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

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WADE AYALA,

Plaintiff, Counterclaim-Defendant and Appellee,

v.

GAIL STAFFORD,

Defendant, Counterclaimant, Third-Party Plaintiff, Appellant, and Cross-Appellee,

v.

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

Third-Party Defendants, Appellees, and Cross-Appellants.

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# APPELLEE/CROSS-APPELLANT EQUITY PROCESS MANAGEMENT, INC.'S COMBINED ANSWER BRIEF AND OPENING BRIEF

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

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## STATEMENT OF THE ISSUES

I. Whether the district court correctly granted Appellee/Cross-Appellant Equity Process Management's ("Equity") motion for summary judgment on Appellant/Cross-Appellee Gail Stafford's ("Stafford") claims of breach of contract (Count 1), declaratory judgment for violations of the Montana Small Tract Financing Act (Count 2), and actual fraud, negligent misrepresentation, and constructive fraud (Count 3)?

II. Whether the district court erred by denying Equity's motion for summary judgment on Stafford's claims of negligence for conducting the Trustee's Sale in violations of the Montana Small Tract Financing Act (Count 7), and violation of the Montana Unfair Trade Practices and Consumer Protection Act (Count 8)?

## STATEMENT OF THE CASE

This case arises out of a property foreclosure on property located outside of Butte, Montana (the "Property"). At the time of the foreclosure, Stafford was a tenant on the Property. A trustee's sale took place on December 14, 2012. Joseph Nowakowski, an Equity employee cried the sale. The Property was sold to the beneficiary Appellee/Cross-Appellant Federal National Mortgage Association ("FNMA") because no other qualified bids were made at the sale.

After taking title to the Property, FNMA filed a wrongful detainer action against Stafford on January 27, 2013 in the Second Judicial District Court, Silver Bow County. Stafford filed an answer and counterclaim on August 26, 2013 requesting a declaratory judgment that she had a leasehold interest in the property for one year. Stafford and FNMA filed cross-motions for summary judgment and a hearing was conducted on September 8, 2014. At the hearing, Stafford's counsel confirmed that she was not claiming any fee ownership of the property.

The cross-motions remained pending without a decision. In the interim, FNMA quitclaimed the Property to Appellee Wade Ayala ("Ayala"). FNMA then moved to dismiss the suit on March 15, 2018 since it no longer owned the Property. In response, on March 23, 2018, Stafford sought to amend her counterclaims and to file new claims against non-parties ReconTrust Company, N.A., Bank of America, N.A., Ayala and Equity. On July 2, 2018, The District Court granted FNMA's motion to dismiss the case, with prejudice, and denied Stafford's motion to amend her counterclaims and to join the non-parties.

Stafford appealed the decision to this Court. On May 14, 2019, the Court affirmed the district court's decision and issued an unpublished opinion in *Fannie Mae v. Stafford*, 2019 MT 114N (*Stafford I*). In affirming, the Court stated the following:

> The District Court acted within its discretion in denying Stafford's motion for leave to amend her pleading. The court found the timing

> and nature of Stafford's proposed amendments problematic. It found Stafford knew about the potential additional parties and claims several years before filing her motion and took issue with the fact that she only filed her motion to amend after Fannie Mae filed its motion to dismiss. The District Court thus concluded the "liberal freedom to amend pleadings contemplated by [M. R. Civ. P. 15], does not afford any relief to [Stafford] under the circumstances." Stafford also offered no meaningful justification for failing to move to amend her pleading earlier. Accordingly, even though the length of the litigation was not Stafford's fault, based on the District Court's findings and conclusions, we hold the court did not abuse its discretion by denying Stafford's motion for leave to amend.

*Stafford I*, ¶ 14.

After the district court dismissed the action in *Stafford I,* Ayala filed a wrongful detainer action against Stafford on July 5, 2018. Stafford filed an answer, counterclaim, and third-party complaint on December 4, 2018. The third-party complaint included claims against Equity and Joseph Nowakowski. Mr. Nowakowski had passed away on August 1, 2018. His estate was then substituted in but was later voluntarily dismissed by Stafford.

Equity filed its answer to the third-party complaint on March 15, 2019, denying all claims made against it and asserting affirmative defenses *of res judicata*, collateral estoppel, laches, and statutes of limitations, among others. Equity moved for summary judgment on all claims against it on September 25, 2019.

The District Court ruled on pending motions on July 23, 2020. Along with Equity's motion for summary judgment, the court ruled on Ayala's motion for

summary judgment and FNMA, ReconTrust, and Bank of America's (collectively "Bank Defendants") motion to dismiss. The court granted Equity's motion for summary judgment on Stafford's claims of breach of contract, declaratory judgment regarding the Montana Small Tract Financing Act[1], actual fraud, negligent misrepresentation. and constructive fraud. However, the court denied Equity's motion with respect to claims of negligence in the trustee sale and violation of Montana Unfair Trade Practices act.

Stafford filed a Notice of Appeal on August 21, 2020. Equity and the other third-party defendants filed their notices of cross appeal on September 4, 2020.

