certificate, and note the fact of such mailing on the docket.").

36. Schwartz could not explain why this certificate of last known address did not contain the Joneses' address. While Schwartz attempted to claim that the certificate of last known address was not required by the foreclosure rules, it certainly was required in order to take a default judgment, and Schwartz was forced to acknowledge as much. TEX. R. CIV. P. 239a. Rule 239a has been in effect since 1967 and applied at the time the certificate of last known address was filed.

37. Schwartz denied that the Bank Defendants were seeking a default judgment, but he was forced to admit that Gabriella and Edwin Jones had not filed answers. Thus, as to Gabriella and Edwin, the Bank Defendants most certainly were seeking a default judgment, and Schwartz's testimony was disingenuous, at best.

38. Only Consuelo had filed an answer. Schwartz's filing of a certificate of last known address shows that, even after receiving notice that Consuelo had filed an answer, Bank Defendants were still attempting to obtain a default judgment against her. Schwartz's testimony to the contrary is simply not credible.

39. Bank Defendants also filed an order setting hearing, which also required them to give all parties notice of the hearing. At trial, Bank Defendants submitted a notice of hearing

purportedly sent to Gabriella and Consuelo on November 3, 2011. Despite a request for production from Plaintiffs, Bank Defendants produced only part of this document to Plaintiffs' counsel during discovery. The document initially produced omitted the last page, which purports to be a printout, scanned into Schwartz's document retention system, from USPS.com showing that certified mail was "unclaimed." Bank Defendants did not provide this document to Plaintiffs' counsel until the night before trial. Bank Defendants provided no explanation for why they did not timely produce this document, given that their counsel had it scanned into his document system since November 2011. While the Court admitted the document into evidence, as this is a bench trial, the Court finds it should not be considered because it was not timely produced, and no good cause or lack of unfair prejudice was proven by the Bank Defendants. The Court finds Consuelo's and Gabriella's testimony that she did not receive it or leave it "unclaimed" as credible, and Schwartz's testimony was not credible, particularly given the numerous instances of misrepresentations made by the Bank Defendants throughout the course of the foreclosure proceedings and the discovery shenanigans engaged in by the Bank Defendants in this Court. Incredibly, Schwartz claimed that the laws governing foreclosure proceedings did not require that the Joneses actually receive notice of the hearing, even though the order setting hearing that *his office submitted* to the Court specifically required him to provide notice, and he knew before the default hearing on November 30, 2011 that the Joneses had not, in fact, received notice.

40. On November 30, 2011, after a hearing at which the Joneses did not appear, the 93rd District Court in Cause No. C-964-11-B signed an Order of Foreclosure. Schwartz testified that he knew that an answer had been filed by Consuelo as early as September 6, 2011. Yet the proposed order his office submitted, and that was ultimately signed, states that Consuelo Jones and Gabriella Jones had not filed an answer to the application for foreclosure, which is obviously false. The false and misleading order was prepared by and "approved as to form and content" by the Bank Defendants' lawyers, Schwartz and Shapiro Law Firm. Schwartz claimed that the proposed order was prepared at the time that the Bank Defendants were still seeking a default, and attempted to blame the Court for the error. But nevertheless, Schwartz agreed that Texas trial courts rely on counsel to prepare the orders, and his firm allowed the Court to sign an order that was false, knowing that Consuelo Jones had filed an answer, and that she had not received notice of the hearing.

41. Bank Defendants never attempted to correct the order after it was signed. Schwartz claimed that the lawyers at his firm did not notice the defect. Yet they later filed it in the real property records and attached it to a purported notice of posting the property for foreclosure sale. =

42. The order authorized American Home Mortgage Servicing, Inc. to foreclose the purported lien on the Jones's property. Consuelo Jones testified that she never received a copy of this order.

43. Despite obtaining the foreclosure order, the Bank Defendants engaged Gabriella in a lengthy process of obtaining a loan modification, involving multiple submissions of information. And despite their promise to halt foreclosure proceedings, the Bank Defendants immediately started getting their ducks in a row to start the process of foreclosure. For example, Bank Defendants filed an "Appointment of Substitute Trustee" on December 7, 2011 in preparation to foreclose.

44. The Bank Defendants claimed to have sent, by certified mail, a letter to Gabriella on January 10, 2013 providing a copy of a Notice of Trustee's sale. There is no postmark on the letter provided by Bank Defendants, however. And the green card that is normally attached to the actual letter is still attached to the original form, not an envelope.

45. Despite a request for production from Plaintiffs, Bank Defendants produced only part of this document to Plaintiffs' counsel, and omitted the last two pages. The last two pages purport to be envelopes marked as "unclaimed." Bank Defendants did not provide these pages of the documents to Plaintiffs' counsel until the night before trial began.

46. Notably, neither of the two envelopes purportedly returned as "unclaimed" and presented by Bank Defendants are addressed to Gabriella, and Schwartz likewise did not have a returned green card or any other documentary proof of mailing to provide to the court. Nevertheless, Schwartz testified that the letter was mailed, but he conceded that he did not place the letter in the mailbox himself. He could only speculate that his mail clerk mailed the letter based on unidentified "milestones" apparently existing on his computer system, which were never produced to Plaintiffs or presented at trial. Schwartz claimed to have discussed the issue with his mail clerk, who was never identified as a person with knowledge of relevant facts in response to discovery and who was not brought to testify at trial. The Court finds Schwartz's testimony was not credible or based on sufficient personal knowledge.

47. While the Court admitted the envelopes into evidence, given this is a bench trial, the Court finds this evidence should not be considered against the Joneses because it was not timely produced, and Bank Defendants did not establish good cause or lack of prejudice. Furthermore, the Court finds Consuelo and Gabriella's testimony that they did not receive or leave mail "unclaimed" as credible, and Schwartz's testimony was not credible, particularly given the numerous instances of misrepresentations made by the Bank Defendants throughout the course of the foreclosure proceedings and the discovery shenanigans engaged in by the Bank Defendants in this Court.

48. The letter recites that the foreclosure would be based on an order signed on March 20, 2011 in Cause No. C-369-11-B. But there is no such order. As stated above, the actual foreclosure order was signed on November 30, 2011.

49. The attached notice of trustee's sale purportedly sent to the Joneses states that the foreclosure sale would be conducted on February 5, 2013 between 10:00 a.m. and 4:00 p.m., beginning not earlier than 10:00 a.m. or not later than three hours thereafter. Schwartz conceded that under Texas law applicable at the time, although the law gives a creditor a six-hour window to conduct a sale, the notice had to specify the time the sale will start, and the sale must be conducted within three hours of the start time. TEX. PROP. CODE § 51.002(a), (c) (West 2013) ("The sale must begin at the time stated in the notice of sale or not later than three hours after that time."). The purpose of providing a specific time, Schwartz conceded, is so that potential buyers and debtors do not have to wait six hours for a sale..

