

IN THE SUPREME COURT OF THE STATE OF MONTANA
Case No. DA-20-0418

WADE AYALA,

Plaintiff, Counter-claim Defendant, and Appellee

v.

GAIL STAFFORD,

Defendant, Counter-Claimant, Third-Party Plaintiff, Appellant, and Cross-Appellee,

v.

RECONTRUST COMPANY, N.A.; BANK OF AMERICA, N.A.; FEDERAL NATIONAL MORTGAGE ASSOCIATION, and EQUITY PROCESS MANAGEMENT, INC.

Third-Party Defendants, Appellees, and Cross Appellants,

SADIE LYNN BARRETT, and DOES 1 - 10,

Third Party Defendants and Appellees.

APPELLEE’S MOTION FOR RELIEF AND BRIEF IN SUPPORT

On Appeal from the Second Judicial District
Butte-Silver Bow County, Montana
Case No. DV-18-267
Honorable Ray J. Dayton

**COUNSEL FOR APPELLANT
GAIL STAFFORD:**

Adam H. Owens, Esq.
Gregory G. Costanza, Esq.
GRANITE PEAK LAW, PLLC
201 W. Madison Ave., Ste. 450
Belgrade, MT 59714
Telephone: (406) 586-0576
Fax: (406) 794-0750
adam@granitepeaklaw.com
gregory@granitepeaklaw.com

**COUNSEL FOR APPELLEE WADE
AYALA:**

Charles E. Hansberry
Jenny M. Jourdonnais
HANSBERRY & JOURDONNAIS,
PLLC
3819 Stephens Ave., Ste. 200
Missoula, MT 59801
Telephone: (406) 203-1730
chuck@HJBusinessLaw.com
jenny@HJBusinessLaw.com

**COUNSEL FOR APPELLEES
AND CROSS-APPELLANTS
RECONTRUST COMPANY,
N.A.; BANK OF AMERICA,
N.A.; and FEDERAL
NATIONAL MORTGAGE
ASSOCIATION:**

Mark D. Etchart
BROWNING, KALECZYC,
BERRY & HOVEN, P.C.
800 N. Last Chance Gulch, Suite
101
P.O. Box 1697
Helena, MT 59624
Phone: (406) 443-6820
Facsimile: (406) 443-6883
mark@bkbh.com

**COUNSEL FOR APPELLEE
EQUITY MANAGEMENT, INC.:**

John Haffey
HAFFEY VAP PLLC
100 Ryman Street, Suite 100
Missoula, MT 59802
Phone: 406-493-1617
john@haffeyvap.com

Gail Stafford (“Stafford”), by and through her counsel of record, Adam H. Owens of Granite Peak Law, PLLC, respectfully submits her Reply Brief in Opposition to Appellee Wade Ayala’s Motion for Relief from the District Court’s September 30, 2020 Order Granting Stay Pending Appeal and Granting Supersedeas Bond (“Stay Order”).

I. INTRODUCTION

This Motion is yet another procedural barrier that has served to frustrate Stafford on her nearly decade long effort to have her ownership of the Property settled in her name and have herself restored for her costs and emotional outlay in so doing. Ayala claims that Stafford in her requested bond failed to provide any justification or analysis resulting in substantial injustice to Wade. It is from that Stay Order that Wade seeks relief. It is clear that Wade is not prejudiced, and that this Motion is either a last-ditch effort to defeat Stafford procedurally, or is at worst, a dilatory effort by counsel.

II. BACKGROUND

This case involves a dispute as to title to property at 86 Elkhorn Lane, in Butte, Montana (the “Property”), where Stafford has lived for more than a decade. Stafford originally resided on the property pursuant to a lease between her and the owner, Colin Caffrey. According to documents recorded with the Silver Bow County Clerk and Recorder, in 2012, Mortgage Electronic Registration Systems, Inc. assigned the deed of trust for the Property to Bank of America, who then substituted ReconTrust Company, N.A. (“ReconTrust”) as the trustee. ReconTrust then scheduled and noticed a foreclosure sale of the {Property to take place on December 14, 2012. *See Stafford’s Reply in Support*

Of Stafford's Motion For Supersedeas Bond And Stay of Court's Order Pending Appeal, pg. 4, Exhibit E to Ayala's Motion for Relief.

