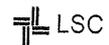


**Texas RioGrande Legal Aid, Inc.**

4920 NORTH IH-35  
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WRITER'S DIRECT EXTENSION - 2725

July 27, 2009

~~Court of Appeals  
Third District of Texas  
P.O. Box 12547  
Austin, TX 78711-2547~~

RE: Court of Appeals Number: 03-06-00273-CV  
Style: *Texas Bankers Association, Finance Commission of Texas, and Credit Union Commission of Texas*  
v.  
*Association of Community Organizations for Reform Now (ACORN), Valerie Norwood, Elsie Shows, Maryann Robles-Valdez, Bobby Martin, Pamela Cooper, and Carlos Rivas*

To the Honorable Justices of the Court of Appeals:

We would like to call to your attention two recent court decisions that bear directly on one issue of this appeal. This pending appeal involves the interpretation of Section 50(a)(6)(E) of the Texas Constitution that caps fees charged to the borrower of a home equity loan. The trial court in this case found that origination fees charged by a lender should be included in the three percent fee cap. Both cases mentioned in this letter and attached also found that fees charged by a lender to a borrower should be included in the fee cap calculation.

In *Reno v. CIT Group (In re Reno)*, Case No. 04-15828-FRM-7, Adv. No. 07-1137, 2008 Bankr. LEXIS 3239, \*9-10 (Bankr. W.D. Tex. Sept. 4, 2008), the court found that a lender violated the three percent fee cap because of, among other fees, origination fees charged by the lender. In *Maluski v. United States Bank, N.A.*, No. H-07-0055, 2008 U.S. Dist. LEXIS 97107, \*21 (S.D. Tex. Dec. 1, 2008), the primary focus of the court was whether the yield spread premium paid by the lender to the broker should be included in the fee cap; however, the court without hesitation also found that origination fees charged by the lender should be included in the fee cap. Both cases clearly support Appellees' position, and the trial court's decision, that fees charged by a lender at the inception of the loan, such as origination fees, must be included in the three percent fee cap calculation.

Respectfully submitted,

ROBERT W. DOGGETT  
Attorney for Appellees

cc: ✓ Jack Hohengarten, Attorney for Appellants, Finance and Credit Union Commissions  
Craig Enoch, Attorney for Appellants, Texas Bankers Association

0018 8 1 2009  
LSC



LEXSEE 2008 BANKR. LEXIS 3239

**IN RE: DAVID BRYANT RENO, JR., MILDRED KING RENO a/k/a MILDRED EDISON; DAVID BRYANT RENO, JR., MILDRED KING RENO a/k/a MILDRED EDISON, Plaintiffs v. THE CIT GROUP/CONSUMER FINANCE, INC., their successors and/or assigns, Defendant**

**CASE NO. 04-15828-FRM-7, CHAPTER 7, ADVERSARY NO. 07-1137**

**UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION**

*2008 Bankr. LEXIS 3239*

**September 4, 2008, Decided**

**COUNSEL:** [\*1] For David Bryant Reno, Jr., Manor, TX, Mildred King Reno, Elgin, TX, Plaintiffs: Gregory R. Phillips, Austin, TX.

For The CIT Group/Consumer Finance, Inc., Houston, TX, Defendant: Gregory A. Balcom, Matthew Wright, Balcom Law Firm, P.C., Houston, TX.

CT Corporation System, Registered Agent for Service of Process, Defendant, Pro se, Dallas, TX.

For Randolph N Osherow, San Antonio, TX, Trustee: Michael V. Baumer, Austin, TX.

**JUDGES:** FRANK R. MONROE, UNITED STATES BANKRUPTCY JUDGE.

**OPINION BY:** FRANK R. MONROE

## **OPINION**

### **MEMORANDUM OPINION**

The Court held a hearing on the Defendant The CIT Group/Consumer Finance Inc.'s Motion for Final Summary Judgment. After the hearing the Court took the matter under advisement. This summary judgment arises out of a Complaint to Determine Validity of a Lien Against Real Property and for Forfeiture of Principal and Interest, Filed Pursuant to *Federal Rule Bankr. Pro. 7001(2)* and *(9)*. This Court has jurisdiction of this proceeding pursuant to *28 U.S.C. § 1334(a)* and *(b)*, *28 U.S.C. § 157(a)* and *(b)(1)*, *28 U.S.C. § 151* and the Stand-

ing Order of Reference of all bankruptcy related matters by the United States District Court, Western District of Texas. This Memorandum Opinion is being issued in accordance [\*2] with *Bankruptcy Rule 7056* as a statement regarding material facts not in genuine dispute and conclusions of law based thereon.

### **Facts**

This action arises from a home equity loan that Plaintiffs obtained from Defendant. Plaintiffs originally purchased the real property and a manufactured home made the basis of this adversary proceeding in September and October 1996 respectively. There were separate lenders for the real property and the manufactured home. The CIT Group held the note on the manufactured home. The Original Certificate of Ownership with respect to the manufactured home dated November 25, 1996 indicates The CIT Group as the first lien holder. Plaintiffs' Exhibit 5. On or about August 24, 2000, CIT extended credit to the Plaintiffs in the amount of \$ 84,960.00 to consolidate the loans on the real property and the manufactured home. In connection with this extension of credit, Defendant required Plaintiffs to sign a Promissory Note together with riders attached ("Note"). To secure repayment of the Note, Plaintiffs executed a Home Equity Deed of Trust together with a Rider to Deed of Trust attached ("Deed of Trust"). The Deed of Trust granted Defendant a security interest in that [\*3] certain real property legally described as follows:

Lot Six (6), Block I, ESTATES AT WILBARGER CREEK SECTION THREE, a subdivision in Travis County

Texas according to the map or plat of record in Volume 86, Pages 129A-133A, Plat Records of Travis County, Texas (hereinafter referred to as "Property").

The Deed of Trust also granted CIT a lien upon that certain manufactured home legally described as follow:

USED 1996 CORNERSTONE  
SILHOUETTE, Bearing Identification  
Numbers SHA04033A, SHA04033B  
(Hereinafter referred to as the "Manufactured Home").

A Fair Market Value Statement prepared by CIT and signed by the Plaintiffs claims the value of the Property and Manufactured Home as of August 24, 2000 was \$ 118,000.00-"as fixed by the attached appraisal." Plaintiffs claim that the actual fair market value of the Property at the time of closing is far less than the value necessary to support the constitutional loan-to-value requirement of 80% pursuant to *Art. 16, §50(a)(6)(B)*.

Defendant also provided Plaintiffs a copy of the Form HUD-1 Settlement Statement ("HUD-1") prepared in connection with CIT's extension of credit. The HUD-1 sets forth various charges paid by Plaintiffs at closing. Plaintiffs [\*4] claim that CIT required payment of fees to originate, evaluate, maintain, record, insure and service the extension of credit in a total amount of \$ 6,423.10 in violation of the home equity statute. The Texas Constitution requires that borrowers pay fees of up to only 3% of the amount loaned pursuant to *Art. 16, §50(a)(6)(E)*.

