IN THE UTAH COURT OF APPEALS

THE BANK OF NEW YORK MELLON FKA THE BANK OF NEW YORK, AS TRUSTEE FOR THE CERTIFICATEHOLDERS CWMBS SERIES 2006-HYB5, Plaintiff and Appellee, v. PAULA A. MITCHELL, Defendant and Appellant. AMERICA FIRST FEDERAL CREDIT UNION, PEPPERWOOD HOMEOWNER'S ASSOCIATION, and JOHN DOES 1-5, Defendants (not participating).	Appellate Case No. 20180141-CA Trial Court Case No. 160902472

APPELLEE'S BRIEF

Appeal from the Orders of the Third Judicial District Court
by The Honorable Todd Shaughnessy

Attorney for Appellant/Defendant
Paula A. Mitchell:

Douglas R. Short
Consumer Law Center of Utah
2290 East 4500 South, Suite 220
Holladay, UT 84117
mail@consumerlawutah.com

Counsel for Appellee/Plaintiff The Bank of New York Mellon fka The Bank of New York, as Trustee for the Certificateholders CWMBS Series 2006-HYB5:

Brigham J. Lundberg
Hillary R. McCormack
LUNDBERG & ASSOCIATES, PC
3269 South Main Street, Suite 100
Salt Lake City, UT 84115
litigationdept@lundbergfirm.com

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INTRODUCTION

"Litigation . . . is not a case of 'if at first you don't succeed, try, try again.'" *Weber v. Henderson*, 275 F. Supp. 2d 616, 622 (E.D. Penn. 2003). Paula A. Mitchell (**Ms. Mitchell**) has already brought and lost most of these claims on previous occasions. She argues the judgment in this case is not final, just as she argued regarding the judgment in the previous appeal before this Court. *See Mitchell v. ReconTrust Co. NA*, 2016 UT App 88, 373 P.3d 189. She will undoubtedly continue to argue, in other courts,[1] that these judgments are not final.

Rather than pinpoint one or two pertinent issues on appeal and properly demonstrating why they were erroneously decided below, Ms. Mitchell "uses a 'throw it at the wall and see what sticks' approach" on appeal. *See Sweeney v. Northeast Ill. Regional Commuter R.R. Corp.*, No. 97C7622, 1998 WL 812546, *1 n.1 (N.D. Ill. Nov. 18, 1998). Ms. Mitchell challenges almost every ruling made by the trial court, in hopes of success on one of them, so as to prolong the litigation related to this property and keep her in her home. However, Ms. Mitchell's claims, whether new or being dusted off and brought anew, are meritless. Her assertions of error and abuse of discretion by the trial court are unsupported by law or facts in the record, and necessarily fail.

STATEMENT OF ISSUES

Ms. Mitchell's brief contains a "statement of issues" section, but it fails to provide this Court with the appropriate standard of review or to include complete record citations.

1 *See infra* Note 3 for a list of other lawsuits in which Ms. Mitchell continues to argue these issues and tie up the real property that is the subject of litigation.

(Ini. Bri. 9-10.) A vague reference to cases that may set forth a standard is inadequate and not compliant. *See* UTAH R. APP. P. 24(a). Neither this Court nor BNYM should be required to conduct Ms. Mitchell's research to allow for appellate review. *See, e.g.*, *State v. Nielsen*, 2014 UT 10, ¶ 33, 326 P.3d 645 (authorizing the Court to reject a brief that fails to adequately state the standard of review); *State v. Smith*, 2010 UT App 231, ¶¶ 2-3, 238 P.3d 1103 ("Briefs that do not comply with the detailed requirements set forth in rule 24(a) may be disregarded or stricken by the court."). Nevertheless, BNYM will attempt to tease out the numerous issues raised by Ms. Mitchell and provide the appropriate review standard.

With her first five (5) stated issues, Ms. Mitchell challenges the court's summary judgment and Rule 12(b) rulings, which are reviewed *de novo*. *See Bahr v. Imus*, 2011 UT 19, ¶ 16, 250 P. 3d 56 (summary judgment reviewed for correctness, giving no deference to the trial court's decision); *Oakwood Village LLC v. Albertsons, Inc.*, 2004 UT 101, ¶ 9, 104 P.3d 1226 (dismissal rulings under 12(b)(6) given no deference and reviewed under correctness standard). Specifically, "[w]hether a party has standing is primarily a question of law, which [is] review[ed] for correctness." *Edwards v. Powder Mountain Water & Sewer,* 2009 UT App 185, ¶ 10, 214 P.3d 120.

Ms. Mitchell's challenge to the court's Rule 59/52 ruling is reviewed for abuse of discretion. *Bergmann v. Bergmann*, 2018 UT App 130, ¶ 12, 428 P.3d 89.

STATEMENT OF THE CASE[2]

A. The Mortgage Loan

In 2006, Ms. Mitchell signed a promissory note (the **Note**) and a deed of trust (the **Deed of Trust**), and thereby obtained a $1,000,000 home loan from America's Wholesale Lender. (R. 2-3, 14-28, 30-33.) The loan enabled her to purchase and obtain title to a home located at 3 South Mistywood Lane (the **Property**) in the Pepperwood Subdivision of Sandy, Utah. (R. 2-3, 11-12.) The Bank of New York Mellon fka The Bank of New York, as Trustee for the Certificateholders CWMBS Series 2006-HYB5 (**BNYM**) holds the endorsed Note. (R. 3, 33.) The Deed of Trust was also assigned to BNYM. (R. 3, 35-36.) In April 2010, Ms. Mitchell defaulted on her loan by failing to make the required payments when due. (R. 4-5.) Ms. Mitchell has managed to tie up the Property in various lawsuits[3] and she still resides in the Property, despite having failed to make a payment on her loan since April 2010. (R. 5.)

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2 Considerable factual background for this matter is summarized in this Court's opinion in *Mitchell v. ReconTrust Co. NA*, 2016 UT App 88, 373 P.3d 189 (hereinafter, ***Mitchell I***). (R. 636-666.) Though the *Mitchell I* opinion is found in the record, citations will be made to the opinion using the universal citation format. Citations herein to *Mitchell I* refer specifically to this Court's appellate opinion issued on April 28, 2016, while discussion involving and textual references to *Mitchell I* refer to the first litigation matter and its subsequent appeals generally.

3 This brief will principally discuss the current matter and *Mitchell I*, the 2011 lawsuit involving the Property. However, it is worth noting that at least two (2) other actions are pending regarding the Property: (1) an eviction action in the Third Judicial District Court, State of Utah, No. 180906841, filed by BNYM in September 2018 to obtain possession of the Property, and (2) a litigation action in the United States District Court for the District of Utah, No. 2:18-cv-00636-BCW, filed by Ms. Mitchell against BNYM and its attorneys who successfully prosecuted this judicial foreclosure.

On August 17, 2010, BNYM, by and through ReconTrust Company NA (**ReconTrust**), the then-current successor trustee of the Deed of Trust, commenced a non-judicial foreclosure action by recording a Notice of Default. *Mitchell I*, 2016 UT App 88, ¶ 3.

B. The *Mitchell I* Litigation

In 2011, Ms. Mitchell attempted to prevent the foreclosure of the Property by filing suit[4] against BNYM, the foreclosure trustee, and the loan servicer, among others. (R. 110, 273.) Ms. Mitchell claimed BNYM could not foreclose because it did not own her mortgage loan. *Mitchell I*, 2016 UT App 88, ¶ 7. The district court dismissed nine of her eleven claims and entered summary judgment against her on two remaining claims. *Id.* ¶¶ 6-11. (R. 110.) Specifically, the court found that BNYM had authority to commence foreclosure proceedings, the debt had not been satisfied, the trust deed had not been severed from the debt, BNYM had a valid, enforceable claim against the Property based on the deed of trust, and Ms. Mitchell was not entitled to quiet title. *Mitchell I*, 2016 UT App 88, ¶¶ 17, 34, 38. Undeterred, Ms. Mitchell asked the court to correct its order, arguing that the court had not actually decided all her claims. (R. 629 n.3.) The district court disagreed and denied her motion. (R. 628-30.)

4 On January 18, 2011, Paula A. Mitchell and her then-husband Wade Mitchell (collectively, "the Mitchells") filed suit in the Third Judicial District Court, State of Utah, No. 110400816, naming as defendants BNYM, ReconTrust, Armand J. Howell, America's Wholesale Lender, and BAC Home Loans Servicing LP. The Mitchells' claims in that matter are summarized in this Court's opinion in *Mitchell I*. While the *Mitchell I* claims are attributable to both of the Mitchells, because Wade Mitchell is not a party to this current appeal, all references to the *Mitchell I* claims herein will be deemed to be Ms. Mitchell's claims, for simplicity's sake.

In January 2014, Ms. Mitchell appealed (R. 273), but then moved to dismiss her own appeal. (Motion to Dismiss Appeal for Lack of Jurisdiction, *Mitchell v. ReconTrust Co. NA*, No. 20140113-CA (Utah Ct. App. Dec. 19, 2014); R. 633.) She argued it did not matter that the district court said it was deciding all her claims—supposedly, because the district court had not expressly addressed all her arguments, it had not actually resolved all outstanding controversies and its judgment was not final. (*Id.*) She lost the motion. (R. 633.) The Utah Court of Appeals ruled, "The district court has resolved all causes of action raised in the litigation." (Order, *Mitchell v. ReconTrust Co. N.A.*, No. 20140113-CA (Utah Ct. App. Jan. 14, 2015); R. 633.) Then, this Court affirmed. *See Mitchell I*, 2016 UT App 88, ¶ 68. (R. 110, 273.)

Ms. Mitchell moved for rehearing, again claiming the district court's judgment was not final because it had not resolved all her claims. Her petition for rehearing was denied. *Mitchell v. ReconTrust Co. NA*, 2016 UT App 88, 373 P.3d 189, *rehearing denied* (Utah Ct. App. Jun. 29, 2016). She raised the same argument again when she petitioned the Utah Supreme Court for certiorari. That petition was denied, too. *See Mitchell v. ReconTrust*, 397 P.3d 508 (table) (Utah 2016). (R. 373-75.)

C. This *Mitchell II* Litigation

The litigation of *Mitchell I* ultimately delayed the non-judicial foreclosure proceedings sufficiently that BNYM had no choice but to forgo further efforts at non-judicial foreclosure due to statute of limitations concerns. Accordingly, in April 2016, BNYM filed a judicial foreclosure complaint against Ms. Mitchell. (R. 1-46.) Ms.

Mitchell moved to dismiss ("1st Motion to Dismiss"), arguing that the statute of limitations had expired and BNYM lacked standing. (R. 96-106.) BNYM opposed dismissal. (R. 109-27.) Ms. Mitchell replied. (R. 148-65.)

Before the first motion to dismiss was decided, Ms. Mitchell moved to dismiss again ("2nd Motion to Dismiss"), arguing the judicial foreclosure was a compulsory counterclaim that should have been brought in *Mitchell I*. (R. 202-15.) BNYM again opposed dismissal. (R. 272-79.) Ms. Mitchell replied. (R. 311-27.)

The court denied the 2nd Motion to Dismiss. (R. 360-68, 384.) Ms. Mitchell sought permission to file an interlocutory appeal of the district court's ruling. (R. 386-406.) This Court denied Ms. Mitchell's petition for permission to file an interlocutory appeal. (R. 417-20.) Thereafter, relying on this Court's decision in *Mitchell I*, the trial court denied the 1st Motion to Dismiss. (R. 421-24.)

Ms. Mitchell then filed an Answer and Counterclaim. (R. 444-507.) BNYM moved to dismiss the counterclaim. (R. 514-20, 523-30.) Ms. Mitchell filed an Amended Answer and Counterclaim. (R. 538-612.) BNYM moved to dismiss the amended counterclaim. (R. 615-23.) Ms. Mitchell opposed dismissal. (R. 711-34.) BNYM replied. (R. 738-45.) The court granted BNYM's motion to dismiss and Ms. Mitchell's amended counterclaim was dismissed. (R. 754-55.)

BNYM moved for summary judgment on its breach of contract and judicial foreclosure claims. (R. 782-807.) The motion was supported by documents from the public records and the Affidavit of Alvin Denmon (the **Denmon Affidavit**), a foreclosure

specialist for New Penn Financial, LLC dba Shellpoint Mortgage Servicing **(Shellpoint Mortgage**)**,** as servicing agent for BNYM. (R. 808-41.) Ms. Mitchell filed a "preliminary" opposition (R. 858-77), followed by a second opposition (R. 901-28). The second opposition was supported by declarations by Paula Mitchell and her spouse, Wade Mitchell. (R. 929-35, 936-45.) BNYM replied. (R. 955-68.)

At the conclusion of the November 6, 2017 oral argument, the court granted BNYM's summary judgment motion. (R. 987.) On November 27, 2017, the court entered an Order Granting Summary Judgment (R. 1016-23) and a Final Judgment (**Final Judgment**) (R. 1027-32.) Pursuant to these rulings, the court also entered an Order of Foreclosure Sale. (R. 1076-77.)

Ms. Mitchell objected to the entry of the Final Judgment (R. 1033-39) and moved to alter or amend the judgment under Rules 59 and 52 (R. 1081-1108). BNYM opposed the motion to alter or amend. (R. 1124-30.) Ms. Mitchell replied. (R. 1134-49.) On January 18, 2018, the court denied Ms. Mitchell's motion to alter or amend the judgment. (R. 1161-62.)

Having timely filed an Affidavit of Attorney Fees and Costs (R. 1062-72) as directed by the court in the Final Judgment, on January 24, 2018, BNYM filed a motion to determine the reasonableness of those amounts. (R. 1163-65.) Ms. Mitchell objected to the motion for attorney fees (R. 1224-42.) BNYM replied. (R. 1246-50.)

At the same time the parties were briefing the reasonableness of the attorney fees, Ms. Mitchell moved to recall the Order of Foreclosure Sale. (R. 1166-1217.) BNYM

opposed the motion to recall. (R. 1278-82.) Ms. Mitchell replied. (R. 1298-3121.)

Before the pending motions on attorney fees and foreclosure sale order recall could be heard, the property was sold at a sheriff's sale on February 13, 2018. (R. 1365-96.) On February 16, 2018, Ms. Mitchell filed a Notice of Appeal. (R. 1290-94.) The court heard oral argument on the pending motions on March 13, 2018. (R. 1357-58.) The court issued a Ruling and Order upholding the attorney fee award as reasonable and denying Ms. Mitchell's recall motion. (R. 1364.)

Ms. Mitchell further challenged the affidavits filed by BNYM in support of its award of attorney fees. (R. 1554-70.) BNYM opposed. (R. 1574-77.) Ms. Mitchell replied. (R. 1583-89.) On June 21, 2018, the court issued a Ruling and Order overruling Ms. Mitchell's objections and upholding the award of attorney fees as reasonable.

On July 20, 2018, Ms. Mitchell filed an Amended Notice of Appeal. (R. 1613-18.) Ms. Mitchell then filed her initial brief on February 8, 2019.

SUMMARY OF THE ARGUMENT

This appeal is nothing more than a second attempt by Ms. Mitchell to avoid repayment of her $1,000,000 mortgage loan and tie the Property up in litigation to avoid her eventual eviction. She has now successfully lived in the Property without payment of her loan for nine (9) years. Ms. Mitchell unconvincingly challenges nearly every ruling by the court below in an attempt to further tie up this Property and prevent its disposition.

Ms. Mitchell's claims regarding BNYM's standing to foreclose and nearly all of her counterclaims are barred by res judicata and this Court's decision in *Mitchell I*. The

claims involve the same parties, the same claims and/or issues that were raise or could have been raised in *Mitchell I*, and the claims and issues were completely and fairly litigated in *Mitchell I*, which resulted in a final judgment on the merits.

Her challenge to BNYM's judicial foreclosure as a waived compulsory counterclaim also fails as it ignores the fact that BNYM had already commenced a non-judicial foreclosure at the time Ms. Mitchell filed her *Mitchell I* lawsuit in an attempt to prevent foreclosure. It also fails to recognize case law from other predominantly non-judicial foreclosure states across the nation supporting the position that a judicial foreclosure is not a compulsory counterclaim to a defaulting borrower's suit brought to prevent or impede foreclosure.

Ms. Mitchell's arguments regarding the trial court's summary judgment ruling misstate the court's findings and ignore BNYM's summary judgment evidence. Instead of identifying evidence in the record that might have created an issue of fact precluding summary judgment, Ms. Mitchell instead tries to convince this Court that BNYM bears the responsibility of disproving each of her defenses, regardless of whether she put forth any evidence to prove those defenses, in the face of BNYM's evidence.

Ms. Mitchell repeats her modus operandi from *Mitchell I*, arguing that no final judgment has been entered in this matter and consequently no foreclosure sale should have occurred. However, she fails to identify any matters that remain outstanding and unresolved before the trial court, and identifies no fraud, inadequacy of price, unfairness, or other prejudice that have affected her in any way in the court's issuance of the Final

Judgment and Order of Foreclosure Sale.

Finally, Ms. Mitchell fails to brief her stated issue regarding a Motion to Alter or Amend the final judgment. Accordingly, all of Ms. Mitchell's arguments are without merit, and the trial court's judgment must be affirmed.

ARGUMENT

I. The Trial Court Properly Denied Ms. Mitchell's Motions to Dismiss.

A. BNYM Had Standing to Foreclose.

Ms. Mitchell complains that the court improperly denied her 1st Motion to Dismiss after concluding that BNYM had standing to bring this foreclosure action. (Ini. Br. 14-20.) In making this argument, and contrary to Rule 24, Ms. Mitchell generally fails to cite to the record. *See* Utah R. App. P. 24(a)(8); *see also Van Den Eikhof v. Vista School*, 2012 UT App 125, ¶ 2, 278 P.3d 622 (requiring "'not just bald citation to authority but development of that authority and reasoned analysis based on that authority'" (quoting *State v. Thomas*, 961 P.2d 299, 305 (Utah 1998))). For this reason alone, the Court need not consider this argument.

1. Ms. Mitchell Was Estopped from Contesting BNYM's Standing.

If the Court considers this argument, denial of Ms. Mitchell's 1st Motion to Dismiss should be upheld, as Ms. Mitchell is estopped from challenging BNYM's standing by this Court's ruling in *Mitchell I*. Collateral estoppel, or issue preclusion, requires proof of the following four (4) elements:

> (i) [T]he party against whom issue preclusion is asserted must

> have been a party to . . . the prior adjudication; (ii) the issue decided in the prior adjudication must be identical to the one presented in the instant action; (iii) the issue in the first action must have been completely, fully, and fairly litigated; and (iv) the first suit must have resulted in a final judgment on the merits.

Snyder v. Murray City Corp., 2003 UT 13, ¶ 35, 73 P.3d 325 (internal quotation marks omitted). Issue preclusion "arises from a different cause of action and prevents parties . . . from relitigating facts and issues in the second suit that were fully litigated in the first suit." *Id.* (citation and internal quotation marks omitted). Each of the four (4) required elements is met in this case.[5]

First, Ms. Mitchell was a party to the prior adjudication, *Mitchell I*. *See* 2016 UT App 88, ¶ 1. The first element is met.

Second, in *Mitchell I*, this Court noted that Ms. Mitchell argued that "MERS . . . lacked authority to appoint BNYM as the successor beneficiary . . ." and Ms. Mitchell "sought declaratory judgments . . . that [BNYM] may not foreclose the trust deed." 2016 UT App 88, ¶¶ 4-5. Additionally, the *Mitchell I* complaint sought "clarification of the 'true ownership of the [d]ebt' and 'by extension the authority of [BNYM] to foreclose upon the Property." *Id.* ¶ 18. Indeed, Ms. Mitchell "alleged that because MERS and its assignee BNYM lacked any beneficial ownership interest in the debt, MERS and BNYM could not foreclose on the property." *Id.* This Court rejected Ms. Mitchell's arguments regarding the assignment, ownership of the debt, and BNYM's standing and authority to

5 On appeal, Ms. Mitchell only challenges the second element of collateral estoppel, regarding whether the issue of standing in *Mitchell I* is identical to the standing challenge below.

foreclose the property. *Id.* ¶¶ 20 n.5, 22-23. This Court stated that ". . . the trust deed expressly grants MERS the right to foreclose and sell the property." *Id.* ¶ 20 n.5; *see also Commonwealth Prop. Advocates, LLC v. Mortgage Elec. Registration Sys., Inc.*, 680 F.3d 1194, 1202-05 (10th Cir. 2011) (determining that MERS retained its authority to foreclose even after the trust deed was securitized because the trust deed "explicitly granted Defendants the authority to foreclose"). The *Mitchell I* Court ultimately concluded that "the district court did not err in concluding that 'MERS had, and BNYM has, authority to commence foreclosure under the terms of the [trust deed].'" *Mitchell I*, 2016 UT App 88, ¶ 38 (alteration in original). These arguments made in *Mitchell I* mirror those made by Ms. Mitchell in her 1st Motion to Dismiss. (*See* R. 101-105.) Thus, the second element of collateral estoppel is met.

Third, these issues were completely, fully, and fairly litigated in *Mitchell I*. Ms. Mitchell challenged BNYM's standing to foreclose by filing her complaint in *Mitchell I* in January 2011. *See generally Mitchell I*, 2016 UT App 88. The majority of her claims were dismissed by the district court, and the remainder were rejected when the court ruled against her on summary judgment. *Id.* ¶¶ 7-11. She appealed to the Utah Court of Appeals, which affirmed the district court's judgment. *Id.* ¶ 68. After her petition for rehearing was denied by this Court, Ms. Mitchell petitioned the Utah Supreme Court for certiorari, but her petition was denied. *Mitchell v. ReconTrust*, 387 P.3d 508 (table) (Utah 2016). Because these issues were completely, fully, and fairly litigated for more than five (5) years, the third element of collateral estoppel is satisfied.

Fourth, *Mitchell I* resulted in a final judgment on the merits. As stated *supra*, the district court in *Mitchell I* disposed of Ms. Mitchell's claims via a motion to dismiss and a summary judgment motion. The dismissal of her claims in *Mitchell I*, pursuant to a Rule 12(b)(6) motion, ". . . [is a] dismissal . . . on the merits and is accorded res judicata effect." *See Mack v. Utah State Dep't of Commerce*, 2009 UT 47, ¶ 29, 221 P.3d 194 (quoting *Fed. Deposit Ins. Corp. v. Paul*, 735 F. Supp. 375 (D. Utah 1990)).

Similarly, granting summary judgment to BNYM on Ms. Mitchell's remaining claims in *Mitchell I* was a "final judgment, i.e., one which puts an end to a lawsuit by declaring that the plaintiff is or is not entitled to recover the remedy sought." *Schoney v. Memorial Estates, Inc*., 863 P.2d 59, 61 (Utah 1993) (citing *Calder Bros. Co. v. Anderson*, 652 P.2d 922, 926 n.4 (Utah 1982); *Amica Mut. Ins. Co. v. Schettler*, 768 P.2d 960, 969 (Utah Ct. App. 1989)). Such a judgment is ". . . an absolute bar to a later action involving the same claim, demand, or cause of action." *Id*. (citing *Salt Lake Citizens Congress v. Mountain States Tel. & Tel. Co*., 846 P.2d 1245, 1251 (Utah 1992); *Jacobsen v. Jacobsen*, 703 P.2d 303, 305 (Utah 1985); *Penrod v. Nu Creation Creme, Inc*., 669 P.2d 873, 875 (Utah 1983)). Moreover, "[w]here parties have been afforded an opportunity to be heard and to contest the issues, '[f]or the purposes of the doctrine of res judicata, a judgment entered on a motion for summary judgment is just as binding as a judgment entered after a trial of the facts.'" *Massey v. Bd. of Trustees of Ogden Area Cmty. Action Comm., Inc*., 2004 UT App 27, ¶ 15 n. 5, 863 P.3d 120 (quoting 50 C.J.S. *Judgment* § 716 (1997)); *see also State Farm Mut. Auto. Ins. Co. v. Dyer*, 19 F.3d 514, 518 n. 8 (10th Cir.

1994) (grant of summary judgment may be a judgment on the merits for res judicata purposes); *Miller v. San Juan County*, 2008 UT App 186, ¶ 12, 186 P.3d 965 (affirming the trial court's dismissal of an action due to the res judicata effect of a previous summary judgment order).

Ms. Mitchell appealed, first to this Court, which affirmed the district court, and later to the Utah Supreme Court, which denied her petition for certiorari. No further appeal has been made and the time for so doing has expired. Thus, *Mitchell I* resulted in a final judgment on the merits and the fourth element is met.

Because the four (4) required elements of issue preclusion are met, the court did not err in denying Ms. Mitchell's 1st Motion to Dismiss.

2. BNYM's Complaint Sufficiently Alleged Standing to Foreclose.

Even if Ms. Mitchell's standing argument was not barred by collateral estoppel, the court did not err in denying Ms. Mitchell's 1st Motion to Dismiss because BNYM alleged standing sufficient to withstand a Rule 12(b)(1) challenge. Ms. Mitchell argued that BNYM had no standing because it did not own the debt and was "asserting this foreclosure claim on behalf of some unidentified person or entity . . . ." (R. 103.) However, Utah courts have rejected such arguments about debt ownership being a required element of standing to foreclose. *See, e.g.*, *Cannon v. PNC Bank*, No. 2:15-cv-00131, 2016 WL 9779290, *8 (D. Utah Aug. 2016) (finding that successor beneficiary may appoint a successor trustee and foreclose following borrower's default); *Marty v. MERS*, 1:10-cv-00033, 2010 WL 4117196, *6 (D. Utah Oct. 19, 2010) (stating that the

beneficiary's contractual right to foreclose, per the terms of the deed of trust, is unaffected by any conveyance of the ownership of the debt). In a matter similar to this one, where a loan servicer sought to enforce a note, submit a proof of claim, and challenge a debtor's Chapter 13 eligibility, the bankruptcy court concluded,

> Actual ownership [of the debt] is not dispositive in this case . . . . [The loan servicer] is entitled to present a proof of claim and challenge eligibility as servicer of a mortgage, which status gives it a pecuniary interest in collecting payments under the terms of the note and deed of trust.

In re Cannon, 521 B.R. 686, 692 (D. Utah, Oct. 23, 2014).

In *Mitchell I*, the district court and appellate court unequivocally rejected Ms. Mitchell's arguments regarding MERS, BNYM, and the ownership of the Note. The trial court concluded that ". . . MERS had, and BNYM has, authority to commence foreclosure under the terms of tre [trust deed] and the Utah statutes." *Mitchell I*, 2016 UT App 88, ¶ 7 (alteration in original). While Ms. Mitchell attempts to emphasize the distinction made by this Court in *Mitchell I* between MERS (and therefore its assignee BNYM) qualifying as either a "statutory beneficiary" or a contractual beneficiary, as contemplated in *Burnett v. Mortgage Elec. Registration Sys., Inc*, 706 F.3d 1231, 1237-38 (10th Cir. 2013), this is either a misapprehension or misstatement of the *Mitchell I* ruling. Whether MERS actually qualified as a "statutory beneficiary," or whether the district court erred in determining MERS did qualify as a "statutory beneficiary," was inapposite to this Court's *Mitchell I* ruling: "We express no opinion on this point." *Mitchell I*, 2016 UT App 88, ¶ 20 n.5. Instead, this Court determined that ". . . the trust deed expressly

grants MERS the right to foreclose and sell the property." *Id.* The *Mitchell I* court also relied on *Commonwealth Prop. Advocates, LLC*, 680 F.3d at 1202-05 in determining that MERS retained its authority to foreclose even after the trust deed was securitized because the trust deed "explicitly granted Defendants the authority to foreclose." *Mitchell I*, 2016 UT App 88, ¶¶ 28-29. Ultimately, the *Mitchell I* court held that "the district court did not err in concluding that 'MERS had, and BNYM has, authority to commence foreclosure under the terms of the [trust deed].'" *Id.* ¶ 38.

Likewise, here, BNYM is not required to allege and prove actual ownership of the debt in order to have standing to foreclose, as it inherited those same explicit contractual rights independent of any rights afforded a "statutory beneficiary." Both the Deed of Trust (R. 15 ("The beneficiary of this [Deed of Trust] is MERS and the successors and assigns of MERS.")) and the Note (R. 30 ¶ 1 ("I understand that Lender may transfer this Note.")) contemplate transfers of interest. BNYM alleged that it was the current beneficiary of the Deed of Trust. (R. 3.) The endorsement on the Note (R. 33) and the Assignment of Deed of Trust (R. 35-36) grant BNYM an interest in the Note and Deed of Trust, along with the standing and authority to foreclose if Ms. Mitchell failed to make the required payments when due. With such standing, Utah Code section 57-1-23 specifically grants BNYM the right to foreclose judicially, as it states that "at the option of the beneficiary, a trust deed may be foreclosed in the manner provided by law for the foreclosure of mortgages on real property." Utah Code Ann. § 57-1-23. Because BNYM adequately alleged that it was the beneficiary of the trust deed and because Utah law

specifically authorizes a beneficiary to elect judicial foreclosure, the trial court did not err in finding that BNYM had standing to foreclose and in denying Ms. Mitchell's 1st Motion to Dismiss.

B. BNYM Did Not Waive Its Judicial Foreclosure Claim.

Ms. Mitchell complains that the court improperly denied her 2nd Motion to Dismiss after concluding that BNYM did not waive its judicial foreclosure claim by not bringing it as a counterclaim in *Mitchell I*.[6] (Ini. Br. 20-28.) Rule 13(a) provides that "[a] pleading must state as a counterclaim any claim that—at the time of its service—the pleader has against any opposing party, if the claim arises out of the transaction or occurrence that is the subject matter of the opposing party's claim." UTAH R. CIV. P. 13(a)(1)(A). However, "[t]he pleader need not state the claim if[,] when the action was commenced, the claim was the subject of another pending action." *Id.* R. 13(a)(2)(A).

1. Rule 13(a) Did Not Mandate a Judicial Foreclosure Claim When BNYM Had Already Commenced a Non-judicial Foreclosure Action.

When Ms. Mitchell filed suit against BNYM in January 2011 in *Mitchell I*, BNYM had already commenced a non-judicial foreclosure action, as a Notice of Default was recorded by the foreclosure trustee on August 17, 2010. *Mitchell I*, 2016 UT App 88, ¶ 3. Ms. Mitchell acknowledges the existence of BNYM's non-judicial foreclosure

6 This is the second time Ms. Mitchell has attempted to present her compulsory counterclaim argument on appeal. In December 2016, after the district court denied her 2nd Motion to Dismiss, Ms. Mitchell filed a Petition for Permission to File Interlocutory Appeal, making the same arguments she now makes here. (R. 388-406.) This Court denied Ms. Mitchell's petition. (R. 419.)

proceedings and even admits that her *Mitchell I* complaint was filed in an attempt to halt that foreclosure action. (Ini. Br. 20-21.) Yet Ms. Mitchell ignores the timing of these actions and fails to analyze Rule 13 in the proper context—that is, a non-judicial foreclosure action was actively being pursued at the very time she alleges BNYM was required to file a judicial foreclosure counterclaim. (Ini. Br. 20-21.)

Rule 13(a) makes clear that BNYM "need not state the [foreclosure counter]claim if[,] when the action commenced, the [foreclosure] claim was the subject of another pending action." Utah R. Civ. P. 13(a)(2)(A) (second alteration in original). To hold otherwise would deprive BNYM of its choice of remedies, requiring it to endure a costly, extensive judicial process instead of a less expensive, abbreviated non-judicial action. In *Douglas v. NCNB Texas Nat. Bank*, 979 F.2d 1128 (5th Cir. 1992), the United States Court of Appeals for the Fifth Circuit explained its reasoning for so holding with respect to a Texas foreclosure:

> [T]he mortgagor should not be permitted to destroy or impair the mortgagee's contractual right to foreclosure under the power of sale by the simple expedient of instituting a suit, whether groundless or meritorious, thereby compelling the mortgagee to abandon the extra-judicial foreclosure which he had the right to elect, nullifying his election, and permitting the mortgagor to control the option as to remedies.

Id. at 1130 (quoting *Kaspar v. Keller*, 466 S.W.2d 326, 329 (Tex. Civ. App. 1971)). Courts around the country concur, holding that judicial foreclosure is not a compulsory counterclaim to a suit brought with the intent of halting a non-judicial foreclosure. *See, e.g., Erickson v. Ditech Fin., LLC*, No. CV-14-08089-PCT-NVW, 2016 WL 4059607, *3

(D. Ariz. July 29, 2016) ("[I]t cannot be concluded that, by seeking declaratory judgment that [lender] was not the Note Holder or Beneficiary of the Deed of Trust, [borrower] forced [lender] to elect judicial foreclosure or forever waive its right to do so."); *In re Draffen*, 731 S.E.2d 435, 438 (N.C. Ct. App. 2012) (holding that lender is not required to file a judicial foreclosure action as a compulsory counterclaim in a federal action and, thus, a subsequent state judicial foreclosure action was not barred by Rule 13(a)); *Chase Mortgage Co.-West v. Bufalini*, No. 25782, 2004 WL 2866978, *2 (Haw. Ct. App. Dec. 14, 2004) (unpublished) (judicial foreclosure is not a compulsory counterclaim); *Umouyo v. Bank of Am., N.A.*, No. 2:16-CV-01576-RAJ, 2019 WL 383958, *2 (W.D. Wash. Jan. 30, 2019) (same); *see also Nunnery v. Ocwen Loan Servicing, LLC*, 641 Fed. App'x 430, 434 (5th Cir. 2016) (following the *Kaspar* rule); *Steptoe v. JPMorgan Chase Bank, N.A.*, 464 S.W.3d 429, 434 (Tex. App. 2015) (same).

Ms. Mitchell asserts that, having already commenced a non-judicial foreclosure action when the 2011 *Mitchell I* litigation was filed, BNYM "made its election of remedies and waived any right to bring a judicial foreclosure." (Ini. Br. 21.) In so doing, Ms. Mitchell champions a view of the "election of remedies" doctrine that has long been outdated. *Cf. Helf v. Chevron U.S.A. Inc.*, 2015 UT 81, ¶¶ 73-74, 361 P.3d 63 (stating that the "advent of liberal pleading rules . . . has eliminated this harsh interpretation" of the doctrine that hearkens back to the nineteenth and early twentieth century). The modern view of the election of remedies doctrine, consistent with Utah's modern pleading rules, is that when a party "must choose between alternative remedies for a single theory of

liability, an election is not final until a judgment is fully satisfied." *Id.* ¶¶ 71, 77.

Moreover, the mere fact that BNYM ultimately halted its non-judicial foreclosure efforts, due to concerns the statute of limitations would expire before a trustee's sale could be completed, and elected to proceed with a judicial foreclosure, is of no consequence. Utah law, like the Texas statute at issue in *Douglas*, grants a lender the option of foreclosing a property via judicial or non-judicial action:

> The trustee . . . may exercise and cause the trust property to be sold in the manner provided in Sections 57-1-24 and 57-1-27 [non-judicial foreclosure] . . . ; or, *at the option of the beneficiary*, a trust deed may be foreclosed in the manner provided by law for the foreclosure of mortgages on real property [judicial foreclosure].

See Utah Code Ann. § 57-1-23 (emphasis added). Here, BNYM was specifically granted the right, by Ms. Mitchell, when she signed the deed of trust, to proceed with its choice of non-judicial or judicial foreclosure. (R. 23.) Having agreed to grant BNYM its choice of remedies, Ms. Mitchell may not now argue otherwise. Accordingly, the trial court did not err in denying Ms. Mitchell's 2nd Motion to Dismiss because judicial foreclosure was not a compulsory counterclaim to the *Mitchell I* litigation complaint.

2. No Error in Examining Other Courts' Rule 13(a) Interpretations.

Without any support, Ms. Mitchell argues that the trial court could not seek guidance from other courts' decisions interpreting Rule 13(a). (Ini. Br. 23.) However, Ms. Mitchell's position is directly contrary to Utah law, which states that, because no Utah court has squarely addressed this issue, this Court may "look to decisions under the

federal rules for guidance." *438 Main Street v. Easy Heat, Inc.*, 2004 UT 72, ¶ 64, 99 P.3d 801; *cf. Threadgill v. Wells Fargo Bank, N.A.*, No. E2016-02339-COA-R3-CV, 2017 WL 3268957, *2-3 (Tenn. Ct. App. 2017) (acknowledging the lack of Tennessee precedent on this same issue and looking to decisions of other state and federal courts for guidance). Moreover, while Ms. Mitchell claims "there is plenty of law on point," she wholly fails to cite any Utah law on point. (R. 23-28.) Thus, it was completely appropriate for the trial court to look to the United States Court of Appeals for the Fifth Circuit's interpretation of Rule 13(a) in *Douglas* for guidance.

In *Douglas*, the FDIC brought claims to recover amounts due on certain promissory notes against two defendants, a drilling company and its owner. *Douglas*, 979 F.2d at 1129. The defendants alleged that any claims on the notes were compulsory counterclaims that should have been brought in a prior action. *Id.* The *Douglas* court analyzed the application of Rule 13(a)[7] of the Federal Rules of Civil Procedure under Texas law. *Id.* at 1130. The court speculated that the plaintiff's debt collection claims "might very well" constitute compulsory counterclaims, but it ultimately did not reach that issue. *Id.* Rather, in reliance on the precedent set forth in *Kaspar v. Keller*, 466 S.W.2d 326 (Tex. Civ. App. 1971), the *Douglas* court concluded that Federal Rule 13(a) was inapplicable because it "would abridge the lender's substantive rights and enlarge the debtor's substantive rights." *Id.* In so doing, the court emphasized that, under Texas law, lenders have a substantive right to elect judicial or non-judicial foreclosure in the event of

7 Federal Rule 13(a) is substantially similar to Utah's Rule 13(a).

default. *Id*. Accordingly, the court held that "it is appropriate . . . to follow the state's practice of permitting a lender to refrain from filing a counterclaim on overdue notes and to wait to pursue either a judicial or nonjudicial foreclosure remedy. *Id.*

Ms. Mitchell makes much of the *Douglas* court's reference to the Rules Enabling Act, 28 U.S.C. § 2072, which provide that the federal rules "shall not abridge, enlarge, or modify any substantive right. *Id.* (Ini. Br. 24.) Ms. Mitchell further posits that because Texas has a state rule of civil procedure that is substantially similar to the federal Rules Enabling Act, and Utah does not, BNYM had no choice but to file a judicial foreclosure counterclaim, notwithstanding the prior existence of its non-judicial foreclosure action. (Ini. Br. 24-25.) However, this issue is not limited to Texas and its state law. "[A] number of courts in other jurisdictions have [addressed the precise issue before us], and have concluded that similar rules of procedure regarding compulsory counterclaims do not bar" subsequent foreclosure proceedings. *Threadgill*, 2017 WL 3268957, *3 (citing *Maddox v. Ky. Fin. Co.*, 736 F.2d 380, 382-83 (6th Cir. 1984); *Nunnery,* 641 Fed. App'x at 433-34; *Deschamps v. Treasure State Trailer Court, Ltd.*, 254 P.3d 566, 569 (Mont. 2011); *Belote v. McLaughlin*, 673 S.W.2d 27, 30-31 (Mo. 1984) (en banc); *In re Draffen*, 731 S.E.2d at 437).

Because Utah's statutory foreclosure scheme was based on California's foreclosure laws, *see, e.g.*, *City Consumer Servs., Inc. v. Peters*, 815 P.2d 234, 235-36 (Utah 1991); *APS v. Briggs*, 927 P.2d 670, 674 (Utah Ct. App. 1996), courts may further find support for this position in cases interpreting California law, such as *FNBN-Rescon I LLC v.*

Citrus El Dorado LLC, No. SA CV 13-0474-DOC, 2015 WL 11416171 (C.D. Cal. Feb. 6, 2015). In *FNBN-Rescon*, the court reviewed the defendant's assertion that the plaintiff's judicial foreclosure was a compulsory counterclaim that should have been brought in the defendants' prior lawsuit alleging breach of contract, fraud, conspiracy, quiet title, and declaratory relief, among other things. *Id.* *1. The court analyzed the *Douglas* ruling and agreed with its reasoning, emphasizing the fact that "[l]ike in Texas, California law authorizes both judicial and non-judicial foreclosure." *Id.* *5. The *FNBN-Rescon* court did not pin its decision to any state law rules enabling provision, but rather simply concluded that:

> If judicial foreclosure was a compulsory counterclaim in a lawsuit like the [one before us], a defaulting borrower could usurp a lender's statutory right of election of remedies by simply suing first and forcing judicial foreclosure as a counterclaim. Requiring [the defendant] to pursue judicial foreclosure as a counterclaim in the [prior a]ction 'would abridge [the defendant's] substantive rights and enlarge [the plaintiff's] substantive rights.'

Id. (quoting *Douglas*, 979 F.2d at 1130). The *FNBN-Rescon* court then concluded that "Plaintiff's judicial foreclosure claim was not a compulsory counterclaim in the [prior a]ction." *Id.* *6.

This Court too should follow the reasoning of courts in Texas (*Douglas*), Arizona (*Erickson*), and California (*FNBN-Rescon*). Because Utah law grants lenders the option of foreclosing a property via judicial or non-judicial action, *see* Utah Code Ann. § 57-1-23, judicial foreclosure is not a counterclaim in a prior action seeking to halt a non-

judicial foreclosure action. Thus, the trial court did not err in dismissing Ms. Mitchell's jurisdictional challenge based on Rule 13(a).

II. The Trial Court Correctly Dismissed Ms. Mitchell's Counterclaim.

A. The Trial Court Properly Accepted as True the Facts in Ms. Mitchell's Counterclaims.

Ms. Mitchell asserts that the trial court, in reviewing BNYM's Motion to Dismiss her counterclaims, failed to accept the alleged facts as true. (Ini. Br. 29-31.) Yet Ms. Mitchell wholly fails to cite to the record or legal authority to support her argument. *See* UTAH R. APP. P. 24(a)(8); *see also Van Den Eikhof*, 2012 UT App 125, ¶ 2. Ms. Mitchell fails to identify any specific and relevant facts in her counterclaims below that "directly contradicted BNYM's unsupported factual assertions." (Ini. Br. 30.) Without identifying such relevant facts which she alleges were not properly accepted by the trial court, it cannot be said that the trial court failed to consider or accept those facts. Moreover, the trial court was not bound to accept as true Ms. Mitchell's conclusory allegations. *See Reynolds v. Woodall*, 2012 UT App 206, ¶ 10, 285 P.3d 7 ("[W]e accept the plaintiff's description of facts alleged in the complaint to be true, but we need no accept extrinsic facts not pleaded nor need we accept legal conclusions in contradiction of the pleaded facts.") (citation and internal quotation marks omitted). Thus, having failed to single out any fact that was not properly accepted by the trial court, it cannot be said that the trial court erred in granting BNYM's motion to dismiss the counterclaims.

B. Ms. Mitchell's Counterclaims Were Barred By Res Judicata.

Ms. Mitchell argues that the trial court erred in dismissing her counterclaims[8] based on the doctrine of res judicata. (Ini. Br. 28.)

"The doctrine of res judicata embraces two distinct branches: claim preclusion and issue preclusion." *Macris & Associates, Inc. v. Neways, Inc.*, 2000 UT 93, ¶ 19, 16 P.3d 1214. "[C]laim preclusion corresponds to causes of action[;] issue preclusion corresponds to the facts and issues underlying causes of action." *Oman v. Davis Sch. Dist.*, 2008 UT 70, ¶ 31, 194 P.3d 956. "[B]oth branches of res judicata 'serve[] the important policy of preventing previously litigated issues from being relitigated . . . .'" *Macris*, 2000 UT 93, ¶ 19 (citation omitted).

1. Claim Preclusion

In Utah, claim preclusion has three requirements:

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8 Specifically, Ms. Mitchell alleged twenty-three (23) counterclaims, titled as follows: (1) Declaratory Judgment re Finality of *Mitchell I*; (2) Declaratory Judgment re Res Judicata Effect of *Mitchell I*; (3) Declaratory Judgment re *Mitchell I* Rulings Being Void as Violating Constitutional Rights; (4) Declaratory Judgment re Invalidity of Note and Trust Deed; (5) Declaratory Judgment re Ownership of the Debt, Note and Trust Deed; (6) Declaratory Judgment re Lack of Required Notice to Cure; (7) Declaratory Judgment re Contractual Rights of BNYM Under the Note and Trust Deed; (8) Effect of BNYM's Failed Attempt to Appoint ReconTrust; (9) Re ReconTrust's Duty to Require Proper Substitution; (10) Re ReconTrust's Duty to Reject Appointment to Foreclose; (11) Re ReconTrust's Duty to Be Independent; (12) Declaratory Judgment re Effect of ReconTrust's Actions as an Unqualified [sic]; (13) Declaratory Judgment re Assignment by MERS to BNYM; (14) Estoppel – Reformation; (15) Breach of Good Faith and Fair Dealing; (16) Re Severance of Security from Debt; (17) Re Possible Satisfaction or Reduction of Debt; (18) Quiet Titles [sic] re Real Property; (19) Quiet Titles [sic] re Trust Deed and Note; (20) Damages Breach of Duty by ReconTrust as Prospective Successor Trustee; (21) Damages Beach of Duty by ReconTrust as Successor Trustee; (22) Breach of Contract; and (23) Civil Conspiracy and Class Action. (R. 564-606.)

> First, both cases must involve the same parties or their privies. Second, the claim that is alleged to be barred must have been presented in the first suit or be one that could and should have been raised in the first action. Third, the first suit must have resulted in a final judgment on the merits.

Mack v. Utah State Dep't of Commerce, 2009 UT 47, ¶ 29. "Claim preclusion is premised on the principle that a controversy should be adjudicated only once." *Id.* (citation and internal quotation marks omitted). "Claims or causes of action are the same as those brought or that could have been brought in the first action if they arise from the same operative facts, or in other words from the same transaction." *Id.* ¶ 30. Thus, claim preclusion "'. . . is thought to turn on the essential similarity of the underlying events giving rise to the various legal claims.'" *Id.* (quoting *Burnett v. Utah Power & Light Co.*, 797 P.2d 1096, 1098 (Utah 1990)); *see also Brunson v. Bank of N.Y. Mellon*, 2012 UT App 222, ¶¶ 2, 5, 286 P.3d 934 (per curiam) (reasoning that where the first lawsuit raised issues related to securitization and the second lawsuit raised claims of wrongful foreclosure and both lawsuits were brought to prevent foreclosure of the same loan involving the same property, the claims brought in both lawsuits were the same for res judicata purposes).

Ms. Mitchell's counterclaims are barred because each of the three (3) elements of claim preclusion are met. First, both *Mitchell I* and this current matter involve Ms. Mitchell and BNYM as parties. (Ini. Br. 7-8; R. 740-41.)

Second, each of Ms. Mitchell's twenty-three (23) counterclaims—with the exception of the first three (3) counterclaims, which purport to collaterally attack

Mitchell I—was brought, or could have been brought, in *Mitchell I*. (R. 739, 754.) While Ms. Mitchell attempts to assert that counterclaims 4, 6, 7, 14, 16, 19, and 23 were not brought in *Mitchell I*, she fails to rebut the fact that each of these counterclaims could have been brought in *Mitchell I* and were brought specifically to prevent foreclosure of the same loan involving the same property. *See Brunson*, 2012 UT App 222, ¶¶ 2, 5. Additionally, Ms. Mitchell presents no factual or legal authority to support her first three (3) "collateral attack" counterclaims, nor does Ms. Mitchell acknowledge to the Court that she already had the opportunity to "attack" the *Mitchell I* ruling on appeal, which opportunity concluded when her petition for certiorari to the Utah Supreme Court was denied. (Ini. Br. 30-31.)

Third, *Mitchell I* resulted in a final judgment on the merits. (*See infra* Section II.B.3.) Accordingly, the Court did not err in dismissing Ms. Mitchell's counterclaims as they were barred by claim preclusion.

2. Issue Preclusion

As stated previously (*see supra* Section I.A.1), the four (4) essential elements of issue preclusion are:

> (i) [T]he party against whom issue preclusion is asserted must have been a party to . . . the prior adjudication; (ii) the issue decided in the prior adjudication must be identical to the one presented in the instant action; (iii) the issue in the first action must have been completely, fully, and fairly litigated; and (iv) the first suit must have resulted in a final judgment on the merits.

Snyder, 2003 UT 13, ¶ 35. Issue preclusion prevents the relitigation of facts and issues

that were previously litigated. *See id.*

In *Mitchell I*, the Ms. Mitchell raised claims regarding the following issues:

- The authority of MERS to appoint BNYM as the successor beneficiary.
- The authority of MERS and BNYM to appoint a successor trustee.
- The authority of ReconTrust to serve as foreclosure trustee.
- The servicing of the loan and issues surrounding a sought-after loan modification.
- The parties' respective rights under the Note and Deed of Trust.
- The validity of the substitution of trustee and the notice of default.
- The validity of the security instrument and secured nature of the loan.
- The authority of BNYM to foreclose the Deed of Trust.
- The respective interests in the Property.

See Mitchell I, 2016 UT App 88, ¶¶ 4-5.