Three people attended the sale in addition to the auctioneer on December 14, 2012: Stafford; Anthony King; and David Kneebone, though only Stafford and Mr. King were present to bid on the Property. *Id.* at pg. 4. The auctioneer qualified Stafford as the only bidder present having sufficient funds to bid on the Property after he examined Stafford's \$170,000 cashier's check and \$49,000 in cash in her possession at the sale. *Id.* The other bidder, Mr. King, was disqualified because he had only a personal check in his possession at the time of sale. *Id.* When the bidding opened at \$190,851.90, the auctioneer pointed to Stafford, who bid "one dollar over". *Id.* at pg. 5. The auctioneer then verbally stopped the sale, stating "that the group holding the auction required the entire amount of the \$233,XXX obligation." (Mr. Kneebone does not recall the exact amount of the obligation required after the thousands digit but did recall that it was at least \$233,000). (Ayala Exhibit E, p. 74, ¶1; Stafford's Reply Brief re: Motion for Stay and Bond). Although Stafford, Kneebone and the other witness maintain that she placed the high bid of \$190,852.90 at the trustee's sale, one dollar (\$1.00) over the opening bid of \$190,851.90, the trustee executed a trustee's deed in favor of Plaintiff/Appellee Federal National Mortgage Association ("FNMA") claiming FNMA submitted the high credit bid of \$190,851.90, a party who did not even have a representative present at the sale. It is also interesting to note that Bank of America executed an assignment of the deed of trust to FNMA dated December 12, 2012, two days prior to the sale but failed to record this

instrument with the Silver Bow County Clerk and Recorder's office until December 24, 2012 as required by § 71-1-313(1) (stating that the assignments must be on record prior to the sale for the Trustee to be able to foreclose on the property through advertisement and sale).

After FNMA filed an action for possession of the Property, DV-13-204BN, Stafford counterclaimed for quiet title and both parties moved for summary judgment. In addition, Stafford served discovery requests in which she specifically asked FNMA to identify the witnesses and circumstances under which FNMA claimed to have placed the high bid at the sale. FNMA refused to adequately respond to these requests even after being compelled by the court to do so and the trial date was cancelled. Instead, on the eve of the hearing on the motions, FNMA filed a self-serving conclusory affidavit of the auctioneer in which he claimed, for the first time, that the only bid at the sale was FNMA's credit bid of \$190,851.90. After hearing the parties' arguments on September 8, 2014, the district court promised to get the parties a ruling on the summary judgment motions as quickly as it could, but it never provided a ruling on the motions. Indeed, despite notices of issue and multiple additional motions in the ensuing years, the district court never ruled on these motions.

Proper ownership was never determined in the previous case by Judge Newman – indeed, nor was improper ownership by Stafford determined there either. (See *FNMA v. Gail Stafford v. FNMA and John Does 1 – 50*, Cause No. DV-13-204BN, Judge Newman, Silver Bow County District Court). In the winter of 2017-18, FNMA sold the property to

a third party, Wade Ayala, without notifying the court or its counsel representing it in DV-13-204BN action, nor did they notify their counsel prior to listing it on the popular website, auction.com. Their counsel only found out after Stafford's counsel called to inquire if it was really for sale as Stafford assumed the listing was spurious or otherwise fraudulent itself. FNMA later filed a Motion to Dismiss that was granted by the District Court on the basis that as FNMA had sold the Property, it no longer had an interest in the Property. Stafford appealed this order to the Montana Supreme Court in DA 18-0439.

