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SUPREME COURT OF TEXAS
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No. 22-0910

IN THE SUPREME COURT OF TEXAS

Deysi R. Santos,

Petitioner,

v.

Yellowfin Loan Servicing Corp.,
as Successor in Interest to First Franklin,

Respondent.

On Appeal from the Fourteenth Court of Appeals
in Houston, Texas
Case No. 14-21-00151-CV

PETITION FOR REVIEW

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Statement of the Case

Nature of the case: Respondent Yellowfin Loan Servicing Corporation, as successor-in-interest to First Franklin bank, sued Petitioner Deysi Santos to recover an allegedly unpaid loan balance stemming from a junior mortgage on a property that was foreclosed on over twelve years before Yellowfin filed suit.

Proceedings in the trial court: The Honorable Donna Roth, 295th Judicial District Court of Harris County, granted summary judgment for Yellowfin. The trial court ordered Santos to pay $21,023.13 in damages and $5,160.00 in attorney's fees.

Proceedings in the court of appeals: The parties in the appellate court proceedings were Santos and Yellowfin. A three-member panel of the Fourteenth Court of Appeals consisting of Justices Jewell, Zimmerer, and Hassan affirmed the decision of the trial court in an opinion written by Justice Jewell. *Santos v. Yellowfin Loan Servicing Corp.*, 2022 WL 2678846 (Tex. App.—Houston [14th] July 12, 2022). The court of appeals subsequently denied Santos's motion for rehearing and her motion for en banc reconsideration.

Statement of Jurisdiction

This Court has jurisdiction because this appeal presents an important question of law, Tex. Gov't Code § 22.001(a): whether Yellowfin's claims over unpaid balances from pre-mortgage-crisis loans used to finance homes that were foreclosed on more than a decade ago are time-barred or equitably barred by waiver. Resolving this dispute will have wide-ranging effects in over 270 materially identical cases that Yellowfin is pursuing in Texas, as well as other like cases now pending or that might be brought in the future.

Issues Presented

I. Whether, under contract law, when a senior lienholder forecloses on real property, extinguishing a junior lien, the foreclosure accelerates the junior loan and the junior creditor's claim to recover any remaining unpaid debt accrues, triggering a two-year limitations period under Texas Property Code § 51.003 or a four-year limitations period under Texas Civil Practice & Remedies Code § 16.004(a)(3).

II. If a senior lienholder's foreclosure does not accelerate the junior loan, triggering the statute of limitations on the junior creditor's claim to remaining debt, whether the junior creditor waives its right to accelerate the junior loan by sitting on that right for over twelve years.

III. (**Unbriefed)** Whether the junior loan was a non-negotiable instrument governed by contract law, and whether the creditor below proved it was the owner of the note it seeks to enforce.

IV. (Unbriefed) Whether the junior creditor below met its burden to show that there was no genuine issue of any material fact entitling it to judgment as a matter of law under Texas Rule of Civil Procedure 166a.

Reasons for Granting Petition

According to the court below, a creditor can purchase a loan originally made to partially finance a long-ago foreclosed-on home and, after its twelve-year silence, sue to recover the unpaid balance. That holding cannot stand.

Deysi Santos financed her homestead through "senior" and "junior" loans obtained simultaneously from the same lender. The junior loan featured pre-mortgage-crisis predatory characteristics: a high interest rate (11.25%), a balloon payment (over $17,000) due immediately after twenty years of timely payments, and a clause permitting acceleration if the borrower defaulted on the senior loan. Santos fell behind on her payments and lost her home during the height of the mortgage crisis in November 2007. The foreclosure sale proceeds did not cover the junior loan.

For over a decade, a series of creditors allegedly bought and sold the junior loan, but none even attempted contacting Santos about it. Then, Yellowfin Loan Servicing Corporation—incorporated just before it filed this suit and many others like it—purportedly purchased the years-old debt. It sent letters to Santos's former address (the home she lost twelve years earlier) and then sued Santos demanding the full remaining loan balance, allegedly over $21,000.

Yellowfin contends that the statute of limitations does not begin running until it says so, when it accelerates a junior loan's repayment, even if it exercises that purported right over twelve years after foreclosure. This

contention ignores an important point of Texas law—foreclosure automatically accelerates repayment on all outstanding loans and the junior creditor's only remedy is to sue for any unpaid debt within the limitations period. No relevant limitations period is anywhere close to twelve years long.

Even if Yellowfin could still timely accelerate the junior loan after foreclosure, it lost the opportunity to exercise that right by failing to act for twelve years following Santos's default. On this point, Yellowfin urges Texas courts to ignore the years that its predecessors-in-interest held the loan. But this assertion overlooks another fundamental principle of Texas law: a creditor assumes only the rights held by its predecessors.

The decision below empowers Yellowfin to attempt collection of years-old debt while brushing aside any associated statutory and equitable limitations in over 270 other cases across Texas. It also incentivizes others to purchase old mortgages and sue to recover long-forgotten debt. That is not lawful, and this Court should say so.

Statement of Facts

I. Background

In April 2005, Santos purchased her homestead through two loans issued on the same day by First Franklin bank. 1CR211-22, 8-18; RR5:14-24.[1] Yellowfin's own counsel characterized the financing scheme as one that existed "in the bad old days before the mortgage crisis." RR5:1-6. The "senior loan" financed 80% of Santos's home ($97,592) and the "junior loan"—offered at a higher 11.25% interest rate—covered the remaining 20% ($24,398). 1CR8 ¶ 3, 211 ¶ E; RR5:5-8. Both loans were secured by the same property. 1CR211-22; 1CR 60-79. The senior lien took priority over the junior lien, so any foreclosure sale proceeds would first apply to the senior loan. RR5:25-6:5.

The junior loan is at issue here. It required Santos to make monthly payments for twenty years and then, in a balloon payment, pay the entire remaining balance. 1CR15. After twenty years of timely payments, Santos would immediately owe $17,263.03—almost 70% of the roughly $25,000 she originally borrowed. 1CR102-06, 8 ¶ 3. If Santos failed to make this lump-sum payment, the junior creditor could foreclose on her home. 1CR9 ¶ 11. The loan also contained an acceleration clause, tying the junior and senior loans together: It permitted the junior creditor to accelerate the note

[1] Citations to the first supplemental clerk's record, reporter's record, and appendix include an abbreviation and pin cite. *E.g.*, 1CR163; RR12:4-7, AP065.

(immediately call the entire balance due) after default on the senior loan, even if Santos's junior-loan payments were up to date. *Id.* Yellowfin's counsel acknowledged that this was "not a good loan" and was "heavily, heavily, heavily weighted in favor of interest." RR12:4-6. It is "not a loan [he] would advise anybody to take." RR12:6-7.

Santos defaulted on the senior loan and the property was foreclosed on in November 2007. 1CR80. It is unclear whether the foreclosure sale fully satisfied the senior loan, but a balance remained on its junior counterpart. *Id.*; RR28:21-29:2. The foreclosure wiped out ("extinguished") the junior loan's security, rendering the note unsecured. RR6:7-17; *see also Ovation Servs., LLC v. Richard*, 624 S.W.3d 610, 619 (Tex. App.—Tyler 2021). To recover the post-foreclosure unsecured debt, the junior creditor could have sought a money judgment. *Diversified Mortg. Invs. v. Lloyd D. Blaylock Gen. Contractor, Inc.*, 576 S.W.2d 794, 808 (Tex. 1978). Yellowfin's predecessors-in-interest did not do so.

It is undisputed that no creditor attempted to contact Santos about the junior loan for over a decade following the 2007 foreclosure. *See* RR26:18-27:3.

Yellowfin incorporated in July 2018, AP066, and allegedly purchased the junior loan the following year, 1CR86-90. In early 2020, Yellowfin sent three letters to Santos's former address—the home previously sold—demanding

she pay the loan balance. 1CR225-31. Because Santos had left the property in 2007, 1CR163, she did not receive these letters.

II. Procedural history

Yellowfin filed this breach-of-contract suit and over 270 others against debtors to recover unpaid pre-mortgage-crisis junior loans that financed homes foreclosed on many years earlier. *See* AP065.[2] The district court granted summary judgment to Yellowfin in a two-page order drafted by Yellowfin's counsel. 1CR269-70.

The court of appeals affirmed, holding that Yellowfin's claim was timely. AP012-16. It rejected Santos's argument that Yellowfin's right to collect the unpaid debt accrued at the 2007 foreclosure, concluding that accrual occurred when Yellowfin purportedly accelerated the loan's repayment in early 2020. AP015-16. Rather than considering Santos's alternative argument that even if Yellowfin still had the right to accelerate Santos's debt in 2020, equitable-waiver principles prevented it from exercising that right, the court conflated Santos's waiver and statute-of-limitations defenses. AP018-19.

[2] Appendix page 65 shows search results identifying these cases. We randomly selected Dallas County and reviewed the cases Yellowfin filed there. Those thirty cases—an over 10% sample of the 270 Yellowfin has filed since incorporating—are materially identical to Santos's. *See infra* at 22.

Summary of Argument

This Court should grant review and reverse.

I. Yellowfin's claim is barred by any applicable statute of limitations. The senior lienholder's foreclosure accelerated the junior loan, turning that loan's balance into unsecured debt. The right to collect that debt accrued more than twelve years before Yellowfin sued, so Yellowfin's claim is untimely.

Even if the claim was not time-barred, Yellowfin waived its right to accelerate the loan. From November 2007 through January 2020, neither Yellowfin nor its predecessors-in-interest contacted Santos. These twelve years of inaction surpass the far shorter time periods where courts applying Texas law have implied a waiver of contractual rights to prevent inequitable consequences.

II. This case presents important issues being considered by courts across Texas. Yellowfin filed over 270 similar suits to recover junior loans that financed homes foreclosed on many years ago. Deciding this case would provide clarity to the courts reviewing those cases and prevent Yellowfin and other debt-buyers from suing on long-forgotten debts.

Argument

I. The court of appeals erred in holding that Yellowfin had a right to collect unpaid debt twelve years after the foreclosure.

A. Yellowfin's right to sue over the junior loan's balance accrued at the 2007 foreclosure, and its claim is therefore time-barred.

When Santos's home was foreclosed on in 2007, the foreclosure accelerated her junior loan and left the note unsecured. That is when the right to recover the note's outstanding balance accrued. Because Yellowfin tried collecting the debt more than twelve years later, its claim was untimely under any applicable statute of limitations.

1. Yellowfin's predecessors-in-interest were entitled to seek a money judgment for any debt not satisfied by the foreclosure sale.

The court of appeals erred in holding that Yellowfin's claim did not accrue until it purportedly accelerated the loan in 2020, three months before filing this suit. *See* AP015-16. Instead, Yellowfin could not accelerate the loan in 2020 because the foreclosure had already accelerated the loan. Yellowfin's claim therefore accrued at the 2007 foreclosure, when its predecessors-in-interest could have sought a money judgment (within the applicable statute of limitations) for the junior loan's remaining balance.

a. Foreclosure extinguishes any junior liens on a property, so that the purchaser acquires title free from any junior lienholder claims. *Conseco Fin. Servicing Corp. v. J & J Mobile Homes, Inc.*, 120 S.W.3d 878, 883 (Tex. App.—Fort Worth 2003). Thus, if foreclosure sale proceeds are insufficient to satisfy

a junior lien, that loan becomes an unsecured note on which the junior creditor may seek a money judgment. *Poston v. Wachovia Mortg. Corp.*, 2012 WL 1606340, at *2 (Tex. App.—Houston [14th] May 8, 2012); *see also Diversified Mortg. Invs. v. Lloyd D. Blaylock Gen. Contractor, Inc.*, 576 S.W.2d 794, 808 (Tex. 1978). And because foreclosure accelerates the note, *see McLemore v. Pac. Sw. Bank*, 872 S.W. 2d 286, 291 (Tex. App.—Texarkana 1994) (citing *Shepler v. Kubena*, 563 S.W.2d 382, 385 (Tex. App.—Austin 1978)), if the lender seeks "to collect any deficiency that remains after the foreclosure," it "must obtain a judgment" to recover within the applicable statute of limitations, *Marhaba Partners Ltd. P'ship v. Kindron Holdings, LLC*, 457 S.W.3d 208, 215 (Tex. App.—Houston [14th] 2015). Under these circumstances, the loan is no longer secured, so "there is no mechanism available for the lender to collect the deficiency through non-judicial means." *Id.* In other words, once a senior lienholder's foreclosure extinguishes a junior creditor's security, the junior creditor cannot also foreclose. *See id.* Nor can it continue demanding monthly payments under the former installment agreement. *See id.* Instead, the junior creditor must "pursue a judgment against the debtor for the unpaid amount of the lien" within the statute of limitations or the right expires. *Wesley v. Amerigo, Inc.*, 2006 WL 22213, at *3 (Tex. App.—Waco Jan. 4, 2006).

It makes sense that a junior creditor's right to seek a money judgment accrues at the foreclosure and not at some later creditor-to-be-determined

date. A junior creditor is entitled to surplus proceeds resulting from a foreclosure sale, *Diversified Mortg. Invs.*, 576 S.W.2d at 808, and the Legislature does not want to force parties like Santos to defend post-foreclosure claims after "memories have faded and documents have been destroyed," *see Safeway Stores, Inc. v. Certainteed Corp.*, 710 S.W.2d 544, 545-46 (Tex. 1986). This point is underscored here, where no one contacted Santos about the debt for twelve years, no record remains of how the sale proceeds were applied to the loans, and it is unclear whether the junior loan's remaining balance was over $21,000 as Yellowfin claims.

b. Santos's home was sold at a nonjudicial foreclosure sale in 2007, but the proceeds were not enough to pay off both the senior and junior loans. 1CR80; RR28:21-29:2. Thus, although the foreclosure extinguished the junior lien, Yellowfin's predecessors-in-interest had the right to sue Santos for any remaining unpaid debt. *Poston*, 2012 WL 1606340, at *2. And because the senior lienholder's foreclosure sale meant that "facts [came] into existence which authorize[d] [the junior creditor] to seek a judicial remedy," *Murray v. San Jacinto Agency, Inc.*, 800 S.W.2d 826, 828 (Tex. 1990), that right to sue for any unpaid debt accrued in 2007.

Yellowfin could not "revive its rights" by "purporting to accelerate" the note in 2020, *see Wells Fargo Bank, N.A. v. Express Limousines, Inc.*, 2022 WL 3048235, at *3 (Tex. App.—Austin Aug. 3, 2022), because the foreclosure had already accelerated the junior loan, *see, e.g.*, *McLemore*, 872 S.W. 2d at 291

(foreclosure constitutes acceleration on an installment debt); *Shepler*, 563 S.W.2d at 385 (same). Thus, Yellowfin's "proper remedy"—indeed its only post-foreclosure remedy, *Marhaba*, 457 S.W.3d at 215—was to pursue a money judgment within the applicable limitations period. *See Diversified Mortg. Invs.*, 576 S.W.2d at 808.

2. Yellowfin's suit is untimely under any applicable statute of limitations.

Section 51.003(a) of the Texas Property Code provides the appropriate statute of limitations for post-foreclosure claims to mortgage debt. *PlainsCapital Bank v. Martin*, 459 S.W.3d 550, 555 (Tex. 2015). "[W]henever a borrower is sued after real property is sold at a foreclosure sale … and judgment is sought against the borrower because the foreclosure sale price is less than the amount owed, then [] the suit is for a 'deficiency judgment,'" *id.*, and "must be brought within two years," Tex. Prop. Code § 51.003(a).

Yellowfin is wrong that Section 51.003(a) does not apply to deficiency actions brought by junior creditors. Section 51.003(a) neither says nor implies that it excludes from coverage a deficiency on a junior loan secured by the foreclosed-on property. That is, nothing in the statute indicates that the two-year limitations period applies only when a foreclosure is performed by the same lienholder who later seeks a deficiency judgment. To the contrary, Section 51.003(a) applies to "*any action* brought to recover the deficiency." Tex. Prop. Code § 51.003(a) (emphasis added). Even if (counterfactually) Section 51.003(a) applied only to senior lienholders, then the default

four-year statute of limitations for enforcing unpaid debt under Texas Civil Practice & Remedies Code § 16.004(a)(3) would apply to a junior creditor's post-foreclosure right to collect.[3] Because Yellowfin tried collecting the debt more than twelve years after its claim accrued, the suit is untimely under any applicable statute of limitations.

3. The authorities relied on by the court of appeals are completely off point.

a. Relying on *Holy Cross v. Wolf*, 44 S.W.3d 562 (Tex. 2001), the court of appeals held that if a note contains an acceleration clause, the creditor's claim to a money judgment accrues and the limitations period starts only when the holder exercises its acceleration right. AP015-16. Under this theory, Yellowfin and its predecessors-in-interest could accelerate the note and thereby trigger the limitations period at any time they wished, from the original default and foreclosure in 2007 until March 2025, when the claim to any remaining balance would automatically accrue under the balloon-payment provision.

This is wrong because *Holy Cross* and the statutory provision it interprets, Section 16.035(e), apply only to debts secured by real property. *See* Tex. Civ. Prac. & Rem. Code § 16.035(e). *Holy Cross* is irrelevant here, where the

[3] Although this is the statute of limitations that the court below applied, it erred in determining when the statute of limitations began to run. *See* AP015.

foreclosure extinguished the lien (eliminating the security interest) and accelerated the junior loan. *See supra* at 10-13.

The junior loan's acceleration clause merely provided an additional, pre-foreclosure recovery option to Yellowfin's predecessor-in-interest. The clause treated a pre-foreclosure default on the senior loan as a default on the junior loan, giving the junior lienholder the right to accelerate its note even when the senior lienholder had not foreclosed. But the senior lienholder *did* foreclose on Santos's home, so the junior creditor's note was accelerated, *supra* at 12-13, and Yellowfin's claim accrued.

b. The court of appeals' reliance on *Mandarino v. Sherwood Lane Invs. LLC*, 2016 WL 4034568 (Tex. App.—Houston [1st] July 26, 2016), reveals a deep confusion in the courts of appeals about when a creditor has a right to sue following a foreclosure and what statute of limitations applies.

First, the court of appeals ignored the common-law principles outlined above (at 10-12) about a junior creditor's post-foreclosure right of recovery, relying instead on an error *Mandarino* made (in dicta) treating Section 51.003 as creating a special deficiency-judgment claim. AP014-16. But Section 51.003(a) "does not create the right to bring an action for a deficiency." *Trunkhill Cap., Inc. v. Jansma*, 905 S.W.2d 464, 468 (Tex. App.—Waco 1995). It "merely places a procedural limitation on a traditional common-law right of action." *Id.* As long as this confusion about when a creditor has a right to sue following a foreclosure reigns, creditors will have their pick—they can either

assert a right to a money judgment following foreclosure as the Legislature intended, *see Wesley*, 2006 WL 22213, at *3, or they can circumvent any limitations period by claiming this right never accrued.

Second, the court of appeals relied on *Mandarino* to hold that Section 51.003(a)'s two-year statute of limitations for post-foreclosure deficiencies did not apply to Yellowfin's suit. AP013-15. While Yellowfin's claim is untimely under any limitations period, *Mandarino*'s holding is nevertheless wrong and will continue to cause confusion if this Court does not intervene.

Mandarino relied only on *Mays v. Bank One, N.A.*, 150 S.W.3d 897 (Tex. App.—Dallas 2004), to hold that Section 51.003(a) does not apply to junior creditors. *Mandarino*, 2016 WL 4034568, at *8. But this reliance was misplaced, as *Mays* involved a timely claim and a different provision. *Mays*, 150 S.W.3d at 900. Notably, the provision *Mays* addressed applies only to deficiency actions for indebtedness "secured by a lien or encumbrance on the real property that was not extinguished by the foreclosure," *see* Tex. Prop. Code § 51.005(c), whereas Section 51.003(a) applies to "any action brought to recover the deficiency" after (and resulting from) a foreclosure, Tex. Prop. Code § 51.003(a). Thus, treating Section 51.005(c) as applying to only senior lienholders (as *Mays* did) while treating Section 51.003(a) as covering all creditors is precisely what the statutory language demands.

c. In any case, the court of appeals failed to appreciate what distinguishes this case from *Mandarino*, which, even if its reasoning were not flawed,

would not apply here. Whereas *Mandarino* involved two loans made on separate days for different purposes, the junior and senior loans here were created on the same day, as part of the same transaction, secured by the same property.

"[A] court may determine, as a matter of law, that multiple separate contracts, documents, and agreements were part of a single, unified instrument." *Rieder v. Woods*, 603 S.W.3d 86, 94 (Tex. 2020) (quotation omitted). In doing so, it may consider whether each agreement was "a necessary part of the same transaction." *Id.* (quotation omitted). Specifically, Texas courts have interpreted two mortgages as a single contract where one note references the other, *Cowan v. Wilson*, 85 S.W.2d 823, 824 (Tex. App.—Amarillo 1935), or where the two notes were executed contemporaneously, *Goode v. Davis*, 135 S.W.2d 285, 288 (Tex. App.—Forth Worth 1939).

The junior and senior loans here were executed contemporaneously by the same lender and were each "a necessary part" of the transaction—without both, Santos could not have financed the home. *See Rieder*, 603 S.W.3d at 94 (quotation omitted). And by the junior loan's terms, a default on the senior loan was also a default on the junior loan, 1CR9 ¶ 11, so "they must be considered as one contract," *see Cowan*, 85 S.W.2d at 824. Thus, the foreclosure resulted in a deficiency on the obligation subject to Section 51.003's limitations even if that statute does not cover a deficiency on a separate loan transaction secured by the foreclosed-on property.

The Legislature enacted Section 51.003 to protect debtors, not to confer a hidden benefit on lenders for breaking the transaction to finance one house into two notes. Yet, if the decision below is not overturned, lenders could circumvent the statute's constraints simply by requiring a borrower to execute two mortgages. On default, the lender could foreclose one mortgage, recover the security, and then sue on the other note unencumbered by any limitations period. This result is contrary to Section 51.003's text and should be rejected.

B. Yellowfin waived its acceleration rights by failing to act for over twelve years.

Even assuming (counterfactually) that the 2007 foreclosure did not accelerate the junior loan and Yellowfin had carte blanche to accelerate the note at any time after Santos's default (including after the foreclosure), Yellowfin and its predecessors-in-interest waived their contractual acceleration rights by sitting on them for more than twelve years.

In just four sentences, the court of appeals rejected Santos's waiver argument, conflating it with her statute-of-limitations defense. It apparently understood Santos to argue that Yellowfin waived its claim by waiting to sue for twelve years after the claim accrued. But Santos actually contended that even if Yellowfin's claim did not accrue at the 2007 foreclosure, then Yellowfin implicitly waived its contractual acceleration rights by failing to exercise them for over a decade.

Under "well established" Texas law, *Alford, Meroney & Co. v. Rowe*, 619 S.W.2d 210, 213 (Tex. App.—Amarillo 1981), a party implicitly waives a contractual right when it has an "existing right," "actual knowledge of its existence," and engages in "conduct inconsistent with the right," *Ulico Cas. Co. v. Allied Pilots Ass'n*, 262 S.W.3d 773, 778 (Tex. 2008). In analyzing these elements, "courts must consider the totality of the circumstances." *LaLonde v. Gosnell*, 593 S.W.3d 212, 220 (Tex. 2019). A party acts inconsistently with a contractual right through "[s]ilence or inaction, for so long a period as to show an intention to yield [the] right." *Tenneco Inc. v. Enter. Prods. Co.*, 925 S.W.2d 640, 643 (Tex. 1996). In addition to weighing the amount of time a party sits on their contractual right, courts also consider "inequitable consequences" that result from enforcing the right. *See Cal-Tex Lumber Co. v. Owens Handle Co.*, 989 S.W.2d 802, 812 (Tex. App.—Tyler 1999). Thus, "[l]oss of the right to accelerate may result from [a creditor's] inconsistent or inequitable conduct." *McGowan v. Pasol*, 605 S.W.2d 728, 732 (Tex. App. 1980—Corpus Christi). Santos has established Yellowfin's waiver.

Under Yellowfin's theory, the junior loan remained an installment debt after the foreclosure extinguished the note's security interest, and its acceleration clause permitted the creditor to immediately collect the remaining balance at any time after default. If this contractual acceleration right survived the foreclosure (and it did not, *supra* at 10-13), it was a waivable right, which can "spring from law or, as in this case, from a

contract." *Tenneco Inc.*, 925 S.W.2d at 643. Additionally, Yellowfin's predecessors-in-interest knew Santos had defaulted on the junior loan, triggering their alleged acceleration rights. 1CR9 ¶ 11; RR20:12-16. By purportedly purchasing the junior loan, Yellowfin "step[ped] into the shoes" of the assignor and had the same acceleration rights and knowledge of those rights as its predecessors. *See Sw. Bell Tel. Co. v. Mktg. on Hold Inc.*, 308 S.W.3d 909, 916 (Tex. 2010).

Yellowfin and its predecessors-in-interest also acted inconsistently with their alleged acceleration rights. They sat on those purported rights from November 2007 until March 2020—over twelve years. *See* RR26:18-27:3. This period far surpasses those where courts have found waivers of contractual rights when parties waited long periods of time before exercising them. *See, e.g.*, *Tenneco Inc.*, 925 S.W.2d at 643-44 (three years); *Vinewood Cap., LLC v. Sheppard Mullin Richter & Hampton, LLP*, 735 F. Supp. 2d 503, 516-19 (N.D. Tex. 2010) (same); *Trelltex, Inc. v. Intecx, LLC*, 494 S.W.3d 781, 791-94 (Tex. App.—Houston [14th] 2016) (nearly six years). This is not a situation where a creditor promptly contacted a debtor to recover an unpaid balance upon default, which would not be a waiver of the debtor's collection rights. Instead, no creditor even tried contacting Santos about this loan for more than twelve years, which constitutes "silence and inaction for such an unreasonable period of time" that "clearly indicate[s] [Yellowfin's] intention

to waive [its] right to assert this claim." *Williams v. Moores*, 5 S.W.3d 334, 336-37 (Tex. App.—Texarkana 1999).

Other equitable considerations further support a finding of waiver here. The junior loan was not a run-of-the-mill note. Instead, it contained numerous predatory terms that contributed to one of the worst financial crises in this country's history, such as a high interest rate and balloon-payment provision. Santos borrowed this money to help finance a home that was foreclosed on over a decade ago. Forcing Santos to pay any remaining balance on the loan and Yellowfin's attorney's fees under these circumstances, even if the statute of limitations has not run, is precisely the type of "inequitable consequences" that the waiver doctrine is designed to prevent. *See Cal-Tex Lumber Co.*, 989 S.W.2d at 812.

Yellowfin admitted below that sitting on rights for twelve years could constitute waiver, AP176, and argued only that the relevant period for assessing waiver resets after each assignment to a successive creditor. Yellowfin is wrong. As an assignee, Yellowfin "suffered the same injury as the assignor[]" and has only the "same ability to pursue [related] claims." *See Sw. Bell Tel. Co.*, 308 S.W.3d at 916. This Court should not ignore the years that lapsed while past creditors sat on their rights before Yellowfin allegedly purchased the junior loan in 2019. If it did, any party could circumvent a waived right by assigning it to another entity (for a price, of course), which

could then exercise the right. The result would eviscerate the time-honored waiver doctrine.

II. The issues presented are important and recurring.

A. Numerous cases in Texas present the same issues as this case. Yellowfin filed over 270 other breach-of-contract suits in Texas. AP065. The similarities between Santos's case and those other cases are striking. For example, in each of the thirty Dallas County cases, Yellowfin tried to recover unpaid balances of junior mortgages offered during the heyday of predatory lending, between 2004 and 2007. These loans had high interest rates (8.525%-12.375%) and large percentages of the principal loan balances remained outstanding (presumably because the high interest rates made paying down principal difficult and resulted in foreclosure).

The decision below will thus have wide-ranging effects. Yellowfin will use it in other cases to enforce long-forgotten loans with terms so predatory that Yellowfin's counsel would "not … advise anybody to take" them. *See* RR12:6-7. Yellowfin may also cite the decision as persuasive authority in other states where it has filed similar suits. Thus, the over 270 Yellowfin cases likely do not fully capture the pernicious effect of the court of appeals' decision. Other entities could follow Yellowfin's example by purchasing and suing to recover unpaid balances on predatory loans used to finance homes foreclosed on during the mortgage crisis.

B. Without this Court's intervention, lower courts will be unable to correct the misunderstandings of law embraced by the decision below. As explained (at 16), *Mandarino v. Sherwood Lane Invs., LLC*, 2016 WL 4034568 (Tex. App.—Houston [1st] July 26, 2016), held that Section 51.003(a)'s two-year statute of limitations does not apply to junior creditors, even though the statute covers "any action" to recover a post-foreclosure deficiency. The court of appeals in this case cemented that atextual interpretation and subverted the Legislature's limitations on deficiency actions. Courts faced with a junior creditor's deficiency claim—as in the over 270 other Yellowfin cases—could apply *Mandarino* and the decision below, creating a domino effect that only this Court can prevent. This Court should intervene to accord Section 51.003(a) its plain meaning—"any action brought to recover the deficiency must be brought within two years of the foreclosure sale"—before the courts of appeals' errors do more damage.

Prayer for Relief

The petition for review should be granted.

Respectfully submitted,[*]

[*] Counsel gratefully acknowledges the work of Holly Petersen and Jeffrey Talley, third-year students in Georgetown Law's Appellate Courts Immersion Clinic, who played key roles in researching and writing this brief.

/s/Madeline Meth

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Counsel for Petitioner

December 9, 2022

Certificate of Compliance

I certify that this Petition complies with Texas Rule of Appellate Procedure 9.4 because it contains 4,499 words, excluding the parts exempted by Rule 9.4(i)(1), in 14-point Palatino Linotype font.

/s/ Madeline Meth
Madeline Meth

Counsel for Petitioner

Certificate of Service

I certify that a true and correct copy of this Petition was served electronically on all counsel of record on December 9, 2022, in compliance with Texas Rule of Appellate Procedure 9.5.

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Appendix

Tab A Trial court's final summary judgment

CAUSE NO. 2020-35442

ATFEX
7

YELLOWFIN LOAN SERVICING CORP., AS SUCCESSOR IN INTEREST TO FIRST FRANKLIN, *Plaintiff, Counter Defendant*	§	IN THE 295TH JUDICIAL DISTRICT COURT OF
vs.	§	
DEYSI R. SANTOS *Defendant, Counter Plaintiff*	§	HARRIS COUNTY, TEXAS

FINAL SUMMARY JUDGMENT

BE IT REMEMBERED that on this day came to be heard Plaintiff's Motion for Summary Judgment, Defendant's response and Plaintiff's reply. The Court has determined that it has jurisdiction over the subject matter and the parties in this proceeding.

The Court, having considered the pleadings and official records on file in this cause, the evidence, and the arguments of the parties and/or their counsel ~~(if any)~~, finds that there is no genuine issue about any material fact, and that Plaintiff is entitled to judgment as a matter of law. ~~The note on which this cause is based is attached hereto as Exhibit A, and incorporated in this judgment by reference herein.~~

The Court hereby RENDERS judgment for Plaintiff, Yellowfin Loan Servicing Corp.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Plaintiff, Yellowfin Loan Servicing Corp., recover from Defendant, Deysi R Santos, judgment for the following:

1. $21,023.13 as the accelerated principal amount due under the contract;
2. $ 5,160.00 in reasonable and necessary attorney's fees for the prosecution of this case through this judgment;
3. All costs of court; and
4. Post-judgment interest on all of the above amounts at the rate of ~~11.25%~~ 5.0% compounded annually, from the date this judgment is rendered until all amounts are paid in full;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that if Defendant unsuccessfully appeals this judgment to an intermediate court of appeals, Plaintiff will additionally recover from Defendant the amount of $7,000.00, representing the anticipated reasonable and necessary attorney fees that would be incurred by Plaintiff in defending the appeal.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that if Defendant unsuccessfully appeals this judgment to the Texas Supreme Court, Plaintiff will additionally recover from Defendant the amount of $12,000.00, representing the anticipated reasonable and necessary fees that would be incurred by Plaintiff in defending the appeal.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this judgment finally disposes of all claims and all parties, and is appealable. All relief not expressly granted in this judgment is denied.

It is further ORDERED, ADJUDGED, and DECREED that execution immediately issue on this judgment.

This is a final judgment that disposes of all parties and all claims.

SIGNED on _____, 2020

Signed:
12/22/2020

JUDGE PRESIDING

Tab B Opinion and judgment of the court of appeals

Affirmed and Memorandum Opinion filed July 12, 2022.

In The

Fourteenth Court of Appeals

NO. 14-21-00151-CV

DEYSI R. SANTOS, Appellant

V.

YELLOWFIN LOAN SERVICING CORP., AS SUCCESSOR IN INTEREST TO FIRST FRANKLIN, Appellee

On Appeal from the 295th District Court
Harris County, Texas
Trial Court Cause No. 2020-35442

M E M O R A N D U M O P I N I O N

After appellant Deysi R. Santos defaulted on a promissory note, the note's owner accelerated all payments due under the note and, when Santos still did not pay, sued to recover the balance owed. Appellee Yellowfin Loan Servicing Corp. owned the note and moved for summary judgment on its breach of contract claim against Santos. The trial court granted the motion and awarded Yellowfin its claimed damages.

Santos appeals and raises nine numbered issues, many of which overlap. Boiled down, Santos (1) challenges Yellowfin's ownership of the note, (2) asserts a limitations defense, and (3) contends that Yellowfin failed to meet its summary judgment burden. After considering the parties' arguments and the record before us, we overrule each of Santos's issues and affirm the trial court's judgment.

Background

On April 28, 2005, Santos executed two loans to purchase a residential property: one for $97,592.00 (the "First Loan") and the second for $24,398.00 (the "Second Loan"). The Second Loan is at issue in today's case and consists of a promissory note (the "Note"), secured by a deed of trust. Santos obtained both loans from First Franklin, a division of National City Bank of Indiana. Under the Note, Santos agreed to pay, in monthly installments, the principal balance as well as all interest and other amounts due at the time of the final payment.

Santos defaulted on her payment obligations. The mortgagee[1] foreclosed on the First Loan in November 2007. The property sold for $104,745.76. The proceeds from the foreclosure satisfied the First Loan and extinguished all junior liens, including the lien underlying the Note.

In 2019, Yellowfin purchased the outstanding Note and became the putative current owner and holder of the Note. Santos contests Yellowfin's ownership, which we discuss below. Yellowfin sent Santos notice of the purchase. Yellowfin then sent a notice of intent to accelerate the payments due under the Note, as a result of Santos's default. Per the notice, Santos had thirty days to cure the default; if she did not, Yellowfin intended to accelerate the Note. Santos did not timely

[1] The original mortgagee was First Franklin, and the mortgagee at the time of foreclosure was National City Bank.

cure, and Yellowfin accelerated all payments due under the Note. Santos did not remit payment.

