Case No. 123038

IN THE SUPREME COURT OF THE STATE OF ILLINOIS

First Midwest Bank, as successor in interest To Waukegan Savings Bank f/k/a/ Waukegan Savings and Loan, SB, Plaintiff-Appellant, v. Andres Cobo; Amy M. Rule, Defendants-Appellees.	Appeal from the Appellate Court, First District, No. 1-17-0872 On Appeal from the Circuit Court of Cook County, Law Division Case No. 15 L 007759 Honorable Raymond W. Mitchell, Judge Presiding. Date of Appellate Order: November 6, 2017

BRIEF OF PLAINTIFF-APPELLANT

Stephen Daday, ARDC No. 3127015
Diana Rdzanek, ARDC No. 6306800
Julie Repple, ARDC No. 6296271
Klein, Daday, Aretos, & O'Donoghue, LLC
Attorneys for Plaintiff-Appellee
2550 W. Golf Rd. Ste. 250
Rolling Meadows, IL 60008
847-590-8700
Email: kdaonotices@kdaolaw.com

Attorneys for Petitioner First Midwest Bank, as successor in interest to Waukegan Savings Bank f/k/a Waukegan Savings and Loan, SB

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IN THE SUPREME COURT OF THE STATE OF ILLINOIS

First Midwest Bank, as successor in interest to Waukegan Savings Bank f/k/a Waukegan Savings and Loan, SB,	Petition for Leave to Appeal from the Appellate Court, First District, No. 1-17-0872
Plaintiff,	On Appeal from the Circuit Court of Cook County, Law Division, Case No. 15 L 007759
v.	
Andres Cobo; Amy M. Rule,	Date of Appellate Order: November 6, 2017
Defendants.	

CERTIFICATE OF SERVICE

To: Arthur C. Czaja
7521 N. Milwaukee Avenue
Niles, IL 60714
Email: arthur@czajalawoffices.com

I, Stephen G. Daday, hereby certify that I served Petitioner First Midwest Bank, as successor in interest to Waukegan Savings Bank f/k/a Waukegan Savings and Loan, SB's Brief in Support of Appeal, upon the party listed above by emailing a copy of the same to the email address listed above on April 25, 2018.

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

Stephen G. Daday

Klein, Daday, Aretos & O'Donoghue, LLC
2550 W. Golf Road, Suite 250
Rolling Meadows, IL 60008
847-590-8700
847-590-9825 (fax)
jrepple@kdaolaw.com
ARDC No. 3127015

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POINTS AND AUTHORITIES

NATURE OF THE CASE

The Illinois Code of Civil Procedure ("the Code") permits a plaintiff to voluntarily dismiss their cause of action without prejudice at any time prior to trial or hearing in their case. 735 ILCS 5/2-1009 (West 2018). The Code further permits a plaintiff to refile their case, previously dismissed voluntarily, within one year of the dismissal or within the remaining period of limitation, whichever is greater. 735 ILCS 5/13-217 (West 2018). However, a plaintiff's ability to refile a voluntarily dismissed case is not limitless. Section 13-217 of the Code permits only one refiling of a claim, even if the applicable statute of limitations has not expired. *Wells Fargo v. Norris*, 2017 IL App (3d) 150764, ¶20.

The matter at bar concerns the application of section 13-217 of the Code as it pertains to a breach of note action. The operative issue is whether a breach of note action is the same cause of action as a mortgage foreclosure suit under *res judicata* principles for the purposes of section 13-217 of the Code. In the lower courts, the trial court denied Defendants' 2-619 motion to dismiss based upon section 13-217 of the Code, struck Defendants' affirmative defenses, and granted summary judgment in favor of the Plaintiff. On appeal, the First District Appellate Court vacated the trial court's order of summary judgment and dismissed Plaintiff's complaint pursuant to section 13-217 of the Code. The Supreme Court of Illinois granted Plaintiff's Petition for Leave to Appeal. Plaintiff adopts and incorporates the arguments made in its Petition for Leave to Appeal with this Brief and respectfully requests that this court reverse the decision of the Appellate Court.

ISSUES PRESENTED FOR REVIEW

(1) Whether the Appellate Court erred in vacating the Circuit Court's order granting summary judgment in favor of Plaintiff?

(2) Whether the Appellate Court erred in dismissing Plaintiff's breach of contract claim pursuant to the single refiling rule of section 13-217 of the Illinois Code of Civil Procedure?

STANDARD OF REVIEW

All matters before the Court in the case at bar are subject to *de novo* review. On appeal, the standard of review of an order of summary judgment is *de novo*. *Seymour v. Collins*, 2015 IL 118432, ¶42. Likewise, the standard of review of the decision to grant or deny a motion to dismiss based upon certain defects or defenses is *de novo*. *King v. First Capital Financial Services Corp.*, 215 Ill.2d 1, (2005).

STATEMENT OF JURISDICTION

Illinois Supreme Court Rule 315 confers jurisdiction upon this Court. The Appellate Court issued its decision on November 6, 2017, and no petition for rehearing was filed. (A67- A79). The petition for leave to appeal was filed with the Supreme Court Clerk on December 27, 2017 and granted on March 21, 2018. (A1). The filing of Appellant's brief is timely.

STATEMENT OF FACTS

On November 20, 2006, Andres Cobo and Amy M. Rule executed a certain promissory note payable to the order of Plaintiff's predecessor in interest, Waukegan Savings and Loan, SB ("Waukegan"), in the principal amount of $227,500.00, with interest (the "Note"). R. V1, C. 116 – C. 118; (A105 – A107). The Note was secured by a mortgage dated November 20, 2006 and recorded December 7, 2006 in the office of the

recorder of deeds of Cook County, Illinois (the "Mortgage"). R. V1, C. 119 – C. 129; (A108 – A121). The Mortgage identified the borrowers as "Andres Cobo and Amy M. Rule, married and Aldo Jordan unmarried." R. V1, C. 119; (A108). The Mortgage was executed by Andres Cobo, Amy Rule, and Aldo Jordan. R. V1, C. 129; (118). Said Mortgage was recorded against the real property commonly known as 625 S. 12th Ave., Maywood, Illinois 60153. R. V1, C. 120; (A109).

On December 8, 2011, Waukegan filed a complaint for mortgage foreclosure in the Chancery Division of the Circuit Court of Cook County, docketed as Case No. 11 CH 42013 ("Foreclosure Action"). R. V1, C. 168 – C. 191; (A163 – A187). The complaint sought foreclosure of the property located at 625 S. 12th Ave., Maywood, Illinois 60153. R. V1, C. 169; (A164). Waukegan named the following parties as defendants to the foreclosure: Aldo Jordan; Aldo Jordan as trustee of the Aldo Jordan Revocable Trust dated September 23, 2009; Stephanie Oelsligle as trustee of the Stephanie Oelsligle Trust dated September 23, 2009; Andres Cobo; Amy Rule; Ex Sites, LLC; and Unknown Owners or Parties Interested in or in Actual Possession of Said Land or Lots. R. V1, C. 168; (A163). The complaint alleged that a default occurred under the terms of the mortgage for monthly installments due July 1, 2011 and thereafter, and alleged an amount due and owing of $214,079.06 plus interest, late fees, and collection costs. R. V1, C. 169; (A164).

The complaint identified the present owner of the subject property as "Aldo Jordan as trustee of the Aldo Jordan Revocable Trust dated September 23, 2009; Stephanie Oelsligle as trustee of the Stephanie Oelsligle Trust dated September 23, 2009." R. V1, C. 169; (A164). The complaint further named as persons claimed to be

personally liable for a deficiency as Andres Cobo, Amy Rule, and Aldo Jordan. R. V1, C. 169; (A164). As its prayer for relief, Plaintiff requested a judgment of foreclosure and sale pursuant to the mortgage and "if sought" an order granting a shortened redemption; a personal judgment for deficiency; an order placing the mortgagee in possession or appointing a receiver; and a judgment for attorneys' fees, costs and expenses. R. V1, C. 170; (A166). The Foreclosure Action was voluntarily dismissed without prejudice on April 2, 2013. R. V1, C. 194.

On April 16, 2013, Plaintiff First Midwest Bank, as agent for the Federal Deposit Insurance Corporation, receiver for Waukegan, filed a complaint for breach of a promissory note in the Law Division of the Circuit Court of Cook County, docketed as Case No. 13 L 3865 ("First Collection Action"). R. V1, C. 196 – C. 202; (A156 – A162). The First Collection Action attached a copy of the Note and alleged a breach of that promissory note dated November 20, 2006. R. V1, C. 196 – C. 202; (A156 – A162). The complaint alleged that on November 20, 2006, borrowers Andres Cobo and Amy M. Rule executed a promissory note in favor of Waukegan in exchange for a loan in the amount of $227,500.00. R. V1, C. 196; (A156). Under the terms of the Note, borrowers were to make monthly payments in the amount of $1,400.76 with an annual interest rate of 6.250%. R. V1, C. 200; (A160). The complaint further alleged that the borrowers failed to make payments dated July 1, 2011 and thereafter. R. V1, C. 197; (A157). As its prayer for relief, Plaintiff requested a judgment against the borrowers in the amount of $251,165.72, plus accrued interest and late fees through the date of judgment, plus attorney's fees and costs of suit. R. V1, C. 197; (A157).

On April 3, 2015, the circuit court entered an order denying Plaintiff's oral motion to continue the trial date, and granting Plaintiff's oral motion to voluntarily dismiss the case pursuant to 735 ILCS 5/2-1009. R. V1, C. 205.

On July 30, 2015, Plaintiff filed a two-count complaint pleaded in the alternative for breach of contract and unjust enrichment against defendants Andres Cobo and Amy M. Rule in the Law Division of the Circuit Court of Cook County, docketed as Case No. 15 L 7759 ("Second Collection Action" or "Plaintiff's Complaint"). R. V1, C. 2 – C. 57; (A100 – A155).

Count I of the Second Collection Action attached a copy of the Note and Mortgage and alleged that defendants Andres Cobo and Amy M. Rule executed a certain promissory note and mortgage in favor of Waukegan for a loan in the amount of $227,500.00. R. V1 C. 2; (A100). Count I further alleged a breach of the note. R. V1 C. 3; (A101). Count I sought a judgment in the amount of $278,838.13 against Andres Cobo and Amy M Rule, jointly and severally, for principal, interest, late charges, appraisal fees, escrow deficiency, and for attorneys' fees and costs. R. V1 C. 4; (A102). Count II of the Second Collection Action for unjust enrichment was pleaded as an alternative legal theory to Count I. R. V1 C. 4; (A102).

Defendants filed a motion to dismiss the Second Collection Action pursuant to section 2-619 of the Code (735 ILCS 5/2-619 (West 2018)). R. V1, C. 101 – C. 203. In their motion to dismiss, Defendants alleged that the Second Collection Action was barred pursuant to section 13-217 of the Code by the single refiling rule, arguing that "Plaintiff previously filed two (2) lawsuits alleging the same breach of the same promissory note and voluntarily dismissed both of the prior lawsuits." R. V1, C. 106.

Following briefing and oral argument, the circuit court denied the motion to dismiss in a written opinion order. R. V1, C. 246 – R. V2, C. 252. In denying the motion, the court applied the transactional test to determine whether the causes of action are the same for purposes of *res judicata*. R. V1, C. 247. The court cited the holding in *LP XXVI, LLC v. Michael Goldstein*, 349 Ill. App. 3d 237, 241 (2004), which determined that "although they are closely related in time and functionality, a mortgage and a promissory note are not part of the same transaction or occurrence because they serve distinct purposes." R. V1, C. 247. The trial court concluded, "Accordingly, the current action constitutes the first refiling of the 2013 promissory note action, not the second refiling of the 2011 mortgage foreclosure action and is not barred by *res judicata* of section 13-217." R. V1, C. 249.

The trial court subsequently denied Defendants' motion to reconsider the order of June 23, 2016 denying Defendants' motion to dismiss. R. V2, C. 428 – C. 430.

On November 16, 2016, Defendants filed their answer to Plaintiff's complaint and four affirmative defenses. R. V2, C. 441 – R. V3, C. 551.

In their first affirmative defense, Defendants pleaded that the Second Collection Action was an impermissible refiling pursuant to 735 ILCS 5/13-217. R. V2, C. 450 – C. 452. Defendants asserted that their first affirmative defense was pled in order to preserve the issue for appeal. R. V2, C. 451.

The second, third, and, fourth affirmative defenses are not relevant for the purposes of this appeal.

On December 8, 2016, Plaintiff filed a motion to strike Defendants' affirmative defenses pursuant to section 2-619 of the Code (735 ILCS 5/2-619). R. V3, C. 552 –

C. 593. Additionally, on January 23, 2017, Plaintiff filed a motion for summary judgment. R. V3, C. 609 – R. V4, C. 928. On March 2, 2017, the trial court granted Plaintiff's motion to strike Defendants' affirmative defenses in a written opinion order, and struck Defendants' first, second, third, and fourth affirmative defenses. R. V6, C. 1311 – C. 1314. On March 23, 2017, in a written opinion order, the trial court granted Plaintiff's motion for summary judgment, and entered a final money judgment in favor of Plaintiff in the amount of $308,192.56. R. V6, C. 1492 – C. 1494.

On April 4, 2017, Defendants timely filed their Notice of Appeal and Request for Preparation of the Record. R. V6, C. 1495 – C. 1499. Following briefing on the issues, on November 6, 2017, the Appellate Court reversed the decision of the trial court, vacated the order granting summary judgment, and dismissed Plaintiff's underlying complaint. (A67, ¶1). The Appellate Court found that for purposes of a *res judicata* analysis, the same set of operative facts gave rise to the cause of action in the Foreclosure Action and the collection actions. (A76, ¶25). Thus, contrary to the circuit court, the Appellate Court held that Plaintiff's Second Collection Action was an impermissible second refiling of the Foreclosure Action in violation of section 13-217 of the Code (735 ILCS 5/13-217). (A78, ¶28).

On December 27, 2017, Plaintiff filed its Petition for Leave to Appeal. (A2 – A50). On or around January 15, 2018, Defendants filed their Answer to the Petition for Leave to Appeal. (A51 – A66). On March 21, 2018, the Supreme Court allowed the Petition for Leave to Appeal. (A1)

From the November 6, 2017 order of the Appellate Court, Plaintiff now appeals.

ARGUMENT

I. The Single Refiling Rule Does Not Bar The Second Collection Action.

Plaintiff did not violate section 13-217 of the Code by filing the Second Collection Action. The Second Collection Action is the first refiling of Plaintiff's First Collection Action, and not a second refiling of the Foreclosure Action.

Section 13-217 of the Code, known as the single refiling rule, provides a plaintiff with a one-time right to refile a claim that has been voluntarily dismissed or dismissed for want of prosecution within one year of the entry of the dismissal order or within the remaining period of limitation, whichever is greater. 735 ILCS 5/13-217 (West 2018). "The purpose of section 13-217 is to facilitate the disposition of cases on the merits and to avoid its frustration upon grounds unrelated to the merits." *Wells Fargo Bank, N.A. v. Norris*, 2017 IL App (3d) 150764, ¶20. However, the refiling rule is not limitless and a plaintiff is permitted only one refiling of a claim. *Id.*

In order to determine whether a complaint is considered to be a refiling of a previously filed complaint for purposes of section 13-217 of the Code, the court applies the principles of *res judicata* to determine if the two matters constitute the same cause of action. *Norris*, 2017 Il App (3d) 150764, ¶21.

The doctrine of *res judicata* allows a trial court to dismiss an action on the grounds that it is barred by a previous judgment. *Marvel of Illinois, Inc. v. Marvel Contaminant Control Industries, Inc.*, 318 Ill.App.3d 856, 863 (2nd Dist. 2001). The essential elements that need to be satisfied in order to invoke the doctrine of *res judicata* are "(1) a final judgment on the merits rendered by a court of competent jurisdiction; (2) an identity of cause of action; and (3) an identity of parties or their privies." *Id.* It is only where all

three elements are satisfied that the prior action will be "conclusive as to all issues that were, or properly might have been, raised in that action." *Id.*

In determining whether there is an identity of the cause of action, the courts apply the transactional test. *Norris*, 2017 Il App (3d) 150764, ¶21(citing *River Park, Inc. v. City of Highland Park*, 184 Ill.2d 290, 310-311(1998)). "[P]ursuant to the transactional analysis, separate claims will be considered the same cause of action for purposes of *res judicata* if they arise from a single group of operative facts, regardless of whether they assert different theories of relief." *River Park, Inc. v. City of Highland Park*, 184 Ill.2d 290, 311 (1998).

Applying section 13-217 of the Code to the case at bar, it is clear that the Second Collection Action was not an impermissible refiling, as a suit for breach of a promissory note and a mortgage foreclosure action do not arise out of a single group of operative facts but rather are separate and distinct causes of action.

A. A Breach of Note Action and a Mortgage Foreclosure Action Do Not Arise From a Single Group of Operative Facts.

The operative facts underlying the promissory note and the mortgage are distinct. A promissory note is a negotiable instrument as defined by the Uniform Commercial Code and codified in Illinois in 810 ILCS 5/3-104(a):

> "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:
> (1) is payable to bearer or to order at the time it is issued or first comes into possession of a holder;
> (2) is payable on demand or at a definite time; and
> (3) does not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money, but the promise or order may contain (i) an undertaking or power to give, maintain, or protect collateral to secure payment, (ii) an authorization or power to the holder to confess judgment or realize on or dispose of collateral, or (iii) a waiver of the

> benefit of any law intended for the advantage or protection of any obligor. 810 ILCS 5/3-104 (West 2018).

Section 15-1207 of the Illinois Mortgage Foreclosure Law ("IMFL") defines mortgage:

> "Mortgage" means any consensual lien created by a written instrument which grants or retains an interest in real estate to secure a debt or other obligation. The term "mortgage" includes, without limitation:
> (a) mortgages securing "reverse mortgage" loans as authorized by subsection (a) of Section 5 of the Illinois Banking Act;
> (b) mortgages securing "revolving credit" loans as authorized by subsection (c) of Section 5 of the Illinois Banking Act, Section 1-6b of the Illinois Savings and Loan Act and Section 46 of the Illinois Credit Union Act;
> (c) every deed conveying real estate, although an absolute conveyance in its terms, which shall have been intended only as a security in the nature of a mortgage;
> (d) equitable mortgages; and
> (e) instruments which would have been deemed instruments in the nature of a mortgage prior to the effective date of this amendatory Act of 1987. 735 ILCS 5/15-1207 (West 2018).

The interaction between a promissory note and a mortgage is apparent. The first is a negotiable instrument, and the second is an agreement to secure a promise to repay. The Uniform Commercial Code clearly contemplates that a promissory note may be executed alongside a corresponding mortgage of collateral. Likewise, the IMFL acknowledges that a mortgage grants a lien on property in order to secure the repayment of a debt. However, notwithstanding the interaction between the two types of instruments, a promissory note and a mortgage are distinct, separate transactions, both in law and in fact.

It follows that a breach of note action is separate and distinct from a mortgage foreclosure action. "Well-settled Illinois case law permits lenders to bring separate enforcement actions on the mortgage and the note." *Turczak v. First American Bank*, 2013 IL App (1st) 121964, ¶27. "Upon default, a mortgagee may sue upon the note itself or bring an action to foreclose the mortgage. These remedies may be pursued consecutively or concurrently." *Farmer City State Bank v. Champaign National Bank*,

138 Ill.App.3d 847, 852 (4th Dist. 1985). This well-settled rule of law indicates the distinctions between a mortgage and a note and the remedies available under each of these contracts. The note is executed to provide capital and evidences the debt. The mortgage secures the debt.

Further, the distinct remedies available under a breach of note action and a mortgage foreclosure action are based upon the differing nature of these causes of action. A mortgage foreclosure suit is a *quasi in rem* action while a breach of note action is a purely *in personam* proceeding.

> A judgment *in personam* imposes a personal liability or obligation on one person in favor of another. A judgment *in rem* affects the interests of all persons in designated property. A judgment *quasi in rem* affects the interests of particular persons in designated property. The latter is of two types. In one the plaintiff is seeking to secure a pre-existing claim in the subject property and to extinguish or establish the nonexistence of similar interests of particular persons. In the other the plaintiff seeks to apply what he [or she] concedes to be the property of the defendant to the satisfaction of a claim against him [or her]. *Turczak*, 2013 IL App (1st) 121964, ¶33 (citing *Hanson v. Denckla*, 357 U.S. 235, 246 n.12, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958)).

A *quasi in rem* foreclosure action provides a distinct remedy from an *in personam* breach of note suit. *Turczak*, 2013 IL App (1st) 121964, ¶33. The legal precedent clearly distinguishes a suit on a promissory note from a mortgage foreclosure action, and treats them as separate causes of action.

The application of a *res judicata* analysis in a breach of contract action should follow these well-settled principles. In analyzing the differing nature of various contracts that may comprise a loan transaction as it applies to the single-refiling rule, the Second District Court in *LP XXVI, LLC v. Goldstein*, 349 Ill.App.3d 237 (2d Dist. 2004) relied upon the same case law precedent. In *Goldstein*, the defendant executed a promissory note in the amount of $1,050,000 which was secured by a mortgage on certain real

property. *LP XXVI, LLC v. Goldstein*, 349 Ill.App.3d 237, 238 (2d Dist. 2004). The defendant also executed a personal commercial guaranty. *Id.* After the default, plaintiff's predecessor in interest filed a mortgage foreclosure suit and following the foreclosure sale obtained an *in rem* deficiency judgment. *Id.* at 239. After being assigned all interest in the note, guaranty, and deficiency judgment, the plaintiff filed a separate lawsuit against the defendant for breach of the guaranty. *Id.* The trial court dismissed the suit on the guaranty, finding that under the doctrine of *res judicata* the claim was barred by the previous foreclosure judgment. *Id.* The Appellate Court reversed the trial court's decision, finding that the action against the guarantor was not barred. In analyzing the facts of the case under the transactional test, the Appellate Court stated:

> At first blush, a transactional analysis may appear to lead to the conclusion that the action on the guaranty is the same cause of action as the mortgage foreclosure, because the note, mortgage, and guaranty were all executed concurrently and, apparently as components of a related deal. Such a result, however, overlooks the practical aspects of the interrelated transactions comprising the execution of the note, mortgage, and guaranty, as well as long-settled precedent, and reduces the transactional analysis to the most cursory and formalistic level. The note was executed to provide the capital, the mortgage to secure the note. Defendant personally provided the guaranty in order to assure the lender that any shortfall in the security provided by the mortgaged property would be made good. While the three transactions are related, we do not believe that their mere proximity in time and the overlap of some of the parties render them a single transaction, especially in light of the purpose of each of these transactions. *Id.* at 240-241.

The holding in *Goldstein* logically follows the well-settled precedent regarding the distinct nature of actions on a note and mortgage foreclosure suits. The *Goldstein* court allowed the Plaintiff to pursue the separate action for breach of guaranty, because the transaction creating the guaranty was distinct from those creating the mortgage and the promissory note. Likewise, in the case at bar, the borrowers executed both a promissory

note, and a separate mortgage. The reasoning of the *Goldstein* court should be applied, and this Court should determine that Plaintiff's single-count mortgage foreclosure case, a *quasi in rem* action did not arise from the same transaction as the subsequent collection actions.

This Court should follow the holding in *Goldstein*, because it considers and distinguishes the unique nature of the different contracts and agreements that may comprise a loan transaction. Beyond a mortgage, note, and guaranty, there are many additional contracts that may be executed in connection with a loan agreement including but not limited to an assignment of rents and UCC Article 9 security agreements and financing statements. Additionally, there are many instances where multiple properties collateralize a single indebtedness, or where the proceeds from a single promissory note are used to purchase several properties with corresponding mortgages. A plaintiff should be able to pursue the remedies provided for in each contract, without jeopardizing the relief authorized by a separate contract. It strains credulity to argue that by instituting a single-count mortgage foreclosure action that might include allegations related to the other contracts that comprise a loan transaction, a plaintiff might be barred from seeking relief under its UCC security agreement and financing statement, guaranty, or other agreement once the mortgage foreclosure is adjudicated, or not adjudicated as in this case. Although a mortgage and promissory note are intertwined, they are in fact and in law just as separate as any other contract that may be part of a loan transaction. It is clear that the cause of action in a breach of note suit and a mortgage foreclosure action are based on entirely different transactions.

In the present case, the Foreclosure Action arose out of the mortgage, while the First Collection Action and Second Collection Action arose out of the note. As such, Plaintiff's Second Collection Action is a refiling of the First Collection Action not a second refiling of the Foreclosure Action.

B. The Trial Court's Analysis is Correct.

The trial court considered the legal precedent regarding the rights of plaintiffs to pursue an action on the note and mortgage consecutively or concurrently as well as the distinct nature of a note and mortgage. R. V1, C. 247. The court also reviewed and analyzed *Goldstein* and determined that under this line of reasoning, Plaintiff's Second Collection Action was not a refiling of the Plaintiff's Foreclosure Action. R. V1, C. 247 – 248. However, the trial court acknowledged that *LSREF2 Nova Investments, III, LLC v. Coleman*, 2015 IL App (1st) 140184 altered the manner in which the court must conduct its analysis for *res judicata* purposes. R. V1, C. 248.

In *Coleman*, the plaintiff's predecessor in interest filed a single-count mortgage foreclosure complaint seeking a judgment of foreclosure and a personal deficiency judgment. *LSREF2 Nova Investments III, LLC v. Coleman*, 2015 IL App (1st) 140184, ¶4. The plaintiff sought relief in its capacity as the holder of the note and mortgage and alleged the amount of the unpaid balance and that the defendant was personally liable for any deficiency. *Id.* The plaintiff additionally attached a copy of the note and mortgage to the complaint. *Id.* The judgment of foreclosure entered in the case provided that the plaintiff was entitled to a deficiency judgment against the defendant. *Id.* at ¶5. Following the foreclosure sale, the court entered an *in rem* deficiency judgment in the sum of $227,416.32 with interest as provided by statute against the subject property. *Id.*

at ¶5. Subsequently, the plaintiff filed a suit on the note, seeking to recover the deficiency amount against defendant. Plaintiff's suit on the note was dismissed under the doctrine of *res judicata*.

On appeal in *Coleman*, the Appellate Court determined that a plaintiff who filed a single-count foreclosure case that sought a personal deficiency judgment against defendants was barred by *res judicata* from pursuing a second action for breach of the note in the amount of the deficiency judgment following the order approving sale. *Id.* at ¶14 – ¶16. The court questioned whether, for the purposes of *res judicata* principles, the claim raised in the breach of note lawsuit could have been resolved in the prior mortgage foreclosure lawsuit. In answering affirmatively, the court stated:

> In the foreclosure action, plaintiff sought to recover any amount not covered by the foreclosure sale against defendant as provided by section 15-1508(e) based on plaintiff's default on the mortgage and the promissory note. In the claim underlying this appeal, plaintiff again sought recovery based on the same default by defendant on the note and recovery of the amount of the deficiency as determined by the order confirming sale in the foreclosure action. We, therefore, conclude that plaintiff's claim as alleged in the complaint before us and its claim for personal deficiency judgment in the foreclosure suit arise from a single group of operative facts---the deficiency which resulted from after the foreclosure sale based on plaintiff's default—albeit on different causes of action against defendant. As a result, plaintiff's claim is barred by the doctrine of *res judicata*. *Id.* at ¶16.

The *Coleman* court found that because the plaintiff failed to obtain a personal deficiency in the completely adjudicated foreclosure, the plaintiff's subsequent collection action for the *in rem* deficiency amount was barred. *Coleman*, 2015 IL App (1st) 140184, ¶15.

The trial court rightly distinguished *Coleman* from the case at bar as Plaintiff never obtained a deficiency judgment in their mortgage foreclosure action because the case was voluntarily dismissed prior to judgment of foreclosure and sale of the real property.

R. V1, C. 246 – R. V2, 252. Further, Plaintiff did not seek to recover a deficiency amount arising out of the Foreclosure Action in either its First Collection Action or its Second Collection Action, but rather the indebtedness evidenced by the note. R. V1, C. 249. The present matter and the *Coleman* case are factually distinguishable and the trial court's analysis should be adopted by this court.

II. The Appellate Court Erred in its Analysis of and Reliance on *Coleman*.

In applying the transactional test, the Appellate Court erred in its reliance on and application of *Coleman*. The decision of the Appellate Court should be reversed as the present matter is factually distinguishable from *Coleman*. Additionally, the Appellate Court failed to distinguish between a personal deficiency judgment following a foreclosure sale and a judgment on a note.

A. The Case at Bar is Factually Distinguishable from *Coleman*.

In *Coleman*, following the completely adjudicated mortgage foreclosure action, the plaintiff filed a breach of note suit to recover the *in rem* deficiency amount not recovered by the plaintiff through the foreclosure sale. *Coleman*, 2015 IL App (1st) 140184, ¶6-7. Here, Plaintiff voluntarily dismissed the mortgage foreclosure action prior to entry of a judgment of foreclosure or sale of the real property, and as such there was no possible personal deficiency judgment to pursue. It was never possible for the court in the Foreclosure Action to enter an order against the borrowers personally, because the foreclosure never reached the point of the judicial sale.

The key distinction between the case at bar and *Coleman* is the fact that *Coleman* was adjudicated to completion, a judgment was entered on a deficiency, and the subsequent suit on the note was an attempt to recover the *in rem* deficiency amount rather than a

separate action on the note. In essence, the second action in *Coleman* was barred because it was a supplementary proceeding to collect on the deficiency previously adjudicated in the foreclosure. In the present matter, the suit on the note is to collect the entire amount due under the note and is not based upon the findings and determinations in the Foreclosure Action or any personal deficiency judgment amount. This breach of contract case arises solely from the note executed by the Defendants in favor of the Plaintiff.

Despite these key factual differences, the Appellate Court examined the allegations made in the relevant complaints in the present case and compared them to the allegations made in the complaints in *Coleman*. The Appellate Court determined that factually this case is akin to *Coleman* and that Plaintiff in its foreclosure complaint was seeking relief under both the mortgage and the note thus barring the filing of Plaintiff's Second Collection Action under section 13-217 of the Code. However, the Appellate Court's analysis does not take into account that the allegations in the mortgage foreclosure complaint are part of the form pleading of section 15-1504 of the IMFL (735 ILCS 5/15-1504(West 2018)) or distinguish between the pursuit of a deficiency judgment following the entry of an order approving sale from a suit for judgment on the note.

The allegations in the Foreclosure Action complaint that the Appellate Court found relevant for purposes of determining that Plaintiff was seeking recovery under the note as well as a judgment of foreclosure include: (1) Plaintiff's capacity found under section 1504(a)(3)(n); (2) the amount of the original indebtedness under section 1504(a)(3)(h); (3) that attached to the complaint was a copy of the mortgage and a copy of the note under section 1504(a)(2); (4) the statement of default and amounts due and owing under

section 1504(a)(3)(j)[1]; (5) the names of defendants claimed to be personally liable for deficiency, if any under section 1504(a)(3)(m)[2]; and (6) that Plaintiff sought as relief a judgment of foreclosure and sale and also a "personal judgment for deficiency." *First Midwest Bank, as successor in Interest to Waukegan Savings Bank, f/k/a Waukegan Savings and Loan, SB,v. Cobo*, 2017 IL App (1st) 170872, ¶23; (A76, ¶23) .

The allegations noted by the Appellate Court are all part of the form complaint found in section 1504(a) of the IMFL. The Appellate Court's reliance on the similarity of the allegations in Plaintiff's Foreclosure Action complaint with the complaint filed in *Coleman* fails to account for the form nature of those pleadings. "The Foreclosure Law establishes the formal pleading requirements of a foreclosure complaint." *Wells Fargo Bank, N.A. v. Mundie*, 2016 IL App (1st) 152931, ¶10. For instance, the allegations regarding a plaintiff's capacity are required under a mortgage foreclosure complaint. *See Wells Fargo Bank, N.A. v. Mundie*, 2016 IL App (1st) 152931, ¶10 ("Section 15-1504(a) provides that a complaint may be in substantially the form prescribed by statute, and section 15-1504(a)(3)(N) requires the plaintiff to state the capacity in which it brings the foreclosure."). Additionally, the allegations that a copy of the note and mortgage are attached to the complaint are necessary to effectually plead and ultimately prove a cause of action for mortgage foreclosure. "To establish a *prima facie* case of foreclosure in accordance with section 15-1504, a plaintiff is required to introduce evidence of the mortgage and promissory note, at which time the burden of proof shifts to the defendant

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[1] Plaintiff included the unpaid principal balance, per diem interest accruing, and further information about the default which is contemplated under the IMFL as an allegation found in paragraph j of section 1504(a)(3). In the case at bar, Plaintiff pled this information as paragraph k. R. V1, C. 169.

[2] This allegation is seen in paragraph N of Plaintiff's mortgage foreclosure complaint. R. V1, C. 169.

to prove any affirmative defenses." *Bank of America, N.A. v. Adeyiga*, 2014 IL App (1st) 131252, ¶67. Attaching a copy of the note to the mortgage foreclosure complaint is not necessarily done in order to pursue a personal deficiency judgment. A copy of the note evidences the debt that is secured by the mortgage and is therefore evidence in a mortgage foreclosure case.

Rather, the case at bar is factually more similar to *Goldstein*. Although the Appellate Court considered *Goldstein* and distinguished it because it involves a separate action on a guaranty and not a note, the holding of *Goldstein* is not so limited. The court in *Goldstein* clearly analyzed the separate contracts that may comprise a loan transaction, including a note, and did not distinguish between those contracts in rendering its decision. *Goldstein* applies as equally to a guaranty as it does to a note or any other related contract. It is clear that the reasoning and analysis of *Goldstein* is more relevant to the case at bar than *Coleman* because *Goldstein* considers the unique nature of the different contracts that may comprise a loan transaction and how each contract though potentially related contemporaneously in time is entirely separate and distinct. This court should reject the Appellate Court's reliance upon *Coleman* as it is factually distinguishable from the case at bar and reverse the ruling of the lower court.

B. The Nature of a Personal Deficiency Judgment is Separate and Distinct from a Judgment on a Note.

The Appellate Court also erred in failing to distinguish between a personal deficiency judgment following a foreclosure sale and a judgment on a note. The Appellate Court reasoned that both the foreclosure action and the collection actions "sought to obtain what defendants owed plaintiff under the terms of the note due to default." *Cobo*, 2017 IL App (1st) 170872, ¶25; (A76). Yet, this statement is not accurate as it applies to

mortgage foreclosure cases, and fails to consider the procedural requirements of the IMFL.

The IMFL outlines a very specific procedure for mortgage foreclosure in Illinois. Beyond the pleading requirements outlined by section 15-1504 (735 ILCS 5/15-1504 (West 2018)), a plaintiff must follow specific procedures for a judgment of foreclosure and sale (735 ILCS 5/15-1506 (West 2018)), for sale of the property (735 ILCS 5/15-1507 (West 2018)), and for confirmation of the sale (735 ILCS 5/15-1508 (West 2018)).

First, a plaintiff mortgagee must obtain a judgment against the mortgagor. *See* 735 ILCS 5/15-1506 (West 2018). A redemption period during which the mortgagor can redeem the property by paying off the total judgment amount must expire. *See* 735 ILCS 5/15-1603 (West 2018). Then, plaintiff may sell the property pursuant to the court's order. *See* 735 ILCS 5/15-1507 (West 2018). In order for the foreclosure to be complete, the court must enter an order confirming the sale and granting possession of the property. *See* 735 ILCS 5/15-1508 (West 2018). In the case of a deficiency, a plaintiff may request a judgment either *in rem* or *in personam*. *See* 735 ILCS 5/15-1508(e) (West 2018). Section 1508(e) of the IMFL permits a court to enter a personal deficiency judgment against any party "(i) if otherwise authorized and (ii) to the extent requested in the complaint and proven upon presentation of the report of sale in accordance with Section 15-1508." 735 ILCS 5/15-1508(e). Section 1508(e) further limits the application of a personal deficiency judgment in cases where "personal service has been had upon the persons personally liable for the mortgage indebtedness, unless they have entered their appearance in the foreclosure action."

735 ILCS 5/15 1508(e). Here, the right of Plaintiff to a personal deficiency judgment was never at issue in the mortgage foreclosure case because the Foreclosure Action never proceeded through any of the necessary steps outlined by the IMFL to obtain a personal deficiency judgment following the foreclosure sale.

In comparison, in a breach of note action, a plaintiff is entitled to pursue the full amount due under the note after a default occurs. There are no additional barriers in obtaining a judgment beyond those regularly associated with litigating a civil case. These two remedies are clearly distinguishable. As noted by the trial court in its order on Defendants' motion to reconsider, there is no deficiency amount linking the mortgage foreclosure action to the suits on the note. R. V2, C. 429. The distinction between a personal deficiency judgment and a judgment on a note is a clear difference between a breach of note action and a mortgage foreclosure suit. It is those differences that render *Coleman* distinguishable and *Goldstein* on point.

The Appellate Court's reliance upon *Coleman* is in error first and foremost because the case at bar is factually distinguishable. In addition, the Appellate Court failed to consider the effect of the form complaint prescribed under the IMFL upon its analysis that allegations related to the note were pled in the mortgage foreclosure case. Further, the reliance on *Coleman* fails to distinguish the key difference between a personal deficiency judgment following a mortgage foreclosure action and a breach of note case. As such, Plaintiff respectfully requests that this Court reverse the decision of the Appellate Court and reinstate the decision of the trial court.

CONCLUSION

The single refiling rule of section 13-217 of the Code does not bar the Second Collection Action as an impermissible second refiling because a mortgage foreclosure case and a suit on a promissory note do not arise out of the same set of operative facts. As noted in Plaintiff's Petition for Leave to Appeal, the Appellate Court's decision in the matter below creates more questions than answers. By reversing the Appellate Court, this uncertainty will be resolved.

WHEREFORE, Plaintiff-Appellant First Midwest Bank, as successor in interest to Waukegan Savings Bank f/k/a Waukegan Savings and Loan, SB respectfully requests that this Court reverse the decision of the Appellate Court and for any further and additional relief that this Court deems just.

Respectfully submitted,

First Midwest Bank, as successor in interest to Waukegan Savings Bank f/k/a Waukegan Savings and Loan, SB,

By: One of Its Attorneys

Stephen Daday, ARDC No. 3127015
Diana Rdzanek, ARDC No. 6306800
Julie Repple, ARDC No. 6296271
Klein, Daday, Aretos & O'Donoghue, LLC
2550 W. Golf Rd. Ste. 250
Rolling Meadows, IL 60008
847-590-8700
kdaonotices@kdaolaw.com

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 22 pages.

Dated: April 25, 2018

Respectfully submitted,

First Midwest Bank, as successor in interest to Waukegan Savings Bank f/k/a Waukegan Savings and Loan, SB,

By: One of Its Attorneys

Stephen Daday, ARDC No. 3127015
Diana Rdzanek, ARDC No. 6306800
Julie Repple, ARDC No. 6296271
Klein, Daday, Aretos & O'Donoghue, LLC
2550 W. Golf Rd. Ste. 250
Rolling Meadows, IL 60008
847-590-8700
kdaonotices@kdaolaw.com

Case No. 123038

IN THE SUPREME COURT OF THE STATE OF ILLINOIS

First Midwest Bank, as successor in interest To Waukegan Savings Bank f/k/a/ Waukegan Savings and Loan, SB, Plaintiff-Appellant, v. Andres Cobo; Amy M. Rule, Defendants-Appellees.	Appeal from the Appellate Court, First District, No. 1-17-0872 On Appeal from the Circuit Court of Cook County, Law Division Case No. 15 L 007759 Honorable Raymond W. Mitchell, Judge Presiding. Date of Appellate Order: November 6, 2017

APPENDIX

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Carolyn Taft Grosboll
SUPREME COURT CLERK

SUPREME COURT OF ILLINOIS

SUPREME COURT BUILDING
200 East Capitol Avenue
SPRINGFIELD, ILLINOIS 62701-1721
(217) 782-2035

Stephen G. Daday
Klein, Daday, Aretos & O'Donoghue, LLC
2550 W. Golf Road, Suite 250
Rolling Meadows IL 60008

FIRST DISTRICT OFFICE
160 North LaSalle Street, 20th Floor
Chicago, IL 60601-3103
(312) 793-1332
TDD: (312) 793-6185

March 21, 2018

In re: First Midwest Bank, etc., Appellant, v. Andres Cobo et al., Appellees. Appeal, Appellate Court, First District.
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The Supreme Court today ALLOWED the Petition for Leave to Appeal in the above entitled cause.

We call your attention to Supreme Court Rule 315(h) concerning certain notices which must be filed.

Very truly yours,

Carolyn Taft Grosboll

Clerk of the Supreme Court

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Case No. 123038

IN THE SUPREME COURT OF THE STATE OF ILLINOIS

First Midwest Bank, as successor in interest to Waukegan Savings Bank f/k/a Waukegan Savings and Loan, SB, Plaintiff, v. Andres Cobo; Amy M. Rule, Defendants.	Petition for Leave to Appeal from the Appellate Court, First District, No. 1-17-0872 On Appeal from the Circuit Court of Cook County, Law Division, Case No. 15 L 007759 Date of Appellate Order: November 6, 2017

PETITION FOR LEAVE TO APPEAL

Stephen Daday, ARDC No. 3127015
Diana Rdzanek, ARDC No. 6306800
Julie Repple, ARDC No. 6296271
Klein, Daday, Aretos, & O'Donoghue, LLC
Attorneys for Plaintiff-Appellee
2550 W. Golf Rd. Ste. 250
Rolling Meadows, IL 60008
847-590-8700
Email: kdaonotices@kdaolaw.com

Attorneys for Petitioner First Midwest Bank, as successor in interest to Waukegan Savings Bank f/k/a Waukegan Savings and Loan, SB

ORAL ARGUMENT REQUESTED IF PETITION IS ALLOWED

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PRAYER FOR LEAVE TO APPEAL

Pursuant to Illinois Supreme Court Rule 315, Plaintiff First Midwest Bank, as successor in interest to Waukegan Savings Bank f/k/a Waukegan Savings and Loan, SB respectfully requests that this Court grants it leave to appeal from the November 6, 2017 decision of the Illinois Appellate Court, First District, vacating the trial court's order granting summary judgment and dismissing the Plaintiff's breach of contract complaint.

STATEMENT OF JURISDICTION

Illinois Supreme Court Rule 315 confers jurisdiction upon this Court. The Appellate Court issued its decision on November 6, 2017, and no petition for rehearing was filed. The filing of this petition for leave to appeal on December 11, 2017 is timely.

POINTS RELIED UPON

The body of law analyzing the single refiling rule of section 13-217 of the Code of Civil Procedure (735 ILCS 5/13-217 (West 1994)) and the principles of *res judicata* in cases arising out of a loan transaction is in conflict. The Illinois appellate courts are not in agreement as to whether a note and a mortgage arise out of the same set of operative facts for the purposes of a *res judicata* analysis. The First, Second, and Third Districts each apply a different analysis to the issue, with differing and at times unjust results.

This case presents a matter of significant importance regarding whether a note and a mortgage arise from the same transaction or are different transactions for the purpose of *res judicata* analysis. It is unclear what constitutes a "refiling" of the same cause of action, and whether the documents signed as part of a loan transaction all arise out of a single group of operative facts or are separate and distinct transactions.

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The issue in this matter is whether the Plaintiff violated the single refiling rule when it filed a second breach of contract action on a note, after first having filed and dismissed a mortgage foreclosure complaint and a first breach of contract action. Plaintiff's successor in interest filed a single count mortgage foreclosure case (hereinafter "foreclosure case") against Defendants. The mortgage foreclosure was voluntarily dismissed. Thereafter, Plaintiff filed a breach of note action (hereinafter "first collection action") that was also voluntarily dismissed. Plaintiff then filed a breach of note action against Defendants (hereinafter "second collection action"). In the trial court and on appeal, Defendants argued that the second collection action is barred by Illinois' single refiling rule, 735 ILCS 5/13-217. The court considered whether the filing of Plaintiff's second collection action was the first refiling of the first collection action or the second refiling of the foreclosure action. The Appellate Court ruled contrary to the trial court in determining that the same set of operative facts gave rise to both causes of action in the foreclosure action and the breach of note actions and thus holding that the second collection action was a second refiling of the action to foreclose a mortgage.

However, that ruling is contrary to established Illinois case law which permits a mortgagee who holds a note secured by a mortgage to sue upon the note or to bring a mortgage foreclosure action either consecutively or concurrently. *Farmer City State Bank v. Champaign Nat. Bank*, 138 Ill.App.3d 847, 852 (4th Dist. 1985); *Turczak v. First American Bank*, 2013 IL App (1st) 121964 ¶29. The ruling is also contrary to prior decisions that found that a guaranty does not arise out of the same operative facts for purposes of a *res judicata* analysis. *LP XXVI, LLC v. Goldstein*, 349 Ill.App.3d 237, 240-

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243 (2d Dist. 2004). The holdings in the case at bar and in *Goldstein* are in conflict to each other and cannot be interpreted as a cohesive statement of law.

Beyond the conflicts stated above, the implications of the Appellate Court's ruling on the case at bar has far reaching policy implications for lenders and borrowers in Illinois as a lender's willingness to offer loss mitigation efforts to a borrower may be thwarted once a foreclosure action or a collection action has been instituted against a borrower.

As such, for the reasons stated herein, Plaintiff respectfully requests that this Court grant it leave to appeal the decision of the Appellate Court.

STATEMENT OF FACTS

On December 8, 2011, Plaintiff's predecessor in interest, Waukegan Savings and Loan, SB, ("Waukegan") filed a complaint for mortgage foreclosure in the Chancery Division of the Circuit Court of Cook County, docketed as Case No. 11 CH 42013 ("Foreclosure Action"). R. V1, C. 168 – C. 191. The complaint attached a copy of the subject mortgage and a copy of the subject note and alleged that on November 20, 2006, mortgagors Andres Cobo, Amy Rule, and Aldo Jordan executed a mortgage in favor of Waukegan to secure indebtedness in the original principal amount of $227,500.00. R. V1, C. 168 – C. 169. The complaint identified the property commonly known as 625 S. 12th Ave., Maywood, Illinois 60153 as the mortgaged real estate. R. V1, C. 169. The complaint further alleged that a default occurred under the terms of the mortgage for monthly installments due July 1, 2011 and thereafter, and alleged an amount due and owing of $214,079.06 plus interest, late fees, and collection costs. R. V1, C. 169. The complaint further alleged that Andres Cobo, Amy Rule, and Aldo Jordan were personally

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liable for any deficiency. R. V1, C. 169. As its prayer for relief, Plaintiff requested a judgment of foreclosure and sale pursuant to the mortgage and "if sought" an order granting a shortened redemption; a personal judgment for deficiency; an order placing the mortgagee in possession or appointing a receiver; and a judgment for attorneys' fees, costs and expenses. R. V1, C. 170. The Foreclosure Action was dismissed without prejudice on April 2, 2013. R. V1, C. 194.

On April 16, 2013, Plaintiff First Midwest Bank, as agent for the Federal Deposit Insurance Corporation, receiver for Waukegan, filed a complaint for breach of promissory note in the Law Division of the Circuit Court of Cook County, docketed as Case No. 13 L 3865 ("First Collection Action"). R. V1, C. 196 – C. 202. The First Collection Action attached a copy of the subject note and alleged a breach of that promissory note dated November 20, 2006 ("Note"). R. V1, C. 196 – C. 202. The complaint alleged that on November 20, 2006, borrowers Andres Cobo and Amy M. Rule executed a promissory note in favor of Waukegan in exchange for a loan in the amount of $227,500.00. R. V1, C. 196. Under the terms of the note, borrowers were to make monthly payments in the amount of $1,400.76 with an annual interest rate of 6.250%. R. V1, C. 200. The complaint further alleged that the borrowers failed to make payments dated July 1, 2011 and thereafter. R. V1, C. 197. As its prayer for relief, Plaintiff requested a judgment against the borrowers in the amount of $251,165.72, plus accrued interest and late fees through the date of judgment, plus attorney's fees and costs of suit. R. V1, C. 197.

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On April 3, 2015, the circuit court entered an order denying Plaintiff's oral motion to continue the trial date, and granting Plaintiff's oral motion to voluntarily dismiss the case pursuant to 735 ILCS 5/2-1009. R. V1, C. 205.

On July 30, 2015, Plaintiff filed a two-count complaint pleaded in the alternative for breach of contract and unjust enrichment against defendants Andres Cobo and Amy M. Rule in the Law Division of the Circuit Court of Cook County, docketed as Case No. 15 L 7759 ("Second Collection Action" or "Plaintiff's Complaint"). R. V1, C. 1 – C. 57.

Count I of the Second Collection Action attached a copy of the subject note and mortgage and alleged that defendants Andres Cobo and Amy M. Rule executed a certain promissory note and mortgage in favor of Waukegan for a loan in the amount of $227,500.00. R. V1 C. 2. Count I further alleged a breach of the note. R. V1 C. 3. Count I sought a judgment in the amount of $278,838.13 against Andres Cobo and Amy M Rule, jointly and severally, for principal, interest, late charges, appraisal fees, escrow deficiency, and for attorneys' fees and costs. R. V1 C. 4. Count II of the Second Collection Action for unjust enrichment was pleaded as an alternative legal theory to Count I. R. V1 C. 4.

