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,

vs.

JOSEPH A. ROMERO AND MARY ROMERO A/K/A MARY O. ROMERO A/K/A MARIA ROMERO,

Defendants/Appellees.

No. D-117-CV-2008-00139
COA 34,426

Civil Appeal from the First Judicial District Court, County of Rio Arriba
Honorable Sarah M. Singleton, District Court Judge

APPELLANT'S BRIEF-IN-CHIEF

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STATEMENT OF COMPLIANCE

This Brief-in-Chief contains 10,647 words, and thus, complies with the maximum 11,000 words allowed pursuant to Rule 12-213 NMRA. This brief was prepared using a proportionally-spaced type style, Time New Roman, utilizing Microsoft Office Word Version 2010.

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PROCEDURAL AND FACTUAL HISTORY

Appellant, the Bank of New York as Trustee for Popular Financial Services Mortgage Pass/Through Certificate Series #2006-D ("BONY as Trustee"), filed a residential mortgage foreclosure action on February 1, 2008. **[1 RP 1-31]** Appellees, Joseph A. Romero and Mary Romero (collectively "the Romeros"), challenged BONY as Trustee's right to enforce the note and mortgage. **[1 RP 53]** During the course of the proceedings, BONY as Trustee introduced into evidence in order to prove its standing to foreclose: (1) a recorded assignment of mortgage showing that MERS as a nominee for Equity One (the loan originator) assigned the Romeros' mortgage to BONY as Trustee on June 25, 2008; (2) the affidavit of Ann Kelley, senior vice president for Litton Loan Servicing LP (the loan servicer), stating that Equity One intended to transfer the note and assign the mortgage to BONY as Trustee prior to filing of the foreclosure complaint; (3) trial testimony of Kevin Flannigan, a senior litigation processor for Litton Loan Servicing, LP; and (4) a trial copy of the note. **[1 RP 161-62, 178-80, 2 RP 242-43]** As to Flannigan's testimony in particular, Flannigan testified that BONY as Trustee had physical possession of both the note and mortgage at the time it filed the foreclosure complaint. **[3 RP 628-29 ¶ 30]** The Romeros objected to Flannigan's testimony, arguing that he lacked personal knowledge to make these claims. **[Id.]** The district court allowed the testimony based on the business records exception because

Flannigan was the present custodian of the records. **[Id.]** As to the note admitted at trial, the face of the note contained two indorsements. One indorsement was "in blank" by Equity One and another indorsement had a special indorsement made by Popular ABS, Inc. payable to "JPMorgan Chase, as trustee for the benefit of the Certificateholders of Popular ABS, Inc. Mortgage/Pass Through Certificate Series #2006-D without recourse. **[Tr. 2-17-09, Ex "A"]**

After trial, the district court found in favor of BONY as Trustee, finding, among other things, that the Romeros had defaulted on the note and mortgage and that BONY as Trustee had standing to foreclose under New Mexico law. **[2 RP 321, 323, 325-27]** Foreclosure judgment was entered in favor of BONY as Trustee on September 1, 2009. **[2 RP 339]** The Romeros appealed the decision to this Court, which unanimously upheld the district court's findings and judgment. **[2 RP 360, 3 RP 590-609]** The Romeros then appealed to the New Mexico Supreme Court and *certiorari* was granted. **[3 RP 589]** The Supreme Court held that BONY as Trustee failed to establish standing as of the time the complaint was filed, as a potential jurisdictional prerequisite to filing the foreclosure action. **[3 RP 613 ¶ 1]**

The Supreme Court noted that the district court had found, as a matter of fact, that BONY as Trustee had established standing to enforce the subject note and mortgage as a holder of the note. **[3 RP 617 ¶ 11]** Nonetheless, after determining that certain evidence should not have been admitted, the Supreme

Court reversed, holding that there was no remaining "substantial evidence," that BONY as Trustee had demonstrated it was a holder. **[3 RP 621-22 ¶ 18]** The Supreme Court observed that "the note introduced at trial differed significantly from the original note attached to the foreclosure complaint." **[3 RP 624-25 ¶ 22]** It therefore held that neither version of the Note itself was sufficient evidence to prove BONY as Trustee had standing as a holder by possession alone because of conflicting and inadequate indorsements. **[3 RP 626-627 ¶ 26]** However, the Supreme Court also acknowledged that more or different evidence might indeed have established BONY as Trustee's standing as a holder, such as entry of the pooling and servicing agreement relied upon by Flannigan in his testimony. **[3 RP 629-30 ¶ 32]** The pooling and servicing agreement was not entered, however, and the Supreme Court therefore held that the actual evidence entered was not "substantial" enough to demonstrate BONY as Trustee's standing. **[3 RP 629-31 ¶¶ 32-33]** The Supreme Court then "reverse[d] the contrary determinations of the courts below" on the issue of BONY as Trustee's status as holder. **[3 RP 635 ¶ 38]**

While ultimately deciding against BONY as Trustee, the Supreme Court also recognized that BONY as Trustee might still be "entitled to enforce" the note as a "nonholder in possession of the instrument who has the rights of a holder." **[3 RP 628 ¶ 29]** *See* NMSA 1978 § 55-3-301. If BONY as Trustee had demonstrated that it was a nonholder, it would have standing because nonholder status does not

require the same indorsements as a holder. The Supreme Court's reasoning on this issue however stemmed from evidentiary rules. **[3 RP 628-29 ¶ 30]** Though BONY as Trustee offered testimony from Flannigan, an employee of the loan servicing company, who stated that BONY as Trustee was the proper transferee based on certain, various business records, the Supreme Court determined that evidence to be inadmissible hearsay. **[3 RP 630-31 ¶ 33]** The Supreme Court held that the exception did not apply because the business records themselves had not been entered. **[3 RP 629 ¶ 31]** In other words, while a qualifying witness could lay the foundation for a document being a business record for entry of the document itself under the hearsay exception, the witness's testimony alone does not qualify for the business records exception. *See State v. Cofer*, 2011-NMCA-085, ¶ 17, 150 N.M. 483, 261 P.3d 1115. The Supreme Court then agreed with the Romeros and held that without the records themselves, Flannigan "had no personal knowledge," since his company did not begin working for BONY as Trustee until after the complaint was filed. **[Id.]** The Supreme Court rejected the affidavit of Ann Kelley, which also contained testimony regarding the transfer, on identical grounds. **[Id.]** The Supreme Court then concluded that the recorded assignment of mortgage alone was insufficient to enforce the note because there was no evidence as to the transfer of the note in the assignment of mortgage, and the separate functions of the note versus the mortgage "cannot be ignored." **[RP 631-33 ¶¶ 34-35]**

The potentially inconsistent note indorsements, witness testimony, affidavit, and assignment of mortgage had not been issues for the district or the intermediate Court of Appeals, which ruled in BONY as Trustee's favor on the standing issue. However, after rejecting all of BONY as Trustee's admitted trial evidence regarding its rights to enforce the note as either a holder or nonholder in possession, the Supreme Court reversed the order of foreclosure for lack of standing. **[3 RP 649 ¶ 61]**

In rendering its decision, the Supreme Court stated: "We reverse the Court of Appeals and district court and remand to the district court with instructions to vacate its foreclosure judgment and to dismiss [BONY as trustee's] foreclosure action for lack of standing." **[3 RP 613 ¶ 1]** The opinion nowhere states that the Supreme Court had reviewed and determined the merits of BONY as Trusteee's claims, that the Supreme Court was making a finding that BONY as Trustee did not have standing, nor that BONY as Trustee could not demonstrate standing in a future action. The opinion also did not state that the dismissal should be with prejudice.