Yellowfin sued Santos for breach of the promissory note and alleged that the amount owed under the Note was $21,023.13. This amount did not include any amount owed but not paid prior to June 1, 2019; Yellowfin waived its right to collect those amounts. Santos counterclaimed for fraud and violation of the Texas Debt Collection Practices Act ("TDCPA").[2]

Yellowfin moved for summary judgment on its claim. Santos responded and raised the arguments she again raises on appeal, which we discuss in more detail below. The trial court granted Yellowfin's motion, awarded $21,023.13 in damages, and awarded trial and conditional appellate attorney's fees, costs of court, and post-judgment interest. Santos appeals.

Issues Presented

Santos presents nine numbered issues for review, which we copy verbatim here. We address overlapping issues together, when appropriate.

1. Did any court have jurisdiction to hear Yellowfin's claim where Yellowfin could not prove it was the owner of the non-negotiable instrument it wanted to enforce?
2. Was there just a single transaction between First Franklin as the lender and Ms. Santos as the borrower when both simultaneous loans between the parties were contractually included in the one loan agreement to finance just one house?
3. Is the two-year limitations period in Tex. Prop. Code § 51.003 for collecting a mortgage deficiency applicable to the Note when there was only one lender who financed the purchase of the property and the foreclosure of the related First Loan by that lender voided the lender's lien for the Note, leaving it with only an unsecured deficiency claim?

[2] Santos non-suited her fraud claim, and the trial court disposed of the TDCPA claim in the final judgment.

4. Is the four-year limitations period for debt in Tex. Civ. Prac. & Rem. Code § 16.004 applicable to the Note when the lender's cause of action contractually accrued no later than the date of foreclosure of the linked First Loan in 2007?
5. Was the summary judgment below void because it failed to meet the standards in Tex. R. Civ. P. 166a and failed to follow relevant precedent?
6. Where there are no servicing records for a 2005 loan, does a 2019 guess by the alleged fourth owner of the loan since a 2007 foreclosure, meet the summary judgment standard in Tex. R. Civ. P. 166a to establish the amount that might be owed by the original borrower?
7. Was the Note still an obligation "secured by a real property lien" when it was acquired by a buyer of defaulted debt more than twelve years after the lien against the property was voided by foreclosure of the First Loan?
8. Does public policy require the owner of a defaulted loan to sue before twelve years after its claim contractually accrued?
9. Is the right to sue on a debt waived if no action is taken on it for more than twelve years after the right contractually accrued?

Analysis

A. Ownership of the Note

In her first issue, Santos argues that the Note was a non-negotiable instrument and that Yellowfin had no standing to enforce it.

In Texas, negotiable instruments are governed by the Uniform Commercial Code ("UCC"), as adopted by the Texas Legislature and codified in the Texas Business and Commerce Code. *See Amberboy v. Societe de Banque Privee*, 831 S.W.2d 793, 793 (Tex. 1992); Tex. Bus. & Com. Code tit. 1, §§ 1.101-12.004 ("Uniform Commercial Code"). "Negotiable instrument" means an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order, so long as the promise or order does not state any other undertaking or instruction by the person promising or ordering payment to do any action in addition to the payment of money. Tex. Bus. & Com.

Code § 3.104(a). A promise or order is unconditional unless it states an express condition to payment, that the promise or order is subject to or governed by another record, or that rights or obligation with respect to the promise or order are stated in another record. *Id.* § 3.106(a).

Santos does not dispute that the Note is a promise to pay. However, Santos argues that the Note violates section 3.106 because the promise is governed by another record or because the rights or obligation with respect to the promise to pay are stated in another record. Specifically, Santos points to sections 11 and 15 of the Note, and those sections' references to other documents. Section 11, governing default and remedies, provides that Santos will be in default if she fails to keep any of her agreements "under this Note *or under any other agreement with [the lender]*." (Emphasis added.) Section 15, governing signatures, states: "You have read and agree to all provisions of this Note including those on pages 1 through 3 *and in the Disclosure Statement which are incorporated herein by reference*. . . . See pages 1, 2 and 3 and the Disclosure Statement for additional important terms and conditions." (Emphasis added.) The Note defines "Disclosure Statement" as "the separate federal truth-in-lending disclosure statement of even date provided to you, the terms of which are incorporated by reference in this Note." Disclosures in the Disclosure Statement "are contract terms," according to the Note.

We agree with Santos that the Note is rendered non-negotiable by its statement that the terms of the Disclosure Statement are incorporated by reference. A mere "reference to another record does not of itself make the promise or order conditional." *Id.* § 3.106(a). But when a note specifically incorporates by reference the terms of other documents, the promise is no longer conditional

because one must examine those other documents to determine if they place conditions on payment.

For instance, in *FFP Marketing Co. v. Long Lane Master Trust IV*, 169 S.W.3d 402, 409 (Tex. App.—Fort Worth 2005, no pet.), a note stated that "[a]ll of the terms of the Loan Agreement and the Indenture are incorporated into this Note by reference, with the same effect as if they were reprinted here in full." Because the note was governed by the terms of another writing, requiring one to look outside the note to determine if payment was conditional or if the terms of that document altered the rights with respect to payment, the court concluded that the note was not a negotiable instrument. *Id.* This court has held similarly. *See Guniganti v. Kalvakuntla*, 346 S.W.3d 242, 249 (Tex. App.—Houston [14th Dist.] 2011, no pet.) (language in note stating that "[a]dditional advances will be made in accordance with the terms and conditions of the Loan Agreement, reference to same being here made for all purposes" burdened the note with the conditions of the other document and rendered the note non-negotiable); *Mitchell v. Riverside Nat'l Bank*, 613 S.W.2d 802, 803 (Tex. App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.) (language in note that it "is subject to and governed by said contract, which is hereby expressly referred to, incorporated herein and made a part hereof" destroyed the negotiability of the instrument and rendered the instrument burdened by the terms within the extrinsic contract). These holdings state the law in Texas. *See Cont'l Nat'l Bank of Fort Worth v. Conner*, 214 S.W.2d 928, 931 (Tex. 1948) (indicating that an otherwise negotiable instrument can be rendered non-negotiable if it is burdened with the conditions of another agreement); *Great N. Energy, Inc. v. Circle Ridge Prod., Inc.*, 528 S.W.3d 644, 661 (Tex. App.—Texarkana 2017, pet. denied) (language that "Deed of Trust, Security Agreement and Financing

Statement are incorporated herein by this reference for all purposes as if fully set forth at length herein" rendered note non-negotiable).

It does not matter whether the terms of the Disclosure Statement actually placed conditions on Santos's payment. As the commentary to section 3.106 explains, "It is not relevant whether any condition to payment is or is not stated in the writing to which reference is made. The rationale is that the holder of a negotiable instrument should not be required to examine another document to determine rights with respect to payment." Tex. Bus. & Com. Code § 3.106 cmt. 1.

Because the Note expressly incorporates the terms of the Disclosure Statement, the Note is burdened by those terms and rendered non-negotiable. Accordingly, the Business and Commerce Code does not govern enforcement of the Note; contract law does. *See FFP Mktg.*, 169 S.W.3d at 409.

A party not identified in a note who is seeking to enforce it as the owner or holder must prove the transfer by which it acquired the note. *See Leavings v. Mills*, 175 S.W.3d 301, 309 (Tex. App.—Houston [1st Dist.] 2004, no pet.). Under Texas law, the transfer of a note may be proved by testimony or documentation. *See id.* at 312. An unexplained gap in the chain of title creates a genuine issue of material fact. *See id.* at 309.

Yellowfin's records custodian, Matt Miller, testified by affidavit that Yellowfin acquired the Note in August 2019 as part of a pool of mortgages sold by RCS Recovery Services, LLC, and that Yellowfin lawfully held the Note. Miller also attached a copy of the Note, to which a series of putative indorsements and allonges were affixed.[3] The first two indorsements show that First Franklin

[3] An indorsement is the placing of a signature, sometimes with an additional notation, on the back of a negotiable instrument to transfer or guarantee the instrument or to acknowledge

indorsed the Note to First Franklin Financial Corporation, which then indorsed it to Dreambuilder Investments, LLC. Dreambuilder then executed an allonge to RCS Recovery Services, LLC, which then sold the Note and also executed an allonge to Yellowfin. Even though the Note is not governed by the Business and Commerce Code, the indorsements and allonges on the Note, as well as the purchase and sale agreement between RCS and Yellowfin, "constitute more than a scintilla of evidence of the assignments of title, and therefore ownership," from the original owner, First Franklin, to the ultimate owner, Yellowfin. *Diversified Fin. Sys., Inc. v. Hill, Heard, O'Neal, Gilstrap & Goetz, P.C.*, 99 S.W.3d 349, 357 (Tex. App.—Fort Worth 2003, no pet.) (even though indorsements on note did not create a presumption of ownership upon transfer, as they would have under the UCC, they nonetheless constituted probative evidence of assignment of ownership). Thus, Yellowfin met its initial summary judgment burden to establish that it owned the Note. Santos did not offer any controverting evidence that would raise a fact issue on Yellowfin's ownership.

Although we agree with Santos that the Note is a non-negotiable instrument, because Yellowfin otherwise established ownership, we nonetheless overrule her first issue challenging Yellowfin's ownership of, and standing to enforce, the Note.

B. Statute of Limitations

In her second, third, fourth, and seventh issues, Santos argues that Yellowfin's claim was time-barred.

According to Santos, the Note was part of a single loan agreement, which included the First Loan; the lender's foreclosure on the First Loan in 2007

payment. *See* "Indorsement," Black's Law Dictionary (11th ed. 2019). An allonge is "[a] slip of paper sometimes attached to a negotiable instrument for the purpose of receiving further indorsements when the original paper is filled with indorsements." "Allonge," Black's Law Dictionary (11th ed. 2019).

extinguished all junior liens; and any right to enforce the Note accrued at that point. Thus, Santos contends, the statute of limitations expired two years after foreclosure, in 2009 or 2011. Because Yellowfin did not file suit until 2020, Santos argues that the suit is time-barred.

Santos and Yellowfin disagree on when Yellowfin's claim accrued and which statute of limitations applies to Yellowfin's claim. Yellowfin posits that its claim did not accrue until it accelerated the note, and the six-year limitations period found in the UCC applies. *See* Tex. Bus. & Com. Code § 3.118 (providing statute of limitations to sue on negotiable instruments is six years). Santos believes that Yellowfin's claim accrued at the point of foreclosure, and the two-year limitations period for deficiency claims applies. *See* Tex. Prop. Code § 51.003(a) (if sale price from foreclosure is less than unpaid balance of indebtedness, action to recover deficiency must be brought within two years of foreclosure sale).

If the limitations period for deficiency claims applies, then Yellowfin's suit is time-barred. Whenever a borrower is sued after real property is sold at a foreclosure sale, and judgment is sought against the borrower because the foreclosure sales price is less than the amount owed, "then (1) the suit is for a 'deficiency judgment,' (2) the suit must be brought within two years of the foreclosure sale, and (3) the suit is governed by § 51.003." *PlainsCapital Bank v. Martin*, 459 S.W.3d 550, 555 (Tex. 2015). But when a senior lienholder forecloses on its lien, and the proceeds of that sale do not satisfy the debt from a junior lien, section 51.003 does not apply to the junior lienholder's suit to recover the value of its note. This is because the junior lienholder has not foreclosed on its lien; only the senior lienholder has.

Two cases are illustrative. In *Mays v. Bank One, N.A.*, 150 S.W.3d 897, 898 (Tex. App.—Dallas 2004, no pet.), the appellant executed two different promissory

notes to different lenders. When the appellant defaulted, the senior lienholder foreclosed but was only able to satisfy the first debt. *Id.* No proceeds were left for the junior lienholder, so that holder sued for the value of its promissory note. *Id.* The appellant aimed to use the property's fair market value to offset the claimed deficiency under Texas Property Code section 51.005, which only applies after a foreclosure sale results in a deficiency. *See id.* at 899; Tex. Prop. Code § 51.005. However, the court found the statute inapplicable, noting that "the only foreclosure was of the lien held by" the senior lienholder. *Mays*, 150 S.W.3d at 900. Because the second lien remained wholly unsatisfied and the second lien was extinguished by the foreclosure, the court held that the statute did not apply. *Id.*

The First Court of Appeals held similarly in *Mandarino v. Sherwood Lane Investments, LLC*, No. 01-15-00192-CV, 2016 WL 4034568 (Tex. App.—Houston [1st Dist.] July 26, 2016, no pet.) (mem. op.). There, appellants purchased a third party's ownership interest in an apartment complex and signed a promissory note with the third party as payee. *Id.* at *1. The third party still owed a portion of the principal from its original purchase of the apartment complex (the "First Lien Principal"), which it incorporated into the new promissory note. *Id.* The original note on the First Lien Principal was designated the "wrapped note" and the note signed by appellants was named the "wraparound note." *Id.* The senior lienholder, who had possession of the wrapped note, foreclosed on its lien after appellants defaulted on their obligations to both notes. *Id.* at *8. However, the proceeds of that sale did not satisfy any of the debt from the junior lien, which was the wraparound note. *Id.* The junior lienholder sued to recover the unpaid balance of its note, and appellants argued that section 51.003 applied to time-bar the suit. *Id.* at *2, 7. But the court of appeals held that the section did not apply: "Just as there was no foreclosure by the junior lienholder in *Mays*, so was there no foreclosure by

Sherwood Lane in the instant case." *Id.* at *8. Because the court concluded that the junior lienholder was not seeking a deficiency judgment when it sued on its promissory note, it was not subject to the statute of limitations for deficiency judgments. *Id.*

Yellowfin is not seeking a deficiency judgment from the 2007 foreclosure sale. Yellowfin (or its predecessor-in-interest) did not foreclose on the Note. Rather, a separate lender foreclosed on the First Loan, and the proceeds from that sale did not satisfy the debt owing under the Note. Thus, section 51.003 does not apply to Yellowfin's suit. *See id.*; *Mays*, 150 S.W.3d at 900.

Rather, Yellowfin's suit is subject to a four-year limitations period. The statute of limitations on a suit for debt is four years after the cause of action accrues. *See* Tex. Civ. Prac. & Rem. Code § 16.004(a)(3). The statute of limitations on foreclosure of a real estate lien similarly is four years from the date of accrual of the cause of action, but "the four-year limitations period does not begin to run until the maturity date of the last note, obligation, or installment." *Id.* § 16.035(a), (e). The question becomes whether Yellowfin's claim accrued more than four years before it filed suit.

If a promissory note contains an optional acceleration clause, limitations does not automatically start to run upon default; an action accrues "only when the holder actually exercises its option to accelerate" the entire note. *See Holy Cross Church of God in Christ v. Wolf*, 44 S.W.3d 562, 566 (Tex. 2001).

It is undisputed that the Note contains an optional acceleration clause[4] and that Yellowfin accelerated the Note on March 25, 2020, which was three months

[4] The Note provides:

> You will be in default under this Note if . . . you fail to make any payment or pay other amounts owing under this Note when due[.] . . . If you are in default, in

before filing suit. Santos did not present any controverting evidence, such as evidence that some other party accelerated the Note at an earlier date. Accordingly, Santos did not raise a fact issue regarding her defense that Yellowfin's claim accrued outside the applicable limitations period.[5] *See, e.g.*, *Ocean Transp., Inc. v. Greycas, Inc.*, 878 S.W.2d 256, 267 (Tex. App.—Corpus Christi 1994, writ denied) (when note provided that lender, at its option, could declare note immediately due and payable upon default of any installment, date of acceleration triggered limitations period).

We overrule Santos's second, third, fourth, and seventh issues.

C. Propriety of Summary Judgment

In her fifth and sixth issues, Santos argues that Yellowfin failed to meet its summary judgment burden under rule 166a.

Santos first argues that the trial court failed to make reasonable inferences and resolve any doubts in Santos's favor, which we construe to mean that the trial court failed to correctly apply the summary judgment standard. For instance, Santos asserts that "[l]imitations on the Note began to run when First Franklin, the original lender, acquired the right to declare all amounts due and payable" and that "[t]he default on the First Loan caused the accrual of the cause of action to enforce both the First Loan and the Note." Santos continues, "[i]f the trial court had just

> addition to any other rights and remedies we have under law and subject to any right you may have to cure your default, we may do any of the following: (aa) accelerate the entire balance owing under this Note after any demand or notice which is required by law, which entire balance will be immediately due and payable . . . .

[5] When a plaintiff moves for summary judgment on its cause of action, the defendant may respond by raising the affirmative defense of limitations, as Santos did here. In that circumstance, the defendant is not required to prove its defense as a matter of law to defeat the plaintiff's summary judgment; it is simply required to raise a fact issue about its defense. *See Brownlee v. Brownlee*, 665 S.W.2d 111, 112 (Tex. 1984) (affirmative defense of modification).

upheld even a few of the points, as it was required to, then the issue of the special two year limitations period for a suing on a deficiency . . . and the four years for debt . . . would have immediately precluded summary judgment in favor of a plaintiff who filed suit in 2020, more than twelve years after the cause of action contractually accrued in 2007." But these are legal arguments, not facts from which inferences may be made or doubts to be resolved. Further, they are premised on Santos's contention that Yellowfin's claim accrued upon Santos's foreclosure in 2007. As already explained, limitations does not bar Yellowfin's suit. The trial court did not err as Santos contends.

Santos also argues that Yellowfin did not offer competent summary judgment proof of the amount of damages claimed. According to Santos, the amount sought by Yellowfin was "a naked guess by someone with no knowledge."

Yellowfin's records custodian, Martin, testified:

> According to Plaintiff's records, Defendant owes a balance of $21,023.13. Plaintiff is not accruing pre-judgment interest. The balance owed was calculated by conducting an amortization of the original principal amount of the Note in accordance with the terms prescribed by the Note (ie: an amortization of $24,398.00 over twenty years with interest accruing at a rate of 11.25 %, and a final balloon payment of $17,263.03) then assuming that each and every payment was timely made through May 1, 2019. To the extent any payment was not made prior to June 1, 2019, Yellowfin waives its right to collect that payment and is not seeking to recover any portion of that payment through this lawsuit.

This uncontroverted evidence is sufficient to establish the amount owed. *See FFP Mktg.*, 169 S.W.3d at 411 ("Generally, an affidavit that sets forth the total balance due on a note is sufficient to sustain an award of summary judgment. Detailed proof of the balance is not required."); *Das v. Deutsche Bank Nat'l Tr. Co.*, No. 05-12-01612-CV, 2014 WL 1022385, at *2 (Tex. App.—Dallas Mar. 5,

2014, pet. denied) (mem. op.) (accepting affidavit testimony from an employee of the "loan . . . servicing agent" as valid evidence of the balance due and owing on the note, given the employee's testimony that he had verified and researched the loan's history and current account information on behalf of the holder, Deutsche Bank); *Albright v. Regions Bank*, No. 13-08-262-CV, 2009 WL 3489853, at *4 (Tex. App.—Corpus Christi Oct. 29, 2009, no pet.) (mem. op.) ("An affidavit made on personal knowledge of the bank officer, which identifies the notes and guaranty and recites the principal and interest due . . . is sufficient to support a summary judgment motion."); *Greene v. Deutsche Bank Nat'l Tr. Co.*, No. 01-04-00483-CV, 2005 WL 1244604, at *1, 3 (Tex. App.—Houston [1st Dist.] May 26, 2005, pet. denied) (mem. op.) (accepting the affidavit of a manager for the "loan servicing agent" as a person sufficiently situated to testify on the balance owed, based on synthesis of eleven records related to the loan's account history). Santos did not present any evidence that she owed a different amount of money or that she was entitled to any credits or offsets (beyond the default amounts excused through June 2019). *E.g.*, *Sandhu v. Pinglia Invs. of Tex., L.L.C.*, No. 14-08-00184-CV, 2009 WL 1795032, at *5 (Tex. App.—Houston [14th Dist.] June 25, 2009, pet. denied) (mem. op.) ("Moreover, Sandhu has not presented any controverting evidence raising a fact issue as to Pinglia Investments's method of computation and the accuracy of its figures.").

We conclude that Yellowfin carried its summary judgment burden to show its entitlement to the damages awarded. We overrule Santos's fifth and sixth issues.

D. Remaining Issues

In her eighth and ninth issues, Santos asks whether public policy requires the owner of a defaulted loan to sue before twelve years after its claim contractually

accrued and whether the right to sue on a debt is waived if no action is taken on it for more than twelve years after the right contractually accrued. These issues are premised on Santos's mistaken contention that Yellowfin's claim to enforce the Note accrued upon Santos's foreclosure in 2007. We have already explained why Santos's position is unmeritorious. We overrule Santos's eighth and ninth issues.

Conclusion

We affirm the trial court's judgment.

/s/ Kevin Jewell
Justice

Panel consists of Justices Jewell, Zimmerer, and Hassan.

July 12, 2022

JUDGMENT

The Fourteenth Court of Appeals

DEYSI R. SANTOS, Appellant

NO. 14-21-00151-CV V.

YELLOWFIN LOAN SERVICING CORP., AS SUCCESSOR IN INTEREST TO FIRST FRANKLIN, Appellee

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This cause, an appeal from the judgment in favor of appellee, Yellowfin Loan Servicing Corp., as Successor in Interest to First Franklin, signed December 22, 2020, was heard on the appellate record. We have inspected the record and find no error in the judgment. We order the judgment of the court below **AFFIRMED**.

We order appellant, Deysi R. Santos, to pay all costs incurred in this appeal.

We further order this decision certified below for observance.

Judgment Rendered July 12, 2022.

Panel Consists of Justices Jewell, Zimmerer, and Hassan. Memorandum Opinion delivered by Justice Jewell.

Tab C Court of appeals order denying motion for en banc reconsideration and order denying motion for rehearing

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Fourteenth Court of Appeals

301 Fannin, Suite 245
Houston, Texas 77002

Tuesday, August 30, 2022

Michael Weems
Hughes, Watters & Askanase, L.L.P.
1201 Louisiana St, 28th Floor
Houston, TX 77002
* DELIVERED VIA E-MAIL *

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Damian William Abreo
Hughes Watters Askanase, LLP
Total Plaza
1201 Louisiana St Fl 28
Houston, TX 77002-5607
* DELIVERED VIA E-MAIL *

RE: Court of Appeals Number: 14-21-00151-CV
Trial Court Case Number: 2020-35442

Style: Deysi R. Santos v. Yellowfin Loan Servicing Corp., as Successor in Interest to First Franklin

Please be advised that on this date the court **DENIED APPELLANT'S** motion for en banc reconsideration in the above cause.

En Banc Panel Consists of Chief Justice Christopher and Justices Wise, Jewell, Bourliot, Zimmerer, Spain, Hassan, Poissant and Wilson.

Sincerely,

/s/ Christopher A. Prine, Clerk

AP022

FILE COPY

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Sincerely,

/s/ Christopher A. Prine, Clerk

AP023

Tab D Relevant statutory provisions

TEXAS STATE LAW

Tex. Prop. Code § 51.002. Sale of Real Property Under Contract Lien

(a) Except as provided by Subsection (a-1), a sale of real property under a power of sale conferred by a deed of trust or other contract lien must be a public sale at auction held between 10 a.m. and 4 p.m. of the first Tuesday of a month. Except as provided by Subsection (h), the sale must take place at the county courthouse in the county in which the land is located, or if the property is located in more than one county, the sale may be made at the courthouse in any county in which the property is located. The commissioners court shall designate the area at the courthouse where the sales are to take place and shall record the designation in the real property records of the county. The sale must occur in the designated area. If no area is designated by the commissioners court, the notice of sale must designate the area where the sale covered by that notice is to take place, and the sale must occur in that area.

(a-1) If the first Tuesday of a month occurs on January 1 or July 4, a public sale under Subsection (a) must be held between 10 a.m. and 4 p.m. on the first Wednesday of the month.

(b) Except as provided by Subsection (b-1), notice of the sale, which must include a statement of the earliest time at which the sale will begin, must be given at least 21 days before the date of the sale by:

(1) posting at the courthouse door of each county in which the property is located a written notice designating the county in which the property will be sold;
(2) filing in the office of the county clerk of each county in which the property is located a copy of the notice posted under Subdivision (1); and

(3) serving written notice of the sale by certified mail on each debtor who, according to the records of the mortgage servicer of the debt, is obligated to pay the debt.

(b-1) If the courthouse or county clerk's office is closed because of inclement weather, natural disaster, or other act of God, a notice required to be posted at the courthouse under Subsection (b)(1) or filed with the county clerk under Subsection (b)(2) may be posted or filed, as appropriate, up to 48 hours after the courthouse or county clerk's office reopens for business, as applicable.

(c) The sale must begin at the time stated in the notice of sale or not later than three hours after that time.

(d) Notwithstanding any agreement to the contrary, the mortgage servicer of the debt shall serve a debtor in default under a deed of trust or other contract lien on real property used as the debtor's residence with written notice by certified mail stating that the debtor is in default under the deed of trust or other contract lien and giving the debtor at least 20 days to cure the default before notice of sale can be given under Subsection (b). The entire calendar day on which the notice required by this subsection is given, regardless of the time of day at which the notice is given, is included in computing the 20-day notice period required by this subsection, and the entire calendar day on which notice of sale is given under Subsection (b) is excluded in computing the 20-day notice period.

(e) Service of a notice under this section by certified mail is complete when the notice is deposited in the United States mail, postage prepaid and addressed to the debtor at the debtor's last known address. The affidavit of a person knowledgeable of the facts to the effect that service was completed is prima facie evidence of service.

(f) Each county clerk shall keep all notices filed under Subdivision (2) of Subsection (b) in a convenient file that is available to the public for examination during normal business hours. The clerk may dispose of the notices after the date of sale specified in the notice has passed. The clerk shall receive a fee of $2 for each notice filed.

(f-1) If a county maintains an Internet website, the county must post a notice of sale filed with the county clerk under Subsection (b)(2) on the website on a page that is publicly available for viewing without charge or registration.

(g) The entire calendar day on which the notice of sale is given, regardless of the time of day at which the notice is given, is included in computing the 21-day notice period required by Subsection (b), and the entire calendar day of the foreclosure sale is excluded.

(h) For the purposes of Subsection (a), the commissioners court of a county may designate an area other than an area at the county courthouse where public sales of real property under this section will take place that is in a public place within a reasonable proximity of the county courthouse as determined by the commissioners court and in a location as accessible to the public as the courthouse door. The commissioners court shall record that designation in the real property records of the county. A designation by a commissioners court under this section is not a ground for challenging or invalidating any sale. A sale must be held at an area designated under this subsection if the sale is held on or after the 90th day after the date the designation is recorded. The posting of the notice required by Subsection (b)(1) of a sale designated under this subsection to take place at an area other than an area of the courthouse remains at the courthouse door of the appropriate county.

(i) Notice served on a debtor under this section must state the name and address of the sender of the notice and contain, in addition to any

other statements required under this section, a statement that is conspicuous, printed in boldface or underlined type, and substantially similar to the following: "Assert and protect your rights as a member of the armed forces of the United States. If you are or your spouse is serving on active military duty, including active military duty as a member of the Texas National Guard or the National Guard of another state or as a member of a reserve component of the armed forces of the United States, please send written notice of the active duty military service to the sender of this notice immediately."

Tex. Prop. Code § 51.003. Deficiency Judgment

(a) If the price at which real property is sold at a foreclosure sale under Section 51.002 is less than the unpaid balance of the indebtedness secured by the real property, resulting in a deficiency, any action brought to recover the deficiency must be brought within two years of the foreclosure sale and is governed by this section.

(b) Any person against whom such a recovery is sought by motion may request that the court in which the action is pending determine the fair market value of the real property as of the date of the foreclosure sale. The fair market value shall be determined by the finder of fact after the introduction by the parties of competent evidence of the value. Competent evidence of value may include, but is not limited to, the following: (1) expert opinion testimony; (2) comparable sales; (3) anticipated marketing time and holding costs; (4) cost of sale; and (5) the necessity and amount of any discount to be applied to the future sales price or the cashflow generated by the property to arrive at a current fair market value.

(c) If the court determines that the fair market value is greater than the sale price of the real property at the foreclosure sale, the persons against whom recovery of the deficiency is sought are entitled to an

offset against the deficiency in the amount by which the fair market value, less the amount of any claim, indebtedness, or obligation of any kind that is secured by a lien or encumbrance on the real property that was not extinguished by the foreclosure, exceeds the sale price. If no party requests the determination of fair market value or if such a request is made and no competent evidence of fair market value is introduced, the sale price at the foreclosure sale shall be used to compute the deficiency.

(d) Any money received by a lender from a private mortgage guaranty insurer shall be credited to the account of the borrower prior to the lender bringing an action at law for any deficiency owed by the borrower. Notwithstanding the foregoing, the credit required by this subsection shall not apply to the exercise by a private mortgage guaranty insurer of its subrogation rights against a borrower or other person liable for any deficiency.

Tex. Prop. Code § 51.005. Judicial or Nonjudicial Foreclosure After Judgment Against Guarantor—Deficiency

(a) This section applies if:

(1) the holder of a debt obtains a court judgment against a guarantor of the debt;
(2) real property subject to a deed of trust or other contract lien securing the guaranteed debt is sold at a foreclosure sale under Section 51.002 or under a court judgment foreclosing the lien and ordering the sale;
(3) the price at which the real property is sold is less than the unpaid balance of the indebtedness secured by the real property, resulting in a deficiency; and
(4) a motion or suit to determine the fair market value of the real property as of the date of the foreclosure sale has not been filed under Section 51.003 or 51.004.

(b) The guarantor may bring an action in the district court in the county in which the real property is located for a determination of the fair market value of the real property as of the date of the foreclosure sale. The suit must be brought not later than the 90th day after the date of the foreclosure sale or the date the guarantor receives actual notice of the foreclosure sale, whichever is later. The fair market value shall be determined by the finder of fact after the introduction by the parties of competent evidence of the value. Competent evidence of value may include:

(1) expert opinion testimony;
(2) comparable sales;
(3) anticipated marketing time and holding costs;
(4) cost of sale; and
(5) the necessity and amount of any discount to be applied to the future sales price or the cash flow generated by the property to arrive at a fair market value as of the date of the foreclosure sale.

(c) If the finder of fact determines that the fair market value is greater than the sale price of the real property at the foreclosure sale, the persons obligated on the indebtedness, including guarantors, are entitled to an offset against the deficiency in the amount by which the fair market value, less the amount of any claim, indebtedness, or obligation of any kind that is secured by a lien or encumbrance on the real property that was not extinguished by the foreclosure, exceeds the sale price. If no competent evidence of fair market value is introduced, the sale price at the foreclosure sale shall be used to compute the deficiency.

(d) Any money received by a lender from a private mortgage guaranty insurer shall be credited to the account of the borrower before the lender brings an action at law for any deficiency owed by the borrower. However, the credit required by this subsection does not apply to the exercise by a private mortgage guaranty insurer of its

subrogation rights against a borrower or other person liable for any deficiency.

Tex. Civ. Prac. & Rem. Code § 16.004. Four-Year Limitations Period

(a) A person must bring suit on the following actions not later than four years after the day the cause of action accrues:

(1) specific performance of a contract for the conveyance of real property;
(2) penalty or damages on the penal clause of a bond to convey real property;
(3) debt;
(4) fraud; or
(5) breach of fiduciary duty.

(b) A person must bring suit on the bond of an executor, administrator, or guardian not later than four years after the day of the death, resignation, removal, or discharge of the executor, administrator, or guardian.

(c) A person must bring suit against his partner for a settlement of partnership accounts, and must bring an action on an open or stated account, or on a mutual and current account concerning the trade of merchandise between merchants or their agents or factors, not later than four years after the day that the cause of action accrues. For purposes of this subsection, the cause of action accrues on the day that the dealings in which the parties were interested together cease.

Tab E Contracts and other documents

HOLD FOR TEXAS LONE STAR TITLE, L.P.

After Recording Return To:

FIRST FRANKLIN
ATTENTION: RECORDS MANAGEMENT
2150 NORTH FIRST STREET
SAN JOSE, CA 95131

Y436760
05/03/05 100782970 $50.00

Notice of Confidentiality Rights: If you are a natural person, you may remove or strike any of the following information from this instrument before it is filed for record in the public records: your social security number or your driver's license number.

[Space Above This Line For Recording Data]

DEED OF TRUST

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 April 28, 2005, together with all Riders to this document.
(B) **"Borrower"** is DAYSI R SANTOS and CARLOS SANTOS, WIFE AND HUSBAND

Borrower is the grantor under this Security Instrument.
(C) **"Lender"** is FIRST FRANKLIN A DIVISION OF NAT. CITY BANK OF IN
Lender is a National Association organized and existing under the laws of United States of America. Lender's address is 2150 NORTH FIRST STREET, SAN JOSE, California 95131

. Lender is the beneficiary under this Security Instrument.
(D) **"Trustee"** is Matthew Haddock

Trustee's address is 210 West 6th Street, Suite 1206, Fort Worth, TX 76102

(E) **"Note"** means the promissory note signed by Borrower and dated April 28, 2005. The Note states that Borrower owes Lender Ninety Seven Thousand Five Hundred Ninety Two and no/100 Dollars (U.S. $97,592.00) plus interest. Borrower has promised to pay this debt in regular Periodic Payments and to pay the debt in full not later than May 01, 2035.
(F) **"Property"** means the property that is described below under the heading "Transfer of Rights in the Property."
(G) **"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.

GF# 3190417229

(H) **"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 [X] Planned Unit Development Rider [X] Other(s) [specify] Prepay Rider
[ ] 1-4 Family Rider [ ] Biweekly Payment Rider

(I) **"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.
(J) **"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.
(K) **"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.
(L) **"Escrow Items"** means those items that are described in Section 3.
(M) **"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.
(N) **"Mortgage Insurance"** means insurance protecting Lender against the nonpayment of, or default on, the Loan.
(O) **"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.
(P) **"RESPA"** means the Real Estate Settlement Procedures Act (12 U.S.C. §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.
(Q) **"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

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 and conveys to Trustee, in trust, with power of sale, the following described property located in the COUNTY [Type of Recording Jurisdiction] of HARRIS [Name of Recording Jurisdiction]:

LOT THIRTY (30), IN BLOCK ONE (1), OF DURHAM PARK SECTION ONE (1), A SUBDIVISION IN HARRIS COUNTY, TEXAS, ACCORDING TO THE MAP OR PLAT THEREOF RECORDED IN FILM CODE NO. 556200 OF THE MAP RECORDS OF HARRIS COUNTY, TEXAS.

which currently has the address of 8805 STONEFAIR LANE
[Street]

HOUSTON [City], Texas 77075 [Zip Code] ("Property Address"):

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 COVENANTS that Borrower is lawfully seised of the estate hereby conveyed and has the right to grant and convey the Property and that the Property is unencumbered, except for encumbrances of record. Borrower 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.