## STATEMENT OF THE FACTS

### *A. Property Foreclosure*

Colin Caffrey was purchasing the Property with a $226,100 loan. The loan was secured a by a Deed of Trust dated January 18, 2008. (District Court Case Register Document (hereafter "Doc.") 56 (App. A, Ex. 1)). Stafford claims that she began renting the "back house" on the property from Mr. Caffrey in January 2010. (Doc. 56 (App. C ¶ 6)). Mr. Caffrey defaulted on the loan and a Trustee's Sale was set for December 14, 2012. (Doc. 56 (App. A, Ex. 3)). Stafford learned

[1] Some ambiguity exists on the disposition of the declaratory judgment claim, see *Order on Pending Matters*, Doc. 89, p. 4.

of the notice of Trustee's Sale on the Property in the summer of 2012. (Doc. 56 (App. D, ¶ 6)). Mr. Caffrey passed away on August 29, 2012. *Id.* at ¶ 7

The Trustee's Sale went forward on December 14, 2012, as evidenced by the Trustee's Deed, recorded in Silver Bow County on December 24, 2012, which states the following :

> WHEREAS, in accordance with the said Notice of Trustee's Sale, the said Trustee did, on December 14, 2012 at 02:00 PM, duly sell at public auction located inside the lobby at the south entrance of the Silver Bow County Courthouse, 155 West Granite Street, Butte, MT the premises in said Trust Indenture and hereinafter described; and
>
> WHEREAS, at such sale said premises were fairly sold to the Grantee herein for the sum of $190,851.90, it being the highest bidder and that sum being the highest bid therefore, which sum was duly paid by said purchaser to the undersigned Trustee.

(Doc. 56 (App. A, Ex. 4)).

### *B. Stafford's allegations concerning the Trustee's Sale*

Stafford was present at the Trustee's Sale on December 14, 2012. (Doc. 56 (App. C, ¶ 11)). She stated the following in her declaration dated April 4, 2014:

> 11. I was present at the Trustee's Sale of the subject property that took place on December 14, 2012. There was no representative from FNMA present at the sale and the Trustee never indicated who the successful bidder was at the sale.
>
> 12. At the Trustee's sale the Trustee asked if there were any bidders for the property. Myself and another party indicated that we would be bidding. The Trustee examined our means of payment and the other party was not allowed to bid, as they only had a personal check. The Trustee then checked to see if I had funds available,

which I did, in the form of a cashier's check in the amount of $170,000 plus $49,000 cash ***totaling $219,000***.

13. After checking my funds, the Trustee made a phone call out of earshot. The initial bid was in the sum of $190,851.90. The Trustee advised that the bidding would increase one dollar at a time.

14. I then bid one dollar more, in the sum of $190,852.90. The Trustee then stated "they" needed at least the $238,000 plus stated in the "Legal Notice", and an additional amount for attorney fees. Then he left.

15. I never knew who "bought" the property, or for how much, until later when I looked up the information at the Clerk & Recorder's office. I then learned that the property was deeded to an entity, FNMA, who was not present at the sale. I was also shocked that despite the Trustee's statement of the need of at least the $238,000 plus listed in the Legal Notice, FNMA "purchased" the property for the initial bid of $190,851.90.

(Doc. 56 (App C, ¶¶ 11-15) (emphasis added)).

Stafford also executed an "Affidavit of Truth" dated December 31, 2012. (Doc. 9 (Ex. G, pp. 5-7)). In this affidavit Stafford admits that she obtained a certified copy of the Trustee Deed on December 27, 2012 showing the property was sold for the opening bid of $190,851.90 to FNMA. She further stated:

> It would seem the Legal Notice stating they would sell to the highest bidder for cash was not true. The only one present with cash, cashier's check (acceptable funds) made a valid bid above opening, yet real property, according to the Trustee Deed filed on December 24th, 2012 transferred for less than high bid (with cash at hand).

*Id*., p. 7

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### *C. Equity's role in the Trustee's Sale.*

FEI, LLC hired Equity to conduct the Trustee's Sale. (Doc. 77, ¶ 2). FEI, LLC provided instructions for the sale and the bid amounts authorized by the beneficiary. *Id*. at ¶ 4. The minimum bid by the beneficiary was $190,851.90. *Id.* The maximum bid, or step bid, authorized to by the beneficiary was $238,564.88. *Id*.

Equity followed FEI, LLC's "Rules of the Auction" for the qualification of bidders. *Id*. at ¶ 5. Those rules require the following with respect to qualifying a bidder:

> 4. Commencing at the appointed time for the foreclosure, the trustee's sale officer will qualify bidders for specific trustee's sales. ***All bidders (including junior lienholders, if any) must qualify to bid at a particular sale.*** In the trustee's sole discretion, junior lienholders encumbering a particular property may make special arrangements with the trustee to qualify to bid and to submit bids by methods not contemplated in these rules.
>
> 5. ***To qualify as a bidder at a trustee's sale***, the prospective bidder must be in attendance when the trustee's sale officer invites prospective bidders to qualify for that sale and must provide the trustee's sale officer the following:
>
> a. The bidder's name, address and telephone number;
>
> b. ***The maximum amount that the bidder may contemplate bidding at the sale (may not be less than one dollar over the beneficiary's maximum bid);***
>
> c. Conclusive evidence that the bidder possesses funds in an amount not less than the actual amount the bidder intends to bid on that sale (the trustee's sale

officer will allow the bidder to bid only up to the amount of funds the bidder has proven is in his/her possession);

d. The funds must be in the form of cash, official check, cashier's check, certified check or money order;

…

6. Qualification of bidders will be deemed closed when all timely submitted applications of potential bidders for qualification to participate in the bidding at a particular sale have been considered and qualified or disqualified. To be deemed "timely submitted", applications for qualification to bid must be submitted at the time the trustee's sale officer invites prospective bidders to qualify to bid at a particular sale.

