IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

THE BANK OF NEW YORK as Trustee for POPULAR FINANCIAL SERVICES MORTGAGE/PASS THROUGH CERTIFICATE SERIES #2006-D,

Plaintiff-Appellant,

v.

Ct.App. No. 34,429
(Dist. Ct. D-117-NM-2008-00139)

JOSEPH A. ROMERO and MARY ROMERO a/ka/ MARY O. ROMERO a/k/a MARIA ROMERO,

Defendants-Appellees.

ANSWER BRIEF OF DEFENDANTS-APPELLEES MARY AND JOSEPH ROMERO

ORAL ARGUMENT IS REQUESTED

Daniel Yohalem
1121 Paseo de Peralta
Santa Fe, New Mexico 87501
(505) 983-9433 Fax: (505) 989-4844
dyohalem@aol.com

Katherine Murray
P.O. Box 5266
Santa Fe, New Mexico 87505
(505) 670-3943
kemurrylaw@gmail.com

Frederick M. Rowe
Santa Fe Neighborhood Law Center
P.O. Box 32024
Santa Fe, New Mexico 87594
(505) 983-4319
fredrowe@cybermesa.com

Joshua R. Simms, P.C.
P.O. Box 50332
Albuquerque, New Mexico 87181
(505) 266-2209 Fax: (505) 256-5136
jsimms@jrsimmspc.com

Counsel for Defendants-Appellees

TABLE OF CONTENTS

This brief utilizes Times New Roman typeface in 14 point type. The body of the brief contains 10,722 words and thus complies with NMRA 12-213(F)(3).

TABLE OF AUTHORITIES

OTHER STATE AND FEDERAL CASES

OTHER AUTHORITIES

RESTATEMENTS

TREATISES

PRELIMINARY STATEMENT

This case is the same case that was decided by the Supreme Court in 2014, *Bank of N.Y. v. Romero,* 2014–NMSC–007, 320 P.3d 1. In *Romero* the Supreme Court ruled that, after motions litigation and a full trial on the merits as to the Bank's standing and its foreclosure claims, the Bank had failed to "introduce any evidence demonstrating that it was a party with the right to enforce the Romeros' note either by an indorsement or proper transfer." *Id.*, ¶ 38. Consequently, the Court ruled that the Bank lacked standing to foreclose on the Note and Mortgage and ordered the Bank's claims dismissed. *Id.*, ¶¶ 1, 38 and 61.

On remand, the District Court implemented the Supreme Court's decision and the appellate mandates and dismissed the Bank's foreclosure "with prejudice." The only issue in this appeal is the Bank's claim that it was error for the District Court to have dismissed its claims "with prejudice." Because the Bank had a full and fair opportunity to prove its standing at trial and failed to do so, the Bank is not entitled to another bite at the apple and the District Court's dismissal with prejudice should be affirmed. Contrary to the Bank of New York's arguments on appeal, the Bank cannot relitigate its claim of authority to enforce the Romeros' Note and Mortgage, and the District Court's dismissal of the Bank's claims "with prejudice" is fully supported by the facts and law.

STATEMENT OF THE CASE

A. Key Facts from the Supreme Court's Opinion About the Note and Mortgage and the Evidence Produced at Trial by the Bank of New York

1. On June 26, 2006, Joseph and Mary Romero signed a promissory note with Equity One, Inc. to borrow $227,240 to refinance their Chimayo home. As security for the loan, the Romeros signed a mortgage contract with the Mortgage Electronic Registration Systems (MERS), as the nominee for Equity One, pledging their home as collateral for the loan. The Romeros soon became delinquent on their increased loan payments. *Id.*, ¶ 5.

2. On April 1, 2008, a third party – the Bank of New York, identifying itself as a trustee for Popular Financial Services Mortgage – filed a complaint in the First Judicial District Court seeking foreclosure on the Romeros' home and claiming to be the holder of the Romeros' Note and Mortgage with the right of enforcement. *Id.*, ¶ 5. The Note that was attached to the Complaint had no indorsements and was payable to Equity One, not to the Bank of New York. *Id.*, ¶ 9.

3. The Romeros responded by arguing, among other things, that the Bank of New York lacked standing to foreclose because nothing in the complaint established how the Bank of New York was a holder of the Note and Mortgage contracts the Romeros signed with Equity One. According to the Romeros, Securities and Exchange Commission filings showed that their loan certificate series was once owned by Popular ABS Mortgage and not Popular Financial Services Mortgage and that the

holder was JPMorgan Chase. *Id.*, ¶ 6.

4. The Bank responded by providing (1) a document showing that MERS as a nominee for Equity One assigned the Romeros' Mortgage to the Bank of New York on June 25, 2008, three months after the Bank filed the foreclosure complaint and (2) the affidavit of Ann Kelley, senior vice president for Litton Loan Servicing LP, stating that Equity One intended to transfer the Note and assign the Mortgage to the Bank of New York prior to the Bank's filing of the foreclosure complaint. However, Kelley's employer Litton Loan Servicing did not begin servicing the Romeros' loan until November 1, 2008, seven months after the foreclosure complaint was filed in district court. *Id.*, ¶ 7.

5. At a bench trial, Kevin Flannigan, a senior litigation processor for Litton Loan Servicing, testified on behalf of the Bank of New York. Flannigan asserted that the copies of the Note and Mortgage admitted as trial evidence by the Bank of New York were copies of the originals and also testified that the Bank of New York had physical possession of both the Note and Mortgage at the time it filed the foreclosure complaint. *Id.*, ¶ 8.

6. The Romeros objected to Flannigan's testimony, arguing that he lacked personal knowledge to make these claims given that Litton Loan Servicing was not a servicer for the Bank of New York until after the foreclosure complaint was filed and the MERS assignment occurred. *Id.*, ¶ 9. The business records exception to the

rule against hearsay did not apply because the records upon which Flannigan claimed to have acquired his knowledge were never offered into evidence and neither Ms. Kelley nor Mr. Flannigan ever claimed to be the custodian of those records at the time the complaint was filed. *Id.*, ¶¶ 31-33.

7. The "original" Note Flannigan purportedly authenticated was different from the "original" Note attached to the Bank of New York's foreclosure complaint. While the Note attached to the complaint as a true copy was not indorsed, the "original" admitted at trial was indorsed twice: first, with a blank indorsement by Equity One and second, with a special indorsement made payable to JPMorgan Chase. *Id.*, ¶ 10. JPMorgan Chase did not subsequently indorse the Note, either in blank or to the Bank of New York. *Id.*, ¶ 26.

8. During discovery in 2008-2009 before the trial of this case, the Bank of New York refused the Romeros' attempts to obtain documents evidencing the Pooling and Servicing Agreement ("PSA") and other facts about securitization. The Bank claimed these documents "will have no conceivable relevance to this lawsuit" and "may contain proprietary and confidential financial information." **1 RP 103-104 (¶¶ b and c) and 119-120 (¶¶ 5 and 6).**

9. At trial, when asked whether either of those two indorsements included the Bank of New York, Flannigan conceded that neither did, but he claimed that his review of the records indicated the Note had been transferred to the Bank of New

York based on a pooling and servicing agreement document that was never entered into evidence and never produced to the Romeros. *Romero*, 2014–NMSC–007, ¶ 10.