50. The notice of sale purportedly sent to the Joneses says the sale will be conducted by Monty Medley as trustee. But the notice of sale that was actually posted at the courthouse states that the sale would be conducted by Connie Medley. Schwartz admitted that the notice of trustee sale that was posted at the courthouse, that actually identified the trustee that would conduct the sale, was never provided to the Joneses, in violation of Texas Property Code section 51.002(b). And Schwartz admitted that the notice of trustee's sale purportedly sent to the Joneses was not filed with the county clerk, as required by section 51.002(b).

51. As if that weren't enough to cause confusion to the general public and the Joneses, the trustee's deed shows that Connie Medley did *not* conduct the sale—it was conducted by Monty Medley. Schwartz agreed that "if the public is looking for Connie Medley in order to have a chance to buy this property, . . . they couldn't find Connie Medley that day because it was Monty

[Medley] conducting the sale." The trustee's deed, which was filed with the county clerk, attached a notice of trustee's sale and an affidavit from a Schwartz employee. The affidavit, which was sworn under oath, stated that the attached notice of trustee's sale was posted with the county clerk and served on the Joneses. But the notice of trustee's sale attached was the copy filed with the county clerk and posted at the courthouse that was *not* served on the Joneses. When presented with this discrepancy, Schwartz backtracked his earlier testimony and attempted to say that the affidavit was truthful, when it clearly wasn't. Schwartz attempted to testify that Ocwen Defendants' exhibit 25 provided proof that the copy posted at the courthouse was also served on the Joneses, but he was caught in a lie. The Court finds that Schwartz's backtracking and inconsistent testimony renders him not credible as a witness.

52. On January 25, 2013, Gabriella again applied for a loan modification. Nevertheless, on February 5, 2013, the foreclosure sale was held by Homeward Residential, not American Home Mortgage Servicing, Inc., who was the party named in the November 30, 2011 order authorizing the foreclosure.

53. Deutsche bought the property at the foreclosure sale for $84,319. But the value of the home, and the debt, was much higher. No witness for the Bank Defendants could explain why such a low amount was paid for the property, even though in October 2011, the Bank Defendants had represented the amount due to be $119,692.40. The Court finds that the Bank Defendants intended to pocket as much money for the property as they could without crediting anything to the Joneses, and that is exactly what they did.

54. Gabriella testified that she was not aware of any home equity lender that would lend 100% of the property value. Indeed, the Texas Constitution requires that a home equity loan be of a "principal amount that when added to the aggregate total of the outstanding principal balances of all other indebtedness secured by valid encumbrances of record against the homestead does not exceed 80% of the fair market value of the homestead on the date the extension of credit is made." Gabriella opined, without objection, that if a person requested and obtained a loan for $111,000, it would be fair to believe that the lender assessed the value of the home as more than $111,000. And on June 21, 2004, at the time of the loan, the house was valued at $148,000. The lender accepted that estimated value and granted the loan on that basis.

55. Altisource Real Estate Valuation Services valued the home as of May 2014. Gabriella testified, without objection, that the market value of the home was assessed by

Altisource at $154,000. She further testified, without objection, that Zillow estimated the value as $162,091, and Realtor.com estimated the value at $174,200. Furthermore, Gabriella testified, without objection, that according to the Greater McAllen Association of Realtors, the estimated value of the home as of the day before trial was $173,120, and provided a range of values of $147,152 to $199,088.

56. Gabriella also testified that she spoke with an appraiser in the area and Nick Cantu, the president of the realtor association for the entire state of Texas. Gabriella testified that based on all this data and her conversations, she believed the value of the property on February 5, 2013 was between $150,000 and $160,000. The property is in a highly desired school district that a lot of people are trying to move into.

57. Given the conflicts of interest involved with the low estimates by Altisource, and the fact that the Zillow estimate was identified as REO occupied, meaning that at the time it was owned by the lender, the Court does not credit the low estimated values for the property. Considering the range of values provided, and the fact that the property was in a highly desired school district, the Court values the home at $160,000 at the time of the foreclosure sale, and finds that the property was substantially undervalued at the time of the foreclosure.

58. Deutsche attempted to evict the Joneses. On July 29, 2013, Deutsche filed a forcible detainer action in the Justice Court Precinct 3 of Hidalgo County in Cause No. FD13-128-31. On July 30, 2013, Consuelo Jones received a notice attached to her door that she was being served with process. When it was explained to her that the bank was attempting to evict her from her home, Consuelo took this as a strike to her dignity, and she was emotionally distressed and ashamed to have to tell her children, and it was a burden that she carried through the date of trial.

59. The justice court granted Deutsche possession of the property, but the Joneses appealed to the County Court No. 8 in Cause No. CL-13-32970H. In the de novo appeal, the County Court No. 8 determined that the Joneses were entitled to possession of the property. The County Court No. 8 issued findings of fact and conclusions of law. The trial court found that Deutsche bank provided no evidence that it had provided a copy of the November 30, 2011 order of foreclosure to the Joneses, and that the notice of trustee's sale dated January 15, 2013 was issued by Homeward Residential, who was not the applicant that secured the order of foreclosure. Additionally, the County Court No. 8 found that the substitute trustee's deed recited that an order to proceed with notice of foreclosure sale had been issued on March 20, 2011, but no such order

was provided. Furthermore, there was no evidence that the Joneses had been provided with a proper demand for possession, that the period of time to vacate the property had expired, that the Joneses had refused to surrender possession in response to a proper demand, or that Deutsche had a superior right to immediate possession.

60. Deutsche appealed the case to the Thirteenth Court of Appeals. On July 2, 2015, the Court of Appeals issued its decision. Ocwen and Deutsche were represented by counsel in these proceedings, which were communicating with Ocwen, and Ocwen was acting on behalf of Deutsche Bank as its servicing agent. The Thirteenth Court of Appeals issued its decision on July 2, 2015 affirming the trial court's judgment and finding that there was no evidence produced establishing that Deutsche gave the Joneses notice to vacate or that the Joneses had refused to vacate.

61. While the ink on that ruling was still wet, Deutsche filed yet another suit to evict the Joneses on July 22, 2015. On July 28, 2015, Consuelo Jones received another notice on her front door stating that service of process had been attempted for Cause No. LT145-15-31. This notice again caused extreme emotional distress. Consuelo Jones felt it was "another ice bucket poured on [her], a knot in her stomach, a knot in her heart." She believed her world was crumbling, and she felt destroyed. She testified that the feeling continues on and is always present in her mind, her heart, and in her life, and it is impossible to push it aside. As with the earlier notice for Cause No. FD13-128-31, Consuelo discussed the notice with Gabriella, who reacted by crying and with sadness, pain, and anger. It also caused anger between Consuelo and Gabriella, leading to several negative reactions, tenseness, and arguments between the two.

62. On August 28, 2015, the trial court dismissed the suit. Deutsche appealed to the County Court at Law No. 2 in Cause No. CL-15-3500-B. The Joneses again won the appeal by way of an oral ruling, but no judgment had been issued, and the case was still pending at the time of trial.