(emphasis added).

(Doc. 77, Ex. B)

Because Stafford admits she could only bid a maximum of $219,000, she could not have qualified to bid at the Trustee Sale. (Doc. 77, ¶ 8).

Joseph Nowakowski was employed by Equity, and as part of his employment he was instructed to cry the Trustee's Sale on the subject property. (Doc. 77 (Ex. C, ¶¶ 2 and 3)). He cried the sale on December 14, 2012. *Id. at* ¶ 5. Three witnesses were at the sale, but the only bid at the sale was the credit bid of FNMA in the amount of $190,851.90. *Id.* at ¶¶ 6 and 8.

///

## STATEMENT OF THE STANDARD OF REVIEW

This Court reviews a district court's grant of summary judgment *de novo*, applying the same M. R. Civ. P. 56 criteria as the district court. *Thieltges v. Royal Alliance Assocs*., 2014 MT 247, ¶12, 376 Mont. 319, 334 P.3d 382 (citing *Draggin' Y Cattle Co. v. Addink*, 2013 MT 319, ¶ 16, 372 Mont. 334, 312 P.3d 451). Summary judgment is proper when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Thieltges* at ¶12 (citing M. R. Civ. P. 56(c)(3); *Stanley L. & Carolyn M. Watkins Trust v. Lacosta*, 2004 MT 144, ¶ 16, 321 Mont. 432, 92 P.3d 620). Material facts are identified by looking at the substantive law of the claims. *McGinnis v. Hand*, 1999 MT 9, ¶ 6, 293 Mont. 72, 972 P.2d 1126. The non-moving party must set forth specific facts and cannot simply rely upon their pleadings nor upon speculation, fanciful or conclusory statements. *Thomas v. Hale* (1990), 246 Mont. 64, 67, 802 P.2d 1255, 1257. "[T]his Court will not reverse a district court's summary adjudication unless such order is clearly erroneous resulting in an abuse of discretion." *Id.* Finally, pursuant to this Court's *de novo* standard of review, the Court can reach the same conclusion as the district court, but on different grounds and affirm summary judgment. *Safeco Ins. Co. of Am. v. Liss*, 2000 MT 380, ¶ 25, 303 Mont. 519, 16 P.3d 399 (citing *Erker v. Kester*, 1999 MT 231, ¶ 21, 296 Mont. 123, 988 P.2d 1221).

## SUMMARY OF ARGUMENT

Equity moved for summary judgment on all claims made against it by Stafford. Those claims were the following:

Count 1- Breach of Contract;

Count 2 - Declaratory Judgment for Violation of the Small Tract Financing Act;

Count 3 - Actual Fraud/Negligent Misrepresentation/Constructive Fraud;

Count 7 - Negligence for conducting the Trustee's Sale in Violations of the Montana Small Tract Financing Act; and

Count 8 - Violation of the Montana Unfair Trade Practices and Consumer Protection Act.

The district court granted summary judgment "in all respects except for the negligence claim and Montana's Unfair Trade Practices claim." (Doc 89, p. 4). However, the court also stated that "Summary Judgment for Equity management is granted for breach of contract, actual fraud, negligent misrepresentation, and constructive fraud" and that "Summary Judgment for Equity Management on Third-Party Plaintiff's claims of negligent sale and a violation of Montana's Unfair Trade Practices is denied." Therefore, the district court's disposition of Count 2 is uncertain.

///

In any event, the district court was correct in granting Equity summary judgment on Counts 1 and 3. The district court erred by denying Equity summary judgment on Counts 7 and 8. Irrespective, based on this Court's *de novo* review, all of Stafford's claims against Equity, as well as Ayala and the Bank Defendants fail as a matter of law based on *res judicata*, black letter contract law, and statutes of limitations.

## ARGUMENT

### I. The District Court Correctly Granted Equity's Motion for Summary Judgment on Stafford's Claims of Breach of Contract (Count 1), Declaratory Judgment for Violations of The Montana Small Tract Financing Act (Count 2), and Actual Fraud, Negligent Misrepresentation, and Constructive Fraud (Count 3).

#### *A. No Contract Formed as a Matter of Law, and any Breach of Contract Claim is Barred by the Statute of Limitations and the Doctrine of Res Judicata.*

Stafford asserts that an enforceable contract to buy the property was formed from her assertion that she placed the high bid at the December 14, 2012 Trustee's Sale. This assertion, which was made well over five years after the sale, was made after she acknowledged she had no ownership interest in the property in *Stafford 1*. *Fannie Mae v. Stafford*, 2019 MT 114N, ¶ 17. Irrespective, well established contract law principles clearly demonstrate Stafford could not have formed a contract with Equity.

Mont. Code Ann. § 28-2-102 sets forth the essential elements of a contract, and states the following:

It is essential to the existence of a contract that there be:

(1) identifiable parties capable of contracting;

(2) their consent;

(3) a lawful object; and

(4) a sufficient cause or consideration.

Mont. Code Ann § 28-2-301 sets forth the essential characteristics of consent, and states the following:

The consent of the parties to a contract must be:

(1) free;

(2) mutual; and

(3) communicated by each to the other.

The material facts show no contract formed. Stafford was not a party capable of contracting. While she alleges she made a bid on the property, she could not have made a valid bid because she was never a "qualified bidder." Whether she believed she made a bid is not relevant and does not give rise to a disputed material fact.