Ayala bought the Property knowing Stafford's claims. (Ayala Exhibit E, p. 81, Stafford's Reply Brief, Stafford Aff. ¶19 - 21). Ayala was aware Stafford occupied the Property when he purchased it. (Ayala Exhibit E, p. 81 - 82, Stafford's Reply Brief, Stafford Aff. ¶19 - 21). Ayala received only a Quitclaim Deed when he purchased the Property, no warranty deed, and the transaction was accomplished without title insurance or financing contingencies. Ayala knew at the time of the sale that, as Stafford was occupying the Property and asserting legal claims of ownership, that he was not to trespass on the Property, which he of course did. He was fully informed of the two pending court cases seeking to resolve this ownership dispute, knowing then that his claim to title was only as good as any predecessor's claim might be. Ayala's counsel even acknowledged such in an email between her and Stafford's then counsel dated December 19, 2017. Such claim a predecessor in interest may have had was based upon a false and misrepresentative quit claim without warranty, masquerading as a Trustee's Deed. Lastly, present counsel informed both Ayala and his counsel by telephone prior to Ayala closing

on the auction that Stafford was asserting claims of ownership to the property due to her status of high bidder at the December 14, 2012 auction. Likewise, Ayala, not being a bona-fide purchaser of the Property, was fully aware of the possibility that litigation regarding the Property could continue for years to come and interfere with or destroy any rights he may have in the Property.

Moreover, Ayala does not desire to live on the Property – indeed he only lived on the Property in the Front House from January 2018 through April of 2019 – moving out of the U.S. afterwards. (Ayala Exhibit D; Ayala Response to Motion to Stay, p. 13). Further, Ayala purchased nearly 80 acres of land in Idaho referred to as their “forever home”. (Ayala Exhibit E; Stafford’s Reply Brief, p. 82, Stafford Aff. ¶28). Ayala is also out of the United States until sometime in 2021, when he returns to the U.S., he presumably intends on returning to Tetonia, in Teton County, Idaho – not to the Property. (Ayala Exhibit E; p. 82, Stafford’s Reply Brief). As such, Ayala and Barrett are not displaced by Stafford’s continued claim of ownership and possession – whereas Stafford being dispossessed of the Property is ruinous.

The court issued an order on July 23, 2020 titled the “Order on Pending Matters” (the “Order”). From this order, Stafford appeals. Stafford filed her Notice of Appeal on August 21, 2020. That same day, Stafford filed her Motion for Approval of Supersedeas Bond and Stay of Court’s Order Pending Appeal (“Stay Motion”). Dkt. 99, attached as Ayala Exhibit C.

On September 30, 2020, the District Court entered its Stay Order. Dkt. 115,

attached as Ayala Exhibit F. Wade argues that the District Court does not analyze, elaborate or provide any rationale in its Stay Order for granting Stafford's Stay Motion or for how Stafford's proposed \$7,500 bond is sufficient to protect Wade's interest during the pendency of the appeal. However, the District Court did not abuse its discretion when it entered the Stay Order by failing to employ conscientious judgment or by exceeding the bounds of reason, resulting in a substantial injustice.

III. LEGAL STANDARD

Montana Rule of Appellate Procedure 22(2) provides that a party may be granted relief from a district court's upon "[d]emonstrat[ing] good cause for the relief requested, supported by affidavit. Trial administration matters, such as the granting of a post-judgment motion for a stay pending appeal at issue here, is within the district court's discretion. *Sourdough Protective Ass'n, v. Board of Cnty. Comm'rs*, 253 Mont. 325, 327, 833 P.2d 207, 208 (1992). "The test for abuse of discretion is whether the district court acted arbitrarily without employment of conscientious judgment or exceeded the bounds of reason resulting in substantial injustice." *In re Matter of B.B.*, 2001 MT 285, ¶ 26, 307 Mont. 379, 37 P.3d 715, citing *In re J.M.J.*, 1999 MT 277, ¶ 16. While, Ayala has certainly attempted to demonstrate that good cause exists for the relief he has requested, he fails to support his attempted demonstration by affidavit, which does not satisfy M.R.App.R. 22(2)(a)(i).