Defendants filed a motion to dismiss the Second Collection Action pursuant to 735 ILCS 5/2-619. R. V1, C. 101 – C. 205. In their motion to dismiss, Defendants alleged that the Second Collection Action was barred pursuant to 735 ILCS 5/13-217 by the single refiling rule, arguing that "Plaintiff previously filed two (2) lawsuits alleging the same breach of the same promissory note and voluntarily dismissed both of the prior lawsuits." R. V1, C. 106.

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Following briefing and oral argument, the circuit court denied the motion to dismiss in a written opinion order. R. V1, C. 247 – C. 249. In denying the motion, the court applied the transactional test to determine whether the causes of action are the same for purposes of *res judicata*. R. V1, C. 247. The court cited the holding in *LP XXVI, LLC v. Michael Goldstein*, 349 Ill. App. 3d 237, 241 (2004), which determined that "although they are closely related in time and functionality, a mortgage and a promissory note are not part of the same transaction or occurrence because they serve distinct purposes." The trial court concluded, "Accordingly, the current action constitutes the first refiling of the 2013 promissory note action, not the second refiling of the 2011 mortgage foreclosure action and is not barred by *res judicata* of section 13-217." R. V1, C. 249.

The trial court subsequently denied Defendants' motion to reconsider the order of June 23, 2016 denying Defendants' motion to dismiss. R. V2, C. 253 – C. 430.

On November 16, 2016, Defendants filed their answer to Plaintiff's complaint and four affirmative defenses. R. V2, C. 441 – R. V3, C. 551.

In their first affirmative defense, Defendants argued that the Second Collection Action was an impermissible refiling pursuant to 735 ILCS 5/13-217. R. V2, C. 450 – C. 452. Defendants asserted that their first affirmative defense was pleaded in order to preserve the issue for appeal. R. V2, C. 450.

In their third affirmative defense, Defendants pleaded that Plaintiff failed to attach a valid note to their complaint. R. V2, C. 454 – C. 456. Specifically, Defendants pleaded that there are two errors apparent in the note: (1) the second page of the note ends with an incomplete sentence; and (2) the footer on the third page of the note misidentifies the document as "Multistate 1-4 Family Rider." R. V2, C. 454 – C. 456.

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The second and fourth affirmative defenses are not relevant for the purposes of the appeal or this petition for leave to appeal.

On December 8, 2016, Plaintiff filed a motion to strike Defendants' affirmative defenses pursuant to 735 ILCS 5/2-619. R. V3, C. 552 – C. 593. Additionally, on January 23, 2017, Plaintiff filed a motion for summary judgment. R. V3, C. 609 – R. V4, C. 928. On March 2, 2017, the trial court granted Plaintiff's motion to strike Defendants' affirmative defenses in a written opinion order, and struck Defendants' first, second, third, and fourth affirmative defenses. R. V6, C. 1311 – C. 1314. On March 23, 2017, in a written opinion order, the trial court granted Plaintiff's motion for summary judgment, and entered a final money judgment in favor of Plaintiff in the amount of $308,192.56. R. V6, C. 1492 – C. 1494.

On April 4, 2017, Defendants timely filed their Notice of Appeal and Request for Preparation of the Record. R. V6, C. 1495 – C. 1499. On November 6, 2017, the Appellate Court vacated the order granting summary judgment and dismissed Plaintiff's underlying complaint. (A1, ¶1). The Appellate Court found that for purposes of a *res judicata analysis*, the same set of operative facts gave rise to the cause of action in the foreclosure action and the breach of note action. (A10, ¶25). Thus, contrary to the circuit court, the Appellate Court held that Plaintiff's second breach of note action was an impermissible second refiling of the foreclosure action in violation of 735 ILCS 5/13-217. (A12, ¶28). The Appellate Court also held that Plaintiff's count II for unjust enrichment did not apply and that the trial court's order of summary judgment could not be affirmed on that basis. (A13, ¶30).

From this decision, Plaintiff now requests leave to appeal.

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ARGUMENT

The Illinois appellate courts are not in agreement as to whether a note and a mortgage arise out of the same set of operative facts for the purposes of a *res judicata* analysis. The body of case law that has developed, specifically in the first, second, and third districts, is not cohesive and the cases considering the subject cannot be read together in conjunction with the Illinois mortgage foreclosure law and prior foreclosure case law precedent in a logical fashion. Respectfully, in this matter, the Appellate Court misapplied the body of case law to create a rule of law that is not in line with court precedent and creates more questions than it provides answers. The Appellate Court's ruling implicates public policy related to loan transactions and creates much uncertainty. For these reasons, Plaintiff respectfully requests this honorable court to grant it leave to appeal.

I. The Body of Case Law Applying *Res Judicata* Principles to Cases Arising Out of Loan Transactions Is In Conflict.

As a body of law, the cases analyzing the single refiling rule of section 13-217 of the Code of Civil Procedure (735 ILCS 5/13-217 (West 1994)) and the principles of *res judicata* in cases arising out of a loan transaction are not cohesive and are in conflict. There are questions as to what constitutes a "refiling" of the same cause of action, and whether the documents signed as part of a loan transaction all arise out of a single group of operative facts.

Section 2-1009(a) of the Code of Civil Procedure (735 ILCS 5/2-1009 (West 1994)) allows a plaintiff to dismiss his or her action without prejudice at any time before trial or hearing begins. 735 ILCS 5/2-1009(a) (West 2012). As a counterpart to section 2-1009(a), section 13-217 of the Code of Civil Procedure allows a plaintiff to refile an

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action that has been voluntarily dismissed within one year of the date of dismissal. 735 ILCS 5/13-217 (West 1994). However, upon taking a voluntary dismissal, a plaintiff is permitted one, and only one, refiling of that action. *Hurst v. Capital Cities Media, Inc.*, 323 Ill. App. 3d 812, 822 (2001). The single refiling rule applies regardless of whether the applicable statute of limitations has expired. *Id.*

The single refiling rule is, like *res judicata*, a rule of claim preclusion. *Carr v. Tillery*, 591 F.3d 909, 914 (7th Cir. 2010). After the first claim is filed and voluntarily dismissed, the dismissal is without prejudice. However, once the voluntarily dismissed claim is refiled and then voluntarily dismissed for a second time, the dismissal becomes one with prejudicial effect. *Id.*

For purposes of section 13-217, a complaint is considered to be a refiling of a previously filed complaint if it constitutes the same cause of action under the principles of *res judicata*. *Mabry v. Boler*, 2012 IL App (1st) 111464, ¶ 22. In making that determination, Illinois courts apply the transactional test. *River Park, Inc. v. City of Highland Park*, 184 Ill.2d 290, 310-11 (1998). Under the transactional test, separate claims will be considered to be the same cause of action if both claims arise from a single group of operative facts, regardless of whether they assert different theories of relief. *Id.* at 311.

The lower courts are in agreement up to the point that separate claims are considered the same cause of action if both claims arise from a single group of operative facts. However, regarding the various documents that may be executed in connection with a loan transaction, the courts have inconsistently identified the operative facts that

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determine whether a single transaction has occurred for purposes of the single refiling rule.

In the decision below from the first appellate district, the Appellate Court concluded that "a single-count complaint, requesting foreclosure of the mortgage as well as a personal judgment for any deficiency, involves operative facts arising from both the mortgage and the promissory note." *First Midwest Bank v. Cobo*, 2017 IL App (1st) 170872 ¶ 22. The Appellate Court determined that the note and the mortgage secured thereby arise out of the same operative facts for the purposes of a *res judicata* analysis. In making that determination, the Appellate Court relied on the First District case *LSREF2 Nova Investments III, LLC v. Coleman,* 2015 IL App (1st) 140184. In *Coleman*, the plaintiff's predecessor-in-interest filed a mortgage foreclosure case against the defendant, and the case concluded with a judgment of foreclosure, judicial sale, and confirmation of sale. *LSREF2 Nova Investments III, LLC v. Coleman,* 2015 IL App (1st) 140184, ¶¶3-6. The order confirming the sale entered an *in rem* deficiency judgment against the defendant. *Id.* at ¶6. The plaintiff then filed a new action seeking to enforce the deficiency under the promissory note. *Id.* at ¶7. The court dismissed the complaint, finding that the claim was barred by *res judicata. Id.* at ¶14. The plaintiff, having pursued its remedy for a personal deficiency judgment in the mortgage foreclosure case, was precluded from seeking a judgment solely on the promissory note in a consecutive action. *Id.* at ¶16. In the case at bar, the Appellate Court applied the holding in *Coleman* and concluded that because a deficiency judgment in a mortgage foreclosure action precludes a subsequent complaint on the note, the note and mortgage contain the same set

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of operative facts. *Id.* at ¶25. Thus, the court reasoned, for purposes of *res judicata*, a note and mortgage are part of the same transaction. *Id.*

The Second District has concluded the opposite. In *LP XXVI, LLC v. Goldstein*, 349 Ill.App.3d 237 (2d Dist. 2004), the court considered a note, mortgage, and guaranty that were executed as part of the same real estate deal. *LP XXVI, LLC v. Goldstein*, 349 Ill.App.3d 237, 238 (2d Dist. 2004). The borrower defaulted, and the plaintiff filed a mortgage foreclosure action in which the property was sold at judicial sale. *Id.* at 239. The plaintiff then filed a separate action to enforce the guaranty. *Id.* Defendant filed a motion to dismiss the guaranty action on the basis that plaintiff was barred from maintaining the guaranty action under the doctrine of *res judicata*. *Id.* The trial court dismissed the action and plaintiff appealed. *Id.* On appeal, the court applied the transactional test and concluded that the guaranty action was a separate action from the mortgage foreclosure. *Id.* at 241. As part of their analysis, the Goldstein court stated:

> At first blush, a transactional analysis may appear to lead to the conclusion that the action on the guaranty is the same cause of action as the mortgage foreclosure, because the note, mortgage, and guaranty were all executed concurrently and, apparently, as components of a related deal. Such a result, however, overlooks the practical aspects of the interrelated transactions comprising the execution of the note, mortgage, and guaranty, as well as long-settled precedent, and reduces the transactional analysis to the most cursory and formalistic level. The note was executed to provide capital, the mortgage to secure the note. Defendant personally provided the guaranty in order to assure the lender than any shortfall in the security provided by the mortgaged property would be made good. While the three transactions are related, we do not believe that their mere proximity in time and the overlap of some of the parties render then a single transaction, especially in light of the purpose of each of the transactions. *Id.* at 240-241.

This analysis clearly recognizes the distinction of the documents that may be part of a loan transaction. Applying the rule from *Goldstein*, one should conclude that a note and mortgage do not share the same set of operative facts for purposes of the transactional

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test and the single refiling rule. However, in the case at bar, the Appellate Court held the opposite. The Appellate Court distinguished *Goldstein* because it involved an action on the guaranty and not the note. Yet, the analysis in *Goldstein* is applicable to all documents that may comprise a loan transaction and although the facts in *Goldstein* concerned an action on a guaranty, it should not be applied in such a limited manner, particularly since both a note and a guaranty are contracts, whereas a mortgage secures the debt evidenced by the note. It is apparent that the holding from the present case is in conflict with the holding in *Goldstein.*

The Third District has applied the rule in yet another way. In *Wells Fargo Bank v. Norris*, 2017 Ill.App.3d 150764 (2017), the court considered the single refiling rule related to a third foreclosure filing of the same mortgage and note. The first case was dismissed upon plaintiff's mistaken belief that the borrowers had entered into a loan modification agreement. *Wells Fargo Bank v. Norris*, 2017 Ill.App.3d 150764, ¶ 4 (2017). The second case in the action alleged a different default date, and attached a copy of the purported loan modification agreement. *Id.* at ¶ 5. When defendant disputed the loan modification, plaintiff dismissed a second time, intending to refile the original action. *Id.* at ¶ 7. The plaintiff then refiled a third time, alleging the original date of default and attaching the same mortgage and note. *Id.* at ¶ 8.

The Third District Appellate Court decided that the third foreclosure was not an impermissible refiling. *Id.* at ¶ 22. In allowing the claim, the court found that the operative facts of two foreclosure cases were "substantially different" because the dates of default were different, and as such, it was clear that the first and second case involved two different causes of action for purposes of the single refiling rule. *Id.* Despite the fact

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that *Norris* is factually distinguishable from the present matter and *Goldstein*, it is relevant to the consideration of the issues at hand because the *Norris* court did not conclude that because all three foreclosure actions arose from the same mortgage that they were barred by the principles that comprise the transactional test and the single refiling rule. Rather, the court noted the differences in each of the mortgage foreclosure cases, namely the date of default. However, under the reasoning put forth by the Appellate Court in the case at bar, the fact that the three actions arose from the same mortgage document should be more compelling.

Taken as a whole, it is unclear whether a note and mortgage arise out of the same operative facts for the purposes of the single refiling rule and a *res judicata* analysis. The case law in this area is not consistent and the holding by the Appellate Court in this matter is in conflict with other appellate districts.

II. The Appellate Court Erred in its Analysis of and Reliance on *Coleman*.

The conflict in the case law is due to the Appellate Court's misplaced reliance upon *Coleman*. The Appellate Court found the holding in *LSREF2 Nova Investments III, LLC v. Coleman*, 2015 IL App (1st) 140184 to be instructive, and applied the analysis to this case. However, the Appellate Court's reliance on *Coleman* is misguided, because the cases do not have the same operative facts, and as such the analysis is inapplicable.

As discussed above, in *Coleman*, the plaintiff's predecessor in interest filed a single count complaint for foreclosure, seeking to foreclose the mortgage, and also sought a personal deficiency. The foreclosure judgment stated that plaintiff would be entitled to a deficiency judgment following the sale of the property. *Id.* at ¶15. However, the order confirming the sale entered an *in rem* deficiency judgment against the defendant. *Id.* After the entry of the order approving sale, the plaintiff then filed a new action seeking to

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enforce the deficiency under the promissory note. *Id.* at ¶16. The court dismissed the complaint, finding that the claim was barred by *res judicata*. *Id.* The plaintiff, having pursued its remedy for a personal deficiency judgment in the mortgage foreclosure case, was precluded from seeking a judgment solely on the promissory note in a consecutive action.

The *Coleman* case is factually distinguishable from the present case, and the outcome of *Coleman* is inapplicable to this case. In *Coleman*, the original foreclosure action was adjudicated to completion, and the plaintiff could have enforced its right to a personal deficiency in the order approving sale, but failed to do so. This precluded the plaintiff from filing a complaint pursuant to the note. In the extant matter, however, the personal deficiency was never at issue, because the foreclosure matter did not reach judgment and judicial sale.

In this matter, the Appellate Court found compelling that the foreclosure action sought to obtain what Defendants owed Plaintiff under the terms of the note due to default. However, this reasoning fails to account for section 1504 of the Illinois Mortgage Foreclosure Law ("IMFL") which contains the form complaint used in mortgage foreclosure actions. *See* 735 ILCS 5/15-1504. As part of that form complaint, plaintiffs are to allege who is personally liable for a deficiency and the capacity of the plaintiff to bring the suit-one of the options being the holder of the note. 735 ILCS 5/15-1504(a)(m),(n). Further, in the prayer for relief, the form provides for a "personal deficiency, if sought." 735 ILCS 5/15-1504(a). In this case, Plaintiff's predecessor in interest filed a mortgage foreclosure complaint that complied with section 1504 of the IMFL. If the filing of a single count mortgage foreclosure case that follows the form

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complaint automatically means that a plaintiff is also seeking relief under the note then prior case law becomes obsolete. For instance, *Farmer City State Bank v. Champaign National Bank*, 138 Ill.App.3d 847, 852 (4th Dist. 1985), states that upon default, a mortgagee can choose whether to proceed on the note or to foreclose upon a mortgage and that these remedies can be pursued consecutively or concurrently. *Farmer City State Bank v. Champaign National Bank*, 138 Ill.App.3d 847, 852 (4th Dist. 1985). Yet, under the reasoning of the Appellate Court, the filing of the single count foreclosure case can act to bar further relief upon the note.

Further, the fact that the foreclosure complaint included a request for relief of a "personal deficiency, if sought" cannot be conclusive for whether the note and mortgage arise out of the same operative facts for the purposes of a *res judicata* analysis. The rights of the plaintiff to a personal deficiency are not adjudicated until the point of confirmation of sale and are predicated by a number of factors including the type of service the plaintiff had on the mortgagor and whether a deficiency exists following sale. The Appellate Court dismissed this difference and yet it is a key distinction to the function of a mortgage foreclosure action compared to a breach of note action. In the present case, the Plaintiff voluntarily dismissed the foreclosure case before judgment had even been entered. The rights of the Plaintiff to a personal deficiency were never at issue, because a judicial sale and confirmation of the deficiency amount never took place. The facts are very different from *Coleman*, where the collection action on the note had already been adjudicated by the order approving sale, such that when the plaintiff filed the collection action, that right had already been extinguished. In *Coleman*, the facts necessary to determine issue preclusion existed as the result of the sale and confirmation.

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In the present case, that condition precedent did not exist. The Appellate Court erred in failing to recognize this distinction.

In contrast, the reasoning and holding in *Goldstein* is more in line with prior case law and with the IMFL. The Appellate Court distinguished *Goldstein* in its opinion because *Goldstein* involved the question of whether an action on a guaranty could be pursued following a foreclosure action. *Cobo*, 2017 IL App. (1st) 170872, ¶26. However, the Appellate Court's treatment of *Goldstein* is respectfully too simplistic and overlooks that the basis for the *Goldstein* opinion was also based on *Farmer City State Bank v. Champaign National Bank*, 138 Ill.App.3d 847 (4th Dist. 1985) as well as the cases mentioned in its opinion, *Citicorp Savings of Illinois v. Ascher*, 196 Ill.App.3d 570 (1990) and *DuQuoin State Bank v. Daulby*, 115 Ill.App.3d 183 (1983). *Cobo*, 2017 IL App. (1st) 170872, ¶26.

It is evident that the analysis and opinion of the Appellate Court relied erroneously on *Coleman* and in so doing created a conflict with prior case precedent and with the IMFL for purposes of a *res judicata* analysis.

III. The Appellate Court Decision Presents Matters of General Importance.

Loss mitigation efforts have been an important policy consideration to Illinois courts following the mortgage foreclosure crisis faced in this state and nationwide. This is evidenced locally through the mediation programs that have been implemented in the circuit courts and nationally through the creation of the Home Affordable Modification Program.

During the life of a loan, often thirty years, it is feasible that a borrower could default by failing to make payments or other instances of default, multiple times over the course of the repayment period. Even within one occurrence of default, a borrower may

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attempt to reinstate, or to enter into a repayment plan, and then fail under that agreement. Lenders are encouraged to work with borrowers in creating repayment plans and loan modifications. However, the appellate court's decision may have the effect of curbing a lender's willingness to engage in loss mitigation after default. If a lender is concerned that dismissing their case either for foreclosure or to collect upon the note could have the effect of precluding them from later recouping their loss, they will be forced to proceed through the foreclosure or breach of note action in order to protect their interests.

Additionally, the appellate court decision in this matter creates more questions than it answers. For instance, the Appellate Court reasoned that because the Plaintiff sought a personal deficiency judgment in its pleading, it was precluded from filing its second breach of note action. However, the Appellate Court failed to consider the question of what type of service Plaintiff had on Defendant. For example, where a mortgage foreclosure is filed, voluntarily dismissed, then refiled, should a plaintiff be unable to locate borrower for personal service and therefore be precluded from obtaining a personal deficiency judgment in the foreclosure, that plaintiff would be unable, upon later locating the borrower, to pursue that borrower for the money owed under the note. This results in an unjust scenario where plaintiff is precluded from collecting upon the amounts due because of the type of service obtained in the foreclosure action. It further means that the type of service determines whether the note and mortgage arise out of the same set of operative facts for the purposes of *res judicata.* It should not be the case that whether a note and mortgage arise out of the same set of operative facts depends upon what happens during the course of the litigation. This goes beyond the transactional test and the concepts of *res judicata.*

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CONCLUSION

The Appellate Court's ruling immensely complicates the decisions lenders must make at all times related to the loan. Upon default, lenders will be forced to decide whether to file for foreclosure or against the note, without the opportunity to pursue both "consecutively or concurrently." A lender may not agree to loss mitigation or loan repayment options, for fear of losing its bite at the apple to recover on the indebtedness. Such uncertainty is the result of the Appellate Court's decision below which stands in conflict with case law from other appellate districts.

WHEREFORE, Plaintiff prays that this honorable court grant it leave to file an appeal, and reverse the decision of the Appellate Court.

Respectfully submitted,

First Midwest Bank, as successor in interest to Waukegan Savings Bank f/k/a Waukegan Savings and Loan, SB,

By: One of Its Attorneys

Stephen Daday, ARDC No. 3127015
Diana Rdzanek, ARDC No. 6306800
Julie Repple, ARDC No. 6296271
Klein, Daday, Aretos & O'Donoghue, LLC
2550 W. Golf Rd. Ste. 250
Rolling Meadows, IL 60008
847-590-8700
kdaonotices@kdaolaw.com

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CERTIFICATE OF COMPLIANCE

I certify that the Petition for Leave to Appeal Pursuant to Supreme Court Rule 315 conforms to the requirements of Rule 341 (a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(c) certificate of compliance, the certificate of service, and the supporting appendix, is 18 pages.

Dated: December 12, 2017

Respectfully submitted,

First Midwest Bank, as successor in interest to Waukegan Savings Bank f/k/a Waukegan Savings and Loan, SB,

By: One of Its Attorneys

Stephen Daday, ARDC No. 3127015
Diana Rdzanek, ARDC No. 6306800
Julie Repple, ARDC No. 6296271
Klein, Daday, Aretos & O'Donoghue, LLC
2550 W. Golf Rd. Ste. 250
Rolling Meadows, IL 60008
847-590-8700
kdaonotices@kdaolaw.com

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Case No. _____

IN THE SUPREME COURT OF THE STATE OF ILLINOIS

First Midwest Bank, as successor in interest to Waukegan Savings Bank f/k/a Waukegan Savings and Loan, SB, Plaintiff, v. Andres Cobo; Amy M. Rule, Defendants.	Petition for Leave to Appeal from the Appellate Court, First District, No. 1-17-0872 On Appeal from the Circuit Court of Cook County, Law Division, Case No. 15 L 007759 Date of Appellate Order: November 6, 2017

APPENDIX

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2017 IL App (1st) 170872

FIRST DIVISION
November 6, 2017

No. 1-17-0872

FIRST MIDWEST BANK, as Successor in Interest to Waukegan Savings Bank, f/k/a Waukegan Savings and Loan, SB,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellee,	)	No. 15 L 007759
v.	)	
ANDRES COBO and AMY M. RULE,	)	Honorable Raymond W. Mitchell,
Defendants-Appellants.	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court, with opinion.
Presiding Justice Pierce and Justice Mikva concurred in the judgment and opinion.

OPINION

¶ 1 Defendants, Andres Cobo and Amy Rule, appeal the order of the Cook County circuit court granting summary judgment in favor of plaintiff, First Midwest Bank, on its complaint for breach of contract and unjust enrichment. On appeal, defendants contend the court erred in (1) denying defendants' motion to dismiss pursuant to section 2-619 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619(a)(9) (West 2016)), where plaintiff's complaint was an impermissible second refiling of its previous claims and (2) granting summary judgment where a genuine issue of material fact exists as to whether the note attached to plaintiff's complaint was actually the note signed by the parties. For the following reasons, we vacate the order granting summary judgment and dismiss the underlying complaint.

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¶ 2 JURISDICTION

¶ 3 The trial court granted summary judgment on March 21, 2017. Defendants filed a notice of appeal on April 4, 2017. Accordingly, this court has jurisdiction pursuant to Illinois Supreme Court Rules 303 (eff. July 1, 2017) and 304(a) (eff. Mar. 8, 2016), governing appeals from final judgments entered below.

¶ 4 BACKGROUND

¶ 5 On November 20, 2006, defendants executed a promissory note in favor of Waukegan Savings and Loan, SB (Waukegan), in exchange for a $227,500 loan. As security for the loan, defendants obtained a mortgage on real property located at 625 S. 12th Avenue in Maywood, Illinois. Plaintiff is the successor in interest to Waukegan.

¶ 6 In 2011, defendants stopped making payments and defaulted on the note and mortgage. On December 8, 2011, Waukegan filed a complaint for foreclosure (foreclosure complaint) and attached a copy of the mortgage and "a copy of the Note secured thereby." The foreclosure complaint alleged the amount of original indebtedness as $227,500. The foreclosure complaint also alleged that plaintiff "is the owner and legal holder of the Note, Mortgage and indebtedness," and alleged a "[d]efault in monthly payments due July 1, 2011 and thereafter" by defendants. The total amount now due was the remaining principal of $214,079.06 "[p]lus interest, late fees and collection costs," and defendants were named as "persons claimed to be personally liable for deficiency." As relief, the foreclosure complaint requested a "Judgment of foreclosure and sale." Plaintiff also requested as relief, "if sought," a "personal judgment for deficiency," a shortened redemption period, an order granting possession, an order "placing the mortgagee in possession or appointing a receiver," and a judgment for attorney fees and expenses. Plaintiff voluntarily dismissed the foreclosure complaint on April 2, 2013.

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¶ 7 On April 16, 2013, plaintiff as receiver for Waukegan filed a complaint for breach of promissory note (breach of note complaint) and attached a copy of the note. The breach of note complaint alleged that defendants executed the promissory note in exchange for a $227,500 loan but they had not made payments on the note since July 1, 2011. The breach of note complaint alleged that pursuant to the terms of the note, defendants owed $251,165.72, which represented the remaining principal of $214,079.06, plus interest, accrued late fees, and other costs. As relief, plaintiff requested this amount "plus accrued interest and late fees through the date of judgment plus attorney's fees and costs" and any relief the court deems just. Plaintiff voluntarily dismissed this complaint pursuant to section 2-1009 of the Code (735 ILCS 5/2-1009 (West 2016)) on April 3, 2015.

¶ 8 On July 30, 2015, plaintiff filed a two-count complaint alleging breach of contract and, in the alternative, unjust enrichment (breach of contract complaint). The breach of contract complaint alleged that defendants executed a promissory note payable to Waukegan in the amount of $227,500 and executed a mortgage on real property located at 625 S. 12th Avenue in Maywood, Illinois, as security for the loan. Attached to the breach of contract complaint were copies of the note and mortgage. Plaintiff alleged that it is the successor in interest to Waukegan. Count I alleged that defendants defaulted on the note by failing to make payments since July 1, 2011, and as of July 27, 2015, the principal amount owed was $214,079.06, plus interest, late charges, appraisal fees, escrow deficiency, and attorney fees and costs. Plaintiff requested these amounts as relief, "pursuant to the Note," under count I. Count II alleged unjust enrichment and requested relief in the amount of $214,079.06.

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¶ 9 Defendants filed a section 2-619 motion to dismiss, arguing that the breach of contract action was barred by section 13-217 of the Code (735 ILCS 5/13-217 (West 1994)).[1] Defendants argued that section 13-217 permits only one refiling of a claim and the breach of contract complaint represented the second refiling of the foreclosure complaint, with the breach of note complaint being the first refiling. The trial court denied defendants' motion to dismiss, finding that the foreclosure complaint and breach of note complaint, although based on "closely related" transactions, were "not part of the same transaction or occurrence." Rather, the claims sought in each complaint were based on "separate contracts executed for distinct purposes and [gave] rise to separate remedies." Therefore, the 2015 breach of contract complaint did not constitute a second refiling of the 2011 foreclosure complaint but rather "the first refiling of Plaintiff's 2013 breach of promissory note action under section 13-217." Defendants filed a motion to reconsider, which the trial court denied.

¶ 10 Defendants filed their answer to the breach of contract complaint and also filed four affirmative defenses. Their first affirmative defense was that the breach of contract complaint was an improper second refiling of a voluntarily dismissed complaint. As their third affirmative defense, defendants argued that the note attached to the breach of contract complaint was "no note at all, but rather a compilation of two unsigned pages of the Note and a third signature page from a rider to the Mortgage." The other affirmative defenses are not relevant on appeal. Plaintiff filed a section 2-619 motion to strike the affirmative defenses and then filed a motion for summary judgment. In response, defendants challenged the amounts due and owing, arguing that plaintiff sought impermissible late fees and the prior attorney fees and costs were unsupported by

[1]This version of section 13-217 is now in effect because our supreme court in *Best v. Taylor Machine Works*, 179 Ill. 2d 367 (1997), found the subsequently amended version unconstitutional in its entirety.

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the attached documents. Plaintiff subsequently withdrew its request for late fees and filed an amended motion for summary judgment, with the affidavit of Jeanine Cozzi stating the amounts due and owing attached.

¶ 11 The trial court granted plaintiff's motion to strike the affirmative defenses and granted summary judgment, finding that "[p]laintiff has established all necessary elements" for its breach of contract claim. The court noted that plaintiff withdrew its request for late charges and attached the supplemental affidavit of Cozzi "containing detailed invoices from the attorney who handled the case." After "[t]aking all of the relevant factors into consideration," plaintiff sufficiently demonstrated "that the attorney fees it seeks are reasonable."

¶ 12 The trial court also addressed defendants' argument "that the copy of the promissory note attached to the complaint is not a correct copy and that Plaintiff's claim therefore fails pursuant to Illinois Code of Procedure section 5/2-606." 735 ILCS 5/2-606 (West 2016). The court determined, however, that section 2-606 pertains to pleading requirements and the "procedurally proper means to attack the legal sufficiency of the pleadings" is a motion pursuant to section 2-615 (735 ILCS 5/2-615 (West 2016)). Nevertheless, the court found it had addressed this issue in its March 2, 2017, order and determined "that Plaintiff's pleadings were sufficient." The trial court entered judgment against defendants in the amount of $308,192.56. This appeal followed.

¶ 13 ANALYSIS

¶ 14 Defendants first argue that the trial court erred in denying their section 2-619 motion to dismiss plaintiff's breach of contract complaint because the complaint was an improper second refiling of the foreclosure complaint. Defendants also raised this issue as an affirmative defense, which the trial court struck before granting summary judgment in favor of plaintiff. A section 2-619 motion to dismiss admits the legal sufficiency of the complaint but asserts an affirmative

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defense or other matter that avoids or defeats the claim. *DeLuna v. Burciaga*, 223 Ill. 2d 49, 59 (2006). "A grant or denial of a motion to dismiss is a question of law that we review *de novo*." *Simmons v. Homatas*, 236 Ill. 2d 459, 477 (2010).

¶ 15 Plaintiff's predecessor in interest filed a foreclosure complaint in 2011, which plaintiff voluntarily dismissed in 2013. A few weeks later, plaintiff filed its complaint for breach of promissory note, which it voluntarily dismissed in 2015. Approximately four months after that dismissal, plaintiff filed the underlying two-count complaint for breach of contract. Section 13-217 provides that if the plaintiff voluntarily dismisses a cause of action, "the plaintiff *** may commence a new action within one year or within the remaining period of limitation, whichever is greater, *** after the action is voluntarily dismissed by the plaintiff." 735 ILCS 5/13-217 (West 1994). Although plaintiff's right to refile is "absolute," this right is not limitless, and section 13-217 permits only one such refiling. *Timberlake v. Illini Hospital*, 175 Ill. 2d 159, 163 (1997). The parties on appeal do not dispute that plaintiff's 2015 breach of contract complaint was a refiling of its 2013 breach of note complaint. Defendants contend, however, that plaintiff's breach of note complaint was a refiling of the 2011 foreclosure complaint. If so, plaintiff's breach of contract complaint constituted an improper second refiling.

¶ 16 A complaint is a refiling under the statute if it contains "the same cause of action" as a previously filed complaint for purposes of *res judicata*. *D'Last Corp. v. Ugent*, 288 Ill. App. 3d 216, 220 (1997). Claims are identical under section 13-217 if "the parties are the same and both theories of relief arise out of a single core of operative facts." *Schrager v. Grossman*, 321 Ill. App. 3d 750, 758 (2000); see also *Mabry v. Boler*, 2012 IL App (1st) 111464, ¶ 23 (finding that separate claims, one alleging personal injury and the other alleging property damage, constituted

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a single cause of action for purposes of section 13-217 because they arose from the same negligent actions that resulted in the accident).

¶ 17 In the past, to determine whether separate complaints involved the same cause of action Illinois courts utilized two tests: the same evidence test and the transactional test. *River Park, Inc. v. City of Highland Park*, 184 Ill. 2d 290, 307 (1998). The same evidence test "is tied to the theories of relief asserted by a plaintiff" so that two claims that may be part of the same transaction are "considered separate causes of action because the evidence needed to support the theories on which they are based differs." *Id.* at 309. In contrast, the transactional test "is more pragmatic" and views a claim in " 'factual terms.' " *Id.* (quoting Restatement (Second) of Judgments § 24 cmt. a, at 197 (1982)). In a transactional analysis, a claim is considered " 'coterminous with the transaction regardless of the number of substantive theories, or variant forms of relief flowing from those theories, that may be available to the plaintiff; *** and regardless of the variations in the evidence needed to support the theories or rights.' " *Id.* (quoting Restatement (Second) of Judgments § 24 cmt. a, at 197 (1982)). In other words, claims can "be considered part of the same cause of action even if there is not a substantial overlap of evidence, so long as they arise from the same transaction." *Id.* at 311.

¶ 18 In *River Park*, our supreme court "adopted the more liberal transactional test" for determining the identity of causes of action. *Id.* at 310. In doing so, the court expressly rejected "the more stringent standards of the same evidence test." *Id.* at 310-11. Therefore, pursuant to the transactional test, separate claims are "considered the same cause of action for purposes of *res judicata* if they arise from a single group of operative facts, regardless of whether they assert different theories of relief." *Id.* at 311. Our supreme court recognized that "the transactional test

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permits claims to be considered part of the same cause of action even if there is not a substantial overlap of evidence, so long as they arise from the same transaction." *Id.*

¶ 19 Here, the trial court found that the foreclosure complaint and breach of note complaint, although based on "closely related" transactions, were "not part of the same transaction or occurrence" because the mortgage and the promissory note served distinct purposes that gave rise to separate remedies. While it may be true that a mortgage and a promissory note constitute separate contracts with distinct remedies, these factors are more relevant in the same evidence test, which our supreme court expressly rejected in *River Park*. *Id.* In the transactional test, whether the claims asserted different theories of relief is irrelevant as long as both claims arose from a single group of operative facts. *Id.*

¶ 20 We find *LSREF2 Nova Investments III, LLC v. Coleman*, 2015 IL App (1st) 140184, instructive. In *Coleman*, the plaintiff's predecessor in interest filed a single-count foreclosure complaint seeking as relief a judgment to foreclose the mortgage and a personal judgment for deficiency. *Id.* ¶ 4. The plaintiff brought the complaint in its capacity as legal holder of the mortgage and promissory note, and both documents were attached as exhibits. The complaint also alleged that the defendant was personally liable for the deficiency. *Id.* The court entered a judgment of foreclosure in favor of the plaintiff, who subsequently purchased the subject property at the judicial sale. *Id.* ¶ 6. The court also entered an order for an "IN REM deficiency judgment." *Id.* Approximately one year later, the plaintiff filed a complaint seeking to enforce the promissory note against the defendant. *Id.* ¶ 7.

¶ 21 The trial court granted the defendant's motion to dismiss the complaint based on *res judicata*. *Id.* ¶ 9. On appeal, the plaintiff argued that no identity of the causes of action existed because it sought separate, consecutive proceedings for adjndicating the mortgage and

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the promissory note. *Id.* ¶ 12. This court, however, affirmed the dismissal of plaintiff's complaint, finding that "[i]n the foreclosure action, plaintiff sought to foreclose on defendant's property, but also explicitly sought a personal deficiency judgment against defendant. Plaintiff sought the personal deficiency judgment based on defendant's obligations under both the promissory note and the mortgage" pursuant to section 15-1508(e) of the Illinois Mortgage Foreclosure Law (735 ILCS 5/15-1508(e) (West 2016)). *Coleman*, 2015 IL App (1st) 140184, ¶ 14. Therefore, under the transactional test, an identity of the causes of action existed between the foreclosure complaint and the subsequent complaint to enforce the terms of the promissory note. *Id.*

¶ 22 We agree that a single-count complaint, requesting foreclosure of the mortgage as well as a personal judgment for any deficiency, involves operative facts arising from both the mortgage and the promissory note. In a foreclosure action, "[t]he mortgagor is the instrumentality of the wrong. It was he or she who breached the contract by defaulting on the note secured by the mortgage. The foreclosure action is based on the note, the vehicle which gives the plaintiff the legal right to proceed against the property. The object of the foreclosure action is to enforce the obligation created by that contract, through the property, but against a specific person." *ABN AMRO Mortgage Group, Inc. v. McGahan*, 237 Ill. 2d 526, 536 (2010). See also *MB Financial Bank, N.A. v. Allen*, 2015 IL App (1st) 143060, ¶ 32 (finding that the mortgage provides the right to obtain a deficiency judgment and the promissory note allows the pursuit of personal monetary judgments).

¶ 23 Here, as in *Coleman*, plaintiff's predecessor in interest filed a single-count foreclosure complaint that alleged it was "the owner and legal holder of the Note, Mortgage and indebtedness," the original amount being $227,500. The complaint attached a copy of the

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mortgage and "a copy of the Note secured thereby," and alleged that defendants defaulted in the monthly payments "due July 1, 2011 and thereafter." The total amount due was the remaining principal of $214,079.06 "[p]lus interest, late fees and collection costs," and defendants were named as "persons claimed to be personally liable for deficiency." As relief, the complaint sought judgment of foreclosure and sale and also "personal judgment for deficiency."

¶ 24 Two weeks after the foreclosure complaint was voluntarily dismissed, plaintiff filed the breach of note complaint. In that complaint, plaintiff alleged that defendants executed the note in exchange for a loan in the amount of $227,500 and they had been delinquent in making payments since July 1, 2011. Plaintiff requested as relief, pursuant to the terms of the note, the amount of $251,165.72, which represented the remaining principal of $214,079.06, plus interest, accrued late fees, and other costs. Plaintiff voluntarily dismissed this complaint and, approximately four months later, filed the underlying two-count breach of contract complaint.

¶ 25 Following *Coleman*, we find that for purposes of *res judicata*, the same set of operative facts gave rise to the causes of action in the foreclosure complaint and the breach of note complaint. We disagree with the trial court's finding that *Coleman* is inapplicable because a judgment for deficiency was actually entered in that case, whereas here plaintiff never obtained such a judgment, nor did plaintiff seek to recover the deficiency in its breach of promissory note complaint. *Coleman*'s analysis on the identity of causes of action for *res judicata* purposes did not depend upon a final judgment, nor is one required to perform the transactional test pursuant to section 13-217. Also, it makes no difference whether plaintiff's theory of relief was based on foreclosure sale and deficiency judgment, or on enforcement of the note itself, where both complaints sought to obtain what defendants owed plaintiff under the terms of the note due to default. The relevant consideration for purposes of section 13-217 is whether both claims arose

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from a single group of operative facts, regardless of whether they asserted different theories of relief. *River Park*, 184 Ill. 2d at 311. We find that standard has been satisfied here.

¶ 26 Plaintiff argues that the trial court properly denied defendants' motion to dismiss and cites as primary support *LP XXVI, LLC v. Goldstein*, 349 Ill. App. 3d 237 (2004), and *Wells Fargo Bank, N.A. v. Norris*, 2017 IL App (3d) 150764. *Goldstein*, however, involved a guaranty that was a contract separate from the mortgage and note. The court in *Goldstein* found that *res judicata* did not apply to bar a subsequent suit based on a guaranty contract where there had been a prior judgment of foreclosure and the previous action "did not encompass the guaranty." *Goldstein*, 349 Ill. App. 3d at 241. The cases cited by *Goldstein* on this issue, *Citicorp Savings of Illinois v. Ascher*, 196 Ill. App. 3d 570 (1990), and *Du Quoin State Bank v. Daulby*, 115 Ill. App. 3d 183 (1983), also involved a guaranty contract where the original foreclosure action did not allege a personal liability under the guaranty. We find *Goldstein* factually distinguishable from the case at bar.

¶ 27 Likewise, in *Norris* the challenged action involved not only the original mortgage but also a loan modification agreement. *Norris*, 2017 IL App (3d) 150764, ¶ 22. The court in *Norris* found that "[t]he operative facts of the two cases are substantially different. In the 2008 case, the mortgage foreclosure complaint alleged a violation of the original mortgage, a breach date of January 2008 to the present, and a principal balance due and owing of $159,061.43. In the 2010 case, however, the mortgage foreclosure complaint alleged a violation of the original mortgage and of a loan modification agreement, a breach date of June 2009 to the present, and a principal balance due and owing of $189,604.15." *Id.* Therefore, the court determined that "the 2010 case did not involve the same cause of action as the 2008 case for the purposes of the single refiling rule." *Id.* Unlike the second complaint in *Norris*, plaintiff's breach of note complaint did not

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allege an additional violation of a loan modification agreement not referred to in the original foreclosure complaint. Also, unlike *Norris*, the principal alleged due and owing in both of plaintiff's complaints was the same amount, $214,079.06, and the breach date alleged in both complaints was July 1, 2011.

¶ 28 We find that plaintiff's breach of contract action represented an improper second refiling in violation of section 13-217, and the trial court shonld have granted defendants' motion to dismiss that count. The complaint, however, also alleged in the alternative a count for unjust enrichment. Although the trial court made no explicit findings regarding unjust enrichment, it granted summary judgment in favor of plaintiff and stated that the final order "dispose[d] of the case in its entirety." On appeal, plaintiff argues that this court could also affirm the trial court's grant of summary judgment based on unjust enrichment. We disagree.

¶ 29 Unjust enrichment is an equitable remedy based on a contract implied in law. *Karen Stavins Enterprises, Inc. v. Community College District No. 508, County of Cook*, 2015 IL App (1st) 150356, ¶ 7. While no actual agreement exists between the parties, there is a duty to pay for goods or services to prevent an unjust enrichment. *Id.* The remedy of unjust enrichment is only available where there is no adequate remedy in law. *Guinn v. Hoskins Chevrolet*, 361 Ill. App. 3d 575, 604 (2005). "This theory is inapplicable where an express contract, oral or written, governs the parties' relationship." *Gagnon v. Schickel*, 2012 IL App (1st) 120645, ¶ 25. Therefore, a party cannot state a claim for unjust enrichment where an express contract exists between the parties and concerns the same subject matter. *Karen Stavins*, 2015 IL App (1st) 150356, ¶ 7.

¶ 30 The unjust enrichment count of plaintiff's complaint alleged that defendants received a loan in the amount of $227,500 from plaintiff's predecessor in interest and used the loan to refinance real property located at 625 S. 12th Avenue in Maywood. Defendants made monthly

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payments to repay the loan and stopped making payments after June 1, 2011. The count further alleged that "[d]efendants have been unjustly enriched by receiving the benefits of the Loan, while at the same time refusing to remit payment for the full amounts due and owing Plaintiff." As relief, plaintiff sought $214,079.06, which represented the amount of "unpaid principal" "due and owing to Plaintiff." Although plaintiff did not specifically reference the mortgage and note in this count, the allegations of defendants' violations and obligations are based on those contracts and concern the same subject matter. Plaintiff also attached copies of the mortgage and promissory note to the complaint. Accordingly, the doctrine of unjust enrichment has no application here, and we cannot affirm the trial court's grant of summary judgment based on this count in plaintiff's complaint. See *Guinn*, 361 Ill. App. 3d at 604-05 (dismissing plaintiff's unjust enrichment count where the allegations relied on the obligations expressed in a contract between the parties, even though the contract was not referenced in the count, and plaintiff attached the contract to her complaint).

¶ 31 For the foregoing reasons, we vacate the trial court's order granting summary judgment and dismiss plaintiff's breach of contract complaint.

¶ 32 Order vacated; complaint dismissed.

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

First Midwest Bank, as successor in interest to Waukegan Savings Bank f/k/a Waukegan Savings and Loan, SB,	)	No. 15 L 7759
Plaintiff,	)	Calendar S
vs.	)	Judge Raymond W. Mitchell
Andres Cobo and Amy M. Rule,	)	
Defendants.	)	

ORDER

This matter is before the Court on Defendants Andres Cobo and Amy Rule's motion to dismiss Plaintiff First Midwest Bank's complaint pursuant to 735 ILCS 5/2-619.

I.

Plaintiff First Midwest Bank is the successor in interest to a promissory note and mortgage that Defendants Andres Cobo and Amy Rule executed in favor of Waukegan Savings and Loan, SB in 2006 in exchange for a $227,500 loan. In 2011, Defendants allegedly defaulted on their payments, and Waukegan filed a complaint for foreclosure on Defendants' mortgage. In 2013, Plaintiff dismissed the foreclosure action without prejudice. Plaintiff filed a second complaint against the Defendants later in 2013 for breach of the promissory note and requested a judgment of $251,165.72. Plaintiff voluntarily dismissed that claim in 2015. Plaintiff commenced this action for breach of the promissory note later in 2015 and requests a judgment of $214,079.06 against the Defendants. Defendants move to dismiss the complaint.

II.

A section 2-619 motion to dismiss admits the legal sufficiency of the complaint. 735 ILCS 5/2-619. The purpose of a section 2-619 motion to dismiss is to dispose of issues of law and easily proved issues of fact at the outset of the litigation. *Henry v. Gallagher*, 383 Ill. App. 3d 901, 903 (1st Dist. 2008). Although a section 2-619 motion to dismiss admits the legal sufficiency of a complaint, it raises defects, defenses, or some other affirmative matter appearing on the face of the complaint or established by external submissions, which defeat the plaintiff's claim. *Ball v. County of Cook, 385 Ill. App. 3d 103, 107 (1st Dist. 2008).*

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Defendants Cobo and Rule move for dismissal of Plaintiff's complaint, arguing this is the second refiling of the same cause of action, in violation of 735 ILCS 5/13-217. Section 13-217 of the Illinois Code of Civil Procedure is a saving provision which provides plaintiffs with the absolute right to refile their complaint within one year, or within the statute of limitations, if the complaint is dismissed for any of the reasons stated in the statute. *Burns v. Steelcase, Inc.*, 138 Ill. App. 3d 1039, 1040 (1st Dist. 1985). However, a plaintiff is allowed only one opportunity to refile an action. *Flesner v. Youngs Dev. Co.*, 145 Ill. 2d 252, 254 (1991). If a plaintiff voluntarily dismisses an action twice, they are not allowed to refile for a "third bite" at the apple. *Gibellina v. Handley*, 127 Ill. 2d 122, 134 (1989).

To determine whether an action is the same for purposes of section 13-217, the court must determine if the causes of action would be the same for *res judicata* purposes. *Mabry v. Boler*, 2012 IL App (1st) 111464, ¶ 22. Illinois adopts a transactional test to determine whether causes of action are the same for purposes of *res judicata*. *River Park, Inc. v. City of Highland Park*, 184 Ill. 2d 290, 312 (1998). Under this test, separate claims will be considered the same cause of action if they arise from a single group of operative facts, regardless of whether they assert different theories of relief. The transactional test "permits claims to be considered part of the same cause of action even if there is not a substantial overlap of evidence, so long as they arise from the same transaction." *Id.* at 309. Defendants contend that the 2011 foreclosure action and the 2013 breach of promissory note action arose from the same transaction or occurrence.

Under Illinois law, a mortgagee is limited to only one satisfaction of a debt, but may choose to sue on both the promissory note and the underlying mortgage, *Eastern Illinois Trust and Sav. Bank v. Vickery*, 164 Ill. App. 3d 84, 85 (3rd Dist. 1987), in separate or concurrent actions, *Farmer City State Bank v. Champaign Nat. Bank*, 138 Ill. App. 3d 847, 852 (4th Dist. 1985). Based on this concept, Illinois courts previously determined that although they are closely related in time and functionality, a mortgage and a promissory note are not part of the same transaction or occurrence because they serve distinct purposes. *LP XXVI, LLC v. Goldstein*, 349 Ill. App. 3d 237, 240-41 (2d Dist. 2004). A mortgage and a promissory note are separate contracts executed for distinct purposes and give rise to separate remedies. *Hickey v. Union Nat. Bank & Trust Co. of Joliet*, 190 Ill. App. 3d 186, 190 (2d Dist. 1989). A note is executed to secure capital, and a mortgage is executed to secure the note. *Goldstein*, 349 Ill. App. 3d at 241. Further, a foreclosure action and an action on a note have different effects on the rights of the parties involved. A mortgage foreclosure action is a *quasi in rem* proceeding, which is brought against parties to "subject certain property of those persons to the discharge of the claims asserted." *ABN AMRO Mortg. Group, Inc. v. McGahan*, 237 Ill. 2d 526, 535 (2010). In contrast, an action on a promissory note is an *in personam* proceeding, "which imposes a personal liability or obligation on one

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person in favor of another." *Turczak v. First American Bank,* 2013 IL App (1st) 121964, ¶ 33.

Applying this reasoning, the present action would not constitute the same action as the Plaintiff's 2011 foreclosure action, but the first refiling of Plaintiff's 2013 breach of promissory note action under section 13-217. Similarly, Plaintiff's claim would not barred be by the doctrine of *res judicata* even though the doctrine typically bars subsequent actions by the same parties involving the same claims, or claims which could have been decided in the original action. *Torcasso v. Standard Outdoor Sales,* 157 Ill. 2d 484, 490 (1993). But, the Illinois Appellate Court's recent decision in *LSREF2 Nova. Invs, III, LLC v. Coleman,* 2015 IL App (1st) 140184 altered the manner in which the court must determine whether the present action is the same as the 2011 foreclosure action for *res judicata* purposes.