For Stafford to qualify to bid on the property she had to have been able to bid at least $238,565.88, which is one dollar more than the maximum bid the

beneficiary had authorized. She admitted the most she could bid was $219,000. (Doc. 56 (App C, ¶ 12)). FEI's rules of the auction precluded her from qualifying. (Doc. 77, ¶¶ 6-8). Nowakowski's affidavit demonstrated this fact when he affirmed that there were no bidders other than the credit bid from FNMA. (Doc. 77, Ex. C ¶ 8). Therefore, no contract could have formed because she was not capable of contracting. Mont. Code Ann. § 28-2-102(1).

Moving beyond that fatal deficiency for contract formation, no interpretation of the facts support a claim that ***consent*** existed. Any consent needed to be free, mutual, and communicated by each to the other. Mont. Code Ann. § 28-2-301. As this Court explained:

> There must be *mutual assent or a meeting of the minds* on all essential terms to form a binding contract. Consent is established when there has been an offer and an acceptance of that offer. More specifically, . . . in order to effectuate a contract there must be not only a valid offer by one party, but also an unconditional acceptance, according to its terms, by the other.

*Keesun Partners v. Ferdig Oil Co*. (1991), 249 Mont. 331, 337, 816 P.2d 417, 421 (emphasis added)(internal citations omitted).

First, Nowakowski's affidavit stated no bids were made other than the beneficiary's credit bid. Whether Stafford believes she made a bid is not relevant. Nowakowski clearly did not accept her bid because she was not a qualified bidder. Therefore, on its face, no mutual consent existed. Stafford's own affidavits and

declaration further prove that no mutual consent existed. While she claims she made a bid for $190,852.90, she also claimed that:

> [Nowakowski] then then stated "they" needed at least the $238,000 plus stated in the "Legal Notice", and an additional amount for attorney fees. Then he left.

(Doc. 9, Ex. G ¶ 14).

Stafford clearly understood that Nowakowski did not acknowledge or accept the bid she asserts she made. There was no "mutual assent or a meeting of the minds." No contract could form as a matter of law.

Stafford attempts to bypass the contract formation issue with arguments that the Trustee's Sale was an "auction without reserve." This simply is not the case. The Trustee's Sale clearly was a "with reserve" auction, and any bidders had to be able to bid at least $238,564.88. FNMA could qualify with its step credit bid. However, the step bid was never triggered because no other qualified bidders existed.

Stafford provides no Montana authority to support argument that the Trustee's Sale was "without reserve" and an enforceable contract was formed by her alleged bid. Mont. Code Ann. §30-11-502(3) expressly states the general rule that an auction is with reserve by default unless explicitly stated that it is without reserve. Her citation to out of state authority offers her no support that an exception to the general rule applied to the Trustee's Sale here. In *Pyles v.*

*Goller* (1996), 109 Md. App. 71, 674 A.2d 35, the advertisement for the subject auction stated that "the auction would be an "Absolute Auction and there would be No Minimums." *Id.* at 37. Therefore, the court found the general rule that auctions are presumed to be with reserve unless they are expressly stated to be without reserve, did not apply.

In *Garden v. Cent. Neb. Hous. Corp.* (8th Cir. 2013), 719 F.3d 899, the court rejected the claim that the auction was without reserve. There, the bid sheet stated "[t]he Trustee's Sale will remain open for ten (10) minutes and I will accept any bids offered during that time." *Id.* at 902. The Court held the following:

> This language, however, does not constitute an express statement that the auction would be without reserve. Instead, the language indicates a "preliminary negotiation, not intended and not reasonably understood to be intended to affect legal relations." *Marten v. Staab*, 4 Neb. Ct. App. 19, 537 N.W.2d 518, 523 (Neb. Ct. App. 1995) (citation omitted)(explaining that seller's statements that property "will be sold to the highest bidder" does not ordinarily transform an auction into one without reserve), aff'd, 249 Neb. 299, 543 N.W.2d 436 (Neb. 1996).

*Garden* at 904.

Also of note in *Garden*, is that it shows that acceptance of a bid must be clear. The court stated:

> The general rule is that "acceptance of a bid at auction is denoted by the fall of the hammer or by any other audible or visible means signifying to the bidder that he or she is entitled to the property[.] 7 Am. Jur. 2d Auctions and Auctioneers § 31 (2013)(footnote omitted). Here, there was no fall of the hammer at the conclusion of the ten minutes. Instead, Frayser simply announced

> that the ten-minute time period had expired. Frayser did not make any indication that he had accepted CNH's bid, such as saying that the property was "going, gone" or "sold" to CNH.

*Garden* at 904-905.

In the case at bar, Stafford acknowledges that Mr. Nowakowski never accepted her bid. The lack of acceptance is fatal to Stafford's claim that a contract formed.

Stafford also cites to *St. Paul Oil & Gas Corp. v. Trijon Expl.* (Tex. App. 1994), 872 S.W.2d 27 in support of her claim that the trustee sale was without reserve. In *Trijon*, the issue was an alleged misrepresentation of an agreement with respect to a deceptive trade practices claim. The court found:

> [I]n the present case it is undisputed that there was no underlying *agreement* between St. Paul and the bidders for Parrino to misrepresent. At most there was merely in invitation from St. Paul to the prospective bidders to enter a second round of bidding, which amounted to nothing more that preliminary negotiation.

*Id.* at 29. (emphasis in original)(internal citations omitted).

