No. 34,437
Court of Appeals
of the
State of New Mexico

PHH MORTGAGE CORPORATION,
Plaintiff-Appellee,

vs.

LEIGH G. WEBB, AKA L. GEOFFREY WEBB,
PATRICIA GAY WEB AND CHARLES SCHWAB BANK, N.A.,
Defendants-Appellants.

APPELLEE'S ANSWER BRIEF

Appeal from the First Judicial District Court
Santa Fe County, New Mexico (No. D-101-CV-2011-03524)
The Honorable Francis J. Mathew, District Judge Presiding

Eraina M. Edwards
Rose L. Brand & Associates, P.C.
7430 Washington St. NE
Albuquerque, NM 87109
Telephone: (505) 833-3036
Facsimile: (505) 833-3040
Email: eraina.edwards@roselbrand.com

Attorney for Plaintiff-Appellee
PHH Mortgage Corporation

ORAL ARGUMENT REQUESTED

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This Answer Brief contains 10,996 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 BACKGROUND

This foreclosure action arises from a note and mortgage executed on August 14, 2003 by Defendants/Appellants, Patricia Gay Webb and Leigh G. Webb aka L. Geoffrey Webb ("Defendants"). **[1 RP 11]** The *in rem* complaint for foreclosure was filed on November 21, 2011 by Plaintiff/Appellee, PHH Mortgage Corporation ("Plaintiff"). **[1 RP 1, 5]** Plaintiff filed its complaint against Defendants and also against Charles Schwab Bank, N.A. based upon Charles Schwab's interest in the subject property as a result of a second mortgage. **[1 RP 1-6]** In the Complaint, Plaintiff alleged that it "... is the owner of the Mortgage and the holder in due course of the Note." **[1 RP 3]** As was common practice at the time, the complaint attached a copy of the note as of the date of loan origination, August 14, 2003, as proof of the contract being sued upon. **[1 RP 8-10, 2 RP 388]** Since this note was from the loan origination, it did not contain any indorsements or allonge because the note had yet to be transferred at the time of the loan origination. Also attached to the complaint was a copy of the mortgage and a copy of the recorded assignment of mortgage from the original mortgagee, Mortgage Registrations Systems, Inc. ("MERS") as nominee for the original lender Charles Schwab Bank, N.A. to Plaintiff, PHH Mortgage Corporation. **[1 RP 31]** All parties are in agreement that prior to the filing of the complaint, Plaintiff was the servicer for both the subject loan and the second mortgage. **[BIC 9, 1 RP 130-133]** The

Defendants were properly served on December 16, 2011. **[1 RP 39-40, 37-38]** The summons stated that "[i]f you fail to file a timely answer or motion, default judgment may be entered against you for the relief demanded in the complaint". **[1 RP 37, 39]** Plaintiff then moved for default judgment on May 13, 2013. **[1 RP 71-72]** In support of its motion for default judgment, Plaintiff filed an affidavit of the absence of loan modification and/or loss mitigation along with a certificate as to the state of the record. **[1 RP 73-84]** A default judgment was entered on May 17, 2013. **[1 RP 86-92]**

On October 16, 2013, Charles Schwab filed a motion to set aside the default judgment against it. **[1 RP 130]** Charles Schwab's motion to set aside admitted that the mortgage had been assigned to Plaintiff on November 4, 2011 and that Plaintiff was the servicer of both the first and second loans before the filing of the complaint. **[1 RP 131]** Subsequently, on January 31, 2014, Plaintiff and Charles Schwab entered into a stipulated order wherein both parties stipulated that the default judgment was set aside as to only Charles Schwab and that the facts and allegations contained in Counts I and.II of the Complaint established that Plaintiff is entitled to relief against the Borrowers. **[2 RP 229-230]** Specifically, the stipulated order provided "[t]he allegations of the Complaint are sustained by the evidence and are hereby adopted as findings of fact against Defendants Leigh G. Webb and Patricia Gay Webb only". **[Id.]** A copy of the proposed stipulated order

was provided to Defendants, and they did not object to the proposed order before its entry. **[2 RP 213]** An Order Approving Sale and Special Master's Report was then entered on July 10, 2014, wherein the total final judgment amount was listed as $235,855.23 and the subject property was sold to Charles Schwab who had the highest bid of $370,000.00. **[2 RP 282-285]**

On August 8, 2014, over one year after the entry of the default judgment and over two and a half years after being served with the Complaint, Defendants moved to set aside the default judgment and order approving sale. **[2 RP 288]** In their motion to set aside, Defendants raised the following arguments relevant to this appeal: (1) Plaintiff failed to establish it had standing to enforce the note and mortgage, and thus, Defendants had a meritorious defense to the foreclosure; and (2) that exceptional circumstances existed to justify relief from default judgment under Rule 1-060(B)(6). **[2 RP 288-298]**

On October 17, 2014, a hearing was held on Defendants' Rule 1-060(B) motion to set aside. The district court found that the issue of standing raised by Defendants pursuant to *Bank of New York v. Romero*, 2014-NMSC-007, 320 P.3d 1, was inapplicable to this particular case based on the admission of the original lender, Defendant Charles Schwab, in a prior pleading that it had transferred the note to Plaintiff. **[2 RP 380-82, 397-98]** Specifically, the district court stated that Charles Schwab had admitted that the note was transferred to the Plaintiff and that

there was not a *Romero* issue when the assignor admits and affirms the transfer. **[Id.]** At the hearing, Plaintiff also clarified that the original Note had been deposited with the district court. **[2 RP 388]** As shown by the copy of the note attached to the deposit of original note, the original note contained an allonge with a special indorsement from Charles Schwab to its agent "Cendant Mortgage Corporation," and then another indorsement "in blank" from Cendant Mortgage Corporation. **[1 RP 92-98]**

The district court ultimately found that Defendants failed to prove or present circumstances under *Romero* that would justify setting aside the judgment or order and that *Romero* was inapplicable under these circumstance where the original lender admitted in a pleading that it transferred the subject note to Plaintiff. **[2 RP 342-344]** The district court also found that Defendants' motion to set aside was untimely and that Defendants had failed to present evidence that would justify setting aside either the default judgment or order approving sale based on exceptional circumstances pursuant to Rule 1-060(B)(6). **[Id.]** A final order denying Defendants' emergency motion to set aside default judgment was entered on January 8, 2015. **[Id.]** This denial is the basis for Defendants' appeal. A Notice of Appeal was filed on January 12, 2015. **[RP 345-347]**

ARGUMENT

SUMMARY OF THE ARGUMENT

The district court's denial of Defendants' Rule 1-060(B)(6) motion was not an abuse of discretion. First, Defendants' motion was untimely brought since it was filed almost three years from the service of the complaint upon Defendants, more than a year after the entry of the default judgment, and after several cautions by the district court for Defendants to obtain counsel. Second, Defendants failed to plead that "exceptional circumstances" existed warranting relief under Rule 1-060(B)(6) because Defendants were not entitled to notice of Plaintiff's intent to seek an in rem default judgment against them after proper service. Defendants further failed to raise meritorious defenses to the foreclosure. They failed to plead with any specificity facts that would counter Plaintiff's assertion of standing in its complaint or to support any of their other alleged defenses and claims. In addition, the district court properly distinguished *Romero* from the case at bar due to the significant procedural and factual differences between the cases.

