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IN THE UTAH COURT OF APPEALS

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SAFE HOME CONTROL, INC.,

Petitioner/Appellant

v.

JARED MUNDAY,

Respondent/Appellee

PUBLIC

Appellate Case No. 20180155-CA

Dist. Ct. Case No. 160400579

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REPLY BRIEF OF APPELLANT

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Appeal from the Fourth Judicial Court, Utah County

Honorable Christine Johnson, District Court No. 160400579

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## **Other Authorities**

[None]

## ARGUMENT

### **I. The Court Erred in Setting Aside the Confession for Lack of Verification.**

The trial court erred when it ruled that the Confession of Judgment (the “Confession”) “lack[ed] the necessary verification” because (1) Munday cannot avoid his obligations based on his own failures; (2) Rule 58A(i) does not require verification to be under oath, and (3) the Confession was verified under oath.

#### **A. Munday Cannot Avoid the Confession Based On an Alleged Failure to Properly Verify the Agreement He Undisputedly Entered.**

Munday cannot avoid the judgment based on an argument of inadequate verification. “[T]he historically accepted rule” is that “a debtor cannot avoid an otherwise valid signed confession based on his failure to verify the statements he subscribed.” *Coast to Coast Demolition & Crushing, Inc. v. Real Equity Pursuit, LLC*, 226 P.3d 605, 609 (Nev. 2010) *see also Los Angeles Adjustment Bureau, Inc. v. Noonan*, 181 Cal. App. 2d Supp. 834, 839 (1960) (“A verification is seldom for the benefit of the one who verifies but is for the purpose of discouraging the individual from uttering false statements, such as in pleadings and criminal complaints. The omitted requirement was never intended for respondent’s benefit. The important consideration for this court is whether or not the confession was in fact signed by the respondent as an intended confession.”).

Safe Home made this argument in its opening brief. [See Safe Home Brief at 13-14]. Munday completely ignored this issue on appeal. For this reason alone, the trial court’s ruling and Munday’s arguments regarding “verification” should be rejected.



**B. Rule 58A(i) Does Not Require An “Oath and Affirmation.”**

The trial court erred in relying on *Mickelsen v. Craigco, Inc.*, 767 P.2d 561 (Utah 1989) to find that the judgment “lack[ed] the necessary verification.” [R.0985]. Rule 58A(i) provides that “[i]f a judgment by confession is authorized by statute, the party seeking the judgment must file with the clerk a statement, *verified by the defendant...*” Utah R. Civ. P. 58A(i). Relying on *Mickelsen* the trial court interpreted the phrase “verified by the defendant” to require “an oath or affirmation” and “must affix a proper jurat.” [See R.0985]. Munday’s appellate brief continues that position. Munday contends that *Mickelsen* defined what is required for a valid verification. [See Opp. at p. 10-15]. However, the trial court’s and Munday’s interpretation of Rule 58A(i) adds requirements to rule 58A(i) that do not exist. They do so by relying on authorities that interpreted statutes that required “verif[ication] *by the oath of* [the claimant].” See e.g. *Mickelsen v. Craigco, Inc.*, 767 P.2d 561, 564 (Utah 1989) (interpreting statutory mechanics’ lien requirement that a mechanic’s lien “must be *verified by the oath of* [the claimant]” (emphasis added)); *Worthington & Kimball Const. Co. v. C & A Dev. Co.*, 777 P.2d 475, 477 (Utah 1989) (same); *First Sec. Mortg. Co. v. Hansen*, 631 P.2d 919, 920 (Utah 1981) (same).

In *Mickelsen*, the court addressed the statutory requirement that a mechanic’s lien be “*verified by the oath of* [the claimant] or some other person.” *Id*; see also Utah Code section 38–1–7 (1974). The appellant argued that the appellee’s notice of lien “was invalid” because the claimant had not sworn an oath. *Id*. The Utah Supreme Court held the oath requirement did “not require that the affiant raise his hand or speak any words in order to have a valid verification,” but rather that “*verified by the oath*” required (1) a correct written



oath or affirmation, that (2) is signed by the affiant in the presence of a notary or other person authorized to take oaths, and (3) the latter must affix a proper jurat. *Id.* at 563-64.

Similar language was at issue in *Worthington & Kimball Const. Co. v. C & A Dev. Co.*, 777 P.2d 475 (Utah 1989). Again, the plaintiff in that case appealed after the trial ruled that a mechanic's lien was not "verified by [an] oath." *Id.* at 476-77. In response, the court simply referred to the *Mickelsen* case, which had been decided only six months prior. *Id.*

Unlike the mechanic's lien statute at issue in *Mickelsen* and *Worthington*, Rule 58A(i) does not require a "verification *by oath*." All that is required is that the statement be "verified by the defendant." *See* Utah R. Civ. P. 58A(i). This is a notable change from both the historical mechanics' lien act and from other Utah Rules of Civil Procedure. For example, Rule 33(b) of the Utah Rules of Civil Procedure require a party responding to interrogatories to answer in "writing *under oath or affirmation*." Rule 83(d)(1)(C) requires vexatious litigants to "include an *oath, affirmation or declaration under criminal penalty* that the proposed paper . . . is not filed for" vexatious purposes. Rule 30 requires a deponent to be administered an "*oath or affirmation*" before being deposed.