B. The Supreme Court's Rulings

10. The twice-indorsed Note restricting payment to JPMorgan Chase did not establish the Bank of New York as a holder with the right of enforcement. *Id.*, ¶ 28

11. Flannigan's testimony was inadmissible and did not establish a proper transfer. *Id.*, ¶ 30. Flannigan had no personal knowledge to support his testimony that transfer of the Romeros' Note to the Bank of New York prior to the filing of the foreclosure complaint was proper because Flannigan did not yet work for the Bank of New York. *Id.*, ¶ 31. The Court came to a similar conclusion about the affidavit of Ann Kelley, who also testified about the status of the Romeros' loan based on her work for Litton Loan Servicing. The Court ruled that as with Flannigan's testimony, such statements by Kelley were inadmissible because they lacked personal knowledge. *Id.*, ¶ 31.

12. In addition, neither Flannigan's testimony nor Kelley's affidavit substantiated the existence of documents evidencing a transfer since none of those documents were entered into evidence. Accordingly, the Bank did not establish that the Romeros' Note was transferred to the Bank of New York. *Id.*, ¶ 33.

13. "Because the Bank of New York did not introduce any evidence demonstrating that it was a party with the right to enforce the Romeros' note either by

an indorsement or proper transfer," the Court held "the Bank's standing to foreclose on the Romeros' mortgage was not supported by substantial evidence." *Id.*, ¶ 38.

14. The Supreme Court remanded the case "to the district court with instructions to vacate its foreclosure judgment and to dismiss the Bank of New York's foreclosure action for lack of standing." *Id.*, ¶ 1. The Supreme Court's Mandate, issued on March 7, 2014, stated, in relevant part: "this cause is remanded for further proceedings, if any, consistent and in conformity with the opinion of this Court." **3 RP 675.** The Court of Appeals Mandate states "the cause is remanded to you for any further proceedings consistent with said decision" and "for any further proceedings consistent with said Supreme Court decision." **3 RP 610.**

C. The District Court Proceedings On Remand

15. On remand, the District Court ordered the Bank of New York to restore the Romero's home and property to the Romeros by vacating the original foreclosure judgment and special master sale of the property to the Bank of New York and, *inter alia*, ordering the Bank to deed the property back to the Romeros, pay property taxes that were owed because the Bank had failed to pay them while it held the property, and repay to the Romeros rent paid by them to the Bank during the time when the Bank wrongly claimed it owned the property. **3 RP 730.** (Order Granting Defendants'/Counter-Plaintiffs' Motion to Vacate Final Judgment and for Other Relief, issued July 28, 2014).

16. The District Court granted the Romeros' motion to file counterclaims against the Bank for violating their rights under the Unfair Practices Act and the tort of Malicious Abuse of Process. The Romeros' counterclaims are being litigated in the District Court during the pendency of this appeal.[1]

17. After substantial litigation of this issue, the District Court dismissed the Bank of New York's foreclosure claims "with prejudice." **4 RP 930-932** (Order Granting Motion to Dismiss and Dismissing Foreclosure with Prejudice, issued Dec. 10, 2014). In this Order the District Court ruled, in relevant part:

> It is the Court's opinion that once the issue of standing has been litigated, as it was here, a dismissal for lack of standing bars another suit by the entity that was found to have no standing. Consequently, based on the Supreme Court's adjudication of the Bank of New York's lack of standing, it is the opinion of the Court that by reason of issue preclusion Plaintiff/Counter-Defendant Bank of New York is precluded from raising in the future the issue that it is entitled to enforce the Romeros' note and foreclose on the Romeros' mortgage.
>
> Therefore, it is ORDERED, ADJUDGED and DECREED that the Complaint for Foreclosure is dismissed **with prejudice** and the Bank of New York cannot refile a complaint to enforce the Romeros' note and

---

[1] **3 RP 727 and 724** (Order Granting Defendants'/Counter-Plaintiffs' Motion for Leave to File Amended Counterclaims, issued July 28, 2014; Order Denying Plaintiff Bank of New York's Motion to Strike, issued July 28, 2014). See also, Order Granting in Part and Denying in Part Counter-Defendant Bank of New York's Motion for Dismissal of Amended Counterclaims, issued February 21, 2015; Order Granting Counter-Plaintiffs Romeros' Motion for Leave to File Second Amended Counterclaims, issued July 30, 2015; Order Denying in its Entirety the Bank's Motion to Dismiss for Lack of Jurisdiction, and in the Alternative, Motion to Stay and Motion for Protective Order, issued July 31, 2015; and Counter-Plaintiffs' Second Amended Counterclaims Against Bank of New York for Unfair Trade Practices and Malicious Abuse of Process, filed August 7, 2015.

> foreclose on the Romeros' mortgage. The Bank of New York is precluded from raising in the future the issue that it is entitled to enforce the Romeros' note and foreclose on the Romeros' mortgage.

Id., citations from hearing transcript omitted, emphasis in original.

18. From the bench, Judge Singleton extensively explained her reasons for reaching her decision:

> And the implication from *Hope Community Ditch* is that dismissals for lack of standing are to be without prejudice. If you look, however, at the case that *Hope* cited, which I briefly was discussing there with Mr. Johnson, which is *Trujillo vs. Acequia de Chamisal*, at 79 N.M. 39, I think that it is simplistic to say a dismissal based on lack of standing is given no preclusive effect. Because that case recognizes, in my opinion, that the dismissal for lack of standing is a bar to another suit by the person who was found to have no standing; it is not a bar to a suit by another person.
>
> Thus, to, sort of, transpose the facts of *Trujillo* to this case, it is conceivable that a person from whom BONY secured or attempted to secure or thought it had secured the note and mortgage may well have standing. They may be able to come in and argue standing. But BONY itself, in my opinion, cannot. That is, I think, if we analyze it and if we look at other cases that have talked about standing and what sort of preclusive effect a determination on standing should have, that is not based on the doctrine of res judicata that is called bar and merger, that's based on the concept of collateral estoppel or issue preclusion.
>
> So I'm looking at some other cases: One, in particular, that I'm looking at that discuss the meanings under the Restatement of Judgments that is cited in New Mexico, Restatement Second of Judgments, Section 20, and this particular case is *Cutler vs. Hayes*, at 818 F.2d 879. It's from the D.C. Circuit, and it's from 1987. But what it says is, "Standing ranks amongst those questions of jurisdiction and justiciability not involving an adjudication on the merits whose disposition will not bar relitigation of the cause of action originally asserted, but may preclude, or collaterally estop, relitigation of the precise issues of jurisdiction adjudicated."

So therefore, to the extent that Bank of New York's standing was adjudicated, and it certainly was adjudicated as of the date that they filed suit, and, in my opinion, an argument can be made it was adjudicated even as to the later date, that is, the time of trial, that litigation is now preclusive on the Bank of New York ever filing suit again. And as that same case I was talking about said, "Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation. To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple law suits, conserves judicial resources and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions. Principles of collateral estoppel clearly apply to standing determinations."

***

So I am going to dismiss the claim, the cause of action pleaded by BONY, with prejudice as to BONY reasserting those claims in the future. Whether somebody else can or not may well depend on an analysis of principles of collateral estoppel, which are better decided in that second case. I'm not going to decide them in this case, because I don't know what their circumstances would be. It could well be, under the *Trujillo* case, that there is a person, an entity out there that can show that it would have standing to enforce the note and mortgage.

