IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court No.
DA 20-0179

THORCO, INC.,

Plaintiff/Appellant,

-vs-

WHITEFISH CREDIT UNION, and JOHN DOES 1-10,

Defendants/Appellees.

On Appeal from the Montana Eleventh Judicial District
Flathead County Cause No. DV-19-534B, Hon. Robert B. Allison

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STATEMENT OF THE ISSUES

Respondent restates the issues as follows:

1. Whether the District Court erred in granting WCU's motion to dismiss based on *res judicata* and collateral estoppel.

2. Whether the District Court abused its discretion in finding Thorco was a vexatious litigant.

STATEMENT OF THE CASE

This is the third appeal[1] from either Dennis and Donna Thornton (Thorntons) or Thorco, Inc. (Thorco) arising from Whitefish Credit Union's (WCU) attempt to foreclose on its security. Thorco, Inc., an entity owned and controlled by the Thorntons, borrowed $3.3 million from the WCU in March 2009 to subdivide and develop approximately 300 acres in Somers, Montana. As collateral, Thorco pledged the property in Somers ("Property"). WCU performed as agreed and lent $3.3 million and Thorco failed to pay it back at maturity. Considerable legal wrangling ensued, including two foreclosure actions (2012 and 2015), numerous counterclaims, and two bankruptcy filings (2014 and 2017). A settlement agreement was reached between the parties in April 2016 which provided Thorco and its shareholders, Dennis and Donna Thornton, with an

[1] *Thorco, Inc., Dennis and Donna Thornton v. WCU,* DA 16-0136; *Dennis and Donna Thornton v. WCU*, DA 18-0595; and *Thorco, Inc. v. WCU*, DA 20-0179

opportunity to retain the Property at a steep discount by way of an option. Thorco and the Thorntons failed to timely exercise the option. The Thorntons sued in 2018 for breach of contract and the District Court dismissed the case on summary judgment. This Court affirmed the District Court's summary judgment in *Thornton v. WCU*, 2019 MT 138N, 396 Mont. 549, 455 P.3d 435.

Two weeks after this Court handed down its decision, Thorco filed the same claim that the Thorntons filed. WCU moved to dismiss the complaint, have Thorco declared a vexatious litigant, and for Rule 11 sanctions against Thorco's counsel. After WCU filed its motion, Thorco amended its complaint without leave and asserted two new claims. The District Court granted WCU's motion to dismiss and declared Thorco a vexatious litigant. The District Court did not issue a ruling on WCU's motion for Rule 11 sanctions and WCU withdrew it so that a final judgment could be entered. Thorco appeals.

STATEMENT OF THE FACTS

This lawsuit is exactly the same as one decided by Judge Wilson in DV-18-336D and affirmed by this Court. (hereinafter sometimes referred to as the "Decided Case.")

The property at issue concerns about 500 acres in Somers, Flathead County. (*Amd. Compl.*, ¶ 4, Appellant's Appendix E) Thorco, Inc. borrowed money from

the WCU in 2009 for the purchase and development of the property and its principals, Dennis and Donna Thornton, husband and wife, personally guaranteed the Note. *Id.*, ¶¶ 5-6. Thorco, Inc. defaulted on the Note and WCU sued to foreclose in Cause No DV-12-174B (Allison). *Id.*, ¶ 8.

As part of a settlement, WCU entered into an option agreement with Thorco, Inc., Dennis Thornton, and Donna Thornton to pay $1,400,000 for a release of the Mortgage instead of the over $4 million owed. *Id.*, ¶¶ 11-18. Pursuant to the settlement agreement, Thorco and the Thorntons executed quitclaim deeds in the event they did not timely exercise the option and WCU executed releases in the event they did timely exercise the option. *Id.*, ¶¶ 19-21. Finally, the Settlement Agreement required the executed documents to be placed in escrow but was silent on which party was to place them in escrow. *Id.*, ¶ 20.

In the Decided Case, Dennis and Donna Thornton sued WCU for $60 million dollars for failing to deposit the executed documents with the title company. *See Compl.*, DV-18-336D, ¶ 18, Appellant's Appendix F; M.R.Civ.P. 201 (judicial notice); Compilers Comments (This rule is identical to the Federal rule except in one respect); *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 999 (9th Cir. 2018) ("[a] court may take judicial notice of matters of public record without converting a motion to dismiss into a motion for summary judgment."); *Dichter-Mad Family Partners, LLP v. United States*, 709 F.3d 749, 762 (9th Cir.

2013) (the court may consider matters of judicial notice without converting the motion to dismiss into a motion for summary judgment) (court can take judicial notice of pleadings when considering a motion to dismiss). In Count 1, they claimed breach of contract for WCU failing to place the executed documents in escrow. *Compl.*, DV-18-336D, ¶¶ 8, 17. In Count 3, they claimed breach of the implied covenant of good faith and fair dealing for the same conduct. *Id.*, ¶ 26. Judge Wilson granted WCU summary judgment on all counts and this Court affirmed.

Fifteen days after this Court's opinion, Thorco filed the present Complaint. Just as in Count 1 of the Decided Case, Thorco claimed breach of contract for WCU failing to deposit the executed documents into escrow. *Compl.*, ¶¶ 23, 39. Just as in Count 3 of the Decided Case, Thorco claimed breach of the implied covenant of good faith and fair dealing in Count 2 of the present case. *Id.*, ¶¶ 42-48.

In Judge Wilson's ruling on summary judgment in the Decided Case, he ruled and this Court affirmed that, "As a matter of law, no obligation accrued for any party to undertake the recording of the mortgage release(s), because *Thorco, Inc.*, and/or the Thorntons failed to perform the condition precedent." (*Order*, DV-18-336D, at 10, Appellant's Appendix C) (emphasis added) Regarding Thorco's allegation that as a result of WCU's failure to deposit the mortgage releases into

escrow it was prohibited from completing the repeated attempts to exercise the option to purchase the property," Judge Wilson already ruled and this Court affirmed that

> It is undisputed that neither *Thorco, Inc.* nor the Thorntons timely exercised the purchase option. . . .
>
> As discussed above, even if the Settlement Agreement was construed to impose a duty on WCU to open an escrow and/or to place the mortgage releases in escrow, any alleged failure of WCU to do either act was of no consequence. Even if an escrow had been opened and the mortgage releases were held in escrow as contemplated by the Settlement Agreement, the title of the Property would have been unaffected because documents held in escrow are not part of the public record.