However, to the extent that *Romero* applies to this case, there was sufficient evidence presented, in particular the admission by the original payee that the note was transferred to Plaintiff, for the district court to logically conclude that Plaintiff had standing. However, if this Court were to find the evidence deficient, which it is not, the *Romero* Opinion should not be applied retroactively since it created a new

principle of law that could not have been clearly foreshowed. In the event that this Court decides to apply *Romero* retroactively and additionally determines evidence of standing was insufficient, the proper action upon remand would be to solely set aside the default judgment and allow Plaintiff an opportunity to present additional evidence of standing through either dispositive motion or trial.

I. STANDARD OF REVIEW ON RULE 1-060 MOTION

It is well-settled that it is within a district court's sound discretion to decline to set aside a default judgment. *Wells Fargo Bank, N.A. v. City of Gallup,* 2011-NMCA-106, ¶ 12, 150 N.M. 706, 265 P.3d 1279. As such, "[w]e generally review the trial court's ruling under Rule 1–060(B) for an abuse of discretion except in those instances where the issue is one of pure law." *See Martinez v. Friede*, 2004-NMSC-006, ¶ 19, 135 N.M. 171, 86 P.3d 596. An abuse of discretion is shown when "the ruling is *clearly* against the logic and effect of the facts and circumstances of the case." *Kinder Morgan CO2 Co. v. State Taxation & Revenue Dep't*, 2009-NMCA-019, ¶ 9, 145 N.M. 579, 203 P.3d 110 (internal quotation and citation omitted) (emphasis added); *see also Wells Fargo*, 2011-NMCA-106, ¶ 12, 150 N.M. 706, 265 P.3d 1279 (stating that only when a ruling is "arbitrary, fanciful, or unreasonable" should it be set aside); *State v. Balderama*, 2004-NMSC-008, ¶ 22, 135 N.M. 329, 88 P.3d 845 (stating that it is an abuse of discretion occurs when the ruling is "clearly untenable, or is not justified by

reason"); *Three Rivers Land Co. v. Maddoux,* 1982-NMSC-111, ¶ 17, 98 N.M. 690, 652 P.2d 240 (citing *Federal Land Bank of Wichita v. Burgett,* 1982-NMSC-030, ¶ 17, 97 N.M. 519, 641 P.2d 1066) ("An abuse of discretion will be found when the trial court's decision is contrary to logic and reason."). Although a judgment by default is not favored, reversal by this Court is warranted only if there is this showing of an abuse of discretion. *N.M. Educators Federal Credit Union v. Woods,* 1984-NMSC-101, ¶ 5, 102 N.M. 16, 690 P.2d 1010. The burden is upon the appellant to show that the trial court abused its discretion, *Coastal Plains Oil Co. v. Douglas,* 1961-NMSC-110, ¶ 9, 69 N.M. 68, 364 P.2d 131, and this burden is a heavy one in view of the requirement that there be a patent showing of abuse of discretion or manifest error in the trial court's exercise of that discretion. *Hanberry v. Fitzgerald,* 1963-NMSC-100, ¶ 9, 72 N.M. 383, 384 P.2d 256.

II. SHOWING REQUIRED TO SET ASIDE DEFAULT JUDGMENT UNDER RULE 1-060(B)(6)

"Two issues arise on every application to open or vacate a judgment, namely, the existence of grounds for opening or vacating the judgment, and the existence of a meritorious defense or cause of action, as the case may be." *Springer Corp. v. Herrera*, 1973-NMSC-057, ¶ 10, 85 N.M. 201, 510 P.2d 1072, *overruled on other grounds by Sunwest Bank of Albuquerque v. Roderiguez*, 1989-NMSC-011, 108 N.M. 211, 770 P.2d 533. However, "Rule 60(b) cannot be used to relieve

a party from the duty to take legal steps to protect his interests." *Benavidez v. Benavidez*, 1983-NMSC-032, ¶ 14, 99 N.M. 535, 660 P.2d 1017. As such, Rule 1-060(B) includes the following relevant circumstances that could justify vacating a judgment:

> (1) mistake, inadvertence, surprise, or excusable neglect...
>
> (6) *any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one (1) year after the judgment, order, or proceeding was entered or taken.* A motion under this paragraph does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court...

Rule 1-060 NMRA (emphasis added). Since the Brief-in-Chief ("BIC") only challenges the denial of the motion under subsection (6), any challenge to the district court's decision under subsection (1) is waived. *See State v. Gillihan*, 1974-NMSC-060, ¶ 8, 86 N.M. 439, 524 P.2d 1335, *see also Hill v. Kemp*, 478 F.3d 1236, 1250-51(10th Cir. 2007); *Headrick v. Rockwell Int'l Corp.*, 24 F.3d 1272, 1277 (10th Cir.1994). A party seeking relief from a default judgment under Rule 1-060(B)(6) must demonstrate: (1) that the motion for relief was made within a "reasonable time"; (2) that a reason justifying the relief sought exists which is

different from those enumerated in parts 1 through 5; and (3) that they have a meritorious defense to the complaint. *Meiboom v. Watson*, 2000-NMSC-004, ¶ ¶ 22, 33, 128 N.M. 536, 994 P.2d 1154.

III. DEFENDANTS' RULE 1-060(B) MOTION WAS NOT TIMELY FILED

Before considering the merits of a Rule 1-060(B)(6) motion, the court must consider whether the motion was made within a reasonable time. *Meiboom* 2000-NMSC-004, ¶ 22, 128 N.M. 536, 994 P.2d 1154. "What constitutes a reasonable time, however, depends on the circumstances of each case." *Freedman v. Perea*, 1973-NMSC-124, ¶ 6, 85 N.M. 745, 517 P.2d 67. As correctly found by the district court, the Rule 1-060(B) motion was untimely. **[2 RP 342]**

Defendants were served on December 16, 2011. **[1 RP 39-4-, 37-38]** The default judgment was then entered over two years later, on May 17, 2013. **[1 RP 86]** However, despite sending multiple correspondence to the district court and attending three post-judgment hearings as early as September 2013, where Appellant Leigh Webb was advised to seek the assistance of counsel by the district court, Defendants did not bring their Rule 1-060(B) motion until August 8, 2014. **[2 RP 239-43, 247, 288, 302]** This delay of over two years from service of the complaint in entering the case, and over a year in obtaining counsel and bringing the Rule 1-060(B) motion, despite participation in hearings and cautions by the district court to obtain counsel, is unwarranted.

Defendants make no attempt in their BIC to account for the delay or explain why they did not seek counsel after attending the September 2013 hearing. As such, the district court's determination that the motion was not brought within a reasonable time for Rule 1-060(B)(6) purposes was not an abuse of discretion. *See Adams v. Para–Chem So., Inc.,* 1998–NMCA–161, ¶ 21, 126 N .M. 189, 967 P.2d 864 (holding that a defendant's failure to react to a complaint for over two years was not excusable neglect even in a situation where the plaintiff caused the delay between the filing of the complaint and entering of default judgment and where the defendant acted very quickly to set aside the default judgment); *see also Nationstar LLC v. Kellen*, COA No. 33,923, Notice of Proposed Summary Disposition (Mar. 2, 2015) (holding that the district court did not abuse its discretion in determining under principles of finality that a Rule 1-060(B) motion brought approximately three years after entry of default judgment in a foreclosure case was not brought within a reasonable time) (adopted in *Nationstar LLC v. Kellen*, COA No. 33, 923, 2015 N.M. App. Unpub. LEXIS 255 (June 30, 2015) (non-precedential)).