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.

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 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 will 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. For the purposes of this Section 22, the term "Lender" includes any holder of the Note who is entitled to receive payments under the Note.

If Lender invokes the power of sale, Lender or Trustee shall give notice of the time, place and terms of sale by posting and filing the notice at least 21 days prior to sale as provided by Applicable Law. Lender shall mail a copy of the notice to Borrower in the manner prescribed by Applicable Law. Sale shall be made at public vendue. The sale must begin at the time stated in the notice of sale or not later than three hours after that time and between the hours of 10 a.m. and 4 p.m. on the first Tuesday of the month. Borrower authorizes Trustee to sell the Property to the highest bidder for cash in one or more parcels and in any order Trustee determines. Lender or its designee may purchase the Property at any sale.

Trustee shall deliver to the purchaser Trustee's deed conveying indefeasible title to the Property with covenants of general warranty from Borrower. Borrower covenants and agrees to defend generally the purchaser's title to the Property against all claims and demands. 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.

If the Property is sold pursuant to this Section 22, Borrower or any person holding possession of the Property through Borrower shall immediately surrender possession of the Property to the purchaser at that sale. If possession is not surrendered, Borrower or such person shall be a tenant at sufferance and may be removed by writ of possession or other court proceeding.

23. **Release.** Upon payment of all sums secured by this Security Instrument, Lender shall provide a release of this Security Instrument to Borrower or Borrower's designated agent in accordance with Applicable Law. Borrower shall pay any recordation costs. Lender may charge Borrower a fee for releasing this Security Instrument, but only if the fee is paid to a third party for services rendered and the charging of the fee is permitted under Applicable Law.

24. **Substitute Trustee; Trustee Liability.** All rights, remedies and duties of Trustee under this Security Instrument may be exercised or performed by one or more trustees acting alone or together. Lender, at its option and with or without cause, may from time to time, by power of attorney or otherwise, remove or substitute any trustee, add one more trustees, or appoint a successor trustee to any Trustee without the necessity of any formality other than a designation by Lender in writing. Without any further act or conveyance of the Property the substitute, additional or successor trustee shall become vested with the title, rights remedies, powers and duties conferred upon Trustee herein and by Applicable Law.

Trustee shall not be liable if acting upon any notice, request, consent, demand, statement or other document believed by Trustee to be correct. Trustee shall not be liable for any act or omission unless such act or omission is willful.

25. **Subrogation.** Any of the proceeds of the Note used to take up outstanding liens against all or any part of the Property have been advanced by Lender at Borrower's request and upon Borrower's representation that such amounts are due and are secured by valid liens against the Property. Lender shall be subrogated to any and all rights, superior titles, liens and equities owned or claimed by any owner or holder of any outstanding liens and debts, regardless of whether said liens or debts are acquired by Lender by assignment or are released by the holder thereof upon payment.

26. **Partial Invalidity.** In the event any portion of the sums intended to be secured by this Security Instrument cannot be lawfully secured hereby, payments in reduction of such sums shall be applied first to those portions not secured hereby.

27. **Purchase Money; Owelty of Partition; Renewal and Extension of Liens Against Homestead Property; Acknowledgment of Cash Advanced Against Non-Homestead Property. Check box as applicable:**

[X] **Purchase Money.**

The funds advanced to Borrower under the Note were used to pay all or part of the purchase price of the Property. The Note also is primarily secured by the vendor's lien retained in the deed of even date with this Security Instrument conveying the Property to Borrower, which vendor's lien has been assigned to Lender, this Security Instrument being additional security for such vendor's lien.

[ ] **Owelty of Partition.**

The Note represents funds advanced by Lender at the special instance and request of Borrower for the purpose of acquiring the entire fee simple title to the Property and the existence of an owelty of partition imposed against the entirety of the Property by a court order or by a written agreement of the parties to the partition to secure the payment of the Note is expressly acknowledged, confessed and granted.

[ ] **Renewal and Extension of Liens Against Homestead Property.**

The Note is in renewal and extension, but not in extinguishment, of the indebtedness described on the attached Renewal and Extension Exhibit which is incorporated by reference. Lender is expressly subrogated to all rights, liens and remedies securing the original holder of a note evidencing Borrower's indebtedness and the original liens securing the indebtedness are renewed and extended to the date of maturity of the Note in renewal and extension of the indebtedness.

[ ] **Acknowledgment of Cash Advanced Against Non-Homestead Property.**

The Note represents funds advanced to Borrower on this day at Borrower's request and Borrower acknowledges receipt of such funds. Borrower states that Borrower does not now and does not intend ever to reside on, use in any manner, or claim the Property secured by this Security Instrument as a business or residential homestead. Borrower disclaims all homestead rights, interests and exemptions related to the Property.

28. **Loan Not a Home Equity Loan. The Loan evidenced by the Note is not an extension of credit as defined by Section 50(a)(6) or Section 50(a)(7), Article XVI, of the Texas Constitution. If the Property is used as Borrower's residence, then Borrower agrees that Borrower will receive no cash from the Loan evidenced by the Note and that any advances not necessary to purchase the Property, extinguish an owelty lien, complete construction, or renew and extend a prior lien against the Property, will be used to reduce the balance evidenced by the Note or such Loan will be modified to evidence the correct Loan balance, at Lender's option. Borrower agrees to execute any documentation necessary to comply with this Section 28.**

BY SIGNING BELOW, Borrower accepts and agrees to the terms and covenants contained in pages 1 through 12 of this Security Instrument and in any Rider executed by Borrower and recorded with it.

Daysi R Santos (Seal) DAYSI R. SANTOS -Borrower

Carlos Santos Jr (Seal) CARLOS SANTOS -Borrower

(Seal) -Borrower

(Seal) -Borrower

(Seal) -Borrower

(Seal) -Borrower

Witness:

Witness:

State of Texas
County of Ft. Bend

This instrument was acknowledged before me on April 28, 2005 (date) by DAYSI R. SANTOS, CARLOS SANTOS

(person(s) acknowledging)

Notary Public

LINDA MARTINEZ
NOTARY PUBLIC
STATE OF TEXAS
My Commission Expires
APRIL 04, 2006

My commission expires:

TEXAS---Single Family---Fannie Mae/Freddie Mac UNIFORM INSTRUMENT
(Page 12 of 12 pages)
Form 3044 1/01

National City

NOTE AND SECURITY AGREEMENT

(Not to be Used for Texas Homestead Loans Unless Proceeds Used Only for Purchase Money or Refinance of Purchase Money)

National City Complete Loan is a registered trademark of National City Corporation.

Date: April 28, 2005

1. DEBTOR (S): DAYSI R. SANTOS

Address: 8806 STONEFAIR LANE
HOUSTON, TX 77075

2. **DEFINITIONS AND GENERAL TERMS.** "You" or "your" means the undersigned Debtors. "We", "our" or "us" means FIRST FRANKLIN, A DIVISION OF NAT. CITY BANK OF IN, 2150 NORTH FIRST STREET, SAN JOSE, California 95131 and its successors and assigns. "Note" means this promissory note and security agreement and all related attachments and addenda. "Loan" means the loan evidenced by this Note. "Property" means the real estate securing the payment of this Note described in Section 4. "Disclosure Statement" means the separate federal truth-in-lending disclosure statement of even date provided to you, the terms of which are incorporated by reference in this Note. Disclosures in the Disclosure Statement are contract terms. You agree that we are making this Loan directly to you. The Section headings of this Note are a table of contents and not contract terms.

3. **PROMISSORY NOTE.** For value received, you, intending to be legally bound, jointly and severally promise to pay to our order the principal sum of $ 24,398.00, which includes a prepaid finance charge of $ 272.87, plus interest on the principal sum outstanding and other sums owed under this Note until paid in full at the per annum rate of 11.2500 %. You will make a monthly payment in the amount of U.S.$ 236.97 on the 1st day of each month beginning on June 1, 2005. If on May 1, 2025, you still owe amounts under this Note, you will pay those amounts in full on that date. You agree that all past due and unpaid charges owed, including past due interest, may be capitalized and earn interest by adding such charges to the principal balance of this Note. Each monthly payment will be applied as of its scheduled due date and will be applied to interest before principal. You will mail your monthly payments to: National City Home Loan Services, 150 Allegheny Center Mall, Pittsburgh, PA 15212, or such other place as we may specify. If you are making a payment by an overnight delivery service only, you will send it to National City, 5101 Interchange Way, Louisville, KY 40229 or such other place as we may specify.

4. **PROPERTY:** 8806 STONEFAIR LANE
HOUSTON, TX 77075

5. **DISBURSEMENT OF PROCEEDS.** You authorize us to disburse all proceeds of this Loan by check, draft, electronic transfer or in such other form or manner as we choose in our sole discretion.

6. **LATE CHARGE; RETURNED INSTRUMENT CHARGE; DEFFERAL CHARGE; SERVICE CHARGES.** If all or any portion of any monthly payment is not received within 10 days after it is due and we do not accelerate the entire balance owing under this Note, you agree to pay a late charge. This late charge will be $15.00. If any check, draft, negotiable order of withdrawal, or other similar instrument is returned to us unpaid for any reason, you agree to pay a returned instrument charge of $20. If we, in our sole discretion, permit you to defer any payment(s) you agree to pay a deferral charge for each payment deferred. We will continue to earn interest on the unpaid principal balance. If you request copies of any documents related to this Loan, you agree to pay a document request charge for the service of providing copies. This document request charge will be $6 per copy. We will not charge you for documents we are required to provide you by law. You agree that we may also charge you a fee, not otherwise enumerated herein, for services that we perform for you that you have requested.

7. **INSURANCE.** You are required to insure the Property until this Loan is paid in full or we sell the Property. You have the risk of loss of the Property and shall be responsible for its loss or damage. You will notify us promptly of any loss or damage to the Property. **You agree to obtain primary insurance coverage (including furnishing existing coverage) from any insurer you want that is acceptable to us provided that the insurer is authorized to do business in the state or jurisdiction where the Property is located or is an eligible surplus lines carrier, in the following types and amounts with us listed as loss payee:** (a) fire, "all risk" perils and flood insurance required by law; and (b) all other insurance required by applicable law. You must keep the Property fully insured against loss or damage on terms which are acceptable to us to the extent permitted by law. All insurance proceeds we receive (including a refund of premium) may at our option reduce the indebtedness of this Note or be used to repair or replace the Property. If the Property is destroyed, you must still pay us whatever you owe under this Note. If you fail to maintain the required insurance, we may at our sole option obtain coverages at your expense that we believe are necessary to protect our interests in the Property. You agree to pay the expense of such insurance on demand or agree that we may add such expense to this Loan. You acknowledge that insurance we purchase may cost substantially more than insurance you could purchase. Failure of your insurer to pay a claim, or any part of a claim, will mean you do not have the insurance required by this Note. You also assign to us any other insurance proceeds related to the Note or our interest in the Property. You must promptly provide us with evidence of insurance and proof of payment of insurance premiums upon our request, and all policies must provide us with a minimum of 10 days prior notice of cancellation or material change in coverage. You irrevocably authorize us as your agent and on your behalf, which authorization will survive your incompetence, to negotiate, settle and release any claim under your insurance or under any insurance with a third party insurer related to the Property, and to receive and sign all related papers and documents on your behalf including, checks, drafts and other items payable to you.

8. **PREPAYMENT.** You may voluntarily prepay the principal sum of this Note in part at any time. If you voluntarily prepay the principal sum of this Note in full within the first months of this Note, you agree to pay a voluntary prepayment charge. This voluntary prepayment charge will be equal to 0% of the principal balance at the time of prepayment. The prepayment charge will apply to amounts prepaid within 60 days of prepayment in full, after deducting any required refund. Unless refund of all or a portion of the prepaid finance charge is required by law, no portion of the prepaid finance charge described in Section 3 will be refunded. Subject to Section 3, you authorize us to apply all prepaid sums to the indebtedness of this Note in any manner we elect.

9. **SECURITY AGREEMENT.** To the extent permitted by law, you grant us a security interest and waive all applicable property exemptions and homestead rights (unless the Property is located in Texas) in the following property to secure performance of your obligations under this Note: (a) the Property including all equipment, parts, accessories and personal property which is a fixture of the Property except "household goods" as defined by 12 C.F.R. 227.12(d) unless purchased with the proceeds of this Loan. If we have a prior lien on your principal residence as security for future obligations, we waive such security as to this Note only; (b) proceeds and unearned premiums of any Property insurance; and (c) the substitutions, replacements, products and proceeds of the foregoing. Our security interest will be a purchase money security interest if any of the foregoing are purchased with the proceeds of this Loan. You agree that we are not a fiduciary with respect to our security interest. You further agree that we may at any time apply proceeds and unearned premiums and refunds of any Property insurance to reduce the indebtedness of this Note, even if you are not in default. Upon our request, you will deliver any documents that are necessary for us to perfect our security interest, or, if applicable, follow our instructions to perfect our security interest in the Property. You will defend at your expense our security interest in the Property. To the extent permitted by law, you agree to pay all actual costs imposed to release our interests in the Property.

10. **PROPERTY MAINTENANCE AND USE.** You will promptly pay all fees, fines, and taxes related to this Loan and the Property. You will maintain the Property in good condition except for ordinary wear and tear, and keep it free from all liens, encumbrances, fines and adverse claims except for those permitted by us in writing. You will make all needed repairs. You will not make any changes to the Property that will decrease its value or decrease its functionality without our prior written consent. You will permit us to inspect the Property at a time which is reasonably convenient. If you do not do any of the foregoing, we may do so at our sole option and add the costs to this Loan or require you to provide us with additional collateral. You will not use, or permit others to use, the Property: (a) in violation of any law; (b) contrary to the provisions of any insurance policies covering the Property or in a manner that would invalidate any warranty or (c) for any business, commercial or agricultural purpose unless this Loan is explicitly for such a purpose.

11. **DEFAULT AND REMEDIES.** You will be in default under this Note if: (a) you fail to make any payment or pay other amounts owing under this Note when due; (b) you fail to keep any of your agreements under this Note or under any other agreement with us; (c) a bankruptcy petition is filed by or against you; (d) you have provided false or misleading information to us; (e) you die or are declared incompetent or incapacitated; (f) the Property is destroyed, determined by us to be uninsurable for use, seized, impounded or threatened with, or subject to, levy, attachment, condemnation, forfeiture or other administrative or judicial proceedings; or (g) you are in default on any obligation that is secured by a lien on the Property. If you are in default, in addition to any other rights and remedies we have under law and subject to any right you may have to cure your default, we may do any of the following: (aa) accelerate the entire balance owing under this Note after any demand or notice which is required by law, which entire balance will be immediately due and payable. **If you are in default, prior to our obtaining a judgment against you, any amounts owing under this Note will continue to bear interest at the interest rate stated in this Note. If we obtain a judgment against you for any amounts owing under this Note, the amount of such judgment will bear interest at the rate permitted by Indiana law for judgments from the date of judgment;** (bb) demand that you vacate the Property and make it available to us at a time that is reasonably convenient. You agree to comply with such demand; (cc) sell, lease, or otherwise dispose of the Property without prior demand, unless otherwise required by law. Our disposal of the Property will not release you from any of your obligations and you will pay us any balance owing under this Note; and (dd) recover all expenses related to retaking, holding, preparing for sale and selling the Property and reasonable collection costs, attorneys' fees (unless you are a resident of New Hampshire, in which case we may not recover our attorneys' fees from you) and legal expenses as permitted by 11 U.S.C. 506 and applicable state law.

12. **PROPERTY CONDITION.** You agree that with respect to any Property: (a) it is free from all material defects, in proper operating order and fit for all intended purposes; (b) that our making this Loan was based in part upon the value and condition of the Property as represented by you; (c) we did not directly or indirectly offer, sell or provide it to you; and (d) we are not a seller, supplier, merchant or warrantor. **Accordingly, except for specific rights afforded by state law, any claims relating to the Property, including any defect or warranty related to it, are not our responsibility.**

13. **ADDITIONAL AGREEMENTS.** You agree that: (a) you may not sell or assign this Note, the Property or any of its benefits or obligations without our prior written consent. We own this Note and may assign this Note or any of its benefits or obligations at any time without your consent; (b) this Note is between you and us and, except for successors or assigns as provided by this Note, this Note will not confer any rights upon any third party; (c) our rights and remedies in this Note are not exclusive; (d) we may waive or delay the enforcement of our rights under this Note without waiving or otherwise affecting such rights; (e) the provisions of this Note are only to the extent permitted by applicable law. Any part of this Note that cannot be enforced will be void, but the remaining parts will remain in effect; (f) you waive notice of dishonor, protest, presentment, demand for payment (subject to any right you may have to cure your default), waiver, delay and all other notices or demands in connection with this Note; (g) you waive all defenses relating to impairment of recourse or collateral, and we can change any term of this Note, release any collateral or release any obligor by agreeing with any one party without notifying or releasing any other party; (h) we can correct errors in this Note as provided in 15 U.S.C. Section 1640 upon notice to you even if such errors are contract terms and you agree to be bound by such corrections. Upon our request, you will promptly re-execute this Note to correct errors in this Note. You can change any term of this Note only in a writing signed by us; (i) the Bank is a national bank located in Indiana and your application for this Loan and the making of this Loan occurred in Indiana. Therefore, this Note shall be governed by and construed in accordance with (y) Federal laws and regulations including but not limited to 12 USC Section 85 and (z) the laws of Indiana, to the extent Indiana laws are not preempted by federal laws or regulations, and without regard to conflict of law principles; (j) this Note describes all agreements between you and us with respect to the Loan and there are no other agreements. An electronic or optically imaged reproduction of this Note or any other document related to your Loan constitutes an original document and may be relied on in full by all parties to the same extent as an original; (k) except as otherwise required by law, we are authorized to mail any notice or other correspondence to you by first class mail to your last known address indicated on our records; (l) you will provide us with 10 days prior written notice of any change in any information contained in your application including a change in your name or address. Except as otherwise specified, all notices and payments to us must be sent to National City, 150 Allegheny Center Mall, Pittsburgh, PA 15212 Attn: Customer Service, Locator 47-23-551, or such other place as we may designate. Our failure or delay in providing you coupon books, billing statements or other payment instructions will not relieve you of your obligations under this Note; (m) all payments must be in lawful money of the United States; (n) if you are a natural person you are competent to enter into this Note and if you are other than a natural person, the person signing on behalf of you represents that he is authorized to enter into and execute this Note; (o) we will not be responsible for any personal items in or on vacated Property. We will make a reasonable effort to return such items to you or have you reclaim them from us provided you notify us within 5 business days of our taking repossession and itemize such items. Even if you notify us, you abandon to us any personal items not reclaimed from us within 10 business days of our taking repossession; (p) we may accept late payments or partial payments without losing any of our rights **If your payment is marked with the words "Paid in Full" or similar language, you must send your payment to National City, 150 Allegheny Center Mall, Pittsburgh, PA 15212 Att'n: Customer Service, Locator 47-23-551 or such other place as we may designate.** If your payment is made to any other address, we may accept the payment without losing any of our rights; (q) our application of your payments or other proceeds is reasonable unless another method is required by law, in which case that method shall be reasonable; (r) this Note will be binding and inure to the benefit of you and us and our respective successors and assigns; (s) **except as otherwise prohibited by law, Bank may provide to others, including, but not limited to, consumer credit reporting agencies, information about our transactions and experiences with you. Also, Bank and its affiliates (collectively "National City") may share with each other all information about you that National City has or may obtain for the purposes, among other things, of evaluating credit applications or offering you products or services that National City believes may be of interest to you. Under the Fair Credit Reporting Act there is certain credit information that cannot be shared about you (unless you are a business) if you tell National City by writing to National City Corporation, Attention: Office of Consumer Privacy, P.O. Box 4068, Kalamazoo, MI 49009. You must include your name, address, account number and social security number;** (t) if this Loan is not for a consumer purpose or you are not a natural person, you are not entitled to any rights afforded consumers under applicable law or regulations; (u) all actions under this Note requiring our consent are at our sole discretion, and such consent may be withheld for any reason; (v) the annual IRS Form 1098 will be issued only to the first borrower listed on this Note at origination and the designation of a borrower as first cannot be changed subsequently; (w) our typewritten name in Section 2 will constitute our signature for purposes of this Note; (x) we have an established business relationship with you, and unless otherwise prohibited by law, National City may contact you to offer you products and services that National City thinks may be of interest to you. Such contacts are not unsolicited and National City may contact you with an automated dialing and announcing device or by fax, email or other form of electronic communication and we may monitor telephone calls with you to assure quality service; (y) all amounts owed under this Note shall be without relief from valuation and appraisement laws; (z) we are authorized to sign on your behalf any document required to enforce our interests under this Note; (aa) disclosures included in this Note but not required by law are not an admission or waiver of rights by us; (bb) you will pay all fees we charge you in connection with this Loan including those indicated on any Good Faith Estimate or HUD1/HUD1A provided in connection with this Loan, which will be nonrefundable to the extent permitted by law; and (cc) in this Note, the term "affiliates" means current and future affiliates of National City Bank of Indiana, including, but not limited to, the following National City Corporation subsidiaries: National City Bank, National City Bank of Michigan/Illinois, National City Bank of Pennsylvania, National City Bank of Southern Indiana, National City Home Loan Services, Inc., First Franklin Financial Corporation, National City Bank of Kentucky, Madison Bank and Trust Company, National City Mortgage Co. and National City Mortgage Services Co.

14. **ADDITIONAL NOTICES.** The following notices are given by Bank only to the extent not inconsistent with 12 U.S.C. Section 85 and related regulations and opinions, and/or the choice of law provision set forth herein (with respect to which Bank expressly reserves all rights). You acknowledge receipt of the following notices before becoming obligated. For purposes of the immediately following *Notice to Cosigner*, "bank" means us.

NOTICE TO COSIGNER

You are being asked to guarantee this debt. Think carefully before you do. If the borrower doesn't pay the debt, you will have to. Be sure you can afford to pay if you have to, and that you want to accept this responsibility. You may have to pay up to the full amount of the debt if the borrower does not pay. You may also have to pay late fees or collection costs, which increase this amount. The bank can collect this debt from you without first trying to collect from the borrower (and after proper notice to you if you are a "cosigner" as defined by Illinois or Michigan law). The bank can use the same collection methods against you that can be used against the borrower, such as suing you, garnishing your wages (unless you receive wages in North Carolina, Pennsylvania, South Carolina or Texas) etc. If this debt is ever in default, that fact may become a part of *your* credit record. This notice is not the contract that makes you liable for the debt.

NOTICE TO ALL SIGNERS

You are hereby notified that a negative credit report reflecting on your credit record may be submitted to a consumer (credit) reporting agency if you fail to fulfill the terms of your credit obligations. I f you believe that we have information about you that is inaccurate or that we have reported or may report to a credit reporting agency information about you that is inaccurate, please notify us of the specific information that you believe is inaccurate by writing to National City, 150 Allegheny Center Mall, Pittsburgh, PA 15212 Att'n: Customer Service, Locator 47-23-551 or such other place as we may designate.

OTHER NOTICES

If the Property is located in California: Lender, may at its option, declare the entire balance of the Secured Debt to be immediately due and payable upon the creation of, or contract for the creation of, any lien, encumbrance, transfer or sale of the Property.

If the Property is located in Colorado: The dollar amount of the finance charge disclosed to you for this credit transaction is based upon your payments being received by us on the date payments are due. If your payments are received after the due date, even if received before the date a late fee applies, you may owe additional and substantial money at the end of the credit transaction and there may be little or no reduction of principal. This is due to the accrual of daily interest until a payment is received.

If the Property is located in Florida: FLORIDA DOCUMENTARY STAMP TAX IN THE AMOUNT REQUIRED BY LAW HAS BEEN PAID OR WILL BE PAID DIRECTLY TO THE DEPARTMENT OF REVENUE, AND FLORIDA DOCUMENTARY STAMPS HAVE BEEN PLACED ON THE TAXABLE INSTRUMENTS AS REQUIRED BY CHAPTER 201, FLORIDA STATUTES.

If the Property is located in Iowa (this is a consumer credit transaction) or Kansas: NOTICE TO CONSUMER: 1. Do not sign this paper (agreement) before you read it. 2. You are entitled to a copy of this paper (agreement). 3. You may prepay the unpaid balance at any time and may be entitled to receive a refund of unearned charges in accordance with law. 4. If you prepay the unpaid balance, you may have to pay a prepayment penalty.

If the Property is located in Iowa and the principal amount of this Loan exceeds $20,000: IMPORTANT: READ BEFORE SIGNING. THE TERMS OF THIS AGREEMENT SHOULD BE READ CAREFULLY BECAUSE ONLY THOSE TERMS IN WRITING ARE ENFORCEABLE. NO OTHER TERMS OR ORAL PROMISES NOT CONTAINED IN THIS WRITTEN CONTRACT MAY BE LEGALLY ENFORCED. YOU MAY CHANGE THE TERMS OF THIS AGREEMENT ONLY BY ANOTHER WRITTEN AGREEMENT.

If the Property is located in Maryland: We elect Subtitle 10, Credit Grantor Closed End Credit Provisions, of Title 12 of the Commercial Law Article of the Annotated Code of Maryland.

If the Property is located in Minnesota: If the amount of this Loan is $100,000 or more, we elect Minn. Stat. § 334.01.

If the Property is located in Missouri: Oral agreements or commitments to loan money, extend credit or to forbear from enforcing repayment of a debt including promises to extend or renew such debt are not enforceable. To protect you (borrower(s)) and us (creditor) from misunderstanding or disappointment, any agreements we reach covering such matters are contained in this writing, which is the complete and exclusive statement of the agreement between us, except as we may later agree in writing to modify it.

If the Property is located in New York: YOU SHOULD CHECK WITH YOUR LEGAL ADVISOR AND WITH OTHER MORTGAGE LIEN HOLDERS AS TO WHETHER ANY PRIOR LIENS CONTAIN ACCELERATION CLAUSES WHICH WOULD BE ACTIVATED BY A JUNIOR ENCUMBRANCE.

DEFAULT IN THE PAYMENT OF THIS LOAN AGREEMENT MAY RESULT IN THE LOSS OF THE PROPERTY SECURING THE LOAN. UNDER FEDERAL LAW, YOU MAY HAVE THE RIGHT TO CANCEL THIS AGREEMENT. IF YOU HAVE THIS RIGHT, THE CREDITOR IS REQUIRED TO PROVIDE YOU WITH A SEPARATE WRITTEN NOTICE SPECIFYING THE CIRCUMSTANCES AND TIMES UNDER WHICH YOU CAN EXERCISE THIS RIGHT.

If the Property is located in North Dakota: THIS OBLIGATION MAY BE THE BASIS FOR A PERSONAL ACTION AGAINST THE PROMISOR OR PROMISORS IN ADDITION TO OTHER REMEDIES ALLOWED BY LAW.

If the Property is located in Oregon: NOTICE TO THE BORROWER: Do not sign this loan agreement before you read it. The loan agreement provides for the payment of a penalty if you wish to repay the loan prior to the date provided for repayment in the loan agreement.

If the Property is located in Texas: THIS WRITTEN AGREEMENT REPRESENTS THE FINAL AGREEMENT BETWEEN THE PARTIES AND MAY NOT BE CONTRADICTED BY EVIDENCE OF PRIOR, CONTEMPORANEOUS OR SUBSEQUENT ORAL AGREEMENTS OF THE PARTIES. THERE ARE NO UNWRITTEN ORAL AGREEMENTS BETWEEN THE PARTIES.

If the Property is located in Vermont: NOTICE TO CO-SIGNER: YOUR SIGNATURE ON THIS NOTE MEANS THAT YOU ARE EQUALLY LIABLE FOR REPAYMENT OF THIS LOAN. IF THE BORROWER DOES NOT PAY, THE LENDER HAS A LEGAL RIGHT TO COLLECT FROM YOU.

If you reside in Wisconsin: NOTICE TO CUSTOMER: (a) DO NOT SIGN THIS BEFORE YOU READ THE WRITING ON THE REVERSE SIDE, EVEN IF OTHERWISE ADVISED. (b) DO NOT SIGN THIS IF IT CONTAINS ANY BLANK SPACES. (c) YOU ARE ENTITLED TO AN EXACT COPY OF ANY AGREEMENT YOU SIGN. (d) YOU HAVE THE RIGHT AT ANY TIME TO PAY IN ADVANCE THE UNPAID BALANCE DUE UNDER THIS AGREEMENT AND YOU MAY BE ENTITLED TO A PARTIAL REFUND OF THE FINANCE CHARGE.

15. SIGNATURES. YOU HAVE READ AND AGREE TO ALL PROVISIONS OF THIS NOTE INCLUDING THOSE ON PAGES 1 THROUGH 3 AND IN THE DISCLOSURE STATEMENT WHICH ARE INCORPORATED HEREIN BY REFERENCE. (1) DO NOT SIGN THIS NOTE BEFORE YOU READ IT OR IF IT CONTAINS ANY BLANK SPACES TO BE FILLED IN. (2) YOU ARE ENTITLED TO A COMPLETELY FILLED-IN COPY OF THIS NOTE BEFORE YOU SIGN IT. BY SIGNING THIS NOTE, YOU ACKNOWLEDGE THAT YOU HAVE RECEIVED AND HAD AN OPPORTUNITY TO REVIEW A COMPLETED COPY OF THIS ENTIRE NOTE BEFORE SIGNING IT ON THE DATE SHOWN ON PAGE 1. **SEE PAGES 1, 2 AND 3 AND THE DISCLOSURE STATEMENT FOR ADDITIONAL IMPORTANT TERMS AND CONDITIONS.**

Debtor: DAYSI R. SANTOS
Type or print name of Debtor

X Daysi R Santos
Debtor's signature

Debtor: _____
Type or print name of Debtor

X _____
Debtor's signature

Debtor: _____
Type or print name of Debtor

X _____
Debtor's signature

Debtor: _____
Type or print name of Debtor

X _____
Debtor's signature

Debtor: _____
Type or print name of Debtor

X _____
Debtor's signature

Debtor: _____
Type or print name of Debtor

X _____
Debtor's signature

FOR MICHIGAN GUARANTORS ONLY: Guaranty Agreement. For value received, you, the undersigned guarantors, jointly, severally and unconditionally guarantee the payment of all sums owing under this Note when due and the performance by the Debtors of all promises contained in this Note. Upon default, we may proceed against any of you without first proceeding against any Debtor. The liability of each of you will be primary and will not be affected by any settlement, release, extension, renewal or modification of this Note whether or not by operation of law. Each of you voluntarily and knowingly waives all rights to any demands, presentments, notices and defenses of any kind or nature you might have in connection with this Guaranty. Each of you agrees to pay all expenses including reasonable attorneys' fees incurred by us if we have to enforce this Guaranty. Each of you acknowledges that you have read and agree to all terms of this Guaranty, Note and Disclosure Statement prior to signing below.

Guarantor: _____
Type or print name of Guarantor

X _____
Guarantor's signature

Guarantor: _____
Type or print name of Guarantor

X _____
Guarantor's signature

FOR LOUISIANA PROPERTIES ONLY:

"NE VARIE TUR" for identification with an Act of Mortgage passed before me this _____ day of _____.

_____
Notary Public
Notary Identification Number

National City®

BALLOON NOTE ADDENDUM TO NOTE AND SECURITY AGREEMENT – FIRST FRANKLIN

Date: April 28, 2005

1. **DEBTOR (S):** DAYSI R. SANTOS DRS E

Property Address: 8306 STONEFAIR LANE
HOUSTON, TX 77075

2. **DEFINED TERMS; ADDENDUM A PART OF THE NOTE.** "Addendum" means this Balloon Note Addendum to Note and Security Agreement which is attached to, made a part of and amends and supplements the Note and Security Agreement ("Note") dated the same date as this Addendum. The terms "we" and "us" include our successors and assigns. In the event there are any conflicts between this Addendum and the Note, the provisions of the Addendum will control. Unless specifically defined in this Addendum, any capitalized terms shall have the same meaning as in the Note.

3. **BALLOON NOTE.** The final payment due under the Note is larger than the previous monthly payments. The final payment includes a substantial payment of principal. This Note is commonly called a "balloon note."

4. **BALLOON NOTE AGREEMENT.** You understand and agree as follows:

THIS LOAN IS PAYABLE IN FULL ON THE FINAL PAYMENT DATE SET FORTH IN THE PAYMENT SCHEDULE IN THE DISCLOSURE STATEMENT. YOU MUST REPAY THE ENTIRE PRINCIPAL BALANCE OF THE LOAN, UNPAID INTEREST AND OTHER SUMS THEN DUE.

5. **SIGNATURES.** YOU HAVE READ AND AGREE TO ALL PROVISIONS OF THIS ADDENDUM AND AGREE THAT ALL NOTICES IN SECTION 15 OF THE NOTE ARE INCORPORATED HEREIN BY REFERENCE. (1) DO NOT SIGN THIS ADDENDUM BEFORE YOU READ IT OR IF IT CONTAINS ANY BLANK SPACES TO BE FILLED IN. (2) YOU ARE ENTITLED TO A COMPLETELY FILLED-IN COPY OF THIS ADDENDUM BEFORE YOU SIGN IT. BY SIGNING THIS ADDENDUM, YOU ACKNOWLEDGE THAT YOU HAVE RECEIVED AND HAD AN OPPORTUNITY TO REVIEW A COMPLETED COPY OF THE ENTIRE NOTE INCLUDING THIS ADDENDUM BEFORE SIGNING.

Debtor: DRS E DAYSI R. SANTOS X Daysi R Santos
Type or print name of Debtor — Debtor's signature

Debtor: _____ X _____
Type or print name of Debtor — Debtor's signature

Debtor: _____ X _____
Type or print name of Debtor — Debtor's signature

Debtor: _____ X _____
Type or print name of Debtor — Debtor's signature

Debtor: _____ X _____
Type or print name of Debtor — Debtor's signature

Debtor: _____ X _____
Type or print name of Debtor — Debtor's signature

[redacted] [redacted]

HOLD FOR TEXAS LONE STAR TITLE

After Recording Return To:

FIRST FRANKLIN
ATTENTION: RECORDS MANAGEMENT
2150 NORTH FIRST STREET
SAN JOSE, CA 95131

05/03/05 Y436761 10078247 $48.00

50-3-4

Notice of Confidentiality Rights: If you are a natural person, you may remove or strike any of the following information from this instrument before it is filed for record in the public records: your social security number or your driver's license number.

