IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

COURT OF APPEALS OF NEW MEXICO
ALBUQUERQUE
FILED

SEP 30 2015

MATRIX FINANCIAL SERVICES CORP,

Plaintiff-Appellant,

v.

Appeal No. 34,635
District Ct. No. D-202-CV-2013-04584

ADELE LARRIBAS,

Defendant-Appellee,

and

if married, JOHN DOE A (true name unknown), her spouse; ELAINE CHAVEZ, and if married, JOHN DOE B (true name unknown), her spouse; and SECRETARY OF HOUSING AND URBAN DEVELOPMENT,

Defendants.

On Appeal from the Second Judicial District Court, County of Bernalillo
Victor S. Lopez, District Judge - Nan G. Nash, District Judge

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PLAINTIFF-APPELLANT MATRIX FINANCIAL SERVICES CORP
BRIEF IN CHIEF

Little, Bradley & Nesbitt, P.A.
Sandra A. Brown
Lucinda R. Silva, Of Counsel
PO Box 3509
Albuquerque, New Mexico 87190-3509
505-248-2400 / 505-254-4722 Fax
Sandy-B@littlepa.com /Lucinda-S@littlepa.com
Attorneys for Plaintiff-Appellant Matrix Financial Services Corp

ORAL ARGUMENT REQUESTED

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SUMMARY OF PROCEEDINGS

I. NATURE OF THE CASE

Matrix Financial Services Corp ("Matrix") filed a Complaint for Foreclosure ("Complaint") against Adele Larribas ("Larribas") and Elaine Chavez ("Chavez"), on May 28, 2013, on a promissory note executed by Larribas and Chavez and a mortgage executed by Larribas. [**RP 1-2 ¶¶ 4, 5; RP 8-19**]. Summary and Default Judgment in favor of Matrix was entered March 6, 2014, [**RP 99-105**], and an Order Approving Sale and Special Master's Report was entered July 1, 2014, [**RP 131-134**]. Larribas filed a June 25, 2014, Motion to Vacate Sale and Declare Judgment Void in Light of New Controlling Law ("Motion"), asserting Matrix lacked standing. [**RP 121**]. After an initial hearing before Judge Nash and a subsequent hearing before Judge Lopez, Judge Lopez entered an Order on Motion to Vacate Foreclosure Default Judgment; and Dismissing Foreclosure Complaint ("Order") on February 24, 2015, granting the Motion and dismissing Plaintiff's Complaint with prejudice. [**RP 178-185**].

II. COURSE OF PROCEEDINGS & SUMMARY OF RELEVANT FACTS

A. The Foreclosure Complaint, Larribas' Answer and Failure to Participate in the Motion for Judgment, and the Judgment and Sale

The Complaint described and included copies of the Note, in the form executed by Larribas, and the Mortgage. [**RP 1-19**]. The Complaint alleged:

> Plaintiff is entitled to enforce the Note and Mortgage. Copies of any applicable Assignment(s) are attached as Exhibit C.

[**RP 2** ¶ 7].

Defendant Secretary of Housing and Urban Development disclaimed any interest in the property. [**RP 21-22**]. Chavez did not respond to the Complaint. [**RP 90**]. Larribas filed her Answer June 20, 2014, [**RP 37-41**], raising standing among other affirmative defenses, [**RP 38** ¶ 7].

On November 6, 2013, Matrix filed and served its Motion for Summary and Default Judgment and Affidavit in Support of Judgment. [**RP 64; RP 47**]. The Affidavit in Support of Judgment executed by Victoria Bressner as a Vice President of Matrix affirmed that Matrix was the holder of the Note. [**RP 48 ¶¶ 5, 7**]. The Motion for Summary Judgment recited that Matrix was the holder of the Note. [**RP 66 ¶ 4**]. No party responded to Matrix's Motion for Summary and Default Judgment. [**RP generally**]. On December 4, 2013, Matrix filed and served a Notice of Non-Response and Completion of Briefing. [**RP 91**]. On December 30, 2013, a Notice of Hearing was filed, setting a March 6, 2014, hearing on the Motion for Summary and Default Judgment. [**RP 94**]. On March 6, 2014, the hearing was held; neither Larribas nor any other defendant appeared. [**3-6-14 1 Tr. 1-6**]. On March 6, 2014, Judge Nash entered a Summary and Default Judgment, [**RP 99-105**], including a finding that Matrix was duly assigned the

Note and Mortgage and that Matrix was entitled to enforce the Note and Mortgage. [**RP 100 ¶ 3**].

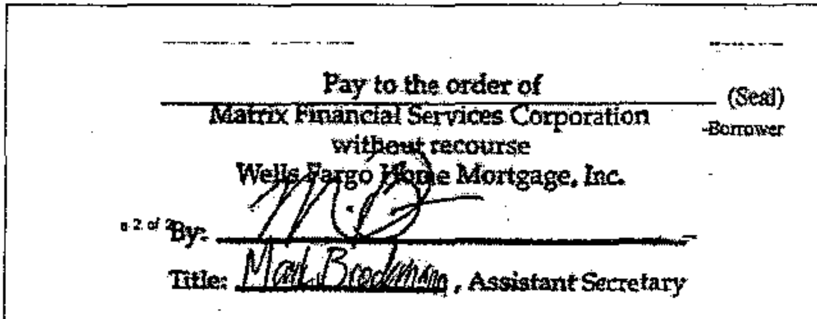
Pursuant to the Notice of Sale filed March 17, 2014, [**RP 106**], a Special Master's Sale was held on April 10, 2014. [**RP 11 ¶ 3**]. On May 13, 2014, Matrix filed and served upon Larribas its Motion for Order Approving Sale and Special Master's Report, [**RP 119-120**], and on July 1, 2014, the Court entered the Order Approving Sale and Special Master's Report, [**RP 131-134**].

B. Plaintiff's Standing and Larribas' Motion Challenge

On June 25, 2014, Larribas filed her Motion, attacking standing because the Note copy attached to the Complaint did not contain any indorsement and alleging there was no evidence that the Note was held by Matrix. [**RP 121**]. On July 16, 2014, Matrix filed Plaintiff's Response to Defendant Adele Larribas' Motion to Vacate Sale and Declare Judgment Void in Light of New Controlling Law ("Response to Motion"), opposing Larribas' Motion because it was untimely and attacked the finality of the judgment, did not meet Rule 1-060(B) grounds for relief from judgment and, if valid, did not warrant the relief sought and requesting the opportunity to supplement the record as to standing. [**RP 135-141**].

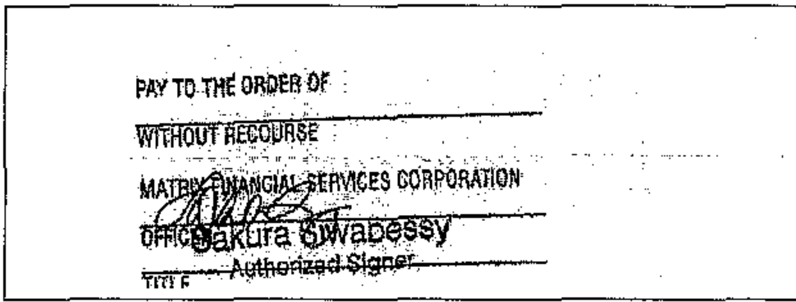
On September 3, 2014, Matrix's undersigned counsel filed its Affidavit Regarding Possession of Original Note, including a copy of the Original Note,

which included the complete copy of the Note that was the subject of the foreclosure. [**RP 149**]. The Original Note copy showed the Original Note to Wells Fargo Home Mortgage, Inc., specially indorsed [1] to Matrix Financial Services Corporation on page 2 of the original Note:


Pay to the order of
Matrix Financial Services Corporation
without recourse
Wells Fargo Home Mortgage, Inc.
By:
Title: , Assistant Secretary
(Seal)
-Borrower

[**RP 153**].

It also showed the Original Note was indorsed in blank[2] by Matrix Financial Services Corporation on the back side of page 2 of the Original Note:


PAY TO THE ORDER OF
WITHOUT RECOURSE
MATRIX FINANCIAL SERVICES CORPORATION
OFFICER Sakura Siwabessy
TITLE Authorized Signer

[1] NMSA 1978, § 55-3-205(a) (1992) – Special indorsement defined as: identifying the person to whom it makes the instrument payable and the instrument becomes payable to the identified person and may be negotiated only by the indorsement of that person.