Upon the Supreme Court's mandate, the foreclosure judgment was set aside by the district court, and the deed to the property was transferred back to the Romeros. **[3 RP 730-732, 4 RP 923-24]** After judgment was duly vacated and upon a motion to dismiss with prejudice by the Romeros, the district court found

that "a dismissal for lack of standing bars another suit by the entity that was found to have no standing." **[4 RP 930-31].** Therefore, BONY as Trustee was "precluded from raising in the future the issue that it is entitled to enforce the Romeros' note and foreclose on the Romeros' mortgage," **[4 RP 930-31]** and for the same "reason of issue preclusion," the district court issued a final order dismissing the Complaint for Foreclosure "with prejudice." **[Id.]** The court's ruling indicates that it is for issue preclusion only, not claim preclusion. **[Id.]** At the hearing on the Romeros' motion to dismiss with prejudice, the district court stated "[t]hat sounds to me more like collateral estoppel than what I call res judicata." **[11-18-14 Tr. 10:24]** However, rather than considering the cases cited by BONY as Trustee in its opposition regarding the inapplicability of preclusion, the district court stated at the hearing that it had been persuaded "in particular" by its *sua sponte* review of *Cutler v. Hayes*, 818 F.2d 879 (D.D.C. 1987), a federal case from the District of Columbia.[1] **[11-18-14 Tr. 28:22]** The district court's Order Granting Motion to

[1] *Cutler*, a case that had not been briefed by either party on the Romeros' motion to dismiss with prejudice, has never been cited in a published opinion in the State of New Mexico. It has been cited in two 10th Circuit cases, neither on point: *Kowalczyk v. I.N.S.*, 245 F.3d 1143, 1150 n.5 (10th Cir. 2001) (citing *Cutler* in a footnote for the principles of determining "unreasonable delay") and *Envtl. Def. Fund v. U.S. Nuclear Regulatory Comm'n*, 902 F.2d 785, 789 (10th Cir. 1990)

Dismiss and Dismissing Foreclosure with Prejudice was issued on December 10, 2014. BONY as Trustee timely filed its Notice of Appeal on January 7, 2015. **[4 RP 930-31]**

SUMMARY OF THE ARGUMENT

BONY as Trustee's following arguments regarding the inapplicability of either claim or issue preclusion to this case were preserved in its Response to Motion to Dismiss with Prejudice and at the hearing held on the Motion to Dismiss with prejudice. **[4 RP 798-807, 11-18-14 Tr. 13:11-23:8]**

Questions of preclusion are more nuanced than the broad application given in the district court's finding that the standing question, in general, could not be relitigated by BONY as Trustee, specifically. Claim preclusion cannot apply since the standing question was potentially jurisdictional, and thus, neither the district court nor Supreme Court had the authority to determine the merits of the claim. To the contrary, the Supreme Court opinion contemplated relitigation at a future date. Also, since the jurisdiction prerequisite is curable, BONY as Trustee should be allowed this opportunity to prove its standing to enforce the Note and Mortgage based on the proper evidentiary standard. Since *Turner* supports this determination,

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(citing *Cutler* to say that the court must "estimate the extent to which delay [by a federal agency] undermines the statutory scheme")).

the district court's bar to BONY as Trustee, to never again file its claim *must* be set aside.

As to issue preclusion, it may be that relitigation of the same fact (BONY as Trustee's standing to enforce as of February 1, 2008) on the same, exact evidence submitted at trial is barred from relitigation. However, issue preclusion cannot apply to litigation of standing at a future date, which would be a new fact, or to new evidence to support BONY as Trustee's assertion of standing on or before February 1, 2008. Also, preclusion should not apply because the Supreme Court could not adjudicate the issue on a factual basis, and there has been a change in the law created by the *Romero* opinion.

Also, by barring BONY as Trustee, from bringing claim, the district court created a hybrid between claim and party preclusion, which is not recognized under the law. In addition, the law-of-the case doctrine likewise does not apply to this case. Lastly, the applicable statute of limitations does not bar the filing of a new suit on BONY as Trustee's claim. Therefore, the district court's order should be set aside.

ARGUMENT

Standard of Review

As a general matter, appellate courts review a district court's conclusions of law de novo. *Dugie v. Cameron*, 1999-NMSC-002, ¶ 5, 126 N.M. 433, 971 P.2d

390. When the Court of Appeals hears a second appeal of the same case, de novo review is applied in ensuring that the district court handled the Supreme Court's rulings properly on remand for its legal conclusions. *State v. Wilson*, 1998-NMCA-084, ¶ 2, 125 N.M. 390, 962 P.2d 636; *Scanlon v. Las Cruces Public Schools*, 2007-NMCA-150, ¶ 5, 143 N.M. 48, 172 P.3d 185; *Rabo Agrofinance, Inc. v. Terra XXI, Ltd.*, 2014-NMCA-106, ¶ 3. There is an exception to the above: when the district court makes findings of fact on remand. In those circumstances, the appellate court will usually apply substantial-evidence review. *Garcia v. Garcia*, 2010-NMCA-014, ¶ 17, 147 N.M. 652, 227 P.3d 621. In this particular case, however, the district court did not make any findings of fact. Instead, it made a legal determination based on the Supreme Court's mandate and the principles of claim and issue preclusion when it dismissed the case with prejudice.

Specifically as to preclusion, appellate courts in New Mexico review de novo whether the elements for either issue or claim preclusion have been satisfied. *Kirby v. Guardian Life Ins. Co. of Am.*, 2010-NMSC-014, ¶ 61, 148 N.M. 106, 231 P.3d 87 (stating the standard of review for claim preclusion as being de novo); *Ideal v. Burlington Resources Oil & Gas Co.*, 2010-NMSC-022, ¶ 10, 148 N.M. 228, 233 P.3d 362 (stating the standard of review for issue preclusion). Since issue preclusion is both an affirmative defense and subject to de novo review, "[t]he party seeking to preclude litigation of an issue has the burden of showing with

clarity and certainty that the issue was actually and necessarily determined; if the basis of the prior decision is unclear, subsequent litigation may proceed." *State ex rel. Martinez v. Kerr-McGee Corp.*, 1995-NMCA-041, ¶ 13, 120 N.M. 118, 898 P.2d 1256 (emphasis added).

I. THE DISTRICT COURT ERRED IN APPLYING CLAIM PRECLUSION

The district court ordered that BONY as Trustee is forever barred from raising in the future a claim that it then has standing, even were it to satisfy the Supreme Court's standard of proof of timely ownership of the note and mortgage at the time of filing a future foreclosure complaint. **[4 RP 930-31]** The Order did not bar another entity from foreclosing on the subject property. However, the district court did not explain how any other entity could rely on an assignment of claims of a predecessor in interest, which claims previously were dismissed with prejudice. While the district court's Order did not invalidate the subject mortgage, invalidate the underlying note, nor decide the merits of the claim for foreclosure, by forever barring BONY as Trustee, but only BONY as Trustee, from bringing another action, the district court applied claim preclusion, despite the intent of its ruling to be only issue preclusion. As such, it is important to discuss how the district court erred in applying both claim and issue preclusion to the decision to dismiss the case with prejudice.

The general requirements of claim preclusion include: "(1) a final judgment on the merits in an earlier action (2) identity of parties or privies in the two suits, and (3) identity of the cause of action in both suits." *Potter v. Pierce,* 2014-NMCA-002, ¶ 7, 315 P.3d 303. The element applicable to this case is whether there is a final judgment on the merits in an earlier action.