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IV. ARGUMENT

1. The District Court Did Not Abuse Its Discretion by Entering the Stay Order, as Sufficient Rationale Was Provided by the Court

Ayala argues that the Stay Order contains no rationale or justification for its decision which in and of itself constitutes an abuse of discretion and cites to *In Re Marriage of Crone*, 2003 MT 238, ¶ 45, 317 Mont. 256, 77 P.3d 167. In *Crone*, the portion of the appeal relevant here was of an award of attorney fees. The Court found the District Court erred when it did not consider the parties' financial resources, and further that evidence of the amount of the fees nor a finding that they were reasonable was included. *Crone* did not reverse the entire decision of the District Court, however merely the element of the decision relating to fees.

Here, Montana Rule of Appellate Procedure 22(2) is controlling, there is no requirement within rule 22 that the Bond has to be "reasonable", as is required when determining an award of attorney's fees. Rather, Rule 22 requires that the bond "shall be fixed at such sum *only* as will secure the amount recovered for the use and detention of the property, the costs of the action, costs on appeal, interest, and damages for delay (emphasis added)." Stafford's Brief in Support of her Motion for Stay and Bond asserts precisely this. It states:

the legal questions in controversy in this matter are not frivolous or simple questions of law, and as such the Montana Supreme Court is not likely to award costs, interest, or damages to either party, even if Stafford loses on appeal. Accordingly, a bond amount of \$7,500 balances the burden imposed on Stafford to secure such bond with the potential for lost costs, interest, and damages for delay that Ayala or Third-Party Defendants could suffer.

See Ayala Exhibit C; Defendant's Brief ISO Motion for Approval Of Supersedeas Bond And Stay, pgs. 4-5. Stafford's Brief further states:

Without a stay of the Order pending the appeal, Stafford will be forced to surrender this possession and control of the Property, which is precisely the act she sought to avoid by seeking to prove her rights here. Stafford believes she has a good-faith basis for the appeal and desires to fully exercise and exhaust her legal rights prior to surrendering possession and control of the Property...

Therefore, Stafford disagrees with Ayala's assertion that the Stay Order does not contain a rationale for the Court granting Stafford's Motion for Stay and Supersedeas Bond, as the language of the order: "the Court, having been advised of the premises contained therein (Stafford's Motion), HEREBY ORDERS" references and incorporates Stafford's rationale for granting the stay and for the amount of the bond, as stated above. Notwithstanding, if this Court agrees with Ayala's assertion that there is not enough rationale contained in the Stay Order, at worst, any lack of rationale would only support a narrower argument for remanding the bond amount issue for the District Court to justify – not for a reversal of the Order to Stay.

2. The *Hilton* Factors are Not Applicable Here.

Ayala asserts that "to extent that the District Court relied on Stafford's belated arguments on the Hilton factors, those arguments were improperly made for the first time in her Reply Brief and should not have even been considered by the District Court." *See Ayala's Motion for Relief, pg. 9.* While it is true that Stafford did not assert any *Hilton* factor arguments in her initial Brief In Support of her Motion for Stay and Bond,

Stafford's asserts that she was not required to meet the *Hilton* factors; those arguments are made by Ayala to attempt to complicate a straightforward issue under M. R. App. P. Rule 22. *Hilton v. Braunskill*, 481 U.S. 770, 776, 107 S. Ct. 2113, 95 L. Ed. 2d 724 (1987). *Hilton*, and its progeny cited by Ayala, do not contemplate the M. R. App. P. Rule 22 standard cited in Stafford's Motion and reiterated herein. The *Hilton* factors are a standard for determining whether a stay is granted under Federal Rules of Civil Procedure Rule 62(b) which is identical to M. R. Civ. P. Rule 62(b). See *HSBC Bank USA, NA. v. Anderson, Order on Motion to Stay Foreclosure Sale Pending Appeal and Motion to Vacate Judgment, DV-12-614D (Mont. 11th Dist. Ct. Nov. 25, 2016)*, attached as Exhibit G to Ayala's Motion for Relief. The order in *DV-12-614D* addresses the application of the *Hilton* factors with regard to the issuance of a stay under M. R. Civ. P. Rule 62(b) in the context of Defendants having filed a rule 60(b) motion. No such Rule 60(b) motion has been filed in this action nor has a request for stay under M. R. Civ. P. Rule 62(b) been made and therefore the *Hilton* factor analysis from *DV-12-614D* Ayala asserts does not apply here.