[2] Section 55-3-205(b) – Blank indorsement defined as: if an indorsement is made by the holder of an instrument and it is not a special indorsement, it is a blank indorsement and is payable to bearer and may be negotiated by transfer of possession alone until specially indorsed.

[RP 154].

On September 4, 2014, Tracy A. Duck, an Authorized Signer for Matrix, filed an Affidavit of Standing at Time of Filing Complaint ("Duck Affidavit"), including a copy of the Original Note filed by counsel, and the sworn statement that Matrix had possession of the indorsed Original Note at the time the Complaint was filed: "The Plaintiff in this action had possession of the promissory Note, as attached, at time of filing its Complaint for Foreclosure." **[RP 157 ¶ 6, 158-160]**. The Original Note thereto was in the same form filed September 3, 2014, and included the special indorsement and blank indorsement noted above. **[RP 159-160]**.

A first hearing was held on the Motion on September 4, 2014. **[9-4-14 2 Tr. 1-25]**. Matrix raised the matter of Larribas' lack of participation in the litigation following the motion for judgment and the finality of judgments. **[9-4-14 2 Tr. 9:10-19]**. The court essentially rejected those defenses in stating that standing can be raised at any time. **[9-4-14 2 Tr. 18:5-8]**. Rule 1-060(B) relief was addressed and the court agreed to further hearing on whether Larribas had a meritorious standing defense. **[9-4-14 2 Tr. 18:10-16]**. Although in receipt of the Duck Affidavit that clarified Matrix's standing as possessor of the Note, **[9-4-14 2 Tr. 7:7-9:1]**, in proceeding, the court indulged Larribas' theory of no standing based upon the bald allegation that "clearly the note has been altered since the filing of

the complaint" because the Note copy attached at Complaint filing did not contain the indorsements existing on the Original Note presented as evidence with the Duck Affidavit. [**9-4-14 2 Tr. 3:17-4:4**]. The court reserved ruling on the Motion to allow Larribas to develop her allegations and meritorious defense claim and to pursue discovery and ordered further hearing limited to standing. [**9-4-14 2 Tr. 18:10-20:19, 23:8-13**]. Larribas did not serve any discovery requests. [**RP generally**].

On February 9, 2015, in supplement of its prior attestations, Matrix filed a Custodian's Affidavit further addressing its possession of the subject Note at the time the Complaint was filed to provide a business record and statement as to the possession of the Original Note on the date the Complaint was filed. [**RP 167-175**]. The Custodian's Affidavit established that as of March 10, 2004, The Bank of New York Mellon Trust Company, N.A. ("BNYMTC"), as Custodian, received the Original Note bearing the special indorsement to Matrix Financial Services Corporation and blank indorsement by Matrix Financial Services Corporation and placed the Original Note in its vault located in Irving, Texas, and the Original Note remained there until on or about July 16, 2014, at the request of and on behalf of Matrix. [**RP 170 ¶¶ 5-7**]. In support of the Custodian's Affidavit, the Custodian included a business record – a computer printout from the Custodian's records – reflecting the date of the deposit of the Original Note with the Custodian on March

10, 2004, and continuous possession with the Custodian until released on July 16, 2014, for delivery to Matrix's counsel for use in this action. [**RP 170 ¶¶ 5-7, 175, 149 ¶ 5, 151**].

On February 10, 2015, a subsequent hearing limited to the issue of standing was held. [**2-10-15 3 Tr. 1-32**]. At hearing Matrix presented the Original Note and documentary evidence of record as of the date of the hearing: Complaint, Affidavit Regarding Possession of Original Note, Duck Affidavit and Custodian's Affidavit. [**2-10-15 3 Tr. 21:5-24:9**]. Larribas presented no evidence. [**2-10-15 3 Tr. generally**]. The court took the matter under advisement. [**2-10-15 3 Tr. 31:3-4**].

III. DISPOSITION IN THE COURT BELOW

On September 4, 2014, the court rejected Matrix's defenses of lack of participation in the litigation following the motion for judgment and the finality of judgment in stating that standing can be raised at any time. [**9-4-14 2 Tr. 9:10-19, 18:5-8**].

By Order on Motion to Vacate Foreclosure Default Judgment; and Dismissing Foreclosure Complaint with Prejudice entered February 24, 2015, rather than limiting the Order to the scope set forth following the September 4, 2014, hearing, or the Motion, the court concluded that "Matrix established no

standing to pursue a foreclosure against Defendants based on the present record," that "the court did not have jurisdiction to enter the Default Judgment entered in this proceeding on March 6, 2014, for lack of standing by the Plaintiff, and must dismiss," and ordered not only that all the prior judgments and orders be set aside but also that the Complaint be dismissed with prejudice. [**RP 183 COL G-I, 184**]. In doing so, the court declared Matrix has no right to foreclose in contravention of its own declaration that it has no jurisdiction to act on the Complaint.

The Order included Findings of Fact that were not supported by substantial evidence, contained misapprehension of facts material to the issue of standing, contained misapprehension of the evidence and contained errors of law. As a result, its conclusions of law and order inaccurately relieved Larribas of any burden to present a meritorious defense and inaccurately applied the law on standing. The court failed to consider the corroborating evidence that proved the Original Note was held by Matrix at the time of the Complaint filing vis-a-vis its custodian The Bank of New York Mellon Trust Company, N.A.'s ("BNYMTC") testimony that it received the Original Note on March 10, 2004, and held it in its vault <u>until</u> July 16, 2014.

ARGUMENT

I. LARRIBAS' MOTION DOES NOT MEET THE THRESHOLD REQUIREMENT OF TIMELINESS AND THE DISTRICT COURT ERRED IN ENTERTAINING THE UNTIMELY RULE 1-060(B)(4) MOTION AND REFUSING TO RECOGNIZE AND ENFORCE THE FINALITY OF THE SUMMARY AND DEFAULT JUDGMENT.

A. Statement Regarding Standard of Review and Issue Preservation.

The issue of relief under Rule 1–060(B)(4) should be reviewed de novo. *Chavez v. Valencia County*, 1974-NMSC-035, ¶ 16, 86 N.M. 205, 521 P.2d 1154, provides:

> There is no discretion on the part of the trial court under Rule 60(b)(4)" [citing], Austin v. Smith, 114 U.S.App.D.C. 97, 312 F.2d 337 (1962); Hicklin v. Edwards, 226 F.2d 410 (8th Cir. 1955). In Wright and Miller, supra, s 2862, it is stated: 'Rule 60(b)(4) authorizes relief from void judgments. Necessarily a motion under this part of the rule differs markedly from motions under the other clauses of Rule 60(b). There is no question of discretion on the part of the court when a motion is under Rule 60(b)(4). Either a judgment is void or it is valid.

Matrix raised and preserved the issue of whether the Motion was timely and violates the finality of the judgment in Plaintiff's Response to Motion filed July 16, 2014, [**RP 135**], and at hearing on the Motion on September 4, 2014. [**9-4-14 2 Tr. 9:10-19**].

B. Larribas was not entitled to relief under Rule 1-060(B) to disturb the finality of the Judgment because the timing of her Motion was not reasonable under the circumstances.

Larribas alleges the Judgment is void because Matrix lacks standing, seeking relief under Rule 1-060(B)(4) NMRA. However, Larribas did not seek her Rule 1-060(B)(4) relief within a "reasonable time" under the circumstances, and Rule 1-060(B) relief should not be available to Larribas as a substitution for a failure to appeal.

Standing may be raised at any point in the proceedings and even for the first time on appeal. *Bank of New York v. Romero*, 2014-NMSC-007, ¶ 17, 320 P.3d 1. However, motions under Rule 60(b)(4) must still be presented within a "reasonable time." *Thompson v. Thompson*, 1983-NMSC-025, ¶ 7, 99 N.M. 473, 660 P.2d 115.[3] Reasonable time is dictated by the circumstances. *Freedman v. Perea*, 1973-NMSC-124, ¶ 6, 85 N.M. 745, 517 P.2d 67. Under the circumstances, Larribas does not meet this threshold requirement under Rule 1-060(B) NMRA.

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[3] Matrix acknowledges this Court's recent opinion which states that "there is no time limitation on asserting that a judgment is void," *Phoenix Funding, LLC v. Aurora Loan Services, LLC*, 2015-NMCA-___, ¶ 10, __ P.3d __ (No. 33,211, August 24, 2015), however Matrix points out to the Court that the Supreme Court cases cited therein pre-date the Supreme Court case of *Thompson*, 1983-NMSC-025, cited herein and that *Thompson's* "reasonable time" standard is the law of New Mexico.