A. Since the district court lacks standing to determine the merits of the case, it could not determine the merits for there to be claim preclusion as to BONY as Trustee's claims

In foreclosure cases, who is entitled to enforce the note and, thus foreclosure the mortgage, is provided for under the Uniform Commercial Code (the "UCC"). *See* NMSA 1978, § 55-3-301 (defining who is entitled to enforce a negotiable interest such as that provided in a note). The UCC controls the question of standing in a foreclosure action because notes that create the contractual basis for relief are negotiable instruments, the transfer and enforceability of which is governed by the UCC. However, while the UCC defines the ways in which a party may be entitled to enforce a negotiable instrument, it does not create the *right* or claim to collection, which is created by contract law, or the right to foreclose created by equity. *See CitiMortgage v Giron*, 2010 WL 3997939 at *5 (discussing the contractual basis for foreclosures in determining whether the plaintiff was the injured party entitled to enforce the note and mortgage) (non-precedential); *Las Campanas Ltd. P'ship v. Pribble*, 1997-NMCA-055, ¶ 9, 123 N.M. 520, 943 P.2d

554 (stating that the right to foreclose is a right in equity). Therefore, since the UCC affects the cause of action (who can bring the claim), but does not *create* the cause of action, the issue of standing is not interwoven with the general subject matter jurisdiction of the state courts. *See ACLU of N.M. v. City of Albuquerque*, 2008-NMSC-045, ¶ 9, n. 1, 144 N.M. 471, 188 P.3d 1222 (stating that when a statute creates both a cause of action and defines persons who may be entitled to pursue the claim, the issue of standing may become interwoven with that of subject matter jurisdiction); *Groveport Madison Local Schools Bd. of Edn. v. Franklin Cty. Bd. of Revision,* 137 Ohio St.3d 266, 2013-Ohio-4627, 998 N.E.2d 1132 ("Subject-matter jurisdiction refers to the statutory or constitutional authority to adjudicate a case. *Lack of standing, on the other hand, challenges a party's capacity to bring an action, not the subject-matter jurisdiction of the tribunal.* (internal citation and quotation omitted) (emphasis in original)); *LaSalle Bank N.A. v. Brown,* 2014-Ohio-3261, ¶ 63, 17 N.E.3d 81 (explaining that standing is required to invoke jurisdiction, but it is not a lack of *subject matter* jurisdiction because courts generally have power to entertain foreclosure actions). However, "[w]here an action is brought by a plaintiff who lacks standing, the action is not justiciable because it fails to present a case or controversy between the parties before it. But the court's lack of "jurisdiction," i.e., its ability to properly resolve a particular action due to the lack of a real case or controversy between the parties, does not

mean that the court lacked subject-matter jurisdiction over the case." *Brown,* 2014-Ohio-3261, ¶ 64. Therefore, standing can still be a quasi-jurisdictional prerequisite necessary to invoke the jurisdiction of the court, as noted by the Supreme Court in the opinion. *Bank of New York v. Romero*, 2014-NMSC-007, ¶ 15 (stating that lack of standing was a "potential jurisdictional defect" and that it reached the issue of standing based on "prudential" concerns).

In regards to jurisdiction defects, it is well-established that "a judgment for a defendant does not bar another action by the plaintiff '"[w]hen the judgment is one of dismissal for lack of jurisdiction, for improper venue, or for nonjoinder or misjoinder of parties.'" *City of Las Vegas v. Oman*, 1990-NMCA-069, ¶ 33, 110 N.M. 425 [citing 1 *Restatement (Second) of Judgments* § 20(1)(a) (1982)]; *see also* Rule 1-041(b) NMRA (stating that dismissal operates as an adjudication on the merits "*other than* a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party") (emphasis added)). In other words, if a court lacks jurisdiction over the parties and controversy to hear the merits of a case, it logically follows that it would be devoid of jurisdiction to dismiss the merits of the case. *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 379 (1981) ("A court lacks discretion to consider the merits of a case over which it is without jurisdiction"). Without an adjudication on the merits, a dismissal cannot have claim preclusive effect. Since the merits of a case are not reached if the Plaintiff lacks standing,

standing in foreclosure cases cannot have a claim preclusive effect.

For example, in *Perez v. Brubaker*, 1983-NMCA-029, 99 N.M. 529, 660 P.2d 619, the district court granted the defendant's motion for summary judgment and dismissed, with prejudice, the plaintiff's complaint because the plaintiff failed to satisfy a jurisdictional prerequisite that an application be made to the medical review commission before filing a malpractice action. *Perez*, 1983-NMCA-029, ¶ 11. On appeal, this Court held that it was improper for the trial court to grant defendant's motion for summary judgment and dismiss the plaintiff's complaint *with* prejudice. *Id.* The Court reasoned that the district court only had authority to determine its power, if any, to act on the merits, rather than having the actual authority to *act* on the merits of the case. *Id.* Accordingly, the district court's attempt to rule on the merits of the complaint without such authority were a nullity absent the plaintiff's satisfaction of the jurisdictional prerequisite, and thus, the district court only had authority to dismiss the plaintiff's complaint without prejudice. *Id.*; *Hope Comty. Ditch Ass'n v. New Mexico State Engineer*, 2005-NMCA-002, ¶ 10, 136 N.M. 761, 105 P.3d 314 ("The suit at issue in that case was not dismissed on the merits, and was instead dismissed for lack of standing, and therefore the denomination "with prejudice" in the order was incorrect"); *Henry v. Daniel,* 2004-NMCA-016, ¶ 13, 135 N.M. 262, 87 P.3d 541 (when there is no personal jurisdiction over the plaintiff's successor, dismissal with prejudice of

successor's claims was error); *see also Afolabi v. Atl. Mortg. & Inv. Corp.*, 849 N.E.2d 1170 (Ind. Ct. App. 2006) (The case was dismissed for lack of prosecution. Therefore, no issue was actually litigated and "the doctrine of *res judicata* does not bar successive foreclosure claims.").

Since the federal test for standing has assisted in guiding New Mexico courts, federal cases discussing that dismissal for lack of jurisdiction should be without prejudice are relevant to this discussion. *See Romero*, 2014-NMSC-007 ¶ 17; *ACLU*, 2008-NMSC-045, ¶10, 188 P.3d 1222 ("While we recognize that standing in our state courts does not have the constitutional dimensions that are present in federal court, New Mexico's standing jurisprudence indicates that our state courts have long been guided by the traditional federal standing analysis."). The Tenth Circuit Federal District Court has held that it is "fundamental" that a dismissal for lack of jurisdiction cannot be an adjudication of the merits," so such a dismissal "*must* be without prejudice." *Martinez v. Richardson*, 472 F.2d 1121, 1126 (10th Cir. 1973) (emphasis added). "Since standing is a jurisdictional mandate, a dismissal with prejudice for lack of standing is inappropriate, and should be corrected to a dismissal without prejudice." *Brereton v. Bountiful City Corp.*, 434 F.3d 1213, 1216 (10th Cir. 2006). Analogous to the New Mexico law cited above, the federal courts have held that this rule stems from the fact that "once a court determines it lacks jurisdiction over a claim, it perforce lacks

jurisdiction to make any determination of the merits of the underlying claim." *Id.* at 1217. The court in *Brereton* further stated, "[q]uite apart from concerns over preclusion consequences, dismissals for lack of jurisdiction should be without prejudice because the court, having determined that it lacks jurisdiction over the action, is *incapable* of reaching a disposition on the merits of the underlying claims." *Id.* at 1218; *see also Frederiksen v. City of Lockport,* 384 F.3d 437, 438 (7th Cir. 2004) ("A suit dismissed for lack of jurisdiction cannot *also* be dismissed 'with prejudice'; that's a disposition on the merits, which only a court with jurisdiction may render."); *Wells Fargo Bank, N.A. v. Byrd,* 178 Ohio App.3d 285, 2008-Ohio-4603, ¶¶ 18-20, 897 N.E.2d 722 ("a dismissal that is premised on jurisdiction "operate[s] as a failure otherwise than on the merits" and should be a dismissal without prejudice"). Since there was no determination on the merits of BONY as Trustee's claim, dismissal with prejudice is not warranted.