63. Despite losing multiple eviction suits and an appeal to the Thirteenth Court of Appeals, the Bank Defendants posted the property for sale on Hubzu, an internet auction site, which Ocwen uses to host all of its auctions. On February 3, 2016, the Bank Defendants sold the property to MARCC for $95,394. Roma Caguiat, owner of MARCC, believed that at the time she purchased the home, it was worth between $130,000 and $140,000. The property was not even

listed for more than $100,000, because if it had been, Roma Caguiat testified MARCC would not have bid on it.

64. On February 13, 2016, MARCC delivered notice to the Joneses that it had purchased the property and that they had three days to vacate the property or else face yet another lawsuit. Seeing this notice caused Consuelo to again recall her feelings of pain, shame, and that she would be out on the streets.

65. On February 18, 2016, MARCC filed suit in Cause No. LT16-0085-J32 in the Justice Court Precinct 3. That case was dismissed on March 10, 2016.

66. MARCC then attempted again to evict the Joneses and filed suit in Cause No. LT16-0220-J31 in the Justice Court Precinct 3. Consuelo received notice on her front door. She recalled feeling threatened. Receiving all the notices caused her to lose concentration, lose sleep, and tortured her mind "all the time." The fear of losing her home, with substantial sentimental value because of the family memories, the shelter it provides, and the safety, was overwhelming. Consuelo explained that the stress from the foreclosure process interfered with her daily life in that it prevented her from performing community service, which she enjoyed. She was only able to resume that service work two seeks before trial in November 2019. Consuelo testified that she has to take medication for high blood pressure and for anxiety. In August 2016, Consuelo had the onset of a stroke and ended up with facial paralysis, and suffered severe heart issues.

67. Gabriella testified that when she learned that the home had been foreclosed on and that she was being evicted, she was in shock. She testified that she thought she was "going to be in this home" and was "protected," but she was not. She was afraid that her family would "out on the street." She testified that it caused mental stress and anguish, and still did as of the date of trial. For the almost seven years between the foreclosure in 2013 and the trial 2019, she suffered through multiple eviction proceedings. Those proceedings have interrupted her daily life by taking time away from work, and it has ruined her holidays and her time with her family, as they are worried they may become homeless.

68. Gabriella's emotional distress has been so bad that she broke out in hives from the stress and had to seek medical attention, at least once or twice a year since the process began. She testified that there were days where she had to "completely shut down everything and everyone and be alone. It's a burden." And it interfered with her ability to function, and prevented her from

being able to focus. She stated that "it's always in the back of my mind thinking what are we going to do, what's the next step, how am I going to protect my family."

69. MARCC obtained a judgment of possession, and Joneses appealed to the County Court at Law No. 6 in Cause No. CL-16-2561-F. That case remained pending at time of trial.

70. As if that were not enough, Gabriella testified, without objection, that on January 25, 2017, she received a form 1099-C from Defendant Ocwen. Ocwen reported to the IRS that it had canceled the debt in the amount of $136,684.92, which obviously did not include any credit for the sale to MARCC. The form 1099-C expressly states on its face that it was for "cancellation of debt" and references "identifiable event code G." Code G refers to a "decision or policy to discontinue collection. Code G is sued to identify cancellation of debt as a result of a decision or a defined policy of the creditor to discontinue collection activity and cancel the debt." *See* https://www.irs.gov/publications/p4681#:~:text=Code%20G—Decision%20or%20policy,activity%20and%20cancel%20the%20debt (Last visited May 7, 2023). Ocwen issued this 1099-C despite the fact that home equity notes are non-recourse against the homeowner. This caused even more emotional distress to Gabriella—it caused her to fear that one day, the IRS would arrive at her door to ask her to pay for the tax liability for an amount that did not even include credit for the sale to MARCC. She explained that it was a "big stressor" and that she thinks about the potential tax liability every day.

71. Benjamin Verooren testified on behalf of the Bank Defendants. He was notified he would testify in July or August 2019, but he was never disclosed as a witness in response to discovery. He was employed by Ocwen Financial Corporation, who is not even a party to the lawsuit, but owns Ocwen Loan Servicing. The Bank Defendants refused to call Verooren a "corporate representative," but stated he would testify as a custodian of records, even though someone else was identified in discovery as the custodian of records.

72. Verooren testified that he is a "Senior Loan Analyst," and described his job duties as requiring him to "attend trials, depositions, mediations." He is tasked with reviewing books and records to prepare him for his appearances and assignments, and he works with other teams and departments to help prepare. In other words, Verooren was a paid, professional witness for the Bank Defendants, who the Bank Defendants chose to hide until trial.

73. Verooren knew nothing about this case until he was assigned to it in July or August of 2019. He had no personal knowledge of any of the facts of this case. He only reviewed

the documents shown to him by the lawyers and frequently denied knowledge of events that occurred in this case. As such, the Court finds his protestations and explanations for the events giving rise to the Joneses' claims are contrived, not based on personal knowledge, not credible, and not deserving of any weight.

74. The Court apportions fault for the injuries suffered by Consuelo and Gabriella Jones 100% to the Bank Defendants. While the testimony showed that the repeated eviction proceedings involved MARCC, they were all caused by the Bank Defendants' tortious conduct, and MARCC was simply another victim—MARCC was unaware of any problems with prior foreclosures or with the invalidity of the note and related documents between the Bank Defendants and the Joneses, of which the Bank Defendants were certainly aware.

75. The parties agreed to submit testimony regarding attorney fees by affidavit. The Court finds that the attorney and paralegal fees incurred and requested by Plaintiffs in the amount $400,000.00 are reasonable and necessary attorney and paralegal fees, and that the award of that amount to Plaintiffs would be equitable and just. The Court finds that the adjusted hourly rates proposed by Plaintiffs are reasonable rates for necessary work, given the respective attorneys' and paralegals' experience, reputation, and abilities, and given the need to defend against the Bank Defendants' counterclaim, the multi-year delay in receiving payment, and the risk of not recovering at all due to the contingency fee agreement. The Court finds as credible, and based on review of the invoices and the credible expert testimony, that a 20% reduction for non-recoverable fees is proper, and awards fees incurred in this lawsuit only on recoverable claims. Thus, the Court awards $380,254.70 as reasonable and necessary, equitable and just attorney and paralegal fees through March 31, 2020. The Court has considered the *Rohrmoos* Factors in its analysis.

76. The Court finds that a reasonable and necessary attorney fee for the work through the entry of judgment in this case is $19,745.30, and that awarding this amount is equitable and just.

77. The court finds that Plaintiffs incurred costs of $11,258.00, and that it is equitable and just to award these costs.

78. Additionally, the Court finds that if the case is appealed to the Thirteenth Court of Appeals, and Plaintiffs prevail, Plaintiffs will incur an additional $10,000.00 in reasonable and necessary attorney fees, and that such conditional award is equitable and just. Additionally, the

Court finds that if the case is appealed to the Texas Supreme Court, and Plaintiffs prevail, Plaintiffs will incur an additional $10,000.00 in reasonable and necessary attorney fees, and that such conditional award is equitable and just.