[Space Above This Line For Recording Data]

DEED OF TRUST
(Secondary Lien)

DEFINITIONS

Words used in multiple sections of this document are defined below and other words are defined in Sections 3, 9, 11, 16, 18 and 19. Certain rules regarding the usage of words used in this document are also provided in Section 14.

(A) **"Security Instrument"** means this document, which is dated April 28, 2005, together with all Riders to this document.

(B) **"Borrower"** is DAYSI R SANTOS and CARLOS SANTOS, WIFE AND HUSBAND

Borrower is the grantor under this Security Instrument.

(C) **"Lender"** is FIRST FRANKLIN A DIVISION OF NAT CITY BANK OF IN. Lender is a National Association organized and existing under the laws of United States of America. Lender's address is 2150 NORTH FIRST STREET, SAN JOSE, California 95131. Lender is the beneficiary under this Security Instrument.

(D) **"Trustee"** is Matthew Haddock

Trustee's address is 210 West 6th Street, Suite 1206, Fort Worth, TX 76102

(E) **"Note"** means the promissory note signed by Borrower and dated April 28, 2005. The Note states that Borrower owes Lender Twenty Four Thousand Three Hundred Ninety Eight and no/100 Dollars (U.S. $24,398.00) plus interest. Borrower has promised to pay this debt in regular Periodic Payments and to pay the debt in full not later than May 01, 2025.

(F) **"Property"** means the property that is described below under the heading "Transfer of Rights in the Property."

(G) "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.

(H) "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]:

[ ] Adjustable Rate Rider	[ ] Condominium Rider	[ ] Second Home Rider
[X] Balloon Rider	[X] Planned Unit Development Rider	[ ] Biweekly Payment Rider
[ ] Home Improvement Rider	[ ] Revocable Trust Rider	
[ ] Other(s) [specify]		

(I) "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.

(J) "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.

(K) "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.

(L) "Escrow Items" means those items that are described in Section 3.

(M) "Miscellaneous Proceeds" means any compensation, settlement, award of damages, or proceeds paid by any third party 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.

(N) "Mortgage Insurance" means insurance protecting Lender against the nonpayment of, or default on, the Loan.

(O) "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.

(P) "RESPA" means the Real Estate Settlement Procedures Act (12 U.S.C. §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.

(Q) "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

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 and conveys to Trustee, in trust, with power of sale, the following described property located in the COUNTY [Type of Recording Jurisdiction] of HARRIS [Name of Recording Jurisdiction]

LOT THIRTY (30), IN BLOCK ONE (1), OF DURHAM PARK SECTION ONE (1), A SUBDIVISION IN HARRIS COUNTY, TEXAS, ACCORDING TO THE MAP OR PLAT THEREOF RECORDED IN FILM CODE NO. 558200 OF THE MAP RECORDS OF HARRIS COUNTY, TEXAS.

which currently has the address of 8806 STONEFAIR LANE [Street]

HOUSTON [City], Texas 77075 [Zip Code] ("Property Address"):

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 COVENANTS that Borrower is lawfully seised of the estate hereby conveyed and has the right to grant and convey the Property and that the Property is unencumbered, except for encumbrances of record. Borrower 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.

Borrower and Lender covenant and agree as follows:

1. Payment of Principal, Interest, Escrow Items, and Late Charges. Borrower shall pay when due the principal of, and interest on, the debt evidenced by the Note and late charges if any, due under the Note. 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 13. Lender shall give a receipt to a person making a cash payment on the Loan.

2. Application of Payments. If principal and interest are amortized monthly, all payments that are received by Lender and made by Borrower in the full amount then due as set forth in the Note shall be applied: first, to interest due; second, to principal due; and last, to any late charges due under the Note. If Borrower pays any scheduled payment(s) in advance, Lender shall apply these amounts on the scheduled due dates as set forth in the Note. If interest accrues daily under the Note, all payments that are received by Lender and made by Borrower in the full amount then due shall be applied first to any interest (including but not limited to any accrued interest) due and second to principal due.

If Borrower is in default, Lender may apply any payments, proceeds or amounts received by Lender at such time and in any manner or in any order that Lender may determine in Lender's discretion, notwithstanding any other provisions of this Section 2.

Any property insurance proceeds received by Lender shall be applied in the manner set forth in Section 6. Any other proceeds of any award or claim for damages, payments for partial release of security, or any other amounts of any kind received by Lender shall be applied by Lender to the sums secured by this Security Instrument in any manner and in any order determined by Lender, whether or not then due, subject to Applicable Law.

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.** Funds for Escrow Items may be held by Lender. 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; and (c) premiums for any and all insurance required by Lender under Section 5. 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 amount 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 8. 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 8 and pay such amount and Borrower shall then be obligated under Section 8 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 13 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 twelve 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 twelve 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.

Funds for Taxes and Insurance will not be held by Lender.

Borrower shall pay yearly taxes, assessments, leasehold payments and ground rents, if any, and premiums for any and all insurance. 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 shall furnish to Lender receipts evidencing such payment within such time period as Lender may require. If Borrower fails to pay the amount due for an Escrow Item, Lender may exercise its rights under Section 8 and pay such amount and Borrower shall then be obligated under Section 8 to repay to Lender any such amount. Lender may revoke this waiver as to any or all Escrow Items at any time by a notice given in accordance with Section 13 and, upon such revocation, Borrower shall pay to Lender all Funds, and in such amounts, that are then required under this Section 3.

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. .

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, reasonable fees which are incurred to comply with federally mandated program required by a federal agency such as the Federal Emergency Management Agency.

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 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 be added to the unpaid balance of the Loan and interest shall accrue at the Note rate, from the time it is added to the unpaid balance until it is paid.

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 20 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.

INSURANCE NOTICE PURSUANT TO TEXAS FINANCE CODE. BORROWER IS NOTIFIED THAT:

(a) INSURANCE IS REQUIRED IN CONNECTION WITH THE LOAN;

(b) BORROWER AS AN OPTION MAY FURNISH THE REQUIRED INSURANCE COVERAGE THROUGH AN INSURANCE POLICY THAT IS IN EXISTENCE AND THAT IS OWNED OR CONTROLLED BY BORROWER OR AN INSURANCE POLICY OBTAINED FROM AN INSURANCE COMPANY AUTHORIZED TO DO BUSINESS IN TEXAS;

[Check if applicable]

[ ] (c) **REQUESTED OR REQUIRED INSURANCE IS SOLD OR OBTAINED BY LENDER AT A PREMIUM OR RATE OF CHARGE THAT IS NOT FIXED OR APPROVED BY THE TEXAS COMMISSIONER OF INSURANCE.**

6. 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.

7. 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.

8. 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 has or 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 8, 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 8.

Any amounts disbursed by Lender under this Section 8 shall become additional debt of Borrower secured by this Security Instrument if allowed under Applicable Law. 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.

9. Assignment of Miscellaneous Proceeds; Forfeiture. If the Property is damaged, 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 the 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 17, 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.

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.

10. 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.

11. 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 16, 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 18) and benefit the successors and assigns of Lender.

12. 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 as allowed under Applicable Law. 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.

13. 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.

14. Governing Law; Severability; Rules of Construction. This Security Instrument shall be governed by federal law and the laws of Texas. 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.

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

16. Transfer of the Property or a Beneficial Interest in Borrower. As used in this Section 16, "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 13 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.

17. 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 as allowed under Applicable Law; 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 16.

18. 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, and if required under Applicable Law, 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 13) 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 20 and the notice of acceleration given to Borrower pursuant to Section 16 shall be deemed to satisfy the notice and opportunity to take corrective action provisions of this Section 18.

19. Hazardous Substances. As used in this Section 19: (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 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.

20. Acceleration; Remedies. If the Property is used as Borrower's residence, Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument or breach of any covenant or agreement in any prior mortgage, deed of trust, security instrument, contract lien, or security agreement. If the Property is not Borrower's residence, then no notice is required. When notice is required, the notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 20 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 will result in acceleration of the sums secured by this Security Instrument and sale of the Property. 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 20, including, but not limited to court costs, attorneys' fees assessed by a court and other fees permitted by Applicable Law. For the purposes of this Section 20, the term "Lender" includes any holder of the Note who is entitled to receive payments under the Note.

If Lender invokes the power of sale, Lender or Trustee shall give notice of the time, place and terms of sale by posting and filing the notice at least 21 days prior to sale as provided by Applicable Law. Lender shall mail a copy of the notice to Borrower in the manner prescribed by Applicable Law. Sale shall be made at public vendue. The sale must begin at the time stated in the notice of sale or not later than three hours after that time and between the hours of 10 a.m. and 4 p.m. on the first Tuesday of the month. Borrower authorizes Trustee to sell the Property to the highest bidder for cash in one or more parcels and in any order Trustee determines. Lender or its designee may purchase the Property at any sale.

Trustee shall deliver to the purchaser Trustee's deed conveying indefeasible title to the Property with covenants of general warranty from Borrower. Borrower covenants and agrees to defend generally the purchaser's title to the

Property against all claims and demands. The recitals in the Trustee's deed shall be prima facie evidence of the truth of the statements made therein.

If the Property is sold pursuant to this Section 20, Borrower or any person holding possession of the Property through Borrower shall immediately surrender possession of the Property to the purchaser at that sale. If possession is not surrendered, Borrower or such person shall be a tenant at sufferance and may be removed by writ of possession or other court proceeding.

21. **Senior Liens.** Borrower shall perform all of Borrower's obligations under any deed of trust, security instrument or other security agreement, which has priority over this Security Instrument, including Borrower's covenants to make payments when due. Borrower agrees that should default be made in the payment of any note secured by an prior valid encumbrance against the Property, or in any of the covenants of any prior deed of trust or other security agreement, then the Note secured by this Security Instrument, at the option of Lender, shall at once become due and payable. Lender may, but shall not be obligated to, advance monies to protect Lender's lien position and add the amount of such advances to Borrower's loan amount.

22. **Release.** Upon payment of all sums secured by this Security Instrument, Lender shall provide a release of this Security Instrument to Borrower or Borrower's designated agent in accordance with Applicable Law. Borrower shall pay any recordation costs.

23. **Substitute Trustee; Trustee Liability.** All rights, remedies and duties of Trustee under this Security Instrument may be exercised or performed by one or more trustees acting alone or together. Lender, at its option and with or without cause, may from time to time, by power of attorney or otherwise, remove or substitute any trustee, add one or more trustees, or appoint a successor trustee to any Trustee without the necessity of any formality other than a designation by Lender in writing. Without any further act or conveyance of the Property the substitute, additional or successor trustee shall become vested with the title, rights, remedies, powers and duties conferred upon Trustee herein and by Applicable Law.

Trustee shall not be liable if acting upon any notice, request, consent, demand, statement or other document believed by Trustee to be correct. Trustee shall not be liable for any act or omission unless such act or omission is willful.

24. **Subrogation.** Any of the proceeds of the Note used to take up outstanding liens against all or any part of the Property have been advanced by Lender at Borrower's request and upon Borrower's representation that such amounts are due and are secured by valid liens against the Property. Lender shall be subrogated to any and all rights, superior titles, liens and equities owned or claimed by any owner or holder of any outstanding liens and debts, regardless of whether said liens or debts are acquired by Lender by assignment or are released by the holder thereof upon payment.

25. **Partial Invalidity.** In the event any portion of the sums intended to be secured by this Security Instrument cannot be lawfully secured hereby, payments in reduction of such sums shall be applied first to those portions not secured hereby.

26. **Receipt for Cash Payment.** Lender shall give a receipt to a person making a cash payment on the loan evidenced by the Note.

27. **Borrower Acknowledgments.** Borrower acknowledges the following:

(a) **No assignment of wages.** Borrower has not assigned wages as security for the Note.

(b) **No unauthorized fees.** Borrower has not paid any fee not disclosed in the HUD-1 or HUD-1A settlement statement.

(c) **No confession of judgment.** Borrower has not executed a confession of judgment or executed a power of attorney to Lender to act on Borrower's behalf.

28. **Purchase Money; Owelty of Partition; Assignment of Contractor's Lien; Renewal and Extension of Liens Against Homestead Property; Acknowledgment of Cash Advanced Against Non-Homestead Property. Check box as applicable:**

[X] **Purchase Money.**

The funds advanced to Borrower under the Note were used to pay all or part of the purchase price of the Property. The Note also is primarily secured by the vendor's lien retained in the deed of even date with this Security Instrument conveying the Property to Borrower, which vendor's lien has been assigned to Lender, this Security Instrument being additional security for such vendor's lien.

[ ] **Owelty of Partition.**

The Note represents funds advanced by Lender at the special instance and request of Borrower for the purpose of acquiring the entire fee simple title to the Property and the existence of an owelty of partition imposed against the entirety of the Property by a court order or by a written agreement of the parties to the partition to secure the payment of the Note is expressly acknowledged, confessed and granted.

[ ] **Assignment of Contractor's Lien.**

(a) **Assignment.** The funds advanced to Borrower under the Note are for the purpose of paying in whole or in part for the improvements to be made by Contractor as evidenced by the residential construction note and residential construction contract ("the Contract"). Contractor has endorsed the residential construction note paid to the order of Lender. Under the Contract,

Borrower granted to Contractor a lien on the Property. In consideration for Lender's Loan to Borrower, contractor hereby irrevocably assigns that lien and any other interest of Contractor in the Property to Lender. Borrower and Contractor agree that the lien and any other interest in the Property assigned to Lender by Contractor shall be for the sole benefit of Lender and shall be merged with this Security Instrument, and may be enforced by Lender in accordance with the terms of this Security Instrument.

(b) **Renewal and Extension.** The Note is in renewal and extension, but not in extinguishment, of the indebtedness under the residential construction note and the Contract between Borrower and Contractor and any other indebtedness described on the attached Renewal and Extension Exhibit which is incorporated by reference.

(c) **Disclosures.** Borrower and Contractor acknowledge the following:

(i) **Construction Contract Disclosure.** Before a Contract was executed, Contractor delivered to Borrower the disclosure statement required for a Texas residential construction contract by Section 53.255 (b) of the Texas Property Code as it may be amended from time to time ("Construction Contract Disclosure").

(ii) **List of Subcontractors and Materialmen.** Contractor attached to the Construction Contract Disclosure a written list that identifies by name, address and telephone number, each subcontractor and supplier Contractor intends to use in the work to be performed. If the list was not attached to the Construction Contract Disclosure provided by Contractor, it has since been provided to Borrower by Contractor.

(iii) **Advance Delivery of Loan Documents and Construction Contract Disclosure.** Lender delivered to Borrower all documentation relating to the loan (including the Construction Contract Disclosure) no later than (1) business day before the date of the closing.

(d) **Commencement Work; Completion of Improvements.** Borrower and Contractor agree that the Contract was executed prior to the commencement of any work or the delivery of any materials pursuant to the Contract. Borrower shall perform all of Borrower's obligations under the Contract.

In the event that the improvements are not completed, or are not completed according to the Contract, or all the labor and material used in construction are not provided by Contractor, then Lender shall have a valid lien for that amount of the Note, less an amount reasonably necessary to complete the improvements according to the Contract, or in such event Lender, at it option, shall have the right to complete the improvements, and the liens granted in this Security Instrument shall inure to benefit of Lender.

(e) **Acknowledgments Regarding the Contract.** If the Property is used as Borrower's residence, then the Contract was not executed by Borrower or Borrower's spouse, if any, before the 5th day after Borrower made written application for any extension of credit for the work and material, unless the work and material are necessary to complete immediate repairs to conditions on Borrower's residence that materially affect the health or safety of Borrower or person residing in the residence and Borrower acknowledges such in writing.

The Contract expressly provides that Borrower may rescind the Contract without penalty or charge within three (3) days after the execution of the Contract by all parties, unless the work and material are necessary to complete immediate repairs to conditions on the Property that materially affect the health or safety of Borrower or person residing in the residence and Borrower acknowledges such in writing.

The Contract was executed by Borrower and Borrower's spouse, if any, at the office of a third-party lender asking an extension of credit for the work and materials, an attorney at law, or a title company.

Renewal and Extension of Liens Against Homestead Property.

The Note is in renewal and extension, but not in extinguishment, of the indebtedness described on the attached Renewal and Extension Exhibit which is incorporated by reference. Lender is expressly subrogated to all rights, liens and remedies securing the original holder of a note evidencing Borrower's indebtedness and the original liens securing the indebtedness are renewed and extended to the date of maturity of the Note in renewal and extension of the indebtedness.

Acknowledgment of Cash Advanced Against Non-Homestead Property.

The Note represents funds advanced to Borrower on this day at Borrower's request and Borrower acknowledges receipt of such funds. Borrower states that Borrower does not now and does not intend ever to reside on, use in any manner, or claim the Property secured by this Security Instrument as a business or residential homestead. Borrower disclaims all homestead rights, interests and exemptions related to the Property.

29. Loan Not a Home Equity Loan. The Loan evidenced by the Note is not an extension of credit as defined by Section 50(a)(6) or Section 50(a)(7), Article XVI, of the Texas Constitution. If the Property is used as Borrower's residence, then Borrower agrees that Borrower will receive no cash from the Loan evidenced by the Note and that any advances not necessary to purchase the Property, extinguish an owelty lien, complete construction, or renew and extend a prior lien against the Property, will be used to reduce the balance evidenced by the Note or such Loan will be modified to evidence the correct Loan balance, at Lender's option. Borrower agrees to execute any documentation necessary to comply with this Section 29.

DO NOT SIGN IF THERE ARE BLANKS LEFT TO BE COMPLETED IN THIS DOCUMENT. YOU MUST RECEIVE A COPY OF THIS DOCUMENT AFTER YOU HAVE SIGNED IT.

IN WITNESS WHEREOF, Borrower, and Contractor, if any, have executed this Security Instrument and, if applicable, as assignment of contractor's lien.

BY SIGNING BELOW, Borrower accepts and agrees to the terms and covenants contained in pages 1 through 12 of this Security Instrument and in any Rider executed by Borrower and recorded with it.

Daysi R Santos (Seal)
DAYSI R. SANTOS -Borrower

Carlos Santos (Seal)
CARLOS SANTOS Non-Borrower

(Seal) -Borrower

(Seal) -Borrower

(Seal) -Borrower

(Seal) -Borrower

Witness:

Witness:

State of Texas
County of Tarrant

This instrument was acknowledged before me on April 29, 2005 (date) by DAYSI R. SANTOS, CARLOS SANTOS (person[s] acknowledging).

LINDA MARTINEZ
NOTARY PUBLIC
STATE OF TEXAS
My Commission Expires
APRIL 04, 2006

Notary Public

My commission expires:

EXHIBIT C

20070677284
11/13/2007 RP1 $20.00

FORECLOSURE SALE DEED

Deed of Trust Date: April 28, 2005

Grantor(s): CARLOS SANTOS and DEYSI R. SANTOS

Original Mortgagee: FIRST FRANKLIN A DIVISION OF NAT CITY BANK OF IN

Current Mortgagee: NATIONAL CITY BANK

Recording Information: CLERK'S FILE NUMBER Y436760

Property Legal Description: LOT THIRTY (30) IN BLOCK ONE (1) OF DURHAM PARK SECTION ONE (1) A SUBDIVISION IN HARRIS COUNTY, TEXAS, ACCORDING TO THE MAP OR PLAT THEREOF RECORDED IN FILM CODE NO. 558200 OF THE MAP RECORDS OF HARRIS COUNTY, TEXAS.

Date of Sale: 11/06/2007 **Time of Sale:** 12:45 P.M.

Place of Sale: "THE COURTHOUSE" OF HARRIS COUNTY, TEXAS IS EXPANDED TO INCLUDE CERTAIN INTERIOR OF THE FIRST FLOOR OF THE FAMILY LAW CENTER TOGETHER WITH CERTAIN COVERED AREA LOCATED OUTSIDE THE FAMILY LAW CENTER

Buyer: NATIONAL CITY BANK

Buyer's Mailing Address:
c/o HOME LOAN SERVICES, INC.
150 ALLEGHENY CENTER MALL, 23-532
PITTSBURGH, PA 15212

Amount of Sale: $104,745.76

By Deed of Trust, Grantor conveyed to MATTHEW HADDOCK, as Trustee, certain property for the purpose of securing and enforcing payment of the indebtedness and obligations therein described, including but not limited to the Note and all renewals and extensions of the note. J. LEVA, J. TWYMAN, S. DASIGENIS, R. BABCOCK, L. MACKIE, B. WOLF, M. ZIENTZ, OR C. NIENDORFF was appointed by an Appointment of Substitute Trustee executed by NATIONAL CITY BANK. NATIONAL CITY BANK, the current mortgagee of the Deed of Trust, requested J. LEVA, J. TWYMAN, S. DASIGENIS, R. BABCOCK, L. MACKIE, B. WOLF, M. ZIENTZ, OR C. NIENDORFF, as Substitute Trustee, to enforce the trust of the Deed of Trust.

Pursuant to the requirements of the Deed of Trust and the laws of the state of Texas, written notice of the time, place, date, and terms of the public foreclosure sale of the Property was posted at the courthouse of HARRIS County, Texas, the county in which the Property is situated, and a copy of the notice was also filed with the county clerk of HARRIS County, Texas, each notice having been posted and filed for at least twenty-one days preceding the date of the foreclosure sale. Written notice of the time, date, place, and terms of the foreclosure sale was served on behalf of the current Mortgagee by certified mail on each debtor who, according to the records of the current Mortgagee, is obligated to pay any of the indebtedness and obligations. The certified-mail notices were timely sent by depositing the notices in the United States mail, postage prepaid in proper amount, and addressed to each debtor at the debtor's last known address as shown by the records of the current Mortgagee at least twenty-one days preceding the date of the foreclosure. Written notice of default and of the opportunity to cure the default to avoid acceleration of the maturity of the note was served on behalf of the current Mortgagee by certified mail on each debtor who, according to the records of the current Mortgagee, is obligated to pay any of the indebtedness and obligations. The certified-mail notices were timely sent by depositing the notices in the United States mail, postage prepaid in proper amount, and addressed to each debtor at the debtor's last known address as shown by the records of the current Mortgagee at least thirty days preceding the date of the acceleration of the maturity of the note and the posting of the mortgaged Property for foreclosure.

In consideration of the premises and of the bid and payment of the amount of $104,745.76, the highest bid by Buyer, I, as Substitute Trustee, by virtue of the authority conferred on me in the Deed of Trust, have GRANTED, SOLD, and CONVEYED all of the Property to Buyer and Buyer's heirs and assigns, to have and to hold the Property, together with the rights, privileges, and appurtenances thereto belonging unto Buyer and Buyer's heirs and assigns forever. I, as the Substitute Trustee, do hereby bind Grantor and Grantor's heirs and assigns to WARRANT and FOREVER DEFEND the Property to Buyer and Buyer's heirs and assigns forever, against the claim or claims of all persons claiming the same or any part thereof.

Executed on 12th day of November, 2007.

J. LEVA, ~~J. TWYMAN, S. DASIGENIS, R. BABCOCK, L. MACKIE, B. WOLF, M. ZIENTZ, OR C. NIENDORFF~~

STATE OF TEXAS §
COUNTY OF Fort Bend §

BEFORE ME, the undersigned authority, on this day personally appeared J. LEVA, ~~J. TWYMAN, S. DASIGENIS, R. BABCOCK, L. MACKIE, B. WOLF, M. ZIENTZ, OR C. NIENDORFF,~~ as Substitute Trustee, known to me to be the person whose name is subscribed to the foregoing instrument, and who acknowledged to me that he/she executed the same for the purposes and consideration therein expressed and in the capacity therein stated.

Given under my hand and seal of office this 12th day of Nov., 2007.

Notary Public, State of Texas

1044479217/07-001598-710
AFTER RECORDATION RETURN TO:
MACKIE WOLF & ZIENTZ, P.C.
Pacific Center I, Suite 660
14180 North Dallas Parkway
Dallas, TX 75254

SANDRA L. DASIGENIS
NOTARY PUBLIC
STATE OF TEXAS
COMM. EXPIRES 08-27-2009

AFFIDAVIT

STATE OF TEXAS §
§
COUNTY OF DALLAS §

BEFORE ME, the undersigned on this day personally appeared and after being duly sworn, deposed and states under oath, as follows:

1. I am over the age of eighteen (18), have not been convicted of a crime of moral turpitude and have personal knowledge of the facts contained in this affidavit.

2. All notices required pursuant to the terms of the Deed of Trust and Texas Property Code Section 51.002(b) and (d) were provided to the debtors.

3. In accordance with Texas Property Code Section 51.002, the Notice of Sale was posted at least twenty-one (21) days prior to the date of sale at the proper location designated by the County Commissioner's Court. Additionally, a copy of the Notice of Sale was filed at least twenty-one (21) days prior to the date of sale in the office of the County Clerk of the county in which the sale occurred.

4. At the time of the Foreclosure Sale and three (3) months prior to sale, the debtors were alive, were not in the armed services of the United States of America, had not filed any bankruptcy proceedings and were not involved in any divorce proceedings where a receiver had been appointed.

Michael W Zientz

STATE OF TEXAS §
§
COUNTY OF DALLAS §

SUBSCRIBED AND SWORN TO before me on November 7, 2007

Notary Public, State of Texas

CARL A. NIENDORFF IV
Notary Public
State of Texas
Comm. Expires 12-29-2010

RECORDER'S MEMORANDUM:
At the time of recordation, this instrument was found to be inadequate for the best photographic reproduction because of illegibility, carbon or photo copy, discolored paper, etc. All blockouts additions and changes were present at the time the instrument was filed and recorded.

ANY PROVISION HEREIN WHICH RESTRICTS THE SALE, RENTAL, OR USE OF THE DESCRIBED REAL PROPERTY BECAUSE OF COLOR OR RACE IS INVALID AND UNENFORCEABLE UNDER FEDERAL LAW.
THE STATE OF TEXAS
COUNTY OF HARRIS
I hereby certify that this instrument was FILED in File Number Sequence on the date and at the time stamped hereon by me; and was duly RECORDED, in the Official Public Records of Real Property of Harris County, Texas on

NOV 13 2007

COUNTY CLERK
HARRIS COUNTY, TEXAS

FILED
2007 NOV 13 AM 8:36
COUNTY CLERK
HARRIS COUNTY, TEXAS

RP-2007-1095

Tab F Documents relating to Yellowfin

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Case Category

Case Type

Case Status

Case Filed Date

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YELLOWFIN LOAN SERVICING CORP vs. ERICA SIMON

DC-20-08275

Location	Case Type	Parties	Attorneys	Judge	Case Filed Date
Dallas County - District Court	Debt/Contract - Cons…	YELLOWFIN LOAN SERVICING CORP, ERICA SIMON	CAROLYN J NOACK, JON C GALLINI	PURDY, MONICA	6/16/2020

YELLOWFIN LOAN SERVICING CORP., vs ASUNCION ROSAS

1156072

Location	Case Type	Parties	Attorneys	Judge	Case Filed Date
Harris County - County Clerk	Debt/Contract - Cons…	YELLOWFIN LOAN SERVICING CORP.,, ASUNCION ROSAS	CAROLYN JEAN BENNETT	Williams, LaShawn A.	6/22/2020

Yellowfin Loan Servicing vs. Monica Grey

CV40974

Location	Case Type	Parties	Attorneys	Judge	Case Filed Date
Falls County - 82nd District Court	Other Civil	Yellowfin Loan Servicing, Monica Grey	Renné Fuganti		

YELLOWFIN LOAN SERVICING CORP. vs. DAVID DIGGLES

DC-20-08260

Location	Case Type	Parties	Attorneys	Judge	Case Filed Date
Dallas County - District Court	Debt/Contract - Cons…	YELLOWFIN LOAN SERVICING CORP.,	CAROLYN J NOACK	TOBOLOWSKY, EMILY	6/15/2020

Help

Department of State: Division of Corporations

Allowable Characters

HOME

Entity Details

THIS IS NOT A STATEMENT OF GOOD STANDING

File Number:	6964280	Incorporation Date / Formation Date:	7/6/2018 (mm/dd/yyyy)
Entity Name:	YELLOWFIN LOAN SERVICING CORPORATION		
Entity Kind:	Corporation	Entity Type:	General
Residency:	Domestic	State:	DELAWARE

REGISTERED AGENT INFORMATION

Name:	CORPORATION SERVICE COMPANY		
Address:	251 LITTLE FALLS DRIVE		
City:	WILMINGTON	County:	New Castle
State:	DE	Postal Code:	19808
Phone:	302-636-5401		

Additional Information is available for a fee. You can retrieve Status for a fee of $10.00 or more detailed information including current franchise tax assessment, current filing history and more for a fee of $20.00.

Would you like ○ Status ○ Status,Tax & History Information

Submit

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Tab G Briefs in the Court of Appeals for the Fourteenth Judicial District of Texas at Houston

ACCEPTED
14-21-00151-CV
FOURTEENTH COURT OF APPEALS
HOUSTON, TEXAS
8/17/2021 3:11 PM
CHRISTOPHER PRINE
CLERK

NO. 14-21-00151-CV

In the Court of Appeals
for the Fourteenth Judicial District of Texas
at Houston

Deysi R. Santos,
Appellant

v.

Yellowfin Loan Servicing Corp.,
As Successor in Interest to First Franklin,
Appellee

Appeal from 295th Judicial District
Harris County, Texas
Hon. Donna Roth

APPELLANT'S BRIEF

Ira D. Joffe
Law Office of Ira D. Joffe
Counsel for Appellant
6750 W. Loop S., Suite 920
Bellaire, TX 77401
(713) 661-9898
(888) 335-1060 Fax
ira.joffe@gmail.com

ORAL ARGUMENT REQUESTED

IDENTITY OF PARTIES AND COUNSEL

DEFENDANT/ APPELLANT

Deysi R. Santos

APPELLANT'S TRIAL AND APPELLATE COUNSEL

Ira D. Joffe
Ira D. Joffe, Attorney at Law
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Bellaire, TX 77401
(713) 661-9898
(888) 335-1060 Fax
ira.joffe@gmail.com

PLAINTIFF / APPELLEE

Yellowfin Loan Servicing Corp.,
as Successor in Interest to First Franklin Mortgage Company

APPELLEE'S TRIAL AND APPELLATE COUNSEL

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mweems@hwa.com

Carolyn J. Noack
Noack Law Firm, PLLC
(Limited to filing Plaintiff's Original Petition)
24165 IH-10 West, Suite 217-418
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STATEMENT OF THE CASE

This is Yellowfin's June 12, 2020, attempt [CR1.4][1] to enforce the second loan in the 80/20 financing arrangement for Ms. Santos' 2005 homestead purchase after the first loan was foreclosed on November 6, 2007. CR1.80. She filed a counterclaim on July 23, 2020. CR.4.

Final Summary Judgment was entered in favor of Yellowfin on December 22, 2020. CR1.269-270. Both Ms. Santos' Plea To The Jurisdiction and her Motion For New Trial were denied on March 18, 2021. CR.249; 250.

STATEMENT REGARDING ORAL ARGUMENT

Ms. Santos requests oral argument be heard in this case as it will assist in the decisional process. This is important because Yellowfin has filed on the order of one hundred fifty cases throughout the state that are similarly defective and abusive. They are improperly using the judicial system to disrupt people's lives more than a decade after the borrowers lost their homes and had their credit destroyed and had to restart their futures.

ISSUES PRESENTED

1. Did any court have jurisdiction to hear Yellowfin's claim where Yellowfin

[1]The Clerk's Record is designated as "CR," the First Supplemental Record "CR1," and the Reporter's Record "RR."

could not prove it was the owner of the non-negotiable instrument it wanted to enforce?

2. Was there just a single transaction between First Franklin as the lender and Ms. Santos as the borrower when both simultaneous loans between the parties were contractually included in the one loan agreement to finance just one house?

3. Is the two-year limitations period in TEX. PROP. CODE §51.003 for collecting a mortgage deficiency applicable to the Note when there was only one lender who financed the purchase of the property and the foreclosure of the related First Loan by that lender voided the lender's lien for the Note, leaving it with only an unsecured deficiency claim?

4. Is the four-year limitations period for debt in TEX. CIV. PRAC. & REM. CODE §16.004 applicable to the Note when the lender's cause of action contractually accrued no later than the date of foreclosure of the linked First Loan in 2007?

5. Was the summary judgment below void because it failed to meet the standards in TEX. R. CIV. P. 166a and failed to follow relevant precedent?

6. Where there are no servicing records for a 2005 loan, does a 2019 guess by a the alleged fourth owner of the loan since a 2007 foreclosure, meet the summary judgment standard in TEX. R. CIV. P. 166a to establish the amount that might be owed by the original borrower?

7. Was the Note still an obligation "secured by a real property lien" when it was acquired by a buyer of defaulted debt more than twelve years after the lien against the property was voided by foreclosure of the First Loan?

8. Does public policy require the owner of a defaulted loan to sue before twelve years after its claim contractually accrued?

9. Is the right to sue on a debt waived if no action is taken on it for more than twelve years after the right contractually accrued?

STATEMENT OF FACTS

Ms. Santos purchased her homestead on April 28, 2005. She financed it through First Franklin, A Division Of National City Bank of Indiana, N.A. ("First Franklin") the only lender, with two simultaneous loans made on that same day in what is commonly referred to as an 80/20 transaction. The primary "First Loan" was in the amount of $97,592.00. CR1.211. The smaller secondary "Note," the subject of the case, in the amount of $24,398.00 at 11.25 percent interest, is captioned "NOTE AND SECURITY AGREEMENT." CR1.49. It includes a BALLOON NOTE ADDENDUM TO NOTE AND SECURITY AGREEMENT - FIRST FRANKLIN (emphasis in the original).[2] CR1.56. It is subordinate to the First Loan.

[2]All capitalizations below, including those in bold print, are shown as they were emphasized in the original loan documents.

The Note's monthly payments of $236.97 were based on a thirty year (360 month) amortization, the same time period as the First Loan, but Paragraph 3 called for a balloon payment of all the remaining principal due in twenty years (240 months) on May 1, 2025. CR1.49.

The Loan Amortization Schedule that Yellowfin relied on said the principal payment in Month 240 would be $17,263.03. CR1.106. That is seventy-one (71%) percent of the original amount borrowed (17,263.03 / 24,398.00 = .707) that would still be due even after making twenty years of payments at 11.25% interest.

Each loan was secured by its own Deed of Trust. The one for the First Loan was recorded in the Harris County property records on May 3, 2005, beginning at RP 004-93-1952. CR1.233. The one for the Note, was recorded the same day as the very next instrument, beginning at RP 004-93-1971. CR1.60.

Ms. Santos became delinquent on the First Loan and it was foreclosed on November 6, 2007. CR1.80.

The sale price of $104,745.76 received at the foreclosure was not enough to pay off both the First Loan and the Note. CR1.80. There are no records showing how the proceeds were applied to either loan.