In *Coleman,* the plaintiff first brought a foreclosure action against the defendant, seeking to recover any amount not covered by the foreclosure sale against defendant as provided by Illinois foreclosure law "based on [the] defendant's obligations under both the promissory note and the mortgage." *Id.* at ¶ 14. The trial court in the foreclosure action entered a foreclosure order and stated that the plaintiff was entitled to a deficiency judgment after sale of the property. *Id.* at ¶ 15. The plaintiff subsequently brought an action to enforce the promissory note against the defendant, seeking to recover "based on the same default by defendant on the note and recovery of the amount of the deficiency as determined by the order confirming the sale in the foreclosure action." *Id.* at ¶ 16.

On appeal, the appellate court was asked to consider whether the claim raised in the plaintiff's promissory note lawsuit could have been resolved in the prior foreclosure lawsuit for *res judicata* purposes. *Id.* The appellate court determined that the plaintiff's claim, as alleged in the complaint, and its claim for a personal deficiency judgment in the foreclosure suit arose from a single group of operative facts—the deficiency which resulted from after foreclosure sale based on plaintiff's default—and was thus in fact barred by *res judicata. Id.* The appellate court distinguished the facts in *Coleman* from other cases, like *LP XXVI, LLC v. Goldstein,* 349 Ill. App. 3d 237 (2d Dist. 2004) and *Turczak v. First American Bank,* 2013 IL App (1st) 121964, in which Illinois courts did not apply *res judicata* to bar a subsequent claim when there was a foreclosure action and a purely *in personam* action at issue. The appellate court concluded its opinion by stating that "where the circuit court had personal jurisdiction over defendant to enter a personal deficiency judgment . . . pursuant to section 15-1508(e) of the Foreclosure Law based on plaintiff's request for a personal deficiency judgment in its foreclosure complaint, plaintiff's subsequent claim for the amount of the deficiency as determined in the foreclosure suit as a result of the sale of the property is barred by the doctrine of *res judicata* . . ." consistent with the holding in *Skolnik v. Petella,* 376 Ill. 500 (1941). *Id.* at ¶ 29.

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Based on *Coleman*, whether an action on a promissory note constitutes the same action as a prior foreclosure action for *res judicata* purposes is highly dependent on the facts. The issue turns on what relief was sought in the foreclosure action and what relief is sought in the promissory note action.

Here, Midwest brought the 2011 action to foreclose on the mortgage. In the foreclosure complaint, Plaintiff alleged that Defendants were personally liable for any deficiency and in its request for relief, listed "A personal judgment for deficiency, if sought." Plaintiff attached a copy of the note secured by the mortgage to the complaint in that action. Thus, Plaintiff arguably sought a personal deficiency judgment against the Defendants in the 2011 foreclose action. But, unlike the plaintiff in *Coleman*, Midwest did not obtain a deficiency judgment against Defendants because Plaintiff voluntarily dismissed the case. Further, in the 2013 action on the promissory note, Plaintiff did not seek to recover a deficiency amount entered in the foreclosure action. In the present case, Plaintiff references the mortgage, but ultimately seeks to recover against the Defendants on the note and again, does not seek to recover a deficiency amount entered in the foreclosure action. Thus, the facts in the present case are distinguishable from *Coleman*.

Since the Plaintiff did not seek to recover a deficiency judgment against Defendants under a note after a personal deficiency judgment was entered against the Defendants in the foreclosure action in the 2013 action and does not seek one in the present case, neither action is the same action as the 2011 foreclosure action for *res judicata* purposes. Accordingly, the current action constitutes the first refiling of the 2013 promissory note action, not the second refiling of the 2011 mortgage foreclosure action and is not barred by *res judicata* or section 13-217.

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III.

Based on the foregoing, it is hereby ORDERED:

(1) Defendants Andres Cobo and Amy Rule's motion to dismiss is DENIED.

(2) Defendants have 28 days, until July 22, 2016, to answer.

(3) The parties shall initiate written fact discovery on or before August 5, 2016.

(4) The parties shall complete written fact discovery by October 7, 2016.

(5) The parties shall complete oral fact discovery by January 12, 2017.

(6) The clerk's status hearing for Friday, June 24, 2016 is stricken.

(7) The case is continued for a case management conference on October 24, 2016 at 10:00 a.m.

Failure to appear will result in dismissal for want of prosecution or entry of a default order. Failure to comply with this order will be a basis for sanctions under Rule 219(c). Failure to enforce this order will constitute a waiver of such discovery by that party.

Judge Raymond W. Mitchell

ENTERED,

JUN 23 2016

Circuit Court – 1992

Judge Raymond W. Mitchell, No. 1992

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

First Midwest Bank, as successor in interest to Waukegan Savings Bank f/k/a Waukegan Savings and Loan, SB,	
Plaintiff,	No. 15 L 7759
vs.	Calendar S
Andres Cobo and Amy M. Rule,	Judge Raymond W. Mitchell
Defendants.	

ORDER

This matter is before the Court on Defendants Andres Cobo and Amy Rule's motion to reconsider the June 23, 2016 Order denying Defendants' motion to dismiss Plaintiff First Midwest Bank's complaint.

I.

Plaintiff First Midwest Bank is the successor in interest to a promissory note and mortgage that Defendants Andres Cobo and Amy Rule executed in favor of Waukegan Savings and Loan, SB in 2006 in exchange for a $227,500 loan. In 2011, Defendants allegedly defaulted on their payments, and Waukegan filed a complaint for foreclosure on Defendants' mortgage. In 2013, Plaintiff dismissed the foreclosure action without prejudice. Plaintiff filed a second complaint against the Defendants later in 2013 for breach of the promissory note and requested a judgment of $251,165.72. Plaintiff voluntarily dismissed that claim in 2015.

Plaintiff commenced this action for breach of the promissory note later in 2015 and requests a judgment of $214,079.06 against the Defendants. Defendants moved to dismiss the complaint, arguing that it was the second refiling of their 2011 foreclosure action and thus violated section 13-217 of the Illinois Code of Civil Procedure. Defendants further asserted that Plaintiff's complaint was barred by the doctrine of *res judicata*. The Court denied Defendants' motion. Defendants now move the Court to reconsider its ruling.

II.

Defendants contend that the Court erred by failing to consider that *res judicata* bars not only what was decided in prior actions, but what could have been decided. In the prior order, the Court acknowledged that *res judicata* bars any

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matters actually decided in addition to all matters that could have been decided in a prior action. *See* 09/23/16 Order at 3. The Court, however, determined that one of the requirements for *res judicata* had not been met. Specifically, the Court determined that Plaintiff's foreclosure action against Defendant was not the same cause of action as those alleged in the Plaintiff's complaint (i.e., did not arise for a single group of operative facts) for *res judicata* purposes. In reaching this conclusion, the Court distinguished the facts in the present action from the facts in *LSREF2 Nova Invs, III, LLC v. Coleman*, 2015 IL App (1st) 140184. After reviewing the original briefing, the briefing submitted in support of the motion to reconsider, and the *Coleman* decision, the Court is convinced that its original ruling was correct as a matter of law.

In *Coleman*, the Illinois Appellate Court focused on what relief the plaintiff sought in the original foreclosure action and in the subsequent note action. The plaintiff in *Coleman* first brought a foreclosure action in which the plaintiff sought a deficiency judgment against the defendant based on the defendant's obligations under the promissory note and the mortgage. *Coleman*, 2015 IL App (1st) 140184, ¶ 14. The trial court in the foreclosure action entered a foreclosure order and stated that the plaintiff was entitled to a deficiency judgment after sale of the property. *Id.* at ¶ 15. The plaintiff then filed suit to enforce the promissory note, again seeking to recover the amount of the deficiency as determined by the court in the foreclosure action. *Id.* at ¶ 16. On appeal, the appellate court determined that the plaintiff's note action and its claim for a personal deficiency judgment in the foreclosure suit were the same cause of action, arising from a single group of operative facts: the deficiency which resulted from after foreclosure sale based on plaintiff's default. *Id.* The appellate court concluded that where the circuit court had personal jurisdiction over the defendant to enter a personal deficiency judgment in the foreclosure action, the plaintiff's subsequent claim for the amount of the deficiency under a breach of promissory note theory was barred by *res judicata*. *Id.* at ¶ 29.

Here, Midwest did not seek a deficiency judgment against the Defendants in the 2011 foreclosure action and then seek to recover that same deficiency amount from Defendants in the 2013 note action. Therefore, the case is factually distinguishable from *Coleman*. Defendants contend that the causes of action are still the same because Midwest sought the same or similar relief in both the 2011 and 2013 actions based on Defendants' default. Defendants argue that Plaintiff placed both the note and mortgage at issue in its complaints and sought to recover fees provided for in the mortgage in the 2013 note action and in the present action. But, it was ultimately the deficiency amount sought, and not what was alleged in or attached to the complaint, that was outcome determinative in *Coleman*. There is no deficiency amount linking the Plaintiff's 2011 foreclosure action and the 2013 note action. Consequently, the causes of action are not the same for *res judicata*

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purposes, and neither section 13-217 nor the doctrine of *res judicata* preclude Plaintiff's claims in the present action.

III.

Based on the foregoing, it is hereby ORDERED:

(1) Defendants Andres Cobo and Amy Rule's motion to reconsider is DENIED.

(2) The case is continued for a case management conference on October 24, 2016 at 10:00 a.m.

Judge Raymond W. Mitchell

ENTERED, SEP 28 2016

Circuit Court

Judge Raymond W. Mitchell, No. 1992

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

First Midwest Bank, as successor in interest to Waukegan Savings Bank f/k/a Waukegan Savings and Loan, SB,	)	
Plaintiff,	)	No. 15 L 7759
vs.	)	Calendar S
Andres Cobo and Amy M. Rule,	)	Judge Raymond W. Mitchell
Defendants.	)	

ORDER

This matter is before the Court on Plaintiff First Midwest Bank's motion to strike Defendants Andres Cobo and Amy M. Rule's affirmative defenses pursuant to 735 ILCS 5/2-619.

I.

Plaintiff First Midwest Bank is the successor in interest to a promissory note and mortgage that Defendants Andres Cobo and Amy Rule executed in favor of Waukegan Savings and Loan, SB in 2006 in exchange for a $227,500 loan. In 2011, Defendants allegedly defaulted on their payments, and Waukegan filed a complaint for foreclosure on Defendants' mortgage. In 2013, Plaintiff dismissed the foreclosure action without prejudice. Plaintiff filed a second complaint against the Defendants later in 2013 for breach of the promissory note and requested a judgment of $251,165.72. Plaintiff voluntarily dismissed that claim in 2015. On July 30, 2015, plaintiff commenced this action alleging breach of the promissory note in Count I and unjust enrichment in Count II, and requests judgment of $214,079.06 against the Defendants. Defendants filed four affirmative defenses. Plaintiff now moves to strike Defendants' affirmative defenses.

II.

An affirmative defense is subject to the same attacks as other pleadings. *Betts v. Manville Personal Injury Settlement Trust*, 225 Ill. App. 3d 882, 904 (4th Dist. 1992). A motion to strike an affirmative defense admits all well-pleaded facts constituting the defense, together with all reasonable inferences which may be drawn therefrom. *Farmer City State Bank v. Guingrich*, 139 Ill. App. 3d 416, 422 (4th Dist. 1985). A motion to strike an affirmative defense raises only a question of

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law as to the sufficiency of the pleading. *Vermeil v. Jefferson Trust & Savings Bank*, 176 Ill. App. 3d 556, 566 (3d Dist. 1988). A motion to strike does not admit as true, however, those allegations which conflict with the facts disclosed in an exhibit. *McCormick v. McCormick*, 118 Ill. App. 3d 455, 460 (1st Dist. 1983). A defense that is asserted in an answer may be stricken upon a plaintiff's motion, if the defense is substantially insufficient in law; thus the correctness of a circuit court's decision to strike affirmative defenses depends on whether the allegations that set forth the defense, if taken to be true, express a legally sufficient defense. *Joppa High Sch. v. Jones*, 35 Ill. App. 3d 323, 325 (5th Dist. 1976).

Plaintiff moves to strike Defendants' four affirmative defenses pursuant to 735 ILCS 5/2-619(a)(9). Section 2-619(a), however, permits only defendants or other parties against whom a claim is asserted to move for involuntary dismissal. 735 ILCS 5/2-619(a). A plaintiff's section 2-619 motion to strike affirmative defenses is therefore procedurally improper. When attacking the legal sufficiency of affirmative defenses, a plaintiff should file a motion pursuant to 735 ILCS 5/2-615. This motion will therefore be analyzed under a section 2-615 standard. Section 2-615 motions to strike an affirmative defense should be granted only where the affirmative defense fails to allege sufficient facts which, if proved, defeat a plaintiff's claim. Section 2-615 motions cannot raise affirmative factual defenses, but can only attack the face of the pleadings. *Vernon v. Schuster*, 179 Ill. 2d 338, 344 (1997).

Plaintiff argues that Defendants' first affirmative defense to Counts I and II should be stricken because the single re-filing rule contained in section 13-217 of the Illinois Code of Civil Procedure does not apply. The Court previously determined in its June 23, 2016 Order that this action constitutes the first refiling of the 2013 action on the note and is therefore permitted pursuant to section 13-217.

Next, Plaintiff argues that Defendants' second affirmative defense to Counts I and II should be stricken because it had no duty to foreclose on the mortgage lien and sell the property. Damages which give rise to a duty to mitigate are those which a plaintiff may have avoided with reasonable effort. *Pioneer Bank & Tr. Co. v. Seiko Sporting Goods, Co.*, 184 Ill. App. 3d 783, 790 (1st Dist. 1989). In this case, Plaintiff seeks damages in the amount of the unpaid balance allegedly due on the promissory note. Plaintiff suffered these damages when Defendants allegedly defaulted on their mortgage. Defendants allege that if Plaintiff had foreclosed on the mortgage and sold the property themselves, the proceeds would offset Plaintiffs damages and thereby reduce Defendants liability. A breaching party, however, may not invoke a duty to mitigate as evidence that the injured party might have taken action that would have been more beneficial to the breaching party. *Id.* at 791. The mortgage attached to the complaint provides Plaintiff the option upon default to either require immediate payment of unpaid sums due on the note or foreclose on the mortgage. Foreclosure is thus one remedy Plaintiff may choose to satisfy the debt

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upon default. Defendants have failed to allege facts that would give rise to a duty to mitigate.

Plaintiff also argues that Defendants' third affirmative defense to Count I should be stricken because it attached a copy of the instrument upon which its cause of action is based. For section 2-615 motions, the test for an affirmative defense is whether it "gives color to the opposing party's claim and then asserts new matters by which the apparent right is defeated." *Mountain States Mortg. Ctr. v. Allen*, 257 Ill. App. 3d 372, 382 (1st Dist. 1993) (quoting *Condon v. Am. Tel. & Tel. Co.*, 210 Ill. App. 3d 701, 709 (2d Dist. 1991)). Plaintiff alleges that the instrument, which contains a signature page with language indicating that it is from a 1-4 Family Rider, is nevertheless the correct signature page of the note from which its claim arises. Defendants' third affirmative defense disputes this allegation and argues that the correct signature page is missing. Defendants' third affirmative defense thus fails to give color to Plaintiff's claims and is therefore improperly pled.

Finally, Plaintiff argues that Defendants' fourth affirmative defense to Count II should be stricken because the statute of limitations does not apply. The statute of limitations for unjust enrichment claims is five years from the date of injury. 735 ILCS 5/13-205. Plaintiff alleges that Defendants defaulted on their loan payments on June 1, 2011 and were then unjustly enriched by continuing to receive the benefits of the loan after their default. Plaintiff filed this action on July 30, 2015, within five years of the date of default. Plaintiff's action was therefore timely filed.

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III.

Based on the foregoing, it is hereby ORDERED:

(1) Plaintiff First Midwest Bank's motion to strike is GRANTED. Defendants first, second, third, and fourth affirmative defenses are stricken.

(2) The case management conference set for March 3, 2017 at 9:00 a.m. is stricken.

(3) The case is continued for a bench trial set for April 24, 2017 at 10:30 a.m.

Judge Raymond W. Mitchell

ENTERED, MAR – 2 2017

Circuit Court – 1992

Judge Raymond W. Mitchell, No. 1992

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

First Midwest Bank, as successor in interest to Waukegan Savings Bank f/k/a Waukegan Savings and Loan, SB,	
Plaintiff,	No. 15 L 7759
vs.	Calendar S
Andres Cobo and Amy M. Rule,	Judge Raymond W. Mitchell
Defendants.	

ORDER

This matter is before the Court on Plaintiff First Midwest Bank's motion for summary judgment pursuant to 735 ILCS 5/2-1005.

I.

Plaintiff First Midwest Bank is the successor in interest to a promissory note and mortgage that Defendants Andres Cobo and Amy Rule executed in favor of Waukegan Savings and Loan, SB in 2006 in exchange for a $227,500 loan. In 2011, Defendants allegedly defaulted on their payments, and Waukegan filed a complaint for foreclosure on Defendants' mortgage. In 2013, Plaintiff dismissed the foreclosure action without prejudice. Plaintiff filed a second complaint against the Defendants later in 2013 for breach of the promissory note and requested a judgment of $251,165.72. Plaintiff voluntarily dismissed that claim in 2015. Plaintiff then commenced this action alleging breach of the promissory note in Count I and unjust enrichment in Count II, and requests judgment of $214,079.06 against the Defendants. In its March 2, 2017 order, the Court struck Defendants' first, second, third, and fourth affirmative defenses. Plaintiff now moves for summary judgment..

II.

Summary judgment is appropriate when the pleadings, depositions, admissions and affidavits, viewed in a light most favorable to the nonmovant, fail to establish a genuine issue of material fact, thereby entitling the moving party to judgment as a matter of law. 735 ILCS 5/2-1005; Progressive Universal Ins. Co. v. Liberty Mut. Fire Ins. Co., 215 Ill. 2d 121, 127-28 (2005). The purpose of summary judgment is not to try a question of fact, but simply to determine whether one exists. Jackson v. TLC Assoc., Inc., 185 Ill. 2d 418, 423 (1998). A trial court is

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required to construe the record against the moving party and may only grant summary judgment if the record shows that the movant's right to relief is clear and free from doubt. *Id.* If disputes as to material facts exist or if reasonable minds may differ with respect to the inferences drawn from the evidence, summary judgment may not be granted. Assoc. Underwriters of Am. Agency, Inc. v. McCarthy, 356 Ill. App. 3d 1010, 1016-17 (1st Dist. 2005).

In order to recover for breach of contract, a plaintiff must establish: (1) the existence of a valid and enforceable contract; (2) performance by the plaintiff; (3) a breach of the subject contract by the defendant; and (4) that the defendant's breach resulted in damages. *Unterschuetz v. City of Chicago*, 346 Ill. App. 3d 65, 69 (1st Dist. 2004).

Plaintiff has established all necessary elements for its breach of promissory note claim. Defendants allegedly executed a promissory note in favor of Plaintiff in the amount of $227,500.00 with a yearly interest rate of 6.250% and monthly payments of $1400.76. Plaintiff alleges that Defendants defaulted on the note by failing to pay the July 1, 2011 payment or any payment thereafter and that its damages include the outstanding balance, accrued interest, late charges, an escrow deficiency, appraisals, and prior legal fees from seeking recovery of amounts owed under the note. In support of its motion, Plaintiff submitted an affidavit of Jeanine Cozzi, the Vice President of Plaintiff's special assets department attesting to these allegations and to the total of $314,202.74 due and owing.

"Where facts contained in the affidavit in support of a motion for summary judgment are not contradicted by counteraffidavit, such facts are admitted and must be taken as true." *Heidelberger v. Jewel Cos.*, 57 Ill. 2d 87, 92-93 (1974). In response to the motion, Defendants have not submitted a counteraffidavit, but dispute the validity of the late charges and that Plaintiff may recover the attorney's fees without presenting sufficient records.. In its reply, however, Plaintiff agreed to withdraw its request for the late charges, attached a supplemental affidavit of Jeanine Cozzi containing detailed invoices from the attorney who handled the case, and reduced its request for judgment to $308,192.56 accordingly.

A party seeking attorney fees bears the burden of demonstrating the reasonableness of fees and providing records of the services performed, by whom they were performed, the time expended, and the hourly rate charged. *Harris Trust & Sav. Bank v. American Nat'l Bank & Trust Co.*, 230 Ill. App. 3d 591, 595 (1st Dist. 1992). In determining whether fees are reasonable, the court considers such factors as the skill and standing of the attorneys employed, the nature of the case, the novelty and difficulty of the issues involved, the degree of responsibility required, the usual and customary charge for the same or similar services in the community, and whether there is a reasonable connection between the fees charged and the litigation. *Id.* The court is permitted to use its own knowledge and

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experience to assess the time required to complete particular activities. *Id.* In support of its motion, Plaintiff provided a supplemental affidavit from the Vice President of its special assets department containing detailed billing statements and breakdowns of costs incurred for legal fees from prosecuting the case against Defendants. Taking all of the relevant factors into consideration, Plaintiff' motion and supporting documentation sufficiently demonstrate that the attorney fees it seeks are reasonable.

Defendants also argue that the copy of the promissory note attached to the complaint is not a correct copy and that Plaintiff's claim therefore fails pursuant to Illinois Code of Civil Procedure section 5/2-606. But section 2-606 contains only pleading requirements. 735 ILCS 5/2-606. A motion pursuant to section 2-615 is the procedurally proper means to attack the legal sufficiency of pleadings. 735 ILCS 5/2-615. It is therefore procedurally improper to attack the face of the pleadings in a section 2-1005 motion. Nevertheless, in its March 2, 2017 order, the Court addressed this issue and determined that Plaintiff's pleadings were sufficient.

III.

Based on the foregoing, it is hereby ORDERED:

(1) Plaintiff First Midwest Bank's motion for summary judgment is GRANTED. Judgment is entered in favor of Plaintiff First Midwest Bank and against Defendants Andres Cobo and Amy M. Rule in the amount of $308,192.56.

(2) The bench trial set for April 24, 2017 at 10:30 a.m. and the clerk's status set for March 24, 2017 at 9:00 a.m. are stricken.

(3) This is a final order that disposes of the case in its entirety.

ENTERED, Judge Raymond W. Mitchell

MAR 23 2017

Circuit Court – 1992

Judge Raymond W. Mitchell, No. 1992

Case No. 123038

IN THE SUPREME COURT OF THE STATE ILLINOIS

First Midwest Savings Bank, as successor In interest to Waukegan Savings Bank f/k/a Waukegan Savings and Loan, SB ASS'N Plaintiff-Petitioner v. Andres Cobo and Amy M. Rule Defendants-Respondents	On Petition for Leave to Appeal From the Appellate Court, First Judicial District Docket No. No. 1-17-0872 There Heard on Appeal From The Circuit Court of Cook County, Illinois County Department, Law Division No. 15 L 007759 The Honorable Raymond L. Mitchell, Presiding

ANSWER TO PETITION FOR LEAVE TO APPEAL

Arthur C. Czaja
7521 N. Milwaukee Avenue
Niles, Illinois 60714
Phone: (847) 647-2106
Facsimile: (847) 647-2057
Email: arthur@czajalawoffices.com

Attorney for Defendants-Respondents
Andres Cobo and Amy M. Rule

Case No. 123038

IN THE SUPREME COURT OF THE STATE ILLINOIS

First Midwest Savings Bank, as successor In interest to Waukegan Savings Bank f/k/a Waukegan Savings and Loan, SB ASS'N Plaintiff-Petitioner v. Andres Cobo and Amy M. Rule Defendants-Respondents	On Petition for Leave to Appeal From the Appellate Court, First Judicial District Docket No. No. 1-17-0872 There Heard on Appeal From The Circuit Court of Cook County, Illinois County Department, Law Division No. 15 L 007759 The Honorable Raymond L. Mitchell, Presiding

ANSWER TO PETITION FOR LEAVE TO APPEAL

INTRODUCTION

Respondents, Andres Cobo and Amy M. Rule ("Defendants"), respectfully request that this Honorable Court deny the Petition for Leave to Appeal filed by the Petitioner, First Midwest Savings Bank ("Plaintiff"), from the opinion and judgment of the Illinois Appellate Court, First Judicial District, First Division (2017 IL App (1st) 170872), which vacated the trial court's order granting summary judgment and dismissed the Plaintiff's complaint.

This case does not meet the criteria for review under Supreme Court Rule 315(a) (Ill. S. Ct. R. 315(a) (eff. November 1, 2017). This case is not one of general importance, there is no conflict between this case and any Supreme Court or other

Appellate Court decision, and there is no need for the exercise of the Supreme Court's supervisory authority.

In its Petition, the Plaintiff, a sophisticated lender represented by sophisticated attorneys, asks this Honorable Court to step in and correct the litigation decisions it made when those decisions turned out to be erroneous. This Honorable Court, however, is not the place to correct such errors.

The Plaintiff brought three lawsuits against the Defendants each seeking a judgment against the Defendants in the amount due under the same promissory note. *First Midwest Bank v. Cobo*, 2017 IL App (1st) 170872, ¶ 15. Each lawsuit alleged the same July 1, 2011 default on the same promissory note. *Id*, ¶¶23 - 25. Each lawsuit sought the same relief, that is, a money judgment against the Defendants in the amount alleged to be due under the same promissory note. *Id.* The Plaintiff voluntarily dismissed its first two lawsuits and then filed a third complaint in this case. *Id.* at 15.

This case was correctly decided by the Appellate Court when it concluded that all three lawsuits arose from the same group of operative facts. *Id.* at ¶25. Having elected twice to voluntarily dismiss its lawsuit, the Plaintiff's third version of the same debt collection action was barred by the one refiling rule set forth in 735 ILCS 5/13-217. The trial court erred in reaching the opposite conclusion and the Appellate Court corrected the error.

The Plaintiff argues that the holding of the Appellate Court conflicts with Second District's decision in *LP XXVI, LLC v. Goldstein*, 349 Ill. App. 3d 237, 811 N.E.2d 286 (2nd Dist. 2004) and the Third District's decision in *Wells Fargo v. Norris*, 2017 Ill. App. 3d 150764 (2017). It does not. The Plaintiff also argues that this case has far reaching

policy implications that will affect a lender's willingness to offer loss mitigation to a borrower in foreclosure. It will not.

The Second District's decision in *Goldstein* involved a lender's right to pursue a personal guaranty after a foreclosure. This case did not involve a personal guaranty. *Goldstein*, therefore, is distinguishable and not in conflict.

Moreover, this case is not in conflict with the Third District's decision in *Norris*. Like *Goldstein*, *Norris* simply does not apply. *Norris* involved a loan modification. This case does not. *Norris* correctly held that a lawsuit based on a breach of a loan modification did not involve the same set of operative facts as a lawsuit based on a breach of the original loan.

Nothing in the Appellate Court's decision here will impact a lender's ability to file a new lawsuit after a borrower's breach of a loan modification or reinstatement. Nothing in the Appellate Court's decision will prevent a lender from entertaining loss mitigation with a borrower during the pendency of a lawsuit. Lenders can and often do place files in litigation on loss mitigation hold when the parties are pursuing loss mitigation efforts. In fact, they are required to do so. *See* 12 C.F.R. 1024.41(f).

Courts simply do not make litigants voluntarily dismiss their own cases. If a case is involuntarily dismissed by the court, the one refiling rule has no application. The Plaintiff's perceived fear that lenders will not want to engage in loss mitigation efforts because of the Appellate Court's decision is nonexistent.

What Plaintiff really asks this Honorable Court to do is craft a rule that will allow lenders to file and voluntarily dismiss lawsuits whenever they feel like, subjecting borrowers to a multiplicity of lawsuits, adding thousands of dollars in court costs, service

fees, publication charges and attorneys' fees to a borrower's account balance. Not only would such a rule be unfair and unworkable, it is contrary to the established body of caselaw that gives all plaintiffs only two bites at the proverbial apple. The Plaintiff had its two bites.

The decision of the Appellate Court in this case does not create uncertainty or create more questions than it answers. The decision in this case was based on the unique facts of the case and does not warrant further review. The issues addressed in this case are not ones of general importance requiring the exercise of the Supreme Court's supervisory authority. Therefore, the Defendants respectfully request that this Honorable Court deny Plaintiff's Petition for Leave to Appeal.

STATEMENT OF FACTS

The Defendants adopt the discussion of the facts contained in the Appellate Court's opinion. *Cobo*, 2017 IL App (1st) 170872, ¶¶5 – 12.

STATEMENT OF GROUNDS FOR DENYING LEAVE TO APPEAL

I. THE BODY OF CASE LAW IS NOT IN CONFLICT.

Plaintiff first argues that the cases analyzing the single refiling rule and *res judicata* arising out of a loan transaction are not cohesive and are in conflict. *See* Petition at pg. 8. There are, however, no such conflicts and all of the cases analyzing these issues can be read harmoniously.

"Although a single group of operative facts may give rise to the assertion of more than one kind of relief or more than one theory of recovery, assertions of different kinds or theories of relief arising out of a single group of operative facts constitute but a single

cause of action." *River Park v. City of Highland Park*, 184 Ill. 2d 290, 703 N.E.2d 883 (1998), quoting *Torcasso v. Standard Outdoor Sales*, 157 Ill. 2d 484, 626 N.E.2d 225 (1993) *Schrager v. Grossman*, 321 Ill. App. 3d 750, 752 N.E.2d 1 (1st Dist. 2000). The Appellate Court's decision did not abrogate this rule in the context of a loan transaction. If anything, it helped clarify it.

The weakness in Plaintiff's argument are underscored by the two cases on which it relies.

At the core of Plaintiff's argument is the decision in *Goldstein*. As noted in the Introduction, *Goldstein* has no application here because Goldstein involved a guaranty that was simply not at issue in this case. Therefore, *Goldstein* is inapposite.

However, even if this Honorable Court were to consider *Goldstein*, nothing in the Appellate Court's decision would change the opinion in *Goldstein* even if it were decided today.

Goldstein involved a lawsuit based on a Commercial Guaranty that was filed after a foreclosure resulted in a deficiency judgment in excess of $74,000. *Goldstein*, 349 Ill. App. 3d at 239. As the Appellate Court correctly held in *Goldstein*,

> "The note was executed to provide capital, the mortgage to secure the note. Defendant personally provided the guaranty in order to assure the lender that any shortfall in the security provided by the mortgaged property would be made good. While the three transactions are related, we do not believe that their mere proximity in time and the overlap of some of the parties render them a single transaction, especially in light of the purpose of each of the transactions." *Goldstein*, 349 Ill. App. 3d at 241.

At the outset, it should be noted that guarantees often involve different parties than those to a mortgage and note. A mortgagor does not execute a separate guaranty to guaranty the same promises he made in his mortgage and note. Therefore, a guaranty involves

different parties than a mortgage and note and would be distinguishable from this case on this basis as well.

Moreover, it is entirely logical to allow a lender to pursue a guaranty separately from an action on a note or mortgage. In many instances, a guarantee may never be invoked. For example, if a lender recovers what was owed from the borrower, there would be no need to sue the guarantor. Similarly, if a foreclosure sale made the lender whole, there would be no need to invoke the guaranty or sue the guarantor. As the Court in *Goldstein* stated,

> "In *Citicorp Savings of Illinois v. Ascher*, 196 Ill. App. 3d 570, 574, 554 N.E.2d 409, 143 Ill. Dec. 474 (1990), the court held that a judgment of foreclosure did not adjudicate the defendant's rights and liabilities under a guaranty contract, and, therefore, the doctrine of *res judicata* did not apply. Likewise, in *Du Quoin State Bank v. Daulby*, 115 Ill. App. 3d 183, 186, 450 N.E.2d 347, 70 Ill. Dec. 874 (1983), the court held that a previous foreclosure did not settle the defendant's liability stemming from a personal guaranty. These cases illustrate that a suit on a personal guaranty is expressly allowed where a previous mortgage foreclosure and sale resulted in a deficiency. In such a situation, *res judicata* will not bar the subsequent suit on the guaranty contract." *Goldstein*, 349 Ill. App. 3d at 242.

Similarly, *Ascher*, as discussed in *Goldstein* and cited above, involved a lawsuit based on a guaranty. *Ascher* is therefore distinguishable. *Ascher*, is also distinguishable because its holding was based on an exclusive remedy provision in the installment contract, which is simply not at issue in this Case. In *Ascher*, the Court ultimately held that the defendant's guaranty did not extend beyond the exclusive remedy of forfeiture provided in the installment contract. *Ascher*, 196 Ill. App. 3d at 575. *Ascher*, therefore, is not in conflict.

Similarly, *Norris* is not in conflict. *Norris* correctly decided that a breach of a loan modification did not involve the same set of operative facts as a breach of an original agreement. This case did not involve a loan modification. If anything, *Norris*

should give lenders comfort because successful loss mitigation will serve only to reset score for the purposes of *res judicata* and the one refiling rule, and reset the clock for the purposes of the statute of limitations.

Here, all three lawsuits were based on the same July 1, 2011 breach of the same promissory note. *Cobo*, 2017 IL App (1st) 170872, ¶¶23 - 24. Moreover, all three lawsuits sought a judgment against the Defendants based on the amount due under the promissory note. Although the foreclosure case concurrently sought a sale of the property pursuant to the mortgage, this concurrent theory relief is distinction is without a difference. A single group of operative facts, regardless of the different theories of relief, constitutes but a single cause of action. *River Park*, 184 Ill. 2d at 311.

Plaintiff argues that the Appellate Court's decision in this case is contrary to the established body of caselaw which permits a mortgagee to sue upon the note or to bring a mortgage foreclosure action either consecutively or concurrently (*see* Petition at pg. 2) and cites to *Farmer City State Bank v. Champaign National Bank*, 138 Ill. App. 3d 847, 486 N.E.2d 301 (4th Dist. 1985) for that proposition. But that is precisely the point. A suit on the note and a foreclosure action may be brought concurrently, and that is precisely what happened in the 2011 foreclosure case.

It is also important to note that *Farmer City* because that case did not conduct a *res judicata* analysis. As the Court in *LSREF2 Nova Investments III, LLC v. Coleman*, 2015 IL App (1st) 140184 observed,

> "First and foremost, the *Farmer City State Bank* court did not conduct a *res judicata* analysis. Furthermore, plaintiff here did not initially file suit on the promissory note like the mortgagee did in *Farmer City State Bank*. Rather, here, plaintiff's claim for a personal deficiency judgment was raised *concurrently* with its request for foreclosure on the property in the foreclosure action, and a final judgment was entered against defendant allowing for entry of a deficiency

> judgment after the sale of the property. Plaintiff, having pursued its remedy for a personal deficiency judgment in the mortgage foreclosure case, is precluded from now seeking a personal deficiency judgment solely on the promissory note in this consecutive action." *Coleman*, 2015 IL App (1st) 140184, ¶19.

Here, as in *Coleman*, the Plaintiff first filed a foreclosure action which it concurrently sought a judgment against the Defendants in the amount due under the note and sought a foreclosure of the property. The foreclosure case involved operative facts arising from both the mortgage and the promissory note. *Cobo*, 2017 IL App (1st) 170872, ¶22. The Appellate Court's correctly decided this case based on the its facts and further review is not warranted.

II. THE APPELLATE COURT CORRECTLY RELIED ON *COLEMAN* IN REACHING ITS DECISION.

Plaintiff next argues that Appellate Court's reliance on *Coleman* was misguided because the operative facts were different. *See* Petition at pg. 13. Plaintiff again urges this Honorable Court to find important that the foreclosure action in *Coleman* proceeded to a final judgment, whereas none of the cases at issue in this Petition reached that point.

Plaintiff's argument, however, was squarely rejected by the Appellate Court when it stated,

> "We disagree with the trial court's finding that *Coleman* is inapplicable because a judgment for deficiency was actually entered in that case, whereas here plaintiff never obtained such a judgment, nor did plaintiff seek to recover the deficiency in its breach of promissory note complaint. *Coleman*'s analysis on the identity of causes of action for *res judicata* purposes did not depend upon a final judgment, nor is one required to perform the transactional test pursuant to section 13-217." *Cobo*, 2017 IL App (1st) 170872, ¶25).

Plaintiff's attempt to distinguish *Coleman* on this basis ought to be rejected once again.

In a carefully written opinion, following the decision in *Coleman*, the Appellate Court held that a single-count complaint, requesting foreclosure of the mortgage as well

as a personal judgment for any deficiency, involves operative facts arising from both the mortgage and the promissory note. *Id.* ¶22. Therefore, the Appellate Court found that for purposes of *res judicata*, the same set of operative facts gave rise to the causes of action in the foreclosure complaint and the breach of note complaint. *Id.* Therefore, the Appellate Court correctly held that the Plaintiff's third lawsuit seeking a judgment against the Defendants in the amount due on the same promissory based on the same July 1, 2011 default and was barred by the single refiling rule.

Here as in *Coleman*, the Plaintiff filed a single-count complaint in the 2011 foreclosure action seeking to foreclose its mortgage and seeking in its prayer for relief a judgment to foreclose the mortgage and a personal judgment for a deficiency. *Cobo*, 2017 IL App (1st) 170872, ¶ 23. The Complaint sought *concurrent* relief under the Note and Mortgage. Here, as in *Coleman* further, the complaint in the 2011 foreclosure action further alleged that Defendants were "persons claimed to be personally liable for deficiency." *Id.* And, the complaint in the 2011 foreclosure action sought a judgment of foreclosure and sale and also "personal judgment for deficiency." *Id.*

As the Appellate Court correctly concluded in this case,

> "We agree that a single-count complaint, requesting foreclosure of the mortgage as well as a personal judgment for any deficiency, involves operative facts arising from both the mortgage and the promissory note. In a foreclosure action, '[t]he mortgagor is the instrumentality of the wrong. It was he or she who breached the contract by defaulting on the note secured by the mortgage. The foreclosure action is based on the note, the vehicle which gives the plaintiff the legal right to proceed against the property. The object of the foreclosure action is to enforce the obligation created by that contract, through the property, but against a specific person.' *ABN AMRO Mortgage Group, Inc. v. McGahan*, 237 Ill. 2d 526, 536, 931 N.E.2d 1190, 342 Ill. Dec. 7 (2010). *See also MB Financial Bank, N.A. v. Allen*, 2015 IL App (1st) 143060, ¶ 32, 394 Ill. Dec. 957, 37 N.E.3d 436 (finding that the mortgage provides the right to obtain a deficiency judgment and the promissory note allows the pursuit of personal monetary judgments)." *First Midwest Bank v. Cobo*, 2017 IL App (1st) 170872, ¶ 22.

Plaintiff, however, also argues that the Appellate Court's decision here failed to account for Section 15-1504 of the Illinois Mortgage Foreclosure Law ("IMFL") which provides for a short form complaint that can be used in a mortgage foreclosure case. *See* Petition at pg. 14. According to Plaintiff, the use of a short form complaint is not controlling on the issue whether a personal deficiency judgment was sought in the 2011 foreclosure action.

Plaintiff forgets, however, that this Section of the IMFL merely provides a pleading convenience to a plaintiff and it is not a requirement. Section 15-1504(a) states, "(a) Form of Complaint. A foreclosure complaint may be in substantially the following form." 735 ILCS 5/15-1504(a). The permissive nature of the statute is evidenced from the use of the word "may" as opposed to "shall." (The use of the word "shall" under Section 15-1105(b) of the IMFL means mandatory and not permissive. 735 ILCS 5/15-1105(b)). If Plaintiff really did not want a money judgment against the Defendants in the 2011 foreclosure action, it could have drafted a complaint that did not seek a personal judgment against them.

This lawsuit was the Plaintiff's third bite at the apple and the Appellate Court correctly concluded that it was barred by the one refiling rule found in Section 13-217. Unhappy with its decisions, the Plaintiff asks this Honorable Court to intervene and correct the errors of its own making. A reviewing court is no place for such extraordinary relief.

III. THIS CASE IS NOT A MATTER OF GENERAL IMPORTANCE.

Plaintiff finally argues, without any citation to authority, that this case presents a matter of general importance and will affect loss mitigation efforts following the

foreclosure crisis in Illinois and nationwide. *See* Petition at pg. 16. However, nothing in the Appellate Court's decision here will have the far-reaching implications Plaintiff suggests.

Plaintiff argues that this case will have the result of curbing a lender's willingness to engage in loss mitigation efforts after a default and will force lenders to proceed to a conclusion of a foreclosure or breach of note action. *See* Petition at pg. 16. Plaintiff is wrong.

As noted in the Introduction, lenders can and are often required by law to place files in foreclosure on loss mitigation hold. Even if a lender were to prematurely dismiss its lawsuit while the parties were engaging in loss mitigation and before a modification or reinstatement was in place, a lender would still have another opportunity to refile its same lawsuit. The one refiling rule specifically allows for this.

However, if a lender is truly concerned about a borrower's default after a loan modification or after a reinstatement, the lender can take comfort in the decision in *Norris* which held that a breach of a loan modification is not the same cause of action as a breach of the original agreement.

Finally, the Plaintiff argues that the Appellate Court failed to consider the question of what type of service the Plaintiff had on Defendant. *See* Petition at pg. 17. Not only was this argument never raised in the trial court or Appellate Court, Plaintiff fails to mention that service was never at issue in any of the cases because the Defendants, represented by the undersigned counsel, voluntarily subjected themselves to the jurisdiction of the court by filing their Appearance in all three lawsuits. The Appellate Court did not address what type of service was had on the Defendants because

it was not an issue in this case. Perhaps the Appellate Court would have ruled differently if the Defendants were not personally served in any of three lawsuits or did not subject themselves to the trial court's jurisdiction, however, that is a question for another day. Not today.

For all of the foregoing reasons, the Defendants request that its Petition for Leave to Appeal be denied.

CONCLUSION

WHEREFORE, the Defendants, respectfully request that this Honorable Court deny Plaintiff's Petition for Leave to Appeal Instanter, and for any further relief this Honorable Court deems equitable and just.

Respectfully submitted,

ANDRES COBO and
AMY M. RULE

By: _____
Arthur C. Czaja
Attorney for Defendants-Respondents

Arthur C. Czaja
Attorney for Defendants-Respondents
7521 N. Milwaukee Avenue
Niles, Illinois 60714
Phone: (847) 647-2106
Facsimile: (847) 647-2057
Email: arthur@czajalawoffices.com

Case No. 123038

IN THE SUPREME COURT OF THE STATE ILLINOIS

First Midwest Savings Bank, as successor In interest to Waukegan Savings Bank f/k/a Waukegan Savings and Loan, SB ASS'N	**On Petition for Leave to Appeal From the Appellate Court, First Judicial District**
Plaintiff-Petitioner	**Docket No. No. 1-17-0872**
v.	**There Heard on Appeal From The Circuit Court of Cook County, Illinois**
Andres Cobo and Amy M. Rule	**County Department, Law Division**
Defendants-Respondents	**No. 15 L 007759**
	The Honorable Raymond L. Mitchell, Presiding

CERTIFICATE OF COMPLIANCE

I certify that this Answer to Petition for Leave to Appeal complies with the requirements of Supreme Rules 341 (a) and (b). The length of this brief, excluding the pages containing Rule 341(d) cover, the Rule 341 (c) certificate of compliance, and the certificate of service is 12 pages.

Respectfully submitted.

ANDRES COBO and
AMY M. RULE

By: _____

Arthur C. Czaja
Attorney for Defendants-Respondents
7521 N. Milwaukee Avenue
Niles, Illinois 60714
Phone: (847) 647-2106
Email: arthur@czajalawoffices.com

Case No. 123038

IN THE SUPREME COURT OF THE STATE ILLINOIS

First Midwest Savings Bank, as successor In interest to Waukegan Savings Bank f/k/a Waukegan Savings and Loan, SB ASS'N	**On Petition for Leave to Appeal From the Appellate Court, First Judicial District**
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Defendants-Respondents	**No. 15 L 007759**
	The Honorable Raymond L. Mitchell, Presiding

NOTICE OF FILING

To: Klein, Daday, Aretos, Odonoghue, LLC, Attorney for Plaintiff-Appellee, 2550 W. Golf Road, Suite 250, Rolling Meadows, IL 60008 (via regular first class mail, postage prepaid and copies via email transmission to DRdzanek@kdaolaw.com, jrepple@kdaolaw.com and sdaday@kdaolaw.com)

PLEASE TAKE NOTICE that on **January 15, 2018**, Defendants-Respondents, ANDRES COBO and AMY M. RULE, served and filed electronically on the Clerk's Office for the the Supreme Court of Illinois, the enclosed **ANSWER TO PETITION FOR LEAVE TO APPEAL** in the above-captioned matter.

Arthur C. Czaja
Attorney for Defendants-Respondents
Andres Cobo and Amy Rule
Cook County Attorney #: 47671
7521 N. Milwaukee Avenue
Niles, Illinois 60714
Phone: (847) 647-2106
Facsimile: (847) 647-2057

Email: arthur@czajalawoffices.com

CERTIFICATE OF SERVICE

I, ARTHUR C. CZAJA, an attorney, under the penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, certify that the statements set forth in this instrument are true and correct, and state that on January 15, 2018, I served copies of the **ANSWER TO PETITION FOR LEAVE TO APPEAL** upon the parties indicated above by enclosing copies thereof in envelopes, addressed as shown, with First Class postage prepaid, and depositing them in the U.S. Mail Depository at 7521 N. Milwaukee Avenue, Niles, IL 60714, and via email transmission as indicated above to the email addresses identified above in accordance with Illinois Supreme Court Rule 11, before the hour of 6:00 p.m.

Arthur C. Czaja
Attorney for Defendants-Respondents
Andres Cobo and Amy Rule
Cook County Attorney #: 47671
7521 N. Milwaukee Avenue
Niles, Illinois 60714
Phone: (847) 647-2106
Facsimile: (847) 647-2057
Email: arthur@czajalawoffices.com

2017 IL App (1st) 170872

FIRST DIVISION
November 6, 2017

No. 1-17-0872

FIRST MIDWEST BANK, as Successor in Interest to Waukegan Savings Bank, f/k/a Waukegan Savings and Loan, SB,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellee,	)	No. 15 L 007759
v.	)	
ANDRES COBO and AMY M. RULE,	)	Honorable Raymond W. Mitchell,
Defendants-Appellants.	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court, with opinion.
Presiding Justice Pierce and Justice Mikva concurred in the judgment and opinion.

OPINION

¶ 1 Defendants, Andres Cobo and Amy Rule, appeal the order of the Cook County circuit court granting summary judgment in favor of plaintiff, First Midwest Bank, on its complaint for breach of contract and unjust enrichment. On appeal, defendants contend the court erred in (1) denying defendants' motion to dismiss pursuant to section 2-619 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619(a)(9) (West 2016)), where plaintiff's complaint was an impermissible second refiling of its previous claims and (2) granting summary judgment where a genuine issue of material fact exists as to whether the note attached to plaintiff's complaint was actually the note signed by the parties. For the following reasons, we vacate the order granting summary judgment and dismiss the underlying complaint.

¶ 2 JURISDICTION

¶ 3 The trial court granted summary judgment on March 21, 2017. Defendants filed a notice of appeal on April 4, 2017. Accordingly, this court has jurisdiction pursuant to Illinois Supreme Court Rules 303 (eff. July 1, 2017) and 304(a) (eff. Mar. 8, 2016), governing appeals from final judgments entered below.

¶ 4 BACKGROUND

¶ 5 On November 20, 2006, defendants executed a promissory note in favor of Waukegan Savings and Loan, SB (Waukegan), in exchange for a $227,500 loan. As security for the loan, defendants obtained a mortgage on real property located at 625 S. 12th Avenue in Maywood, Illinois. Plaintiff is the successor in interest to Waukegan.

¶ 6 In 2011, defendants stopped making payments and defaulted on the note and mortgage. On December 8, 2011, Waukegan filed a complaint for foreclosure (foreclosure complaint) and attached a copy of the mortgage and "a copy of the Note secured thereby." The foreclosure complaint alleged the amount of original indebtedness as $227,500. The foreclosure complaint also alleged that plaintiff "is the owner and legal holder of the Note, Mortgage and indebtedness," and alleged a "[d]efault in monthly payments due July 1, 2011 and thereafter" by defendants. The total amount now due was the remaining principal of $214,079.06 "[p]lus interest, late fees and collection costs," and defendants were named as "persons claimed to be personally liable for deficiency." As relief, the foreclosure complaint requested a "Judgment of foreclosure and sale." Plaintiff also requested as relief, "if sought," a "personal judgment for deficiency," a shortened redemption period, an order granting possession, an order "placing the mortgagee in possession or appointing a receiver," and a judgment for attorney fees and expenses. Plaintiff voluntarily dismissed the foreclosure complaint on April 2, 2013.

¶ 7 On April 16, 2013, plaintiff as receiver for Waukegan filed a complaint for breach of promissory note (breach of note complaint) and attached a copy of the note. The breach of note complaint alleged that defendants executed the promissory note in exchange for a $227,500 loan but they had not made payments on the note since July 1, 2011. The breach of note complaint alleged that pursuant to the terms of the note, defendants owed $251,165.72, which represented the remaining principal of $214,079.06, plus interest, accrued late fees, and other costs. As relief, plaintiff requested this amount "plus accrued interest and late fees through the date of judgment plus attorney's fees and costs" and any relief the court deems just. Plaintiff voluntarily dismissed this complaint pursuant to section 2-1009 of the Code (735 ILCS 5/2-1009 (West 2016)) on April 3, 2015.