*Trijon* provides no support for finding the Trustee's Sale was an auction "without reserve."

The recent case of *Rest. Supply, LLC v. Giardi Ltd. P'ship* (2019), 330 Conn. 642, 200 A.3d 182, provides the Court with persuasive authority for rejecting Stafford's claim that the subject Trustee Sale was an auction without reserve. Giardi sought to sell its property for $450,000. *Id*. 184. The plaintiff and others

made offers for the property, and Giardi then directed all prospective buyers to resubmit their highest and best offers. *Id*. Plaintiff submitted a cash offer of $460,000 with no contingencies, which it claimed was the highest and best offer. *Id*. Giardi did not accept the offer, and purportedly accepted a lower offer. *Id*.

The court in *Giardi* looked to the Connecticut's sale by auction statute, which comes from the Uniform Commercial Code. *Id* ¶ 186. That statute is almost identical to Mont. Code Ann. § 30-11-502.

The *Giardi* court stated:

> We begin with the statutory language. Our sale by auction statute, § 42a-2-328, which our legislature adopted verbatim from § 2-328 of the Uniform Commercial Code, provides that an auction can be held "with reserve" or "without reserve." Section 42a-2-328 (3) provides that "*a sale is with reserve* unless the goods are in *explicit terms* put up without reserve." (Emphasis added.) A comment to § 42a-2-328 explains that the drafters intended the language to "make it clear" that "[a]n auction 'with reserve' is the normal procedure. . . . The prior announcement of the nature of the auction . . . as . . . without reserve will, however, enter as an 'explicit term' in the 'putting up' of the goods and conduct thereafter must be governed accordingly. . . ." Conn. Gen. Stat. Ann. § 42a-2-328 (West 2009), comment (2).

*Giardi* at 186.

Connecticut courts never resolved whether the phrase "highest and best" constituted "explicit terms" sufficient to create an auction without reserve, so it looked to other jurisdictions. *Id.* The court found the following:

> Other jurisdictions that have adopted identical language to § 42a-2-328 have held that "[t]he statement that the sale [will] be made to the highest bidder is not the equivalent of an announcement that the

> auction [will] be without reserve." (Internal quotation marks omitted.) *Wells Fargo Bank, N.A. v. Holdco Asset Management, L.P.*, 729 Fed. Appx. 124, 126 (2d Cir. 2018); id., 125 (applying New York's sale by auction statute that contains language identical to § 42a-2-328); see also, e.g., *Sly v. First National Bank of Scottsboro*, 387 So. 2d 198, 200 (Ala. 1980) (*applying identical language and concluding that seller's use of phrase "'highest, best and last bidder'" did not transform auction into auction without reserve*).

*Giardi* at 186 (emphasis added).

The court found that plaintiff's allegation that Giardi used the phrase highest and best offer, without more, was insufficient to plead an auction without reserve. *Id.* at 187. Therefore, the court found the plaintiff failed to plead compliance with, or any exception to the statute of frauds, and affirmed the judgment striking the plaintiff's claims. *Id.*

The case of *Wells Fargo Bank, N.A. v. HoldCo Asset Mgmt., L.P.* (2d Cir. 2018), 729 F. App'x 124, which was cited in *Giardi*, also provides persuasive authority for the case at bar. In that case, Wells Fargo was the trustee for a special purpose entity that issued collateralized debt obligations. *Id*. at 125. Wells Fargo announced it would be selling off the collateral of the trust estate in a series of five auctions. *Id*. Holdco submitted the highest bids for four of the securities at the fourth auction. Wells Fargo declined to sell three of the assets by instructing its liquidation agent not to sell the collateral for less than a predetermined reserve price for each asset. *Id.* Holdco's bids for the three assets were below the predetermined reserve price. *Id.*

The following discussion of the court demonstrates how the Trustee Sale in the case at bar was, in fact, a "with reserve" auction.

> The primary issue we are called upon to determine is whether the terms on which the auction was held allowed Wells Fargo to decline HoldCo's offer or whether it was bound to accept it.
>
> An auction is a type of sale, and, like any sale, it is only complete when an offer has been accepted. *In re NextWave Personal Communications, Inc.*, 200 F.3d 43, 60 (2d Cir. 1999) ("As in contract law more generally, a sale by auction is valid only upon offer and acceptance."); N.Y.U.C.C. § 2-328; Restatement (Second) of Contracts § 28. New York follows *the generally accepted practice of presuming that an auction is "with reserve,"* meaning that an invitation to bid is an advertisement for prospective buyers to make offers to the seller, which the seller may freely accept or reject. *See Drew v. John Deere Co. of Syracuse*, 19 A.D.2d 308, 241 N.Y.S.2d 267, 269-70 (4th Dep't 1963); *NextWave*, 200 F.3d at 60; *see also* 7 Am. Jur. 2d Auctions and Auctioneers § 34; N.Y.U.C.C. § 2-328(3); Uniform Land Transactions Act § 2-207(a); Restatement (Second) of Contracts § 28(1)(a). *Under the "normal procedure," then, "[t]here is no contract until the offer made by the bidder is accepted by the auctioneer's 'knocking down' the property to him*." *Drew*, 241 N.Y.S.2d at 269-70. A seller may, through "express statement," modify the normal procedures. *Id.* at 270. If a seller clearly indicates that an auction is "without reserve" or "absolute," the invitation to bid functions as an offer to sell to the highest (qualified, bona-fide) bidder and bids are acceptances conditional on being the highest bid. *Id.* at 269; *see also* 7 Am. Jur. 2d Auctions and Auctioneers § 36. Conversely, a seller may declare that an auction is "conditional," reserving her right to reject offers even after the bidding has closed. *See Stonehill Capital Mgmt., LLC v. Bank of the West*, 28 N.Y.3d 439, 449, 45 N.Y.S.3d 864, 68 N.E.3d 683 (2016); 7 Am. Jur. 2d Auctions and Auctioneers § 34.