A foreclosure judgment to the extent it determines the right of the parties in the property is a final judgment. *Grygorwicz* v. *Trujillo,* 2009-NMSC-009, ¶ 8, 145 N.M. 650, 203 P.3d 865. The time for appealing a final judgment is 30 days from the entry of judgment. NMSA 1978, § 39-1-1 (1917). Although the 30-day time for appeal can be tolled by a motion under Rule 1-060(B), that motion must be timely filed within 30 days of the judgment. Rule 12-201(D)(1) NMRA. That the Rules of Appellate Procedure encompass Rule 1-060(B) motions within Rule 12-201(D)(1) further exemplifies the notion that Rule 1-060(B) motions are not intended by the Court to thwart the time for appeal.

The March 6, 2014, Default and Summary Judgment of foreclosure was a final judgment for the purposes of appeal. Larribas, who had appeared and answered in the suit, did not oppose the Motion for Summary Judgment directed at her during the briefing phase or at hearing, and following the hearing and entry of judgment she did not file a motion to reconsider pursuant to Rule 1-059(E) NMRA, a timely Rule 1-060(B) motion or a timely Notice of Appeal. Rather, Larribas waited over three months to file a Rule 1-060(B) motion.

By submitting a late Rule 1-060(B) motion on a non-appealable order, Larribas plainly attempted to use her tardy motion as a substitute for an appeal. This is not the purpose of Rule 1-060(B). "It is well established that a motion for relief from a judgment or order under Rule 60(b) is not intended to extend the time

for taking an appeal and cannot be used as a substitute for an appeal." *Gedeon* v. *Gedeon,* 1981-NMSC-065, ¶ 17, 96 N.M. 315, 630 P.2d 267.

> Where an action or suit is regularly commenced and prosecuted, judgment regularly entered, even though by default, the defendant cannot thereafter on motion vacate such judgment on the ground of the existence of a complete defense to the action, which defense was available to the defendant before the entry of the judgment. ... Were it not so, no matter how enjoyable or profitable litigation might be to some, a suit could be prolonged beyond the three score and ten allotted to the life of man.

Ealy v. McGahen, 1933-NMSC-033, ¶¶ 19-21, 37 N.M. 246, 21 P.2d 84.

Here, the Judgment was entered post-*Romero* and thus the timing of *Romero* does not work in Larribas' favor as the *Romero* holding relied upon by Larribas existed at the time of the Judgment. Larribas already raised standing in her Answer and Larribas had ample opportunity and time to pursue her defense in a timely fashion. Where she failed to do that and observe the Rules of Civil Procedure, Larribas should not be permitted to collaterally attack the Judgment; such conduct is not reasonable under the circumstances and should not be condoned.

C. Policy considerations make Larribas' Rule 1-060(B)(4) Motion untimely under the circumstances.

Matrix's actions in filing and prosecuting the foreclosure through conclusion are in accordance with the applicable law when filing its Complaint, moving for judgment and through today. Disturbing the Judgment and requiring Matrix to

retroactively produce evidence discussed in the context of the particular facts of the *Romero* decision is inequitable and was not contemplated by the decision itself. Instead, *Romero* merely reiterated existing law on standing – and this restatement of the law does not defeat the Judgment here. The result in the court below is inequitable to Matrix as the party entitled to foreclose in the foreclosure proceeding and as the purchaser at sale of the property. If Larribas and the court below were correct in the application of *Romero*, generations of foreclosures are subject to challenge in New Mexico, highlighting the ridiculousness of imparting such a broad interpretation to *Romero* and not recognizing the existing Rules and case law as to finality of judgment, pleadings and admissible evidence on summary judgment. The upheaval occasioned by such an application of *Romero* is the epitome of inequity and why Rule 1-060 should not be available to set aside the Judgment and Order Approving Sale here.

II. THE DISTRICT COURT ERRED IN ENTERTAINING LARRIBAS' POST-JUDGMENT CHALLENGE TO STANDING WHERE DEFENDANT LARRIBAS DID NOT ARTICULATE HER STANDING OBJECTIONS AND FAILED TO RESPOND TO THE MOTION FOR JUDGMENT OR APPEAR FOR HEARING ON SAME.

A. Statement Regarding Standard of Review and Issue Preservation.

Standing based upon the pleadings is a question of law, which the Court reviews de novo. *City of Sunland Park v. Santa Teresa Services Co.*, 2003-NMCA-106, ¶ 39, 134 N.M. 243, 75 P.3d 843. This issue was raised and preserved

in the trial court by virtue of Plaintiff's Response Motion filed July 16, 2014, [**RP 135**], and at hearing on the Motion on September 4, 2014. [**9-4-14 2 Tr. 9:10-19**].

B. Larribas' failure to pursue her standing defenses before Judgment is a default and consent to Judgment.

Plaintiff offers that Larribas by her lack of response or objection to the Judgment consented to the Judgment. Rule 1-007.1(D) NMRA; Rule 1-056(E) NMRA. Pursuant to Rule 1-007.1(D), where a party fails to file a response to a motion, the court may rule on the motion with or without hearing. On a summary judgment motion made and supported by the movant, where there is no response by a party, summary judgment, if appropriate, shall be entered against the non-responding party. Rule 1-056(E). The failures by Larribas should be deemed admissions by Larribas of those facts asserted by Matrix that established Matrix's standing to pursue the foreclosure action.

In *Bank of New York Mellon v. Singh*, No. 34,041, mem. op. at 1, (N.M. Ct. App. Jan. 21, 2015) (non-precedential) *cert. denied*, No. 35,132, (March 18, 2015), and *BOKF, N.A., v. Lopez*, No. 34,005, mem. op. at 1, (N.M. Ct. App. Nov. 3, 2014) (non-precedential) *cert. denied*, No. 34,973 (Dec. 10, 2014), this Court concluded that where the bank is not on notice of the standing issue, the bank is entitled to rely on defendant's admission by default of allegations of standing. *Singh* and *Lopez* involved default judgments in a foreclosure action on appeal by

borrowers asserting lack of standing. In each case, the Court of Appeals found that the borrower was deemed to have admitted the bank's facts supporting standing and rejected the borrower's post judgment standing challenge. *Lopez*, No. 34,005, mem. op. at 1; *Singh*, No. 34,041, mem. op. at 2. The Court of Appeals distinguished the facts from *Romero*, 2014-NMSC-007, where the borrower "objected to the plaintiff bank's standing during the foreclosure proceedings and thus put the plaintiff to its proof on that issue." *Lopez*, No. 34,005, mem. op. at 1. On this point, *Singh* and *Romero* are on ends of a continuum concerning the notice of the standing defense in that in *Singh* the borrower did nothing and in *Romero* the borrower hotly pursued the standing defense.

Matrix is distinguishable from the *Romero* bank and should receive the same treatment as was given to the bank in *Singh*. In *Romero* it appears that the borrowers were assertive in their defense of standing and the standing objection was vigorously litigated at trial and was more than a cursory reference in an answer to the complaint. Here, Matrix had no actual notice of the nature of Larribas' allegation of lack of standing aside from it appearing as an affirmative defense in a "kitchen-sink" answer. [**RP 38** ¶ 7]. Following the answer, Matrix put on the proof of standing in its Affidavit in Support of Judgment, [**RP 48** ¶¶ **5,** 7], to which Larribas made no response whatsoever. Notably, this was offered pre-*Romero* and thus Matrix was likewise not on notice of proof of standing holding

that would emanate from the *Romero* decision. Given the procedural posture, Larribas' failure to participate in the pre-judgment activity to pursue a standing defense is analogous to the *Singh/Lopez* borrowers. This Court should find that Matrix is permitted to rely on Larribas' admissions by failure to respond to Matrix's proffer of evidence concerning standing offered through the time of Judgment. The Court of Appeals in *Singh* stated that to ignore the borrower's admission by default would render a default judgment meaningless. *Singh*, No. 34,041, mem. op. at 2. To ignore Larribas' admissions by lack of response and failure to attend the hearing on the summary judgment motion would render the summary judgment rules void, particularly where Matrix did provide evidence of its standing in its Affidavit in Support of Judgment and was not on notice that such evidence was disputed.