¶ 8 On July 30, 2015, plaintiff filed a two-count complaint alleging breach of contract and, in the alternative, unjust enrichment (breach of contract complaint). The breach of contract complaint alleged that defendants executed a promissory note payable to Waukegan in the amount of $227,500 and executed a mortgage on real property located at 625 S. 12th Avenue in Maywood, Illinois, as security for the loan. Attached to the breach of contract complaint were copies of the note and mortgage. Plaintiff alleged that it is the successor in interest to Waukegan. Count I alleged that defendants defaulted on the note by failing to make payments since July 1, 2011, and as of July 27, 2015, the principal amount owed was $214,079.06, plus interest, late charges, appraisal fees, escrow deficiency, and attorney fees and costs. Plaintiff requested these amounts as relief, "pursuant to the Note," under count I. Count II alleged unjust enrichment and requested relief in the amount of $214,079.06.

¶ 9 Defendants filed a section 2-619 motion to dismiss, arguing that the breach of contract action was barred by section 13-217 of the Code (735 ILCS 5/13-217 (West 1994)).[1] Defendants argued that section 13-217 permits only one refiling of a claim and the breach of contract complaint represented the second refiling of the foreclosure complaint, with the breach of note complaint being the first refiling. The trial court denied defendants' motion to dismiss, finding that the foreclosure complaint and breach of note complaint, although based on "closely related" transactions, were "not part of the same transaction or occurrence." Rather, the claims sought in each complaint were based on "separate contracts executed for distinct purposes and [gave] rise to separate remedies." Therefore, the 2015 breach of contract complaint did not constitute a second refiling of the 2011 foreclosure complaint but rather "the first refiling of Plaintiff's 2013 breach of promissory note action under section 13-217." Defendants filed a motion to reconsider, which the trial court denied.

¶ 10 Defendants filed their answer to the breach of contract complaint and also filed four affirmative defenses. Their first affirmative defense was that the breach of contract complaint was an improper second refiling of a voluntarily dismissed complaint. As their third affirmative defense, defendants argued that the note attached to the breach of contract complaint was "no note at all, but rather a compilation of two unsigned pages of the Note and a third signature page from a rider to the Mortgage." The other affirmative defenses are not relevant on appeal. Plaintiff filed a section 2-619 motion to strike the affirmative defenses and then filed a motion for summary judgment. In response, defendants challenged the amounts due and owing, arguing that plaintiff sought impermissible late fees and the prior attorney fees and costs were unsupported by

[1]This version of section 13-217 is now in effect because our supreme court in *Best v. Taylor Machine Works*, 179 Ill. 2d 367 (1997), found the subsequently amended version unconstitutional in its entirety.

the attached documents. Plaintiff subsequently withdrew its request for late fees and filed an amended motion for summary judgment, with the affidavit of Jeanine Cozzi stating the amounts due and owing attached.

¶ 11 The trial court granted plaintiff's motion to strike the affirmative defenses and granted summary judgment, finding that "[p]laintiff has established all necessary elements" for its breach of contract claim. The court noted that plaintiff withdrew its request for late charges and attached the supplemental affidavit of Cozzi "containing detailed invoices from the attorney who handled the case." After "[t]aking all of the relevant factors into consideration," plaintiff sufficiently demonstrated "that the attorney fees it seeks are reasonable."

¶ 12 The trial court also addressed defendants' argument "that the copy of the promissory note attached to the complaint is not a correct copy and that Plaintiff's claim therefore fails pursuant to Illinois Code of Procedure section 5/2-606." 735 ILCS 5/2-606 (West 2016). The court determined, however, that section 2-606 pertains to pleading requirements and the "procedurally proper means to attack the legal sufficiency of the pleadings" is a motion pursuant to section 2-615 (735 ILCS 5/2-615 (West 2016)). Nevertheless, the court found it had addressed this issue in its March 2, 2017, order and determined "that Plaintiff's pleadings were sufficient." The trial court entered judgment against defendants in the amount of $308,192.56. This appeal followed.

¶ 13 ANALYSIS

¶ 14 Defendants first argue that the trial court erred in denying their section 2-619 motion to dismiss plaintiff's breach of contract complaint because the complaint was an improper second refiling of the foreclosure complaint. Defendants also raised this issue as an affirmative defense, which the trial court struck before granting summary judgment in favor of plaintiff. A section 2-619 motion to dismiss admits the legal sufficiency of the complaint but asserts an affirmative

defense or other matter that avoids or defeats the claim. *DeLuna v. Burciaga*, 223 Ill. 2d 49, 59 (2006). "A grant or denial of a motion to dismiss is a question of law that we review *de novo*." *Simmons v. Homatas*, 236 Ill. 2d 459, 477 (2010).

¶ 15 Plaintiff's predecessor in interest filed a foreclosure complaint in 2011, which plaintiff voluntarily dismissed in 2013. A few weeks later, plaintiff filed its complaint for breach of promissory note, which it voluntarily dismissed in 2015. Approximately four months after that dismissal, plaintiff filed the underlying two-count complaint for breach of contract. Section 13-217 provides that if the plaintiff voluntarily dismisses a cause of action, "the plaintiff *** may commence a new action within one year or within the remaining period of limitation, whichever is greater, *** after the action is voluntarily dismissed by the plaintiff." 735 ILCS 5/13-217 (West 1994). Although plaintiff's right to refile is "absolute," this right is not limitless, and section 13-217 permits only one such refiling. *Timberlake v. Illini Hospital*, 175 Ill. 2d 159, 163 (1997). The parties on appeal do not dispute that plaintiff's 2015 breach of contract complaint was a refiling of its 2013 breach of note complaint. Defendants contend, however, that plaintiff's breach of note complaint was a refiling of the 2011 foreclosure complaint. If so, plaintiff's breach of contract complaint constituted an improper second refiling.

¶ 16 A complaint is a refiling under the statute if it contains "the same cause of action" as a previously filed complaint for purposes of *res judicata*. *D'Last Corp. v. Ugent*, 288 Ill. App. 3d 216, 220 (1997). Claims are identical under section 13-217 if "the parties are the same and both theories of relief arise out of a single core of operative facts." *Schrager v. Grossman*, 321 Ill. App. 3d 750, 758 (2000); see also *Mabry v. Boler*, 2012 IL App (1st) 111464, ¶ 23 (finding that separate claims, one alleging personal injury and the other alleging property damage, constituted

a single cause of action for purposes of section 13-217 because they arose from the same negligent actions that resulted in the accident).

¶ 17 In the past, to determine whether separate complaints involved the same cause of action Illinois courts utilized two tests: the same evidence test and the transactional test. *River Park, Inc. v. City of Highland Park*, 184 Ill. 2d 290, 307 (1998). The same evidence test "is tied to the theories of relief asserted by a plaintiff" so that two claims that may be part of the same transaction are "considered separate causes of action because the evidence needed to support the theories on which they are based differs." *Id.* at 309. In contrast, the transactional test "is more pragmatic" and views a claim in " 'factual terms.' " *Id.* (quoting Restatement (Second) of Judgments § 24 cmt. a, at 197 (1982)). In a transactional analysis, a claim is considered " 'coterminous with the transaction regardless of the number of substantive theories, or variant forms of relief flowing from those theories, that may be available to the plaintiff; *** and regardless of the variations in the evidence needed to support the theories or rights.' " *Id.* (quoting Restatement (Second) of Judgments § 24 cmt. a, at 197 (1982)). In other words, claims can "be considered part of the same cause of action even if there is not a substantial overlap of evidence, so long as they arise from the same transaction." *Id.* at 311.

¶ 18 In *River Park*, our supreme court "adopted the more liberal transactional test" for determining the identity of causes of action. *Id.* at 310. In doing so, the court expressly rejected "the more stringent standards of the same evidence test." *Id.* at 310-11. Therefore, pursuant to the transactional test, separate claims are "considered the same cause of action for purposes of *res judicata* if they arise from a single group of operative facts, regardless of whether they assert different theories of relief." *Id.* at 311. Our supreme court recognized that "the transactional test

permits claims to be considered part of the same cause of action even if there is not a substantial overlap of evidence, so long as they arise from the same transaction." *Id.*

¶ 19 Here, the trial court found that the foreclosure complaint and breach of note complaint, although based on "closely related" transactions, were "not part of the same transaction or occurrence" because the mortgage and the promissory note served distinct purposes that gave rise to separate remedies. While it may be true that a mortgage and a promissory note constitute separate contracts with distinct remedies, these factors are more relevant in the same evidence test, which our supreme court expressly rejected in *River Park*. *Id.* In the transactional test, whether the claims asserted different theories of relief is irrelevant as long as both claims arose from a single group of operative facts. *Id.*

¶ 20 We find *LSREF2 Nova Investments III, LLC v. Coleman*, 2015 IL App (1st) 140184, instructive. In *Coleman*, the plaintiff's predecessor in interest filed a single-count foreclosure complaint seeking as relief a judgment to foreclose the mortgage and a personal judgment for deficiency. *Id.* ¶ 4. The plaintiff brought the complaint in its capacity as legal holder of the mortgage and promissory note, and both documents were attached as exhibits. The complaint also alleged that the defendant was personally liable for the deficiency. *Id.* The court entered a judgment of foreclosure in favor of the plaintiff, who subsequently purchased the subject property at the judicial sale. *Id.* ¶ 6. The court also entered an order for an "IN REM deficiency judgment." *Id.* Approximately one year later, the plaintiff filed a complaint seeking to enforce the promissory note against the defendant. *Id.* ¶ 7.

¶ 21 The trial court granted the defendant's motion to dismiss the complaint based on *res judicata*. *Id.* ¶ 9. On appeal, the plaintiff argued that no identity of the causes of action existed because it sought separate, consecutive proceedings for adjudicating the mortgage and

the promissory note. *Id.* ¶ 12. This court, however, affirmed the dismissal of plaintiff's complaint, finding that "[i]n the foreclosure action, plaintiff sought to foreclose on defendant's property, but also explicitly sought a personal deficiency judgment against defendant. Plaintiff sought the personal deficiency judgment based on defendant's obligations under both the promissory note and the mortgage" pursuant to section 15-1508(e) of the Illinois Mortgage Foreclosure Law (735 ILCS 5/15-1508(e) (West 2016)). *Coleman*, 2015 IL App (1st) 140184, ¶ 14. Therefore, under the transactional test, an identity of the causes of action existed between the foreclosure complaint and the subsequent complaint to enforce the terms of the promissory note. *Id.*

¶ 22 We agree that a single-count complaint, requesting foreclosure of the mortgage as well as a personal judgment for any deficiency, involves operative facts arising from both the mortgage and the promissory note. In a foreclosure action, "[t]he mortgagor is the instrumentality of the wrong. It was he or she who breached the contract by defaulting on the note secured by the mortgage. The foreclosure action is based on the note, the vehicle which gives the plaintiff the legal right to proceed against the property. The object of the foreclosure action is to enforce the obligation created by that contract, through the property, but against a specific person." *ABN AMRO Mortgage Group, Inc. v. McGahan*, 237 Ill. 2d 526, 536 (2010). See also *MB Financial Bank, N.A. v. Allen*, 2015 IL App (1st) 143060, ¶ 32 (finding that the mortgage provides the right to obtain a deficiency judgment and the promissory note allows the pursuit of personal monetary judgments).

¶ 23 Here, as in *Coleman*, plaintiff's predecessor in interest filed a single-count foreclosure complaint that alleged it was "the owner and legal holder of the Note, Mortgage and indebtedness," the original amount being $227,500. The complaint attached a copy of the

mortgage and "a copy of the Note secured thereby," and alleged that defendants defaulted in the monthly payments "due July 1, 2011 and thereafter." The total amount due was the remaining principal of $214,079.06 "[p]lus interest, late fees and collection costs," and defendants were named as "persons claimed to be personally liable for deficiency." As relief, the complaint sought judgment of foreclosure and sale and also "personal judgment for deficiency."

¶ 24 Two weeks after the foreclosure complaint was voluntarily dismissed, plaintiff filed the breach of note complaint. In that complaint, plaintiff alleged that defendants executed the note in exchange for a loan in the amount of $227,500 and they had been delinquent in making payments since July 1, 2011. Plaintiff requested as relief, pursuant to the terms of the note, the amount of $251,165.72, which represented the remaining principal of $214,079.06, plus interest, accrued late fees, and other costs. Plaintiff voluntarily dismissed this complaint and, approximately four months later, filed the underlying two-count breach of contract complaint.

¶ 25 Following *Coleman*, we find that for purposes of *res judicata*, the same set of operative facts gave rise to the causes of action in the foreclosure complaint and the breach of note complaint. We disagree with the trial court's finding that *Coleman* is inapplicable because a judgment for deficiency was actually entered in that case, whereas here plaintiff never obtained such a judgment, nor did plaintiff seek to recover the deficiency in its breach of promissory note complaint. *Coleman*'s analysis on the identity of causes of action for *res judicata* purposes did not depend upon a final judgment, nor is one required to perform the transactional test pursuant to section 13-217. Also, it makes no difference whether plaintiff's theory of relief was based on foreclosure sale and deficiency judgment, or on enforcement of the note itself, where both complaints sought to obtain what defendants owed plaintiff under the terms of the note due to default. The relevant consideration for purposes of section 13-217 is whether both claims arose

from a single group of operative facts, regardless of whether they asserted different theories of relief. *River Park*, 184 Ill. 2d at 311. We find that standard has been satisfied here.

¶ 26 Plaintiff argues that the trial court properly denied defendants' motion to dismiss and cites as primary support *LP XXVI, LLC v. Goldstein*, 349 Ill. App. 3d 237 (2004), and *Wells Fargo Bank, N.A. v. Norris*, 2017 IL App (3d) 150764. *Goldstein*, however, involved a guaranty that was a contract separate from the mortgage and note. The court in *Goldstein* found that *res judicata* did not apply to bar a subsequent suit based on a guaranty contract where there had been a prior judgment of foreclosure and the previous action "did not encompass the guaranty." *Goldstein*, 349 Ill. App. 3d at 241. The cases cited by *Goldstein* on this issue, *Citicorp Savings of Illinois v. Ascher*, 196 Ill. App. 3d 570 (1990), and *Du Quoin State Bank v. Daulby*, 115 Ill. App. 3d 183 (1983), also involved a guaranty contract where the original foreclosure action did not allege a personal liability under the guaranty. We find *Goldstein* factually distinguishable from the case at bar.

¶ 27 Likewise, in *Norris* the challenged action involved not only the original mortgage but also a loan modification agreement. *Norris*, 2017 IL App (3d) 150764, ¶ 22. The court in *Norris* found that "[t]he operative facts of the two cases are substantially different. In the 2008 case, the mortgage foreclosure complaint alleged a violation of the original mortgage, a breach date of January 2008 to the present, and a principal balance due and owing of $159,061.43. In the 2010 case, however, the mortgage foreclosure complaint alleged a violation of the original mortgage and of a loan modification agreement, a breach date of June 2009 to the present, and a principal balance due and owing of $189,604.15." *Id.* Therefore, the court determined that "the 2010 case did not involve the same cause of action as the 2008 case for the purposes of the single refiling rule." *Id.* Unlike the second complaint in *Norris*, plaintiff's breach of note complaint did not

allege an additional violation of a loan modification agreement not referred to in the original foreclosure complaint. Also, unlike *Norris*, the principal alleged due and owing in both of plaintiff's complaints was the same amount, $214,079.06, and the breach date alleged in both complaints was July 1, 2011.

¶ 28 We find that plaintiff's breach of contract action represented an improper second refiling in violation of section 13-217, and the trial court should have granted defendants' motion to dismiss that count. The complaint, however, also alleged in the alternative a count for unjust enrichment. Although the trial court made no explicit findings regarding unjust enrichment, it granted summary judgment in favor of plaintiff and stated that the final order "dispose[d] of the case in its entirety." On appeal, plaintiff argues that this court could also affirm the trial court's grant of summary judgment based on unjust enrichment. We disagree.

¶ 29 Unjust enrichment is an equitable remedy based on a contract implied in law. *Karen Stavins Enterprises, Inc. v. Community College District No. 508, County of Cook*, 2015 IL App (1st) 150356, ¶ 7. While no actual agreement exists between the parties, there is a duty to pay for goods or services to prevent an unjust enrichment. *Id.* The remedy of unjust enrichment is only available where there is no adequate remedy in law. *Guinn v. Hoskins Chevrolet*, 361 Ill. App. 3d 575, 604 (2005). "This theory is inapplicable where an express contract, oral or written, governs the parties' relationship." *Gagnon v. Schickel*, 2012 IL App (1st) 120645, ¶ 25. Therefore, a party cannot state a claim for unjust enrichment where an express contract exists between the parties and concerns the same subject matter. *Karen Stavins*, 2015 IL App (1st) 150356, ¶ 7.

¶ 30 The unjust enrichment count of plaintiff's complaint alleged that defendants received a loan in the amount of $227,500 from plaintiff's predecessor in interest and used the loan to refinance real property located at 625 S. 12th Avenue in Maywood. Defendants made monthly

payments to repay the loan and stopped making payments after June 1, 2011. The count further alleged that "[d]efendants have been unjustly enriched by receiving the benefits of the Loan, while at the same time refusing to remit payment for the full amounts due and owing Plaintiff." As relief, plaintiff sought $214,079.06, which represented the amount of "unpaid principal" "due and owing to Plaintiff." Although plaintiff did not specifically reference the mortgage and note in this count, the allegations of defendants' violations and obligations are based on those contracts and concern the same subject matter. Plaintiff also attached copies of the mortgage and promissory note to the complaint. Accordingly, the doctrine of unjust enrichment has no application here, and we cannot affirm the trial court's grant of summary judgment based on this count in plaintiff's complaint. See *Guinn*, 361 Ill. App. 3d at 604-05 (dismissing plaintiff's unjust enrichment count where the allegations relied on the obligations expressed in a contract between the parties, even though the contract was not referenced in the count, and plaintiff attached the contract to her complaint).

¶ 31 For the foregoing reasons, we vacate the trial court's order granting summary judgment and dismiss plaintiff's breach of contract complaint.

¶ 32 Order vacated; complaint dismissed.

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

First Midwest Bank, as successor in interest to Waukegan Savings Bank f/k/a Waukegan Savings and Loan, SB,	)	No. 15 L 7759
Plaintiff,	)	Calendar S
vs.	)	Judge Raymond W. Mitchell
Andres Cobo and Amy M. Rule,	)	
Defendants.	)	

ORDER

This matter is before the Court on Defendants Andres Cobo and Amy Rule's motion to dismiss Plaintiff First Midwest Bank's complaint pursuant to 735 ILCS 5/2-619.

I.

Plaintiff First Midwest Bank is the successor in interest to a promissory note and mortgage that Defendants Andres Cobo and Amy Rule executed in favor of Waukegan Savings and Loan, SB in 2006 in exchange for a $227,500 loan. In 2011, Defendants allegedly defaulted on their payments, and Waukegan filed a complaint for foreclosure on Defendants' mortgage. In 2013, Plaintiff dismissed the foreclosure action without prejudice. Plaintiff filed a second complaint against the Defendants later in 2013 for breach of the promissory note and requested a judgment of $251,165.72. Plaintiff voluntarily dismissed that claim in 2015. Plaintiff commenced this action for breach of the promissory note later in 2015 and requests a judgment of $214,079.06 against the Defendants. Defendants move to dismiss the complaint.

II.

A section 2-619 motion to dismiss admits the legal sufficiency of the complaint. 735 ILCS 5/2-619. The purpose of a section 2-619 motion to dismiss is to dispose of issues of law and easily proved issues of fact at the outset of the litigation. *Henry v. Gallagher*, 383 Ill. App. 3d 901, 903 (1st Dist. 2008). Although a section 2-619 motion to dismiss admits the legal sufficiency of a complaint, it raises defects, defenses, or some other affirmative matter appearing on the face of the complaint or established by external submissions, which defeat the plaintiff's claim. *Ball v. County of Cook, 385 Ill. App. 3d 103, 107 (1st Dist. 2008).*

Defendants Cobo and Rule move for dismissal of Plaintiff's complaint, arguing this is the second refiling of the same cause of action, in violation of 735 ILCS 5/13-217. Section 13-217 of the Illinois Code of Civil Procedure is a saving provision which provides plaintiffs with the absolute right to refile their complaint within one year, or within the statute of limitations, if the complaint is dismissed for any of the reasons stated in the statute. *Burns v. Steelcase, Inc.*, 138 Ill. App. 3d 1039, 1040 (1st Dist. 1985). However, a plaintiff is allowed only one opportunity to refile an action. *Flesner v. Youngs Dev. Co.*, 145 Ill. 2d 252, 254 (1991). If a plaintiff voluntarily dismisses an action twice, they are not allowed to refile for a "third bite" at the apple. *Gibellina v. Handley*, 127 Ill. 2d 122, 134 (1989).

To determine whether an action is the same for purposes of section 13-217, the court must determine if the causes of action would be the same for *res judicata* purposes. *Mabry v. Boler*, 2012 IL App (1st) 111464, ¶ 22. Illinois adopts a transactional test to determine whether causes of action are the same for purposes of *res judicata*. *River Park, Inc. v. City of Highland Park*, 184 Ill. 2d 290, 312 (1998). Under this test, separate claims will be considered the same cause of action if they arise from a single group of operative facts, regardless of whether they assert different theories of relief. The transactional test "permits claims to be considered part of the same cause of action even if there is not a substantial overlap of evidence, so long as they arise from the same transaction." *Id.* at 309. Defendants contend that the 2011 foreclosure action and the 2013 breach of promissory note action arose from the same transaction or occurrence.

Under Illinois law, a mortgagee is limited to only one satisfaction of a debt, but may choose to sue on both the promissory note and the underlying mortgage, *Eastern Illinois Trust and Sav. Bank v. Vickery*, 164 Ill. App. 3d 84, 85 (3rd Dist. 1987), in separate or concurrent actions, *Farmer City State Bank v. Champaign Nat. Bank*, 138 Ill. App. 3d 847, 852 (4th Dist. 1985). Based on this concept, Illinois courts previously determined that although they are closely related in time and functionality, a mortgage and a promissory note are not part of the same transaction or occurrence because they serve distinct purposes. *LP XXVI, LLC v. Goldstein*, 349 Ill. App. 3d 237, 240-41 (2d Dist. 2004). A mortgage and a promissory note are separate contracts executed for distinct purposes and give rise to separate remedies. *Hickey v. Union Nat. Bank & Trust Co. of Joliet*, 190 Ill. App. 3d 186, 190 (2d Dist. 1989). A note is executed to secure capital, and a mortgage is executed to secure the note. *Goldstein*, 349 Ill. App. 3d at 241. Further, a foreclosure action and an action on a note have different effects on the rights of the parties involved. A mortgage foreclosure action is a *quasi in rem* proceeding, which is brought against parties to "subject certain property of those persons to the discharge of the claims asserted." *ABN AMRO Mortg. Group, Inc. v. McGahan*, 237 Ill. 2d 526, 535 (2010). In contrast, an action on a promissory note is an *in personam* proceeding, "which imposes a personal liability or obligation on one

person in favor of another." *Turczak v. First American Bank,* 2013 IL App (1st) 121964, ¶ 33.

Applying this reasoning, the present action would not constitute the same action as the Plaintiff's 2011 foreclosure action, but the first refiling of Plaintiff's 2013 breach of promissory note action under section 13-217. Similarly, Plaintiff's claim would not barred be by the doctrine of *res judicata* even though the doctrine typically bars subsequent actions by the same parties involving the same claims, or claims which could have been decided in the original action. *Torcasso v. Standard Outdoor Sales*, 157 Ill. 2d 484, 490 (1993). But, the Illinois Appellate Court's recent decision in *LSREF2 Nova. Invs, III, LLC v. Coleman*, 2015 IL App (1st) 140184 altered the manner in which the court must determine whether the present action is the same as the 2011 foreclosure action for *res judicata* purposes.

In *Coleman*, the plaintiff first brought a foreclosure action against the defendant, seeking to recover any amount not covered by the foreclosure sale against defendant as provided by Illinois foreclosure law "based on [the] defendant's obligations under both the promissory note and the mortgage." *Id.* at ¶ 14. The trial court in the foreclosure action entered a foreclosure order and stated that the plaintiff was entitled to a deficiency judgment after sale of the property. *Id.* at ¶ 15. The plaintiff subsequently brought an action to enforce the promissory note against the defendant, seeking to recover "based on the same default by defendant on the note and recovery of the amount of the deficiency as determined by the order confirming the sale in the foreclosure action." *Id.* at ¶ 16.

On appeal, the appellate court was asked to consider whether the claim raised in the plaintiff's promissory note lawsuit could have been resolved in the prior foreclosure lawsuit for *res judicata* purposes. *Id.* The appellate court determined that the plaintiff's claim, as alleged in the complaint, and its claim for a personal deficiency judgment in the foreclosure suit arose from a single group of operative facts—the deficiency which resulted from after foreclosure sale based on plaintiff's default—and was thus in fact barred by *res judicata. Id.* The appellate court distinguished the facts in *Coleman* from other cases, like *LP XXVI, LLC v. Goldstein*, 349 Ill. App. 3d 237 (2d Dist. 2004) and *Turczak v. First American Bank*, 2013 IL App (1st) 121964, in which Illinois courts did not apply *res judicata* to bar a subsequent claim when there was a foreclosure action and a purely *in personam* action at issue. The appellate court concluded its opinion by stating that "where the circuit court had personal jurisdiction over defendant to enter a personal deficiency judgment . . . pursuant to section 15-1508(e) of the Foreclosure Law based on plaintiff's request for a personal deficiency judgment in its foreclosure complaint, plaintiff's subsequent claim for the amount of the deficiency as determined in the foreclosure suit as a result of the sale of the property is barred by the doctrine of *res judicata* . . ." consistent with the holding in *Skolnik v. Petella*, 376 Ill. 500 (1941). *Id.* at ¶ 29.

Based on *Coleman*, whether an action on a promissory note constitutes the same action as a prior foreclosure action for *res judicata* purposes is highly dependent on the facts. The issue turns on what relief was sought in the foreclosure action and what relief is sought in the promissory note action.

Here, Midwest brought the 2011 action to foreclose on the mortgage. In the foreclosure complaint, Plaintiff alleged that Defendants were personally liable for any deficiency and in its request for relief, listed "A personal judgment for deficiency, if sought." Plaintiff attached a copy of the note secured by the mortgage to the complaint in that action. Thus, Plaintiff arguably sought a personal deficiency judgment against the Defendants in the 2011 foreclose action. But, unlike the plaintiff in *Coleman*, Midwest did not obtain a deficiency judgment against Defendants because Plaintiff voluntarily dismissed the case. Further, in the 2013 action on the promissory note, Plaintiff did not seek to recover a deficiency amount entered in the foreclosure action. In the present case, Plaintiff references the mortgage, but ultimately seeks to recover against the Defendants on the note and again, does not seek to recover a deficiency amount entered in the foreclosure action. Thus, the facts in the present case are distinguishable from *Coleman*.

Since the Plaintiff did not seek to recover a deficiency judgment against Defendants under a note after a personal deficiency judgment was entered against the Defendants in the foreclosure action in the 2013 action and does not seek one in the present case, neither action is the same action as the 2011 foreclosure action for *res judicata* purposes. Accordingly, the current action constitutes the first refiling of the 2013 promissory note action, not the second refiling of the 2011 mortgage foreclosure action and is not barred by *res judicata* or section 13-217.

III.

Based on the foregoing, it is hereby ORDERED:

(1) Defendants Andres Cobo and Amy Rule's motion to dismiss is DENIED.

(2) Defendants have 28 days, until July 22, 2016, to answer.

(3) The parties shall initiate written fact discovery on or before August 5, 2016.

(4) The parties shall complete written fact discovery by October 7, 2016.

(5) The parties shall complete oral fact discovery by January 12, 2017.

(6) The clerk's status hearing for Friday, June 24, 2016 is stricken.

(7) The case is continued for a case management conference on October 24, 2016 at 10:00 a.m.

Failure to appear will result in dismissal for want of prosecution or entry of a default order. Failure to comply with this order will be a basis for sanctions under Rule 219(c). Failure to enforce this order will constitute a waiver of such discovery by that party.

Judge Raymond W. Mitchell
ENTERED,
JUN 23 2016
Circuit Court – 1992

Judge Raymond W. Mitchell, No. 1992

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

First Midwest Bank, as successor in interest to Waukegan Savings Bank f/k/a Waukegan Savings and Loan, SB,	)	
Plaintiff,	)	No. 15 L 7759
vs.	)	Calendar S
Andres Cobo and Amy M. Rule,	)	Judge Raymond W. Mitchell
Defendants.	)	

ORDER

This matter is before the Court on Defendants Andres Cobo and Amy Rule's motion to reconsider the June 23, 2016 Order denying Defendants' motion to dismiss Plaintiff First Midwest Bank's complaint.

I.

Plaintiff First Midwest Bank is the successor in interest to a promissory note and mortgage that Defendants Andres Cobo and Amy Rule executed in favor of Waukegan Savings and Loan, SB in 2006 in exchange for a $227,500 loan. In 2011, Defendants allegedly defaulted on their payments, and Waukegan filed a complaint for foreclosure on Defendants' mortgage. In 2013, Plaintiff dismissed the foreclosure action without prejudice. Plaintiff filed a second complaint against the Defendants later in 2013 for breach of the promissory note and requested a judgment of $251,165.72. Plaintiff voluntarily dismissed that claim in 2015.

Plaintiff commenced this action for breach of the promissory note later in 2015 and requests a judgment of $214,079.06 against the Defendants. Defendants moved to dismiss the complaint, arguing that it was the second refiling of their 2011 foreclosure action and thus violated section 13-217 of the Illinois Code of Civil Procedure. Defendants further asserted that Plaintiff's complaint was barred by the doctrine of *res judicata*. The Court denied Defendants' motion. Defendants now move the Court to reconsider its ruling.

II.

Defendants contend that the Court erred by failing to consider that *res judicata* bars not only what was decided in prior actions, but what could have been decided. In the prior order, the Court acknowledged that *res judicata* bars any

matters actually decided in addition to all matters that could have been decided in a prior action. *See* 09/23/16 Order at 3. The Court, however, determined that one of the requirements for *res judicata* had not been met. Specifically, the Court determined that Plaintiff's foreclosure action against Defendant was not the same cause of action as those alleged in the Plaintiff's complaint (i.e., did not arise for a single group of operative facts) for *res judicata* purposes. In reaching this conclusion, the Court distinguished the facts in the present action from the facts in *LSREF2 Nova. Invs, III, LLC v. Coleman*, 2015 IL App (1st) 140184. After reviewing the original briefing, the briefing submitted in support of the motion to reconsider, and the *Coleman* decision, the Court is convinced that its original ruling was correct as a matter of law.

In *Coleman*, the Illinois Appellate Court focused on what relief the plaintiff sought in the original foreclosure action and in the subsequent note action. The plaintiff in *Coleman* first brought a foreclosure action in which the plaintiff sought a deficiency judgment against the defendant based on the defendant's obligations under the promissory note and the mortgage. *Coleman*, 2015 IL App (1st) 140184, ¶ 14. The trial court in the foreclosure action entered a foreclosure order and stated that the plaintiff was entitled to a deficiency judgment after sale of the property. *Id.* at ¶ 15. The plaintiff then filed suit to enforce the promissory note, again seeking to recover the amount of the deficiency as determined by the court in the foreclosure action. *Id.* at ¶ 16. On appeal, the appellate court determined that the plaintiff's note action and its claim for a personal deficiency judgment in the foreclosure suit were the same cause of action, arising from a single group of operative facts: the deficiency which resulted from after foreclosure sale based on plaintiff's default. *Id.* The appellate court concluded that where the circuit court had personal jurisdiction over the defendant to enter a personal deficiency judgment in the foreclosure action, the plaintiff's subsequent claim for the amount of the deficiency under a breach of promissory note theory was barred by *res judicata*. *Id.* at ¶ 29.

Here, Midwest did not seek a deficiency judgment against the Defendants in the 2011 foreclosure action and then seek to recover that same deficiency amount from Defendants in the 2013 note action. Therefore, the case is factually distinguishable from *Coleman*. Defendants contend that the causes of action are still the same because Midwest sought the same or similar relief in both the 2011 and 2013 actions based on Defendants' default. Defendants argue that Plaintiff placed both the note and mortgage at issue in its complaints and sought to recover fees provided for in the mortgage in the 2013 note action and in the present action. But, it was ultimately the deficiency amount sought, and not what was alleged in or attached to the complaint, that was outcome determinative in *Coleman*. There is no deficiency amount linking the Plaintiff's 2011 foreclosure action and the 2013 note action. Consequently, the causes of action are not the same for *res judicata*

purposes, and neither section 13-217 nor the doctrine of *res judicata* preclude Plaintiff's claims in the present action.

III.

Based on the foregoing, it is hereby ORDERED:

(1) Defendants Andres Cobo and Amy Rule's motion to reconsider is DENIED.

(2) The case is continued for a case management conference on October 24, 2016 at 10:00 a.m.

Judge Raymond W. Mitchell

ENTERED, SEP 28 2016

Circuit Court 1992

Judge Raymond W. Mitchell, No. 1992

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

First Midwest Bank, as successor in interest to Waukegan Savings Bank f/k/a Waukegan Savings and Loan, SB,	)	
Plaintiff,	)	No. 15 L 7759
vs.	)	Calendar S
Andres Cobo and Amy M. Rule,	)	Judge Raymond W. Mitchell
Defendants.	)	

ORDER

This matter is before the Court on Plaintiff First Midwest Bank's motion to strike Defendants Andres Cobo and Amy M. Rule's affirmative defenses pursuant to 735 ILCS 5/2-619.

I.

Plaintiff First Midwest Bank is the successor in interest to a promissory note and mortgage that Defendants Andres Cobo and Amy Rule executed in favor of Waukegan Savings and Loan, SB in 2006 in exchange for a $227,500 loan. In 2011, Defendants allegedly defaulted on their payments, and Waukegan filed a complaint for foreclosure on Defendants' mortgage. In 2013, Plaintiff dismissed the foreclosure action without prejudice. Plaintiff filed a second complaint against the Defendants later in 2013 for breach of the promissory note and requested a judgment of $251,165.72. Plaintiff voluntarily dismissed that claim in 2015. On July 30, 2015, plaintiff commenced this action alleging breach of the promissory note in Count I and unjust enrichment in Count II, and requests judgment of $214,079.06 against the Defendants. Defendants filed four affirmative defenses. Plaintiff now moves to strike Defendants' affirmative defenses.

II.

An affirmative defense is subject to the same attacks as other pleadings. *Betts v. Manville Personal Injury Settlement Trust*, 225 Ill. App. 3d 882, 904 (4th Dist. 1992). A motion to strike an affirmative defense admits all well-pleaded facts constituting the defense, together with all reasonable inferences which may be drawn therefrom. *Farmer City State Bank v. Guingrich*, 139 Ill. App. 3d 416, 422 (4th Dist. 1985). A motion to strike an affirmative defense raises only a question of

law as to the sufficiency of the pleading. *Vermeil v. Jefferson Trust & Savings Bank*, 176 Ill. App. 3d 556, 566 (3d Dist. 1988). A motion to strike does not admit as true, however, those allegations which conflict with the facts disclosed in an exhibit. *McCormick v. McCormick*, 118 Ill. App. 3d 455, 460 (1st Dist. 1983). A defense that is asserted in an answer may be stricken upon a plaintiff's motion, if the defense is substantially insufficient in law; thus the correctness of a circuit court's decision to strike affirmative defenses depends on whether the allegations that set forth the defense, if taken to be true, express a legally sufficient defense. *Joppa High Sch. v. Jones*, 35 Ill. App. 3d 323, 325 (5th Dist. 1976).

Plaintiff moves to strike Defendants' four affirmative defenses pursuant to 735 ILCS 5/2-619(a)(9). Section 2-619(a), however, permits only defendants or other parties against whom a claim is asserted to move for involuntary dismissal. 735 ILCS 5/2-619(a). A plaintiff's section 2-619 motion to strike affirmative defenses is therefore procedurally improper. When attacking the legal sufficiency of affirmative defenses, a plaintiff should file a motion pursuant to 735 ILCS 5/2-615. This motion will therefore be analyzed under a section 2-615 standard. Section 2-615 motions to strike an affirmative defense should be granted only where the affirmative defense fails to allege sufficient facts which, if proved, defeat a plaintiff's claim. Section 2-615 motions cannot raise affirmative factual defenses, but can only attack the face of the pleadings. *Vernon v. Schuster*, 179 Ill. 2d 338, 344 (1997).

Plaintiff argues that Defendants' first affirmative defense to Counts I and II should be stricken because the single re-filing rule contained in section 13-217 of the Illinois Code of Civil Procedure does not apply. The Court previously determined in its June 23, 2016 Order that this action constitutes the first refiling of the 2013 action on the note and is therefore permitted pursuant to section 13-217.

Next, Plaintiff argues that Defendants' second affirmative defense to Counts I and II should be stricken because it had no duty to foreclose on the mortgage lien and sell the property. Damages which give rise to a duty to mitigate are those which a plaintiff may have avoided with reasonable effort. *Pioneer Bank & Tr. Co. v. Seiko Sporting Goods, Co.*, 184 Ill. App. 3d 783, 790 (1st Dist. 1989). In this case, Plaintiff seeks damages in the amount of the unpaid balance allegedly due on the promissory note. Plaintiff suffered these damages when Defendants allegedly defaulted on their mortgage. Defendants allege that if Plaintiff had foreclosed on the mortgage and sold the property themselves, the proceeds would offset Plaintiffs damages and thereby reduce Defendants liability. A breaching party, however, may not invoke a duty to mitigate as evidence that the injured party might have taken action that would have been more beneficial to the breaching party. *Id.* at 791. The mortgage attached to the complaint provides Plaintiff the option upon default to either require immediate payment of unpaid sums due on the note or foreclose on the mortgage. Foreclosure is thus one remedy Plaintiff may choose to satisfy the debt

upon default. Defendants have failed to allege facts that would give rise to a duty to mitigate.

Plaintiff also argues that Defendants' third affirmative defense to Count I should be stricken because it attached a copy of the instrument upon which its cause of action is based. For section 2-615 motions, the test for an affirmative defense is whether it "gives color to the opposing party's claim and then asserts new matters by which the apparent right is defeated." *Mountain States Mortg. Ctr. v. Allen*, 257 Ill. App. 3d 372, 382 (1st Dist. 1993) (quoting *Condon v. Am. Tel. & Tel. Co.*, 210 Ill. App. 3d 701, 709 (2d Dist. 1991)). Plaintiff alleges that the instrument, which contains a signature page with language indicating that it is from a 1-4 Family Rider, is nevertheless the correct signature page of the note from which its claim arises. Defendants' third affirmative defense disputes this allegation and argues that the correct signature page is missing. Defendants' third affirmative defense thus fails to give color to Plaintiff's claims and is therefore improperly pled.

Finally, Plaintiff argues that Defendants' fourth affirmative defense to Count II should be stricken because the statute of limitations does not apply. The statute of limitations for unjust enrichment claims is five years from the date of injury. 735 ILCS 5/13-205. Plaintiff alleges that Defendants defaulted on their loan payments on June 1, 2011 and were then unjustly enriched by continuing to receive the benefits of the loan after their default. Plaintiff filed this action on July 30, 2015, within five years of the date of default. Plaintiff's action was therefore timely filed.

III.

Based on the foregoing, it is hereby ORDERED:

(1) Plaintiff First Midwest Bank's motion to strike is GRANTED. Defendants first, second, third, and fourth affirmative defenses are stricken.

(2) The case management conference set for March 3, 2017 at 9:00 a.m. is stricken.

(3) The case is continued for a bench trial set for April 24, 2017 at 10:30 a.m.

Judge Raymond W. Mitchell

ENTERED, MAR - 2 2017

Circuit Court – 1992

Judge Raymond W. Mitchell, No. 1992

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

First Midwest Bank, as successor in interest to Waukegan Savings Bank f/k/a Waukegan Savings and Loan, SB,	)	
Plaintiff,	)	No. 15 L 7759
vs.	)	Calendar S
Andres Cobo and Amy M. Rule,	)	Judge Raymond W. Mitchell
Defendants.	)	

ORDER

This matter is before the Court on Plaintiff First Midwest Bank's motion for summary judgment pursuant to 735 ILCS 5/2-1005.

I.

Plaintiff First Midwest Bank is the successor in interest to a promissory note and mortgage that Defendants Andres Cobo and Amy Rule executed in favor of Waukegan Savings and Loan, SB in 2006 in exchange for a $227,500 loan. In 2011, Defendants allegedly defaulted on their payments, and Waukegan filed a complaint for foreclosure on Defendants' mortgage. In 2013, Plaintiff dismissed the foreclosure action without prejudice. Plaintiff filed a second complaint against the Defendants later in 2013 for breach of the promissory note and requested a judgment of $251,165.72. Plaintiff voluntarily dismissed that claim in 2015. Plaintiff then commenced this action alleging breach of the promissory note in Count I and unjust enrichment in Count II, and requests judgment of $214,079.06 against the Defendants. In its March 2, 2017 order, the Court struck Defendants' first, second, third, and fourth affirmative defenses. Plaintiff now moves for summary judgment..

II.

Summary judgment is appropriate when the pleadings, depositions, admissions and affidavits, viewed in a light most favorable to the nonmovant, fail to establish a genuine issue of material fact, thereby entitling the moving party to judgment as a matter of law. 735 ILCS 5/2-1005; Progressive Universal Ins. Co. v. Liberty Mut. Fire Ins. Co., 215 Ill. 2d 121, 127-28 (2005). The purpose of summary judgment is not to try a question of fact, but simply to determine whether one exists. Jackson v. TLC Assoc., Inc., 185 Ill. 2d 418, 423 (1998). A trial court is

required to construe the record against the moving party and may only grant summary judgment if the record shows that the movant's right to relief is clear and free from doubt. *Id.* If disputes as to material facts exist or if reasonable minds may differ with respect to the inferences drawn from the evidence, summary judgment may not be granted. Assoc. Underwriters of Am. Agency, Inc. v. McCarthy, 356 Ill. App. 3d 1010, 1016-17 (1st Dist. 2005).

In order to recover for breach of contract, a plaintiff must establish: (1) the existence of a valid and enforceable contract; (2) performance by the plaintiff; (3) a breach of the subject contract by the defendant; and (4) that the defendant's breach resulted in damages. *Unterschuetz v. City of Chicago*, 346 Ill. App. 3d 65, 69 (1st Dist. 2004).

Plaintiff has established all necessary elements for its breach of promissory note claim. Defendants allegedly executed a promissory note in favor of Plaintiff in the amount of $227,500.00 with a yearly interest rate of 6.250% and monthly payments of $1400.76. Plaintiff alleges that Defendants defaulted on the note by failing to pay the July 1, 2011 payment or any payment thereafter and that its damages include the outstanding balance, accrued interest, late charges, an escrow deficiency, appraisals, and prior legal fees from seeking recovery of amounts owed under the note. In support of its motion, Plaintiff submitted an affidavit of Jeanine Cozzi, the Vice President of Plaintiff's special assets department attesting to these allegations and to the total of $314,202.74 due and owing.

"Where facts contained in the affidavit in support of a motion for summary judgment are not contradicted by counteraffidavit, such facts are admitted and must be taken as true." *Heidelberger v. Jewel Cos.*, 57 Ill. 2d 87, 92-93 (1974). In response to the motion, Defendants have not submitted a counteraffidavit, but dispute the validity of the late charges and that Plaintiff may recover the attorney's fees without presenting sufficient records.. In its reply, however, Plaintiff agreed to withdraw its request for the late charges, attached a supplemental affidavit of Jeanine Cozzi containing detailed invoices from the attorney who handled the case, and reduced its request for judgment to $308,192.56 accordingly.

A party seeking attorney fees bears the burden of demonstrating the reasonableness of fees and providing records of the services performed, by whom they were performed, the time expended, and the hourly rate charged. *Harris Trust & Sav. Bank v. American Nat'l Bank & Trust Co.*, 230 Ill. App. 3d 591, 595 (1st Dist. 1992). In determining whether fees are reasonable, the court considers such factors as the skill and standing of the attorneys employed, the nature of the case, the novelty and difficulty of the issues involved, the degree of responsibility required, the usual and customary charge for the same or similar services in the community, and whether there is a reasonable connection between the fees charged and the litigation. *Id.* The court is permitted to use its own knowledge and

experience to assess the time required to complete particular activities. *Id.* In support of its motion, Plaintiff provided a supplemental affidavit from the Vice President of its special assets department containing detailed billing statements and breakdowns of costs incurred for legal fees from prosecuting the case against Defendants. Taking all of the relevant factors into consideration, Plaintiff motion and supporting documentation sufficiently demonstrate that the attorney fees it seeks are reasonable.

Defendants also argue that the copy of the promissory note attached to the complaint is not a correct copy and that Plaintiff's claim therefore fails pursuant to Illinois Code of Civil Procedure section 5/2-606. But section 2-606 contains only pleading requirements. 735 ILCS 5/2-606. A motion pursuant to section 2-615 is the procedurally proper means to attack the legal sufficiency of pleadings. 735 ILCS 5/2-615. It is therefore procedurally improper to attack the face of the pleadings in a section 2-1005 motion. Nevertheless, in its March 2, 2017 order, the Court addressed this issue and determined that Plaintiff's pleadings were sufficient.

III.

Based on the foregoing, it is hereby ORDERED:

(1) Plaintiff First Midwest Bank's motion for summary judgment is GRANTED. Judgment is entered in favor of Plaintiff First Midwest Bank and against Defendants Andres Cobo and Amy M. Rule in the amount of $308,192.56.

(2) The bench trial set for April 24, 2017 at 10:30 a.m. and the clerk's status set for March 24, 2017 at 9:00 a.m. are stricken.

(3) This is a final order that disposes of the case in its entirety.

ENTERED, Judge Raymond W. Mitchell

MAR 23 2017

Circuit Court – 1992

Judge Raymond W. Mitchell, No. 1992

APPEAL TO THE APPELLATE COURT OF ILLINOIS FIRST DISTRICT
FROM THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

First Midwest Savings Bank, as successor in Interest to Waukegan Savings Bank f/k/a Waukegan Savings and Loan, SB	)	Case No. 15-L-007759
Plaintiff	)	
v.	)	
Andres Cobo and Amy M. Rule,	)	
Defendants	)	Calendar S

NOTICE OF FILING

To: Klein, Daday, Aretos, Odonoghue, LLC, Attorney for Plaintiff-Appellee, 2550 W. Golf Road, Suite 250, Rolling Meadows, IL 60008

On 9/6, 2017, the Defendants-Appellants, ANDRES COBO and AMY M. RULE, by and through their attorney, Arthur C. Czaja, caused the enclosed **NOTICE OF APPEAL** and **REQUEST FOR PREPARATION OF RECORD ON APPEAL** to be filed with the Clerk of the Circuit Court of Cook County on the 8th Floor of the Richard J. Daley Center at 50 W. Washington Street, Chicago, Illinois and a copy of said documents is attached hereto and herby served upon you.

Arthur C. Czaja
Attorney for Defendants-Appellants
Cook Attorney #: 47671
7521 N. Milwaukee Avenue
Niles, Illinois 60714
Phone: (847) 647-2106
Facsimile: (847) 647-2057
Email: arthur@czajalawoffices.com

PROOF OF SERVICE

The undersigned, an attorney, certifies that on 4/4, 2017 he caused a true and correct copy of this Notice and the enclosed **NOTICE OF APPEAL** and **REQUEST FOR PREPARATION OF RECORD ON APPEAL** to be served upon the party(ies) listed above, by placing a copy of this Notice and enclosed **NOTICE OF APPEAL** and **REQUEST FOR PREPARATION OF RECORD ON APPEAL** in properly addressed envelopes to the party(ies) identified hereinabove at the address(es) identified hereinabove REGULAR, FIRST CLASS U.S. MAIL, POSTAGE PREPAID.

Arthur C. Czaja
Attorney for Defendants-Appellants
Cook Attorney #: 47671
7521 N. Milwaukee Avenue
Niles, Illinois 60714
Phone: (847) 647-2106
Facsimile: (847) 647-2057
Email: arthur@czajalawoffices.com

APPEAL TO THE APPELLATE COURT OF ILLINOIS FIRST DISTRICT
FROM THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

First Midwest Savings Bank, as successor in Interest to Waukegan Savings Bank f/k/a Waukegan Savings and Loan, SB	)	Case No. 15-L-007759
Plaintiff	)	
v.	)	
Andres Cobo and Amy M. Rule,	)	
Defendants	)	Calendar S

NOTICE OF APPEAL

NOW COME the Defendants-Appellants, ANDRES COBO and AMY M. RULE, by and through their attorney, Arthur C. Czaja, appeal to the Appellate Court of Illinois for the First District from the following orders entered in this matter in the Circuit Court of Cook County:

1. The order of June 23, 2016 denying the Defendants-Appellants' Section 2-619(a)(9) motion to dismiss Plaintiff-Appellee's complaint (hereinafter "Motion to Dismiss").