In addition, the HUD-1 sets forth that Plaintiffs paid \$ 45,312.56 of the total extension of credit to repay in full the purchase money loan to CIT for the Manufactured Home in addition to the amount needed to pay off the Property. Plaintiffs claim that because Defendant extended this credit prior to the effective date of *Art. 16, §50(a)(8)*, the credit it extended was under *Art. 16, §50(a)(6)* and the manner which the credit was extended violated §§ *50(a)(6)(H)* and *(Q)(i)*.

On or about July 13, 2007, Plaintiffs notified bankruptcy counsel for CIT by certified mail, return receipt requested of CIT's failure to comply with certain obligations placed on Defendant by *Texas Constitution, Article XVI, §50(a)(6)(A)-(Q)*. Defendant responded to Plaintiffs denying each of the alleged failures to comply identified by Plaintiffs. Defendant now brings its Motion for Final Summary [\*5] Judgment on all counts.

Conclusions of Law

Summary judgment shall be rendered when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c)*; *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-325, 106 S.Ct. 2548, 91 L.Ed. 2d 265 (1986); *Ragas v. Tennessee Gas Pipeline Co.*, 136 F.3d 455, 458 (5th Cir. 1998). A dispute regarding a material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict in favor of the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 106 S.Ct. 2505, 91 L.Ed. 2d 202 (1986). When ruling on a motion for summary judgment, the court is required to view all inferences drawn from the factual record in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed. 2d 538 (1986).

Once the moving party has made an initial showing that there is no evidence to support the nonmoving party's case, the party opposing the motion must come forward with [\*6] competent summary judgment evidence of the existence of a genuine fact issue. *Matsushita*, 475 U.S. at 586. Mere conclusory allegations are not competent summary judgment evidence, and thus are insufficient to defeat a motion for summary judgment. *Eason v. Thaler*, 73 F.3d 1322, 1325 (5th Cir. 1996). Unsubstantiated assertions, improbable inferences and unsupported speculation are not competent summary judgment evidence. *See Forsyth v. Barr*, 19 F.3d 1527, 1533 (5th Cir.), cert. denied, 513 U.S. 871, 115 S. Ct. 195, 130 L. Ed. 2d 127 (1994). The party opposing summary judgment is required to identify specific evidence in the record and to articulate the precise manner in which that evidence supports his claim. *Ragas*, 136 F.3d at 458. Rule 56 does not impose a duty on the court to "sift through the record in search of evidence" to support the nonmovant's opposition to the motion for summary judgment. *Id.*, see also *Skotak v. Tenneco Resins, Inc.*, 953 F.2d 909, 915-16 & n. 7 (5th Cir.), cert. denied, 506 U.S. 832, 113 S. Ct. 98, 121 L. Ed. 2d 59 (1992). "Only disputes over facts that might affect the outcome of the suit under the governing laws will properly preclude the entry of summary judgment." *Anderson*, 477 U.S. at 248. Disputed fact issues which are [\*7] "irrelevant and unnecessary" will not be considered by a court in ruling on a summary judgment motion. *Id.* If the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to its case and on which it will bear the burden of proof at trial, summary judgment must be granted. *Celotex*, 477 U.S. at 322-23.

Plaintiffs' Section 50(a)(6)(B) Claim

Defendant presently moves for summary judgment dismissing the Plaintiffs' claim that the loan failed to comply with the various provisions of §50(a)(6). It moves for dismissal of the §50(a)(6)(B) claim on the ground that the loan did not exceed 80% of the fair market value of the homestead at the time the loan was made. *Section 50(a)(6)(B)* states:

Sec. 50 The homestead of a family, or of a single adult person, shall be, and is hereby protected from forced sale, for the payment of all debts except:

(6) an extension of credit that:

(B) is of a principal amount that when added to the aggregate total of the outstanding principal balance of all other indebtedness secured by valid encumbrances of record against the homestead does not exceed 80 percent of the fair market value of the homestead on the date the extension [\*8] of credit is made.

*Tex. Const. art. XVI, §50(a)(6)(B)..*

The loan amount was \$ 84,960.00. Defendant attaches a true and correct copy of the Fair Market Value Statement signed by the Plaintiffs reflecting an appraised value of \$ 118,000.00. See Defendant Exhibit 2. Defendant claims that this proves that the amount of the loan was equivalent to 72% of the fair market value of the property securing the loan. Defendant claims that the amount of the loan was based on an appraisal obtained by the Plaintiffs and submitted to Defendants which reflects a valuation in compliance with the home equity provisions.

The Fair Market Value Statement indicates that the borrowers and lender agree that the fair market value is \$ 118,000 "as fixed by the attached appraisal." Plaintiffs point out that under §50(h) of the Texas Constitution a lender may conclusively rely on the written acknowledgment as to the fair market value of the homestead property if the value acknowledged is the value estimated in an appraisal or evaluation prepared in accordance with a state or federal requirement applicable to an extension of credit under *Subsection (a)(6), Art. 16, §50(h)*. Here Defendant failed to produce the appraisal [\*9] upon which the Fair Market Value Statement was made. As such, there is no way the Court can find that the Defendant complied with *Art. 16, §50(h)* and therefore Defendant's motion on this count must be denied.

Plaintiffs' Section 50(a)(6)(E) Claim

Defendant also moved for dismissal of the Plaintiffs' §50(a)(6)(E) claim on the ground that the only fee charged Plaintiffs was the loan origination fee of \$ 2,251.40 and that this amount did not exceed the 3% cap. [Such amount equals 2.6% of the ending loan balance and cannot violate §50(a)(6)(E)]. *Section 50(a)(6)(E)* states:

Sec. 50 The homestead of a family, or of a single adult person, shall be, and is hereby protected from forced sale, for the payment of all debts except:

(6) an extension of credit that:

(E) does not require the owner or the owner's spouse to pay, in addition to any interest, fees to any person that are necessary to originate, evaluate, maintain, record, insure or service the extension of credit that exceed, in the aggregate, three percent of the original principal amount of the extension of credit.

*Tex. Const. art. XVI, §50(a)(6)(E).*

Plaintiffs contend that this section was violated because in addition to the origination fee, [\*10] they were required to pay other fees that when combined with the origination fee caused the total to impermissibly exceed 3% of the original principal amount of the loan or \$ 2,548.80 (\$ 84,960.00 x .03). Both parties provided a copy of the HUD-1 closing statement that reflects the fees paid by the Plaintiffs. In addition to the loan origination fee of \$ 2,251.40, the Plaintiffs paid an escrow fee of \$ 200.00, a document preparation fee of \$ 120.00, title insurance of \$ 877.00, messenger fee of \$ 35.00, tax certificate fee of \$ 37.50, recording fees of \$ 95.00 and a fee for a certificate of attachment of \$ 11.00. These are all charges considered fees paid by a borrower under *Title 7, Texas Administrative Code §153.5* which are regulations promulgated in connection with the home equity statute. When added together these additional fees together with the loan origination fee total \$ 3,626.90 which amount exceeds the 3% cap of \$ 2,548.80. The Motion for Summary Judgment on this claim is denied as it appears Defendant charged fees in excess of the constitutional maximum.