Matrix is not advocating a pro forma summary judgment, distinguishing it from *Atherton v. Gopin*, 2015-NMCA-003, 340 P.3d 630, *cert. granted*, 2014-NMCERT-__, 344 P.3d 988 (No. 34,978, Dec. 19, 2014), where the Court of Appeals refused to condone a pro forma grant of a summary judgment simply because non-movant filed a late response to a motion for summary judgment. In *Atherton*, the non-movant filed a late response to a motion for summary judgment and the trial court denied the non-movant's request to enlarge the time to respond to the motion. *Atherton*, 2015-NMCA-003, ¶ 22. Rather than determine the merits

of the motion for summary judgment, the court relied on the non-movant's deemed admissions only and granted the summary judgment. *Atherton*, 2015-NMCA-003, ¶ 22. In the present case and unlike *Atherton*, Larribas did absolutely nothing when Matrix presented a supported motion for summary judgment, which at that *pre-Romero* time was without question a sufficient demonstration of standing. Larribas filed no response to the motion, timely or otherwise, and Larribas did not attend the hearing. Given the procedural status and the pending supported motion there was nothing to be done except enter the Judgment.

This matter is more similar to *Eichenberg v. Duran*, No. 34,032, dec. at 2 (N.M. Ct. App. Mar. 17, 2015) (non-precedential), in that Larribas had the opportunity to respond and be heard on the summary judgment. In *Eichenberg*, this Court affirmed the district court's grant of a summary judgment where the borrower failed to respond to the motion for summary judgment, the Court granted summary judgment on its merits, then held a hearing where notice of the hearing had not been given, and ultimately affirmed its summary judgment because the borrower's statement of affirmative defenses was insufficient to defeat the summary judgment. *Eichenberg*, No. 34,032.

This is consistent with *U.S. Bank, NA v. Payne*, No. 33,006, dec. at 1, (N.M. Ct. App. Apr. 21, 2014) (non-precedential), wherein this Court upheld a similar summary judgment noting:

> "the district court and this Court are bound to accept as true the uncontroverted facts recited in Plaintiff's motion for summary judgment. [ ] Rule 1–056(D)(2). ... those facts include the recitation that the Plaintiff is the assignee of the mortgage at issue in this case and the holder in due course of the promissory note secured by that mortgage. [ ] Further, these facts are supported by an affidavit filed with the motion for summary judgment. [ ]."

Matrix offers that because the summary judgment was granted on the merits with supporting evidence and the borrower did not controvert the motion with evidence when given ample opportunity to do so, the court should have, like *Eichenberg* and *Payne*, upheld its summary judgment.

III. THE DISTRICT COURT ERRED TO THE EXTENT ITS DECISION IMPOSED REQUIREMENTS CONCERNING DATED INDORSEMENTS AND ATTACHMENTS TO PLEADINGS.

The district court erred by grafting onto *Romero's* standing analysis the concept that an indorsement must be dated. [**RP 181 FOF 13, RP 182 FOF 22, 2-10-15 3 Tr. 7:16-8:5, 10:13-21, 11:4-7.**] Such an evidentiary rule departs from *Romero*, improperly adds new requirements under the UCC, and contravenes "notice pleading" standards.

A. Statement Regarding Standard of Review and Issue Preservation.

The issues presented in this section are legal questions and questions of statutory interpretation are subject to de novo review. *See Romero*, 2014-NMSC-007, ¶ 40. This issue was raised and preserved in the trial court at hearings on September 4, 2014, [**9-4-14 2 Tr. 10:1-3**] and February 10, 2015, [**2-10-15 3 Tr.**

9:19-25, 19:23-20:4] and in Plaintiff's Proposed Findings of Fact and Conclusions of Law submitted to Judge Lopez on February 20, 2015, [which it appears the court below does not include with the record proper].

B. The Lower Court Attempted to Add New Requirements Under the UCC and Does not Consider the UCC's Statutory Presumptions.

Courts are not permitted to add requirements to the UCC that the New Mexico legislature did not include. *See Vukovich v. St. Louis, Rocky Mountain & Pac. Co.*, 1936-NMSC-053, ¶ 20, 40 N.M. 374, 60 P.2d 356; *see also Duran v. Xerox Corp.*, 1986-NMCA-124, ¶ 17, 105 N.M. 277, 731 P.2d 973 ("This court should not add language to statutes that the legislature has seen fit to omit."); *Second Nat. Bank of Danville v. Massey-Ferguson Credit Corp.*, 478 N.E.2d 916, 918 (Ind. Ct. App. 1985) ("[A]n extension of the plain meaning of [the UCC] by the addition of words or phrases would encroach upon the legislative function. . . ." and would be inconsistent with policies.") (internal citations omitted). Yet, here, the lower court's focus on the date of the indorsement in its order effectively adds new requirements.

1. There is No Requirement That Indorsements be Dated.

The district court's focus at hearing and in the Order infers its reliance on a dating requirement for note indorsements. [**RP 181 FOF 13, RP 182 FOF 22, 2-10-15 3 Tr. 7:16-8:5, 10:13-21, 11:4-7.**] The UCC contains no provisions

requiring or even suggesting that an indorsement to a note be dated. *See* NMSA 1978, §§ 55-3-109 (1992); 55-3-204 (1992); *see also, e.g., Mbaku v. Bank of Am.*, No. 12-CV-00190- PAB-KLM, 2014 WL 4099313, at *12 (D. Colo. Aug. 20, 2014) ("[T]here is no requirement that an endorsement must be dated or notarized in order to be valid."); *Everbank v. Katz*, 2014-Ohio-4080, ¶ 7 ("It is of no consequence that the allonge was undated. The Uniform Commercial Code does not require endorsements on negotiable instruments to be dated."). To the contrary, for blank indorsements like the one at issue here, the official commentary to UCC Section 55-3-205(b) states: "A blank indorsement is usually the signature of the indorser on the back of the instrument *without other words*." Section 55-3-205 cmt. 2 (emphasis added).

2. *Romero* Does Not Impose a Dating Requirement on Indorsements.

Romero specifically recognized there are other ways a plaintiff may establish its authority to foreclose under the UCC. *See Romero*, 2014-NMSC-007, ¶ 19 (quoting NMSA 1978, § 55-3-301 (1992)). Further, *Romero* also recognized that a party who produces an original note with a blank indorsement (dated or not) is entitled to a *presumption* of enforcement. *Romero*, 2014-NMSC-007, ¶ 38.

Although *Romero* references the fact that the indorsements therein were undated, the Supreme Court analyzed that issue in the context of the UCC holder analysis because Bank of New York was in possession of an original note with *two*

conflicting indorsements – one indorsed in blank, and another by special indorsement. *See Romero*, 2014-NMSC-007, ¶ 26. Additionally, the loan servicer in that case did not adequately explain the conflict between the indorsements at trial. *Romero*, 2014-NMSC-007, ¶¶ 30-32. *Romero's* discussion concerning the date on which the lender took possession occurred only after the Court had first determined the plaintiff was *not* a "holder," and thus, it was not entitled to the UCC's presumption of standing to enforce the note. Only under the particular circumstances in *Romero* (*e.g.*, an unresolved conflict between a special indorsement and blank indorsement) was it necessary to determine whether the plaintiff was a "'nonholder in possession of the instrument who has the rights of a holder'" by transfer, and thus, to determine whether such a transfer occurred before the lawsuit. *See Romero*, 2014-NMSC-007, ¶ 29 (quoting Section 55-3-301).

Here, none of these issues arose because Matrix's Note does not include the unusual infirmities present in *Romero*. The Note does not contain conflicting indorsements, but instead contains a clear special indorsement to Matrix and Matrix's own blank indorsement. [**RP 153, 154**]. Thus, not only did Matrix allege it was the holder in the complaint and following affidavits, it also conclusively established it was the "holder" under the UCC when it presented the original indorsed Note to the district court.

3. The UCC Creates Presumptions in Favor of a Holder, which the District Court Did Not Consider.

The district court erred because it did not consider the rights and presumptions created under the UCC in favor of a holder. When a plaintiff presents the original note to the court with a blank indorsement, the plaintiff establishes it is then the holder of the note, and is entitled to enforce the note and foreclose the mortgage. *Romero*, 2014-NMSC-007, ¶ 26; *see also* § 55-3-301 ("'Person entitled to enforce' an instrument means (i) the holder of the instrument"); NMSA 1978, § 55-1-201(b)(21)(A)(2005) (defining a "holder" as "the person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession."); § 55-3-205(b) (an instrument "'becomes payable bearer" "[w]hen indorsed in blank").