After the foreclosure First Franklin had the right to sue for any unsecured amounts it was still owed on the First Loan and on the Note but it did not. Neither did

any other entity until Yellowfin filed the Plaintiff's Original Petition on June 12, 2020, [CR1.4] suing on the Note more than twelve years after the November 6, 2007 foreclosure. CR1.80.

Yellowfin's documents claim that ownership of the Note was allegedly transferred to it from First Franklin in a series of undated documents. The first was an undated indorsement stamped on an untitled piece of paper from First Franklin to First Franklin Financial Corporation ("FFFC") without recourse. CR1.53. The next indorsement, on the same untitled page, was from FFFC to Dreambuilder Investments, LLC. ("Dreambuilder"). *Id*. It was also undated and also without recourse.

The next two undated indorsements, also without recourse, were on identical pages each labeled "Allonge to the Note." The first was from Dreambuilder, allegedly acting through RCS Recovery Service, LLC, ("RCS") as its attorney-in-fact, making a transfer from Dreambuilder, without recourse, to itself, RCS. CR1.54.

There is no document in the record showing Dreambuilder's appointment of RCS as its attorney-in-fact.

That was followed by an identical undated document showing an indorsement from RCS to Yellowfin Loan Servicing Corporation also without recourse. CR1.55.

There is no evidence that Dreambuilder and RCS are the same entity.

However, each Allonge to the Note document used the identical Loan Number ending in 793 and Previous Loan Number ending in 368. CR1.197,198.

The Note is captioned is "NOTE AND SECURITY AGREEMENT." Emphasis in the original. CR1.49 The identical "Allonge to the Note" documents do not use that term. They each say they "endorse and assign the within Note and Deed of Trust/Mortgage securing the same, so far as the same pertains to said Note." CR1.54;56.

The only date in the chain of title documents is August 29, 2019, that is on both the Mortgage Note Purchase and Sale Agreement [CR1.86] and on the Bill of Sale. CR1.90.

The Bill of Sale was supported by a list of the loans allegedly included in the pool of roughly two hundred (200) redacted loans that it represented. CR1.91-97. The only financial data was in a column labeled "Original Loan Amount."

The only dollar amount on the line for Ms. Santos' Note is "Original Loan Amount $24,398.00." CR1.91.

There is no evidence from any previous alleged owner of the Note before Yellowfin to support the $21,023.13 claimed in Paragraphs 12 and 13 of the Plaintiff's Original Petition. CR1.5. Neither is there any evidence that any entity, including First Franklin, ever claimed actual knowledge of the exact amount owed

on the Note on or after the November 6, 2007, foreclosure, or made a representation to the next entity in the chain of even the approximate amount that was allegedly owed at the time of transfer. There is no representation by any entity in the chain, except for Yellowfin, of the exact amount allegedly owed after the foreclosure.

A contractual definition on Page 2 of the Deed of Trust provided that the loan servicer was required to follow the federal loan servicing regulations even if they would not otherwise apply.

> **(P) "RESPA"** means the Real Estate Settlement Procedures Act (12 U.S.C. §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. Emphasis in the original. CR1.61.

"**SECTION 5. Transfer of Servicing**" (emphasis in the original) in the Mortgage Note Purchase and Sale Agreement included that "Buyer [Yellowfin] shall assume all servicing responsibilities related to the Mortgage Notes." CR1.87.

There is no evidence of any monthly statements being sent to Ms. Santos since the November 6, 2007, foreclosure.

The Matthew Miller Affidavit in support of Yellowfin's motion for summary judgment refers to no other entity's records of how the loan was serviced since its

inception in 2005. CR1.40-41.

The amount of Yellowfin's claim in the case is based on a guess. Mr. Miller's testimony that Yellowfin relies on includes "4. According to Plaintiff's records, Defendant owes a balance of $21,023.13. Plaintiff is not accruing pre-judgment interest. The balance owed was calculated by conducting an amortization of the original principal amount of the Note in accordance with the terms prescribed by the Note ... then assuming that each and every payment was timely made through June 1, 2019." CR1.40.

There is no evidence that Yellowfin based its demand on monthly mortgage statements after the foreclosure or on an original amortization schedule made by First Franklin or from any entity that actually serviced the loan represented by the Note.

The footer on all five pages of the December 3, 2019, amortization schedule Yellowfin used as Exhibit H in support of its motion for summary judgment says "Powered by The Mortgage Office™." CR1.102-106. That date was more than three months after Yellowfin allegedly acquired its interest in the Note on August 29, 2019, [CR1.86-90] and approaching twelve years after the November 6, 2007, foreclosure. CR1.80.

The Mortgage Office entity is not further identified. It is neither a party to the case nor a witness. There is no evidence that it reviewed any actual servicing records

of the Note.

The first attempted contact between Yellowfin and Ms. Santos was the January 14, 2020, Notice Under Fair Debt Collection Practices Act letter saying "the amount of the debt as of 08/29/2019 is $21,640.59." CR.225. That conflicts with lines 171 and 172 on the amortization schedule that say the Principal Balance amounts due on 8/1/2019 and 9/1/2019 were $20,943.00 and $20,902.37 respectively. CR1.105. It was an overstatement of the amount owed according to Yellowfin's records.

Though printed on Yellowfin stationery, with a Tampa, Florida return address, Yellowfin's records, marked Yellowfin 071-073, showed that it was actually generated[3] and mailed by Hatteras, Inc. in Dearborn, Michigan. It is stamped "PROOF" at top and bottom. CR1.225-227.

It was followed by the February 26, 2020, Notice of Intent to Accelerate letter saying "[t]he new post waiver principal balance, as of 7/1/2019 is $21,023.13." It was also on Yellowfin stationery and generated by Hatteras. CR1.228-230.

That amount conflicts with line 170 in the amortization schedule that shows the Principal Balance on 7/1/2019 is $20,983.25. CR1.105. It was another overstatement

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[3]On April 21, 2021, the United States Court of Appeals for the Eleventh Circuit ruled that the disclosure of information of indebtedness to such a vendor is a violation of 15 U.S.C. §1692c(b) in the Fair Debt Collection Practices Act. *Hunstein v. Preferred Collection and Management Services, Inc.,* No. 19-14434. An *en banc* review is pending.

of the amount according to Yellowfin's records.

The last attempted presuit contact was the March 25, 2020, Re: Notice of Acceleration letter. For a third time it was also generated on Yellowfin stationery and also certified as mailed by Hatteras. CR1.231-232. The second paragraph included that "Yellowfin expressly reserves its rights and remedies under the NOTE AND SECURITY AGREEMENT (emphasis in the original) and at law." CR1.231.

All three of these notice letters were addressed to Ms. Santos at the property address on Stonefair Lane, where she had not lived since the 2007 foreclosure. CR1.163. She did not receive them and had no notice she was going to be sued for not responding.

There is no record from Hatteras showing if they were returned to sender.

Ms. Santos' first knowledge of the suit came when she was served at her home on Rhinebeck Drive, where she had lived since 2016. CR1.4,¶2; 21-22.

Paragraph 15 said "[d]ue to the Defendant's default, Plaintiff has retained counsel to enforce the contract" and sought attorney fees. It included a claim under TEX. CIV. PRAC. & REM. CODE §38.001 because "[n]otice of the claim was timely presented to" Ms. Santos. CR1.6.

There was no litigation by anyone to try to collect on the Note for the more the twelve and a half years between the November 6, 2007, foreclosure [CR1.80] and

June 12, 2020, when Yellowfin filed its petition. CR1.4.

SUMMARY OF THE ARGUMENT

Yellowfin never had standing because the Note is not a negotiable instrument and there is no evidence of a proper assignment of a non-negotiable instrument.

Yellowfin claims that in 2019 it became the fifth entity to own the Note that First Franklin originated in 2005, the fourth since First Franklin foreclosed in 2007. It did not loan any money to Ms. Santos. Its rights are derivative of First Franklin's. Any successor in interest to the original lender has only the rights in the loan that the original lender had.

The alleged debt is a deficiency balance subject to the two year statute of limitations in TEX. PROP. CODE §51.003 that began running on November 6, 2007.

Since any possible limitations period expired for First Franklin no later than 2013, six years after its cause of action arose, it could not have sued Ms. Santos in 2020. Neither could Yellowfin, even if it were a valid assignee.

Nothing in the record shows why public policy upholding the purpose of statutes of limitation should be ignored.

The summary judgment is defective as a matter of law because the trial court did not give Ms. Santos any of the inferences she was entitled to under TEX. R. CIV. P. 166a and relevant precedent.

Even if limitations and waiver did not matter, Yellowfin's claim is not based on the servicing records for the Note. It has absolutely no evidence of the amount allegedly owed. Its unsubstantiated guess does not meet the evidentiary requirement for summary judgment in TEX. R. CIV. P. 166a.

A successor to the original lender cannot wait until 2020 to enforce the right to sue on a debt that contractually accrued in 2007 any more than the original lender could have. Even if the right were technically still available in 2020 it had been consciously waived by five different entities since it accrued in 2007. Waiver can be implied by a long period of inaction.

Yellowfin is not entitled to attorney fees under TEX. CIV. PRAC. & REM. CODE §38.001because it sent the presuit demand to where it knew Ms. Santos had not lived for more than twelve years.

ARGUMENT

I. Assignees Do Not Have More Rights than the Original Lender Had and They Are Subject to All the Defenses the Borrower Has Against the Original Lender

This is a simple statute of limitations case that the debt collector's original counsel in San Antonio, a collection mill running a volume practice, should have known not to file in the first place. The proof is in the Plaintiff's self-chosen name and derivative status of "Yellowfin Loan Servicing Corp., As Successor in Interest

to First Franklin." CR1.4. Yellowfin never loaned Ms. Santos any money. It has filed roughly one hundred fifty similar cases in Texas as successor to various original lenders for similarly ancient second loans that were left unsatisfied after the foreclosure of the related first loans.

Yellowfin's Houston trial counsel told the court "Deysi Santos signed two notes. This was one of the 80/20 loan arrangements that existed in the bad old days before the mortgage crisis. The note we are here on today is the 20 percent portion of that 80/20 finance." RR.5:4-8.

He also acknowledged the loan was not in her favor. "Yes, absolutely, it is heavily, heavily, heavily weighted in favor of interest. The first payment is $8.24 of principal, $228.73 in interest. It is not a good loan. It's not a loan I would advise anybody to take." RR.12:4-7.

Only First Franklin and Ms. Santos were involved in the original loan transaction in 2005. CR1.49-52. Yellowfin was not. *Id*. Further, it had no direct connection to First Franklin; it was a complete stranger to the 2005 transaction. It never loaned Ms. Santos any money. It did not enter the picture until the August 29, 2019 Mortgage Note Purchase and Sale Agreement [CR1.86-89] and Bill of Sale [CR1.90] at the end of a chain of alleged and disputed transfers of ownership of the Note. CR1.53-55. That was almost twelve years after the November 6, 2007,

foreclosure of the inextricably related First Loan. CR1.80.

When First Franklin's rights in the Note ran out, so did Yellowfin's. "When a claim is assigned, the assignee "steps into the shoes of the assignor and is considered under the law to have suffered the same injury as the assignor [] and have the same ability to pursue the claims." Sw. Bell Tel. Co. v. Mktg. on Hold Inc., 308 S.W.3d 909, 916 (Tex.2010)." *In Re Travelers Property Cas. Co. Of Am.*, 485 S.W.3d 921, 927 (Tex. App. - Dallas 2016, orig. proceeding)("*Travelers*"). That means the right to sue under the defaulted Note dates back to no later First Franklin's rights in 2007.

"An assignee "takes the assigned rights subject to all defenses which the opposing party might be able to assert against his assignor." Burns v. Bishop, 48 S.W.3d 459, 466 (Tex. App.-Houston [14th Dist.] 2001, no pet.). Therefore, a claim otherwise barred by the applicable statute of limitations cannot be made viable by assignment." *Uddin v. Cunningham*, No. 01-18-00002-CV (Tex. App. - Houston [1st Dist.] August 29, 2019, mem. op. on rehearing)("*Uddin*").

Ms. Santos disputes Yellowfin's standing, as set out below. However, as a matter of law, even if it had standing for the assigned claim, Yellowfin, at best, had only the same rights that First Franklin had to convey, not more.

Yellowfin cannot meet the burden to prove First Franklin could have sued in 2020. If First Franklin could not have sued under the Note contract in June 2020 then

Yellowfin could not have sued under it in June 2020. As shown below, First Franklin could not have sued in June 2020, and the trial court had no jurisdiction for the case.

The inescapable conclusion is that the trial court lacked jurisdiction to hear Yellowfin's defective and expired claim as a matter of law. The summary judgment in favor of Yellowfin in the court below should be reversed and judgment rendered in Ms. Santos' favor that Yellowfin has no enforceable claim against her from her dealings with First Franklin. She should be allowed to pursue her counterclaim.

II. Standard of Review

A. Summary Judgment

This Court reviews "a trial court's summary judgment de novo." *Lujan v. Navistar, Inc.* 555 S.W.3d 79, 84 (Tex. 2018). "When reviewing a summary judgment, we take as true all evidence favorable to the nonmovant, and we indulge every reasonable inference and resolve any doubts in the nonmovant's favor." *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005)("*Valence*").

As shown below, the trial court failed to do that for Ms. Santos, the nonmovant in this case. In and of itself that is enough to reverse the summary judgment below.

B. Mistake of Law

"A trial court has no discretion in determining what the law is or in applying

the law to the facts. Id. at 840.[4] Thus, a clear failure by the trial court to analyze or apply the law correctly will constitute an abuse of discretion. In re Allstate Cty. Mut. Ins. Co., 85 S.W.3d 193, 195 (Tex. 2002) (orig. proceeding).*" In Re Baileys, Relator*, No. 01-16-00830 (Tex. App - Houston [1st Dist.] November 9, 2017).

The district court's failure to recognize that Yellowfin's rights were no more than First Franklin's was a mistake of law and therefore an abuse of discretion.

The trial court abused its discretion again when it granted summary judgment based on evidence that did not meet the standard in TEX. R. CIV. P. 166a(c).

The trial court further abused its discretion in denying Ms. Santos's Plea To The Jurisdiction [CR.249] and granting summary judgment to Yellowfin [CR1.269-270] where there was no proof that it had standing, as shown below.

The fact that any assignee's rights in the Note depended on First Franklin's rights was a constant all the way down the line each time the Note allegedly changed hands. Even presuming, arguendo, that all the links in the entire fourteen-year chain that began with the Note's 2005 origination by First Franklin [CR1.49], and continued through the undated indorsements, all without recourse, to defaulted debt buyers FFFC and Dreambuilder [CR1.53], and RCS [CR1.54] and ending on August 29, 2019, with the one to Yellowfin, [CR1.55] were valid, Yellowfin still only had

[4]Referring to *Walker v. Packer*, 827 S.W.2d 833 (Tex. 1992)(orig. proceeding).

the rights that First Franklin had to convey. *In Re Travelers Property Cas. Co. Of Am.*, 485 S.W.3d 921, 927 (Tex. App. - Dallas 2016, orig. proceeding) ("*Travelers*").

No alleged sale of the Note as a link in that disputed chain could have put Ms. Santos in a contractually worse position than she was in with the original lender First Franklin in 2007.

It is instructive that the August 29, 2019, date of the alleged transfer to Yellowfin, was on the very same day that the First Court of Appeals issued the memorandum opinion in *Uddin* presaging that their claim here is not valid.

III. Yellowfin Had No Standing and the Trial Court Had No Jurisdiction

The Court has a duty to confirm both its own jurisdiction and the trial court's. ""Subject matter jurisdiction is essential to the authority of a court to decide a case," and "[s]tanding is implicit in the concept of subject matter jurisdiction." Tex. Ass'n of Bus. v. Tex. Air Control Bd., 852 S.W.2d 440, 443 (Tex.1993). "An opinion issued in a case brought by a party without standing is advisory because rather than remedying an actual or imminent harm, the judgment addresses only a hypothetical injury." Id. at 444. We "have no jurisdiction to render such opinions." Id. Courts cannot presume or create standing and jurisdiction, even for equitable reasons." *State v. Naylor*, 466 S.W.3d 783, 796 (Tex. 2015).

As was set out in the Defendant's First Amended Plea To The Jurisdiction, that

the trial court denied on March 18, 2021 [CR.249], Ms. Santos contended that Yellowfin did not have standing at the time the case was filed.""Standing must exist at the time a plaintiff files suit. *Martin v. Clinical Pathology Lab., Inc*., 343 S.W.3d 885, 888 (Tex. App.-Dallas 2011, pet. denied); *In re Vogel*, 261 S.W.3d 917, 921 (Tex. App.-Houston [14th Dist.] 2008, orig. proceeding). If the plaintiff lacks standing at the time suit is filed, the case must be dismissed even if the plaintiff later acquires an interest sufficient to support standing." *Rutherford v. 6353 Joint Venture*, No.,14-16-00053-CV, Tex. App. - Houston [14th Dist.] July 25, 2017." CR.189.

A. The Note Was Not a Negotiable Instrument and Yellowfin Had No Right to Enforce it

Yellowfin was a complete stranger to the Note between Ms. Santos and First Franklin. CR1.49-52. It allegedly acquired its interest in the Note, and standing to enforce it, via a chain of indorsements on allonges related to the Note. CR1.53-55. That method of transfer depends on the Note being a negotiable instrument as defined in TEX. BUS. & COM. CODE §§3.104 and 3.106. It is not. It is decidedly a non-negotiable instrument.

The complete transaction between First Franklin and Ms. Santos involved at least the two promissory notes, a disclosure statement, the two deeds of trust and the **BALLOON RIDER TO MORTGAGE, DEED OF TRUST OR SECURITY**

DEED, FIRST FRANKLIN. CR.1.74. The various documents were intentionally generated and interlinked by First Franklin. The Note's very name **"NOTE AND SECURITY AGREEMENT**" instead of just "Promissory Note" and its internal references made the linkage to the First Loan and all the other loan agreement documents clear and unavoidable. Emphasis in the original. CR1.49.

Paragraph 21 in the **DEED OF TRUST (Secondary Lien)**(emphasis in the original)[CR1.60], the security instrument for the Note, specifically made a default on the related First Loan, which had priority over the Note, a default that gave First Franklin the right to call the Note due in its entirety. It could have done that even if the payments on the Note were current. It could have even done it if the Note were paid ahead.

> "**21. Senior Liens.** Borrower shall perform all of Borrower's obligations under any deed of trust, security instrument or other security agreement, which has priority over this Security Instrument, including Borrower's covenants to make payments when due. Borrower agrees that should default be made in the payment of any note secured by an (sic) prior valid encumbrance against the Property, or in any of the covenants of any prior deed of trust or other security agreement, then the Note secured by this Security Instrument, at the option of Lender, shall at once become due and payable..." Emphasis in the original. CR1.69.

The Note itself reinforced the linkage by referring to multiple other documents. Paragraph "**11. DEFAULT AND REMEDIES**" says the borrower will be in default if "(b) you fail to keep any of your agreements under this Note or under any other

agreement with us" ... " or (g) you are in default on any obligation that is secured by a lien on the Property. If you are in default, in addition to any other rights and remedies we have under law and subject to any right you may have to cure your default, we many do any of the following: (aa) accelerate the entire balance owing under this Note after any demand or notice which is required by law, which entire balance will be immediately due and payable." Emphasis in the original. CR1.50.

Those conditions were precisely met, and First Franklin's right to sue contractually accrued, and it could have sued in 2007, because the First Loan was a prior lien secured by the property. It was another agreement with First Franklin, and the foreclosure meant that Ms. Santos was in default in another obligation secured by the property.

The name of Paragraph "**13. ADDITIONAL AGREEMENTS**" (emphasis in the original) is an additional clear indication that the Note is more than just "an unconditional promise or order to pay a fixed amount of money" contemplated by TEX. BUS. & COM. CODE §3.104. It includes "(z) we are authorized to sign on your behalf any document required to enforce our interests under this Note." CR1.50.

All the words in Paragraph "**15. SIGNATURES**" are printed in capital letters. CR1.52. It makes very clear there are conditions both in the Note and in another document. It begins with "YOU HAVE READ AND AGREE TO ALL PROVISIONS

OF THIS NOTE INCLUDING THOSE ON PAGES 1 THROUGH 3 AND IN THE DISCLOSURE STATEMENT WHICH ARE INCORPORATED HERE BY REFERENCE." It ends in bold print saying **"SEE PAGES 1, 2 AND 3 AND THE DISCLOSURE STATEMENT FOR ADDITIONAL IMPORTANT TERMS AND CONDITIONS.**" Emphasis in the original.

Paragraph **"7. Borrower's Loan Application**" (emphasis in the original) in the Deed of Trust for the Note said that the borrower would be in default if there were "materially false, misleading, or inaccurate information or statements to Lender (or failed to provide Lender with material information) in connection with the Loan." CR1.65.

The loan agreement between Ms. Santos and First Franklin included at least a loan application, two notes, a Disclosure Statement, and two deeds of trust. That makes the promises referred to in Section 7 of the Note "subject to or governed by another record" besides just the Note itself, a condition prohibited by TEX. BUS.& COM. CODE §3.106(a)(ii). The "**ADDITIONAL IMPORTANT TERMS AND CONDITIONS**" referenced in Paragraph 15 of the Deed of Trust are "rights or obligations with respect to the promise or order [that] are stated in another record" that clearly violate the condition prohibited by §3.106(a)(iii).

This is not a unique situation. In 2017 another court dealt with the same

problem as here, where the loan agreement failed to meet the restrictions in §3.106 concerning references to other documents and found it was therefore not a negotiable instrument:

> "While promissory notes can be and are often referred to as negotiable instruments, they can only be negotiable instruments under Chapter 3 if they constitute "an unconditional promise or order to pay a fixed amount of money." Id. Whether an instrument meets this standard is governed by Section 3.106, titled "Unconditional Promise or Order." TEX. BUS. & COM. CODE ANN. § 3.106 (West Supp. 2016).
>
> "Section 3.106 states that "a promise or order is unconditional unless it states (i) an express condition to payment, (ii) that the promise or order is subject to or governed by another record, or (iii) that rights or obligations with respect to the promise or order are stated in another record." TEX. BUS. & COM. CODE ANN. § 3.106(a). Comment 1 to Section 3.106 explains,
>
> > "For example, a promissory note is not an instrument defined by Section 3-104 if it contains any of the following statements: 1. "This note is subject to a contract of sale...." 2. "This note is subject to a loan and security agreement...." 3. "Rights and obligations of the parties with respect to this note are stated in an agreement ... between the payee and maker of this note." It is not relevant whether any condition to payment is or is not stated in the writing to which reference is made. The rationale is that the holder of a negotiable instrument should not be required to examine another document to determine rights with respect to payment.
>
> "TEX. BUS. & COM. CODE ANN. § 3.106 cmt. 1 (West 2002).
>
> "A review of the promissory note in this case establishes that it does not meet the criteria of Section 3.106. The promissory note states,

> "This Note shall be secured by a Deed of Trust, Security Agreement and Financing Statement, and said Deed of Trust, Security Agreement and Financing Statement are incorporated herein by this reference for all purposes as if fully set forth at length herein. The Promissory Note is specifically agreed to be subject to the terms of said Deed of Trust, Security Agreement and in the event of default thereon, the same shall constitute an event of default under this Note, and shall, in any case, at the option of the holder hereof, mature the entire indebtedness evidenced hereby and secured by and hereinbefore mentioned Deed of Trust and Security Agreement.... THIS DOCUMENT AND ALL OTHER DOCUMENTS RELATING TO THIS LOAN CONSTITUTE A WRITTEN LOAN AGREEMENT WHICH REPRESENT THE FINAL AGREEMENT BETWEEN THE PARTIES.

> "Because the promissory note contains statements such as the ones specified under Comment 1 to Section 3.106, the promissory note is not a negotiable instrument under Section 3.104.[15] See Guniganti, 346 S.W.3d at 249-50. Accordingly, Chapter 3 of the Business and Commerce Code, including Section 3.110, does not apply to this case. Instead, contract law governs this dispute.[16] FFP Marketing Co., 169 S.W.3d at 409." *Great N. Energy v. Circle Ridge Prod. Inc*., 528 S.W.3d 644, 661-662 (Tex. App. - Texarkana 2017, pet. denied).

That is the precisely the same situation as here where the Note is not even titled as a simple Promissory Note, but as "**NOTE AND SECURITY AGREEMENT**." Emphasis in the original. CR1.49.

No assignee reading the terms on the face of the Note would have any idea if the Note had gone into default years earlier because of issues under Paragraphs 11, 13, or 15 in the Note, or in 7 or 21 in the Deed of Trust, or the completely undisclosed

conditions or restrictions that could be in the referenced Disclosure Agreement and loan application.

Certainly Paragraph 15 in the Note [CR1.52] highlighted that the Disclosure Agreement is the source of "rights or obligations with respect to the promise or order are stated in another record" under §3.106(a)(iii).

Negotiability depends on documented certainty on the face of the note, not baseless guesses about unseen documents. The Note violates the restrictions in §3.106 on its face and it is not a negotiable instrument. To find otherwise would be an abuse of discretion.

B. The Note Could Not Have Been Negotiated to Yellowfin by Endorsement

"The negotiability of an instrument is a question of law." *Guniganti v. Kalvakuntla*, 346 S.W.3d 242, 248 (Tex. App.- Houston [14th Dist.] 2011, no pet.) (citing *FFP Mktg. Co. v. Long Lane Master Trust IV,* 169 S.W.3d 402, 407 (Tex. App.- Fort Worth 2005, no pet.)" ("*FFP*").

The applicable standard for interpreting the words in a statute is their plain meaning. "Our primary objective in construing statutes is to give effect to the Legislature's intent. The plain meaning of the text is the best expression of legislative intent unless a different meaning is apparent from the context or the plain meaning

leads to absurd or nonsensical results." *Molinet v. Kimbrell*, 356 S.W.3d 407, 411 (Tex. 2011)(citations omitted).

The plain meaning here is that because the Note failed to meet the definition of being "unconditional" in §3.106(a) it was therefore not an "unconditional promise or order to pay" under §3.104(a) and therefore by definition not a negotiable instrument. While it could have been contractually assigned, it could not have been properly negotiated to another entity by an indorsement under Chapter 3 TEX. BUS. & COM CODE.

The two indorsements on the untitled page acting as an allonge [CR1.53] and the indorsements on the two Allonge To The Note [CR1.54-55] documents supporting the alleged subsequent transfers from the original lender, are all four irrelevant. They are insufficient as a matter of law to establishing Yellowfin's right to enforce the Note, a non-negotiable promissory note.

"A person not identified in a note who is seeking to enforce it as the owner or holder must prove the transfer by which he acquired the note." *Leavings v. Mills*, 175 S.W.3d 301, 309 (Tex. App. - Houston [1st Dist.] 2004, no pet.). Yellowfin has no such proof that goes all the way back up the chain to First Franklin.

"While negotiation or assignment can change ownership of a promissory note, the endorsement of a non-negotiable promissory note does not create a presumption

of ownership in the transferee. Thus, to recover on a non-negotiable promissory note, the holder must establish his status as the instrument's legal owner... A general denial is sufficient to raise the issue of legal ownership and places the burden on the plaintiff to prove his status." *FFP* at 409, citations omitted.

The Original Answer met the *FFP* standard because it contained a general denial in addition to the other more specific objections. CR.10. That general denial in and of itself was enough to defeat summary judgment in favor of Yellowfin. It was repeated in the January 20, 2021, Plea To The Jurisdiction. CR.194.

The alleged indorsements on the disputed allonges are moot and irrelevant. They are not sufficient to transfer the ownership of a non-negotiable note. Yellowfin has not met its burden of proving a valid chain of contractual assignments of the Note since its inception with First Franklin in 2005. Even if limitations had not expired Yellowfin had no standing and the trial court lacked jurisdiction. The case should have been dismissed as a matter of law.

IV. The Summary Judgment Failed to Meet the Requirements in TEX. R. CIV. P. 166a

A. The Trial Court Failed to Resolve Doubts in the Nonmovant's Favor or Grant Her the Favorable Inferences She Was Entitled to as a Matter of Law

Ms. Santos' response to Yellowfin's Motion For Final Summary Judgment

included sixty-eight (68) numbered items in the Section entitled "The Required Evidence, Favorable Inferences, and Doubts That Must Be Resolved In Ms. Santos's Favor." CR1.113-124. Most of them were repeated in the Motion For New Trial. CR.179-184.

If the trial court had just upheld even a few of the points, as it was required to, then the issue of the special two year limitations period for a suing on a deficiency in TEX. PROP. CODE §51.003 and the four years for debt in TEX. CIV. PRAC. & REM. CODE §16.004 would have immediately precluded summary judgment in favor of a plaintiff who filed suit in 2020, more than twelve years after the cause of action contractually accrued in 2007. The most relevant points she was denied include:

> 1. Ms. Santos bought her homestead with both a first note ("First Loan") and the subordinated Note And Security Agreement ("Note"), Plaintiff's Exhibit A, from First Franklin, A Division Of National City Bank of Indiana ("First Franklin"), the same original lender. They were both signed on the same day, with just one joint purpose between the parties - the financing of that one house. CR1.113.
>
> 2. In the caption of the case Yellowfin identifies itself "As Successor In Interest To First Franklin." It has no more rights in the Note than First Franklin had. CR1.113.
>
> 21. Limitations on the Note began to run when First Franklin, the original lender, acquired the right to declare all amounts due and payable. The same Paragraph 21. Senior Liens, made the default that led to the November 2007 foreclosure of the First Loan a default on the Note and gave the holder the power to accelerate:
>
> "Borrower agrees that should default be made in the

> payment of any note secured by an[y] prior valid encumbrance against the Property, or in the covenants of any prior deed of trust or other security agreement, then the Note secured by this Security Instrument, at the option of Lender, shall at once become due and payable." CR1.117.

22. The house was foreclosed in November 2007 because of a default on one of those senior lien agreements, the First Loan. CR1.117.

23. The default on the First Loan caused the accrual of the cause of action to enforce both the First Loan and the Note. That was as early as the default letter sent prior to the acceleration that led to the November 2007 foreclosure. CR.117-118.

24. Both the First Loan and the Note were secured only by liens against the property. They were both part "of the indebtedness secured by the real property" owed to the same lender. CR1.118.

28. After the 2007 foreclosure under TEX. PROP. CODE §51.002, the owner of the Note could not rely on the four year limitations period in TEX. CIV. PRAC. & REM. CODE §16.004 to enforce a debt. Instead it was bound by the special two year period in which to sue to enforce a deficiency that is set in TEX. PROP. CODE §51.003(a).

> Sec. 51.003. DEFICIENCY JUDGMENT. (a) If the price at which real property is sold at a foreclosure sale under Section 51.002 is less than the unpaid balance of the indebtedness secured by the real property, resulting in a deficiency, any action brought to recover the deficiency must be brought within two years of the foreclosure sale and is governed by this section. CR1.118.

However, the trial court failed to follow binding precedent by failing to resolve these points in favor of Ms. Santos as required. "When reviewing a summary judgment, we take as true all evidence favorable to the nonmovant, and we indulge

every reasonable inference and resolve any doubts in the nonmovant's favor." *Provident Life and Acc. Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003). That was an abuse of discretion. It was a double failure. Once in the original judgment [CR1.269-270] and again in denying the Motion For New Trial. CR.250. The summary judgment below has a faulty foundation and should be reversed.

B. There Was No Business Record Supporting the Amount Demanded, Only a Guess by Someone with No Knowledge

Even if there had been a valid assignment, Yellowfin has no admissible proof of the amount of its alleged claim because it has absolutely no records of any servicing of the loan represented by the 2005 Note. Its 2019 claim of the amount allegedly owed more than twelve years after the 2007 foreclosure was a naked guess by someone with no knowledge. Guessing is not servicing.

Yellowfin is a loan servicing company, and bought the loan from RCS, the alleged previous servicer. Section 5 in the Mortgage Note Purchase and Sale Agreement required RCS to provide "(iii) such information in seller's possession that may be necessary for the Buyer to service the Mortgage Notes" and that Yellowfin was required to "bear the expenses of transportation and storage of such Transfer Documents and of other documents, instruments and files to be delivered to Buyer." CR1.87. There should have been records but there were none. This despite the

requirement on Page 2 of the Deed of Trust that the loan be serviced according to RESPA requirements. CR1.61:¶(P).

According to Paragraph 4 in the Matt Miller Affidavit "[t]he balance owed was calculated by conducting an amortization of the original principal amount of the Note in accordance with the terms prescribed by the Note (ie: an amortization of $24,398.00 over twenty years with interest accruing at a rate of 11.25%, and a final balloon payment of $17,263.03) then assuming that each and every payment was timely made through May 1, 2019." CR1.40.

There is no evidence of an original amortization schedule made by the lender First Franklin. There is no evidence that First Franklin ever provided a payment history of the Note to anyone. The only financial information in the redacted forest of horizontal black boxes in Yellowfin's Exhibit G from RCS is "$24,398.00" in the "Original Loan Amount" column and "11/28/2005" in the "Loan Date" column. CR1.91.

Mr. Miller's Affidavit was generated for litigation purposes on October 2, 2020, but not by First Franklin, nor anyone else in the alleged chain of ownership before Yellowfin. It refers to the amortization schedule that Yellowfin used as Exhibit H in support to the Motion For Final Summary Judgment. CR1.102-106. There is a footer at the bottom of every page of that schedule that says "Tuesday, December 3,

2019" and "Powered by The Mortgage Office™." *Id.*

That date was more than three months after the August 29, 2019, Mortgage Note Purchase and Sale Agreement [CR1.86-89] and Bill of Sale [CR1.90], and more than twelve years after the November 6, 2007, foreclosure. CR1.80. The Mortgage Office entity is not a party to the case and it was not a witness. There is no evidence of what it is or that it reviewed any actual servicing records of the Note.

Yellowfin's counsel confirmed that the number in the amortization schedule was not in a business record. He told the trial court "The assertion we've made is that $21,023.13 was due as a principal balance as of June 1st, 2019. That amount is based on an amortization table that was, presumably, secured off the Internet." RR.10:17-20. A document "that was, presumably, secured off the Internet" does not rise to the level of evidence sufficient to support summary judgment.

The first of the five prongs in the definition of "business record" requires the amortization schedule to be a record that "was made at or near the time by – or from information transmitted by -- someone with knowledge." TEX. R. EVID. 803(6)(A). The amortization schedule does not meet that definition and it is not a business record because it fails all three conditions. It was not made "at or near the time" because it was not generated until more than twelve years after the 2007 foreclosure. It was not based on information from "someone with knowledge" of what happened between

2007 and 2019, but a presumption. It was not made by "someone with knowledge."