B. The district court erred in applying claim preclusion to the "adjudication" of the Supreme Court in its opinion because the Supreme Court likewise lacked jurisdiction to determine the merits of the case

A lack of jurisdiction applies at all levels—meaning that neither the district court *nor* the Supreme Court had the power to make findings on the merits in this case. *Smith v. City of Santa Fe*, 2007-NMSC-055, ¶ 10, 142 N.M. 786, 171 P.3d 300 (holding that jurisdictional issues must be decided before a court can review the case, because "lack of jurisdiction at any stage of the proceedings is a

controlling consideration"). Since a court cannot reach the merits of a case absent jurisdiction, claim preclusion similarly cannot be applied to such jurisdictional determinations because they are not on the merits. 18A Charles A. Wright, et al., *Fed. Practice and Procedure* § 4436, at 154 (2d ed. 2015). Many cases both in New Mexico and in other jurisdictions recognize this principle. *See, e.g., Chavez v. Chenoweth*, 1976-NMCA-076, ¶ 27, 89 N.M. 423, 553 P.2d 703 ("The dismissal by this Court was for lack of an appealable order. The claims were not adjudicated in this Court. There being no prior adjudication there is no basis for applying res judicata"); *Brereton*, 434 F.3d 1213, 1216 (10th Cir. 2006); *Martinez*, 472 F.2d 1121, 1126 (10th Cir. 1973).

In this case, the "merits" of the claim are those developed in the complaint for foreclosure—not the evidence establishing standing. *U.S. Bank National Association v. Kimball*, 27 A.3d 1087, ¶ 22, 1095 (Vt. 2011); *Fed. Home Loan Mortg. Corp. v. Schwartzwald*, 2012-Ohio-5017, ¶ 40, 979 N.E.2d 1214, 1223. However thoroughly the Supreme Court discussed the evidence regarding whether BONY as Trustee had demonstrated its right to enforce the note, it did not—and could not, based on its ruling on standing—reach the merits of BONY as Trustee's actual complaint. *State ex rel Overton v. New Mexico State Tax Commission*, 1969-NMSC-140, ¶ 20, 81 N.M. 28 , 462 P.2d 613 ("...the trial court had no jurisdiction to decide the constitutional questions involved, nor can we decide them."); *See,*

e.g., *Robey v. Shapiro, Marianos & Cejda, LLC*, 434 F.3d 1208, 1211 (10th Cir. 2006) (holding that the merits of the case cannot be addressed before standing is established, even when the case can easily be dismissed on the merits); *San Juan County, Utah v. United States*, 420 F.3d 1197, 1203 (10th Cir. 2005), *aff'd by* 505 F.3d 1163 (10th Cir. 2007) ("Because standing implicates the district court's subject matter jurisdiction, we must address this issue before addressing the merits of [the] appeal.").

By stating that likely there would be "future attempts by *whichever*[2] institution may be able to establish standing to foreclose on the Romero home," the Supreme Court acknowledged its inability to reach the merits of the case, and thus, anticipated that future actions would be filed by *any* institution with standing, including BONY as Trustee, to enforce the note and mortgage here at issue. **[4 RP 635 ¶ 39]** The Supreme Court was also silent on whether the dismissal for lack of standing should be with or without prejudice, but by referencing "future attempts" to foreclose, the Supreme Court acknowledged that dismissal of the foreclosure claims should be without prejudice. *See* Rule 1-041(b) NMRA (expressly excluding jurisdictional dismissals from the presumption of decision on the

[2] "Whichever" is used as a determiner "to emphasize a *lack of restriction* in selecting one of a definite set of alternatives." Oxford Dictionary *found at* http://www.oxforddictionaries.com/us/definition/american_english/whichever

merits); *Corsini v. Bloomberg*, 26 F.Supp.3d 230, 246 (S.D.N.Y. 2014) (stating that, when a form of dismissal is not "presumptively" on the merits, cases so dismissed will not be assumed decided on the merits unless explicitly stated).

Also, the Supreme Court implicitly acknowledged that there may be evidence to prove that BONY as Trustee was a non-holder in possession, such as the pooling and servicing agreement that was not introduced into evidence, testimony by Equity One or others regarding the indorsements, or other evidence establishing the indorsement dates. As such, the Supreme Court did not intend to bar BONY as Trustee from establishing its standing in a new case at a future date, and the district court erred by not allowing BONY as Trustee this opportunity.

Defendants argued in their Motion to Dismiss with Prejudice that the Supreme Court "clearly contemplated its ruling was the end of the road," **[4 RP 778],** because the Court stated: "As a result of our holding [on standing], the issue of HLPA violation is now moot in this case." **[3 RP 635 ¶ 39]** However, "moot" can mean both "hypothetical and "academic," *Moot*, Black's Law Dictionary (10th ed. 2014), and "made irrelevant; rendered no longer a true case or controversy." *Mooted*, Black's Law Dictionary (10th ed. 2014). As the Supreme Court stated that it intended to offer observations as "guidance" for future opinions, its words actually indicate an acknowledgement that the lack of standing determination rendered the HLPA issue beyond its reach, and therefore, the remainder of the

opinion was merely advisory and dicta. **[3 RP 640 ¶ 45]** The Supreme Court noticeably highlighted this understanding when it appended the qualifications "*[a]s a result of our holding that the Bank of New York has not established standing*" and "*in this case*" to its observation that the HLPA could not be determined. **[3 RP 635 ¶ 39]**

C. Only when a defect in standing or subject matter jurisdiction is not curable is dismissal with prejudice warranted

If it is determined that a defect in jurisdiction is incurable, such as when the claim has no basis in law, claim preclusion may apply. In *Turner v. First N.M. Bank*, the Court of Appeals applied claim preclusion to a dismissal without prejudice, barring relitigation when plaintiffs filed "a virtually identical lawsuit" a second time. 2015 WL 1227496, at 1 (N.M. Ct. App. Mar. 17, 2015). The plaintiffs' first suit had been dismissed for failure to state a claim and, instead of appealing, they filed the complaint again with a different judge. *Id.* They changed only one aspect of one count of their complaint—otherwise it was completely identical. *Id.* The minimal alteration was not sufficient to cure the problem of federal preemption that had made that count fail in the first case. *Id.* at 3. The district court rejected the complaint again on claim preclusion grounds, the second time with prejudice. *Id.* at 1. The Court of Appeals affirmed the district court's decision, including the "with prejudice" language. *Id.*

Particularly in regards to dismissals in foreclosure cases for lack of a lender

plaintiff's standing, many jurisdictions have held, in analogous situations to the case at bar, that such dismissal cannot have claim preclusive effect because the standing defect may be curable. *See Wells Fargo Bank, N.A. v. Bohatka,* 112 So. 3d 596 (Ct. App. 1st Dist. 2013) (dismissal of foreclosure with prejudice on a motion to dismiss for lack of standing was improper. "[T]he ways to allege standing to foreclose on a note are many and often very complex."); *Deutsche Bank Nat. Trust Co. v. Byrams*, No. 108545, 2012 WL 130661, at *2 (Okla. Jan. 17, 2012) ("If Deutsche Bank became a person entitled to enforce the note as either a holder or nonholder in possession who had the rights of a holder *after* the foreclosure action was filed, then the case may be dismissed without prejudice and the action may be re-filed in the name of the proper party" (emphasis added) (internal citation and quotation omitted)); *Kimball,* 2011 VT 81, ¶ 22, 27 A.3d 10897 ("[D]espite the court's invocation of 'with prejudice' in its dismissal order, U.S. Bank cannot be precluded from pursuing foreclosure on the merits should it be prepared to prove the necessary elements. . . . Thus, this may be but an ephemeral victory for the homeowner.").

