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

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.

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:

Brandy Wingate Voss
Ray Thomas
Olegario "Ole" Garcia
Attorneys for Consuelo Jones and Gabriela Jones
brandy@brandyvosslaw.com
rthomas@raythomaspc.com
ogarcia@raythomaspc.com

Randal W. Hill
Attorney for MARCC Real Estate Investment, LLC
rhill@rwhlegal.com

Tom Hanson
Daniel Koeneke
Attorneys for Ocwen Loan Servicing, LLC et al
thanson@mcglinchey.com
daniel@edrattorneys.com

EXHIBIT: DBMORLOCK-MSJ

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

MORLOCK, L.L.C.	§	
Plaintiff,	§	
	§	
v.	§	**Civil Action No. 4:21-cv-03202**
	§	
REGINALD PETTEWAY AND THE	§	
BANK OF NEW YORK MELLON,	§	
TRUSTEE	§	
Defendants.	§	

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Morlock, L.L.C., a Texas Limited Liability Company, Plaintiff, files this Motion For Summary Judgment.

NATURE OF RELIEF SOUGHT

1. Plaintiff Morlock is entitled to a Summary Judgment against BNY because, based on the Summary Judgment evidence and documents in this case, enforcement of BNY's Deed of Trust lien is barred by the Texas four (4) year statute of limitations.

2. In this case, Plaintiff Morlock seeks a Declaratory Judgment which declares that enforcement of the Deed of Trust is barred. Morlock also seeks a Summary Judgment which strikes and cancels the Deed of Trust as a cloud on Morlock's title to the Property because enforcement of the Deed of Trust is barred by the Texas four-year statute of limitations and is void.

3. The undisputed summary judgment evidence supports Morlock's claims because the Note which is secured by the Deed of Trust lien was accelerated and matured as early as 2006 and as late as May 5, 2016, and the Deed of Trust was not foreclosed within (4) years of that date.

PARTIES

4. Plaintiff is Morlock, L.L.C., a Texas Limited Liability Company ("Morlock").

5. Defendants are:

a) The Bank of New York Mellon, FKA The Bank of New York As Trustee For The Certificateholders Of The CWABS Inc., Asset-Backed Certificate Series 2006-18. ("BNY"); and

b) Reginald Petteway ("Petteway").

NATURE OF DISPUTE AND PROCEDURAL BACKGROUND

6. This case involves the validity of a Deed of Trust lien held by BNY.

7. This case was originally filed in the 80th District Court of Harris County, Texas on July 29, 2021.

8. Defendant BNY filed its Notice of Removal on October 1, 2021.

9. This case is set for trial in December, 2023.

FACTS

10. Morlock is the owner of a single-family residence located in Harris County, Texas, (the "Property") which is known as 14431 Daly Drive, Houston, Texas 77041, and which is legally described as:

> LOT FIFTEEN (15), IN BLOCK THREE (3) OF TERRACES ON MEMORIAL AN ADDITION IN HARRIS COUNTY, TEXAS ACCORDING TO THE MAP OR PLAT THEREOF RECORDED UNDER FILM CODE NO. 582199 OF THE MAP RECORDS OF HARRIS COUNTY, TEXAS ALSO KNOWN AS 14431 DALY DRIVE, HOUSTON, TEXAS 77041.

11. Morlock is not the obligor on the Note which is claimed to be owned by BNY because Morlock acquired the Property at a Trustee's Sale which was conducted on October 4, 2011. The Trustee's Sale was conducted on behalf of the Terraces On Memorial Homeowners Association (the "HOA"), the homeowners association for the subdivision, because Petteway, the former owner of the Property, did not pay the HOA assessments. A copy of the Trustee's Deed to

Morlock is attached as Exhibit 1. Morlock has owned the Property for more than eleven- and one-half years.

12. On July 26, 2006, Reginald A. Petteway, the prior owner of the Property, purchased the Property and executed a note (the "Note") payable to America's Wholesale Lender in the original sum of $397,600. Exhibit 2. The Note was secured by a Deed of Trust (the "Deed of Trust") which was filed of record under Clerk's File Number Z485809 in the Official Public Records of Real Property of Harris County, Texas. A copy of the Deed of Trust is attached as Exhibit 3. The Note and Deed of Trust were subsequently transferred to BNY pursuant to an assignment of Note and Deed of Trust, dated December 29, 2006, which was recorded under County Clerk's File No. 20070033114 in the Official Public Records of Real Property of Harris County, Texas. Exhibit 4.