The record was also controverted by Ms. Santos because "the source of information or method or circumstances of preparation indicate a lack of trustworthiness." TEX. R. EVID. 803(b)(E). It is a document generated for litigation, not a business record. It was only generated to provide the basis for a guess for the amounts demanded in the presuit letters to Ms. Santos. CR.225-227 and CR1.82-85.

As the amount demanded by Yellowfin is admittedly a guess with no foundation it does not meet the requirements for summary judgment in TEX. R. CIV. P. 166a(c) that include it be based on uncontroverted testimonial evidence.

V. There Was Only One Transaction Between First Franklin and Ms. Santos

It is undisputed that the First Loan [CR1.233] and the Note [CR1.49] were both loans from First Franklin to Ms. Santos that she signed on April 28, 2005, as part of the same transaction to finance the acquisition of their homestead. Either loan by itself would have been pointless. She could not have bought the property without both loans. Each was also secured by a Deed of Trust she signed in favor of First Franklin, shown on CR1.211 for the First Loan and on CR1.60 for the Note. There was only one lender and only one borrower and only one house. One transaction.

Even if the two notes did not refer to each other, which they did, and had not been executed at the same time at the same place, by the same parties, for just one

purpose, which they were, the relevant precedent shows they can be read together to describe a single transaction.

> "To discern the contracting parties' intent, courts may properly consider all writings pertaining to the same transaction, even if the writings were executed at different times and do not expressly refer to one another. DeWitt Cnty. Elec. Coop., 1 S.W.3d at 102; see also Miles v. Martin, 159 Tex. 336, 341, 321 S.W.2d 62, 65 (1959) ("It is well settled that separate instruments executed at the same time, between the same parties, and relating to the same subject matter may be considered together and construed as one contract. This undoubtedly is sound in principle when the several instruments are truly parts of the same transaction and together form one entire agreement." (citation omitted))." *Pitts & Collard, LLP v. Schechter*, 369 S.W.3 301, 313 (Tex. App. - Houston [1st Dist.] 2011, no pet).

What also cannot be ignored is that the Deed of Trust for the Note, the security instrument for the Note that Yellowfin seeks to enforce, intentionally linked itself to the First Loan. It made a payment default on the First Loan an enforceable default on the Note.

Typically a note that calls for installments cannot be called due in its entirety until it is accelerated. The procedure involves sending a default letter, followed by the borrower's failure to cure the default, ending with an acceleration letter from the lender calling the entire amount due. "If a note or deed of trust secured by real property contains an optional acceleration clause, default does not ipso facto start limitations running on the note. Rather, the action accrues only when the holder

actually exercises its option to accelerate." *Holy Cross Church of God in Christ v. Wolf*, 44 S.W.3d 562, 566 (Tex. 2001). In the typical case, where there is only one Note and one Deed of Trust for the transaction, that makes sense and would control.

However, this is not a typical case. What is different here is that Paragraph 11 in the Note [CR1.50] and Paragraph 21 in the Deed of Trust [CR1.69] contractually added another way for the Note to be called due in its entirety, aside from the Lender sending an acceleration letter after defaults on the Note.

An adhesion contract is one in which "one party has absolutely no bargaining power or ability to change the contract terms." *In re H.E. Butt Grocery Co.*, 17 S.W. 3d 360, 371 (Tex. App. - Houston [14th Dist.] 2000, orig. proceeding). The First Loan, the Note, and the Deeds of Trust for each of them were adhesion contracts and Ms. Santos were bound by their terms, as were First Franklin, the drafter, and its alleged successors. Ms. Santos did not chose to interlink the two obligations but First Franklin insisted on it.

No successor to First Franklin can ignore First Franklin's intention to have a default on the First Loan be treated as a default on the Note that gave it the right to use an additional way to call the all remaining amounts on the Note due and payable. That was a right above and beyond what it would normally have and allowed it to get around having to send a default letter followed by an acceleration letter.

Yellowfin cannot pretend the two notes were not linked. "In construing a written contract, the primary concern of the court is to ascertain the true intentions of the parties as expressed in the instrument. To achieve this objective, courts should examine and consider the entire writing in an effort to harmonize and give effect to all the provisions of the contract so that none will be rendered meaningless. Contract terms are given their plain, ordinary, and generally accepted meanings unless the contract itself shows them to be used in a technical or different sense." *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 662 (Tex. 2005, internal citations omitted)("*Valence*").

The Court is required to interpret contracts according to their plain meaning. *Id.* There is nothing in any document that permitted Yellowfin to ignore the effect of the right to sue that the Deed of Trust for the Note awarded to the original lender.

Having gone out of its way to give itself the additional right against Ms. Santos that allowed it to enforce a default on the First Loan as a default on the Note that could make all the Note's payments be called due, the original lender could not deny that right's existence. Neither could any assignee, valid or not.

Even if Ms. Santos were paid ahead on the Note when she defaulted on the First Loan, the plain meaning of the language in the Deed of Trust for the Note provided that a default on the First Loan still gave First Franklin the contractual right to declare

a default and take steps to make the entire remaining balance on the Note due and payable.

It was the payment defaults on the First Loan, a note that is part of the loan agreement between First Franklin and Ms. Santos that contractually caused the accrual of First Franklin's cause of action to enforce both the First Loan and the Note, and led to the November 6, 2007, foreclosure. That was as early as the default letter sent prior to the acceleration that led to the foreclosure. CR1.80.

The exact date in 2007 is unknowable[5] because Yellowfin was a stranger to the First Loan as well and it has no records from the servicing of the First Loan. Regardless, it is therefore indisputable that First Franklin's cause of action based on its right to call the Note in default accrued no later than the date of the November 6, 2007, foreclosure on the First Loan.

VI. All Possible Statutes of Limitation Expired Years Ago

A. TEX. PROP. CODE §51.003 - Foreclosure Deficiency

The total indebtedness from Ms. Santos to First Franklin, in the two notes she signed to have them finance her one house on April 28, 2005, was $121,990.00. Each

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[5] It actually had to be at least fifty-one days earlier than that because Paragraph 22 in the Deed of Trust for the First Loan required it to send a default letter by certified mail at giving at least thirty (30) days notice to cure the payment default [CR.300] and TEX. PROP. CODE §51.002(d) required another twenty-one (21) days notice after acceleration before a foreclosure sale could take place.

of the simultaneously made notes was secured by only that same single house, her homestead. The First Loan was in the amount of $97,592.00 [CR1.233] and the Note in the amount of $24,398.00 [CR1.49]. There was just a single overall transaction.

Two years later the foreclosure of that property only brought in $104,745.76. CR1.80.

Once First Franklin foreclosed on the First Loan under TEX. PROP. CODE §51.002 and wiped out the liens securing the First Loan and the Note, it guaranteed that its remaining claim for any unpaid amount on the Note after that date was nothing more than an unsecured deficiency from the single transaction it financed with Ms. Santos. "Under Texas law, generally, if, after a valid foreclosure of a senior lien, a junior lien is not satisfied from the proceeds of a sale, then the junior lien is extinguished."*Kothari v. Oyervidez*, 373 S.W.3d 801, 807 (Tex. App - Houston [1st Dist.] 2012, pet. denied)(internal citations omitted).

"Accordingly, the foreclosure sale of the senior lien extinguished the junior lien." *Diversified Mortgage Investors v. Lloyd D. Blalock General Contractor, Inc.*, 765 S.w.2d 794, 806 (Tex. 1978).

Yellowfin's counsel made that clear at the summary judgment hearing. "On November 6, 2007, a little over two years after the inception of theses loans, the first and primary lien was foreclosed. When that happened, it foreclosed the deed of trust

on this second lien out of existence, making it an entirely unsecured debt." RR. 6:7-11.

That statement conflicted with the affirmative defense in Paragraphs 37 and 38 of Yellowfin's No Evidence Motion For Summary Judgment on Defendant's Affirmative Defenses. Those paragraphs each depended on a note "secured by a real property lien" and " a note or deed of trust secured by real property" respectively. CR1.37,38. Ms. Santos accepts Yellowfin's counsel's analysis that was no longer the case after the foreclosure.

The failure to receive enough from the foreclosure of the First Loan to pay off both the First Loan and Note that were both secured by the same property before the foreclosure, and were part of the loan agreement between the parties that made a default on the second a default on the first, left First Franklin with a deficiency claim against Ms. Santos for the money she owed from financing the purchase of the property. The security admittedly gone, the deficiency claim on the Note is all that First Franklin had left. That is what it sold, and that is what Yellowfin allegedly bought many years later and is trying to enforce.

First Franklin's right to sue for the unsecured deficiency due on the Note accrued no later than the date of the November 6, 2007, foreclosure under TEX. PROP. CODE §51.002 that started the special two year limitations period set by TEX. PROP. CODE §51.003.

> Sec. 51.003. DEFICIENCY JUDGMENT. (a) If the price at which real property is sold at a foreclosure sale under Section 51.002 is less than the unpaid balance of the indebtedness secured by the real property, resulting in a deficiency, any action brought to recover the deficiency must be brought within two years of the foreclosure sale and is governed by this section.

The Court is required to "construe [a] statute's words according to their plain and common meaning, unless a contrary intention is apparent from the context, or unless such a construction leads to absurd results." *Youngkin v. Hines*, 546 S.W.3d 675, 680 (Tex. 2018). (citations omitted). "We presume the Legislature selected language in a statue with care and that every word or phrase was used with a purpose in mind." *Texas Lottery Comm'n v. First State Bank of DeQueeen*, 325 S.W.3d 628, 635 (Tex. 2010)(citations omitted).

The plain meaning of the statutory language "any action" is all encompassing and means what it says. "Any" means any. It is not restricted and cannot be read to only apply to just one loan where the same lender made two loans to the same borrower at the same time to finance a single home and the two loans were contractually linked to each other when made.

The plain meaning of "[t]he indebtedness secured by the real property" language in the statute applies to both the First Loan and the linked Note in the transaction between Ms. Santos and First Franklin and the one piece of real property

that secured both obligations. The statute neither says nor implies that it excludes from coverage under §51.003 a second loan made by the same lender to the same borrower at the same time as part of the same purpose. Its purpose is to protect the borrower.

"Section 51.003 was added to the Property Code in 1991. No doubt it is intended to protect borrowers and guarantors. When lenders are the sole bidders at a foreclosure sale, they can control the foreclosure sale price and by implication the deficiency judgment. There is little incentive for them to bid high when a low bid preserves the amount they might get in a judgment against the borrower. Thus the nonjudicial foreclosure sale often does not directly represent what a buyer might pay in the market." *Moayedi v. Interstate35/Chisam Road, LP*, 438 SW.3d 1, 4-5 (Tex. 2014).

The public policy purpose behind the shortened post-foreclosure limitations period is there for a reason. The statute was not designed to confer a hidden benefit on the lender for breaking the transaction for one house into two notes with different interest rates or maturity dates. It specifically sets a short time to act on a deficiency claim so the threat of post-foreclosure litigation after the borrower has lost the property will not linger into the borrower's distant future, as Yellowfin has made it do here, trying to bring the zombie debt back to life. It does not give the lender the

right to a longer period of time to sue on a second loan made at the same time as the first, for the same purpose as the first, after specifically setting the short limitations period that exists only for enforcing a deficiency on a home loan. It is the shortest debt collection statute in Texas for a reason.

Neither First Franklin nor anyone else filed suit within the two years after the foreclosure and the special limitations period for the deficiency claim expired as a matter of law on or about November 6, 2009.

There is no good faith argument that First Franklin could have sued on the Note more than two years after the foreclosure of the First Loan. It could also not have passed on a right that it did not have and Yellowfin cannot enforce a non-existent right.

Yellowfin's pleadings below attempted to cloud that issue by relying on a distinguishable case and its progeny where the second loan was in a commercial lending situation, not purchase money for a homestead, and was neither made by the same lender nor part of the same original transaction. Their argument is unpersuasive and inapplicable.

B. TEX. CIV. PRAC. & REM. CODE §16.004 - Debt

Even if the claim on the Note could be ignored as a deficiency claim after the foreclosure, and considered as only a claim for debt, the cause of action still

contractually accrued no later than the November 6, 2007, foreclosure. The statute of limitations for enforcing a debt claim under TEX. CIV. PRAC. & REM. CODE §16.004 therefore expired no later than four years after that accrual.

> Sec. 16.004. FOUR-YEAR LIMITATIONS PERIOD. (a) A person must bring suit on the following actions not later than four years after the day the cause of action accrues:
> ...
> (3) debt;

That expiration date was no later than November 6, 2011, four years after the November 6, 2007, foreclosure and accrual date. CR1.80. Again, neither First Franklin nor any other party filed suit on the Note before November 6, 2011, and the time to have done so expired more than eight years before the Plaintiff's Original Petition was filed on June 12, 2020. CR1.4.

First Franklin could not have sued on the debt in 2020 and neither could anyone else. The suit for debt was barred by limitations.

C. TEX. CIV. PRAC. & REM. CODE §16.035 - Real Property Secured by a Lien

Yellowfin cannot rely on TEX. CIV. PRAC. & REM. CODE §16.035 (e) that requires actual acceleration before limitations begins.

> Sec. 16.035. LIEN ON REAL PROPERTY. (a) A person must bring suit for the recovery of real property under a real property lien or the foreclosure of a real property lien not later than four years after the day the cause of action accrues.

...
(e) If a series of notes or obligations or a note or obligation payable in installments is secured by a real property lien, the four-year limitations period does not begin to run until the maturity date of the last note, obligation, or installment.

By the plain meaning of its own terms §16.035(e) is inapplicable. Following the November 6, 2007, foreclosure the Note was no longer "secured by a real property lien" and Yellowfin did not sue here to recover the real property. The Plaintiff's Reply In Support Of Summary Judgment made that inapplicability abundantly clear in Yellowfin's excuse to avoid the applicability of federal loan servicing rules for loans secured by real estate. To wit, "Yellowfin's Note is not "secured by" anything and has not been since the November 6, 2007 foreclosure sale. RESPA and its regulations are inapplicable under the plain meaning of the words in the statute and Defendant has presented no authority that contradicts that plain language." CR1.261,¶18.

As shown above, Yellowfin took the complete opposite position in Paragraphs 37 and 38 in the No Evidence Motion For Summary Judgment saying the Note was "secured by a real property lien." CR1.37,38.

The Note cannot be both secured and unsecured at the same time; secured when it helps Yellowfin extend limitations but unsecured when they say that would let them dodge federal regulations related to "loan servicing," which is literally part of

Yellowfin Loan Servicing Corp.'s self-chosen name. Speaking out of both sides of its mouth undermined the basis for granting Yellowfin the summary judgment below.

The Court is required to apply the "plain meaning" rule to statutory interpretation. By admitting that the Note was not secured Yellowfin has precluded itself from being able to rely on §16.035. It has exercised its option to plead itself out of court for any defense under §16.035 by pleading facts which affirmatively negate that section. *Khan v. GBAK Properties, Inc*., 372 S.W.3d 347, 357 (Tex. App. - Houston [1st Dist. - Houston] 2012, citations omitted, no pet.).

Summary judgment in Yellowfin's favor was not possible as a matter of law where its contradictory positions were based on opposing sides of the same issue. Yellowfin's filings are inconsistent with the requirement to prove that "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law on the issues expressly set out in the motion or in an answer or any other response." TEX. R. CIV. P. 166a(c).

D. TEX. BUS. & COM. CODE §3.118 - Negotiable Instrument

Even if the Note were a negotiable instrument, which it is not, and the six year limitations period in TEX. BUS. & COM. CODE §3.118 were applicable, it still would have expired no later than November 6, 2013, six years after the November 6, 2007, foreclosure, when the claim contractually accrued. As shown above, Paragraph 21 in

the Deed of Trust granted the right to call all installments due. There is no evidence that §3.118 voided the other way that First Franklin gave itself to be able to call the Note due and payable.

Six years is the longest possible applicable statutory limitations period. The ones for ten, fifteen, and twenty-five years are all related to adverse possession, and clearly inapplicable since possession of the property was lost in 2007. The Property is in Houston, TX 77075 [CR1.8.] and Ms. Santos was served where she lives in Houston, TX 77089. CR1.21.

E. The Remaining Installments Due in the Future

Yellowfin's only remaining argument is that the there had to be an actual acceleration for the unmatured installments to come due. That also fails.

If the Note had been a stand alone transaction, and Yellowfin had standing, then perhaps it would have a point. It could argue that because the payments with a future due date had not come due then limitations had not expired on them. It could then argue that the waiver of collecting on the payments due from 2007 through 2020 could be ignored and there was still a right to payments due after 2020.

However, Paragraph 21. Senior Liens in the Deed of Trust [CR1.69] undermines that option by giving the alternate way to call the Note due in its entirety.

As set out above that right to call the entire amount due, ahead of the last due

date, is repeated in the Note itself in "**11. DEFAULT AND REMEDIES.**" Emphasis in the original. CR1.50. Those two ways to contractually call the loan due without the need for a default letter followed by an acceleration letter cannot be ignored.

VII. Waiver

Remembering that Yellowfin only ever had First Franklin's rights to begin with, as did any other entity in the disputed chain, and that First Franklin waived its right to sue on the Note starting in 2007, as of 2020 the defense has been established against all entities, including Yellowfin. If any entity after First Franklin actually acquired the Note, that acquisition came with the immediate right to call the Note due and sue because of the default that led to the 2007 foreclosure.

Between 2007 and 2020 every entity before Yellowfin chose to waive and abandon that right by selling the Note instead of suing on it. Yellowfin waived it from August 29, 2019 until June 12, 2020. CR1.4.

The previous years of waiver were not reset with each alleged transfer of ownership. They were cumulative. Each transfer by an entity in the alleged chain of ownership was a clear waiver of the transferring entity's right to sue.

Ms. Santos raised waiver as a defense in the Answer. CR.15. She raised it again in the summary judgment response. CR1.133.

It was included in the favorable inferences and doubts that had to be resolved

in her favor as the nonmovant in responding to the Motion For Final Summary Judgment. See points 52, 53, 54, 55. CR1.122. *Valence* at 661.

"A waivable right may spring from law or, as in this case, from a contract. A party's express renunciation of a known right can establish waiver. Silence or inaction, for so long a period as to show an intention to yeiled the known right, is also enough to prove waiver." *Tenneco Inc. v. Enterprise Products Co.*, 925 S.W.2d 640, 643 (Tex. 1996)(citations omitted).

Twelve years of inaction on enforcing the right that accrued to First Franklin in 2007, potentially controlled by statutes of limitation ranging from two to four to six years, was enough to show the intention to yield the known right and establish waiver.

Yellowfin's trying to enforce the repeatedly waived right to sue on the Note is just another "claim otherwise barred by the applicable statute of limitations [that] cannot be made viable by assignment." *Uddin, supra.*

Uddin's proposition that a claim cannot be revived by transfer is impliedly for one that was made based on a valid transfer. A transferee has even less ability to revive a claim where the alleged transfer was defective, as it was here. Even if everything above could be ignored, the summary judgment is still defective as a matter of law because of more than twelve years of wavier by all the alleged owners

for their collective failure to enforce the known right that contractually accrued on November 6, 2007.

VIII. Public Policy on Limitations Should Be Respected

The summary judgment below cites no valid reason for ignoring the applicable limitations periods in either TEX. PROP. CODE §51.003 or TEX. CIV. PRAC. & REMEDIES CODE §16.004 or any other statute. Neither does it hold that there should be a change in the long standing public policy behind limitations that goes back to at least the nineteenth century. "We have long recognized the salutary purpose of statutes of limitations. In Gautier v. Franklin, 1 Tex. 732, 739 (1847), we wrote that statutes of limitations

> are justly held "as statutes of repose to quiet titles, to suppress frauds, and to supply the deficiencies of proof arising from the ambiguity, obscurity and antiquity of transactions. They proceed upon the presumption that claims are extinguished, or ought to be held extinguished whenever they are not litigated in the proper forum at the prescribed period. They take away all solid ground of complaint, because they rest on the negligence or laches of the party himself; they quicken diligence by making it in some measure equivalent to right...." [Joseph P. Story, Conflicts of Law 482.]" *SV v. RV*, 933 S.W.2d 1, 3 (Tex. 1996).

This case exhibits all of those problems. The claim is based on a complete lack of proof of the superannuated transaction. It was not litigated in the prescribed period. It is based on the negligence and laches of all alleged owners of the Note since 2007.

There is nothing in the record that supports Yellowfin's desire, or gives it the ability, to disrupt people's lives more than a decade after the original lender foreclosed and took their house and undo the progress they have made restoring their financial situation. No alleged holder of the Note has shown any diligence and the claim is based on no solid records.

There is good public policy in allowing borrowers to recover their financial health and well being after a reasonable amount of time. "In addition to affording comfort and repose to the defendant, statutes of limitation protect the courts and the public from the perils of adjudicating stale claims." *Godoy v. Wells Fargo Bank, N.A.*, 575 S.W.3d 531, 538 (Tex. 2019).

In this case Yellowfin's records were so poor and its diligence so undetectable that it sent the demand letters to the property address they knew First Franklin took from Ms. Santos in 2007 [CR1.163] instead of an address where there was a chance they would reach her in 2020.

PRAYER

Ms. Santos prays that the Court reverse the decision below and render judgment that Yellowfin has no claim against her based on the Note because it had no proof it owned the non-negotiable Note. Should the Court find Yellowfin had ownership rights in the Note she further prays that the Court find that limitations

expired before Yellowfin acquired its rights in 2019 and that neither Yellowfin nor any other entity could have ever had standing in 2020 to enforce the Note after limitations expired, and remand the case for such further proceedings as are appropriate, and for such further relief that she may be entitled to at law or in equity.

Respectfully submitted,

/s/ Ira D. Joffe
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CERTIFICATE OF COMPLIANCE

I certify that this Brief complies with TEX. R. APP. P. 9 because it is printed in a minimum of 14 point type and contains 11,957 words.

/s/ Ira Joffe
Ira Joffe

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served via the ECF system on August 17, 2021.

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APPENDIX

Page Document

CAUSE NO. 2020-35442

YELLOWFIN LOAN SERVICING CORP., AS SUCCESSOR IN INTEREST TO FIRST FRANKLIN, *Plaintiff, Counter Defendant*	§	IN THE 295TH JUDICIAL
	§	DISTRICT COURT OF
vs.	§	
DEYSI R. SANTOS *Defendant, Counter Plaintiff*	§	HARRIS COUNTY, TEXAS

FINAL SUMMARY JUDGMENT

BE IT REMEMBERED that on this day came to be heard Plaintiff's Motion for Summary Judgment Defendant's response and Plaintiff's reply. The Court has determined that it has jurisdiction over the subject matter and the parties in this proceeding.

The Court, having considered the pleadings and official records on file in this cause, the evidence, and the arguments of the parties and/or their counsel ~~(if any)~~, finds that there is no genuine issue about any material fact, and that Plaintiff is entitled to judgment as a matter of law. ~~The note on which this cause is based is attached hereto as Exhibit A, and incorporated in this judgment by reference herein.~~

The Court hereby RENDERS judgment for Plaintiff, Yellowfin Loan Servicing Corp.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Plaintiff, Yellowfin Loan Servicing Corp., recover from Defendant, Deysi R Santos, judgment for the following:

1. $21,023.13 as the accelerated principal amount due under the contract;
2. $ 5,160.00 in reasonable and necessary attorney's fees for the prosecution of this case through this judgment;
3. All costs of court; and
4. Post-judgment interest on all of the above amounts at the rate of ~~11.25%~~ 5.0% compounded annually, from the date this judgment is rendered until all amounts are paid in full;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that if Defendant unsuccessfully appeals this judgment to an intermediate court of appeals, Plaintiff will additionally recover from Defendant the amount of $7,000.00, representing the anticipated reasonable and necessary attorney fees that would be incurred by Plaintiff in defending the appeal.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that if Defendant unsuccessfully appeals this judgment to the Texas Supreme Court, Plaintiff will additionally recover from Defendant the amount of $12,000.00, representing the anticipated reasonable and necessary fees that would be incurred by Plaintiff in defending the appeal.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this judgment finally disposes of all claims and all parties, and is appealable. All relief not expressly granted in this judgment is denied.

It is further ORDERED, ADJUDGED, and DECREED that execution immediately issue on this judgment.

This is a final judgment that disposes of all parties and all claims.

SIGNED on _____, 2020

Signed:
12/22/2020

JUDGE PRESIDING

Automated Certificate of eService

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Ira Joffe
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Status as of 8/17/2021 3:17 PM CST

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Damian William Abreo	24006728	dabreo@hwa.com	8/17/2021 3:11:26 PM	SENT

Associated Case Party: Yellowfin LoanServicing Corp. as Successor in Interest to First Franklin

Name	BarNumber	Email	TimestampSubmitted	Status
Michael Weems	24066273	mlw@hwa.com	8/17/2021 3:11:26 PM	SENT

ACCEPTED
14-21-00151-CV
FOURTEENTH COURT OF APPEALS
HOUSTON, TEXAS
9/23/2021 3:51 PM
CHRISTOPHER PRINE
CLERK

CAUSE NO. 14-21-00151-CV

IN THE COURT OF APPEALS
FOURTEENTH JUDICIAL DISTRICT OF TEXAS
HOUSTON, TEXAS

DEYSI R. SANTOS
Appellant

v.

YELLOWFIN LOAN SERVICING CORP., AS SUCCESSOR IN INTEREST TO FIRST FRANKLIN.,
Appellee

On Appeal from the 295th District Court
Harris County, Texas
Cause No. 2020-35442

APPELLEES' BRIEF

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ATTORNEYS FOR APPELLEE,
YELLOWFIN LOAN SERVICING CORP.

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TABLE OF AUTHORITIES

CASES:

STATEMENT OF THE CASE

Nature of the Case:	This is an action by Yellowfin Loan Servicing Corp. to enforce a promissory Note. Deysi R. Sanntos ("Santos") executed the second lien Note at issue on April 28, 2005. The first lien was foreclosed on November 6, 2007, rendering the second lien Note unsecured. Yellowfin purchased the Note on August 29, 2019, and is the holder and payee of the Note. With all necessary conditions met, Yellowfin filed this lawsuit on June 12, 2020, seeking judgment for $21,023.13 and an award of its fees and costs. On July 23, 2020, Santos counterclaimed for fraud and violation of the Texas Debt Collection Act. The trial court entered summary judgment in favor of Yellowfin as to all claims and counterclaims on December 22, 2020. This appeal followed.
County Civil Court at Law No. 4:	Honorable Donna Roth 295th District Court Harris County, Texas 201 Caroline, 14th Floor Houston TX 77002-1900 Tel. (832) 927-137
Course of Proceedings:	On June 12, 2020, Yellowfin filed this lawsuit. On August17, 2020, Santos filed her First Amended Plea to the Jurisdiction, Answer, and Counterclaim. On December 22, 2020, the Court entered summary judgment in favor of Yellowfin on all claims. On January 20, 2021, Santos filed a Motion for New Trial. That same day, Santos also filed a second Plea to the Jurisdiction. On March 18, 2021, the Court denied Santos' motion for new trial and second Plea to the Jurisdiction. Santos filed her Notice of Appeal on March 19, 2021.
Order being Appealed:	Appellant seeks review and reversal of the 295th District Court's December 22, 2020 Final Summary Judgment.

RECORD REFERENCES

The Clerk's Record will be cited as "CR#:[Page No.]," where the number following "CR" shall designate the original clerks record (1), the first supplement to the clerk's record (2), or the second supplement to the clerk's record (3)

STATEMENT OF JURISDICTION

This is an appeal of a final judgment entered by the 295th District Court of Harris County, Texas on December 22, 2020. Santos timely filed her notice of appeal on March 19, 2021, eighty-seven (87) days after the Court signed its final judgment in favor of Yellowfin. This Court has appellate jurisdiction pursuant to Texas Constitution Article 5, §§1 and 6 and Section 22.220 of the Texas Government Code.

STATEMENT REGARDING ORAL ARGUMENT

Yellowfin believes this appeal can be decided solely on the briefs. The pertinent record is not voluminous. The legal issues are not novel or unique. Accordingly, Yellowfin does not believe that oral argument is necessary or helpful in this appeal.

Should the Court determine that oral argument would be of value in the disposition of this appeal, Yellowfin would welcome the opportunity to participate.

CAUSE NO. 14-21-00151-CV

IN THE COURT OF APPEALS
FOURTEENTH JUDICIAL DISTRICT OF TEXAS
HOUSTON, TEXAS

DEYSI R. SANTOS
Appellant

v.

YELLOWFIN LOAN SERVICING CORP., AS SUCCESSOR IN INTEREST TO FIRST FRANKLIN,
Appellee

On Appeal from the 295th District Court
Harris County, Texas
Cause No. 2020-35442

APPELLEES' BRIEF

ISSUES PRESENTED FOR REVIEW

This is a suit to enforce a promissory note. The trial court granted summary judgment in favor of Yellowfin. The propriety of summary judgment is a question of law which the Court must review *de novo*. *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003). Santos attacks the trial court's summary

judgment in nine points of error.[1] Under review by this Court is whether the trial court erred by entering summary judgment in favor of Yellowfin on its claims and on Appellee's counterclaims. Appellant frames her points of error as follows:

1. Santos contends that the trial court lacked jurisdiction because Yellowfin could not prove it is the owner of the Note. This contention is based solely on Appellant's assertion that the Note is not a negotiable instrument and cannot be transferred by indorsement.

2. Despite seeking the benefits conferred by purchasing a home by taking two separate loans, Santos contends that the two loans were a single transaction between First Franklin as the lender and Santos as the borrower.

3. Santos argues the two-year limitations period in TEX. PROP. CODE §51.003 (governing foreclosure deficiency actions) is applicable to the second lien Note because the debt owed to Yellowfin is a deficiency claim resulting from the foreclosure of the first lien.

4. Santos argues that the four-year limitations period in TEX. CIV. PRAC. & REM. CODE §16.004 is applicable to the Note because despite the presence of optional acceleration language in the Note, Yellowfin's cause of action arose when the first lien was foreclosed.

5. Santos contends that Yellowfin failed to meet the summary judgment standard in TEX. R. CIV. P. 166(a) by calculating the amount due on the

[1] This case is one of three virtually identical cases wherein Appellant's counsel represents defendants in collection lawsuits filed by Yellowfin. The arguments put forth in Appellant's brief were urged in all three cases in the trial courts, resulting in three summary judgments in favor of Yellowfin, and are now being urged again before three Texas Appellate Courts. The second case is Yellowfin v. LaTanya Thompson; Cause No. 1156055, in the Harris County Civil Court at Law No. 4, before the Honorable Leslie Briones. The judgment against Ms. Thompson is now on appeal before the First Court of Appeals as Case No. 01-21-00147-CV. The third case is Yellowfin v. Tyvon Smith and Tamara Smith; Cause No. 1156795, in the Harris County Civil Court at Law No. 2, before the Honorable Jim Kovach. The judgment against Mr. and Mrs. Smith is now on appeal before the Fifth Court of Appeals as Case No. 05-21-00306-CV (the result of the Supreme Court's April 22, 2021, Order styled "Transfer of Cases From Courts of Appeals").

loan using an amortization table, then waiving all payments that came due prior to July 1, 2019.

6. In duplication of point no. 5, Santos argues that there are no servicing records for her loan and that the amount owed is a guess by Yellowfin that does not meet the Rule 166a standard.

7. Santos contends that the Note is not an obligation "secured by a real property lien" because the lien securing the Note was foreclosed out of existence when the first lien was foreclosed.

8. Santos contends that public policy requires the Court to ignore well established Texas law and shoe-horn Yellowfin's claims into the coverage of one of several statutes of limitation found in the Property and Civil Practices and Remedies Code. Santos give no consideration to the public policy concerns underlying borrowers failing to fulfill their contractual obligations.

9. Santos contends that Yellowfin and its predecessors waived the right to sue on the Note by failing to exercise it when the first lien was foreclosed.

In addition to the nine items identified in the "Issues Presented" portion of Santo's brief, she also argues:

1. Yellowfin holds only the rights First Franklin held under the Note. First Franklin is barred by limitations so Yellowfin is barred by limitations. Therefore the trial court lacked jurisdiction.

2. Yellowfin's cause of action accrued and limitations began to run when Santos defaulted under the first lien note and deed of trust.

3. The trial court failed to resolve all doubts in favor of Santos and failed to reach "Favorable Inferences" on her behalf.

STATEMENT OF FACTS

The facts in this case are simple, undisputed, and supported by the Clerk's Record. Santos borrowed money, did not pay it back, and now seeks to avoid the legal consequences by employing a number of creative but legally unsupportable arguments.

On April 28, 2005, Santos executed a Note and Security Agreement (the "Note") in the principal amount of $24,398.00. CR2:49-56. The unpaid balance was to accrue interest at a rate of eleven and one quarter percent (11.25%). CR2:49. The Note was payable to the order of First Franklin a division of Nat. City Bank of In. ("First Franklin"). CR2:49.

The Note was secured by a Deed of Trust (Secondary Lien) (the "Deed of Trust") in favor of First Franklin encumbering real property and improvements located at 8806 Stonefair Lane, Houston, TX 77075 (the "Property"). CR2:60-76.

The Property was also encumbered by a superior Deed of Trust in favor of First Franklin (the "deed of trust"). CR2:211-222. The first lien was foreclosed on November 6, 2007, and conveyed by the substitute trustee to National City Bank. CR2:80-81.

First Franklin made a special indorsement on the Note directing payment to First Franklin Financial Corporation. CR2:53. First Franklin Financial Corporation made a special indorsement on the Note directing payment to Dreambuilder

Investments, LLC. CR2:53. Dreambuilder Investments, LLC executed an Allonge directing payment to RCS Recovery Services, LLC. CR2:54. RCS executed an Allonge directing payment to Yellowfin. CR2:55. Yellowfin has possession of the original Note and all Allonges. CR2:41 (¶5).

On February 26, 2020, Yellowfin mailed a Notice of Intent to Accelerate and Right to Cure letter to Santos advising: (1) Yellowfin purchased the account on August 29, 2019, (2), the amount due as of that date was $21,640.59, (3), Yellowfin waives and forgives the monthly installment payments due through June 1, 2019, and the new post waiver principal balance, as of July 1, 2019, was $21,023.13, (4) the monthly payment amount is $236.97, (5) payments are due beginning July 1, 2019, and (6) Santos had thirty (30) days in which to cure the default or Yellowfin would accelerate the balance of the Note. CR2:82-83. On March 25, 2020, Yellowfin mailed a Notice of Acceleration, advising Santos that the principal balance had been accelerated and was due immediately. CR2:84-85.

On June 12, 2020, Yellowfin filed this lawsuit seeking judgment for $21,023.13 and an award of its fees and costs. CR2:4-18. This amount represents the outstanding principal balance as of June 1, 2019, assuming all prior payments had been timely made. CR2:40-41 (¶4).