CONCLUSIONS OF LAW

1. This Court has the authority to revisit a previously rendered summary judgment so long as the Court affords the parties an opportunity to litigate the issue. *See Bi-Ed, Ltd. v. Ramsey*, 935 S.W.2d 122, 123 (Tex. 1996); *Elder Constr., Inc. v. City of Colleyville*, 839 S.W.2d 91, 92 (Tex. 1992). Bank Defendants did not properly request a continuance or ask to recess of the case after Plaintiffs requested that the Court withdraw its summary judgment rulings, and this Court provided all parties the opportunity to litigate all issues raised in the case. Any harm from withdrawing the prior summary judgment rulings has been ameliorated or waived.

Declaratory relief awarded to Gabriella and Consuelo Jones

2. Contrary to Bank Defendants' arguments, declaratory relief is available to assess the validity of notes and liens under the Texas Constitution, even if the result implicates title to the property. *Cadle Co. v. Ortiz*, 227 S.W.3d 831, 837–38 (Tex. App.—Corpus Christi–Edinburg 2007, pet. denied). Furthermore, actions seeking the recission of foreclosure sales are properly brought under the Texas declaratory judgments act. *Trien v. Fed. Home Loan Mortgage Corp.*, 400 F. Supp. 3d 596, 601 (W.D. Tex. 2019); *Alanis v. U.S. Bank*, 489 S.W.3d 485, 501–03 (Tex. App.—Houston [1st Dist.] 2015, pet. denied); *Cadle Co.*, 227 S.W.3d at 833, 837. Homeowners are entitled to seek declaratory relief "as to the invalidity of [a] lien." *Schmidt v. Crawford*, 584 S.W.3d 640, 656 (Tex. App.—Houston [1st Dist.] 2019, no pet.) (citing *Kyle v. Strasburger*, 522 S.W.3d 461, 465 (Tex. 2017)). "Section 37.004 of the TDJA explicitly permits 'a person interested under a deed' to seek a determination of 'any question of construction or validity arising under the instrument and obtain a declaration of rights, status, or other legal relations thereunder.'" *Porterfield v. Deutsche Bank Nat'l Tr. Co.*, No. SA:16-CV-105-DAE, 2016 WL 5017344, at *7 (W.D. Tex. Sept. 19, 2016).

3. Texas Constitution Article XVI section 50(a) imposes requirements on lenders who seek to force a sale of a family's homestead for the payment of debts. Tex. Const. art. XVI, § 50. For example, section 50(a)(6)(C) precludes foreclosure on a family homestead unless the debt is "without recourse for personal liability against each owner and the spouse of each owner, unless the owner or spouse obtained the extension of credit by actual fraud." Tex. Const. art. XVI, §

50(a)(6)(C). Furthermore, section 50(a)(6)(M) precludes foreclosure on a family homestead unless the debt transaction "is closed not before:

> (i) the 12th day after the later of the date that the owner of the homestead submits a loan application to the lender for the extension of credit or the date that the lender provides the owner a copy of the notice prescribed by Subsection (g) of this section;
>
> (ii) one business day after the date that the owner of the homestead receives a copy of the loan application if not previously provided and a final itemized disclosure of the actual fees, points, interest, costs, and charges that will be charged at closing. If a bona fide emergency or another good cause exists and the lender obtains the written consent of the owner, the lender may provide the documentation to the owner or the lender may modify previously provided documentation on the date of closing."

Tex. Const. art. XVI, § 50(a)(6)(M). Section 50(g) requires the lender to provide the text of section 50 to the debtor. Tex. Const. art. XVI, § 50(g).

4. Section 50(c) then provides:

> No mortgage, trust deed, or other lien on the homestead shall ever be valid unless it secures a debt described by this section, whether such mortgage, trust deed, or other lien, shall have been created by the owner alone, or together with his or her spouse, in case the owner is married. All pretended sales of the homestead involving any condition of defeasance shall be void.

Tex. Const. art. XVI, § 50(c).

5. Plaintiffs proved that the home equity loan application was submitted on the day of closing. Gabriella Jones testified that the application dated June 21, 2004 is the only application she has ever seen, and no other application was produced in this case by the Bank Defendants during discovery or offered into evidence. The Court will not speculate that another application could have been submitted by Edwin Jones prior to June 21, 2004, as requested by Bank Defendants. The Court also rejects the Bank Defendants' argument that a mere recital in contractual documents that the 12-day closing requirement imposed by the Texas Constitution has been complied with requires a different outcome in this case. The Texas Constitution requires actual compliance, not a mere recital of compliance, and the testimony and evidence at trial shows the Bank Defendants failed to comply. *Wood v. HSBC Bank USA, N.A.*, 505 S.W.3d 542, 545 (Tex. 2016) ("What the Constitution forbids cannot be evaded even by agreement of the parties, and what is "never valid is always void.").

6. The Court finds and declares that Texas Home Equity Adjustable Rate Note in favor of Ameriquest Mortgage Company and signed by Plaintiff Gabriella Jones and Edwin Jones on June 21, 2004 is unconstitutional, void, and unenforceable by the Bank Defendants or their agents, successors, or assigns, by way of forced sale or foreclosure, in that it fails to comply with Texas Constitution article XVI, §50(a)(6). The closing occurred on the same day that Plaintiffs submitted their loan application in violation of Texas Constitution article XVI, §50(a)(6)(M)(i). The closing also occurred on the same day that Plaintiffs were provided with a final itemized disclosure of the actual fees, points, interest, costs, and charges that would be charged at closing in violation of Texas Constitution article XVI, §50(a)(6)(M)(ii). Additionally, Bank Defendants failed to provide the required notice of rights under Texas Constitution article XVI, § 50(g).

7. The Texas Home Equity Security Instrument (First Lien) in favor of Ameriquest Mortgage Company signed by Plaintiff Gabriella Jones, Plaintiff Consuelo Jones, and Edwin Jones on June 21, 2004 is unconstitutional, void, and unenforceable by the Bank Defendants or their agents, successors, or assigns, by way of forced sale or foreclosure, in that it fails to comply with Texas Constitution article XVI, §50(a)(6). The closing occurred on the same day that Plaintiffs submitted their loan application in violation of Texas Constitution article XVI, §50(a)(6)(M)(i). The closing also occurred on the same day that Plaintiffs were provided with a final itemized disclosure of the actual fees, points, interest, costs, and charges that would be charged at closing in violation of Texas Constitution article XVI, §50(a)(6)(M)(ii). Additionally, Bank Defendants failed to provide the required notice of rights under Texas Constitution article XVI, § 50(g).

8. The Texas Home Equity Affidavit and Agreement (First Lien) in favor of Ameriquest Mortgage Company signed by Plaintiff Gabriella Jones, Plaintiff Consuelo Jones, and Edwin Jones on June 21, 2004 is unconstitutional, void, and unenforceable by the Bank Defendants or their agents, successors, or assigns, by way of forced sale or foreclosure, in that it fails to comply with Texas Constitution article XVI, §50(a)(6). The closing occurred on the same day that Plaintiffs submitted their loan application in violation of Texas Constitution article XVI, §50(a)(6)(M)(i). The closing also occurred on the same day that Plaintiffs were provided with a final itemized disclosure of the actual fees, points, interest, costs, and charges that would be charged at closing in violation of Texas Constitution article XVI, §50(a)(6)(M)(ii). Additionally, Bank Defendants failed to provide the required notice of rights under Texas Constitution article XVI, § 50(g).