Id. at 10, 12-13.

Based on the doctrines of issue and claim preclusion, WCU filed a motion to dismiss Thorco's complaint in the present case. In yet another maneuver in this long history of legal maneuvers to prevent WCU from foreclosing, Thorco first responded to WCU's motion by filing an amended complaint alleging two new specious bases for breach of contract: (1) WCU failed to file a Form 1099 (Count II) and (2) WCU breached a second agreement to deposit the mortgage releases into escrow (Count III). Thorco never moved for leave to file an amended complaint as required under M.R.Civ.P. 15(a)(1)(B) and its amended complaint was not properly before the District Court. WCU objected to its untimeliness but also argued its motion should be granted even considering the amended complaint.

(*WCU's Reply to Motion to Dismiss*, pp. 9-13, Docket #14; *Order* at 6, Docket #15) The District Court granted WCU's motion to dismiss. Thorco appealed.

STANDARD OF REVIEW

WCU agrees with Thorco's standard of review.

SUMMARY OF THE ARGUMENT

Thorco's lawsuit is the same case that this Court just decided and therefore *res judicata* and collateral estoppel bar it. Thorco's request to have this Court reconsider its earlier ruling under the guise of "manifest injustice" is exactly why this Court has explained that the policy behind these doctrines is to establish the law of the case to put an end to incessant litigation. Since the ruling in the Decided Case is the law of the case, Judge Allison in the present case cannot interpret the agreement differently. Also, Thorco's desired interpretation is irrelevant because regardless of *when* the documents were to be deposited, this Court held that neither party had an obligation to deposit them and neither the Thorntons nor Thorco exercised the option.

Thorco's second argument – that it has "new" claims that were never litigated – provides no relief. Actually, Thorntons presented evidence of the alleged breach of the second agreement in the Decided Case but never appealed it.

Thorntons had every opportunity to amend to submit this evidence as a claim but never did. Even when they filed a proposed amended complaint, the Thorntons never alleged a breach of the second agreement. The Thorntons also had every opportunity to add Thorco as a party. They had months to do it but waited and then missed the deadline. When they filed a belated motion to amend, their claims and those of Thorco, were simply derivative of the claims Judge Wilson just ruled on in the Decided Case. Again, the proposed amended complaint never alleged a second breach of contract.

The District Court should be affirmed.

ARGUMENT

Issue 1: Whether the District Court erred in granting WCU's motion to dismiss based on *res judicata* and collateral estoppel.

Thorco submits two arguments supporting reversal. First, injustice would result because this Court got it wrong the first time. *Opening Br.*, 26-36. Second, its alleged "new" claims were not adjudicated in the Decided Case. *Id.*, 20-26.

A. Thorco's claims are the same that this Court just affirmed in *Thornton v. WCU* and are barred by both *res judicata* and collateral estoppel.

Thorco does not dispute the District Court's ruling with respect to application of the facts to the elements for *res judicata* and collateral estoppel, except in one sense discussed below. Instead, it relies on an equitable argument

that "manifest injustice" would result if this Court didn't reconsider its earlier ruling. Notably, it cites no law supporting its argument that re-litigating the merits is a basis to argue manifest injustice. If the elements of *res judicata* are met, the result is just and no injustice occurs. Here, all of the elements are easily met.

In considering a motion to dismiss for failure to state a claim upon which relief may be granted under Rule 12(b)(6), M.R.Civ.P., all pleaded facts are admitted, the claim's allegations are taken as true and the claim is construed broadly and favorably towards the pleader. *Fennessy v. Dorrington,* 2001 MT 204, ¶9, 306 Mont. 307, 32 P.3d 1250. Courts are not required to accept legal conclusions as true. *Threlkeld v. Colorado,* 2000 MT 369, ¶ 33, 303 Mont. 432, 16 P.3d 359. Dismissal is justified when the allegations of the complaint itself clearly demonstrate that plaintiff does not have a claim. *Wheeler v. Moe*, 163 Mont. 154, 161, 515 P.2d 679, 683 (1973).

The doctrine of issue preclusion bars the same parties or any party in privity thereto from re-litigating in a second suit those issues that were decided in a previous suit, notwithstanding the fact that the second suit is based upon a different cause of action. *Denturist Ass'n of Mont. v. State*, 2016 MT 119, ¶ 12, 383 Mont. 391, 372 P.3d 466 (citing *Baltrusch v. Baltrusch*, 2006 MT 51, ¶ 15, 331 Mont. 281, 130 P.3d 1267). The elements of issue preclusion are:

> (1) the identical issue raised was previously decided in a prior adjudication;

(2) a final judgment on the merits was issued in the prior adjudication;

(3) the party against whom collateral estoppel is now asserted was a party or in privity with a party to the prior adjudication; and

(4) the party against whom preclusion is asserted must have been afforded a full and fair opportunity to litigate any issues which may be barred.

Id., ¶ 12.

Here, all four elements are met. The first element is met because Thorco's claims are based on the allegation that WCU failed to deposit the executed documents into an escrow account and thereby prevented Thorco from exercising the option. Based on this allegation, Thorntons in the Decided Case asserted claims for breach of contract and breach of the implied covenant of good faith and fair dealing, just as Thorco does in the present case. The second element is met because Judge Wilson ruled in favor of WCU on these issues and claims and this Court affirmed.

The third element is met because Thorco is 100% owned by Dennis and Donna Thornton. The plaintiffs in both cases need not be identical for privity to exist. Rather, privity exists where "two parties are so closely aligned in interest that one is the virtual representative of the other . . . ." *Denturist*, ¶ 14 (quoting *Nordhorn v. Ladish Co.* (9th Cir. 1993), 9 F.3d 1402, 1405). For example, in *Denturist*, a dentist ("Brisendine") sought to challenge a rule promulgated by the

Montana Board of Dentistry (the "Board"). *Id.*, ¶ 3. The Board argued that the validity of the rule had already been upheld in a suit brought by the Denturist Association of Montana (the "Association"). *Id.*, ¶¶ 3-6. In ruling in favor of the Board, the court determined that privity existed between Brisendine and the Association despite the fact that the two suits had different plaintiffs, noting:

> [t]he [prior] litigants included every denturist in Montana, and they brought their suit "on behalf of the profession of denturitry." Even though not a denturist at the time of the earlier litigation, Brisendine's interests are "closely aligned," if not exactly aligned, with the prior denturists who made the same challenge that Brisendine now makes.