On August 17, 2020, Santos filed her First Amended Plea to the Jurisdiction, Answer, and Counterclaim. CR1:4-52. The Plea to the Jurisdiction alleged that

Yellowfin lacks standing to sue because it lacks standing to enforce the Note and because Yellowfin's immediate predecessor, RCS Recover Services, LLC forfeited its right to do business in Texas prior to selling the Note to Yellowfin. CR:82-83.

On December 22, 2020, the Court entered summary judgment in favor of Yellowfin on all claims, awarding Yellowfin $21,023.13 in damages and $5,160.00 in attorney's fees plus costs, interest, and conditional fees should Santos seek a new trial or appeal. CR2:269-270. Implicit in the Court's judgment is a finding that Yellowfin has standing to pursue its claims and that the Court has subject matter jurisdiction.

On January 20, 2021, Santos filed a Motion for New Trial. CR1:178-187. That same day, Santos also filed a second Plea to the Jurisdiction. CR1:188-213. On March 18, 2021 the Court denied Santos' motion for new trial. CR1:249. That same day, the Court denied Santos' second Plea to the Jurisdiction. CR1:250. On March 19, 2021, Santos filed her Notice of Appeal. CR1:254.

SUMMARY OF THE ARGUMENT

The trial court properly granted summary judgment in Yellowfin's favor. The summary judgment evidence establishes that Yellowfin is the owner of the Note and has standing to enforce it. The Note constitutes a separate legal obligation from the first lien note and deed of trust and the balance owed is not a deficiency claim. The Note has not been previously accelerated, and its enforcement is not barred by

limitations. The final judgment entered disposed of all claims and of all parties and is supported by competent summary judgment evidence. There is no evidence in the record supporting the contention that Yellowfin or its predecessors waived the right to enforce the Note. The trial court did not err in entering final summary judgment in favor of Yellowfin.

STANDARD OF REVIEW

The Court must review the trial court's grant of summary judgment on a *de novo* basis. *El Paso Nat. Gas Co. v. Minco Oil & Gas, Inc.*, 8 S.W.3d 309, 312 (Tex. 1999). The Court must affirm the trial court's order granting Appellee's Motions for Summary judgment if any one of Appellee's theories have merit. *Western Invs., Inc. v. Urena*, 162 S.W.3d 547 (Tex. 2005); *Cincinnati Life Ins. Co. v. Cates*, 972 S.W.2d 623, 624 (Tex. 1996). The Court must uphold the trial court's summary judgment if it can be upheld on any available legal theory that is supported by the evidence. *Point Lookout West, Inc. v. Whorton*, 742 S.W.2d 277, 279 (Tex. 1987).

ARGUMENT

I. THE NOTE IS A NEGOTIABLE INSTRUMENT; THE INDORSEMENTS AND ALLONGES ARE VALID NEGOTIATIONS; YELLOWFIN HAS STANDING AND THE TRIAL COURT HAD JURISDICTION.

A. The Note is a negotiable instrument.

a. A negotiable instrument is an unconditional promise or order to pay.

"Negotiable instrument" means an unconditional promise or order to pay a

fixed amount of money, with or without interest or other charges described in the promise or order, if it… does not state any other undertaking or instruction by the person promising or ordering payment to do any action in addition to the payment of money. TEX. BUS. & COM. CODE §3.104(a). A promise or order is unconditional unless it states an express condition to payment, that the promise or order is subject to or governed by another record, or that rights or obligation with respect to the promise or order are stated in another record. TEX. BUS & COM. CODE §3.106(a). Whether the Note is a negotiable instrument is a question of law for the Court to determine. *Guniganti v. Kalvakuntla*, 346 S.W.3d 242, 248 (Tex. App. – Houston [14th Dist.] 2011, no pet.).

b. The Note contains an unconditional promise to pay.

The Note contains an unconditional promise to pay a fixed amount of money. "For value received, you, intending to be legally bound, jointly and severally promise to pay to our order the principal sum of $24,398.00, which includes a prepaid finance charge of $272.87, plus interest on the principal sum outstanding and other sums owed under this Note until paid in full at the per annum rate of 11.2500%."." CR2:8, §3.

c. The promise to pay is not burdened by conditions contained in another document.

Appellants contend that Note is not a negotiable instrument because (1) the

transaction in which Appellant purchased the Property involved two notes, two deeds of trust, a disclosure statement and a balloon payment rider to the deed of trust; (2) the Note stated that a default on any other debt secured by a lien on the Property was a default under the Note; (3) the Note authorized the holder to sign Appellant's name on "any document required to enforce out interests under this Note," CR2:9, at §13(z); (4) Paragraph 15 of the Note references and incorporates terms contained in the Disclosure Statement; and (5) the Deed of Trust states that providing materially false, misleading, or inaccurate information to the lender is a default. None of these allegations constitutes a limit or condition on Appellant's promise to pay amounts specified in the Note.

"A promise or order is not made conditional by reference to another record for a statement of rights with respect to collateral, prepayment, or acceleration." TEX. BUS. & COM. CODE § 3.106(b). A reference to unidentified "contract documents" for information about non-payment, acceleration, pre-payment penalties, and lender's remedies upon default does not render the Note non-negotiable. "The rule in this state undoubtedly is that before a reference in an otherwise negotiable instrument to another agreement will make the former non-negotiable, it must appear therefrom that the paper is to be burdened with the conditions of the agreement. *Continental Nat. Bank of Fort Worth v. Conner*, 214 S.W.2d 928, 931 (Tex. 1948); *Guniganti*, 346 S.W.3d at 249. There is no language

in the Note that even suggests that Appellant's promise to pay is to be burdened by or conditioned upon terms contained in the Disclosure. Rather, the Note references and incorporates the Disclosure Statement when addressing Appellant's signature and execution of the Note. (CR2:52). Nothing in the Note states, or even suggests, that Appellants' promise, and legal obligation, to make payments under the Note is subject to, governed by, or stated in another record or document.

Appellants rely on *Great N. Energy*, a decision of the Texarkana Court of Appeals. *Great N. Energy v. Circle Ridge Prod., Inc.*, 528 S.W.3d 644 (Tex. App. – Texarkana 2017, pet. denied.). In *Great N. Energy*, the owner of an interest in an oil and gas lease sold that interest to a purchaser in exchange for a promissory note. *Great N. Energy*, 528 S.W.3d at 650. The note referenced a Deed of Trust, Security Agreement, and Financing Statement, and incorporated those documents by reference. *Great N. Energy*, 528 S.W.3d at 661. The Eastland Court found that the note contained statements such as the ones specified in Comment 1 to Section 3.106 of the Business and Commerce Code, and therefore was not a negotiable instrument.[2] Notably, the statements referenced in Comment 1 all address the of rights and obligations relating to the maker's promise to pay.

[2] The statements identified in Comment 1 to Section 3.106 are "I promise to pay $100,000 to the order of John Doe if he conveys title to Blackacre to me." "This note is subject to a contract of sale dated April 1, 1990 between the payee and maker of this note." "This note is subject to a loan and security agreement dated April 1, 1990 between the payee and maker of this note." "Rights and obligations of the parties with respect to this note are stated in an agreement dated April 1, 1990 between the payee and maker of this note."

While the Note does reference the Disclosure Statement, it does not contain any language limiting Appellant's promise to pay nor does it refer to any other document that makes Appellant's promise to pay anything other than unconditional. The fact that Appellant funded the purchase of the property with two separate loans does not limit the promise to pay contained in the Note. Making the default on other agreement secured by the Property a default under the Note does not limit the promise to pay conditioned in the Note, nor does authorizing the holder to sign Appellant's signature to documents necessary to the enforcement of the Note. There simply are no conditions to Appellant's promise to pay.

The Note is a negotiable instrument under the plain meaning of Section §3.104(a) and the Court should decline Appellants' invitation to read provisions into the Note that are not there, or to expand the conditions under which an otherwise negotiable instrument will be rendered non-negotiable.

B. The indorsements and allonges are valid negotiations and successfully transferred ownership of the Note.

Because the Note is a negotiable instrument within the meaning of Chapter 3 of the Texas Business & Commerce Code, it can be negotiated by a transfer of possession and an indorsement by the payee making the transfer. TEX. BUS. & COM. CODE 3.201(a) and (b). An indorsement is merely "a signature, other than that of a signer as maker, drawer, or acceptor, that alone or accompanied by other words is

made on an instrument for the purpose of negotiating the instrument, restricting payment of the instrument, or incurring indorser's liability on the instrument." TEX. BUS. & COM. CODE §3.204. "For the purpose of determining whether a signature is made on an instrument, a paper affixed to the instrument is a part of the instrument." *Id.*

Appellant did not file a verified pleading challenging the genuineness of any indorsement. The indorsements, therefore, must be considered fully proved. TEX. R. CIV. P. 93(8).

The uncontroverted summary judgment evidence proves that Yellowfin has possession of the Note and that the allonges are attached to the Note. CR2:41, ¶5. The sole evidence before the Court as to whether the allonges are "affixed" to the Note is the testimony of Matt Miller, who testifies "the allonges depicted in Exhibit A are affixed and attached to the Original Note." CR2:41, ¶ 5. The Note and Allonges contain a chain of indorsements, the last of which says "Pay to the order of: Yellowfin Loan Servicing Corporation without recourse." CR2:55. The uncontroverted summary judgment evidence conclusively proved that Yellowfin is the holder of the Note and entitled to enforce it. *See* TEX. BUS. & COM. CODE §§3.201(b), 3.203(b); *Deweese v. Ocwen Loan Servicing, L.L.C.*, 2014 WL 6998063 at *3 (Tex. App. – Houston [1st Dist.] Dec. 11, 2014, no pet.) (affirming summary judgment over a standing challenge based on affidavit testimony that Ocwen had

possession of the note and the note contained a special indorsement to Ocwen); *Taylor v. Fred Clark Felt Company*, 567 S.W.2d 863, 866 (Tex. App. – Houston [14th Dist.] 1978, writ ref'd n.r.e.) (affidavit of counsel stating he was in possession of note coupled with note made payable to movant was sufficient summary judgment evidence to prove standing). Yellowfin's possession of the Note coupled with the special indorsement making the Note payable to Yellowfin conclusively establishes that Yellowfin has standing to bring this lawsuit.

C. Yellowfin has standing; the trial court properly exercised jurisdiction.

The trial court properly exercised jurisdiction over the subject matter of this suit and personal jurisdiction over Appellants. Yellowfin sought enforcement of a promissory note and judgment in the amount of $21,023.13 plus interest, costs, and fees. The damages sought are within the jurisdictional limits of this Court. *See* TEX. GOVT. CODE §§24.007(b); TEX. CONST. ART. 5, §§ 1 and 8. This Court has in personam jurisdiction over Appellant because Appellant resides within the geographic jurisdiction of this Court, was served with process, and voluntarily appeared in defense of Yellowfin's claims. *In re Davenport*, 2015 WL 2929555, at *4 (Tex. App. – Houston [1st Dist.] Jan. 22, 2015, orig. proceeding); *In re Parr*, 199 S.W.3d 457, 461 (Tex. App. – Houston [1st Dist.] 2006, orig. proceeding). Yellowfin has established standing as a matter of law by presenting uncontroverted evidence of the same. Appellants' jurisdictional challenge has no basis in fact or law and must

be denied and the trial court's judgment affirmed.

II. YELLOWFIN'S CLAIM IS NOT A DEFICIENCY CLAIM.

Appellants next argue that there was only one transaction between First Franklin and Appellants and therefore the Note is merely a deficiency balance left over from the foreclosure of the first lien. This argument is unsupported by Texas law.

A. Appellants' authority is inapposite.

In support of her position, Appellant cites the *Pitt & Collard, LLP* opinion from the First Court of Appeals. *Pitt & Collard, LLP v. Schechter*, 369 S.W.3d 301, 313 (Tex. App. – Houston [1st Dist.] 2011, no pet.). The discussion in *Pitt & Collard* supports the proposition that all writings pertaining to the same transaction should be read together when attempting to discern the intent of the parties in the event some portion of the agreement is ambiguous. *Pitt & Collard*, 369 S.W.3d at 313. There is nothing in the *Pitt & Collard* decision that suggests that separate loans, capable of being separately negotiated and enforced and containing separate payment obligations, should be considered one contract for the purposes of limitations. In *Pitt & Collard*, the Court cited to *Miles v. Martin*, for the language quoted by Appellee. In that case, the Texas Supreme Court stated,

> It is well settled that separate instruments executed at the same time, between the same parties, and relating to the same subject matter may be considered together and construed as one contract. This undoubtedly

> is sound in principle when the several instruments are truly parts of the same transaction and together form one entire agreement. It is, however, simply a device for ascertaining and giving effect to the intention of the parties and cannot be applied arbitrarily and without regard to the realities of the situation.

Miles v. Martin, 321 S.W.2d 62, 66 (Tex. 1959) (emphasis added). Appellants are attempting to take a tool used for construing ambiguous contracts and contort it into a legal principle under which separate agreements with separate rights and obligations must be considered as one contract for the purposes of applying statutes of limitations. Neither *Miles v. Martin*, nor *Pitt & Collard* support this proposition.

B. The amount owed on the Note is not a deficiency balance.

Based on the argument that the first lien documents, the Note, and Deed of Trust are the same contract, Appellant contends that the foreclosure of the First Lien on the property rendered the balance owed on the Note a deficiency balance subject to the two-year statute of limitations in TEX. PROP. CODE §51.003. While this argument is creative, it is not novel. Other courts have examined the application of the statute of limitations for deficiency actions where a first lien foreclosure left a subordinate lien extinguished and the debt it secured unsatisfied. *See e.g. Mandarino v. Sherwood Lane Investments, LLC*, 2016 WL 4034568, at *8 (Tex. App. – Houston [1st Dist.] July 26, 2016). Speaking for a unanimous panel, Justice Massengale wrote:

In *Mays v. Bank One, N.A.*, 150 S.W.3d 897 (Tex. App.– Dallas 2004, no pet.), the appellant executed two different promissory notes to different lenders. *Mays*, 150 S.W.3d at 898. When the appellant defaulted, the senior lienholder foreclosed, but it was only able to satisfy the first debt. *Id.* No proceeds were left for the junior lienholder, so that holder sued for the value of its promissory note. *Id.* The appellant aimed to use the property's fair market value to offset the claimed deficiency under Texas Property Code section 51.005, which only applies after a foreclosure sale results in a deficiency. *See id.* at 899; TEX. PROP. CODE § 51.005. However, the court found the statute inapplicable, noting that "the only foreclosure was of the lien held by" the senior lienholder. *Mays*, 150 S.W.3d at 900. Because the second lien remained wholly unsatisfied and the second lien was extinguished by the foreclosure, the court held that the statute did not apply. *Id.*

The factual situation in this case is similar to the one in *Mays*. Here, the senior lienholder, who had possession of the wrapped note, foreclosed on the lien after appellants defaulted on their obligations to both notes, leading to Lee Wallis's default on the wrapped note. However, the proceeds of that sale did not satisfy any of the debt from the junior lien, the wraparound note at issue in this suit. Just as there was no foreclosure by the junior lienholder in *Mays*, so was there no foreclosure by Sherwood Lane in the instant case. *See id.*

We conclude that the statute of limitations for deficiency judgments is similarly inapplicable. While *Mays* dealt with a different subsection of the Property Code, we aim to harmonize the provisions in any statute and assign an undefined statutory term a meaning that is consistent throughout. *See Tex. Dep't of Transp. v. Needham*, 82 S.W.3d 314, 318 (Tex. 2002). *Mays*'s interpretation of the statute is thus relevant to our interpretation of Section 51.003. Based on this analysis and the plain language of the statute, we conclude that Sherwood Lane was not seeking a deficiency judgment when it sued on the promissory note, and it was not subject to the statute of limitations for deficiency judgments. *See* TEX. PROP. CODE 51.003; *PlainsCapital Bank*, 459 S.W.3d at 555; *Mays*, 150 S.W.3d at 900….

> Sherwood Lane asserts that section 3.118 of the Texas Business and Commerce Code was the appropriate statute of limitations. We agree.

Mandarino, 2016 WL 4034568, at *8.

Mandarino is persuasive precedent and is controlling. This is not a deficiency action and Yellowfin's claim is not a deficiency claim. *Poston v. Wachovia Mortg. Corp.*, 2012 WL 1606340, at *2 (Tex. App. – Houston [14th Dist.] May 8, 2012, pet. denied) ("when a junior lien is extinguished by foreclosure on a superior lien, the unpaid portion of the loan that was secured by the junior lien merely becomes an unsecured debt for which the lender may obtain a money judgment.") Yellowfin's claims are not subject to the two-year limitations period imposed on deficiency claims; it is not a deficiency claim.

Appellants will attempt to distinguish *Mandarino* and *Poston* by arguing that in those cases two separate lenders originated the loan secured by the first lien and the loan secured by the second lien. This is a meaningless distinction. At the time of the first lien foreclosure, the mortgagee of Appellants' first lien was National City Bank. CR2:80. The record contains no indication of which entity held the Note that forms the basis of this suit at the time of the foreclosure, but what is clear is that National City Bank is not in the chain of ownership of the Note and does not appear on any indorsement or Allonge. Appellants' position would render a debt owed to, for argument's sake, Dreambuilder Investments, LLC a deficiency of a debt owed to

National City Bank. This position lacks any support in Texas law and this Court should decline the invitation to create this precedent.

III. THE LIMITATIONS PERIOD FOR DEFICIENCY CLAIMS DOES NOT GOVERN.

Appellant contends that the debt owed to Yellowfin is a deficiency balance subject to the two-year statute of limitations contained in Section 51.003 of the Texas Property Code. Appellant also contends that Yellowfin's cause of action on the Note accrued on or before November 6, 2007, when the foreclosure of the first lien occurred. Neither contention finds support in Texas law.

A. Property Code Section 51.003 does not mean what Appellant thinks it means.

The First Lien note and deed of trust constitute separate contractual obligations from those imposed by the Note. The Foreclosure Sale Deed by which the Property was conveyed after foreclosure of the first lien references only the first lien note obligation. CR2:80. It does not identify the Note held by Yellowfin nor purport to seek payment on that Note. The amount owed to Yellowfin is not a deficiency balance as contemplated by Texas Property Code Section 51.003. Appellants urge the Court to read Section 51.003 as imposing a two-year limitations period following a foreclosure sale for all debts formerly secured by a property. The plain language of the statute does not lend itself to this interpretation nor does a common-sense reading of the statute. The statute states that if a lender forecloses

and does not recover a sufficient amount to satisfy "the indebtedness secured by the real property, resulting in a deficiency" any action to recover "the deficiency" must be brought within two years of the foreclosure sale "and is governed by this section." TEX. PROP. CODE §51.003(a). The statute goes on to provide a mechanism for offsetting the fair market value of the property at the time of sale against any deficiency if the property was sold for less than the fair market value. In doing so, it recognizes that the value of "a lien or encumbrance on the real property that was not extinguished by the foreclosure" must be deducted from the fair market value. TEX. PROP. CODE 51.003 (c). The legislature is cognizant of the effect of foreclosure on other liens and knows how to reference liens that are not the lien being foreclosed. Had the legislature wished to say that "a debt secured by any lien that is foreclosed out of existence shall become part of the deficiency" it most certainly could have but it did not. Its use of "the unpaid balance of the indebtedness secured by the real property" does not contemplate surviving liens becoming deficiency claims and there is no reason to assume that the Texas Legislature intended that debt secured by liens that do not survive a foreclosure become deficiency claims subject to Section 51.003.

Section 51.003 is inapposite. There is no authority for the proposition that the foreclosure of the First Lien caused Yellowfin's claim to accrue and the statute of limitations to start running. There is no authority for the application of Section

51.003 of the Property to a junior lien following the foreclosure of a senior lien. To the extent Appellants challenge the trial court's judgment based on this statute, this Court must affirm that judgment.

IV. THE STATUTE OF LIMITATIONS HAS NOT RUN BECAUSE YELLOWFIN'S CAUSE OF ACTION DID NOT ACCRUE UNTIL IT ACCELERATED THE NOTE.

A. Section 16.004 of the Civil Practice and Remedies Code is not the governing limitations statute.

Yellowfin filed suit to collect the unpaid balance owed under the Note. CR2:4-7. Section 3.118 of the Texas Business and Commerce sets the limitations period for actions to enforce promissory notes. *Mandarino*, 2016 Tex. App. LEXIS 7897 at *21-22. Section 3.118(a) of the Business and Commerce Code states "Except as provided in Subsection (e), an action to enforce the obligation of a party to pay a note payable at a definite time must be commenced within six years after the due date or dates stated in the note or, if a due date is accelerated, within six years after the accelerated due date." TEX. BUS. & COM. CODE §3.118(a). As the First Court of Appeals noted in *Educap, Inc. v. Sanchez*, "when it applies, the statute of limitations on negotiable instruments supersedes the statute of limitations on debts because the statute of limitations on negotiable instruments is more specific." *Ecucap, Inc. v. Sanchez*, 2013 Tex. App. LEXIS 7709, at *6 (Tex. App. – Houston [1st Dist.] June 25, 2013, pet. denied). Under the plain language of Section 3.118(a), the statute of limitations as to each monthly payment runs six months after the

payment is due, and the statute of limitations as to any amount remaining due at maturity or upon acceleration runs six years after the maturity or acceleration.

B. Limitations began to run upon acceleration or maturity.

The maturity date of the Note is May 1, 2025. CR2:8. Yellowfin accelerated the Note's maturity on March 25, 2020. CR2:84-85. The record contains no evidence of a prior acceleration. In the absence of acceleration, the statute of limitations for an action to enforce the Note would not run until May 1, 2031.

The statute of limitations as to each payment that comes due runs six years after the due date of that payment. *Gabriel v. Alhabbal*, 618 S.W.2d 894, 897 (Tex. App. – Houston [1st Dist.] 1981, writ ref'd n.r.e.); *Dell Computer Corp. v. Ramirez*, 390 F.3d 377, 391 (5th Cir. 2004). Given the March 25, 2020, acceleration, the statute of limitations will not run until March 25, 2026. Appellants cannot show that the Note's maturity was accelerated prior to March 25, 2020. Yellowfin is not attempting to collect any payment that came due more than six years prior to the filing of this lawsuit. The statute of limitations has not run.

C. Even if Section 16.004 did control, Appellants cannot establish accrual prior to the March 25, 2020, acceleration.

If Section 16.004 of the Civil Practice and Remedies Code were applicable, Appellants still cannot prove that limitations have run. In applying the statute of limitations, no matter which statute of limitations, a cause of action accrues when a

set of facts comes into existence that gives the claimant a right to seek a remedy in the courts. *Murray v. San Jacinto Agency, Inc.*, 800 S.W.2d 826, 828 (Tex. 1990). Assuming the applicable limitations period is four years, that period still begins to run upon the accrual of the cause of action. Under Texas law, a cause of action on a note accrues when the note matures by its own terms or upon acceleration. *Fraps v. Lindsay*, 2003 Tex. App. LEXIS 10062, at *14 (Tex. App. – Houston [1st Dist.] Nov. 26, 2003, no pet.). The Note was accelerated on March 25, 2020, and would have matured on May 1, 2025. Accordingly, if the four-year statute of limitations governs this action, limitations would not run until March 25, 2024.

D. The Deed of Trust provides an optional right to accelerate the loan; it does not alter well-established law.

Appellants argue that limitations began to run on November 6, 2007, when the First Lien was foreclosed. The argument is based on Paragraph 21 of the Deed of Trust which reads:

> "21. **Senior Liens**. Borrower shall perform all of Borrower's obligations under any deed of trust, security instrument or other security agreement, which has priority over this Security Instrument, including Borrower's covenants to make payments when due. Borrower agrees that should default be made in the payment of any note secured by an prior valid encumbrance against the Property, or in any of the covenants of any prior deed of trust or other serurity agreement, then the Note secured by this Security Instrument, **at the option of Lender**, shall at once become due and payable…"

CR2:69, § 21 (emphasis added). Appellants argue that the payment default on the

First Loan somehow contractually caused the accrual of First Franklin's cause of action to enforce both the First Loan and the Note.

Nothing in Paragraph 21 of the Deed of Trust changes the fact that a cause of action to enforce a note accrues when the balance matures or when the note is accelerated. Paragraphs 16, 20, and 21 of the Deed of Trust, by their plain terms, give the "Lender" the right, but not the obligation to accelerate the balance based on the foreclosure of the First Lien. Paragraph 20 contains an optional acceleration clause and does not mandate that the loan is automatically accelerated. Because the record contains no indication that any prior owner of the Note chose to exercise the right to accelerate the Note based on the foreclosure of the prior lien, the cause of action for enforcement of the Note did not accrue and limitations did not begin to run. *Fraps*, 2003 Tex. App. LEXIS 10062, at *14.

E. Appellants failed to establish a limitations defense.

Limitations are an affirmative defense. Appellants had the burden of conclusively establishing, through competent summary judgment evidence, that limitations expired before suit was filed. *Regency Field Servs., LLC v. Swift Energy Operating, LLC*, 2021 Tex. LEXIS 374, at *16 (Tex. May 7, 2021). To do so, Appellants must have conclusively established when Yellowfin's cause of action accrued. *Id.* The only two dates in the record that demonstrate the accrual of a cause of action to enforce the Note are the maturity date of the Note, December 1, 2035,

and the Notice of Acceleration served by Yellowfin on March 25, 2020. CR:105 and 135. Appellants have not demonstrated that limitations ran on Yellowfin's claims and summary judgment in favor of Yellowfin was warranted. This Court must uphold the trial court's judgment.

V. YELLOWFIN PRESENTED COMPETENT, ADMISSIBLE SUMMARY JUDGMENT EVIDENCE AND THE TRIAL COURT RULED CORRECTLY.

A trial court's evidentiary rulings are reviewed for an abuse of discretion. *Sw. Energy Prod. Co. v. Berry-Helfand*, 491 S.W.3d 699, 727 (Tex. 2016). A trial court abuses its discretion when it acts without regard for any guiding rules. *Caffee Ribs, Inc. v. State*, 487 S.W.3d 137, 142 (Tex. 2016). A trial court's evidentiary rulings must be upheld if there is any legitimate basis for the ruling or if it is correct under any legal theory, even if the ground was not raised in the trial court. *Enbridge Pipelines (E. Tex.) L.P. v. Avinger Timber, LLC*, 386 S.W.3d 256, 264 (Tex. 2012).

Where the plaintiff is the movant on its affirmative claims in a traditional motion for summary judgment, the plaintiff must affirmatively demonstrate by summary judgment evidence that there is no genuine issue of material fact concerning each element of its claim for relief. See TEX. R. CIV. P. 166a; *Diversicare Gen. Partner, Inc. v. Rubio*, 185 S.W.3d 842, 846 (Tex. 2005). Plaintiff meets this burden if it produces evidence that would be sufficient to support an instructed verdict at trial. *Id.*

A. Matt Miller's Affidavit Testimony is competent, admissible summary judgment evidence.

Appellants argue that Matt Miller's Affidavit testimony and the amortization table offered as a business record do not meet the requirement of TEX. R. CIV. P. 166a. Appellants argue that the affidavit contains testimony based on a guess from someone without the requisite knowledge.

Mr. Miller's testimony as to the amounts Yellowfin seeks to collect is competent summary judgment evidence. *American 10-Minute Oil Change, Inc. v. Metropolitan Nat. Bank-Farmer's Branch*, 783 S.W.2d 598, 601 (Tex. App. – Dallas 1989, no writ). (finding that the bank president's affidavit setting forth amounts due after accounting for offsets was competent summary judgment evidence in the absence of a controverting affidavit).

Each of the records identified in Mr. Miller's testimony were incorporated and kept in the course of Yellowfin's business. Mr. Miller testified that the facts stated in his affidavit were true and correct and within his personal knowledge. CR2:40, ¶ 1. He further testified that he is the custodian of records for Yellowfin, and that the documents attached to his affidavit testimony "as Exhibits, A, B, D, E, F, G, and H" "are true and correct copies of records maintained by Yellowfin in the regular course of its business." CR2:40, ¶¶ 2-3. This testimony meets Rule 803's requirement that the third-party documents be "incorporated and kept in the course of the testifying

witness' business." See *Semien v. Unifund CCR Partners*, 321 S.W.3d 235, 240-41 (Tex. App. – Houston [1st Dist.] 2010, no pet.).

Further, Mr. Miller's testimony serves only to recite the premises for Yellowfin's calculation (that it is assumed that all payments through June 1, 2019, were made) and then to recite the content of the amortization table based on those premises. Finally, "An affidavit made on the personal knowledge of a bank officer, in which the officer identifies the notes and guaranty and recites the principal and interest due, is not conclusory and is sufficient to support a summary judgment motion." *American 10-Minute Oil Change, Inc.*, 783 S.W.2d at 601. The statements in Mr. Miller's affidavit were neither hearsay nor conclusory and were admissible and competent summary judgment evidence.

The statements in paragraph 4 of the affidavit are not hearsay because they cite to the business records themselves which fall under exceptions of the affidavit. CR2:40-41. Exhibit I to Yellowfin's Motion for Summary Judgment is a Loan Amortization Schedule that demonstrates the amortization conducted by Yellowfin in arriving at the amount due under the loan. CR2:102-106. The amortization table is a business record of Yellowfin. CR2:40, ¶3. Appellant takes exception to the amortization table because there is no evidence of an original amortization schedule made by First Franklin, the amortization table state "Powered by The Mortgage Office" at the bottom of each page and The Mortgage Office is not a party to the suit

and didn't testify, and the amortization table is dated December 3, 2019.[3]

Loan amortization is a function of the application of a mathematical formula to the terms of a Note, like interest rate, payments per year, principal balance, and maturity date. It is lunacy to suggest that the amortization table generated by Yellowfin differs in any way from one that may have been generated by First Franklin at the origination of the loan. Amortization tables are readily available from a number of sources, capable of replication and being controverted, and widely relied upon by anyone contemplating the effect of interests or payments over time. In fact, Appellant attached an amortization table to their Plea to the Jurisdiction as "Exhibit 2" and apparently did not suffer any evidentiary heartburn. CR1:, ‖ 21; 33-40. Arithmetic is not hearsay. The fact that the amortization table was not generated at the time of loan origination is of no moment. Yellowfin clearly generated the table after the Note was acquired and while analyzing whether to offer assistance to get the loan back to performing status. The table was generated at or near the time of the events it portrays; the normal amortization of the Appellant's loan had all payments been timely made. It was created by someone with sufficient knowledge of the Note to insert the proper principal balance, interest rate, payment intervals, and maturity date into the table. The amortization table was supported by

[3] *See* Appellants' Brief, p. 8, third, and fourth paragraphs.

uncontradicted testimony *and the table comports with Appellant's amortization calculation.* There is no evidence to the contrary in the record and no reason to exclude the table from summary judgment evidence.

Perhaps more importantly, there is no dispute as to whether payments have been made since the foreclosure of the first lien deed of trust. Appellant acknowledges that when the first lien was foreclosed, she "repudiated" the Note and "chose to make no further payments." CR1:14, ¶ 39. Yellowfin's waiver of all payments prior to June 1, 2019, and subsequent calculation of the amount due based on the assumption that all payments prior to that date were timely made is not guesswork by Yellowfin, it is math. Appellant, without evidence or authority, contends that the amortization was "generated for litigation purposes… but not by First Franklin, nor anyone else in the alleged chain ow ownership…" The amortization, as Appellant points out, is dated December 3, 2019. This lawsuit was not filed until June 12, 2020. Appellants' allegation that the amortization was generated for use in litigation does not make it so, particularly in the absence of evidence or supporting authority.

"Summary judgment based on the uncontroverted affidavit of an interested witness is proper if the evidence is clear, positive, direct, otherwise credible, free from contradictions and consistencies, and could have been readily controverted." *Trico Techs. V. Montiel*, 949 S.W.2d 308, 310 (Tex. 1997). Mr. Miller's testimony

and the documentary evidence attached thereto meet the criteria set forth by the Supreme Court. Mr. Miller's testimony was uncontroverted but could have been readily controverted by proof of payment (if such proof existed) or records from prior owners of the indebtedness. No attempt was made to controvert the affidavit testimony. Mr. Miller's testimony and the documents attached thereto are admissible and are competent summary judgment evidence and the trial court did not act without reference or regard to any governing rules or principles and therefore did not abuse its discretion. The trial court did not err in entering summary judgment in favor of Yellowfin and this Court should affirm the trial court's judgment.

B. Appellants were not entitled to the "Favorable Inferences" they seek because they presented no evidence to support their defenses.

Appellants complain that the trial court did not resolve "Doubts That Must be Resolved in the Smith's Favor" in Appellants' favor. When a plaintiff moves for summary judgment on its cause of action, it must prove it is entitled to summary judgment by establishing each element of its claims as a matter of law. *MMP. Ltd. v. Jones*. 710 S.W.2d 59, 60 (Tex. 1986). The plaintiff may ignore any affirmative defenses. *Bauer v. Jasso*, 946 S.W.2d 552, 555-56 (Tex. App. – Corpus Christi 1997, no writ). The defendant's affirmative defense cannot, without summary judgment evidence, defeat the plaintiff's motion for summary judgment. *Brownlee v. Brownlee,* 665 S.W.2d 111,112 (Tex. 1984). In this case, in addition to

Yellowfin's evidence, Appellants filed (1) a copy of a February 8, 2013, Forfeiture whereby RCS forfeited its certificate of registration in Texas (CR1:32); (2) an amortization table that matched Yellowfin's calculations (CR1;33-40); (3) a copy of the February 5, 2008, Substitute Trustee's Deed, which Yellowfin also relied on (CR1:41-42); (4) a second amortization table that shows the amortization of the principal amount over a twenty-year period with no balloon payment (CR1:43-50); (5) a copy of the Deed of Trust (CR1:52-60); (6) Yellowfin's Responses to Appellant's written discovery (CR1:108-129); (7) a copy of the first lien deed of trust (CR1:154-165); and (8) a copy of the Property's ownership history as reported by the Harris County Appraisal District (CR2:163). From this evidence, and that introduced by Yellowfin, Appellants seek the following conclusions of fact and conclusions of law (couched, of course, as "favorable inferences"):

1. "Ms. Santos bought their homestead with a first note ("First Loan") and a the subordinated Note and Security Agreement ("Note")… from First Faranklin...., the same original lender. They were both signed on the same day, with juse one joint purpose between the parties – the financing of that one house." This is not contested and is not material to the issues resolved on summary judgment.

2. "In the caption of the case Yellowfin identifies itself "As Successor In Interest to First Franklin." It has no more rights in the Note than First Franklin had." This also is uncontested and seems axiomatic.