9. All assignments and transfers of the note and lien arising from (a) the Texas Home Equity Adjustable Rate Note signed by Plaintiff Gabriella Jones and Edwin Jones on June 21, 2004, (b) the Texas Home Equity Security Instrument (First Lien) signed by Plaintiff Gabriella Jones, Plaintiff Consuelo Jones, and Edwin Jones signed on June 21, 2004, and (c) the Texas Home Equity Affidavit and Agreement (First Lien) signed by Plaintiff Gabriella Jones, Plaintiff Consuelo Jones, and Edwin Jones on June 21, 2004, are unconstitutional, void, and unenforceable by the Bank Defendants or their agents, successors, or assigns, by way of forced sale or foreclosure, in that they are based on invalid, unenforceable, unconstitutional, and void transactions. The closing of the equity loan underlying the assignments and transfers occurred on the same day that Plaintiffs submitted their loan application in violation of Texas Constitution article XVI, §50(a)(6)(M)(i). The closing also occurred on the same day that Plaintiffs were provided with a final itemized disclosure of the actual fees, points, interest, costs, and charges that would be charged at closing in violation of Texas Constitution article XVI, §50(a)(6)(M)(ii). Additionally, Bank Defendants failed to provide the required notice of rights under Texas Constitution article XVI, § 50(g).

10. The Bank Defendants failed to perfect a valid lien on the property with the legal description of "ALL OF LOT 56, COUNTRY ESTATES AN ADDITION TO THE CITY OF MISSION, HIDALGO COUNTY, TEXAS ACCORDING TO THE MAP THEREOF IN VOLUME 28, PAGE 48A OF THE MAP RECORDS, HIDALGO COUNTY, TEXAS." The closing of the equity loan underlying the lien occurred on the same day that Plaintiffs submitted their loan application in violation of Texas Constitution article XVI, §50(a)(6)(M)(i). The closing also occurred on the same day that Plaintiffs were provided with a final itemized disclosure of the actual fees, points, interest, costs, and charges that would be charged at closing in violation of Texas Constitution article XVI, §50(a)(6)(M)(ii). Additionally, Bank Defendants failed to provide the required notice of rights under Texas Constitution article XVI, § 50(g).

11. The Substitute Trustee's Deed dated February 7, 2013 and filed as Document 2013-2383031 in the Official Deed Records of Hidalgo County, Texas is void, unenforceable, and otherwise set aside as relating to the following property: "ALL OF LOT 56, COUNTRY ESTATES AN ADDITION TO THE CITY OF MISSION, HIDALGO COUNTY, TEXAS ACCORDING TO THE MAP THEREOF IN VOLUME 28, PAGE 48A OF THE MAP RECORDS, HIDALGO COUNTY, TEXAS. The closing of the equity loan underlying substitute trustee's deed occurred on the same day that Plaintiffs submitted their loan application in violation of Texas Constitution

article XVI, §50(a)(6)(M)(i). The closing also occurred on the same day that Plaintiffs were provided with a final itemized disclosure of the actual fees, points, interest, costs, and charges that would be charged at closing in violation of Texas Constitution article XVI, §50(a)(6)(M)(ii). Additionally, Bank Defendants failed to provide the required notice of rights under Texas Constitution article XVI, § 50(g).

12. The Special Warranty Deed dated February 3, 2016 from Deutsche Bank National Trust Company, as Trustee for Ameriquest Mortgage Securities, Inc., Asset-Backed Pass-Through Certificates, Series 2004-R8 to MARCC Real Estate Investment is void, unenforceable, and otherwise set aside as relating to the following property: "ALL OF LOT 56, COUNTRY ESTATES AN ADDITION TO THE CITY OF MISSION, HIDALGO COUNTY, TEXAS ACCORDING TO THE MAP THEREOF IN VOLUME 28, PAGE 48A OF THE MAP RECORDS, HIDALGO COUNTY, TEXAS." The closing of the equity giving rise to this transaction occurred on the same day that Plaintiffs submitted their loan application in violation of Texas Constitution article XVI, §50(a)(6)(M)(i). The closing also occurred on the same day that Plaintiffs were provided with a final itemized disclosure of the actual fees, points, interest, costs, and charges that would be charged at closing in violation of Texas Constitution article XVI, §50(a)(6)(M)(ii). Additionally, Bank Defendants failed to provide the required notice of rights under Texas Constitution article XVI, § 50(g).

13. The Joneses were not required to tender or be willing to tender the borrowed funds back to the Bank Defendants in order to obtain declaratory relief that the foregoing transactions were unconstitutional, void, and unenforceable by way of forced sale. Home equity loans are nonrecourse against the borrower under Texas Constitution article XVI, §50(a)(6)(C), and the sole action a lender can take is against the property. *See Ann Graham, Where Agencies, the Courts, and the Legislature Collide: Ten Years of Interpreting the Texas Constitutional Provisions for Home Equity Lending*, 9 Tex. Tech Admin. L.J. 69, 77 (2007) ("The Texas constitutional borrower protections have a severe downside for lenders. If the lender has violated even one of these complex and ambiguous constitutional condition precedent to establishing a lien on homestead property in Texas, the lender (unless it cures the defect) has no valid lien and cannot foreclose on the property. With neither recourse against the borrower nor a valid lien, the lender loses the entire loan amount.").

14. Furthermore, while Bank Defendants argue that Plaintiffs were required to tender the borrowed funds and that the Texas Constitution requires borrowers to provide 60-days written notice of any constitutional violation, allowing the lender to cure any such violation and maintain the validity of the lien, Plaintiffs were not required to prove these issues. Plaintiffs expressly pleaded that all conditions precedent to recovery had been satisfied. Bank Defendants did not file a specific denial pointing out the failure to tender the borrowed funds or give notice and an opportunity to cure, and these issues were not tried by consent. Accordingly, Plaintiffs were not required to prove they tendered the borrowed funds or provided notice and an opportunity to cure under the Texas Constitution. *See* Tex. R. Civ. P. 54 ("In pleading the performance or occurrence of conditions precedent, it shall be sufficient to aver generally that all conditions precedent have been performed or have occurred. When such performances or occurrences have been so plead, the party so pleading same shall be required to prove only such of them as are specifically denied by the opposite party."); *see also* Tex. R. Civ. P. 93(12) (requiring that denial of notice or proof of loss "shall be made specifically and with particularity"); *Rise Above Steel Co., LLC. v. Liberty Mut. Ins. Co.*, 656 S.W.3d 577, 584 (Tex. App.—El Paso 2022, no pet.) ("A defendant cannot generally deny that the plaintiff has not proved all conditions precedent, but must specifically deny which conditions precedent have not been met."); *Hynds v. Foster*, No. 01-15-01034-CV, 2017 WL 769909, at *13 (Tex. App.—Houston [1st Dist.] Feb. 28, 2017, no pet.) (mem. op.) ("'Although Hynds denied that Foster gave "notice and proof of his claim as alleged,' he did not specifically deny that Foster had failed to present his contract claim as required by statute. As a result, Hynds has waived his right to complain about Foster's failure to plead and prove presentment on appeal."); *Wade & Sons, Inc. v. Am. Standard, Inc.*, 127 S.W.3d 814, 826 (Tex. App.—San Antonio 2003, pet. denied) ("A defendant cannot generally deny that the plaintiff has not proved all conditions precedent, but must specifically deny which conditions precedent have not been met. By failing to specifically deny that Trane failed to give proper notice, Consolidated, Browning, and Federal waived their right to complain of such failure on appeal."); *Fillion v. David Silvers Co.*, 709 S.W.2d 240, 246 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.) (describing tender of borrowed funds as a "condition precedent").