Plaintiffs' Section 50(a)(6)(H) and (Q)(i) Claim

Defendant last moves for dismissal of Plaintiffs' §50(a)(6)(H) and (Q)(i) [\*11] claim that the loan was secured by a lien on property other than their homestead i.e. the Manufactured Home, and that the loan proceeds were used to repay a debt other than one secured by the

homestead i.e. the personal property loan on the Manufactured Home. The argument is that in requiring a non-homestead loan to be paid at closing to itself as the personal property lender on the purchase of the Manufactured Home, Defendant violated §50(a)(6)(H) which states:

Sec. 50 The homestead of a family, or of a single adult person, shall be, and is hereby protected from forced sale, for the payment of all debts except:

(6) an extension of credit that:

(H) is not secured by any additional real or personal property other than the homestead.

*Tex. Const. art. XVI, §50(a)(6)(H).*

In addition Plaintiffs claim that Defendants violated §50(a)(6)(Q)(i) as Defendant required Plaintiff to repay a debt which was not secured by the homestead was a personal property loan. Section 50 (a)(6)(Q)(i) states:

Sec. 50 The homestead of a family, or of a single adult person, shall be, and is hereby protected from forced sale, for the payment of all debts except:

(6) an extension of credit that:

(Q) is made on the condition [\*12] that:

(i) the owner of the homestead is not required to apply the proceeds of the extension of credit to repay another debt except debt secured by the homestead or debt to another lender.

*Tex. Const. art. XVI, §50(a)(6)(Q)(i).*

Defendant counters that at the time the loan was made, the Manufactured Home had already been secured to a foundation and claimed as homestead as admitted by the Plaintiffs in their Answers to Interrogatories which Defendant attached as Exhibit 3. As such, Defendant asserts that the Manufactured Home was permanently attached to the property, no longer considered personal property, and that the purchase money lien could be refinanced with a home equity loan on the real property of which the Manufactured Home was now a part.

Defendant cites to Section 19(l) of the Texas Manufactured Housing Standards Act which states:

If a manufactured home is permanently affixed or becomes an improvement to real estate, the manufacturer's certificate or the original document of title shall be surrendered to the department for cancellation. The legal description or the appropriate tract or parcel number of the real estate must be given to the department when the certificate or document [\*13] of title is surrendered. The department may not cancel a manufacturer's certificate or a document of title if a lien has been registered or recorded on the manufactured home. If a lien has been registered or recorded, the department shall notify the owner and each lienholder that the title and description of the lien have been surrendered to the department and that the department may not cancel the title until the lien is released. Permanent attachment to real estate does not affect the validity of a lien recorded or registered with the department before the manufactured home is permanently attached. The rights of a prior lienholder pursuant to a security agreement or the provisions of a credit transaction and the rights of the state pursuant to a tax lien are preserved. The department shall issue a certificate of attachment to real estate to the person who surrenders the manufacturer's certificate or document of title.

Act of June 15, 2001, 77th Leg., R.S. ch 1055, §2, sec. 19(1), 2001 Tex. Gen. Laws 2331, *repealed by* Acts 2001, 77th Leg. ch. 1421 §13, 2001 Tex. Gen. Laws 5020, eff. June 1, 2003. <sup>1</sup> Defendant cites to Section 19A of the Texas Manufactured Housing Standards Act:

CERTAIN [\*14] MANUFACTURED HOMES CONSIDERED REAL PROPERTY. (a) A manufactured home that is permanently attached to the real property is classified and taxed as real property if the real property to which the home is attached is titled in the name of the consumer under a deed or contract for sale. A manufactured home is considered permanently attached to real property if the home is secured to a foundation and connected to a utility, including a utility providing water, electric, natural gas, propane or butane gas or wastewater services.

Act of June 15, 2001, 77th Leg., R.S., ch. 1055, §3, sec. 19A, 2001 Tex. Gen. Laws 2331, *repealed by* Acts 2001, 77th Leg. ch. 1421 §13, 2001 Tex. Gen. Laws 5020, eff. June 1, 2003.<sup>2</sup> Defendant made the loan in question in 2000 so the foregoing provisions do not apply as they were enacted in 2001 to be effective January 1, 2002. In addition, the procedure to classify a manufactured home as personal or real property was different in 2000 when this transaction occurred than it is today. *See In re Tirey*, 350 B.R. 62 (Bankr. S.D. Tex. 2006)(State law governed issue of whether debtors' manufactured home was real property or personal property for purposes of Bankruptcy Code's [\*15] anti-modification provision. Manufactured home was personal property under Texas law in effect at the time debtors purchased manufactured home in May, 1999).

1 TEX. REV. CIV. STAT. ANN. art. 5221f, §19(l), *repealed by* Acts 2001, 77th Leg. ch. 1421, §13, eff. June 1, 2003.

2 TEX. REV. CIV. STAT. ANN. art. 5221f, §19A, *repealed by* Acts 2001, 77th Leg. ch. 1421, §13, eff. June 1, 2003.

It is unclear from the evidence presented whether the Manufactured Home was actually part of the homestead prior to the home equity lending transaction. As such, after reviewing the parties' contentions and the corresponding summary judgment evidence, there are genuine issues of material fact that exist with respect to this particular claim and the application of the applicable manufactured housing and property statutes to the lending transaction in question. Therefore, the Court denies entry of summary judgment on this claim.

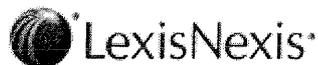
An Order of even date will be entered in connection with this Memorandum Opinion.

**SIGNED this 04th day of September, 2008.**

/s/ Frank R. Monroe

**FRANK R. MONROE**

**UNITED STATES BANKRUPTCY JUDGE**



LEXSEE 2008 US DIST LEXIS 97107

**ANTHONY E. MALUSKI, Plaintiff, v. U.S. BANK, N.A., as Trustee, successor by merger to FIRSTAR BANK, N.A., successor in interest to FIRSTAR BANK MILWAUKEE, N.A., as Trustee for SALMON BROTHERS MORTGAGE SECURITIES VII, INC. FLOATING RATE MORTGAGE PASS-THROUGH CERTIFICATES SERIES 199-NC4, Defendant.**

**CIVIL ACTION NO. H-07-0055**

**UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION**

*2008 U.S. Dist. LEXIS 97107*

**December 1, 2008, Decided**

**December 1, 2008, Filed**

**COUNSEL:** [\*1] For Anthony E Maluski, Plaintiff: Ira D Joffe, LEAD ATTORNEY, Attorney at Law, Bellaire, TX.

For U S Bank NA, as Trustee, successor by merger to Firststar Bank NA, successor in interest to Firststar Bank Milwaukee NA, as Trustee for Salomon Brothers Mortgage Securities VII, Inc Floating Rate Mortgage Pass-Through Certificates Series 1999-NC4, Defendant: Mark Douglas Cronenwett, Cowles Thompson PC, Dallas, TX.