IV. APPEALLANT'S MOTION DID NOT SUFFICIENTY PLEAD EXCEPTIONAL CIRCUMSTANCES PURSUANT TO RULE 1-060(B)(6)

"Rule 1-060(B)(6) is designed to apply only to exceptional circumstances, which, in the sound discretion of the trial judge, require an exercise of a 'reservoir of equitable power' to assure that justice is done." *Stein v. Alpine Sports, Inc.*,

1998-NMSC-040, ¶ 17, 126 N.M. 258, 968 P.2d 769. Defendants, in their motion for relief and in their BIC, rely heavily on two cases, *Rodriguez v. Conant*, 1987-NMSC-040, 105 N.M. 746, 737 P.2d 527, and *Dyer v. Pacheco*, 1982-NMCA-148, 98 N.M. 670, 651 P.2d 1314, both of which are easily distinguishable from the case at bar.[1]

In *Rodriguez*, the defaulted defendant contended that he "had no knowledge that he was a party to the suit..." and that "[h]ad he been aware of the claims against him... he would have contacted counsel, responded to the court's process, and defended himself." *Rodriguez*, 1987-NMSC-040, ¶ 10, 105 N.M. 746, 737 P.2d 527. In *Dyer*, the defaulted defendant, after being served, immediately took the complaint to his insurance carrier and was told by his insurance broker "not to

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[1] It is important to note that while *Rodriguez* and *Dyer* are factually distinguishable from the case at bar, the *Rodriguez* and *Dyer* Courts adhered to the long-held principle the Rule 60(B) motions are addressed to the discretion of the trial court and would not be disturbed on appeal except for an abuse of discretion. *Rodriguez*, 1987-NMSC-040, ¶ 18, 105 N.M. 746, 737 P.2d 527; *Dyer v. Pacheco*, 1982-NMCA-148, ¶ 4, 98 N.M. 670, 651 P.2d 1314.

worry about it." *Dyer*, 1982-NMCA-148, ¶ 10, 98 N.M. 670, 651 P.2d 1314. Moreover, the plaintiff in *Dyer* allowed his complaint to "lay dormant in the clerk's office for two years and 3 months after the complaint was filed and process served..." and "... waited for one year and five days to elapse after the default judgement was entered to seek defendant's financial records and insurance policy..." *Dyer*, 1982-NMCA-148, ¶ 3, 98 N.M. 670, 651 P.2d 1314.

As the district court correctly concluded, none of the "exceptional circumstances" present in *Rodriguez* and *Dyer* are present here. **[2 RP 342]** For example, unlike *Rodriguez*, Defendants do not argue or allege that they were unaware of the foreclosure lawsuit. On the contrary, the record clearly establishes that they were well aware of the existence of the action, and were admonished by the district court on several occasions, as early as September 2013, to seek the assistance of counsel, but nonetheless they chose not to retain an attorney or appear in the case. **[2 RP 247, 302]** Moreover, unlike *Dyer*, Defendants do not contend that they reasonably relied on a third-party to protect their interests (such as an insurance agent/broker), or that there was a lengthy (unexplained or otherwise) delay in Plaintiff's prosecution of the foreclosure action.

Instead, Defendants, again erroneously relying on *Rodriguez*, simply argue that "[w]hen the bank moved for default judgment against the Borrowers in 2013, it knew the whereabouts of the Borrowers and failed to give notice to the

Borrowers that it was seeking a default judgment against them." **[BIC 37-8]** Defendants contend that this lack of "notice," along with the "amount" of the judgment demonstrates exceptional circumstances sufficient to warrant the granting of their motion. **[BIC 40-42]** To be clear, however, the Supreme Court in *Rodriguez* specifically held that "neither the due process clause nor our Rules of Civil Procedure for the District Courts required that defendant be notified of the applications for default judgments or of the hearing on damages after he failed to appear in this action." *Rodriguez*, 1987-NMSC-040, ¶ 17, 105 N.M. 746, 737 P.2d 527. The *Rodriguez* Court then went on to state that "the failure of the party seeking to sustain a default judgment to give notice to opponents whose whereabouts were known *may be* a factor supporting the district court's decision to set aside that judgment..." under Rule 60(b)(6), reiterating that such a determination, as always, lies within the discretion of the trial court. *Rodriguez*, 1987-NMSC-040, ¶ 18, 105 N.M. 746, 737 P.2d 527 (emphasis added).

To the extent that Defendants rely on *Rodriguez* (and the cases cited therein) for the proposition that "...cases involving large sums of money should not be determined by default judgments...", the amount of the default judgment, by itself, does not warrant setting it aside. Instead, it is the *prejudice* to a defendant resulting from such a judgment that may warrant such relief. For example, *United Salt Corp. v. McKee*, 1981-NMSC-052, ¶ 1, 96 N.M. 65, 628 P.2d 310, cited by the Supreme

Court in *Rodriguez*, addressed the effect of a default judgment for money damages entered against two defaulted defendants on a third non-defaulted defendant. In turn, the cases cited by the Court in *United Salt Corp.* likewise involve circumstances where it would be highly prejudicial to allow a large default judgment to stand. *See Erick Rios Bridoux v. E. Air Lines*, 214 F.2d 207, 209 (D.C. Cir. 1954) (defaulted defendant's attorneys had withdrawn from case without notice and default judgment was entered while defendant was absent from the country); *Tozer v. Charles A. Krause Mill. Co.*, 189 F.2d 242, 244, 246 (3d Cir. 1951) (defaulted defendant never received copy of complaint sent by Secretary of the Commonwealth via registered mail and had no knowledge of action prior to entry of default judgment); *Hutton v. Fisher*, 359 F.2d 913, 915 (3d Cir. 1966) ("[W]e think it should be considered that the entry of default in all likelihood would have been avoided or quickly challenged but for questionable procedure and one serious, though unintentional, misrepresentation of fact by the plaintiff's counsel.").

While these cases considered whether it would be inequitable to uphold a default judgment when such default was entered through no fault of the defendant, such circumstances simply do not exist here. This conclusion is particularly true in light of the fact that Defendants do not claim that they were improperly served and do not claim negligence by an attorney in not filing an answer. They also do not

challenge that the summons clearly stated that "[i]f you fail to file a timely answer or motion, default judgment may be entered against you for the relief demanded in the complaint". **[1 RP 37, 39]** It is also imperative to note that unlike a money judgment there is no personal liability under the default judgment at issue here. **[1 RP 5]** As such, Defendants' reliance on the argument that default judgments for money awards are disfavored is without merit.