Each of these issues was expressly settled in *Mitchell I*. Thus, even if Ms. Mitchell's counterclaims are not barred by claim preclusion, they are barred by issue preclusion, as all four (4) of its requirements are satisfied: *Mitchell I* resulted in a final judgment (*see infra* Section II.B.3), these issues were fully litigated, and both BNYM and Ms. Mitchell were parties. *Cf. Snyder*, 2003 UT 13, ¶ 35.

3. *Mitchell I* Resulted in a Final Judgment on the Merits.

Ms. Mitchell argues, without any analysis or support in the record, that *Mitchell I* did not result in a final judgment on the merits. (Ini. Br. 31-32.) Notwithstanding Ms.

Mitchell's inadequate briefing on this point, the facts demonstrate that *Mitchell I* did result in a final judgment on the merits.

In *Mitchell I*, the trial court dismissed nine of the Ms. Mitchell's eleven claims and entered summary judgment against them on the remaining two claims. *Mitchell I*, 2016 UT App 88, ¶ 7. (R. 110.) Ms. Mitchell asked the district court to correct its order, arguing that the court had not actually decided all their claims. (R. 629 n.3.) The court disagreed and denied her motion. (R. 628-30.) Ms. Mitchell appealed (R. 273), but then moved to dismiss her own appeal. (R. 633.) She argued it did not matter that the district court said it was deciding all her claims—that because the district court had not expressly addressed all her arguments, it had not actually resolved all outstanding controversies and its judgment was not final. *(Id.)* Ms. Mitchell lost the motion. (*Id.*) The Utah Court of Appeals further ruled that "[t]he district court has resolved all causes of action raised in the litigation." (Order, *Mitchell v. ReconTrust Co. N.A.*, No. 20140113-CA (Utah Ct. App. Jan. 14, 2015); R. 633.) And ultimately, this Court affirmed. *See Mitchell v. ReconTrust Co. NA*, 2016 UT App 88, 373 P.3d 189 ("*Mitchell I*"). (R. 110, 273.)

Ms. Mitchell moved for rehearing, again claiming the district court's judgment was not final because it had not resolved all her claims. The petition for rehearing was denied. *Mitchell v. ReconTrust Co. N.A.*, 2016 UT App 88, 373 P.3d 189, *rehearing denied* (Utah Ct. App. Jun. 29, 2016). Ms. Mitchell raised the same argument again when petitioning the Utah Supreme Court for certiorari. That petition was also denied. *See Mitchell v. ReconTrust*, 397 P.3d 508 (table) (Utah 2016). (R. 373-75.)

Meanwhile, in November 2016, the trial court in this judicial foreclosure matter stayed the case due to the *Mitchell I* Court's prior exclusive jurisdiction over these issues. (R. 367.) The trial court indicated that the stay would remain in place until a final, non-appealable order was achieved in *Mitchell I*. (R. 367.) Ms. Mitchell even acknowledged that a final judgment in *Mitchell I* would be necessary before this matter could continue (R. 380). Once Ms. Mitchell's appeals were exhausted, and the trial court determined *Mitchell I* was final and no longer appealable as a result of the denial of Ms. Mitchell's petition for certiorari and the order of remittitur, the trial court lifted the stay and allowed this matter to proceed. (R. 369-76, 384.) Thus, *Mitchell I* resulted in a final judgment on the merits.

C. No Error in Dismissing Collateral Attack of *Mitchell I*.

Ms. Mitchell complains that the court erred in dismissing her counterclaims that purported to collaterally attack *Mitchell I*. (Ini. Br. 34.) In so doing, Ms. Mitchell again fails to cite to the record and relevant authority in any meaningful way. *See* UTAH R. APP. P. 24(a)(8); *see also Van Den Eikhof*, 2012 UT App 125, ¶ 2. Ms. Mitchell also fails to provide any analysis to support her collateral attack. (Ini. Br. 34.) For example, Ms. Mitchell includes a lengthy block quote from a 1900 Utah Supreme Court case, *see State v. Bates*, 61 P. 905, 906 (Utah 1900), but she provides no analysis as to how the case or its ruling relates to this matter. (Ini. Br. 34.) Instead, Ms. Mitchell appears to have quoted the case for her own conclusion that "a void judgment may be collaterally attacked at any time, in any proceeding" (Ini. Br. 34), notwithstanding the fact that such a statement is

not supported by the *Bates* quotation. *See Bates*, 61 P. at 906. Indeed, it appears Ms. Mitchell simply concludes, with no supporting authority, that the various courts' rulings in the *Mitchell I* proceedings constitute a "void judgment" that may be collaterally attacked. (Ini. Br. 34.) Without any reasoned analysis or citation to legal authority or the record, it cannot be said that the trial court erred in finding "no legal, factual, or logical support for such claims and [for] declin[ing] to entertain them in this case." (R. 754.) Accordingly, for this inadequate pleading alone, this Court should reject Ms. Mitchell's collateral attack argument.

III. The Trial Court Properly Granted Summary Judgment.

A. No Error in Application of the Summary Judgment Standard.

Ms. Mitchell uses sweeping conclusory assertions to claim that the trial court did not apply the proper summary judgment standard, because she alleges "there was not evidence in the record as to each and every element/fact BNYM had to prove." (Ini. Br. 39.) However, the Rule 56 standard required BNYM, as the moving party, to show "that there is no genuine dispute as to any material fact and [BNYM] is entitled to judgment as a matter of law." UTAH R. CIV. P. 56(a). In fact, the trial court specifically ruled that "[BNYM] met its burden of establishing the undisputed facts and showing that judgment should enter as a matter of law pursuant to Rule 56(a) . . . ." (R. 1017.)

While summarily claiming that BNYM did not introduce evidence to support each fact it had to prove, Ms. Mitchell fails to identify or marshal *any* evidence in the record

that may have been used to support the trial court's summary judgment ruling.[9] Indeed, Ms. Mitchell ignores the trial court's undisputed fact findings that: Ms. Mitchell breached the terms and conditions of the note and deed of trust, thereby defaulting on her loan obligations, by failing to make the monthly payments when due; Ms. Mitchell has not made a payment on her loan obligations since April 2010; BNYM accelerated the unpaid balance of the debt and demanded payment; and, as of May 31, 2017, Ms. Mitchell owed BNYM $1,343,034.81, plus interest, attorney fees, costs, taxes, and other fees. (R. 1017-21.) Having wholly failed to acknowledge and grant a "healthy dose of deference . . . to [these] factual findings," *State v. Nielsen*, 2014 UT 10, ¶ 41, 326 P.3d 645, Ms. Mitchell's arguments necessarily fail. *See id.* ¶ 42 ("[A] party challenging a factual finding or sufficiency of the evidence to support a [ruling] will almost certainly fail to carry its burden of persuasion on appeal if it fails to marshal.")

B. BNYM's Claims Were Proven With Evidence.

Ms. Mitchell asserts that the elements of BNYM's breach of contract claim had no evidentiary support. (Ini. Br. 41-46.) Breach of contract requires a showing of: (1) a contract, (2) performance by the party seeking recovery, (3) breach by the other party, and (4) damages. *See Bair v. Axiom Design L.L.C.*, 2001 UT 20, ¶ 14, 20 P.3d 388.

First, Ms. Mitchell argues that BNYM did not prove the existence of a contract between the parties. (Ini. Br. 41.) But BNYM introduced evidence of such a contract in the form of the deed of trust, assignment, and endorsed note. (R. 810-11.) Moreover, in

9 In a prior time, Ms. Mitchell's arguments would not be decided on the merits at all due to her failure to marshal. *See State v. Nielsen*, 2014 UT 10, ¶ 37, 326 P.3d 645.

Mitchell I and again in her counterclaim, Ms. Mitchell asserted a cause of action for breach of the covenant of good faith and fair dealing, *see Mitchell I*, 2016 UT App 88, ¶ 9; (R. 592), which duty is implied in contracts. *See Mitchell I*, 2016 UT App 88, ¶ 10. Ms. Mitchell cannot now be heard to argue that no contract exists when she previously admitted as much by filing a contract-based claim for breach of the covenant of good faith and fair dealing in *Mitchell I* and her counterclaim in this matter.

Second, Ms. Mitchell claims that BNYM did not prove that it fully performed its contractual obligations. (Ini. Br. 42.) But BNYM introduced evidence that it (or its predecessor-in-interest in the contract) disbursed the sum of $1,000,000 to or for the benefit of Ms. Mitchell, which disbursement thereafter obligated Ms. Mitchell to make timely monthly payments. (R. 810-11.)

Third, Ms. Mitchell asserts that BNYM did not prove that Ms. Mitchell breached the contract. (Ini. Br. 43.) But BNYM introduced evidence that Ms. Mitchell did breach the contract by failing to make the required monthly payments when due, which is required by the terms of the note and deed of trust. (R. 811.)

Fourth, Ms. Mitchell alleges that BNYM did not prove that Ms. Mitchell actually owed $1,343,034.81 in damages. (Ini. Br. 44.) But BNYM introduced admissible evidence that Ms. Mitchell did owe that amount. (R. 812.)

Fifth, Ms. Mitchell claims that BNYM did not prove that it has the right to foreclose judicially. (Ini. Br. 45-46.) But BNYM introduced evidence, in the form of the deed of trust, that it had the right to foreclose. (R. 819-29.) Specifically, paragraph 22 of

the deed of trust stated, "If the default is not cured . . . , Lender at its option may require immediate payment in full of all sums secured by this [deed of trust] without further demand and may invoke the power of sale and *any other remedies permitted by [a]pplicable [l]aw.*" (R. 828.) *See* Utah Code Ann. § 57-1-23 (allowing judicial or non-judicial foreclosure, at the option of the beneficiary).

BNYM proved each of the elements listed above with admissible evidence, namely the Denmon Affidavit. (R. 808-841.) "[w]here the movant supports a motion for summary judgment with affidavits or other sworn evidence, the nonmoving party may not rely on bare allegations from the pleading to raise a dispute of fact." *Poteet v. White*, 2006 UT 63, ¶ 7, 147 P.3d 439. If a motion for summary judgment is supported by affidavit, or other admissible evidence, the nonmoving party must submit admissible evidence and demonstrate that there is a genuine issue of material fact precluding summary judgment. *Id.* Ms. Mitchell did no such thing.

Instead, Ms. Mitchell proffered the Declarations of Paula Mitchell (R. 929) and Wade Mitchell (R. 936-45) to support her opposition to BNYM's summary judgment motion. (R. 901-28.) But those Declarations merely contained various evasive statements and unsubstantiated opinions that the declarant "did not recall" and "d[id] not know if" the statements made in the Denmon Affidavit were true. (*See, e.g.*, R. 930 ¶ 2; 931 ¶¶ 8-9, 14; 933 ¶¶ 28-29; 943 ¶¶ 46-47.) The Mitchells' testimony, via their Declarations, reflects a pattern of relying on vague statements in an unsuccessful effort to avoid summary judgment, which lead the the *Mitchell I* district court to conclude: the Mitchells'

statements "were unclear, less than certain, and imprecise." *Mitchell I*, 2016 UT App 88, ¶ 55 (internal quotation marks omitted). Likewise, none of the vague statements or other opinions in the Declarations adequately controverted the evidence in the Denmon Affidavit nor did they create a genuine issue of material fact. *See Robertson v. Utah Fuel Co*., 889 P.2d 1382, 1388 n.4 (Utah Ct. App. 1995) ("'Unsubstantiated opinions and conclusions' are insufficient to defeat a motion for summary judgment." (citation omitted)). Accordingly, because Ms. Mitchell failed to controvert BNYM's admissible evidence in support of its claims, it cannot be said that the trial court erred in granting BNYM's summary judgment motion.

C. No Error in Admission of the Denmon Affidavit.

Ms. Mitchell claims the trial court erred in admitting the Denmon Affidavit because she alleges Mr. Denmon was incompetent and/or lacked personal knowledge. (R. 39-40.) Rule 56 states that:

> An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, must set out facts that would be admissible in evidence, and must show that the affiant or declarant is competent to testify on the matters stated.

UTAH R. CIV. P. 56(c)(4). Ms. Mitchell argues that Mr. Denmon "clearly lacks any personal knowledge" and his affidavit "fails to 'show that [he] is competent to testify on the matters stated.'" (Ini. Br. 40 (alteration in original).) However, Ms. Mitchell's theory for this argument—that BNYM's counsel drafted the affidavit for Mr. Denmon to sign and that a deposition of Mr. Denmon *might* reveal that he is incompetent to testify or

lacks personal knowledge (Ini. Br. 40)—is nothing but pure speculation. Theories, speculation, or assertions of fact without an evidentiary basis are insufficient to create a genuine fact issue and preclude the granting of summary judgment. *Webster v. Sill*, 675 P.2d 1170, 1172 (Utah 1983). Contrary to Ms. Mitchell's conclusory assertions, the Denmon Affidavit expressly states that Mr. Denmon is "familiar with the business records maintained by" BYNM, including Ms. Mitchell's loan, and that he has "acquired personal knowledge" via his examination of the business records related to Ms. Mitchell's loan. (R. 809 ¶¶ 2, 5.) Mr. Denmon also stated "under oath, on his own personal knowledge, . . . that he is in all respect[s] authorized and competent to testify" regarding these matters. (R. 812 ¶ 26.)

Ms. Mitchell provides nothing in return to rebut Mr. Denmon's assertions regarding personal knowledge and competency to testify, nor did she move to strike the Denmon Affidavit. But even if she had, district courts enjoy broad discretion when deciding motions to strike summary judgment affidavits. *Portfolio Recovery Associates, LLC v. Migliore*, 2013 UT App 255, ¶ 4, 314 P.3d 1069 (citing *Murdock v. Springville Mun. Corp*., 1999 UT 39 ¶ 25, 982 P.2d 65; *see also A Good Brick Mason, Inc. v. Spectrum Dev. Corp*., 2010 UT App 145U, para. 2, 2010 WL 2244374 (mem.) ("The district court is granted broad discretion to decide motions to strike summary judgment affidavits.")) Therefore, Ms. Mitchell must demonstrate an abuse of discretion, which "'may be demonstrated by showing that the district court relied on an erroneous conclusion of law or that there was no evidentiary basis for the trial court's ruling.'"

Portfolio, 2013 UT App 255, ¶ 4 (quoting *Daniels v. Gamma West Brachytherapy, LLC*, 2009 UT 66, ¶ 32, 221 P.3d 256 (citation and internal quotation marks omitted)).

In a similar case where a borrower opposed summary judgment and sought to strike summary judgment affidavits based on his belief that the affiants lacked personal knowledge or a factual foundation for the averments in the affidavits, this Court held that the trial court did not abuse its discretion by accepting the affidavits and denying the motion to strike. *Portfolio*, 2013 UT App 255, ¶ 5. This Court held, "[a]bsent an indication that the averments are obviously outside the personal knowledge of the affiant or otherwise inadmissible, the district court may properly accept the affidavit at face value." *Id*. (citing *A Good Brick Mason, Inc.*, 2010 UT App 145U, para. 3 ("[O]ur role is not to cross-examine the affidavit by conjecture; rather, we take it at face value . . . ")). Ms. Mitchell's brief fails to set forth any abuse of discretion by the district court accepting the Denmon Affidavit at face value, and she has not demonstrated that any statement in the Denmon Affidavit was obviously outside Mr. Denmon's personal knowledge or otherwise inadmissible.

Ms. Mitchell also objects to the Denmon Affidavit on the grounds that Mr. Denmon was not identified in BNYM's Rule 26 initial disclosures. (Ini. Br. 40-41.) However, BNYM complied with its initial disclosure obligations by setting forth the names and information, *if known*, of the individuals likely to have discoverable information. *See* UTAH R. CIV. P. 26(a). BNYM served its initial disclosures[10] on Ms.

10 Notably, Ms. Mitchell did not comply with her Rule 26 obligation to serve initial disclosures on BNYM. No such disclosures were ever made available to BNYM. *See*

Mitchell on February 23, 2017. (R. 531-35.) BNYM disclosed that certain employees of Shellpoint Mortgage, as the current loan servicer, may have discoverable information supporting BNYM's claims, including information regarding the loan documents, payment records, and payment history. (R. 532-33.) At the time the initial disclosures were served, BNYM did not know which specific employee of Shellpoint Mortgage would testify; therefore, BNYM complied with Rule 26(a). Moreover, not only did Ms. Mitchell fail to make her own initial disclosures, but she failed to conduct any discovery at all in this matter. (R. 959.) Additionally, once the Denmon Affidavit was filed in support of BNYM's summary judgment motion, Ms. Mitchell made no effort to depose Mr. Denmon or seek a deferral of the motion under Rule 56(d) to allow time to take discovery. *See* UTAH R. CIV. P. 56(d). Therefore, any alleged failure by BNYM to supplement its initial disclosures under Rule 26(d)(4) was harmless. *See* UTAH R. CIV. P. 26(d)(4) (allowing use of affidavit where failure to supplement disclosures was harmless); *see also* UTAH R. CIV. P. 61 (providing no error in admitting evidence is grounds for disturbing a judgment or order unless refusal is inconsistent with substantial justice). Accordingly, the trial court did not err in admitting the Denmon Affidavit.

D. Ms. Mitchell Had No to Valid Defense to Preclude Summary Judgment.

Without any support, Ms. Mitchell argues that the trial court could not enter summary judgment for BNYM unless it was able to prove that all of her defenses were invalid. (Ini. Br. 47.) That is, Ms. Mitchell would have BNYM be required to produce

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generally Record (no certificate of service for Ms. Mitchell's Rule 26 initial diclosures).

evidence to disprove each of the 17+ defenses that Ms. Mitchell included in her Answer. (Ini. Br. 47 n.13.) As support for this claim, she cites Utah case law stating that "a judgment can property be rendered against a defendant only if, on the undisputed facts, the defendant has no valid defense." *Disabled Am. Veterans v. Hendrixson*, 340 P.2d 416, 417 (Utah 1959). Yet Ms. Mitchell cites no authority or precedent for her desire to place the burden of proof on BNYM to disprove each of her defenses, instead of simply proving its own judicial foreclosure claim. (Ini. Br. 47.) Indeed, what Ms. Mitchell fails to acknowledge is that she, and not BNYM, would bear the burden of proving her affirmative defenses at trial. *See Orvis v. Johnson*, 2008 UT 2, ¶ 18, 177 P.3d 600. This too is one of Ms. Mitchell's well-worn strategies. In *Mitchell I*, she also argued that the trial "court misallocated the burden on summary judgment," contending that BNYM had not met its initial burden and the Mitchells "therefore were not even under any obligation to prove any factual dispute." 2016 UT App 88, ¶ 49-50. This Court in *Mitchell I* wholly rejected her argument, because "it does not account for the fact that [Ms. Mitchell] would carry the burden of proof at trial." *See id.* ¶¶ 49-51. Specifically, the Court opined

> Because the Mitchells as the nonmoving party would carry the burden of proof at trial, [BNYM], as the moving party, met their burden on summary judgment by showing, by reference to the evidence, that there [was] no genuine issue of material fact. To successfully defend against [BNYM's] motion, the Mitchells therefore had an obligation to set forth specific facts showing that there [was] a genuine issue for trial. The Mitchells have not demonstrated that the district court misallocated the parties' burdens on summary judgment.

Id. (second and fourth alterations in original). This Court should conclude the same: First,

that BNYM satisfied its burden on summary judgment by introducing evidence showing there was no genuine issue of material fact and BNYM was entitled to judgment as a matter of law on its claims; and second, that Ms. Mitchell did not meet her burden in proving facts to support their affirmative defenses and create a genuine issue of material fact to preclude summary judgment. Because Ms. Mitchell failed to meet this burden, summary judgment was appropriate.

IV. All Claims Were Decided Against Ms. Mitchell.

A. Case Is Ripe for Appeal.

Ms. Mitchell asserts that the orders on appeal are not final because, under Rule 58A, the trial court cannot prepare its own judgment and, under Rule 54, the trial court's Final Judgment was not, in fact, final. (Ini. Br. 48.)

Rule 58A(c) provides guidance for "[t]he prevailing party or a party directed by the court" in preparing a proposed judgment. *See* UTAH R. CIV. P. 58A(c). The purpose of these provisions is, most commonly, to give the non-prevailing party an opportunity to contest the proposed judgment, as prepared by the prevailing party, if it does not reflect the ruling of the court, as announced from the bench. *See id.* R. 58A(c)(3) & (4) (providing procedures for objecting to proposed judgment). Nowhere in Rule 58A does it state that the court *must* delegate the preparation of a judgment to one of the parties. *See id.* R. 58A. Nor does Rule 58A require the court to circulate its judgment for review by the parties before being entered. *See id*. Therefore, it was within the trial court's discretion to prepare the Final Judgment.

Rule 54(a) defines "judgment" as "a decree or order that adjudicated all claims and the rights and liabilities of all parties . . . ." UTAH R. CIV. P. 54(a). In entering its Final Judgment, the trial court, having already rejected all claims brought by Ms. Mitchell, specifically adjudicated all the claims brought by BNYM, ruling in favor of BNYM on its breach of contract and judicial foreclosure claims and stating that "[j]udgment is therefore entered in favor of Plaintiff and against Defendant Paula A. Mitchell for the amount of $1,343,034.81, plus additional interest, costs, taxes, and other fees owing to Plaintiff and incurred after May 31, 2017." (R. 1029 ¶ 10.) It is illogical for Ms. Mitchell to assume that the court's judgment could include, for example, costs that "continue to accrue" (R. 1029 ¶ 9), such as the sheriff's costs attendant to the sheriff's sale which had not yet occurred at the time the Final Judgment was entered. Yet this is Ms. Mitchell's position as to why no final judgment exists. (Ini. Br. 51.)

Additionally, Ms. Mitchell contests the existence of a final judgment because the amount of attorney fees awarded to BNYM had yet to be determined. (Ini. Br. 51-54.) Indeed, in its Final Judgment, the trial court indicated that the amount of attorney fees awarded to BNYM would be determined in accordance with Rule 73(a) following the entry of judgment. (R. 1031 ¶ 18; 1160 ¶ 3.) Ms. Mitchell, relying on this Court's precedent in *McQuarrie v. McQuarrie*, 2017 UT App 209, ¶ 4, 407 P.3d 1096, argues that the Final Judgment cannot, therefore, be final because it contemplated additional actions by the parties. *See id.* ¶¶ 4-5. Even, assuming *arguendo*, that Ms. Mitchell's point is well-taken, it is now moot. Subsequent to the entry of the Final Judgment, a motion and

affidavit for attorney fees were filed (R. 1062-72, 1163-65, 1524-47), the motion was fully briefed (R. 1224-42, 1246-50, 1428-42, 1446-51), and the court made a determination of the reasonableness of BNYM's attorney fees and costs (R. 1611). Therefore, because the issue of attorney fees has now been resolved, and no additional claims remain outstanding, it is undisputed that a final judgment exists. Ms. Mitchell's arguments to the contrary are moot.

B. No Error In Issuing Order of Foreclosure Sale.

Ms. Mitchell objects to the trial court's entry of an Order of Foreclosure Sale because she asserts, without any supporting authority, that an Order of Foreclosure Sale may not issue in the absence of a final judgment. (Ini. Br. 54-56.) In particular, Ms. Mitchell insists that the judgment must state "the amount due" in accordance with Utah's judicial foreclosure statute, Utah Code sections 78B-6-901 *et seq.*, and argues that the Final Judgment did not do this, due to its failure to itemize the accruing interest, fees, costs, and taxes. (Ini. Br. 55.) However, Ms. Mitchell's concerns are unfounded.

A court must "ascertain what sum of money, if any, is due and owing on the note and [deed of trust] before the court can properly issue an order of sale . . . ." *Stewart Livestock Co. v. Ostler,* 144 P.2d 276, 281 (Utah 1943). This is necessary so that the beneficiary knows the total amount it is owed and the amount it is entitled to bid at the sheriff's sale via credit bid. *Cf. id.* Here, the court properly ascertained the amount due and owing, as the Final Judgment stated:

> Judgment is therefore entered in favor of [BNYM] and

> against [Ms. Mitchell] for the amount of $1,343,034.81, plus additional interest, costs, taxes, and other fees owing to [BNYM] and incurred after May 31, 2017.
>
> [BNYM] is entitled to judicially foreclose the Mitchell Trust Deed and sell the Property to recover any unpaid obligations owed to [BNYM] under the Mitchell Trust Deed and Note.
>
> [BNYM] is entitled to an Order of Foreclosure Sale order[ing] the Property foreclosed and sold by the Sheriff of Salt Lake County, State of Utah, according to the law and practice of this court *to satisfy the judgment set forth above* as due and owing.

(R. 1029, ¶¶ 10-12 (emphasis added).)

This Final Judgment, therefore, enabled the court to issue the Order of Foreclosure Sale and authorized BNYM to enter a credit bid of up to $1,343,034.81 at the sheriff's sale. (R. 1029 ¶¶ 9-12.) Ultimately, the Property was sold to BNYM at the sheriff's sale for a sum of $1,275,000—some $68,000 less than the amount stated in the Final Judgment. (R. 1623.) Thus, any claim by Ms. Mitchell that BNYM's attorney fees or any other post-judgment costs needing to be stated and itemized in a written order prior to the issuance of the Order of Foreclosure Sale is irrelevant, as the Property sold at auction to BNYM for an amount less than the stated amount in the Final Judgment.

Further, in Utah, "the remedy of setting aside [a foreclosure] sale will be applied only in cases which reach unjust extremes." *Bank of Am. v. Adamson*, 2017 UT 2, ¶ 20, 391 P.3d 196.[11] A borrower seeking to set a sale aside must show "fraud or other unfair

11 *Adamson* involved a non-judicial trustee's sale, not a sheriff's sale after a foreclosure judgment as in this case. The difference is inconsequential; the interests of finality and clear title that motivated *Adamson* apply with equal force here. *See Adamson*, 2017 UT 2, ¶ 17 ("[W]hen . . . title to real property is at issue, the need for finality is at its

dealing" or that "he suffered prejudice from some defect in the sale." *Id.* ¶ 23; *see also Concepts Inc. v. First Sec. Realty Servs, Inc.*, 743 P.2d 1158, 1160 (Utah 1987). "[A] court may set aside a sheriff's sale where (1) a debtor's property is sold at a grossly inadequate price and (2) there were irregularities during the sale that contributed to the inadequacy of price or circumstances of unfairness during the redemption period caused by the conduct of the party benefitted by the sale." *Pyper v. Bond*, 2011 UT 45, ¶ 15, 258 P.3d 575. Ms. Mitchell has not alleged and cannot show any fraud or other unfair dealing in the court's issuing of the Final Judgment, nor any inadequacy of price or circumstances of unfairness with respect to the subsequent sheriff's sale. Indeed, Ms. Mitchell did not introduce any evidence of efforts to pay a reasonable amount for the Property at auction or to redeem the Property in the 180 days following sale. Thus, any claims by Ms. Mitchell to reverse or vacate the foreclosure sale necessarily fail. Accordingly, the trial court did not err in issuing the Order of Foreclosure Sale after entry of the Final Judgment.

C. No Abuse of Discretion in Denying Motion to Alter or Amend.

As a seventh issue for appeal, Ms. Mitchell lists "VIII. [sic] Trial court erred by not correcting its own legal errors raised in the Rule 59/52 motion." (Ini. Br. 10.) However, Ms. Mitchell admits that this issue was not preserved for appeal, stating that there was "[n]o opportunity to do so . . . ." (*Id.*) More importantly, after stating this issue in her Statement of Issues, Ms. Mitchell did not bother to actually brief the issue. (*See* Ini.

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apex." (citation omitted)).

Br. 57 (no argument following discussion of sixth issue on appeal and prior to attorney fees issue).) Indeed, Rule 59 is only mentioned on two (2) other occasions in Ms. Mitchell's brief: once in the Summary of Argument and a second time in a passing mention of "the Rule 59 Motion." (Ini. Br. 13, 53.) Likewise, Rule 52 is only mentioned once, in the Summary of Argument. (Ini. Br. 13.) Accordingly, this issue is insufficiently briefed, *see* UTAH R. APP. P. 24(a); *State v. Thomas*, 961 P.2d 299, 304-05 (Utah 1998), and Ms. Mitchell's argument should be denied.

CLAIM FOR ATTORNEY FEES

The parties' written agreements allow for reasonable attorney fees and costs. (R. 23 ¶ 22; 31-32 ¶ 7.) BNYM was awarded its reasonable attorney fees and costs below. (R. 1031 ¶ 18; 1611.) "[W]hen a party who received attorney fees below prevails on appeal, 'the party is also entitled to fees reasonably incurred on appeal.'" *Valcarce v. Fitzgerald*, 961 P.2d 305, 319 (Utah 1998) (citation omitted). If it is the prevailing party on appeal, BNYM should be awarded its attorney fees incurred on appeal.

CONCLUSION

Ms. Mitchell's arguments regarding standing and her myriad counterclaims regarding BNYM's authority to foreclose were all previously decided in *Mitchell I* and are barred by res judicata. Her further attempts to relitigate or otherwise attack *Mitchell I* are groundless. BNYM's judicial foreclosure action was proper and its summary judgment was adequately supported by evidence in the record. Ms. Mitchell's attempts to manufacture error out of the trial court's judgment and post-judgment rulings are

unsupported and any perceived missteps are, at most, harmless error. BNYM respectfully requests judgment be affirmed.

Dated this 1st day of April, 2019.

Brigham J. Lundberg
Hillary R. McCormack
Lundberg & Associates, PC
3269 S. Main St., Ste. 100
Salt Lake City, UT 84115
Tel: (801) 263-3400
Fax: (801) 263-6513
brigham.lundberg@lundbergfirm.com
hillary.mccormack@lundbergfirm.com
Attorneys for Appellee

CERTIFICATE OF COMPLIANCE WITH RULE 24(a)(11)

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1. This brief complies with the type-volume limitation of Utah R. App. P. 24(g)(1) because:

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   [x] materials in the record that are the subject of the dispute and that are of central importance to the determination of the issues presented for review.

3. This brief complies with Utah R. App. P. 21(g).

Date: April 1, 2019

Brigham J. Lundberg
Hillary R. McCormack
Lundberg & Associates, PC
3269 S. Main St., Ste. 100
Salt Lake City, UT 84115
Tel: (801) 263-3400
Fax: (801) 263-6513
brigham.lundberg@lundbergfirm.com
hillary.mccormack@lundbergfirm.com
Attorneys for Appellee

CERTIFICATE OF SERVICE

I, Brigham J. Lundberg, certify that on the 1st day of April, 2019, I served two (2) copies of the Appellee's Brief by first class mail, postage prepaid, and via electronic transmission to the following:

Douglas Short
Consumer Law Center of Utah
2290 East 4500 South, Suite 220
Holladay, UT 84047
mail@consumerlawutah.com
Attorney for Appellant

ADDENDUM

to Appellee's Brief
(Appellate Case No. 20180141-CA)

I. *Mitchell v. ReconTrust Co. NA*, 2016 UT App 88 (A001-A031)

II. Relevant Statutes and Rules

A. Rule 13, Utah Rules of Civil Procedure (A032)
B. Utah Code section 57-1-23 (A033)

III. Relevant Orders, Minute Entries, Decisions, Request(s), and Judgment

A. Ruling and Order dated November 21, 2016 (A034-A042)
B. Minute Entry Ruling dated December 8, 2016 (A043-A044)
C. Order from the Utah Court of Appeals dated December 22, 2016 (A045-A046)
D. Ruling and Order dated January 17, 2017 (A047-A050)
E. Plaintiffs' Request for Judicial Notice dated March 7, 2017 (A051-A054)
    i. Order in Case No. 110400816 dated February 28, 2014 (A055-A059)
    ii. Order from the Utah Court of Appeals in Case No. 20140113-CA dated January 14, 2015 (A060-A064)
F. Ruling and Order dated March 30, 2017 (A094-A095)
G. Affidavit of Alvin Denmon dated August 21, 2017 (A096-A129)
H. Minute Entry dated November 6, 2017 (A130)
I. Order Granting Summary Judgment dated November 27, 2017 (A131-A138)
J. Final Judgment dated November 27, 2017 (A139-A144)
K. Order of Foreclosure Sale dated December 12, 2017 (A145-A146)
L. Ruling and Order dated January 18, 2018 (A147-A150)
M. Signed Minute Entry re: Pending Motions dated March 14, 2018 (A151-A152)
N. Minute Entry Order dated March 14, 2018 (A153)
O. Ruling and Order dated March 16, 2018 (A154)
P. Return on Order of Sale dated March 19, 2018 (A155-A186)
Q. Return and Recorded Certificate of Sale entered March 20, 2018 (A187-A188)
R. Ruling and Order dated April 27, 2018 (A189-A192)
S. Return on Sheriff's Sale and Certificate entered May 11, 2018 (A193-A194)
T. Ruling and Order dated June 21, 2018 (A195-A198)

IV. Other Record Materials

A. Deed of Trust recorded May 24, 2006 (A199-A213)

THE UTAH COURT OF APPEALS

PAULA A. MITCHELL AND WADE MITCHELL,
Appellants,
v.
RECONTRUST COMPANY NA, THE BANK OF NEW YORK MELLON, ARMAND J. HOWELL, AMERICA'S WHOLESALE LENDER, AND BAC HOME LOANS SERVICING LP,
Appellees.

Opinion
No. 20140113-CA
Filed April 28, 2016

Third District Court, West Jordan Department
The Honorable Barry G. Lawrence
No. 110400816

Douglas R. Short, Attorney for Appellants

Chandler P. Thompson and Robert H. Scott,
Attorneys for Appellees ReconTrust Company NA, The Bank of New York Mellon, America's Wholesale Lender, and BAC Home Loans Servicing LP

Armand J. Howell, Appellee Pro Se

SENIOR JUDGE RUSSELL W. BENCH authored this Opinion, in which JUDGE MICHELE M. CHRISTIANSEN concurred.[1] JUDGE J. FREDERIC VOROS JR. concurred, with opinion.

BENCH, Senior Judge:

¶1 Paula A. Mitchell and Wade Mitchell appeal from the district court's orders dismissing several of their claims and granting summary judgment on their remaining claims in favor

1. Senior Judge Russell W. Bench sat by special assignment as authorized by law. *See generally* Utah R. Jud. Admin. 11-201(6).

of ReconTrust Company NA, the Bank of New York Mellon (BNYM), America's Wholesale Lender (AWL), BAC Home Loans Servicing LP (BAC), and Armand J. Howell. We affirm.

BACKGROUND

¶2 Paula Mitchell obtained a $1 million loan from AWL in 2006. To secure this loan, she executed a trust deed in favor of AWL on real property in Salt Lake County. The trust deed defined AWL as "Lender" and designated Stewart Matheson as the trustee. The trust deed provided that Mortgage Electronic Registration Systems Inc. (MERS) "is acting solely as nominee for Lender and Lender's successors and assigns" and "is the beneficiary under this Security Instrument." The trust deed also indicated that Paula Mitchell

> agree[d] that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property.

¶3 On August 17, 2010, MERS recorded a document assigning its beneficial interest under the trust deed to BNYM. That same day, BNYM recorded a substitution of trustee in which BNYM, as the current beneficiary, appointed ReconTrust as successor trustee under the trust deed. Also on that day, ReconTrust filed a notice of default and intent to sell the property. According to the notice, Paula Mitchell had defaulted on her loan obligation by failing to make payments since May 2010.

¶4 Attempting to prevent foreclosure, Paula and Wade Mitchell filed a complaint in January 2011 against ReconTrust,

BNYM, AWL, and BAC (collectively, Bank Defendants). The Mitchells also named Howell as a defendant, alleging that he was an attorney who "traditionally conducts foreclosure sales for ReconTrust and is expected to conduct the sale [of the Mitchells' property] unlawfully."[2] The Mitchells raised claims generally based on a theory that MERS, which was referred to as the nominee of the lender and the beneficiary under the terms of the trust deed, lacked authority to appoint BNYM as the successor beneficiary and that BNYM thus lacked authority to appoint ReconTrust as the successor trustee. The Mitchells also alleged that ReconTrust was not authorized to serve as a trustee under Utah's statutes. Further, they alleged that BAC, which was servicing the loan and was purportedly acting as an agent of BNYM, "directed [the Mitchells] to default in order to be able to seek a modification because that would be the only way to obtain a loan modification." Because they purportedly defaulted at BAC's suggestion, the Mitchells alleged that the defendants were estopped from enforcing the trust deed and note.

¶5 In terms of relief, the Mitchells sought declaratory judgments clarifying the respective rights under the trust deed and note, invalidating the substitution of trustee and notice of default, declaring the debt unsecured and that the defendants may not foreclose the trust deed, and declaring that the debt had been satisfied via insurance or credit default swaps. The

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2. Howell is mentioned only three more times in the complaint. In the claim for punitive damages, the Mitchells alleged that "Howell knows of the legal deficiencies in ReconTrust's efforts to act as a foreclosing trustee, and that ReconTrust is not qualified under the statute to serve as a foreclosing trustee, and yet he turns a blind eye to such defects and knowingly conducts unlawful sales for them." They also alleged that Howell and the other defendants "colluded in their nationwide practices" and claimed that punitive damages were necessary to "dissuade Mr. Howell from continuing to conduct unlawful sales for ReconTrust."

Mitchells also sought a permanent injunction of any foreclosure sale conducted by ReconTrust on behalf of BNYM, an order quieting title to the subject property in their names, an award of punitive damages, and an award of attorney fees incurred in defending against an improper foreclosure.

¶6 Bank Defendants moved to dismiss, arguing that the Mitchells failed to state any claims upon which relief could be granted. In support of their motion, Bank Defendants indicated that on October 6, 2011, ReconTrust had recorded a cancellation of notice of default, thereby mooting the Mitchells' claims challenging ReconTrust's authority to act as a trustee with power of sale because ReconTrust would not be conducting any further foreclosure proceedings on the Mitchells' property.

¶7 The district court granted the motion to dismiss in part and dismissed nine of the Mitchells' eleven claims. The court first determined that under the terms of the trust deed, "MERS was the statutory beneficiary and, by contract, the agent of the Lender and the Lender's successors." The court explained that "MERS assigned its interest to BNYM and [BNYM] is now, under the terms of the [trust deed] and the statute, the beneficiary." The court then addressed each cause of action. Regarding the Mitchells' first cause of action seeking a declaration with respect to the true ownership of the debt, "and by extension the authority of [the] defendants to foreclose," the district court concluded that it stated "no genuine claim for declaratory relief" because "MERS had, and BNYM has, authority to commence foreclosure under the terms of the [trust deed] and the Utah statutes." Because the tenth cause of action was "a restatement of the [f]irst," the court dismissed the tenth cause of action for the same reasons.

¶8 The court proceeded to dismiss the second and seventh causes of action, which challenged the notice of default and alleged a breach of duty by the trustee, as moot in light of the cancellation of the notice of default. As for the fourth cause of action, based on a theory that the ownership of the debt had

been severed from the trust deed, the court dismissed it because "[n]o fact is alleged suggesting that the [trust deed] has been severed from the underlying obligation, nor is there any allegation how, under Utah law, this might occur." The court also dismissed the fifth cause of action, stating that "the claim fails to allege any basis for concluding that payment by a third party to the holder of the debt satisfies" the Mitchells' obligations under the note and trust deed. The court dismissed the sixth cause of action for quiet title. It reasoned that BNYM was the beneficiary and that any securitization of the debt "does not change the [trust deed's] terms . . . making BNYM now the agent (nominee) for the current owner or owners of the debt." Moreover, the Mitchells did not dispute that their title was subject to the trust deed. Last, the court dismissed the eighth cause of action for an injunction and the eleventh cause of action for punitive damages because both were remedies rather than stand-alone claims.

¶9 The district court denied Bank Defendants' motion to dismiss with respect to two causes of action. Specifically, the court concluded that the third cause of action, which appeared to be based on theories of estoppel and breach of the implied covenant of good faith and fair dealing, possibly stated a claim because "actions by the Lender or its agents encouraging [the Mitchells] to default may constitute a modification of the underlying agreement, a waiver of one or more of its terms, or act to estop the current lender from asserting certain contractual terms." The court also determined that the ninth cause of action survived the motion to dismiss because it sought attorney fees related to a breach of contract and therefore "if [the Mitchells'] estoppel[] theory establishes that the contract was modified by [BAC's] conduct, a breach of contract may be proven." Accordingly, the district court allowed the Mitchells to proceed on their third and ninth causes of action.

¶10 Bank Defendants later moved for summary judgment on the remaining two claims. The court granted this motion. It reasoned that all possible legal theories for the third cause of

action relied upon "the alleged misrepresentation that occurred in March 2010 regarding a possible loan modification." The court then concluded that the evidence showed, "[at] most," that the Mitchells had a "subjective understanding that they had been assured that a loan modification would occur." Thus, it was "undisputed that there was never an agreement to modify according to any certain terms, and there was certainly nothing in writing." Given this undisputed fact, and noting that the third cause of action was "unclear as to precisely its legal theory or the relief sought," the court determined that "there can be no claim that [BAC] is bound by a modified loan agreement as a matter of law" and that a waiver claim likewise would fail. Similarly, the court concluded that a claim for breach of the covenant of good faith and fair dealing would fail because "there can be no implied duty arising" under a nonexistent modification and "no such duty can be implied out of the [Mitchells'] existing loan." The court also concluded that any claim grounded in promissory estoppel failed because, inter alia, the Mitchells could not reasonably rely on such an indefinite promise and because the record did not support actual reliance. Consequently, the court dismissed the third cause of action. Because the ninth cause of action depended on the success of the third cause of action, the court dismissed the ninth cause of action as well. Then, upon Bank Defendants' motion, the district court determined that the Mitchells had failed to comply with discovery orders and dismissed the complaint as a discovery sanction; the sanction served as a separate and independent basis for dismissing the Mitchells' claims.

¶11 After these orders were entered, Howell, who had not joined Bank Defendants' motions, moved for summary judgment. The district court granted Howell's motion, stating that "the reasoning of [the rulings with regard to Bank Defendants] applies with equal force to Howell and compels a similar result." The court emphasized that the Mitchells had "not pointed to an independent cause of action against Howell that was not addressed in the prior rulings." The court further explained that "the Complaint alleges that Howell was merely

acting on behalf of ReconTrust and is devoid of any allegations that Howell engaged in conduct that would somehow create liability separate from the other Defendants." Accordingly, the court granted summary judgment to Howell and thereby disposed of all of the Mitchells' claims. The Mitchells appeal.[3]

ISSUES AND STANDARDS OF REVIEW

¶12 The Mitchells contend that the district court erred in dismissing nine of their claims. "A district court's ruling on . . . a motion to dismiss . . . is a legal question which we review for correctness." *Commonwealth Prop. Advocates, LLC v. Mortgage Elec. Registration Sys., Inc.*, 2011 UT App 232, ¶ 6, 263 P.3d 397.

¶13 The Mitchells next challenge a number of the district court's rulings relating to evidence presented in connection with summary judgment. In particular, they contend that the district court erred in its rulings on motions to strike several affidavits. They also contend that the district court erred in refusing to take judicial notice of declarations from witnesses in a separate action. "We review a district court's decision on a motion to strike affidavits submitted in support of or in opposition to a motion for summary judgment for an abuse of discretion." *Portfolio Recovery Assocs., LLC v. Migliore*, 2013 UT App 255, ¶ 4,

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3. The Mitchells moved this court for permission to file over-length briefs. Although we granted their motion to file an over-length opening brief, we denied their motion to file an over-length reply brief. The Mitchells nevertheless included, as they explain, the "full reply brief they would have filed by attaching [it] in the addendum" to their reply brief. This attachment constitutes "a blatant attempt to skirt" this court's order and the page limitations stated in rule 24(f) of the Utah Rules of Appellate Procedure. *See Aspenwood, LLC v. C.A.T., LLC*, 2003 UT App 28, ¶ 46, 73 P.3d 947. Consequently, we have not considered this addendum.

314 P.3d 1069. Likewise, "[w]e review the [district] court's judicial notice of prior adjudicated facts under Rule 201 of the Utah Rules of Evidence for abuse of discretion." *In re J.B.*, 2002 UT App 267, ¶ 14, 53 P.3d 958.

¶14 The Mitchells contend that the district court erred in rendering summary judgment against them on their remaining two claims. We review the district court's decision for correctness.[4] *Commonwealth Prop. Advocates*, 2011 UT App 232, ¶ 6.

¶15 Finally, the Mitchells contend that they are entitled to attorney fees. "Whether attorney fees are recoverable is a question of law . . . ." *R.T. Nielson Co. v. Cook*, 2002 UT 11, ¶ 16, 40 P.3d 1119.

ANALYSIS

I. Claims Dismissed Under Rule 12(b)(6)

¶16 On appeal, the Mitchells challenge the dismissal of several claims. Rule 12(b)(6) of the Utah Rules of Civil Procedure allows a defendant to move to dismiss an action that the defendant believes "fail[s] to state a claim upon which relief can be granted." Utah R. Civ. P. 12(b)(6). "[A] rule 12(b)(6) motion to dismiss admits the facts alleged in the [complaint] but challenges the [plaintiff's] right to relief based on those facts." *Maese v.*

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4. The Mitchells also contend that the district court erred in dismissing their claims as a discovery sanction. After determining that the Mitchells had failed to comply with discovery orders, the district court dismissed the complaint as a discovery sanction but stated that this rationale served as an alternative ground for dismissing the complaint. Because we affirm the district court's dismissal of the Mitchells' claims on the merits, *see infra* ¶¶ 56, 60, we do not reach the alternative basis for its decision.

Davis County, 2012 UT App 48, ¶ 3, 273 P.3d 949 (citation and internal quotation marks omitted). Thus, a district court should grant a motion to dismiss when, "assuming the truth of the allegations in the complaint and drawing all reasonable inferences therefrom in the light most favorable to the plaintiff, it is clear that the plaintiff is not entitled to relief." *Hudgens v. Prosper, Inc.*, 2010 UT 68, ¶ 14, 243 P.3d 1275 (citation and internal quotation marks omitted). In evaluating a motion to dismiss, the district court may "consider documents that are referred to in the complaint and [are] central to the plaintiff's claim" and may also "take judicial notice of public records." *BMBT, LLC v. Miller*, 2014 UT App 64, ¶ 6, 322 P.3d 1172 (alteration in original) (citations and internal quotation marks omitted). Our review of the district court's dismissal orders requires us to "accept the plaintiff's description of facts alleged in the complaint to be true, but we need not accept extrinsic facts not pleaded[,] nor need we accept legal conclusions in contradiction of the pleaded facts." *Reynolds v. Woodall*, 2012 UT App 206, ¶ 10, 285 P.3d 7 (citation and internal quotation marks omitted).

¶17 We will address the Mitchells' causes of action by category based upon the district court's rationale for dismissal. Thus, we consider the district court's dismissal orders relying on its conclusions that Bank Defendants had authority to commence foreclosure proceedings, that the cancellation of ReconTrust's notice of default mooted several claims, that the trust deed had not been severed from the debt, that the debt had not been satisfied, that the Mitchells were not entitled to quiet title, and that punitive damages were not appropriate.

A. The Authority to Appoint a Successor Trustee and the Authority to Foreclose

¶18 The Mitchells challenge the dismissal of their first and tenth causes of action. The first cause of action sought clarification of the "true ownership of the [d]ebt" and "by extension the authority of [the] defendants to foreclose upon the

Property." It alleged that because MERS and its assignee BNYM lacked any beneficial ownership interest in the debt, MERS and BNYM could not foreclose on the property. The tenth cause of action similarly sought to block a non-judicial foreclosure on the ground that MERS did not have "any beneficial interest in the Property or the Trust Deed that could even possibly be assigned to BNYM." The district court deemed the tenth cause of action to be a "restatement" of the first. Then, after taking judicial notice of the trust deed and the promissory note, the court ruled that both causes of action failed because "MERS had, and BNYM has, authority to commence foreclosure under the terms of the [trust deed]."

¶19 The Mitchells argue that MERS and its assignee BNYM lacked the authority to appoint ReconTrust as the successor trustee for the purpose of foreclosing on the property. In support, they contend that "[o]nly a statutorily defined 'Beneficiary' may initiate the non-judicial foreclosure of the trust deed." The Mitchells further contend that MERS did not meet the statutory definition of a "beneficiary" and that BNYM, as MERS's assignee, therefore could not validly appoint ReconTrust as successor trustee. Bank Defendants counter that MERS and its assignee had the authority to foreclose and appoint a successor trustee under the terms of the trust deed itself. We agree with Bank Defendants.

¶20 Utah Code section 57-1-19(1) defines a "beneficiary" under a trust deed as "the person named or otherwise designated in a trust deed as the person for whose benefit a trust deed is given, or his successor in interest." Utah Code Ann. § 57-1-19(1) (LexisNexis 2010). However, even if the Mitchells are correct that MERS does not meet this definition,[5] the terms of

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5. The district court ruled that MERS was a statutory beneficiary as defined by section 57-1-19(1). The district court reasoned that the statute defines "beneficiary" as "'the person named or otherwise designated in a trust deed as the person for whose (continued…)

the trust deed nevertheless gave MERS the authority to appoint a successor trustee and foreclose on the property.