Further, Stafford is unaware of any Montana Supreme Court case law which affirms weighing of the *Hilton* factors is the proper standard in this state when determining whether a motion for stay and supersedeas bond should be granted under M. R. App. P. Rule 22. Further still, the Montana Supreme Court Order in DA 16-0546 that Ayala cites confirming the 11th Judicial District Court's Order in *DV-12-614D* also does not even mention the *Hilton* factors, let alone make a determination that the *Hilton* factors

are the proper standard for determining a M. R. App. P. Rule 22 Motion for Stay and Supersedeas bond in circumstances such as the ones before the court in this action.

Lastly, with regard to Ayala's argument that Stafford made the Hilton arguments improperly for the first time in her Reply Brief, Stafford was merely countering Ayala's *Hilton* factor arguments so as to not be considered by the court to have waived or otherwise failed to counter those arguments. Notwithstanding, if the *Hilton* factors are applicable, Stafford asserts they weigh in favor of her Motion for Stay and Supersedeas bond being granted.

3. The Bond Amount is Adequate – as Ayala's Requested Amount is not Mandatory Under M. R. App. P. Rule 22

As for the adequacy of the \$7,500 bond, the plain language of M. R. App. P. Rule 22(1)(b) states in pertinent part that “[w]hen the judgment or order determines the disposition of property in controversy as in real actions . . . the amount of the supersedeas bond shall be fixed at such sum only as will secure the amount recovered for the use and detention of the property, the costs of the action, costs on appeal, interest, and damages for delay.”

The District Court had the supersedeas bond issue thoroughly briefed before it by both Parties, and it sided with Stafford's analysis in the briefing. Ayala's calculation can be construed a myriad of ways – the Affidavits filed by Ayala in support of his opposition to the Motion to Stay attempted to inflate the damages he claims, and simply serve to defeat Stafford economically by encouraging the Court to require a bond Stafford cannot

afford and is primarily based on Stafford having a landlord tenancy relationship with Ayala, which Stafford has never had.

Notwithstanding, Ayala offered through counsel in December of 2017 to rent the back house to Stafford “on the terms she had with former owner” if she waived her claims as to ownership of the property. (Ayala Exhibit E; See Stafford’s Reply Brief in Support of Motion for Preliminary Injunction and Temporary Restraining Order (Dkt. 60, pp. 12-14) and (Dkt. 61, ¶ 26, Ex. 19; see also ¶¶ 21 – 26 and accompanying exhibits). Stafford previously rented the Back House on the Property from Caffrey for \$180 per month which included all utilities. (Ayala Exhibit E; Stafford Aff. ¶¶ 5 - 6). The request for a \$97,105.90 bond is inconsistent with what M.R.App.P. Rule 22 requires and inconsistent with Ayala’s lease offer and the fair market rental value of the Back House and should be rejected for that reason.

In support of this position, Stafford requested residential and commercial property manager Robert Varady inspect the Back House and yard of the Property. (Ayala Exhibit E; Stafford Aff., ¶29; Varady Aff., ¶6). Ayala claims the Back House of the Property can be rented for \$650 a month – or more. (Ayala Exhibit E; Ayala Response to Motion for Stay, p.13). This is a pipedream and is inconsistent with the market. (Ayala Exhibit E; Varady Aff., ¶¶ 16 - 19). In reality, the Property, which consists of a 20’ x 18’ living area, with an additional woodshed out behind the living area, attached as a porch/shed structure, along with an unfinished basement with a dirt floor, that lacks insulation, might conservatively be rentable for \$350 a month. (Ayala Exhibit E; Varady Aff., ¶¶ 18 - 19).