***

I guess, to me, it goes without saying, I believe, that the Supreme Court did determine that the Bank of New York did not have standing and that the Bank of New York was not going to be the one against whom the Home Loan Protection Act defense was going to be raised, but I don't even think I really need to reach that issue. I've told you that I believe that the Bank of New York can't raise it, and, therefore, the Bank of New York is precluded from raising these same claims again.

So that's my ruling.

11-18-14 Tr 28:2-31:4.

SUMMARY OF ARGUMENT

The only issue on appeal is whether the District Court on remand from the Supreme Court's decision against the Bank of New York in *Bank of N.Y. v. Romero,* 2014–NMSC–007, 320 P.3d 1, correctly dismissed the Bank of New York's claims "with prejudice." A dismissal "with prejudice" means the dismissed claim or issue has been finally litigated and decided on the merits, is entitled to preclusive effect, and cannot be re-litigated. Because the these requirements were satisfied, the District Court properly dismissed the Bank's claims with prejudice.

On remand the district court properly vacated the foreclosure and dismissed the case with prejudice in order to give effect to the Supreme Court's decision and the appellate mandates which is the law of the case. Moreover, issue preclusion bars relitigation of the bank's standing to enforce the Romeros' Note and Mortgage. In addition, the Supreme Court's final determination of the Bank's lack of standing to enforce the Romeros' Note also bars a second suit on the same transaction or claim.

Contrary to the Bank's arguments, the *Romero* decision was based on well-settled law which does not justify a waiver of long-standing principles of preclusion and the Bank of New York's new "factual" arguments are not only made many years too late, they are purely hypothetical and are contradicted by the real facts.

Finally, because the District Court expressly did not decide whether future litigation by the Bank would be barred by the applicable statute of limitation, this

issue is not ripe for appellate review.

ARGUMENT

The only issue before the Court in this appeal is whether the District Court properly dismissed the Bank's foreclosure claim "with prejudice," rather than "without prejudice." As detailed below, dismissal of a case "with prejudice" creates a presumption that the claim or issue decided in the first case cannot be re-filed or re-litigated in a second case. It is a designation placed by the district court that there was a ruling that bars the new litigation either through res judicata (claim preclusion) or through collateral estoppel (issue preclusion) as to a threshold requirement such as standing.

In this appeal, the issue that was finally and necessarily decided by the Supreme Court, after the Bank had a full and fair opportunity at trial and on appeal to prove and argue its case, was that the Bank of New York lacked **any** authority to enforce the Romeros' Note and Mortgage. Because of important principles of preclusion, this determination cannot be re-litigated and the Bank is barred from bringing the same claims against the Romeros in a subsequent case. Under the facts of this case, the District Court correctly dismissed the Bank's claims "with prejudice."

I. A Dismissal "With Prejudice" Means the Dismissed Claim or Issue Has Been Finally Litigated and Decided on the Merits, Is Entitled to Preclusive Effect, and Cannot Be Re-Litigated.

In *Kirby v. Guardian Life Insurance Company of America,* the Supreme Court

explained that:

> A dismissal with prejudice is an adjudication on the merits only 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. If this were otherwise, plaintiffs could simply ignore dismissals and file the same claim as many times as they wished, so long as the claim never progressed to a determination of the substantive issues.

2010–NMSC–014, ¶ 66, 148 N.M. 106.[2] In other words, a decision by the first court to dismiss a case with prejudice means that if the defendant in the first case is subsequently sued by the same plaintiff based on claims that were litigated or that could have been litigated in the first suit, the defendant in the second case can invoke a **presumption** that a final judgment on the merits has been rendered that bars the second suit. Although the "with prejudice" designation is not an absolute bar to the filing of a second case, the plaintiff in the second case will be limited to trying to show that the second case presents issues that were not actually decided in the first case or that could not have been raised in the first case. The court considering the second case will presume that the merits of the claim or the merits of a threshold issue such as standing were finally decided unless the plaintiff convincingly shows otherwise. If there has been "a full and fair opportunity to litigate issues arising out

---

[2] In *Computer One, Inc. v. Grisham & Lawless P.A.*, the Court observed that the underlying purpose of res judicata is to "relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, ... prevent[ ] inconsistent decisions, [and to] encourage reliance on adjudication." 2008-NMSC-038, ¶ 31, 144 N.M. 424 (internal quotation marks and citations omitted).

of that [earlier] claim," a second suit will be precluded. *Kirby,* 2010-NMSC-014, ¶ 61.

Recent appellate decisions demonstrate that a court must look beyond the designation of "with" or "without" prejudice to determine whether a second suit is permitted or barred. For example, in *Kirby,* the first case consisted of the plaintiff's challenge of the denial of disability benefits under her Benefit Plan. The defendants were the Plan and the insurance company (Guardian) that funded the Plan. After a hearing on Guardian's motion for dismissal, the Court dismissed Guardian "with prejudice" as a proper defendant. Subsequently in the first case, the plaintiff obtained a decision against the other defendant (the Benefit Plan) that she was entitled to benefits under the Plan. After that decision, the plaintiff filed a second action against Guardian to enforce the judgment through a writ of garnishment of Plan payments by Guardian. Guardian claimed that the second suit was barred by Guardian's dismissal "with prejudice" in the initial action. The Court carefully reviewed what was litigated and decided in the first suit and ruled that the second action was a separate action – a garnishment collection action – presenting claims and issues that could not have been raised in the first suit. Consequently, the Court ruled that Guardian was not entitled to res judicata protection in the second suit. *Id.,* ¶¶ 59-66.

Similarly, in *Cagan v. Village of Angel Fire*, 2005-NMCA-059, 137 N.M. 570, the Court of Appeals scrutinized the litigation and ruling in a first case that was

dismissed "with prejudice" for lack of prosecution to determine whether res judicata applied in a subsequently filed second case involving the same parties and very similar claims. The Court ruled that, as to all claims that had been subject to the motion for summary judgment for lack of prosecution in the first case, there had been a full opportunity for briefing and a hearing had been held, and consequently, res judicata applied to bar those claims dismissed with prejudice. *Id.* ¶12 ("we hold that when a dismissal with prejudice for lack of prosecution is entered pursuant to a written motion and after a hearing on the merits where the losing party has had notice and an opportunity to be heard, a dismissal under Rule 1–041(E)(1) constitutes an adjudication on the merits"). A new claim that could not have been brought in the first case was allowed to proceed. *Id.* ¶¶ 29-31.

This understanding of the "with prejudice" presumption of preclusion is supported by the recent majority opinion in *Turner v. First New Mexico Bank*, 2015-NMCA-068, 352 P.3d 661, *cert. denied* (June 26, 2015), which examined the effect of the opposite designation – that of a dismissal "without prejudice." In *Turner* two judges held that a dismissal "without prejudice" in the first case did not bar the court in the second case from concluding that the claims or issues litigated in the first case were precluded from being litigated in the second case by operation of res judicata or collateral estoppel. The Court ruled that even a dismissal "without prejudice" could constitute a final order on the merits, depending on what the court in the first case

actually considered and decided.

> Here, Defendant filed a motion to dismiss pursuant to Rule 1–012(B)(6). Plaintiffs responded in writing to the motion and then made oral arguments in opposition to the motion in a notice hearing held before Judge Viramontes. Under these circumstances, the "merits" of whether the First Complaint stated a cause of action under Rule 1–012(B)(6) was fully and fairly litigated before Judge Viramontes in accordance with the due process rights of Plaintiffs to notice and an opportunity to be heard. Accordingly, we conclude that the order dismissing the complaint constituted a judgment "on the merits" that the First Complaint failed to state a cause of action.