¶21 Case law from this court and the Tenth Circuit Court of Appeals indicates that a trust deed's plain language may give MERS, as "nominee for Lender and Lender's successors and assigns," the authority to appoint a successor trustee. Specifically, this court has previously suggested that at least one of the statutes governing conveyances does not "imply[] . . . or somehow indicat[e] that the original parties to the Note and Deed of Trust cannot validly contract at the outset 'to have someone other than the beneficial owner of the debt act on behalf of that owner to enforce rights granted in [the security instrument].'" *Commonwealth Prop. Advocates, LLC v. Mortgage Elec. Registration Sys., Inc.*, 2011 UT App 232, ¶ 13, 263 P.3d 397 (third alteration in original) (quoting *Marty v. Mortgage Elec.*

(…continued)
benefit a trust deed is given, or his successor in interest'"; that MERS was named in the trust deed as the beneficiary; and that MERS's status as nominee of the Lender was thus of no consequence under the statutory definition. (Quoting Utah Code Ann. § 57-1-19.) The United States Court of Appeals for the Tenth Circuit reached a different conclusion on a similar question in *Burnett v. Mortgage Electronic Registration Systems, Inc.*, 706 F.3d 1231 (10th Cir. 2013). On analogous facts, it apparently concluded that MERS could not be "the person named or otherwise designated in a trust deed as the person for whose benefit a trust deed is given," because MERS held "no ownership right in the note." *Id.* at 1237. Based on *Burnett*, Bank Defendants concede that the district court apparently erred. We express no opinion on this point. But we agree with the district court and the Tenth Circuit in *Burnett* that the statute is not dispositive where, as here, the trust deed expressly grants MERS the right to foreclose and sell the property and thus, by implication, the right to appoint a successor trustee for that purpose. *Id.*

Registration Sys., No. 1:10-cv-00033-CW, 2010 WL 4117196, at *5 (D. Utah Oct. 19, 2010)). In other words, "[t]he plain language of [a conveyancing] statute does nothing to prevent MERS from acting as nominee for Lender and Lender's successors and assigns when permitted by the Deed of Trust." *Id.* Similarly, the Tenth Circuit has noted that even when "MERS is not a beneficiary as that term is defined in [Utah Code section] 57-1-19(1)[,] . . . MERS nonetheless [may have the] authority to appoint [a successor trustee] and foreclose on [a] property" under the plain language of the trust deed. *See Burnett v. Mortgage Elec. Registration Sys., Inc.*, 706 F.3d 1231, 1237 (10th Cir. 2013).

¶22 Consistent with this case law, we conclude that the terms of the trust deed in this case explicitly gave MERS the right to appoint a successor trustee regardless of whether MERS satisfied the statutory definition of a beneficiary. The trust deed explained with respect to substituting the trustee that "Lender, at its option, may from time to time remove Trustee and appoint a successor trustee to any Trustee appointed hereunder." But the trust deed also stated,

> Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender including, but not limited to, releasing and canceling this Security Instrument.

Because the trust deed granted MERS, as nominee for Lender and its assigns, the right "to exercise any or all of those interests" "granted by Borrower in this Security Interest" and the right "to take any action required of Lender," the trust deed allowed MERS to remove the trustee and appoint a successor trustee on

Lender's behalf. It also gave MERS the "right to foreclose and sell the Property." *See, e.g.*, *Sincere v. BAC Home Loans Servicing, LP*, No. 3:11-cv-00038, 2011 WL 6888671, at *5 (W.D. Va. Dec. 30, 2011) (construing a similar trust deed and concluding that "the plain terms of the deed of trust supplied MERS with the authority to take any action required of the lender, including foreclosing and selling the property in the event of a default as well as appointing substitute trustees to do the same," and noting that the borrower's signature on the trust deed "indicates that he agreed MERS had the authority to take any action required of the lender"); *Ramirez-Alvarez v. Aurora Loan Servs., LLC*, No. 01:09cv1306, 2010 WL 2934473, at *3 (E.D. Va. July 21, 2010) (interpreting similar language in a trust deed to mean that the borrower "agreed that MERS, filling the dual roles of beneficiary and nominee for the lender, had the right to foreclose on the property and take any action required of the lender, such as the appointment of substitute trustees"). Thus, we conclude that the trust deed's terms, to which Paula Mitchell agreed, provide MERS and its assignee BNYM the authority to appoint a successor trustee. Consequently, BNYM could validly appoint ReconTrust as successor trustee in accordance with the trust deed's plain language.

¶23 The Mitchells' challenge to the dismissal of their first and tenth causes of action depends upon their assertion that MERS and its assignee BNYM lacked authority to foreclose. But as we have concluded, the plain terms of the trust deed authorized MERS, as Lender's nominee, "to foreclose and sell the Property." Accordingly, the district court did not err in dismissing the Mitchells' first and tenth causes of action.

B. The Claims Dismissed as Moot

¶24 The Mitchells argue that the district court erred in dismissing the second and seventh causes of action as moot, asserting that "the questions of what duties ReconTrust had, and still has, to the Mitchells remain unanswered." The second cause

of action challenged ReconTrust's qualifications as successor trustee and its actions, including its notice of default. The seventh cause of action alleged that ReconTrust breached its duties as successor trustee by initiating a non-judicial foreclosure sale without authority to do so. Thus, both causes of action challenged ReconTrust's power as successor trustee to carry out a non-judicial foreclosure sale. The district court determined that these two claims were moot by virtue of the fact that ReconTrust withdrew its notice of default and represented to the court that it would not be conducting any further foreclosure proceedings on the Mitchells' property.

¶25 "If the requested judicial relief cannot affect the rights of the litigants, the case is moot and a court will normally refrain from adjudicating it on the merits." *Merhish v. H.A. Folsom & Assocs.*, 646 P.2d 731, 732 (Utah 1982) (citation and internal quotation marks omitted). "Once a controversy has become moot, a trial court should enter an order of dismissal." *Id.* at 733.

¶26 The Mitchells acknowledge that ReconTrust withdrew the notice of default but nevertheless argue that these causes of action are not moot, because ReconTrust lacks the statutory authority to conduct a non-judicial foreclosure sale. We first note that this argument is contrary to their statement before the district court that they voluntarily agreed to dismiss "their present request for a declaratory judgment that ReconTrust lacks the statutory authority to conduct non-judicial foreclosure sales in Utah." In any event, the cancellation of the notice of default and BNYM's continuing freedom to appoint a qualified trustee, *see supra* ¶¶ 22–23, eliminated any dispute regarding whether ReconTrust was authorized to foreclose on the Mitchells' property. Further, because ReconTrust retracted its notice of default and never sold the property, ReconTrust cannot be held liable for breach of any duty based on an unauthorized foreclosure. Because the requested relief in relation to the second and seventh causes of action would not affect the rights of the

parties, the district court properly dismissed these claims as moot.[6]

C. The Claim That Ownership of the Debt Was Severed from the Trust Deed

¶27 The Mitchells contend that the district court erred in dismissing the fourth cause of action. This cause of action alleged that AWL transferred the ownership interest in the debt to a mortgage-backed security. It further alleged that "fractionalizing the ownership of the Debt by securitization . . . effectively destroy[ed] the security for the Debt."[7] Thus, the Mitchells sought "a judgment declaring that the Debt has . . . become unsecured, and the Trust Deed may not be foreclosed." On appeal, the Mitchells argue that "the Trust Deed has been severed from the Debt . . . rendering the Debt unsecured, and precluding foreclosure."

¶28 The premise underlying this argument and the Mitchells' fourth cause of action was rejected by this court in *Commonwealth Property Advocates, LLC v. Mortgage Electronic Registration Systems, Inc.*, 2011 UT App 232, 263 P.3d 397. There, a debtor argued that the lender and MERS, as the lender's nominee, "lost their rights under the Deed of Trust when the Note was

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6. Since this appeal was filed, BNYM recorded a substitution of trustee appointing eTitle Insurance Agency as the successor trustee. Taking judicial notice of this recorded document, *see* Utah R. Evid. 201, we observe that it supports our conclusion that it is no longer relevant whether ReconTrust was properly appointed successor trustee in the first place or whether ReconTrust was qualified under Utah law to act as a trustee.

7. "Securitization" is the "process of pooling loans and selling them to investors on the open market." *Commonwealth Prop. Advocates, LLC v. Mortgage Elec. Registration Sys., Inc.*, 680 F.3d 1194, 1197 n.2 (10th Cir. 2011).

securitized." *Id.* ¶ 11. This court disagreed, explaining that "when a debt is transferred, the underlying security continues to secure the debt." *Id.* ¶ 13 (citing Utah Code Ann. § 57-1-35 (LexisNexis 2010)); *accord Burnett v. Mortgage Elec. Registration Sys., Inc.*, 706 F.3d 1231, 1237–38 (10th Cir. 2013); *Commonwealth Prop. Advocates, LLC v. Mortgage Elec. Registration Sys., Inc.*, 680 F.3d 1194, 1202–05 (10th Cir. 2011) (determining that MERS retained its authority to foreclose even after the debt secured by a Utah trust deed was securitized, and concluding that "[e]ven assuming Plaintiff is correct that securitization deprives Defendants of their implicit power to foreclose as holders of the trust deeds, the trust deeds *explicitly* granted Defendants the authority to foreclose").

¶29 The Mitchells have not persuaded us that their argument is distinguishable from the one precluded by this court's decision in *Commonwealth Property Advocates*. Any securitization of the debt secured by the trust deed did not take away MERS's power to foreclose under the trust deed's terms. *See Commonwealth Prop. Advocates*, 2011 UT App 232, ¶¶ 11–13. As a consequence, we affirm the district court's dismissal of the Mitchells' fourth cause of action.

D. Satisfaction of the Debt

¶30 The Mitchells challenge the dismissal of their fifth cause of action that sought a declaratory judgment regarding the satisfaction of the debt. The Mitchells assert that the debt "has been paid in whole, by means of insurance or some similar instrument [e.g., a credit default swap], such that the true owners of the Debt are no longer owed anything . . . , which extinguishes the Debt and the trust deed."

¶31 The district court dismissed this cause of action on the ground that "the claim fails to allege any basis for concluding that payment by a third party to the holder of the debt satisfies [the Mitchells'] obligations under the Note and [the trust deed]." Beyond offering a conclusory statement, the Mitchells make no effort on appeal to demonstrate error in the district court's

reasoning. *See Simmons Media Group, LLC v. Waykar, LLC*, 2014 UT App 145, ¶ 37, 335 P.3d 885 (indicating that appellants do not meet their burden to demonstrate district court error when they fail to present reasoned analysis based on relevant legal authority). Accordingly, we affirm the dismissal of this claim.

E. Quiet Title

¶32 The Mitchells contend that the district court prematurely dismissed their sixth cause of action for quiet title. In so arguing, they concede that the property was subject to the trust deed but assert that the district court "never examined, let alone determined, who, if anybody, actually has any valid, enforceable claim against the Property based on the trust deed."

¶33 "A quiet title action 'is a suit brought to quiet an existing title against an adverse or hostile claim of another and the effect of a decree quieting title is not to vest title but rather is to perfect an existing title as against other claimants.'" *Haynes Land & Livestock Co. v. Jacob Family Chalk Creek, LLC*, 2010 UT App 112, ¶ 19, 233 P.3d 529 (quoting *Nolan v. Hoopiiaina* (*In re Malualani B. Hoopiiaina Trust*), 2006 UT 53, ¶ 26, 144 P.3d 1129). "To succeed in an action to quiet title to real estate, a plaintiff must prevail on the strength of his own claim to title and not on the weakness of a defendant's title or even its total lack of title." *Church v. Meadow Springs Ranch Corp.*, 659 P.2d 1045, 1048–49 (Utah 1983).

¶34 We agree with Bank Defendants that, instead of showing the strength of their own claim to title, the Mitchells "only attack the alleged interest of [Bank Defendants] in the property." The district court concluded that the Mitchells' theories attacking Bank Defendants' rights vis-à-vis the trust deed were legally incorrect. In light of this conclusion, and because the Mitchells conceded that their title is subject to the trust deed, the district court dismissed the Mitchells' quiet title action. In other words, the district court did determine that Bank Defendants have a "valid, enforceable claim against the Property based on the trust deed." The Mitchells' effort on appeal falls short of demonstrating error in the district court's analysis. Accordingly,

we affirm the court's decision that the Mitchells did not state a claim that would entitle them to quiet title.

F. The Punitive Damages Claim

¶35 The Mitchells also challenge the district court's dismissal of their eleventh cause of action seeking punitive damages.[8] On appeal, the Mitchells attempt to recast this cause of action as one for civil conspiracy, stating, "Although admittedly mislabeled as a request for punitive damages, the 11th [cause of action] actually sets forth its own common law claim of civil conspiracy . . . ."

¶36 "[T]o preserve an issue for appeal the issue must be presented to the trial court in such a way that the trial court has an opportunity to rule on that issue." *Brookside Mobile Home Park, Ltd. v. Peebles*, 2002 UT 48, ¶ 14, 48 P.3d 968. Issues that are not raised before the district court "are usually deemed waived." *438 Main St. v. Easy Heat, Inc.*, 2004 UT 72, ¶ 51, 99 P.3d 801.

¶37 The Mitchells have not preserved this argument for appeal. In opposing Bank Defendants' motion to dismiss, the Mitchells did not address their eleventh cause of action. Consequently, they did not present the district court with an opportunity to rule on the same argument they now raise on appeal, namely, that they sufficiently alleged a claim for civil conspiracy. The Mitchells also have not argued that plain error or exceptional circumstances would justify our review of this issue. Because the Mitchells did not preserve their argument challenging the district court's dismissal of their eleventh cause of action, we affirm the district court's decision without reaching its merits.

¶38 In short, the district court did not err in concluding that "MERS had, and BNYM has, authority to commence foreclosure

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8. The Mitchells do not specifically challenge the dismissal of their eighth cause of action for an injunction. *See supra* ¶ 8.

under the terms of the [trust deed]." Moreover, the Mitchells have not demonstrated that the district court erred in granting Bank Defendants' motion to dismiss all but the third and ninth causes of actions.

II. Challenges to the Evidence on Summary Judgment

¶39 The Mitchells next challenge three of the district court's rulings relating to evidence presented in connection with summary judgment. Specifically, they assert that the district court erred in denying their motion to strike a bank employee's affidavit, in granting Bank Defendants' motion to strike the Mitchells' affidavits, and in refusing to take judicial notice of declarations made in a separate case. We reject these arguments.

A. The Court's Refusal to Strike a Bank Employee's Affidavit

¶40 First, the Mitchells assert that the district court improperly refused to strike an affidavit from a bank employee. They argue that the affidavit was inadmissible because it constituted hearsay and was not based on the employee's personal knowledge.

¶41 District courts generally have "broad discretion to decide motions to strike summary judgment affidavits." *Portfolio Recovery Assocs., LLC v. Migliore*, 2013 UT App 255, ¶ 4, 314 P.3d 1069 (citation and internal quotation marks omitted). To obtain reversal, appellants must show not only district court error but also "error that was substantial and prejudicial in the sense that there is at least a reasonable likelihood that in the absence of the error the result would have been different." *Ross v. Epic Eng'g, PC*, 2013 UT App 136, ¶ 12, 307 P.3d 576 (citation and internal quotation marks omitted).

¶42 Here, the district court considered the affidavit at issue as "relevant to the dispute" and "properly before the Court." However, the district court stated that it had "decided the motion for summary judgment without reference to the [bank employee's] Affidavit." Because the bank employee's affidavit

played no role in the district court's decision on summary judgment, the Mitchells cannot show that they were prejudiced by the district court's denial of their motion to strike. Accordingly, we will not reverse the district court on this basis.

B. The Court's Striking of the Mitchells' Affidavits

¶43 Second, the Mitchells assert that the district court erred in striking their own affidavits. But as with their challenge to the court's refusal to strike the bank employee's affidavit, the Mitchells cannot show that they were prejudiced by the court's decision to exclude their affidavits. *See id.* The Mitchells have not been harmed, because the court specifically stated that "even considering the affidavits, Defendants would still be entitled to summary judgment." As a result, this argument also does not present reason to reverse the district court.

C. The Court's Refusal to Take Judicial Notice of Certain Declarations

¶44 Third, the Mitchells argue that the district court erred in not taking judicial notice of declarations that former employees of Bank of America made in a separate case.[9] According to the Mitchells, the declarations contain admissions that Bank of America "systematically tried to induce homeowners into 'default' in order to force them into foreclosure" and would be offered to "demonstrat[e] that [the Mitchells would] likely be able to present similar evidence at trial."

¶45 Rule 201 of the Utah Rules of Evidence governs judicial notice of adjudicative facts. It provides that "[t]he court may judicially notice a fact that is not subject to reasonable dispute because it . . . is generally known . . . or . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Utah R. Evid. 201(b). The court "may

9. Bank of America is the successor-by-merger to BAC.

take judicial notice on its own; or . . . must take judicial notice if a party requests it and the court is supplied with the necessary information." *Id.* R. 201(c).

¶46 The Mitchells have not demonstrated that the district court erred by refusing to take judicial notice of the former employees' declarations. Appellants must support their arguments on appeal with reasoned analysis based on relevant legal authority. *See Simmons Media Group, LLC v. Waykar, LLC*, 2014 UT App 145, ¶ 37, 335 P.3d 885; *see also* Utah R. App. P. 24(a)(9). The Mitchells' argument is limited to a conclusory statement that the district court violated rule 201(d) because the rule "mandates [that] a court shall take judicial notice of uncontroverted facts in situations such as this." However, the Mitchells do not analyze whether the declarations contain "adjudicative facts" and, as in the district court, the Mitchells have not offered any authority that would allow the court to take judicial notice of declarations filed in another action and then to consider the substance of those declarations. Accordingly, this claim of error fails.

III. Claims Dismissed on Summary Judgment

¶47 Next, the Mitchells challenge the district court's summary judgment against them on their third cause of action.[10] Summary judgment is appropriate if, viewing "the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party," *Orvis v. Johnson*, 2008 UT 2, ¶ 6, 177 P.3d 600 (citation and internal quotation marks omitted), "there is no

10. Without additional analysis, the Mitchells state that they challenge the district court's order with regard to the ninth cause of action for "breach of contract." The district court dismissed the ninth cause of action because it "depended on the success of the Third Cause of Action." Because we affirm the dismissal of the third cause of action, we do not address the ninth.

genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law," Utah R. Civ. P. 56(a).[11]

A. Summary Judgment in Favor of Bank Defendants

¶48 The Mitchells first challenge the merits of the district court's summary judgment in favor of Bank Defendants on the third cause of action. Specifically, the Mitchells contend that the district court erred in granting summary judgment on their third cause of action for "estoppel and breach of good faith and fair dealing," which was based on their assertion that the defendants had caused them to stop making their mortgage payments. At the outset, the district court noted that the third cause of action was "unclear as to precisely its legal theory or the relief sought" but concluded that "all possible legal theories rely on the alleged misrepresentation that occurred in March 2010 regarding a possible loan modification." The court later determined that the third cause of action could not survive summary judgment under a theory of promissory estoppel or a theory of breach of the covenant of good faith and fair dealing. The Mitchells raise arguments on appeal related to both legal theories.

1. Promissory Estoppel

¶49 The Mitchells' arguments related to the theory of promissory estoppel appear directed at one element, namely, that the "plaintiff acted with prudence and in reasonable reliance on a promise made by the defendant." *Youngblood v. Auto-Owners Ins. Co.*, 2007 UT 28, ¶ 16, 158 P.3d 1088 (citation and internal quotation marks omitted). They then argue that the court misallocated the burden on summary judgment. The Mitchells further argue that the district court inappropriately

11. Although rule 56 of the Utah Rules of Civil Procedure has been amended since the time the district court granted summary judgment in this case, those changes are not relevant to our analysis.

weighed the evidence against them in concluding that they could not show the existence of a definite and certain promise to support a promissory estoppel claim.

¶50 In particular, the Mitchells contend that the "court never determined whether defendants met their initial burdens" and that the Mitchells "therefore were not even under any obligation to prove any factual dispute." Relying on *Orvis v. Johnson*, 2008 UT 2, 177 P.3d 600, they state that a movant must "'affirmatively provide factual evidence establishing that there is no genuine issue of material fact.'" (Quoting *id.* ¶ 16.) The Mitchells' argument, however, does not account for the fact that they would carry the burden of proof at trial on the third cause of action. The same case cited by the Mitchells clarified that

> [a] summary judgment movant, *on an issue where the nonmoving party will bear the burden of proof at trial*, may satisfy its burden on summary judgment by showing, by reference to "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," that there is no genuine issue of material fact.

Orvis, 2008 UT 2, ¶ 18 (emphasis added) (quoting an earlier version of rule 56 of the Utah Rules of Civil Procedure). "Upon such a showing, whether or not supported by additional affirmative factual evidence, the burden then shifts to the nonmoving party, who 'may not rest upon the mere allegations or denial of the pleadings,' but 'must set forth specific facts showing that there is a genuine issue for trial.'" *Id.* (emphasis omitted) (quoting an earlier version of rule 56).

¶51 Because the Mitchells as the nonmoving party would carry the burden of proof at trial, Bank Defendants, as the moving party, met their burden on summary judgment by showing, by reference to the evidence, "that there [was] no genuine issue of material fact." *Id.* To successfully defend against Bank Defendants' motion, the Mitchells therefore had an

obligation to "'set forth specific facts showing that there [was] a genuine issue for trial.'" *Id.* (quoting an earlier version of rule 56). The Mitchells have not demonstrated that the district court misallocated the parties' burdens on summary judgment.

¶52 Likewise, the Mitchells have not demonstrated that the district court inappropriately weighed the evidence. They assert that the district court weighed the evidence because it did not accept their allegation that BAC instructed them to miss mortgage payments in order to obtain a loan modification. They also focus on the district court's statements that the Mitchells' testimony was "unclear," "less than certain," and "imprecise."

¶53 "Promissory estoppel involves a clear and definite promise . . . ." *Youngblood*, 2007 UT 28, ¶ 19 (citation and internal quotation marks omitted). Thus, a "party claiming estoppel must present evidence showing that an offer or promise was made on which the party based his or her reliance." *Nunley v. Westates Casing Servs., Inc.*, 1999 UT 100, ¶ 36, 989 P.2d 1077. "Likewise, the alleged promise must be reasonably certain and definite, and a claimant's subjective understanding of the promissor's statements cannot, without more, support a promissory estoppel claim." *Id.*

¶54 The district court's decision rested on its conclusion that "there is no evidence supporting a clear promise or representation by [BAC] to unconditionally modify the loan." Instead, the evidence, including the Mitchells' testimony, indicated that BAC told the Mitchells that "once [they] missed two payments, [they] could *apply for* a loan modification." Because the evidence showed that the Mitchells, at most, had a "subjective understanding that they had been assured that a loan modification would occur," the district court determined as a matter of law that the Mitchells "could not reasonably rely on a promise that is so indefinite that it lacks—literally—any terms."

¶55 In this regard, the context of the district court's statements—that the Mitchells were "unclear," "less than certain," and "imprecise"—matters. The court stated that the

Mitchells' testimony on the issue of whether BAC promised them a loan modification was "less than certain," noting that "[Wade] Mitchell testified that someone from [BAC] promised them a loan modification, and so he and his wife 'expected' a loan modification." And it was "unclear from [the Mitchells'] own testimony whether [BAC] actually promised them an unconditional loan modification, or whether it simply agreed to discuss the matter." The court also indicated that the Mitchells' affidavits were "similarly imprecise" because Wade Mitchell testified that "they were only promised the ability to *apply for* a loan modification." Given this context and the court's task of evaluating whether the Mitchells had provided specific facts showing that BAC made a promise on certain terms, we are not convinced that the court improperly weighed the evidence.

¶56 The Mitchells do not identify any evidence that the district court failed to consider or any evidence that unequivocally indicates that BAC, without condition, promised to modify the loan on certain terms. The evidence, even construed in the light most favorable to the Mitchells, does not show that there was a genuine issue of material fact, because any instruction given by BAC to the Mitchells does not meet the legal standard for a definite and certain promise required for a promissory estoppel claim. *See id.* As a consequence, the district court did not err in concluding that no genuine issue of fact existed and that Bank Defendants were entitled to judgment as a matter of law on this theory.

2. Breach of the Covenant of Good Faith and Fair Dealing

¶57 The Mitchells also challenge the district court's summary judgment decision on the third cause of action on the theory of a breach of the covenant of good faith and fair dealing. They contend that the court misapplied the law and should have concluded that "the allegations show defendants intentionally rendered it difficult if not impossible for [Paula Mitchell] to receive the fruits of her Loan by falsely inducing her into 'defaulting.'" They also make the contrary argument that their

claims "are not based on the existing Loan" but instead are "based on defendants' misconduct impairing the Loan by fraudulently inducing a 'default' in order to profit from it."

¶58 "Under the covenant of good faith and fair dealing, each party impliedly promises that he will not intentionally or purposely do anything which will destroy or injure the other party's right to receive the fruits of the contract." *Iota, LLC v. Davco Mgmt. Co.*, 2012 UT App 218, ¶ 32, 284 P.3d 681 (citation and internal quotation marks omitted). "[O]ne party may not render it difficult or impossible for the other to continue performance and then take advantage of the non-performance he has caused." *Id.* (alteration in original) (citation and internal quotation marks). Some limitations on the covenant of good faith and fair dealing exist:

> the Covenant cannot be used (1) to create new or independent rights or obligations to which the parties have not agreed in the contract; (2) to establish rights or duties inconsistent with the express terms of the contract; or (3) to require a party to exercise an express contractual right in a manner detrimental to its own interests in order to benefit the other party to the contract.

Cook Assocs., Inc. v. Utah Sch. & Inst. Trust Lands Admin., 2010 UT App 284, ¶ 16, 243 P.3d 888 (citing *Oakwood Vill. LLC v. Albertsons, Inc.*, 2004 UT 101, ¶ 45, 104 P.3d 1226). Consistent with these limitations, this court has recognized that "[d]eclining to give up rights granted by a contract does not constitute a breach of the covenant of good faith and fair dealing." *Iota*, 2012 UT App 218, ¶ 33.

¶59 Despite the Mitchells' statement that their claim is "not based on the existing Loan," they do not appear to contend that the implied duty arises out of any separate agreement to modify the loan. Although vague, we understand the substance of the Mitchells' argument to center on an implied duty arising out of

the original loan agreement. The Mitchells theorize that Bank Defendants breached the implied duty of good faith and fair dealing by inducing them to default with the information that the Mitchells could obtain a loan modification only if they first defaulted.

¶60 Considering the evidence in the light most favorable to the Mitchells and thus assuming that Bank Defendants told the Mitchells that they could not even apply for a loan modification unless they defaulted, Bank Defendants did not breach the implied duty of good faith and fair dealing as a matter of law. The information regarding a possible loan modification did not render it impossible for the Mitchells to continue making their mortgage payments. Indeed, according to Wade Mitchell's affidavit, the Mitchells' default was at least in part attributable to the fact that "cash flow was getting tighter." Thus, Bank Defendants' conduct did not impede the Mitchells from performing their obligations under the contract or render it impossible for them to perform. *See id.* ¶¶ 32–33. Furthermore, the district court correctly concluded that "no such duty can be implied out of [the Mitchells'] existing loan as a matter of law," because the Mitchells' position—that Bank Defendants could not foreclose after their missed payments—would require Bank Defendants to forgo rights granted by the original loan agreement. *See id.* ¶ 33. Accordingly, we affirm the district court's dismissal of the Mitchells' third cause of action based on the theory of the covenant of good faith and fair dealing.[12]

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12. The Mitchells also suggest that the district court should have accepted certain allegations in the complaint as true in its consideration of the third cause of action. However, because the Mitchells have not demonstrated that they preserved this argument, we do not consider it. *See* Utah R. App. P. 24(a)(5) (requiring the appellant's brief to contain "citation to the record showing that the issue was preserved in the trial court" or a basis for addressing an unpreserved issue); *438 Main St. v. Easy*

(continued…)

B. Summary Judgment in Favor of Howell

¶61 The Mitchells also challenge the district court's order granting summary judgment to Howell, the attorney who on occasion conducted trustee's sales on behalf of ReconTrust. They attack the court's ruling on both procedural and substantive grounds.

¶62 As for their procedural argument, the Mitchells contend that Howell waived the defense of failure to state a claim by not raising it sooner. In support, they rely on rule 12(h) of the Utah Rules of Civil Procedure, which provides, "A party waives all defenses and objections not presented either by motion or by answer or reply . . . ." Utah R. Civ. P. 12(h). "A defense of failure to state a claim, however, falls under a procedural exception . . . ." *Mack v. Utah State Dep't of Commerce*, 2009 UT 47, ¶ 14, 221 P.3d 194 (citing Utah R. Civ. P. 12(h)). The rule specifies that "the defense of failure to state a claim upon which relief can be granted . . . may also be made by a later pleading . . . or by motion for judgment on the pleadings or at the trial on the merits." Utah R. Civ. P. 12(h). Accordingly, a "defense of failure to state a claim . . . may be raised any time before the court or jury determines the validity of a party's claim." *Mack*, 2009 UT 47, ¶ 14 (citing Utah R. Civ. P. 12(h)). Because Howell raised the defense by moving for summary judgment before the court ruled on the merits of the claims against him, the Mitchells have not shown that the district court erred in refusing to strike Howell's motion on the ground that Howell had waived the defense of failure to state a claim.

¶63 Regarding the merits, the Mitchells contend that the district court erred in concluding that "Howell was entitled to [the] same result as [the] co-defendants." The Mitchells

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(…continued)
Heat, Inc., 2004 UT 72, ¶ 51, 99 P.3d 801 ("Issues that are not raised at trial are usually deemed waived.").

acknowledge the court's determination that they had "not pointed to an independent cause of action against Howell that was not addressed in the prior rulings." Nevertheless, they contend that the court erred because "each 'cause of action' is still a claim against Howell personally."

¶64 The Mitchells have failed to demonstrate that the district court erred in concluding that "the reasoning of [the rulings with regard to Bank Defendants] applies with equal force to Howell and compels a similar result." They also have not addressed the court's rationale that "the Complaint alleges that Howell was merely acting on behalf of ReconTrust and is devoid of any allegations that Howell engaged in conduct that would somehow create liability separate from the other Defendants." Accordingly, we affirm the district court's grant of summary judgment to Howell.

IV. Attorney Fees

¶65 Finally, the Mitchells contend that they are entitled to attorney fees under a number of legal theories: contract, the private attorney general doctrine, the common fund doctrine, and the court's inherent authority. We conclude that an award of attorney fees is not warranted here.

¶66 "As a general rule, Utah courts award attorney fees only to a prevailing party, and only when such an action is permitted by either statute or contract." *Doctors' Co. v. Drezga*, 2009 UT 60, ¶ 32, 218 P.3d 598. At the appellate level, generally "when a party who received attorney fees below prevails on appeal, the party is also entitled to fees reasonably incurred on appeal." *Robertson's Marine, Inc. v. I4 Sols., Inc.*, 2010 UT App 9, ¶ 8, 223 P.3d 1141 (citation and internal quotation marks omitted).

¶67 The district court did not award any attorney fees to the Mitchells. And on appeal, their request for attorney fees under all theories is contingent upon their success before this court. Because the Mitchells did not receive attorney fees below and

have not prevailed on appeal, we decline to award them attorney fees incurred on appeal. *See id.*

CONCLUSION

¶68 The Mitchells have not demonstrated that the district court erred in dismissing several of their causes of action upon Bank Defendants' motion to dismiss. The Mitchells have also failed to show that the district court erred in its evidentiary rulings or in granting summary judgment to the defendants on their remaining claims. Accordingly, we affirm.

VOROS, Judge (concurring):

¶69 I concur in the majority opinion. Alternatively, I believe this appeal is inadequately briefed.

¶70 For example, perhaps the Mitchells' most sympathetic claim is their claim for equitable estoppel. They assert that Bank Defendants induced them to miss monthly payments on the note and consequently should be estopped from foreclosing on the house based on those missed monthly payments. But the Mitchells' brief fails to cite any relevant legal authority, quote testimony from the record, identify the elements of equitable estoppel, or explain how a reasonable fact-finder could find each of those legal elements. They instead rely on statements such as the following: "It is believed a pattern of deliberate misconduct will come to light through discovery, which misconduct has resulted in thousands of similarly situated borrowers being duped by defendants into 'defaulting,' so that they could hijack their loans for defendants' own hidden profit scheme," and "No one could possibly consider such systematic profiteering from fraudulent statements fair or equitable."

¶71 Similarly, the Mitchells describe at some length what they call their "discovery disputes" in the trial court; the factual background and procedural history of these issues comprise seven pages of their brief. But those seven pages contain no citations to the record on appeal. The briefing of these two points typifies the Mitchells' principal brief.

¶72 An appellant's argument must contain "citations to the authorities, statutes, and parts of the record relied on." Utah R. App. P. 24(a)(9). "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." *State v. Davie*, 2011 UT App 380, ¶ 16, 264 P.3d 770 (citation and internal quotation marks omitted). "An inadequately briefed claim is by definition insufficient to discharge an appellant's burden to demonstrate trial court error." *Simmons Media Group, LLC v. Waykar, LLC*, 2014 UT App 145, ¶ 37, 335 P.3d 885. So while I concur in the majority opinion, I would in the alternative reject all the Mitchells' claims on appeal as "not adequately briefed, researched, or presented." *See State v. Lusk*, 2001 UT 102, ¶ 34, 37 P.3d 1103.

Rule 13. Counterclaim and crossclaim.

(a) Compulsory counterclaim.

(a)(1) A pleading must state as a counterclaim any claim that—at the time of its service—the pleader has against an opposing party if the claim:

(a)(1)(A) arises out of the transaction or occurrence that is the subject matter of the opposing party's claim; and

(a)(1)(B) does not require adding another party over whom the court cannot acquire jurisdiction.

(a)(2) The pleader need not state the claim if:

(a)(2)(A) when the action was commenced, the claim was the subject of another pending action, or

(a)(2)(B) the opposing party sued on its claim by attachment or other process that did not establish personal jurisdiction over the pleader on that claim, and the pleader does not assert any counterclaim under this rule.

(b) Permissive counterclaim. A pleading may state as a counterclaim against an opposing party any claim that is not compulsory.

(c) Relief sought in a counterclaim. A counterclaim need not diminish or defeat the recovery sought by the opposing party. It may request relief that exceeds in amount or differs in kind from the relief sought by the opposing party.

(d) Counterclaim maturing or acquired after pleading. The court may permit a party to file a supplemental pleading asserting a counterclaim that matured or was acquired by the party after serving an earlier pleading.

(e) Crossclaim against coparty. A pleading may state as a crossclaim any claim by one party against a coparty if the claim arises out of the transaction or occurrence that is the subject matter of the original action or of a counterclaim, or if the claim relates to any property that is the subject matter of the original action. The crossclaim may include a claim that the coparty is or may be liable to the crossclaimant for all or part of a claim asserted in the action against the crossclaimant.

(f) Joining additional parties. Rules 19 and 20 govern the addition of a person as a party to a counterclaim or crossclaim.

(g) Separate trials; separate judgments. If the court orders separate trials under Rule 42, it may enter judgment on a counterclaim or crossclaim under Rule 54(b) when it has jurisdiction to do so, even if the opposing party's claims have been dismissed or otherwise resolved.

Effective November 1, 2016.

57-1-23 Sale of trust property -- Power of trustee -- Foreclosure of trust deed.

The trustee who is qualified under Subsection 57-1-21(1)(a)(i) or (iv) is given the power of sale by which the trustee may exercise and cause the trust property to be sold in the manner provided in Sections 57-1-24 and 57-1-27, after a breach of an obligation for which the trust property is conveyed as security; or, at the option of the beneficiary, a trust deed may be foreclosed in the manner provided by law for the foreclosure of mortgages on real property. The power of sale may be exercised by the trustee without express provision for it in the trust deed.

Amended by Chapter 236, 2001 General Session

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

THE BANK OF NEW YORK MELLON, fka THE BANK OF NEW YORK, as Trustee for the Certificate Holders CWMBS Series 2006-HYB5, Plaintiff, vs. PAULA MITCHELL, AMERICA FIRST FEDERAL CREDIT UNION, PEPPERWOOD HOMEOWNER'S ASSOCIATION, and JOHN DOES 1-5, Defendants.	**RULING AND ORDER** Case No. 160902472 Judge Todd Shaughnessy

Before the court is Defendant Paula Mitchell's motion to dismiss re: waived compulsory counterclaim and in the alternative motion to dismiss re: prior exclusive jurisdiction.[1] Oral was

[1] Also before the court is Plaintiff's objection to the reply memorandum filed by Mitchell. The court agrees with Plaintiff that the reply memorandum is untimely, having been filed after a deadline agreed to by counsel for the parties. Instead of filing the reply memorandum on that date, Defendant filed a motion for a further extension of time. The same practice occurred earlier in this case – Defendant negotiated an extension of a filing deadline and then, on that deadline, filed a motion for a further extension rather than the agreed-upon memorandum. In that instance, the court extended the deadline.

The court encourages – indeed requires – counsel to confer about matters such as extensions of filing deadlines, expects that reasonable requests will be honored, and also expects counsel to adhere to Standard 14 of the Standards of Professionalism and Responsibility. But when an extension has been negotiated by counsel, that deadline governs and absent the most

held November 16, 2016. Douglas R. Short represented Defendant, Brad G. DeHaan represented Plaintiff The Bank of New York Mellon ("BNYM"), and Greg Howe appeared on behalf of American First Federal Credit Union. Having considered the briefing and arguments of counsel, and for good cause, the court now rules as follows.

On January 19, 2011, following commencement of non-judicial foreclosure proceedings by BNYM, Mitchell filed suit in West Jordan, case no. 110400816 ("*Mitchell I*"), seeking a judicial determination that BNYM lacks any interest in the subject property and quieting title in favor of Mitchell. The trial court granted BNYM's motion to dismiss most of the claims and later granted summary judgment in its favor on the remaining claims. The Utah Court of Appeals affirmed in *Mitchell v. ReconTrust Co. NA*, 2016 UT App 88, 373 P.3d 189. Specifically, the court of appeals upheld the district court's determination that BNYM, and others, have a "'valid, enforceable claim against the Property based on the trust deed.'" *Mitchell,* 2016 UT App 88, ¶ 34 (quoting district court opinion). The Court of Appeals prematurely issued an order of remittitur on August 16, 2016, but recalled the remittitur the following day. Mitchell filed a petition for a writ of certiorari with the Utah Supreme Court (case no. 20160635-SC); the supreme court has yet to rule on the

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truly exceptional of circumstances, the court will not grant a further extension. Doing so is, in this court's view, completely inconsistent with the spirit and letter of the Standards of Professionalism and Civility, and has the untoward effect of encouraging gamesmanship. For that reason, the objection to the reply memorandum is sustained and the court declines to consider it. The matter, however, is academic this time because the court has read the reply memorandum and nothing in it would cause the court to reach a result different than what is explained here.

petition. BNYM filed this action on April 15, 2016, seeking judicial foreclosure of the Property at issue in *Mitchell I*.[2]

Mitchell raises two grounds for dismissal: (1) BNYM was required to raise its judicial foreclosure claim in *Mitchell I*; and (2) the doctrine of prior exclusive jurisdiction prevents this court from exerting jurisdiction over the same property, parties, and claims at issue in *Mitchell I*.

Rule 13(a) of the Utah Rules of Civil Procedure requires a pleading to state as a counterclaim "any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject-matter of the opposing party's claim . . . ." Utah R. Civ. P. 13(a). Mitchell argues BNYM was required by Rule 13(a) to bring its claim for judicial foreclosure as a counterclaim in *Mitchell I* because it arises from the same transaction or occurrence against the same parties. The issue raised is whether a judicial foreclosure claim is a compulsory counterclaim that, if not timely asserted, is waived. No Utah cases have addressed the issue; accordingly, the court "may look to decisions under the federal rules for guidance" since the Utah Rules of Civil Procedure are fashioned after the Federal Rules of Civil Procedure. *438 Main Street v. Easy Heat, Inc.*, 2004 UT 72, ¶ 64, 99 P.3d 801. In *Douglas v. NCNB Texas Nat. Bank*, the Fifth Circuit Court of Appeals adopted the interpretation of Texas state

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[2] BNYM also brought a breach of contract action against Mitchell, seeking payoff of the balance due under the Note.

courts, holding that judicial foreclosure is not a compulsory counterclaim. *Douglas v. NCNB Texas Nat. Bank*, 979 F.2d 1128, 1130 (5th Cir. 1992). The court reasoned that:

> [T]he mortgagor should not be permitted to destroy or impair the morgagee's contractual right to foreclosure under the power of sale by the simple expedient of instituting a suit, whether groundless or meritorious, thereby compelling the mortgagee to abandon the extra-judicial foreclosure when he had the right to elect, nullifying his election, and permitting the mortgagor to control the option as to remedies.

Id. (quoting *Kaspar v. Keller*, 466 S.W.2d 326, 329 (Tex. Civ. App. Waco 1971)). The purpose of this rule is to prevent the borrower depriving the lender its choice of remedies, *id.*, and has been adopted by other jurisdictions. *See, e.g., Erickson v. Ditech Financial, LLC*, -- P.3d ---, 2016 WL 4059607 (D. Arizona 2016) ("[I]t cannot be concluded that, by seeking declaratory judgment that [lender] was not the Note Holder or Beneficiary of the Deed of Trust, [borrower] forced [lender] to elect judicial foreclosure or forever waived its right to do so."); *Chase Mortg. Company-West v. Bufalini*, 2004 WL 2866978 (Haw. Ct. App. 2004) (unpublished) (judicial foreclosure is not a compulsory counterclaim); *In re Draffen*, 731 S.E.2d 435, 438 (N.C. Ct. App. 2012) (holding that the federal rules do not require lender to filed a foreclosure action as a compulsory counterclaim in a federal action thus state action seeking judicial foreclosure not barred by Rule 13(a)); *Ruby Valley Nat. Bank v. Wells Fargo Delaware Trust Co., N.A.*, 317 P.3d 174 (Mont. 2014) (finding senior lienholder was not obligated to assert a compulsory counterclaim for judicial foreclosure during a foreclosure action by junior lienholder because he was not a necessary party to the prior action

and rule 13 does not prohibit senior lienholder from later initiating a foreclosure action against the subject property).

Like the Texas statute at issue *Douglas*, Utah law grants a lender the option of judicially or non-judicially foreclosing on property. Utah Code § 57-1-23 (LexisNexis 2016) ("The trustee who is qualified . . . may exercise and cause the trust property to be sold in the manner provided in Sections 57-1-24 [non-judicial foreclosure] and 57-1-27 [judicial foreclosure] . . . ."). Reading Rule 13(a) in the manner requested by Mitchell would eliminate BNYM's ability to select non-judicial or judicial foreclosure and would permit Mitchell (and all, similarly-situated borrowers) to control the lender's foreclosure rights by simply filing a suit concerning the trust deed. Because the lender has the *option* of selecting judicial or non-judicial foreclosure, and because the borrow is not entitled to deprive the lender of its choice, the court concludes that a counterclaim for judicial foreclosure is not compulsory and BNYM was not obligated to assert it as a counterclaim in *Mitchell I.* Mitchell's motion to dismiss is denied.

Mitchell alternatively contends this action must be dismissed because there is not yet a final, non-appealable order in *Mitchell I*, and the real property at issue, characterized by Mitchell as the *res* of this judicial foreclosure proceeding, remains before the court in *Mitchell I*, so the claims are barred by the doctrine of prior exclusive jurisdiction. The doctrine of prior exclusive jurisdiction appears to have been first recognized in *Escalante Co. v. Kent*, 7 P.2d 276 (Utah 1932). There, a suit involving foreclosure on a mortgage was brought in Iron County and a later suit was brought in Salt Lake County. The Utah Supreme Court stated:

> Where two actions between the same parties, on the same subject, and to test the same rights, are brought in different courts having concurrent jurisdiction, the court which first acquires jurisdiction . . . retains its jurisdiction and may dispose of the whole controversy, and no court of coordinate power is at liberty to interfere with its action.

Escalante Co., 7 P.2d at 278; *see also* 21 C.J.S. Courts §§ 255-57 (2016) (the court first acquiring jurisdiction, particularly when court must have control of property to adjudicate the action, is entitled to maintain it to the exclusion of other coordinate courts). The Supreme Court concluded the Salt Lake County case could not proceed until the suit in Iron County had been resolved. This rule rests upon "comity and the necessity of avoiding conflict in the execution of judgments by independent courts, and is a necessary one because any other rule would unavoidably lead to perpetual collision and be productive of most calamitous results." *Id.* Similarly, in *Nielson v. Schiller*, plaintiff was restrained from proceeding with his foreclosure suit against defendant in a second county because the first county's jurisdiction had already been invoked. *Nielson*, 66 P.2d 365, 367 (Utah 1937). In this situation, the Utah Supreme Court admonished that the second-place court should have stayed its proceedings until termination of the case pending in the first-place court. *Id.* at 368.

This case falls within the reach of the prior exclusive jurisdiction rule. *Mitchell I* involves the same parties, the same property, and the same general subject matter – BNYM's right to foreclose on the property. The property is currently in the control of the *Mitchell I* court. BNYM argues *Mitchell I* has been disposed, all claims have been dismissed or summary judgment granted in

their favor by the trial court and affirmed by the Court of Appeals. However, there is not yet a final, non-appealable judgment, and that cannot occur until the Court of Appeals has remitted the action. While Utah's appellate courts have never set out a comprehensive scope and purpose of remittitur, it has opined the primary effect of remittitur "is to provide a clear indication that the trial court has regained jurisdiction to take action consistent with the mandate." *State v. Lara*, 2005 UT 70, ¶ 13, 124 P.3d 243 (citing *Chase Manhattan Bank v. Principal Funding Corp.*, 2004 UT 9, ¶ 9, 89 P.3d 109). Similarly, Rule 36 of the Utah Rules of Appellate Procedure requires the Court of Appeals not to issue the remittitur until "after expiration of the time for filing a petition for writ of certiorari" and, if a petition for writ of certiorari is timely filed, that filing automatically stays remittitur until the Supreme Court's disposition of the petition. Utah R. App. P. 36(a)(2). Thus, while the petition is pending, no remittitur may issue, and jurisdiction remains with the appellate courts.

Mitchell contends that the prior exclusive jurisdiction rule requires this court to dismiss this case. The court disagrees. Dismissal is not the appropriate remedy in this situation, none of the cases cited by Mitchell require or even suggest such action, and dismissal of this case could have unanticipated and unintended collateral consequences. The Utah Supreme Court in *Nielsen* stated that in these circumstances the second-place court should stay the proceeding pending resolution of the first-place action. Staying the action pending the resolution of the petition for certiorari, as opposed to dismissing it, is not only consistent with the Utah Supreme Court's cases on the

subject, it is also the path most likely "to achieve the just, speedy, and inexpensive determination" of the parties' dispute. Utah R. Civ. P. 1. Accordingly, Mitchell's motion to dismiss is denied.

Neither party has explicitly requested a stay, as an alternative to dismissal. At oral argument, the court asked counsel about the issue, and neither party requested requested that relief then. In Plaintiff's case, she disavowed that remedy, insisting that the court must dismiss the case. The court is reluctant to grant a remedy that neither party has requested, but always retains the inherent authority to do so. For that reason, and based on that inherent authority, the court will stay further proceedings in this case until there is a final, non-appealable order in *Mitchell I*. At that point, either party may file a motion to lift the stay. And to ensure that neither party's rights are adversely affected by the court's decision to grant a stay even though the parties did not request it, the court will permit either party to file a motion to lift the stay should they believe circumstances warrant.

This ruling and order is the order of the court and no additional order is required to be prepared.

DATED: November 21, 2016.

THIRD JUDICIAL DISTRICT COURT

Judge Todd Shaughnessy

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 160902472 by the method and on the date specified.

MAIL: PEPPERWOOD HOMEOWNERS ASSOCIAT RA: TEERLINK PROPERTY SERVICES LLC 2500 PEPPERWOOD DR SANDY, UT 84092

MANUAL EMAIL: BRAD G DEHAAN brad.dehaan@lundbergfirm.com
MANUAL EMAIL: CRAIG H HOWE chowe@joneswaldo.com
MANUAL EMAIL: HILLARY R MCCORMACK hillary.mccormack@lundbergfirm.com
MANUAL EMAIL: BLAKE D MILLER bmiller@joneswaldo.com
MANUAL EMAIL: DOUGLAS R SHORT mail@consumerlawutah.com

Date: 11/21/2016 /s/ MANDY ACEVEDO

Deputy Court Clerk

3RD DISTRICT COURT - SALT LAKE
SALT LAKE COUNTY, STATE OF UTAH

THE BANK OF NEW YORK MELLON FK,	:	RULING
Plaintiff,	:	MINUTE ENTRY
	:	
vs.	:	Case No: 160902472
PAULA A MITCHELL,	:	Judge: TODD M SHAUGHNESSY
Defendant.	:	Date: December 8, 2016

Before the court is plaintiff's motion to lift stay and submit for decision. The motion is based on the Supreme Court's denial of defendant's petition for wreit of certiorari, and the Utah Court of Appeals' remittitur dated December 7, 2016. Although defendant objects to the motion as premature, and apparently envisions further briefing on the subject, further briefing or argument is unnecessary. The conditions for lifting the stay imposed by the court's November 21, 2016, order plainly have been satisfied and the stay is lifted. And with that, the court hereby denies defendant's motion to dismiss. No further order is required.