When interpreting a statute or rule, Utah courts should "assume . . . that the legislature used each term advisedly according to its ordinary and usually accepted meaning" and "presume that the expression of one term should be interpreted as the exclusion of another." *Marion Energy, Inc. v. KFJ Ranch P'ship*, 2011 UT 50, ¶ 14, 267 P.3d 863. Courts, therefore "give effect to omissions in statutory language by presuming all omissions to be purposeful." *Id.*; *see also Arbogast Family Tr. v. River Crossings, LLC*, 2010 UT 40, ¶ 18, 238 P.3d 1038 ("When we interpret a procedural rule, we do so

according to our general rules of statutory construction.”); *Burns v. Boyden*, 2006 UT 14, ¶ 19, 133 P.3d 370 (“We interpret court rules, like statutes and administrative rules....”). Unlike other statutes and rules, Rule 58A(i) does not require verification *by the oath or affirmation* of the defendant. *See* Utah R. Civ. P. 58A(i). Rule 58A(i)’s exclusion of “oath and affirmation,” is presumed purposeful and should be given meaning. This can only be accomplished by giving Rule 58A’s requirement for a “statement verified by the defendant” a different meaning than the statutes that required a petition to be “verified by the oath of [the claimant].” *See, e.g.*, Utah Code section 38–1–7 (1974). The trial court’s reliance on authority that interpreted a statute that required verification by an oath was an error because Rule 58A does not impose any requirement for verification by oath.

Additionally, “verified” cannot be interpreted to have the same meaning as “verified by oath,” as Munday contends, because it renders the suffix “*by oath*” superfluous. *See Arredondo v. Avis Rent A Car Sys., Inc.*, 2001 UT 29, ¶ 13, 24 P.3d 928 (Utah 2001) (When interpreting a statute, courts have a “fundamental duty to give effect, if possible, to every word of the statute.”). Thus, in the context of Rule 58A, the word “verified” is to be given its ordinary meaning or usually accepted interpretation and cannot have the same meaning as “verified by oath.” *Arbogast Family Tr.*, 2010 UT 40, ¶ 18 (When interpreting a rule of civil procedure, a court should “start by examining the ordinary meaning or usually accepted interpretation.”).

The ordinary meaning of “verified” is “to make certain that something is correct.” *See, e.g.* Cambridge Dictionary, <https://dictionary.cambridge.org/us/dictionary/english/verified> (last visited January 15,

2019). Thus, in order for a statement to be verified by the defendant under Rule 58A, a defendant must confirm the accuracy of a statement for confession of judgment. This meaning is consistent with other rules and statutes that require something to be “verified” (as opposed to “verified by oath”). See *Aequitas Enterprises, LLC v. Interstate Inv. Grp., LLC*, 2011 UT 82, ¶17, 267 P.3d 923 (“[Party’s] attempt to interpret one rule by drawing on other rules is well taken.”). For example, Rule 26.1(c)(1) and (5) require each party in a domestic dispute to submit “copies of statements verifying the amounts listed on the Financial Declaration” and “[d]ocuments *verifying* the value of all real estate.” Likewise, Utah Code section 11-42-205 requires an appraisal before a local entity can designate an assessment area in order to “verify[] that the market value of the property, ..., is at least three times the amount of the assessments proposed to be levied against the unimproved property.”

Utah Code section 20A-7-505 requires a sponsor of an initiative petition to “verify each signature sheet by completing the verification . . . on the last page of each initiative packet.” Utah Code section 20A-7-503(3) defines what is required to “verify” the signatures, which amount to confirming that “all the names that appear in th[e] initiative packet were signed by the individuals,” and confirming that names, addresses are correct, and each signer is registered to vote in Utah or intends to become registered to vote. *Id.* Notable, “verification” does not require an oath or affirmation, notarization, or jurat.

It is also consistent with the ordinary meaning of the word. See *State v. Martinez-Castellanos*, 2018 UT 46, ¶ 6, 428 P.3d 1038 (“The trooper *verified* that the car was indeed registered and that Mr. Martinez-Castellanos had a valid Utah Driver license.”); *State v.*

*Speed*, 2017 UT App 76, ¶ 27, 397 P.3d 824 (“At the beginning of the hearing, the court *verified* that both parties had reviewed the PSI.”)

Here, Munday “verified” the Confession, by signing the Confession’s acknowledgement, which stated that Munday “hereby authorizes and consents to the entry of Judgment by Confession against him . . . in the principal amount of \$160,000” and “stipulate[d] that the Judgment in the form attached may be entered against [him] in favor of plaintiff in that specified sum as defined [there]in.” [R.002]. Simply put, Munday “verified” the statement by signing his name; confirming the statements contained therein were correct and accurate. There is no dispute that Munday signed the confession; he conceded as much to the trial court. [R.0005]. And the trial court acknowledged as much in its ruling. [See R.0984 (“Munday signed a Judgment by Confession”)]. Accordingly, Munday “verified” the accuracy of the statement by signing it.