To the contrary of Appellant's arguments, the facts of this case are much more closely akin to those of *Flagstar Bank, FSB v. Giles*, 2012 WL 3193592 (N.M. Ct. App. July 25, 2012) (non-precedential).[2] *Flagstar*, just like the case at bar, involved the foreclosure of a first mortgage lien. The foreclosure complaint was filed on December 17, 2008 and served on the defendant on January 8, 2009. *Id.* at *2. When the defendant failed to respond to the complaint or otherwise appear, a default judgment was entered against him on April 12, 2010. *Id.* On May 18, 2010, the defendant, via his newly-retained counsel, filed a motion to set aside the default judgment on the grounds that his failure to respond to the complaint

[2] "While an unpublished opinion of this Court is of no precedential value, it may be presented to this Court for consideration if a party believes it persuasive." *Gormley v. Coca-Cola Enterprises*, 2004-NMCA-021, ¶ 10, 135 N.M. 128, 85 P.3d 252, *aff'd, Gormley v. Coca-Cola Enterprises*, 2005-NMSC-003, 137 N.M. 192, 109 P.3d 280.

was due to excusable neglect under Rule 60(b)(1). *Id.* at *4-5. Specifically, the defendant alleged "that he was not on notice that his participation in the litigation was necessary to prevent the entry of a default judgment because he believed that the parties had negotiated a settlement of the foreclosure lawsuit through a deed in lieu of foreclosure." *Id.* at *4. The defendant also argued that his conduct was excusable because "he reacted quickly to the default judgment by obtaining legal representation and moving to set aside the default judgment." *Id.* at *5.

In affirming the trial court's denial of the defendant's motion, the Court of Appeals stated:

> The record is clear that Giles was aware of Flagstar's complaint for foreclosure and was personally served with the summons and complaint. Despite the express language of the summons requiring a response and stating that the failure to timely answer or submit a motion may result in a default judgment, Giles chose not to enter an appearance or otherwise address the complaint for approximately eighteen months. As the principal of a commercial real estate company, the district court can presume that Giles has experience in real estate litigation and is fully aware of his duty to respond to a complaint filed against him. *See In re Gaines,* 113 N.M. 652, 658, 830 P.2d 569, 575 (Ct.App.1992) ("[A] party, served with an initial summons and thus having actual notice of the litigation, [cannot] claim 'excusable neglect' under Rule [1–0]60(B) for not being aware of subsequent proceedings in the matter." (citation omitted)). Giles chose from the outset to address the foreclosure lawsuit informally and to do nothing in the court proceedings until after he learned that default judgment was entered against him.

> *See* Rule 1–055(B) NMRA (recognizing that a party is only entitled to three days' written notice and a hearing before the entry of a default judgment when the party or the party's representative "has appeared in the action"); *Rodriguez,* 105 N .M. at 748, 737 P.2d at 529 (requiring notice only when a party has appeared in the action). As such, Giles had no entitlement to notice and he was not excused from filing a response or motion to Flagstar's complaint. *See Kinder Morgan CO2 Co.,* 2009–NMCA–019, ¶ 18 ("[C]arelessness by a litigant ... does not afford a basis for relief under Rule [1–060(B)(1).]" (alteration, internal quotation marks, and citation omitted)).
>
> We are likewise unpersuaded by Giles' argument that his conduct is excusable in part because he reacted quickly to the default judgment by obtaining legal representation and moving to set aside the default judgment. The fact remains that for an extremely long period of time Giles neglected to file a response to the complaint in this case. *See Magnolia Mountain Ltd. P'ship v. Ski Rio Partners, Ltd.,* 2006–NMCA–027, ¶ 37, 139 N.M. 288, 131 P.3d 675 ("[E]quity aids the vigilant, not those who slumber on their rights." (internal quotation marks and citation omitted)). We will not excuse Giles' failure to timely acknowledge the case or defend himself based on his quick response to the entry of default judgment. *See Adams v. Para–Chem So., Inc.,* 1998–NMCA–161, ¶ 21, 126 N .M. 189, 967 P.2d 864 (holding that a defendant's failure to react to a complaint for over two years was not excusable neglect even in a situation where the plaintiff caused the delay between the filing of the complaint and entering of default judgment and where the defendant acted very quickly to set aside the default judgment).

Id. at *4-5.

In this case, Defendants were properly served and the summons warned that not answering the complaint would result in a default judgment. **[1 RP 37, 39]**

Also, as in *Giles*, the Defendants here argue that they did not answer due to alleged loss mitigation communications with Plaintiff. However, such an allegation, even if true, does not reasonably explain how such discussions prevented them from timely answering the complaint. Lastly, like in *Giles*, the Defendants waited an extremely long time (over a year), even after several reprimands from the district court, before retaining an attorney and bringing the Rule 1-060 motion. Since at the time of the default judgment's entry, Defendants had not entered into the case or filed an answer, they were not entitled to notice of Plaintiff's attempt to seek default judgment, just as in *Giles*. If the similar actions by the Giles were not considered sufficient for the "excusable neglect" standard in *Giles,* the same actions by the Defendants here cannot meet the more difficult standard of exceptional circumstances under subsection (6).

Defendants also argue that there were exception circumstances because "based upon both the scheduling order for the District Court and correspondence and communications with the Bank, the Borrowers believed they had properly entered this case and properly responded to the Complaint..." **[BIC 9]** However, such belief is unreasonable considering the warning regarding the failure to file an answer contained in the summons. It is also difficult to understand Defendants' assertion that they thought they has "properly entered this case" when no entry of

appearance or any other pleadings or correspondence were filed of record by Defendants until after the default judgment was entered.

Since Defendants fail to raise any grounds other than subsection (6) for their Rule 1-060(B) motion and fail to meet the exception circumstances standard, their motion does not satisfy the standards under the first prong of the Rule 1-060(B) test. Since the district court correctly concluded that the first prong of the Rule 1-060(B) test was not fulfilled, it did not abuse its discretion in denying Defendants' Rule 1-060(B) motion. **[2 RP 342-43]** Therefore, this Court may uphold the district court's decision under the first prong of the Rule 1-060(B) test alone.

V. APPELLANT'S RULE 1-060(B) MOTION DID NOT SUFFICIENTY PLEAD A MERITORIOUS DEFENSE TO THE FORECLOSURE ACTION

A. Defendants failed to meet their burden of proof under Rule 1-060(B) by failing to plead any facts with the required particularity

Assuming *arguendo* that the first prong of the Rule 1-060(B) test was met, in deciding a motion to set aside a default judgment under Rule 1-060(B)(1)-(6), the trial court must still determine that the party seeking to set aside the default judgment has shown a meritorious defense to the suit and that setting aside the default would not be inequitable to the non-movants. *N.M. Educators Fed. Credit Union v. Woods*, 1984-NMSC-101, ¶ 4, 102 N.M. 16, 690 P.2d 1010. While there is no universally accepted standard as to what satisfies the meritorious defense

requirement, the object is to "ascertain that there is a possibility that the outcome of the suit after trial will be different from the result achieved by default." *Sunwest Bank*, 1989-NMSC-011, ¶ 11, 108 N.M. 211, 770 P.2d 533. Although well-pled facts are to be accepted as true without supporting testimonial documentation, the proffered defenses must set forth relevant legal grounds substantiated by particular facts to counter the complaint. *Id.*; *Magnolia Mountain, Ltd. P'ship v. Ski Rio Partners, LTD*, 2006-NMCA-027, ¶ 15, 139 N.M. 288, 131 P.3d 675 (internal quotation and citation omitted) (stating that "a litigant attempting to show a meritorious defense is subject to a heightened pleading requirement" similar to the standard for pleading fraud with specificity found in Rule 1-009 NMRA). Mainly, the movant must set forth a clear and specific showing, not by conclusion, but by definite recitation of facts, that an injustice has probably been done by the judgment. *Kirkland v. Fort Morgan Auth. Sewer Serv., Inc.*, 524 So.2d 600, 606 (Ala. 1988) (cited in *Magnolia Mountain,* 2006-NMCA-027, ¶ 15, 139 N.M. 288, 131 P.3d 675).