End Of Order - Signature at the Top of the First Page

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 160902472 by the method and on the date specified.

EMAIL: HILLARY R MCCORMACK hillary.mccormack@lundbergfirm.com
EMAIL: BLAKE D MILLER bmiller@joneswaldo.com
EMAIL: DOUGLAS R SHORT mail@consumerlawutah.com

Date: 12/08/2016 /s/ TODD M SHAUGHNESSY

Deputy Court Clerk

The Order of the Court is stated below:
Dated: December 08, 2016 03:25:29 PM **/s/** TODD M SHAUGHNESSY
District Court Judge

3RD DISTRICT COURT - SALT LAKE
SALT LAKE COUNTY, STATE OF UTAH

THE BANK OF NEW YORK MELLON FK,	:	RULING
Plaintiff,	:	MINUTE ENTRY
	:	
vs.	:	Case No: 160902472
PAULA A MITCHELL,	:	Judge: TODD M SHAUGHNESSY
Defendant.	:	Date: December 8, 2016

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EMAIL: DOUGLAS R SHORT mail@consumerlawutah.com

Date: 12/08/2016 /s/ TODD M SHAUGHNESSY

Deputy Court Clerk

IN THE UTAH COURT OF APPEALS

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PAULA MITCHELL,	)	
Petitioner,	)	ORDER
v.	)	
BANK OF NEW YORK MELLON,	)	Case No. 20161026-CA
Respondent.	)	

Before Judges Orme, Christiansen, and Mortensen.

This matter is before the court on a petition for permission to appeal from an interlocutory order filed pursuant to Rule 5 of the Utah Rules of Appellate Procedure.

IT IS HEREBY ORDERED that the petition for permission to appeal is denied.

DATED this 22nd day of December, 2016.

FOR THE COURT:

Gregory K. Orme, Judge

CERTIFICATE OF SERVICE

I hereby certify that on December 22, 2016, a true and correct copy of the foregoing ORDER was deposited in the United States mail or was sent by electronic mail to be delivered to:

BRAD G. DEHAAN
HILLARY R MCCORMACK
LUNDBERG & ASSOCIATES
brad.dehaan@lundbergfirm.com
hillary.mccormack@lundbergfirm.com

DOUGLAS R SHORT
ATTORNEY AT LAW
mail@consumerlawutah.com

BLAKE D. MILLER
CRAIG H HOWE
MILLER TOONE PC
bmiller@joneswaldo.com
chowe@joneswaldo.com

THIRD DISTRICT, SALT LAKE
ATTN: JULIE RIGBY AND CHERYL AIONO
chrisd@utcourts.gov
cheryla@utcourts.gov, julier@utcourts.gov

By

Ashley Dovidauskas
Judicial Assistant

Case No. 20161026
THIRD DISTRICT, SALT LAKE, 160902472

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

THE BANK OF NEW YORK MELLON, fka THE BANK OF NEW YORK, as Trustee for the Certificate Holders CWMBS Series 2006-HYB5, Plaintiff, vs. PAULA MITCHELL, AMERICA FIRST FEDERAL CREDIT UNION, PEPPERWOOD HOMEOWNER'S ASSOCIATION, and JOHN DOES 1-5, Defendants.	**RULING AND ORDER** Case No. 160902472 Judge Todd Shaughnessy

Before the court is Defendant Paula Mitchell's motion to dismiss. The previously scheduled hearing is cancelled and the request for oral argument is denied because the court finds that the issue raised by the motion has been authoritatively decided. Utah R. Civ. P. 7(h) (LexisNexis 2016) ("The court must grant a request for a hearing on a motion . . . that would dispose of the action or any claim or defense in the action unless the court finds that . . . the issue has been authoritatively decided."). Having considered the briefing, and for good cause, the court now rules as follows.

Defendant raises two grounds under Rule 12(b)(6) seeking to dismiss the claims against her: (1) the claims are time barred by the statute of limitations; and (2) Plaintiff lacks standing to bring this action. Defendant withdrew her statute of limitations defense after conceding there are

"factual disputes at issue that will likely require discovery to resolve[,]" therefore the court does not considered this argument as a basis for dismissing the current action. Defendant's second argument maintains that Plaintiff lacks standing to seek judicial foreclosure because it lacks any ownership interest in the Note and has no beneficial ownership interests in the trust deed such that it may seek foreclosure under Utah Code section 57-1-23. Defendant argues it was assigned MERS's beneficial interest in the trust (which includes the right to foreclose on the property) and, therefore, has standing to pursue this action. Defendant asks this court to deny the motion on the basis of collateral estoppel, since this issue was previously raised in *Mitchell v. ReconTrust*, 2016 UT App 88, 373 P.3d 189.

The party seeking to invoke collateral estoppel must show that:

> (i) [T]he party against whom issue preclusion is asserted must have been a party to . . .the prior adjudication; (ii) the issue decided in the prior adjudication must be identical to the one presented in the instant action; (iii) the issue in the first action must have been completely, fully, and fairly litigated; and (iv) the first suit must have resulted in a final judgment on the merits."

Snyder v. Murray City Corp., 2003 UT 13, ¶ 35, 73 P.3d 325. In *Mitchell*, Defendant alleged that "because MERS and its assignee [Plaintiff] lacked any beneficial ownership interest in the debt, MERS and [Plaintiff] could not foreclose on the property." *Mitchell*, 2016 UT App 88, ¶ 18. The Court of Appeals concluded that, regardless of whether MERS satisfied the statutory definition of a beneficiary, the trust deed's terms gave it, and its assignee Plaintiff, the authority to foreclose on the property. *Id.* ¶¶ 20 n.5, 22-23. This same issue underpins Defendant's standing argument.

Regardless of whether Plaintiff meets the statutory definition of "beneficiary" for purposes of section 57-1-23, the trust deed gives it the authority to foreclose on the property.[1] The *Mitchell* case involved the same parties, resulted in a final judgment on the merits,[2] and was completely, fully, and fairly litigated. Having satisfied the elements of collateral estoppel, Plaintiff has demonstrated it has standing to bring this action under Utah Code section 57-1-23 because it has the right to foreclose and sell the property through the trust deed, irrespective of whether it meets the statutory definition of "beneficiary." Accordingly, Defendant's motion to dismiss is denied.

This ruling and order is the order of the court and no additional order is required to be prepared in this matter.

DATED: January 17, 2017.

THIRD JUDICIAL DISTRICT COURT

Judge Todd Shaughnessy

STATE OF UTAH THIRD DISTRICT COURT SALT LAKE CITY

[1] This section provides that a judicial foreclosure may be sought by a "trustee who is qualified under Subsection 57-1-21(1)(a)(i) or (iv) . . . or, at the option of the beneficiary . . . in the manner provided by law for the foreclosure of mortgages on real property." Utah Code § 57-1-23 (LexisNexus 2016). "Beneficiary" is denied for purposes of this section in section 57-1-19, which was directly at issue in *Mitchell*, 2016 UT App 88, ¶ 20.

[2] On December 2, 2016, the Utah Supreme Court denied Defendant's Petition for Writ of Certiorari making the decision in *Mitchell* a final, non-appealable order.

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 160902472 by the method and on the date specified.

MANUAL EMAIL: BRAD G DEHAAN brad.dehaan@lundbergfirm.com
MANUAL EMAIL: CRAIG H HOWE chowe@joneswaldo.com
MANUAL EMAIL: HILLARY R MCCORMACK hillary.mccormack@lundbergfirm.com
MANUAL EMAIL: BLAKE D MILLER bmiller@joneswaldo.com
MANUAL EMAIL: DOUGLAS R SHORT mail@consumerlawutah.com

Date: 01/17/2017 /s/ MARK PARADISE

Deputy Court Clerk

Brad G. DeHaan (USB No. 8168)
Hillary R. McCormack (USB No. 11719)
LUNDBERG & ASSOCIATES, PC
Attorneys for Plaintiff
3269 South Main Street, Suite 100
Salt Lake City, Utah 84115
Telephone: (801) 263-3400
brad.dehaan@Lundbergfirm.com

Attorneys for Plaintiff
Parcel No. 28-22-203-047
L&A Case No. 14.64383.2/JAT

IN THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE DEPARTMENT
SALT LAKE COUNTY, STATE OF UTAH

THE BANK OF NEW YORK MELLON fka THE BANK OF NEW YORK, AS TRUSTEE FOR THE CERTIFICATEHOLDERS CWMBS SERIES 2006-HYB5, Plaintiff, vs. PAULA A. MITCHELL, AMERICA FIRST FEDERAL CREDIT UNION, PEPPERWOOD HOMEOWNER'S ASSOCIATION, AND JOHN DOES 1-5, Defendants	REQUEST FOR JUDICIAL NOTICE Civil No. 160902472 Judge Todd M. Shaughnessy

Pursuant to Rule 201 of the Utah Rules of Evidence, plaintiff The Bank of New York Mellon fka The Bank of New York, as Trustee for the Certificateholders CWMBS Series 2006-HYB5 ("BNYM"), by and through its counsel, hereby respectfully requests the Court take judicial notice of the following:

1. The Order Denying Plaintiff's Motion entered on February 28, 2014, in Case No. 110400816, Third District Court, State of Utah, a copy of which is attached hereto as Exhibit A.

2. The Order entered on January 14, 2015, in Case No. 20140113, Utah Court of Appeals, State of Utah, a copy of which is attached hereto as Exhibit B.

3. The Utah Court of Appeals decision in *Mitchell v. ReconTrust Co. NA,* 2016 UT App 88, 373 P.3d 189, a copy of which is attached hereto as Exhibit C.

DATED this 7th day of March, 2017.

LUNDBERG & ASSOCIATES, PC

Brad G. DeHaan
Attorney for Plaintiff

CERTIFICATE OF MAILING

I certify that on the 7th day of March, 2017, I caused a copy of the foregoing instrument to be mailed, postage prepaid, or via electronic service, to the following:

Douglas Short
2290 East 4500 South, Ste. 220
Holladay, Utah 84117
mail@consumerlawutah.com

Blake D. Miller
Craig H. Howe
Jones Waldo
170 S. Main St., Suite 1500
Salt Lake City, Utah 84101-1644
chowe@joneswaldo.com

bmiller@joneswaldo.com

Pepperwood Homeowners Association
R/A Teerlink Property Services, LLC
2500 Pepperwood Dr.
Sandy, Utah 84092

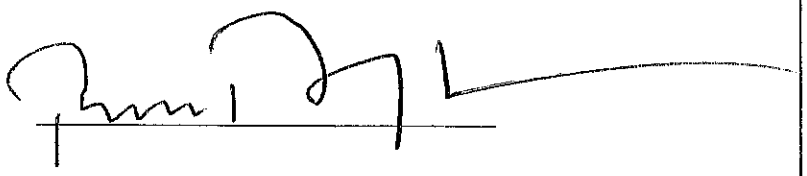

EXHIBIT "A"

THIRD DISTRICT COURT IN AND FOR SALT LAKE COUNTY
WEST JORDAN DEPARTMENT, STATE OF UTAH

Paula A Mitchell and Wade Mitchell Plaintiffs	:	Order Denying Plaintiff's Motion
Recontrust Company, N.A., a national association; The Bank of New York Mellon as Trustee for the Certificate Holders CWMBS Series 2006-HYB5; Armand J. Howell, an individual; America's Wholesale Lender, a corporation or d/b/a of Countrywide Home Loans Inc.; BAC Home Loans Servicing LP, a foreign limited partnership and DOES, 1-1000 Defendants	:	Case: 110400816 Judge Barry G Lawrence

THIS MATTER is before the Court on Plaintiffs' Motion to Correct Misstatements. The Parties briefed the issues[1] and the Court has determined that a hearing on the motion is not necessary.[2] Having reviewed the record and considering the arguments of counsel, the Court now issues the following Order.

[1] The Court notes that on February 10, 2014, plaintiffs' counsel requested an additional week to file his reply memorandum. Then, on February 18, 2014, counsel again asked for an additional week. Then, on February 25, 2014, counsel asked for yet another week, or until March 7, 2014 to file a reply. This is an improper and dilatory tactic that counsel has used in the past. In fact, in the Court's *Order Granting Summary Judgment* dated September 20, 2013, at fn. 2, the Court stated that counsel's repeated use of this delay tactic was "improper, abusive and unfair." Accordingly, it is concerning to the Court that counsel continues to employ this tactic.

[2] A hearing is not necessary because Plaintiffs' motion is not a dispositive motion. *See* Utah R. Civ. P. 7(e) (only requiring the court to hold hearings on motions "that would dispose of the action or any claim or defense in the action"). This is not a dispositive motion. The Court previously dismissed all claims and Plaintiffs' motion merely seeks to revive them.

In a series of three rulings spanning nearly two years, the Court dismissed all of Plaintiffs' claims against all Defendants. First, in a Memorandum Decision entered March 14, 2012, the Court dismissed "all claims ... except the Third Cause of Action to the extent it asserts estoppel, and the Ninth Cause of Action for Breach of Contract." Next, in an Order Granting Summary Judgment entered September 20, 2013, the Court dismissed the remaining claims against all Defendants except Armand Howell. Finally, in a Memorandum Decision and Order entered January 3, 2014, the Court dismissed all claims against Howell. The last order was a final order as it disposed of all claims against all parties and "ended the controversy between the litigants." *Loffredo v. Holt*, 2001 UT 97, ¶ 12 (citing *Kennedy v. New Era Indus., Inc.*, 600 P.2d 534, 536 (Utah 1979)). Plaintiffs now seek relief from these three rulings in a motion entitled "Motion to Correct Misstatements as to Status of the Case as to Scope of Court's Ruling."

The pending motion is not authorized by the Utah Rules of Civil Procedure and is the type of motion that was expressly forbidden by the Utah Supreme Court in *Gillett v. Price*, 2006 UT 24, 135 P.3d 861. In *Gillett*, the court ended the "common practice" among Utah attorneys to file post-judgment motions to reconsider and "other similarly titled motions." *Id.* at ¶ 7. In doing so, the court reasoned that "the form of a motion does matter because it directs the court and litigants to the specific, and available, relief sought." *Id.* at ¶ 8. The court concluded that

> [h]ereafter, when a party seeks relief from a judgment, it must turn to the rules to determine whether relief exists, and if so, direct the court to the specific relief available. Parties can no longer leave this task to the court by filing so-called motions to reconsider and relying upon district courts to construe the motions within the rules.

Id. at ¶ 8.

Here, although Plaintiffs' motion includes a passing reference in a footnote to Rule 59, Plaintiffs fail to explain why they are entitled to relief under that rule. Missing from Plaintiffs' motion is any analysis of the grounds listed in Rule 59. In substance, Plaintiffs' motion merely seeks reconsideration of the Court's earlier rulings. Because Plaintiffs' motion is not recognized by the rules and fails to "direct the court to the specific relief available," *Id.* at ¶ 8, the Court will deny the motion.

Even if the Court were to consider Plaintiffs' argument, the Court would not be persuaded to reconsider its earlier rulings.[3] The Court's three prior rulings, taken together, dismissed all claims against all defendants. Plaintiffs have failed to identify a single claim that was not disposed of by the earlier rulings. Rather, Plaintiffs have merely repackaged arguments

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[3] Plaintiffs argue that the Court's earlier rulings did not dismiss all of their claims and that any characterization to the contrary by the Court is error. Plaintiffs contend that each "Cause of Action" in their Complaint contained multiple "claims" and that the Court improperly dismissed whole "Causes of Action" without considering each "claim."

that have already been considered and rejected by the Court. The Court sees no reason to reconsider its earlier rulings or to correct any "misstatements as to the status of the case."

Based on the foregoing, the Court hereby DENIES Plaintiffs' Motion to Correct Misstatements. No additional order is necessary.

Dated this 28th of February, 2014

Barry G Lawrence
District Court Judge

STATE OF UTAH
THIRD DISTRICT COURT
WEST JORDAN

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 110400816 by the method and on the date specified.

MAIL: ALLISON R BARGER 648 E 100 S SALT LAKE CITY, UT 84102
MAIL: JENNIFER M DAVENPORT 648 E 100 S SALT LAKE CITY UT 84102
MAIL: JEFFREY S RASMUSSEN 170 S MAIN ST STE 950 SALT LAKE CITY UT 84101
MAIL: DOUGLAS R SHORT 177 E FT UNION BLVD MIDVALE UT 84047
MAIL: CHANDLER P THOMPSON 170 S MAIN ST STE 950 SALT LAKE CITY UT 84101

Date: 02/28/2014

/s/ LISA MUNK

Deputy Court Clerk

Printed: 02/28/14 10:06:50 Page 1 (last)

EXHIBIT "B"

IN THE UTAH COURT OF APPEALS

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PAULA A. MITCHELL AND WADE MITCHELL,	)	
Plaintiffs and Appellants,	)	ORDER
v.	)	Case No. 20140113-CA
RECONTRUST COMPANY, ET AL.,	)	
Defendants and Appellees.	)	

This matter is before the court on Appellants' motion to dismiss their own appeal for lack of jurisdiction, and Appellees' motion to dismiss the appeal based on Appellants' failure to timely file their brief. The district court has resolved all causes of action raised in the litigation. Further, the final order of the district court complied with rule 7(f)(2) of the Utah Rules of Civil Procedure.

IT IS HEREBY ORDERED that the motion to dismiss for lack of jurisdiction is denied.

IT IS ALSO HEREBY ORDERED that the motion to dismiss the appeal for failure to timely file a brief is denied. Appellants shall file their brief within thirty (30) days of the date of this order. However, because Appellants have already been granted two extensions to file their brief, Appellants should not expect to be granted any further extensions absent extraordinary circumstances beyond their control.

Dated this 14th day of January, 2015.

FOR THE COURT:

S. Roth

Stephen L. Roth, Judge

CERTIFICATE OF SERVICE

I hereby certify that on January 14, 2015, a true and correct copy of the foregoing ORDER was deposited in the United States mail or was sent by electronic mail to be delivered to:

JENNIFER M. DAVENPORT
ALLISON R BARGER
MATHESON & HOWELL PC
jmdavenport@stoelhw.com
abarger@mathesonhowell.com

DOUGLAS R SHORT
ATTORNEY AT LAW
mail@consumerlawutah.com

CHANDLER P. THOMPSON
JEFFREY SCOTT RASMUSSEN
AKERMAN LLP
chandler.thompson@akerman.com
jeffrey.rasmussen@akerman.com

Dated this January 14, 2015.

By _____
Judicial Assistant

Case No. 20140113
District Court No. 110400816

EXHIBIT "C"

THE UTAH COURT OF APPEALS

PAULA A. MITCHELL AND WADE MITCHELL,
Appellants,
v.
RECONTRUST COMPANY NA, THE BANK OF NEW YORK MELLON, ARMAND J. HOWELL, AMERICA'S WHOLESALE LENDER, AND BAC HOME LOANS SERVICING LP,
Appellees.

Opinion
No. 20140113-CA
Filed April 28, 2016

Third District Court, West Jordan Department
The Honorable Barry G. Lawrence
No. 110400816

Douglas R. Short, Attorney for Appellants

Chandler P. Thompson and Robert H. Scott,
Attorneys for Appellees ReconTrust Company NA, The Bank of New York Mellon, America's Wholesale Lender, and BAC Home Loans Servicing LP

Armand J. Howell, Appellee Pro Se

SENIOR JUDGE RUSSELL W. BENCH authored this Opinion, in which JUDGE MICHELE M. CHRISTIANSEN concurred.[1] JUDGE J. FREDERIC VOROS JR. concurred, with opinion.

BENCH, Senior Judge:

¶1 Paula A. Mitchell and Wade Mitchell appeal from the district court's orders dismissing several of their claims and granting summary judgment on their remaining claims in favor

1. Senior Judge Russell W. Bench sat by special assignment as authorized by law. *See generally* Utah R. Jud. Admin. 11-201(6).

of ReconTrust Company NA, the Bank of New York Mellon (BNYM), America's Wholesale Lender (AWL), BAC Home Loans Servicing LP (BAC), and Armand J. Howell. We affirm.

BACKGROUND

¶2 Paula Mitchell obtained a $1 million loan from AWL in 2006. To secure this loan, she executed a trust deed in favor of AWL on real property in Salt Lake County. The trust deed defined AWL as "Lender" and designated Stewart Matheson as the trustee. The trust deed provided that Mortgage Electronic Registration Systems Inc. (MERS) "is acting solely as nominee for Lender and Lender's successors and assigns" and "is the beneficiary under this Security Instrument." The trust deed also indicated that Paula Mitchell

> agree[d] that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property.

¶3 On August 17, 2010, MERS recorded a document assigning its beneficial interest under the trust deed to BNYM. That same day, BNYM recorded a substitution of trustee in which BNYM, as the current beneficiary, appointed ReconTrust as successor trustee under the trust deed. Also on that day, ReconTrust filed a notice of default and intent to sell the property. According to the notice, Paula Mitchell had defaulted on her loan obligation by failing to make payments since May 2010.

¶4 Attempting to prevent foreclosure, Paula and Wade Mitchell filed a complaint in January 2011 against ReconTrust,

BNYM, AWL, and BAC (collectively, Bank Defendants). The Mitchells also named Howell as a defendant, alleging that he was an attorney who "traditionally conducts foreclosure sales for ReconTrust and is expected to conduct the sale [of the Mitchells' property] unlawfully."[2] The Mitchells raised claims generally based on a theory that MERS, which was referred to as the nominee of the lender and the beneficiary under the terms of the trust deed, lacked authority to appoint BNYM as the successor beneficiary and that BNYM thus lacked authority to appoint ReconTrust as the successor trustee. The Mitchells also alleged that ReconTrust was not authorized to serve as a trustee under Utah's statutes. Further, they alleged that BAC, which was servicing the loan and was purportedly acting as an agent of BNYM, "directed [the Mitchells] to default in order to be able to seek a modification because that would be the only way to obtain a loan modification." Because they purportedly defaulted at BAC's suggestion, the Mitchells alleged that the defendants were estopped from enforcing the trust deed and note.

¶5 In terms of relief, the Mitchells sought declaratory judgments clarifying the respective rights under the trust deed and note, invalidating the substitution of trustee and notice of default, declaring the debt unsecured and that the defendants may not foreclose the trust deed, and declaring that the debt had been satisfied via insurance or credit default swaps. The

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2. Howell is mentioned only three more times in the complaint. In the claim for punitive damages, the Mitchells alleged that "Howell knows of the legal deficiencies in ReconTrust's efforts to act as a foreclosing trustee, and that ReconTrust is not qualified under the statute to serve as a foreclosing trustee, and yet he turns a blind eye to such defects and knowingly conducts unlawful sales for them." They also alleged that Howell and the other defendants "colluded in their nationwide practices" and claimed that punitive damages were necessary to "dissuade Mr. Howell from continuing to conduct unlawful sales for ReconTrust."

Mitchells also sought a permanent injunction of any foreclosure sale conducted by ReconTrust on behalf of BNYM, an order quieting title to the subject property in their names, an award of punitive damages, and an award of attorney fees incurred in defending against an improper foreclosure.

¶6 Bank Defendants moved to dismiss, arguing that the Mitchells failed to state any claims upon which relief could be granted. In support of their motion, Bank Defendants indicated that on October 6, 2011, ReconTrust had recorded a cancellation of notice of default, thereby mooting the Mitchells' claims challenging ReconTrust's authority to act as a trustee with power of sale because ReconTrust would not be conducting any further foreclosure proceedings on the Mitchells' property.

¶7 The district court granted the motion to dismiss in part and dismissed nine of the Mitchells' eleven claims. The court first determined that under the terms of the trust deed, "MERS was the statutory beneficiary and, by contract, the agent of the Lender and the Lender's successors." The court explained that "MERS assigned its interest to BNYM and [BNYM] is now, under the terms of the [trust deed] and the statute, the beneficiary." The court then addressed each cause of action. Regarding the Mitchells' first cause of action seeking a declaration with respect to the true ownership of the debt, "and by extension the authority of [the] defendants to foreclose," the district court concluded that it stated "no genuine claim for declaratory relief" because "MERS had, and BNYM has, authority to commence foreclosure under the terms of the [trust deed] and the Utah statutes." Because the tenth cause of action was "a restatement of the [f]irst," the court dismissed the tenth cause of action for the same reasons.

¶8 The court proceeded to dismiss the second and seventh causes of action, which challenged the notice of default and alleged a breach of duty by the trustee, as moot in light of the cancellation of the notice of default. As for the fourth cause of action, based on a theory that the ownership of the debt had

been severed from the trust deed, the court dismissed it because "[n]o fact is alleged suggesting that the [trust deed] has been severed from the underlying obligation, nor is there any allegation how, under Utah law, this might occur." The court also dismissed the fifth cause of action, stating that "the claim fails to allege any basis for concluding that payment by a third party to the holder of the debt satisfies" the Mitchells' obligations under the note and trust deed. The court dismissed the sixth cause of action for quiet title. It reasoned that BNYM was the beneficiary and that any securitization of the debt "does not change the [trust deed's] terms . . . making BNYM now the agent (nominee) for the current owner or owners of the debt." Moreover, the Mitchells did not dispute that their title was subject to the trust deed. Last, the court dismissed the eighth cause of action for an injunction and the eleventh cause of action for punitive damages because both were remedies rather than stand-alone claims.

¶9 The district court denied Bank Defendants' motion to dismiss with respect to two causes of action. Specifically, the court concluded that the third cause of action, which appeared to be based on theories of estoppel and breach of the implied covenant of good faith and fair dealing, possibly stated a claim because "actions by the Lender or its agents encouraging [the Mitchells] to default may constitute a modification of the underlying agreement, a waiver of one or more of its terms, or act to estop the current lender from asserting certain contractual terms." The court also determined that the ninth cause of action survived the motion to dismiss because it sought attorney fees related to a breach of contract and therefore "if [the Mitchells'] estoppel[] theory establishes that the contract was modified by [BAC's] conduct, a breach of contract may be proven." Accordingly, the district court allowed the Mitchells to proceed on their third and ninth causes of action.

¶10 Bank Defendants later moved for summary judgment on the remaining two claims. The court granted this motion. It reasoned that all possible legal theories for the third cause of

action relied upon "the alleged misrepresentation that occurred in March 2010 regarding a possible loan modification." The court then concluded that the evidence showed, "[at] most," that the Mitchells had a "subjective understanding that they had been assured that a loan modification would occur." Thus, it was "undisputed that there was never an agreement to modify according to any certain terms, and there was certainly nothing in writing." Given this undisputed fact, and noting that the third cause of action was "unclear as to precisely its legal theory or the relief sought," the court determined that "there can be no claim that [BAC] is bound by a modified loan agreement as a matter of law" and that a waiver claim likewise would fail. Similarly, the court concluded that a claim for breach of the covenant of good faith and fair dealing would fail because "there can be no implied duty arising" under a nonexistent modification and "no such duty can be implied out of the [Mitchells'] existing loan." The court also concluded that any claim grounded in promissory estoppel failed because, inter alia, the Mitchells could not reasonably rely on such an indefinite promise and because the record did not support actual reliance. Consequently, the court dismissed the third cause of action. Because the ninth cause of action depended on the success of the third cause of action, the court dismissed the ninth cause of action as well. Then, upon Bank Defendants' motion, the district court determined that the Mitchells had failed to comply with discovery orders and dismissed the complaint as a discovery sanction; the sanction served as a separate and independent basis for dismissing the Mitchells' claims.

¶11 After these orders were entered, Howell, who had not joined Bank Defendants' motions, moved for summary judgment. The district court granted Howell's motion, stating that "the reasoning of [the rulings with regard to Bank Defendants] applies with equal force to Howell and compels a similar result." The court emphasized that the Mitchells had "not pointed to an independent cause of action against Howell that was not addressed in the prior rulings." The court further explained that "the Complaint alleges that Howell was merely

acting on behalf of ReconTrust and is devoid of any allegations that Howell engaged in conduct that would somehow create liability separate from the other Defendants." Accordingly, the court granted summary judgment to Howell and thereby disposed of all of the Mitchells' claims. The Mitchells appeal.[3]

ISSUES AND STANDARDS OF REVIEW

¶12 The Mitchells contend that the district court erred in dismissing nine of their claims. "A district court's ruling on . . . a motion to dismiss . . . is a legal question which we review for correctness." *Commonwealth Prop. Advocates, LLC v. Mortgage Elec. Registration Sys., Inc.*, 2011 UT App 232, ¶ 6, 263 P.3d 397.

¶13 The Mitchells next challenge a number of the district court's rulings relating to evidence presented in connection with summary judgment. In particular, they contend that the district court erred in its rulings on motions to strike several affidavits. They also contend that the district court erred in refusing to take judicial notice of declarations from witnesses in a separate action. "We review a district court's decision on a motion to strike affidavits submitted in support of or in opposition to a motion for summary judgment for an abuse of discretion." *Portfolio Recovery Assocs., LLC v. Migliore*, 2013 UT App 255, ¶ 4,

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3. The Mitchells moved this court for permission to file overlength briefs. Although we granted their motion to file an overlength opening brief, we denied their motion to file an overlength reply brief. The Mitchells nevertheless included, as they explain, the "full reply brief they would have filed by attaching [it] in the addendum" to their reply brief. This attachment constitutes "a blatant attempt to skirt" this court's order and the page limitations stated in rule 24(f) of the Utah Rules of Appellate Procedure. *See Aspenwood, LLC v. C.A.T., LLC*, 2003 UT App 28, ¶ 46, 73 P.3d 947. Consequently, we have not considered this addendum.

314 P.3d 1069. Likewise, "[w]e review the [district] court's judicial notice of prior adjudicated facts under Rule 201 of the Utah Rules of Evidence for abuse of discretion." *In re J.B.*, 2002 UT App 267, ¶ 14, 53 P.3d 958.

¶14 The Mitchells contend that the district court erred in rendering summary judgment against them on their remaining two claims. We review the district court's decision for correctness.[4] *Commonwealth Prop. Advocates*, 2011 UT App 232, ¶ 6.

¶15 Finally, the Mitchells contend that they are entitled to attorney fees. "Whether attorney fees are recoverable is a question of law . . . ." *R.T. Nielson Co. v. Cook*, 2002 UT 11, ¶ 16, 40 P.3d 1119.

ANALYSIS

I. Claims Dismissed Under Rule 12(b)(6)

¶16 On appeal, the Mitchells challenge the dismissal of several claims. Rule 12(b)(6) of the Utah Rules of Civil Procedure allows a defendant to move to dismiss an action that the defendant believes "fail[s] to state a claim upon which relief can be granted." Utah R. Civ. P. 12(b)(6). "[A] rule 12(b)(6) motion to dismiss admits the facts alleged in the [complaint] but challenges the [plaintiff's] right to relief based on those facts." *Maese v.*

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4. The Mitchells also contend that the district court erred in dismissing their claims as a discovery sanction. After determining that the Mitchells had failed to comply with discovery orders, the district court dismissed the complaint as a discovery sanction but stated that this rationale served as an alternative ground for dismissing the complaint. Because we affirm the district court's dismissal of the Mitchells' claims on the merits, *see infra* ¶¶ 56, 60, we do not reach the alternative basis for its decision.

Davis County, 2012 UT App 48, ¶ 3, 273 P.3d 949 (citation and internal quotation marks omitted). Thus, a district court should grant a motion to dismiss when, "assuming the truth of the allegations in the complaint and drawing all reasonable inferences therefrom in the light most favorable to the plaintiff, it is clear that the plaintiff is not entitled to relief." *Hudgens v. Prosper, Inc.*, 2010 UT 68, ¶ 14, 243 P.3d 1275 (citation and internal quotation marks omitted). In evaluating a motion to dismiss, the district court may "consider documents that are referred to in the complaint and [are] central to the plaintiff's claim" and may also "take judicial notice of public records." *BMBT, LLC v. Miller*, 2014 UT App 64, ¶ 6, 322 P.3d 1172 (alteration in original) (citations and internal quotation marks omitted). Our review of the district court's dismissal orders requires us to "accept the plaintiff's description of facts alleged in the complaint to be true, but we need not accept extrinsic facts not pleaded[,] nor need we accept legal conclusions in contradiction of the pleaded facts." *Reynolds v. Woodall*, 2012 UT App 206, ¶ 10, 285 P.3d 7 (citation and internal quotation marks omitted).

¶17 We will address the Mitchells' causes of action by category based upon the district court's rationale for dismissal. Thus, we consider the district court's dismissal orders relying on its conclusions that Bank Defendants had authority to commence foreclosure proceedings, that the cancellation of ReconTrust's notice of default mooted several claims, that the trust deed had not been severed from the debt, that the debt had not been satisfied, that the Mitchells were not entitled to quiet title, and that punitive damages were not appropriate.

A. The Authority to Appoint a Successor Trustee and the Authority to Foreclose

¶18 The Mitchells challenge the dismissal of their first and tenth causes of action. The first cause of action sought clarification of the "true ownership of the [d]ebt" and "by extension the authority of [the] defendants to foreclose upon the

Property." It alleged that because MERS and its assignee BNYM lacked any beneficial ownership interest in the debt, MERS and BNYM could not foreclose on the property. The tenth cause of action similarly sought to block a non-judicial foreclosure on the ground that MERS did not have "any beneficial interest in the Property or the Trust Deed that could even possibly be assigned to BNYM." The district court deemed the tenth cause of action to be a "restatement" of the first. Then, after taking judicial notice of the trust deed and the promissory note, the court ruled that both causes of action failed because "MERS had, and BNYM has, authority to commence foreclosure under the terms of the [trust deed]."

¶19 The Mitchells argue that MERS and its assignee BNYM lacked the authority to appoint ReconTrust as the successor trustee for the purpose of foreclosing on the property. In support, they contend that "[o]nly a statutorily defined 'Beneficiary' may initiate the non-judicial foreclosure of the trust deed." The Mitchells further contend that MERS did not meet the statutory definition of a "beneficiary" and that BNYM, as MERS's assignee, therefore could not validly appoint ReconTrust as successor trustee. Bank Defendants counter that MERS and its assignee had the authority to foreclose and appoint a successor trustee under the terms of the trust deed itself. We agree with Bank Defendants.

¶20 Utah Code section 57-1-19(1) defines a "beneficiary" under a trust deed as "the person named or otherwise designated in a trust deed as the person for whose benefit a trust deed is given, or his successor in interest." Utah Code Ann. § 57-1-19(1) (LexisNexis 2010). However, even if the Mitchells are correct that MERS does not meet this definition,[5] the terms of

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5. The district court ruled that MERS was a statutory beneficiary as defined by section 57-1-19(1). The district court reasoned that the statute defines "beneficiary" as "'the person named or otherwise designated in a trust deed as the person for whose (continued...)

the trust deed nevertheless gave MERS the authority to appoint a successor trustee and foreclose on the property.

¶21 Case law from this court and the Tenth Circuit Court of Appeals indicates that a trust deed's plain language may give MERS, as "nominee for Lender and Lender's successors and assigns," the authority to appoint a successor trustee. Specifically, this court has previously suggested that at least one of the statutes governing conveyances does not "imply[] . . . or somehow indicat[e] that the original parties to the Note and Deed of Trust cannot validly contract at the outset 'to have someone other than the beneficial owner of the debt act on behalf of that owner to enforce rights granted in [the security instrument].'" *Commonwealth Prop. Advocates, LLC v. Mortgage Elec. Registration Sys., Inc.*, 2011 UT App 232, ¶ 13, 263 P.3d 397 (third alteration in original) (quoting *Marty v. Mortgage Elec.*

(...continued)
benefit a trust deed is given, or his successor in interest'"; that MERS was named in the trust deed as the beneficiary; and that MERS's status as nominee of the Lender was thus of no consequence under the statutory definition. (Quoting Utah Code Ann. § 57-1-19.) The United States Court of Appeals for the Tenth Circuit reached a different conclusion on a similar question in *Burnett v. Mortgage Electronic Registration Systems, Inc.*, 706 F.3d 1231 (10th Cir. 2013). On analogous facts, it apparently concluded that MERS could not be "the person named or otherwise designated in a trust deed as the person for whose benefit a trust deed is given," because MERS held "no ownership right in the note." *Id.* at 1237. Based on *Burnett*, Bank Defendants concede that the district court apparently erred. We express no opinion on this point. But we agree with the district court and the Tenth Circuit in *Burnett* that the statute is not dispositive where, as here, the trust deed expressly grants MERS the right to foreclose and sell the property and thus, by implication, the right to appoint a successor trustee for that purpose. *Id.*

Registration Sys., No. 1:10-cv-00033-CW, 2010 WL 4117196, at *5 (D. Utah Oct. 19, 2010)). In other words, "[t]he plain language of [a conveyancing] statute does nothing to prevent MERS from acting as nominee for Lender and Lender's successors and assigns when permitted by the Deed of Trust." *Id.* Similarly, the Tenth Circuit has noted that even when "MERS is not a beneficiary as that term is defined in [Utah Code section] 57-1-19(1)[,] . . . MERS nonetheless [may have the] authority to appoint [a successor trustee] and foreclose on [a] property" under the plain language of the trust deed. *See Burnett v. Mortgage Elec. Registration Sys., Inc.*, 706 F.3d 1231, 1237 (10th Cir. 2013).

¶22 Consistent with this case law, we conclude that the terms of the trust deed in this case explicitly gave MERS the right to appoint a successor trustee regardless of whether MERS satisfied the statutory definition of a beneficiary. The trust deed explained with respect to substituting the trustee that "Lender, at its option, may from time to time remove Trustee and appoint a successor trustee to any Trustee appointed hereunder." But the trust deed also stated,

> Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender including, but not limited to, releasing and canceling this Security Instrument.

Because the trust deed granted MERS, as nominee for Lender and its assigns, the right "to exercise any or all of those interests" "granted by Borrower in this Security Interest" and the right "to take any action required of Lender," the trust deed allowed MERS to remove the trustee and appoint a successor trustee on

Lender's behalf. It also gave MERS the "right to foreclose and sell the Property." *See, e.g., Sincere v. BAC Home Loans Servicing, LP*, No. 3:11-cv-00038, 2011 WL 6888671, at *5 (W.D. Va. Dec. 30, 2011) (construing a similar trust deed and concluding that "the plain terms of the deed of trust supplied MERS with the authority to take any action required of the lender, including foreclosing and selling the property in the event of a default as well as appointing substitute trustees to do the same," and noting that the borrower's signature on the trust deed "indicates that he agreed MERS had the authority to take any action required of the lender"); *Ramirez-Alvarez v. Aurora Loan Servs., LLC*, No. 01:09cv1306, 2010 WL 2934473, at *3 (E.D. Va. July 21, 2010) (interpreting similar language in a trust deed to mean that the borrower "agreed that MERS, filling the dual roles of beneficiary and nominee for the lender, had the right to foreclose on the property and take any action required of the lender, such as the appointment of substitute trustees"). Thus, we conclude that the trust deed's terms, to which Paula Mitchell agreed, provide MERS and its assignee BNYM the authority to appoint a successor trustee. Consequently, BNYM could validly appoint ReconTrust as successor trustee in accordance with the trust deed's plain language.

¶23 The Mitchells' challenge to the dismissal of their first and tenth causes of action depends upon their assertion that MERS and its assignee BNYM lacked authority to foreclose. But as we have concluded, the plain terms of the trust deed authorized MERS, as Lender's nominee, "to foreclose and sell the Property." Accordingly, the district court did not err in dismissing the Mitchells' first and tenth causes of action.

B. The Claims Dismissed as Moot

¶24 The Mitchells argue that the district court erred in dismissing the second and seventh causes of action as moot, asserting that "the questions of what duties ReconTrust had, and still has, to the Mitchells remain unanswered." The second cause

of action challenged ReconTrust's qualifications as successor trustee and its actions, including its notice of default. The seventh cause of action alleged that ReconTrust breached its duties as successor trustee by initiating a non-judicial foreclosure sale without authority to do so. Thus, both causes of action challenged ReconTrust's power as successor trustee to carry out a non-judicial foreclosure sale. The district court determined that these two claims were moot by virtue of the fact that ReconTrust withdrew its notice of default and represented to the court that it would not be conducting any further foreclosure proceedings on the Mitchells' property.

¶25 "If the requested judicial relief cannot affect the rights of the litigants, the case is moot and a court will normally refrain from adjudicating it on the merits." *Merhish v. H.A. Folsom & Assocs.*, 646 P.2d 731, 732 (Utah 1982) (citation and internal quotation marks omitted). "Once a controversy has become moot, a trial court should enter an order of dismissal." *Id.* at 733.

¶26 The Mitchells acknowledge that ReconTrust withdrew the notice of default but nevertheless argue that these causes of action are not moot, because ReconTrust lacks the statutory authority to conduct a non-judicial foreclosure sale. We first note that this argument is contrary to their statement before the district court that they voluntarily agreed to dismiss "their present request for a declaratory judgment that ReconTrust lacks the statutory authority to conduct non-judicial foreclosure sales in Utah." In any event, the cancellation of the notice of default and BNYM's continuing freedom to appoint a qualified trustee, *see supra* ¶¶ 22–23, eliminated any dispute regarding whether ReconTrust was authorized to foreclose on the Mitchells' property. Further, because ReconTrust retracted its notice of default and never sold the property, ReconTrust cannot be held liable for breach of any duty based on an unauthorized foreclosure. Because the requested relief in relation to the second and seventh causes of action would not affect the rights of the

parties, the district court properly dismissed these claims as moot.[6]

C. The Claim That Ownership of the Debt Was Severed from the Trust Deed

¶27 The Mitchells contend that the district court erred in dismissing the fourth cause of action. This cause of action alleged that AWL transferred the ownership interest in the debt to a mortgage-backed security. It further alleged that "fractionalizing the ownership of the Debt by securitization . . . effectively destroy[ed] the security for the Debt."[7] Thus, the Mitchells sought "a judgment declaring that the Debt has . . . become unsecured, and the Trust Deed may not be foreclosed." On appeal, the Mitchells argue that "the Trust Deed has been severed from the Debt . . . rendering the Debt unsecured, and precluding foreclosure."

¶28 The premise underlying this argument and the Mitchells' fourth cause of action was rejected by this court in *Commonwealth Property Advocates, LLC v. Mortgage Electronic Registration Systems, Inc.*, 2011 UT App 232, 263 P.3d 397. There, a debtor argued that the lender and MERS, as the lender's nominee, "lost their rights under the Deed of Trust when the Note was

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6. Since this appeal was filed, BNYM recorded a substitution of trustee appointing eTitle Insurance Agency as the successor trustee. Taking judicial notice of this recorded document, *see* Utah R. Evid. 201, we observe that it supports our conclusion that it is no longer relevant whether ReconTrust was properly appointed successor trustee in the first place or whether ReconTrust was qualified under Utah law to act as a trustee.

7. "Securitization" is the "process of pooling loans and selling them to investors on the open market." *Commonwealth Prop. Advocates, LLC v. Mortgage Elec. Registration Sys., Inc.*, 680 F.3d 1194, 1197 n.2 (10th Cir. 2011).

securitized." *Id.* ¶ 11. This court disagreed, explaining that "when a debt is transferred, the underlying security continues to secure the debt." *Id.* ¶ 13 (citing Utah Code Ann. § 57-1-35 (LexisNexis 2010)); *accord Burnett v. Mortgage Elec. Registration Sys., Inc.*, 706 F.3d 1231, 1237–38 (10th Cir. 2013); *Commonwealth Prop. Advocates, LLC v. Mortgage Elec. Registration Sys., Inc.*, 680 F.3d 1194, 1202–05 (10th Cir. 2011) (determining that MERS retained its authority to foreclose even after the debt secured by a Utah trust deed was securitized, and concluding that "[e]ven assuming Plaintiff is correct that securitization deprives Defendants of their implicit power to foreclose as holders of the trust deeds, the trust deeds *explicitly* granted Defendants the authority to foreclose").

¶29 The Mitchells have not persuaded us that their argument is distinguishable from the one precluded by this court's decision in *Commonwealth Property Advocates*. Any securitization of the debt secured by the trust deed did not take away MERS's power to foreclose under the trust deed's terms. *See Commonwealth Prop. Advocates*, 2011 UT App 232, ¶¶ 11–13. As a consequence, we affirm the district court's dismissal of the Mitchells' fourth cause of action.

D. Satisfaction of the Debt

¶30 The Mitchells challenge the dismissal of their fifth cause of action that sought a declaratory judgment regarding the satisfaction of the debt. The Mitchells assert that the debt "has been paid in whole, by means of insurance or some similar instrument [e.g., a credit default swap], such that the true owners of the Debt are no longer owed anything . . . , which extinguishes the Debt and the trust deed."

¶31 The district court dismissed this cause of action on the ground that "the claim fails to allege any basis for concluding that payment by a third party to the holder of the debt satisfies [the Mitchells'] obligations under the Note and [the trust deed]." Beyond offering a conclusory statement, the Mitchells make no effort on appeal to demonstrate error in the district court's

reasoning. *See Simmons Media Group, LLC v. Waykar, LLC*, 2014 UT App 145, ¶ 37, 335 P.3d 885 (indicating that appellants do not meet their burden to demonstrate district court error when they fail to present reasoned analysis based on relevant legal authority). Accordingly, we affirm the dismissal of this claim.

E. Quiet Title

¶32 The Mitchells contend that the district court prematurely dismissed their sixth cause of action for quiet title. In so arguing, they concede that the property was subject to the trust deed but assert that the district court "never examined, let alone determined, who, if anybody, actually has any valid, enforceable claim against the Property based on the trust deed."

¶33 "A quiet title action 'is a suit brought to quiet an existing title against an adverse or hostile claim of another and the effect of a decree quieting title is not to vest title but rather is to perfect an existing title as against other claimants.'" *Haynes Land & Livestock Co. v. Jacob Family Chalk Creek, LLC*, 2010 UT App 112, ¶ 19, 233 P.3d 529 (quoting *Nolan v. Hoopiiaina* (*In re Malualani B. Hoopiiaina Trust*), 2006 UT 53, ¶ 26, 144 P.3d 1129). "To succeed in an action to quiet title to real estate, a plaintiff must prevail on the strength of his own claim to title and not on the weakness of a defendant's title or even its total lack of title." *Church v. Meadow Springs Ranch Corp.*, 659 P.2d 1045, 1048–49 (Utah 1983).

¶34 We agree with Bank Defendants that, instead of showing the strength of their own claim to title, the Mitchells "only attack the alleged interest of [Bank Defendants] in the property." The district court concluded that the Mitchells' theories attacking Bank Defendants' rights vis-à-vis the trust deed were legally incorrect. In light of this conclusion, and because the Mitchells conceded that their title is subject to the trust deed, the district court dismissed the Mitchells' quiet title action. In other words, the district court did determine that Bank Defendants have a "valid, enforceable claim against the Property based on the trust deed." The Mitchells' effort on appeal falls short of demonstrating error in the district court's analysis. Accordingly,

we affirm the court's decision that the Mitchells did not state a claim that would entitle them to quiet title.

F. The Punitive Damages Claim

¶35 The Mitchells also challenge the district court's dismissal of their eleventh cause of action seeking punitive damages.[8] On appeal, the Mitchells attempt to recast this cause of action as one for civil conspiracy, stating, "Although admittedly mislabeled as a request for punitive damages, the 11th [cause of action] actually sets forth its own common law claim of civil conspiracy . . . ."

¶36 "[T]o preserve an issue for appeal the issue must be presented to the trial court in such a way that the trial court has an opportunity to rule on that issue." *Brookside Mobile Home Park, Ltd. v. Peebles*, 2002 UT 48, ¶ 14, 48 P.3d 968. Issues that are not raised before the district court "are usually deemed waived." *438 Main St. v. Easy Heat, Inc.*, 2004 UT 72, ¶ 51, 99 P.3d 801.

¶37 The Mitchells have not preserved this argument for appeal. In opposing Bank Defendants' motion to dismiss, the Mitchells did not address their eleventh cause of action. Consequently, they did not present the district court with an opportunity to rule on the same argument they now raise on appeal, namely, that they sufficiently alleged a claim for civil conspiracy. The Mitchells also have not argued that plain error or exceptional circumstances would justify our review of this issue. Because the Mitchells did not preserve their argument challenging the district court's dismissal of their eleventh cause of action, we affirm the district court's decision without reaching its merits.

¶38 In short, the district court did not err in concluding that "MERS had, and BNYM has, authority to commence foreclosure

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8. The Mitchells do not specifically challenge the dismissal of their eighth cause of action for an injunction. *See supra* ¶ 8.

under the terms of the [trust deed]." Moreover, the Mitchells have not demonstrated that the district court erred in granting Bank Defendants' motion to dismiss all but the third and ninth causes of actions.