15. Under the UDJA, this Court may award "costs and reasonable and necessary attorney's fees as are equitable and just." Tex. Civ. Prac. & Rem. Code § 37.009. The Court can award reasonable and necessary attorney fees to the prevailing party or even to the nonprevailing

party. "[T]he award of attorney's fees in declaratory judgment actions is clearly within the trial court's discretion and is not dependent on a finding that a party 'substantially prevailed.'" *Barshop v. Medina Cnty. Underground Water Conservation Dist.*, 925 S.W.2d 618, 637 (Tex. 1996).

16. Even if this Court is ultimately determined to be wrong in awarding declaratory relief to Plaintiffs, it still finds that the award of attorney fees in this case would be equitable and just despite a reversal of the declaratory relief. *Kachina Pipeline Co., Inc. v. Lillis*, 471 S.W.3d 445, 455 (Tex. 2015) ("When an appellate court reverses a declaratory judgment, it may reverse an attorney's fee award, but it is not required to do so."). The court finds it would be equitable and just to award Plaintiffs' attorney's fees even if Plaintiffs are determined to be the nonprevailing party on their own claims. And even if it is determined that Plaintiffs were required to elect a remedy on their affirmative claims, this Court can award the attorney fees based on Defendants' own request for declaratory relief, regardless of who is ultimately determined to be the winner of that claim on appeal. Thus, the Court finds that under any set of circumstances after an appeal, the award of Plaintiffs' reasonable and necessary attorney's fees are equitable and just.

Equitable subrogation claim

17. The Court rejects Bank Defendants' conditional counter-claim for declaratory relief that they are equitably and/or contractually subrogated to the Bank of America Lien up to an amount equivalent to $75,817.72 plus interest. Texas courts "have honored equitable subrogation claims against homestead property when a refinance, even though unconstitutional, was used to pay off valid liens." *LaSalle Bank Nat. Ass'n v. White*, 246 S.W.3d 616, 619 (Tex. 2007). But Bank Defendants did not submit proof that the Bank of America lien was valid; the original note was never offered into evidence, nor was the actual assignment of that note to Bank of America presented into evidence. Without more proof, this Court cannot determine that Bank Defendants are entitled to equitable subrogation.

18. Moreover, without the original note, this Court cannot determine the interest rate to be applied to the subrogation claim. While Bank Defendants assert they are entitled to 6% statutory interest under Texas Finance Code § 302.002, that statutory rate only applies "[i]f a creditor has not agreed with an obligor to charge the obligor any interest." Tex. Fin. Code Ann. § 302.002. In contrast, "[i]f an obligor has agreed to pay to a creditor any compensation that constitutes interest, the obligor is considered to have agreed on the rate produced by the amount of that interest, regardless of whether that rate is stated in the agreement." *Id.*

19. Moreover, Bank Defendants waived any claim for subrogation by canceling the entire debt, as shown by their issuance of the 1099-C, with an event code G, to Gabriella Jones showing that it had canceled the debt in the amount of $136,684.92. *See* https://www.irs.gov/publications/p4681#:~:text=Code%20G—Decision%20or%20policy,activity%20and%20cancel%20the%20debt (Last visited Mat 7, 2023).

79. Finally, the subrogation claim is barred by the statute of limitations. A lender's cause of action to "enforce its subrogation lien rights accrues on the date the refinancing loan matures. If the maturity of the refinancing loan is accelerated, the debt is mature for purposes of both the lender's contractual rights and its subrogation rights." *PNC Mortgage v. Howard*, 651 S.W.3d 154, 159–60 (Tex. App.—Dallas 2021, pet. granted). The application for foreclosure, giving rise to the order of foreclosure that has been the basis of all the litigation at issue in this case, stated that American Home Mortgage Servicing, Inc. gave notice of its intent to accelerate on July 21, 2009 and accelerated the debt on February 23, 2011. The statute of limitations required suit be filed within 4 years after the refinancing loan was accelerated; thus, the four-year statute of limitations expired on February 23, 2015.

20. Plaintiffs filed this lawsuit on January 26, 2017. By that time, the limitations period for Bank Defendants' subrogation counterclaim had already expired. Thus, to invoke the limitations period in Texas Civil Practice and Remedies Code section 16.069's benefit, Bank Defendants were required to file their counterclaim to declare their equitable subrogation rights no later than the 30th day after the date they were required to answer. Tex. Civ. Prac. & Rem. Code § 16.069(b).

21. Defendant Homeward Residential Inc. (f/k/a American Home Mortgage Servicing, Inc.) was served on March 1, 2017. Defendant Deutsche Bank National Trust Company as trustee for Ameriquest Mortgage Securities, inc., Asset-Backed Pass-Through Certificates, Series 2004-R8, was not served but answered on March 27, 2017. Defendant Ocwen Loan Servicing LLC was served on March 1, 2017.

22. Bank Defendants did not assert their counter-claim for contractual or equitable subrogation until March 25, 2019. Accordingly, the claim was barred by limitations. Importantly, Bank Defendants did not seek to foreclose on the allegedly equitably subrogated lien, and it has been over 4 years since they asserted their entitlement to a subrogated lien. Accordingly, they would not be able to initiate a new foreclosure suit on their subrogated lien at this point anyway.

Tex. Civ. Prac. & Rem. Code § 16.035(b). In other words, their request for declaratory relief is for all practical purposes moot.