As shown by these authorities, for cases with "curable defects," "suit may be brought again where a jurisdictional defect has been cured or loses its controlling force." *Park Lake Res. Ltd. Liab. v. U.S. Dep't of Agriculture*, 378 F.3d 1132, 1137 (10th Cir. 2004); *see also "On the Merits"—Prematurity or Precondition*, 18A

Fed. Prac. & Proc. Juris. § 4437 (2d ed.) ("In ordinary circumstances a second action on the same claim is not precluded by dismissal of a first action for prematurity or failure to satisfy a precondition to suit. No more need be done than...satisfy the precondition..."); *United States v. AVX Corp.*, 962 F.2d 108, 113 (1st Cir. 1992) (holding that standing is a precondition to the court's jurisdiction).

New Mexico has adopted the position that potential defects in demonstrating jurisdiction, as when a complaint failed to set forth all the proper elements of an offense may be cured by later filings or amendments. *State v. Pina*, 1977-NMCA-020, ¶ 31, 90 N.M. 181, 561 P.2d 43 ("To the extent that the complaint, standing alone, could be considered defective, any such defect was cured by the Bill of Particulars filed by the State."); *La Mesa Comm'y Ditch v. Appelzoeller*, 1914-NMSC-033, ¶ 22, 19 N.M. 75, 140 P. 1051; *Romero v. Luna*, 1892-NMSC-011, ¶ 7, 6 N.M. 440, 30 P. 855. Therefore, dismissals of claims with curable defects must be without prejudice. *Perez*, 1983-NMCA-029, ¶ 11 (reversing a dismissal with prejudice because the trial court could later obtain jurisdiction once the plaintiff followed the proper procedures to have the matter first heard by a medical review board).

BONY as Trustee's case here is distinguishable from *Turner* in two ways: (1) the Court of Appeals cited case law suggesting that dismissal for *failure to state a claim* is "ordinarily" a dismissal on the merits, which is not the case with

dismissals for standing, *Turner*, 2015 WL 1227496, at 3 (quoting *AVX Corp. v. Cabot Corp.*, 424 F.3d 28, 30 (1st Cir. 2005)); *cf. Trujillo v. Acequia de Chamisal*, 1968-NMCA-015, ¶ 11, 79. N.M. 39, 439 P.2d 557 (holding that dismissals for lack of standing are not on the merits); and (2) in *Turner*, the plaintiffs' first suit was properly dismissed without prejudice, and it was only when they attempted to refile an "identical" lawsuit that they were precluded. 2015 WL 1227496, at 1. BONY as Trustee here faces a dismissal with prejudice on their first suit, without any opportunity to refile and correct the evidentiary standing defects. The rule from *Turner* and the other authorities discussed above suggests that the BONY as Trustee might be barred from filing an identical complaint and subsequently presenting identical evidence of standing, e.g. the same Note, the same MERS mortgage assignment, the same inadmissible testimony and affidavits. However, it does not suggest that BONY as Trustee would be barred from gathering valid, admissible proof of standing and refiling on those grounds. *Turner,* at ¶ 3 (noting that the changes made in the complaint might require new review, but were too "minor" to change the any of the grounds on which it was previously dismissed).

The deficiencies the Supreme Court identified would be remedied if BONY as Trustee can demonstrate either that it is a holder of the Romeros' Note or a nonholder entitled to enforce the Note. *Romero*, 2014-NMSC-007, ¶ 29. This showing requires nothing more than evidence that BONY as Trustee has

possession of the original note and mortgage, which it has already established, and that a person transferred possession to BONY as Trustee with the intention of giving it the right to enforce the instruments. NMSA 1978 § 55-3-203(a). As referred to both at trial and in the Supreme Court's opinion, business records exist that delineate the transfer of the instruments to BONY as Trustee. *Romero*, 2014-NMSC-008, ¶ 33. The Supreme Court rejected BONY as Trustee's attempts to convey the information in the records via witnesses and not by admitting the records themselves, even though the trial court permitted that approach. *Id.* Clearly, BONY as Trustee may, and is willing and able to meet, the evidentiary standard established in *Romero* and prove standing if given an opportunity to file a new suit. BONY as Trustee could also cure any defects in demonstrating its status as a holder by obtaining corrected indorsements on the original note before filing a new suit. *Id.* at ¶ 25. In such case, the jurisdictional defects would have been cured in every respect contemplated by the Supreme Court. For this reason, the district's order dismissing BONY as Trustee's claim with prejudice should not be upheld.

II. THE DISTRICT COURT ERRED IN APPLYING ISSUE PRECLUSION BECAUSE ISSUE PRECLUSION DOES NOT BAR RELITIGATION ON THE STANDING ISSUE ON NEW FACTS AND EVIDENCE

Collateral estoppel ("issue preclusion") refers to matters actually litigated and determined, and it bars relitigation of such issues in a later action—even if the

later action "differs significantly" from the prior litigation. *Collateral Estoppel*, Black's Law Dictionary (10th ed. 2014). The elements of issue preclusion are: "(1) the party to be estopped was a party to the prior proceeding, (2) the cause of action in the case presently before the court is different from the cause of action in the prior adjudication, (3) the issue was actually litigated in the prior adjudication, and (4) the issue was necessarily determined in the prior litigation." *Ideal*, 2010-NMSC-022, ¶ 9. The District Court applied issue preclusion by barring BONY as Trustee from relitigating the standing issue. **[RP 930-31]**

A. BONY as Trustee should not be barred from introducing new evidence of its standing, either from before the filing of the prior complaint or at a future date, because there has been no trial regarding standing that utilized the proper evidentiary standard

According to *Cutler v. Hayes*, which the district court relied upon in deciding that BONY as Trustee should be precluded from relitigating standing, issue preclusion "clearly appl[ies] to standing determinations." 818 F.2d 879, 889. However, *Cutler* itself also stated why issue preclusion applied: "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*." *Id.* at 888 (emphasis added). The court in *Cutler* did not find *standing itself* was a "precise issue" that had already

been adjudicated—it found that the plaintiff could not repeatedly present "substantially the same" facts and argument to the court and force the court to re-rule. *Id.* at 889.

As with the claim preclusion in *Turner*, courts have been willing to apply issue preclusion to cases in which the parties who have been dismissed attempt to relitigate the same issue without making any changes. *See, e.g., Brereton*, 434 F.3d 1213, 1219 (10th Cir. 2006) (holding that the plaintiff might be precluded "from relitigating the standing issue *on the facts presented*"(emphasis added)); *Pacific Frontier v. Pleasant Grove City*, 414 F.3d 1221, 1229 (10th Cir. 2005) (applying issue preclusion only when the previously-litigated issue is "identical" to the current one). This problem can emerge as a full faith and credit or "judge-shopping" issue, when parties refile identical claims to different judges or different jurisdictions as a form of collateral attack. *See, e.g., Lewis v. Seneff*, 654 F.Supp.2d 1349, 1357 (M.D.Fla. 2009) (holding that issue preclusion applies to refiled suit when another state's court dismissed "materially identical facts and claims" regarding standing in the first suit without prejudice). Issue preclusion typically bars refiling of this kind. 18 James W. Moore et al., *Moore's Federal Practice* § 132.03(5)(c) (3d ed. 2013) ("[A] second complaint cannot command a second consideration of *the same* jurisdictional claim." (emphasis added)).