2. The order of September 28, 2016 denying the Defendants-Appellants' Section 2-1203 motion to reconsider the denial of their motion to dismiss Plaintiff-Appellee's complaint (hereinafter "Motion to Reconsider").

3. The order of March 2, 2017 granting Plaintiff-Appellee's Section 2-619 motion to strike the Defendants-Appellants' Affirmative Defenses (hereinafter "Motion to Strike").

4. The order of March 23, 2017 granting Plaintiff-Appellee's Section 2-1005 motion for summary judgment (hereinafter "Motion for Summary Judgment).

WHEREFORE, the Defendants-Appellants, A ANDRES COBO and AMY M. RULE, by and through this Appeal, will ask the Appellate Court to reverse the orders of June 23, 2016,

September 28, 2016, March 2, 2017 and March 23, 2017 and to remand this cause with direction to either dismiss the complaint or to set the matter for trial on the merits as to all claims and defenses, or for such other and further relief as the Appellate Court may deem proper.

Respectfully submitted,

ANDRES COBO and
AMY M. RULE

By: _____
Arthur C. Czaja
Attorney for Defendants-Appellants

Arthur C. Czaja
Attorney for Defendants-Appellants
Cook County Attorney #: 47671
7521 N. Milwaukee Avenue
Niles, IL 60714
Telephone: (847) 647-2106
Facsimile: (847) 647-2057
Email: arthur@czajalawoffices.com

Request for Preparation of Record on Appeal (Rev. 12/05/11) CCA N025

APPEAL TO THE APPELLATE COURT OF ILLINOIS
FROM THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

Filing Fee $110

COUNTY DEPARTMENT, LAW DIVISION/DISTRICT

FIRST MIDWEST SAVINGS BANK
Plaintiff/Appell EE

v.

ANDRES COBO and AMY M. RULE
Defendant/Appell ANTS

Reviewing Court No.

Circuit Court No. 2015-L-007759

Honorable RAYMOND W. MITCHELL
Trial Judge

Date Notice of Appeal Filed APRIL 4, 2017

REQUEST FOR PREPARATION OF RECORD ON APPEAL

Attorney (or *Party if no attorney*):

Name: ARTHUR C. CZAJA Cook County Attorney Code No. 47671 or *Pro Se* 99500

Address: 7521 N. MILWAUKEE AVE. City: NILES State: IL Zip: 60714

Telephone Number: 847-647-2107 E-mail Address (optional) arthur@czajalawoffices.com

Attorney for: ANDRES COBO and AMY M. RULE
Name of Party

NOTICE IS HEREBY GIVEN to the Clerk of the Circuit Court of Cook County that

ARTHUR C. CZAJA, attorney for Defendants-Appellants requests the preparation of the Record on Appeal in the above case.
Name

DESIGNATION OF RECORD

The Clerk of the Circuit Court of Cook County shall prepare the Record on Appeal in accordance with Illinois Supreme Court Rule 321. The record on Appeal shall include the common law record, which consists of trial documents filed and judgments and orders entered by the trial court and:

- ■ **All documentary exhibits entered at trial, except for those other exhibits that cannot ordinarily be included for review and are subject to motion.**
- ☐ **Reports of Proceedings prepared in accordance with Illinois Supreme Court Rule 323.**
- ☐ **Certificate in Lieu of Record on Appeal pursuant to Illinois Supreme Court Rule 325.**
- ☐ **Documents filed under seal on the following dates and unsealed:** _____.
  A copy of the trial court Order authorizing these documents to be unsealed for the purpose of inclusion in the Record on Appeal is attached hereto or will be provided by the Appellant to the Civil Appeals Division at least 30 days in advance of the date on which the Record on Appeal is scheduled to be transmitted to the Appellate Court. Upon return of the Record on Appeal to the Circuit Court, it is the responsibility of the parties to obtain an Order resealing these records, if the records are to be resealed.
- ☐ **Documents filed under seal on the following dates, which are to remain sealed:** _____.
  Please note that, pursuant to Rule 17 of Appellate Court of Illinois, "No record, exhibit, or brief may be filed under seal in the Appellate Court, unless Appellate Court has first given leave for filing under seal, notwithstanding that the material was filed under seal in the Circuit Court."

FEES

Payment may be made by Cash, Check or Money Order. Cash payments accepted for in-person payments only.
Checks or money order should be made to *Clerk of the Circuit Court of Cook County*. Pursuant to 705 ILCS 105/27.2a(k) and 27.2(k), the Clerk of the Circuit Court of Cook County must charge fees for Records on Appeal in advance as follows:

100 pages or less, $110
100 - 200 pages, $185
Each page in excess of 200, $.30/page
Reduced fee for Local Governments and School Districts, $50

All prescribed fees are due in advance of transmission of the Record on Appeal. It is understood and agreed that once a request for preparation of a Record on Appeal is made by submission of this form, the Appellant is responsible for the costs of preparing the Record on Appeal, regardless of whether the Appeal is successful, dismissed, the time is extended, or a party elects to not transmit the Record on Appeal to the Appellate Court. The Clerk of the Circuit Court of Cook County reserves the right to pursue a claim to recover the costs and expenses, including reasonable attorneys' fees, related to preparation of the Record on Appeal. It is also understood and agreed that Appellant is responsible for filing the Record on Appeal at the Appellate Court.

ARTHUR C. CZAJA
(Type or print name)

(Signature of Appellant or Appellant's Attorney)

DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

THIS IS AN ATTEMPT TO COLLECT A DEBT AND ANY INFORMATION OBTAINED FROM YOU MAY BE USED FOR THAT PURPOSE.

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

FIRST MIDWEST BANK, as successor in interest to Waukegan Savings Bank f/k/a Waukegan Savings and Loan, SB,	)	
Plaintiff,	)	
v.	)	No.
ANDRES COBO; AMY M. RULE,	)	
Defendants.	)	

COMPLAINT

NOW COMES the Plaintiff, FIRST MIDWEST BANK, as successor in interest to Waukegan Savings Bank f/k/a Waukegan Savings and Loan, SB ("Plaintiff"), by and through its attorneys, Klein, Daday, Aretos & O'Donoghue, LLC, and complains of the Defendants, ANDRES COBO and AMY M. RULE (collectively "Defendants"), as follows:

COUNT I – Breach of Contract

1. Plaintiff First Midwest Bank is a Financial Institution duly authorized to do business in Illinois.

2. Defendants were at all times material herein residents of Cook County, Illinois.

3. On or about November 20, 2006, Defendants executed a promissory note payable to Waukegan Savings and Loan, SB in the principal amount of $227,500.00, with interest (the "Note"). (See Exhibit A attached hereto and incorporated herein).

4. On or about November 20, 2006, Defendants executed a mortgage on the property

located at 625 S. 12th Avenue, Maywood, IL 60153 as security for the Note (the "Mortgage"). (See Exhibit B attached hereto and incorporated herein).

5. Pursuant to the Note and Mortgage, Waukegan Savings and Loan, SB advanced said sum to Defendants and Defendants were to make monthly payments to Waukegan Savings and Loan, SB in the amount of $1,400.76.

6. On or about September 26, 2007, Waukegan Savings and Loan, SB changed its name to Waukegan Savings Bank.

7. On or about August 3, 2012, Waukegan Savings Bank was placed into receivership by the Federal Deposit Insurance Corporation, and its assets were purchased and assumed by Plaintiff First Midwest Bank, including the Note and Mortgage. A copy of the Purchase and Assumption Agreement is attached hereto and incorporated herein as Exhibit C.

8. Defendants have defaulted on the Note by failing to make payments when due and therefore are in breach of the agreement.

9. Defendants failed to make the payment due on July 1, 2011 and each payment thereafter, causing Plaintiff to accelerate the Note according to its terms.

10. As of July 27, 2015, there is due and owing to Plaintiff the principal amount of $214,079.06; plus interest in the amount of $55,601.09 through July 27, 2015 with $37.1665035 per diem accruing thereafter; plus late charges in the amount of $3,151.80; plus appraisal fees of $270.00; plus an escrow deficiency of $5,736.18; plus attorney's fees, costs, and any other amounts due to Plaintiff pursuant to the Note and Mortgage.

11. Plaintiff has demanded payment of the amounts due under the Note and Mortgage, and Defendants have failed and refused to pay.

12. Plaintiff has fulfilled all of its obligations under the Note.

WHEREFORE, Plaintiff FIRST MIDWEST BANK, as successor in interest to Waukegan Savings Bank f/k/a Waukegan Savings and Loan, SB, respectfully requests that this Court enter judgment in its favor and against the Defendants, ANDRES COBO and AMY M. RULE, jointly and severally, in the amount of $214,079.06; plus interest in the amount of $55,601.09 through July 27, 2015 with $37.1665035 per diem accruing thereafter; plus late charges in the amount of $3,151.80; plus appraisal fees of $270.00; plus an escrow deficiency of $5,736.18; plus attorney's fees, costs, and any other amounts due to Plaintiff pursuant to the Note.

COUNT II – Unjust Enrichment (Pled in the Alternative)

Plaintiff pleads this Count II of its complaint as an alternative legal theory to Count I, *supra*, as follows:

1. Plaintiff First Midwest Bank is a Financial Institution duly authorized to do business in Illinois.

2. Defendants were at all times material herein residents of Cook County, Illinois.

3. On or about November 20, 2006, Waukegan Savings and Loan, SB gave Defendants $227,500.00.

4. Waukegan Savings and Loan, SB intended for the $227,500.00 (the "Loan") to be a loan to Defendants, not a gift.

5. Defendants used the Loan to refinance the real property commonly known as 625 S. 12th Avenue, Maywood, IL 60153.

6. Defendants made monthly payments to Waukegan Savings and Loan, SB to repay the Loan beginning on January 1, 2007.

7. On or about September 26, 2007, Waukegan Savings and Loan, SB changed its name to Waukegan Savings Bank.

8. Defendants made monthly payments to repay the Loan beginning January 1, 2007 and ending on June 1, 2011.

9. Defendants have not made any monthly payments to repay the Loan since the June 1, 2011 payment.

10. On or about August 3, 2012, Waukegan Savings Bank was placed into receivership by the Federal Deposit Insurance Corporation, and its assets were purchased and assumed by Plaintiff First Midwest Bank, including any claims that Waukegan Savings Bank had against Defendants. A copy of the Purchase and Assumption Agreement is attached hereto and incorporated herein as Exhibit C.

11. Defendants have been unjustly enriched by receiving the benefits of the Loan, while at the same time refusing to remit payment for the full amounts due and owing Plaintiff.

12. Defendants' unjust enrichment has been to Plaintiff's detriment.

13. Defendants continue to refuse to remit payment for the full amounts due and owing Plaintiff.

14. Defendants' retention of funds that are properly due and owing Plaintiff violates fundamental principles of justice, equity, and good conscience.

15. As of July 27, 2015, there remains due and owing to Plaintiff unpaid principal of $214,079.06.

WHEREFORE, Plaintiff FIRST MIDWEST BANK, as successor in interest to Waukegan Savings Bank f/k/a Waukegan Savings and Loan, SB, respectfully requests that this

Court enter judgment in its favor and against the Defendants, ANDRES COBO and AMY M. RULE, jointly and severally, in the amount of $214,079.06.

Respectfully Submitted,
First Midwest Bank, as successor in interest to Waukegan Savings Bank f/k/a Waukegan Savings and Loan, SB

By: _____
One of the Attorneys for Plaintiff

Stephen G. Daday
Aaron D. White, Jr.
Klein, Daday, Aretos & O'Donoghue, LLC
2550 W. Golf Rd., Ste. 250
Rolling Meadows, IL 60008
847-590-8700
Atty. No. 91091
kdaonoticcs@skdaglaw.com

[redacted]

NOTE

November 20, 2006 [Date] | Waukegan [City] | Illinois [State]

625 S. 12 Ave, Maywood, Illinois, 60153
[Property Address]

1. BORROWER'S PROMISE TO PAY

In return for a loan that I have received, I promise to pay U.S. $ 227,500.00 (this amount is called "Principal"), plus interest, to the order of the Lender. The Lender is

WAUKEGAN SAVINGS AND LOAN, SB

I will make all payments under this Note in the form of cash, check or money order.

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

2. INTEREST

Interest will be charged on unpaid principal until the full amount of Principal has been paid. I will pay interest at a yearly rate of 6.250 %.

The interest rate required by this Section 2 is the rate I will pay both before and after any default described in Section 6(B) of this Note.

3. PAYMENTS

(A) Time and Place of Payments

I will pay principal and interest by making a payment every month.

I will make my monthly payment on the 1st day of each month beginning on January 1, 2007. I will make these payments every month until I have paid all of the principal and interest and any other charges described below that I may owe under this Note. Each monthly payment will be applied as of its scheduled due date and will be applied to interest before Principal. If, on December 1, 2036, I still owe amounts under this Note, I will pay those amounts in full on that date, which is called the "Maturity Date."

I will make my monthly payments at

P.O. Box 19 1324 Golf Road
Waukegan, IL, 60079-0019

or at a different place if required by the Note Holder.

(B) Amount of Monthly Payments

My monthly payment will be in the amount of U.S. $ 1,400.76.

4. BORROWER'S RIGHT TO PREPAY

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

I may make a full Prepayment or partial Prepayments without paying a Prepayment charge. The Note Holder will use my Prepayments to reduce the amount of Principal that I owe under this Note. However, the Note Holder may apply my Prepayment to the accrued and unpaid interest on the Prepayment amount, before applying my Prepayment to reduce the Principal amount of the Note. If I make a partial Prepayment, there will be no changes in the due date or in the amount of my monthly payment unless the Note Holder agrees in writing to those changes.

EXHIBIT A

[redacted]

5. LOAN CHARGES

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

6. BORROWER'S FAILURE TO PAY AS REQUIRED

(A) Late Charge for Overdue Payments

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

(B) Default

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

(C) Notice of Default

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

(D) No Waiver By Note Holder

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

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

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

7. GIVING OF NOTICES

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

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

8. OBLIGATIONS OF PERSONS UNDER THIS NOTE

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

9. WAIVERS

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

10. UNIFORM SECURED NOTE

This Note is a uniform instrument with limited variations in some jurisdictions. In addition to the protections given to the Note Holder under this Note, a Mortgage, Deed of Trust, or Security Deed (the "Security Instrument"), dated the same date as this Note, protects the Note Holder from possible losses which might result if I do not keep the promises which I make in

[redacted]

BY SIGNING BELOW, Borrower accepts and agrees to the terms and covenants contained in pages 1 through 3 of this 1-4 Family Rider.

Andres Cobo (Seal) -Borrower
ANDRES COBO

Amy M. Rule by Andres Cobo (Seal) -Borrower
AMY M RULE BY ANDRES COBO
AS ATTORNEY-IN-FACT

=> Atty in law.

(Seal) -Borrower

(Seal) -Borrower

(Seal) -Borrower

(Seal) -Borrower

PAY TO THE ORDER OF
Waukegan Savings Bank
Mary L. Manning, VP
Mary L. Manning, Vice President

[redacted]

This instrument was prepared by:

Name:
WAUKEGAN SAVINGS AND LOAN, SB

Address:
P.O. BOX 19 1324 GOLF ROAD
WAUKEGAN IL, 60079-0019

8360690 2612616O

After Recording Return To:
WAUKEGAN SAVINGS AND LOAN, SB
ATTN: VALERIE MCCULLOUGH
P.O. BOX 19 1324 GOLF ROAD
WAUKEGAN IL, 60079-0019

0634101349

Doc#: 0634101349 Fee: $50.00
Eugene "Gene" Moore RHSP Fee:$10.00
Cook County Recorder of Deeds
Date: 12/07/2006 01:15 PM Pg: 1 of 14

[Space Above This Line For Recording Data]

MORTGAGE

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 November 20, 2006, together with all Riders to this document.
(B) "Borrower" is ANDRES COBO and AMY M RULE, MARRIED AND ALDO JORDAN UNMARRIED

Borrower is the mortgagor under this Security Instrument.
(C) "Lender" is WAUKEGAN SAVINGS AND LOAN, SB
Lender is a A Savings Bank organized and existing under the laws of State Of Illinios. Lender's address is
P.O. Box 19 1324 Golf Road, Waukegan, IL 60079-0019
. Lender is the mortgagee under this Security Instrument.
(D) "Note" means the promissory note signed by Borrower and dated November 20, 2006. The Note states that Borrower owes Lender Two Hundred Twenty Seven Thousand Five Hundred Dollars And No Cents Dollars (U.S. $227,500.00) plus interest. Borrower has promised to pay this debt in regular Periodic Payments and to pay the debt in full not later than December 1, 2036.
(E) "Property" means the property that is described below under the heading "Transfer of Rights in the Property."
(F) "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.
(G) "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
☐ Balloon Rider	☐ Planned Unit Development Rider	☐ Other(s) [specify]
☒ 1-4 Family Rider	☐ Biweekly Payment Rider	

(H) "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.

1498

BOX 333-CTI

EXHIBIT B

[redacted]

(I) "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.
(J) "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.
(K) "Escrow Items" means those items that are described in Section 3.
(L) "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.
(M) "Mortgage Insurance" means insurance protecting Lender against the nonpayment of, or default on, the Loan.
(N) "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.
(O) "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.
(P) "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 does hereby mortgage, grant and convey to Lender and Lender's successors and assigns the following described property located in the County [Type of Recording Jurisdiction] of Lake [Name of Recording Jurisdiction]:

LOT 624 IN MADISON STREET ADDITION, A SUBDIVISION OF PART OF SECTION 10, TOWNSHIP 39 NORTH, RANGE 12, EAST OF THE THIRD PRINCIPAL MERIDIAN, IN COOK COUNTY, ILLINOIS.

P.I.N. 15-10-425-013-0000

Pin Number 15-10-425-013-0000
which currently has the address of 625 S. 12 AVE, [Street]
MAYWOOD [City], Illinois, 60153 [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 mortgage, 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.

[redacted]

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

[redacted]

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

[redacted]

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.

[redacted]

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.

[redacted]

(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.

[redacted]

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

[redacted]

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 Section 22 of 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 unless as otherwise provided under Applicable Law. 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).

[redacted]

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

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

22. Acceleration; Remedies. Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument (but not prior to acceleration under Section 18 unless Applicable Law provides otherwise). The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument, foreclosure by judicial proceeding and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to assert in the foreclosure proceeding the non-existence of a default or any other defense of Borrower to acceleration and foreclosure. 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 foreclose this Security Instrument by judicial proceeding. 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.

23. Release. Upon payment of all sums secured by this Security Instrument, Lender shall release this Security Instrument. 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. Waiver of Homestead. In accordance with Illinois law, the Borrower hereby releases and waives all rights under and by virtue of the Illinois homestead exemption laws.

25. Placement of Collateral Protection Insurance. Unless Borrower provides Lender with evidence of the insurance coverage required by Borrower's agreement with Lender, Lender may purchase insurance at Borrower's expense to protect Lender's interests in Borrower's collateral. This insurance may, but need not, protect Borrower's interests. The coverage that Lender purchases may not pay any claim that Borrower makes or any claim that is made against Borrower in connection with the collateral. Borrower may later cancel any insurance purchased by Lender, but only after providing Lender with evidence that Borrower has obtained insurance as required by Borrower's and Lender's agreement. If Lender purchases insurance for the collateral, Borrower will be responsible for the costs of that insurance, including interest and any other charges Lender may impose in connection with the placement of the insurance, until the effective date of the cancellation or expiration of the insurance. The costs of the insurance may be added to Borrower's total outstanding balance or obligation. The costs of the insurance may be more than the cost of insurance Borrower may be able to obtain on its own.

[redacted]

BY SIGNING BELOW, Borrower accepts and agrees to the terms and covenants contained in pages 1 through 11 of this Security Instrument and in any Rider executed by Borrower and recorded with it.

Andres Cobo (Seal)
ANDRES COBO -Borrower

Amy M. Rule by Andres Cobo as Atty in law (Seal)
AMY M RULE BY ANDRES COBO AS ATTORNEY-IN-FACT -Borrower

Aldo Jordan (Seal)
ALDO JORDAN -Borrower

(Seal)
-Borrower

(Seal)
-Borrower

(Seal)
-Borrower

Witness:

Witness:

State of Illinois
County of LAKE

This instrument was acknowledged before me on November 20, 2006 (date) by ANDRES COBO and AMY M RULE AND ALDO JORDAN (name[s] of person[s]).

Maribel Torres
Notary Public

"OFFICIAL SEAL"
MARIBEL TORRES
Notary Public, State of Illinois
My Commission Expires 08/21/2010

1-4 FAMILY RIDER

[redacted]

(Assignment of Rents)

THIS 1-4 FAMILY RIDER is made this 20th day of November, 2006, and is incorporated into and shall be deemed to amend and supplement the Mortgage, Deed of Trust, or Security Deed (the "Security Instrument") of the same date given by the undersigned (the "Borrower") to secure Borrower's Note to

WAUKEGAN SAVINGS AND LOAN, SB

(the "Lender") of the same date and covering the Property described in the Security Instrument and located at:

625 S. 12 AVE, MAYWOOD, ILLINOIS, 60153

[Property Address]

1-4 FAMILY COVENANTS. In addition to the covenants and agreements made in the Security Instrument, Borrower and Lender further covenant and agree as follows:

A. ADDITIONAL PROPERTY SUBJECT TO THE SECURITY INSTRUMENT. In addition to the Property described in Security Instrument, the following items now or hereafter attached to the Property to the extent they are fixtures are added to the Property description, and shall also constitute the Property covered by the Security Instrument: building materials, appliances and goods of every nature whatsoever now or hereafter located in, on, or used, or intended to be used in connection with the Property, including, but not limited to, those for the purposes of supplying or distributing heating, cooling, electricity, gas, water, air and light, fire prevention and extinguishing apparatus, security and access control apparatus, plumbing, bath tubs, water heaters, water closets, sinks, ranges, stoves, refrigerators, dishwashers, disposals, washers, dryers, awnings, storm windows, storm doors, screens, blinds, shades, curtains and curtain rods, attached mirrors, cabinets, paneling and attached floor coverings, all of which, including replacements and additions thereto, shall be deemed to be and remain a part of the Property covered by the Security Instrument. All of the foregoing together with the Property described in the Security Instrument (or the leasehold estate if the Security Instrument is on a leasehold) are referred to in this 1-4 Family Rider and the Security Instrument as the "Property."

B. USE OF PROPERTY; COMPLIANCE WITH LAW. Borrower shall not seek, agree to or make a change in the use of the Property or its zoning classification, unless Lender has agreed in writing to the change. Borrower shall comply with all laws, ordinances, regulations and requirements of any governmental body applicable to the Property.

C. SUBORDINATE LIENS. Except as permitted by federal law, Borrower shall not allow any lien inferior to the Security Instrument to be perfected against the Property without Lender's prior written permission.

D. RENT LOSS INSURANCE. Borrower shall maintain insurance against rent loss in addition to the other hazards for which insurance is required by Section 5.

E. "BORROWER'S RIGHT TO REINSTATE" DELETED. Section 19 is deleted.

F. BORROWER'S OCCUPANCY. Unless Lender and Borrower otherwise agree in writing, Section 6 concerning Borrower's occupancy of the Property is deleted.

G. ASSIGNMENT OF LEASES. Upon Lender's request after default, Borrower shall assign to Lender all leases of the Property and all security deposits made in connection with leases

[redacted]

of the Property. Upon the assignment, Lender shall have the right to modify, extend or terminate the existing leases and to execute new leases, in Lender's sole discretion. As used in this paragraph G, the word "lease" shall mean "sublease" if the Security Instrument is on a leasehold.

H. ASSIGNMENT OF RENTS; APPOINTMENT OF RECEIVER; LENDER IN POSSESSION. Borrower absolutely and unconditionally assigns and transfers to Lender all the rents and revenues ("Rents") of the Property, regardless of to whom the Rents of the Property are payable. Borrower authorizes Lender or Lender's agents to collect the Rents, and agrees that each tenant of the Property shall pay the Rents to Lender or Lender's agents. However, Borrower shall receive the Rents until (i) Lender has given Borrower notice of default pursuant to Section 22 of the Security Instrument and (ii) Lender has given notice to the tenant(s) that the Rents are to be paid to Lender or Lender's agent. This assignment of Rents constitutes an absolute assignment and not an assignment for additional security only.

If Lender gives notice of default to Borrower: (i) all Rents received by Borrower shall be held by Borrower as trustee for the benefit of Lender only, to be applied to the sums secured by the Security Instrument; (ii) Lender shall be entitled to collect and receive all of the Rents of the Property; (iii) Borrower agrees that each tenant of the Property shall pay all Rents due and unpaid to Lender or Lender's agents upon Lender's written demand to the tenant; (iv) unless applicable law provides otherwise, all Rents collected by Lender or Lender's agents shall be applied first to the costs of taking control of and managing the Property and collecting the Rents, including, but not limited to, attorney's fees, receiver's fees, premiums on receiver's bonds, repair and maintenance costs, insurance premiums, taxes, assessments and other charges on the Property, and then to the sums secured by the Security Instrument; (v) Lender, Lender's agents or any judicially appointed receiver shall be liable to account for only those Rents actually received; and (vi) Lender shall be entitled to have a receiver appointed to take possession of and manage the Property and collect the Rents and profits derived from the Property without any showing as to the inadequacy of the Property as security.

If the Rents of the Property are not sufficient to cover the costs of taking control of and managing the Property and of collecting the Rents any funds expended by Lender for such purposes shall become indebtedness of Borrower to Lender secured by the Security Instrument pursuant to Section 9.

Borrower represents and warrants that Borrower has not executed any prior assignment of the Rents and has not performed, and will not perform, any act that would prevent Lender from exercising its rights under this paragraph.

Lender, or Lender's agents or a judicially appointed receiver, shall not be required to enter upon, take control of or maintain the Property before or after giving notice of default to Borrower. However, Lender, or Lender's agents or a judicially appointed receiver, may do so at any time when a default occurs. Any application of Rents shall not cure or waive any default or invalidate any other right or remedy of Lender. This assignment of Rents of the Property shall terminate when all the sums secured by the Security Instrument are paid in full.

I. CROSS-DEFAULT PROVISION. Borrower's default or breach under any note or agreement in which Lender has an interest shall be a breach under the Security Instrument and Lender may invoke any of the remedies permitted by the Security Instrument.

[redacted]

BY SIGNING BELOW, Borrower accepts and agrees to the terms and covenants contained in pages 1 through 3 of this 1-4 Family Rider.

Andres Cobo (Seal) -Borrower
ANDRES COBO

Amy M. Rule by Andres Cobo as Atty in law (Seal) -Borrower
AMY M RULE BY ANDRES COBO
AS ATTORNEY-IN-FACT

ALDO JORDAN (Seal) -Borrower
ALDO JORDAN

(Seal) -Borrower

(Seal) -Borrower

(Seal) -Borrower

PURCHASE AND ASSUMPTION AGREEMENT

WHOLE BANK

ALL DEPOSITS

AMONG

FEDERAL DEPOSIT INSURANCE CORPORATION
RECEIVER OF WAUKEGAN SAVINGS BANK
WAUKEGAN, ILLINOIS

FEDERAL DEPOSIT INSURANCE CORPORATION

and

FIRST MIDWEST BANK
ITASCA, ILLINOIS

DATED AS OF

AUGUST 3, 2012

PURCHASE AND ASSUMPTION AGREEMENT

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PURCHASE AND ASSUMPTION AGREEMENT

WHOLE BANK

ALL DEPOSITS

THIS AGREEMENT, made and entered into as of the 3rd day of **AUGUST, 2012**, by and among the **FEDERAL DEPOSIT INSURANCE CORPORATION, RECEIVER** of **WAUKEGAN SAVINGS BANK, WAUKEGAN SAVINGS BANK** (the "**Receiver**"), **FIRST MIDWEST BANK**, organized under the laws of the State of Illinois, and having its principal place of business in **ITASCA, ILLINOIS** (the "**Assuming Institution**"), and the **FEDERAL DEPOSIT INSURANCE CORPORATION**, organized under the laws of the United States of America and having its principal office in Washington, D.C., acting in its corporate capacity (the "**Corporation**").

RECITALS

A. On the Bank Closing Date, the Chartering Authority closed **WAUKEGAN SAVINGS BANK** (the "**Failed Bank**") pursuant to applicable law and the Corporation was appointed Receiver thereof.

B. The Assuming Institution desires to purchase certain assets and assume certain deposits and other liabilities of the Failed Bank on the terms and conditions set forth in this Agreement.

C. Pursuant to 12 U.S.C. § 1823(c)(2)(A), the Corporation may provide assistance to the Assuming Institution to facilitate the transactions contemplated by this Agreement, which assistance may include indemnification pursuant to Article XII.

D. The Board of Directors of the Corporation (the "**Board**") has determined to provide assistance to the Assuming Institution on the terms and subject to the conditions set forth in this Agreement.

E. The Board has determined pursuant to 12 U.S.C. § 1823(c)(4)(A) that such assistance is necessary to meet the obligation of the Corporation to provide insurance coverage for the insured deposits in the Failed Bank and is the least costly to the deposit insurance fund of all possible methods for meeting such obligation.

NOW, THEREFORE, in consideration of the mutual promises herein set forth and other valuable consideration, the parties hereto agree as follows:

AGREEMENT

ARTICLE I. GENERAL.

1.1. **Purpose**. The purpose of this Agreement is to set forth requirements regarding, among other things, the terms and conditions on which the Assuming Institution purchases certain assets and assumes certain liabilities of the Failed Bank.

1.2. **Shared-Loss Agreements**. If the Receiver and the Assuming Institution desire to share losses and recoveries on certain acquired assets, a Shared-Loss Agreement or Shared-Loss

Agreements are attached hereto as Exhibit 4.15A and/or Exhibit 4.15B, as applicable, and will govern the terms of any such shared-loss arrangement. To the extent that any inconsistencies may arise between the terms of this Agreement and a Shared-Loss Agreement with respect to the subject matter of a Shared-Loss Agreement, the terms of the applicable Shared-Loss Agreement shall control.

1.3. Defined Terms. Capitalized terms used in this Agreement shall have the meanings set forth or referenced in this Section 1.3. As used herein, words imparting the singular include the plural and vice versa.

"**Acquired Subsidiary**" or "**Acquired Subsidiaries**" means one or more, as applicable, Subsidiaries of the Failed Bank acquired pursuant to Section 3.1.

"**Affiliate**" of any Person means any director, officer, or employee of that Person and any other Person (i) who is directly or indirectly controlling, or controlled by, or under direct or indirect common control with, such Person, or (ii) who is an affiliate of such Person as the term "affiliate" is defined in § 2(k) of the Bank Holding Company Act of 1956, as amended, 12 U.S.C. § 1841.

"**Agreement**" means this Purchase and Assumption Agreement by and among the Assuming Institution, the Corporation and the Receiver, as amended or otherwise modified from time to time.

"**Assets**" means all assets of the Failed Bank purchased pursuant to Section 3.1. Assets owned by Subsidiaries of the Failed Bank are not "Assets" within the meaning of this definition by virtue of being owned by such Subsidiaries.

"**Assumed Deposits**" means Deposits.

"**Assuming Institution**" has the meaning set forth in the introduction to this Agreement.

"**Bank Closing Date**" means the close of business of the Failed Bank on the date on which the Chartering Authority closed such institution.

"**Bank Premises**" means the banking buildings, drive-in banking facilities, teller facilities (staffed or automated), storage and service facilities, structures connecting remote facilities to banking houses, land on which the foregoing are located and unimproved land, together with any adjacent parking, that are owned or leased by the Failed Bank and that are currently utilized, or are intended to be utilized in the future by the Failed Bank as shown on the Failed Bank Records as of the Bank Closing Date.

"**Bid Amount**" has the meaning set forth in Article VII.

"**Bid Form**" means Exhibit "A" to the bid instructions provided to the Assuming Institution.

"**Bid Valuation Date**" means *May 17, 2012*.

"**Board**" has the meaning set forth in Recital D.

"**Book Value**" means, with respect to any Asset and any Liability Assumed, the dollar amount thereof stated on the Failed Bank Records. The Book Value of any item shall be

determined as of the Bank Closing Date after adjustments made by the Receiver for differences in accounts, suspense items, unposted debits and credits and other similar adjustments or corrections and for setoffs, whether voluntary or involuntary. The Book Value of an Acquired Subsidiary shall be determined from the investment in subsidiary and related accounts on the "bank only" (unconsolidated) balance sheet of the Failed Bank based on the Equity Method of Accounting. Without limiting the generality of the foregoing, (i) the Book Value of a Liability Assumed shall include all accrued and unpaid interest thereon as of the Bank Closing Date, and (ii) the Book Value of a Loan shall reflect adjustments for earned interest, or unearned interest (as it relates to the "rule of 78s" or add-on-interest loans, as applicable), if any, as of the Bank Closing Date, adjustments for the portion of earned or unearned loan-related credit life and/or disability insurance premiums, if any, attributable to the Failed Bank as of the Bank Closing Date, and adjustments for Failed Bank Advances, if any, in each case as determined for financial reporting purposes. The Book Value of an Asset shall not include any adjustment for loan premiums, discounts or any related deferred income, fees or expenses, or general or specific reserves on the Failed Bank Records.

"**Business Day**" means a day other than a Saturday, Sunday, Federal legal holiday or legal holiday under the laws of the State where the Failed Bank is located, or a day on which the principal office of the Corporation is closed.

"**Chartering Authority**" means (i) with respect to a national bank, a Federal savings association or savings bank, the Office of the Comptroller of the Currency, (ii) with respect to a bank or savings institution chartered by a State, the agency of such State charged with primary responsibility for regulating and/or closing banks or savings institutions, as the case may be, (iii) the Corporation in accordance with 12 U.S.C. § 1821(c)(4), with regard to self appointment, or (iv) the appropriate Federal banking agency in accordance with 12 U.S.C. § 1821(c)(9).

"**Commitment**" means the unfunded portion of a line of credit or other commitment reflected on the books and records of the Failed Bank to make an extension of credit (or additional advances with respect to a Loan) that was legally binding on the Failed Bank as of the Bank Closing Date, other than extensions of credit pursuant to the credit card business and overdraft protection plans of the Failed Bank, if any.

"**Corporation**" has the meaning set forth in the introduction to this Agreement.

"**Counterclaim**" has the meaning set forth in Section 12.1(b).

"**Credit Documents**" means the agreements, instruments, certificates or other documents at any time evidencing or otherwise relating to, governing or executed in connection with or as security for, a Loan, including without limitation notes, bonds, loan agreements, letter of credit applications, lease financing contracts, banker's acceptances, drafts, interest protection agreements, currency exchange agreements, repurchase agreements, reverse repurchase agreements, guarantees, deeds of trust, mortgages, assignments, security agreements, pledges, subordination or priority agreements, lien priority agreements, undertakings, security instruments, certificates, documents, legal opinions, participation agreements and intercreditor agreements, and all amendments, modifications, renewals, extensions, rearrangements, and substitutions with respect to any of the foregoing.

"**Credit File**" means all Credit Documents and all other credit, collateral or insurance documents in the possession or custody of the Assuming Institution, or any of its Subsidiaries or

Affiliates, relating to an Asset or a Loan included in a Put Notice, or copies of any such documents.

"**Deposit**" means a deposit as defined in 12 U.S.C. § 1813(l), including without limitation, outstanding cashier's checks and other official checks and all uncollected items included in the depositors' balances and credited on the books and records of the Failed Bank; provided that the term "Deposit" shall not include all or any portion of those deposit balances which, in the discretion of the Receiver or the Corporation, (i) may be required to satisfy it for any liquidated or contingent liability of any depositor arising from an unauthorized or unlawful transaction, or (ii) may be needed to provide payment of any liability of any depositor to the Failed Bank or the Receiver, including the liability of any depositor as a director or officer of the Failed Bank, whether or not the amount of the liability is or can be determined as of the Bank Closing Date.

"**Deposit Secured Loan**" means a loan in which the only collateral securing the loan is Assumed Deposits or deposits at other insured depository institutions.

"**Electronically Stored Information**" means any system backup tapes, any electronic mail (whether on an exchange or other similar system), any data on personal computers and any data on server hard drives.

"**Eligible Individuals**" has the meaning set forth in Section 4.12.

"**Equity Method of Accounting**" means the carrying value of a bank's investment in a subsidiary is originally recorded at cost but is adjusted periodically to record as income the bank's proportionate share of the subsidiary's earnings or losses and decreased by the amount of cash dividends or similar distributions received from the subsidiary. Acquired Subsidiaries with negative equity will be restated to $1 pursuant to the Equity Method of Accounting.

"**ERISA**" has the meaning set forth in Section 4.12.

"**Failed Bank**" has the meaning set forth in Recital A.

"**Failed Bank Advances**" means the total sums paid by the Failed Bank to (i) protect its lien position, (ii) pay ad valorem taxes and hazard insurance and (iii) pay premiums for credit life insurance, accident and health insurance and vendor's single interest insurance.

"**Failed Bank Records**" means Records of the Failed Bank, including but not limited to, its corporate minutes, general ledger and subsidiary ledgers and schedules which support the general ledger balances.

"**Fair Market Value**" means:

(a) "Market Value" as defined in the regulation prescribing the standards for real estate appraisals used in federally related transactions, 12 C.F.R. § 323.2(g), and accordingly shall mean the most probable price which a property should bring in a competitive and open market under all conditions requisite to a fair sale, the buyer and seller each acting prudently and knowledgeably, and assuming the price is not affected by undue stimulus. Implicit in this definition is the assumed consummation of a sale as of a specified date and the passing of title from seller to buyer under conditions whereby:

(i) Buyer and seller are typically motivated;

(ii) Both parties are well informed or well advised, and acting in what they consider their own best interests;

(iii) A reasonable time is allowed for exposure in the open market;

(iv) Payment is made in terms of cash in U.S. dollars or in terms of financial arrangements comparable thereto; and

(v) The price represents the normal consideration for the property sold unaffected by special or creative financing or sales concessions granted by anyone associated with the sale;

as determined as of the Bank Closing Date by an appraiser chosen by the Receiver; any costs and fees associated with such determination shall be paid by the Receiver, and

with respect to Bank Premises (to the extent, if any, that Bank Premises are purchased utilizing this valuation method), shall be determined not later than sixty (60) days after the Bank Closing Date by an appraiser selected by the Receiver within seven (7) days after the Bank Closing Date, and with respect to Specialty Assets, shall be determined by an appraiser selected by the Receiver within seven (7) days after the Bank Closing Date; or

(b) with respect to property other than Bank Premises and Specialty Assets purchased utilizing this valuation method, the price therefor as established by the Receiver, as determined in accordance with clause (a) above.

"**FDIC Office Space**" has the meaning set forth in Section 4.11.

"**Final Legal Notice**" has the meaning set forth in Section 2.3(u).

"**Fixtures**" means those leasehold improvements, additions, alterations and installations constituting all or a part of Bank Premises (including without limitation automated teller machines that are affixed to a Bank Premises and may be not removed without causing structural damage to such Bank Premises) and which were acquired, added, built, installed or purchased at the expense of the Failed Bank, regardless of the holder of legal title thereto as of the Bank Closing Date.

"**Furniture and Equipment**" means the furniture and equipment (other than Safe Deposit Boxes, Personal Computers, Owned Data Management Equipment, Specialty Assets and motor vehicles), leased or owned by the Failed Bank and reflected on the Failed Bank Records as of the Bank Closing Date and located on or at Bank Premises, including without limitation automated teller machines (to the extent they are not Fixtures), carpeting, furniture, office machinery, shelving, office supplies, telephone, surveillance and security systems, ancillary equipment and artwork. Furniture and equipment located at a storage facility not adjacent to a Bank Premises are excluded from this definition.

"**GSE**" means a government sponsored enterprise.

"**Indemnitees**" means, except as provided in Section 12.1(b)(xi), (i) the Assuming Institution, (ii) the Subsidiaries and Affiliates of the Assuming Institution other than any Subsidiaries or Affiliates of the Failed Bank that are or become Subsidiaries or Affiliates of the Assuming Institution and (iii) the directors, officers, employees and agents of the Assuming Institution and its Subsidiaries and Affiliates who are not also present or former directors,

officers, employees or agents of the Failed Bank or of any Subsidiary or Affiliate of the Failed Bank.

"**Information Package**" means the most recent compilation of financial and other data with respect to the Failed Bank, including any amendments or supplements thereto, provided to the Assuming Institution by the Corporation on the web site used by the Corporation to market the Failed Bank to potential acquirers.

"**Initial Payment**" means the payment made pursuant to Article VII (based on the best information available as of the Bank Closing Date), the amount of which shall be either (i) if the Bid Amount is positive, the aggregate Book Value of the Liabilities Assumed minus the sum of the aggregate purchase price of the Assets as determined pursuant to Section 3.2 and assets purchased (including any Bank Premises purchased via the Bid Form) and the positive Bid Amount, or (ii) if the Bid Amount is negative, the sum of the aggregate Book Value of the Liabilities Assumed and the negative Bid Amount minus the aggregate purchase price of the Assets and assets purchased (including any Bank Premises purchased via the Bid Form). The Initial Payment shall be payable by the Corporation to the Assuming Institution if (i) the Liabilities Assumed are greater than the sum of the positive Bid Amount and the Assets and any other assets purchased , or if (ii) the sum of the Liabilities Assumed and the negative Bid Amount are greater than the Assets and assets purchased. The Initial Payment shall be payable by the Assuming Institution to the Corporation if (i) the Liabilities Assumed are less than the sum of the positive Bid Amount and the Assets and assets purchased, or if (ii) the sum of the Liabilities Assumed and the negative Bid Amount is less than the Assets and assets purchased. Such Initial Payment shall be subject to adjustment as provided in Article VIII.

"**Leased Data Management Equipment**" means any equipment, computer hardware, computer software (and the lease or licensing agreements related thereto), computer networking equipment, printers, fax machines, copiers, document scanners, data tape systems, data tapes, DVDs, CDs, flash drives, telecommunications and check processing equipment and any other electronic storage media leased by the Failed Bank at Bank Closing which is, was, or could have been used by the Failed Bank in connection with data management activities.

"**Legal Balance**" means the amount of indebtedness legally owed by an Obligor with respect to a Loan, including principal and accrued and unpaid interest, late fees, attorneys' fees and expenses, taxes, insurance premiums, and similar charges, if any.

"**Liabilities Assumed**" has the meaning provided in Section 2.1.

"**Lien**" means any mortgage, lien, pledge, charge, assignment for security purposes, security interest or encumbrance of any kind with respect to an Asset, including any conditional sale agreement or capital lease or other title retention agreement relating to such Asset.

"**Loan**" or "**Loans**" means, individually or collectively, all of the following owed to or held by the Failed Bank as of the Bank Closing Date:

(a) loans (including loans which have been charged off the Failed Bank Records in whole or in part prior to and including the Bid Valuation Date), participation agreements, interests in participations, overdrafts of customers (including but not limited to overdrafts made pursuant to an overdraft protection plan or similar extensions of credit in connection with a deposit account), revolving commercial lines of credit, home equity lines of credit, Commitments, United States and/or State-guaranteed student loans and lease financing contracts;

(b) all Liens, rights (including rights of set-off), remedies, powers, privileges, demands, claims, priorities, equities and benefits owned or held by, or accruing or to accrue to or for the benefit of, the holder of the obligations or instruments referred to in clause (a) above, including but not limited to those arising under or based upon Credit Documents, casualty insurance policies and binders, standby letters of credit, mortgagee title insurance policies and binders, payment bonds and performance bonds at any time and from time to time existing with respect to any of the obligations or instruments referred to in clause (a) above; and

(c) all amendments, modifications, renewals, extensions, refinancings and refundings of or for any of the foregoing.

"**New Loan**" means a Loan made by the Failed Bank after the Bid Valuation Date that is not a continuation, amendment, modification, renewal, extension, refinancing, restructuring or refunding of or for any then-existing Loan.

"**Obligor**" means each Person liable for the full or partial payment or performance of any Loan, whether such Person is obligated directly, indirectly, primarily, secondarily, jointly or severally.

"**Other Real Estate**" means all interests in real estate (other than Bank Premises and Fixtures), including but not limited to mineral estates, leasehold rights, condominium and cooperative interests, easements, air rights, water rights, and development rights that are owned by the Failed Bank.

"**Owned Data Management Equipment**" means any equipment, computer hardware, computer software, computer networking equipment, printers, fax machines, copiers, document scanners, data tape systems, data tapes, DVDs, CDs, flash drives, telecommunications and check processing equipment and any other electronic storage media owned by the Failed Bank at Bank Closing which is, was, or could have been used by the Failed Bank in connection with data management activities.

"**Payment Date**" means the first Business Day after the Bank Closing Date.

"**Person**" means any individual, corporation, partnership, joint venture, association, limited liability company, limited liability partnership, joint-stock company, trust, unincorporated organization, or government or any agency or political subdivision thereof, excluding the Corporation.

"**Personal Computer(s)**" means computers based on a microprocessor generally designed to be used by one person at a time and which usually store informational data on that computer's internal hard drive or attached peripheral, and associated peripherals (such as keyboard, mouse, etc.). A personal computer can be found in various configurations such as laptops, net books, and desktops.

"**Primary Indemnitor**" means any Person (other than the Assuming Institution or any of its Affiliates) who is obligated to indemnify or insure, or otherwise make payments (including payments on account of claims made against) to or on behalf of any Person in connection with

the claims covered under Article XII, including without limitation any insurer issuing any directors and officers liability policy or any Person issuing a financial institution bond or banker's blanket bond.

"Pro Forma" means a balance sheet that reflects a reasonably accurate financial statement of the Failed Bank through the Bank Closing Date and serves as a basis for the opening entries of both the Assuming Institution and the Receiver.

"Proprietary Software" means computer software developed for and owned by the Failed Bank for its own purpose and use.

"Put Date" has the meaning set forth in Section 3.4(d).

"Put Notice" has the meaning set forth in Section 3.4(c).

"Qualified Beneficiaries" has the meaning set forth in Section 4.12.

"Qualified Financial Contract" means a qualified financial contract as defined in 12 U.S.C. § 1821(e)(8)(D).

"Record" means any document, microfiche, microfilm or Electronically Stored Information (including but not limited to magnetic tape, disc storage, card forms and printed copy) of the Failed Bank generated or maintained by the Failed Bank that is owned by or in the possession of the Receiver at the Bank Closing Date.

"Receiver" has the meaning set forth in the introduction to this Agreement.

"Related Liability" with respect to any Asset means any liability existing and reflected on the Failed Bank Records as of the Bank Closing Date for (i) indebtedness secured by mortgages, deeds of trust, chattel mortgages, security interests or other liens on or affecting such Asset, (ii) ad valorem taxes applicable to such Asset and (iii) any other obligation determined by the Receiver to be directly related to such Asset.

"Related Liability Amount" with respect to any Related Liability on the books of the Assuming Institution, means the amount of such Related Liability as stated on the Failed Bank Records of the Assuming Institution (as maintained in accordance with generally accepted accounting principles) as of the date as of which the Related Liability Amount is being determined. With respect to a liability that relates to more than one Asset, the amount of such Related Liability shall be allocated among such Assets for the purpose of determining the Related Liability Amount with respect to any one of such Assets.

Such allocation shall be made by specific allocation, where determinable, and otherwise shall be pro rata based upon the dollar amount of such Assets stated on the Failed Bank Records of the entity that owns such Asset.

"Repurchase Price" means, with respect to any Asset, first taking the Book Value of the Asset at the Bank Closing Date and either subtracting the pro rata Asset discount or adding the pro rata Asset premium, and subsequently adjusting that amount (i) for any advances and interest on such Asset after the Bank Closing Date, (ii) by subtracting the total amount received by the Assuming Institution for such Asset after the Bank Closing Date, regardless of how applied and (iii) by adding total disbursements of principal made by the Receiver not otherwise included in the Book Value. For New Loans, Deposit Secured Loans and overdrafts put back to the Receiver

under Section 3.4, the Repurchase Price shall not take into account the pro rata Asset discount or premium.

"Safe Deposit Boxes" means the safe deposit boxes of the Failed Bank, if any, including the removable safe deposit boxes and safe deposit stacks in the Failed Bank's vault(s), all rights and benefits under rental agreements with respect to such safe deposit boxes, and all keys and combinations thereto.

"Settlement Date" means the first Business Day immediately prior to the day which is three hundred sixty-five (365) days after the Bank Closing Date, or such other date prior thereto as may be agreed upon by the Receiver and the Assuming Institution. The Receiver, in its discretion, may extend the Settlement Date.

"Settlement Interest Rate" means, for the first calendar quarter or portion thereof during which interest accrues, the rate determined by the Receiver to be equal to the investment rate on twenty-six (26)-week United States Treasury Bills as published on the Bank Closing Date by the United States Treasury on the TreasuryDirect.gov website; provided, that if no such Investment Rate is published the week of the Bank Closing Date, the investment rate for such Treasury Bills most recently published by the United States Treasury on TreasuryDirect.gov prior to the Bank Closing Date shall be used. Thereafter, the rate shall be adjusted to the rate determined by the Receiver to be equal to the Investment Rate on such Treasury Bills in effect as of the first day of each succeeding calendar quarter during which interest accrues as published by the United States Treasury on the TreasuryDirect.gov website.

"Shared-Loss Agreements" means, if any, the Single Family Shared-Loss Agreement attached hereto as Exhibit 4.15A and, if any, the Commercial Shared-Loss Agreement, attached hereto as Exhibit 4.15B.