Plaintiffs' Intentional Infliction of Emotional Distress Claims

23. The four elements of the tort of intentional infliction of emotional distress are: "(1) the defendant acted intentionally or recklessly; (2) such conduct was extreme and outrageous; (3) the conduct of the defendant caused the plaintiff mental distress; and (4) such distress was severe." *LaCoure v. LaCoure*, 820 S.W.2d 228, 233 (Tex. App.—El Paso 1991, writ denied). "Intent may be inferred from the circumstances and the conduct of the actor, not just from the overt expressions of intent by the actor." *Id.*

24. Separate and apart from the problems with the home equity loan under the Texas Constitution, Bank Defendants acted in an extreme and outrageous way in their conduct in foreclosing on the property, their repeated failed attempts to evict the Joneses, their sale of the property to MARCC without disclosing the prior eviction attempts so that MARCC would then bear the burden of evicting the Joneses, and their issuance of a 1099-C while knowing that they would then continue to seek to recover on the subrogated lien from Bank of America. Their intent to cause emotional distress can be inferred from the misrepresentations in the court filings when obtaining the order to foreclose, their misrepresentations that they would not seek an order of foreclosure while the Joneses attempted to obtain a loan modification, their repeated attempts to evict the Joneses knowing that the foreclosure order had been fraudulently obtained, their almost immediate posting of the property for sale and the sale to MARCC without disclosing the prior eviction proceedings, and their issuance of a 1099-C knowing they intended to assert a subrogation lien.

25. This conduct was extreme and outrageous. The conduct was so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community.

26. Bank Defendants' conduct proximately caused both Consuelo and Gabriella severe emotional distress, for which they should be compensated. The Joneses presented direct evidence of the nature, duration, and severity of their mental anguish, and established a substantial disruption in their daily routine.

27. The amount, paid now in cash, that would fairly and reasonably compensate Consuelo for her emotional distress in the past, resulting from the occurrences in question, is $350,000.

28. The amount, paid now in cash, that would fairly and reasonably compensate Consuelo for her emotional distress in the past, resulting from the occurrences in question, is $350,000.

29. Bank Defendants were part of a conspiracy that damaged Plaintiffs. Bank Defendants had knowledge of, agreed to, and intended a common objective or course of action that resulted in damages to Plaintiffs, and Bank Defendants performed an act or acts to further the conspiracy. Accordingly, Bank Defendants are jointly and severally liable for the damages.

30. The Court finds, by clear and convincing evidence, that the harm to Plaintiffs arose from gross negligence by the Bank Defendants. They committed acts which, when viewed objectively from the standpoint of Bank Defendants, involved an extreme degree of risk, considering the probability and magnitude of the potential harm to others and of which Bank Defendants had actual, subjective awareness of the risk involved, but nevertheless proceeded with conscious indifference to the rights, safety, or welfare of others. Additionally, the Court finds, by clear and convincing evidence, that Bank Defendants' actions were malicious, in that they had a specific intent to cause substantial injury or harm to Plaintiffs. Additionally, the Court finds, by clear and convincing evidence, that Bank Defendants' actions constituted fraud, other than constructive fraud. Numerous fraudulent misrepresentations were proven at trial both during the foreclosure proceedings, during the attempted modifications of the loan, during the eviction process, and thereafter.

31. The Court determines that exemplary damages should be awarded as a penalty and by way of punishment. The Court has considered the nature of the wrongs, the character of the conduct involved, the degree of culpability of the Bank Defendants, the situation and sensibilities of the parties concerned, and the extent to which the conduct offends a public sense of justice. The Court finds that the sum of money that should be assessed against Defendant Deutsche Bank National Trust Company and awarded to Plaintiff Consuelo Jones is $625,000.00. The Court finds that the sum of money that should be assessed against Defendant Ocwen Loan Servicing LLC and awarded to Plaintiff Consuelo Jones is $625,000.00.

32. The Court finds that the sum of money that should be assessed against Defendant Deutsche Bank National Trust Company and awarded to Plaintiff Gabriella Jones is $625,000.00. The Court finds that the sum of money that should be assessed against Defendant Ocwen Loan Servicing LLC and awarded to Plaintiff Gabriella Jones is $625,000.00.

Election of Remedies

33. Plaintiffs elected to seek declaratory relief regarding the validity of the transactions at issue in this case, and for that claim they are entitled to recover attorney fees. Plaintiffs are recovering separately for intentional infliction of emotional distress based Bank Defendants' post-contract conduct, as that provides the greatest recovery. Should these elections be found erroneous on appeal, this Court finds that Plaintiffs would be entitled to relief on their remaining claims. Should the election of rescission be rejected on review by appeal, the case should be remanded for a new election of damages.

Wrongful Foreclosure

34. Wrongful foreclosure can support two alternative remedies. *Diversified, Inc. v. Gibraltar Sav. Ass'n*, 762 S.W.2d 620, 623 (Tex. App.—Houston [14th Dist.] 1988, writ denied). A mortgagor can sue for its actual damages. *Peterson v. Black*, 980 S.W.2d 818, 823 (Tex. App. - San Antonio 1998, no pet.). Or the mortgagor can sue to set aside the trustee's deed. *Univ. Sav. Ass'n v. Springwood Shopping Center*, 644 S.W.2d 705, 706 (Tex. 1982).

35. There were numerous defects in the foreclosure process, as identified in the fact findings above. The findings regarding violations of the Texas Constitution render the foreclosure sale void and the subsequent foreclosure wrongful. Additionally, Bank Defendants fraudulently obtained a faulty order of foreclosure by misrepresenting that Plaintiff Consuelo Jones had not answered the foreclosure suit, failing to provide proper notice to Plaintiffs of the final hearing, and misrepresenting Plaintiffs' last known address. Bank Defendants then failed to provide the proper notice of the foreclosure sale, failed to properly identify the time the sale would start, failed to identify the correct trustee conducting the sale, and violated posting requirements for the sale.

36. While the Court does not believe that Plaintiffs were required to demonstrate a grossly inadequate sales price in order to rescind the foreclosure order, sale, and trustees deed, they did present that proof. Contrary to Bank Defendants' arguments, it is not true that 50% of property value is the absolute benchmark for an adequate sales price. In fact, the Thirteenth Court

of appeals has expressly rejected this argument and stated that each case must be decided on the facts. *Estate of Broughton v. Fin. Freedom Senior Funding Corp.*, No. 13-14-00091-CV, 2016 WL 2955058, at *3 (Tex. App.—Corpus Christi-Edinburg May 19, 2016, judgm't vacated w.r.m.) (mem. op.).

37. Accordingly, the remedy of rescission is supported by the wrongful foreclosure claim.

38. Plaintiffs are entitled to recover exemplary damages. *Nolan v. Bettis*, 577 S.W.2d 551, 555 (Tex. Civ. App. - Austin 1979, writ ref'd n.r.e.); *Consolidated Tex. Fin. v. Shearer*, 739 S.W.2d 477, 480 (Tex. App. - Fort Worth 1987, writ ref'd n.r.e.).

Fraud

39. Bank Defendants made numerous fraudulent statements of fact and promises regarding their intent to proceed with foreclosure during the numerous attempts by the Joneses to modify the loan. Bank Defendants knew that the loan did not comply with the Texas Constitution but represented that the loan was valid and enforceable. Defendants knew that despite promises not to continue foreclosure proceedings during the loan modification process, they were doing just that—they had no intention to stop proceeding towards foreclosure. promise of future performance made with an intent, at the time the promise was made, not to perform as promised. Bank Defendants made material misrepresentations with knowledge of their falsity or made recklessly without any knowledge of the truth and as a positive assertion, and the misrepresentations were made with the intention that they be acted on by Plaintiffs, and Plaintiffs justifiably relied on the misrepresentations and suffered injuries.