### **C. The Confession Meets the Mickelson Requirements.**

Even if Rule 58A required an “oath and affirmation” and the elements described in *Mickelson* therefore applied, the Confession still is sufficient because the jurat “subscribed and sworn to before me” meets the *Mickelson* requirements. See *White v. Heber City*, 26 P.2d 333 (Utah 1933) (The “phrase or language, ‘Subscribed and sworn to before me,’ fairly and reasonably means not only that the claimant subscribed the claim in the presence of the notary, but also that the notary administer an oath to the claimant, and that he [,] under oath in substance and effect [,] stated that the statements contained in the instrument or document subscribed by him were true.”).

Munday's attempts to distinguish *White* fail. *Mickelson* did not limit *White*'s holding on this issue. *Mickelson*'s reference to *White* was only to acknowledge the confusion in a line of cases regarding whether an "oath" required an "oral averment." See *Mickelson*, 767 P.2d at 563. Further *Mickelson* only overruled *Worthington & Kimball Const. Co.*, 777 P.2d 475, *Spangler v. District Court of Salt Lake County*, 104 Utah 584, 140 P.2d 775 (1943) and *Colman v. Schwendiman*, 680 P.2d 29 (Utah 1984) "to the extent that they conflict with th[e] new rule" that "[t]here is no minimum requirement that an oath must be administered to the affiant or that the affiant must speak an oral oath or affirmation or raise his or her hand." *Mickelson*, 767 P.2d at 564. In other words, *Mickelson* allowed an "oath" to be given through writing, but it did not disallow the administration of an oral oath.

Thus, *White*'s holding that the jurat "subscribed and sworn to before me" is sufficient to establish that a statement is sworn to under an oath is still good law. See also *In re Williamson*, 43 BR. 813, 823 (Bankr. D. Utah 1984) ("The first phrase of the jurat is 'subscribed and sworn to before me. . .' The purpose of this language is to certify that the person making the foregoing acknowledgment did, in fact, appear before the official and did subscribe to the acknowledgement and oath. . . In other words, it is to certify that the signatory voluntarily signed . . . in the presence of the certifying official under penalty of perjury.").

## **II. The Court Erred in Finding the Confession Lacked a Proper Jurat.**

Munday incorrectly contends that Safe Home has failed to address the trial court's findings relating to an inadequate jurat. As discussed above, the requirement of a proper



jurat is based on the trial court's reliance on *Mickelsen*. This was an error, and there is no jurat requirement under Rule 58A(i).

However, even if *Mickelsen* and its requirements for a jurat applied, the jurat at issue is sufficient under the Notaries Public Reform Act and the trial court's finding that the Confession "lack[ed] a proper jurat," was also an error. Safe Home addressed this error in its opening brief. [See Safe Home Brief at 13].

In reaching its conclusion that the jurat was deficient, the trial court relied on Utah Code section 46-1-2-(5)'s definition of "jurat" to determine that a proper jurat must contain a "written oath or affirmation," an "indication that the statement was voluntarily signed," and an "indication that the signer of the document produced evidence of his identity." [R.0985]. The trial court then held that the jurat "Subscribed and Sworn to" did not meet those requirements. [R.0985]. The trial court's ruling is in error.

Although the trial court cited Utah Code section 46-1-2, it ignored section 46-1-6.5. Section 46-1-6.5(2)(b) declares that "[a]n affidavit for a jurat that is in substantially the following form is sufficient." Utah Code Ann. § 46-1-6.5(2)(b). The code then identifies the essential information to include the language "[s]ubscribed and sworn to before me" with the date, name of the notary, and name of the document signer. *Id.* That information is present in this case. [See R.0001-02]. The Confession contains the critical "subscribed and sworn to before me" language, the date, the name of the notary, and Munday's signature. [*Id.*]. Thus, the jurat at issue "substantially" followed the Utah Code and "is sufficient for the completion of a notarization." *Id.* §46-1-6.5(1); see also *White*, 26 P.2d

at 335; *In re Williamson*, 43 BR. at 823. For these reasons, Munday's arguments that the Confession is inadequate because it lacks a proper jurat fail.

### **III. The Confession Contained a "Specified Sum."**

The trial court's ruling regarding "specified sum" was also an error for at least two reasons. First, Munday's specifically acknowledged that the signing bonus of \$160,000 "constituted a 'specified sum' within the scope of Rule 58A([i])." [R.0002]. Second, the trial court's requirement for a "final specified amount," ignores the plain meaning of "specified sum." [R.0986].

#### **A. Munday's Arguments Ignore the Facts of the Case and His Own Agreement.**

Munday's arguments about there being no "specified sum" ignore the realities of this case. As part of his negotiated contract with Safe Home, Munday voluntarily accepted a \$160,000 signing bonus. [R.0013]. Safe Home required that "prior to receiving the Signing Bonus, [Munday] must sign the consent to judgment." [R.0013]. Munday voluntarily did so and then took the \$160,000. [*See* R.001].