*Wells Fargo* at 125-126 (emphasis added).

///

In rejecting Holdco's claim that the auction was without reserve, the court held the following:

> HoldCo claims that Wells Fargo's invitation to bid expressly announced that the auction at issue was absolute. We disagree. The invitation to bid contains no language amounting to the "express statement" required by New York law to indicate an intent for an auction to proceed without reserve. *Drew*, 241 N.Y.S.2d at 270; *see also Stonehill*, 28 N.Y.3d at 451 (holding that a seller must send a "a forthright, reasonable signal" that "remove[s] any doubt of the parties' intent" to hold an auction that does not function in the normal manner) (internal quotation marks omitted). "[F]ormulaic language," such as that to which HoldCo points, will not do. *Id.* When the invitation to bid states that "[e]ach item of Collateral will be awarded only to the best bidder who is also a qualified bidder," … it only recites the practice common to all auctions that the sale, if made at all, will be made to the highest qualified bidder. In New York, it is long established that *"[t]he statement that the sale [will] be made to the highest bidder is not the equivalent of an announcement that the auction [will] be 'without reserve.'"* *Drew*, 241 N.Y.S.2d at 270.

*Wells Fargo* at 126 (emphasis added).

The facts in the case at bar, like *Giardi* and *Wells Fargo*, show the auction was with reserve. To qualify to bid at the sale, Stafford had to be able to bid $238,565.88, which was one dollar more than the beneficiary's step bid. She did not have that amount. Stafford, by her own admissions, acknowledges that Mr. Nowakowski stated "they" needed at least $238,xxx before ending the sale. That is proof the sale was with reserve, just as in *Wells Fargo*.

Therefore, this Court should affirm the district court's grant of summary judgment to Equity on Stafford's Count 1 since no contract existed. Additionally,

any breach of contract claim Stafford could make, assuming, *arguendo,* she could, is clearly barred by the statute of limitations. The statute of limitations for an oral contract is five years. Mont. Code. Ann. § 27-2-202(2). Stafford acknowledges that on December 27, 2012, she was aware of all the facts she now bases her claims on in this matter. (Doc. 56 (App. B, p. 2)). She did not file suit against Equity until December 4, 2018, almost six years later.

Finally, since *Stafford I* was a final judgment on the merits, all her claims in this matter are barred by the doctrine of *res judicata.* This Court has held that "[t]he doctrine of res judicata bars not only issues that were actually litigated, but also those that could have been litigated in a prior proceeding." *State ex rel. Harlem Irrigation Dist. v. Mont. Seventeenth Judicial Dist. Court* (1995), 271 Mont. 129, 894 P.2d 943, 946. Since Equity conducted the sale on behalf of ReconTrust (by way of FEI, LLC), the privity requirement of *res judicata* is established. See *ABS Indus., Inc. v. Fifth Third Bank* (6th Cir. 2009), 333 F. App'x 994, 999 ("it is well settled that a principal-agent relationship satisfies the privity requirement of res judicata where the claims alleged are within the scope of the agency relationship.") Equity therefore adopts Ayala's and the Bank Defendant's arguments requesting complete dismissal of all claims based on *res judicata*.

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### B. The Claim for a Declaratory Judgment for Violations of The Montana Small Tract Financing Act is Time Barred.

Stafford alleges that Equity violated the STFA. Specifically, she claims that since she placed the highest bid at the trustee sale, and ReconTrust did not convey the property to her, the sale did not comply with the requirement of a sale to the highest bidder. Again, as discussed above, Stafford was not a qualified bidder for the sale, and therefore could not bid. But, even accepting her argument that Equity violated the STFA, which it denies, she lacks standing to challenge a completed sale involving a Deed of Trust that she was a stranger to. Even if she had standing, her time to seek relief expired long ago.

Claims asserting violations of the STFA must be brought within two years. Mont. Code Ann. § 27-2-211(1)(c), provides, in pertinent part:

> (1) Within 2 years is the period prescribed for the commencement of an action upon:
> …
> (c) a liability created by statute ....

Stafford knew of all the elements of her STFA claim by December 27, 2012, as shown in her "Affidavit of Truth" discussed in Part C of the *Statement of Facts*, above. At the latest, she had to bring her claim seeking a declaration of violation of the STFA by December 27, 2014. The first time she filed this claim against Equity was not until December 4, 2018. Stafford's claim against Equity is almost four years beyond the time she had to make the claim. Therefore, her claim is

barred as a matter of law based on statute of limitations in addition to *res judicata*.

### C. The Claims of Actual Fraud, Negligent Misrepresentation, and Constructive Fraud are Time Barred.

The district court correctly granted summary judgment in Equity's favor. Equity's motion for summary judgment was based solely on the expiration of the statutes of limitations for those claims. Therefore, Equity presumes that is the basis for the district court's ruling.