Id. ¶ 8. Thus, under the reasoning of the majority opinion, a dismissal "with prejudice" would require the court in the second case to presume that a final decision on the merits had been reached in the first case, but to review the claims and issues raised in the second case to ensure the proper application of preclusion.

The minority opinion in *Turner* reached a different conclusion, concurring with the result on other grounds. It took the position that a dismissal "without prejudice" absolutely precludes the application of res judicata in the second case because the designation "without prejudice" is a binding determination that the court in the first case did not reach the merits of any claim. This concurring opinion relies on *Bralley v. City of Albuquerque*, 1985-NMCA-043, ¶¶ 17-18, 102 N.M. 715, for the proposition that:

> The phrase "without prejudice," as set out in the order, indicates it was a final order but that the dismissal was not intended to be res judicata as to the merits of the controversy so as to preclude plaintiff from pursuing a new action once he exhausted available administrative remedies.

On this basis the *Turner* concurrence states that when a case is dismissed without prejudice res judicata can never bar a second suit on the same claim.[3] The corollary of the concurrence's reasoning when applied to the instant case would be that a dismissal "with prejudice" must always be treated as a final disposition on the merits that bars a second suit. See, *Hope Cmty. Ditch Ass'n v. N.M. State Eng'r*, 2005–NMCA–002, ¶ 10, 136 N.M. 761 ("[A] dismissal with prejudice is an adjudication on the merits for purposes of res judicata.").[4]

In sum, the District Court's dismissal with prejudice here must be applied either

---

[3] This bright line interpretation of "without prejudice" advanced by the concurrence appears not to be consistent with the analysis required by other New Mexico cases and the *Restatement (Second) of Judgments*, in which a court in a subsequent suit must look beyond the "with" or "without prejudice" label to determine what, if any, preclusive effect the initial dismissal should have on the subsequent suit.

> The rule that a defendant's judgment acts as a a bar to a second action on the same claim is based largely on the ground that fairness to the defendant, and sound judicial administration, require that at some point litigation over the particular controversy comes to an end. These considerations may impose such a requirement even if the substantive issues have not been tried, especially if the plaintiff has failed to avail himself of opportunities to pursue his remedies in the first proceeding, or has deliberately flouted orders of the court.

Restatement (Second) of Judgments § 19 (1982) cmt. a, at 160. See also, *Kirby*, 2010-NMSC-014, ¶¶ 59-66; *Cagan*, 2005-NMCA-059, ¶¶ 8-15, discussed above.

[4] The Bank's reliance on *Hope Cmty. Ditch Ass'n* is misplaced. Although the Court says that a dismissal for lack of standing should not be with prejudice, the case it relies on for this proposition is *Trujillo v. Acequia de Chamisal*, 1968-NMCA-015, ¶ 14, 79 N.M. 39, which actually holds that a dismissal for lack of standing may not be relitigated. See discussion of *Trujillo* at p. 30, below.

as a presumption of a final ruling on the merits or, under the concurring opinion in *Turner*, as a non-reviewable final ruling on the merits. As detailed below, under either rationale a second suit against the Romeros by the Bank of New York is barred by principles of collateral estoppel and/or res judicata.

II. On Remand the District Court Properly Vacated the Foreclosure and Dismissed the Case with Prejudice In Order to Give Effect to the Supreme Court's Decision and Appellate Mandates.

The Supreme Court's final decision on the merits of BONY's right to enforce the Romeros' Note was the law of the case on remand. "[A] decision by an appeals court on an issue of law made in one stage of a lawsuit becomes binding on subsequent trial courts as well as appeals courts during the course of that litigation." *State ex rel. King v. UU Bar Ranch Ltd. Partnership,* 2009-NMSC-010, ¶ 21, 145 N.M. 769. In *UU Bar Ranch*, the appellate decision, having reversed the lower court, constituted the law of the case and was binding both on the district court on remand and the second appeals court.

In the instant case, the Supreme Court's decision states "we reverse the decisions below and remand this matter to the district court **with instructions to vacate its judgment of foreclosure**." *Romero,* 2014-NMSC-007, ¶ 61 (emphasis added). The Supreme Court Mandate states "this cause is remanded for further proceedings, if any, consistent and in conformity with the opinion of this Court." **3 RP 675.** The Court of Appeals Mandate states "the cause is remanded to you for any

further proceedings consistent with said decision" and "for any further proceedings consistent with said Supreme Court decision." **3 RP 610.** "If there is any doubt or ambiguity regarding the mandate, the **meaning** of the [appellate] opinion governs. In fact, the opinion itself so dominates that even the mandate must give way to the opinion as the law of the case." *UU Bar Ranch Ltd. Partnership,* 2009-NMSC-010, ¶ 22 (emphasis in original). The "later courts were bound to follow not only [the first appellate court's] mandate, but the **meaning** of the opinion." *Id.* ¶ 46 (emphasis in original). Likewise, the Supreme Court's final determination of the Bank's lack of standing in *Romero* was not only binding on the District Court, but is also binding on this Court in this appeal.

The *Romero* decision clearly demonstrates that the Supreme Court intended that the foreclosure be dismissed with prejudice. The Supreme Court made a final determination as to the Bank's lack of standing to enforce the Romeros' Note based on review of the evidence and arguments submitted during summary judgment litigation and a full trial on the merits. The Court held that pursuant to long standing New Mexico law concerning assignment of mortgages, limitations on business records hearsay, and the treatment of indorsements required by the New Mexico Uniform Commercial Code, **none** of the evidence introduced by the Bank established its lawful standing to file a home mortgage foreclosure action against the Romeros. *Romero,* 2014-NMSC-007, ¶ 1. The Court's pertinent findings as to the Bank's lack of

standing to enforce the Romeros' Note relevant to the dismissal with prejudice include:

> The Bank's possession of the Romeros' unindorsed note made payable to Equity One does not establish the Bank's entitlement to enforcement. (*Id.* ¶ 23)
>
> Because JPMorgan Chase did not subsequently indorse the note, either in blank or to the Bank of New York, the Bank of New York cannot establish itself as the holder of the Romeros' note simply by possession. (*Id.* ¶ 26)
>
> [W]e conclude that the Bank of New York's possession of the twice-indorsed note restricting payment to JPMorgan Chase does not establish the Bank of New York as a holder with the right of enforcement. (*Id.* ¶ 28)
>
> [N]either the MERS assignment nor Flannigan's testimony establish the Bank of New York as a nonholder in possession with the rights of a holder by transfer. (*Id.* ¶ 36)
>
> Because the Bank of New York did not introduce any evidence demonstrating that it was a party with the right to enforce the Romeros' note either by an indorsement or proper transfer, we hold that the Bank's standing to foreclose on the Romeros' mortgage was not supported by substantial evidence, and we reverse the contrary determinations of the courts below. (*Id.* ¶ 38)

The Supreme Court clearly contemplated that its ruling was the end of the road for the Bank to establish its standing to foreclose, that the Bank could not do so at some time in the future, and that it was dismissing the case with prejudice as to the Bank of New York.