In addition, the meritorious defense analysis is analogous to the summary judgment analysis. *Magnolia Mountain*, 2006-NMCA-027, ¶ ¶ 16-17, 139 N.M. 288, 131 P.3d 675. "As with summary judgment, the point of requiring a showing of a meritorious defense is to ensure that the movant has a viable legal defense and that there are genuine issues of fact that require submission to a factfinder." *Id.* The

factual issues presented must be genuine and not a sham. *Id.* ¶ 20. When there are inconsistencies in a party's allegations, there is reason for the district court to believe that the party is attempting to create a sham issue of fact. *Id.* ¶ 21. In sum, "parties seeking to set aside a default judgment must assert a valid legal theory and allege with some particularity facts that would support that legal theory; such facts are to be taken as true, but in order to reopen the judgment and proceed to trial, the factual issues presented must be genuine." *Id.* ¶ 17.

In the instant case, Defendants' motion to set aside failed to state any facts which would establish a "meritorious defense." On the contrary, the majority of Defendants' motion (and their BIC) is devoted to an attack on the sufficiency of the complaint rather than establishing a defense to the foreclosure. For example, although Defendants contend that the complaint did not establish *prima facie* evidence of standing, they do not allege any particular facts to rebut the contention in the complaint that "Plaintiff is the owner of the Mortgage and the holder in due course of the Note." **[1 RP 3]** Likewise, Defendants bare assertion that they dispute the amount Plaintiff alleges it is owed is not based on any actual facts, but simply on the alleged lack of a "sworn statement on the amounts due and owing…" **[2 RP 293]** Here again, Defendants offered nothing to rebut the contention in the complaint that "[t]here is due Plaintiff on the Mortgage the unpaid principal sum of

$170,823.59..."[3] **[1 RP 4]** Lastly, to the extent that Defendants' motion argues that there are "serious issues regarding the subject mortgage" with respect to "the legal description of the subject property", "potential counterclaims against Plaintiff under the Fair Housing Act, Unfair Trade Practices and Equal Credit Opportunity Act", or a failure of Plaintiff to meet conditions precedent before filing the complaint, these too lack any factual support and therefore do not constitute a meritorious defense under Rule 60(B). **[1 RP 297]** *See Flagstar Bank, FSB v. Licha*, 2015-NMCA-086, ¶ 27, 356 P.3d 1102, 1111 (determining that the allegation that more discovery was required to determine whether there was an HLPA violation by the foreclosing bank did plead facts with specificity to overcome a motion for summary judgment); *see also Spears v. Canon De Carnue Land Grant*, 1969-NMSC-163, ¶ 12, 80 N.M. 766, 461 P.2d 415 ("The party opposing a motion for summary judgment cannot defeat the motion . . . by the bare contention that an issue of fact exists, but must show that evidence is available[.]"); *Guest v. Berardinelli*, 2008-NMCA-144, ¶ 35, 145 N.M. 186, 195 P.3d 353 ("General assertions of the existence of a triable issue are insufficient to overcome summary judgment on appeal.") Since Defendants have failed to allege with any

[3] Contrary to Defendants' contention, Plaintiff filed an "Affidavit of Amounts Due", containing supporting business records of the default and amounts due and owing, on May 13, 2013 in connection with its motion for default. **[RP 53-55]**

particularity what factual evidence is present to support any of their alleged meritorious defenses sufficient to have defeated a motion for summary judgment, they did not meet their burden and the district court did not abuse its discretion in not setting aside the default judgment. *Magnolia Mountain*, 2006-NMCA-027, ¶ ¶ 16-17, 139 N.M. 288, 131 P.3d 675 ("As with summary judgment, the point of requiring a showing of a meritorious defense is to ensure that the movant has a viable legal defense and that there are genuine issues of fact that require submission to a factfinder.")

Lastly, New Mexico Courts have held that a movant must also establish that there are no intervening equities before a court can properly set aside a default judgment. *N.M. Educators Fed. Credit Union*, 1984-NMSC-101, ¶ 4, 102 N.M. 16, 690 P.2d 1010. In the instant matter, the subject property was sold to Charles Schwab Bank, N.A. through the foreclosure sale. The Order Approving Sale was entered on July 10, 2014 confirming the sale. **[2 RP 282]** "[A] purchaser for value without notice of shortcomings in the proceedings which could be raised by a previous owner under the statutes, or which would become apparent from a reasonable examination of the record, took free from such defect." *Rael v. Cisneros,* 1971-NMSC-073, ¶ 16, 82 N.M. 705, 487 P.2d 133. Since Charles Schwab admitted to the transfer of the note to Plaintiff, it had no reason to doubt

the foreclosure finality and its good faith purchase of the property in an intervening equity that precludes the grant of Appellants' Rule 1-060(B) motion.

B. *Romero* is inapplicable to the case at bar due to the substantial procedural differences between the two cases

The bulk of Defendants' BIC regarding Defendants' alleged meritorious defenses is devoted to the trial court's determination that *Romero* was inapplicable to the case at bar. In *Romero*, the Supreme Court held that a plaintiff in a foreclosure action must establish that it is the holder of the note and mortgage at the time of the filing of the complaint. *Bank of New York v. Romero*, 2014-NMSC-007, ¶ ¶ 17, 21, 320 P.3d 1. Here, Defendants rely on *Romero* for the proposition that Plaintiff failed to demonstrate that it had standing to foreclose. The trial court, however, correctly distinguished *Romero* from the present case.

Most importantly, *Romero* did not involve a default judgment or a motion to set aside a default judgment. Rather, the defendants in *Romero* responded to the complaint specifically arguing that "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." *Romero*, 2014-NMSC-007, ¶ 6, 320 P.3d 1. The case was eventually decided at a bench trial at which both parties presented evidence in support of their respective positions, including the issue of standing. *Id.* Although

the trial court ruled in favor of the foreclosing plaintiff, the Supreme Court reversed, holding "... that the Bank's standing to foreclose on the Romeros' mortgage was not supported by substantial evidence." *Id.* ¶ 38.

Unlike *Romero*, the trial court did not decide this case after a full-fledged trial, but instead entered a default judgment based on Defendants' failure to respond to the complaint. "Upon the default, the allegations of the complaint are taken as true." *United Nuclear Corp. v. General Atomic Company,* 1980-NMSC-094, ¶ 391, 96 N.M. 155, 629 P.2d 231, appeal dismissed, 451 U.S. 901 (1981). Similar to the view this Court is currently proposing taking in a similar foreclosure matter, *Bank of America, N.A v. George*, COA No. 34,835, Notice of Proposed Summary Disposition, *3-5 (Nov. 10, 2015), Plaintiff has procedurally demonstrated standing. Plaintiff's complaint alleged that it was the "holder in due course of the note". **[1 RP 3]** As stated in the *George* Notice of Proposed Summary Disposition, the term "holder" has a special meaning in the arena of commercial paper. *Bank of America, N.A v. George*, COA No. 34,835, Notice of Proposed Summary Disposition, *4. As in *George*, Plaintiff's allegations were deemed admitted by Defendants when they failed to contest the foreclosure and consequently had the default judgment entered against them. *Id.*; *see Passino v. Cascade Steel Fabricators, Inc.,* 1986-NMCA-078, ¶ 8, 105 N.M. 457, 734 P.2d 235; *Gallegos v. Franklin*, 1976-NMCA-019, ¶ 36, 89 N.M. 118, 547 P.2d 1160

("The allegations of the Complaint are sustained by the evidence and are hereby adopted as findings of fact, and the Court concludes as a matter of law that Plaintiff has standing[.]").