"Specialty Assets" means assets that have a greater value than more traditional furniture and equipment owned by the Failed Bank and reflected on the Failed Bank Records as of the Bank Closing Date and located on or at Bank Premises, including without limitation fine art and high end decorative art; classic and antique motor vehicles; rare books; rare coins; airplanes; boats; jewelry; collectible firearms; Indian or other cultural artifacts; sculptures; Proprietary Software; and any other items that typically cannot be appraised by a Furniture and Equipment appraiser. Specialty Assets does not include any repossessed collateral.

"Subsidiary" has the meaning set forth in § 3(w)(4) of the Federal Deposit Insurance Act, 12 U.S.C. § 1813(w)(4), as amended.

ARTICLE II. ASSUMPTION OF LIABILITIES.

2.1. Liabilities Assumed by Assuming Institution. The Assuming Institution expressly assumes at Book Value (subject to adjustment pursuant to Article VIII) and agrees to pay, perform and discharge, all of the following liabilities of the Failed Bank as of the Bank Closing Date, except as otherwise provided in this Agreement (such liabilities referred to as **"Liabilities Assumed"**):

(a) Assumed Deposits, except those Deposits specifically listed on Schedule 2.1(a); provided, that as to any Deposits of public money which are Assumed Deposits, the Assuming Institution agrees to properly secure such Deposits with such Assets as appropriate which, prior to the Bank Closing Date, were pledged as security by the Failed Bank,

or with assets of the Assuming Institution, if such securing Assets, if any, are insufficient to properly secure such Deposits;

(b) liabilities for indebtedness secured by mortgages, deeds of trust, chattel mortgages, security interests or other liens on or affecting any Assets, if any; provided, that the amount of any liability assumed pursuant to this Section 2.1(b) shall be limited to the market value of the Assets securing such liability as determined by the Receiver;

(c) all borrowings from, and obligations and indebtedness to, Federal Reserve Banks and Federal Home Loan Banks, if any, whether currently owed, or conditional or not yet matured, including but not limited to, if applicable, (i) advances, including principal, interest, and any prepayment fees, costs and expenses; (ii) letters of credit, including any reimbursement obligations; (iii) acquired member assets programs, including representations, warranties, credit enhancement obligations and servicing obligations; (iv) affordable housing programs, including retention agreements and other contracts and monitoring obligations; (v) swaps and other derivatives; and (vi) safekeeping and custody agreements, provided, that the assumption of any liability pursuant to this Section 2.1(c) shall be limited to the market value of the assets securing such liability as determined by the Receiver; and overdrafts, debit balances, service charges, reclamations and adjustments to accounts with the Federal Reserve Banks as reflected on the books and records of any such Federal Reserve Bank within ninety (90) days after the Bank Closing Date, if any;

(d) ad valorem taxes applicable to any Asset, if any; provided, that the assumption of any ad valorem taxes pursuant to this Section 2.1(d) shall be limited to an amount equal to the market value of the Asset to which such taxes apply as determined by the Receiver;

(e) liabilities, if any, for federal funds purchased, repurchase agreements and overdrafts in accounts maintained with other depository institutions (including any accrued and unpaid interest thereon computed to and including the Bank Closing Date); provided, that the assumption of any liability pursuant to this Section 2.1(e) shall be limited to the market value of the Assets securing such liability as determined by the Receiver;

(f) United States Treasury tax and loan note option accounts, if any;

(g) liabilities for any acceptance or commercial letter of credit provided, that the assumption of any liability pursuant to this Section 2.1(g) shall be limited to the market value of the Assets securing such liability as determined by the Receiver;

(h) liabilities for any "standby letters of credit" as defined in 12 C.F.R. § 337.2(a) issued on the behalf of any Obligor of a Loan acquired hereunder by the Assuming Institution, but excluding any other standby letters of credit;

(i) duties and obligations assumed pursuant to this Agreement including without limitation those relating to the Failed Bank's Records, credit card business, debit card business, stored value and gift card business, overdraft protection plans, safe deposit business, safekeeping business and trust business, if any;

(j) liabilities, if any, for Commitments;

(k) liabilities, if any, for amounts owed to any Acquired Subsidiary;

(l) liabilities, if any, with respect to Qualified Financial Contracts;

(m) liabilities, if any, under any contract pursuant to which loan servicing is provided to the Failed Bank by others; and,

(n) any deferred revenue, income or fees recorded on the general ledger of the Failed Bank as of the Bank Closing Date attributable to any business assumed pursuant to Section 4.2, 4.3, 4.4, or 4.5 of this Agreement, excluding any deferred income or revenue relative to FASB 91 – Loan Fees and Costs associated with originating or acquiring Loans and initial direct costs of leases.

2.2. Interest on Deposit Liabilities. The Assuming Institution agrees that, from and after the Bank Closing Date, it will accrue and pay interest on Assumed Deposits pursuant to Section 2.1 at a rate(s) it shall determine; provided, that for non-transaction Deposit liabilities such rate(s) shall not be less than the lowest rate offered by the Assuming Institution to its depositors for non-transaction deposit accounts. The Assuming Institution shall permit each depositor to withdraw, without penalty for early withdrawal, all or any portion of such depositor's Deposit, whether or not the Assuming Institution elects to pay interest in accordance with any deposit agreement formerly existing between the Failed Bank and such depositor; and further provided, that if such Deposit has been pledged to secure an obligation of the depositor or other party, any withdrawal thereof shall be subject to the terms of the agreement governing such pledge. The Assuming Institution shall give notice to such depositors as provided in Section 5.3 of the rate(s) of interest which it has determined to pay and of such withdrawal rights.

2.3. Unclaimed Deposits.

(a) Final Legal Notice. Fifteen (15) months following the Bank Closing Date, the Assuming Institution will provide the Receiver a listing of all deposit accounts, including the type of account, not claimed by the depositor. The Receiver will review the list and authorize the Assuming Institution to act on behalf of the Receiver to send a Final Legal Notice in a form substantially similar to Exhibit 2.3A (the "**Final Legal Notice**") to the owner(s) of the unclaimed deposits reminding them of the need to claim or arrange to continue their account(s) with the Assuming Institution. The Assuming Institution will send the Final Legal Notice to the depositors within thirty (30) days following notification of the Receiver's authorization. The Assuming Institution will prepare an Affidavit of Mailing in a form substantially similar to Exhibit 2.3B and will forward the Affidavit of Mailing to the Receiver after mailing out the Final Legal Notice to the owner(s) of unclaimed deposit accounts.

(b) Unclaimed Deposits. If, within eighteen (18) months after the Bank Closing Date, any depositor of the Failed Bank does not claim or arrange to continue such depositor's Assumed Deposits at the Assuming Institution, the Assuming Institution shall, within fifteen (15) Business Days after the end of such eighteen (18) month period, (i) refund to the Receiver the full amount of each such Deposit (without reduction for service charges), (ii) provide to the Receiver a schedule of all such refunded Deposits in such form as may be prescribed by the Receiver, and (iii) assign, transfer, convey, and deliver to the Receiver, all right, title and interest of the Assuming Institution in and to the Records previously transferred to the Assuming Institution and other records generated or maintained by the Assuming Institution pertaining to such Deposits. During such eighteen (18) month period, at the request of the Receiver, the Assuming Institution promptly shall provide to the Receiver schedules of unclaimed Deposits in such form as may be prescribed by the Receiver.

2.4. Employee Plans. Except as provided in Section 4.12, the Assuming Institution shall have no liabilities, obligations or responsibilities under the Failed Bank's health care, bonus, vacation, pension, profit sharing, deferred compensation, 401k or stock purchase plans or similar plans, if any, unless the Receiver and the Assuming Institution agree otherwise subsequent to the date of this Agreement.

ARTICLE III. PURCHASE OF ASSETS.

3.1. Assets Purchased by Assuming Institution. With the exception of certain assets expressly excluded in Sections 3.5 and 3.6 and, if applicable, listed on Schedule 3.5(l) the Assuming Institution hereby purchases from the Receiver, and the Receiver hereby sells, assigns, transfers, conveys and delivers to the Assuming Institution, all right, title and interest of the Receiver in and to all of the assets (real, personal and mixed, wherever located and however acquired) including all subsidiaries, joint ventures, partnerships and any and all other business combinations or arrangements, whether active, inactive, dissolved or terminated, of the Failed Bank whether or not reflected on the books of the Failed Bank as of the Bank Closing Date. Assets are purchased hereunder by the Assuming Institution subject to all liabilities for indebtedness collateralized by Liens affecting such Assets to the extent provided in Section 2.1.

3.2. Asset Purchase Price.

(a) Determination of Asset Purchase Price. All Assets and assets of the Failed Bank subject to an option to purchase by the Assuming Institution shall be purchased for the amount, or the amount resulting from the method specified for determining the amount, as specified on Schedule 3.2, except as otherwise may be provided herein. Any Asset, asset of the Failed Bank subject to an option to purchase or other asset purchased for which no purchase price is specified on Schedule 3.2 or otherwise herein shall be purchased at its Book Value. The purchase price for Acquired Subsidiaries shall be adjusted pursuant to Section 4.6(i)(iv), if applicable.

(b) Purchase Price for Securities. The purchase price for any security (other than the capital stock of any Acquired Subsidiary and Federal Home Loan Bank stock) purchased under Section 3.1 by the Assuming Institution shall consist of the market price (as defined below) of the security as of the Bank Closing Date, multiplied by the bank's ownership interest in the security (see Calculation of Purchase Price below) and shall include accrued interest, where applicable, as noted below.

(i) Definition of Market Price: The market price for any security shall be (i) the market price for that security quoted at the close of the trading day effective on the Bank Closing Date as published electronically by Bloomberg, L.P., or alternatively, at the discretion of the Receiver, by IDC/Financial Times (FT) Interactive Data; (ii) provided that if such market price is not available for such security, the Assuming Institution will submit a written purchase price bid for such security within three days of notification/bid request by the Receiver (unless a different time period is agreed to by the Assuming Institution and the Receiver) and the Receiver, in its sole and absolute discretion, will accept or reject each such purchase price bid; (iii) further provided that in the absence of an acceptable bid from the Assuming Institution, or in the event that a security is deemed essential to the Receiver as determined by the Receiver in its discretion (see Section 3.6 Retention or Repurchase of Assets Essential to the Receiver) such security shall not pass to the Assuming Institution and shall be deemed to be an excluded asset hereunder and listed on Schedule 3.5(l).

(ii) Calculation of Purchase Price. The bank's ownership interest in a security will be quantified one of two ways: (i) number of shares or other units, as applicable (in the case of equity securities) or (ii) par value or notational amount, as applicable (in the case of non-equity securities). As a result, the purchase price (except where determined pursuant to clause (ii) of the preceding paragraph) shall be calculated one of two ways, depending on whether or not the security is an equity security: (i) the purchase price for an equity security shall be calculated by multiplying the number of shares or other units by the applicable market price per unit; and (ii) the purchase price for a non-equity security shall be an amount equal to the applicable market price (expressed as a decimal), multiplied by the par value for such security (based on the payment factor most recently widely available). The purchase price also shall include accrued interest as calculated below (see Calculation of Accrued Interest), except to the extent the parties may otherwise expressly agree, pursuant to clause (ii) of the preceding paragraph. If the factor used to determine the par value of any security for purposes of calculating the purchase price, is not for the period in which the Bank Closing Date occurs, then the purchase price for that security shall be subject to adjustment post-closing based on a "cancel and correct" procedure. Under this procedure, after such current factor becomes publicly available, the Receiver will recalculate the purchase price utilizing the current factor and related interest rate, and will notify the Assuming Institution of any difference and of the applicable amount due from one party to the other. Such amount will then be paid as part of the settlement process pursuant to Article VIII.

(iii) Calculation of Accrued Interest for Securities: Accrued interest shall be calculated for a non-equity security by multiplying the interest rate (expressed as a decimal point) paid on the security as then most recently publicly available, by the most recent par value (or notational amount, as applicable) of that security, multiplied by the number of days from and including the first interest day of the accrual period in which the Bank Closing Date occurs, through the Bank Closing Date.

(c) Purchase Price for Qualified Financial Contracts. Qualified Financial Contracts shall be purchased at market value determined in accordance with the terms of Exhibit 3.2(c). Any costs associated with such valuation shall be shared equally by the Receiver and the Assuming Institution.

3.3. Manner of Conveyance; Limited Warranty; Nonrecourse; Etc. **THE CONVEYANCE OF ALL ASSETS, INCLUDING REAL AND PERSONAL PROPERTY INTERESTS, PURCHASED BY THE ASSUMING INSTITUTION UNDER THIS AGREEMENT SHALL BE MADE, AS NECESSARY, BY RECEIVER'S DEED OR RECEIVER'S BILL OF SALE, "*AS IS*", "WHERE IS", WITHOUT RECOURSE AND, EXCEPT AS OTHERWISE SPECIFICALLY PROVIDED IN THIS AGREEMENT, WITHOUT ANY WARRANTIES WHATSOEVER WITH RESPECT TO SUCH ASSETS, EXPRESS OR IMPLIED, WITH RESPECT TO TITLE, VALUE, COLLECTIBILITY, GENUINENESS, ENFORCEABILITY, DOCUMENTATION, CONDITION OR FREEDOM FROM LIENS OR ENCUMBRANCES (IN WHOLE OR IN PART), OR ANY OTHER MATTERS.**

3.4. Puts of Assets to the Receiver.

(a) Puts Within 30 Days After the Bank Closing Date. During the thirty (30)-day period following the Bank Closing Date and only during such period (which thirty (30)-day period may be extended in writing in the sole and absolute discretion of the Receiver for any Loan), in accordance with this Section 3.4, the Assuming Institution shall be entitled to require the Receiver to purchase any New Loans and any Deposit Secured Loan transferred to the Assuming Institution pursuant to Section 3.1 which is not fully secured by Assumed Deposits or deposits at other insured depository institutions due to either insufficient Assumed Deposit or deposit collateral or deficient documentation regarding such collateral; provided that with regard to any Deposit Secured Loan secured by an Assumed Deposit:

(i) no such purchase may be required until any Deposit setoff determination, whether voluntary or involuntary, has been made; and

(ii) the Assuming Institution shall be entitled to require the Receiver to purchase, within forty (40) days from Bank Closing Date, any remaining overdraft transferred to the Assuming Institution pursuant to Section 3.1 which existed on the thirtieth (30th) day following the Bank Closing Date and which was made after the Bid Valuation Date and not made pursuant to an overdraft protection plan or similar extension of credit.

Notwithstanding the foregoing, the Assuming Institution shall not have the right to require the Receiver to purchase any Loan if (i) the Obligor with respect to such Loan is an Acquired Subsidiary, or (ii) the Assuming Institution has:

(A) made any advance in accordance with the terms of a Commitment or otherwise with respect to such Loan;

(B) taken any action that increased the amount of a Related Liability with respect to such Loan over the amount of such liability immediately prior to the time of such action;

(C) created or permitted to be created any Lien on such Loan which secures indebtedness for money borrowed or which constitutes a conditional sales agreement, capital lease or other title retention agreement;

(D) entered into, agreed to make, grant or permit, or made, granted or permitted any modification or amendment to, any waiver or extension with respect to, or any renewal, refinancing or refunding of, such Loan or related Credit Documents or collateral, including, without limitation, any act or omission which diminished such collateral; or

(E) sold, assigned or transferred all or a portion of such Loan to a third party (whether with or without recourse).

(iii) The Assuming Institution shall transfer all such Assets to the Receiver without recourse, and shall indemnify the Receiver against any and all claims of any Person claiming by, through or under the Assuming Institution with respect to any such Asset, as provided in Section 12.4.

(b) Puts Prior to the Settlement Date. During the period from the Bank Closing Date to and including the Business Day immediately preceding the Settlement Date, the Assuming Institution shall be entitled to require the Receiver to purchase any Asset which the Assuming Institution can establish is evidenced by forged or stolen instruments as of the Bank Closing Date; provided that the Assuming Institution shall not have the right to require the Receiver to purchase any such Asset with respect to which the Assuming Institution has taken any action referred to in Section 3.4(a)(ii) with respect to such Asset. The Assuming Institution shall transfer all such Assets to the Receiver without recourse, and shall indemnify the Receiver against any and all claims of any Person claiming by, through or under the Assuming Institution with respect to any such Asset, as provided in Section 12.4.

(c) Notices to the Receiver. In the event that the Assuming Institution elects to require the Receiver to purchase one or more Assets, the Assuming Institution shall deliver to the Receiver a notice (a "Put Notice") which shall include:

(i) a list of all Assets that the Assuming Institution requires the Receiver to purchase;

(ii) a list of all Related Liabilities with respect to the Assets identified pursuant to (i) above; and

(iii) a statement of the estimated Repurchase Price of each Asset identified pursuant to (i) above as of the applicable Put Date.

Such notice shall be in the form prescribed by the Receiver or such other form to which the Receiver shall consent. As provided in Section 9.6, the Assuming Institution shall deliver to the Receiver such documents, Credit Files and such additional information relating to the subject matter of the Put Notice as the Receiver may request and shall provide to the Receiver full access to all other relevant books and Records.

(d) Purchase by Receiver. The Receiver shall purchase Assets that are specified in the Put Notice and shall assume Related Liabilities with respect to such Assets, and the transfer of such Assets and Related Liabilities shall be effective as of a date determined by the Receiver which date shall not be later than thirty (30) days after receipt by the Receiver of the Put Notice (the "Put Date").

(e) Purchase Price and Payment Date. Each Asset purchased by the Receiver pursuant to this Section 3.4 shall be purchased at a price equal to the Repurchase Price of such Asset less the Related Liability Amount applicable to such Asset, in each case determined as of the applicable Put Date. If the difference between such Repurchase Price and such Related Liability Amount is positive, then the Receiver shall pay to the Assuming Institution the amount of such difference; if the difference between such amounts is negative, then the Assuming Institution shall pay to the Receiver the amount of such difference. The Assuming Institution or the Receiver, as the case may be, shall pay the purchase price determined pursuant to this Section 3.4(e) not later than the twentieth (20th) Business Day following the applicable Put Date, together with interest on such amount at the Settlement Interest Rate for the period from and including such Put Date to and including the day preceding the date upon which payment is made.

(f) Servicing. The Assuming Institution shall administer and manage any Asset subject to purchase by the Receiver in accordance with usual and prudent banking standards and business practices until such time as such Asset is purchased by the Receiver.

(g) Reversals. In the event that the Receiver purchases an Asset (and assumes the Related Liability) that it is not required to purchase pursuant to this Section 3.4, the Assuming Institution shall repurchase such Asset (and assume such Related Liability) from the Receiver at a price computed so as to achieve the same economic result as would apply if the Receiver had never purchased such Asset pursuant to this Section 3.4.

3.5. Assets Not Purchased by Assuming Institution. The Assuming Institution does not purchase, acquire or assume, or (except as otherwise expressly provided in this Agreement) obtain an option to purchase, acquire or assume under this Agreement:

(a) any financial institution bonds, banker's blanket bonds, or public liability, fire, extended coverage insurance policy, bank owned life insurance or any other insurance policy of the Failed Bank, or premium refund, unearned premium derived from cancellation, or any proceeds payable with respect to any of the foregoing;

(b) any interest, right, action, claim, or judgment against (i) any officer, director, employee, accountant, attorney, or any other Person employed or retained by the Failed Bank or any Subsidiary of the Failed Bank on or prior to the Bank Closing Date arising out of any act or omission of such Person in such capacity, (ii) any underwriter of financial institution bonds, banker's blanket bonds or any other insurance policy of the Failed Bank, (iii) any shareholder or holding company of the Failed Bank, or (iv) any other Person whose action or inaction may be related to any loss (exclusive of any loss resulting from such Person's failure to pay on a Loan made by the Failed Bank) incurred by the Failed Bank; provided that for the purposes hereof, the acts, omissions or other events giving rise to any such claim shall have occurred on or before the Bank Closing Date, regardless of when any such claim is discovered and regardless of whether any such claim is made with respect to a financial institution bond, banker's blanket bond, or any other insurance policy of the Failed Bank in force as of the Bank Closing Date;

(c) prepaid regulatory assessments of the Failed Bank, if any;

(d) legal or equitable interests in tax receivables of the Failed Bank, if any, including any claims arising as a result of the Failed Bank having entered into any agreement or otherwise being joined with another Person with respect to the filing of tax returns or the payment of taxes;

(e) amounts reflected on the Failed Bank Records as of the Bank Closing Date as a general or specific loss reserve or contingency account, if any;

(f) leased or owned Bank Premises and leased or owned Fixtures, Proprietary Software, Furniture and Equipment located on leased or owned Bank Premises, and Specialty Assets located on leased or owned Bank Premises, if any; provided that the Assuming Institution does obtain an option under Sections 4.6, 4.7 or 4.8, as the case may be, with respect thereto;

(g) owned Bank Premises which the Receiver, in its discretion, determines may contain environmentally hazardous substances;

(h) any "goodwill," as such term is defined in the instructions to the report of condition prepared by banks examined by the Corporation in accordance with 12 C.F.R. § 304.3, and other intangibles (other than intellectual property);

(i) any criminal restitution or forfeiture orders issued in favor of the Failed Bank;

(j) any and all prepaid fees or any other income as shown on the books and Records of the Failed Bank, but not taken into income as of the Bank Closing Date, associated with a line of business of the Failed Bank which is not assumed pursuant to this Agreement;

(k) assets essential to the Receiver in accordance with Section 3.6;

(l) any banker's bank stock, and the securities listed on the attached Schedule 3.5(l);

(m) reserved;

(n) prepaid accounts associated with any contract or agreement that the Assuming Institution either does not directly assume pursuant to the terms of this Agreement nor has an option to assume under Section 4.8;

(o) except with respect to any Federal Home Loan Bank loans, any contract pursuant to which the Failed Bank provides loan servicing for others;

(p) all assets that were fully charged-off by the Failed Bank prior to the Bid Valuation Date, other than those assets that were secured by collateral that is an Asset purchased by the Assuming Institution under this Agreement;

(q) any Loan that was secured by collateral that is an asset retained by the Receiver under this Agreement; and

(r) all assets related to any plan of the Failed Bank described in Section 2.4 or any plan of the type described in Section 2.4 under which the Failed Bank has any liability, obligation or responsibility unless the Assuming Institution assumes liability, obligations or responsibilities under such plan subsequent to the date of this Agreement.

3.6. Retention or Repurchase of Assets Essential to Receiver.

(a) The Receiver may refuse to sell to the Assuming Institution, or the Assuming Institution agrees, at the request of the Receiver set forth in a written notice to the Assuming Institution, to sell, assign, transfer, convey, and deliver to the Receiver, all of the Assuming Institution's right, title and interest in and to, any Asset or asset essential to the Receiver as determined by the Receiver in its discretion (together with all Credit Documents evidencing or pertaining thereto), which may include any Asset or asset that the Receiver determines to be:

(i) made to an officer, director, or other Person engaging in the affairs of the Failed Bank, its Subsidiaries or Affiliates or any related entities of any of the foregoing;

(ii) the subject of any investigation relating to any claim with respect to any item described in Section 3.5(a) or (b), or the subject of, or potentially the subject of, any legal proceedings;

(iii) made to a Person who is an Obligor on a loan owned by the Receiver or the Corporation in its corporate capacity or its capacity as receiver of any institution;

(iv) secured by collateral which also secures any asset owned by the Receiver; or

(v) related to any asset of the Failed Bank not purchased by the Assuming Institution under this Article III or any liability of the Failed Bank not assumed by the Assuming Institution under Article II.

(vi) Each such Asset or asset purchased by the Receiver shall be purchased at a price equal to the Repurchase Price thereof less the Related Liability Amount with respect to any Related Liabilities related to such Asset or asset, in each case determined as of the date of the notice provided by the Receiver pursuant to Section 3.6(a). The Receiver shall pay the Assuming Institution not later than the twentieth (20th) Business Day following receipt of related Credit Documents and Credit Files together with interest on such amount at the Settlement Interest Rate for the period from and including the date of receipt of such documents to and including the day preceding the day on which payment is made. The Assuming Institution agrees to administer and manage each such Asset or asset in accordance with usual and prudent banking standards and business practices until each such Asset or asset is purchased by the Receiver. All transfers with respect to Asset or assets under this Section 3.6 shall be made as provided in Section 9.6. The Assuming Institution shall transfer all such Assets or assets and Related Liabilities to the Receiver without recourse, and shall indemnify the Receiver against any and all claims of any Person claiming by, through or under the Assuming Institution with respect to any such Asset or asset, as provided in Section 12.4.

3.7. Receiver's Offer to Sell Withheld Loans. For the period of thirty (30) days commencing the day after the Bank Closing Date, the Receiver may sell, in its sole and absolute discretion, and the Assuming Institution, may purchase, in its sole and absolute discretion, any Loans initially withheld from sale to the Assuming Institution pursuant to Sections 3.5 or 3.6 of this Agreement. Loans sold under this section will, at the sole and absolute discretion of the Receiver, be treated as if initially sold under Section 3.1 of this Agreement, or sold pursuant to the standard loan sale agreement utilized by the Receiver for the sale of loan pools. If sold under Section 3.1 of this Agreement, the purchase price for such Loan shall be the Book Value as of the Bank Closing Date, adjusted (i) for any advances and interest on such Loan after the Bank Closing Date, (ii) by subtracting the total amount received by the Assuming Institution for such Loan after the Bank Closing Date, and (iii) by adding total disbursements of principal made by the Receiver and not otherwise included in the Book Value. The sale will be subject to all relevant terms of this Agreement except that the Loans purchased pursuant to this Section 3.7 shall not be included in the calculation of the pro rata Asset discount or pro rata Asset premium utilized for the repurchase of other Assets. No Loan purchased pursuant to this Section 3.7 shall be a Shared-Loss Loan pursuant to the Shared-Loss Agreements unless (i) it is cross-collateralized with a Shared-Loss Loan purchased pursuant to this Agreement and (ii) it otherwise meets the definition of Shared-Loss Loan in the applicable Shared-Loss Agreement.

Payment for Loans sold under this Section 3.7 will be handled through the settlement process pursuant to Article VIII. Loans sold pursuant to the standard loan sale agreement shall be governed by and paid for in accordance with that document.

ARTICLE IV. ASSUMPTION OF CERTAIN DUTIES AND OBLIGATIONS.

4.1. Continuation of Banking Business. For the period commencing on the first banking Business Day after the Bank Closing Date and ending on the first anniversary of the Bank Closing Date, the Assuming Institution will provide full service banking in the trade area of the Failed Bank. Thereafter, the Assuming Institution may cease providing such banking services in the trade area of the Failed Bank, provided the Assuming Institution has received all necessary regulatory approvals, including the approval of the Receiver and, if applicable, the Corporation. At the option of the Assuming Institution, such banking services may be provided at any or all of the Bank Premises, or at other premises within such trade area, as determined by the Receiver. The Assuming Institution may open, close or sell branches upon receipt of the necessary regulatory approvals, provided that the Assuming Institution or its successors continue to provide banking services in the trade area during the period specified in this Section 4.1. The Assuming Institution will pay to the Receiver, upon the sale of a branch or branches within the year following the date of this Agreement, fifty percent (50%) of any franchise premium in excess of the franchise premium paid by the Assuming Institution with respect to such branch or branches.

4.2. Credit Card Business. The Assuming Institution agrees to honor and perform, from and after the Bank Closing Date, all duties and obligations with respect to the Failed Bank's credit card business (including issuer or merchant acquirer) debit card business, stored value and gift card business, and/or processing related to credit cards, if any, and assumes all extensions of credit or balances outstanding as of the Bank Closing Date with respect to these lines of business. The obligations undertaken pursuant to this Section do not include loyalty, reward, affinity, or other similar programs related to the credit and debit card businesses.

4.3. Safe Deposit Business. The Assuming Institution assumes and agrees to discharge, from and after the Bank Closing Date, in the usual course of conducting a banking business, the duties and obligations of the Failed Bank with respect to all Safe Deposit Boxes, if any, of the Failed Bank and to maintain all of the necessary facilities for the use of such boxes by the renters thereof during the period for which such boxes have been rented and the rent therefor paid to the Failed Bank, subject to the provisions of the rental agreements between the Failed Bank and the respective renters of such boxes; provided, that the Assuming Institution may relocate the Safe Deposit Boxes of the Failed Bank to any office of the Assuming Institution located in the trade area of the branch of the Failed Bank in which such Safe Deposit Boxes were located, as determined by the Receiver. The Safe Deposit Boxes shall be located and maintained in such trade area for a minimum of one year from the Bank Closing Date.

4.4. Safekeeping Business. The Receiver transfers, conveys and delivers to the Assuming Institution and the Assuming Institution accepts all securities and other items, if any, held by the Failed Bank in safekeeping for its customers as of the Bank Closing Date. The Assuming Institution assumes and agrees to honor and discharge, from and after the Bank Closing Date, the duties and obligations of the Failed Bank with respect to such securities and items held in safekeeping. The Assuming Institution shall provide to the Receiver written verification of all assets held by the Failed Bank for safekeeping within sixty (60) days after the Bank Closing Date. The assets held for safekeeping by the Failed Bank shall be held and

maintained by the Assuming Institution in the trade area of the Failed Bank for a minimum of one year from the Bank Closing Date. At the option of the Assuming Institution, the safekeeping business may be provided at any or all of the Bank Premises, or at other premises within such trade area, as determined by the Receiver. The Assuming Institution shall be entitled to all rights and benefits which accrue after the Bank Closing Date with respect to securities and other items held in safekeeping.

4.5. Trust Business.

(a) Assuming Institution as Successor. The Assuming Institution shall, without further transfer, substitution, act or deed, to the full extent permitted by law, succeed to the rights, obligations, properties, assets, investments, deposits, agreements, and trusts of the Failed Bank under trusts, executorships, administrations, guardianships, and agencies, and other fiduciary or representative capacities, all to the same extent as though the Assuming Institution had assumed the same from the Failed Bank prior to the Bank Closing Date; provided, that any liability based on the misfeasance, malfeasance or nonfeasance of the Failed Bank, its directors, officers, employees or agents with respect to the trust business is not assumed hereunder.

(b) Wills and Appointments. The Assuming Institution shall, to the full extent permitted by law, succeed to, and be entitled to take and execute, the appointment to all executorships, trusteeships, guardianships and other fiduciary or representative capacities to which the Failed Bank is or may be named in wills, whenever probated, or to which the Failed Bank is or may be named or appointed by any other instrument.

(c) Transfer of Trust Business. In the event additional proceedings of any kind are necessary to accomplish the transfer of such trust business, the Assuming Institution agrees that, at its own expense, it will take whatever action is necessary to accomplish such transfer. The Receiver agrees to use reasonable efforts to assist the Assuming Institution in accomplishing such transfer.

(d) Verification of Assets. The Assuming Institution shall provide to the Receiver written verification of the assets held in connection with the Failed Bank's trust business within sixty (60) days after the Bank Closing Date.

4.6. Bank Premises.

(a) Option to Purchase. Subject to Section 3.5, the Receiver hereby grants to the Assuming Institution an exclusive option for the period of thirty (30) days commencing the day after the Bank Closing Date with respect to Bank Premises for which the Assuming Institution declined its option to purchase at a fixed price as shown on the Bid Form, and for a period of ninety (90) days commencing the day after the Bank Closing Date with respect to all other owned Bank Premises to purchase any or all owned Bank Premises, including all Fixtures, Furniture and Equipment located on the Bank Premises. The Assuming Institution shall give written notice to the Receiver within the option period of its election to purchase or not to purchase any of the owned Bank Premises. Any purchase of such premises shall be effective as of the date of the Bank Closing Date and such purchase shall be consummated as soon as practicable thereafter, and in no event later than the Settlement Date.

(b) Option to Lease. The Receiver hereby grants to the Assuming Institution an exclusive option for the period of ninety (90) days commencing the day after the Bank

Closing Date to cause the Receiver to assign to the Assuming Institution any or all leases for leased Bank Premises, if any, which have been continuously occupied by the Assuming Institution from the Bank Closing Date to the date it elects to accept an assignment of the leases with respect thereto to the extent such leases can be assigned; provided that the exercise of this option with respect to any lease must be as to all premises or other property subject to the lease. To the extent the lease payments provided for in any assigned lease are minimal in relation to the current market rate, and the value of that difference is not otherwise reflected in the purchase of the associated Fixtures, the Assuming Institution agrees to pay the Receiver the Fair Market Value of the Receiver's interest in any such assigned lease. The Assuming Institution shall give notice to the Receiver within the option period of its election to accept or not to accept an assignment of any or all leases (or enter into new leases in lieu thereof). The Assuming Institution agrees to assume all leases assigned (or enter into new leases in lieu thereof) pursuant to this Section 4.6.

(c) Facilitation. The Receiver agrees to facilitate the assumption, assignment or sublease of leases or the negotiation of new leases by the Assuming Institution; provided that neither the Receiver nor the Corporation shall be obligated to engage in litigation, make payments to the Assuming Institution or to any third party in connection with facilitating any such assumption, assignment, sublease or negotiation or commit to any other obligations to third parties.

(d) Occupancy. The Assuming Institution shall give the Receiver fifteen (15) days prior written notice of its intention to vacate prior to vacating any leased Bank Premises with respect to which the Assuming Institution has not exercised the option provided in Section 4.6(b). Any such notice shall be deemed to terminate the Assuming Institution's option with respect to such leased Bank Premises.

(e) Occupancy Costs.

(i) The Assuming Institution agrees to pay to the Receiver, or to appropriate third parties at the direction of the Receiver, during and for the period of any occupancy by it of (x) owned Bank Premises the market rental value, as determined by the appraiser selected in accordance with the definition of Fair Market Value, and all operating costs, and (y) leased Bank Premises, all operating costs with respect thereto and to comply with all relevant terms of applicable leases entered into by the Failed Bank, including without limitation the timely payment of all rent. Operating costs include, without limitation all taxes, fees, charges, maintenance, utilities, insurance and assessments, to the extent not included in the rental value or rent. If the Assuming Institution elects to purchase any owned Bank Premises in accordance with Section 4.6(a), the amount of any rent paid (and taxes paid to the Receiver which have not been paid to the taxing authority and for which the Assuming Institution assumes liability) by the Assuming Institution with respect thereto shall be applied as an offset against the purchase price thereof.

(ii) The Assuming Institution agrees during the period of occupancy by it of owned or leased Bank Premises, to pay to the Receiver rent for the use of all owned or leased Furniture and Equipment and all owned or leased Fixtures located on such Bank Premises for the period of such occupancy. Rent for such property owned by the Failed Bank shall be the market rental value thereof, as determined by the Receiver within sixty (60) days after the Bank Closing Date. Rent for such leased property shall be

an amount equal to any and all rent and other amounts which the Receiver incurs or accrues as an obligation or is obligated to pay for such period of occupancy pursuant to all leases and contracts with respect to such property. If the Assuming Institution purchases any owned Furniture and Equipment or owned Fixtures in accordance with Section 4.6(f) or 4.6(h), the amount of any rents paid by the Assuming Institution with respect thereto shall be applied as an offset against the purchase price thereof.

(f) Certain Requirements as to Fixtures, Furniture and Equipment and Certain Specialty Assets. If the Assuming Institution purchases owned Bank Premises (including any Bank Premise(s) purchased at the fixed price shown on the Bid Form) or accepts an assignment of the lease (or enters into a sublease or a new lease in lieu thereof) for leased Bank Premises as provided in Section 4.6(a) or 4.6(b), or if the Assuming Institution does not exercise such option but within twelve (12) months following the Bank Closing Date obtains the right to occupy all or any portion of such premises (whether by assignment, lease, sublease, purchase or otherwise), other than in accordance with Section 4.6(a) or 4.6(b), the Assuming Institution shall (i) effective as of the Bank Closing Date, purchase from the Receiver all Fixtures, Furniture and Equipment, and all Specialty Assets with an appraised value as determined in accordance with Section 4.6(j) of less than $10,000, owned by the Failed Bank at Fair Market Value and located on such portion as of the Bank Closing Date, (ii) accept an assignment or a sublease of the leases or negotiate new leases for all Fixtures, Furniture and Equipment leased by the Failed Bank and located on such portion, and (iii) if applicable, accept an assignment or a sublease of any ground lease or negotiate a new ground lease with respect to any land on which such portion of Bank Premises are located; provided that the Receiver shall not have disposed of such Fixtures, Furniture and Equipment or repudiated the leases referred to in clause (ii) or (iii).

(g) Vacating Premises.

(i) If the Assuming Institution elects not to purchase any owned Bank Premises, the notice of such election in accordance with Section 4.6(a) shall specify the date upon which the Assuming Institution's occupancy of such premises shall terminate, which date shall not be later than one hundred eighty (180) days after Bank Closing Date. The Assuming Institution shall be responsible for promptly relinquishing and releasing to the Receiver such premises and the Fixtures, Furniture and Equipment located thereon which existed at the time of the Bank Closing Date, in the same condition as at the Bank Closing Date and at the premises where they were inventoried at the Bank Closing Date, normal wear and tear excepted. Any of the aforementioned which is missing will be charged to the Assuming Institution at the item's Fair Market Value as determined in accordance with this Agreement. By occupying any such premises after the expiration of such one hundred eighty (180)-day period, the Assuming Institution shall, at the Receiver's option, (x) be deemed to have agreed to purchase such Bank Premises, and to assume all leases, obligations and liabilities with respect to leased Furniture and Equipment and leased Fixtures located thereon and any ground lease with respect to the land on which such premises are located, and (y) be required to purchase all Fixtures, Furniture and Equipment owned by the Failed Bank and located on such premises as of the Bank Closing Date.

(ii) If the Assuming Institution elects not to accept an assignment of the lease or sublease any leased Bank Premises, the notice of such election in accordance

with Section 4.6(b) shall specify the date upon which the Assuming Institution's occupancy of such leased Bank Premises shall terminate, which date shall not be later than one hundred eighty (180) days after Bank Closing Date. Upon vacating such premises, the Assuming Institution shall be liable for relinquishing and releasing to the Receiver such premises and the Fixtures and the Furniture and Equipment located thereon which existed at the time of the Bank Closing Date, in the same condition as at the Bank Closing Date, and at the premises where they were inventoried at Bank closing, normal wear and tear excepted. Any of the aforementioned which is missing will be charged to the Assuming Institution at the item's Fair Market Value as determined in accordance with this Agreement. By failing to provide notice of its intention to vacate such premises prior to the expiration of the option period specified in Section 4.6(b), or by occupying such premises after the one hundred eighty (180)-day period specified above in this Section 4.6(g)(ii), the Assuming Institution shall, at the Receiver's option, (x) be deemed to have assumed all leases, obligations and liabilities with respect to such premises (including any ground lease with respect to the land on which premises are located), and leased Furniture and Equipment and leased Fixtures located thereon in accordance with this Section 4.6 (unless the Receiver previously repudiated any such lease), and (y) be required to purchase all Fixtures, Furniture and Equipment owned by the Failed Bank at Fair Market Value and located on such premises as of the Bank Closing Date.

(h) Furniture and Equipment and Certain Other Equipment. The Receiver hereby grants to the Assuming Institution an option to purchase all Furniture and Equipment owned by the Failed Bank at Fair Market Value and located at any leased or owned Bank Premises that the Assuming Institution elects to vacate or which it could have, but did not occupy, pursuant to this Section 4.6; provided that, the Assuming Institution shall give the Receiver notice of its election to purchase such property at the time it gives notice of its intention to vacate such Bank Premises or within ten (10) days after the Bank Closing Date for Bank Premises it could have, but did not, occupy.

(i) Option to Put Bank Premises and Related Fixtures, Furniture and Equipment.

(i) For a period of ninety (90) days following the Bank Closing Date, the Assuming Institution shall be entitled to require the Receiver to purchase any Bank Premises that is owned, directly or indirectly, by an Acquired Subsidiary and the purchase price paid by the Receiver shall be the Fair Market Value of the Bank Premises.

(ii) If the Assuming Institution elects to require the Receiver to purchase any Bank Premises that is owned, directly or indirectly, by an Acquired Subsidiary, the Assuming Institution shall also have the option, exercisable within the same ninety (90) day time period, to require the Receiver to purchase any Fixtures, Furniture and Equipment that is owned, directly or indirectly, by an Acquired Subsidiary which is located on such Bank Premises and was utilized by the Failed Bank for banking purposes. The purchase price paid by the Receiver shall be the Fair Market Value of the Fixtures, Furniture and Equipment purchased.

(iii) In the event the Assuming Institution elects to exercise its options under this Section 4.6(i), the Assuming Institution shall pay to the Receiver occupancy costs in accordance with Section 4.6(e) and shall vacate the Bank Premises in accordance with Section 4.6(g)(i).

(iv) Regardless of whether the Assuming Institution exercises any of its options under this Section 4.6(i), the purchase price for the Acquired Subsidiary shall be adjusted by the difference between the Fair Market Value of the Bank Premises and Fixtures, Furniture and Equipment utilized by the Failed Bank for banking purposes and their respective Book Value as reflected of the books and records of the Acquired Subsidiary. Such adjustment shall be made in accordance with Article VIII of this Agreement.

(j) Option to Purchase Specialty Assets. The Receiver hereby grants to the Assuming Institution an exclusive option for the period of thirty (30) days commencing the day after the Receiver provides the Assuming Institution the appropriate appraisal to purchase at Fair Market Value all, some or none of the Specialty Assets.

(k) Data Removal. The Assuming Institution shall, prior to returning any automated teller machine to Receiver and unless otherwise requested by the Receiver, (i) remove all data from that automated teller machine and (ii) provide a written statement to the Receiver that all data has been removed in a manner that renders it unrecoverable.

4.7. Agreement with Respect to Leased Data Management Equipment.

(a) Option. The Receiver hereby grants to the Assuming Institution an exclusive option for the period of ninety (90) days commencing the day after Bank Closing to accept an assignment from the Receiver of all Leased Data Management Equipment.

(b) Notices Regarding Leased Data Management Equipment. The Assuming Institution shall (i) give written notice to the Receiver within the option period specified in Section 4.7(a) of its intent to accept or decline an assignment or sublease of all Leased Data Management Equipment and promptly accept an assignment or sublease of such Leased Data Management Equipment, and (ii) give written notice to the appropriate lessor(s) that it has accepted an assignment or sublease of any such Leased Data Management Equipment that is subject to a lease.

(c) Facilitation by Receiver. The Receiver agrees to facilitate the assignment or sublease of Leased Data Management Equipment or the negotiation of new leases or license agreements by the Assuming Institution; provided, that neither the Receiver nor the Corporation shall be obligated to engage in litigation, make payments to the Assuming Institution or to any third party in connection with facilitating any such assumption, assignment, sublease or negotiation or commit to any other obligations to third parties.

(d) Operating Costs. The Assuming Institution agrees, during its period of use of any Leased Data Management Equipment, to pay to the Receiver or to appropriate third parties at the direction of the Receiver all operating costs with respect thereto and to comply with all relevant terms of any existing Leased Data Management Equipment leases entered into by the Failed Bank, including without limitation the timely payment of all rent, taxes, fees, charges, maintenance, utilities, insurance and assessments.

(e) Assuming Institution's Obligation. The Assuming Institution shall, not later than fifty (50) days after giving the notice provided in Section 4.7(b), (i) relinquish and release to the Receiver or, at the direction of the Receiver, to a third party, all Leased Data Management Equipment, in the same condition as at Bank Closing, normal wear and tear

excepted, or (ii) accept an assignment or a sublease of any existing Leased Data Management lease or negotiate a new lease or license agreement under this Section 4.7 with respect to Leased Data Management Equipment.

(f) Data Removal. The Assuming Institution shall, prior to returning any Leased Data Management Equipment, and unless otherwise requested by the Receiver, (i) remove all data from the Leased Data Management Equipment and (ii) provide a written statement to the Receiver that all data has been removed in a manner that renders it unrecoverable.

4.8. Certain Existing Agreements.

(a) Assumption of Agreements. Subject to the provisions of Section 4.8(b), with respect to agreements existing as of the Bank Closing Date which provide for the rendering of services by or to the Failed Bank, within ninety (90) days after the Bank Closing Date, the Assuming Institution shall give the Receiver written notice specifying whether it elects to assume or not to assume each such agreement. Except as may be otherwise provided in this Article IV, the Assuming Institution agrees to comply with the terms of each such agreement for a period commencing on the day after the Bank Closing Date and ending on: (i) in the case of an agreement that provides for the rendering of services by the Failed Bank, the date which is ninety (90) days after the Bank Closing Date, and (ii) in the case of an agreement that provides for the rendering of services to the Failed Bank, the date which is thirty (30) days after the Assuming Institution has given notice to the Receiver of its election not to assume such agreement; provided that the Receiver can reasonably make such service agreements available to the Assuming Institution. The Assuming Institution shall be deemed by the Receiver to have assumed agreements for which no notification is timely given. The Receiver agrees to assign, transfer, convey and deliver to the Assuming Institution all right, title and interest of the Receiver, if any, in and to agreements the Assuming Institution assumes hereunder. In the event the Assuming Institution elects not to accept an assignment of any lease (or sublease) or negotiate a new lease for leased Bank Premises under Section 4.6 and does not otherwise occupy such premises, the provisions of this Section 4.8(a) shall not apply to service agreements related to such premises. The Assuming Institution agrees, during the period it has the use or benefit of any such agreement, promptly to pay to the Receiver or to appropriate third parties at the direction of the Receiver all operating costs with respect thereto and to comply with all relevant terms of such agreement.

(b) Excluded Agreements. The provisions of Section 4.8(a) regarding the Assuming Institution's election to assume or not assume certain agreements shall not apply to (i) agreements pursuant to which the Failed Bank provides loan servicing for others or loan servicing is provided to the Failed Bank by others, (ii) agreements maintained between the Failed Bank and MERSCORP, Inc., or its wholly owned subsidiary, Mortgage Electronic Registration Systems, Inc., (iii) agreements that are subject to Sections 4.1 through 4.7 and any insurance policy or bond referred to in Section 3.5(a) or other agreement specified in Section 3.5 and (iv) consulting, management or employment agreements, if any, between the Failed Bank and its employees or other Persons. Except as otherwise expressly set forth elsewhere in this Agreement, the Assuming Institution does not assume any liabilities or acquire any rights under any of the agreements described in this Section 4.8(b).

4.9. Informational Tax Reporting. The Assuming Institution agrees to perform all obligations of the Failed Bank with respect to Federal and State income tax informational

reporting related to (i) the Assets and the Liabilities Assumed, (ii) deposit accounts that were closed and loans that were paid off or collateral obtained with respect thereto prior to the Bank Closing Date, (iii) miscellaneous payments made to vendors of the Failed Bank, and (iv) any other asset or liability of the Failed Bank, including, without limitation, loans not purchased and Deposits not assumed by the Assuming Institution, as may be required by the Receiver.

4.10. Insurance.

(a) Assuming Institution to Insure. The Assuming Institution will obtain and maintain insurance coverage acceptable to the Receiver (including public liability, fire, and extended coverage insurance) naming the Assuming Institution as the insured and the Receiver as additional insured, effective from and after the Bank Closing Date, with respect to all (i) Bank Premises that the Assuming Institution occupies, and (ii) Fixtures, Furniture and Equipment and Leased Data Management Equipment located on those Bank Premises.

(b) Rights of Receiver. If the Assuming Institution at any time from or after Bank Closing Date fails to (i) obtain or maintain any of the insurance policies required by Section 4.10(a), (ii) pay any premium in whole or in part related to those insurance policies, or (iii) provide evidence of those insurance policies acceptable to the Receiver, then the Receiver may in its sole and absolute discretion, without notice, and without waiving or releasing any obligation or liability of the Assuming Institution, obtain and maintain insurance policies, pay insurance premiums and take any other actions with respect to the insurance coverage as the Receiver deem advisable. The Assuming Institution will reimburse the Receiver for all sums disbursed in connection with this Section 4.10(b).

4.11. Office Space for Receiver and Corporation; Certain Payments.

(a) FDIC Office Space. For the period commencing on the day following the Bank Closing Date and ending on the one hundred eightieth (180th) day following the Bank Closing Date, the Assuming Institution will provide to the Receiver and the Corporation, without charge, adequate and suitable office space (including parking facilities and vault space), furniture, equipment (including photocopying and telecopying machines), email accounts, network access and technology resources (such as shared drive), and utilities (including local telephone service and fax machines) (collectively, "**FDIC Office Space**") at the Bank Premises occupied by the Assuming Institution for the Receiver and the Corporation to use in the discharge of their respective functions with respect to the Failed Bank.

(b) Receiver's Right to Extend. Upon written notice by the Receiver or the Corporation, for the period commencing on the one hundred eighty first (181st) day following the Bank Closing Date and ending no later than the three hundred and sixty-fifth (365th) day following the Bank Closing Date, the Assuming Institution will continue to provide to the Receiver and the Corporation FDIC Office Space at the Bank Premises. During the period from the 181st day following the Bank Closing Date until the day the FDIC and the Corporation vacate FDIC Office Space, the Receiver and the Corporation will pay to the Assuming Institution their respective pro rata share (based on square footage occupied) of (A) the market rental value for the applicable owned Bank Premises or (B) actual rent paid for applicable leased Bank Premises.

(c) Receiver's Relocation Right. If the Receiver or the Corporation determine that the space provided by the Assuming Institution is inadequate or unsuitable, the

Receiver and the Corporation may relocate to other quarters having adequate and suitable FDIC Office Space and the costs of relocation shall be borne by the Assuming Institution and any rental and utility costs for the balance of the period of occupancy by the Receiver and the Corporation shall paid in accordance with 4.11(b).