Here, Matrix first alleged it was entitled to enforce the Note in its original Complaint, [**RP 2**], and then proved that fact by presenting the original, blank-indorsed Note to the court. [**RP 149-154; 9-4-14 2 Tr. 5:10; 2-10-15 3 Tr. 24:4-9**]. And, unlike *Romero*, the Note here did not contain any conflicting indorsements. [**RP 158-160**]. Therefore, once Matrix proved it was the "holder" (consistent with its original averments), it did not need to embark on proof at earlier times or prove that it was a "non-holder in possession" or establish other means of enforcement under the UCC. *See Romero*, 2014-NMSC-007, ¶ 26. The

standing analysis was satisfied at the point when the district court was presented with evidence that Matrix was a "holder." [**RP 149-154; 9-4-14 2 Tr. 5:10**].

Even if the district court were required to analyze Matrix's status on an earlier date (*i.e.*, also analyze standing when the foreclosure complaint was first filed), Section 3-308 of the UCC provides a *presumption* of entitlement to enforce the Note once plaintiff establishes it is the current note holder. *See* NMSA 1978, § 55-3-308 (1992). The Supreme Court acknowledged the presumption in favor of note holders when distinguishing the peculiar facts of *Romero*: [T]he UCC clarifies that the Bank of New York is not afforded any assumption of enforcement without proper documentation:

> Because the transferee is not a holder, there is no presumption under Section [55–] 3–308 [(1992) (entitling a holder in due course to payment by production and upon signature)] that the transferee, by producing the instrument, is entitled to payment. The instrument, by its terms, is not payable to the transferee and the transferee must account for possession of the unindorsed instrument by proving the transaction through which the transferee acquired it.'

Romero, 2014-NMSC-007, ¶ 38 (quoting Section 55-3-203, cmt. 3). By contrast, the presumption of enforcement under Section 55-3-308 *was* available to Matrix, because it proved it was in possession of an original, blank indorsed Note and was thus a "holder."

Section 55-3-308(b) of the New Mexico UCC provides:

> If the validity of signatures is admitted or proved and there is compliance with Subsection (a), a plaintiff producing the instrument is

entitled to payment if the plaintiff proves entitlement to enforce the instrument under Section 55-3-301 NMSA 1978, unless the defendant proves a defense or claim in recoupment.

Section 55-3-308(b) (emphasis added).

According to the official UCC commentary, Section 55-3-308(b) means that "[o]nce signatures are proved or admitted[,] a holder, by mere production of the instrument, proves 'entitlement to enforce the instrument' because under Section 3-301 a holder is a person entitled to enforce the instrument." Section 55–3-308 cmt. 2 (emphasis added); *see also* 6 Hawkland UCC Series § 3-308:3 (citing UCC § 3-308(b) cmts. 1 & 2), and *The Cadle Co. v. Shearer*, 69 S.W.3d 122, 47 U.C.C. Rep. Serv. 2d 629 (Mo. Ct. App. W.D. 2002) (once the maker admits the making of its signature, the holder establishes a prima facie case by producing the note in court)").

The maker of the Note here, Larribas, admitted her signature on the Note when she failed to specifically deny the authenticity of and authority to make her signature in any pleading she filed. [**RP 37, 121**]. S*ee* Section 55-3-308(a) ("the authenticity of, and authority to make, each signature on the instrument is admitted unless specifically denied in the pleadings.").

Because the signatures were admitted and Matrix held the original special–indorsed and blank-indorsed Note, Matrix established a "prima facie case for recovery." *See* Section 55-3-308; 6 Hawkland UCC Series § 3-308:3 (citing UCC §

3-308(b) cmts. 1 & 2). Thus, it did not need to "account for possession of the unendorsed instrument by proving the transaction through which the transferee acquired it." *See Romero*, 2014-NMSC-007, ¶ 38. Once Matrix established its prima facie case for recovery, the burden then shifted to Larribas to prove a defense to Matrix's enforcement of the Note. *See* Section 55–3-308; *see also* 6 Hawkland UCC Series § 3-308:3. At hearing on the Motion, Larribas merely baldly alleged that the Note was altered and theorized that the Note could have left Matrix during the time Matrix asserts it held the Note but did not present any documentary or testimonial evidence that any party other than Matrix held the Note. [See, e.g., **9-4-14 2 Tr. 3:25-4:1; ; 2-10-15 3 Tr. 4:9-10, 30:21-31:2**). Accordingly, Larribas failed to prove her purported defense to Matrix's prima facie case for recovery on the Note.

Under these circumstances, many courts have determined that foreclosing parties have established their "standing" to foreclose. In a line of Connecticut cases, for example, foreclosing parties have proven their standing to foreclose where: (1) they produced a blank-indorsed note and thus established a prima facie case for enforcement of the note, and (2) the borrowers then failed to present "'evidence demonstrating that the plaintiff was not in possession of the promissory note' when it commenced [the] foreclosure action." *See Equity One, Inc. v. Shivers*, 74 A.3d 1225, 1235 (Conn. 2013) (quoting *Chase Finance, LLC v.*

Fequiere, 989 A.2d 606 (Conn. App. Ct. 2010), *cert. denied*, 991 A.2d 564 (Conn. 2010)); *RMS Residential Properties, LLC v. Miller*, 32 A.3d 307, 315 (Conn. 2011) (stating that "having failed to present any evidence rebutting the presumption that [the plaintiff] was the rightful owner of the debt at the time that it commenced the foreclosure action, the defendant has failed to satisfy her burden"); *see also, e.g., U.S. Bank, N.A. v. Ugrin*, 91 A.3d 924, 930 (Conn. App. Ct. 2014) (same).

As in these other cases, standing in this case was established after Matrix proved it was a holder, and Larribas failed to rebut Matrix's prima facie case.

C. The District Court's Order Is Contrary to New Mexico's Notice Pleading Standards.

The district court also erred in holding, as argued by Larribas, that Plaintiff must demonstrate standing "*at* the time of the filing" of the foreclosure. **[RP 183, COL B, C (emphasis added)]**. *Romero* contains no requirement that a plaintiff conclusively establish its standing upon first filing the complaint. Inherent in the district court order was a preoccupation with the Note copy attached to the Complaint and focus on whether Matrix established standing when it filed the Complaint. **[RP 180 FOF 11-12, RP 183 COL D, F]**. This approach by the district court conflicts with general "notice pleading" standards.

As the Supreme Court recently confirmed, "[t]hroughout the past seventy-five years, this Court has maintained our state's notice pleading requirements, emphasizing our policy of avoiding insistence on hypertechnical form and exacting

language." *Zamora v. St. Vincent Hosp., Inc.*, 2014-NMSC-035, ¶ 10, 335 P.3d 1243. Rule 1-008 only requires that pleadings contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Rule 1-008 NMRA 2015. Thus, "specific evidentiary detail is not required at [the complaint] stage of the pleadings." *Petty v. Bank of N.M. Holding Co.*, 1990-NMSC-021, ¶ 7, 109 N.M. 524, 787 P.2d 443. And, "'[t]he Rules of Civil Procedure disfavor looking upon pleadings as tests of skill where a single misstep could bar recovery.'" *Zamora*, 014-NMSC-035 at ¶ 10 (quoting *Mendoza v. Tamaya Enters., Inc.*, 2010-NMCA-074, ¶ 15, 148 N.M. 534). Accordingly, it is only at trial or in a dispositive motion that plaintiffs are required to *prove* the necessary elements of their claims, including that they are the proper party to enforce the rights asserted.

Adopting a rule that, in foreclosure actions, standing must be proven *at* the time of the complaint would be contrary to the well-established standards set forth above and would add evidentiary burdens at the pleading stage that do not currently exist. No longer would plaintiffs only be required to provide fair notice of their claims in their complaints. Instead, affirming the district court would require plaintiffs to *prove* their right to enforce the note within the complaint itself and its attachments.

Because Matrix alleged that it was the holder of the Note in its Complaint, attached a copy of the Note to the Complaint, and later proved it was the holder of

Note by producing the original Note with a special and its own blank indorsement, Matrix complied with New Mexico's notice pleading requirements. The district court should therefore be reversed.

IV. THE DISTRICT COURT ERRED IN CONCLUDING THAT MATRIX DID NOT HAVE STANDING TO PURSUE FORECLOSURE AGAINST DEFENDANTS BASED UPON THE RECORD PRESENTED.

A. Statement Regarding Standard of Review and Issue Preservation.

The substantial evidence standard ordinarily applies, however, when the resolution of the issue depends upon the interpretation of documentary evidence, the Appellate Court is in as good a position as the trial court to interpret the evidence; the Appellate Court will examine and weigh it, and will review the record, giving some weight to the findings of the trial judge on such issue. *Romero*, 2014-NMSC-007, ¶ 18.