II. Challenges to the Evidence on Summary Judgment

¶39 The Mitchells next challenge three of the district court's rulings relating to evidence presented in connection with summary judgment. Specifically, they assert that the district court erred in denying their motion to strike a bank employee's affidavit, in granting Bank Defendants' motion to strike the Mitchells' affidavits, and in refusing to take judicial notice of declarations made in a separate case. We reject these arguments.

A. The Court's Refusal to Strike a Bank Employee's Affidavit

¶40 First, the Mitchells assert that the district court improperly refused to strike an affidavit from a bank employee. They argue that the affidavit was inadmissible because it constituted hearsay and was not based on the employee's personal knowledge.

¶41 District courts generally have "broad discretion to decide motions to strike summary judgment affidavits." *Portfolio Recovery Assocs., LLC v. Migliore*, 2013 UT App 255, ¶ 4, 314 P.3d 1069 (citation and internal quotation marks omitted). To obtain reversal, appellants must show not only district court error but also "error that was substantial and prejudicial in the sense that there is at least a reasonable likelihood that in the absence of the error the result would have been different." *Ross v. Epic Eng'g, PC*, 2013 UT App 136, ¶ 12, 307 P.3d 576 (citation and internal quotation marks omitted).

¶42 Here, the district court considered the affidavit at issue as "relevant to the dispute" and "properly before the Court." However, the district court stated that it had "decided the motion for summary judgment without reference to the [bank employee's] Affidavit." Because the bank employee's affidavit

played no role in the district court's decision on summary judgment, the Mitchells cannot show that they were prejudiced by the district court's denial of their motion to strike. Accordingly, we will not reverse the district court on this basis.

B. The Court's Striking of the Mitchells' Affidavits

¶43 Second, the Mitchells assert that the district court erred in striking their own affidavits. But as with their challenge to the court's refusal to strike the bank employee's affidavit, the Mitchells cannot show that they were prejudiced by the court's decision to exclude their affidavits. *See id.* The Mitchells have not been harmed, because the court specifically stated that "even considering the affidavits, Defendants would still be entitled to summary judgment." As a result, this argument also does not present reason to reverse the district court.

C. The Court's Refusal to Take Judicial Notice of Certain Declarations

¶44 Third, the Mitchells argue that the district court erred in not taking judicial notice of declarations that former employees of Bank of America made in a separate case.[9] According to the Mitchells, the declarations contain admissions that Bank of America "systematically tried to induce homeowners into 'default' in order to force them into foreclosure" and would be offered to "demonstrat[e] that [the Mitchells would] likely be able to present similar evidence at trial."

¶45 Rule 201 of the Utah Rules of Evidence governs judicial notice of adjudicative facts. It provides that "[t]he court may judicially notice a fact that is not subject to reasonable dispute because it . . . is generally known . . . or . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Utah R. Evid. 201(b). The court "may

9. Bank of America is the successor-by-merger to BAC.

take judicial notice on its own; or . . . must take judicial notice if a party requests it and the court is supplied with the necessary information." *Id.* R. 201(c).

¶46 The Mitchells have not demonstrated that the district court erred by refusing to take judicial notice of the former employees' declarations. Appellants must support their arguments on appeal with reasoned analysis based on relevant legal authority. *See Simmons Media Group, LLC v. Waykar, LLC*, 2014 UT App 145, ¶ 37, 335 P.3d 885; *see also* Utah R. App. P. 24(a)(9). The Mitchells' argument is limited to a conclusory statement that the district court violated rule 201(d) because the rule "mandates [that] a court shall take judicial notice of uncontroverted facts in situations such as this." However, the Mitchells do not analyze whether the declarations contain "adjudicative facts" and, as in the district court, the Mitchells have not offered any authority that would allow the court to take judicial notice of declarations filed in another action and then to consider the substance of those declarations. Accordingly, this claim of error fails.

III. Claims Dismissed on Summary Judgment

¶47 Next, the Mitchells challenge the district court's summary judgment against them on their third cause of action.[10] Summary judgment is appropriate if, viewing "the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party," *Orvis v. Johnson*, 2008 UT 2, ¶ 6, 177 P.3d 600 (citation and internal quotation marks omitted), "there is no

10. Without additional analysis, the Mitchells state that they challenge the district court's order with regard to the ninth cause of action for "breach of contract." The district court dismissed the ninth cause of action because it "depended on the success of the Third Cause of Action." Because we affirm the dismissal of the third cause of action, we do not address the ninth.

genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law," Utah R. Civ. P. 56(a).[11]

A. Summary Judgment in Favor of Bank Defendants

¶48 The Mitchells first challenge the merits of the district court's summary judgment in favor of Bank Defendants on the third cause of action. Specifically, the Mitchells contend that the district court erred in granting summary judgment on their third cause of action for "estoppel and breach of good faith and fair dealing," which was based on their assertion that the defendants had caused them to stop making their mortgage payments. At the outset, the district court noted that the third cause of action was "unclear as to precisely its legal theory or the relief sought" but concluded that "all possible legal theories rely on the alleged misrepresentation that occurred in March 2010 regarding a possible loan modification." The court later determined that the third cause of action could not survive summary judgment under a theory of promissory estoppel or a theory of breach of the covenant of good faith and fair dealing. The Mitchells raise arguments on appeal related to both legal theories.

1. Promissory Estoppel

¶49 The Mitchells' arguments related to the theory of promissory estoppel appear directed at one element, namely, that the "plaintiff acted with prudence and in reasonable reliance on a promise made by the defendant." *Youngblood v. Auto-Owners Ins. Co.*, 2007 UT 28, ¶ 16, 158 P.3d 1088 (citation and internal quotation marks omitted). They then argue that the court misallocated the burden on summary judgment. The Mitchells further argue that the district court inappropriately

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11. Although rule 56 of the Utah Rules of Civil Procedure has been amended since the time the district court granted summary judgment in this case, those changes are not relevant to our analysis.

weighed the evidence against them in concluding that they could not show the existence of a definite and certain promise to support a promissory estoppel claim.

¶50 In particular, the Mitchells contend that the "court never determined whether defendants met their initial burdens" and that the Mitchells "therefore were not even under any obligation to prove any factual dispute." Relying on *Orvis v. Johnson*, 2008 UT 2, 177 P.3d 600, they state that a movant must "'affirmatively provide factual evidence establishing that there is no genuine issue of material fact.'" (Quoting *id.* ¶ 16.) The Mitchells' argument, however, does not account for the fact that they would carry the burden of proof at trial on the third cause of action. The same case cited by the Mitchells clarified that

> [a] summary judgment movant, *on an issue where the nonmoving party will bear the burden of proof at trial*, may satisfy its burden on summary judgment by showing, by reference to "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," that there is no genuine issue of material fact.

Orvis, 2008 UT 2, ¶ 18 (emphasis added) (quoting an earlier version of rule 56 of the Utah Rules of Civil Procedure). "Upon such a showing, whether or not supported by additional affirmative factual evidence, the burden then shifts to the nonmoving party, who 'may not rest upon the mere allegations or denial of the pleadings,' but 'must set forth specific facts showing that there is a genuine issue for trial.'" *Id.* (emphasis omitted) (quoting an earlier version of rule 56).

¶51 Because the Mitchells as the nonmoving party would carry the burden of proof at trial, Bank Defendants, as the moving party, met their burden on summary judgment by showing, by reference to the evidence, "that there [was] no genuine issue of material fact." *Id.* To successfully defend against Bank Defendants' motion, the Mitchells therefore had an

obligation to "'set forth specific facts showing that there [was] a genuine issue for trial.'" *Id.* (quoting an earlier version of rule 56). The Mitchells have not demonstrated that the district court misallocated the parties' burdens on summary judgment.

¶52 Likewise, the Mitchells have not demonstrated that the district court inappropriately weighed the evidence. They assert that the district court weighed the evidence because it did not accept their allegation that BAC instructed them to miss mortgage payments in order to obtain a loan modification. They also focus on the district court's statements that the Mitchells' testimony was "unclear," "less than certain," and "imprecise."

¶53 "Promissory estoppel involves a clear and definite promise . . . ." *Youngblood*, 2007 UT 28, ¶ 19 (citation and internal quotation marks omitted). Thus, a "party claiming estoppel must present evidence showing that an offer or promise was made on which the party based his or her reliance." *Nunley v. Westates Casing Servs., Inc.*, 1999 UT 100, ¶ 36, 989 P.2d 1077. "Likewise, the alleged promise must be reasonably certain and definite, and a claimant's subjective understanding of the promissor's statements cannot, without more, support a promissory estoppel claim." *Id.*

¶54 The district court's decision rested on its conclusion that "there is no evidence supporting a clear promise or representation by [BAC] to unconditionally modify the loan." Instead, the evidence, including the Mitchells' testimony, indicated that BAC told the Mitchells that "once [they] missed two payments, [they] could *apply for* a loan modification." Because the evidence showed that the Mitchells, at most, had a "subjective understanding that they had been assured that a loan modification would occur," the district court determined as a matter of law that the Mitchells "could not reasonably rely on a promise that is so indefinite that it lacks—literally—any terms."

¶55 In this regard, the context of the district court's statements—that the Mitchells were "unclear," "less than certain," and "imprecise"—matters. The court stated that the

Mitchells' testimony on the issue of whether BAC promised them a loan modification was "less than certain," noting that "[Wade] Mitchell testified that someone from [BAC] promised them a loan modification, and so he and his wife 'expected' a loan modification." And it was "unclear from [the Mitchells'] own testimony whether [BAC] actually promised them an unconditional loan modification, or whether it simply agreed to discuss the matter." The court also indicated that the Mitchells' affidavits were "similarly imprecise" because Wade Mitchell testified that "they were only promised the ability to *apply for* a loan modification." Given this context and the court's task of evaluating whether the Mitchells had provided specific facts showing that BAC made a promise on certain terms, we are not convinced that the court improperly weighed the evidence.

¶56 The Mitchells do not identify any evidence that the district court failed to consider or any evidence that unequivocally indicates that BAC, without condition, promised to modify the loan on certain terms. The evidence, even construed in the light most favorable to the Mitchells, does not show that there was a genuine issue of material fact, because any instruction given by BAC to the Mitchells does not meet the legal standard for a definite and certain promise required for a promissory estoppel claim. *See id.* As a consequence, the district court did not err in concluding that no genuine issue of fact existed and that Bank Defendants were entitled to judgment as a matter of law on this theory.

2. Breach of the Covenant of Good Faith and Fair Dealing

¶57 The Mitchells also challenge the district court's summary judgment decision on the third cause of action on the theory of a breach of the covenant of good faith and fair dealing. They contend that the court misapplied the law and should have concluded that "the allegations show defendants intentionally rendered it difficult if not impossible for [Paula Mitchell] to receive the fruits of her Loan by falsely inducing her into 'defaulting.'" They also make the contrary argument that their

claims "are not based on the existing Loan" but instead are "based on defendants' misconduct impairing the Loan by fraudulently inducing a 'default' in order to profit from it."

¶58 "Under the covenant of good faith and fair dealing, each party impliedly promises that he will not intentionally or purposely do anything which will destroy or injure the other party's right to receive the fruits of the contract." *Iota, LLC v. Davco Mgmt. Co.*, 2012 UT App 218, ¶ 32, 284 P.3d 681 (citation and internal quotation marks omitted). "[O]ne party may not render it difficult or impossible for the other to continue performance and then take advantage of the non-performance he has caused." *Id.* (alteration in original) (citation and internal quotation marks). Some limitations on the covenant of good faith and fair dealing exist:

> the Covenant cannot be used (1) to create new or independent rights or obligations to which the parties have not agreed in the contract; (2) to establish rights or duties inconsistent with the express terms of the contract; or (3) to require a party to exercise an express contractual right in a manner detrimental to its own interests in order to benefit the other party to the contract.

Cook Assocs., Inc. v. Utah Sch. & Inst. Trust Lands Admin., 2010 UT App 284, ¶ 16, 243 P.3d 888 (citing *Oakwood Vill. LLC v. Albertsons, Inc.*, 2004 UT 101, ¶ 45, 104 P.3d 1226). Consistent with these limitations, this court has recognized that "[d]eclining to give up rights granted by a contract does not constitute a breach of the covenant of good faith and fair dealing." *Iota*, 2012 UT App 218, ¶ 33.

¶59 Despite the Mitchells' statement that their claim is "not based on the existing Loan," they do not appear to contend that the implied duty arises out of any separate agreement to modify the loan. Although vague, we understand the substance of the Mitchells' argument to center on an implied duty arising out of

the original loan agreement. The Mitchells theorize that Bank Defendants breached the implied duty of good faith and fair dealing by inducing them to default with the information that the Mitchells could obtain a loan modification only if they first defaulted.

¶60 Considering the evidence in the light most favorable to the Mitchells and thus assuming that Bank Defendants told the Mitchells that they could not even apply for a loan modification unless they defaulted, Bank Defendants did not breach the implied duty of good faith and fair dealing as a matter of law. The information regarding a possible loan modification did not render it impossible for the Mitchells to continue making their mortgage payments. Indeed, according to Wade Mitchell's affidavit, the Mitchells' default was at least in part attributable to the fact that "cash flow was getting tighter." Thus, Bank Defendants' conduct did not impede the Mitchells from performing their obligations under the contract or render it impossible for them to perform. *See id.* ¶¶ 32–33. Furthermore, the district court correctly concluded that "no such duty can be implied out of [the Mitchells'] existing loan as a matter of law," because the Mitchells' position—that Bank Defendants could not foreclose after their missed payments—would require Bank Defendants to forgo rights granted by the original loan agreement. *See id.* ¶ 33. Accordingly, we affirm the district court's dismissal of the Mitchells' third cause of action based on the theory of the covenant of good faith and fair dealing.[12]

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12. The Mitchells also suggest that the district court should have accepted certain allegations in the complaint as true in its consideration of the third cause of action. However, because the Mitchells have not demonstrated that they preserved this argument, we do not consider it. *See* Utah R. App. P. 24(a)(5) (requiring the appellant's brief to contain "citation to the record showing that the issue was preserved in the trial court" or a basis for addressing an unpreserved issue); *438 Main St. v. Easy*

(continued...)

B. Summary Judgment in Favor of Howell

¶61 The Mitchells also challenge the district court's order granting summary judgment to Howell, the attorney who on occasion conducted trustee's sales on behalf of ReconTrust. They attack the court's ruling on both procedural and substantive grounds.

¶62 As for their procedural argument, the Mitchells contend that Howell waived the defense of failure to state a claim by not raising it sooner. In support, they rely on rule 12(h) of the Utah Rules of Civil Procedure, which provides, "A party waives all defenses and objections not presented either by motion or by answer or reply . . . ." Utah R. Civ. P. 12(h). "A defense of failure to state a claim, however, falls under a procedural exception . . . ." *Mack v. Utah State Dep't of Commerce*, 2009 UT 47, ¶ 14, 221 P.3d 194 (citing Utah R. Civ. P. 12(h)). The rule specifies that "the defense of failure to state a claim upon which relief can be granted . . . may also be made by a later pleading . . . or by motion for judgment on the pleadings or at the trial on the merits." Utah R. Civ. P. 12(h). Accordingly, a "defense of failure to state a claim . . . may be raised any time before the court or jury determines the validity of a party's claim." *Mack*, 2009 UT 47, ¶ 14 (citing Utah R. Civ. P. 12(h)). Because Howell raised the defense by moving for summary judgment before the court ruled on the merits of the claims against him, the Mitchells have not shown that the district court erred in refusing to strike Howell's motion on the ground that Howell had waived the defense of failure to state a claim.

¶63 Regarding the merits, the Mitchells contend that the district court erred in concluding that "Howell was entitled to [the] same result as [the] co-defendants." The Mitchells

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(...continued)
Heat, Inc., 2004 UT 72, ¶ 51, 99 P.3d 801 ("Issues that are not raised at trial are usually deemed waived.").

acknowledge the court's determination that they had "not pointed to an independent cause of action against Howell that was not addressed in the prior rulings." Nevertheless, they contend that the court erred because "each 'cause of action' is still a claim against Howell personally."

¶64 The Mitchells have failed to demonstrate that the district court erred in concluding that "the reasoning of [the rulings with regard to Bank Defendants] applies with equal force to Howell and compels a similar result." They also have not addressed the court's rationale that "the Complaint alleges that Howell was merely acting on behalf of ReconTrust and is devoid of any allegations that Howell engaged in conduct that would somehow create liability separate from the other Defendants." Accordingly, we affirm the district court's grant of summary judgment to Howell.

IV. Attorney Fees

¶65 Finally, the Mitchells contend that they are entitled to attorney fees under a number of legal theories: contract, the private attorney general doctrine, the common fund doctrine, and the court's inherent authority. We conclude that an award of attorney fees is not warranted here.

¶66 "As a general rule, Utah courts award attorney fees only to a prevailing party, and only when such an action is permitted by either statute or contract." *Doctors' Co. v. Drezga*, 2009 UT 60, ¶ 32, 218 P.3d 598. At the appellate level, generally "when a party who received attorney fees below prevails on appeal, the party is also entitled to fees reasonably incurred on appeal." *Robertson's Marine, Inc. v. I4 Sols., Inc.*, 2010 UT App 9, ¶ 8, 223 P.3d 1141 (citation and internal quotation marks omitted).

¶67 The district court did not award any attorney fees to the Mitchells. And on appeal, their request for attorney fees under all theories is contingent upon their success before this court. Because the Mitchells did not receive attorney fees below and

have not prevailed on appeal, we decline to award them attorney fees incurred on appeal. *See id.*

CONCLUSION

¶68 The Mitchells have not demonstrated that the district court erred in dismissing several of their causes of action upon Bank Defendants' motion to dismiss. The Mitchells have also failed to show that the district court erred in its evidentiary rulings or in granting summary judgment to the defendants on their remaining claims. Accordingly, we affirm.

VOROS, Judge (concurring):

¶69 I concur in the majority opinion. Alternatively, I believe this appeal is inadequately briefed.

¶70 For example, perhaps the Mitchells' most sympathetic claim is their claim for equitable estoppel. They assert that Bank Defendants induced them to miss monthly payments on the note and consequently should be estopped from foreclosing on the house based on those missed monthly payments. But the Mitchells' brief fails to cite any relevant legal authority, quote testimony from the record, identify the elements of equitable estoppel, or explain how a reasonable fact-finder could find each of those legal elements. They instead rely on statements such as the following: "It is believed a pattern of deliberate misconduct will come to light through discovery, which misconduct has resulted in thousands of similarly situated borrowers being duped by defendants into 'defaulting,' so that they could hijack their loans for defendants' own hidden profit scheme," and "No one could possibly consider such systematic profiteering from fraudulent statements fair or equitable."

¶71 Similarly, the Mitchells describe at some length what they call their "discovery disputes" in the trial court; the factual background and procedural history of these issues comprise seven pages of their brief. But those seven pages contain no citations to the record on appeal. The briefing of these two points typifies the Mitchells' principal brief.

¶72 An appellant's argument must contain "citations to the authorities, statutes, and parts of the record relied on." Utah R. App. P. 24(a)(9). "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." *State v. Davie*, 2011 UT App 380, ¶ 16, 264 P.3d 770 (citation and internal quotation marks omitted). "An inadequately briefed claim is by definition insufficient to discharge an appellant's burden to demonstrate trial court error." *Simmons Media Group, LLC v. Waykar, LLC*, 2014 UT App 145, ¶ 37, 335 P.3d 885. So while I concur in the majority opinion, I would in the alternative reject all the Mitchells' claims on appeal as "not adequately briefed, researched, or presented." *See State v. Lusk*, 2001 UT 102, ¶ 34, 37 P.3d 1103.

The Order of the Court is stated below:
Dated: March 30, 2017 05:16:11 PM **/s/** TODD M SHAUGHNESSY District Court Judge

3RD DISTRICT COURT - SALT LAKE
SALT LAKE COUNTY, STATE OF UTAH

THE BANK OF NEW YORK MELLON FK, Plaintiff,	:	RULING RULING AND ORDER
vs.	:	Case No: 160902472
PAULA A MITCHELL, Defendant.	:	Judge: SHAUGHNESSY, TODD M Date: March 30, 2017

Before the court is Plaintiff's Motion to Dismiss First Amended Counterclaim. The motion is fully briefed. The court denies the request for oral argument on the ground that the issues presented by the motion have been authoritatively decided and oral argument would not assist the court in deciding the questions presented.

The motion to dismiss the First Amended Counterclaim is granted. All of the issues and claims set forth in the First Amended Counterclaim were, or could have been, asserted in the Mitchell I case, with the possible exception of the claims in which, according to defendant, she seeks to collaterally attack the decisions by the Utah Court of Appeals and Utah Supreme Court. Defendant apparently seeks to have this court declare that the Utah Court of Appeals and Utah Supreme Court lacked jurisdiction to decide the Mitchell I case. The court finds no legal, factual, or logical support for such claims and declines to entertain them in this case.

No further order is required.

End Of Order - Signature at the Top of the First Page

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 160902472 by the method and on the date specified.

EMAIL: BRAD G DEHAAN brad.dehaan@lundbergfirm.com
EMAIL: CRAIG H HOWE chowe@joneswaldo.com
EMAIL: HILLARY R MCCORMACK hillary.mccormack@lundbergfirm.com
EMAIL: BLAKE D MILLER bmiller@joneswaldo.com

EMAIL: DOUGLAS R SHORT mail@consumerlawutah.com
EMAIL: DOUGLAS R SHORT mail@consumerlawutah.com

Date: 03/30/2017 /s/ TODD M SHAUGHNESSY

Deputy Court Clerk

Brad G. DeHaan (USB No. 8168)
Hillary R. McCormack (USB No. 11719)
LUNDBERG & ASSOCIATES, PC
Attorneys for Plaintiff
3269 South Main Street, Suite 100
Salt Lake City, Utah 84115
Telephone: (801) 263-3400
brad.dehaan@Lundbergfirm.com

Attorneys for Plaintiff
Parcel No. 28-22-203-047
L&A Case No. 15.61512.1/JAT

IN THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE DEPARTMENT
SALT LAKE COUNTY, STATE OF UTAH

THE BANK OF NEW YORK MELLON FKA THE BANK OF NEW YORK, AS TRUSTEE FOR THE CERTIFICATEHOLDERS CWMBS SERIES 2006-HYB5, Plaintiff, vs. PAULA A. MITCHELL, AMERICA FIRST FEDERAL CREDIT UNION, PEPPERWOOD HOMEOWNER'S ASSOCIATION, AND JOHN DOES 1-5, Defendants.	AFFIDAVIT OF ALVIN DENMON IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT Civil No. 160902472 Judge Todd M. Shaughnessy

STATE OF Texas)
: ss.
COUNTY OF HARRIS)

I, Alvin Denmon, being first duly sworn, depose and state as follows:

1. I am employed as a Foreclosure Specialist for New Penn Financial, LLC d/b/a Shellpoint Mortgage Servicing, as servicing agent for plaintiff The Bank of New York Mellon, fka The Bank of New York, as Trustee for the Certificateholders CWMBS Series 2006-HYB5 ("Bank of New York").

2. I am familiar with the business records maintained by Bank of New York and New Penn Financial, LLC d/b/a Shellpoint Mortgage Servicing for the purpose of servicing mortgage loans, including specifically the mortgage loan for defendant Paula A. Mitchell described in the Mitchell Trust Deed, Note, and Rider.

3. These records (which include data compilations, electronically imaged documents, and others) are made at or near the time by, or from information provided by, persons with knowledge of the activity and transactions reflected in such records, and are kept in the ordinary course of business activity conducted regularly by Bank of New York and New Penn Financial, LLC d/b/a Shellpoint Mortgage Servicing.

4. It is the regular practice of Bank of New York's and New Penn Financial, LLC d/b/a Shellpoint Mortgage Servicing's business to make these records.

5. In the course of making this affidavit, I have acquired personal knowledge of the matters stated herein by examining these business records, including the business records for and relating to the mortgage loan given to Paula A. Mitchell described in the Mitchell Trust Deed, Note and Rider.

6. Defendant Paula A. Mitchell acquired an ownership interest in the Property by a Special Warranty Deed executed on May 23, 2006 and recorded on May 24, 2006 in the Salt

Lake County Recorder's Office as Entry No. 9733511. A copy of the Special Warranty Deed is attached hereto as Exhibit A.

7. On May 23, 2006, defendant Paula A. Mitchell, as trustor, executed and delivered a certain trust deed (the "Mitchell Trust Deed") to Stewart T. Matheson, as trustee, for the benefit of Mortgage Electronic Registration Systems, Inc., as nominee for America's Wholesale Lender, it successors and assigns, to secure obligations under a certain promissory note executed in conjunction therewith. A copy of the Mitchell Trust Deed is attached hereto as Exhibit B.

8. On May 24, 2006, the Mitchell Trust Deed was recorded in the Salt Lake County Recorder's Office as Entry No. 9733512.

9. On May 23, 2006, in conjunction with the execution of the Mitchell Trust Deed, defendant Paula A. Mitchell executed a promissory note ("Note") and Rider ("Rider") in the amount of $1,000,000.00. A copy of the Note and Rider are attached hereto as Exhibit C.

10. Plaintiff is the current beneficiary under the Mitchell Trust Deed by virtue of an Assignment of Deed of Trust ("2010 Assignment") recorded on August 17, 2010 in the Salt Lake County Recorder's Office as Entry No. 11012216. A copy of the 2010 Assignment is attached hereto as Exhibit D.

11. Plaintiff is the current holder of the Note and Rider.

12. Pursuant to the terms of the Mitchell Trust Deed, Note, and Rider, plaintiff or plaintiff's predecessors-in-interest, loaned, advanced and disbursed the sum of $1,000,000.00 to or on behalf of, and to the benefit of, defendant Paula A. Mitchell.

13. The Note obligated defendant Paula A. Mitchell to make monthly principal and

interest payments to plaintiff or plaintiff's predecessor-in-interest, beginning July 1, 2006.

14. The Note provides that the initial rate of interest agreed to be paid by defendant Paula A. Mitchell is 6.500% per annum.

15. Defendant Paula A. Mitchell's obligations under the Note, Rider, and Mitchell Trust Deed were secured by the Property.

16. Defendant Paula A. Mitchell breached the terms and conditions of the Note, Rider, and Mitchell Trust Deed by failing to make the required monthly payments when due.

17. Based upon defendant Paula A. Mitchell's failure to pay the monthly payments under the terms of the Note, Rider, and Mitchell Trust Deed, defendant Paula A. Mitchell is in default.

18. Because defendant Paula A. Mitchell was in default and breached the terms of the Note, Rider, and Mitchell Trust Deed, plaintiff accelerated the entire unpaid balance as immediately due and payable.

19. Defendant Paula A. Mitchell failed to cure the default under the terms of the Note, Rider, and Mitchell Trust Deed.

20. The last payment made by defendant Paula A. Mitchell under the terms of the Note, Rider, and Mitchell Trust Deed was on April 21, 2010.

21. Defendant Paula A. Mitchell has not made a payment under the terms of the Note, Rider, and Mitchell Trust Deed since April 21, 2010.

22. Defendant is due and owing for the monthly payment under the Mitchell Trust Deed, Note and Rider since May 1, 2010 through present date.

23. The terms of the Note, Rider, and Mitchell Trust Deed allow plaintiff to recover its reasonable attorney's fees and costs incurred in connection with this matter.

24. The terms of the Mitchell Trust Deed allow plaintiff to invoke the power of foreclosure sale and any other remedies permitted by applicable law.

25. As of May 31, 2017, the amount due and owing to plaintiff under the Note, Rider, and Mitchell Trust Deed is $1,343,034.81, plus additional interest, attorney's fees, costs, taxes, and other fees which will continue to accrue after May 31, 2017.

26. The undersigned affiant makes these statements under oath, on his own personal knowledge, and states that he is in all respect authorized and competent testify thereof in this or any other court.

DATED this 21 day of August, 2017.

Alvin Denmon

By: Alvin Denmon

Alvin Denmon, of New Penn Financial, LLC d/b/a Shellpoint Mortgage Servicing for The Bank of New York Mellon FKA the Bank of New York, as Trustee for the Certificateholders of the CWMBS Inc., CHL Mortgage Pass-Through Trust 2006-HYB5, Mortgage Pass Through Certificates, Series 2006-HYB5

STATE OF Texas)
: ss.
COUNTY OF Harris)

Subscribed, sworn to, and acknowledged before me this 21st day of August, 2017, by Alvin Denmon, signer of the above instrument, who duly acknowledged to me that he executed the same.

Notary Public Joy Wilson

JOY WILSON
Notary Public, State of Texas
Comm. Expires 03-16-2020
Notary ID 130564260

CERTIFICATE OF MAILING

I certify that on the 27th day of September, 2017, I caused a copy of the foregoing instrument to be mailed, postage prepaid, or via electronic service, to the following:

Douglas Short
2290 East 4500 South, Ste. 220
Holladay, Utah 84117
mail@consumerlawutah.com

EXHIBIT "A"

[redacted]

WHEN RECORDED MAIL TO:
PAULA A. MITCHELL
3 SOUTH MISTYWOOD LANE
SANDY, UT. 84092

[redacted]

9733511
5/24/2006 4:48:00 PM $12.00
Book - 9298 Pg - 7353-7354
Gary W. Ott
Recorder, Salt Lake County, UT
MERIDIAN TITLE
BY: eCASH, DEPUTY - EF 2 P.

SPECIAL WARRANTY DEED
(Corporate)

Timbersmith Inc., a corporation organized and existing under the laws of the State of Utah, with its principal office at Sandy, **Grantor**, hereby CONVEYS and WARRANTS **against all claiming by, through or under it to**

V-V **PAULA A. MITCHELL,**

Grantee,

of SANDY, County of SALT LAKE, State of UT, for the sum of TEN DOLLARS and other good and valuable consideration, the following tract of land in SALT LAKE, State of UT, to-wit

Lot 804 B, AMENDED PEPPERWOOD PHASE 8B, according to the official plat thereof on file and of record in the County Recorder's Office.

[redacted]

Subject to easements, restrictions and rights of way appearing of record or enforceable in law and equity and general property taxes for the year 2006 and thereafter.

The Grantor hereby binds itself to warrant and defend the title as against the acts of Grantor and no other, subject to the matters above set forth.

The officer(s) who sign this deed hereby certify that this deed and the transfer represented thereby was duly authorized under a resolution duly adopted by the board of directors of the grantor at a lawful meeting duly held and attended by a quorum.

In witness whereof, the grantor has caused its corporate name and seal to be hereunto affixed by its duly authorized officer(s) this 23rd day of MAY, 2006

TIMBERSMITH INC.

By: _____
SHALER R. SMITH, VICE-PRESIDENT

STATE OF UTAH)
:ss
COUNTY OF SALT LAKE)

On the 23rd day of MAY, 2006, personally appeared before me SHALER R. SMITH, who being by me duly sworn, did say that he is the VICE-PRESIDENT of TIMBERSMITH INC., a Corporation, and that the foregoing instrument was signed in behalf of said corporation by authority of a resolution of its Board of Directors, and the said SHALER R. SMITH acknowledged to me that said corporation executed the same.

Michelle Sorensen
Notary Public

My Commission Expires: November 22, 2006
Residing at: MIDVALE, UT

MICHELLE SORENSEN
NOTARY PUBLIC • STATE of UTAH
6925 SOUTH UNION PARK CENTER STE 360
MIDVALE UT 84047
MY COMMISSION EXPIRES: 11-22-2006

EXHIBIT "B"

After Recording Return To:
COUNTRYWIDE HOME LOANS, INC.
MS SV-79 DOCUMENT PROCESSING
P.O.Box 10423
Van Nuys, CA 91410-0423

[redacted]

6955 UNION PARK CENTER #400
MIDVALE
UT 84047

9733512
5/24/2006 4:48:00 PM $36.00
Book - 9298 Pg - 7355-7369
Gary W. Ott
Recorder, Salt Lake County, UT
MERIDIAN TITLE
BY: eCASH, DEPUTY - EF 15 P.

[Space Above This Line For Recording Data]

[redacted]

[redacted]

DEED OF TRUST

[redacted]

DEFINITIONS

Words used in multiple sections of this document are defined below and other words are defined in Sections 3, 11, 13, 18, 20 and 21. Certain rules regarding the usage of words used in this document are also provided in Section 16.

(A) **"Security Instrument"** means this document, which is dated MAY 23, 2006 , together with all Riders to this document.
(B) **"Borrower"** is
PAULA A MITCHELL

Borrower is the trustor under this Security Instrument.
(C) **"Lender"** is
AMERICA'S WHOLESALE LENDER
Lender is a CORPORATION
organized and existing under the laws of NEW YORK
Lender's address is
4500 Park Granada MSN# SVB-314, Calabasas, CA 91302-1613
(D) **"Trustee"** is
STEWART T. MATHESON, ATTORNEY AT LAW
648 EAST FIRST SOUTH, SALT LAKE CITY, UT 84102

[redacted]

[redacted]

(E) "MERS" is Mortgage Electronic Registration Systems, Inc. MERS is a separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns. MERS is the beneficiary under this Security Instrument. MERS is organized and existing under the laws of Delaware, and has an address and telephone number of P.O. Box 2026, Flint, MI 48501-2026, tel. (888) 679-MERS.
(F) "Note" means the promissory note signed by Borrower and dated MAY 23, 2006 . The Note states that Borrower owes Lender
ONE MILLION and 00/100

Dollars (U.S. $ 1,000,000.00) plus interest. Borrower has promised to pay this debt in regular Periodic Payments and to pay the debt in full not later than JUNE 01, 2036 .
(G) "Property" means the property that is described below under the heading "Transfer of Rights in the Property."
(H) "Loan" means the debt evidenced by the Note, plus interest, any prepayment charges and late charges due under the Note, and all sums due under this Security Instrument, plus interest.
(I) "Riders" means all Riders to this Security Instrument that are executed by Borrower. The following Riders are to be executed by Borrower [check box as applicable]:

[X] Adjustable Rate Rider	[ ] Condominium Rider	[ ] Second Home Rider
[ ] Balloon Rider	[ ] Planned Unit Development Rider	[ ] 1-4 Family Rider
[ ] VA Rider	[ ] Biweekly Payment Rider	[ ] Other(s) [specify]

(J) "Applicable Law" means all controlling applicable federal, state and local statutes, regulations, ordinances and administrative rules and orders (that have the effect of law) as well as all applicable final, non-appealable judicial opinions.
(K) "Community Association Dues, Fees, and Assessments" means all dues, fees, assessments and other charges that are imposed on Borrower or the Property by a condominium association, homeowners association or similar organization.
(L) "Electronic Funds Transfer" means any transfer of funds, other than a transaction originated by check, draft, or similar paper instrument, which is initiated through an electronic terminal, telephonic instrument, computer, or magnetic tape so as to order, instruct, or authorize a financial institution to debit or credit an account. Such term includes, but is not limited to, point-of-sale transfers, automated teller machine transactions, transfers initiated by telephone, wire transfers, and automated clearinghouse transfers.
(M) "Escrow Items" means those items that are described in Section 3.
(N) "Miscellaneous Proceeds" means any compensation, settlement, award of damages, or proceeds paid by any third party (other than insurance proceeds paid under the coverages described in Section 5) for: (i) damage to, or destruction of, the Property; (ii) condemnation or other taking of all or any part of the Property; (iii) conveyance in lieu of condemnation; or (iv) misrepresentations of, or omissions as to, the value and/or condition of the Property.
(O) "Mortgage Insurance" means insurance protecting Lender against the nonpayment of, or default on, the Loan.
(P) "Periodic Payment" means the regularly scheduled amount due for (i) principal and interest under the Note, plus (ii) any amounts under Section 3 of this Security Instrument.
(Q) "RESPA" means the Real Estate Settlement Procedures Act (12 U.S.C. Section 2601 et seq.) and its implementing regulation, Regulation X (24 C.F.R. Part 3500), as they might be amended from time to time, or any additional or successor legislation or regulation that governs the same subject matter. As used in this Security Instrument, "RESPA" refers to all requirements and restrictions that are imposed in regard to a "federally related mortgage loan" even if the Loan does not qualify as a "federally related mortgage loan" under RESPA.
(R) "Successor in Interest of Borrower" means any party that has taken title to the Property, whether or not that party has assumed Borrower's obligations under the Note and/or this Security Instrument.

TRANSFER OF RIGHTS IN THE PROPERTY
The beneficiary of this Security Instrument is MERS (solely as nominee for Lender and Lender's successors and assigns) and the successors and assigns of MERS. This Security Instrument secures to Lender: (i) the repayment of the Loan, and all renewals, extensions and modifications of the Note; and (ii) the performance of Borrower's covenants and agreements under this Security Instrument and the Note. For this purpose, Borrower irrevocably grants, conveys and warrants to Trustee, in trust, with power of sale, the following described property located in the

COUNTY	of	SALT LAKE
[Type of Recording Jurisdiction]		[Name of Recording Jurisdiction]

[redacted]

LOT 804 B, AMENDED PEPPERWOOD PHASE 8B, ACCORDING TO THE PLAT THEREOF AS RECORDED IN THE OFFICE OF THE SALT LAKE COUNTY RECORDER.

which currently has the address of
3 SOUTH MISTYWOOD LANE, SANDY
[Street/City]
Utah 84092-4850 ("Property Address"):
[Zip Code]

TOGETHER WITH all the improvements now or hereafter erected on the property, and all easements, appurtenances, and fixtures now or hereafter a part of the property. All replacements and additions shall also be covered by this Security Instrument. All of the foregoing is referred to in this Security Instrument as the "Property." Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender including, but not limited to, releasing and canceling this Security Instrument.

BORROWER COVENANTS that Borrower is lawfully seised of the estate hereby conveyed and has the right to grant, convey and warrant the Property and that the Property is unencumbered, except for encumbrances of record. Borrower further warrants and will defend generally the title to the Property against all claims and demands, subject to any encumbrances of record.

THIS SECURITY INSTRUMENT combines uniform covenants for national use and non-uniform covenants with limited variations by jurisdiction to constitute a uniform security instrument covering real property.

UNIFORM COVENANTS. Borrower and Lender covenant and agree as follows:

1. Payment of Principal, Interest, Escrow Items, Prepayment Charges, and Late Charges. Borrower shall pay when due the principal of, and interest on, the debt evidenced by the Note and any prepayment charges and late charges due under the Note. Borrower shall also pay funds for Escrow Items pursuant to Section 3. Payments due under the Note and this Security Instrument shall be made in U.S. currency. However, if any check or other instrument received by Lender as payment under the Note or this Security Instrument is returned to Lender unpaid, Lender may require that any or all subsequent payments due under the Note and this Security Instrument be made in one or more of the following forms, as selected by Lender: (a) cash; (b) money order; (c) certified check, bank check, treasurer's check or cashier's check, provided any such check is drawn upon an institution whose deposits are insured by a federal agency, instrumentality, or entity; or (d) Electronic Funds Transfer.

Payments are deemed received by Lender when received at the location designated in the Note or at such other location as may be designated by Lender in accordance with the notice provisions in Section 15. Lender may return any payment or partial payment if the payment or partial payments are insufficient to bring the Loan current. Lender may accept any payment or partial payment insufficient to bring the Loan current, without waiver of any rights hereunder or prejudice to its rights to refuse such payment or partial payments in the future, but Lender is not obligated to apply such payments at the time such payments are accepted. If each Periodic Payment is applied as of its scheduled due date, then Lender need not pay interest on unapplied funds. Lender may hold such unapplied funds until Borrower makes payment to bring the Loan current. If Borrower does not do so within a reasonable period of time, Lender shall either apply such funds or return them to Borrower. If not applied earlier, such funds will be applied to the outstanding principal balance under the Note immediately prior to foreclosure. No offset or claim which Borrower might have now or in the future against Lender shall relieve Borrower from making payments due under the Note and this Security Instrument or performing the covenants and agreements secured by this Security Instrument.

2. Application of Payments or Proceeds. Except as otherwise described in this Section 2, all payments accepted and applied by Lender shall be applied in the following order of priority: (a) interest due under the Note; (b) principal due under the Note; (c) amounts due under Section 3. Such payments shall be applied to each Periodic Payment in the order in which it became due. Any remaining amounts shall be applied first to late charges, second to any other amounts due under this Security Instrument, and then to reduce the principal balance of the Note.

[redacted]

If Lender receives a payment from Borrower for a delinquent Periodic Payment which includes a sufficient amount to pay any late charge due, the payment may be applied to the delinquent payment and the late charge. If more than one Periodic Payment is outstanding, Lender may apply any payment received from Borrower to the repayment of the Periodic Payments if, and to the extent that, each payment can be paid in full. To the extent that any excess exists after the payment is applied to the full payment of one or more Periodic Payments, such excess may be applied to any late charges due. Voluntary prepayments shall be applied first to any prepayment charges and then as described in the Note.

Any application of payments, insurance proceeds, or Miscellaneous Proceeds to principal due under the Note shall not extend or postpone the due date, or change the amount, of the Periodic Payments.

3. Funds for Escrow Items. Borrower shall pay to Lender on the day Periodic Payments are due under the Note, until the Note is paid in full, a sum (the "Funds") to provide for payment of amounts due for: (a) taxes and assessments and other items which can attain priority over this Security Instrument as a lien or encumbrance on the Property; (b) leasehold payments or ground rents on the Property, if any; (c) premiums for any and all insurance required by Lender under Section 5; and (d) Mortgage Insurance premiums, if any, or any sums payable by Borrower to Lender in lieu of the payment of Mortgage Insurance premiums in accordance with the provisions of Section 10. These items are called "Escrow Items." At origination or at any time during the term of the Loan, Lender may require that Community Association Dues, Fees, and Assessments, if any, be escrowed by Borrower, and such dues, fees and assessments shall be an Escrow Item. Borrower shall promptly furnish to Lender all notices of amounts to be paid under this Section. Borrower shall pay Lender the Funds for Escrow Items unless Lender waives Borrower's obligation to pay the Funds for any or all Escrow Items. Lender may waive Borrower's obligation to pay to Lender Funds for any or all Escrow Items at any time. Any such waiver may only be in writing. In the event of such waiver, Borrower shall pay directly, when and where payable, the amounts due for any Escrow Items for which payment of Funds has been waived by Lender and, if Lender requires, shall furnish to Lender receipts evidencing such payment within such time period as Lender may require. Borrower's obligation to make such payments and to provide receipts shall for all purposes be deemed to be a covenant and agreement contained in this Security Instrument, as the phrase "covenant and agreement" is used in Section 9. If Borrower is obligated to pay Escrow Items directly, pursuant to a waiver, and Borrower fails to pay the amount due for an Escrow Item, Lender may exercise its rights under Section 9 and pay such amount and Borrower shall then be obligated under Section 9 to repay to Lender any such amount. Lender may revoke the waiver as to any or all Escrow Items at any time by a notice given in accordance with Section 15 and, upon such revocation, Borrower shall pay to Lender all Funds, and in such amounts, that are then required under this Section 3.

Lender may, at any time, collect and hold Funds in an amount (a) sufficient to permit Lender to apply the Funds at the time specified under RESPA, and (b) not to exceed the maximum amount a lender can require under RESPA. Lender shall estimate the amount of Funds due on the basis of current data and reasonable estimates of expenditures of future Escrow Items or otherwise in accordance with Applicable Law.

The Funds shall be held in an institution whose deposits are insured by a federal agency, instrumentality, or entity (including Lender, if Lender is an institution whose deposits are so insured) or in any Federal Home Loan Bank. Lender shall apply the Funds to pay the Escrow Items no later than the time specified under RESPA. Lender shall not charge Borrower for holding and applying the Funds, annually analyzing the escrow account, or verifying the Escrow Items, unless Lender pays Borrower interest on the Funds and Applicable Law permits Lender to make such a charge. Unless an agreement is made in writing or Applicable Law requires interest to be paid on the Funds, Lender shall not be required to pay Borrower any interest or earnings on the Funds. Borrower and Lender can agree in writing, however, that interest shall be paid on the Funds. Lender shall give to Borrower, without charge, an annual accounting of the Funds as required by RESPA.

If there is a surplus of Funds held in escrow, as defined under RESPA, Lender shall account to Borrower for the excess funds in accordance with RESPA. If there is a shortage of Funds held in escrow, as defined under RESPA, Lender shall notify Borrower as required by RESPA, and Borrower shall pay to Lender the amount necessary to make up the shortage in accordance with RESPA, but in no more than 12 monthly payments. If there is a deficiency of Funds held in escrow, as defined under RESPA, Lender shall notify Borrower as required by RESPA, and Borrower shall pay to Lender the amount necessary to make up the deficiency in accordance with RESPA, but in no more than 12 monthly payments.

Upon payment in full of all sums secured by this Security Instrument, Lender shall promptly refund to Borrower any Funds held by Lender.

4. Charges; Liens. Borrower shall pay all taxes, assessments, charges, fines, and impositions attributable to the Property which can attain priority over this Security Instrument, leasehold payments or ground rents on the Property, if any, and Community Association Dues, Fees, and Assessments, if any. To the extent that these items are Escrow Items, Borrower shall pay them in the manner provided in Section 3.

Borrower shall promptly discharge any lien which has priority over this Security Instrument unless Borrower: (a) agrees in writing to the payment of the obligation secured by the lien in a manner acceptable to Lender, but only so long as Borrower is performing such agreement; (b) contests the lien in good faith by, or defends against enforcement of the lien in, legal proceedings which in Lender's opinion operate to prevent the enforcement of the lien while those proceedings are pending, but only until such proceedings are concluded; or (c) secures from the holder of the lien an agreement satisfactory to Lender subordinating the lien to this Security Instrument. If Lender determines that any part of the Property is subject to a lien which can attain

priority over this Security Instrument, Lender may give Borrower a notice identifying the lien. Within 10 days of the date on which that notice is given, Borrower shall satisfy the lien or take one or more of the actions set forth above in this Section 4.

Lender may require Borrower to pay a one-time charge for a real estate tax verification and/or reporting service used by Lender in connection with this Loan.

5. Property Insurance. Borrower shall keep the improvements now existing or hereafter erected on the Property insured against loss by fire, hazards included within the term "extended coverage," and any other hazards including, but not limited to, earthquakes and floods, for which Lender requires insurance. This insurance shall be maintained in the amounts (including deductible levels) and for the periods that Lender requires. What Lender requires pursuant to the preceding sentences can change during the term of the Loan. The insurance carrier providing the insurance shall be chosen by Borrower subject to Lender's right to disapprove Borrower's choice, which right shall not be exercised unreasonably. Lender may require Borrower to pay, in connection with this Loan, either: (a) a one-time charge for flood zone determination, certification and tracking services; or (b) a one-time charge for flood zone determination and certification services and subsequent charges each time remappings or similar changes occur which reasonably might affect such determination or certification. Borrower shall also be responsible for the payment of any fees imposed by the Federal Emergency Management Agency in connection with the review of any flood zone determination resulting from an objection by Borrower.

If Borrower fails to maintain any of the coverages described above, Lender may obtain insurance coverage, at Lender's option and Borrower's expense. Lender is under no obligation to purchase any particular type or amount of coverage. Therefore, such coverage shall cover Lender, but might or might not protect Borrower, Borrower's equity in the Property, or the contents of the Property, against any risk, hazard or liability and might provide greater or lesser coverage than was previously in effect. Borrower acknowledges that the cost of the insurance coverage so obtained might significantly exceed the cost of insurance that Borrower could have obtained. Any amounts disbursed by Lender under this Section 5 shall become additional debt of Borrower secured by this Security Instrument. These amounts shall bear interest at the Note rate from the date of disbursement and shall be payable, with such interest, upon notice from Lender to Borrower requesting payment.

All insurance policies required by Lender and renewals of such policies shall be subject to Lender's right to disapprove such policies, shall include a standard mortgage clause, and shall name Lender as mortgagee and/or as an additional loss payee. Lender shall have the right to hold the policies and renewal certificates. If Lender requires, Borrower shall promptly give to Lender all receipts of paid premiums and renewal notices. If Borrower obtains any form of insurance coverage, not otherwise required by Lender, for damage to, or destruction of, the Property, such policy shall include a standard mortgage clause and shall name Lender as mortgagee and/or as an additional loss payee.

In the event of loss, Borrower shall give prompt notice to the insurance carrier and Lender. Lender may make proof of loss if not made promptly by Borrower. Unless Lender and Borrower otherwise agree in writing, any insurance proceeds, whether or not the underlying insurance was required by Lender, shall be applied to restoration or repair of the Property, if the restoration or repair is economically feasible and Lender's security is not lessened. During such repair and restoration period, Lender shall have the right to hold such insurance proceeds until Lender has had an opportunity to inspect such Property to ensure the work has been completed to Lender's satisfaction, provided that such inspection shall be undertaken promptly. Lender may disburse proceeds for the repairs and restoration in a single payment or in a series of progress payments as the work is completed. Unless an agreement is made in writing or Applicable Law requires interest to be paid on such insurance proceeds, Lender shall not be required to pay Borrower any interest or earnings on such proceeds. Fees for public adjusters, or other third parties, retained by Borrower shall not be paid out of the insurance proceeds and shall be the sole obligation of Borrower. If the restoration or repair is not economically feasible or Lender's security would be lessened, the insurance proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower. Such insurance proceeds shall be applied in the order provided for in Section 2.