For Property Asset Management, Inc., Intervenor Plaintiff: Mark Douglas Cronenwett, LEAD ATTORNEY, Cowles Thompson PC, Dallas, TX.

For Anthony E Maluski, Intervenor Defendant: Ira D Joffe, LEAD ATTORNEY, Attorney at Law, Bellaire, TX.

**JUDGES:** EWING WERLEIN, JR., UNITED STATES DISTRICT JUDGE.

**OPINION BY:** EWING WERLEIN, JR.

**OPINION**

**MEMORANDUM AND ORDER**

Pending are Defendant U.S. Bank, N.A.'s First Amended Motion for Final Summary Judgment (Document No. 31); Intervenor-Plaintiff Property Asset Management, Inc.'s Motion for Final Summary Judgment

(Document No. 34); and Plaintiff Anthony E. Maluski's Motion for Summary Judgment (Document No. 39). Plaintiff seeks to abate a foreclosure action against his homestead. After carefully considering the motions, responses, replies, and the applicable law, the Court concludes as [\*2] follows.

#### I. Background

On June 25, 1999, Plaintiff Anthony E. Maluski, the borrower, contracted with New Century Mortgage Corp., the lender, for a \$ 116,250 home equity loan (the "Loan"), evidenced by a Texas Home Equity Adjustable Rate Note (the "Note") and secured by a Texas Home Equity Security Instrument (the "Lien") encumbering Plaintiff's homestead.<sup>1</sup> *See* Document No. 31, exs. A-1 (Note), A-2 (Aff. & Agmt.), A-3 (Lien). The interest rate on the Loan was 10.750%, subject to biannual adjustment beginning on July 1, 2001. *See id.*, ex. A-1 (Note). Plaintiff's principal and interest payments of \$ 1,303.10 were due the first day of each month from August 1, 1999, until July 1, 2014. *See id.*, ex. A-1.

1 The legal description of Plaintiff's homestead property securing the home equity loan is: "Lot Fifteen (15), in Block Eleven (11) OF NORHILL ADDITION, a subdivision in Harris County, Texas, according to the map or plat thereof recorded at Volume 6, Page 3 of the Map Records of Harris County, Texas." *See* Document No. 1, ex. Orig. Pet.; Document No. 31, ex. A-3.

According to the final HUD Settlement Statement prepared for the Loan, there were \$ 7,335.94 in settlement charges, \$ 1,777.99 of [\*3] which was interest not subject to the Texas Constitution's three percent limitation on closing fees that may be charged to an owner acquiring a home equity loan. Plaintiff received a \$ 2,070.45 credit on the remaining balance of \$ 5,557.95 in fees that count against the three percent limitation, leaving a net amount of \$ 3,487.50 in closing fees actually paid by Plaintiff, a sum exactly equivalent to three percent of \$ 116,250, which was the original principal amount of the loan. *Id.*, ex. B (HUD Statement). Separately, New Century paid to the mortgage broker, Global Finance, a \$ 2,325 yield spread premium ("YSP") outside of closing.<sup>2</sup> *See id.* at line 811.<sup>3</sup>

2 YSPs are lump sums that lenders may pay to mortgage brokers when the broker originates a loan at an interest rate above the lender's par rate for the borrower.

3 Plaintiff's objection to the final HUD Statement proffered by U.S. Bank is without merit. *See* Document No. 35 at 4-5. The final HUD Statement relied upon by Defendants was authenticated by Texas American Title Company's custodian of records, and is consistent with the "Revised" Closing Statement Plaintiff attached to his Original Petition in all respects except the relative [\*4] amounts of the borrowed funds that were to be remitted to the Internal Revenue Service (\$ 47,118.75) and to Plaintiff himself (\$ 14,555.13). Plaintiff, by letter dated June 25, 1999, to the title company, however, directed that the latter figures be changed so as to disburse only \$ 2,000 to Plaintiff himself and the balance of his loan proceeds to the Internal Revenue Service. The final HUD statement produced by Texas American Title Company and relied on by Defendants is consistent with Plaintiff's instructions and is unrefuted in the summary judgment evidence. Plaintiff's objection is DENIED.

On July 2, 1999, New Century assigned the Note and Lien to U.S. Bank. *See* Document No. 31, ex. A-4. The summary judgment evidence is that Plaintiff has not tendered any Loan payments since June 10, 2005. *See* Document No. 34, ex. A (Hawk Decl.) P 8. Because of Plaintiff's failure timely to remit payments, the loan servicer, Ocwen Loan Servicing LLC, sent Plaintiff a Notice of Default on August 15, 2005, which demanded payment of the amounts owed by September 15, 2005, lest Ocwen accelerate the Loan payments and exercise its right to foreclose. *See id.*, ex. A-7 (Notice of Default). Plaintiff never [\*5] remitted payment. *Id.*, ex. A (Hawk Decl.) P 8.

Plaintiff filed the instant suit in state court to abate a pending foreclosure action against his homestead. *See* Document No. 1, exs. Orig. Pet., Plea in Abate. Plaintiff asserts that the Note and Lien are invalid because they violated the Texas Constitution. *See id.*, ex. Orig. Pet. U.S. Bank removed on the basis of diversity jurisdiction. U.S. Bank later transferred the Note and Lien to Property Asset Management, Inc. ("PAMI"), which thereafter intervened in this suit. *See* Document No. 31, ex. A-5; Document Nos. 1, 18, 19, 31, 34.<sup>4</sup> According to PAMI, Plaintiff defaulted on and is in breach of the Note, and PAMI seeks a declaration that PAMI may foreclose on Plaintiff's property securing the Note. *See* Document No. 19 at 6-7.

4 Plaintiff objects to Defendant's evidence of the assignment based upon its having been executed under date of June 14, 2007, but not made effective until August 1, 2007, and thereafter filed for record on August 27, 2007. *See* Document No. 35 at 1-4; Document No. 36 at 1-4. Plaintiff's objections are without merit and are DENIED.

U.S. Bank, PAMI, and Plaintiff each seeks summary judgment. *See* Document No. 31, 34, 39. [\*6] U.S. Bank contends that it is not a proper party to Plaintiff's suit because it no longer holds the Note or Lien, or, alternatively, that the Note and Lien are valid because the Note did not violate the Texas Constitution insofar as Plaintiff was not charged fees in excess of three percent of the total loan amount. Document No. 31. Plaintiff contends that the Note and Lien are invalid because he was charged fees in excess of the three percent limitation, and thus, U.S. Bank must forfeit "all principal and interest previously paid or to be paid on the Loan. Document No. 39. PAMI contends that it is entitled to summary judgment on its suit on the Note and for breach of contract. Document No. 34.