All of these cases, then, have two things in common: (1) they involve issues

of standing being litigated for the second time, not dismissed after a single failed attempt; and (2) the unsuccessful parties brought substantially the same—sometimes exactly the same—facts and argument before the court. The instant case is easily distinguishable on both of those grounds. First, as several of the above cases affirm, dismissal *without prejudice* is both appropriate and necessary when the plaintiff fails to demonstrate standing. *Brereton*, 434 F.3d at 1219. Because the district court here dismissed "with prejudice" BONY as Trustee's first suit, it has not had the chance to refile and demonstrate that it has more than sufficient means by which to cure the previously-identified evidentiary defects. Second, BONY as Trustee does not assert that it would bring a "materially identical" case for its standing before the court if it refiles. *Lewis*, 654 F.Supp.2d at 1357. As stated above, the Supreme Court opinion in *Romero* acknowledged that had the district court not applied the wrong evidentiary standard, there might have been other evidence that BONY as Trustee could have used to demonstrate standing, e.g. the business records indicating a transfer of the note, 2014-NMSC-007, ¶ 3, and that there was yet more evidence that could emerge in the future that would prove standing, e.g. evidence to clarify the indorsements. *Id.* at ¶ 26. This is certainly not a case in which "no amendment could cure the defect," *Brereton*, 434 F.3d at 1219, and nothing suggests that BONY as Trustee would present identical facts and claims if permitted to refile. *Edwell v. Chase*, 2005 WL 3664804, at 1 (D.N.M.

Dec. 7, 2005) (unpublished) (holding that applying issue preclusion and dismissing with prejudice was "premature" because the court "cannot determine at this time whether the issues will be identical" in relitigation). Since BONY as Trustee could come forward with admissible evidence to support when it obtained standing, the district court's dismissal with prejudice is premature and issue preclusion should not apply to the standing issue.

The district court's reliance on *Trujillo* to support the bar of BONY as Trustee from ever relitigating the standing issue is similarly misplaced. In fact, *Trujillo* established that two parents could bring an identical suit after their son's claim was dismissed for lack of standing, even though res judicata bars parties in privity from bringing subsequent actions. 1968-NMCA-015, ¶ 12; *Brunacini v. Kavanagh*, 1993-NMCA-157, ¶ 9, 117 N.M. 122, 869 P.2d 821 (stating that res judicata precludes subsequent claims when "the parties are the same or in privity with another"). The parents could bring the suit again when their son could not simply because the Court had discovered that the parents actually owned title to the land. All parties agreed that the son had never had standing. *Trujillo*, 1968-NMCA-015 ¶ 7. It logically follows that the son, but not the parents, was barred from relitigating the claim because it was clear that the parents owned the land at the time of the trespass occurrence that lead to the suit. In this case, no other party will come forward with evidence that it owns the note at issue and there is much

evidence that can be presented to show that BONY as Trustee then and still is entitled to enforce the Note. Therefore, *Trujillo* is a case where a defect was not curable and thus is distinguishable for this case.

B. The district court erred in applying issue preclusion because the Supreme Court did not clearly adjudicate the standing issue

In a foreclosure suit, the district court determines the plaintiff's standing as a matter of fact. *See, e.g., Romero*, 2014-NMSC-007, ¶ 18; *Deutsche Bank Nat'l Trust Co. v. Beneficial N.M. Inc.*, 2014-NMCA-090, ¶ 7. The function of a reviewing court is neither to make findings of fact nor to weigh the evidence presented to the district court. *Padilla v. Frito-Lay*, 1981-NMCA-154, ¶ 12, 97 N.M. 354, 639 P.2d 1208 (stating that a reviewing court is not a trier of fact); *Clayton v. Trotter*, 1990-NMCA-078, ¶ 4, 110 N.M. 369, 796 P.2d 262 (holding that reviewing courts "see if legal error that would change the result occurred," but cannot "retry the case for a better result even if [they] would have ruled differently."). Indeed, "an appellate court *cannot* make findings of its own," but can only apply the law to the findings of the lower court. *Scott v. Jordan*, 1983-NMCA-022, ¶ 19, 99 N.M. 567, 661 P.2d 59 (emphasis added). If the existing findings of fact are insufficient or unclear, the case must be remanded until the district court has "resolve[d] the material issues in a meaningful way." *Montoya v. Medina*, 2009-NMCA-029, ¶ 5, 145 N.M. 690, 203 P.3d 905.

The Supreme Court in this case did not purport to make any findings of fact regarding BONY as Trustee's standing. **[3 RP 628 ¶ 28]** It concluded that "[BONY as Trustee's] possession of a twice-indorsed note restricting payment to JPMorgan Chase does not establish [BONY as Trustee] as a holder with the right of enforcement," **[Id.]**, which leaves open several possible avenues for standing, such as: the introduction of evidence based on the Supreme Court's explication of the business records exception to the hearsay rule, presenting facts other than possession to provide proof of holder status, or—most obviously—nonholder status, which would afford BONY as Trustee standing without any proof of holder status. NMSA 1978 § 55-3-301. The Supreme Court also did not at any point state that its dismissal as to standing was "on the merits," and preliminary standing questions carry no presumption that the case has been decided on its merits. Rule 1-041(b) NMRA. These facts strongly suggest that the Supreme Court did *not* adjudicate standing on the merits and, since the district court provided no additional factual review of the standing question, issue preclusion cannot apply since there is not *clear* showing of an adjudication on the merits. *Kerr-McGee Corp.*, 1995-NMCA-041, ¶ 13 ("[t]he party seeking to preclude litigation of an issue has the burden of showing with *clarity and certainty* that the issue was actually and necessarily determined; if the basis of the prior decision is unclear, subsequent litigation may proceed." (emphasis added)). For this reason, the district

court's dismissal with prejudice should not stand.

C. Issue preclusion should not apply because the *Romero* Opinion created new law and there are changed circumstances relevant to the standing issue

It is well established that res judicata does not bar relitigation—even of the same question, involving the same parties—where "the facts have materially changed or new facts have occurred which may have altered the legal rights or relations of the litigants." *Bellet v. Grynberg*, 1992-NMSC-063, ¶ 14, 114 N.M. 690, 845 P.2d 784; *see also, e.g., State v. Cotton Belt Ins. Co.*, 1981-NMSC-129, ¶ 5, 97 N.M. 152, 637 P.2d 684. Similarly, when there has been a change in law, issue preclusion does not apply, and claim preclusion will not apply if the prior adjudication was not on the merits. *Wolford v. Lasater*, 1999-NMCA-024, ¶ 13, 126 N.M. 614, 973 P.2d 866 (identifying that "change in law can affect issue preclusive effect of judgment"); *Town of Atrisco v. Monohan*, 1952-NMSC-011, ¶ 21, 56 N.M. 70, 240 P.2d 216 (describing "the general rule that res judicata is no defense where between the time of the first judgment and the second there has been an intervening decision or a change in the law creating an altered situation").

When an intervening decision changes the legal standards of proof on an issue, "applying preclusion would not advance the equitable administration of the law." *Bobby v. Bies*, 556 U.S. 825, 837 (2009) (refusing to apply issue preclusion to the question of a defendant's mental retardation, regardless of whether it had

previously been adjudicated, because subsequent court decisions had created a new test). Therefore, even if the issue was decided on the merits in an earlier proceeding, the previous ruling does not preclude a party from relitigating the issue on the basis of an intervening change in the law. *Davis v. United States*, 417 U.S. 333, 342 (1974). The same effect would also result if a state court issued a supervening declaration interpreting state law in a way contrary to previous interpretations. *Cannon v. Gibson*, 259 F.3d 1253, 1265 (10th Cir. 2001) (noting that the court is bound to follow previous decisions regarding interpretation of state law "absent a supervening declaration to the contrary by the state's courts or an intervening change in the state law.").