Stafford, in her opening brief, does not point to any error with respect to the clear application of the applicable statutes of limitations. Instead, Stafford challenges the district court's finding that a contract never formed. (Stafford Opening Brief, pg. 37). With respect to that, Equity incorporates by reference section I.A of the *Argument* above.

The dispositive issue here is simple application of the statutes of limitations. The district court did not find that the statutes of limitations were equitably tolled for these claims, but only Counts 7 and 8. Equity's argument with respect to equitable tolling is addressed in the next session.

Stafford asserts Equity is liable for actual fraud, negligent misrepresentation, and constructive fraud for its handling of the Trustee's Sale. The statutes of limitations for those actions expired long before claims were ever made against

Equity. Actions for fraud must be brought within two years pursuant to Mont. Code Ann. § 27-2-203, which states the following:

> The period prescribed for the commencement of an action for relief on the ground of fraud or mistake is within 2 years, the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake.

Stafford's negligent misrepresentation claim is governed by Mont. Code Ann. § 27-2-204, which states, in pertinent part:

> 27-2-204 Tort actions — general and personal injury.
>
> (1) Except as provided in 27-2-216 and 27-2-217, the period prescribed for the commencement of an action upon a liability not founded upon an instrument in writing is within 3 years.

Stafford discovered the bases for the facts constituting her fraud and negligent misrepresentation claims by December 27, 2012. She had to bring her fraud claims against Equity by December 27, 2014. She had to bring her negligent misrepresentation claim by December 27, 2015. Those claims are time barred since she did not file suit against Equity for those causes of action until December 4, 2018.

Additionally, these claims, like all others, are barred by the doctrine of *res judicata*, as set forth in the briefs of Ayala and the Bank Defendants.

Therefore, the district court correctly granted Equity summary judgment on Count 3 of Stafford's Third-Party Complaint.

///

## II. The District Court Erred in Denying Equity's Motion for Summary Judgment on Stafford's Claims of Negligence for Conducting the Trustee's Sale in Violations of the Montana Small Tract Financing Act (Count 7) and Violation of the Montana Unfair Trade Practices and Consumer Protection Act (Count 8) Because the Statutes of Limitations for Those Claims Should Not Have Been Equitably Tolled and the Doctrine of *Res Judicata* Applies.

The district erred in finding Counts 7 and 8 were equitably tolled. As this Court has held, "[s]tatutes of limitations promote basic fairness." *Christian v. Atl. Richfield Co.*, 2015 MT 255, ¶ 13, 380 Mont. 495, 503, 358 P.3d 131, 139 (citing *Burley v. BNSF Ry. Co*., 2012 MT 28, ¶ 16, 364 Mont. 77, 273 P.3d 825). They ensure that the responding party as a reasonable opportunity to mount an effective defense. *Christian*, at ¶ 13 (citing *Mont. Pole & Treating Plant v. I.F. Laucks & Co*. (9th Cir. 1993), 993 F.2d 676, 678).

In *Schoof v. Nesbit*, 2014 MT 6, 373 Mont. 226, 316 P.3d 831, this Court discussed when statutes of limitations may be equitably tolled. The Court noted that the doctrine of equitable tolling arrests the running of the limitations period after a claim has accrued, allowing, "*in limited circumstances,*" an action to be pursued despite the failure to comply with the statutory filing deadlines. *Id.* at ¶ 33 (citing *Lozeau v. GEICO Indem. Co*., 2009 MT 136, ¶ 14, 350 Mont. 320, 207 P.3d 316). The Court used a three-part test in applying the doctrine.

> the statute of limitations may be tolled when a party reasonably and in good faith pursues one of several possible legal remedies and the claimant meets three criteria: (1) timely notice to the defendant within the applicable statute of limitations in filing the first claim; (2) lack of

> prejudice to the defendant in gathering evidence to defend against the second claim; and (3) good faith and reasonable conduct by the plaintiff in filing the second claim.

*Lozeau*, ¶ 14 (citing *Let the People Vote v. Bd. of Co. Comm. of Flathead Co*., 2005 MT 225, ¶ 18, 328 Mont. 361, 120 P.3d 385).

In *Schoof*, the Court extended the doctrine of equitable tolling to apply to a 30-day limitation period to file suit to void a county commissioners' decision. The Court considered aspects of federal equitable tolling rules. *Schoof* at ¶ 35. It looked to the Second Circuit Court of Appeals that had held "that equitable tolling may extend a statute in 'rare and exceptional circumstances,' when the "defendant is responsible for concealing the existence of plaintiff's cause of action.'" *Id*. (internal citations omitted). The Court also stated that "[t]his relief is only available when the plaintiff is actually prevented from filing on time despite exercising 'that level of diligence which could reasonably be expected in the circumstances.'" *Id.* (internal citations omitted). Because there was a question as to whether the commissioners' actions were concealed, the Court remanded for further proceedings. *Id.* at ¶¶ 37, 38, and 41. The Court, however, made clear that its "holding today merely applies the doctrine to those instances where a plaintiff is substantially prejudiced by a defendant's concealment of a claim, despite the exercise of diligence by the plaintiff." *Id.* at ¶ 37.