## II. Standard of Review

*Rule 56(c)* provides that summary judgment "should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." *FED. R. CIV. P. 56(c)*. The moving party must "demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 2553, 91 L. Ed. 2d 265 (1986).

Once the movant carries this burden, the [\*7] burden shifts to the nonmovant to show that summary judgment should not be granted. *Morris v. Covan World Wide Moving, Inc.*, 144 F.3d 377, 380 (5th Cir. 1998). A party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials

in a pleading, and unsubstantiated assertions that a fact issue exists will not suffice. *Id.* "[T]he nonmoving party must set forth specific facts showing the existence of a 'genuine' issue concerning every essential component of its case." *Id.*

In considering a motion for summary judgment, the district court must view the evidence "through the prism of the substantive evidentiary burden." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 2513, 91 L. Ed. 2d 202 (1986). All justifiable inferences to be drawn from the underlying facts must be viewed in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986). "If the record, viewed in this light, could not lead a rational trier of fact to find" for the nonmovant, then summary judgment is proper. *Kelley v. Price-Macemon, Inc.*, 992 F.2d 1408, 1413 (5th Cir. 1993) (citing *Matsushita*, 106 S. Ct. at 1351). "If, on the other [\*8] hand, the factfinder could reasonably find in [the nonmovant's] favor, then summary judgment is improper." *Id.* Even if the standards of *Rule 56* are met, a court has discretion to deny a motion for summary judgment if it believes that "the better course would be to proceed to a full trial." *Anderson*, 106 S. Ct. at 2513.

In order to withstand a no-evidence motion for summary judgment, the nonmovant must "make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 106 S. Ct. at 2552. If the nonmovant fails to make such a showing, "there can be no 'genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial," and summary judgment must be granted. *Id.*

### III. Discussion

#### A. Plaintiff's and U.S. Bank's Motions for Summary Judgment

##### 1. Whether YSPs are Properly Treated as "Fees" or "Interest" for the Purposes of *Article XVI, Section 50(a)(6)(E)*

The central legal issue in both U.S. Bank's and Plaintiff's motions for summary judgment is whether the \$ 2,325 YSP paid by [\*9] the lender, New Century, to the mortgage broker, Global Finance, is a fee subject to *Texas Constitution article XVI, section 50(a)(6)(E)*. *Article XVI, section 50(a)(6)(E)* of the Texas Constitution provides that a home equity loan is valid only if it, among other things:

does not require the owner or the owner's spouse to pay, in addition to any interest, fees to any person that are necessary to originate, evaluate, maintain, record, insure, or service the extension of credit that exceed, in the aggregate, three percent of the original principal amount of the extension of credit[.]

*TEX. CONST. art. XVI, § 50(a)(6)(E)*. In other words, *section 50(a)(6)(E)* limits fees, not interest, "necessary to originate, evaluate, maintain, record, insure, or service the extension of credit" to three percent of the amount of the loan." *Tarver v. Sebring Capital Credit Corp.*, 69 S.W.3d 708, 709 (Tex. App.--Waco 2002, no pet.) (quoting *TEX. CONST. art. XVI § 50(a)(6)(E)*).

U.S. Bank contends that the YSP is not a "fee" subject to the three percent limitation because (1) it was not required to be paid by Plaintiff, who is the only person protected by the constitutional restriction, and (2) assuming the lender [\*10] ultimately recovers the YSP fee it paid to the broker from the borrower's payments of interest on the note, the borrower's payments nonetheless are payments of "interest"--not "fees." See Document No. 31 at 7-11. Plaintiff's argument that the Note is invalid is premised on the notion that the YSP is a "fee" within the meaning of *section 50(a)(6)(E)* because ultimately the lender recoups the amount of the YSP through Plaintiff's payments of presumably a higher rate of interest on the Note. If the amount of the YSP paid by the lender to the broker is deemed to be a "fee" required to be paid by the borrower, then Plaintiff was charged in excess of the 3% limitation, and forfeiture of principal and interest is the penalty. See Document No. 39 at 2-4; Document No. 35 at 5-9; *TEX. CONST. art. XVI, § 50(a)(6)(Q)(x)*. The parties agree that the principal amount of the Loan was \$ 116,250, and that three percent of the principal is \$ 3,487.50. See Document No. 31 at 8 n.2; Document No. 1, ex. Orig. Pet. at 3.

At the outset it is observed that no state or federal case has been cited in which a borrower ever has contended that YSPs separately paid by a lender to a mortgage broker are actually "fees" [\*11] charged to the borrower that fall within the 3% Texas constitutional limitation, and the Court has found no such Texas precedent. The standard for interpretation of the Texas Constitution was set out in *Doody v. Ameriquest Mortgage Co.*, 49 S.W.3d 342, 344 (Tex. 2001) (internal citations omitted), which held:

When interpreting our state constitution, we rely heavily on its literal text and must give effect to its plain language. We strive

to give constitutional provisions the effect their makers and adopters intended. We construe constitutional provisions and amendments that relate to the same subject matter together and consider those amendments and provisions in light of each other. And we strive to avoid a construction that renders any provision meaningless or inoperative.

Moreover, "[t]raditionally the homestead laws have been interpreted by Texas courts liberally in favor of the homestead owner." *Tarver*, 69 S.W.3d at 711.

The constitutional language at issue plainly mandates that, in order to be valid, home equity loans must "not require *the owner or owner's spouse to pay*, in addition to any interest, fees . . . that exceed . . . three percent of the original principal amount of the [\*12] extension of credit." *TEX. CONST. art. XVI, § 50(a)(6)(E)* (emphasis added). Here, as indicated on the final HUD Settlement Statement, the lender, New Century, paid to the mortgage broker outside of closing a YSP fee of \$ 2,325. See Document No. 31, ex. B (HUD Statement). Thus, it was the lender--*not the owner, Plaintiff, or the "owner's spouse"*--that paid the YSP to the mortgage broker. Although the lender well may expect to recoup the amount of the YSP via return on its investment (i.e., interest on the Loan), so it is with all other of the lender's overhead, expenses, and fees.

This conclusion is consistent with holdings in analogous cases. For example, in *Bjustrom v. Trust One Mortgage*, a mortgagor alleged that Trust One charged excessive closing fees on a mortgage insured by the Federal Housing Administration (FHA)--a violation of Department of Housing and Urban Development (HUD) regulations. 178 F. Supp. 2d 1183, 1185-87 (W.D. Wash. 2001), *aff'd*, 322 F.3d 1201 (9th Cir. 2003). The HUD regulation provided in pertinent part:

The [lender] may collect from the [borrower] the following charges, fees or discounts: [] A charge to compensate the [lender] for expenses incurred in originating [\*13] and closing the loan, the charge not to exceed [] \$ 20 dollars or one percent of the original principal amount of the mortgage . . . , whichever is the greater.