The Bank wrongly argues that the Supreme Court's decision specifically recognizes the Bank's right to relitigate any interest it might have in the Note and

Mortgage. **BIC 18-19.** Contrary to the Bank's claim, the Supreme Court not only **never** stated that the Bank could establish its standing to foreclose at some time in the future, it definitively decided that the Bank would **not** be allowed to relitigate this issue. The Court stated:

> As a result of our holding that the Bank of New York has not established standing to bring a foreclosure action, the issue of HLPA violation is now moot in this case. But because [the protection afforded by the Home Loan Protection Act] is an issue that is likely to be addressed again in future attempts by whichever institution may be able to establish standing to foreclose on the Romero home ..., [the Court will address that issue].

Romero, 2014–NMSC–007, ¶ 39. If the Court did not intend its ruling to bar a future foreclosure by the Bank of New York, it would not have stated that "the issue of HLPA violation is now moot in this case." That is, if it had intended that the Bank could pursue another foreclosure against the Romeros, the HLPA defense discussed by the Court would not be moot. The Court knew the HLPA would be an important defense for the Romeros and it would not have described the HLPA issues as "moot" if it intended the Bank to have another bite of the apple. In addition, the Court specifically does not name the Bank of New York as an institution, in any capacity, which might have a claim in the future. It merely allowed that "some" institution may be able to establish standing to foreclose on the Romeros' home in the future. By which the Court clearly meant some institution **other than the Bank of New York.** Otherwise, if the Court intended that the Bank could continue to attempt to enforce

the Note and Mortgage, it would have said so and mentioned the Bank by name, instead of referring to "some" institution. Thus, the Supreme Court clearly intended to foreclose future litigation by the Bank against the Romeros of its alleged interest in the Note and Mortgage. Since that is the law of the case, the District Court's dismissal with prejudice was correct.

III. The District Court Properly Recognized That Relitigation of the Bank's Interest in the Romeros' Note and Mortgage Is Barred by the Supreme Court's Final and Necessary Determination On the Merits that the Bank Lacked Standing to Enforce the Note and Mortgage.

The Bank devotes the majority of its Brief-in-Chief to attempting to narrowly define and apply issue and claim preclusion and arguing that it was error for the District Court to acknowledge the potential overlap between issue preclusion and claim preclusion here. **BIC 10-38.** Claim preclusion and issue preclusion differ primarily in scope. "[W]here causes of action in the cases are identical in all respects, the first judgment is a conclusive bar upon the parties as to every issue which either was **or could have been** litigated in the previous case. But absent the identity of the causes of action, the parties are precluded from relitigating only those ultimate issues and facts shown to have been actually and necessarily determined in the previous litigation." *Mascarenas v. City of Albuquerque,* 2012-NMCA-031, ¶30, 274 P.3d 781, *quoting C & H Constr. & Paving Co. v. Citizens Bank,* 93 N.M. 150, 160, 597 P.2d 1190, 1200 (Ct. App. 1979) (emphasis added). "[I]ssue preclusion requires that the

issue was 'actually litigated' and 'necessarily determined' in the first suit, whereas claim preclusion does not so require." *Pielhau v. State Farm Mut. Auto. Ins. Co.*, 2013-NMCA-112 ¶ 11, 314 P. 3d 698, *cert. granted and case stayed* (2013). Since the issue of the Bank's right to enforce the Romeros' Note was actually litigated by the parties and necessarily determined, the Supreme Court's final determination of the Bank's lack of standing is entitled to preclusive effect in **any** subsequent proceeding under the doctrines of both collateral estoppel and res judicata.

A. Issue preclusion bars relitigation of the Bank's standing to enforce the Romeros' Note and Mortgage.

The District Court properly held that the Supreme Court's adjudication of the Bank's lack of standing acted as bar to that issue being relitigated in **any** subsequent action. **11-18-14 Tr. 5:17-7:2.** See *Trujillo,* 1968-NMCA-015, ¶ 7. See also, *Cutler v. Hayes,* 818 F.2d 879, 888-890 (U.S.App.D.C. 1987) ("Principles of collateral estoppel clearly apply to standing determinations."); *Gupta v. Thai Airways Intern., Ltd.,* 487 F.3d 759 (9th Cir. 2007) ("[W]hen the decision on the jurisdictional question is on the merits of an issue before the court, it constitutes a binding determination of that issue," *quoting Shore v. Shore,* 43 Cal.2d 677, 681, 277 P.2d 4 (1954)).

Issue preclusion bars relitigation in a subsequent action of any material issue actually litigated and necessarily determined whether on the same or a different claim. Restatement (Second) of Judgments § 27, at 250. Since the issue of the Bank's standing to enforce the Note was fully litigated and necessarily determined by the

Supreme Court, the Bank of New York and any party claiming to derive its interest from the Bank are barred from relitigating this issue in any subsequent action. The District Court properly recognized that a final determination of a party's standing precludes relitigation of standing because the issue was litigated and necessarily determined.

"The doctrine of collateral estoppel or issue preclusion differs from res judicata. Collateral estoppel applies to identical issues in two suits where the same parties or parties in privity are involved in both actions even though the subject matter in the second action differs from the first." *Reeves v. Wimberly,* 1988-NMCA-038, ¶ 8,107 N.M. 231 (internal citation omitted). Collateral estoppel bars relitigation of an issue when four elements are met: "(1) the parties are the same or in privity with the parties in the original action; (2) the subject matter or cause of action in the two suits are different; (3) the ultimate facts or issues were actually litigated; and (4) the issue was necessarily determined." *Id.* It is clear from the Supreme Court's ruling in *Romero* that the issue of the Bank's standing to foreclose was actually litigated and necessarily determined and that the Bank and those in privity with it are barred from relitigating that issue in any subsequent proceeding. "The purpose of collateral estoppel is to prevent endless relitigation of the same issues under the guise of different causes of action." *Reeves,* 1988-NMCA-038, ¶ 6. Here, the Bank had a full and fair opportunity to present all its evidence and arguments as to its right to enforce the Romeros' note

in its motions litigation, a full trial on the merits, and review by two appellate courts.

The Bank vaguely claims that it can now somehow cure its failure to establish its standing to enforce the Note. **BIC 23-24, 27-28, 30, 32, and 34-35.** However, the Bank's right to enforce the Romeros' Note was an issue of ultimate fact and/or law finally determined by the Supreme Court. Once a party has litigated an issue of ultimate fact and "suffered an adverse determination, new evidentiary facts may not be brought forward to obtain a different determination of that ultimate fact. And similarly if the issue was one of law, new arguments may not be presented to obtain a different determination." Restatement (Second) of Judgments § 27 cmt c. at 253. "When an issue is properly raised, by pleadings or otherwise, and is submitted for determination, is determined, the issue is actually litigated within the meaning of this Section. ... A determination may be based on a failure of pleading or of proof as well as on the sustaining of the burden of proof." *Id.* cmt d, at 255. "[I]t is well established that 'a party that has had an opportunity to litigate the question of subject matter jurisdiction may not reopen that question on a collateral attack on the judgment.'" *Cordova v. Larsen,* 2004-NMCA-087, ¶ 15, 136 N.M. 87, *quoting Ins. Corp. of Ireland, Ltd., v. Compagnie des Bauxites de Guinee,* 456 U.S. 694, 702 n. 9, 102 S.C. 2099 (1982). See also, *Gupta,* 487 F.3d 759, 766-767 ("[W]hen the decision on the jurisdictional question is based on the determination of the merits of an issue before the court, it constitutes a binding determination of that issue" and "evidence which

was not introduced in the earlier proceedings does not overcome the preclusive effect of the prior decisions").