If Borrower abandons the Property, Lender may file, negotiate and settle any available insurance claim and related matters. If Borrower does not respond within 30 days to a notice from Lender that the insurance carrier has offered to settle a claim, then Lender may negotiate and settle the claim. The 30-day period will begin when the notice is given. In either event, or if Lender acquires the Property under Section 22 or otherwise, Borrower hereby assigns to Lender (a) Borrower's rights to any insurance proceeds in an amount not to exceed the amounts unpaid under the Note or this Security Instrument, and (b) any other of Borrower's rights (other than the right to any refund of unearned premiums paid by Borrower) under all insurance policies covering the Property, insofar as such rights are applicable to the coverage of the Property. Lender may use the insurance proceeds either to repair or restore the Property or to pay amounts unpaid under the Note or this Security Instrument, whether or not then due.

6. Occupancy. Borrower shall occupy, establish, and use the Property as Borrower's principal residence within 60 days after the execution of this Security Instrument and shall continue to occupy the Property as Borrower's principal residence for at least one year after the date of occupancy, unless Lender otherwise agrees in writing, which consent shall not be unreasonably withheld, or unless extenuating circumstances exist which are beyond Borrower's control.

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7. Preservation, Maintenance and Protection of the Property; Inspections. Borrower shall not destroy, damage or impair the Property, allow the Property to deteriorate or commit waste on the Property. Whether or not Borrower is residing in the Property, Borrower shall maintain the Property in order to prevent the Property from deteriorating or decreasing in value due to its condition. Unless it is determined pursuant to Section 5 that repair or restoration is not economically feasible, Borrower shall promptly repair the Property if damaged to avoid further deterioration or damage. If insurance or condemnation proceeds are paid in connection with damage to, or the taking of, the Property, Borrower shall be responsible for repairing or restoring the Property only if Lender has released proceeds for such purposes. Lender may disburse proceeds for the repairs and restoration in a single payment or in a series of progress payments as the work is completed. If the insurance or condemnation proceeds are not sufficient to repair or restore the Property, Borrower is not relieved of Borrower's obligation for the completion of such repair or restoration.

Lender or its agent may make reasonable entries upon and inspections of the Property. If it has reasonable cause, Lender may inspect the interior of the improvements on the Property. Lender shall give Borrower notice at the time of or prior to such an interior inspection specifying such reasonable cause.

8. Borrower's Loan Application. Borrower shall be in default if, during the Loan application process, Borrower or any persons or entities acting at the direction of Borrower or with Borrower's knowledge or consent gave materially false, misleading, or inaccurate information or statements to Lender (or failed to provide Lender with material information) in connection with the Loan. Material representations include, but are not limited to, representations concerning Borrower's occupancy of the Property as Borrower's principal residence.

9. Protection of Lender's Interest in the Property and Rights Under this Security Instrument. If (a) Borrower fails to perform the covenants and agreements contained in this Security Instrument, (b) there is a legal proceeding that might significantly affect Lender's interest in the Property and/or rights under this Security Instrument (such as a proceeding in bankruptcy, probate, for condemnation or forfeiture, for enforcement of a lien which may attain priority over this Security Instrument or to enforce laws or regulations), or (c) Borrower has abandoned the Property, then Lender may do and pay for whatever is reasonable or appropriate to protect Lender's interest in the Property and rights under this Security Instrument, including protecting and/or assessing the value of the Property, and securing and/or repairing the Property. Lender's actions can include, but are not limited to: (a) paying any sums secured by a lien which has priority over this Security Instrument; (b) appearing in court; and (c) paying reasonable attorneys' fees to protect its interest in the Property and/or rights under this Security Instrument, including its secured position in a bankruptcy proceeding. Securing the Property includes, but is not limited to, entering the Property to make repairs, change locks, replace or board up doors and windows, drain water from pipes, eliminate building or other code violations or dangerous conditions, and have utilities turned on or off. Although Lender may take action under this Section 9, Lender does not have to do so and is not under any duty or obligation to do so. It is agreed that Lender incurs no liability for not taking any or all actions authorized under this Section 9.

Any amounts disbursed by Lender under this Section 9 shall become additional debt of Borrower secured by this Security Instrument. These amounts shall bear interest at the Note rate from the date of disbursement and shall be payable, with such interest, upon notice from Lender to Borrower requesting payment.

If this Security Instrument is on a leasehold, Borrower shall comply with all the provisions of the lease. If Borrower acquires fee title to the Property, the leasehold and the fee title shall not merge unless Lender agrees to the merger in writing.

10. Mortgage Insurance. If Lender required Mortgage Insurance as a condition of making the Loan, Borrower shall pay the premiums required to maintain the Mortgage Insurance in effect. If, for any reason, the Mortgage Insurance coverage required by Lender ceases to be available from the mortgage insurer that previously provided such insurance and Borrower was required to make separately designated payments toward the premiums for Mortgage Insurance, Borrower shall pay the premiums required to obtain coverage substantially equivalent to the Mortgage Insurance previously in effect, at a cost substantially equivalent to the cost to Borrower of the Mortgage Insurance previously in effect, from an alternate mortgage insurer selected by Lender. If substantially equivalent Mortgage Insurance coverage is not available, Borrower shall continue to pay to Lender the amount of the separately designated payments that were due when the insurance coverage ceased to be in effect. Lender will accept, use and retain these payments as a non-refundable loss reserve in lieu of Mortgage Insurance. Such loss reserve shall be non-refundable, notwithstanding the fact that the Loan is ultimately paid in full, and Lender shall not be required to pay Borrower any interest or earnings on such loss reserve. Lender can no longer require loss reserve payments if Mortgage Insurance coverage (in the amount and for the period that Lender requires) provided by an insurer selected by Lender again becomes available, is obtained, and Lender requires separately designated payments toward the premiums for Mortgage Insurance. If Lender required Mortgage Insurance as a condition of making the Loan and Borrower was required to make separately designated payments toward the premiums for Mortgage Insurance, Borrower shall pay the premiums required to maintain Mortgage Insurance in effect, or to provide a non-refundable loss reserve, until Lender's requirement for Mortgage Insurance ends in accordance with any written agreement between Borrower and Lender providing for such termination or until termination is required by Applicable Law. Nothing in this Section 10 affects Borrower's obligation to pay interest at the rate provided in the Note.

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Mortgage Insurance reimburses Lender (or any entity that purchases the Note) for certain losses it may incur if Borrower does not repay the Loan as agreed. Borrower is not a party to the Mortgage Insurance.

Mortgage insurers evaluate their total risk on all such insurance in force from time to time, and may enter into agreements with other parties that share or modify their risk, or reduce losses. These agreements are on terms and conditions that are satisfactory to the mortgage insurer and the other party (or parties) to these agreements. These agreements may require the mortgage insurer to make payments using any source of funds that the mortgage insurer may have available (which may include funds obtained from Mortgage Insurance premiums).

As a result of these agreements, Lender, any purchaser of the Note, another insurer, any reinsurer, any other entity, or any affiliate of any of the foregoing, may receive (directly or indirectly) amounts that derive from (or might be characterized as) a portion of Borrower's payments for Mortgage Insurance, in exchange for sharing or modifying the mortgage insurer's risk, or reducing losses. If such agreement provides that an affiliate of Lender takes a share of the insurer's risk in exchange for a share of the premiums paid to the insurer, the arrangement is often termed "captive reinsurance." Further:

(a) Any such agreements will not affect the amounts that Borrower has agreed to pay for Mortgage Insurance, or any other terms of the Loan. Such agreements will not increase the amount Borrower will owe for Mortgage Insurance, and they will not entitle Borrower to any refund.

(b) Any such agreements will not affect the rights Borrower has - if any - with respect to the Mortgage Insurance under the Homeowners Protection Act of 1998 or any other law. These rights may include the right to receive certain disclosures, to request and obtain cancellation of the Mortgage Insurance, to have the Mortgage Insurance terminated automatically, and/or to receive a refund of any Mortgage Insurance premiums that were unearned at the time of such cancellation or termination.

11. Assignment of Miscellaneous Proceeds; Forfeiture. All Miscellaneous Proceeds are hereby assigned to and shall be paid to Lender.

If the Property is damaged, such Miscellaneous Proceeds shall be applied to restoration or repair of the Property, if the restoration or repair is economically feasible and Lender's security is not lessened. During such repair and restoration period, Lender shall have the right to hold such Miscellaneous Proceeds until Lender has had an opportunity to inspect such Property to ensure the work has been completed to Lender's satisfaction, provided that such inspection shall be undertaken promptly. Lender may pay for the repairs and restoration in a single disbursement or in a series of progress payments as the work is completed. Unless an agreement is made in writing or Applicable Law requires interest to be paid on such Miscellaneous Proceeds, Lender shall not be required to pay Borrower any interest or earnings on such Miscellaneous Proceeds. If the restoration or repair is not economically feasible or Lender's security would be lessened, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower. Such Miscellaneous Proceeds shall be applied in the order provided for in Section 2.

In the event of a total taking, destruction, or loss in value of the Property, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower.

In the event of a partial taking, destruction, or loss in value of the Property in which the fair market value of the Property immediately before the partial taking, destruction, or loss in value is equal to or greater than the amount of the sums secured by this Security Instrument immediately before the partial taking, destruction, or loss in value, unless Borrower and Lender otherwise agree in writing, the sums secured by this Security Instrument shall be reduced by the amount of the Miscellaneous Proceeds multiplied by the following fraction: (a) the total amount of the sums secured immediately before the partial taking, destruction, or loss in value divided by (b) the fair market value of the Property immediately before the partial taking, destruction, or loss in value. Any balance shall be paid to Borrower.

In the event of a partial taking, destruction, or loss in value of the Property in which the fair market value of the Property immediately before the partial taking, destruction, or loss in value is less than the amount of the sums secured immediately before the partial taking, destruction, or loss in value, unless Borrower and Lender otherwise agree in writing, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument whether or not the sums are then due.

If the Property is abandoned by Borrower, or if, after notice by Lender to Borrower that the Opposing Party (as defined in the next sentence) offers to make an award to settle a claim for damages, Borrower fails to respond to Lender within 30 days after the date the notice is given, Lender is authorized to collect and apply the Miscellaneous Proceeds either to restoration or repair of the Property or to the sums secured by this Security Instrument, whether or not then due. "Opposing Party" means the third party that owes Borrower Miscellaneous Proceeds or the party against whom Borrower has a right of action in regard to Miscellaneous Proceeds.

Borrower shall be in default if any action or proceeding, whether civil or criminal, is begun that, in Lender's judgment, could result in forfeiture of the Property or other material impairment of Lender's interest in the Property or rights under this Security Instrument. Borrower can cure such a default and, if acceleration has occurred, reinstate as provided in Section 19, by causing the action or proceeding to be dismissed with a ruling that, in Lender's judgment, precludes forfeiture of the Property or other material impairment of Lender's interest in the Property or rights under this Security Instrument. The proceeds of any award or claim for damages that are attributable to the impairment of Lender's interest in the Property are hereby assigned and shall be paid to Lender.

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All Miscellaneous Proceeds that are not applied to restoration or repair of the Property shall be applied in the order provided for in Section 2.

12. Borrower Not Released; Forbearance By Lender Not a Waiver. Extension of the time for payment or modification of amortization of the sums secured by this Security Instrument granted by Lender to Borrower or any Successor in Interest of Borrower shall not operate to release the liability of Borrower or any Successors in Interest of Borrower. Lender shall not be required to commence proceedings against any Successor in Interest of Borrower or to refuse to extend time for payment or otherwise modify amortization of the sums secured by this Security Instrument by reason of any demand made by the original Borrower or any Successors in Interest of Borrower. Any forbearance by Lender in exercising any right or remedy including, without limitation, Lender's acceptance of payments from third persons, entities or Successors in Interest of Borrower or in amounts less than the amount then due, shall not be a waiver of or preclude the exercise of any right or remedy.

13. Joint and Several Liability; Co-signers; Successors and Assigns Bound. Borrower covenants and agrees that Borrower's obligations and liability shall be joint and several. However, any Borrower who co-signs this Security Instrument but does not execute the Note (a "co-signer"): (a) is co-signing this Security Instrument only to mortgage, grant and convey the co-signer's interest in the Property under the terms of this Security Instrument; (b) is not personally obligated to pay the sums secured by this Security Instrument; and (c) agrees that Lender and any other Borrower can agree to extend, modify, forbear or make any accommodations with regard to the terms of this Security Instrument or the Note without the co-signer's consent.

Subject to the provisions of Section 18, any Successor in Interest of Borrower who assumes Borrower's obligations under this Security Instrument in writing, and is approved by Lender, shall obtain all of Borrower's rights and benefits under this Security Instrument. Borrower shall not be released from Borrower's obligations and liability under this Security Instrument unless Lender agrees to such release in writing. The covenants and agreements of this Security Instrument shall bind (except as provided in Section 20) and benefit the successors and assigns of Lender.

14. Loan Charges. Lender may charge Borrower fees for services performed in connection with Borrower's default, for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument, including, but not limited to, attorneys' fees, property inspection and valuation fees. In regard to any other fees, the absence of express authority in this Security Instrument to charge a specific fee to Borrower shall not be construed as a prohibition on the charging of such fee. Lender may not charge fees that are expressly prohibited by this Security Instrument or by Applicable Law.

If the Loan is subject to a law which sets maximum loan charges, and that law is finally interpreted so that the interest or other loan charges collected or to be collected in connection with the Loan exceed the permitted limits, then: (a) any such loan charge shall be reduced by the amount necessary to reduce the charge to the permitted limit; and (b) any sums already collected from Borrower which exceeded permitted limits will be refunded to Borrower. Lender may choose to make this refund by reducing the principal owed under the Note or by making a direct payment to Borrower. If a refund reduces principal, the reduction will be treated as a partial prepayment without any prepayment charge (whether or not a prepayment charge is provided for under the Note). Borrower's acceptance of any such refund made by direct payment to Borrower will constitute a waiver of any right of action Borrower might have arising out of such overcharge.

15. Notices. All notices given by Borrower or Lender in connection with this Security Instrument must be in writing. Any notice to Borrower in connection with this Security Instrument shall be deemed to have been given to Borrower when mailed by first class mail or when actually delivered to Borrower's notice address if sent by other means. Notice to any one Borrower shall constitute notice to all Borrowers unless Applicable Law expressly requires otherwise. The notice address shall be the Property Address unless Borrower has designated a substitute notice address by notice to Lender. Borrower shall promptly notify Lender of Borrower's change of address. If Lender specifies a procedure for reporting Borrower's change of address, then Borrower shall only report a change of address through that specified procedure. There may be only one designated notice address under this Security Instrument at any one time. Any notice to Lender shall be given by delivering it or by mailing it by first class mail to Lender's address stated herein unless Lender has designated another address by notice to Borrower. Any notice in connection with this Security Instrument shall not be deemed to have been given to Lender until actually received by Lender. If any notice required by this Security Instrument is also required under Applicable Law, the Applicable Law requirement will satisfy the corresponding requirement under this Security Instrument.

16. Governing Law; Severability; Rules of Construction. This Security Instrument shall be governed by federal law and the law of the jurisdiction in which the Property is located. All rights and obligations contained in this Security Instrument are subject to any requirements and limitations of Applicable Law. Applicable Law might explicitly or implicitly allow the parties to agree by contract or it might be silent, but such silence shall not be construed as a prohibition against agreement by contract. In the event that any provision or clause of this Security Instrument or the Note conflicts with Applicable Law, such conflict shall not affect other provisions of this Security Instrument or the Note which can be given effect without the conflicting provision.

As used in this Security Instrument: (a) words of the masculine gender shall mean and include corresponding neuter words or words of the feminine gender; (b) words in the singular shall mean and include the plural and vice versa; and (c) the word "may" gives sole discretion without any obligation to take any action.

[redacted]

17. Borrower's Copy. Borrower shall be given one copy of the Note and of this Security Instrument.

18. Transfer of the Property or a Beneficial Interest in Borrower. As used in this Section 18, "Interest in the Property" means any legal or beneficial interest in the Property, including, but not limited to, those beneficial interests transferred in a bond for deed, contract for deed, installment sales contract or escrow agreement, the intent of which is the transfer of title by Borrower at a future date to a purchaser.

If all or any part of the Property or any Interest in the Property is sold or transferred (or if Borrower is not a natural person and a beneficial interest in Borrower is sold or transferred) without Lender's prior written consent, Lender may require immediate payment in full of all sums secured by this Security Instrument. However, this option shall not be exercised by Lender if such exercise is prohibited by Applicable Law.

If Lender exercises this option, Lender shall give Borrower notice of acceleration. The notice shall provide a period of not less than 30 days from the date the notice is given in accordance with Section 15 within which Borrower must pay all sums secured by this Security Instrument. If Borrower fails to pay these sums prior to the expiration of this period, Lender may invoke any remedies permitted by this Security Instrument without further notice or demand on Borrower.

19. Borrower's Right to Reinstate After Acceleration. If Borrower meets certain conditions, Borrower shall have the right to have enforcement of this Security Instrument discontinued at any time prior to the earliest of: (a) five days before sale of the Property pursuant to any power of sale contained in this Security Instrument; (b) such other period as Applicable Law might specify for the termination of Borrower's right to reinstate; or (c) entry of a judgment enforcing this Security Instrument. Those conditions are that Borrower: (a) pays Lender all sums which then would be due under this Security Instrument and the Note as if no acceleration had occurred; (b) cures any default of any other covenants or agreements; (c) pays all expenses incurred in enforcing this Security Instrument, including, but not limited to, reasonable attorneys' fees, property inspection and valuation fees, and other fees incurred for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument; and (d) takes such action as Lender may reasonably require to assure that Lender's interest in the Property and rights under this Security Instrument, and Borrower's obligation to pay the sums secured by this Security Instrument, shall continue unchanged. Lender may require that Borrower pay such reinstatement sums and expenses in one or more of the following forms, as selected by Lender: (a) cash; (b) money order; (c) certified check, bank check, treasurer's check or cashier's check, provided any such check is drawn upon an institution whose deposits are insured by a federal agency, instrumentality or entity; or (d) Electronic Funds Transfer. Upon reinstatement by Borrower, this Security Instrument and obligations secured hereby shall remain fully effective as if no acceleration had occurred. However, this right to reinstate shall not apply in the case of acceleration under Section 18.

20. Sale of Note; Change of Loan Servicer; Notice of Grievance. The Note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times without prior notice to Borrower. A sale might result in a change in the entity (known as the "Loan Servicer") that collects Periodic Payments due under the Note and this Security Instrument and performs other mortgage loan servicing obligations under the Note, this Security Instrument, and Applicable Law. There also might be one or more changes of the Loan Servicer unrelated to a sale of the Note. If there is a change of the Loan Servicer, Borrower will be given written notice of the change which will state the name and address of the new Loan Servicer, the address to which payments should be made and any other information RESPA requires in connection with a notice of transfer of servicing. If the Note is sold and thereafter the Loan is serviced by a Loan Servicer other than the purchaser of the Note, the mortgage loan servicing obligations to Borrower will remain with the Loan Servicer or be transferred to a successor Loan Servicer and are not assumed by the Note purchaser unless otherwise provided by the Note purchaser.

Neither Borrower nor Lender may commence, join, or be joined to any judicial action (as either an individual litigant or the member of a class) that arises from the other party's actions pursuant to this Security Instrument or that alleges that the other party has breached any provision of, or any duty owed by reason of, this Security Instrument, until such Borrower or Lender has notified the other party (with such notice given in compliance with the requirements of Section 15) of such alleged breach and afforded the other party hereto a reasonable period after the giving of such notice to take corrective action. If Applicable Law provides a time period which must elapse before certain action can be taken, that time period will be deemed to be reasonable for purposes of this paragraph. The notice of acceleration and opportunity to cure given to Borrower pursuant to Section 22 and the notice of acceleration given to Borrower pursuant to Section 18 shall be deemed to satisfy the notice and opportunity to take corrective action provisions of this Section 20.

21. Hazardous Substances. As used in this Section 21: (a) "Hazardous Substances" are those substances defined as toxic or hazardous substances, pollutants, or wastes by Environmental Law and the following substances: gasoline, kerosene, other flammable or toxic petroleum products, toxic pesticides and herbicides, volatile solvents, materials containing asbestos or formaldehyde, and radioactive materials; (b) "Environmental Law" means federal laws and laws of the jurisdiction where the Property is located that relate to health, safety or environmental protection; (c) "Environmental Cleanup" includes any response action, remedial action, or removal action, as defined in Environmental Law; and (d) an "Environmental Condition" means a condition that can cause, contribute to, or otherwise trigger an Environmental Cleanup.

Borrower shall not cause or permit the presence, use, disposal, storage, or release of any Hazardous Substances, or threaten to release any Hazardous Substances, on or in the Property. Borrower shall not do, nor allow anyone else to do, anything affecting the Property (a) that is in violation of any Environmental Law, (b) which creates an Environmental Condition, or (c) which, due to the presence, use, or release of a Hazardous

[redacted]

Substance, creates a condition that adversely affects the value of the Property. The preceding two sentences shall not apply to the presence, use, or storage on the Property of small quantities of Hazardous Substances that are generally recognized to be appropriate to normal residential uses and to maintenance of the Property (including, but not limited to, hazardous substances in consumer products).

Borrower shall promptly give Lender written notice of (a) any investigation, claim, demand, lawsuit or other action by any governmental or regulatory agency or private party involving the Property and any Hazardous Substance or Environmental Law of which Borrower has actual knowledge; (b) any Environmental Condition, including but not limited to, any spilling, leaking, discharge, release or threat of release of any Hazardous Substance, and (c) any condition caused by the presence, use or release of a Hazardous Substance which adversely affects the value of the Property. If Borrower learns, or is notified by any governmental or regulatory authority, or any private party, that any removal or other remediation of any Hazardous Substance affecting the Property is necessary, Borrower shall promptly take all necessary remedial actions in accordance with Environmental Law. Nothing herein shall create any obligation on Lender for an Environmental Cleanup.

NON-UNIFORM COVENANTS. Borrower and Lender further covenant and agree as follows:

22. Acceleration; Remedies. Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument (but not prior to acceleration under Section 18 unless Applicable Law provides otherwise). The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to bring a court action to assert the non-existence of a default or any other defense of Borrower to acceleration and sale. If the default is not cured on or before the date specified in the notice, Lender at its option may require immediate payment in full of all sums secured by this Security Instrument without further demand and may invoke the power of sale and any other remedies permitted by Applicable Law. Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this Section 22, including, but not limited to, reasonable attorneys' fees and costs of title evidence.

If the power of sale is invoked, Trustee shall execute a written notice of the occurrence of an event of default and of the election to cause the Property to be sold and shall record such notice in each county in which any part of the Property is located. Lender or Trustee shall mail copies of such notice in the manner prescribed by Applicable Law to Borrower and to the other persons prescribed by Applicable Law. In the event Borrower does not cure the default within the period then prescribed by Applicable Law, Trustee shall give public notice of the sale to the persons and in the manner prescribed by Applicable Law. After the time required by Applicable Law, Trustee, without demand on Borrower, shall sell the Property at public auction to the highest bidder at the time and place and under the terms designated in the notice of sale in one or more parcels and in any order Trustee determines (but subject to any statutory right of Borrower to direct the order in which the Property, if consisting of several known lots or parcels, shall be sold). Trustee may in accordance with Applicable Law, postpone sale of all or any parcel of the Property by public announcement at the time and place of any previously scheduled sale. Lender or its designee may purchase the Property at any sale.

Trustee shall deliver to the purchaser Trustee's deed conveying the Property without any covenant or warranty, expressed or implied. The recitals in the Trustee's deed shall be prima facie evidence of the truth of the statements made therein. Trustee shall apply the proceeds of the sale in the following order: (a) to all expenses of the sale, including, but not limited to, reasonable Trustee's and attorneys' fees; (b) to all sums secured by this Security Instrument; and (c) any excess to the person or persons legally entitled to it or to the county clerk of the county in which the sale took place.

23. Reconveyance. Upon payment of all sums secured by this Security Instrument, Lender shall request Trustee to reconvey the Property and shall surrender this Security Instrument and all notes evidencing debt secured by this Security Instrument to Trustee. Trustee shall reconvey the Property without warranty to the person or persons legally entitled to it. Such person or persons shall pay any recordation costs. Lender may charge such person or persons a fee for reconveying the Property, but only if the fee is paid to a third party (such as the Trustee) for services rendered and the charging of the fee is permitted under Applicable Law.

24. Substitute Trustee. Lender, at its option, may from time to time remove Trustee and appoint a successor trustee to any Trustee appointed hereunder. Without conveyance of the Property, the successor trustee shall succeed to all the title, power and duties conferred upon Trustee herein and by Applicable Law.

25. Request for Notices. Borrower requests that copies of the notices of default and sale be sent to Borrower's address which is the Property Address.

[redacted]

BY SIGNING BELOW, Borrower accepts and agrees to the terms and covenants contained in this Security Instrument and in any Rider executed by Borrower and recorded with it.

Paula A. Mitchell (Seal)
PAULA A. MITCHELL -Borrower

(Seal)
-Borrower

(Seal)
-Borrower

(Seal)
-Borrower

STATE OF UTAH, Salt Lake County ss:

The foregoing instrument was subscribed and sworn to and acknowledged before me this 5-23-06 by Paula A. Mitchell

My Commission Expires: 5/15/09

Notary Public
Residing at: Slc, utah

MARK G JARVIS
NOTARY PUBLIC • STATE of UTAH
84 E 6400 S SUITE 100
SALT LAKE CITY, UT 84107
COMM. EXP. 05/15/2009

EXHIBIT "C"

Prepared by: MARYANN MASUISUI

[redacted]

InterestOnly℠ ADJUSTABLE RATE NOTE

(One-Year LIBOR Index (As Published in *The Wall Street Journal*) - Rate Caps)

THIS NOTE CONTAINS PROVISIONS ALLOWING FOR A CHANGE IN MY FIXED INTEREST RATE TO AN ADJUSTABLE INTEREST RATE AND FOR CHANGES IN MY MONTHLY PAYMENT. THIS NOTE LIMITS THE AMOUNT MY ADJUSTABLE INTEREST RATE CAN CHANGE AT ANY ONE TIME AND THE MAXIMUM RATE I MUST PAY.

MAY 23, 2006	SALT LAKE	UTAH
[Date]	[City]	[State]

3 SOUTH MISTYWOOD LANE, SANDY, UT 84092-4850
[Property Address]

1. BORROWER'S PROMISE TO PAY

In return for a loan that I have received, I promise to pay U.S. $ 1,000,000.00 (this amount is called "Principal"), plus interest, to the order of Lender. Lender is
AMERICA'S WHOLESALE LENDER
I will make all payments under this Note in the form of cash, check or money order.

I understand that Lender may transfer this Note. Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the "Note Holder."

2. INTEREST

Interest will be charged on unpaid principal until the full amount of Principal has been paid. I will pay interest at a yearly rate of 6.500 %. The interest rate I will pay may change in accordance with Section 4 of this Note.

The interest rate required by this Section 2 and Section 4 of this Note is the rate I will pay both before and after any default described in Section 7(B) of this Note.

3. PAYMENTS

(A) Time and Place of Payments

I will make a payment on the first day of every month, beginning on JULY 01, 2006 . Before the First Principal and Interest Payment Due Date as described in Section 4 of this Note, my payment will consist only of the interest due on the unpaid principal balance of this Note. Thereafter, I will pay principal and interest by making a payment every month as provided below.

I will make my monthly payments of principal and interest beginning on the First Principal and Interest Payment Due Date as described in Section 4 of this Note. I will make these payments every month until I have paid all of the principal and interest and any other charges described below that I may owe under this Note. Each monthly payment will be applied as of its scheduled due date, and if the payment includes both principal and interest, it will be applied to interest before Principal. If, on JUNE 01, 2036 , I still owe amounts under this Note, I will pay those amounts in full on that date, which is called the "Maturity Date."

I will make my monthly payments at
P.O. Box 10219, Van Nuys, CA 91410-0219
or at a different place if required by the Note Holder.

(B) Amount of My Initial Monthly Payments

My monthly payment will be in the amount of U.S. $ 5,416.67 before the First Principal and Interest Payment Due Date, and thereafter will be in an amount sufficient to repay the principal and interest at the rate determined as described in Section 4 of this Note in substantially equal installments by the Maturity Date. The Note Holder will notify me prior to the date of change in monthly payment.

(C) Monthly Payment Changes

Changes in my monthly payment will reflect changes in the unpaid principal of my loan and in the interest rate that I must pay. The Note Holder will determine my new interest rate and the changed amount of my monthly payment in accordance with Section 4 or 5 of this Note.

[redacted]

[redacted]

4. ADJUSTABLE INTEREST RATE AND MONTHLY PAYMENT CHANGES

(A) Change Dates

The initial fixed interest rate I will pay will change to an adjustable interest rate on the first day of JUNE, 2011, and the adjustable interest rate I will pay may change on that day every 12th month thereafter. The date on which my initial fixed interest rate changes to an adjustable interest rate, and each date on which my adjustable interest rate could change, is called a "Change Date."

(B) The Index

Beginning with the first Change Date, my adjustable interest rate will be based on an Index. The "Index" is the average of interbank offered rates for one-year U.S. dollar-denominated deposits in the London market (LIBOR), as published in *The Wall Street Journal*. The most recent Index figure available as of the date 45 days before each Change Date is called the "Current Index."

If the Index is no longer available, the Note Holder will choose a new index that is based upon comparable information. The Note Holder will give me notice of this choice.

(C) Calculation of Changes

Before each Change Date, the Note Holder will calculate my new interest rate by adding TWO & ONE-QUARTER percentage points (2.250 %) to the Current Index. The Note Holder will then round the result of this addition to the nearest one-eighth of one percentage point (0.125%). Subject to the limits stated in Section 4(D) below, this rounded amount will be my new interest rate until the next Change Date.

The Note Holder will then determine the amount of the monthly payment that would be sufficient to repay the unpaid principal that I am expected to owe at the Change Date in full on the Maturity Date at my new interest rate in substantially equal payments. The result of this calculation will be the new amount of my monthly payment.

(D) Limits on Interest Rate Changes

The interest rate I am required to pay at the first Change Date will not be greater than 11.500 % or less than 2.250 %. Thereafter, my adjustable interest rate will never be increased or decreased on any single Change Date by more than two percentage points from the rate of interest I have been paying for the preceding 12 months. My interest rate will never be greater than 11.500 %.

(E) Effective Date of Changes

My new interest rate will become effective on each Change Date. I will pay the amount of my new monthly payment beginning on the first monthly payment date after the Change Date until the amount of my monthly payment changes again.

(F) Notice of Changes

Before the effective date of any change in my interest rate and/or monthly payment, the Note Holder will deliver or mail to me a notice of such change. The notice will include information required by law to be given to me and also the title and telephone number of a person who will answer any question I may have regarding the notice.

(G) Date of First Principal and Interest Payment

The date of my first payment consisting of both principal and interest on this Note (the "First Principal and Interest Payment Due Date") shall be the first monthly payment date after the first Change Date.

5. BORROWER'S RIGHT TO PREPAY

I have the right to make payments of Principal at any time before they are due. A payment of Principal only is known as a "Prepayment." When I make a Prepayment, I will tell the Note Holder in writing that I am doing so. I may not designate a payment as a Prepayment if I have not made all the monthly payments due under this Note.

I may make a full Prepayment or partial Prepayments without paying any Prepayment charge. The Note Holder will use my Prepayments to reduce the amount of Principal that I owe under this Note. However, the Note Holder may apply my Prepayment to the accrued and unpaid interest on the Prepayment amount before applying my Prepayment to reduce the Principal amount of the Note. If I make a partial Prepayment, there will be no changes in the due date of my monthly payments unless the Note Holder agrees in writing to those changes. If the partial Prepayment is made during the period when my monthly payments consist only of interest, the amount of the monthly payment will decrease for the remainder of the term when my payments consist of only interest. If the partial Prepayment is made during the period when my payments consist of principal and interest, my partial Prepayment may reduce the amount of my monthly payments after the first Change Date following my partial Prepayment. However, any reduction due to my partial Prepayment may be offset by an interest rate increase.

6. LOAN CHARGES

If a law, which applies to this loan and which sets maximum loan charges, is finally interpreted so that the interest or other loan charges collected or to be collected in connection with this loan exceed the permitted limits, then: (a) any such loan charge shall be reduced by the amount necessary to reduce the charge to the permitted limit; and (b) any sums already collected from me that exceeded permitted limits will be refunded to me. The Note Holder may choose to make this refund by reducing the Principal I owe under this Note or by making a direct payment to me. If a refund reduces Principal, the reduction will be treated as a partial Prepayment.

7. BORROWER'S FAILURE TO PAY AS REQUIRED

(A) Late Charges for Overdue Payments

If the Note Holder has not received the full amount of any monthly payment by the end of FIFTEEN calendar days after the date it is due, I will pay a late charge to the Note Holder. The amount of the charge will be 5.000 % of my overdue payment of interest, during the period when my payment is interest only, and of principal and interest thereafter. I will pay this late charge promptly but only once on each late payment.

(B) Default

If I do not pay the full amount of each monthly payment on the date it is due, I will be in default.

[redacted]

(C) Notice of Default

If I am in default, the Note Holder may send me a written notice telling me that if I do not pay the overdue amount by a certain date, the Note Holder may require me to pay immediately the full amount of Principal that has not been paid and all the interest that I owe on that amount. That date must be at least 30 days after the date on which the notice is mailed to me or delivered by other means.

(D) No Waiver By Note Holder

Even if, at a time when I am in default, the Note Holder does not require me to pay immediately in full as described above, the Note Holder will still have the right to do so if I am in default at a later time.

(E) Payment of Note Holder's Costs and Expenses

If the Note Holder has required me to pay immediately in full as described above, the Note Holder will have the right to be paid back by me for all of its costs and expenses in enforcing this Note to the extent not prohibited by applicable law. Those expenses include, for example, reasonable attorneys' fees.

8. GIVING OF NOTICES

Unless applicable law requires a different method, any notice that must be given to me under this Note will be given by delivering it or by mailing it by first class mail to me at the Property Address above or at a different address if I give the Note Holder a notice of my different address.

Unless the Note Holder requires a different method, any notice that must be given to the Note Holder under this Note will be given by mailing it by first class mail to the Note Holder at the address stated in Section 3(A) above or at a different address if I am given a notice of that different address.

9. OBLIGATIONS OF PERSONS UNDER THIS NOTE

If more than one person signs this Note, each person is fully and personally obligated to keep all of the promises made in this Note, including the promise to pay the full amount owed. Any person who is a guarantor, surety or endorser of this Note is also obligated to do these things. Any person who takes over these obligations, including the obligations of a guarantor, surety or endorser of this Note, is also obligated to keep all of the promises made in this Note. The Note Holder may enforce its rights under this Note against each person individually or against all of us together. This means that any one of us may be required to pay all of the amounts owed under this Note.

10. WAIVERS

I and any other person who has obligations under this Note waive the rights of Presentment and Notice of Dishonor. "Presentment" means the right to require the Note Holder to demand payment of amounts due. "Notice of Dishonor" means the right to require the Note Holder to give notice to other persons that amounts due have not been paid.

11. UNIFORM SECURED NOTE

This Note is a uniform instrument with limited variations in some jurisdictions. In addition to the protections given to the Note Holder under this Note, a Mortgage, Deed of Trust, or Security Deed (the "Security Instrument"), dated the same date as this Note, protects the Note Holder from possible losses that might result if I do not keep the promises that I make in this Note. That Security Instrument describes how and under what conditions I may be required to make immediate payment in full of all amounts I owe under this Note. Some of those conditions read as follows:

(A) Until my initial fixed interest rate changes to an adjustable interest rate under the terms stated in Section 4 above, Uniform Covenant 18 of the Security Instrument shall read as follows:

> **Transfer of the Property or a Beneficial Interest in Borrower.** As used in this Section 18, "Interest in the Property" means any legal or beneficial interest in the Property, including, but not limited to, those beneficial interests transferred in a bond for deed, contract for deed, installment sales contract or escrow agreement, the intent of which is the transfer of title by Borrower at a future date to a purchaser.
>
> If all or any part of the Property or any interest in it is sold or transferred (or if Borrower is not a natural person and a beneficial interest in Borrower is sold or transferred) without Lender's prior written consent, Lender may, at its option, require immediate payment in full of all sums secured by this Security Instrument. However, this option shall not be exercised by Lender if exercise is prohibited by federal law.
>
> If Lender exercises this option, Lender shall give Borrower notice of acceleration. The notice shall provide a period of not less than 30 days from the date the notice is given in accordance with Section 15 within which Borrower must pay all sums secured by this Security Instrument. If Borrower fails to pay these sums prior to the expiration of this period, Lender may invoke any remedies permitted by this Security Instrument without further notice or demand on Borrower.

(B) When my initial fixed interest rate changes to an adjustable interest rate under the terms stated in Section 4 above, Uniform Covenant 18 of the Security Instrument described in Section 11(A) above shall then cease to be in effect, and Uniform Covenant 18 of the Security Instrument shall instead read as follows:

> **Transfer of the Property or a Beneficial Interest in Borrower.** As used in this Section 18, "Interest in the Property" means any legal or beneficial interest in the Property, including, but not limited to, those beneficial interests transferred in a bond for deed, contract for deed, installment sales contract or escrow agreement, the intent of which is the transfer of title by Borrower at a future date to a purchaser.

If all or any part of the Property or any Interest in the Property is sold or transferred (or if Borrower is not a natural person and a beneficial interest in Borrower is sold or transferred) without Lender's prior written consent, Lender may require immediate payment in full of all sums secured by this Security Instrument. However, this option shall not be exercised by Lender if such exercise is prohibited by Applicable Law. Lender also shall not exercise this option if: (a) Borrower causes to be submitted to Lender information required by Lender to evaluate the intended transferee as if a new loan were being made to the transferee; and (b) Lender reasonably determines that Lender's security will not be impaired by the loan assumption and that the risk of a breach of any covenant or agreement in this Security Instrument is acceptable to Lender.

To the extent permitted by Applicable Law, Lender may charge a reasonable fee as a condition to Lender's consent to the loan assumption. Lender may also require the transferee to sign an assumption agreement that is acceptable to Lender and that obligates the transferee to keep all the promises and agreements made in the Note and in this Security Instrument. Borrower will continue to be obligated under the Note and this Security Instrument unless Lender releases Borrower in writing.

If Lender exercises the option to require immediate payment in full, Lender shall give Borrower notice of acceleration. The notice shall provide a period of not less than 30 days from the date the notice is given in accordance with Section 15 within which Borrower must pay all sums secured by this Security Instrument. If Borrower fails to pay these sums prior to the expiration of this period, Lender may invoke any remedies permitted by this Security Instrument without further notice or demand on Borrower.

WITNESS THE HAND(S) AND SEAL(S) OF THE UNDERSIGNED.

Paula A. Mitchell (Seal)
PAULA A. MITCHELL -Borrower

(Seal)
-Borrower

(Seal)
-Borrower

(Seal)
-Borrower

[Sign Original Only]

PAY TO THE ORDER OF
WITHOUT RECOURSE
COUNTRYWIDE HOME LOANS, INC., A NEW YORK CORPORATION
DOING BUSINESS AS AMERICA'S WHOLESALE LENDER
BY: Michele Sjolander
MICHELE SJOLANDER
EXECUTIVE VICE PRESIDENT

[Space Above This Line For Recording Data]

FIXED/ADJUSTABLE RATE RIDER

(LIBOR One-Year Index (As Published In *The Wall Street Journal*) - Rate Caps)

After Recording Return To:
COUNTRYWIDE HOME LOANS, INC.
MS SV-79 DOCUMENT PROCESSING
P.O.Box 10423
Van Nuys, CA 91410-0423

[redacted]

Prepared By:
MARYANN MASUISUI
AMERICA'S WHOLESALE LENDER

6955 UNION PARK CENTER #400
MIDVALE
UT 84047

[redacted]

THIS FIXED/ADJUSTABLE RATE RIDER is made this TWENTY-THIRD day of MAY, 2006, and is incorporated into and shall be deemed to amend and supplement the Mortgage, Deed of Trust, or Security Deed (the "Security Instrument") of the same date given by the undersigned ("Borrower") to secure Borrower's Fixed/Adjustable Rate Note (the "Note") to AMERICA'S WHOLESALE LENDER ("Lender") of the same date and covering the property described in the Security Instrument and located at:

3 SOUTH MISTYWOOD LANE, SANDY, UT 84092-4850

[Property Address]

[redacted]

[redacted]

THE NOTE PROVIDES FOR A CHANGE IN BORROWER'S FIXED INTEREST RATE TO AN ADJUSTABLE INTEREST RATE. THE NOTE LIMITS THE AMOUNT BORROWER'S ADJUSTABLE INTEREST RATE CAN CHANGE AT ANY ONE TIME AND THE MAXIMUM RATE BORROWER MUST PAY.

ADDITIONAL COVENANTS. In addition to the covenants and agreements made in the Security Instrument, Borrower and Lender further covenant and agree as follows:

A. ADJUSTABLE RATE AND MONTHLY PAYMENT CHANGES

The Note provides for an initial fixed interest rate of 6.500 %. The Note also provides for a change in the initial fixed rate to an adjustable interest rate, as follows:

4. ADJUSTABLE INTEREST RATE AND MONTHLY PAYMENT CHANGES

(A) Change Dates

The initial fixed interest rate I will pay will change to an adjustable interest rate on the first day of JUNE, 2011, and the adjustable interest rate I will pay may change on that day every 12th month thereafter. The date on which my initial fixed interest rate changes to an adjustable interest rate, and each date on which my adjustable interest rate could change, is called a "Change Date."

(B) The Index

Beginning with the first Change Date, my adjustable interest rate will be based on an Index. The "Index" is the average of interbank offered rates for one year U.S. dollar-denominated deposits in the London market ("LIBOR"), as published in the *The Wall Street Journal*. The most recent Index figure available as of the date 45 days before each Change Date is called the "Current Index."

If the Index is no longer available, the Note Holder will choose a new index that is based upon comparable information. The Note Holder will give me notice of this choice.

(C) Calculation of Changes

Before each Change Date, the Note Holder will calculate my new interest rate by adding TWO & ONE-QUARTER percentage points (2.250 %) to the Current Index. The Note Holder will then round the result of this addition to the nearest one-eighth of one percentage point (0.125%). Subject to the limits stated in Section 4(D) below, this rounded amount will be my new interest rate until the next Change Date.

The Note Holder will then determine the amount of the monthly payment that would be sufficient to repay the unpaid principal that I am expected to owe at the Change Date in full on the Maturity Date at my new interest rate in substantially equal payments. The result of this calculation will be the new amount of my monthly payment.

(D) Limits on Interest Rate Changes

The interest rate I am required to pay at the first Change Date will not be greater than 11.500 % or less than 2.250 %. Thereafter, my adjustable interest rate will never be increased or decreased on any single Change Date by more than two percentage points from the rate of interest I have been paying for the preceding 12 months. My interest rate will never be greater than 11.500 %.

(E) Effective Date of Changes

My new interest rate will become effective on each Change Date. I will pay the amount of my new monthly payment beginning on the first monthly payment date after the Change Date until the amount of my monthly payment changes again.

(F) Notice of Changes

The Note Holder will deliver or mail to me a notice of any changes in my initial fixed interest rate to an adjustable interest rate and of any changes in my adjustable interest rate before the effective date of any change. The notice will include the amount of my monthly payment, any information required by law to be given to me and also the title and telephone number of a person who will answer any question I may have regarding the notice.

[redacted]

B. TRANSFER OF THE PROPERTY OR A BENEFICIAL INTEREST IN BORROWER

1. Until Borrower's initial fixed interest rate changes to an adjustable interest rate under the terms stated in Section A above, Uniform Covenant 18 of the Security Instrument shall read as follows:

Transfer of the Property or a Beneficial Interest in Borrower. As used in this Section 18, "Interest in the Property" means any legal or beneficial interest in the Property, including, but not limited to, those beneficial interests transferred in a bond for deed, contract for deed, installment sales contract or escrow agreement, the intent of which is the transfer of title by Borrower at a future date to a purchaser.

If all or any part of the Property or any Interest in the Property is sold or transferred (or if Borrower is not a natural person and a beneficial interest in Borrower is sold or transferred) without Lender's prior written consent, Lender may require immediate payment in full of all sums secured by this Security Instrument. However, this option shall not be exercised by Lender if such exercise is prohibited by Applicable Law.

If Lender exercises this option, Lender shall give Borrower notice of acceleration. The notice shall provide a period of not less than 30 days from the date the notice is given in accordance with Section 15 within which Borrower must pay all sums secured by this Security Instrument. If Borrower fails to pay these sums prior to the expiration of this period, Lender may invoke any remedies permitted by this Security Instrument without further notice or demand on Borrower.

2. When Borrower's initial fixed interest rate changes to an adjustable interest rate under the terms stated in Section A above, Uniform Covenant 18 of the Security Instrument described in Section B1 above shall then cease to be in effect, and the provisions of Uniform Covenant 18 of the Security Instrument shall be amended to read as follows:

Transfer of the Property or a Beneficial Interest in Borrower. As used in this Section 18, "Interest in the Property" means any legal or beneficial interest in the Property, including, but not limited to, those beneficial interests transferred in a bond for deed, contract for deed, installment sales contract or escrow agreement, the intent of which is the transfer of title by Borrower at a future date to a purchaser.

If all or any part of the Property or any Interest in the Property is sold or transferred (or if Borrower is not a natural person and a beneficial interest in Borrower is sold or transferred) without Lender's prior written consent, Lender may require immediate payment in full of all sums secured by this Security Instrument. However, this option shall not be exercised by Lender if such exercise is prohibited by Applicable Law. Lender also shall not exercise this option if: (a) Borrower causes to be submitted to Lender information required by Lender to evaluate the intended transferee as if a new loan were being made to the transferee; and (b) Lender reasonably determines that Lender's security will not be impaired by the loan assumption and that the risk of a breach of any covenant or agreement in this Security Instrument is acceptable to Lender.

To the extent permitted by Applicable Law, Lender may charge a reasonable fee as a condition to Lender's consent to the loan assumption. Lender also may require the transferee to sign an assumption agreement that is acceptable to Lender and that obligates the transferee to keep all the promises and agreements made in the Note and in this Security Instrument. Borrower will continue to be obligated under the Note and this Security Instrument unless Lender releases Borrower in writing.

If Lender exercises the option to require immediate payment in full, Lender shall give Borrower notice of acceleration. The notice shall provide a period of not less than 30 days from the date the notice is given in accordance with Section 15 within which Borrower must pay all sums secured by this Security Instrument. If Borrower fails to pay these sums prior to the expiration of this period, Lender may invoke any remedies permitted by this Security Instrument without further notice or demand on Borrower.

[redacted]

BY SIGNING BELOW, Borrower accepts and agrees to the terms and covenants contained in this Fixed/Adjustable Rate Rider.

Paula A. Mitchell (Seal)
PAULA A. MITCHELL - Borrower

_____ (Seal)
- Borrower

_____ (Seal)
- Borrower

_____ (Seal)
- Borrower

EXHIBIT "D"

[redacted]

11012218
8/17/2010 10:46:00 AM $12.00
Book - 9849 Pg - 8601-8602
Gary W. Ott
Recorder, Salt Lake County, UT
LSI TITLE CO
BY: eCASH, DEPUTY - EF 2 P.

RECORDING REQUESTED BY:
RECONTRUST COMPANY, N.A.
2380 Performance Dr, TX2-984-0407
Richardson, TX 75082

WHEN RECORDED MAIL DOCUMENT
TAX STATEMENT TO:
BAC HOME LOANS SERVICING, LP
400 COUNTRYWIDE WAY SV-35
SIMI VALLEY, CA 93065

[redacted]

SPACE ABOVE THIS LINE FOR RECORDER'S

CORPORATION ASSIGNMENT OF DEED OF TRUST/MORTGAGE

FOR VALUE RECEIVED, THE UNDERSIGNED HEREBY GRANTS, ASSIGNS AND TRANSFER TO:

THE BANK OF NEW YORK MELLON FKA THE BANK OF NEW YORK, AS TRUSTEE FOR THE CERTIFICATEHOLDERS CWMBS SERIES 2006-HYB5

ALL BENEFICIAL INTEREST UNDER THAT CERTAIN DEED OF TRUST DATED 05/23/2006, EXECUTED BY: PAULA A MITCHELL, TRUSTOR; TO STEWART T. MATHESON, ATTORNEY AT LAW, AS TRUSTEE AND RECORDED AS INSTRUMENT NO. 9733512 ON 05/24/2006, IN BOOK 9298, PAGE 7355 OF OFFICIAL RECORDS IN THE COUNTY RECORDERS OFFICE OF SALT LAKE COUNTY, IN THE STATE OF UTAH. THE LAND AFFECTED BY THIS ASSIGNMENT IS LOCATED IN SALT LAKE COUNTY, THE STATE OF UTAH AND IS DESCRIBED AS FOLLOWS:

LOT 804 B, AMENDED PEPPERWOOD PHASE 8B, ACCORDING TO THE PLAT THEREOF AS RECORDED IN THE OFFICE OF THE SALT LAKE COUNTY RECORDER.