Not surprisingly, Munday's Confession expressly consented "to the entry of Judgment by Confession against him or her in the principal amount of \$160,000." [R.001]. That amount further was defined as the "Judgment Amount." [*Id.*]. Munday "expressly stipulate[d] and agree[d] that the sum that is specified as the Judgment Amount shall be deemed to be 'justly due' *and shall be deemed to constitute a 'specified sum'* within the scope of Rule 58A(f) [sic] of the Utah Rules of Civil Procedure. [Munday] further



stipulates that the *Judgment* in the form attached *may be entered against him* in favor of plaintiff *in that specified sum* as defined herein.” [R.002 (emphasis added)].

Munday breached his contractual obligations by failing to repay the \$160,000. Accordingly, Safe Home filed the Confession. When it did so, it did not try to vary the amount that was owed. Rather, Safe Home requested – and still requests – the defined and stipulated Judgment Amount. It requested – and still requests – a judgment in the amount of \$160,000. That stipulated, specified sum never changed. Safe Home has only ever requested a judgment for the \$160,000 Munday “expressly stipulate[d] and agree[d]” would “constitute a ‘specified sum’” that “may be entered against him” as a judgment.<sup>1</sup> [R.002]. As explained in Safe Home’s opening brief, Munday expressly consented to that judgment and should not now be allowed to simultaneously keep the \$160,000 he obtained while repudiating the terms he expressly approved in order to obtain that amount. [See Safe Home Brief at 19-20].

Finally, contrary to Munday’s arguments on appeal, this issue was preserved in the trial court. [See, e.g., R.0829 (“Munday agreed that the Judgment would be deemed to comply with the rule”); R.0830 (recognizing Munday’s argument “ignores the plain language of the Judgment itself” because Munday “expressly stipulates and agrees that the

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<sup>1</sup> Safe Home has reserved the right to augment the judgment after it is entered to account for attorney fees. However, both the confession of judgment and rule 73 are clear that this augmentation occurs after the judgment is entered. See Utah R. Civ. P. 73(a) (“Attorney fees must be claimed by filing a motion for attorney fees no later than 14 days after the judgment is entered . . .”). [See R.001 (“Judgment Amount may be augmented by any and all attorneys’ fees and costs . . .”)].

sum that is specified as the Judgment Amount shall be deemed to be ‘justly due’ and shall be deemed to constitute a ‘specified sum’ within the scope of Rule 58A”)].

**B. The Confession Concisely Stated the Claim and That the Specified Sum Was Due.**

Even if the Court ignored that Safe Home has only ever sought the \$160,000, Munday expressly approved as the “Judgment Amount,” his arguments about the “specified sum” still fail.

There is little authority interpreting rule 58A(i)’s instruction that a confession of judgment should state “that the specified sum is due or to become due.” *See* Utah R. Civ. P. 58A(i)(1). Certainly, Munday has not identified any appellate authority from any jurisdiction refusing to enter a confession of judgment because the judgment allowed for an accounting of payments already made by the debtor or allowed for augmentation of the judgment to account for fees and costs. Absent such authority, this Court should look to the plain language of rule 58A and to comparable rules for guidance. Both favor Safe Home positions on appeal.

First, the language of rule 58A supports Safe Home’s arguments. Rule 58A(i) is written differently than how the trial court applied it. The trial court rejected the Confession because “[t]here was no *final specified amount*.” [R.0986 (emphasis added)]. That is not what rule 58A actually requires. Instead, rule 58A(i) indicates that the confession should “concisely state the claim and that the *specified sum* is due or to become due.” Utah R. Civ. P. 58A(i). In addition to adding the word “*final*” to the rule, the trial court ignored the meaning of the word “sum.” *Accord. Aequitas Enterprises*, 2011 UT 82, ¶17 (recognizing

courts should “read the plain language” of the rules). A “sum” is the product of a mathematical equation. It is “the aggregate of two or more numbers, magnitudes, quantities, or particulars.” See Dictionary.com, <https://www.dictionary.com/browse/sum?s=t> (last visited Jan. 15, 2019); see also, e.g., *Utah Ass’n of Credit Men v. Jones*, 164 P. 1029, 1030 (Utah 1917) (affirming confession of judgment for “\$1,100 . . . and for all costs of docketing, filing, and satisfying said judgment” (emphasis added)). By using the word “sum,” rule 58A(i) did not preclude the type of calculation allowed by the Confession in this case.

Second, comparable language from other rules favor Safe Home. See generally *Aequitas Enterprises*, 2011 UT 82, ¶17 (“[Party’s] attempt to interpret one rule by drawing on other rules is well taken.”). For example, there is no closer analogy to a confession of judgment than a default judgment. Indeed, “[t]he only difference between entering a judgment by confession and entering one upon default under such a statute is that, in the first instance, the defendant in proper terms expressly confesses judgment, while in the second he tacitly consents by his silence that judgment may be entered against him for the amount claimed in the complaint.” *Utah Ass’n of Credit Men v. Bowman*, 113 P. 63, 67 (1911). Not surprisingly then, rule 55 and rule 58A have similar language. Compare Utah R. Civ. P. 55(a) (allowing entry of judgment by the clerk for “a sum certain”); with Utah R. Civ. P. 58A(i) (allowing entry of judgment by the clerk for a “specified sum”). Importantly, although rule 55 requires “a sum certain” it also recognizes and requires the types of credits contemplated by the Confession before this Court. See Utah R. Civ. P. 55(b)(1) (requiring a deduction for “credits to which the defendant is entitled”).