In the first foreclosure lawsuit, the Bank had over six years of litigation in which to establish its standing to enforce the Romeros' Note and in that time the Bank "did not introduce **any** evidence that it was a party with the right to enforce the Romeros' note either by an indorsement or proper transfer." *Romero,* 2014-NMSC-007, ¶ 38 (emphasis added). The Court issued a final ruling on the merits that the Bank's "standing to foreclose on the Romeros' home was not supported by substantial evidence." *Id.* Consequently, the Bank cannot now relitigate its claimed right to enforce the Note and Mortgage in a subsequent action. Indeed, since standing is a threshold requirement for litigation of the Bank's foreclosure claims against the Romeros in the future, the District Court properly ruled that the Bank was barred from bringing any claims to enforce the Note and foreclose on the property in the future and dismissed the foreclosure action with prejudice. Thus, the District Court's dismissal with prejudice was appropriate and lawful.

B. The Supreme Court's final determination of the Bank's lack of standing to enforce the Romeros' Note and Mortgage also bars a second suit on the same transaction or claim.

When the District Court dismissed the Bank's claims "with prejudice" on the basis of issue preclusion as to standing it clearly did so because the Court recognized that since the Bank could never again litigate the essential threshold issue of its

standing to enforce the Romeros' Note and Mortgage, that meant it could not bring another action against the Romeros based on that Note and Mortgage at all. Thus the Court ended its ruling from the bench by reiterating its denial of the Bank's assertion that it had an interest in the Romeros' Note and Mortgage: "I've told you that I believe that the Bank of New York can't raise it, and, therefore, the Bank of New York is precluded from raising these same claims again. So that's my ruling." **11-18-14 Tr 31:1-4.** This was a practical and proper application of preclusion under these circumstances.

Although the District Court did not actually determine whether res judicata, as distinct from issue preclusion by collateral estoppel, would also bar all subsequent claims against the Romeros by the Bank of New York or those in privity with it, it is clear that application of res judicata would in fact bar such claims. The application of res judicata is a fact specific inquiry requiring specific finding as to the nature of the claim being brought in the second suit and the reasons advanced, if any, for why the claim could not have been advanced in the initial suit.

A claim for the purposes of res judicata (merger and bar) includes "all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose." Restatement (Second) of Judgments § 24 (1) at 196."[R]es judicata applies to issues which were not specifically raised, but which could properly have been considered

and determined in the prior action." *First State Bank v. Muzio,* 1983-NMSC-057, ¶8, 100 N.M. 98.

For res judicata to apply, the subsequent action must have the following relationship to the first suit:

1. The *parties* must be the same or in privity;

2. The *cause of action* must be the same;

3. There must have been a *final decision* in the first suit;

4. The first decision must have been *on the merits.*

Id. ¶7 (emphasis in original). Any subsequent foreclosure action filed by the Bank of New York or its privities would clearly satisfy all four res judicata requirements: 1) the parties would necessarily be the same or in privity; 2) the cause of action would necessarily be the same; 3) a final decision has been issued in the first foreclosure action; and 4) the decision by the Supreme Court was on the merits as to the Bank's right to enforce the Note and Mortgage.

Moreover, if the Bank of New York or those in privity with it were to file any other suit against the Romeros based on the Bank's alleged interest in the Romeros' Note or other evidence of its right to foreclose on the Romeros' property, the second suit would be barred by res judicata because it would constitute the same underlying claim. To determine whether a second lawsuit concerns the same claim New Mexico courts "apply the transaction approach from the Restatement (Second) of Judgements

Section 24." *Pielhau,* 2013-NMCA-112 , ¶14. "In determining whether claims arise out of the same transaction, we consider the relatedness of the facts, trial convenience, and the parties expectations." *Id.* Here, the evidence would overlap extensively with the prior litigation, it clearly would have been more convenient to present the evidence during the first trial when the Bank's standing was first challenged, and it would comport with the parties' expectations that, having litigated its interest in the Romeros' Note all the way to the Supreme Court, litigation would now be at an end.

New Mexico appellate decisions set forth strong policy reasons for the application of res judicata to bar subsequent litigation when, as here, a party had a full and fair opportunity to bring its claims. The following policy concerns weigh heavily in favor of barring a second suit by the Bank of New York against the Romeros:

> [T]his rule is based on three long-standing and well-reasoned principles of public policy. First, public policy favors an end to litigation. ...
>
> Second, public policy favors judicial economy and thus forbids a defendant to split up his defenses in order to present them in a piecemeal fashion. ...
>
> Third, where a party has an opportunity to present his defense and neglects to do so, public policy requires that he take the consequences of his negligence.

Muzio, 1983-NMSC-057, ¶ 9. "The doctrine of claim preclusion ensures finality, advances judicial economy, and avoids piecemeal litigation." *Pielhau*, 2013-NMCA-112, ¶ 8. "**A party cannot by negligence or design withhold issues and litigate them in consecutive actions**." *Muzio,* 1983-NMSC-057, ¶ 9. (emphasis in original).

"[T]he law in New Mexico is clear that a party may not withhold issues and litigate them in subsequent proceedings, and may not split his demands or his defenses. It is equally clear that this rule applies to issues which were, or could have been, determined in the first action." *In re Richards,* 1999-NMSC-030, ¶ 20, 127 N.M. 716 (internal citations omitted). "**Public policy requires that there be an end to litigation and that rights once established by final judgment shall not again be litigated in any subsequent proceeding.**" *Muzio,* 1983-NMSC-057, ¶ 9 (emphasis in original). As the District Court recognized, the Bank failed "to meet its burden of proof" in the instant foreclosure action. **7-17-14 Tr 23:4.** Thus, res judicata would bar subsequent litigation on the same transaction as to all "issues which were, or could have been, determined in the earlier action." *Muzio,* 1983-NMSC-057, ¶ 9.

Under the modern rules of civil procedure, parties are encouraged and expected to bring all related claims in one proceeding.

> It permits the presentation in the action of all material relevant to the transaction without artificial confinement to any single substantive theory or kind of relief and without regard to the historical forms of action or distinctions between law and equity. A modern system allows allegations to be made in general form and reads them indulgently; it allows allegations to be mutually inconsistent subject to the pleader's duty to be truthful. It permits considerable freedom of amendment and is willing to tolerate changes of direction in the course of litigation.
>
> ***
>
> **The law of res judicata now reflects the expectation that parties who are given the capacity to present their "entire controversies" shall in fact do so.**

Restatement, § 24, cmt. a at 198 (emphasis added). Thus, even new evidence or legal arguments would now be barred. In short, the Bank was obligated to have introduced any evidence and legal arguments with which it could have established its standing to enforce the Romeros' Note and foreclose on the Romeros' property before the Supreme Court's final decision and cannot do so now.