(d) Expenditures. The Assuming Institution will pay such bills and invoices on behalf of the Receiver and the Corporation as the Receiver or the Corporation may direct for the period beginning on the date of the Bank Closing Date and ending on Settlement Date. The Assuming Institution shall submit its requests for reimbursement of such expenditures pursuant to Article VIII of this Agreement.

4.12. Continuation of Group Health Plan Coverage for Former Employees of the Failed Bank.

(a) Continuation Coverage. The Assuming Institution agrees to assist the Receiver, as provided in this Section 4.12, in offering individuals who were employees or former employees of the Failed Bank, or any of its Subsidiaries, and who, immediately prior to the Bank Closing Date, were receiving, or were eligible to receive, health insurance coverage or health insurance continuation coverage from the Failed Bank ("**Eligible Individuals**"), the opportunity to obtain health insurance coverage in the Corporation's Federal Insurance Administration Continuation Coverage Plan which provides for health insurance continuation coverage to such Eligible Individuals and other persons who are qualified beneficiaries of the Failed Bank ("**Qualified Beneficiaries**") as defined in the Employee Retirement Income Security Act of 1974, as amended ("**ERISA**") § 607, 29 U.S.C. § 1167. The Assuming Institution shall consult with the Receiver and not later than five (5) Business Days after the Bank Closing Date shall provide written notice to the Receiver of the number (if available), identity (if available) and addresses (if available) of the Eligible Individuals who are Qualified Beneficiaries of the Failed Bank and for whom a "qualifying event" (as defined in ERISA § 603, 29 U.S.C. § 1163) has occurred and with respect to whom the Failed Bank's obligations under Part 6 of Subtitle B of Title I of ERISA, 29 U.S.C. §§ 1161-1169 have not been satisfied in full, and such other information as the Receiver may reasonably require. The Receiver shall cooperate with the Assuming Institution in order to permit it to prepare such notice and shall provide to the Assuming Institution such data in its possession as may be reasonably required for purposes of preparing such notice.

(b) Qualified Beneficiaries; Expenses. The Assuming Institution shall take such further action to assist the Receiver in offering the Eligible Individuals who are Qualified Beneficiaries of the Failed Bank the opportunity to obtain health insurance coverage in the Corporation's Federal Insurance Administration Continuation Coverage Plan as the Receiver may direct. All expenses incurred and paid by the Assuming Institution (i) in connection with the obligations of the Assuming Institution under this Section 4.12, and (ii) in providing health insurance continuation coverage to any Eligible Individuals who are hired by the Assuming Institution and such employees' Qualified Beneficiaries shall be borne by the Assuming Institution.

(c) Failed Bank Employees. Unless otherwise agreed by the Receiver and the Assuming Institution, the Assuming Institution shall be responsible for all salaries and payroll costs, including benefits, for all Failed Bank employees from the time of the closing of the Failed Bank until the Assuming Institution makes a final determination as to whether such employee is to be retained by the Assuming Institution. The Assuming Institution shall offer to

the Failed Bank employees it retains employment benefits comparable to those the Assuming Institution, offers its current employees. In the event the Receiver utilizes the services of any Failed Bank employee, the Receiver shall reimburse the Assuming Institution for such cost through the settlement process described in Article VIII.

(d) No Third Party Beneficiaries. This Section 4.12 is for the sole and exclusive benefit of the parties to this Agreement, and for the benefit of no other Person (including any former employee of the Failed Bank or any Subsidiary thereof, Eligible Individual or Qualified Beneficiary of such former employee). Nothing in this Section 4.12 is intended by the parties, or shall be construed, to give any Person (including any former employee of the Failed Bank or any Subsidiary thereof, Eligible Individual or Qualified Beneficiary of such former employee) other than the Corporation, the Receiver and the Assuming Institution, any legal or equitable right, remedy or claim under or with respect to the provisions of this Section 4.12.

4.13. Interim Asset Servicing. At any time after the Bank Closing Date, the Receiver may establish on its books an asset pool(s) and may transfer to such asset pool(s) (by means of accounting entries on the books of the Receiver) all or any assets and liabilities of the Failed Bank which are not acquired by the Assuming Institution, including, without limitation, wholly unfunded Commitments and assets and liabilities which may be acquired, funded or originated by the Receiver subsequent to the Bank Closing Date. The Receiver may remove assets (and liabilities) from or add assets (and liabilities) to such pool(s) at any time in its discretion. At the option of the Receiver, the Assuming Institution agrees to service, administer and collect such pool assets in accordance with, and for the term set forth in, Exhibit 4.13.

4.14. Reserved.

4.15. Loss Sharing. This Agreement includes no Shared-Loss Agreements.

ARTICLE V. DUTIES WITH RESPECT TO DEPOSITORS OF THE FAILED BANK.

5.1. Payment of Checks, Drafts, Orders and Deposits. Subject to Section 9.5, the Assuming Institution agrees to pay all properly drawn checks, drafts, withdrawal orders and Assumed Deposits of depositors of the Failed Bank presented for payment, whether drawn on the check or draft forms provided by the Failed Bank or by the Assuming Institution, to the extent that the Deposit balances to the credit of the respective makers or drawers assumed by the Assuming Institution under this Agreement are sufficient to permit the payment thereof, and in all other respects to discharge, in the usual course of conducting a banking business, the duties and obligations of the Failed Bank with respect to the Deposit balances due and owing to the depositors of the Failed Bank assumed by the Assuming Institution under this Agreement.

5.2. Certain Agreements Related to Deposits. Except as may be modified pursuant to Section 2.2, the Assuming Institution agrees to honor the terms and conditions of any written escrow or loan servicing agreement or other similar agreement relating to a Deposit liability assumed by the Assuming Institution pursuant to this Agreement.

5.3. Notice to Depositors.

(a) Assumption of Deposits. Within seven (7) days after the Bank Closing Date, the Assuming Institution shall give notice by mail to each depositor of the Failed Bank of (i) the assumption of the Deposit liabilities of the Failed Bank, and (ii) the procedures to claim

Deposits (the Receiver shall provide item (ii) to Assuming Institution). The Assuming Institution shall also publish notice of its assumption of the Deposit liabilities of the Failed Bank in a newspaper of general circulation in the county or counties in which the Failed Bank was located.

(b) Notice to Depositors. Within seven (7) days after the Bank Closing Date, the Assuming Institution shall give notices by mail to each depositor of the Failed Bank, as required under Section 2.2.

(c) Fee Schedule. If the Assuming Institution proposes to charge fees different from those fees formerly charged by the Failed Bank, the Assuming Institution shall include its fee schedule in its mailed notice.

(d) Approval of Notices and Publications. The Assuming Institution shall obtain approval of all notices and publications required by this Section 5.3 from counsel for the Receiver prior to mailing or publication.

(e) Validation. To validate the notice requirements outlined in Section 5.3, the Assuming Institution shall provide the Receiver (i) an Affidavit of Publication to meet the publication requirements outlined in Section 5.3(a) and (ii) the Assuming Institution will prepare an Affidavit of Mailing in a form substantially similar to Exhibit 2.3B after mailing the seven (7) day Notice to Depositors as required under Section 5.3(b).

ARTICLE VI. RECORDS.

6.1. Transfer of Records. In accordance with Sections 2.1 and 3.1, the Receiver assigns, transfers, conveys and delivers to the Assuming Institution, whether located on Bank Premises occupied or not occupied by the Assuming Institution or at any other location, any and all Records of the Failed Bank, other than the following:

(a) Records pertaining to former employees of the Failed Bank who were no longer employed by the Failed Bank as of the Bank Closing Date and Records pertaining to employees of the Failed Bank who were employed by the Failed Bank as of the Bank Closing Date and for whom the Receiver is unable to obtain a waiver to release such Records to the Assuming Institution;

(b) Records pertaining to (i) any asset or liability of the Failed Bank retained by the Receiver, or (ii) any asset of the Failed Bank acquired by the Receiver pursuant to this Agreement; and

(c) any other Records as determined by the Receiver.

6.2. Transfer of Assigned Records. The Receiver shall transfer to the Assuming Institution all Records described in Section 6.1 as soon as practicable on or after the date of this Agreement.

6.3. Preservation of Records.

(a) Assuming Institution Records Retention. The Assuming Institution agrees that it will preserve and maintain for the joint benefit of the Receiver, the Corporation and the Assuming Institution, all Records of which it has custody. The Assuming Institution shall have the primary responsibility to respond to subpoenas, discovery requests, and other

similar official inquiries and customer requests for lien releases with respect to the Records of which it has custody. With respect to its obligations under this Section 6.3 regarding Electronically Stored Information, the Assuming Institution will complete the Data Retention Catalog attached hereto as Schedule 6.3 and submit it to the Receiver within thirty (30) days following the Bank Closing Date.

(b) Destruction of Certain Records. With regard to all Records of which it has custody which are at least ten (10) years old as of the date of the appointment of the Receiver, the Assuming Institution agrees to request written permission to destroy such records by submitting a written request to destroy, specifying precisely which records are included in the request, to DRR-- Records Manager, CServiceFDICDAL@FDIC.gov.

(c) Destruction of Records After Six Years. With regard to all Records of which it has custody which have been maintained in the custody of the Assuming Institution after six (6) years from the date of the appointment of the Receiver, the Assuming Institution agrees to request written permission to destroy such records by submitting a written request to destroy, specifying precisely which records are included in the request, to DRR-- Records Manager, CServiceFDICDAL@FDIC.gov.

6.4. Access to Records; Copies. The Assuming Institution agrees to permit the Receiver and the Corporation access to all Records of which the Assuming Institution has custody, and to use, inspect, make extracts from or request copies of any such Records in the manner and to the extent requested, and to duplicate, in the discretion of the Receiver or the Corporation, any Record pertaining to Deposit account relationships; provided that in the event that the Failed Bank maintained one or more duplicate copies of such Records, the Assuming Institution hereby assigns, transfers, and conveys to the Corporation one such duplicate copy of each such Record without cost to the Corporation, and agrees to deliver to the Corporation all Records assigned and transferred to the Corporation under this Article VI as soon as practicable on or after the date of this Agreement. The party requesting a copy of any Record shall bear the cost (based on standard accepted industry charges to the extent applicable, as determined by the Receiver) for providing such duplicate Records. A copy of each Record requested shall be provided as soon as practicable by the party having custody thereof.

6.5. Right of Receiver or Corporation to Audit. The Receiver or the Corporation, their respective agents, contractors and employees, may (but are not required to) perform an audit to determine the Assuming Institution's compliance with this Agreement at any time, by providing not less than ten (10) Business Days prior notice. The scope and duration of any such audit shall be at the discretion of the Receiver or the Corporation, as the case may be. The Receiver or the Corporation, as the case may be, shall bear the expense of any such audit. In the event that any corrections are necessary as a result of such an audit, the Assuming Institution and the Receiver shall make such accounting adjustments, payments and withholdings as may be necessary to give retroactive effect to such corrections.

ARTICLE VII. BID; INTIAL PAYMENT.

The Assuming Institution has submitted to the Receiver a Deposit premium bid of 0.0% and an Asset (discount) bid of ($20,438,000.00) (the "Bid Amount"). The Deposit premium bid will be applied to the total of all Assumed Deposits except for brokered, CDARS®, and any market place or similar subscription services Deposits as reflected on Schedule 7. On the Payment Date, the Assuming Institution will pay to the Corporation, or the Corporation will

pay to the Assuming Institution, as the case may be, the Initial Payment, together with interest on such amount (if the Payment Date is not the day following the Bank Closing Date) from and including the day following the Bank Closing Date to and including the day preceding the Payment Date at the Settlement Interest Rate.

ARTICLE VIII. ADJUSTMENTS; SETTLEMENT PROCESS.

8.1. Pro Forma Statement. The Receiver, as soon as practicable after the Bank Closing Date, in accordance with the best information then available, shall provide to the Assuming Institution a Pro Forma statement reflecting any adjustments of such liabilities and assets as may be necessary. Such Pro Forma statement shall take into account, to the extent possible, (a) liabilities and assets of a nature similar to those contemplated by Section 2.1 or Section 3.1, respectively, which on the Bank Closing Date were carried in the Failed Bank's suspense accounts, (b) accruals as of the Bank Closing Date for all income related to the assets and business of the Failed Bank acquired by the Assuming Institution hereunder, whether or not such accruals were reflected on the Failed Bank Records in the normal course of its operations, and (c) adjustments to determine the Book Value of any investment in an Acquired Subsidiary and related accounts on the "bank only" (unconsolidated) balance sheet of the Failed Bank based on the Equity Method of Accounting, whether or not the Failed Bank used the Equity Method of Accounting for investments in subsidiaries, except that the resulting amount cannot be less than the Acquired Subsidiary's recorded equity as of the Bank Closing Date as reflected on the Failed Bank Records of the Acquired Subsidiary. Acquired Subsidiaries with negative equity will be restated to $1 pursuant to the Equity Method of Accounting. Any Asset purchased by the Assuming Institution or any asset of an Acquired Subsidiary purchased by the Assuming Institution pursuant to Section 3.1 which was partially or wholly charged off during the period beginning the day after the Bid Valuation Date to the date of the Bank Closing Date shall be deemed not to be charged off for the purposes of the Pro Forma statement, and the purchase price shall be determined pursuant to Section 3.2.

8.2. Correction of Errors and Omissions; Other Liabilities.

(a) Adjustments to Correct Errors. In the event any bookkeeping omissions or errors are discovered in preparing any Pro Forma statement or in completing the transfers and assumptions contemplated hereby, the parties hereto agree to correct such errors and omissions, it being understood that, as far as practicable, all adjustments will be made consistent with the judgments, methods, policies or accounting principles utilized by the Failed Bank in preparing and maintaining Failed Bank Records, except that adjustments made pursuant to this Section 8.2(a) are not intended to bring the Failed Bank Records into accordance with generally accepted accounting principles.

(b) Receiver's Rights Regarding Other Liabilities. If the Receiver discovers at any time subsequent to the date of this Agreement that any claim exists against the Failed Bank which is of such a nature that it would have been included in the liabilities assumed under Article II had the existence of such claim or the facts giving rise thereto been known as of the Bank Closing Date, the Receiver may, in its discretion, at any time, require that such claim be assumed by the Assuming Institution in a manner consistent with the intent of this Agreement. The Receiver will make appropriate adjustments to the Pro Forma statement provided by the Receiver to the Assuming Institution pursuant to Section 8.1 as may be necessary.

8.3. Payments. The Receiver agrees to cause to be paid to the Assuming Institution, or the Assuming Institution agrees to pay to the Receiver, as the case may be, on the Settlement Date, a payment in an amount which reflects net adjustments (including any costs, expenses and fees associated with determinations of value as provided in this Agreement) made pursuant to Section 8.1 or Section 8.2, plus interest as provided in Section 8.4. The Receiver and the Assuming Institution agree to effect on the Settlement Date any further transfer of assets to or assumption of liabilities or claims by the Assuming Institution as may be necessary in accordance with Section 8.1 or Section 8.2.

8.4. Interest. Any amounts paid under Section 8.3 or Section 8.5 shall bear interest for the period from and including the day following the Bank Closing Date to and including the day preceding the payment at the Settlement Interest Rate.

8.5. Subsequent Adjustments. In the event that the Assuming Institution or the Receiver discovers any errors or omissions as contemplated by Section 8.2 or any error with respect to the payment made under Section 8.3 after the Settlement Date, the Assuming Institution and the Receiver agree to promptly correct any such errors or omissions, make any payments and effect any transfers or assumptions as may be necessary to reflect any such correction plus interest as provided in Section 8.4.

ARTICLE IX. CONTINUING COOPERATION.

9.1. General Matters. The parties hereto will, in good faith and with their best efforts, cooperate with each other to carry out the transactions contemplated by this Agreement and to effect the purposes hereof.

9.2. Additional Title Documents. The Receiver, the Corporation and the Assuming Institution each shall, at any time, and from time to time, upon the request of any party hereto, execute and deliver such additional instruments and documents of conveyance as shall be reasonably necessary to vest in the appropriate party its full legal or equitable title in and to the property transferred pursuant to this Agreement or to be transferred in accordance herewith. The Assuming Institution shall prepare such instruments and documents of conveyance (in form and substance satisfactory to the Receiver) as shall be necessary to vest title to the Assets in the Assuming Institution. The Assuming Institution shall be responsible for recording such instruments and documents of conveyance at its own expense.

9.3. Claims and Suits.

(a) Defense and Settlement. The Receiver shall have the right, in its discretion, to (i) defend or settle any claim or suit against the Assuming Institution with respect to which the Receiver has indemnified the Assuming Institution in the same manner and to the same extent as provided in Article XII, and (ii) defend or settle any claim or suit against the Assuming Institution with respect to any Liability Assumed, which claim or suit may result in a loss to the Receiver arising out of or related to this Agreement, or which existed against the Failed Bank on or before the Bank Closing Date. The exercise by the Receiver of any rights under this Section 9.3(a) shall not release the Assuming Institution with respect to any of its obligations under this Agreement.

(b) Removal of Actions. In the event any action at law or in equity shall be instituted by any Person against the Receiver and the Corporation as codefendants with respect

to any asset of the Failed Bank retained or acquired pursuant to this Agreement by the Receiver, the Receiver agrees, at the request of the Corporation, to join with the Corporation in a petition to remove the action to the United States District Court for the proper district. The Receiver agrees to institute, with or without joinder of the Corporation as co-plaintiff, any action with respect to any such retained or acquired asset or any matter connected therewith whenever notice requiring such action shall be given by the Corporation to the Receiver.

9.4. Payment of Deposits. In the event any depositor does not accept the obligation of the Assuming Institution to pay any Deposit liability of the Failed Bank assumed by the Assuming Institution pursuant to this Agreement and asserts a claim against the Receiver for all or any portion of any such Deposit liability, the Assuming Institution agrees on demand to provide to the Receiver funds sufficient to pay such claim in an amount not in excess of the Deposit liability reflected on the books of the Assuming Institution at the time such claim is made. Upon payment by the Assuming Institution to the Receiver of such amount, the Assuming Institution shall be discharged from any further obligation under this Agreement to pay to any such depositor the amount of such Deposit liability paid to the Receiver.

9.5. Withheld Payments. At any time, the Receiver or the Corporation may, in its discretion, determine that all or any portion of any deposit balance assumed by the Assuming Institution pursuant to this Agreement does not constitute a "Deposit" (or otherwise, in its discretion, determine that it is the best interest of the Receiver or Corporation to withhold all or any portion of any deposit), and may direct the Assuming Institution to withhold payment of all or any portion of any such deposit balance. Upon such direction, the Assuming Institution agrees to hold such deposit and not to make any payment of such deposit balance to or on behalf of the depositor, or to itself, whether by way of transfer, set-off or otherwise. The Assuming Institution agrees to maintain the "withheld payment" status of any such deposit balance until directed in writing by the Receiver or the Corporation as to its disposition. At the direction of the Receiver or the Corporation, the Assuming Institution shall return all or any portion of such deposit balance to the Receiver or the Corporation, as appropriate, and thereupon the Assuming Institution shall be discharged from any further liability to such depositor with respect to such returned deposit balance. If such deposit balance has been paid to the depositor prior to a demand for return by the Corporation or the Receiver, and payment of such deposit balance had not been previously withheld pursuant to this Section 9.5, the Assuming Institution shall not be obligated to return such deposit balance to the Receiver or the Corporation. The Assuming Institution shall be obligated to reimburse the Corporation or the Receiver, as the case may be, for the amount of any deposit balance or portion thereof paid by the Assuming Institution in contravention of any previous direction to withhold payment of such deposit balance or return such deposit balance the payment of which was withheld pursuant to this Section 9.5.

9.6. Proceedings with Respect to Certain Assets and Liabilities.

(a) Cooperation by Assuming Institution. In connection with any investigation, proceeding or other matter with respect to any asset or liability of the Failed Bank retained by the Receiver, or any asset of the Failed Bank acquired by the Receiver pursuant to this Agreement, the Assuming Institution shall cooperate to the extent reasonably required by the Receiver.

(b) Access to Records. In addition to its obligations under Section 6.4, the Assuming Institution shall provide representatives of the Receiver access at reasonable times and locations without other limitation or qualification to (i) its directors, officers, employees

and agents and those of the Acquired Subsidiaries, and (ii) its books and Records, the books and Records of such Acquired Subsidiaries and all Credit Files, and copies thereof. Copies of books, Records and Credit Files shall be provided by the Assuming Institution as requested by the Receiver and the costs of duplication thereof shall be borne by the Receiver.

(c) Loan Documents. Not later than ten (10) days after the Put Notice pursuant to Section 3.4 or the date of the notice of transfer of any Loan by the Assuming Institution to the Receiver pursuant to Section 3.6, the Assuming Institution shall deliver to the Receiver such documents with respect to such Loan as the Receiver may request, including without limitation the following: (i) all related Credit Documents (other than certificates, notices and other ancillary documents), (ii) a certificate setting forth the principal amount on the date of the transfer and the amount of interest, fees and other charges then accrued and unpaid thereon, and any restrictions on transfer to which any such Loan is subject, and (iii) all Credit Files, and all documents, microfiche, microfilm and computer records (including but not limited to magnetic tape, disc storage, card forms and printed copy) maintained by, owned by, or in the possession of the Assuming Institution or any Affiliate of the Assuming Institution relating to the transferred Loan.

9.7. Information. The Assuming Institution promptly shall provide to the Corporation such other information, including financial statements and computations, relating to the performance of the provisions of this Agreement as the Corporation or the Receiver may request from time to time, and, at the request of the Receiver, make available employees of the Failed Bank employed or retained by the Assuming Institution to assist in preparation of the Pro Forma statement pursuant to Section 8.1.

9.8. Tax Ruling. The Assuming Institution shall not at any time, without the Corporation's prior consent, seek a private letter ruling or other determination from the Internal Revenue Service or otherwise seek to qualify for any special tax treatment or benefits associated with any payments made by the Receiver or Corporation pursuant to this Agreement.

ARTICLE X. CONDITION PRECEDENT.

The obligations of the parties to this Agreement are subject to the Receiver and the Corporation having received at or before the Bank Closing Date evidence reasonably satisfactory to each of any necessary approval, waiver, or other action by any governmental authority, the board of directors of the Assuming Institution, or other third party, with respect to this Agreement and the transactions contemplated hereby, the closing of the Failed Bank and the appointment of the Receiver, the chartering of the Assuming Institution, and any agreements, documents, matters or proceedings contemplated hereby or thereby.

ARTICLE XI. REPRESENTATIONS AND WARRANTIES OF THE ASSUMING INSTITUTION.

The Assuming Institution represents and warrants to the Corporation and the Receiver as follows:

11.1. Corporate Existence and Authority. The Assuming Institution (a) is duly organized, validly existing and in good standing under the laws of its Chartering Authority and has full power and authority to own and operate its properties and to conduct its business as now conducted by it, and (b) has full power and authority to execute and deliver this Agreement and

to perform its obligations hereunder. The Assuming Institution has taken all necessary corporate (or other applicable governance) action to authorize the execution, delivery and performance of this Agreement and the performance of the transactions contemplated hereby.

11.2. Third Party Consents. No governmental authority or other third party consents (including but not limited to approvals, licenses, registrations or declarations) are required in connection with the execution, delivery or performance by the Assuming Institution of this Agreement, other than such consents as have been duly obtained and are in full force and effect.

11.3. Execution and Enforceability. This Agreement has been duly executed and delivered by the Assuming Institution and when this Agreement has been duly authorized, executed and delivered by the Corporation and the Receiver, this Agreement will constitute the legal, valid and binding obligation of the Assuming Institution, enforceable in accordance with its terms.

11.4. Compliance with Law.

(a) No Violations. Neither the Assuming Institution nor any of its Subsidiaries is in violation of any statute, regulation, order, decision, judgment or decree of, or any restriction imposed by, the United States of America, any State, municipality or other political subdivision or any agency of any of the foregoing, or any court or other tribunal having jurisdiction over the Assuming Institution or any of its Subsidiaries or any assets of any such Person, or any foreign government or agency thereof having such jurisdiction, with respect to the conduct of the business of the Assuming Institution or of any of its Subsidiaries, or the ownership of the properties of the Assuming Institution or any of its Subsidiaries, which, either individually or in the aggregate with all other such violations, would materially and adversely affect the business, operations or condition (financial or otherwise) of the Assuming Institution or the ability of the Assuming Institution to perform, satisfy or observe any obligation or condition under this Agreement.

(b) No Conflict. Neither the execution and delivery nor the performance by the Assuming Institution of this Agreement will result in any violation by the Assuming Institution of, or be in conflict with, any provision of any applicable law or regulation, or any order, writ or decree of any court or governmental authority.

11.5. Insured or Guaranteed Loans. If any Loans being transferred pursuant to this Agreement are insured or guaranteed by any department or agency of any governmental unit, federal, state or local, Assuming Institution represents that Assuming Institution has been approved by such agency and is an approved lender or mortgagee, as appropriate, if such approval is required. The Assuming Institution further assumes full responsibility for determining whether or not such insurance or guarantees are in full force and effect on the date of this Agreement and with respect to those Loans whose insurance or guaranty is in full force and effect on the date of this Agreement, Assuming Institution assumes full responsibility for doing all things necessary to insure such insurance or guarantees remain in full force and effect. Assuming Institution agrees to assume all of the obligations under the contract(s) of insurance or guaranty and agrees to cooperate with the Receiver where necessary to complete forms required by the insuring or guaranteeing department or agency to effect or complete the transfer to Assuming Institution.

11.6. Representations Remain True. The Assuming Institution represents and warrants that it has executed and delivered to the Corporation a Purchaser Eligibility Certification and Confidentiality Agreement and that all information provided and representations made by or on behalf of the Assuming Institution in connection with this Agreement and the transactions contemplated hereby, including, but not limited to, the Purchaser Eligibility Certification and Confidentiality Agreement (which are affirmed and ratified hereby) are and remain true and correct in all material respects and do not fail to state any fact required to make the information contained therein not misleading.

11.7. No Reliance; Independent Advice. The Assuming Institution is not relying on the Receiver or the Corporation for any business, legal, tax, accounting, investment or other advice in connection with this Agreement and the Exhibits hereto and documents delivered in connection with the foregoing, and has had adequate opportunity to consult with advisors of its choice in connection therewith.

ARTICLE XII. INDEMNIFICATION.

12.1. Indemnification of Indemnitees. From and after the Bank Closing Date and subject to the limitations set forth in this Section 12.1 and Section 12.6 and compliance by the Indemnitees with Section 12.2, the Receiver agrees to indemnify and hold harmless the Indemnitees against any and all costs, losses, liabilities, expenses (including attorneys' fees) incurred prior to the assumption of defense by the Receiver pursuant to Section 12.2(d), judgments, fines and amounts paid in settlement actually and reasonably incurred in connection with claims against any Indemnitee based on liabilities of the Failed Bank that are not assumed by the Assuming Institution pursuant to this Agreement or subsequent to the execution hereof by the Assuming Institution or any Subsidiary or Affiliate of the Assuming Institution for which indemnification is provided:

(a) hereunder in this Section 12.1, subject to certain exclusions as provided in Section 12.1(b):

(i) claims based on the rights of any shareholder or former shareholder as such of (A) the Failed Bank, or (B) any Subsidiary or Affiliate of the Failed Bank;

(ii) claims based on the rights of any creditor as such of the Failed Bank, or any creditor as such of any director, officer, employee or agent of the Failed Bank, with respect to any indebtedness or other obligation of the Failed Bank arising prior to the Bank Closing Date;

(iii) claims based on the rights of any present or former director, officer, employee or agent as such of the Failed Bank or of any Subsidiary or Affiliate of the Failed Bank;

(iv) claims based on any action or inaction prior to the Bank Closing Date of the Failed Bank, its directors, officers, employees or agents as such, or any Subsidiary or Affiliate of the Failed Bank, or the directors, officers, employees or agents as such of such Subsidiary or Affiliate;

(v) claims based on any malfeasance, misfeasance or nonfeasance of the Failed Bank, its directors, officers, employees or agents with respect to the trust business of the Failed Bank, if any;

(vi) claims based on any failure or alleged failure (not in violation of law) by the Assuming Institution to continue to perform any service or activity previously performed by the Failed Bank which the Assuming Institution is not required to perform pursuant to this Agreement or which arise under any contract to which the Failed Bank was a party which the Assuming Institution elected not to assume in accordance with this Agreement and which neither the Assuming Institution nor any Subsidiary or Affiliate of the Assuming Institution has assumed subsequent to the execution hereof;

(vii) claims arising from any action or inaction of any Indemnitee, including for purposes of this Section 12.1(a)(vii) the former officers or employees of the Failed Bank or of any Subsidiary or Affiliate of the Failed Bank that is taken upon the specific written direction of the Corporation or the Receiver, other than any action or inaction taken in a manner constituting bad faith, gross negligence or willful misconduct; and

(viii) claims based on the rights of any depositor of the Failed Bank whose deposit has been accorded "withheld payment" status and/or returned to the Receiver or Corporation in accordance with Section 9.5 and/or has become an "unclaimed deposit" or has been returned to the Corporation or the Receiver in accordance with Section 2.3;

(b) provided that with respect to this Agreement, except for Section 12.1(a)(vii) and (viii), no indemnification will be provided under this Agreement for any:

(i) judgment or fine against, or any amount paid in settlement (without the written approval of the Receiver) by, any Indemnitee in connection with any action that seeks damages against any Indemnitee (a "**Counterclaim**") arising with respect to any Asset and based on any action or inaction of either the Failed Bank, its directors, officers, employees or agents as such prior to the Bank Closing Date, unless any such judgment, fine or amount paid in settlement exceeds the greater of (A) the Repurchase Price of such Asset, or (B) the monetary recovery sought on such Asset by the Assuming Institution in the cause of action from which the Counterclaim arises; and in such event the Receiver will provide indemnification only in the amount of such excess; and no indemnification will be provided for any costs or expenses other than any costs or expenses (including attorneys' fees) which, in the determination of the Receiver, have been actually and reasonably incurred by such Indemnitee in connection with the defense of any such Counterclaim; and it is expressly agreed that the Receiver reserves the right to intervene, in its discretion, on its behalf and/or on behalf of the Receiver, in the defense of any such Counterclaim;

(ii) claims with respect to any liability or obligation of the Failed Bank that is expressly assumed by the Assuming Institution pursuant to this Agreement or subsequent to the execution hereof by the Assuming Institution or any Subsidiary or Affiliate of the Assuming Institution;

(iii) claims with respect to any liability of the Failed Bank to any present or former employee as such of the Failed Bank or of any Subsidiary or Affiliate of the Failed Bank, which liability is expressly assumed by the Assuming Institution pursuant to this Agreement or subsequent to the execution hereof by the Assuming Institution or any Subsidiary or Affiliate of the Assuming Institution;

(iv) claims based on the failure of any Indemnitee to seek recovery of damages from the Receiver for any claims based upon any action or inaction of the Failed Bank, its directors, officers, employees or agents as fiduciary, agent or custodian prior to the Bank Closing Date;

(v) claims based on any violation or alleged violation by any Indemnitee of the antitrust, branching, banking or bank holding company or securities laws of the United States of America or any State thereof;

(vi) claims based on the rights of any present or former creditor, customer, or supplier as such of the Assuming Institution or any Subsidiary or Affiliate of the Assuming Institution;

(vii) claims based on the rights of any present or former shareholder as such of the Assuming Institution or any Subsidiary or Affiliate of the Assuming Institution regardless of whether any such present or former shareholder is also a present or former shareholder of the Failed Bank;

(viii) claims, if the Receiver determines that the effect of providing such indemnification would be to (A) expand or alter the provisions of any warranty or disclaimer thereof provided in Section 3.3 or any other provision of this Agreement, or (B) create any warranty not expressly provided under this Agreement;

(ix) claims which could have been enforced against any Indemnitee had the Assuming Institution not entered into this Agreement;

(x) claims based on any liability for taxes or fees assessed with respect to the consummation of the transactions contemplated by this Agreement, including without limitation any subsequent transfer of any Assets or Liabilities Assumed to any Subsidiary or Affiliate of the Assuming Institution;

(xi) except as expressly provided in this Article XII, claims based on any action or inaction of any Indemnitee, and nothing in this Agreement shall be construed to provide indemnification for (i) the Failed Bank, (ii) any Subsidiary or Affiliate of the Failed Bank, or (iii) any present or former director, officer, employee or agent of the Failed Bank or its Subsidiaries or Affiliates; provided that the Receiver, in its sole and absolute discretion, may provide indemnification hereunder for any present or former director, officer, employee or agent of the Failed Bank or its Subsidiaries or Affiliates who is also or becomes a director, officer, employee or agent of the Assuming Institution or its Subsidiaries or Affiliates;

(xii) claims or actions which constitute a breach by the Assuming Institution of the representations and warranties contained in Article XI;

(xiii) claims arising out of or relating to the condition of or generated by an Asset arising from or relating to the presence, storage or release of any hazardous or toxic substance, or any pollutant or contaminant, or condition of such Asset which violate any applicable Federal, State or local law or regulation concerning environmental protection; and

(xiv) claims based on, related to or arising from any asset, including a loan, acquired or liability assumed by the Assuming Institution, other than pursuant to this Agreement.

12.2. Conditions Precedent to Indemnification. It shall be a condition precedent to the obligation of the Receiver to indemnify any Person pursuant to this Article XII that such Person shall, with respect to any claim made or threatened against such Person for which such Person is or may be entitled to indemnification hereunder:

(a) give written notice to the Regional Counsel (Litigation Branch) of the Corporation in the manner and at the address provided in Section 13.6 of such claim as soon as practicable after such claim is made or threatened; provided that notice must be given on or before the date which is six (6) years from the date of this Agreement;

(b) provide to the Receiver such information and cooperation with respect to such claim as the Receiver may reasonably require;

(c) cooperate and take all steps, as the Receiver may reasonably require, to preserve and protect any defense to such claim;

(d) in the event suit is brought with respect to such claim, upon reasonable prior notice, afford to the Receiver the right, which the Receiver may exercise in its sole and absolute discretion, to conduct the investigation, control the defense and effect settlement of such claim, including without limitation the right to designate counsel and to control all negotiations, litigation, arbitration, settlements, compromises and appeals of any such claim, all of which shall be at the expense of the Receiver; provided that the Receiver shall have notified the Person claiming indemnification in writing that such claim is a claim with respect to which such Person is entitled to indemnification under this Article XII;

(e) not incur any costs or expenses in connection with any response or suit with respect to such claim, unless such costs or expenses were incurred upon the written direction of the Receiver; provided that the Receiver shall not be obligated to reimburse the amount of any such costs or expenses unless such costs or expenses were incurred upon the written direction of the Receiver;

(f) not release or settle such claim or make any payment or admission with respect thereto, unless the Receiver consents thereto; provided that the Receiver shall not be obligated to reimburse the amount of any such settlement or payment unless such settlement or payment was effected upon the written direction of the Receiver; and

(g) take such reasonable action as the Receiver may request in writing as necessary to preserve, protect or enforce the rights of the Indemnitee against any Primary Indemnitor.

12.3. No Additional Warranty. Nothing in this Article XII shall be construed or deemed to (a) expand or otherwise alter any warranty or disclaimer thereof provided under Section 3.3 or any other provision of this Agreement with respect to, among other matters, the title, value, collectability, genuineness, enforceability, documentation, condition or freedom from liens or encumbrances, of any (i) Asset, or (ii) asset of the Failed Bank purchased by the Assuming Institution subsequent to the execution of this Agreement by the Assuming Institution or any Subsidiary or Affiliate of the Assuming Institution, or (b) create any warranty not expressly provided under this Agreement with respect thereto.

12.4. Indemnification of Receiver and Corporation. From and after the Bank Closing Date, the Assuming Institution agrees to indemnify and hold harmless the Corporation and the Receiver and their respective directors, officers, employees and agents from and against any and all costs, losses, liabilities, expenses (including attorneys' fees), judgments, fines and amounts paid in settlement actually and reasonably incurred in connection with any of the following:

(a) claims based on any and all liabilities or obligations of the Failed Bank assumed by the Assuming Institution pursuant to this Agreement or subsequent to the execution hereof by the Assuming Institution or any Subsidiary or Affiliate of the Assuming Institution, whether or not any such liabilities subsequently are sold and/or transferred, other than any claim based upon any action or inaction of any Indemnitee as provided in Section 12.1(a)(vii) or (viii);

(b) claims based on any act or omission of any Indemnitee (including but not limited to claims of any Person claiming any right or title by or through the Assuming Institution with respect to Assets transferred to the Receiver pursuant to Section 3.4 or Section 3.6), other than any action or inaction of any Indemnitee as provided in (vii) or (viii) of Section 12.1(a); and

(c) claims based on any failure to preserve, maintain or provide reasonable access to Records transferred to the Assuming Institution pursuant to Article VI.

12.5. Obligations Supplemental. The obligations of the Receiver, and the Corporation as guarantor in accordance with Section 12.7, to provide indemnification under this Article XII are to supplement any amount payable by any Primary Indemnitor to the Person indemnified under this Article XII. Consistent with that intent, the Receiver agrees only to make payments pursuant to such indemnification to the extent not payable by a Primary Indemnitor. If the aggregate amount of payments by the Receiver, or the Corporation as guarantor in accordance with Section 12.7, and all Primary Indemnitors with respect to any item of indemnification under this Article XII exceeds the amount payable with respect to such item, such Person being indemnified shall notify the Receiver thereof and, upon the request of the Receiver, shall promptly pay to the Receiver, or the Corporation as appropriate, the amount of the Receiver's (or Corporation's) payments to the extent of such excess.

12.6. Criminal Claims. Notwithstanding any provision of this Article XII to the contrary, in the event that any Person being indemnified under this Article XII shall become involved in any criminal action, suit or proceeding, whether judicial, administrative or investigative, the Receiver shall have no obligation hereunder to indemnify such Person for liability with respect to any criminal act or to the extent any costs or expenses are attributable to the defense against the allegation of any criminal act, unless (a) the Person is successful on the merits or otherwise in the defense against any such action, suit or proceeding, or (b) such action, suit or proceeding is terminated without the imposition of liability on such Person.

12.7. Limited Guaranty of the Corporation. The Corporation hereby guarantees performance of the Receiver's obligation to indemnify the Assuming Institution as set forth in this Article XII. It is a condition to the Corporation's obligation hereunder that the Assuming Institution shall comply in all respects with the applicable provisions of this Article XII. The Corporation shall be liable hereunder only for such amounts, if any, as the Receiver is obligated to pay under the terms of this Article XII but shall fail to pay. Except as otherwise provided above in this Section 12.7, nothing in this Article XII is intended or shall be construed to create any liability or obligation on the part of the Corporation, the United States of America or any department or agency thereof under or with respect to this Article XII, or any provision hereof, it being the intention of the parties hereto that the obligations undertaken by the Receiver under this Article XII are the sole and exclusive responsibility of the Receiver and no other Person or entity.

12.8. Subrogation. Upon payment by the Receiver, or the Corporation as guarantor in accordance with Section 12.7, to any Indemnitee for any claims indemnified by the Receiver under this Article XII, the Receiver, or the Corporation as appropriate, shall become subrogated to all rights of the Indemnitee against any other Person to the extent of such payment.

ARTICLE XIII. MISCELLANEOUS.

13.1. Costs, Fees, and Expenses. All fees, costs and expenses incurred by a party in connection with this Agreement (including the performance of any obligations or the exercise of any rights hereunder) shall be borne by such party unless expressly otherwise provided; provided that the Assuming Institution shall pay all fees, costs and expenses (other than attorneys' fees incurred by the Receiver) incurred in connection with the transfer to it of any Assets or Liabilities Assumed hereunder or in accordance herewith. Further, the Assuming Institution shall be responsible for the payment of MERS routine transaction charges.

13.2. WAIVER OF JURY TRIAL. EACH PARTY HEREBY IRREVOCABLY AND UNCONDITIONALLY WAIVES, TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, ALL RIGHT TO TRIAL BY JURY IN OR TO HAVE A JURY PARTICIPATE IN RESOLVING ANY DISPUTE, ACTION, PROCEEDING OR COUNTERCLAIM, WHETHER SOUNDING IN CONTRACT, TORT OR OTHERWISE, ARISING OUT OF OR RELATING TO OR IN CONNECTION WITH THIS AGREEMENT OR ANY OF THE TRANSACTIONS CONTEMPLATED HEREBY.

13.3. Consent; Determination or Discretion. When the consent or approval of a party is required under this Agreement, such consent or approval shall be obtained in writing and unless expressly otherwise provided, shall not be unreasonably withheld or delayed. When a determination or decision is to be made by a party under this Agreement, that party shall make such determination or decision in its reasonable discretion unless expressly otherwise provided.

13.4. Rights Cumulative. Except as expressly otherwise provided herein, the rights of each of the parties under this Agreement are cumulative, may be exercised as often as any party considers appropriate and are in addition to each such party's rights under this Agreement, any of the agreements related thereto or under applicable law. Any failure to exercise or any delay in

exercising any of such rights, or any partial or defective exercise of such rights, shall not operate as a waiver or variation of that or any other such right, unless expressly otherwise provided.

13.5. References. References in this Agreement to Recitals, Articles, Sections, Schedules and Exhibits are to Recitals, Articles, Sections, Schedules and Exhibits of this Agreement, respectively, unless the context indicates that a Shared-Loss Agreement is intended. References to parties are to the parties to this Agreement. Unless expressly otherwise provided, references to days and months are to calendar days and months respectively. Article and Section headings are for convenient reference and shall not affect the meaning of this Agreement. References to the singular shall include the plural, as the context may require, and *vice versa*.

13.6. Notice.

(a) Form of Notices. All notices shall be given in writing and provided in accordance with the provisions of this Section 13.6, unless expressly otherwise provided.

(b) Notice to the Receiver or the Corporation. With respect to a notice under this Agreement:

Federal Deposit Insurance Corporation
1601 Bryan Street
Dallas, Texas 75201
Attention: Settlement Agent

In addition, with respect to notices under Section 4.6, with a copy to:

BankPremiseNotice@fdic.gov

In addition, with respect to notice under Article XII:

Federal Deposit Insurance Corporation
1601 Bryan Street
Dallas, Texas 75201-3430
Regional Counsel (Litigation Branch)

In addition, with respect to communications under Exhibit 4.13, a copy to:

Federal Deposit Insurance Corporation
1601 Bryan Street, Room 16022
Dallas, Texas 75201-3430
Attention: Gregory Godwin, Interim Servicing Manager
GGodwin@FDIC.gov

(c) Notice to Assuming Institution. With respect to a notice under this Agreement:

Michael L. Scudder (with a copy to: [redacted]
Chief Executive Officer and Chairman of the Board
First Midwest Bank
One Pierce Place, Suite 1500
Itasca, Illinois 60143
[redacted]

13.7. Entire Agreement. This Agreement and the Shared-Loss Agreements, if any, including the Schedules and Exhibits hereto and thereto, embody the entire agreement of the parties hereto in relation to the subject matter herein and supersede all prior understandings or agreements, oral or written, between the parties.

13.8. Counterparts. This Agreement may be executed in any number of counterparts and by the duly authorized representative of a different party hereto on separate counterparts, each of which when so executed shall be deemed to be an original and all of which when taken together shall constitute one and the same Agreement.

13.9. GOVERNING LAW. THIS AGREEMENT AND THE RIGHTS AND OBLIGATIONS HEREUNDER SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE FEDERAL LAW OF THE UNITED STATES OF AMERICA, AND IN THE ABSENCE OF CONTROLLING FEDERAL LAW, IN ACCORDANCE WITH THE LAWS OF THE STATE IN WHICH THE MAIN OFFICE OF THE FAILED BANK IS LOCATED.

13.10. Successors. All terms and conditions of this Agreement shall be binding on the successors and assigns of the Receiver, the Corporation and the Assuming Institution. Nothing expressed or referred to in this Agreement is intended or shall be construed to give any Person other than the Receiver, the Corporation and the Assuming Institution any legal or equitable right, remedy or claim under or with respect to this Agreement or any provisions contained herein, it being the intention of the parties hereto that this Agreement, the obligations and statements of responsibilities hereunder, and all other conditions and provisions hereof are for the sole and exclusive benefit of the Receiver, the Corporation and the Assuming Institution and for the benefit of no other Person.

13.11. Modification. No amendment or other modification, rescission or release of any part of this Agreement or a Shared-Loss Agreement, if any, shall be effective except pursuant to a written agreement subscribed by the duly authorized representatives of the parties.

13.12. Manner of Payment. All payments due under this Agreement shall be in lawful money of the United States of America in immediately available funds as each party hereto may specify to the other parties; provided that in the event the Receiver or the Corporation is obligated to make any payment hereunder in the amount of $25,000.00 or less, such payment may be made by check.

13.13. Waiver. Each of the Receiver, the Corporation and the Assuming Institution may waive its respective rights, powers or privileges under this Agreement; provided that such waiver shall be in writing; and further provided that no failure or delay on the part of the Receiver, the Corporation or the Assuming Institution to exercise any right, power or privilege under this Agreement shall operate as a waiver thereof, nor will any single or partial exercise of any right, power or privilege under this Agreement preclude any other or further exercise thereof or the exercise of any other right, power or privilege by the Receiver, the Corporation or the Assuming Institution under this Agreement, nor will any such waiver operate or be construed as a future waiver of such right, power or privilege under this Agreement.

13.14. Severability. If any provision of this Agreement is declared invalid or unenforceable, then, to the extent possible, all of the remaining provisions of this Agreement shall remain in full force and effect and shall be binding upon the parties hereto.

13.15. Term of Agreement. This Agreement shall continue in full force and effect until the tenth (10th) anniversary of the Bank Closing Date; provided that the provisions of Sections 6.3 and 6.4 shall survive the expiration of the term of this Agreement; and provided further that the receivership of the Failed Bank may be terminated prior to the expiration of the term of this Agreement, and in such event, the guaranty of the Corporation, as provided in and in accordance with the provisions of Section 12.7, shall be in effect for the remainder of the term of this Agreement. Expiration of the term of this Agreement shall not affect any claim or liability of any party with respect to any (a) amount which is owing at the time of such expiration, regardless of when such amount becomes payable, and (b) breach of this Agreement occurring prior to such expiration, regardless of when such breach is discovered.

13.16. Survival of Covenants, Etc. The covenants, representations, and warranties in this Agreement shall survive the execution of this Agreement and the consummation of the transactions contemplated hereunder.

[Signature Page Follows]

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed by their duly authorized representatives as of the date first above written.

FEDERAL DEPOSIT INSURANCE CORPORATION,
RECEIVER OF WAUKEGAN SAVINGS BANK
WAUKEGAN, ILLINOIS

BY: [redacted]
MICHAEL W. LAMB
RECEIVER-IN-CHARGE

Attest:

[redacted]
CLOSING MANAGER

FEDERAL DEPOSIT INSURANCE CORPORATION

BY: [redacted]
MICHAEL W. LAMB
ATTORNEY-IN-FACT

Attest:

[redacted]
CLOSING MANAGER

FIRST-MIDWEST BANK
ITASCA, ILLINOIS

BY: [redacted]
STEPHANIE R. WISE
EVP, DIRECTOR OF STRATEGIC PLANNING
AND EXECUTION

Attest:

[redacted]

SCHEDULE 2.1(a)

EXCLUDED DEPOSIT LIABILITY ACCOUNTS

Waukegan Savings Bank has no deposits associated with the Depository Organization (DO) Cede & Co as Nominee for DTC. The DO accounts do not pass to the Assuming Bank and are excluded from the transaction as described in Section 2.1 of the P&A Agreement. This schedule will be updated post closing with data as of Bank Closing date.