This issue was raised and preserved in the trial court in Plaintiff's Response to Motion filed July 16, 2014, [**RP 135**], at hearings on the Motion on September 4, 2014, [**9-4-14 2 Tr. 7:1-9:1**], and February 10, 2015, [**2-10-15 3 Tr. Generally**] and in Plaintiff's Proposed Findings of Fact and Conclusions of Law submitted to Judge Lopez on February 20, 2015.

B. Matrix Presented Sufficient Evidence to Demonstrate it had Standing to Enforce the Note and Mortgage in this Foreclosure Action.

The district court concluded that "Matrix established no standing to pursue a foreclosure against Defendants based upon the present record." However, the record is abundantly clear, particularly in view of the multiple misapprehensions contained in the Order on appeal, that Matrix presented substantial evidence to support it had standing as of the February 20, 2015, hearing on the Motion.

1. Matrix's proof of standing was sufficient under the UCC and *Romero*.

Standing to enforce a note is a jurisdictional prerequisite and must be established to have existed at the time the complaint is filed. *Romero*, 2014-NMSC-007, ¶ 17. To establish standing to foreclose, a lender must show that, at the time it filed its complaint for foreclosure, it had: (1) a right to enforce the note, which represents the debt, and (2) ownership of the mortgage lien upon the debtor's property[4]. *Romero*, 2014-NMSC-007, ¶ 17. There are three persons entitled to enforce a negotiable instrument under the UCC: (i) the holder of the instrument, (ii) a nonholder in possession of the instrument who has the rights of a holder, or (iii) a person note in possession of the instrument who is entitled to

[4] As to this later element, Matrix' ownership of the mortgage was not an element addressed in the district court's order. However, the pleadings demonstrate that Matrix owned the Mortgage by virtue of the Assignment of Mortgage dated July 15, 2002. **[RP 2 ¶ 7]**.

enforce the instrument. *Romero*, 2014-NMSC-007, ¶ 20; § 55-3-301. The holder of the instrument is "the person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession." § 55-1-201(b)(21(A) "A third party must prove both physical possession and the right to enforcement through either a proper indorsement or a transfer by negotiation." *Romero*, 2014-NMSC-007, ¶ 21.

Matrix possessed the original Note bearing the special indorsement to Matrix Financial Services Corporation and blank indorsement by Matrix Financial Services Corporation. It is established that a holder of a note as a result of a special indorsement and possessing the note may indorse the note in blank without creating a "conflicting indorsement"; the effect of the blank indorsement is to allow the holder to negotiate, or transfer, the note to another person. *Flagstar Bank, FSB v. Licha*, 2015-NMCA-086, ¶ 16, __ P.3d __ (No. 33,150, June 4, 2015).

For the purposes of argument and without waiving other argument herein, Matrix acknowledges that this Court has held Plaintiff "must be able to show, through properly indorsed and dated documentation, that it is the owner or both the note and the mortgage on the date of filing a foreclosure action." *Deutsche Bank v. Johnston*, 2014-NMCA-090, ¶ 13, 335 P.3d 217 (*cert. granted*). In *Johnston* the Court of Appeals held that the unindorsed note filed with the complaint,

assignment of mortgage and indorsed note presented at trial were insufficient to show standing. *Johnston*, 2014-NMCA-090, ¶ 15. The Court of Appeals concluded more was needed, noting a lender must provide properly indorsed, dated documentation that it was the owner of the note and mortgage on the date of filing the foreclosure action. *Johnston*, 2014-NMCA-090, ¶ 17.

Again, in *Bank of New York Mellon v. Lopes*, 2014-NMCA-097, ¶¶11-13, 336 P.3d 443, the Court of Appeals found no standing under facts similar to *Johnston* – unindorsed note filed with the complaint, assignment of mortgage and indorsed note presented post complaint only – without any evidence of whether it held the note at the time the complaint was filed. Notably, neither Court required that a dated indorsement be produced and presumably was purposefully selective in using the broader term "dated *documentation*" as opposed to "dated *indorsement*" to describe what proof is necessary.

Since those decisions, confronted with similar facts but more evidence offered by the bank, this Court has held that evidence in the form of a post-complaint affidavit that plaintiff's agent possessed the indorsed note prior to filing the complaint establishes plaintiff's standing to foreclose at the time it filed its complaint. *Singh*, No. 34,041, mem. op. at 1. In *Singh*, the affidavit of the plaintiff-bank's attorney stating the firm held the note for the plaintiff-bank at the time the Complaint was filed was sufficient evidence to demonstrate that plaintiff-

bank was in possession of the indorsed note prior to filing the foreclosure and had standing. *Id.*

What was missing in *Johnston* and *Lopes*, evidence of whether the plaintiff-bank held the Note at the time the Complaint was filed, is not missing here, and what the lender in *Singh* demonstrated to show standing is present here. Matrix provided evidence in the form similar to what the Court accepted in *Singh* to meet the standing requirements further discussed in *Johnston* and *Lopes*. Post-Judgment and specifically in response to the Motion by Larribas attacking the Judgment, Matrix offered the September 4, 2014, Affidavit of Tracy A. Duck, Authorized Signer for Matrix, including a copy of the Original Note, and the sworn statement that Matrix had possession of the indorsed Original Note, which contained the indorsements, at the time the Complaint was filed: "The Plaintiff in this action had possession of the promissory Note, as attached, at time of filing its Complaint for Foreclosure." [**RP 157 ¶ 6, 158-160**]. Matrix offered a subsequent Custodian's Affidavit by an officer of the custodian entity, in which the Custodian verified that as of March 10, 2004, The Bank of New York Mellon Trust Company, N.A. ("BNYMTC"), as Custodian, received the Original Note bearing the special indorsement to Matrix Financial Services Corporation and blank indorsement by Matrix Financial Services Corporation and placed the Original Note in its vault located in Irving, Texas, and the Original Note remained there until on or about

July 16, 2014, at the request of and on behalf of Plaintiff-Appellant Matrix. [**RP 170 ¶¶ 5-7**]. In support of the Custodian's Affidavit, the Custodian included a business record – a computer printout from the Custodian's records – reflecting the date of the deposit of the Original Note with the Custodian on March 10, 2004, and continuous possession with the Custodian until released on July 16, 2014, for delivery to Matrix's counsel for use in this action. [**RP 170 ¶¶ 5-7, 175, 149 ¶ 5, 151**]. These submissions by Matrix are consistent with *Romero* and this Court's rulings since interpreting *Romero.*

2. Matrix's affidavits of standing were credible, admissible and substantial evidence of its standing.

The affiants who provided evidence of standing were qualified to provide such testimony, their testimony by affidavit was of sufficient quality to support Matrix's standing, and the business records and documents that were the subject of their testimony were properly offered and authenticated such that they should have been accepted below as substantial evidence of Matrix's standing.

New Mexico jurisprudence gives a broad interpretation to witnesses who are qualified to testify to personal knowledge when reviewing business records. *See Roark v. Farmers Group, Inc.*, 2007-NMCA-074, ¶¶ 24-26, 142 N.M. 59, 162 P.3d 896. Such is consistent with the Rules of Evidence permitting a custodian or qualified witness to testify to records of regularly conducted activity upon

demonstrating that the records were made at or near the time by or from information by or from someone with knowledge, kept in the course of a regularly conducted activity of a business and that making records was a regular practice. Rule 11-803(6) NMRA 2015. The Duck Affidavit meets these criteria.

The affidavits submitted by Matrix likewise reference and contain documents that are authenticated by the statements of explanation and description within the affidavits. Rule 11-901 NMRA 2015 permits a witness with knowledge of the evidence to provide just such authentication: "To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." -- for example, through "*Testimony of a Witness with Knowledge*. Testimony that an item is what it is claimed to be." Rule 11-901.