Similarly, the facts of this case mirror those of *BOKF, N.A. v. Lopez*, 2014 WL 7236489, *1 (N.M. Ct. App., Nov. 3, 2014) (non-precedential) *cert. denied sub nom. BOKF v. Lopez*, 344 P.3d 987 (N.M. 2014). In *Lopez*, the defendant appealed the trial court's denial of his motion to set aside the default judgment entered against him in a foreclosure action. The defendant in *Lopez* similarly argued that: (1) "the complaint does not create a prima facie case for foreclosure of the note and mortgage because it fails to show that the Bank had standing"; and (2) that "it should not matter whether they are raising standing following the entry of default judgment, because standing may be raised at any point in a case." *Id.*

In affirming the trial court's denial of the defendant's motion, the Court of Appeals stated:

> We disagree with Defendants' first argument because, as we discussed in the notice of proposed disposition, the allegations of the complaint do in fact "create a *prima facie* case for foreclosure" by establishing Plaintiff's standing. As we pointed out, the complaint alleged that Plaintiff was both a "holder" and a "holder in due course" of the promissory note, terms of art that carry with them the authority to enforce a note. *See Bank of N.Y. Mellon v. Lopes*, 2014–NMCA—— ¶¶ 9–10, —— P.3d ——, (No. 32,310, July 22, 2014). Furthermore, Plaintiff alleged that the mortgage was assigned to it well before the date the foreclosure complaint was filed.

> These admitted allegations, taken together, show that Plaintiff had the authority to enforce both the promissory note and the mortgage at the time the foreclosure complaint was filed, and thus also show that Plaintiff had standing to bring the foreclosure action.

Id. Turning to defendant's second argument, the Court distinguished *Romero*, stating:

> As for Defendants' second argument, we disagree because, contrary to Defendants' argument, the procedural posture of this case is crucial. As discussed above, by defaulting rather than answering the foreclosure complaint, Defendants admitted the facts necessary to establish Plaintiff's standing to pursue the foreclosure action. This puts Defendants in an entirely different position than, for example, the defendants in *Romero,* who objected to the plaintiff bank's standing during the foreclosure proceedings and thus put the plaintiff to its proof on that issue. *See id.* ¶ 6. The plaintiff in *Romero* had notice of the standing issue and therefore had an opportunity to present any evidence it might have had concerning that issue; Plaintiff in this case has never been put on notice of the issue and is entitled to rely on Defendants' admission by default of the allegations made in the complaint.

Id.; see contra Phoenix Funding, LLC v. Aurora Loan Services, LLC, 2015-NMCA-____, 2015 WL 5020997 (No. 33,211, Aug. 24, 2015) (allowing collateral attack of a prior foreclosure default judgment based on party's allegations that the judgment was void for lack of standing of the foreclosing plaintiff). Since this case is analogous to the facts of *Lopez*, Plaintiff here should likewise be able to rely on the Defendants' admission, especially since this default judgment was entered

before the *Romero* opinion and at no point in the district court proceedings was it procedurally proper for Plaintiff to put forth evidence of its standing e.g. evidentiary hearing, motion for summary judgment hearing, or trial. Since Defendants had the burden of proof at the Rule 1-060(B) motion hearing, it would have been improper and inequitable to require Plaintiff to proceed on the merits of its claim at said motion hearing. *See Bank of New York Mellon v. Singh*, COA No. 34,041, 2015 N.M. App. Unpub. LEXIS 21, ¶ 5 (Jan. 21, 2015) (non-precedential) ("...the Bank in this case was not put on notice of the [standing] issue and is entitled to rely on Homeowner's admission by default of the allegations made in the complaint. To hold otherwise would render meaningless the default judgment that was entered in this case.").

C. Assuming arguendo that *Romero* is applicable to this case, the district court did not abuse its discretion in considering the totality of the circumstances and evidence in determining that Plaintiff has standing

Assuming that *Romero* is applicable to this case and Plaintiff was required to prove its standing in defending against the Rule 1-060(B) motion, there is sufficient evidence of record to support the district court's determination of standing using the Rule 1-060(B) abuse of discretion standard.[4] A common sense

[4] It is important to reiterate that the district court proceeding appealed from was the hearing of a motion and denial of a Rule 1-060(B) motion and not an evidentiary

approach shows that evidence was presented that Plaintiff was entitled to enforce the note. First, Charles Schwab admitted through its motion to set aside that the Plaintiff was the servicer of the "PHH loan" before the filing of the complaint. **[1 RP 131]** Specifically, Charles Schwab's Rule 1-060(B) motion referenced the assignment of mortgage from MERS on behalf of Charles Schwab Bank, N.A. to Plaintiff, which was executed and recorded before the filing of the complaint. **[1 RP 131]** Second, the stipulated order between Charles Schwab and Plaintiff admitted the Plaintiff's allegation that it was the holder of the note and mortgage through its inclusion of the language "[t]he allegations of the Complaint are sustained by the evidence". [**2 RP 229, 1 RP 3**] Thirdly, to the extent that the language of the stipulated order was ambiguous, Charles Schwab confirmed the admission by not denying it at Defendants' Rule 1-060(B) motion hearing. *See e.g.* Rule 1-008 NMRA ("Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading"). Fourthly, the transfer of the note was supported by circumstantial evidence in the form of the Assignment of Mortgage.

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hearing or trial. As such, the Rule 1-060(B) abuse of discretion standard of review would still apply to Plaintiff's defenses to the Rule 1-060(B) motion and not a *prima facie* or substantial evidence standard, appropriate for a motion for summary judgment hearing, or trial or evidentiary hearing, respectively.

Fifthly, the original note containing as the last indorsement a blank indorsement from Cendent Mortgage Corporation, an agent for Charles Schwab Bank, N.A., before the transfer of the note to Plaintiff, was deposited with the court's registry.[5] **[1 RP 97-98]** *See* NMSA 1978, §55-3-205(b). Lastly, knowing that Plaintiff was the holder, Charles Schwab also felt assured in purchasing the property at the foreclosure sale from Plaintiff. All of these facts taken together, as a totality of the circumstances, show that Plaintiff had possession of the note that had been negotiated between Plaintiff and Charles Schwab before the complaint was filed. As such, it was logical and reasonable for the district court to conclude that this case was distinguishable from the evidence, or lack therefore, presented in *Romero*, and it did not abuse its discretion is denying the Rule 1-060(B) motion. *Kinder Morgan CO2 Co. v. State Taxation & Revenue Dep't*, 2009-NMCA-019, ¶ 9, 145 N.M. 579, 203 P.3d 110 (providing that an abuse of discretion is shown

[5] While Defendants dispute the authorization of the Cendent note indorsee, the UCC provides that "...the burden of establishing validity [of a signature on a negotiable instrument] is on the person claiming validity, but the signature is presumed to be authentic and authorized unless the action is to enforce the liability of the purported signer and the signer is dead or incompetent at the time of trial of the issue of validity of the signature..." NMSA 1978, § 55-3-308.

when "the ruling is *clearly* against the logic and effect of the facts and circumstances of the case." (internal quotation and citation omitted) (emphasis added)).