See 24 C.F.R. § 203.27(a) (emphasis added). Similar to the case at bar, the borrower in *Bjustrom* "allege[d] that the [YSP is] . . . ultimately 'collected' from the borrower

through their interest payments" and thus subject to the one percent limitation. *Bjustrom*, 178 F. Supp. 2d at 1190. The court in *Bjustrom*, relied on (1) the "plain reading of the [regulation]"; (2) *section 203.27's* failure to limit *the interest* that can be collected by a lender; (3) HUD approval of mortgages wherein the YSPs effectively caused the fees to exceed the one percent limit without commenting on the fee limitation; and (4) HUD policy statements declaring that YSPs are not "illegal per se" without commenting on the one percent limitation, and concluded that "collection from the borrower means collecting *directly* from the borrower, and does not apply to *indirect* payments of yield spread . . . premiums from the lender to the mortgage broker." *Id.* at 1190-93 (emphasis in original) ("The assertion that all borrowers ultimately pay for the yield [spread] [\*14] . . . premiums through higher interest rates is too strained a reading of 'collect' to compel inclusion of such indirect payments.").

5 *Accord Dominguez v. Alliance Mortg. Co.*, 226 F. Supp. 2d 907, 909-11 (N.D. Ill. 2002) ("We agree with the litany of cases holding that the [FHA and HUD] 1% limit on origination fees only applies to fees directly collected from the borrower, not indirectly collected through interest payments." (citing *Bjustrom*)); *Vargas v. Univ'l Mortg. Corp.*, No. 01 C 0087, 2001 U.S. Dist. LEXIS 19635, 2001 WL 1545874, at \*3 (N.D. Ill. Nov. 29, 2001) ("The directive puts an upper limit on 'origination fee[s]' which are paid by the borrower to the broker; it says nothing about YSPs which are paid by the lender." (citing *Bjustrom*)); *Byars v. SCME Mortg. Bankers, Inc.*, 109 Cal. App. 4th 1134, 135 Cal. Rptr. 2d 796, 802-03 (Cal. Ct. App. 2003) (adopting the reasoning of *Bjustrom* to conclude that "[t]he payment of a YSP does not violate the HUD regulation imposing a 1 percent cap on loan origination fees"); see also *Geraci v. Homestreet Bank*, 203 F. Supp. 2d 1211, 1213-15 (W.D. Wash. 2002), *aff'd*, 347 F.3d 749 (9th Cir. 2003) (adopting *Bjustrom*, and concluding that a YSP "should not be included as part of the one percent [\*15] cap on origination fees imposed by [the Veterans Affairs lending regulation]"--which provides "[a] lender may charge and the veteran may pay a flat charge not exceeding 1 percent of the amount of the loan"--because the lender, not the borrower, pays the broker the YSP fee); *Kolle v. SGB Corp.*, No. 01 C 5708, 2002 U.S. Dist. LEXIS 18120, 2002 WL 31133183, at \*2-5 (N.D. Ill. Sept. 25, 2002) ("Because the court concludes that yield spread premiums do not apply toward the 1 % cap

placed on veterans' fees under VA regulations, Count V must be dismissed." (citing Bjuström)).

The Texas constitutional mandate that valid home equity loans must "not require *the owner or owner's spouse* to pay" fees in excess of three percent of the principal is a plain proscription of excess *payments* being required from the *owner*. None of the YSP was required to be paid by Plaintiff, and its payment by the *lender* is not chargeable to Plaintiff. The amount of the YSP is therefore not included within the 3% fee calculation. See *TEX. CONST. art. XVI, § 50(a)(6)(E)*; see also, Regulatory Commentary on Equity Lending Procedures ("Commentary") at 4 (Oct. 7, 1998); 7 *TEX. ADMIN. CODE 153.5(5)* ("There is no restriction on a lender absorbing costs [\*16] that might otherwise be fees, and, therefore, covered by the fee limitation.").

Plaintiff argues that he must "pay" the YSP fee in the form of higher interest payments to the lender. The lender's theoretical recoupment of the YSP via the owner's interest payments, however, does not alter the nature of what the owner is actually paying: namely, *interest*. Again, the "literal text" and "plain language" of art. XVI, § 50(a)(6)(E) is to proscribe "fees" of more than 3% "in addition to any interest." (Emphasis added). If interest is being paid, therefore, it is not a fee subject to the 3% limitation. Even if it is presumed that the lender over the life of the note recoups the amount of the YSP (and presumably other costs and overhead associated with the lending business) from the owner's payments of interest on the note, the owner's payments still cannot be characterized as anything other than interest in accordance with the terms of the note. See, e.g., *Bank of New York v. Mann*, No. 02 C 9265, 2004 U.S. Dist. LEXIS 16385, 2004 WL 1878293, at \*4-6 (N.D. Ill. Aug. 18, 2004) (interpreting a limitation on loan charges proscribed by the Illinois Interstate Act, and *holding* that YSP fees paid by lender to broker were not [\*17] charged to borrower: "Although a YSP could reasonably be found to be a charge payable indirectly by the borrower by way of a higher interest rate, it is not a charge *in addition to the stated rate of interest*." (emphasis added)).

The Texas Department of Banking and three other Texas administrative agencies with oversight responsibilities involving lending have issued a regulatory commentary ("Commentary") on home equity lending procedures, which the Texas Supreme Court has consulted and cited for advisory help in its decision on a home equity loan case. See *Stringer v. Cendant Mortg. Corp.*, 23 S.W.3d 353, 357 (Tex. 2000) ("Although the commentary is advisory and not authoritative, it represents four Texas administrative agencies' interpretation of the Home Equity Constitutional Amendment."). As applied to this case, the Commentary states that "[t]he three percent

limitation pertains to fees charged to or paid by the [borrower] *at the inception of the loan*." Commentary at 4 (emphasis added); see also 7 *TEX. ADMIN. CODE 153.5(15)*. It is uncontroverted that YSPs are not "charged to or paid by the [borrower] at the inception of the loan," but at most--in the Plaintiff's own description [\*18] of his claim--are recovered by the lender *over the course of the loan* from the borrower via interest payments. See Document No. 39 P 14. How Texas's administrative and regulatory agencies understand and apply the constitutional proviso furnishes persuasive secondary authority as to why Plaintiff's payments of interest over the life of the loan cannot be recharacterized as "payments" of a YSP by Plaintiff subject to the 3% constitutional limitation on fees actually paid at closing.<sup>6</sup>