Id., ¶ 15. In this case, Thorco's interests are exactly aligned with the Thorntons. *See also Adams v. Two Rivers Apartments, LLLP*, 2019 MT 157, ¶ 13, 396 Mont. 315, 444 P.3d 415 (privity existed between partnership and its general partners because interests of entities in litigation were closely aligned).

Finally, the fourth element is met because Thorco, Inc. is the alter ego of its shareholders, the Thorntons, and therefore were provided an opportunity to litigate the issue as a matter of law. This Court recently made it clear in *Adams v. Two Rivers Apartments, LLLP* that the principals of a business organization may not use organizational formalities to obtain a second bite at the apple – i.e., issue preclusion will bar principals of a business organization from re-litigating issues that were decided in a previous suit involving the organization itself (rather than the principals).

In *Adams*, a partnership brought suit against a builder alleging negligent construction. *Id.*, ¶ 2. The parties eventually signed a mutual release and agreed to dismiss with prejudice. *Id.* Residents of the building subsequently brought suit against the partnership and its general partners, who in turn filed a third-party complaint against the builder for contribution. *Id.*, ¶ 3. The builder was granted a motion to dismiss on the basis of issue preclusion. *Id.*, ¶¶ 3-4. On appeal, the Supreme Court affirmed and, with regard to the fourth element, held that the fourth element had been satisfied despite the fact that the general partners had not been party to the original suit:

> [t]he General Partners offer no explanation why they did not participate as plaintiffs in the [prior] case, even though they are privies of [the partnership] and thus had the opportunity to be named parties…. Their Third-Party Complaint seeks indemnification or contribution for [the builder's] alleged faulty construction that caused the mold—the very issue and claim litigated and settled in the [prior] case. The General Partners had the opportunity to pursue their claims against [the builder] in the [prior] case but inexplicably chose not to be included. The General Partners have not met their burden of establishing the absence of a full and fair opportunity to litigate.

Id., ¶ 19.

Thorco chose to not appear in the Decided Case until after the deadline to amend passed, at which time Judge Wilson granted summary judgment to WCU. (This argument is more fully developed below.)

Therefore, in this case, the District Court correctly dismissed Thorco's complaint on the basis that Counts 1 and 3 for failing to place the documents in escrow was nearly "verbatim" of the same counts in the Decided Case. *Order* at 6.

On appeal, Thorco argues for the first time, that the fourth element – full and fair opportunity – was not met based on the holding of *Kubacki v. Molchan* (2007) which held that when a court entertains litigation that could terminate the real estate interests of third parties, collateral estoppel requires those parties be made a part of the proceedings and served with notice. *Resp.* at 27-30. Having never raised this argument below, it should be rejected on appeal. *Flowers v. Bd. of Pers. Appeals*, 2020 MT 150, ¶ 14, 400 Mont. 238, 465 P.3d 210. Thorco never argued the elements of issue preclusion and in particular the fourth element of full and fair opportunity, never argued the *Kubacki* case, and never argued that this case involved claims for possession and ownership of real estate. (*Thorco's Resp. to Mot. to Dismiss*, Docket #9, pp. 7-10, Appendix 1[2])

Even if this Court considers the argument, it is not true that "this case involves claims for possession and ownership of real property." *Id.* at 30. In the Decided Case, the Thorntons filed damage claims for breach of contract and prayed for $80 million in damages. (*Compl.* in the Decided Case, pp. 9-10, Appellant's Appendix F) The Thorntons did request specific performance but only

[2] For convenience, Appellee's appendix will use numbers since Appellant used letters.

as an alternative remedy with the request that they be granted another 18-month option period. *Id.* Similarly in the present case, Thorco prayed for damages as a primary remedy and specific performance as a secondary remedy. (*Amd. Compl.*, Docket #10, p. 8) Unlike *Kubacki*, the Decided Case and the present case do not involve the transfer of title of real property. Also, since title has transferred following this Court's opinion in the Decided Case, any issue of possession and ownership of property is moot. *See, e.g., Turner v. Mountain Eng'g & Constr.*, 276 Mont. 55, 63, 915 P.2d 799, 804 (1996) ("A party who is confronted with a judgment ordering a foreclosure sale and who allows the foreclosure sale to proceed runs the risk that his appeal will thereby be rendered moot").

Finally, *Kubachi* is easily distinguishable because that case involved an entirely separate third-party that had no control over the positioning of the action at issue, and thus was denied a fair opportunity to litigation. *Id.*, ¶ 22. By contrast, in the case at bar the Thorntons as plaintiffs had complete control over the positioning of the action, chose to bring the claim in their own name, and could have easily added Thorco as a party if done so timely. Therefore, any lack of opportunity did not result from a *denial* that was beyond Thorco's control as was the case in *Kubachi*, but rather a conscious strategic decision by Thorco's principals to waive the opportunity to litigate.

Thorco next argues this Court's affirmation of Judge Wilson's ruling was wrong and it wants a reconsideration. *Opening Br.* at 30-36. Whether a prior court reached the correct result is not an element of issue preclusion, nor has Thorco cited any supporting law. The analysis stops here. This Court's opinion is the law of the case.

In *Baltrusch v. Baltrusch*, 2006 MT 51, ¶ 15, 331 Mont. 281, 130 P.3d 1267, this Court stated, "*Res judicata* and collateral estoppel are doctrines that embody a judicial policy that favors a definite end to litigation, whereby we seek to prevent parties from incessantly waging piecemeal, collateral attacks against judgments. The doctrines deter plaintiffs from splitting a single cause of action into more than one lawsuit, thereby conserving judicial resources and encouraging reliance on adjudication by preventing inconsistent judgments." In *Blaine Cty. v. Stricker*, 2017 MT 80, ¶ 40, 387 Mont. 202, 394 P.3d 159, this Court stated, "when we state in an opinion 'a principle or rule of law necessary to the decision, such pronouncement becomes the law of the case, and must be adhered to throughout its subsequent progress.'"

Since the ruling in the Decided Case is the law of the case, Judge Allison in the present case cannot interpret the agreement differently. Also, Thorco's desired interpretation is irrelevant because regardless of *when* the documents were to be deposited, this Court held that neither party had an obligation to deposit them:

> Therefore, as a matter of law, **no obligation accrued for either party** to ensure the recording of the mortgage release or **to open an escrow** before the option period expired.