3. "Limitation on the Note began to run when First Franklin... acquired the right to declare all amounts due and payable. The same Paragraph 21. Senior Liens, made the default that led to the November 2007 foreclosure of the First Loan a default on the Note and gave the holder the power to

accelerate…" This is not an inference, this is a legal conclusion properly within the province of the Court.

4. "The house was foreclosed in November 2007 because of a default on one of those senior lien agreements, the First Loan." These facts are not in dispute.

5. "The default on the First Loan cause the accrual of the cause of action to enforce both the First Loan and the Note. That was as early as the default letter sent prior to acceleration that led to the November 2007 foreclosure." The referenced letter is not a part of the record and the remainder of the sentence is a legal conclusion properly within the province of the Court.

6. "Both the First Loan and the Note were secured by liens against the property. They were both part "of the indebtedness secured by the real property" owed to the same lender."" The first sentence is not in dispute. The second sentence is a legal conclusion to the extent it attempts to bring the Note into the purview of the two-year limitations period contained in Section 51.003 of the Texas Property Code.

7. "After the 2007 foreclosure under TEX. PROP. CODE §51.002, the owner of the Note could not rely on the four-year limitations period in TEX. CIV. PRAC. & REM. CODE 16.004 to enforce a debt. Instead it was bound by the special two-year period in which to sue to enforce a deficiency that is set in TEX. PROP. CODE §51.003(a)." These statements are also legal conclusions, and incorrect legal conclusions at that.

The remaining sixty-one "Favorable Inferences" follow the same tone, regurgitating the arguments made in Appellant's Plea to the Jurisdiction and elsewhere, utterly failing to point to any evidence that would support the requested "inference", and seeking to tell the trial court which statutes must be applied to conclude that limitations have run, and even a quote from the *Guniganti* opinion. CR: 186-194. While Appellant is entitled to "every reasonable inference" in the summary

judgment process and review, she is not entitled to dictate conclusions of law to the trial court or to this Court and not entitled to "reasonable inferences" supported only by their allegations.

When reviewing a summary judgment, the Court must take as true all competent evidence favorable to the non-movant and indulge every reasonable inference in the non-movant's favor. *Southwestern Elec. Power Co. v. Grant*, 73 S.W.3d 211, 215 (Tex. 2002). In this case, the relevant evidence is limited to the Note, Deed of Trust, Substitute Trustee's Deed, the Affidavit Testimony of Matt Miller, the Affidavit Testimony of Damian Abreo, Yellowfin's Fair Debt Letter, Notice of Default Letter, and Notice of Acceleration Letter, the Mortgage Note Purchase and Sale Agreement, the Bill of Sale (as redacted), and the amortizations prepared by Yellowfin and Appellants. There is no evidence from which a factfinder could draw a reasonable inference as to the alleged invalidity of the transfers, the prior Note holders' intent to waive their rights, the existence of excess proceeds, or any of the other theories by which Appellant seeks to avoid her legal obligation. In this case Appellant has failed to provide even circumstantial evidence of the vast majority of "reasonable inferences" she seeks. *See e.g. Beasley v. Wal-Mart Stores, Inc.*, at 2020 Tex. App. LEXIS 1331, at *17-18 (Tex. App. – Dallas Feb. 18, 2020, no pet.) ("Circumstantial evidence from which equally plausible but opposite inferences could be drawn is merely speculative and, therefore, legally

insufficient…").Summary judgment in favor of Yellowfin should be affirmed.

VI. THE RIGHT TO ENFORCE THE NOTE HAS NOT BEEN WAIVED.

Waiver, in this context, is an affirmative defense, and Appellant bore the burden of persuasion through actual competent evidence. *Regency Field Servs., LLC.*, 2021 Tex. LEXIS 374, at *16 In order to prove waiver by any of the holders of the Note, Appellant had to plead and prove (1) the existence of a right, benefit, or advantage, (2) the waiving party's actual or constructive knowledge of that right, benefit, or advantage, and (3) the actual intent to relinquish the right or intentional conduct inconsistent with the right. *Ulico Cas. Co. v. Allied Pilots Ass'n.*, 262 S.W.3d 773, 778 (Tex. 2008).

A. The record is void of evidence supporting waiver.

Appellant invites the Court to infer an intent to relinquish the right to sue to enforce the Note from the period of time that has passed since the foreclosure of the First Lien but offers no evidence of actual intent on the part of Yellowfin or any prior owner to waive the right to sue. The Court must reject this invitation.

Appellant argues that "First Franklin waived its right to sue on the Note starting in 2007" and because Yellowfin can only hold those rights that First Franklin once held, the waiver defense is established as to Yellowfin.[4] Appellant fails to recognize a difference between waiving a right and choosing not to immediately

[4] *See* Appellant's brief, p. 46, first full paragraph.

exercise it. Under the Deed of Trust, the mortgagee has the right but not the duty to accelerate the Note upon default, or upon alienation of title through foreclosure of the First Lien. Choosing not to accelerate the Note and not to initiate litigation is not intentional conduct inconsistent with the Note holder's rights. An optional acceleration clause would not be optional if failure to exercise the option automatically implied a waiver of the right to accelerate.

"The universal test for implied waiver by litigation conduct is whether the party's conduct – action or inaction – clearly demonstrates that party's intent to relinquish, abandon, or waive the right at issue." *Lalonde v. Gosnell,* 593 S.W.3d 212, 219-220 (Tex. 2019). There is no evidence in the record of an actual intent by any holder of the Note to relinquish the right to enforce the Note nor is there evidence of intentional conduct inconsistent with the right to enforce the Note. In order to find that Yellowfin or any of its predecessors waived the right to enforce the Note, the Court would have to infer an intent to abandon on the part of that party.

B. The Court cannot infer an intent to waive the right to sue by Yellowfin or any of its predecessors.

Waiver by inference only applies to prevent fraud and inequitable consequences. *Cal-Tex Lumber Co. v. Owens Handle Co.*, 989 S.W.2d 802, 812 (Tex. App. – Tyler 1999, no pet.); *Blardone's Estate v. McConnico*, 604 S.W.2d 278, 283 (Tex. App. – Corpus Christi 1980, writ ref'd n.r.e.); *Langley v. Jernigan,*

76 S.W.3d 752, 756 (Tex. App. – Waco 2002) rev'd on other grounds, 11 S.W.3d 153 (Tex. 2003).

There is no allegation that Yellowfin or its predecessors acted fraudulently or that any inequitable consequences will result from enforcement of the Note that Appellants voluntarily made. As the Texas Supreme Court recently advised "the universal test for implied waiver by litigation conduct is whether the party's conduct – action or inaction – clearly demonstrates the party's intent to relinquish, abandon, or waive the right at issue – whether the right originates in a contract, statute, or the constitution. This is a high standard. In determining whether a party's conduct clearly demonstrates an intent to waive a right, courts must consider the totality of the circumstances. This is a case-by-case approach that necessitates consideration of all the facts and circumstances attending a particular case." *LaLonde v. Gosnell*, 593 S.W.3d 212, 219-20 (Tex. 2019).

The trial court weighed the attendant circumstances and found no waiver as a matter of law. Appellant presented no evidence upon which the trial court could base an inference of waiver. As Appellant repeatedly points out, she cannot demonstrate what party held the mortgage for what period of time. The only dates in the record are the date of the foreclosure, the date on which Yellowfin acquired the Note, and the date Yellowfin filed suit. Roughly twelve and a half years passed between the November 6, 2007, foreclosure and the June 12, 2020, Petition in this

suit. Yellowfin acquired the Note on August 29, 2019. Prior to Yellowfin owning the Note, the chain of indorsements indicates that four other entities once owned the Note. If each of the five entities held the Note for three years after the foreclosure, it is unlikely that the Court could infer an intent to waive rights under the Note under any circumstances. On the other hand, if one entity held the Note for twelve years and then the remaining transfers took place within a few weeks, could the Court infer waiver? Perhaps. Fortunately, the Court does not have to make such a determination because there is no evidence in the record that supports Appellee's waiver defense. Yellowfin has not waived its rights and was entitled to summary judgment on its claims.

VII. WHETHER THE NOTE IS AN OBLIGATION "SECURED BY A REAL PROPERTY LIEN" IS LARGELY IRRELEVANT.

Appellant argues that Yellowfin cannot "rely on the apparent safe harbor" in Section 16.035 of the Texas Civil Practice and Remedies Code. TEX. CIV. PRAC. & REM. CODE §16.035(e). Yellowfin has no need to do so. Section 16.035 governs only "a suit for the recovery of real property under a real property lien or the foreclosure of a real property lien." TEX. CIV. PRAC. & REM. CODE §16.035(a). The lien that previously secured the Note against the Property was foreclosed out of existence when the prior lien was foreclosed. *Diversified Mortgage Investors v. Lloyd D. Blalock General Contractor, Inc.*, 765 S.W.2d 794, 806 (Tex. 1978).

Yellowfin is not attempting to foreclose a lien on real property or to recover real property because its debt is unsecured.

While this discussion provides Appellants with an opportunity to accuse Yellowfin of contradicting itself, the outcome is of no moment. Appellant incorrectly contends that the foreclosure deficiency limitations period applies as established by Section 51.003 of the Texas Property Code. TEX. PROP. CODE §51.003. When that fails, Appellant argues that the four-year limitations period governing actions for debt applies. TEX. CIV. PRAC. & REM. CODE §16.004. For reasons unknown, Appellant argues that the four-year statute of limitations in Section 16.035 of the Civil Practice and Remedies Code is unavailable to Yellowfin. The proper statute of limitations provision for actions to enforce notes is in Section 3.118 of the Business and Commerce Code. *See* TEX. BUS. & COMM. CODE §3.118(a). *See Aguero v. Ramirez*, 70 S.W.372, 374 (Tex. App. – Corpus Christi 2002, pet. denied) ("If Ramirez was suing to enforce the lien, the deed of trust, or seeking to foreclose on the property used as security, the fourt-year statute of limitations would apply… However, Ramirez is only suing to enforce the payment on the promissory note. His suit is still actionable.")' *PNC Mortgage v. Howard*. 618 S.W.3d 75, 87 (Tex. App. – Dallas 2019) (mem. Op.)

As demonstrated in Section IV above, whether the applicable limitations period is six years under the Business and Commerce Code or four years under

Sections 16.004, 16.035, or 16.051 of the Civil Practice and Remedies Code, the key question (and the one the Appellant cannot answer) is "when did the cause of action accrue and the running of the statute start?" The record contains only one answer to this question: March 25, 2020, when Yellowfin accelerated the indebtedness. No matter which statute is applicable, limitations had not run by July 13, 2020, when Yellowfin filed its Original Petition in this case.

VIII. THE DEBT OWED WAS ACCURATELY CALCULATED AFTER YELLOWFIN WAIVED THE RIGHT TO COLLECT PAST PAYMENTS; IT IS NOT A GUESS

It is undisputed that Appellant failed to make payments on the Note at any point after the November 6, 2007, foreclosure. Appellants acknowledge in their Answer that they "repudiated" the Note when the prior lien was foreclosed. CR:12, ¶41.

A. Yellowfin waived collection of any payments due or costs incurred through June 1, 2019. Based on that waiver, the amount due can be calculated with certainty.

Calculating the amount contractually due would be as simple as determining the contractual due date by serving discovery on the prior owners and holders of the Note, then adding up all of the payments that have come due since that due date. Given the probability of actually collecting payment from Appellant, it is more efficient for Yellowfin to waive its right to collect any payment that came due through June 1, 2019, and to treat the loan as if all payments through June 1, 2019,

had been timely made.

Appellant cries foul over Yellowfin's waiver of payment that came due through June 1, 2019, arguing that the summary judgment is the result of a "naked guess." Appellant, ever a fan of imposing requirements not contained in Texas law, fails to cite any authority as to why Yellowfin cannot make such a waiver. Texas law has long recognized that waiver "is essentially unilateral in its character" and "no act of the party in whose favor it is made is necessary to complete it." *Perry Homes v. Cull*, 258 S.W.3d 580, 594 (Tex. 2008) citing *Mass Bonding & Ins. Co. v. Orkin Exterminating Co.*, 416 S.W.2d 396, 401 (Tex. 1967). Under well-established Texas law, Yellowfin can and has unilaterally waived its right to collect payments that came through June 1, 2019. Appellant's approval is not necessary.

With the waiver of those payments, calculating the balance due is a matter of simple mathematics. Prior to the waiver, Appellant owed $21,640.59 and can produce no evidence that even suggests the balance is less than this amount. After Yellowfin's waiver of all payments prior to June 1, 2019, Appellant owed $21,023.13 and produced no evidence to suggest this amount was improper. Summary judgment in favor of Yellowfin is supported by the affidavit testimony of Matt Miller, Yellowfin's custodian of records. Mr. Miller expressly states, "According to Plaintiff's records, Defendant owes a balance of $21,023.13." CR2:40, ¶4. The summary judgment is also supported by the referenced records, the

loan amortization schedule generated by Yellowfin when it waived collection of payment through June 1, 2019, and calculated the amount owed. CR2:102-106. The loan amortization schedule itself matches the terms of the Note, and sets forth for each payment due the exact amount of principal remaining, so it is a simple matter of reference to ascertain the amount due after Yellowfin's waiver. There simply is no evidence in the record that would contradict Mr. Miller's testimony, not even the testimony of the Appellant.

IX. PUBLIC POLICY CANNOT AND SHOULD NOT SUPPLANT EXISTING LAW.

In a final effort to avoid paying a valid debt, Appellant admonishes the Court that it should respect "Public Policy on Limitations." "The Legislature determines public policy through the statutes it passes." *Fairfield Ins. Co. v. Stephens Martin Paving, LP*, 246 S.W.3d 653, 665 (Tex. 2008) "Courts are to derive public policy from existing law, nor create it." *Fairfield Ins. Co.*, 246 S.W.3d at 673 (J. Hecht, concurring).

Under established Texas law, a cause of action on a note accrues when the note matures or when an optional acceleration clause is invoked and that maturity accelerated. *Fraps* 2003 Tex. App. LEXIS 10062, at *14. The Note would have matured on May 1, 2025, but was accelerated by Yellowfin on March 25, 2020. Appellant argues that because the Note *could have been accelerated* when she defaulted on the first lien note and deed of trust, the Court should ignore well

established law and apply the foreclosure deficiency statute, the contractual statute of limitations, or the six-year statute of limitations for negotiable instruments. So long as you measure from the foreclosure of the first lien, it doesn't matter. Appellant urges the Court, in the name of public policy, to impose and apply a statutes of limitations where no cause of action accrued, limitations did not begin to run until a little over a year ago, and not a single one of the available statutory limitations periods are available. The Court should abjectly refuse to do so. The Texas Legislature has not annunciated such a policy in its statutes and the Court should not create public policy (or legislation) by contorting statutory language in an effort to accommodate Appellant's sense of justice.

Appellant borrowed money and did not pay it back. Yellowfin owns and is entitled to enforce that debt. Summary judgment in favor of Yellowfin was and remains appropriate. The Court should affirm the trial court's judgment.

CONCLUSION AND PRAYER

As mandated by established law and demonstrated by the contents of the 295th District Court's record, summary judgment was correctly entered in favor of Yellowfin and against Appellant on all matters before the Court. This Court should affirm the judgment of the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Appellee's Brief was served on the following parties in accordance with the Texas Rules of Civil Procedure, on the 23RD day of September, 2021.

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CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated and contains 10,332 words as calculated by the word processing software used to create it, and is under the 15,000 word length limit established by TEX. R. APP. P. 9.4(i)(2)(B).

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In the Court of Appeals
for the Fourteenth Judicial District of Texas
at Houston

Deysi R. Santos,
Appellant

v.

Yellowfin Loan Servicing Corp.,
As Successor in Interest to First Franklin,
Appellee

Appeal from 295th Judicial District
Harris County, Texas
Hon. Donna Roth

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I. Public Policy on Limitations Should Be Respected

Yellowfin's attack on public policy is unfounded. It is based on the myopic view that the only way "a cause of action on a note accrues [is] when the note matures or when an optional acceleration clause is invoked and that maturity accelerated." Yellowfin Brief at 40. That consciously ignored the other way to make the claim accrue here that was intentionally added to the Note by the original lender when it tied a default on the First Loan to the right to call a default on the Note, regardless of payment status on the Note. CR1.50,¶11. The original lender could have enforced that provision and so could any alleged assignee, including Yellowfin.

When that right accrued no later than the November 6, 2007, foreclosure [CR1.80] the statute of limitations began to run.

They offered no rebuttal to the precedent going back to *Gautier v. Franklin*, 1 Tex. 732, 739 (1847), cited by the Supreme Court in *SV v. RV*, 933 S.W.2d 1,3 (Tex. 1996) that Texas has "long recognized the salutary purpose of statutes of limitations." Appellant's Brief at 48.

The Supreme Court relied on *Gautier* again in 2015 for the proposition that "[W]e define accrual as occurring when those rights arise. *See S.V.* 933 S.W.2d at 3 ("[Limitations] quicken diligence by making [a claim] in some measure equivalent

to a right..." (quoting *Gautier v. Franklin*, 1 Tex. 732, 739)((internal quotation marks omitted))." *American Star Energy v. Stowers*, 457 S.W.3d 427, 432 (Tex. 2015).

After the actual lender, the one who had a real loss, not one based on a speculative investment, had a reasonable amount of time to seek a deficiency, it is good public policy to allow a defaulted borrower who lost her home to recover her financial health and mental well being following the trauma of foreclosure. "In addition to affording comfort and repose to the defendant, statutes of limitation protect the courts and the public from the perils of adjudicating stale claims." *Godoy v. Wells Fargo Bank, N.A.*, 575 S.W.3d 531, 538 (Tex. 2019).

There is no good public policy reason for granting opportunists immunity from limitations and precedent so they can abuse the courts to terrorize a former homeowner thirteen years after she bounced back from losing her home to the actual lender.

If Ms. Santos had stolen money from First Franklin at the time of the 2007 foreclosure, [CR1.80] instead of contractually losing her homestead because of her inability to pay, the five year statute of limitations for theft would have run out in 2012. TEX. CODE CRIM. P. art. 12.01(4)(A). There is no reason for Yellowfin to have superior rights against her in 2020, for its late acquired and disputed claim on the original loan thirteen years after that claim accrued, compared to First Franklin's in

2007.

II. Yellowfin's Claim of Negotiability Relies on Repeated Misrepresentations

Page 20 of Yellowfin's Brief cites *Educap, Inc. v. Sanchez*, 2013 Tex. App. LEXIS 7709 at *6 (Tex. App.) Houston [1st Dist.] June 25, 2013, pet. denied) for saying "when it applies, the statute of limitations on negotiable instruments supersedes the statute of limitations on debts becomes the statue of limitations on negotiable instruments is more specific." It does not apply to the non-negotiable Note.

Relying on how this Court ruled in the last line in the same quoted paragraph, that Yellowfin for whatever reason again chose to omit, *Educap* makes Ms. Santos' point where it says "However, not all promissory notes are negotiable instruments. See *Guniganti v. Kalvakuntla*, 346 S.W.3d 242, 250 (Tex. App.-Houston [14th Dist.] 2011, no pet.) (holding promissory note at issue was not negotiable instrument)." *Id*.

The Court can take judicial notice that they made the same argument based on the same misrepresentation by omission on July 29, 2021, in their Brief in *Smith v. Yellowfin*, No. 05-21-00306-CV, on appeal from Harris County Civil Court at Law No. 2. That is one of the "three virtually identical cases" listed in footnote 1 on Page 2 in their Brief here. It was countered the same way on Page 2 in the Smiths' Reply Brief in that case on August 18, 2021. The omission should not have been repeated

here a month later on September 23, 2021, after Yellowfin had actual knowledge of the misrepresentation.

As was thoroughly set out in Section III. in Ms. Santos' Brief, the Note here is not a negotiable instrument. It fails to meet the statutory definition.

Page 19 of the Yellowfin's Brief here again also falsely says "Nothing in the Note states, or even suggests, that Appellants' (sic) promise, and legal obligation to, make payments under the Note is subject to, governed by, or stated in another record or document." That exact language was on Page 10 in Yellowfin's Brief in the *Smith* where the plural "Appellants" was correct because there were two of them, instead of just the one here.

It was a misrepresentation in each case. Yellowfin's own document, its Exhibit A, is the NOTE AND SECURITY AGREEMENT. CR1.49. On the second page section 11. DEFAULT AND REMEDIES includes "You will be in default under this Note if: ... (b) you fail to keep any of your agreements under this Note or under any other agreement with us." That also applied if "(g) you are in default on any other obligation that is secured by a lien on the Property. If you are in default, in addition to any other rights and remedies we have under law and subject to any right you may have to cure your default, we may do any of the following: (aa) accelerate the entire balance owing under this Note after any demand or notice which is required by law,

which entire balance will be immediately due and payable." CR1.50.

Clearly the ability to accelerate and foreclose on the Note here, based on a default in another obligation to the same creditor, or a default on another note to the same creditor, or under any agreement also secured by a lien on the same Property that secured the Note, governs what happens under the Note here. The payment default on the First Loan, secured by the same property, that led to the Foreclosure Sale Deed, Plaintiff's Exhibit C, [CR1.80] was by definition proof of a default under the First Loan that made First Franklin's claim accrue under the terms of the Note.

The detailed and specific reference to the influence of such defaults outside the Note means the Note is "subject to or governed by another record" and incorporates "rights or obligations with respect to the promise or order [that] are stated in another record," in violation of TEX. BUS. & COM. CODE §3.106a(ii) and (iii). Those conditions prevent the Note from containing the "unconditional promise" required to meet the definition of a negotiable instrument in §3.104.

Yellowfin's false statements fail to change the language in the Note and turn it into a negotiable instrument.

III. Waiver

Section VI. A on Page 33 in Yellowfin's Brief sets out the three points for establishing waiver as (1) the existence of the right, (2) actual or constructive

knowledge of the right, and (3) actual intent to relinquish the right or intentional conduct inconsistent with the right. They were all met by Yellowfin's evidence.

(1) As shown above, the right to foreclose on the Note based on a default on the First Loan clearly existed. It is set out in 11. DEFAULT AND REMEDIES in the Deed of Trust. CR1.50.

(2) First Franklin drafted the Note. It had actual knowledge of the right to accelerate the Note based on a default on the First Loan. CR1.50,§11. All subsequent alleged owners of the Note had First Franklin's rights. Yellowfin had at least constructive knowledge of the right in the document it sued to enforce.

(3) Inconsistent with enforcing the right, there is no evidence of even a single demand letter or cure notice being letter sent to Ms. Santos where she lived, by any of the alleged assignees in the chain, from First Franklin Financial through Yellowfin, trying to collect on the Note in the thirteen years between the November 6, 2007, foreclosure [CR1.80] and Yellowfin's filing suit on June 12, 2020. CR1.4. They all knew the Note was in default when they bought it and could have started collections at any time. The four who allegedly sold the Note took an active step not to enforce the right.

Paragraph 5 in Yellowfin's Motion For Summary Judgment set out the transfers of the Note from First Franklin to First Franklin Financial Corp. to Dreambuilder Investments, LLC to RCS Recovery Service, LLC, to Yellowfin. CR1.25. Each entity that allegedly acquired the Note immediately had the existing right to send a default letter so they could call the loan due and payable but they each chose not to use it.

The ones before Yellowfin all intentionally waived the right when they allegedly sold the Note instead of exercising the known right. Selling the Note confirmed "actual intent to relinquish the right" and was "intentional conduct inconsistent with the right." The right was waived by all entities from November 6, 2007, through June 12, 2020.

A. Waiver Can Be Inferred

Page 36 of Yellowfin's Brief makes the unsupported allegation that "[i]f each of the five entities held the Note for three years after the foreclosure, it is unlikely that the Court could infer an intent to waive rights under the Note under any circumstances."

The clock did not stop running on the right each time the Note was allegedly transferred because the starting date never changed. It did not restart on each alleged transfer. "When a claim is assigned, the assignee "steps into the shoes of the assignor and is considered under the law to have suffered the same injury as the assignor [] and have the same ability to pursue the claims." Sw. Bell Tel. Co. v. Mktg. on Hold Inc., 308 S.W.3d 909, 916 (Tex.2010)." *In Re Travelers Property Cas. Co. Of Am.*, 485 S.W.3d 921, 927 (Tex. App. - Dallas 2016, orig. proceeding)("*Travelers*"). That "same ability" to enforce began in 2007 and cannot be read as "new and expanded ability" to enforce that rolls back its odometer on each alleged transfer.

Page 35 of Yellowfin's Brief makes the unsupportable assertion that there is no allegation "that any inequitable consequences will result from enforcement of the Note that Appellants (sic) voluntarily made."

Waiver can also be inferred after thirteen years of inaction by the original lender and all the alleged successors. Ms. Santos' Brief at 39-41. In the years between the November 2007 foreclosure [CR1.117] and when Yellowfin filed suit on June 12, 2020, [CR.4] none of the four alleged owners since First Franklin ever made themselves known to or contacted Ms. Santos.

Page 34 of Yellowfin's Brief includes a string cite of three cases for the proposition that "Waiver by inference only applies to prevent fraud and inequitable consequences." It is hard to imagine anything more inequitable or fraudulent than a scavenger buyer of defaulted debt, the last of four who hid in the shadows, who gave no value to Ms. Santos, who paid a hugely discounted amount to allegedly acquire its disputed interest in the Note, then suing her some thirteen years after she lost her home to the actual lender, and demanding to be paid back for credit it never gave. A zombie debt attack is not equitable.

Yellowfin's Brief ignores the fact that the three demand letters they sent before suing [CR1.225-232] were all sent to the property address on Stonefair Lane, Houston, TX 77075 that Ms. Santos had lost in the 2007 foreclosure instead of to the

address they found to serve her on Rhinebeck Dr., Houston TX 77089. CR.4,¶2. They never gave her notice before suing and then sued because she did not respond to something she never saw. Even if that were not fraud it was certainly was not equitable.

There is nothing equitable in a complete stranger to the original transaction disrupting Ms. Santos' life thirteen years after the foreclosure.

Thirteen years of inaction on causes of action with statutes of limitation ranging from two to four to six years was more than enough to show and establish waiver.

IV. The Two Year Limitations Period for Enforcing a Deficiency Applies; the Opposing Cases Are All Distinguishable

A. There Was Only One Transaction Between Ms. Santos and First Franklin

The First Loan and the Note [CR1.49] were both loans from First Franklin to Ms. Santos that she signed on April 28 2005, as part of the same transaction to finance the acquisition of her homestead. If there were only one loan then she could not have purchased the house. Each was also secured by a simultaneous Deed of Trust she signed in favor of First Franklin. The one for the First Loan was recorded in the Harris County property records on May 3, 2005, beginning at RP 004-93-1952. CR1.233. The one for the Note, was recorded the same day as the very next

instrument, beginning at RP 004-93-1971. CR1.60. There was only one lender and only one borrower and only one house. One transaction.

There is no evidence to support the contention in Section IV. on Page 27 in Yellowfin's Brief that mistakenly says "[t]he First Lien note and deed of trust constitute a separate legal obligation from the Note." As repeatedly shown above, the two notes and deeds of trust were linked together.

It also contradicts what Yellowfin's Brief admitted on Page 30 where they quoted one of the inferences that Ms. Santos said she was entitled to, and then said it was not contested.

> "1. "Ms. Santos bought her homestead with a first note ("First Loan") and a the subordinated Note and Security Agreement ("Note")… from First Franklin...., the same original lender. They were both signed on the same day, with just one joint purpose between the parties – the financing of that one house." This is not contested and is not material to the issues resolved on summary judgment."

Ms. Santos could not have purchased the property with just one of the two loans. They are part of the same transaction and have to be read together. When twins are joined at the hip they do not travel separately.

B. An Advisory Opinion in a Distinguishable Case Is Not Binding Precedent

The cases Yellowfin relies on to say this was not a deficiency claim are distinguishable, as set out in Defendant's Reply To Motion For New Trial [CR.242-

247] and largely repeated here.

The main cases Yellowfin cites are *Mays v. Bank One, N.A.*, 150 S.W.3d 897 (Tex. App. - Dallas 2004, no pet.)("*Mays*") and *Mandarino v. Sherwood Lane Investments, LLC*, 2016 WL 4034568 (Tex. App. - Houston [1st Dist.] July 26, 2016)("*Mandarino*") that relied on it. Those commercial cases involved two loans from two different lenders for two different transactions and at two different times. That is not the situation here where there was only one lender in the two simultaneous personal loans secured by the same property. Freestanding commercial property is not given the same protections as a Texas homestead.

Mays was a one issue appeal based on whether or not Mr. Mays could first raise on appeal an affirmative defense that he failed to raise in the trial court concerning his right to an offset against Bank One's claim for an amount that he contended Bank of America, the other lender, should have received at foreclosure. He was a guarantor for that loan, not the borrower. The opinion said "We conclude Mays did not properly raise the defense he now argues. Nevertheless, we will determine whether Texas Property Code section 51.005 is applicable to the claims brought by Bank One." *Mays* at 899. Bank One did not file the appeal in *Mays*, Mr. Mays did. Once the appeal went against him on jurisdictional grounds Bank One had no claim properly before the court.

The *Mays* court should have dismissed the case because of the lack of jurisdiction the quoted sentence made clear. Without having timely raised the defense in the trial court Mr. Mays had no standing to pursue it in the court of appeals. Standing has to be present at all times or the court has to dismiss.

"It is well settled that "a controversy must exist between the parties at every stage of the legal proceedings, including the appeal." Williams v. Lara, 52 S.W.3d 171, 184 (Tex.2001). "If a controversy ceases to exist—'the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome'—the case becomes moot." Id. (quoting Murphy v. Hunt, 455 U.S. 478, 481, 102 S.Ct. 1181, 71 L.Ed.2d 353 (1982))." *Bd. of Adjustment of San Antonio v. Wende*, 92 S.W.3d 434, 427 (Tex. 2002).

What the *Mays* court published was no more than an advisory opinion on Bank One's theoretical right if it had to further defend against Mr. Mays, which it did not. "An opinion issued in a case brought by a party without standing is advisory because rather than remedying an actual or imminent harm, the judgment addresses only a hypothetical injury. See Allen v. Wright, 468 U.S. 737, 751, 104 S.Ct. 3315, 3324, 82 L.Ed.2d 556 (1984). Texas courts, like federal courts, have no jurisdiction to render such opinions." *Tex. Ass'n of Business v. Air Control Bd.* 852 S.W.2d 440, 444 (Tex. 1993).

Mays and its progeny cannot be considered controlling.

In neither *Mays* nor *Mandarino* did the second lender, a stranger to the contract with the first lender, have a claim against the first lender for proceeds the first lender received from the foreclosure. That was not the case here, where there was only one lender who generated and owned both cross-collateralized loans and its documents made a default on the first loan a default on the second even if the second were still being timely paid.

The Factual and Procedural Background section in *Mays* made it clear that there were two distinct creditors at the time of the foreclosure. It was a commercial transaction and Mr. Mays was only a guarantor, not a borrower, and Bank One's original lien stemmed from a transaction for a different property.

> "In May 2001, Mays-Frankum Enterprises[1] executed a promissory note for $875,000.00, payable to the order of Bank One. The note was supported by Commercial Guaranty Agreements executed by Max Frankum[2] and Mays. Later, the debt was restructured, and Bank One was granted a second lien, pursuant to a deed of trust, upon certain real property in Collin County. Bank of America held the first lien against that same real property. Bank One's note matured and was not paid. Bank of America's note was also in default, and it proceeded with foreclosure of its first lien. The foreclosure satisfied only Bank of America's debt. No proceeds were left for Bank One. Accordingly, Bank One filed suit on the promissory note and guaranty against Mays, Frankum, and Mays-Frankum Enterprises. The trial court granted Bank One's motion for summary judgment, holding Mays, Frankum and Mays-Frankum Enterprises jointly and severally liable for the amount due on the note." *Mays* at 898.

Mandarino, in 2016, is also a commercial case that involved two different loans from two different lenders for two different purposes. It clearly states that *Mays* is a case where "the appellant executed two different promissory notes to different lenders. Mays, 150 S.W.3d at 898." *Mandarino* at 8.

> "On October 16, 2006, the appellants purchased Sherwood Pines's interest in the apartment complex. To secure the purchase, they signed a promissory note as makers, with Sherwood Pines as payee. Sherwood Pines still owed a portion of the principal from its original purchase of the property (the "First Lien Principal"), which it incorporated into the new promissory note. The additional balance that appellants owed to Sherwood Pines (the "Second Lien Principal") was described in the note as "Five Hundred and Sixty-Five Thousand Dollars" in words but $569,529.87 in numbers. The original note on the First Lien Principal was designated the "wrapped note" and the note signed by appellants was named the "wraparound note." The wraparound note stated that a deed and deed of trust conveying the property would be transferred in exchange for the note, and the legal description of the property was provided in an attached exhibit.
>
> "The wraparound note was structured to provide for monthly payments that included portions of both the First and Second Lien Principal amounts, plus associated interest. The amounts owed under both the wrapped note and wraparound note, with interest, were to be paid in full by June 1, 2011. The wraparound note contained a provision requiring the appellants to make best efforts to formally assume the wrapped note within six months. If the appellants did not assume liability on the wrapped note, the wraparound note required that they pay Sherwood Pines two percent of the outstanding total loan balance. The wraparound note allowed for acceleration of full payment in the event of default at the holder's option. *Mandarino* at 1.

Neither *Mays* nor *Mandarino* are applicable or binding here where there was

only one lender in one transaction for one purpose whose foreclosure was the author of its own deficiency claim. In neither of those cases was there a deed of trust that made a default in one note a default that automatically gave the same lender the right to call the other one immediately due.

The third distinguishable case in the string, *Poston v. Wachovia Mortg. Corp*., 2012 WL 1606340 (Tex. App. - Houston [14th Dist.] May 8, 2012, pet denied) is also inapplicable because it too relies on *Mays*. It does not even contain the word "deficiency" let alone rule on it.

Having failed to prove their claim was not a deficiency claim, the two year limitations period in TEX. PROP. CODE §51.003(a) applies and Yellowfin's claim was barred by limitations.

PRAYER

Ms. Santos prays that the Court reverse the decision below and render judgment that Yellowfin has no claim against her based on the Note because it had no proof it owned the Note. Should the Court find Yellowfin had ownership rights in the Note she further prays that the Court find that limitations expired before 2019 and that neither Yellowfin nor any other entity could have ever have standing to enforce the Note in 2020 after limitations expired, and remand the case for such further proceedings as are appropriate, and for such further relief as she may be

entitled to at law or in equity.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this Brief complies with TEX. R. APP. P. 9 because it is printed in a minimum of 14 point type and contains 3,780 words.

/s/ Ira Joffe
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I certify that a copy of the foregoing was served via the ECF system on October 13, 2021.

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