6 This reasoning has been applied in analogous cases. In *In re Mourer*, a bankruptcy case, the debtor-borrower asserted that the creditor-lender violated Truth in Lending Act ("TILA") and Home Ownership and Equity Protection Act ("HOEPA") by charging the debtor fees and points which exceeded an eight percent limitation in TILA and HOEPA, triggering certain disclosure requirements that were not met. 309 B.R. 502, 504 (W.D. Mich. 2004). The TILA/HOEPA regulation at issue in *Mourer* provides in pertinent part, "The total points and fees payable by the consumer at *or before loan closing* will exceed the greater of 8 percent of the total loan amount . . ." 12 C.F.R. § 226.32(a)(1)(ii) (emphasis added). Relying [\*19] on the "law's clear and unambiguous language," the district court reversed the bankruptcy judge, and held that a "YSP is not properly included in the calculation of the 8% trigger" because there was "no evidence or even contention that the [borrowers] paid the YSP at or before loan closing. The YSP was paid by [the lender] to [the mortgage broker] at the time of closing, but to the extent this obligation was payable by the [borrower], it was payable in the form of a higher interest rate, not at or before the closing, but over the course of the loan." *Id.* at 505; accord *Mills v. Equicredit Corp.*, 344 F. Supp. 2d 1071, 1076-77 (E.D. Mich. 2004) ("Plaintiffs have brought forth no evidence or contention that they paid the yield spread premium at or before closing. Further, Plaintiffs have provided no legal authority to support the position that the yield spread premium should be included in the calculation of the 8 percent trigger. Accordingly, the Court holds that pursuant to relevant case law and the plain language of 12 C.F.R. § 226.32(a)(1)(ii) the yield spread premium should not be included in the 8

percent trigger calculation." (citing Mourer), *af-f'd*, 172 F. App'x 652 (6th Cir. 2006); [\*20] *see also Wolski v. Fremont Inv. & Loan*, 127 Cal. App. 4th 347, 25 Cal. Rptr. 3d 500, 503-08 (Cal. Ct. App. 2005) (holding that under California's predatory lending statutes--providing that a loan is subject to the statutes if "[t]he total points and fees payable by the consumer at or before closing for a mortgage or deed of trust will exceed 6 percent of the total loan amount"--YSPs are not subject to the six percent limitation because they are not paid "at or before closing" (citing Mourer)).

### 2. U.S. Bank's Request for Summary Judgment on Plaintiff's Claim Regarding the Alleged \$ 300 Appraisal

Plaintiff alleges in his Original Petition that he "receiv[ed] letters and phone calls seeking to collect . . . \$ 300 for the appraisal that was actually used in making the loan," and that this fee (in addition to the \$ 250 appraisal fee recorded on the HUD statement) would cause the three percent limitation to be exceeded. *See* Document No. 1, ex. Orig. Pet. at 4. U.S. Bank requests summary judgment on this claim because Plaintiff "has not produced any document to support his claim that a second appraisal report . . . was prepared or that he gave notice of the alleged excessive fees." *See* Document No. 31 at 11-12. U.S. [\*21] Bank contends, moreover, that Plaintiff has suffered no damage because there is no proof that he "actually incurred the expense of the [alleged \$ 300] appraisal." *Id.* Indeed, there is no summary judgment evidence sufficient to raise a genuine issue that Plaintiff was in fact charged a second appraisal fee, or that he paid such a fee. Accordingly, U.S. Bank is entitled to summary judgment denying Plaintiff's claim that he was charged or incurred an additional \$ 300 appraisal fee.

### 3. Calculating the Fees Subject to the Three Percent Limitation in Plaintiff's Home Equity Loan

The summary judgment evidence establishes that the fees charged to Plaintiff and therefore subject to the three percent limitation were:

1. \$ 3,237.50 as a loan origination fee,
2. \$ 250 as a appraisal fee,
3. \$ 200 as a document preparation fee,
4. \$ 110 for attorney's fees,
5. \$ 1,094 for title insurance,
6. \$ 25 for a tax deletion,
7. \$ 50 for an EPA lien endorsement fee,

8. \$ 273.50 in other endorsements,
9. \$ 50 as a messenger fee,
10. \$ 125 as an escrow fee,
11. \$ 78 as a recording fee, and
12. \$ 64.95 for a tax certificate.<sup>7</sup>

*See* Document No. 31, ex. B (HUD Statement) at lines 800-1400.<sup>8</sup> The gross fees subject to the three [\*22] percent limitation are \$ 5,557.95, less a \$ 2,070.45 closing cost credit allowed to Plaintiff, leaving a net total of \$ 3,487.50 in fees actually charged to and paid by Plaintiff. This sum is exactly equal to the three percent limitation--*i.e.*, three percent of the principal loaned: \$ 116,250. Accordingly, Plaintiff was not required "to pay, in addition to any interest, fees . . . that exceed, in the aggregate, three percent of the original principal amount of the extension of credit." *See TEX. CONST. art. XVI, § 50(a)(6)(E)*. The Loan complied with *section 50(a)(6)(E)*, and thus the Note and Lien are not rendered invalid by the constitutional proscription.

7 It is undisputed that two other items on the HUD statement, \$ 1,743.75 in loan discount points and \$ 34.24 in per diem interest, are not subject to the three percent limitation. *See* Document No. 1, ex. Orig. Pet. P 6.2; Document No. 31 at 8-9; *see also Tarver*, 69 S.W.3d at 711-12 ("Therefore, we hold that points are a form of 'interest' and not subject to the three-percent limitation.").

8 Plaintiff's contention that the issuance of the final HUD Statement five days after the closing made it untimely, *see* Document No. 35 P 22, is without [\*23] merit. *See Doody*, 49 S.W.3d at 346 ("[T]hrough *section 50(a)(6)(Q)(x)*'s cure provision, the amendment provides a means for the lender to correct mistakes within a *reasonable time* in order to validate a lien securing a *section 50(a)(6)* extension of credit." (emphasis added)); *Fix v. Flagstar Bank, FSB*, 242 S.W.3d 147, 157-59 (*Tex. App.--Fort Worth 2007, no pet. h.*) (three months is a reasonable time to cure a pre-2003 loan); *see also TEX. CONST. art. XVI, § 50(a)(6)(Q)(x)* (amended in 2003 in order to codify Doody's holding allowing a reasonable time to cure, and giving the lender sixty days to cure).

### B. PAMI's Motion for Summary Judgment

PAMI, the intervenor-plaintiff, moves for summary judgment on its causes of action against Plaintiff for breach of contract and for suit on the Note. *See* Document No. 34. Under Texas law, to succeed on a suit on

an unpaid debt, "[PAMI] ha[s] the burden to establish (1) the existence of the debt or note; (2) that [Plaintiff] has signed the note; (3) that [PAMI] was the holder of the note; and (4) that a balance was due and owing under the note." *Doncaster v. Hernaiz*, 161 S.W.3d 594, 602 (Tex. App.--San Antonio 2005, no pet.) (citing *Hudspeth v. Investor Collection Servs. L.P.*, 985 S.W.2d 477, 479 (Tex. App.--San Antonio 1998, no pet.)). [\*24] Plaintiff challenges the first and third elements above.