40. Bank Defendants' conduct proximately caused both Consuelo and Gabriella severe emotional distress, for which they should be compensated. The Joneses presented direct evidence of the nature, duration, and severity of their mental anguish, and established a substantial disruption in their daily routine.

41. The amount, paid now in cash, that would fairly and reasonably compensate Consuelo for her emotional distress in the past, resulting from the occurrences in question, is $350,000.

42. The amount, paid now in cash, that would fairly and reasonably compensate Consuelo for her emotional distress in the past, resulting from the occurrences in question, is $350,000.

43. Bank Defendants were part of a conspiracy that damaged Plaintiffs. Bank Defendants had knowledge of, agreed to, and intended a common objective or course of action that resulted in damages to Plaintiffs, and Bank Defendants performed an act or acts to further the conspiracy. Accordingly, Bank Defendants are jointly and severally liable for the damages.

44. The Court finds, by clear and convincing evidence, that the harm to Plaintiffs arose from gross negligence by the Bank Defendants. They committed acts which, when viewed objectively from the standpoint of Bank Defendants, involved an extreme degree of risk, considering the probability and magnitude of the potential harm to others and of which Bank Defendants had actual, subjective awareness of the risk involved, but nevertheless proceeded with conscious indifference to the rights, safety, or welfare of others. Additionally, the Court finds, by clear and convincing evidence, that Bank Defendants' actions were malicious, in that they had a specific intent to cause substantial injury or harm to Plaintiffs. Additionally, the Court finds, by clear and convincing evidence, that Bank Defendants' actions constituted fraud, other than constructive fraud. Numerous fraudulent misrepresentations were proven at trial both during the foreclosure proceedings, during the attempted modifications of the loan, during the eviction process, and thereafter.

45. The Court determines that exemplary damages should be awarded as a penalty and by way of punishment. The Court has considered the nature of the wrongs, the character of the conduct involved, the degree of culpability of the Bank Defendants, the situation and sensibilities of the parties concerned, and the extent to which the conduct offends a public sense of justice. The Court finds that the sum of money that should be assessed against Defendant Deutsche Bank National Trust Company and awarded to Plaintiff Consuelo Jones is $625,000.00. The Court finds that the sum of money that should be assessed against Defendant Ocwen Loan Servicing LLC and awarded to Plaintiff Consuelo Jones is $625,000.00.

46. The Court finds that the sum of money that should be assessed against Defendant Deutsche Bank National Trust Company and awarded to Plaintiff Gabriella Jones is $625,000.00. The Court finds that the sum of money that should be assessed against Defendant Ocwen Loan Servicing LLC and awarded to Plaintiff Gabriella Jones is $625,000.00.

47. A fraud claim can also support the remedy of rescission, and the Court rescinds all transactions between the parties. *Residential Credit Sols., Inc. v. Padilla*, No. 13-15-00504-CV, 2018 WL 1959989, at *4 (Tex. App.—Corpus Christi–Edinburg Apr. 26, 2018, no pet.) (mem. op.).

Negligence

48. The negligence of the Bank Defendants proximately caused the injuries in question. Bank defendants failed to use ordinary care, that is, they failed to do that which a person of ordinary prudence would have done under the same or similar circumstances or doing that which a person of ordinary prudence would not have done under the same or similar circumstances.

49. The Bank Defendants' negligence was a substantial factor in bringing about Plaintiffs' injuries and without which such injuries would not have occurred. A person of ordinary prudence would have foreseen that the injuries, or some similar injury, might reasonably result from their actions.

50. Bank Defendants' conduct proximately caused both Consuelo and Gabriella severe emotional distress, for which they should be compensated. The Joneses presented direct evidence of the nature, duration, and severity of their mental anguish, and established a substantial disruption in their daily routine.

51. The amount, paid now in cash, that would fairly and reasonably compensate Consuelo for her emotional distress in the past, resulting from the occurrences in question, is $350,000.

52. The amount, paid now in cash, that would fairly and reasonably compensate Consuelo for her emotional distress in the past, resulting from the occurrences in question, is $350,000.

53. Bank Defendants were part of a conspiracy that damaged Plaintiffs. Bank Defendants had knowledge of, agreed to, and intended a common objective or course of action that resulted in damages to Plaintiffs, and Bank Defendants performed an act or acts to further the conspiracy. Accordingly, Bank Defendants are jointly and severally liable for the damages.

54. The Court finds, by clear and convincing evidence, that the harm to Plaintiffs arose from gross negligence by the Bank Defendants. They committed acts which, when viewed objectively from the standpoint of Bank Defendants, involved an extreme degree of risk, considering the probability and magnitude of the potential harm to others and of which Bank Defendants had actual, subjective awareness of the risk involved, but nevertheless proceeded with conscious indifference to the rights, safety, or welfare of others. Additionally, the Court finds, by clear and convincing evidence, that Bank Defendants' actions were malicious, in that

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55. The Court determines that exemplary damages should be awarded as a penalty and by way of punishment. The Court has considered the nature of the wrongs, the character of the conduct involved, the degree of culpability of the Bank Defendants, the situation and sensibilities of the parties concerned, and the extent to which the conduct offends a public sense of justice. The Court finds that the sum of money that should be assessed against Defendant Deutsche Bank National Trust Company and awarded to Plaintiff Consuelo Jones is $625,000.00. The Court finds that the sum of money that should be assessed against Defendant Ocwen Loan Servicing LLC and awarded to Plaintiff Consuelo Jones is $625,000.00.

56. The Court finds that the sum of money that should be assessed against Defendant Deutsche Bank National Trust Company and awarded to Plaintiff Gabriella Jones is $625,000.00. The Court finds that the sum of money that should be assessed against Defendant Ocwen Loan Servicing LLC and awarded to Plaintiff Gabriella Jones is $625,000.00.

Exemplary damage caps

57. Bank Defendants are "fiduciaries" as that term is defined by Section 32.45, Texas Penal Code. The term "fiduciary" includes trustees and attorneys in fact. Deutsche Bank's capacity in this case is as a trustee. As servicing agents, Ocwen and Homeward's capacities in this case are as attorneys in fact. As fiduciaries, Bank Defendants claimed a first lien against the Homestead through a deed of trust.

58. Bank Defendants' foreclosure of the Homestead contrary to the terms of the deed of trust and contrary to Texas law. Bank Defendants intentionally, knowingly, or recklessly misapplied property they held as a fiduciary or property of a financial institution in a manner that involves substantial risk of loss to the owner of the property or to a person for whose benefit the property is held. Their conduct constitutes Misapplication of Fiduciary Property under Section 32.45, Texas Penal Code, a felony.

59. As a result, the limitation on the amount of punitive damages set forth in Section 41.008, Texas Civil Practice & Remedies Code does not apply.

05/15/23

DATE

JUDGE PRESIDING

Cc:

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