Even if issue preclusion otherwise applied to BONY as Trustee's dismissal for lack of standing, the circumstances of the case may have changed in two crucial ways: (1) the indorsements on the original note may be corrected before the filing of a second suit to reflect the BONY as Trustee's status as a holder, thus changing the legal rights and relations of the litigants, *Bellet*, 1992-NMSC-063, ¶ 14; and (2) the evidentiary requirements for demonstrating standing were materially changed by the Supreme Court's ruling in *Romero*. Therefore, BONY as Trustee should be given the opportunity to correct any defects in its showing of standing that stemmed from rules that emerged between its first filing and the present. *Brooks Trucking Co., Inc. v. Bull Rogers, Inc.*, 2006-NMCA-025, ¶ 18, 139 N.M. 99, 128

P.3d 1076 (holding that, when circumstances change after the first lawsuit is filed, the parties may address the changes in supplemental pleading but they are "not required" to act upon the changes until a second lawsuit).

In this case, the change in law is not merely a change in the BONY as Trustee's legal theory, but a change in the underlying requirements of standing. *Rosette, Inc. v. U.S. Dept. of Interior*, 2007-NMCA-136, ¶ 38, 142 N.M. 717, 169 P.3d 704 (holding that "a mere change in legal theory does not create a new cause of action."). The Supreme Court's interpretation of the preconditions for suit, specifically the methods by which a plaintiff must demonstrate that it is the holder of the note, represented a notable departure from previous decisions and practice in the state. *See, e.g., State v. Herrera*, 2001-NMCA-007, ¶ 14, 130 N.M. 85, 18 P.3d 326 (holding that an instrument that is both specially indorsed and indorsed in blank "states contradictory terms but is nonetheless a bearer instrument," and the bearer "should be able to rely on the bearer term and acquire rights as a holder without obtaining the indorsement of the identified payee.") For that reason, the Romeros were unable to cite any authority for the argument that an additional indorsement was required to transfer rights to BONY as Trustee after the note had been indorsed to JPMorgan Chase as Trustee. *Bank of New York v. Romero*, 2011-NMCA-110, ¶ 20, 150 N.M. 769, 266 P.3d 638, *overruled by* 2014-NMSC-007. That requirement apparently emerged from the Supreme Court's interpretation of

the applicable statutory provisions. *See, e.g., Romero*, 2014-NMSC-007, ¶ 23 (citing New Mexico's UCC provisions).

Older case law suggested that if Equity One indorsed the note to JPMorgan Chase, as Trustee, but retained possession, Equity One would "still be presumed to be the owner," with full rights to transfer the note elsewhere. *Tompkins v. Rain*, 1921-NMSC-015, ¶ 5, 26 N.M. 631, 195 P. 800. Equity One would therefore have the right to "strike out such indorsement" to JPMorgan Chase as Trustee, or any other indorsement either blank or special, and newly indorse the note in blank. *Id.*; *Edwards v. Mesch*, 1988-NMSC-085, ¶ 4, 107 N.M. 704, 763 P.2d 1169 (holding explicitly that "the rule in *Tompkins* was not disturbed by the passage of the UCC.") In those circumstances, BONY as Trustee could have established standing as a holder by showing that Equity One had retained possession after its indorsement to JPMorgan Chase, as Trustee, and subsequently indorsed the note in blank. *Edwards*, 1988-NMSC-085, ¶ 4 (holding that the argument that the party to whom the note had been specially indorsed—and not the party in continued possession—was the real party in interest was "without merit."). In this case, Equity One's continued possession could have been demonstrated through other evidence, and not necessarily contained on the face of the note. *Id.* at ¶ 6 (identifying the holder despite other indorsements on the note by the holder's assertions at trial). Under this prior law, BONY as Trustee would then be entitled

to enforce the note as a bearer pursuant to its blank indorsement. *Romero*, 2014-NMSC-007, ¶ 27.

The Supreme Court cited to only one case in its analysis: *Cadle Co., Inc. v. Wallach Concrete, Inc.*, 1995-NMSC-039, 120 N.M. 56, 897 P.2d 1104. In *Cadle*, the Court had found that the FDIC could not be a holder in due course of a negotiable instrument specially indorsed to the Federal Reserve Bank when the Federal Reserve Bank had never indorsed it either to the FDIC or in blank. *Id.* at ¶ 15. Because the Federal Reserve Bank had "failed to indorse the promissory note," the instrument, "although negotiable, was not 'negotiated.'" *Id.* This is distinguishable from this case in which the instrument did contain a blank indorsement to bearer but also contained a conflicting special indorsement to a particular payee, neither of which was dated. *Herrera*, 2001-NMCA-007, ¶ 14.

Unlike in *Cadle*, then, the original note in this case had been indorsed both specially to JPMorgan Chase, as trustee, *and* in blank. **[2-17-09 Tr. Ex. "A"]** Earlier cases in the state, many of them unpublished, established a line of precedents suggesting that multiple indorsements on an instrument would not interfere with the bearer's status as a holder if one of the indorsements was properly blank. *See, e.g., Herrera*, 2001-NMCA-007, ¶ 14 (stating that when an instrument "contains both bearer and order instructions[, the UCC] resolves such confusion by making the bearer term prevail."); *Bank of Am. v. Quintana*, 2012

WL 1252723 (N.M. Ct. App. Mar. 12, 2012) (unpublished), *rev'd by* 2014 WL 809199 (holding that a bank was entitled to enforce a note with two indorsements, one in blank); *In re Sandford*, 2012 WL 6012785 (Bankr. D.N.M. Dec. 3, 2012) (unpublished) (finding that a bank was entitled to enforce a note with multiple undated indorsements, one of which was in blank). After its decision in *Romero*, which reversed the Court of Appeals, the Supreme Court also explicitly overruled *Quintana* because it too stated a different, older rule. *Bank of Am., N.A. v. Quintana*, 2014 WL 809199 (N.M. Feb. 27, 2014). In doing so, the Supreme Court created new law. Therefore, neither claim nor issue preclusion should apply to BONY as Trustee's continued litigation of the standing issue or its filing of a new claim.

III. THE DISTRICT COURT ERRED BY APPLYING A HYBRID BETWEEN CLAIM AND PARTY PRECLUSION WHICH IS NOT A PRINCIPLE UNDER LAW

The district court expressed the opinion that the only suits that could continue after dismissal for standing were suits "by another person," and that "dismissal for lack of standing is a bar to another suit by the person who was found to have no standing." **[11-18-14 Tr. 28:9]** It justified this prohibition as "issue preclusion." **[4 RP 930-31]** Proper issue preclusion involves a single *issue*, not a party. *Collateral Estoppel*, Black's Law Dictionary (10th ed. 2014) (defining issue preclusion as a bar to relitigation of "matters actually litigated and determined,"

not to particular relitigating parties). The same parties are permitted, under the doctrine of issue preclusion, to litigate any other issues or claims. *United States v. Hopkins*, 927 F.Supp.2d 1120, 1167 (D.N.M. 2013) (defining issue preclusion as preventing parties from "relitigating *the same issue* in another lawsuit." (emphasis added)). It is true that when *claim* preclusion applies, it will bar parties and those in privity from raising any issues that *could have* been litigated at the time. Charles A. Wright, *The Law of Federal Courts* § 100A 722 (5th ed. 1994).