Opinion, ¶ 8, Appendix 2 (emphasis added). The desired interpretation is further irrelevant because regardless of *which party* was obligated or *when* the documents should have been deposited, this Court held that neither Thorco nor the Thorntons exercised the option:

> Thorco did not exercise its option to purchase the property.
> . . .
> It is undisputed that Thorco failed to exercise the purchase option within the specific period.

Opinion, ¶¶ 4, 8.

Thorco argues that prior counsel "confused the issues." *Opening Br.*, 32. Conduct of former counsel is neither an element of *res judicata* nor an exception thereto. *Chien v. Skystar Bio Pharm. Co.*, 623 F. Supp. 2d 255, 261 (D. Conn. 2009). In *Chien*, a similar argument was made and the Court stated, "Mr. Chien may have a claim against his prior counsel for malpractice, but that does not allow him to circumvent the doctrine of *res judicata*. *See generally* Restatement 2d of Judgments, § 20 (outlining exceptions to *res judicata*, not including error of counsel). In our legal system, litigants choose their own counsel, and fairly or not, Mr. Chien must pay the price for any errors he says his counsel made." If Thorntons' counsel failed to make the correct argument on appeal, those arguments are considered waived. *Bragg v. McLaughlin*, 1999 MT 320, ¶ 21, 297 Mont. 282,

993 P.2d 662 (arguments not made in previous appeals barred by doctrine of *res judicata*) (overruled on other grounds).

Thorco argues that it alleged its attempt to exercise the option by offering $1.4 million to First American Title in accordance with the agreement, and this should be taken as true. *Opening Br.*, p.13, ¶ 7; p.35. While good faith allegations are taken as true, the requirement for same should not allow a party to commit fraud upon the Court. Dennis Thornton already testified on April 16, 2018, under oath that he and his wife, "as officers and/or agents of Thorco, Inc. . . . attempted to open the escrow," not that they had offered the $1.4 million. (*Aff. Dennis Thornton*, DV-18-336, Appendix 3, ¶ 5) He also testified that *he did not have the money* but only had one or more lenders of investors who "indicated their willingness" to provide money before they withdrew it. *Id.*, ¶ 9. He then testified inconsistently that the source of funds was neither an investor nor a lender but a buyer who made a verbal (ie, invalid) agreement to purchase the property for $750,000 and then retain Thorco to undertake $2 million in development work. *Id.*, ¶ 16. More inconsistency is found in Dennis Thornton's August 2018 affidavit wherein he testified that Thorco (ie, he was testifying on behalf of Thorco) entered into a buy-sell agreement with Jeff Cameron and since the title report still showed its mortgage of $3,360,000, he went to First American Title and told them "I needed a fully signed copy from the escrow." *Aff. Dennis Thornton*, 8/17/18,

Appendix 4, ¶¶ 4-5. He never testified to what he alleges in the present case, that is that he "went to First American Title and offered the money to exercise the purchase Option." *Opening Br.* at 35.

Even more inconsistency is found in Thorntons' response to summary judgment wherein his counsel made a statement of allegedly undisputed facts from all of the involved players. Instead of a buy sell agreement with Mr. Cameron for $750,000 and $2 million in development work, Dennis Thornton stated that a person named Mr. Harshbarger agreed to pay $15 million for only 300 acres (ie, half the property) and hire Thorco to complete $7 million in development work. (*Thorntons' Resp. to WCU's MSJ*, Appendix 5, p. 11-12, ¶¶ 20, 27) Instead of Dennis Thornton visiting First American Title, now Mr. Harshbarger visited First American Title and discovered it had no record of any agreement. (*Id.*, p. 13, ¶¶ 30-32)

Dennis Thornton can't keep his story straight but the bottom line is that courts are not required to accept legal conclusions as true (*Threlkeld, supra*), the law of the case as decided by this Court is that Thorco did not exercise the option, and its allegation that it attempted to exercise the option is not only untrue, it need not be taken as true since it is in direct conflict with the law of the case.

B. Evidence of Thorco's "new" claims was presented in the Decided Case and the Thorntons and Thorco had plenty of opportunity to assert claims in the Decided Case based on this evidence.

Thorco's second basis for arguing the District Court erred is that WCU breached a second agreement, that the claim arose after the complaint was filed in the Decided Case, and that it have never been adjudicated.[3] *Opening Br.*, 20-26. Thorco's claim is exactly the "incessant piecemeal attack" that this Court in *Baltrusch* explained should not occur. By raising new *claims*, as opposed to the same *issues* in a prior litigation, the legal doctrine shifts from *issue* preclusion (collateral estoppel) to *claim* preclusion (*res judicata*).

> *Res judicata*, or claim preclusion, bars the relitigation of a claim that the party has already had an opportunity to litigate. Collateral estoppel, or issue preclusion, bars the reopening of an issue that has been litigated and determined in a prior suit. We have indicated that *res judicata* will apply once a final judgment has been entered.

Baltrusch, ¶ 15 (internal citations omitted).

Res judicata, or claim preclusion, bars a party from relitigating a matter that the party already had the opportunity to litigate. *Baltrusch*, ¶ 15. "This includes claims that were or *could have been* litigated in the first action." *Adams v. Two*

[3] Thorco has apparently abandoned its first alleged "new" basis -- failing to file a Form 1099 – because it makes no argument on appeal. *Skinner v. Allstate Ins. Co.*, 2005 MT 323, ¶ 9, 329 Mont. 511, 127 P.3d 359 (issues raised in post-trial motion but not briefed on appeal deemed abandoned). For the record, Thorco actually made the Form 1099 allegation in the Decided Case. *See (Proposed) Amended Complaint*, ¶ 10.V, p. 8, *attached to Thorco's Motion for Leave to Amend Complaint*, DV-18-336D, Appellant's Appendix. B. Neither Thorco nor Thorntons asserted on appeal this claim for breach.

Rivers Apartments, ¶ 7, citing *Brilz v. Metro. Gen. Ins. Co.*, 2012 MT 184, ¶ 21, 366 Mont. 78, 285 P.3d 494. *Res judicata* applies if the subject matter is the same and the issues are the same and relate to the same subject matter. *Adams*, ¶ 7.