SCHEDULE 3.2

PURCHASE PRICE OF ASSETS OR ANY OTHER ASSETS

(a)	cash and receivables from depository institutions, including cash items in the process of collection, plus interest thereon:	Book Value
(b)	securities (exclusive of the capital stock of Acquired Subsidiaries and FHLB stock), plus interest thereon:	As provided in Section 3.2(b)
(c)	federal funds sold and repurchase agreements, if any, including interest thereon:	Book Value
(d)	Loans:	Book Value
(e)	credit card business:	Book Value
(f)	safe deposit business, safekeeping business and trust business, if any:	Book Value
(g)	Records and other documents:	Book Value
(h)	Other Real Estate:	Book Value
(i)	all repossessed collateral, such as boats, motor vehicles, aircraft, trailers, and fire arms	Book Value
(j)	capital stock of any Acquired Subsidiaries (subject to Section 3.2(b), and FHLB stock:	Book Value
(k)	amounts owed to the Failed Bank by any Acquired Subsidiaries:	Book Value
(l)	assets securing Deposits of public money, to the extent not otherwise purchased hereunder:	Book Value
(m)	overdrafts of customers:	Book Value
(n)	rights, if any, with respect to Qualified Financial Contracts:	As provided in Section 3.2(c)

(o)	rights of the Failed Bank to have loan servicing provided to the Failed Bank by others and related contracts:	Book Value
(q)	Personal Computers and Owned Data Management Equipment:	Fair Market Value
(r)	Safe Deposit Boxes	Fair Market Value

Assets subject to an option to purchase:

(a)	Bank Premises with a fixed price:	As set forth in the Bid Form
	All other Bank Premises	Fair Market Value
(b)	Furniture and Equipment:	Fair Market Value
(c)	Fixtures:	Fair Market Value
(d)	Other Equipment:	Fair Market Value
(e)	Specialty Assets	Fair Market Value

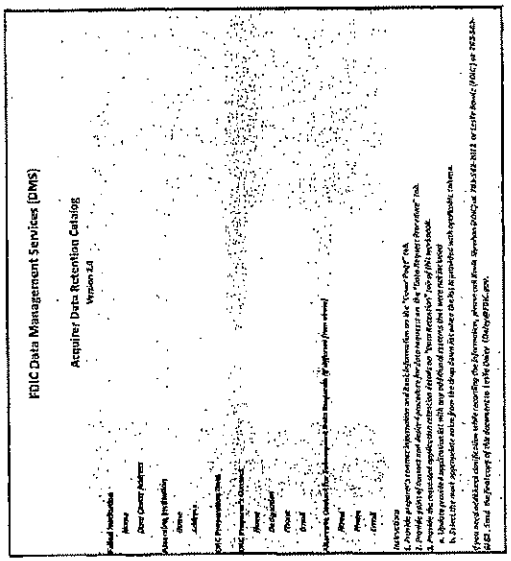
SCHEDULE 3.5(l)

EXCLUDED SECURITIES

NONE

SCHEDULE 6.3

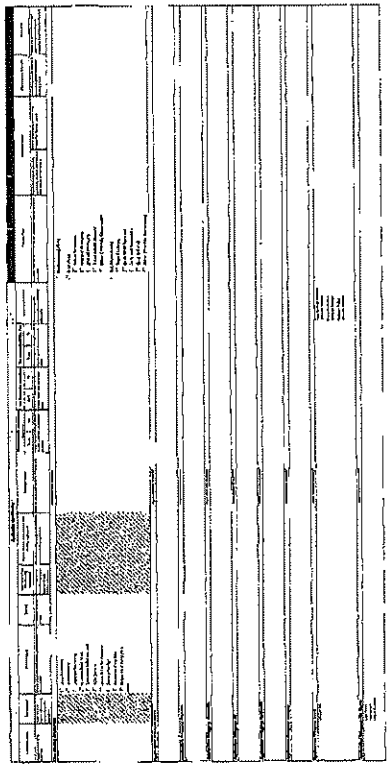
DATA RETENTION CATALOG


FDIC Data Management Services (DMS)

Acquirer Data Retention Catalog

Version 2.0

FDIC Confidential



SCHEDULE 7

Accounts Excluded from Calculation of Deposit Franchise Bid Premium

Waukegan Savings Bank
Waukegan, IL

The accounts identified below will pass to the Assuming Institution (unless otherwise noted). When calculating the premium to be paid on Assumed Deposits in a purchase and assumption transaction, the FDIC will exclude the following categories of deposit accounts:

Category	Description	Amount
I	Non-DO Brokered Deposits	$0.00
II	CDARS	$0.00
III	Market Place Deposits	$0.00
	Total deposits excluded from calculation of premium	$0.00

Category Description

I. Brokered Deposits
Brokered deposit accounts are accounts for which the "depositor of record" is an agent, nominee or custodian who deposits funds for a principal or principals to whom "pass-through" deposit insurance coverage may be extended. The FDIC separates brokered deposit accounts into two categories: 1) Depository Organization (DO) Brokered Deposits and 2) Non-Depository Organization (Non-DO) Brokered Deposits. This distinction is made by the FDIC to facilitate our role as Receiver and Insurer. These terms will not appear on other "brokered deposit" reports generated by Waukegan Savings Bank.

Non-DO Brokered Deposits pass to the Assuming Institution, but are excluded from Assumed Deposits when the deposit premium is calculated. Please see the attached "Schedule 7 – Non-DO Broker Deposit Detail Report" for a listing of these accounts. This list will be updated post closing with balances as of the Bank Closing Date.

If Waukegan Savings Bank had any DO Brokered Deposits (Cede & Co as Nominee for DTC), they are excluded from Assumed Deposits in the Purchase and Assumption Agreement.

II. CDARS
CDARS deposits pass to the Assuming Institution, but are excluded from Assumed Deposits when the deposit premium is calculated.

Waukegan Savings Bank did not participate in the CDARS program as of the date of the deposit download. If CDARS deposits are taken between the date of the deposit download and the Bank Closing Date, they will be identified post closing and made part of Schedule 7 to the Purchase and Assumption Agreement.

III. Market Place Deposits
"Market Place Deposits" is a description given to deposits that may have been solicited via a money desk, internet subscription service (for example, QwickRate®), or similar programs.

Waukegan Savings Bank does not have QwickRate® deposits as identified above. The QwickRate® deposits are reported as time deposits in the Call Report. This list will be updated post closing with balances as of the Bank Closing Date.

This schedule provides account categories and balances as of the date of the deposit download, or as indicated. The deposit franchise bid premium will be calculated using account categories and balances as of the Bank Closing Date that are reflected in the general ledger or subsystem as described above. The final numbers for Schedule 7 will be provided post closing.

EXHIBIT 2.3A

FINAL LEGAL NOTICE
Claiming Requirements for Deposits
Under 12 U.S.C. 1822(e)

[Date]

[Name of Unclaimed Depositor]
[Address of Unclaimed Depositor]
[Anytown, USA]

Subject: **[XXXXX – Name of Bank**
City, State] – In Receivership

Dear **[Sir/Madam]:**

As you may know, on **[Date: Closing Date]**, the **[Name of Bank ("The Bank")]** was closed and the Federal Deposit Insurance Corporation ("FDIC") transferred **[The Bank's]** accounts to **[Name of Acquiring Institution]**.

According to federal law under 12 U.S.C., 1822(e), on **[Date: eighteen months from the Closing Date]**, **[Name of Acquiring Institution]** must transfer the funds in your account(s) back to the FDIC if you have not claimed your account(s) with **[Name of Acquiring Institution]**. Based on the records recently supplied to us by **[Name of Acquiring Institution]**, your account(s) currently fall into this category.

This letter is your formal Legal Notice that you have until **[Date: eighteen months from the Closing Date]**, to claim or arrange to continue your account(s) with **[Name of Acquiring Institution]**. There are several ways that you can claim your account(s) at **[Name of Acquiring Institution]**. It is only necessary for you to take any one of the following actions in order for your account(s) at **[Name of Acquiring Institution]** to be deemed claimed. In addition, if you have more than one account, your claim to one account will automatically claim all accounts:

1. Write to **[Name of Acquiring Institution]** and notify them that you wish to keep your account(s) active with them. Please be sure to include the name of the account(s), the account number(s), the signature of an authorized signer on the account(s), name, and address. **[Name of Acquiring Institution]** address is:

   [123 Main Street
   Anytown, USA]

2. Execute a new signature card on your account(s), enter into a new deposit agreement with **[Name of Acquiring Institution]**, change the ownership on your account(s), or renegotiate the terms of your certificate of deposit account(s) (if any).

3. Provide **[Name of Acquiring Institution]** with a change of address form.

4. Make a deposit to or withdrawal from your account(s). This includes writing a check on any account or having an automatic direct deposit credited to or an automatic withdrawal debited from an account.

If you do not want to continue your account(s) with **[Name of Acquiring Institution]** for any reason, you can withdraw your funds and close your account(s). Withdrawing funds from one or more of your account(s) satisfies the federal law claiming requirement. If you have time deposits, such as certificates of deposit, **[Name of Acquiring Institution]** can advise you how to withdraw them without being charged an interest penalty for early withdrawal.

If you do not claim ownership of your account(s) at **[Name of Acquiring Institution by Date: eighteen months from the Closing Date]** federal law requires **[Name of Acquiring Institution]** to return your deposits to the FDIC, which will deliver them as unclaimed property to the State indicated in your address in the Failed Institution's records. If your address is outside of the United States, the FDIC will deliver the deposits to the State in which the Failed Institution had its main office. 12 U.S.C. § 1822(e). If the State accepts custody of your deposits, you will have 10 years from the date of delivery to claim your deposits from the State. After 10 years you will be permanently barred from claiming your deposits. However, if the State refuses to take custody of your deposits, you will be able to claim them from the FDIC until the receivership is terminated. If you have not claimed your insured deposits before the receivership is terminated, and a receivership may be terminated at any time, all of your rights in those deposits will be barred.

If you have any questions or concerns about these items, please contact **[Bank Employee]** at **[Name of Acquiring Institution]** by phone at **[(XXX) XXX-XXXX]**.

Sincerely,

[Name of Claims Specialist]
[Title]

EXHIBIT 2.3B

AFFIDAVIT OF MAILING

AFFIDAVIT OF MAILING

State of

COUNTY OF

I am employed as a **[Title of Office]** by the **[Name of Acquiring Institution]**.

This will attest that on **[Date of mailing]**, I caused a true and correct copy of the Final Legal Notice, attached hereto, to owners of unclaimed deposits of **[Name of Failed Bank]**, City, State, to be prepared for deposit in the mail of the United States of America on behalf of the Federal Deposit Insurance Corporation. A list of depositors to whom the notice was mailed is attached. This notice was mailed to the depositor's last address as reflected on the books and records of the **[Name of Failed Bank]** as of the date of failure.

_____
[Name]
[Title of Office]
[Name of Acquiring Institution]

Subscribed and sworn to before me this _____day of [Month, Year].

My commission expires:

_____ _____
[Name], Notary Public

EXHIBIT 3.2(c)

VALUATION OF CERTAIN

QUALIFIED FINANCIAL CONTRACTS

A. Scope

Interest Rate Contracts - All interest rate swaps, forward rate agreements, interest rate futures, caps, collars and floors, whether purchased or written.

Option Contracts - All put and call option contracts, whether purchased or written, on marketable securities, financial futures, foreign currencies, foreign exchange or foreign exchange futures contracts.

Foreign Exchange Contracts - All contracts for future purchase or sale of foreign currencies, foreign currency or cross currency swap contracts, or foreign exchange futures contracts.

B. Exclusions

All financial contracts used to hedge assets and liabilities that are acquired by the Assuming Institution but are not subject to adjustment from Book Value.

C. Adjustment

The difference between the Book Value and market value as of the Bank Closing Date.

D. Methodology

1. The price at which the Assuming Institution sells or disposes of Qualified Financial Contracts will be deemed to be the fair market value of such contracts, if such sale or disposition occurs at prevailing market rates within a predefined timetable as agreed upon by the Assuming Institution and the Receiver.

2. In valuing all other Qualified Financial Contracts, the following principles will apply:

   (i) All known cash flows under swaps or forward exchange contracts shall be present valued to the swap zero coupon interest rate curve.

   (ii) All valuations shall employ prices and interest rates based on the actual frequency of rate reset or payment.

   (iii) Each tranche of amortizing contracts shall be separately valued. The total value of such amortizing contract shall be the sum of the values of its component tranches.

(iv) For regularly traded contracts, valuations shall be at the midpoint of the bid and ask prices quoted by customary sources (e.g., The Wall Street Journal, Telerate, Reuters or other similar source) or regularly traded exchanges.

(v) For all other Qualified Financial Contracts where published market quotes are unavailable, the adjusted price shall be the average of the bid and ask price quotes from three (3) securities dealers acceptable to the Receiver and Assuming Institution as of the Bank Closing Date. If quotes from securities dealers cannot be obtained, an appraiser acceptable to the Receiver and the Assuming Institution will perform a valuation based on modeling, correlation analysis, interpolation or other techniques, as appropriate.

EXHIBIT 4.13

INTERIM ASSET SERVICING ARRANGEMENT

This Interim Asset Servicing Arrangement is made pursuant to and as of the date of that certain Purchase and Assumption Agreement (the "**Purchase and Assumption Agreement**") among the Receiver, the Assuming Institution and the Corporation, to which this Arrangement is attached. Capitalized terms used and not otherwise defined in this Exhibit 4.13 shall have the meanings assigned to such terms in the Agreement.

(a) With respect to each asset or liability designated from time to time by the Receiver to be serviced by the Assuming Institution pursuant to this Interim Asset Servicing Arrangement (the "**Arrangement**"), including any assets or liabilities sold or conveyed by the Receiver to any party other than the Assuming Institution (any such party, a "**Successor Owner**") but with respect to which the Receiver has an obligation to service or provide servicing support (such assets and liabilities, the "**Pool Assets**"), for certain loans (the "**Loans**") during the term of this Arrangement the Assuming Institution shall service or provide servicing support to the Pool Assets as described in this Exhibit 4.13.

If the Assuming Institution is an approved or qualified servicer for any government sponsored entity (each, a "**GSE**") and if any of the Loans are owned by a GSE, the Assuming Institution shall service or provide servicing support for the Loans owned by a GSE in accordance with the guidelines promulgated by and its agreements with the applicable GSE. If the Assuming Institution is not an approved or qualified servicer for a GSE or the Loans are not owned by a GSE, then the Assuming Institution shall service or provide servicing support for the Loans in accordance with the following:

(i) promptly post and apply payments received to the applicable system of record;

(ii) reverse and return insufficient funds checks;

(iii) pay (A) participation payments to participants in Loans, as and when received; (B) tax and insurance bills, as they come due, out of any escrow funds maintained for such purposes; and (C) unfunded commitments and protective advances out of any escrow funds created for such purposes;

(iv) process funding draws under Loans and protective advances in connection with collateral and acquired property, in each case, as and to the extent authorized and funded by the Receiver;

(v) maintain in use all data processing equipment and systems and other systems of record on which any activity with respect to any Pool Assets are, or prior to the Bank Closing Date, were, recorded, and maintain all historical data on any such systems as of the Bank Closing Date and not, without the express consent of the Receiver (which consent must be sought at least sixty (60) days prior to taking any action), deconvert, remove, transfer or

otherwise discontinue use of any of the Failed Bank's systems of record with respect to any Pool Asset;

(vi) maintain accurate records reflecting (A) payments received by the Assuming Institution, (B) information received by the Assuming Institution concerning changes in the address or identity of any Obligor and (C) other servicing actions taken by the Assuming Institution, including checks returned for insufficient funds;

(vii) send (A) billing statements to Obligors on Pool Assets (to the extent that such statements were sent by the Failed Bank or as are requested by the Receiver) and (B) notices to Obligors who are in default on Loans (in the same manner as the Failed Bank or as are requested by the Receiver);

(viii) employ a sufficient number of qualified employees to provide the services required to be provided by the Assuming Institution pursuant to this Arrangement (with the number and qualifications of such employees to be not less than the number and qualifications of employees employed by the Failed Bank to perform such fonctions as of the Bank Closing Date);

(ix) hold in trust any Credit Files and any servicing files in the possession or on the premises of the Assuming Institution for the Receiver or the Successor Owner (as applicable) and segregate from the other books and records of the Assuming Institution and appropriately mark such Credit Files and servicing files to clearly reflect the ownership interest of the Receiver or the successor owner (as applicable);

(x) send to the Receiver (indicating closed bank name and number), Attn: Interim Servicing Manager, at the email address provided in Section 13.6 of the Purchase and Assumption Agreement, or to such other person at such address as the Receiver may designate, via overnight delivery: (A) on a weekly basis, weekly reports, including, without limitation, reports reflecting collections and trial balances, and (B) any other reports, copies or information as may be requested from time to time by the Receiver, including, if requested, copies of (1) checks or other remittances received, (2) insufficient funds checks returned, (3) checks or other remittances for payment to participants or for taxes, insurance, funding advances and protective advances, (4) pay-off requests, and (5) notices to defaulted Obligors;

(xi) remit on a weekly basis to the Receiver (indicating closed bank name and number), Attn: DRR Cashier Unit, Business Operations Support Branch, in the same manner as provided in paragraph (a)(x), via wire transfer to the account designated by the Receiver, or to such other person at such other address and/or account as the Receiver may designate, all payments received;

(xii) prepare and timely file all information reports with appropriate tax authorities, and, if requested by the Receiver, prepare and file tax returns and remit taxes due on or before the due date;

(xiii) provide and furnish such other services, operations or functions, including, without limitation, with regard to any business, enterprise or agreement which is a Pool Asset, as may be requested by the Receiver;

(xiv) establish a custodial account for the Receiver and for each successor owner at the Assuming Institution, each of which shall be interest bearing, titled in the name of Assuming Institution, in trust for the Receiver or the successor owner (as applicable), in each case as the owner, and segregate and hold all funds collected and received with respect to the Pool Assets separate and apart from any of the Assuming Institution's own funds and general assets; and

(xv) no later than the end of the second Business Day following receipt thereof, deposit into the applicable custodial account and retain therein all funds collected and received with respect to the Pool Assets.

Notwithstanding anything to the contrary in this Exhibit, the Assuming Institution shall not be required to initiate litigation or other collection proceedings against any Obligor or any collateral with respect to any defaulted Loan. The Assuming Institution shall promptly notify the Receiver, at the address referred to above in paragraph (a)(x), of any claims or legal actions regarding any Pool Asset.

(b) In consideration for the provision of the services provided pursuant to this Arrangement, the Receiver agrees to reimburse the Assuming Institution for actual, reasonable and necessary expenses incurred in connection with the performance of its duties pursuant to this Arrangement, including expenses of photocopying, postage and express mail, data processing and amounts paid for employee services (based upon the number of hours spent performing servicing duties).

(c) The Assuming Institution shall provide the services described herein for a term of up to three hundred sixty-five (365) days after the Bank Closing Date. The Receiver may terminate the Arrangement at any time upon not less than sixty (60) days notice to the Assuming Institution without any liability or cost to the Receiver other than the fees and expenses due to the Assuming Institution as of the termination date pursuant to paragraph (b) above.

(d) At any time during the term of this Arrangement, the Receiver may, upon not less than thirty (30) days prior written notice to the Assuming Institution, remove one or more Pool Assets, and at the time of such removal the Assuming Institution's responsibility with respect thereto shall terminate.

(e) At the expiration of this Arrangement or upon the termination of the Assuming Institution's responsibility with respect to any Pool Asset pursuant to paragraph (d) hereof, the Assuming Institution shall:

(i) deliver to the Receiver (or its designee) all of the Credit Documents and records relating to the Pool Assets; and

(ii) cooperate with the Receiver to facilitate the orderly transition of managing the Pool Assets to the Receiver or its designees (including, without limitation, its contractors and persons to which any Pool Assets are convoyed).

(f) At the request of the Receiver, the Assuming Institution shall perform such transitional services with regard to the Pool Assets as the Receiver may request. Transitional

services may include, without limitation, assisting in any due diligence process deemed necessary by the Receiver and providing to the Receiver and its designees (including, without limitation, its contractors and any actual or potential successor owners) (i) information and data regarding the Pool Assets, including, without limitation, system reports and data downloads sufficient to transfer the Pool Assets to another system or systems and to facilitate due diligence by actual and potential successor owners, and (ii) access to employees of the Assuming Institution involved in the management of, or otherwise familiar with, the Pool Assets.

(g) Until such time as the Arrangement expires or is terminated, without limitation of its obligations set forth above or in the Purchase and Assumption Agreement and without any additional consideration (other than that set forth in paragraph (b) above), the Assuming Institution shall provide the Receiver and its designees (including, without limitation, its contractors and actual and potential successor owners) with the following, as the same may be requested:

(i) access to and the ability to obtain assistance and information from personnel of the Assuming Institution, including former personnel of the Failed Bank and personnel of third party consultants;

(ii) access to and the ability to use and download information from data processing systems and other systems of record on which information regarding Pool Assets or any assets transferred to or liabilities assumed by the Assuming Institution is stored or maintained (regardless of whether information with respect to other assets or liabilities is also stored or maintained thereon); and

(iii) access to and the ability to use and occupy office space (including parking facilities and vault space), facilities, utilities (including local telephone service and facsimile machines), furniture, equipment (including photocopying and facsimile machines), and technology and connectivity (including email accounts, network access and technology resources such as shared drives) in the Bank Premises occupied by the Assuming Institution.

EXHIBIT 4.15A

SINGLE FAMILY SHARED-LOSS AGREEMENT

INTENTIONALLY OMITTED

EXHIBIT 4.15B

COMMERCIAL SHARED-LOSS AGREEMENT

INTENTIONALLY OMITTED

EXHIBIT 5

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
FMH ~~SECOND~~ DISTRICT
LAW DIVISION

FIRST MIDWEST BANK, agent for FEDERAL DEPOSIT INSURANCE CORPORATION, receiver for WAUKEGAN SAVINGS BANK, Plaintiff, vs. ANDRES COBO and AMY M. RULE, Defendants,	2013L003865 CALENDAR/ROOM J TIME 00:00 Breach of Contract

FILED
2013 APR 16 AM 10 02
CLERK

COMPLAINT AT LAW
BREACH OF PROMISSORY NOTE

NOW COMES the Plaintiff, FIRST MIDWEST BANK, agent for FEDERAL DEPOSIT INSURANCE CORPORATION, receiver for WAUKEGAN SAVINGS BANK (hereinafter referred to as "Plaintiff"), by and through its attorneys, Law Offices of Thaddeus M. Bond Jr. & Associates, P.C., and complaining of Defendants ANDRES COBO and AMY M. RULE (hereinafter referred to as "Defendants"), allege and state as follows:

1. On or about November 20, 2006, the Defendants entered into a Promissory Note attached hereto as Exhibit A wherein Waukegan Savings Bank loaned the Defendants $227,500.00 upon the terms and conditions set forth therein.

2. On August 3, 2012, Waukegan Savings Bank was closed by the Illinois Department of Professional Regulation and the Federal Deposit Insurance Corporation was appointed as receiver. First Midwest Bank purchased certain assets from the FDIC and agreed to act as its agent for the purpose of administering and collecting the promissory note that is the subject of this case.

3. The Defendants have been delinquent in their payment obligations on the attached promissory note since July 1, 2011.

4. The amount due on the loan as of April 12, 2013 is set forth as follows. Additional amounts shall accrue after the filing of this Complaint pursuant to the terms of the promissory note.

Principal	$214,079.06
Interest	$24,938.72
Accrued late fees	$1470.84
Property Tax Advance	$5736.18
Appraisal	$135.00
Legal Fees and Court Costs	$4805.92
TOTAL DUE	$251,165.72

Per Diem Interest: $37.1665035

5. Despite repeated demands, the Defendants have failed to reinstate or repay the loan to the Plaintiff or its predecessors in interest.

6. The attached Promissory Note provides that the Defendant shall to pay the Plaintiff its court costs and attorney's fees in any legal action taken to enforce the loan.

WHEREFORE Plaintiff prays for judgment against Defendant in the amount of $251,165.72 plus accrued interest and late fees through the date of judgment plus attorney's fees and costs of suit and for such further relief as this Court deems just.

Respectfully Submitted,

Attorney for Plaintiff

Ted Bond, Jr.
Law Offices of Thaddeus M. Bond Jr. & Associates, P.C.
200 N. King Avenue, Suite 203
Waukegan, Illinois 60085
(847) 599-9101
Attorney Number 34308

AFFIDAVIT PURSUANT TO SUPREME COURT RULE 222 (B)

Pursuant to Supreme Court Rule 222 (B), counsel for the above named plaintiff certifies that plaintiff seeks money damages in excess of Fifty Thousand Dollars and 00/100ths Dollars ($50,000.00).

By: _____
Attorney for the Plaintiff

0242007564

NOTE

November 20, 2006 [Date] | Waukegan [City] | Illinois [State]

625 S. 12 Ave, Maywood, Illinois, 60153

[Property Address]

1. BORROWER'S PROMISE TO PAY

In return for a loan that I have received, I promise to pay U.S. $ 227,500.00 (this amount is called "Principal"), plus interest, to the order of the Lender. The Lender is

WAUKEGAN SAVINGS AND LOAN, SB

I will make all payments under this Note in the form of cash, check or money order.

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

2. INTEREST

Interest will be charged on unpaid principal until the full amount of Principal has been paid. I will pay interest at a yearly rate of 6.250 %.

The interest rate required by this Section 2 is the rate I will pay both before and after any default described in Section 6(B) of this Note.

3. PAYMENTS

(A) Time and Place of Payments

I will pay principal and interest by making a payment every month.

I will make my monthly payment on the 1st day of each month beginning on January 1, 2007. I will make these payments every month until I have paid all of the principal and interest and any other charges described below that I may owe under this Note. Each monthly payment will be applied as of its scheduled due date and will be applied to interest before Principal. If, on December 1, 2036, I still owe amounts under this Note, I will pay those amounts in full on that date, which is called the "Maturity Date."

I will make my monthly payments at

P.O. Box 19 1324 Golf Road
Waukegan, IL, 60079-0019

or at a different place if required by the Note Holder.

(B) Amount of Monthly Payments

My monthly payment will be in the amount of U.S. $ 1,400.76.

4. BORROWER'S RIGHT TO PREPAY

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

I may make a full Prepayment or partial Prepayments without paying a Prepayment charge. The Note Holder will use my Prepayments to reduce the amount of Principal that I owe under this Note. However, the Note Holder may apply my Prepayment to the accrued and unpaid interest on the Prepayment amount, before applying my Prepayment to reduce the Principal amount of the Note. If I make a partial Prepayment, there will be no changes in the due date or in the amount of my monthly payment unless the Note Holder agrees in writing to those changes.

0242007584

5. LOAN CHARGES

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

6. BORROWER'S FAILURE TO PAY AS REQUIRED

(A) Late Charge for Overdue Payments

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

(B) Default

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

(C) Notice of Default

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

(D) No Waiver By Note Holder

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

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

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

7. GIVING OF NOTICES

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

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

8. OBLIGATIONS OF PERSONS UNDER THIS NOTE

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

9. WAIVERS

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

10. UNIFORM SECURED NOTE

This Note is a uniform instrument with limited variations in some jurisdictions. In addition to the protections given to the Note Holder under this Note, a Mortgage, Deed of Trust, or Security Deed (the "Security Instrument"), dated the same date as this Note, protects the Note Holder from possible losses which might result if I do not keep the promises which I make in

0242007564

BY SIGNING BELOW, Borrower accepts and agrees to the terms and covenants contained in pages 1 through 3 of this 1-4 Family Rider.

ANDRES COBO (Seal) -Borrower

AMY M RULE BY ANDRES COBO AS ATTORNEY-IN-FACT (Seal) -Borrower

(Seal) -Borrower

(Seal) -Borrower

(Seal) -Borrower

(Seal) -Borrower

1

IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT
LAKE COUNTY, ILLINOIS
CHANCERY DIVISION

WAUKEGAN SAVINGS BANK, Plaintiff	11 CH 4 2013
vs.	
ALDO JORDAN; ALDO JORDAN AS TRUSTEE OF THE ALDO JORDAN REVOCABLE TRUST DATED SEPTEMBER 23, 2009; STEPHANIE OELSLIGLE AS TRUSTEE OF THE STEPHANIE OELSLIGLE TRUST DATED SEPTEMBER 23, 2009; ANDRES COBO; AMY RULE; EX SITES, LLC; UNKNOWN OWNERS OR PARTIES INTERESTED IN OR IN ACTUAL POSSESSION OF SAID LAND OR LOTS. Defendants.	

FILED - 1
2011 DEC -8 AM 10: 26
CIRCUIT COURT OF COOK COUNTY, ILLINOIS CHANCERY DIV.
DOROTHY BROWN CLERK

COMPLAINT FOR FORECLOSURE

1. Plaintiff WAUKEGAN SAVINGS BANK, files this Complaint to foreclose the Mortgage hereinafter described and joins the following persons as Defendants: ALDO JORDAN; ALDO JORDAN AS TRUSTEE OF THE ALDO JORDAN REVOCABLE TRUST DATED SEPTEMBER 23, 2009; STEPHANIE OELSLIGLE AS TRUSTEE OF THE STEPHANIE OELSLIGLE TRUST DATED SEPTEMBER 23, 2009; ANDRES COBO; AMY RULE; EX SITES, LLC; and UNKNOWN OWNERS OR PARTIES INTERESTED IN OR IN ACTUAL POSSESSION OF SAID LAND OR LOTS.

2. Attached as Exhibit A is a copy of said Mortgage and as Exhibit B a copy of the Note secured thereby.

3. Information concerning Mortgage:

(A) Nature of instrument: Mortgage:

(B) Date of Mortgage: November 20, 2006

(C) Name of Mortgagors: ANDRES COBO; AMY RULE; ALDO JORDAN

(D) Name of Mortgagee: WAUKEGAN SAVINGS AND LOAN, SB

(E) Date and Place of Recording: December 7, 2006, Lake County, Illinois

(F) Identification of Recording: Document No. 0634101349

(G) Interest subject to Mortgage: Fee Simple.

(H) Amount of original indebtedness: $227,500.00

(I) Legal Description of mortgage premises and common addresses:

LOT 524 IN MADISON STREET ADDITION, A SUBDIVISION OF PART OF SECTION 10, TOWNSHIP 39 NORTH, RANGE 12, EAST OF THE THIRD PRINCIPAL MERIDIAN, IN COOK COUNTY, ILLINOIS.

P.I.N.(S): 15-10-425-013

Property Address: 625 S. 12TH AVE., MAYWOOD, IL 60153

(J) Statements as to defaults: Default in monthly installments due July 1, 2011 and thereafter.

(K) Statement separately itemized as to unpaid principal, interest, other charges and total amount due, and also the date of the foregoing calculations and per diem interest accruing under the Mortgage after the date of such calculations:

1. Date of calculations: October 21, 2011

2. Amounts Due:

Principal	$214,079.06
Plus interest, late fees and collection costs	

(L) Name of present owner of said premises: ALDO JORDAN AS TRUSTEE OF THE ALDO JORDAN REVOCABLE TRUST DATED SEPTEMBER 23, 2009; STEPHANIE OELSLIGLE AS TRUSTEE OF THE STEPHANIE OELSLIGLE TRUST DATED SEPTEMBER 23, 2009

(M) Names of other persons who are joined as defendants and whose interest in or lien on the mortgaged real estate is sought to be terminated: EX SITES, LLC; UNKNOWN OWNERS OR PARTIES INTERESTED IN OR IN ACTUAL POSSESSION OF SAID LAND OR LOTS

(N) Name of persons claimed to be personally liable for deficiency: ANDRES COBO; AMY RULE; ALDO JORDAN

(O) Capacity in which Plaintiff brings this suit: Plaintiff is the owner and legal holder of the Note, Mortgage and indebtedness..

(P) Facts in support of redemption period shorter than the longer of (i) 7 months from the date the mortgagor or, if more than one, all mortgagors (I) have been served with summons or by publication or (II) have otherwise submitted to the jurisdiction of the court, or (ii) 3 months from the entry of the judgment of foreclosure, if sought: None at this time.

(Q) Statement that the right of redemption has been waived by all owners of redemption, if applicable: Not applicable.

(R) Facts in support of request for attorney's fees and of court costs and expenses if applicable: Plaintiff has been requested to retain counsel for prosecution of this foreclosure and to incur substantial attorney fees, court costs, title insurance or abstract costs and other expenses which should be added to the balance secured by said Mortgage as provided under the terms of the Note and Mortgage.

(S) Facts in support of a request for appointment of mortgagee in possession or for appointment of a receiver, and the identity of such receiver, if sought: None at this time.

(T) Plaintiff does not offer to mortgagor in accordance with Section 15-1402 to accept title to the real estate in satisfaction of all indebtedness and obligations secured by the Mortgage without judicial sale.

REQUEST FOR RELIEF

Plaintiff requests;

(i) A Judgment of foreclosure and sale.

(ii) An order granting a shortened redemption period, if sought.

(iii) A personal judgment for deficiency, if sought.

(iv) An order granting possession, if sought

(v) An order placing the mortgagee in possession or appointing a receiver, if sought.

(vi) A judgment for attorney's fees, costs and expenses, if sought.

Plaintiff, WAUKEGAN SAVINGS BANK

Its Attorney

THADDEUS M. BOND JR. & ASSOCIATES P.C.
200 N. King Ave., Suite 203
WAUKEGAN, IL 60085
Telephone: (847)599-9101
ARDC#06205614

NOTICE TO CONSUMER TO FEDERAL FAIR DEBT COLLECTION PRACTICES ACT

1. The amount of the debt is set forth in the attached Complaint.

2. The name of the Creditor is the named Plaintiff in the attached Complaint.

3. Unless you notify us within 30 days after receipt of this Notice that you dispute the validity of the debt set forth in the attached Complaint, or any portion thereof, we will assume that the debt is valid.

4. If you notify us in writing within said 30 day period that the debt or any portion thereof is disputed, we will obtain verification of the debt and a copy of such verification will be mailed to you.

5. Upon your written request within 30 days after receipt of this Notice, we will provide you with the name and address of the original creditor if it is different from the Plaintiff named in the attached Complaint.

6. **This is an attempt to collect a debt and any information obtained will be used for that purpose.**

0242007564

This instrument was prepared by:

Name:

WAUKEGAN SAVINGS AND LOAN, SB

Address:

P.O. BOX 19 1324 GOLF ROAD
WAUKEGAN IL, 60079-0019

'03606913 2612116

After Recording Return To:

WAUKEGAN SAVINGS AND LOAN, SB
ATTN: VALERIE MCCULLOUGH
P.O. BOX 19 1324 GOLF ROAD
WAUKEGAN IL, 60079-0019

Doc#: 0634101349 Fee: $50.00
Eugene "Gene" Moore RHSP Fee:$10.00
Cook County Recorder of Deeds
Date: 12/07/2006 01:15 PM Pg: 1 of 14

[Space Above This Line For Recording Data]

MORTGAGE

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 November 20, 2006, together with all Riders to this document.
(B) "Borrower" is ANDRES COBO and AMY M RULE, MARRIED AND ALDO JORDAN UNMARRIED

Borrower is the mortgagor under this Security Instrument.
(C) "Lender" is WAUKEGAN SAVINGS AND LOAN, SB
Lender is a A Savings Bank organized and existing under the laws of State Of Illinois. Lender's address is

P.O. Box 19 1324 Golf Road, Waukegan, IL 60079-0019

. Lender is the mortgagee under this Security Instrument.
(D) "Note" means the promissory note signed by Borrower and dated November 20, 2006. The Note states that Borrower owes Lender Two Hundred Twenty Seven Thousand Five Hundred Dollars And No Cents Dollars (U.S. $227,500.00) plus interest. Borrower has promised to pay this debt in regular Periodic Payments and to pay the debt in full not later than December 1, 2036.
(E) "Property" means the property that is described below under the heading "Transfer of Rights in the Property."
(F) "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.
(G) "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
☐ Balloon Rider	☐ Planned Unit Development Rider	☐ Other(s) [specify]
☒ 1-4 Family Rider	☐ Biweekly Payment Rider	

(H) "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.

(I) "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.
(J) "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.
(K) "Escrow Items" means those items that are described in Section 3.
(L) "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.
(M) "Mortgage Insurance" means insurance protecting Lender against the nonpayment of, or default on, the Loan.
(N) "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.
(O) "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.
(P) "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 does hereby mortgage, grant and convey to Lender and Lender's successors and assigns the following described property located in the County [Type of Recording Jurisdiction] of Lake [Name of Recording Jurisdiction]:

LOT 824 IN MADISON STREET ADDITION, A SUBDIVISION OF PART OF SECTION 10, TOWNSHIP 39 NORTH, RANGE 12, EAST OF THE THIRD PRINCIPAL MERIDIAN, IN COOK COUNTY, ILLINOIS.

P.I.N. 15-10-425-013-0000

Pin Number 15-10-425-013-0000
which currently has the address of 625 S. 12 AVE, [Street]

MAYWOOD [City], Illinois 60153 [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 mortgage, 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 Section 22 of 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 unless as otherwise provided under Applicable Law. 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 may result in acceleration of the sums secured by this Security Instrument, foreclosure by judicial proceeding and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to assert in the foreclosure proceeding the non-existence of a default or any other defense of Borrower to acceleration and foreclosure. 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 foreclose this Security Instrument by judicial proceeding. 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.

23. Release. Upon payment of all sums secured by this Security Instrument, Lender shall release this Security Instrument. 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. Waiver of Homestead. In accordance with Illinois law, the Borrower hereby releases and waives all rights under and by virtue of the Illinois homestead exemption laws.

25. Placement of Collateral Protection Insurance. Unless Borrower provides Lender with evidence of the insurance coverage required by Borrower's agreement with Lender, Lender may purchase insurance at Borrower's expense to protect Lender's interests in Borrower's collateral. This insurance may, but need not, protect Borrower's interests. The coverage that Lender purchases may not pay any claim that Borrower makes or any claim that is made against Borrower in connection with the collateral. Borrower may later cancel any insurance purchased by Lender, but only after providing Lender with evidence that Borrower has obtained insurance as required by Borrower's and Lender's agreement. If Lender purchases insurance for the collateral, Borrower will be responsible for the costs of that insurance, including interest and any other charges Lender may impose in connection with the placement of the insurance, until the effective date of the cancellation or expiration of the insurance. The costs of the insurance may be added to Borrower's total outstanding balance or obligation. The costs of the insurance may be more than the cost of insurance Borrower may be able to obtain on its own.

0243007564

BY SIGNING BELOW, Borrower accepts and agrees to the terms and covenants contained in pages 1 through 11 of this Security Instrument and in any Rider executed by Borrower and recorded with it.

Andres Cobo
ANDRES COBO (Seal) -Borrower

Amy M. Rule by Andres Cobo as Atty in law
AMY M RULE BY ANDRES COBO AS ATTORNEY-IN-FACT (Seal) -Borrower

Aldo Jordan
ALDO JORDAN (Seal) -Borrower

(Seal) -Borrower

(Seal) -Borrower

(Seal) -Borrower

Witness:

Witness:

State of Illinois
County of LAKE

This instrument was acknowledged before me on November 20, 2006 (date) by ANDRES COBO and AMY M RULE AND ALDO JORDAN (name[s] of person[s]).

Notary Public

"OFFICIAL SEAL"
MARIBEL TORRES
Notary Public, State of Illinois
My Commission Expires 08/21/2010

1-4 FAMILY RIDER

0242007564

(Assignment of Rents)

THIS 1-4 FAMILY RIDER is made this 20th day of November, 2006 and is incorporated into and shall be deemed to amend and supplement the Mortgage, Deed of Trust, or Security Deed (the "Security Instrument") of the same date given by the undersigned (the "Borrower") to secure Borrower's Note to

WAUKEGAN SAVINGS AND LOAN, SB

(the "Lender") of the same date and covering the Property described in the Security Instrument and located at:

625 S. 12 AVE, MAYWOOD, ILLINOIS, 60153

[Property Address]

1-4 FAMILY COVENANTS. In addition to the covenants and agreements made in the Security Instrument, Borrower and Lender further covenant and agree as follows:

A. ADDITIONAL PROPERTY SUBJECT TO THE SECURITY INSTRUMENT. In addition to the Property described in Security Instrument, the following items now or hereafter attached to the Property to the extent they are fixtures are added to the Property description, and shall also constitute the Property covered by the Security Instrument: building materials, appliances and goods of every nature whatsoever now or hereafter located in, on, or used, or intended to be used in connection with the Property, including, but not limited to, those for the purposes of supplying or distributing heating, cooling, electricity, gas, water, air and light, fire prevention and extinguishing apparatus, security and access control apparatus, plumbing, bath tubs, water heaters, water closets, sinks, ranges, stoves, refrigerators, dishwashers, disposals, washers, dryers, awnings, storm windows, storm doors, screens, blinds, shades, curtains and curtain rods, attached mirrors, cabinets, paneling and attached floor coverings, all of which, including replacements and additions thereto, shall be deemed to be and remain a part of the Property covered by the Security Instrument. All of the foregoing together with the Property described in the Security Instrument (or the leasehold estate if the Security Instrument is on a leasehold) are referred to in this 1-4 Family Rider and the Security Instrument as the "Property."

B. USE OF PROPERTY; COMPLIANCE WITH LAW. Borrower shall not seek, agree to or make a change in the use of the Property or its zoning classification, unless Lender has agreed in writing to the change. Borrower shall comply with all laws, ordinances, regulations and requirements of any governmental body applicable to the Property.

C. SUBORDINATE LIENS. Except as permitted by federal law, Borrower shall not allow any lien inferior to the Security Instrument to be perfected against the Property without Lender's prior written permission.

D. RENT LOSS INSURANCE. Borrower shall maintain insurance against rent loss in addition to the other hazards for which insurance is required by Section 5.

E. "BORROWER'S RIGHT TO REINSTATE" DELETED. Section 19 is deleted.

F. BORROWER'S OCCUPANCY. Unless Lender and Borrower otherwise agree in writing, Section 6 concerning Borrower's occupancy of the Property is deleted.

G. ASSIGNMENT OF LEASES. Upon Lender's request after default, Borrower shall assign to Lender all leases of the Property and all security deposits made in connection with leases

of the Property. Upon the assignment, Lender shall have the right to modify, extend or terminate the existing leases and to execute new leases, in Lender's sole discretion. As used in this paragraph G, the word "lease" shall mean "sublease" if the Security Instrument is on a leasehold.

H. ASSIGNMENT OF RENTS; APPOINTMENT OF RECEIVER; LENDER IN POSSESSION. Borrower absolutely and unconditionally assigns and transfers to Lender all the rents and revenues ("Rents") of the Property, regardless of to whom the Rents of the Property are payable. Borrower authorizes Lender or Lender's agents to collect the Rents, and agrees that each tenant of the Property shall pay the Rents to Lender or Lender's agents. However, Borrower shall receive the Rents until (i) Lender has given Borrower notice of default pursuant to Section 22 of the Security Instrument and (ii) Lender has given notice to the tenant(s) that the Rents are to be paid to Lender or Lender's agent. This assignment of Rents constitutes an absolute assignment and not an assignment for additional security only.

If Lender gives notice of default to Borrower: (i) all Rents received by Borrower shall be held by Borrower as trustee for the benefit of Lender only, to be applied to the sums secured by the Security Instrument; (ii) Lender shall be entitled to collect and receive all of the Rents of the Property; (iii) Borrower agrees that each tenant of the Property shall pay all Rents due and unpaid to Lender or Lender's agents upon Lender's written demand to the tenant; (iv) unless applicable law provides otherwise, all Rents collected by Lender or Lender's agents shall be applied first to the costs of taking control of and managing the Property and collecting the Rents, including, but not limited to, attorney's fees, receiver's fees, premiums on receiver's bonds, repair and maintenance costs, insurance premiums, taxes, assessments and other charges on the Property, and then to the sums secured by the Security Instrument; (v) Lender, Lender's agents or any judicially appointed receiver shall be liable to account for only those Rents actually received; and (vi) Lender shall be entitled to have a receiver appointed to take possession of and manage the Property and collect the Rents and profits derived from the Property without any showing as to the inadequacy of the Property as security.

If the Rents of the Property are not sufficient to cover the costs of taking control of and managing the Property and of collecting the Rents any funds expended by Lender for such purposes shall become indebtedness of Borrower to Lender secured by the Security Instrument pursuant to Section 9.

Borrower represents and warrants that Borrower has not executed any prior assignment of the Rents and has not performed, and will not perform, any act that would prevent Lender from exercising its rights under this paragraph.

Lender, or Lender's agents or a judicially appointed receiver, shall not be required to enter upon, take control of or maintain the Property before or after giving notice of default to Borrower. However, Lender, or Lender's agents or a judicially appointed receiver, may do so at any time when a default occurs. Any application of Rents shall not cure or waive any default or invalidate any other right or remedy of Lender. This assignment of Rents of the Property shall terminate when all the sums secured by the Security Instrument are paid in full.

I. CROSS-DEFAULT PROVISION. Borrower's default or breach under any note or agreement in which Lender has an interest shall be a breach under the Security Instrument and Lender may invoke any of the remedies permitted by the Security Instrument.

0242007564

BY SIGNING BELOW, Borrower accepts and agrees to the terms and covenants contained in pages 1 through 3 of this 1-4 Family Rider.

Andres Cobo (Seal) -Borrower
ANDRES COBO

Amy M. Rule by Andres Cobo as Atty in fact (Seal) -Borrower
AMY M RULE BY ANDRES COBO
AS ATTORNEY-IN-FACT

ALDD JORDAN (Seal) -Borrower
ALDD JORDAN

(Seal) -Borrower

(Seal) -Borrower

(Seal) -Borrower

8 36 0690
26 126160 192

POWER OF ATTORNEY

Doc#: 0634101348 Fee: $26.00
Eugene "Gene" Moore RHSP Fee:$10.00
Cook County Recorder of Deeds
Date: 12/07/2006 01:12 PM Pg: 1 of 1

Mail to:
Waukegan Savings and Loan SB
1324 Golf Road
P.O. Box 19
Waukegan, IL 60079-0019

Prepared by: Waukegan Savings and Loan SB

I Amy M Rule, married to Andres Cobo, of the city of Maywood, County of Cook, State of Illinois, hereby appoint Andres Cobo, of city of Maywood, County of Cook, State of Illinois, as my attorney in fact to act in my capacity to sign any documents necessary, including note, mortgage and other documents required by Waukegan Savings and Loan, SB its successors and/or assigns, and including a waiver of homestead, to complete the refinance of the property in the amount of $227,500.00 located at 625 S 12 Ave, Maywood, IL 60153 and legally described as follows:

LOT 624 IN MADISON STREET ADDITION, A SUBDIVISION OF PART OF SECTION 10, TOWNSHIP 39 NORTH, RAGE 12, EAST OF THE THIRD PRINCIPAL MERIDIAN, IN COOK COUNTY, ILLINOIS.

Tax 15-10-425-013

Giving and granting unto my said attorney full power and authority to do and perform all and every act and thing whatsoever, requisite and necessary to be done in and about the premises, as fully, to all intent and purposes, as I might or could do if personally present at the doing thereof with full power of substitution and revocation, hereby ratifying and confirming all that my said attorney shall lawfully do or cause to be done by virtue hereof. This Power of Attorney shall not terminate or be affected by the disability or incapacity of the principal.

IN TESTIMONY WHEREOF, I have hereunto set my hand and seal this 18 day of November 2006.

Amy M Rule
Amy M Rule

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

The foregoing instrument was acknowledged before me on November 18, 2006, by Amy M Rule.
Date

Notary Public

OFFICIAL SEAL
MARIA L VILLAFANE
NOTARY PUBLIC - STATE OF ILLINOIS
MY COMMISSION EXPIRES:09/20/09

196
C-7

0242007564

NOTE

November 20, 2006 [Date] | Waukegan [City] | Illinois [State]

625 S. 12 Ave, Maywood, Illinois, 60153
[Property Address]

1. BORROWER'S PROMISE TO PAY

In return for a loan that I have received, I promise to pay U.S. $ 227,500.00 (this amount is called "Principal"), plus interest, to the order of the Lender. The Lender is

WAUKEGAN SAVINGS AND LOAN, SB

I will make all payments under this Note in the form of cash, check or money order.

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

2. INTEREST

Interest will be charged on unpaid principal until the full amount of Principal has been paid. I will pay interest at a yearly rate of 6.250 %.

The interest rate required by this Section 2 is the rate I will pay both before and after any default described in Section 6(B) of this Note.

3. PAYMENTS

(A) Time and Place of Payments

I will pay principal and interest by making a payment every month.

I will make my monthly payment on the 1st day of each month beginning on January 1, 2007. I will make these payments every month until I have paid all of the principal and interest and any other charges described below that I may owe under this Note. Each monthly payment will be applied as of its scheduled due date and will be applied to interest before Principal. If, on December 1, 2036, I still owe amounts under this Note, I will pay those amounts in full on that date, which is called the "Maturity Date."

I will make my monthly payments at

P.O. Box 19 1324 Golf Road
Waukegan, IL, 60079-0019

or at a different place if required by the Note Holder.

(B) Amount of Monthly Payments

My monthly payment will be in the amount of U.S. $ 1,400.76

4. BORROWER'S RIGHT TO PREPAY

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

I may make a full Prepayment or partial Prepayments without paying a Prepayment charge. The Note Holder will use my Prepayments to reduce the amount of Principal that I owe under this Note. However, the Note Holder may apply my Prepayment to the accrued and unpaid interest on the Prepayment amount, before applying my Prepayment to reduce the Principal amount of the Note. If I make a partial Prepayment, there will be no changes in the due date or in the amount of my monthly payment unless the Note Holder agrees in writing to those changes.

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5. LOAN CHARGES

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

6. BORROWER'S FAILURE TO PAY AS REQUIRED

(A) Late Charge for Overdue Payments

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

(B) Default

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

(C) Notice of Default

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

(D) No Waiver By Note Holder

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

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

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

7. GIVING OF NOTICES

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

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

8. OBLIGATIONS OF PERSONS UNDER THIS NOTE

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

9. WAIVERS

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

10. UNIFORM SECURED NOTE

This Note is a uniform instrument with limited variations in some jurisdictions. In addition to the protections given to the Note Holder under this Note, a Mortgage, Deed of Trust, or Security Deed (the "Security Instrument"), dated the same date as this Note, protects the Note Holder from possible losses which might result if I do not keep the promises which I make in

0242007564

BY SIGNING BELOW, Borrower accepts and agrees to the terms and covenants contained in pages 1 through 3 of this 1-4 Family Rider.

Andres Cobo (Seal)
ANDRES COBO -Borrower

Amy M. Rule by Andres Cobo (Seal) Atty in law
AMY M RULE BY ANDRES COBO -Borrower
AS ATTORNEY-IN-FACT

(Seal) -Borrower

(Seal) -Borrower

(Seal) -Borrower

(Seal) -Borrower

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