It was apparent to Mr. Varady that there is no insulation between the ground of the unfinished and the actual flooring of the main level. (Ayala Exhibit E; Varady Aff., ¶¶ 10 – 11). As he surveyed the bathroom, Mr. Varady noticed low, minimal water pressure, lacking sufficient pressure to run a shower so there is not one. (Ayala Exhibit E; Varady Aff., ¶ 12). There might be a gallon and a half of water pressure per minute, which is extremely low for a residential property of any kind. (Ayala Exhibit E; Varady Aff., ¶ 13). Mr. Varady concluded that none of the rooms are of sufficient size, and also observed that there is no kitchen, no kitchenette, no stove-top, or anything of the like, and Stafford has no access to the same in the other property. (Ayala Exhibit E; Varady Aff., ¶¶ 14 - 15).

Mr. Varady owns his own unit that is a similar 20' x 20' to the Back House that Stafford is in – and there, there is a kitchenette, a countertop and stove, and Mr. Varady rents that for \$450, plus utilities, and it has recently been fully remodeled with new floors, walls, carpets, and bathroom. (Ayala Exhibit E; Varady Aff., ¶ 16). Conversely, the Back House to the Property has not been updated or redone in several years. (Ayala Exhibit E; Varady Aff., ¶ 17; Stafford Aff. ¶ 27). From his observations, Stafford has limited access to the rest of the property, which is occupied outside by numerous chickens and livestock like goats that present a nuisance. (Ayala Exhibit E; Varady Aff., ¶ 20). Mr. Varady then concluded that Stafford's unit could not, in his opinion, rent for \$650 a month as a one bedroom of this size, lacking a full bathroom with a shower, utility room, and kitchen with stovetop oven and kitchen sink, and without modern appliances. In Mr. Varady's

opinion, a desperate renter might rent something like this property for \$350 a month. (Ayala Exhibit E; Varady Aff., ¶¶ 18 - 19). Rental income is not a requisite element of the supersedeas bond amount under M. R. App. P. Rule 22.

Notwithstanding, if this Court determined that rental income is a requisite element, Stafford's use of the property during the appeal process would be the time period over which the value of Stafford's use of the property should be calculated, not the time period starting from service of the Notice to Quit in March 2018 to August 2021 as Ayala asserts, and would be much lower than \$350 per month.¹

4. Unlawful Detainer Damages are Not Final and Ayala Does Not Deserve Them in any Bond Calculation

The basis for Ayala's treble damages is misplaced. Ayala has not prevailed on his unlawful detainer action, and therefore his request for treble damages in support of the inflated bond amount requested of the District Court is untimely and should not be considered by this Court in making its decision on whether to reverse. MCA section 70-27-207 does not simply require treble damages because a landlord – indeed one who is not involved in an actual dispute as to their ownership, even, simply says their tenant is in unlawful possession. Further, Stafford has never had free use of the property since

¹ Assuming arguendo that Ayala's allegation that the appeal will not be finalized until August 2021 is correct, Stafford used to pay \$180/month to rent the back house from Collin Caffrey, including utilities. The home was also in much better condition at that time. For the expected 12 months of the appeal from August 2020 to August 2021. The cost of the use of the property would have been \$2,160 (12*\$180). However, considering the condition of the back house, lack of a refrigerator or stove, and insufficient water pressure, the rental rate should be much lower than \$180/month.

Ayala's 'purchase,' and Ayala has never asked Stafford to pay any rents. (Ayala Exhibit E; Stafford Aff., ¶ 24).