In *Estate of Kinnaman v. Mt. W. Bank, N.A.*, 2016 MT 25, 382 Mont. 153, 365 P.3d 486, a borrower's estate brought eight claims against a lender which the lender argued were barred by the doctrine of claim preclusion. *Id.* In dismissing, the *Kinnaman* Court found the third element pivotal, quoting with favor the following language from the Restatement (Second) of Judgments: "[w]hen a valid and final judgment rendered in an action extinguishes the plaintiff's claim [. . .], the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose." *Id.*, ¶18. The Court elaborated further:

> [t]he concept of "transaction" here "connotes a natural grouping or common nucleus of operative facts." Thus, where one act causes a number of harms to, or invades a number of different interests of, the same person, there is still only one transaction. The rationale and premise underlying this approach is that modern procedural systems afford parties ample means for fully developing the entire transaction in one action—e.g., by permitting the presentation of all material relevant to the transaction without artificial confinement to any single substantive theory or kind of relief and without regard to historical forms of action or distinctions between law and equity; by allowing allegations to be made in general form and reading them indulgently; by allowing allegations to be mutually inconsistent subject to the pleader's duty to be truthful; by permitting

> considerable freedom of amendment and tolerating changes of direction in the course of litigation; and by enabling parties to resort to compulsory processes besides private investigations to ascertain the facts surrounding the transaction. "The law of res judicata now reflects the expectation that parties who are given the capacity to present their 'entire controversies' shall in fact do so."

Id. (internal citations omitted). The *Kinnaman* Court ultimately concluded that the borrower "had an opportunity in the [prior] foreclosure actions to present the 'entire controversy' and **it should have done so**." *Id.,* ¶¶19, 20 (emphasis supplied).

Here, Thorco's new claim involves the same subject matter – the option agreement – as in the Decided Case. Whether WCU had an obligation to deposit the releases in escrow, when the option period expired, and whether the option was ever exercised were all issues in the Decided Case. Proof that it involved the same subject matter lies in the fact that Dennis Thornton did, in fact, raise WCU's alleged breach of the second agreement is his affidavit filed in response to summary judgment in the Decided Case. He testified that WCU agreed to open an agreement upon the condition that he dismiss his bankruptcy and to stay with the original Agreement if WCU placed it into escrow, and that when Thorco dismissed its bankruptcy, WCU retrieved the documents from escrow. (*Aff. D. Thornton*, Aug. 17, 2018, ¶ 62, Appendix 4) Judge Wilson considered all evidence of record

(Rule 56, M.R.Civ.P.) and granted summary judgment in spite of this testimony. Thorntons never appealed on this basis and thus it is the law of the case.

Aside from just Dennis Thornton's testimony, both the Thorntons and Thorco had plenty of opportunity to add this claim in the Decided Case. Thorco alleged this second agreement was entered approximately April 23, 2018. (*First Amd. Compl.*, ¶ 51-55, Appellant's Appendix B) Thorco alleged WCU breached this second option period after it dismissed its second bankruptcy, which occurred on May 21, 2018. (Exhibit I to *WCU's M.S.J.,* DV-18-336D, Appellant's Appendix G) Per the Scheduling Order in the Decided Case, the deadline to amend pleadings and join additional parties was September 14, 2018. (Appendix 6) Therefore, the Thorntons and Thorco had approximately four to five months before the deadline passed to amend its complaint and add this claim. In fact, Thorntons would be compelled to amend and add this claim as it involved the same transaction. *Brilz,* ¶¶ 23-30 (claim preclusion acts as common-law compulsory joinder requirement for claims arising out of same transaction).

Thorco's alleged claims are also contrary to the rule of law established in the Decided Case. This Court held that the Settlement Agreement was neither modified, extended, nor renewed, and that Thorco failed to *timely* exercise its option. *Opinion*, ¶¶ 4, 8. Thorco cannot now claim that the Settlement Agreement was modified or that it could have timely exercised the option.

On appeal, Thorco makes two arguments: that it never had the opportunity to join the Decided Case and thus (2) it was legally prohibited from pursuing these claims. The record reflects otherwise.

Judge Wilson did not "prohibit" Thorco from the opportunity to participate. He ruled that the Thorntons were not entitled to add Thorco as a party *at the time requested* as a matter of law. Of course, Thorco, as a party to the option, would have a right to participate in the litigation. Thorco's principals chose to wait until the deadline in September rather than amending right after Thorco's bankruptcy was dismissed in May. On the day of the deadline, Thorntons failed to follow the rules of procedure and seek leave.[4] They also failed to demonstrate "extraordinary circumstances" for filing after WCU's summary judgment motion. (*Order*, Appellant's Appendix A) When Thorntons eventually filed their untimely motion for leave to amend, Judge Wilson granted summary judgment to WCU and denied the motion for leave to amend because Thorco's claims were simply derivative of the claim that WCU failed to open the escrow. (*Order*, Appellant's Appendix C, at 15-19) Thus, the claim was futile and Thornton's failed to meet their burden for a motion to amend. *Citizens Awareness Network v. Mont. Bd. of Envtl. Review*, 2010 MT 10, ¶ 16, 355 Mont. 60, 227 P.3d 583. This Court affirmed that the proposed claims were derivative. *Opinion*, ¶ 12.

[4] Likewise, in this case, Thorco failed to seek leave to amend and instead just filed an amended complaint.

Thorco argues that it "made every effort to present those claims." *Opening Br.*, 25. This statement is false. Thorntons' proposed amended complaint consisted of 124 paragraphs of allegations and 11 counts[5]. In those allegations, Thorntons never once mentioned a renewed option, a second agreement, that the documents were delivered but then removed them from escrow, or that Thorco dismissed its bankruptcy in reliance thereon. In fact, it alleged the opposite: that they asked their own attorney to request the escrow to be opened but they didn't make the request to WCU; that WCU breached the Agreement, not a second agreement; and they alleged breach of the implied covenant based on WCU's conduct regarding the original agreement, not an alleged second agreement. (proposed amended complaint, Appellant's Appendix B, ¶¶ 11, 36, 47) In sum, Thorco's statement in its opening brief – "Thorco made every effort to present those claims but was prohibited from doing so by Judge Wilson." – is absolutely false.