TOGETHER WITH THE NOTE OR NOTES THEREIN DESCRIBED OR REFERRED TO, THE MONEY DUE AND TO BECOME DUE THEREON WITH INTEREST, AND ALL RIGHTS ACCRUED OR TO ACCRUE UNDER SAID DEED OF TRUST/MORTGAGE.

Dated: 8/13, 2010

By: MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.

BY: Carmella Boone Assistant Secretary

[redacted]

Form UTAssgn (04/08)

STATE OF Texas)
COUNTY OF Tarrant)

On 8/13/10, before me Connie L. Briscoe, personally appeared Camelia Boone Assistant Secretary, known to me (or proved to me on the oath of _____ or through TX DL) to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that he/she executed the same for the purposes and consideration therein expressed.

WITNESS MY HAND AND OFFICIAL SEAL

Connie L. Briscoe
Notary Public's Signature

CONNIE L BRISCOE
MY COMMISSION EXPIRES
February 23, 2011

[redacted]

Form UTAssgn (04/08)

3RD DISTRICT COURT - SALT LAKE
SALT LAKE COUNTY, STATE OF UTAH

THE BANK OF NEW YORK MELLON FK, Plaintiff,	:	MINUTES
	:	MOTION FOR SUMMARY JUDGMENT
	:	
vs.	:	Case No: 160902472 LM
PAULA A MITCHELL Et al,	:	Judge: TODD M SHAUGHNESSY
Defendant.	:	Date: November 6, 2017

Clerk: kristit

No Parties Present
Plaintiff's Attorney(s): BRAD G DEHAAN
Defendant's Attorney(s): DOUGLAS R SHORT
Audio
Tape Number: N42 Tape Count: 428-515

HEARING

This case comes before the Court at the date and time set for oral argument on the pending Motion for Summary Judgment.

4:29 PM Mr. Dehaan presents argument for the Motion for Summary Judgment.
4:45 PM Mr. Short presents argument in opposition.
5:03 PM Mr. Dehaan presents reply argument.

Based on the information presented, the Court grants the Motion for Summary Judgment and gives the basis for this ruling. Mr. Dehaan to prepare an appropriate Order for Summary Judgment to be submitted to the Court, with objections from Mr. Short noted for the record.

The Order of the Court is stated below:
Dated: November 27, 2017 02:39:28 PM **/s/** TODD M SHAUGHNESSY District Court Judge

Brad G. DeHaan (USB No. 8168)
Hillary R. McCormack (USB No. 11719)
LUNDBERG & ASSOCIATES, PC
Attorneys for Plaintiff
3269 South Main Street, Suite 100
Salt Lake City, Utah 84115
Telephone: (801) 263-3400
litigationdept@lundbergfirm.com
Attorneys for Plaintiff

Parcel No. 28-22-203-047
L&A Case No. 14.64383.2/JAT

IN THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE DEPARTMENT SALT LAKE COUNTY, STATE OF UTAH	
THE BANK OF NEW YORK MELLON fka THE BANK OF NEW YORK, AS TRUSTEE FOR THE CERTIFICATEHOLDERS CWMBS SERIES 2006-HYB5, Plaintiff, vs. PAULA A. MITCHELL; PEPPERWOOD HOMEOWNER'S ASSOCIATION; AND JOHN DOES 1-5, Defendants	ORDER GRANTING SUMMARY JUDGMENT Civil No. 160902472 Judge Todd M. Shaughnessy

This matter came before the court for hearing plaintiff's Motion for Summary Judgment on November 6, 2017. Brad G. DeHaan appeared as counsel for plaintiff, and Douglas R. Short appeared as counsel for defendant Paula A. Mitchell. Having carefully reviewed the record and the pleadings on file herein, considering the arguments of counsel, and for good cause appearing,

it is hereby:

ORDERED, ADJUDGED, and DECREED AS FOLLOWS:

1. Plaintiff's Motion for Summary Judgment is GRANTED.

2. Plaintiff met its burden of establishing the undisputed facts and showing that judgment should enter as a matter of law pursuant to Rule 56(a) of the Utah Rules of Civil Procedure.

3. The court incorporates by this reference the Ruling and Order entered in this case on January 17, 2017, regarding, among other things, plaintiff's standing to bring this action.

4. Based upon plaintiff having provided sufficient evidence pursuant to the findings and decision in *Mitchell I,* as set forth in plaintiff's Motion for Summary Judgment, and the Affidavit of Alvin Denmon, the Court finds that there is no genuine issue as to any of the following material facts:

a. This action involves the real property with a purported address of 3 South Mistywood Lane, Sandy, Salt Lake County, Utah 84092 ("Property"), more particularly described as:

> Lot 804 B, AMENDED PEPPERWOOD PHASE 8B, according to the plat thereof as recorded in the office of the Salt Lake County Recorder.
>
> Together with all the improvements now or hereafter erected on the property, and all easements, appurtenances, and fixtures now or hereafter a part of the property.
>
> Parcel No. 28-22-203-047-0000.

b. Defendant Paula A. Mitchell acquired an ownership interest in the Property by a Special Warranty Deed executed on May 23, 2006 and recorded on May 24, 2006 in the Salt Lake County Recorder's Office as Entry No. 9733511.

c. On May 23, 2006, defendant Paula A. Mitchell, as trustor, executed and delivered a certain trust deed (the "Mitchell Trust Deed") to Stewart T. Matheson, as trustee, for the benefit of Mortgage Electronic Registration Systems, Inc., as nominee for America's Wholesale Lender, it successors and assigns, to secure obligations under a certain promissory note executed in conjunction therewith.

d. On May 24, 2006, the Mitchell Trust Deed was recorded in the Salt Lake County Recorder's Office as Entry No. 9733512.

e. On May 23, 2006, in conjunction with the execution of the Mitchell Trust Deed, defendant Paula A. Mitchell executed a promissory note ("Note"), with a mortgage rider ("Rider"), in the amount of $1,000,000.00.

f. Plaintiff is the current beneficiary under the Mitchell Trust Deed by virtue of an Assignment of Deed of Trust ("2010 Assignment") recorded on August 17, 2010 in the Salt Lake County Recorder's Office as Entry No. 11012216.

g. Plaintiff is the current holder of the Note and Rider.

h. Pursuant to the terms of the Mitchell Trust Deed, Note, and Rider, plaintiff or plaintiff's predecessors-in-interest, loaned, advanced and disbursed the sum of $1,000,000.00 to or on behalf of, and to the benefit of, defendant Paula A. Mitchell.

i. The Note obligated defendant Paula A. Mitchell to make monthly principal and interest payments to plaintiff or plaintiff's predecessor-in-interest, beginning July 1, 2006.

j. The Note provides that the initial rate of interest agreed to be paid by defendant Paula A. Mitchell is 6.500% per annum.

k. Defendant Paula A. Mitchell's obligations under the Note, Rider, and Mitchell Trust Deed were secured by the Property.

l. Defendant Paula A. Mitchell breached the terms and conditions of the Note, Rider, and Mitchell Trust Deed by failing to make the required monthly payments when due.

m. Based upon defendant Paula A. Mitchell's failure to pay the monthly payments under the terms of the Note, Rider, and Mitchell Trust Deed, defendant Paula A. Mitchell is in default.

n. Because defendant Paula A. Mitchell was in default and breached the terms of the Note, Rider, and Mitchell Trust Deed, plaintiff accelerated the entire unpaid balance as immediately due and payable.

5. Defendant Paula A. Mitchell failed to properly controvert or provide a written

response to the following material facts, as required by Rules 56(a)(4) and 56(a)(2) of the Utah Rules of Civil Procedure, and the following material facts are therefore deemed admitted:

a. Defendant Paula A. Mitchell failed to cure the default under the terms of the Note, Rider, and Mitchell Trust Deed.

b. The last payment made by defendant Paula A. Mitchell under the terms of the Note, Rider, and Mitchell Trust Deed was on April 21, 2010.

c. Defendant Paula A. Mitchell has not made a payment under the terms of the Note, Rider, and Mitchell Trust Deed since April 21, 2010.

d. Defendant has not paid any of the monthly payments due and owing under the Mitchell Trust Deed, Note and Rider since May 1, 2010.

e. The terms of the Note and Mitchell Trust Deed allow plaintiff to recover its reasonable attorney's fees and costs incurred in connection with this matter.

f. The terms of the Mitchell Trust Deed allow plaintiff to invoke the power of foreclosure sale and any other remedies permitted by applicable law.

g. As of May 31, 2017, the amount due and owing to plaintiff under the Note, Rider, and Mitchell Trust Deed is $1,343,034.81, plus additional interest, attorney's fees, costs, taxes, and other fees which will continue to accrue after May 31, 2017.

6. The Affidavit of Alvin Denmon used to support plaintiff's Motion for Summary Judgment is made on personal knowledge, sets forth facts that are admissible in evidence, and shows that Mr. Alvin Denmon is competent to testify on the matters stated therein.

7. Plaintiff complied with its obligations regarding its initial disclosures pursuant to Rule 26(a) of the Utah Rules of Civil Procedure.

8. Based on the above, judgment should enter in favor of plaintiff and against defendant Paula A. Mitchell for the amount of $1,343,034.81, plus additional interest, costs, taxes, and other fees owing to plaintiff incurred after May 31, 2017.

9. Plaintiff is entitled to judicially foreclose the Mitchell Trust Deed and sell the Property to recover any unpaid obligations owed to plaintiff under the Mitchell Trust Deed and Note.

10. Plaintiff is entitled to an Order of Foreclosure Sale ordering the Property foreclosed and sold by the sheriff of Salt Lake County, State of Utah according to the law and practice of this Court to satisfy the judgment set forth above as due and owing to plaintiff.

11. Plaintiff or any other party to this action may become a purchaser at any foreclosure sale, and that following the sale, the sheriff of Salt Lake County, State of Utah, is ordered to execute and deliver a certificate of sale as required by law; and that upon expiration of the period of redemption as described by law, the Sheriff is ordered to execute and deliver a Sheriff's Deed to the purchaser of the Property; and that the purchaser of the Property be let into possession of the Property upon production of the Sheriff's Deed.

12. Upon any judicially-ordered sale of the Property in this court action and expiration of the period of redemption, surplus proceeds, if any, beyond plaintiff's lien, costs, and costs of sale, shall be deposited and interplead in a new court action pursuant to Utah Code

§ 78B-6-904 or § 59-1-29, with notice to all parties in this action, so that all those who claim any interest in the Property may assert their claims to such excess proceeds and their respective priorities in such new proceeding.

13. Upon the expiration of the period of redemption applicable to judicial foreclosure sales, that the defendants and all persons claiming by, through, or under them, or any of them, be forever barred and foreclosed of all right, title, claim, interest and equity of redemption in and to the Property and each and every part thereof, and that plaintiff have deficiency judgment against defendant Paula A. Mitchell, if applicable, for the full amount of any sums which may remain owing to plaintiff under the obligation evidenced by the Mitchell Trust Deed and Note after due and proper application of the proceeds of the sale of the Property as hereinabove stated.

14. The clerk of the court is hereby ordered, authorized and directed to issue an Order of Foreclosure Sale effectuating this Final Order and Judgment.

15. All other parties to the case are in default and entry of a judgment of priority in favor of Plaintiff is therefore appropriate.

16. Pursuant to the terms of the parties' written agreements, Plaintiff is awarded its attorney fees and costs incurred in this action in an amount to be determined upon the filing of plaintiff's Affidavit of Attorney Fees and Costs.

17. The court has considered and overrules all objections to the form of this order and the accompanying judgment, whether those objections are specifically referred to herein or not. Many of those objections have been the subject of prior written and oral rulings by this court and

by the Utah Court of Appeals, all of which are incorporated herein.

****END OF DOCUMENT****
****Electronically signed by the Judge in the top-right corner of the first page.****

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

THE BANK OF NEW YORK MELLON fka THE BANK OF NEW YORK, as trustee for THE CERTIFICATEHOLDERS CWMBS SERIES 2006-HYB5, Plaintiff, vs. PAULA A. MITCHELL;PEPPERWOOD HOMEOWNER'S ASSOCIATION, Defendants.	**FINAL JUDGMENT** Case No. 160902472 Judge Todd Shaughnessy

Pursuant to Rules 55, 56, 57, and 58A of the Utah Rules of Civil Procedures, and for good cause appearing, judgment is hereby entered in favor of Plaintiff and against Defendants as follows:

1. This action involves the real property with a purported street address of 3 South Mistywood Lane, Sandy, Salt Lake County, Utah 84092 (the "Property"), more particularly described as:

> Lot 804 B, AMENDED PEPPERWOOD PHASE 8B, according to the plat thereof as recorded in the office of the Salt Lake County Recorder.
>
> Together with all the improvements now or hereafter erected on the property, and all easements, appurtenances, and fixtures now or hereafter a part of the property.

Parcel No. 28-22-203-047-0000.

2. Defendant Paula A. Mitchell acquired an ownership interest in the Property by a Special Warranty Deed executed on May 23, 2006, and recorded on May 24, 2006, in the Salt Lake County Recorder's Office as Entry No. 9733511.

3. On May 23, 2006, Defendant Paula A. Mitchell, as trustor, executed and delivered a certain trust deed (the "Mitchell Trust Deed") to Stewart T. Matheson, as trustee, for the benefit of Mortgage Electronic Registration Systems, Inc., as nominee for America's Wholesale Lender, its successors and assigns, to secure obligations under a certain promissory note executed in conjunction therewith.

4. On May 24, 2006, the Mitchell Trust Deed was recorded in the Salt Lake County Recorder's Office as Entry No. 9733512.

5. On May 23, 2006, in conjunction with the execution of the Mitchell Trust Deed, defendant Paula Mitchell executed a promissory note ("Note"), with a mortgage rider ("Rider"), in the amount of $1,000,000.00.

6. Plaintiff is the current beneficiary of the Mitchell Trust Deed by virtue of an Assignment of Trust Deed ("2010 Assignment") recorded on August 17, 2010, in the Salt Lake County Recorder's Office as Entry No. 11012216.

7. Plaintiff is the current holder of the Note and Rider.

8. Defendant Paula Mitchell is in breach of the terms of the Note, Rider, and Mitchell Trust Deed by, among other things, failing to pay amounts when due. By virtue of this, the Note,

Rider, and Trust Deed are in default and Plaintiff has accelerated the entire unpaid balance as immediately due and payable.

9. As of May 31, 2017, the amount due and owing to Plaintiff under the Note, Rider, and Trust Deed is $1,343,034.81, plus additional interest, attorneys' fees, costs, taxes, and other fees which continue to accrue after May 31, 2017.

10. Judgment is therefore entered in favor of Plaintiff and against Defendant Paula A. Mitchell for the amount of $1,343,034.81, plus additional interest, costs, taxes, and other fees owing to Plaintiff and incurred after May 31, 2017.

11. Plaintiff is entitled to judicially foreclose the Mitchell Trust Deed and sell the Property to recover any unpaid obligations owed to Plaintiff under the Mitchell Trust Deed and Note.

12. Plaintiff is entitled to an Order of Foreclosure Sale order the Property foreclosed and sold by the Sheriff of Salt Lake County, State of Utah, according to the law and practice of this court to satisfy the judgment set forth above as due and owing.

13. Plaintiff or any other party to this action may become a purchaser at any foreclosure sale, and following the sale the Sheriff of Salt Lake County, State of Utah, is ordered to execute and deliver a certificate of sale as required by law; and upon expiration of the period of redemption as described by law, the Sheriff is ordered to execute and deliver a Sheriff's Deed to the purchaser of the Property; and the purchaser of the Property shall be let into possession of the Property upon production of the Sheriff's Deed.

14. Upon any judicially-ordered sale of the Property in this court action and expiration of the period of redemption, surplus proceeds, if any, beyond Plaintiff's lien, costs, and costs of sale, shall be deposited and interpled in a new court action pursuant to Utah Code Ann. § 78B-6-904 or §59-1-29, with notice to all parties in this action, so that all those who claim any interest in the Property may assert their claims to such excess proceeds and their respective priorities in such new proceeding.

15. Upon the expiration of the period of redemption applicable to judicial foreclosure sales, the defendants and all persons claiming by, through, or under them, or any of them, be forever barred and foreclosed of all right, title, claim, interest and equity of redemption in and to the Property and each and every part thereof, and that Plaintiff have deficiency judgment against Defendant Paula Mitchell, if applicable, for the full amount of any sums that may remain owing to Plaintiff under the obligation evidenced by the Mitchell Trust Deed and Note after due and proper application of the proceeds of the sale of the Property as hereinabove stated.

16. The Clerk of the Court is hereby authorized, ordered, and directed to issue an Order of Foreclosure Sale effecting this Final Judgment.

17. All other defendants in this matter have been served with process and are in default of the claims asserted against them. Specifically, Plaintiff is entitled to a declaration that the Mitchell Trust Deed is prior in time and right to claims by the Pepperwood Homeowner's Association.

18. Pursuant to the terms of the parties' written agreements, and as allowed by Rule 73(a) of the Utah Rules of Civil Procedure, Plaintiff is awarded is reasonable attorneys' fees and costs incurred in this matter in an amount to be determined upon timely filing of a motion and supporting affidavit of attorneys' fees and costs.

All claims against all parties have been resolved and this is a final judgment.

DATED: November 27, 2017.

THIRD JUDICIAL DISTRICT COURT

Judge Todd Shaughnessy

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 160902472 by the method and on the date specified.

MANUAL EMAIL: BRAD G DEHAAN brad.dehaan@lundbergfirm.com
MANUAL EMAIL: CRAIG H HOWE chowe@joneswaldo.com
MANUAL EMAIL: HILLARY R MCCORMACK hillary.mccormack@lundbergfirm.com
MANUAL EMAIL: BLAKE D MILLER bmiller@joneswaldo.com
MANUAL EMAIL: DOUGLAS R SHORT drs@consumerlawutah.com

Date: 11/27/2017 /s/ KRISTI THORNLEY

Deputy Court Clerk

The Order of the Court is stated below:
Dated: December 12, 2017 05:31:03 PM **/s/** TODD M SHAUGHNESSY District Court Judge

Brad G. DeHaan (USB No. 8168)
Hillary McCormack (USB No. 11719)
LUNDBERG & ASSOCIATES
3269 South Main Street, Suite 100
Salt Lake City, Utah 84115
(801) 263-3400
(801) 263-6513 (fax)
LitigationDept@Lundbergfirm.com
Attorneys for Plaintiff

Parcel No. 28-22-203-047
L&A Case No. 14.64383.2

THIRD JUDICIAL DISTRICT COURT, SALT LAKE DEPARTMENT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

THE BANK OF NEW YORK MELLON, fka THE BANK OF NEW YORK, AS TRUSTEE FOR THE CERTIFICATEHOLDERS CWMBS SERIES 2006-HYB5,

Plaintiff,

v.

PAULA A. MITCHELL; PEPPERWOOD HOMEOWNER'S ASSOCIATION; AND JOHN DOES 1-5,

Defendants.

ORDER OF FORECLOSURE SALE

Case No. 160902472

Judge: Todd M. Shaughnessy

TO THE SHERIFF OF SALT LAKE COUNTY, STATE OF UTAH:

On the 27th day of November, the above named plaintiff obtained an Order Granting Summary Judgment in the Third Judicial District Court, Salt Lake Department, of Salt Lake County, Utah against the defendants, which Order was entered on the same day.

The Order provides that the Property described in the Order be sold at a public auction.

NOW, THEREFORE, you are hereby commanded and required to proceed to give notice of such sale and to sell the Property described in said Final Order and distribute the proceeds of said sale as directed in said Final Order and to make and file your report of such sale with the Clerk of the Court within 60 days of the date of your receipt hereof, and to do all things according to the terms and requirements of said Final Order and the provisions of the statues of the State of Utah.

****END OF DOCUMENT****

**** Electronically signed by the Judge in the top-right corner of the first page.****

3RD DISTRICT COURT - SALT LAKE
SALT LAKE COUNTY, STATE OF UTAH

THE BANK OF NEW YORK MELLON FK,	:	RULING
Plaintiff,	:	RULING AND ORDER
	:	
vs.	:	Case No: 160902472
PAULA A MITCHELL,	:	Judge: TODD M SHAUGHNESSY
Defendant.	:	Date: January 18, 2018

Before the court is the Combined Rule 59 and 52 Motions to Alter or Amend Final Judgment (Motion to Alter or Amend), filed by Defendant Paula Mitchell (Mitchell). The motion is fully briefed and has been submitted for decision. Mitchell requests oral argument. Rule 7(h) does not contemplate oral argument on all motions; the present motion is not dispositive. Oral argument is discretionary. And for the reasons explained below, oral argument would not materially assist the court in deciding the Motion to Alter or Amend.

1. The majority of Mitchell's Motion to Alter or Amend consists of re-arguing issues that have already been presented to and ruled on by the court, including on motions other than the summary judgment motion that fully resolved the issues in the case. To the extent Mitchell disagrees with the court's rulings, her remedy is to file an appeal not to serially re-argue those issues with this court.

2. The balance of the issues and arguments raised in the Motion to Alter or Amend, other than item 3 below, are being raised for the first time. The court respectfully declines to consider, after the entry of judgment in the case, issues and arguments that could and should have been raised earlier.

3. Finally, the final judgment entered in this case was not entered sua sponte or otherwise improperly. As was discussed at the hearing, and as was reflected in the proposed papers filed by BONY, the court's ruling on the summary judgment motion, combined with earlier rulings in the case, fully resolved all claims of all parties. The recent amendments to Utah Rule of Civil Procedure 58, and Utah Rule of Appellate Procedure 4, contemplate parties preparing, or courts if parties do not, a judgment that unambiguously conveys to all involved the conclusion of the litigation in the trial court. The purpose is to ensure all parties understand the deadline for filing a notice of appeal. That is all this court did by preparing and entering the Final Judgment in

this case; make clear when notices of appeal were due. And with respect to the issue of attorneys' fees, those same amendments contemplate that the amount and reasonableness of attorneys' fees will be determined in proceedings following entry of judgment.

No further order on the Motion to Alter or Amend is required.

End Of Order - Signature at the Top of the First Page

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 160902472 by the method and on the date specified.

EMAIL: BRAD G DEHAAN brad.dehaan@lundbergfirm.com
EMAIL: CRAIG H HOWE chowe@joneswaldo.com
EMAIL: HILLARY R MCCORMACK hillary.mccormack@lundbergfirm.com
EMAIL: BLAKE D MILLER bmiller@joneswaldo.com
EMAIL: DOUGLAS R SHORT drs@consumerlawutah.com

Date: 01/18/2018 /s/ TODD M SHAUGHNESSY

Deputy Court Clerk

The Order of the Court is stated below:
Dated: January 18, 2018 03:14:20 PM **/s/** TODD M SHAUGHNESSY District Court Judge

3RD DISTRICT COURT - SALT LAKE
SALT LAKE COUNTY, STATE OF UTAH

THE BANK OF NEW YORK MELLON FK, Plaintiff,	:	RULING RULING AND ORDER
vs.	:	Case No: 160902472
PAULA A MITCHELL, Defendant.	:	Judge: TODD M SHAUGHNESSY Date: January 18, 2018

Before the court is the Combined Rule 59 and 52 Motions to Alter or Amend Final Judgment (Motion to Alter or Amend), filed by Defendant Paula Mitchell (Mitchell). The motion is fully briefed and has been submitted for decision. Mitchell requests oral argument. Rule 7(h) does not contemplate oral argument on all motions; the present motion is not dispositive. Oral argument is discretionary. And for the reasons explained below, oral argument would not materially assist the court in deciding the Motion to Alter or Amend.

1. The majority of Mitchell's Motion to Alter or Amend consists of re-arguing issues that have already been presented to and ruled on by the court, including on motions other than the summary judgment motion that fully resolved the issues in the case. To the extent Mitchell disagrees with the court's rulings, her remedy is to file an appeal not to serially re-argue those issues with this court.

2. The balance of the issues and arguments raised in the Motion to Alter or Amend, other than item 3 below, are being raised for the first time. The court respectfully declines to consider, after the entry of judgment in the case, issues and arguments that could and should have been raised earlier.

3. Finally, the final judgment entered in this case was not entered sua sponte or otherwise improperly. As was discussed at the hearing, and as was reflected in the proposed papers filed by BONY, the court's ruling on the summary judgment motion, combined with earlier rulings in the case, fully resolved all claims of all parties. The recent amendments to Utah Rule of Civil Procedure 58, and Utah Rule of Appellate Procedure 4, contemplate parties preparing, or courts if parties do not, a judgment that unambiguously conveys to all involved the conclusion of the litigation in the trial court. The purpose is to ensure all parties understand the deadline for filing a notice of appeal. That is all this court did by preparing and entering the Final Judgment in

this case; make clear when notices of appeal were due. And with respect to the issue of attorneys' fees, those same amendments contemplate that the amount and reasonableness of attorneys' fees will be determined in proceedings following entry of judgment.

No further order on the Motion to Alter or Amend is required.

End Of Order - Signature at the Top of the First Page

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 160902472 by the method and on the date specified.

EMAIL: BRAD G DEHAAN brad.dehaan@lundbergfirm.com
EMAIL: CRAIG H HOWE chowe@joneswaldo.com
EMAIL: HILLARY R MCCORMACK hillary.mccormack@lundbergfirm.com
EMAIL: BLAKE D MILLER bmiller@joneswaldo.com
EMAIL: DOUGLAS R SHORT drs@consumerlawutah.com

Date: 01/18/2018 /s/ TODD M SHAUGHNESSY

Deputy Court Clerk

The Order of the Court is stated below:
Dated: March 14, 2018 03:50:08 PM
At the direction of:
/s/ TODD M SHAUGHNESSY
District Court Judge
by
/s/ Mandy Acevedo
District Court Clerk

3RD DISTRICT COURT - SALT LAKE
SALT LAKE COUNTY, STATE OF UTAH

THE BANK OF NEW YORK MELLON FK, Plaintiff,	:	MINUTES
	:	PENDING MOTIONS
	:	
vs.	:	Case No: 160902472 LM
PAULA A MITCHELL Et al,	:	Judge: TODD M SHAUGHNESSY
Defendant.	:	Date: March 13, 2018

Clerk: mandya

PRESENT
Plaintiff's Attorney(s): BRAD G DEHAAN
Defendant's Attorney(s): DOUGLAS R SHORT
Audio
Tape Number: W39 Tape Count: 4:07-5:35

HEARING

This case comes before the court on the motion for determination of reasonableness of award of attorneys fees and the Rule 64E motion. Court first addresses the attorney fee issue.
4:08 PM Mr. Dehaan presents argument on the motion for determination of reasonableness of attorney fees.
4:19 PM Mr. Short presents argument.
4:31 PM Mr. Dehaan presents rebuttal argument.
4:35 PM Court makes findings as stated on the record. The court finds that counsel made good faith effort to comply with the orders.
4:41 PM Court addresses the Rule 64E motion. Mr. Short presents argument.
5:06 PM Mr. Dehaan presents argument.
5:16 PM Mr. Short presents rebuttal argument.
5:23 PM Court makes findings as stated on the record.
The parties may obtain a transcript of this ruling if they wish to appeal.
Court discusses briefing schedules.

This order will be the order of the court and no further order shall be necessary.

End Of Order - Signature at the Top of the First Page

3RD DISTRICT COURT - SALT LAKE
SALT LAKE COUNTY, STATE OF UTAH

THE BANK OF NEW YORK MELLON FK,	:	RULING
Plaintiff,	:	RULING AND ORDER
	:	
vs.	:	Case No: 160902472
PAULA A MITCHELL,	:	Judge: TODD M SHAUGHNESSY
Defendant.	:	Date: March 14, 2018

Plaintiff's motion to determine reasonable amount of fees and Defendant's motion filed pursuant to Rule 64E(d)(1) were heard by the court on March 13, 2018.

With respect to the attorneys' fees motion, the court found the hourly rate to be reasonable and set up a procedure to determine the reasonableness of the hours spent. Those findings and order were made orally on the record.

The court denied the motion purportedly filed under Rule 64E(d)(1) and explained on the record the reasons for that ruling.

No further order is necessary.

End Of Order - Signature at the Top of the First Page

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 160902472 by the method and on the date specified.

EMAIL: BRAD G DEHAAN brad.dehaan@lundbergfirm.com
EMAIL: DOUGLAS R SHORT drs@consumerlawutah.com
EMAIL: DOUGLAS R SHORT drs@consumerlawutah.com

Date: 03/16/2018 /s/ TODD M SHAUGHNESSY

Deputy Court Clerk

The Order of the Court is stated below:
Dated: March 16, 2018 10:09:38 AM **/s/** TODD M SHAUGHNESSY
District Court Judge

3RD DISTRICT COURT - SALT LAKE
SALT LAKE COUNTY, STATE OF UTAH

THE BANK OF NEW YORK MELLON FK,	:	RULING
Plaintiff,	:	RULING AND ORDER
	:	
vs.	:	Case No: 160902472
PAULA A MITCHELL,	:	Judge: TODD M SHAUGHNESSY
Defendant.	:	Date: March 14, 2018

Plaintiff's motion to determine reasonable amount of fees and Defendant's motion filed pursuant to Rule 64E(d)(1) were heard by the court on March 13, 2018.

With respect to the attorneys' fees motion, the court found the hourly rate to be reasonable and set up a procedure to determine the reasonableness of the hours spent. Those findings and order were made orally on the record.

The court denied the motion purportedly filed under Rule 64E(d)(1) and explained on the record the reasons for that ruling.

No further order is necessary.

End Of Order - Signature at the Top of the First Page

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 160902472 by the method and on the date specified.

EMAIL: BRAD G DEHAAN brad.dehaan@lundbergfirm.com
EMAIL: DOUGLAS R SHORT drs@consumerlawutah.com
EMAIL: DOUGLAS R SHORT drs@consumerlawutah.com

Date: 03/16/2018 /s/ TODD M SHAUGHNESSY

Deputy Court Clerk

RETURN

REAL ESTATE - ORDER OF SALE

In the District Court

STATE OF UTAH)
) **ss. SHERIFF'S OFFICE**
COUNTY OF SALT LAKE)

I hereby certify and return that I received the attached Order of Sale and Decree of Foreclosure on the

I posted written Notice particularly describing said property for Twenty-one days in three public places of the Precinct where the same is situated, on the property and in the County Courthouse at the place of sale. I published a copy of the notice once a week for four (4) successive weeks preceding said sale in the Intermountain Commercial Record, a newspaper of general circulation published in the County of Salt Lake, State of Utah, proof of such publication being attached.

On the 13th of February 2018, at 12:00 o'clock noon of said day I did attend and offered for sale at public auction the property as described and sold the same to The Bank of New York Mellon, fka The Bank of New York, as Trustee for the Certificate Holders of the CWMBS Inc, CHL Mortgage pass Through Trust 2006-HYB5, Mortgage Pass Through Certificates, Series 2006-HYB5, for the sum of $1,275,000 lawful money of the United States, said purchaser being the highest bidder.

I have given to said purchaser, a Certificate of Sale and have caused a duplicate Certificate to be recorded with the Salt Lake County Recorder, State of Utah.

I herewith return said Order of Sale to court without further service by me, with judgment satisfied as follows, to-wit:

Principal.....$1,343,034.81	Sheriff's fees $548.50
Total Judgment....$1,343,604.74	Deficiency.....$68,607.74
Bid $1,275,000.00	

DATED at Salt Lake City, Utah, February 14, 2018
ROSIE RIVERA, Sheriff of Salt Lake County, State of Utah

By _____
Police Officer
Docket No. 17-16331
Civil No. 160902472

NOTICE OF REAL ESTATE SALE
SALT LAKE COUNTY SHERIFF'S OFFICE

In the District Court of the Third Judicial District in and for the County of Salt Lake, State of Utah:

THE BANK OF NEW YORK MELLON, fka THE BANK OF NEW YORK, AS TRUSTEE FOR THE CERTICATEHOLDERS CWMBS SERIES 2006-HYB5,
Plaintiff,
vs.
PAULA A. MITCHELL; PEPPERWOOD HOMEOWNER'S ASSOCIATION; AND JOHN DOES 1-5,
Defendant,

ORDER

DISTRICT COURT

CIVIL #160902472

To be sold at Sheriff's Sale at the County Courthouse, 450 S State, in the Third District Court Building, 1st floor, in the City and County of Salt Lake, State of Utah, on the 13th of February 2018, at 12 o'clock noon of said day, all right, title and interest of said Paula A. Mitchell, in and to that certain piece or parcel of real property situated in Salt Lake County, State of Utah, described as follows to-wit:

Lot 804 B, AMENDED PEPPERWOOD PHASE 8B
Together with all the improvements now or hereafter erected on the property, and all easements, appurtenances, and fixtures now or hereafter a part of the property.

Purchase price payable in lawful money of the United States of America.

DATED at Salt Lake City, Utah, January 11, 2018

ROSIE RIVERA, Sheriff of Salt Lake County, State of Utah

By _____
Police Officer

Docket No. 17-16331
Date of First Publication: January 19, 2018

Brad DeHaan
- Attorney
LUNDBERG & ASSOCIATES
801-263-3400

The Record Invoice

Utah Legal Publishing

111 E 5600 S #202
Murray, UT 84107

Phone: (801) 972-5642
Fax: (801) 972-4457
URL: www.slcrecord.com

Court Services Division
3365 S 900 W
SALT LAKE CITY, UT 84119

Acct. #: 01100100
Phone: #: (385)468-9758
Post Date: 01/19/2018
Due Date: 02/18/2018
Invoice #: 300001306
PO #:

Ad #	Text	Start	Stop	Ins.	Amount	Prepaid	Due
00001859	#17-16331 Mitchell	01/19/2018	02/09/2018	4	324.00	0.00	324.00

Thank You for Business

Please return a copy with payment

Total Due **324.00**

Affidavit of Publication

STATE OF UTAH } SS
COUNTY OF SALT LAKE }

Jan Bradley, being duly sworn, says: That she is the Manager of the The Intermountain Commercial Record, a newspaper of general circulation printed and published each Tuesday, Wednesday and Friday in Salt Lake City, Salt Lake County, Utah; that the publication, a copy of which is attached hereto, was published in the said newspaper on the following dates:
January 19, 2018, January 26, 2018, February 02, 2018, February 09, 2018

That said newspaper was regularly issued and circulated on those dates and that said notice was published on utahlegals.com, on the same day as the first newspaper publication and the notice remained on utahlegals.com for at least 30 days.

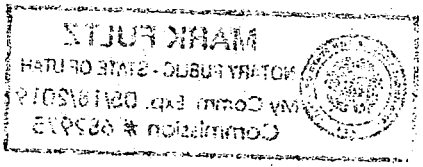
Jan Bradley
Manager

Subscribed to and sworn to me this 9th day of February, 2018.

Mark Fultz
Notary Public
Salt Lake County, Utah
My commission expires:
May 18, 2019

MARK FULTZ
NOTARY PUBLIC - STATE OF UTAH
My Comm. Exp. 05/18/2019
Commission # 682975

NOTICE OF
REAL ESTATE SALE SALT LAKE COUNTY SHERIFF'S OFFICE
In the District Court of the Third Judicial District in and for the County of Salt Lake, State of Utah:
ORDER
DISTRICT COURT
CIVIL #160902472
THE BANK OF NEW YORK MELLON, fka THE BANK OF NEW YORK, AS TRUSTEE FOR THE CERTICATEHOLDERS
CWMBS SERIES 2006-HYBS,
Plaintiff,
vs.
PAULA A. MITCHELL; PEPPERWOOD HOMEOWNER'S ASSOCIATION; AND JOHN DOES 1-5,
Defendant,
To be sold at Sheriffs Sale at the County Courthouse, 450 S State, in the Third District Court Building, 1st floor, in the City and County of Salt Lake, State of Utah, on the 13th of February 2018, at 12 o'clock noon of said day, all right, title and interest of said Paula A. Mitchell, in and to that certain piece or parcel of real property situated in Salt Lake County, State of Utah, described as follows to-wit:
Lot 804 B, AMENDED PEPPERWOOD PHASE 8B
Together with all the improvements now or hereafter erected on the property, and all easements, appurtenances, and fixtures now or hereafter a part of the property.
Purchase price payable in lawful money of the United States of America.
DATED at Salt Lake City, Utah, January 11, 2018
ROSIE RIVERA, Sheriff of Salt Lake County, State of Utah
By /s/
Police Officer
Docket No. 17-16331
Brad DeHaan
Attorney
LUNDBERG & ASSOCIATES
801-263-3400
Date of first publication January 19, 2018 - 02-09-2018
(02/23/18)


MARK RULTZ
NOTARY PUBLIC - STATE OF UTAH
My Comm. Exp. 09/10/2017
Commission # 682975

The Order of the Court is stated below:
Dated: December 12, 2017 05:31:03 PM
/s/ TODD M SHAUGHNESSY
District Court Judge

Brad G. DeHaan (USB No. 8168)
Hillary McCormack (USB No. 11719)
LUNDBERG & ASSOCIATES
3269 South Main Street, Suite 100
Salt Lake City, Utah 84115
(801) 263-3400
(801) 263-6513 (fax)
LitigationDept@Lundbergfirm.com
Attorneys for Plaintiff

Parcel No. 28-22-203-047
L&A Case No. 14.64383.2

THIRD JUDICIAL DISTRICT COURT, SALT LAKE DEPARTMENT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

THE BANK OF NEW YORK MELLON, fka THE BANK OF NEW YORK, AS TRUSTEE FOR THE CERTIFICATEHOLDERS CWMBS SERIES 2006-HYB5,

Plaintiff,

v.

PAULA A. MITCHELL; PEPPERWOOD HOMEOWNER'S ASSOCIATION; AND JOHN DOES 1-5,

Defendants.

ORDER OF FORECLOSURE SALE

Case No. 160902472

Judge: Todd M. Shaughnessy

TO THE SHERIFF OF SALT LAKE COUNTY, STATE OF UTAH:

On the 27th day of November, the above named plaintiff obtained an Order Granting Summary Judgment in the Third Judicial District Court, Salt Lake Department, of Salt Lake County, Utah against the defendants, which Order was entered on the same day.

The Order provides that the Property described in the Order be sold at a public auction.

NOW, THEREFORE, you are hereby commanded and required to proceed to give notice of such sale and to sell the Property described in said Final Order and distribute the proceeds of said sale as directed in said Final Order and to make and file your report of such sale with the Clerk of the Court within 60 days of the date of your receipt hereof, and to do all things according to the terms and requirements of said Final Order and the provisions of the statues of the State of Utah.

****END OF DOCUMENT****

**** Electronically signed by the Judge in the top-right corner of the first page.****

Brad G. DeHaan (USB No. 8168)
Hillary McCormack (USB No. 11719)
LUNDBERG & ASSOCIATES
3269 South Main Street, Suite 100
Salt Lake City, Utah 84115
(801) 263-3400
(801) 263-6513 (fax)
LitigationDept@Lundbergfirm.com
Attorneys for Plaintiff

Parcel No. 28-22-203-047
L&A Case No. 14.64383.2

THIRD JUDICIAL DISTRICT COURT, SALT LAKE DEPARTMENT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

THE BANK OF NEW YORK MELLON, fka THE BANK OF NEW YORK, AS TRUSTEE FOR THE CERTIFICATEHOLDERS CWMBS SERIES 2006-HYB5, Plaintiff, v. PAULA A. MITCHELL; PEPPERWOOD HOMEOWNER'S ASSOCIATION; AND JOHN DOES 1-5, Defendants.	PRAECIPE Case No. 160902472 Judge: Todd M. Shaughnessy

TO THE SHERIFF OF SALT LAKE COUNTY, STATE OF UTAH:

Pursuant to the attached Order of Foreclosure Sale, you are respectfully instructed to give notice and sell at public auction all of the right, title, and interest of the Defendants in this action in real property located at 3 South Mistywood Lane, Sandy, UT 84092 (the "Property"), more particularly described as:

Lot 804 B, AMENDED PEPERWOOD PHASE 8B, according to the plat thereof as recorded in the office of the Salt Lake County Recorder.

Parcel No. 28-22-203-047

You are also requested to notify the Plaintiff, by and through its counsel, of the date of the sale thirty (30) days prior to the date of the sale

DATED this 19th day of December, 2017

LUNDBERG & ASSOCIATES

Brad G. DeHaan
Attorney for Plaintiff

The Order of the Court is stated below:
Dated: November 27, 2017 02:39:28 PM /s/ TODD M. SHAUGHNESSY District Court Judge

I CERTIFY THAT THIS IS A TRUE COPY OF AN ORIGINAL DOCUMENT ON FILE IN THE THIRD DISTRICT COURT, SALT LAKE COUNTY, STATE OF UTAH.
DATE: 12 FEB 2017
DEPUTY COURT CLERK
THIRD DISTRICT COURT SALT LAKE CITY

Brad G. DeHaan (USB No. 8168)
Hillary R. McCormack (USB No. 11719)
LUNDBERG & ASSOCIATES, PC
Attorneys for Plaintiff
3269 South Main Street, Suite 100
Salt Lake City, Utah 84115
Telephone: (801) 263-3400
litigationdept@lundbergfirm.com
Attorneys for Plaintiff

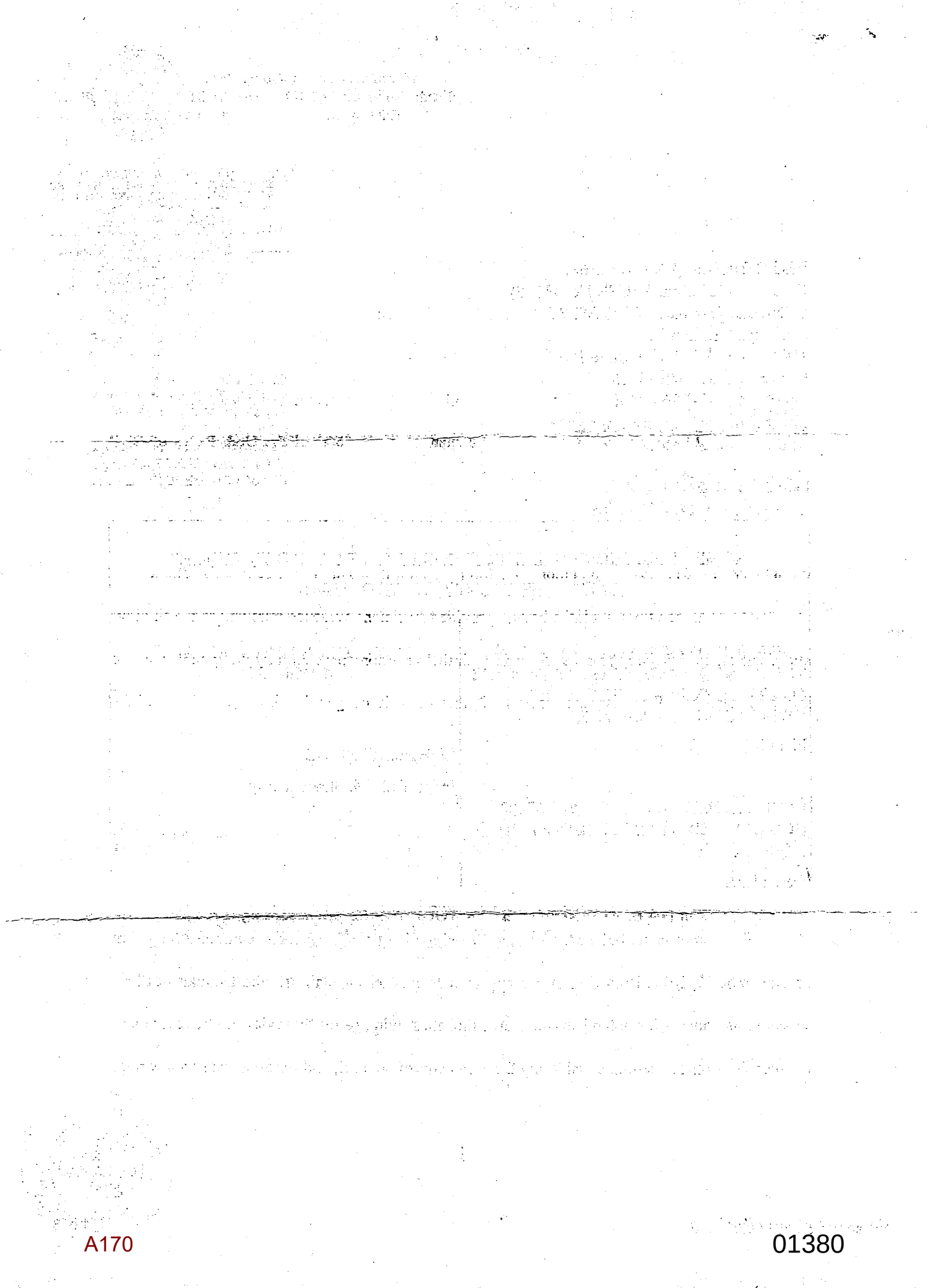
12682228
12/18/2017 4:28:00 PM $24.00
Book - 10630 Pg - 8775-8782
ADAM GARDINER
Recorder, Salt Lake County, UT
eTITLE INSURANCE AGENCY
BY: eCASH, DEPUTY - EF 8 P.

Parcel No. 28-22-203-047
L&A Case No. 14.64383.2/JAT

IN THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE DEPARTMENT
SALT LAKE COUNTY, STATE OF UTAH

THE BANK OF NEW YORK MELLON fka THE BANK OF NEW YORK, AS TRUSTEE FOR THE CERTIFICATEHOLDERS CWMBS SERIES 2006-HYB5, Plaintiff, vs. PAULA A. MITCHELL; PEPPERWOOD HOMEOWNER'S ASSOCIATION; AND JOHN DOES 1-5, Defendants	ORDER GRANTING SUMMARY JUDGMENT Civil No. 160902472 Judge Todd M. Shaughnessy

This matter came before the court for hearing plaintiff's Motion for Summary Judgment on November 6, 2017. Brad G. DeHaan appeared as counsel for plaintiff, and Douglas R. Short appeared as counsel for defendant Paula A. Mitchell. Having carefully reviewed the record and the pleadings on file herein, considering the arguments of counsel, and for good cause appearing,



it is hereby:

ORDERED, ADJUDGED, and DECREED AS FOLLOWS:

1. Plaintiff's Motion for Summary Judgment is GRANTED.

2. Plaintiff met its burden of establishing the undisputed facts and showing that judgment should enter as a matter of law pursuant to Rule 56(a) of the Utah Rules of Civil Procedure.

3. The court incorporates by this reference the Ruling and Order entered in this case on January 17, 2017, regarding, among other things, plaintiff's standing to bring this action.

4. Based upon plaintiff having provided sufficient evidence pursuant to the findings and decision in *Mitchell I,* as set forth in plaintiff's Motion for Summary Judgment, and the Affidavit of Alvin Denmon, the Court finds that there is no genuine issue as to any of the following material facts:

a. This action involves the real property with a purported address of 3 South Mistywood Lane, Sandy, Salt Lake County, Utah 84092 ("Property"), more particularly described as:

> Lot 804 B, AMENDED PEPPERWOOD PHASE 8B, according to the plat thereof as recorded in the office of the Salt Lake County Recorder.
>
> Together with all the improvements now or hereafter erected on the property, and all easements, appurtenances, and fixtures now or hereafter a part of the property.
>
> Parcel No. 28-22-203-047-0000.

b. Defendant Paula A. Mitchell acquired an ownership interest in the Property by a Special Warranty Deed executed on May 23, 2006 and recorded on May 24, 2006 in the Salt Lake County Recorder's Office as Entry No. 9733511.

c. On May 23, 2006, defendant Paula A. Mitchell, as trustor, executed and delivered a certain trust deed (the "Mitchell Trust Deed") to Stewart T. Matheson, as trustee, for the benefit of Mortgage Electronic Registration Systems, Inc., as nominee for America's Wholesale Lender, it successors and assigns, to secure obligations under a certain promissory note executed in conjunction therewith.

d. On May 24, 2006, the Mitchell Trust Deed was recorded in the Salt Lake County Recorder's Office as Entry No. 9733512.

e. On May 23, 2006, in conjunction with the execution of the Mitchell Trust Deed, defendant Paula A. Mitchell executed a promissory note ("Note"), with a mortgage rider ("Rider"), in the amount of $1,000,000.00.

f. Plaintiff is the current beneficiary under the Mitchell Trust Deed by virtue of an Assignment of Deed of Trust ("2010 Assignment") recorded on August 17, 2010 in the Salt Lake County Recorder's Office as Entry No. 11012216.

g. Plaintiff is the current holder of the Note and Rider.

h. Pursuant to the terms of the Mitchell Trust Deed, Note, and Rider, plaintiff or plaintiff's predecessors-in-interest, loaned, advanced and disbursed the sum of $1,000,000.00 to or on behalf of, and to the benefit of, defendant Paula A. Mitchell.

i. The Note obligated defendant Paula A. Mitchell to make monthly principal and interest payments to plaintiff or plaintiff's predecessor-in-interest, beginning July 1, 2006.

j. The Note provides that the initial rate of interest agreed to be paid by defendant Paula A. Mitchell is 6.500% per annum.

k. Defendant Paula A. Mitchell's obligations under the Note, Rider, and Mitchell Trust Deed were secured by the Property.

l. Defendant Paula A. Mitchell breached the terms and conditions of the Note, Rider, and Mitchell Trust Deed by failing to make the required monthly payments when due.

m. Based upon defendant Paula A. Mitchell's failure to pay the monthly payments under the terms of the Note, Rider, and Mitchell Trust Deed, defendant Paula A. Mitchell is in default.

n. Because defendant Paula A. Mitchell was in default and breached the terms of the Note, Rider, and Mitchell Trust Deed, plaintiff accelerated the entire unpaid balance as immediately due and payable.