The Duck Affidavit clearly states that Ms. Duck is authorized as a signor for Matrix and sets forth her qualifications to testify in the affidavit. [**RP 156, ¶¶ 1-2**]. The Duck Affidavit goes on to lay the evidentiary foundation commiserate with requirements under Rule 11-803(6). [**RP 156, ¶¶ 3-4**]. After which, the Duck Affidavit provides the affirmative statement that Matrix had possession of the Note, bearing the special and blank indorsements, at the time the Complaint was filed. [**RP 156, ¶¶ 5-6**]. Matrix adds the Custodian's Affidavit to this evidence,

providing additional testimony as to the physical location of the Note and a business record that substantiates the repeated testimony on behalf of Matrix that Matrix held the Note at the time the Complaint was filed. **[RP 169-175]**. The Custodian's Affidavit offered by Matrix on the Note that is the subject of Matrix foreclosure action, sets forth her qualifications to give the testimony and the evidentiary foundation commiserate with requirements under Rule 11-803(6). **[RP 169, ¶¶ 1-3]**. The Custodian's Affidavit then provides a timeline of its possession of Matrix's Note in the form containing the indorsements, from March 10, 2004, through July 16, 2014, including the date on which the Complaint was filed, and dispels any notion that the Note left the vault during that period of time[5]. **[RP 170, ¶¶ 4-7, RP 171-175]**.

In *Licha*, this Court acknowledged the district court's holding that an affidavit sufficed as evidence of standing to proceed, when it was the affidavit of a plaintiff, who also serviced the loan in question, and in which the affiant stated:

> "that Flagstar's vault document management system" indicates that Flagstar held possession of the original note when it commenced the instant foreclosure action, that Flagstar continues to hold possession of the original note, and that she reviewed the copy of the note ...and has confirmed that it is a true and correct copy of the original note that is maintained at Flagstar."

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[5] Which baseless theory was the most Larribas could muster as opposition to Matrix's assertions of continuous possession from March 10, 2005 through July 16, 2014.

Licha, 2015-NMCA-86, ¶ 4. (internal citations and quotations omitted). The Court of Appeals went on to explicitly acknowledge that the sole records attached to the affidavit were copies of the original note with indorsements, the mortgage and an assignment of mortgage. *Licha*, 2015-NMCA-86, ¶ 4.

Here, the Duck Affidavit and Custodian's Affidavit, further solidifying the veracity and strength of Matrix's repeated statements as to it holder status at the time of the Complaint, are similar to the *Licha* affidavit. The Custodian's Affidavit references its vault system and describes it business record documenting the dates in order to state that Matrix was in possession of the original note as of March 10, 2004, and to state the dates that it remained in possession of the same. **[RP 170, ¶¶ 4-7, RP 171-175]**. The Duck Affidavit and Custodian's Affidavit even go beyond the records that were attached to the pertinent affidavit in *Licha* insofar as Matrix offered a business record documenting the dates of the Custodian's possession of the Note. In *Licha*, the affidavit was attacked as not establishing personal knowledge of the affiant because of the affiant's reliance on the servicer's computer system for her testimony. *See Licha*, 2015-NMCA-086, ¶ 9. The Court of Appeals did not explicitly address this argument because it was not properly preserved by the appellants. *Id.* However, current New Mexico law clearly establishes that an affiant may rely on the review of a computer system to

establish personal knowledge of the records contained therein. *See Roark*, 2007-NMCA-074, ¶¶ 27-29.

While the burden to show standing may rest on Matrix, once Matrix presented such evidence, Larribas did not establish any good cause to proceed under Rule 1-060(B) because she provided no evidence to controvert Matrix's evidence. **[RP generally, 182 FOF 11-12, 183 COL A, 2-10-15 3 Tr. 4:9-10, 24:13-16, 30:17-21]**. Consequently, the motion under Rule 1-060(B) should not have been granted because Larribas could not and did not show good cause for relief under Rule 1-060(B) or a meritorious defense. If the record on appeal allows a reasonable inference that an entity has standing to maintain an action, and there is no evidence to the contrary, this Court can presume that the entity did in fact have the requisite standing. *Los Vigiles Land Grant v. Rebar Haygood Ranch, LLC,* 2014-NMCA-017, ¶¶ 10, 20, 317 P.3d 842. Matrix offers that the post-judgment record in this case absolutely clears any question concerning standing and that the only reasonable inference and conclusion is that Matrix had standing at the time it filed this action.

3. The District Court Findings of Fact 8, 11, 12, 13, 19, 22, 23, 24, 25 and 26 are unsupported by substantial evidence, and/or contain misapprehension of facts material to the issue of standing, and/or contain misapprehension of the evidence and/or contain errors of law.

The district court in its Order erroneously ignored permissible business record evidence and attacked the various affidavits offered. The district court's comments on the evidence and eventual rulings were clearly opposite existing law concerning business records and authenticity of evidence and constitute sufficient error, which this Court, in its own weighing of the evidence, can conclude Matrix established its standing.

The district court criticized the quality of the Custodian's Affidavit that referenced and included a business record and its meaning, disparaging it because no live witness explained it, [**RP 182 FOF 27**]; however, the Custodian's Affidavit did sufficiently explain the item and what Matrix claimed it to be. There can always be "more" or "better" but that does not mean that less than "more" or "better" is insufficient, and it was error for the district court to impose further evidentiary requirements where the evidence supplied complied with the law and there was no basis for challenging it.

With all due respect to the district court, it appears that the district court misread and misunderstood the plain language of the evidence, the scope and purpose of the evidence, and/or disregarded the applicable Rules of Evidence in

reviewing the evidence. [See, e.g., **RP 179 FOF 8, 180 FOF 11-12, 181 FOF 19, 182 FOF 23]**. For example, it appeared that the district court did not comprehend that a Custodian can be an entity and that an officer of the entity acts/speaks on behalf of the entity, [**RP 181 FOF 19, 2-10-15 3 Tr. 15:6-16:11**], and in doing so disregarded that Rule 11-803(6)(d) permits a qualified witness to offer business records evidence. There is no prohibition in the law that an entity cannot serve as the custodian of documents.

It also appeared that the district court did not consider evidence presented on standing as a whole. A fact finder must weigh and assess the evidence, but it also must engage in this review in light of all the evidence in the case. *See, eg.*, UJI 13-110 NMRA (2015).

The district court also made issue of the involvement of Matrix's counsel officers and agents, including BNYMTC, Matrix Capital Bank and Two Harbors Investment Corp. as persons and entities that could not offer any evidence. [**RP 179 FOF 8, 180 FOF 11-12, 182 FOF 24, 25, 26**]. The following findings of fact by the district court are nonsensical insofar as the district court infers that no one except persons with personal knowledge of the Note's origins could offer any testimony as to Matrix's standing during the life of the loan.

8.	**As an employee of the Plaintiff law firm, the Affidavit of Sandra A. Brown and inclusion of the 2nd copy of the Note were not based on the signor's personal knowledge of the documents' origins, and for this reason the 2nd copy of the**

	Note is assigned no weight.
11.	**Mr. (sic) Duck's representation of his (sic) "personal knowledge of the Matrix Financial Services Corp procedures for creating these records," which includes the 3rd copy of the Note, including the endorsement, is not credible because the Note was created on July 15, 2002, and it did not initially contain the endorsement, as evidenced by the 1st copy of the Note attached to the Complaint.**
12.	**The original note was apparently prepared by Wells Fargo, but Mr. Duck did not indicate that he was an employee of that institution and present on July 15, 2002, or at the time the endorsement was allegedly affixed to the Note; he did not explain his opportunity to obtain personal knowledge of the Note's preparation or the timing of its endorsement.**

[RP 179 FOF 8, 180 FOF 11-12]. The claims by the district court of lack of personal knowledge and/or employment by Wells Fargo at the time the loan was given or indorsed to Matrix and taking issue with Matrix not having a live witness, **[RP 179 FOF 8, 180 FOF 11-12, 182 FOF 27, 2-10-15 3 Tr. 13:23-15:5]**, misstate the evidentiary standards. To the extent those inform the Order the district court generated, the Order is in error.

The district court findings underlying its order generally appear to disregard the Rules of Evidence concerning self-authenticating evidence that is presented in the form of acknowledged documents, such as the affidavits, pursuant to Rule 11-902(8) NMRA 2015, or the self-authenticating quality of commercial paper and related documents permitted under Rule 11-902(9) NMRA.

The district court's findings seem to imply that the only way Matrix can establish standing is to bring forth the live testimony of all persons present at the

original signing of the Note, the persons present at the time the Note was transferred and endorsed, a person who individually held the Note, (albeit the note has never been held by an individual), or perhaps each and every person who has viewed the Note since its inception. Surely, as demonstrated by this Court in previous applications of *Romero*, this is not a fair reading of *Romero* and the showing of standing contemplated by the Supreme Court.

V. ASSUMING ARGUENDO MATRIX DID NOT ESTABLISH STANDING TO PURSUE FORECLOSURE AGAINST DEFENDANTS BASED UPON THE PRESENT RECORD, THE DISTRICT COURT ERRED IN DISMISSING THE COMPLAINT WITH PREJUDICE.