[5] Count 1 – Breach of Contract;
Count 2 – Breach of Contract – Specific Performance;
Count 3 – Breach of the Covenant of Good Faith and Fair Dealings;
Count 4 – Breach of Contract – Impossibility;
Count 5 – Tortious Interference with Contract – WCU;
Count 6 – Tortious Interference with Contract – Sean Frampton and the Frampton Purdy Law Firm
Count 7 – Commercial Interference with Contract – WCU and its agent Aaron Archer
Count 8 – Commercial Interference with Contract – Sean Frampton and the Frampton Purdy Law Firm
Count 9 – Damages Resulting from Legal Malpractice of the Attorneys and Law Firms Representing the Plaintiffs
Count 10 – Damages to Dennis and Donna Thornton Personally Due to Breach of Contract
Count 11 – Punitive Damages

Thorco's second part to its argument is that it was legally prohibited from presenting claims for a second breach of contract. Thorco's heavy reliance on *Moats Trucking* is misplaced. *Opening Br.*, 21. In *Moats Trucking*, this Court held that individual shareholders who controlled all of the stock of a corporation could not disregard the corporate entity and pursue an action on their own behalf when the cause of action accrued to the corporation. *Id.*, 231 Mont. 474, 477, 753 P.2d 883, 885 (1988) Using this authority, WCU argued that the Thorntons, although they were shareholders, were not the title holders to the property and therefore couldn't bring a damage claim for $60-80 million dollars. (Appellant's Appendix G, p. 5-6) Judge Wilson never ruled on this argument. (Appellant's Appendix C)

Thorco's argument is misplaced because even though the Thorntons as sole shareholders could not assert damage claims that belonged to Thorco, nothing prohibited them from amending the lawsuit to add Thorco as a party and asserting its own damage claim. They just didn't do it and when they tried to do it, they did it incorrectly and untimely. Also, the Thorntons, as parties to the original option agreement, had standing in their own right to assert a claim for a breach of a second agreement but never did. Therefore, Thorco's argument that it was legally prohibited from presenting claims for an alleged second breach is incorrect and unavailing.

As a final word on the legal point, Thorco thinks it "remarkable" that WCU took opposite positions on Thorntons' relationship with Thorco. *Opening Br.*, 17. Thorco misunderstands the law and WCU's arguments. In WCU's motion for summary judgment in front of Judge Wilson, the issue was *standing* and WCU argued under *Moats Trucking* that the Thorntons lacked standing to sue on claims belonging to Thorco. In Judge Allison's court, the issue was *privity* under the third element of issue preclusion and WCU argued under *Denturist*, 2016 MT 119, that privity existed because the "two parties are so closely aligned in interest that one is the virtual representative of the other." (*WCU's Mot. to Dismiss*, Docket #4, p. 6 citing to *Denturist*, ¶ 14) These arguments are neither opposite nor inconsistent.

Accordingly, the District Court correctly ruled that,

> In any event, principles of privity and *res judicata*, *infra,* apply because the ROA claim in Count III is a new claim, not an issue addressed in prior litigation. Count III and its ROA claim could have been raised easily in DV-18-336 for all to ponder. It was not, and therefore will not be considered in the instant case.

Order at 6-7.

> … Thorco's interests are fully aligned with the interests of the Thorntons who own 100% of Thorco, and entered into the Settlement Agreement collectively with the Thorntons – their privity is indisputable. Thorco could have joined DV-18-336 as a party plaintiff had its management chosen to do so, and could have asserted claims such as the ROA claims described in Counts III and IV of the First Amended Complaint. Instead, Thorco's corporate interest in DV-18-336 was represented by its owners, the Thorntons.

Order at 7.

> The Thorntons have offered no explanation as to why Thorco was not a party in DV-18-336 even though they were in privity with Thorco and thus had the opportunity to include Thorco as a party plaintiff in that suit. Thus the Thorntons have not met their burden of establishing the absence of a full and fair opportunity to litigate.

Order at 8.

In sum, the District Court did not err in granting WCU's motion to dismiss based on the doctrine of *res judicata* and collateral estoppel. This Court should AFFIRM on issue 1.

Issue 2: Whether the district court abused its discretion in finding Thorco was a vexatious litigant.

Although the standard of review is abuse of discretion, this Court has said the following specific to a finding of vexatious litigant: "We review a pre-filing order entered against a vexatious litigant for abuse of discretion. The question under this standard is not whether we would have reached the same decision as the trial judge, but whether the trial judge acted arbitrarily without conscientious judgment or exceeded the bounds of reason." *Belanus v. Potter*, 2017 MT 95, ¶ 15, 387 Mont. 298, 394 P.3d 906 citing *Boushie v. Windsor*, 2014 MT 153, ¶ 8, 375 Mont. 301, 328 P.3d 631.

The facts presented to the District Court overwhelmingly show that it neither acted arbitrarily without conscientious judgment nor exceeded the bounds of reason. This lawsuit is the third district court complaint in a serious of efforts by Thorco and its principals to frustrate WCU's efforts to foreclose on its collateral. Litigation involving the Thornton's property in Somers has been ongoing since 2011, more than eight years. The original loan matured in March 2011 and WCU first filed to foreclose in February 2012. Since that initial filing, Thorntons and Thorco have used process to cause delay and tie up court resources all in an effort to prevent WCU from obtaining the property through foreclosure. In addition to three district court complaints, Thorco has filed a bogus appeal to the Montana Supreme Court and two bankruptcies which it voluntarily dismissed. Judge Wilson summarized the procedural history of the first lawsuit, DV-12-174B:

> In February 2012, WCU commenced a foreclosure action against Thorco, Inc. and the Thorntons. The action involved two tracts of land - a 300 acre tract and a 200 acre tract ("the Property"). Pursuant to Mont.R.Evid. 202(6), the Court takes judicial notice of the proceedings in *Whitefish Credit Union v. Thorco, Inc., Dennis Thornton, Donna Thornton, and John Doe(s) 1-10*, Cause No. DV-12-174 in Department B of this District Court (hereinafter "DV-12-174"). In DV-12-174, Thorco, Inc. and the Thorntons asserted a host of counterclaims against WCU, including bad faith, breach of contract, constructive fraud and negligence, and sought punitive damages. DV-12-174, Dkt. No. 6, Ans. and Countercl. to Pl.'s Compl. for Foreclosure at pp. 12-15. In March 2014, WCU was granted summary judgment on its claim for foreclosure and on Thorco, Inc.'s and the Thorntons' counterclaims, except their counterclaim for negligence and punitive damages. See DV-12-174 Dkt. No. 156, Or. and

> Rationale on Pending Mots (March 10, 2014). In April 2014, WCU was awarded attorney fees. DV-12-174 Dkt. No. 171, Or. and Rationale on Mot. for Atty Fees (April 21, 2014). Trial was scheduled for May 27, 2014. DV-12- 174 Dkt. No. 163, Min. Entry (Mar. 27, 2014). In early May 2014, the trial date was vacated. DV-12-174 Dkt. No. 175, Or. Vac. Sched. Or. (May 06, 2014). On May 27, 2014 Thorco, Inc. filed for bankruptcy protection under Chapter 11. DV-12-174 Dkt. No. 181, Def.s' Not of Bankr. Filing (May 29, 2014). Thorco, Inc.' s bankruptcy case was dismissed on March 03, 2015. DV- 12-174, 0kt. No. 193, Def.s' Not. of Dismiss. Of Thorco, Inc.'s Ch. 11 Bankr. (Sept. 18, 2015).