VI. *ROMERO* SHOULD NOT BE GIVEN RETROACTIVE EFFECT

In order for a law or rule to not have retroactive effect in civil law, the decision to be applied non-retroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed. *Beavers v. Johnson Controls World Services, Inc.*, 1994-NMSC-094, ¶ 23, 118 N.M. 391 (quoting *Whenry v. Whenry*, 1982-NMSC-067, 98 N.M. 737, quoting *Chevron Oil*). If it is established that a new principle of law is created, the court is to "weigh the merits" and consider the history, purpose, and effect of the new rule and whether retrospective operation will further or retard its operation. *Id.* Lastly, the court must weigh the inequity imposed by retroactive application, "for where a decision could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity." *Id.* (citations omitted). Here, *Romero* created a new principle of law, and "weighing the merits" requires non-retroactivity.

A. *Romero's* application of Official Comment 2 to Section 203(b) conflicted with prior case regarding the burden of proof to enforce a negotiable instrument

The Supreme Court in *Romero* applied Official Comment 2 to NMSA, 1978 Section 203(b) to provide that the "transferee must account for possession of the unindorsed instrument by proving the transaction through which the transferee acquired it." *Romero*, 2014-NMSC-007, ¶ 29, 320 P.3d 1. Therefore, absent indorsement, the transferee has the burden to show how it received possession of the note. However, no binding New Mexico decision pre-*Romero* applied Official Comment 2 and the only binding prior case law instead placed the burden on the obligator to come forward with evidence that a person claiming to be entitled to enforce a note was not in fact entitled to do so. *See Edwards v. Mesch*, 1988-NMSC-085, ¶ 4, 107 N.M. 704, 763 P.2d 1169 (holding that the argument that the party to whom the note had been specially indorsed—and not the payee in continued possession—was the real party in interest was "without merit."); *Good v. Harris*, 1966-NMSC-249, ¶ ¶ 15-18, 77 N.M. 178, 420 P.2d 767 (holding post-enactment of the UCC that "[a] negotiable instrument may be assigned or transferred without a writing" in holding that a verbal assignment of the note had been made to plaintiff, and that plaintiff was therefore the holder and was in possession of the note) (citing *Butler v. Kopplin*, 253 S.W.2d 514 (Mo. Court of Appeals, Eastern Dist. 1952) (providing that "a note may still be transferred by

assignment, or by mere delivery without indorsement..." in upholding a grant of judgment, absent note indorsement, upon an affidavit of plaintiff's attorney attesting that plaintiff was the holder and where no evidence was provided to the contrary)).

In addition, pre-*Romero*, the fact that a note was in the hands of the plaintiff unindorsed was of slight importance if the evidence supports a finding of intent to transfer because "[p]ossession of a note, *unindorsed*, by one other than the payee or indorsee, affords prima facie evidence that he is the equitable owner." *Citizen's Bank of Clovis v. Brown*, 1934-NMSC-037, ¶ 12, 38 N.M. 310, 32 P.2d 755; *see City Nat'l Bank v. Hickox*, 1888-NMSC-017, ¶ 4, 5 N.M. 22, 16 P. 912 (discussing, while not providing at what time possession must be proven, that "[p]ossession of [a note] payable to bearer or indorsed in blank, is prima facie evidence that the holder is the proper owner and lawful possessor of the same; and nothing short of fraud, not even gross negligence, is, unattended with mala fides, sufficient to overcome the effect of that evidence..."). *Hickox* further provided that:

> [I]t is clear [Plaintiff] has nothing to do in the opening of his case except to prove the signatures to the instrument, and introduce the same in evidence, as the instrument goes to the jury clothed with the presumption that the plaintiff became the holder of the same for value, at its date, in the usual course of business, without notice of anything to impeach his title. Clothed as the instrument is with those presumptions, the plaintiff is not bound to introduce any evidence to show that he gave value for the

> same, until the other party has clearly proved that the consideration of the instrument was illegal, or that it was fraudulent in its inception, or that it had been lost or stolen before it came to the possession of the holder.

Id. ¶ 4.

These older decisions (some pre- and some post-enactment of the UCC in 1961) provided a liberal standard to prove standing to enforce a negotiable instrument and shifted the burden to defendants to disprove an assertion of standing, even where there are no indorsements on the note. This standard was applied statewide in thousands of foreclosure cases before *Romero* and even in the rulings favorable to the creditor on the issue in the monumental case in the district and appellate court. *See Bank of New York v. Romero*, 2011-NMCA-110, ¶ ¶ 20-21, *overruled by Bank of New York v. Romero*, 2014-NMSC-007, 320 P.3d 1 (upholding finding of standing on trial witnesses testimony and assignment of mortgage when defendant did not provide evidence to counter assertion of standing.) Despite the limited holding of the *Romero* Opinion solely to cases with conflicting indorsements, to the extent that the analysis of the UCC in *Romero* adopting Comment 2 could be relied on to reverse the district court's ruling, Plaintiff proposes that *Romero* should not be applied retroactively as being inconsistent with prior case law.

B. The *Romero* Opinion created new law because it involved matters of first impression and the results were not clearly foreseeable when it was just as likely that the Supreme Court

could have adopted the positions favorable to creditor plaintiffs

Romero should not be given retroactive effect to this action because the Opinion established (for the first time in New Mexico history) a specific evidentiary mandate creditors are required to meet to enforce negotiable instruments in foreclosure cases. In fact, the Opinion was the primary twenty-first century, "post-foreclosure boom" case decided in New Mexico interpreting the UCC on the issue of standing to foreclose. Since the New Mexico district courts in thousands of prior foreclosure actions up until the time of the Opinion did not apply the standard articulated in the Opinion, without adverse appellate rulings, the Opinion could not have been *clearly* foreshadowed. The decision to apply a technical or liberal approach could have gone either way because the Opinion interpretation of the preconditions for suit, specifically the methods by which a plaintiff must demonstrate that it is the holder of the note with conflicting indorsements, represented a notable departure from previous decisions and practice in the state on similar facts to those present in *Romero*. *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 by the payee "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" and that the "bearer term prevail[s]").

C. The "Weighing of the Merits" of the New Law Warrants Non-retroactivity of the Opinion

If it is established that a new principle of law is created, the court is to "weigh the merits" and consider the history, purpose, and effect of the new rule and whether retrospective operation will further or retard its operation." *Beavers*, 1994-NMSC-094, ¶ 23, 118 N.M. 391 (quoting *Whenry v. Whenry*, 1982-NMSC-067, 98 N.M. 737, quoting *Chevron Oil*). From what can be inferred from the Opinion and principles regarding standing in general, the history and purpose of requiring proper indorsements as proof of standing at the initiation of an action is to attempt to protect consumers from multiple lawsuits for the same debt collection. *See Romero*, 2014-NMSC-007, ¶ 37, 320 P.3d 1. However, the UCC already addresses the issue of multiple liabilities, providing several protections to consumers against just such an eventuality. *See Edwards*, 1988-NMSC-085, ¶ 5, 107 N.M. 704, 763 P.2d 1169 (providing "[t]he Mesches' argument on appeal that the district court ruling exposes them to double liability is without merit. 'The liability of any party is discharged to the extent of his payment or satisfaction to the holder even though it is made with knowledge of a claim of another person to the instrument …'"). Since the harm that the new rule is trying to protect is

minimal, it would not be inconsistent with its purpose to not apply the new rule retroactively.