The District Court's ruling in this case is supported by caselaw holding that dismissals for lack of standing should be dismissals **with prejudice** as to the final determination of standing and subsequent litigation of any claims dependent on that standing will be barred. See *Trujillo v. Acequia de Chamisal*, 1968-NMCA-015, ¶ 14 (holding that dismissal of Arturo's claims in earlier suit on basis of Arturo's lack of standing barred another suit by Arturo on the same cause of action.);[5] *San Juan Agric. Water Users Assn. v. KNME TV*, 2010-NMCA-012, ¶ 6, 147 N.M. 643 ("Plaintiffs lacked standing to bring the action, and the court did not err in dismissing the action with prejudice."); *THI of New Mexico at Las Cruces, LLC v. New Mexico Human Servs. Dep't*, No. 31,588, 2013 WL 6640490, at *2 (N.M. Ct. App. Nov. 25, 2013) (affirming district court's ruling dismissing case with prejudice for lack of standing); *Kimbrell v. Kimbrell*, 2014-NMSC-027, 331 P.3d 915 (affirming the district court's

[5] Although the Court of Appeals in *Trujillo* states that the dismissal with prejudice in the first case was in error, it actually upheld the dismissal with prejudice as to Arturo, the only plaintiff in the first case, but ruled that his parents were not barred from bringing the second case because there was no determination on the merits as to *their* rights in the first case. See discussion of *Trujillo* by the District Court in the Statement of Proceedings, ¶ 18, above, agreeing with this interpretation.

dismissal with prejudice for lack of standing); *Eastham v. Pub. Employees Ret. Ass'n Bd.*, 1976-NMSC-046, ¶¶ 15, 25-26, 89 N.M. 399 (affirming district court dismissal with prejudice for lack of standing and distinguishing dismissal on this ground from other grounds, such as absence of indispensable party, when dismissal would ordinarily be without prejudice). See also *Bank of Am., N.A. v. Kuchta*, 2014-Ohio-4275, ¶15, 141 Ohio St. 3d 75, 21 N.E.3d 1040, *reconsideration denied*, 2014-Ohio-5251, ¶ 15, 140 Ohio St. 3d 1523, 20 N.E.3d 730, and its many progeny (holding that because the issue of standing could have been and in fact was raised during the foreclosure proceedings, res judicata barred further litigation of the issue of standing); Geoffrey C. Hazard Jr., *Revisiting the Second Restatement of Judgments: Issue Preclusion and Related Problems*, 66 Cornell L. Rev. 564, 590 (1981).[6]

Finally, "the policies advanced by claim preclusion are at their zenith in cases

---

[6] Contrary to the Bank's argument, Rule 1-041(B) does not preclude a dismissal with prejudice after an adjudication on the merits of standing if that issue has been fully litigated, as it was here. **BIC 13-16.** The rule merely states that involuntary dismissals on grounds other than lack of subject matter jurisdiction, improper venue or failure to join a party, must be treated as adjudications on the merits. It is silent as to how involuntary dismissals for lack of standing are to be treated and basic principles of issue and claim preclusion still apply: "[the judgment remains effective to preclude relitigation of the precise issue of jurisdiction or venue that led to the initial dismissal." 18 Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d. §4436, at 149. Moreover, "[c]ircumstances of flagrant procedural delict, finally, can be met by special rules of preclusion that rest on the particular unfairness of allowing a second action in an individualized setting." *Id.* §4437, at 181. In this case, the merits of BONY's right to enforce the Note were fully litigated and finally determined and that determination bars any subsequent claim based on the same underlying transaction.

involving interests in real property... The public's interest in the reliability and certainty of titles to real property is substantial and requires efficient and decisive resolution of any disputes regarding these matters." 18 *Moore's Federal Practice* §131.12[4][b] at 131-24 (Matthew Bender 3d. Ed.). "[A] foreclosure proceeding, which is considered to be a proceeding in rem, is conclusive on the parties as to their interest in the property and any claims by way of mitigation or offset, such as a claim of lender liability must be resolved in that action or lost forever. Furthermore, parties not before the court may be bound by any such determination and thereby precluded from any subsequent action relating to the same property interests." *Id.*, §131.23[4] at 131-66.

In sum, under New Mexico law and the strong public policy favoring an end to litigation, especially litigation involving real property rights, the dismissal with prejudice was proper and subsequent lawsuits by the Bank of New York to try to enforce the Romeros' Note should be barred.

IV. The Supreme Court's Decision in *Romero* Was Based on Well-Settled Law Which Does Not Justify a Waiver of Long-Standing Principles of Preclusion

The Bank of New York seeks to avoid application of claim preclusion by wrongly arguing that the Supreme Court's decision in this case represented a "change in the underlying requirements of standing" and that res judicata will not bar a second suit if there has been an intervening change in the law between the two suits. **BIC 31-**

36. But the Supreme Court's decision in *Romero* clearly did not establish new law as to standing; it merely upheld the long-standing requirement that a plaintiff in a foreclosure action must have the authority to enforce the note and mortgage at issue as of the time of filing suit. As the Supreme Court stressed in its decision, the Bank did "not dispute that it was required to demonstrate under New Mexico's Uniform Commercial Code (UCC) that it had standing to bring a foreclosure suit at the time it filed suit." *Romero,* 2014-NMSC-007, ¶ 17.

Second, the Bank wrongly argues that the Supreme Court changed "the methods by which a plaintiff must demonstrate that it is the holder of the note." **BIC 33-36.** But all the Court did was apply basic, long-standing evidentiary and UCC rules to the Bank's evidence and concluded the Bank lacked standing. *Romero,*2014-NMSC-007, ¶¶ 17, 19-38. Contrary to the Bank's claims here, *Romero* did not create new law as to indorsements, nor did it overrule a single case or principle of law in its decision. The Bank misstates the holdings of the cases cited in its Brief-in-Chief. **BIC 33-34.** These cases explain the rules for dealing with improper indorsements.[7]

---

[7] For example, in *State v. Herrera*, 2001-NMCA-007, ¶ 19, 130 N.M. 85, 88, the Court held that when a Defendant's indorsement included only his name and "did not include language making the check payable to an identified person," then the indorsement was not a special indorsement and "was not sufficient to transform the legal effect of the check from bearer to order." *Id.* The Court concluded that "because Defendant's indorsement included only his signature, the indorsement qualified as an indorsement in blank." *Id.* In contrast to what the Bank has argued, *Herrera* specifically recognized that when indorsed properly, as was done in the instant case, "a bearer instrument can be transformed to an order instrument" as specified in the

(continued...)

Contrary to the Bank's brief, none of them holds that when the evidence shows that an indorsement in blank is **followed** by a proper special indorsement, as was the case here, the indorsement in blank should nonetheless govern. As the Court clearly ruled in *Romero* the law is the opposite of what the Bank argues here:

> The Bank provides no authority and we know of none that exists to support its argument that the payment restrictions created by a special indorsement can be ignored contrary to our long-held rules on indorsements and the rights they create.

Romero, 2014-NMSC-007, ¶ 27.

The Supreme Court's decision in *Romero* upheld long standing New Mexico law concerning standing to enforce notes and mortgages, the business records hearsay exception, and indorsements required by the New Mexico Uniform Commercial Code. The Bank simply failed these long-standing tests and there is no basis for exempting it from the consequences of issue and claim preclusion.