Munday does not dispute that the questioned language of rule 58A is substantially similar to the language in rule 55. Instead, he argues that rule 55 is implemented through a different procedural mechanism than rule 58A. Specifically, Munday recognizes that rule 55(b)(1)(D) requires “a verified complaint, an affidavit, or an unsworn declaration,” while rule 58A(i) requires a “statement verified by the defendant.” *See* Utah R. Civ. P. 55(b)(1)(D); *id.* R. 58A(i). Focusing on that difference, however, misses the mark. The question is not how each rule is implemented. Rather, the question is, once implemented, what the substantially similar language of the two rules requires. In this respect, neither Munday nor the trial court offered any explanation of why, for example, “a sum certain” must deduct payments made by the defendant, but a “specified sum” cannot. *See* Utah R. Civ. P. 55(b)(1)(D); *id.* R. 58A(i). Indeed, both Munday and the trial court ignore that if confessions of judgments are not allowed to reflect payments made towards the original debt, it would substantially prejudice the judgment debtors.

Munday’s arguments also fail to harmonize rule 58A(i) with rules 54 and 73. Munday argued, and the trial court ruled, that the Confession failed because it allowed for augmentation of attorney fees and costs. Specifically, the trial court’s ruling expressly relied on the fact that “[t]he amount of attorneys’ fees and costs is unspecified.” [R.0986]. Again, that ruling does not harmonize the rules of civil procedure.

Rule 54 declares that “[t]he party who claims costs must not later than 14 days *after the entry of judgment* file and serve a verified memorandum of costs.” Utah R. Civ. P. 54(d)(2) (emphasis added). Likewise, rule 73 declares that “[a]ttorney fees must be claimed by filing a motion for attorney fees no later than 14 days *after the judgment is entered.*”

*Id.* R.73(a) (emphasis added). Rules 54 and 73 do not exclude judgments by confession from their reach. Rather, those rules apply to all judgments. *See* Utah R. Civ. P. 54(a) (providing a single definition for “Judgment”). The trial court therefore erred when it required a calculation of costs and fees at the time the confession was executed or filed, rather than “14 days after the entry of judgment.” Utah R. Civ. P. 54(d)(2), 73(a). Munday’s arguments on appeal likewise fail for the same reason.

#### **IV. Munday’s Constitutional Challenges Fail.**

Munday’s constitutional challenge to Rule 58A(i) fail because he has not adequately briefed the issue and has not offered any argument that the Rule 58A(i) is unconstitutionally applied to him under the facts of this case.

##### **A. Munday’s Facial Challenge to Rule 58A(i) is Inadequately Briefed.**

Confessions of judgment have been a part of Utah law for more than 100 years. *See, e.g., Utah Ass’n of Credit Men v. Jones*, 164 P. 1029, 1030-32 (Utah 1917) (finding confession of judgment was not improper preference of creditors). Nevertheless, Munday seeks to invalidate Utah law though a conclusory argument section that essentially rests on a single California case decided more than 40 years ago. The Court should decline to accept Munday’s invitation to address this inadequately briefed constitutional question.

First, Munday has failed to establish that his constitutional challenge was addressed in the trial court. *See generally Holladay v. Storey*, 2013 UT App 158, ¶34, 307 P.3d 584 (“[I]t is not the appellate court’s burden to comb through the record to verify whether, and where, [Munday] preserved this issue, and we therefore decline to address it.”). For that reason alone, the Court can decline review now.



Second, even on appeal, Munday fails to adequately explore and define the boundaries of his constitutional question. For example, although Munday attacks Rule 58(A)(i), he never addresses the relevant provisions of the Utah Code. That is a glaring omission given the language of Rule 58(A)(i).

Rule 58A(i) is unique. It is one of only a few rules that expressly incorporate the provisions of the Utah Code. Specifically, rule 58A(i) only applies when “a judgment by confession *is authorized by statute.*” *See* Utah R. Civ. P. 58A(i) (emphasis added). Thus, Rule 58A(i) cannot be viewed in isolation. Rather, it must be viewed in conjunction with terms, limits, and protections afforded “by statute.” *Id.* Munday offers no such analysis. Indeed, his brief does not even cite, let alone meaningfully discuss, any provision of the Utah Code that addresses confessions of judgment. He simply asks the Court to strike down Rule 58A(i) without fully exploring or explaining that rule.