In addition to those findings about the 2012 case, the following should be considered. Trial in the 2012 case was set for May 5, 2014, and Thorco filed for bankruptcy the first time in early May 2014, resulting in the trial being vacated. Thorco's bankruptcy was dismissed on March 3, 2015. When WCU sought a judgment of foreclosure and order of sale and the order of sale was granted on February 23, 2016, Thorco filed an interlocutory appeal to the Montana Supreme Court on February 29, 2016 and, since it was obviously an interlocutory and premature appeal, it was dismissed a month later on March 22, 2016.

Mediation was held on April 4, 2016. As a result of that mediation, the parties entered into the Settlement Agreement at issue. The Agreement provided Thorco yet another opportunity to regain its property at a steep discount. The 18-month deadline set forth in the Settlement Agreement ran until December 8, 2017 but was extended by WCU's counsel to December 27, 2017. (Exhibit K to *WCU's M.S.J.*, DV-18-336D, Appellant's Appendix G) On the very day of the deadline,

Thorco filed its second bankruptcy in what appears to be an attempt to prevent WCU from recording the deeds it held pursuant to the Settlement Agreement. (*Id.*, Exhibit I to *WCU's M.S.J.,* DV-18-336D) Again, Thorco dismissed its own bankruptcy without an order of discharge.

Even though neither Thorntons nor Thorco exercised their option, Thorntons sued WCU in DV-18-336D claiming $80 million in damages. The Court granted summary judgment to WCU. (*Order,* DV-18-336D, Appellant's Appendix G)

After the rulings and judgment in DV-18-336D, Dennis Thornton recorded misleading documents and stated false legal conclusions in recordings with the Flathead County Clerk and Recorder. On June 26, 2019, Dennis Thornton, on behalf of Thorco, Inc., recorded a *Notice of Pendency of Action* against the Property stating, "This action seeks specific performance of a contract allowing Thorco, Inc. to purchase the properties. . . .," even though Judge Wilson's order of October 4, 2018 undisputedly ruled that Thorco, Inc. did not timely exercise the purchase option. (*Order* at 10, Appellant's Appendix G) Recently, Judge Wilson ordered that Thorntons' *Notice* (Rec. No. 201800026040) and *Amended Notice* (Rec. No. 201800026153) "are diametrically opposed to [his] rulings and judgment which were affirmed" and then ordered that they be stricken from the record. (*Order,* DV-18-336D, Appendix 7)

Within 15 days after the Supreme Court affirmed Judge Wilson, Thorco, Inc. filed the present lawsuit and, of course, recorded a *lis pendens* to prevent WCU from selling the property.

As this Court has expressly declared, "[a] District Court possesse[s] authority to restrict a vexatious litigant's access to the courts." *Motta v. Granite Cty. Comm'rs*, 2013 MT 172, ¶ 22, 370 Mont. 469, 304 P.3d 720 (citations omitted). Put another way, a vexatious litigant can be sanctioned by way of a pre-filing order which prohibits the litigant from filing in any Montana Court without first obtaining leave from said court. *McCann v. McCann*, 2018 MT 207, ¶ 45, 392 Mont. 385, 425 P.3d 682.

Montana Courts utilize the following five factor test (adopted from the Ninth Circuit) when determining whether a pre-filing order is appropriate:

> (1) the litigant's history of litigation and, in particular, whether it has entailed vexatious, harassing, or duplicative lawsuits;
> (2) the litigant's motive in pursuing the litigation; e.g., whether the litigant has an objective good faith expectation of prevailing;
> (3) whether the litigant is represented by counsel;
> (4) whether the litigant has caused needless expense to other parties or has posed an unnecessary burden on the courts and their personnel; and
> (5) whether other sanctions would be adequate to protect the courts and other parties.

Motta, 2013 MT 172, ¶ 20.

In the case at bar, each of the five factors favors of finding that both Thorco and the Thorntons are vexatious litigants that should be subject to a pre-filing

order. First, Thorco and the Thorntons have a nearly decade-long history of initiating and prolonging harassing and duplicative lawsuits in the present matter. Based on the timing of certain filings, dismissal of bankruptcy's, filing of improper appeals, and the filing of a recent lawsuit on the exact issue that this Court has already decided, the evidence supports a conclusion that neither Thorco nor the Thorntons have a good faith expectation of prevailing. Second, the motive in pursuing the litigation has always been causing delay and preventing WCU from exercising its rights to the property through foreclosure, despite the fact that there was no objective good faith expectation of prevailing. Third, Thorco and the Thorntons have been represented by at least 12 different attorneys throughout the proceedings. See, e.g., *McCann*, 2018 MT 207, ¶ 42 (implying that counsel should know not to repeatedly initiate unsupported claims). Fourth, it is without question that the litigation has caused unnecessary expense to WCU and inflicted an unnecessary burden on this Court. Finally, as to whether other sanctions would be adequate, adverse rulings have caused no hesitation in Thorco's conduct so sanctions are unlikely to change behavior.

Based on these facts, the District Court did not abuse its discretion in relying on the following conduct:

> 1. Bankruptcy #1 filed in May, 2014 for the sole purpose of avoiding trial in the foreclosure action, DV-12-174, then dismissing the bankruptcy in March, 2015;

2. On March 1, 2016 Thorco and the Thorntons filed Appeal #1 with the Montana Supreme Court days after Judgment of Foreclosure and Order of Sale was entered against them on February 23, 2016 in the foreclosure action. The appeal was clearly premature. The Supreme Court dismissed the appeal on March 22, 2016. The purpose of the appeal was to prevent WCU from selling the Property.