5. Defendant Paula A. Mitchell failed to properly controvert or provide a written

response to the following material facts, as required by Rules 56(a)(4) and 56(a)(2) of the Utah Rules of Civil Procedure, and the following material facts are therefore deemed admitted:

a. Defendant Paula A. Mitchell failed to cure the default under the terms of the Note, Rider, and Mitchell Trust Deed.

b. The last payment made by defendant Paula A. Mitchell under the terms of the Note, Rider, and Mitchell Trust Deed was on April 21, 2010.

c. Defendant Paula A. Mitchell has not made a payment under the terms of the Note, Rider, and Mitchell Trust Deed since April 21, 2010.

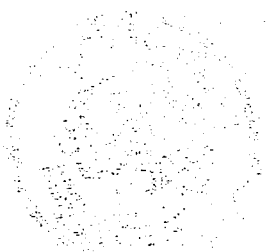
d. Defendant has not paid any of the monthly payments due and owing under the Mitchell Trust Deed, Note and Rider since May 1, 2010.

e. The terms of the Note and Mitchell Trust Deed allow plaintiff to recover its reasonable attorney's fees and costs incurred in connection with this matter.

f. The terms of the Mitchell Trust Deed allow plaintiff to invoke the power of foreclosure sale and any other remedies permitted by applicable law.

g. As of May 31, 2017, the amount due and owing to plaintiff under the Note, Rider, and Mitchell Trust Deed is $1,343,034.81, plus additional interest, attorney's fees, costs, taxes, and other fees which will continue to accrue after May 31, 2017.

6. The Affidavit of Alvin Denmon used to support plaintiff's Motion for Summary Judgment is made on personal knowledge, sets forth facts that are admissible in evidence, and shows that Mr. Alvin Denmon is competent to testify on the matters stated therein.



7. Plaintiff complied with its obligations regarding its initial disclosures pursuant to Rule 26(a) of the Utah Rules of Civil Procedure.

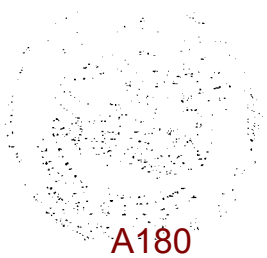
8. Based on the above, judgment should enter in favor of plaintiff and against defendant Paula A. Mitchell for the amount of $1,343,034.81, plus additional interest, costs, taxes, and other fees owing to plaintiff incurred after May 31, 2017.

9. Plaintiff is entitled to judicially foreclose the Mitchell Trust Deed and sell the Property to recover any unpaid obligations owed to plaintiff under the Mitchell Trust Deed and Note.

10. Plaintiff is entitled to an Order of Foreclosure Sale ordering the Property foreclosed and sold by the sheriff of Salt Lake County, State of Utah according to the law and practice of this Court to satisfy the judgment set forth above as due and owing to plaintiff.

11. Plaintiff or any other party to this action may become a purchaser at any foreclosure sale, and that following the sale, the sheriff of Salt Lake County, State of Utah, is ordered to execute and deliver a certificate of sale as required by law; and that upon expiration of the period of redemption as described by law, the Sheriff is ordered to execute and deliver a Sheriff's Deed to the purchaser of the Property; and that the purchaser of the Property be let into possession of the Property upon production of the Sheriff's Deed.

12. Upon any judicially-ordered sale of the Property in this court action and expiration of the period of redemption, surplus proceeds, if any, beyond plaintiff's lien, costs, and costs of sale, shall be deposited and interplead in a new court action pursuant to Utah Code



§ 78B-6-904 or § 59-1-29, with notice to all parties in this action, so that all those who claim any interest in the Property may assert their claims to such excess proceeds and their respective priorities in such new proceeding.

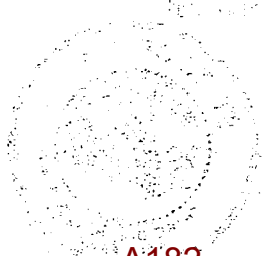
13. Upon the expiration of the period of redemption applicable to judicial foreclosure sales, that the defendants and all persons claiming by, through, or under them, or any of them, be forever barred and foreclosed of all right, title, claim, interest and equity of redemption in and to the Property and each and every part thereof, and that plaintiff have deficiency judgment against defendant Paula A. Mitchell, if applicable, for the full amount of any sums which may remain owing to plaintiff under the obligation evidenced by the Mitchell Trust Deed and Note after due and proper application of the proceeds of the sale of the Property as hereinabove stated.

14. The clerk of the court is hereby ordered, authorized and directed to issue an Order of Foreclosure Sale effectuating this Final Order and Judgment.

15. All other parties to the case are in default and entry of a judgment of priority in favor of Plaintiff is therefore appropriate.

16. Pursuant to the terms of the parties' written agreements, Plaintiff is awarded its attorney fees and costs incurred in this action in an amount to be determined upon the filing of plaintiff's Affidavit of Attorney Fees and Costs.

17. The court has considered and overrules all objections to the form of this order and the accompanying judgment, whether those objections are specifically referred to herein or not. Many of those objections have been the subject of prior written and oral rulings by this court and



by the Utah Court of Appeals, all of which are incorporated herein.

****END OF DOCUMENT****
****Electronically signed by the Judge in the top-right corner of the first page.****

Notary's Copy Certification

On this 18th day of December, 2017, I certify that the document identified as

Simplifile Document Number 2F6A6B98-64B9-B2E3-C43A-B6E3AE075918,

is a true, exact, complete and unaltered scanned image made by me of "14.64383.2 ORDER" presented to me by the document's custodian, eTitle Insurance Agency, and that, to the best of my knowledge, said electronically scanned image is neither a public record nor a publicly recorded document, certified copies of which are available from an official source other than a notary.

Alyse R Lewis

Alyse Ruth Lewis
3269 South Main #100
Salt Lake City, UT 84115
Notary Public
State of Utah
My commission number is 692249
My commission expires on December 1, 2020

Seal:

Commission Number: 692249

ALYSE RUTH LEWIS
Notary Public State of Utah
My Commission Expires on:
December 1, 2020
Comm. Number: 692249

SALT LAKE COUNTY SHERIFF'S OFFICE
COURT SERVICES DIVISION

STATE OF UTAH)
) **ss. SHERIFF'S OFFICE**
COUNTY OF SALT LAKE)

RETURN ON SHERIFF'S DEED AND CERTIFICATE

I hereby certify and return that I received the hereto annexed Blue Back Certificate of Sale on the
Property sold on the
Deed mailed to / picked up by _____Date_____

****

RETURN ON SHERIFF'S LEVY - RECORDED

I herewith return Recorded copy of Certificate to court without further service by me.
Date recorded: February 23, 2018

****

I herewith return said papers to court without further service by me.
Dated March 9, 2018
Court: Third District Matheson Salt Lake County
Civil No: 160902472
Docket No: 17-16331

By_____
Police Officer

$12.00

12721784
02/23/2018 08:36 AM $12.00
Book - 10649 Pg - 5751
ADAM GARDINER
RECORDER, SALT LAKE COUNTY, UTAH
UNIFIED POLICE
3365 S 900 W
SLC UT 84119
BY: CRA, DEPUTY - MA 1 P.

REAL ESTATE
CERTIFICATE OF SALE
ORDER OF SALE
IN THE DISTRICT COURT,
in and for Salt Lake County, State of Utah

JUDGMENT RENDERED
November 27, 2017
ORDER OF SALE ISSUED
December 12, 2017
PROPERTY SOLD
February 13, 2018
CIVIL NO. 160902472

THE BANK OF NEW YORK MELLON, fka THE BANK OF NEW YORK, AS TRUSTEE FOR THE CERTIFICATEHOLDERS CWMBS SERIES 2006-HYB5,

Plaintiffs,

vs

PAULA A. MITCHELL; PEPPERWOOD HOMEOWNER'S ASSOCIATION; AND JOHN DOES 1-5,

Defendants,

I hereby certify that under the judgment and decree and Order of Sale of the court in and for Salt Lake County, State of Utah, in an action pending in said Court in the above named suit, I was commanded to sell the property described, according to law, and apply the proceeds of such sale toward the satisfaction of the judgment in said action, amounting to the sum of $1,343,034.81, with interest, costs, attorney's fees and Sheriff's fees, amounting in all to the sum of $1,343,604.74.

On the 13th of February 2018, at 12 o'clock noon of said day at the County Courthouse, Salt Lake City, Salt Lake County, State of Utah and after due and legal notice I caused to be sold at public auction, according to law, the real property to The Bank of New York Mellon, fka The Bank of New York, as Trustee for the Certificate Holders of the CWMBS Inc, CHL Mortgage pass Through Trust 2006-HYB5, Mortgage Pass Through Certificates, Series 2006-HYB5, who made the highest bid for the sum of $1,275,000, lawful money of the United States, for the real estate in said Order of Sale described as follows, to-wit:

Lot 804 B, AMENDED PEPPERWOOD PHASE 8B
Together with all the improvements now or hereafter erected on the property, and all easements, appurtenances, and fixtures now or hereafter a part of the property.

I further certify that said property is subject to redemption in lawful money of the United States pursuant to the statute in such cases made and provided.

DATED at Salt Lake City, Utah, February 14, 2018

ROSIE RIVERA, Sheriff of Salt Lake County, State of Utah

By Sgt. Evan Mella
Police Officer

SALT LAKE COUNTY CIVIL DIV. CERTIFICATE OF SALE 01398

Docket No. 17-16331

A188

3RD DISTRICT COURT - SALT LAKE
SALT LAKE COUNTY, STATE OF UTAH

THE BANK OF NEW YORK MELLON FK,	:	RULING
Plaintiff,	:	RULING AND ORDER
	:	
vs.	:	Case No: 160902472
PAULA A MITCHELL,	:	Judge: TODD M SHAUGHNESSY
Defendant.	:	Date: April 27, 2018

Before the court is Plaintiff's supplemental submissions regarding the reasonableness of hours spent by attorneys in litigating this case. Both parties have filed papers related to this request and plaintiff has filed a Request to Submit for Decision.

At the hearing held in this matter on March 13, 2018, and in a follow up Ruling and Order dated March 14, 2018, the court made certain interim rulings regarding the attorneys fee issue. Specifically, the court ruled, over defendant's objection, on the reasonableness of the hourly rate. The court directed plaintiff to file an affidavit that contained a detailed breakdown of the hours spent and tasks performed. The parties briefs suggest they are in possession of such a declaration. The court, however, cannot locate such a declaration on the docket. To ensure the record is adequate, and to enable the court to consider the question presented, counsel for plaintiff is directed to file (or re-file) that declaration and attachments, together with a Request to Submit for Decision.

End Of Order - Signature at the Top of the First Page

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 160902472 by the method and on the date specified.

EMAIL: BRAD G DEHAAN brad.dehaan@lundbergfirm.com
EMAIL: CRAIG H HOWE chowe@joneswaldo.com
EMAIL: HILLARY R MCCORMACK hillary.mccormack@lundbergfirm.com
EMAIL: BLAKE D MILLER bmiller@joneswaldo.com
EMAIL: DOUGLAS R SHORT drs@consumerlawutah.com

EMAIL: DOUGLAS R SHORT drs@consumerlawutah.com
EMAIL: DOUGLAS R SHORT drs@consumerlawutah.com

Date: 04/27/2018 /s/ TODD M SHAUGHNESSY

Deputy Court Clerk

The Order of the Court is stated below:
Dated: April 27, 2018 03:45:33 PM **/s/** TODD M SHAUGHNESSY District Court Judge

3RD DISTRICT COURT - SALT LAKE
SALT LAKE COUNTY, STATE OF UTAH

THE BANK OF NEW YORK MELLON FK, Plaintiff,	:	RULING RULING AND ORDER
vs.	:	Case No: 160902472
PAULA A MITCHELL, Defendant.	:	Judge: TODD M SHAUGHNESSY Date: April 27, 2018

Before the court is Plaintiff's supplemental submissions regarding the reasonableness of hours spent by attorneys in litigating this case. Both parties have filed papers related to this request and plaintiff has filed a Request to Submit for Decision.

At the hearing held in this matter on March 13, 2018, and in a follow up Ruling and Order dated March 14, 2018, the court made certain interim rulings regarding the attorneys fee issue. Specifically, the court ruled, over defendant's objection, on the reasonableness of the hourly rate. The court directed plaintiff to file an affidavit that contained a detailed breakdown of the hours spent and tasks performed. The parties briefs suggest they are in possession of such a declaration. The court, however, cannot locate such a declaration on the docket. To ensure the record is adequate, and to enable the court to consider the question presented, counsel for plaintiff is directed to file (or re-file) that declaration and attachments, together with a Request to Submit for Decision.

End Of Order - Signature at the Top of the First Page

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 160902472 by the method and on the date specified.

EMAIL: BRAD G DEHAAN brad.dehaan@lundbergfirm.com
EMAIL: CRAIG H HOWE chowe@joneswaldo.com
EMAIL: HILLARY R MCCORMACK hillary.mccormack@lundbergfirm.com
EMAIL: BLAKE D MILLER bmiller@joneswaldo.com
EMAIL: DOUGLAS R SHORT drs@consumerlawutah.com

EMAIL: DOUGLAS R SHORT drs@consumerlawutah.com
EMAIL: DOUGLAS R SHORT drs@consumerlawutah.com

Date: 04/27/2018 /s/ TODD M SHAUGHNESSY

Deputy Court Clerk

SALT LAKE COUNTY SHERIFF'S OFFICE
COURT SERVICES DIVISION

STATE OF UTAH)
) **ss. SHERIFF'S OFFICE**
COUNTY OF SALT LAKE)

RETURN ON SHERIFF'S DEED AND CERTIFICATE

I hereby certify and return that I received the hereto annexed Blue Back Certificate of Sale on the
Property sold on the
Deed mailed to / picked up by _____Date_____

****

RETURN ON SHERIFF'S LEVY - RECORDED

I herewith return Recorded copy of Certificate to court without further service by me.
Date recorded: May 2, 2018

****

I herewith return said papers to court without further service by me.
Dated May 15, 2018
Court: Third District Matheson Salt Lake County
Civil No: 160902472
Docket No: 17-16331

Shaughnessy

By_____
Police Officer

REAL ESTATE
AMENDED CERTIFICATE OF SALE
ORDER OF SALE
IN THE DISTRICT COURT,
in and for Salt Lake County, State of Utah

THE BANK OF NEW YORK MELLON, fka THE BANK OF NEW YORK, AS TRUSTEE FOR THE CERTIFICATEHOLDERS CWMBS SERIES 2006-HYB5,

Plaintiffs,

vs

PAULA A. MITCHELL; PEPPERWOOD HOMEOWNER'S ASSOCIATION; AND JOHN DOES 1-5,

Defendants,

JUDGMENT RENDERED
November 27, 2017
ORDER OF SALE ISSUED
December 12, 2017
PROPERTY SOLD
February 13, 2018
CIVIL NO. 160902472

I hereby certify that under the judgment and decree and Order of Sale of the court in and for Salt Lake County, State of Utah, in an action pending in said Court in the above named suit, I was commanded to sell the property described, according to law, and apply the proceeds of such sale toward the satisfaction of the judgment in said action, amounting to the sum of $1,343,034.81, with interest, costs, attorney's fees and Sheriff's fees, amounting in all to the sum of $1,343,604.74.

On the 13th of February 2018, at 12 o'clock noon of said day at the County Courthouse, Salt Lake City, Salt Lake County, State of Utah and after due and legal notice I caused to be sold at public auction, according to law, the real property to The Bank of New York Mellon, fka The Bank of New York, as Trustee for the Certificate Holders of the CWMBS Inc, CHL Mortgage pass Through Trust 2006-HYB5, Mortgage Pass Through Certificates, Series 2006-HYB5, who made the highest bid for the sum of $1,275,000, lawful money of the United States, for the real estate in said Order of Sale described as follows, to-wit:

Lot 804 B, AMENDED PEPPERWOOD PHASE 8B

Together with all the improvements now or hereafter erected on the property, and all easements, appurtenances, and fixtures now or hereafter a part of the property. All rights, title, interest of the defendant in the property is conveyed to the purchaser.

I further certify that said property is subject to redemption in lawful money of the United States pursuant to the statute in such cases made and provided.

DATED at Salt Lake City, Utah, April 17, 2018

ROSIE RIVERA, Sheriff of Salt Lake County, State of Utah

By Sgt. Evan Mallas
Police Officer

SALT LAKE COUNTY CIVIL DIV

Docket No. 17-16331

3RD DISTRICT COURT - SALT LAKE
SALT LAKE COUNTY, STATE OF UTAH

THE BANK OF NEW YORK MELLON FK,	:	RULING
Plaintiff,	:	RULING AND ORDER
	:	
vs.	:	Case No: 160902472
PAULA A MITCHELL,	:	Judge: TODD M SHAUGHNESSY
Defendant.	:	Date: June 21, 2018

Before the court is a request to submit for decision the supplemental affidavit of attorneys' fees and costs filed by plaintiff and the motion to strike the supplemental affidavit filed by defendant. The motion to strike the supplemental affidavit is fully briefed.

Based on the papers filed, the court denies the motion to strike the supplemental affidavit of Mr. Dehaan. In this respect, the court finds and concludes that (1) defendant's procedural objections are not well taken and those objections are overruled by the court, (2) defendant has not shown that plaintiff's counsel committed perjury in the affidavit, and (3) defendant is not entitled to a jury trial on the issue of attorneys' fees; the issue has been the subject of at least one hearing and a number of written submissions from both parties and all parties have had a full and fair opportunity to address the issue.

Having overruled the objections to the Dehaan affidavit, the court finds the tasks performed by counsel to be reasonable and necessary to prosecute this case, and the hourly rate charged to be reasonable, and awards attorneys' fees in the amount of $27,480 and costs in the amount of $1,144 for a total of $28,624.00.

End Of Order - Signature at the Top of the First Page

CERTIFICATE OF NOTIFICATION

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EMAIL: CRAIG H HOWE chowe@aklawfirm.com

EMAIL: BRIGHAM J LUNDBERG brigham.lundberg@lundbergfirm.com
EMAIL: HILLARY R MCCORMACK hillary.mccormack@lundbergfirm.com
EMAIL: BLAKE D MILLER bmiller@aklawfirm.com
EMAIL: DOUGLAS R SHORT drs@consumerlawutah.com

Date: 06/21/2018 /s/ TODD M SHAUGHNESSY

Deputy Court Clerk

The Order of the Court is stated below:
Dated: June 21, 2018 02:54:44 PM **/s/** TODD M SHAUGHNESSY
District Court Judge

3RD DISTRICT COURT - SALT LAKE
SALT LAKE COUNTY, STATE OF UTAH

THE BANK OF NEW YORK MELLON FK, Plaintiff,	:	RULING RULING AND ORDER
vs.	:	Case No: 160902472
PAULA A MITCHELL, Defendant.	:	Judge: TODD M SHAUGHNESSY Date: June 21, 2018

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EMAIL: CRAIG H HOWE chowe@aklawfirm.com

EMAIL: BRIGHAM J LUNDBERG brigham.lundberg@lundbergfirm.com
EMAIL: HILLARY R MCCORMACK hillary.mccormack@lundbergfirm.com
EMAIL: BLAKE D MILLER bmiller@aklawfirm.com
EMAIL: DOUGLAS R SHORT drs@consumerlawutah.com

Date: 06/21/2018 /s/ TODD M SHAUGHNESSY

Deputy Court Clerk

After Recording Return To:
COUNTRYWIDE HOME LOANS, INC.
MS SV-79 DOCUMENT PROCESSING
P.O.Box 10423
Van Nuys, CA 91410-0423

Prepared By:
MARYANN MASUISUI
AMERICA'S WHOLESALE LENDER

6955 UNION PARK CENTER #400
MIDVALE
UT 84047

9733512
5/24/2006 4:48:00 PM $38.00
Book - 9298 Pg - 7355-7369
Gary W. Ott
Recorder, Salt Lake County, UT
MERIDIAN TITLE
BY: eCASH, DEPUTY - EF 15 P.

[Space Above This Line For Recording Data]

122557
[Escrow/Closing #]

[redacted]
[Doc ID #]

Tax Serial Number: 2822203047

DEED OF TRUST

[redacted]

DEFINITIONS

Words used in multiple sections of this document are defined below and other words are defined in Sections 3, 11, 13, 18, 20 and 21. Certain rules regarding the usage of words used in this document are also provided in Section 16.

(A) **"Security Instrument"** means this document, which is dated MAY 23, 2006 , together with all Riders to this document.
(B) **"Borrower"** is
PAULA A MITCHELL

Borrower is the trustor under this Security Instrument.
(C) **"Lender"** is
AMERICA'S WHOLESALE LENDER
Lender is a CORPORATION
organized and existing under the laws of NEW YORK
Lender's address is
4500 Park Granada MSN# 8VB-314, Calabasas, CA 91302-1613
(D) **"Trustee"** is
STEWART T. MATHESON, ATTORNEY AT LAW
648 EAST FIRST SOUTH, SALT LAKE CITY, UT 84102

[redacted]

[redacted]

(E) "MERS" is Mortgage Electronic Registration Systems, Inc. MERS is a separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns. **MERS is the beneficiary under this Security Instrument.** MERS is organized and existing under the laws of Delaware, and has an address and telephone number of P.O. Box 2026, Flint, MI 48501-2026, tel. (888) 679-MERS.

(F) "Note" means the promissory note signed by Borrower and dated MAY 23, 2006 . The Note states that Borrower owes Lender

ONE MILLION and 00/100

Dollars (U.S. $ 1,000,000.00) plus interest. Borrower has promised to pay this debt in regular Periodic Payments and to pay the debt in full not later than JUNE 01, 2036 .

(G) "Property" means the property that is described below under the heading "Transfer of Rights in the Property."

(H) "Loan" means the debt evidenced by the Note, plus interest, any prepayment charges and late charges due under the Note, and all sums due under this Security Instrument, plus interest.

(I) "Riders" means all Riders to this Security Instrument that are executed by Borrower. The following Riders are to be executed by Borrower [check box as applicable]:

[X] Adjustable Rate Rider	[ ] Condominium Rider	[ ] Second Home Rider
[ ] Balloon Rider	[ ] Planned Unit Development Rider	[ ] 1-4 Family Rider
[ ] VA Rider	[ ] Biweekly Payment Rider	[ ] Other(s) [specify]

(J) "Applicable Law" means all controlling applicable federal, state and local statutes, regulations, ordinances and administrative rules and orders (that have the effect of law) as well as all applicable final, non-appealable judicial opinions.

(K) "Community Association Dues, Fees, and Assessments" means all dues, fees, assessments and other charges that are imposed on Borrower or the Property by a condominium association, homeowners association or similar organization.

(L) "Electronic Funds Transfer" means any transfer of funds, other than a transaction originated by check, draft, or similar paper instrument, which is initiated through an electronic terminal, telephonic instrument, computer, or magnetic tape so as to order, instruct, or authorize a financial institution to debit or credit an account. Such term includes, but is not limited to, point-of-sale transfers, automated teller machine transactions, transfers initiated by telephone, wire transfers, and automated clearinghouse transfers.

(M) "Escrow Items" means those items that are described in Section 3.

(N) "Miscellaneous Proceeds" means any compensation, settlement, award of damages, or proceeds paid by any third party (other than insurance proceeds paid under the coverages described in Section 5) for: (i) damage to, or destruction of, the Property; (ii) condemnation or other taking of all or any part of the Property; (iii) conveyance in lieu of condemnation; or (iv) misrepresentations of, or omissions as to, the value and/or condition of the Property.

(O) "Mortgage Insurance" means insurance protecting Lender against the nonpayment of, or default on, the Loan.

(P) "Periodic Payment" means the regularly scheduled amount due for (i) principal and interest under the Note, plus (ii) any amounts under Section 3 of this Security Instrument.

(Q) "RESPA" means the Real Estate Settlement Procedures Act (12 U.S.C. Section 2601 et seq.) and its implementing regulation, Regulation X (24 C.F.R. Part 3500), as they might be amended from time to time, or any additional or successor legislation or regulation that governs the same subject matter. As used in this Security Instrument, "RESPA" refers to all requirements and restrictions that are imposed in regard to a "federally related mortgage loan" even if the Loan does not qualify as a "federally related mortgage loan" under RESPA.

(R) "Successor in Interest of Borrower" means any party that has taken title to the Property, whether or not that party has assumed Borrower's obligations under the Note and/or this Security Instrument.

TRANSFER OF RIGHTS IN THE PROPERTY

The beneficiary of this Security Instrument is MERS (solely as nominee for Lender and Lender's successors and assigns) and the successors and assigns of MERS. This Security Instrument secures to Lender: (i) the repayment of the Loan, and all renewals, extensions and modifications of the Note; and (ii) the performance of Borrower's covenants and agreements under this Security Instrument and the Note. For this purpose, Borrower irrevocably grants, conveys and warrants to Trustee, in trust, with power of sale, the following described property located in the

COUNTY of SALT LAKE :

[Type of Recording Jurisdiction] [Name of Recording Jurisdiction]

DOC ID #: 00013815028105006

LOT 804 B, AMENDED PEPPERWOOD PHASE 8B, ACCORDING TO THE PLAT THEREOF AS RECORDED IN THE OFFICE OF THE SALT LAKE COUNTY RECORDER.

which currently has the address of
3 SOUTH MISTYWOOD LANE, SANDY
[Street/City]
Utah 84092-4850 ("Property Address"):
[Zip Code]

TOGETHER WITH all the improvements now or hereafter erected on the property, and all easements, appurtenances, and fixtures now or hereafter a part of the property. All replacements and additions shall also be covered by this Security Instrument. All of the foregoing is referred to in this Security Instrument as the "Property." Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender including, but not limited to, releasing and canceling this Security Instrument.

BORROWER COVENANTS that Borrower is lawfully seised of the estate hereby conveyed and has the right to grant, convey and warrant the Property and that the Property is unencumbered, except for encumbrances of record. Borrower further warrants and will defend generally the title to the Property against all claims and demands, subject to any encumbrances of record.

THIS SECURITY INSTRUMENT combines uniform covenants for national use and non-uniform covenants with limited variations by jurisdiction to constitute a uniform security instrument covering real property.

UNIFORM COVENANTS. Borrower and Lender covenant and agree as follows:

1. Payment of Principal, Interest, Escrow Items, Prepayment Charges, and Late Charges. Borrower shall pay when due the principal of, and interest on, the debt evidenced by the Note and any prepayment charges and late charges due under the Note. Borrower shall also pay funds for Escrow Items pursuant to Section 3. Payments due under the Note and this Security Instrument shall be made in U.S. currency. However, if any check or other instrument received by Lender as payment under the Note or this Security Instrument is returned to Lender unpaid, Lender may require that any or all subsequent payments due under the Note and this Security Instrument be made in one or more of the following forms, as selected by Lender: (a) cash; (b) money order; (c) certified check, bank check, treasurer's check or cashier's check, provided any such check is drawn upon an institution whose deposits are insured by a federal agency, instrumentality, or entity; or (d) Electronic Funds Transfer.

Payments are deemed received by Lender when received at the location designated in the Note or at such other location as may be designated by Lender in accordance with the notice provisions in Section 15. Lender may return any payment or partial payment if the payment or partial payments are insufficient to bring the Loan current. Lender may accept any payment or partial payment insufficient to bring the Loan current, without waiver of any rights hereunder or prejudice to its rights to refuse such payment or partial payments in the future, but Lender is not obligated to apply such payments at the time such payments are accepted. If each Periodic Payment is applied as of its scheduled due date, then Lender need not pay interest on unapplied funds. Lender may hold such unapplied funds until Borrower makes payment to bring the Loan current. If Borrower does not do so within a reasonable period of time, Lender shall either apply such funds or return them to Borrower. If not applied earlier, such funds will be applied to the outstanding principal balance under the Note immediately prior to foreclosure. No offset or claim which Borrower might have now or in the future against Lender shall relieve Borrower from making payments due under the Note and this Security Instrument or performing the covenants and agreements secured by this Security Instrument.

2. Application of Payments or Proceeds. Except as otherwise described in this Section 2, all payments accepted and applied by Lender shall be applied in the following order of priority: (a) interest due under the Note; (b) principal due under the Note; (c) amounts due under Section 3. Such payments shall be applied to each Periodic Payment in the order in which it became due. Any remaining amounts shall be applied first to late charges, second to any other amounts due under this Security Instrument, and then to reduce the principal balance of the Note.

If Lender receives a payment from Borrower for a delinquent Periodic Payment which includes a sufficient amount to pay any late charge due, the payment may be applied to the delinquent payment and the late charge. If more than one Periodic Payment is outstanding, Lender may apply any payment received from Borrower to the repayment of the Periodic Payments if, and to the extent that, each payment can be paid in full. To the extent that any excess exists after the payment is applied to the full payment of one or more Periodic Payments, such excess may be applied to any late charges due. Voluntary prepayments shall be applied first to any prepayment charges and then as described in the Note.

Any application of payments, insurance proceeds, or Miscellaneous Proceeds to principal due under the Note shall not extend or postpone the due date, or change the amount, of the Periodic Payments.

3. Funds for Escrow Items. Borrower shall pay to Lender on the day Periodic Payments are due under the Note, until the Note is paid in full, a sum (the "Funds") to provide for payment of amounts due for: (a) taxes and assessments and other items which can attain priority over this Security Instrument as a lien or encumbrance on the Property; (b) leasehold payments or ground rents on the Property, if any; (c) premiums for any and all insurance required by Lender under Section 5; and (d) Mortgage Insurance premiums, if any, or any sums payable by Borrower to Lender in lieu of the payment of Mortgage Insurance premiums in accordance with the provisions of Section 10. These items are called "Escrow Items." At origination or at any time during the term of the Loan, Lender may require that Community Association Dues, Fees, and Assessments, if any, be escrowed by Borrower, and such dues, fees and assessments shall be an Escrow Item. Borrower shall promptly furnish to Lender all notices of amounts to be paid under this Section. Borrower shall pay Lender the Funds for Escrow Items unless Lender waives Borrower's obligation to pay the Funds for any or all Escrow Items. Lender may waive Borrower's obligation to pay to Lender Funds for any or all Escrow Items at any time. Any such waiver may only be in writing. In the event of such waiver, Borrower shall pay directly, when and where payable, the amounts due for any Escrow Items for which payment of Funds has been waived by Lender and, if Lender requires, shall furnish to Lender receipts evidencing such payment within such time period as Lender may require. Borrower's obligation to make such payments and to provide receipts shall for all purposes be deemed to be a covenant and agreement contained in this Security Instrument, as the phrase "covenant and agreement" is used in Section 9. If Borrower is obligated to pay Escrow Items directly, pursuant to a waiver, and Borrower fails to pay the amount due for an Escrow Item, Lender may exercise its rights under Section 9 and pay such amount and Borrower shall then be obligated under Section 9 to repay to Lender any such amount. Lender may revoke the waiver as to any or all Escrow Items at any time by a notice given in accordance with Section 15 and, upon such revocation, Borrower shall pay to Lender all Funds, and in such amounts, that are then required under this Section 3.

Lender may, at any time, collect and hold Funds in an amount (a) sufficient to permit Lender to apply the Funds at the time specified under RESPA, and (b) not to exceed the maximum amount a lender can require under RESPA. Lender shall estimate the amount of Funds due on the basis of current data and reasonable estimates of expenditures of future Escrow Items or otherwise in accordance with Applicable Law.

The Funds shall be held in an institution whose deposits are insured by a federal agency, instrumentality, or entity (including Lender, if Lender is an institution whose deposits are so insured) or in any Federal Home Loan Bank. Lender shall apply the Funds to pay the Escrow Items no later than the time specified under RESPA. Lender shall not charge Borrower for holding and applying the Funds, annually analyzing the escrow account, or verifying the Escrow Items, unless Lender pays Borrower interest on the Funds and Applicable Law permits Lender to make such a charge. Unless an agreement is made in writing or Applicable Law requires interest to be paid on the Funds, Lender shall not be required to pay Borrower any interest or earnings on the Funds. Borrower and Lender can agree in writing, however, that interest shall be paid on the Funds. Lender shall give to Borrower, without charge, an annual accounting of the Funds as required by RESPA.

If there is a surplus of Funds held in escrow, as defined under RESPA, Lender shall account to Borrower for the excess funds in accordance with RESPA. If there is a shortage of Funds held in escrow, as defined under RESPA, Lender shall notify Borrower as required by RESPA, and Borrower shall pay to Lender the amount necessary to make up the shortage in accordance with RESPA, but in no more than 12 monthly payments. If there is a deficiency of Funds held in escrow, as defined under RESPA, Lender shall notify Borrower as required by RESPA, and Borrower shall pay to Lender the amount necessary to make up the deficiency in accordance with RESPA, but in no more than 12 monthly payments.

Upon payment in full of all sums secured by this Security Instrument, Lender shall promptly refund to Borrower any Funds held by Lender.

4. Charges; Liens. Borrower shall pay all taxes, assessments, charges, fines, and impositions attributable to the Property which can attain priority over this Security Instrument, leasehold payments or ground rents on the Property, if any, and Community Association Dues, Fees, and Assessments, if any. To the extent that these items are Escrow Items, Borrower shall pay them in the manner provided in Section 3.

Borrower shall promptly discharge any lien which has priority over this Security Instrument unless Borrower: (a) agrees in writing to the payment of the obligation secured by the lien in a manner acceptable to Lender, but only so long as Borrower is performing such agreement; (b) contests the lien in good faith by, or defends against enforcement of the lien in, legal proceedings which in Lender's opinion operate to prevent the enforcement of the lien while those proceedings are pending, but only until such proceedings are concluded; or (c) secures from the holder of the lien an agreement satisfactory to Lender subordinating the lien to this Security Instrument. If Lender determines that any part of the Property is subject to a lien which can attain

priority over this Security Instrument, Lender may give Borrower a notice identifying the lien. Within 10 days of the date on which that notice is given, Borrower shall satisfy the lien or take one or more of the actions set forth above in this Section 4.

Lender may require Borrower to pay a one-time charge for a real estate tax verification and/or reporting service used by Lender in connection with this Loan.

5. Property Insurance. Borrower shall keep the improvements now existing or hereafter erected on the Property insured against loss by fire, hazards included within the term "extended coverage," and any other hazards including, but not limited to, earthquakes and floods, for which Lender requires insurance. This insurance shall be maintained in the amounts (including deductible levels) and for the periods that Lender requires. What Lender requires pursuant to the preceding sentences can change during the term of the Loan. The insurance carrier providing the insurance shall be chosen by Borrower subject to Lender's right to disapprove Borrower's choice, which right shall not be exercised unreasonably. Lender may require Borrower to pay, in connection with this Loan, either: (a) a one-time charge for flood zone determination, certification and tracking services; or (b) a one-time charge for flood zone determination and certification services and subsequent charges each time remappings or similar changes occur which reasonably might affect such determination or certification. Borrower shall also be responsible for the payment of any fees imposed by the Federal Emergency Management Agency in connection with the review of any flood zone determination resulting from an objection by Borrower.

If Borrower fails to maintain any of the coverages described above, Lender may obtain insurance coverage, at Lender's option and Borrower's expense. Lender is under no obligation to purchase any particular type or amount of coverage. Therefore, such coverage shall cover Lender, but might or might not protect Borrower, Borrower's equity in the Property, or the contents of the Property, against any risk, hazard or liability and might provide greater or lesser coverage than was previously in effect. Borrower acknowledges that the cost of the insurance coverage so obtained might significantly exceed the cost of insurance that Borrower could have obtained. Any amounts disbursed by Lender under this Section 5 shall become additional debt of Borrower secured by this Security Instrument. These amounts shall bear interest at the Note rate from the date of disbursement and shall be payable, with such interest, upon notice from Lender to Borrower requesting payment.

All insurance policies required by Lender and renewals of such policies shall be subject to Lender's right to disapprove such policies, shall include a standard mortgage clause, and shall name Lender as mortgagee and/or as an additional loss payee. Lender shall have the right to hold the policies and renewal certificates. If Lender requires, Borrower shall promptly give to Lender all receipts of paid premiums and renewal notices. If Borrower obtains any form of insurance coverage, not otherwise required by Lender, for damage to, or destruction of, the Property, such policy shall include a standard mortgage clause and shall name Lender as mortgagee and/or as an additional loss payee.

In the event of loss, Borrower shall give prompt notice to the insurance carrier and Lender. Lender may make proof of loss if not made promptly by Borrower. Unless Lender and Borrower otherwise agree in writing, any insurance proceeds, whether or not the underlying insurance was required by Lender, shall be applied to restoration or repair of the Property, if the restoration or repair is economically feasible and Lender's security is not lessened. During such repair and restoration period, Lender shall have the right to hold such insurance proceeds until Lender has had an opportunity to inspect such Property to ensure the work has been completed to Lender's satisfaction, provided that such inspection shall be undertaken promptly. Lender may disburse proceeds for the repairs and restoration in a single payment or in a series of progress payments as the work is completed. Unless an agreement is made in writing or Applicable Law requires interest to be paid on such insurance proceeds, Lender shall not be required to pay Borrower any interest or earnings on such proceeds. Fees for public adjusters, or other third parties, retained by Borrower shall not be paid out of the insurance proceeds and shall be the sole obligation of Borrower. If the restoration or repair is not economically feasible or Lender's security would be lessened, the insurance proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower. Such insurance proceeds shall be applied in the order provided for in Section 2.

If Borrower abandons the Property, Lender may file, negotiate and settle any available insurance claim and related matters. If Borrower does not respond within 30 days to a notice from Lender that the insurance carrier has offered to settle a claim, then Lender may negotiate and settle the claim. The 30-day period will begin when the notice is given. In either event, or if Lender acquires the Property under Section 22 or otherwise, Borrower hereby assigns to Lender (a) Borrower's rights to any insurance proceeds in an amount not to exceed the amounts unpaid under the Note or this Security Instrument, and (b) any other of Borrower's rights (other than the right to any refund of unearned premiums paid by Borrower) under all insurance policies covering the Property, insofar as such rights are applicable to the coverage of the Property. Lender may use the insurance proceeds either to repair or restore the Property or to pay amounts unpaid under the Note or this Security Instrument, whether or not then due.

6. Occupancy. Borrower shall occupy, establish, and use the Property as Borrower's principal residence within 60 days after the execution of this Security Instrument and shall continue to occupy the Property as Borrower's principal residence for at least one year after the date of occupancy, unless Lender otherwise agrees in writing, which consent shall not be unreasonably withheld, or unless extenuating circumstances exist which are beyond Borrower's control.

7. Preservation, Maintenance and Protection of the Property; Inspections. Borrower shall not destroy, damage or impair the Property, allow the Property to deteriorate or commit waste on the Property. Whether or not Borrower is residing in the Property, Borrower shall maintain the Property in order to prevent the Property from deteriorating or decreasing in value due to its condition. Unless it is determined pursuant to Section 5 that repair or restoration is not economically feasible, Borrower shall promptly repair the Property if damaged to avoid further deterioration or damage. If insurance or condemnation proceeds are paid in connection with damage to, or the taking of, the Property, Borrower shall be responsible for repairing or restoring the Property only if Lender has released proceeds for such purposes. Lender may disburse proceeds for the repairs and restoration in a single payment or in a series of progress payments as the work is completed. If the insurance or condemnation proceeds are not sufficient to repair or restore the Property, Borrower is not relieved of Borrower's obligation for the completion of such repair or restoration.

Lender or its agent may make reasonable entries upon and inspections of the Property. If it has reasonable cause, Lender may inspect the interior of the improvements on the Property. Lender shall give Borrower notice at the time of or prior to such an interior inspection specifying such reasonable cause.

8. Borrower's Loan Application. Borrower shall be in default if, during the Loan application process, Borrower or any persons or entities acting at the direction of Borrower or with Borrower's knowledge or consent gave materially false, misleading, or inaccurate information or statements to Lender (or failed to provide Lender with material information) in connection with the Loan. Material representations include, but are not limited to, representations concerning Borrower's occupancy of the Property as Borrower's principal residence.

9. Protection of Lender's Interest in the Property and Rights Under this Security Instrument. If (a) Borrower fails to perform the covenants and agreements contained in this Security Instrument, (b) there is a legal proceeding that might significantly affect Lender's interest in the Property and/or rights under this Security Instrument (such as a proceeding in bankruptcy, probate, for condemnation or forfeiture, for enforcement of a lien which may attain priority over this Security Instrument or to enforce laws or regulations), or (c) Borrower has abandoned the Property, then Lender may do and pay for whatever is reasonable or appropriate to protect Lender's interest in the Property and rights under this Security Instrument, including protecting and/or assessing the value of the Property, and securing and/or repairing the Property. Lender's actions can include, but are not limited to: (a) paying any sums secured by a lien which has priority over this Security Instrument; (b) appearing in court; and (c) paying reasonable attorneys' fees to protect its interest in the Property and/or rights under this Security Instrument, including its secured position in a bankruptcy proceeding. Securing the Property includes, but is not limited to, entering the Property to make repairs, change locks, replace or board up doors and windows, drain water from pipes, eliminate building or other code violations or dangerous conditions, and have utilities turned on or off. Although Lender may take action under this Section 9, Lender does not have to do so and is not under any duty or obligation to do so. It is agreed that Lender incurs no liability for not taking any or all actions authorized under this Section 9.

Any amounts disbursed by Lender under this Section 9 shall become additional debt of Borrower secured by this Security Instrument. These amounts shall bear interest at the Note rate from the date of disbursement and shall be payable, with such interest, upon notice from Lender to Borrower requesting payment.

If this Security Instrument is on a leasehold, Borrower shall comply with all the provisions of the lease. If Borrower acquires fee title to the Property, the leasehold and the fee title shall not merge unless Lender agrees to the merger in writing.

10. Mortgage Insurance. If Lender required Mortgage Insurance as a condition of making the Loan, Borrower shall pay the premiums required to maintain the Mortgage Insurance in effect. If, for any reason, the Mortgage Insurance coverage required by Lender ceases to be available from the mortgage insurer that previously provided such insurance and Borrower was required to make separately designated payments toward the premiums for Mortgage Insurance, Borrower shall pay the premiums required to obtain coverage substantially equivalent to the Mortgage Insurance previously in effect, at a cost substantially equivalent to the cost to Borrower of the Mortgage Insurance previously in effect, from an alternate mortgage insurer selected by Lender. If substantially equivalent Mortgage Insurance coverage is not available, Borrower shall continue to pay to Lender the amount of the separately designated payments that were due when the insurance coverage ceased to be in effect. Lender will accept, use and retain these payments as a non-refundable loss reserve in lieu of Mortgage Insurance. Such loss reserve shall be non-refundable, notwithstanding the fact that the Loan is ultimately paid in full, and Lender shall not be required to pay Borrower any interest or earnings on such loss reserve. Lender can no longer require loss reserve payments if Mortgage Insurance coverage (in the amount and for the period that Lender requires) provided by an insurer selected by Lender again becomes available, is obtained, and Lender requires separately designated payments toward the premiums for Mortgage Insurance. If Lender required Mortgage Insurance as a condition of making the Loan and Borrower was required to make separately designated payments toward the premiums for Mortgage Insurance, Borrower shall pay the premiums required to maintain Mortgage Insurance in effect, or to provide a non-refundable loss reserve, until Lender's requirement for Mortgage Insurance ends in accordance with any written agreement between Borrower and Lender providing for such termination or until termination is required by Applicable Law. Nothing in this Section 10 affects Borrower's obligation to pay interest at the rate provided in the Note.

Mortgage Insurance reimburses Lender (or any entity that purchases the Note) for certain losses it may incur if Borrower does not repay the Loan as agreed. Borrower is not a party to the Mortgage Insurance.

Mortgage insurers evaluate their total risk on all such insurance in force from time to time, and may enter into agreements with other parties that share or modify their risk, or reduce losses. These agreements are on terms and conditions that are satisfactory to the mortgage insurer and the other party (or parties) to these agreements. These agreements may require the mortgage insurer to make payments using any source of funds that the mortgage insurer may have available (which may include funds obtained from Mortgage Insurance premiums).

As a result of these agreements, Lender, any purchaser of the Note, another insurer, any reinsurer, any other entity, or any affiliate of any of the foregoing, may receive (directly or indirectly) amounts that derive from (or might be characterized as) a portion of Borrower's payments for Mortgage Insurance, in exchange for sharing or modifying the mortgage insurer's risk, or reducing losses. If such agreement provides that an affiliate of Lender takes a share of the insurer's risk in exchange for a share of the premiums paid to the insurer, the arrangement is often termed "captive reinsurance." Further:

(a) Any such agreements will not affect the amounts that Borrower has agreed to pay for Mortgage Insurance, or any other terms of the Loan. Such agreements will not increase the amount Borrower will owe for Mortgage Insurance, and they will not entitle Borrower to any refund.

(b) Any such agreements will not affect the rights Borrower has - if any - with respect to the Mortgage Insurance under the Homeowners Protection Act of 1998 or any other law. These rights may include the right to receive certain disclosures, to request and obtain cancellation of the Mortgage Insurance, to have the Mortgage Insurance terminated automatically, and/or to receive a refund of any Mortgage Insurance premiums that were unearned at the time of such cancellation or termination.

11. Assignment of Miscellaneous Proceeds; Forfeiture. All Miscellaneous Proceeds are hereby assigned to and shall be paid to Lender.

If the Property is damaged, such Miscellaneous Proceeds shall be applied to restoration or repair of the Property, if the restoration or repair is economically feasible and Lender's security is not lessened. During such repair and restoration period, Lender shall have the right to hold such Miscellaneous Proceeds until Lender has had an opportunity to inspect such Property to ensure the work has been completed to Lender's satisfaction, provided that such inspection shall be undertaken promptly. Lender may pay for the repairs and restoration in a single disbursement or in a series of progress payments as the work is completed. Unless an agreement is made in writing or Applicable Law requires interest to be paid on such Miscellaneous Proceeds, Lender shall not be required to pay Borrower any interest or earnings on such Miscellaneous Proceeds. If the restoration or repair is not economically feasible or Lender's security would be lessened, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower. Such Miscellaneous Proceeds shall be applied in the order provided for in Section 2.

In the event of a total taking, destruction, or loss in value of the Property, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower.

In the event of a partial taking, destruction, or loss in value of the Property in which the fair market value of the Property immediately before the partial taking, destruction, or loss in value is equal to or greater than the amount of the sums secured by this Security Instrument immediately before the partial taking, destruction, or loss in value, unless Borrower and Lender otherwise agree in writing, the sums secured by this Security Instrument shall be reduced by the amount of the Miscellaneous Proceeds multiplied by the following fraction: (a) the total amount of the sums secured immediately before the partial taking, destruction, or loss in value divided by (b) the fair market value of the Property immediately before the partial taking, destruction, or loss in value. Any balance shall be paid to Borrower.

In the event of a partial taking, destruction, or loss in value of the Property in which the fair market value of the Property immediately before the partial taking, destruction, or loss in value is less than the amount of the sums secured immediately before the partial taking, destruction, or loss in value, unless Borrower and Lender otherwise agree in writing, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument whether or not the sums are then due.

If the Property is abandoned by Borrower, or if, after notice by Lender to Borrower that the Opposing Party (as defined in the next sentence) offers to make an award to settle a claim for damages, Borrower fails to respond to Lender within 30 days after the date the notice is given, Lender is authorized to collect and apply the Miscellaneous Proceeds either to restoration or repair of the Property or to the sums secured by this Security Instrument, whether or not then due. "Opposing Party" means the third party that owes Borrower Miscellaneous Proceeds or the party against whom Borrower has a right of action in regard to Miscellaneous Proceeds.

Borrower shall be in default if any action or proceeding, whether civil or criminal, is begun that, in Lender's judgment, could result in forfeiture of the Property or other material impairment of Lender's interest in the Property or rights under this Security Instrument. Borrower can cure such a default and, if acceleration has occurred, reinstate as provided in Section 19, by causing the action or proceeding to be dismissed with a ruling that, in Lender's judgment, precludes forfeiture of the Property or other material impairment of Lender's interest in the Property or rights under this Security Instrument. The proceeds of any award or claim for damages that are attributable to the impairment of Lender's interest in the Property are hereby assigned and shall be paid to Lender.