Treble damages are not just given to a prevailing party on their damages claim, which, again, Ayala has not yet prevailed upon in this case. Prior to a finding that a lease is terminated, a lessee defendant remains liable for unpaid rent, pursuant to the lease agreement. *Montana Williams Double Diamond Corp. v. Hill*, 573 P. 2d 649 (1978). After the lease is terminated by judicial proceedings, what survives is a liability, not for rent, but for damages to the lessor. *Montana Williams*, 573 P.2d citing *Sanders v. Kahn*, 134 A.2d 107 (D.C.Mun. App.) (1957); *Hermitage Co. v. Levine*, 248 N.Y. 333, 162 N.E. 97, 59 A.L.R. 1015 (1928); 50 Am.Jur.2d, Landlord and Tenant, § 1224. It is these damages, found to exist after expiration of the lease term or after termination of the lease agreement, and a finding of unlawful detainer, which may be trebled. *Id.*

Thus, hypothetically, if Stafford refused Ayala's demand to return possession of the premises to him, and Stafford was found to have forcibly and unlawfully detained the property, Ayala may be entitled to treble damages. *See* §§ 70-27-103 and 70-27-206, MCA; *LIC, INC. v. Baltrusch*, 692 P. 2d 1264, 1266 (1985). Stafford has asserted her own claims of ownership and rights to possession of the Property. She never entered into a lease agreement with Ayala, nor did he ever demand rents from her. (Ayala Exhibit E; Stafford Aff., ¶ 24). Absent a determination by the District Court that Ayala has

succeeded on his claim of unlawful detainer – which has not occurred, he is not entitled to trebled damages, and he certainly cannot use such a theory to inflate his bond request. (See M.R.App.P. Rule 22).

5. CONCLUSION

Based on the foregoing, Stafford respectfully asks this Court to affirm the District Court’s Stay Order, or, in the alternative, to remand the same and direct the District Court to re-issue the Stay Order with rationale supporting its decision for granting Stafford’s Motion for Stay and Bond Pending Appeal.

DATED this 23rd day of October 2020.

/s/ Adam H. Owens
Adam H. Owens
Granite Peak Law, PLLC
Attorney for Appellant

CERTIFICATE OF SERVICE

I, Kyrstyn Ventura-Hart, certify that a true and accurate copy of the foregoing was served to the following on October 23, 2020 through the Montana Supreme Court Electronic Filing System and via email:

Charles E. Hansberry
Jenny M. Jourdonnais
Hansberry & Jourdonnais, PLLC
3819 Stephens, Ave., Ste. 200
Missoula, MT 59801

John F. Haffey
Haffey Vap, PLLC
101 E. Broadway St., Ste. 200
Missoula, MT 59807

Mark D. Etchart
BROWNING, KALECZYC,
BERRY & HOVEN, P.C.
800 N. Last Chance Gulch,
Suite 101
P.O. Box 1697
Helena, MT 59624

By: /s/ Kyrstyn Ventura-Hart
Legal Assistant
Granite Peak Law, PLLC

CERTIFICATE OF COMPLIANCE

Pursuant to Montana Rule of Appellate Procedure 11(4)(e), I certify that this Brief is printed with proportionately spaced Times New Roman text typeface of 14 points; is double-spaced; and the word count is 4,140 words , excluding the Caption, the Certificate of Service and Certificate of Compliance.

By: /s/ Adam H. Owens

CERTIFICATE OF SERVICE

I, Adam H. Owens, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 10-23-2020:

Charles E. Hansberry (Attorney)
3819 Stephens Ave.
Suite 200
Missoula MT 59801
Representing: Wade Ayala
Service Method: eService

Jenny M. Jourdonnais (Attorney)
3819 Stephens Ave.
Suite 200
Missoula MT 59801
Representing: Wade Ayala
Service Method: eService

Mark D. Etchart (Attorney)
PO Box 1697
Helena MT 59601
Representing: Bank of America, N.A., Federal National Mortgage Association, Recontrust Company, N.A.
Service Method: eService

John Francis Haffey (Attorney)
101 East Broadway Ste 200
PO Box 8718
Missoula MT 59807
Representing: Equity Process Management, Inc.
Service Method: eService

Gregory G. Costanza (Attorney)
2301 Stampede Ave
Cody WY 82414
Representing: Gail Stafford
Service Method: eService

Electronically Signed By: Adam H. Owens
Dated: 10-23-2020