A. Statement Regarding Standard of Review and Issue Preservation.

The undersigned was unable to find a standard of review statement in New Mexico case law concerning a dismissal with prejudice based upon the district court's determination of lack of standing or jurisdiction. Although generally dismissals with prejudice provided by rule or law are reviewed for an abuse of discretion – *see, e.g.*, *Lujan v. City of Albuquerque*, 2003-NMCA-104, 134 N.M. 207, 75 P.3d 423 (pursuant to Rule 1-007.1 and Rule 1-056 NMRA); *Pizza Hut of Santa Fe, Inc. v. Branch*, 1976-NMCA-051, 89 N.M. 325, 552 P.2d 227 (pursuant to Rule 1-037 NMRA as discovery sanction); Rule 1-041(B) NMRA (for failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the

defendant) – Matrix submits that the dismissal by the district court was not one for which there is any rule or law granting discretion for such a dismissal and that the question presented is a question of law subject to de novo review. *See Romero*, 2014-NMSC-007, ¶ 40.

This issue was raised and preserved in the district court by virtue of Plaintiff's Response to Motion filed July 16, 2014, [**RP 135**], Matrix's continued opposition to Larribas' motion when the subject of granting motions such as Larribas' with or without prejudice was raised at hearing on September 4, 2014, [**9-4-14 2 Tr. 12:5-12**], and in the Notice of Appeal filed in the District Court on March 25, 2015, **[RP 185].**

B. The District Court Lacked Jurisdiction to Enter an Order of Dismissal with Prejudice.

For the same reason the district court declared its judgment was void for lack of standing and thus that it had no jurisdiction, the district court was without authority to enter a dismissal with prejudice, which net effect was to adjudicate the merits in the case in favor of Larribas and against Matrix by destroying Matrix's rights to pursue its foreclosure action. In the face of its bold determination that it did not have jurisdiction to enter a judgment in favor of Matrix, the error in the district court's exercise of jurisdiction in annihilating Matrix's rights is astounding, and the district court should be reversed.

A plaintiff without standing in a foreclosure action deprives the district court of subject matter jurisdiction, rendering any judgment void. *Phoenix Funding, LLC v. Aurora Loan Services, LLC*, 2015-NMCA-___, ¶ 10, __ P.3d __ (No. 33,211, August 24, 2015). A court without jurisdiction to hear a case cannot issue a valid order on the merits of that case. *Cordova v. Larsen*, 2004-NMCA-087, ¶ 14, 136 N.M. 87, 94 P.3d 830. Trial of issues before a court without jurisdiction is the same as if the issues had never been presented. *Jernigan v. New Amsterdam Cas. Co.*, 1961-NMSC-170, ¶ 7, 69 N.M. 336, 367 P.2d 519.

It follows that a dismissal with prejudice is an exercise of jurisdiction over the parties and the subject matter. A dismissal with prejudice is an adjudication on the merits to the extent that when a claim has been dismissed with prejudice, the ... element of ***res judicata*** (a final valid judgment ***on the** merits*) will be presumed so as to bar a subsequent suit against the same defendant by the same plaintiff based on the same transaction. *Pielhau v. State Farm Mut. Auto. Ins. Co.*, 2013-NMCA-112, ¶ 10, 314 P.3d 698, 701 *cert. granted* 2013-NMCERT___, 314 P.3d 963 (No. 34,363, Nov. 15, 2013). Conversely, the words "without prejudice" when used in an order or decree generally indicate that there has been no resolution of the controversy on its merits and leave the issues in litigation open to another suit as if no action had ever been brought. *Bralley v. City of Albuquerque*, 1985-NMCA-043, ¶ 18, 102 N.M. 715, 699 P.2d 646. A dismissal "without prejudice"

gives the complainant the right to state a new and proper cause of action, if he can, and does not take away any rights of defense to the action. *Bralley*, 1985-NMCA-043, ¶ 18.

Therefore, a dismissal for lack of jurisdiction should be without prejudice because the court, having determined that it lacks jurisdiction over the action, is *incapable* of reaching a disposition on the merits of the underlying claims. *Brereton v. Bountiful City Corp.*, 434 F.3d 1213, 1218 (10th Cir. 2006). Some jurisdictions have termed the litigation a nullity where there is lack of standing, requiring a dismissal without prejudice. *Citibank v. Martin,* 11 Misc.3d 219, 226, 807 N.Y.S.2d 284 (Civ. Ct. NYC 2005).

In applying the principles relative to this issue, at most the district court had authority not to exercise authority and was limited to entering a dismissal without prejudice. However, the effect of the dismissal with prejudice was to declare that Matrix can no longer prosecute its foreclosure action against Larribas, potentially destroying Matrix's rights under the Note and Mortgage and granting Larribas a free house. It is incongruous to the court's order of no standing and no subject matter jurisdiction, as it thus had no authority to enter a foreclosure judgment.

The inappropriateness of the dismissal here is underscored when one considers the Court's handling of matters where dismissal with prejudice is specifically permitted and is within the authority of the trial court. Dismissal with

prejudice is an extreme measure that should be used sparingly. *Lowery v. Atterbury*, 1992-NMSC-001, ¶ 11, 113 N.M. 71, 823 P.2d 313. Dismissal with prejudice requires an assessment of the violating party's conduct weighed against the underlying principles that cases should be tried on their merits and that dismissal is so severe a sanction that it must be reserved for the extreme case and used only where a lesser sanction would not serve the ends of justice. *Lujan*, 2003-NMCA-104, ¶¶ 11, 12, 13. The district court must explain the basis for ordering dismissal with prejudice. *Lujan*, 2003-NMCA-104, ¶ 13. For example, dismissal with prejudice has been granted where there is a willful noncompliance with a court order as in *Newsome v. Farer*, 1985-NMSC-096, ¶ 30, 103 N.M. 415, 708 P.2d 327, where the plaintiff's IPRA suit was dismissed where he failed to give notice or to attend a court ordered document production. Arguably, even if the district court here had the authority to enter a dismissal with prejudice, there was no indication that Matrix engaged in any conduct that warranted such punishment, and the district court clearly did not meet the high threshold required for such action or explain why Matrix should be subject to the severe sanction of dismissal with prejudice.

For the foregoing reasons, the district court erred by dismissing the action with prejudice where it had determined it lacked jurisdiction to adjudicate the rights of the parties, and its Order should therefore be reversed.

CONCLUSION

For the reasons set forth above, Matrix respectfully requests the Court reverse the district court Order in its entirety, determine that Matrix produced substantial evidence of its standing to foreclose in this case, and remand this case to the district court to issue a judgment on mandate setting aside the Order on appeal, denying Larribas' Motion and ordering that all writs, judgments and final orders therein remain in full force and effect. In the alternative, Matrix respectfully requests that this Court reverse the district court's Order of dismissal with prejudice and remand to the district court to issue a judgment on mandate dismissing the case without prejudice.

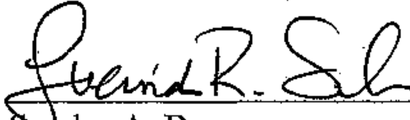
ORAL ARGUMENT IS REQUESTED

Matrix submits that the issues raised in this appeal are numerous and complex, and of great public importance and oral argument would permit the Court, if it chooses, to have counsel to expand on any issues of fact or law presented in their briefs and address the questions of the Court.

CERTIFICATION OF WORD COUNT

Pursuant to Rule 12-213(F)(3) NMRA 2015, undersigned counsel hereby certifies that the word count in the body of this Brief-in-Chief, as defined in Rule 12-213(F)(3) is 10,893.

Respectfully submitted
LITTLE, BRADLEY & NESBITT, P.A.



Sandra A. Brown
Lucinda R. Silva, Of Counsel
Attorneys for Plaintiff Appellant Matrix Financial Services Corp
PO Box 3509
Albuquerque, NM 87190-3509
(505) 248-2400 Fax (505) 254-4722
sandy-b@littlepa.com
lucinda-s@littlepa.com

I hereby certify that a copy of the foregoing
was served on Sept 30th 2015,
to the following Parties or their attorneys of record:

Joshua R. Simms
Joshua R Simms PC
PO Box 50332
Albuquerque, NM 87181-0332
(505) 247-0900 / (505) 256-5136 Fax
jsimms@jrsimmspc.com
Attorney for Defendant-Appellee Adele Larribas

SERVED VIA U.S. Mail & EMAIL

Brooke A. Freshman