13. Petteway defaulted under the Note almost immediately after the Note was signed and the loan was closed and was in default almost continuously ever since. BNY accelerated the indebtedness in 2006 and the Property was posted for a Trustees Sale scheduled for January 2, 2007. A copy of the Notice of Substitute Trustee's Sale is attached as Exhibit 5. The scheduled sale was not conducted on January 2, 2007.

14. The Property was also reposted for sale on numerous additional dates.

15. The Property is located in the Terraces on Memorial Subdivision. Residences in the Terraces on Memorial Subdivision are subject to Restrictions (the "Restrictions") for the subdivision which are recorded under county Clerk's File No. Y900968 in the Official Public Records of Real Property of Harris County, Texas, which Restrictions include an obligation to pay assessments to the Terraces on Memorial Homeowners Association (the "HOA"). Exhibit 6.

16. In addition to Petteway's numerous defaults under the Note, Petteway failed to pay the HOA assessments which resulted in the foreclosure of the HOA lien and sale of the Property to Morlock on October 4, 2011. Exhibit 1.

17. In addition to BNY's prior acceleration of the debt in 2006, on May 5, 2016, BNY accelerated the indebtedness under the Note and sent another Notice of Acceleration of the debt. See Exhibit 7.

18. This letter was sent to Petteway at a time after he no longer owned or resided in the Property. This letter was sent almost five (5) years after Morlock became the owner of the Property.

19. Since that date, there has been no agreement with Petteway or any other party to reinstate the debt. There has been no payment on the Note. According to documents produced by BNY there has been no written agreement to reinstate the debt.

LEGAL ARGUMENTS

The Court must look to Texas law on the issues of the statute of limitations and tolling

20. At the outset, it must be noted that this is a diversity case and the Court must apply the Texas statute of limitations and its accompanying tolling rules. See *Bloom v. Aftermath Pub Adjusters, Inc.*, 902 F 3d 516, 517-18 (5th Cir. 2018); *Jorrie v. BNY Mellon, Trustee*, 740 F. 3d 809 (5th Cir. 2018)

21. Under Texas law the applicable statute of limitations for a nonjudicial foreclosure sale under a deed of trust is stated in §16.035 of the Texas Civil Practice and Remedies Code, which states:

> §16.035. Lien on Real Property
>
> …
>
> (b) 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 date of cause of action accrues.

22. The statute of limitations commences on the maturity date of a note. *Castillo v. BB&T Co.*, 05-19-00584-CV (Tex. App.-Dallas 2020, no pet); *Hardy v. Wells Fargo Bank, N.A.*, 01-12-00945 (Tex. App. – Houston [1st Dist.] 2014, no pet.).

23. Under Tex. Civ. Prac. & Rem. Code §16.035, in Texas a foreclosure sale under a deed of trust must be held within four (4) years of the date of maturity or enforcement is barred. *Id.*

24. If a note or deed of trust contains an optional acceleration clause, the cause of action accrues (and the statute of limitations starts to run) when the holder accelerates its option to accelerate. *Khan v. Gbak Props., Inc.,* 371 S.W. 3d 347, 353 (Tex. App.-Houston [1st Dist.] 2012, no pet.)

25. Because the Note in this case matured when the Note was accelerated, certainly by May 5, 2016, BNY had four years from this date to enforce the Deed of Trust or enforcement would be barred by the Texas four-year statute of limitations.

26. Four years from May 5, 2016, is May 5, 2020. It is undisputed that the Deed of Trust was not foreclosed by this date. To date, more than seven (7) years have passed, and the Deed of Trust still has not been foreclosed.

27. The purpose of the statutes of limitations is to compel plaintiffs to assert their claims "within a reasonable period while the evidence is fresh in the minds of the parties and witnesses." *Wagner & Brown, Ltd. v. Harwood*, 58 S.W. 3d 732, 734 (Tex. 2001) (quoting

Computer Assocs. Int'l, Inc. v. Altai, Inc., 918 S.W. 2d 453, 455 (Tex. 1996); see *Murray v. San Jacinto Agency, Inc.,* 800 S.W. 2d 826, 828 (Tex. 1990); *Medina v. Tate*, 438 S.W. 3d 583, 598 (Tex. App.-Houston [1st Dist.] 2013, no pet.).

28. Since the Note matured in either 2006 or at least on May 5, 2016, unless tolled or extended, the enforcement of the Deed of Trust would be barred unless the Deed of Trust had been foreclosed prior to May 5, 2020.