If Munday were offering an “as-applied” challenge, his limited analysis and briefing might be less meaningful. In an as-applied challenge, “a party concedes that the challenged [law] may be facially constitutional, but argues that under the particular facts of the party’s case, ‘the [law] was applied . . . in an unconstitutional manner.’” *Gillmor v. Summit County*, 2010 UT 69, ¶27, 246 P.3d 102 (omission in original). That is not Munday’s contention. Rather, Munday has asserted a facial challenge to Rule 58A(i). He does not contend that this case is unique, but rather that “Rule 58A(i) fails to pass constitutional muster.” [Munday Brief at 25; *accord id.* at 22 (“Rule 58A(i) Is Unconstitutional”)]. By presenting a facial challenge, Munday must show “that the [law] is so constitutionally flawed that no set of circumstances exists under which the [law] would be valid.” *Id.*

Munday cannot meet that rigorous burden without even discussing the statutory “set of circumstances” that are incorporated as the prerequisite to Rule 58A(i)’s application.<sup>2</sup> Nor should the Court endeavor to make Munday’s arguments for him. *See, e.g., State v. Sloan*, 2003 UT App 170, ¶13, 72 P.3d 138 (“An issue is inadequately briefed when the overall analysis of the issue is so lacking as to shift the burden of research and argument to the reviewing court.”).

**B. Munday’s Facial Attack Fails.**

Even if the Court were to independently research and evaluate Munday’s constitutional challenge, it still would fail. The United States Supreme Court has declared “that a cognovit clause is not, per se, violative of Fourteenth Amendment due process.” *D.H. Overmyer Co. Inc., of Ohio v. Frick Co.*, 405 U.S. 174, 187 (1972). *See generally id.* at 176 (“The cognovit is the ancient legal device by which the debtor consents in advance to the holder’s obtaining a judgment without notice or hearing . . .”); Black’s Law Dictionary 859 (8th Ed. 2004) (defining “cognovit judgment” as “[a] debtor’s confession of judgment”). In fact, the Supreme Court has affirmed the entry of a judgment by confession. *See Overmyer*, 405 U.S. at 783.

In *D.H. Overmyer Co. Inc., of Ohio v. Frick Co.*, 405 U.S. 174 (1972), a judgment was entered “without prior notice to Overmyer.” *Id.* at 181. Only after judgment was

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<sup>2</sup> Likewise, Munday has not even attempted to explain why invalidating the procedure for obtaining a judgment by confession would invalidate the statutory right or authority to obtain a judgment by confession. He merely assumes that if the procedures set forth in Rule 58A(i) were to fail, that the substantive rights granted in the Utah Code also would fail. His implicit conclusion is not supported by any authority.



entered did the clerk of the court “mail[] notices of the entry of the judgment . . . to Overmyer.” *Id.* at 182. Overmyer appealed and argued that Ohio’s confession of judgment framework was unconstitutional. The United State Supreme Court disagreed. The Court recognized that “[t]he due process rights to notice and hearing prior to a civil judgment are subject to waiver.” *Id.* at 782. As a result, “a cognovit clause is not, per se, violative of Fourteenth Amendment due process.” *Id.* at 187. The Court then affirmed the confession of judgment because the record evidence indicated that Overmyer “voluntarily, intelligently, and knowingly waived the rights it otherwise possessed to prejudgment notice and hearing.” *Id.* at 187.

The United State Supreme Court also decided *Swarb v. Lennox*, 405 U.S. 191 (1972) as a “companion to” the *Overmyer* matter. *See Swarb*, 405 U.S. at 193. The United States Supreme Court described the confession of judgment procedures as follows:

It is apparent, therefore, that in Pennsylvania confession-of-judgment provisions are given full procedural effect; that the plaintiff’s attorney himself may effectuate the entire procedure; that the prothonotary, a nonjudicial officer, is the official utilized; that notice issues after the judgment is entered; and that execution upon the confessed judgment may be taken forthwith. The defendant may seek relief by way of a petition to strike the judgment or to open it, but he must assert prima facie grounds for this relief, and he achieves a trial only if he persuades the court to open. Meanwhile, the judgment and its lien remain.

*Id.* at 195. The plaintiffs in *Swarb* appealed and argued “that the court should have declared the Pennsylvania rules and statutes unconstitutional on their face.” *Id.* The Supreme Court disagreed. The Court recognized that the *Overmyer* opinion prevented a facial unconstitutional argument. *Id.* at 200. The Court explained that “[i]n *Overmyer* it is recognized . . . that, under appropriate circumstances, a cognovit debtor may be held

effectively and legally to have waived those rights he would possess if the document he signed had contained no cognovit provision.” *Id.* at 200. As such, the Supreme Court again rejected a facial attack to a confession of judgment statute. *Id.*; *see also id.* at 202 (“Problems of this kind are peculiarly appropriate grist for the legislative mill.”).<sup>3</sup>

Other courts have ruled similarly. *See, e.g., FDIC v. Aaronian*, 93 F.3d 636, 640 (9th Cir. 1996) (“Cognovit notes serve a valuable commercial purpose by interjecting a measure of security for the creditor into the lending relationship” and “are not unconstitutional per se”); *Bryant v. Jefferson Fed. Sav. & Loan Ass’n*, 509 F.2d 511, 515 (D.C. Cir. 1974) (“*Overmyer* and *Swarb* . . . clearly dispose of appellants’ facial constitutional challenge.”); *Gifford v. Casper Neon Sign Co.*, 618 P.2d 547, 550 (Wyo. 1980) (“[D]eclining to hold cognovit judgments facially invalid”).