3. Bankruptcy #2 filed December 27, 2017 to prevent WCU's recording of the deeds to the Property. Dennis Thornton admitted the purpose of this bankruptcy, soon dismissed by Thorco, was to prevent WCU from receiving the benefits of the Settlement Agreement, deed recordation. Aff. D. Thornton, ¶ 60.

4. DV-18-336 filed on April 6, 2018 in which the Thorntons allege WCU breached the Settlement Agreement supra. Judge Wilson awarded summary judgment to WCU on October 4, 2018 finding the Thorntons did not exercise the payment option before it expired, a condition precedent to obtaining mortgage releases. In Appeal #2, the Montana Supreme Court affirmed that decision on June 11, 2019.

5. On October 23 and 24, 2018 following entry of judgment against the Thorntons in DV-18-336 on October 9, 2018, Dennis Thornton recorded false documents with the Flathead County Clerk and Recorder, including a lis pendens, relating to the Property. In his November 12, 2019 Order striking these documents, Judge Wilson found them to be "diametrically opposed to this Court's rulings and judgment which were affirmed on appeal and therefore null and void."

6. On June 26, 2019, fifteen (15) days after the Supreme Court's decision in DV-18-336, the Complaint commencing the instant case, DV-19-534, was filed now alleging by Thorco essentially the same claims alleged by the Thorntons in DV-18-336. Since DV-18-336 did not end until Judge Wilson's November 12, 2019 Order supra, these two cases — the instant case, DV-19-534, and DV-18-336 - overlapped by almost five (5) months.

In response to WCU's vexatious litigant motion, Thorco has several contentions. The first is that in the foreclosure action, DV-12-174 Thorco and the Thorntons had a counterclaim "meritorious enough to survive summary judgment and proceed to jury trial." There was no jury trial; the case settled at

> mediation. Of the eight counterclaims asserted, only negligence, rarely dismissed on summary judgment, survived to mediation.
>
> Secondly, Thorco contends its "claims" were so strong in the eyes of WCU ("claim" not "claims" — Defendants had one claim, negligence) that WCU gave Thorco a "favorable" Settlement Agreement. The Court does not understand how the Agreement could be termed favorable if Thorco could not meet the payment option eighteen (18) months later, failed to borrow from Peter to pay Paul, no longer owns the Property, and has resorted to recriminatory bankruptcy filings, futile litigation and recordation of patently false documents and lis pendens to avoid the inevitable conclusion: the decision in 2012 to borrow a very large sum of money was a very bad decision by Thorco and its guarantors, rivaled only by the decision of WCU to loan it, the only difference being WCU had some protection in the event these two decisions went south. In June of 2016, the Agreement may have looked favorable to Thorco, but not in late December, 2018.
>
> Finally, Thorco argues its ROA theory, namely, that Thorco is a victim of WCU's breach of a 2018 contract, Count III of the First Amended Complaint. In this regard, see the Court's assessment of the ROA theory supra.

Order, Docket #15, p.9, l.11 – p.10, l.13.

On appeal, Thorco argues that the District Court abused its discretion by considering its bankruptcy filings because famous people file for bankruptcy. *Opening Br.*, 38. Wrong is wrong, even if everyone does it. Thorco never disputed the motivation for which WCU argued Thorco filed its bankruptcy. Similarly, Thorco never disputed the basis for which it filed its premature appeal and while counsel writes on appeal that it was a "mistake," nothing in the record supports this position. *Id.*, 39. Since motivation of filings is a factor to consider

and the motivation is undisputed, the District Court acted neither arbitrarily nor outside the bounds of reason.

Thorco next argues that Thorco and the Thorntons are different and apparently should be treated separately. *Opening Br.*, at 39. Thorco does not act without Dennis Thornton as he and his wife are the sole shareholders. The same privity analysis discussed above with regard to *res judicata* would apply to this issue. Thorco cannot rely on a "separate legal existence" as this would allow parties to hide from their conduct behind corporate veils.

Thorco's next argument addresses its final issue with the District Court's ruling and the *Stokes* criteria, and it argues that the present action was made in good faith. Not even close. It violated Rule 11. Its brief completely fails to show how the District Court abused its discretion, acted arbitrarily without conscientious judgment, or exceeded the bounds of reason.

Thorco argues that its conduct was not as bad as described in *Stokes*. *Opening Br.*, 42. *Stokes* is not and should not be the threshold.

Finally, Thorco argues that the pre-filing order is not narrowly tailored. *Opening Br.*, 43. As Thorco mentioned, it moved the Court to modify the order. (Appellant's Appendix J) However, Thorco neither made this argument in that motion nor requested a modification to alleviate what it considers too broad. (*Thorco's Appl. For Leave to File Pursuant to Pre-Filing Order*, Docket #21)

Thorco cannot raise new arguments on appeal that it did not give the District Court a chance to correct and its argument should be rejected. *Flowers, supra.*

Without a pre-filing order, either the Thorntons or Thorco will file again. The District Court carefully considered the history of the litigation and filings between WCU and the Thorntons/Thorco, considered the criteria and applied the facts to them, and issued its ruling based on the evidence. It did not abuse its discretion and should be AFFIRMED.

CONCLUSION

This Court should AFFIRM the District Court's *Order Re First Amended Complaint and Vexatious Litigant* dated February 4, 2020.

DATED this 4th day of August, 2020.

FRAMPTON PURDY LAW FIRM

By: _____
Sean S. Frampton
Attorneys for Appellee

CERTIFICATE OF COMPLIANCE

I, Sean S. Frampton, attorney for Appellee, hereby certifies that Appellee's Response Brief complies with the Montana Rules of Appellate Procedure:

A: Document has double-line spacing and is proportionately spaced in Times New Roman text typeface of 14 points;

B: Word count, exclusive of tables and certificates, does not exceed 10,000;

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I am relying on the word count of the word processing system used to prepare the brief (Microsoft Office Word) in calculating the document's length.

DATED this 4th day of August, 2020.

FRAMPTON PURDY LAW FIRM

By: 

Sean S. Frampton
Attorneys for Appellee

CERTIFICATE OF MAILING

The undersigned does hereby certify that on the 4th day of August, 2020, a true and correct copy of the foregoing document was served upon the persons named below, at the addresses set out below their names, as indicated below.

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CERTIFICATE OF SERVICE

I, Sean S. Frampton, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 08-04-2020:

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Service Method: eService

Electronically signed by Kelly Kracker-Sletten on behalf of Sean S. Frampton
Dated: 08-04-2020