What is even more concerning is the second factor to consider in weighing the merits regarding the effect of the new rule if applied retroactively. The effect of the new rule for foreclosures in New Mexico, if applied retroactivity, is that it will continue to cause confusion to litigants and the district courts as to what will be sufficient to prove standing, for cases where "indorsement defects" are present at the complaint stage. The new rule applied retroactively also has the effect of compelling additional litigation in this case filed over four years ago in 2011 upon remand, while the mortgage remains unpaid. Additional litigation in district court for this case and others then results in properties remaining in the limbo of the judicial foreclosure process affecting alienability of the property and consumers' credit reporting. It is also likely that creditors will be unable to find title insurers to insure many mortgage transactions if the ruling continues to be applied retroactively – all of sudden foreclosures could be, and are being, vacated post-sale when no one realized there would be an issue since the Opinion was not in existence. Additional foreclosure litigation also decreases property values with vacant properties being neglected and vandalized, and reduces the inventory of the real estate market in New Mexico to potential buyers. It is also likely that creditors will begin to decrease lending in New Mexico due to the stringent standing

requirements. Thus, while disallowing retroactive application may retard the purpose of the new rule, retroactive application of the Opinion will create more problems for New Mexico as a whole than the exceptionally rare instance in which there may be multiple suits filed against a consumer by different entities attempting to enforce a note. The balancing of the merits, therefore, disfavors retroactive application of *Romero*.

D. Equity disfavors retroactive application of *Romero*

Plaintiff would be substantially prejudiced and would incur a hardship by having to re-litigate its claim filed in compliance with law at the time of its initiation and at the time of judgment. Further, the case has been pending for over four years while no mortgage payments have been made on the loan. While on the other hand, Defendants are not prejudiced as long as the party in possession of the original note takes judgment.

In equity, Plaintiff should be allowed to have met the standard at the time of filing with a properly indorsed note presented at the judgment stage relating back to the filing of the complaint. Equity does not favor holding creditor plaintiffs to a standard not yet in existence at the time they filed their complaints, which arguably could result in a taking of creditors' rights to collect in some cases. *See Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 55 S. Ct. 854, 79 L. Ed. 1593 (1935) (providing that the Frazier-Lemke Act, which retroactively allowed a

mortgagor whose property was already being foreclosed upon to declare bankruptcy and have the property be appraised and sold, instead of allowing the bank to foreclose was an unconstitutional taking because it took away the rights of the mortgagee in property). Since equity rules in favor of Plaintiff, *Romero* should not be given retroactive effect.

VII. IF THE COURT AFFIRMS THE PROPOSED SUMMARY DISPOSITION, REVERSAL SHOULD BE LIMITED TO SETTING ASIDE THE JUDGMENT

New Mexico is a notice pleading state. Therefore, if this Court is to reverse the district court's decision, it should be limited to a reversal of the default judgment and not a dismissal of the suit. Plaintiff properly pled in its complaint that "Plaintiff is the holder in due course of the Note". **[1 RP 2]** Under New Mexico law, "[a] Motion to Dismiss is properly granted only when it appears that the plaintiff cannot recover or be entitled to relief under any state of facts provable under the claim." *Shea v. H.S. Pickrell Co.,* 1987-NMCA-149, ¶ 6, 106 N.M. 683, 748 P.2d 980. In considering whether a complaint states a cause of action upon which relief can be granted, the court must accept as true all the facts which are pled. *McCasland v. Prather*, 1978-NMCA-098, ¶ 5, 92 N.M. 192, 585 P.2d 336. "The general policy of the Rules requires that adjudication on the merits rather than technicalities of procedure and form shall determine the rights of the litigants." *Id.* ¶ 6. Only when there is a *total* failure to allege a matter essential to the relief

sought should dismissal be granted. *Cypress Gardens, Ltd. v. Platt*, 1998-NMCA-007, ¶ 6, 124 N.M. 472, 952 P.2d 467 (emphasis added) (citation and quotation omitted).

Thus, any doubts as to the sufficiency of the complaint must be resolved in favor of the party opposing dismissal. *Shea, supra*. For these reasons, there is no basis to grant a dismissal of the case upon a mandate to the district court. In addition, when a case is reversed it must go back to the point at which the error occurred upon mandate to the district court. *See State ex rel. Bujac v. Dist. Court of Second Judicial Dist. for Bernalillo County,* 1922-NMSC-023, ¶ 37, 28 N.M. 28 (holding that after an appeal a case must be returned to the point where the error occurred). In this case, the error occurred at the motion to set aside default judgment phase, and Plaintiff should be given an opportunity to file a motion for summary judgment supported by evidence proving its possession of the note before the filing of the complaint.

VIII. ASSUMING *ARGUENDO* THAT DISMISSAL IS WARRANTED, SUCH DISMISSAL MUST BE WITHOUT PREJUDICE

In foreclosure cases, the UCC controls the question of standing. 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 (N.M. Ct. App.) (non-precedential) (discussing the contractual basis for foreclosures in determining whether the plaintiff was the injured party entitled to enforce the note and mortgage); *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,* 998 N.E.2d 1132, 1139 (Ohio 2013) ("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*, 17 N.E.3d 81, 94 (Ohio Ct. App. 2014) (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,* 17 N.E.3d 81 at 94. Therefore, standing can still be a jurisdictional prerequisite necessary to invoke the jurisdiction of the court, as noted by the Supreme Court in the *Romero* Opinion. *Bank of New York v. Romero*, 2014-NMSC-007, ¶ 15, 320 P.3d 1 (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; *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 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 Plaintiff lacks standing, the determination of a lack of standing cannot have claim preclusive effect, and thus, cannot be with prejudice.

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.*

Analogous to the New Mexico law cited above, the federal courts have held that "[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." *Brereton v. Bountiful City Corp.*, 434 F.3d 1213, 1218 (10th Cir. 2006). (emphasis added). For the foregoing reasons, assuming this Court decides that a dismissal is warranted, which Plaintiff contends it is not, the dismissal *must* be without prejudice.

REQUEST FOR ORAL ARGUMENT

Due to the novel nature of the issues presented on appeal, Plaintiff respectfully requests oral argument on this appeal.

CONCLUSION

The district court did not abuse its discretion in determining that Defendants presented no meritorious defense to foreclosure or exceptional circumstances justifying setting aside the judgment, and thus, it did not err in denying the motion to set aside default judgment and order approving sale. For all the foregoing reasons, the district court's decision should be affirmed.

Respectfully Submitted,

ROSE L. BRAND & ASSOCIATES, P.C.

By: _____
ERAINA EDWARDS
Attorneys for Plaintiff/Appellee
7430 Washington Street, NE
Albuquerque, NM 87109
Telephone: (505) 833-3036
Fax: (505) 833-3040
Email: Eraina.Edwards@roselbrand.com

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed to the below counsel on the 1st day of December, 2015.

Eric N. Ortiz, Esq.
Joseph C. Gonzales, Esq.
Richard Pener, Esq.
Eric Ortiz & Associates
Attorneys for Appellants Leigh G. Webb and Patricia Gay Webb
510 Slate Ave. NW
Albuquerque, NM 87102
Telephone: (505) 720-0070
Facsimile: (866) 897-9491

_____
ERAINA M. EDWARDS, Attorney