“Because the procedure is not invalid per se, a debtor must allege with some specificity facts tending to show a constitutional defect in the *application* of this procedure to him . . .” *Aaronian*, 93 F.3d at 640. In other words, Munday should have made an as-applied constitutional challenge. But he did not. Munday’s argument on this issue does not contain even a single cite to the record in this unique case. Nor does that record support his

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<sup>3</sup> Munday’s argument entirely ignores the binding precedent from the United State Supreme Court. Instead, Munday calls a split-decision case from California “the lead case.” [See Munday Brief at 22 (citing *Isbell v. County of Sonoma*, 21 Cal. 3d 61 (1978))]. In so doing, Munday entirely ignores the strong rebuke contained in the dissent. *See Isbell*, 21 Cal. 3d 76 (Richardson J., dissenting) (“The majority’s holding of facial unconstitutionality conflicts with the latest expressions of the United State Supreme Court on the subject . . .”). This Court should not turn to questionable authority from California to address an issue of federal constitutional law already decided by the United States Supreme Court.

cause. To the contrary, the record reveals that Munday had substantial experience in the relevant industry and previously had signed similar confessions when he received advances from prior employers. [See, e.g. R.921-24]. At the time of execution Munday himself indicated, “I’ve done these things a lot. I know what all these things are.” [R.890]. Further, Munday received specific consideration in connection with the confession – a \$160,000 Signing Bonus. [See R.0013]. This was not an adhesion contract. While the contract required that “prior to receiving the Signing Bonus, [Munday] must sign the consent to judgment,” nobody forced Munday to accept the \$160,000 Signing Bonus. [*Id.*]. Rather, Munday freely chose to execute the confession – as he had throughout his career – and then pocketed the \$160,000 that followed. He cannot now properly complain about contract terms he freely entered to obtain a benefit he negotiated and kept.

**V. Munday is Not Entitled to Attorney Fees.**

Because the trial court erred in its ruling, it also erred in awarding Munday his attorney fees as the prevailing party under Utah Code Section 78B-5-826. But even if the trial court’s ruling on the confession is upheld, its ruling allowing fees was still flawed because the enforcement of the confession was not a “civil action.”

Utah Code 78B-5-826 allows a party to collect attorney fees “that prevails in a *civil action*.” The issue is one of statutory interpretation and the meaning of “civil action.” “[U]nless a statute is ambiguous,” Utah Courts “look exclusively to a statute’s plain language to ascertain the statute’s meaning.” *Prince v. Bear River Mut. Ins. Co.*, 2002 UT 68, ¶ 21, 56 P.3d 524. The meaning should be “in harmony with other statutes in the same chapter and related chapters.” *State v. Holm*, 2006 UT 31, ¶ 16, 137 P.3d 726. “Where the

legislature includes particular language in one section of a statute but omits it in another it is generally presumed that the legislature acts intentionally and purposely in the disparate inclusion or exclusion.” *Alliant Techsystems, Inc. v. Salt Lake Bd. of Equalization*, 2012 UT 4, ¶ 23 n.27, 270 P.3d 44 *quoting Johnson v. United States*, 559 U.S. 133 (2010). For this reason, “different words used in similar statutes are presumed to have different meanings.” *Outfront Media, LLC v. Salt Lake City Corp.*, 2017 UT 74, ¶ 28, 416 P.3d 389.

The trial court’s interpretation of “civil action” under Utah Code 78B-5-826 violates these rules of statutory interpretation and is contrary to this Court’s rulings in *Thorpe v. Washington City*, 2010 UT App. 297, 243 P.3d 500, and *Brigham Young University v. Tremco Consultants, Inc.*, 2007 UT 17, 156 P.3d 782. The trial court and Munday both define “civil action” to have the same meaning as “civil proceeding” *i.e.* “an expansive interpretation [that] include[s] all proceedings before a civil court within the state.” [Opp. at p. 27]; *see also Black’s Law Dictionary*, 1324 (9th ed. 2009) (“[a proceeding] is more comprehensive than the word ‘action’”).

But different words used in similar statutes are presumed to have different meanings, and the use of particular language in one section of a statute that is omitted in another is presumed intentional. *See Outfront Media, LLC*, 2017 UT 74, ¶ 28. Part 8 in Chapter 5 of Title 78B uses different wording in referencing filings or proceedings having a civil character. For example, section 78B-5-805 applies to “any civil action or proceeding.” Section 78B-5-813 applies to “any civil proceeding.” The rules of statutory interpretation presume “civil action” and “civil proceeding” have different meanings and

the use of one while excluding the other is presumed intentional. *Alliant Techsystems, Inc.*, 2012 UT 4, ¶ 23 n.27.