Plaintiff's challenge as to the first element, which is based on his erroneous interpretation of *article XVI, section 50(a)(6)(E) of the Texas Constitution*, discussed above, is without merit. The uncontested summary judgment evidence establishes that Plaintiff signed the Note--thus satisfying the second element. See Document No. 31, ex. A-1 (the Note). The summary judgment evidence also establishes that U.S. Bank transferred the Note and Lien to PAMI, thereby satisfying the third element. See Document No. 31, ex. A-5 (Transfer to PAMI). The uncontested summary judgment evidence further establishes that Plaintiff is in default on the accelerated Note, there being an outstanding total amount of \$ 128,085.93 as of March 6, 2008--satisfying the fourth and final element. See Document No. 34, ex. A P 8 (Hawk Decl.), A-7 (Notice of Default). PAMI is entitled to judgment as a matter of law on its cause of action for suit on the Note and for breach of contract.<sup>9</sup>

9 "The essential elements of a breach of contract claim are: (1) the existence of a valid contract; (2) performance or tendered performance by the plaintiff; (3) breach of [\*25] the contract by the defendant; and (4) damages sustained by the plaintiff as a result of the breach." *Aguiar v. Segal*, 167 S.W.3d 443, 450 (Tex. App.--Houston [14 Dist.] 2005, pet. denied).

#### C. Declaratory Judgment and Order Allowing Foreclosure

PAMI seeks a declaratory judgment that: (1) Plaintiff is in default under the valid Note and Lien; (2) PAMI is entitled to recover the outstanding balance on the Note, pre- and post-judgment interest, costs, and attorneys' fees; and (3) PAMI may pursue all appropriate foreclosure remedies under the Lien and state law. See Document No. 34 at 8.

The only defenses raised by Plaintiff to these claims are challenges to the validity of the Note and Lien under the Texas Constitution and a challenge as to PAMI's standing to sue on the Note and Lien--both of which are discussed and rejected above. The uncontested summary judgment evidence is that Plaintiff has made no payments on the Loan since June 10, 2005, and has lawfully been served with a notice of default and accelera-

tion. See Document No. 34, ex. A (Hawk Decl.) P 8, ex. A-7 (Notice of Default). It is uncontested that even after he received the Notice of Default, Plaintiff has continued to [\*26] refuse to make any payments on the Loan and the amount owed by Plaintiff as of March 6, 2008 was \$ 128,085.93. See *id.*, ex. A (Hawk Decl.) P 8. Accordingly, Defendants are entitled to declaratory judgment that Plaintiff is in default, and that PAMI is entitled to have and recover the \$ 128,085.93 outstanding balance on the Note as of March 6, 2008, pre- and post-judgment interest, and reasonable attorneys' fees and expenses in accordance with the Note.

Under Texas law, "[a] party seeking to foreclose a lien created under *TEX. CONST. art. XVI, § 50(a)(6)*, for a home equity loan . . . may file . . . a suit . . . seeking a final judgment which includes an order allowing foreclosure under the security instrument and *TEX. PROP. CODE § 51.002*," as PAMI did here. *TEX. R. CIV. P. 735*. Given the uncontested summary judgment that: (1) a debt exists; (2) the debt is secured by a lien created under § 50(a)(6); (3) Plaintiff is in default under the Note and security instrument; and (4) Plaintiff received a notice of default and acceleration, PAMI is entitled to an order allowing foreclosure under the security instrument and *TEX. PROP. CODE § 51.002*.

PAMI's proof of its attorneys' fees is commingled [\*27] with fees incurred by U.S. Bank, which did not seek attorneys' fees in its pleading. A party may recover only its own attorneys' fees.<sup>10</sup> In the interest of justice, the Court will allow PAMI within fourteen days after the entry of this Memorandum and Order to file supplemental verified proof establishing the amount of reasonable attorneys' fees and expenses incurred solely by PAMI in enforcing the Note.

10 PAMI's reliance on a theory that U.S. Bank's and PAMI's claims were "inextricably intertwined" is misplaced. The cases cited by PAMI apply the theory of "inextricably intertwined" claims where single parties face multiple, intertwined claims. See, e.g., *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 310-14 (Tex. 2006) (reviewing the "inextricably intertwined" exception to the American rule that parties should bear the cost of their attorney's fees in a case where one plaintiff had multiple theories of recovery against a single defendant); *Rx.com v. Hruska*, H-05-4148, 2006 U.S. Dist. LEXIS 82493, \*14-16 (S.D. Tex. Oct. 20, 2006) (Miller, J.) (allowing a single defendant to recover attorney's fees when defending multiple claims which were "inextricably intertwined"). PAMI does [\*28] not cite any case applying the theory of "inextricably intertwined" claims in a case allow-

ing one party to claim and recover the fees incurred by an unrelated party to the same suit.

Page 3 of the Map Records of Harris County, Texas,

#### IV. Order

For the foregoing reasons, it is

ORDERED that Defendant U.S. Bank, N.A.'s Motion for Summary Judgment (Document No. 31) is GRANTED, and Plaintiff Anthony E. Maluski shall take nothing against Defendant U.S. Bank, N.A. and his claims are DISMISSED on the merits; it is further

ORDERED that Intervenor Property Asset Management, Inc.'s Motion for Summary Judgment (Document No. 34) is GRANTED as follows: the following sums are due and owing to Intervenor Property Asset Management, Inc. by Plaintiff Anthony E. Maluski, and are secured by the Security Instrument on the property that is the subject of this cause: (a) the outstanding balance of the Note in the amount of \$ 128,085.93 as of March 6, 2008; (b) prejudgment interest; (c) post-judgment interest from the date of judgment until paid; and (d) reasonable attorneys' fees and expenses incurred in enforcing the Note; and it is further

ORDERED that Property Asset Management, Inc. is authorized to foreclose on the property that secured the Note indebtedness, [\*29] to wit:

Lot Fifteen (15), in Block Eleven (11) OF NORHILL ADDITION, a subdivision in Harris County, Texas, according to the map or plat thereof recorded at Volume 6,

pursuant to the Note and the Security Instrument and *TEX. PROP. CODE § 51.002*; and it is further

ORDERED that Plaintiff Anthony E. Maluski's Motion for Summary Judgment (Document No. 39) is DENIED; and it is further

ORDERED that within fourteen (14) days after the entry of this Memorandum and Order, Intervenor Property Asset Management, Inc. may file supplemental verified proof establishing the amount of reasonable attorneys' fees and expenses that have been incurred by PAMI in enforcing the Note, and which therefore may be properly included as a debt of the Loan; and within seven (7) days after having been served with PAMI's Supplemental Proof, Plaintiff may file a response thereto. A Final Judgment will thereafter be entered. <sup>11</sup>

<sup>11</sup> Because no issues remain to be tried, this case is REMOVED from Docket Call on December 5, 2008.

The Clerk shall notify all parties and provide them with a true copy of this Order.

SIGNED at Houston, Texas, on this 1st day of December, 2008.

/s/ Ewing [\*30] Werlein, Jr.

EWING WERLEIN, JR.

UNITED STATES DISTRICT JUDGE