On its face, the three-part test discussed in *Schoof* and *Lozeau* shows that equitable tolling could not apply to Stafford's claims against Equity. This test presupposes that a first claim, of several possible legal theories, is made against a defendant *within the applicable statute of limitations of the first claim.* Here, no claim was made against Equity until December 4, 2018. Even if the test could be used with respect to Equity, there is clear prejudice here. Notwithstanding the passage of time, Joseph Nowakowski, Equity's employee, and crier at the Trustee's Sale, passed away on August 1, 2018, before suit was ever filed against Equity. There is also no showing of good faith and reasonable conduct by Stafford in failing to make any timely claims against Equity as previously noted in *Stafford I.*

Stafford had knowledge of the critical facts of her claims as of December 27, 2012, according to her own affidavits. No concealment of her claims existed. Further, no original claim was made against Equity that could support Stafford filing another claim outside of a statute of limitations to attempt to invoke the doctrine. As the Court Stated in *Weidow v. Uninsured Employers' Fund*, 2010 MT 292, ¶28, 359 Mont. 77, 246 P.3d 704, "[w]e caution that the doctrine of equitable tolling has been applied only sparingly and warn against application of it to 'what is at best a garden variety claim of excusable neglect.'" The district court erred in applying the doctrine here.

Stafford's cause of action for negligence for conducting the Trustee Sale in violation of the STFA (Count 7) should be governed by the two-year statute of limitations set forth in Mont. Code Ann. § 27-2-211(1)(c) and is time-barred. Even applying the longer 3-year statute of limitations under Mont. Code Ann. § 27-2-204, given her claim is couched in negligence, yields the same result. As such, the district court erred in denying Equity's motion for summary judgment on Count 7.

Stafford's claim for violation of the Montana Unfair Trade Practices and Consumer Protection Act (Count 8) is equally barred by the statute of limitations. Stafford claimed Equity violated the Act by representing:

a. the Property would be sold at the auction;
b. the Property would be sold to the highest bidder;
c. the starting bid at the auction would be $190,851.90;
d. the reason for ending the auction early was the failure to meet a reserve price;
e. FNMA placed the highest bid in at the auction;
f. FNMA purchased the property at the auction; and
g. the only bid at the auction was the credit bid of FNMA in the amount of $190,851.90.

(Doc. 10, ¶ 110).

The statute of limitations for a violation of Montana's Consumer Protection Act is two years pursuant to Mont. Code Ann. § 27-2-211(1)(c). *Hein v. Sott,* 2015 MT 196, ¶ 13, 380 Mont. 85, 353 P.3d 494. All the facts constituting her claim under the Act were known to her by December 27, 2012, according to her own affidavit. Stafford's claim under the Act was time barred. The doctrine of

equitable tolling does not apply. Therefore, the district court erred by denying Equity's motion for summary judgment on Count 8.

## CONCLUSION

The District Court's grants of summary judgment in Equity's favor on Counts 1 and 3 were proper. While Count 2's disposition is somewhat uncertain, under the Court's de novo review, any uncertainty can be removed. No contract of any kind formed between Stafford and any other party. To the extent she could make such a claim, it could only be for an oral contract, to which the statute of limitations expired. Equally the statute of limitations for Counts 2 and 3 expired well before the claims were ever made. Additionally, all claims should be dismissed based on *res judicata*.

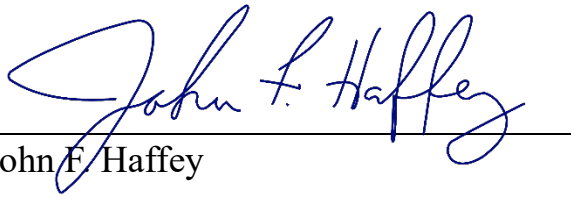
The District Court erred by denying Equity's motion for summary judgment on Counts 7 and 8 based on equitable tolling. The record demonstrates that Stafford had all the knowledge of her potential claims on December 27, 2012 when she obtained the Trustee's Deed. This Court's precedent demonstrates the doctrine cannot, and should not, apply in this matter.

Therefore, Equity requests that the Court affirm the district court's order granting summary judgment to Equity for breach of contract, actual fraud, negligent misrepresentation and constructive fraud (and declaratory judgment on

STFA) and reverse the district court's denial of summary judgment on Stafford's' claims of negligent sale and violation of the UTPA. To the extent Count 2 (declaratory judgment on STFA) was not resolved, Equity respectfully requests that the Court direct summary judgment and dismissal.

DATED this 29th day of January, 2021.

HAFFEY VAP PLLC

By 
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## CERTIFICATE OF COMPLIANCE

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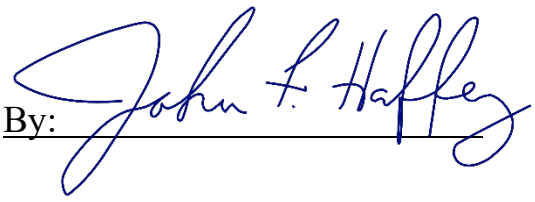
By: 

## CERTIFICATE OF SERVICE

I hereby certify that I have filed a true and accurate copy of the foregoing ***Appellee/Cross-Appellant Equity Process Management, Inc.'s Combined Answer Brief and Opening Brief*** with the Clerk of the Montana Supreme Court and each attorney of record by following means:

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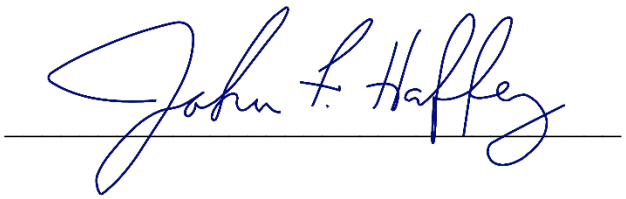

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