29. Where a sale under a deed of trust has not occurred within four (4) years of the date of maturity, the deed of trust is void. *The Cadle Co. v. Butler*, 951 S.W.2d 901 (Tex. App.- Corpus Christi 1997, no pet.); *Woodside Assurance, Inc. v. N.K. Resources, Inc.,* 175 S.W. 3d 421 (Tex.App.-Houston [14th Dist.] 2005, no pet.).

30. In the present case, Morlock has provided proof that the debt was accelerated originally in 2006 and again as of May 5, 2016.

31. Therefore, under Texas law, a sale under the Deed of Trust had to be completed within four (4) years or enforcement would be barred and the Deed of Trust would be void.

32. Since the Note was accelerated, certainly by May 5, 2016, Defendant had four (4) years, in which to conduct the sale under the Deed of Trust which it did not do.

33. Since the sale was not conducted within four (4) years from the date of acceleration, enforcement was and is barred under Texas law. Tex. Civ. Prac. and Remedies Code §16.035.

The evidence supports Morlock's claim to strike BNY's Deed of Trust as a cloud on title

34. In its Petition, Morlock seeks a judgment declaring the Deed of Trust to be void and striking the Deed of Trust as a cloud on Morlock's title because enforcement of the Deed of Trust was and is barred by the applicable statute of limitations.

35. Morlock is the owner of the Property in issue and has filed this action to quiet title. A suit to quiet title is equitable in nature and the principal issues in such suits is "the existence of a cloud on title that equity will remove." *Florey v. McConnell,* 212 S.W. 3d 439, 448 (Tex. App. – Austin 2016, pet denied).

36. A cloud on title includes any deed, contract, lien or other instrument which is not void on its face that purports to convey an interest in or makes a charge upon the property of the owner, the invalidity of which would require proof. *Wright v. Matthews*, 26 S.W. 3d 575, 578 (Tex. App. – Beaumont 2000, pet. denied). A suit to quiet title "enables the holder of the feeblest equity to remove from his way to legal title any unlawful hindrance having the appearance of better right." *Florey,* 212 S.W. 3d at 448 (quoting *Thompson v. Locke*, 1 S.W. 112, 115 (Tex. 1886).

37. In order to recover in a title action which involved "clouds" on an undisputed owner's title to real property, the owner challenges an adverse interest that impacts the title of the owner. *Florey v. McConnell,* supra.

38. A claim is sufficiently adverse if its assertion casts a cloud on the owner's title or enjoyment of the property. *Kratz v. Rodriguez,* 563 S.W. 2d 627, 629 (Tex. App. – Corpus Christi 1977, writ ref'd n.r.e.).

39. To satisfy the requirements in a suit to quiet title a plaintiff must establish right, title or ownership in property and must allege or identify an adverse claim. *Wright v. Matthews,* supra at 578.

40. In the present case, it is undisputed that Morlock is the owner of the property which is at issue in this case. See Exhibit 1. Morlock's ownership is not denied and, in fact is admitted by BNY.

41. Morlock has also alleged and identified an interest which is claimed by BNY and which is adverse. See Exhibit 3.

42. Morlock has established proof that enforcement of the Deed of Trust claimed by BNY is barred by the statute of limitations.

43. As stated elsewhere in this Motion, the applicable four-year statute of limitations for a nonjudicial foreclosure sale under a deed of trust is stated in §16.035 of the Civil Practice and Remedies Code.

44. Where a sale under a deed of trust has not occurred within four (4) years of the date of maturity, the deed of trust is void. *The Cadle Co. v. Butler,* 951 S.W. 2d 901 (Tex. App-Corpus Christ 1997, no pet.); *Woodside Assurance Inc. v. N.K. Resources, Inc.,* 175 S.W. 3d 421 (Tex. – App. – Houston [14th Dist.] 2005, no pet.).

45. Since the sale was conducted within four (4) years, enforcement is barred under Texas law. Tex. Civ. Prac. and Remedies Code §16.035.

WHEREFORE, Morlock, L.L.C., Plaintiff requests that Defendant BNY be given notice as required by law; that the Court grant Morlock's Motion and that, Plaintiff be granted all relief as it may show itself justly entitled.

Respectfully submitted,

By: */s/ Jerry L. Schutza*
Jerry L. Schutza
SBN: 17853800
815 Walker, Ste. 1453
Houston, Texas 77002
Telephone: (713) 963-9988
Email: schutzalaw@yahoo.com

ATTORNEY FOR PLAINTIFF
MORLOCK, L.L.C.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was sent to opposing counsel and all parties of interest via electronic service on July 24, 2023.

VIA ELECTRONIC SERVICE

Damian Abreo

/s/ Jerry L. Schutza
Jerry L. Schutza