The district court's decision however moves beyond both claim and issue preclusion. At the hearing on the Defendants' motion to dismiss, the court made clear that BONY as Trustee could not present any further evidence of standing—even if it had arisen *after* the Supreme Court's ruling. **[11-18-14 Tr. 31:25]** Typically, a change in the relationship between the parties, such as one acquiring full and valid possession of the other's note and mortgage, would overcome claim preclusion. *Bellet*, 1992-NMSC-063, ¶ 14. In barring BONY as Trustee from ever attempting to litigate its own standing, which is a prerequisite to any suit on the subject note, the district court effectively applied a heightened hybrid form of claim preclusion to one specific party with no opportunity for cure or remedy. *See Flagstar Bank, F.S.B. v. Licha*, 2015 WL 730063, at 4 (N.M. Ct. App. 2015) ("Standing is a jurisdictional prerequisite"); *Brereton*, 434 F.3d at 1217 (holding that a court can never reach the merits if it lacks jurisdiction). Since such a result is

not contemplated by the principles of either issue or claim preclusion, it should be overturned.

IV. THE LAW-OF-THE CASE DOCTRINE DOES NOT SUPPORT THE DISTRICT COURT'S DISMISSAL WITH PREJUDICE

Law of the case applies only to particular issues that have already been presented and decided in the same matter. *State v. Porras-Fuerte*, 1994-NMCA-141, ¶ 11, 119 N.M. 180, 889 P.2d 215, *writ granted by* 119 N.M. 21, 888 N.M. 21 (permitting the State to raise the issue of standing on remand because it was not argued previously). Almost exclusively, our courts invoke law-of-the-case doctrine when a party fails to object to instructions in trial court. *See, e.g., Am. Tel. & Tel. Co. of Wyoming v. Walker*, 1967-NMSC-049, ¶ 15, 77 N.M. 755, 427 P.2d 267 ("No exception or objection was taken to either of these instructions in the trial court and no claim of error therein is here asserted. They are, therefore, the law of the case."). The courts have also applied the doctrine in three other circumstances: (1) when a party failed to move for directed verdict and instead accepted the submission of the issues to the jury, in which case the party could be barred from challenging the sufficiency of the evidence on appeal, *Murphy v. Frinkman*, 1978-NMCA-127, ¶ 4, 92 N.M. 428, 589 P.2d 212 (stating that, though the Court "might well rest [its] opinion on that rule," it could and did opt to perform a complete review); (2) when the trial court made findings of fact that were "not attacked," *Reed v. Nevins*, 1967-NMSC-065, ¶ 2, 77 N.M. 587, 425 P.2d 813; and (3) when

there was an "agreement of all the parties and the trial court" on an issue, *Belmore v. State Tax Comm'n*, 1952-NMSC-041, ¶ 11, 56 N.M. 436, 245 P.2d 149. None of the above circumstances mirror the facts of this case, as all underline a failure of a party to object or make exception to a decision. *Reed*, 1967-NMSC-065, ¶ 2.

Even when the law-of-the-case doctrine does apply, it is subject to exceptions: (1) when new evidence emerges; (2) intervening law undermines the decision, (3) or the prior ruling "was clearly erroneous and would, if followed, create a manifest injustice." *Bishop v. Smith*, 760 F.3d 1070, 1086 (10th Cir. 2014). The United States Supreme Court has held that a "change of circumstance, whether of fact or law," can overcome previously-established law of the case, as can previously unforeseen issues. *Wyoming v. Oklahoma*, 502 U.S. 437, 446 (1992). In this case, applying the doctrine is inappropriate for the following reasons: (1) this is not the type of issue for which law-of-the-case doctrine is typically invoked, because the doctrine is used almost exclusively to govern uncontested matters; (2) the doctrine "appl[ies] only to decisions on the actual merits," and as discussed the Supreme Court made no decision on the merits here, *Kennedy v. Lubar*, 273 F.3d 1293, 1299 (10th Cir. 2001); and (3) changed circumstances have undermined the law of the case to such an extent that applying it as though on the merits would create manifest injustice. [The "changed circumstances" stemming from the Supreme Court's decision in this case are discussed at length above.] For these

reasons, law-of-the case is inapplicable to this case and the district court's dismissal with prejudice cannot rest on this doctrine.

V. THE STATUTE OF LIMITATIONS TO FORECLOSE THE MORTGAGE DOES NOT BAR FILING OF A NEW CLAIM BY BONY AS TRUSTEE

The statute of limitations for foreclosing on a mortgage based on a default of the debt obligation is six years, which begins to run at the time of default. *Welty v. W. Bank of Las Cruces*, 1987-NMSC-066, ¶ 8, 106 N.M. 126, 740 P.2d 120. That period of limitation can be tolled, which "interrupts the time of a period for the limitations of an action," but when the cause of tolling ends, the calculation of the time begins again. *Schultz ex rel. Schultz v. Pojoaque Tribal Police Dept.*, 2013-NMSC-013, ¶ 14. When the statutory period is thus interrupted, it is extended for the amount of time tolled "but not a day longer." *Id.* at ¶ 15.

The New Mexico Supreme Court has held that the statute of limitations is tolled during the pendency of an action, including during appeal—even if the action is ultimately dismissed. *Bracken v. Yates Petroleum Corp.*, 1988-NMSC-072, ¶ 12, 107 N.M. 463, 760 P.2d 155. Under this "equitable" tolling principle, diligent filing of the complaint satisfies the statutory provisions. *Gathman-Matotan Architects & Planners, Inc. v. State Dep't of Fin. & Admin., Prop. Control Div.*, 1990-NMSC-013, ¶ 13, 109 N.M. 492, 787 P.2d 411; *City of Rio Rancho v. Amrep Sw. Inc.*, 2011-NMSC-037, ¶ 45, 150 N.M. 428, 260 P.3d 414 ("The filing itself

shows the proper diligence on the part of the plaintiff which such statutes of limitation were intended to [e]nsure.").

Generally, upon entry of a final order on remand from appeal, a plaintiff has the remainder of the statutory period in which to file a new complaint. *Bracken*, 1988-NMSC-072, ¶ 13. In addition, if an action fails "for any cause, except negligence in its prosecution," the plaintiff can commence a new suit within six months of obtaining a final judgment and that new suit will be "deemed a continuation of the first" for statute of limitations purposes. NMSA 1978 § 37-1-14. The statute of limitations will therefore not bar a suit when the plaintiff's original filing was timely "but the statute ran before the second suit was filed." *Amica Mut. Ins. Co. v. McRostie*, 2006-NMCA-046, ¶ 1, 139 N.M. 486.

In this case, there has been continuous action since April 2008 for a default that occurred on August 1, 2007. **[1 RP 04]** Therefore, prior to the filing of the first complaint, the six-year statute of limitations was nowhere near elapsing. The Romeros' loan itself had been in existence for less than two years, and the period of default was even shorter than that. The statute of limitations has been tolled by the diligent pursuit of this case through several levels of appeal—and even after the current appeal is concluded. If the district court is overruled, BONY as Trustee has at least six months to file a new suit pursuant to the savings clause, NMSA 1978 § 37-1-14.

CONCLUSION

Since the district court's decision to dismiss the case with prejudice solely as to BONY as Trustee's refiling of the claim is not supported by principles of either claim or issue preclusion, law-of-the-case, or the relevant statute of limitations, the district court's order should be overruled. As such, BONY AS Trustee prays that this court overturn the district court's ruling and remand for the dismissal of the case mandated by the Supreme Court to be "without prejudice".

REQUEST FOR ORAL ARGUMENT

Due to the novel nature of the issues presented on appeal and the severity of the district court's ruling of a dismissal with prejudice, BONY as Trustee respectful requests oral argument on this appeal.

Respectfully Submitted,

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