“Civil proceeding” has a broader meaning “civil action.” See *Black's Law Dictionary*, 1324 (9th ed. 2009) (“[a proceeding] is more comprehensive than the word ‘action’”). A “civil proceeding” is a phrase commonly used to refer to the business done in courts. See *id.* Several courts have addressed this issue and come to the same conclusion. See *Food & Water Watch, Inc. v. United States Env'tl. Prot. Agency*, 302 F. Supp. 3d 1058, 1063 (N.D. Cal. 2018) (“The term [proceeding] is more comprehensive than the word ‘action.’”); *Mount v. Apao*, 139 Haw. 167, 176 (2016) (same); *Melssen v. Auto-Owners Ins. Co.*, 285 P.3d 328, 334 (Colo. App. 2012) (same); *Heltsley v. Frogge*, 350 S.W.3d 807, 809 (Ky. Ct. App. 2011) (same); *Dever v. Lucas*, 174 Ohio App. 3d 725, 731 (2008) (same); *Karellas v. Karellas*, 61 Mass. App. Ct. 716, 723 (2004) (same).

While “civil proceeding” is broad and refers to the business done in courts, this Court has recognized the phrase “civil action” “is a term of art, and a rather precise one at that.” *Thorpe v. Washington City*, 2010 UT App. 297, ¶ 15, 243 P.3d 500. In *Thorpe* this Court held “civil action” “does not expansively include any and all filings having a civil character.” Instead, the Court defined the term as follows: “A civil action is commenced (1) by filing a complaint with the court, or (2) by service of a summons together with a copy of the complaint.” *Id.* Munday offers little to distinguish *Thorpe v. Washington City*, 2010 UT App. 297, 243 P.3d 500. While the *Thorpe* Court was addressing a notice of claim under the Governmental Immunity Act this does not alter the Court’s analysis on the meaning “civil action.”

This meaning for “Civil Action” is consistent with how the phrase is used in Part 8 of Chapter 5 in Title 78B. There, the legislature used both “civil proceeding” and “civil action.” If the legislature intended Utah Code section 78B-5-826 to apply “all proceedings before a civil court within the state,” as Munday argues, it would have used the broader “civil proceeding,” as it did in Utah Code section 78B-5-813, or both “civil proceeding” and “civil action,” as it did in Utah Code section 78B-5-805. But it did not. The legislature limited Utah Code 78B-5-813 to “civil actions” only. The legislature’s exclusion of “proceeding” from the statute’s application should be given effect.

The trial court acknowledged that the Confession did not fit into this definition, as a complaint and service of a summons “was not done here.” [R.1081]. The trial court nevertheless reasoned that while the proceeding was not commenced with a complaint or service of a summons, “that [did] not change the fact that a confession of judgment [] is a *civil* judgment which is subject to collection pursuant to *civil* procedural rules.” [*Id.* (emphasis in original)]. However, it was this same reasoning that the Utah Supreme Court expressly rejected in *Tremco*, 2007 UT 17.

The *Tremco* court recognized that just because a proceeding is civil in nature or is governed by the Rules of Civil Procedure, does mean that the proceeding is a “civil action.” *See id.* at ¶ 46-47. The *Tremco* court also defined “civil action” as a proceeding “that must be prosecuted in the manner prescribed by the Utah Rules of Civil Procedure, commencing with the filing of a summons and complaint and not the abbreviated post-judgment collection procedures of rule 69.” *See also McBride–Williams v. Huard*, 2004 UT 21, 94 P.3d 175 (stating that a civil action is commenced under rule 3 of the Utah Rules of Civil



Procedure by filing a complaint with the court or by serving a summons on the defendant with a copy of the complaint).

Munday's policy argument also fails because there was not an unequal exposure to the risk of contractual liability for attorney fees as it relates to obtaining the judgment itself. *See Giusti v. Sterling Wentworth Corp.*, 2009 UT 2, ¶ 77, 201 P.3d 966. The Confession only allows for attorney fees in *collecting* on the judgment once it was entered. The Confession states that Munday "agrees that the Judgment and Judgment Amount may be augmented by any and all attorney fees and costs incurred by Plaintiff *in collecting* on the Judgment or *collecting* the Judgment Amount." [R.001]. The parties' agreement did not allow Safe Home its attorney fees incurred in seeking to *obtain* the judgment. Nor does it allow Munday his fees in resisting Safe Home's efforts to obtain the judgment. Thus, even if the Confession constituted a "civil action" under Utah Code section 78B-5-805 (which it does not), the statute would not apply to proceedings relating to obtaining or resisting the judgment, only to those proceedings relating to collecting on the judgment.

### **CONCLUSION**

Munday should not be allowed to escape his agreement with Safe Home. There is no dispute that Munday signed the Confession, promised to work for Safe Home for 3-years, and took the \$160,000 only to quit four-months later. The trial court erred in preventing Safe Home from obtaining a judgment against Munday and awarding him his attorney fees. The trial court's ruling should be reversed and Munday should be required to repay the \$160,000 signing bonus.



DATED: January 15, 2019

HATCH, JAMES & DODGE



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## CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Public Brief of Appellant Safe Home Control, Inc. complies with the type-volume limitations set forth in Utah R. App. P. 24(f)(1). According to the “word count” feature of Microsoft Word, this brief contains 6,803 words, including footnotes, headings, and quotations, but excluding the tables of contents, table of authorities, and certificates.

DATED: January 15, 2019

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 15<sup>th</sup> day of January, 2019, I caused a true and correct copy of the **REPLY BRIEF OF APPELLANT SAFE HOME CONTROL, INC** to be delivered via electronic delivery, or as otherwise noted, to the following:

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