V. The Bank of New York's New "Factual" Arguments Are Not Only Made Many Years Too Late, They are Purely Hypothetical and They Are Contradicted by the Actual Facts

The Bank offers myriad hypothetical scenarios about new "evidence" and/or theories on which it might now be able to establish its right to enforce the Note. **BIC 33-36.** These hypothetical scenarios are not only offered too late, they are just as

---

[7](...continued)
New Mexico UCC. *Id.* See, 1978 NMSA §§ 55–3–109(c) and 55–3–205(a) (1992).

fallacious as the ones rejected by the Supreme Court. First, the Bank argues that because the second version of the Bank's "original" Note has two indorsements, one an indorsement in blank and the other a special indorsement, the indorsement in blank must govern and the Supreme Court wrongly ruled otherwise. But the Bank fails to inform this Court about the many facts that directly contradict its argument:

> 1. The Bank first proffered an "original" Note with no indorsements at all that was attached to the Complaint filed in 2008. This unindorsed Note was payable to Equity One. **1 RP 7-10.**
>
> 2. Later in the case the Bank proffered a second Note which it also claimed was the "original" Note. This Note contained two indorsements: the first by Equity One in blank and the second by Popular ABS, Inc. to JP Morgan Chase for the benefit of Popular ABS, Inc. Mortgage pass through certificate holders. *Romero,* 2014-NMSC-007, ¶¶ 10, 22 and 26 and Trial Exhibit A.[8]
>
> 3. On its face, the Note shows that it was transferred by Equity One (the payee) to Popular ABS, Inc., which took the Note indorsed in blank and then transferred it to JPMorgan Chase as trustee for the certificate holders of Popular ABS, Inc.'s securitized mortgage trust. *Id.*
>
> 4. This is supported by documents in the public record that show that Popular ABS, Inc, held the Note and then transferred it to JPMorgan Chase. The PSA which BONY hid from discovery as "not relevant" and "proprietary and confidential financial information," identifies Popular ABS, Inc. as the "depositor" and "issuing entity". See 2006 PSA Supplement at S-10 and S-31.[9]

---

[8] In its Opinion, the Supreme Court incorrectly states that the second indorsement to JPMorgan Chase was made by Equity One. The Note shows that this second indorsement was from Popular ABS, Inc. to JP Morgan Chase. **Trial Ex. A.**

[9] The 2006 supplement to the pertinent PSA is a public document on the Securities and Exchange Commission website. Available at

(continued...)

5. There was **no** evidence in the record that JPMorgan Chase ever transferred the Note to the Bank of New York. *Romero,* 2014-NMSC-007, ¶¶ 33 and 38.

6. The Bank falsely claimed in its brief in the Supreme Court that the special indorsement on the Note to JPMorgan Chase was a "mistake" and should be disregarded. *Id.,* ¶ 27. See also, Bank of New York Answer Brief, filed April 22, 2012 in S.Ct. 33,224, at 19-20 and 22.

Despite these facts, the Bank now wants this Court to find that the Supreme Court should have recognized the indorsement in blank as the final indorsement converting the specially indorsed note into bearer paper by operation of law and allow the Bank to relitigate its standing. Not only does the Bank's specious argument contradict the evidence about the chain of custody of the Note, it also makes no sense. The second "original" Note has an indorsement in blank by the Note's payee, Equity One. The other indorsement is from Popular ABS. Inc. to JPMorgan Chase for the benefit of securitized mortgage pass-through certificate holders. Therefore, the special indorsement must have been the last indorsement. The order of indorsements is obvious: the Note was first indorsed by Equity One in blank and then transferred by Equity One to Popular ABS, Inc. which then specially indorsed it to JP Morgan Chase as trustee for a securitized trust created by Popular ABS. The Bank's attempt to argue here that the Supreme Court was mistaken and should have found that the indorsement

---

(...continued)
http://www.sec.gov/Archives/edgar/data/1374592/000114420406039431/v053322_424b5 (last visited October 12, 2015).

occurred in the reverse order makes no sense, is improper, and is not supported by the record in this case. Notably, the securitization documents it claims will support this argument are the very documents it refused to produce in discovery and did not introduce as evidence at trial. **1 RP 103-104 (¶¶ b and c) and 119-120 (¶¶ 5 & 6).** *Romero,* 2014-NMSC-007, ¶32.

Compounding this fallacious argument, the Bank indulges in another purely hypothetical and false argument that if Equity One specially indorsed the Note to JPMorgan Chase, but never transferred the Note to JPMorgan Chase, Equity One **could have** struck out the special indorsement, transferred the Note to the Bank of New York, and the Bank of New York "could have established standing as a holder by showing that Equity One had retained possession after its indorsement to JPMorgan Chase and subsequently indorsed the note in blank." **BIC 34.** There is not a shred of evidence to support this bizarre hypothetical and, more importantly, the Bank had ample opportunity to prove it during the long history of this litigation, but failed to do so because it is not true.

VI. Because the District Court Expressly Did Not Decide Whether Future Litigation by the Bank of New York Would be Barred by the Applicable Statute of Limitation, This Issue Is Not Ripe For Appellate Review.

In its opinion issued from the bench at the conclusion of the hearing on the Romeros' motion to dismiss with prejudice, the District Court expressly declined to rule on the Romeros' argument that, in addition to being barred by preclusion, the

Bank's relitigation of its foreclosure claims were barred by the applicable statutes of limitations. The Court stated:

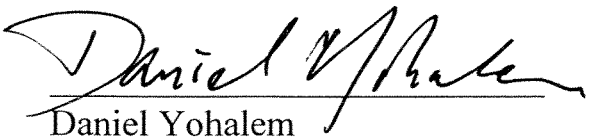
> I also think that would be the time [in any second case that might be filed by the Bank of New York] to determine whether or not the statute of limitations has run, and that the Romeros certainly can raise that statute of limitations issue based on there being more than six years having passed since they defaulted on the demand that they pay under the acceleration demand letter that they received. But whether or not it has is something to be determined in a second case.

11-18-14 Tr 30:14-20. Although the Romeros have a strong statute of limitations defense (**11-18-14 Tr 8:15-12:16**), this issue is not ripe for review at this time since there was no final appealable order as to the applicable statute of limitations. **4 RP 930-932.** The issue will be more carefully considered and decided if and when the Bank or another entity were to file a second action against the Romeros. At that time, the District Court will be able to issue a ruling on the basis of the timing and claims actually filed.

CONCLUSION

For the foregoing reasons, the decision by the District Court should be affirmed. Due to the importance of the issues before this Court and to bring finality to this litigation, oral argument will assist the Court's informed disposition of this appeal.

Respectfully Submitted,



Daniel Yohalem
1121 Paseo de Peralta
Santa Fe, New Mexico 87501
(505) 983-9433 Fax: (505) 989-4844
dyohalem@aol.com

Katherine Murray
P.O. Box 5266
Santa Fe, New Mexico 87505
(505) 670-3943
kemurrylaw@gmail.com

Frederick M. Rowe
Santa Fe Neighborhood Law Center
P.O. Box 32024
Santa Fe, New Mexico 87594
(505) 983-4319
fredrowe@cybermesa.com

Joshua R. Simms, P.C.
P.O. Box 50332
Albuquerque, New Mexico 87181
(505) 266-2209 Fax: (505) 256-5136
jsimms@jrsimmspc.com

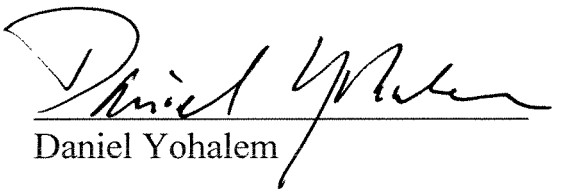
Attorneys for Defendants-Appellees
Joseph Romero and Mary Romero

CERTIFICATE OF SERVICE

I hereby certify that on October 15, 2015 the foregoing Answer Brief was served on the Bank of New York's attorneys by first-class mail, postage prepaid, as follows:

Johnson Law Firm, LLC
Thomas L. Johnson
P. O. Box 27747
Albuquerque, NM 87125-7747

Eraina Edwards
Rose Little Brand & Associates
7430 Washington St. NE
Albuquerque, NM 87109



Daniel Yohalem