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Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

FIRST BANK OF LINCOLN, a Montana bank corporation,

Appellant,

vs.

LAND TITLE OF NEZ PERCE COUNTY, an Idaho corporation,

Respondent.

Supreme Court No. 46000-2018

RESPONDENT'S BRIEF

Appeal from the District Court of the Second Judicial District for Nez Perce County

Honorable Jeff Brudie, District Judge Presiding

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I. STATEMENT OF THE CASE

A. Nature of the Case.

This case concerns (a) whether a secured creditor should recover twice for the same debt despite the damage such ruling would do to the integrity of the non-judicial foreclosure process; and (b) whether that same secured creditor—if it later voluntarily stipulates and elects to give up its security interest in other collateral—can still nevertheless recover for the alleged loss of that other collateral.

Appellant, First Bank of Lincoln (hereinafter "First Bank") at its foreclosure sale of the Hotel Lincoln in Lincoln, Montana attended by the bank President made a successful full credit bid in 2014 and received that property. Now, First Bank seeks protection from itself, saying it accidentally over bid at that foreclosure sale and that the very debt that formed the basis for its full credit bid is still owed. The Full Credit Bid Rule exists for the common sense reason that no creditor is entitled to a double recovery of the same debt, as that would be an unjustified windfall. The Full Credit Bid Rule also preserves the integrity of the non-judicial foreclosure sale process, ensuring that secured creditors only bid the fair market value of the property, and that other parties who must make cash bids at such sales are not wasting their time. Otherwise, why would a sophisticated bank creditor ever do anything than simply bid the full amount of its debt regardless of how little the collateral was actually worth? The foreclosure sale process would be rendered a sham, a mere excuse simply to turn over collateral to the secured creditor.

Further, alternative grounds besides the Full Credit Bid Rule justify the decision below. In 2016, First Bank vindicated its position in Washington state court that its second deed of trust

still encumbered a bowling alley property in Washington State. But inexplicably, having achieved that ruling on appeal, First Bank voluntarily stipulated to release its second deed of trust and dismiss that case. Having done so, First Bank made an election of remedies, and that doctrine as well as the doctrines of judicial estoppel and quasi estoppel now bar First Bank from bringing the present lawsuit, as the central tenet of this lawsuit is Respondent's, Land Title of Nez Perce County, Inc. (hereinafter "Land Title"), conduct rendered valueless the bowling alley collateral. On the contrary, First Bank voluntarily released that collateral.

B. Course of Proceedings.

First Bank filed the Complaint in the present Idaho action against Land Title on November 29, 2016.[1] The Complaint alleges (1) Negligence; (2) Third-Party Beneficiary; (3) Specific Performance; and (4) Equitable Estoppel. The Complaint alleges that First Bank "suffered damages in the amount of original loan . . . , less the fair-market value of the Hotel Lincoln."[2]

Land Title filed a Motion for Summary Judgment on July 19, 2017.[3] However, prior to that date for hearing, First Bank file a Motion for a Continuance for Summary Judgment Briefing Schedule and Hearing Date.[4] The basis for the continuance was that the Montana First Judicial District Court in a separate proceeding instituted by First Bank regarding the obligation on this

[1] R. 2. An amended Complaint was later filed on 12/4/2017, but the changes were relatively minor. R. 235.
[2] R. 241 and 242, paras. 4.7 and 5.7.
[3] R. 145-46.
[4] R. 43-45.

debt had set a hearing on cross motions for summary judgment on August 16, 2017.[5] On July 19, 2017, without hearing, the District Court granted the Motion for Continuance.[6] On July 19, 2017, First Bank filed a Motion for Reconsideration of that order, as well as opposition to the Motion for Continuance.[7] A telephonic hearing was held on August 10, 2017, on the reconsideration.[8] At the hearing on the Motion for Continuance, the Court indicated that it would still grant the continuance but that if there was no ruling by the first of November, Land Title could re-notice its hearing on its Motion for Summary Judgment.[9] Land Title re-noticed its hearing on its Motion for Summary Judgment on November 3, 2017.[10] A hearing was set on January 25, 2018, on that Motion for Summary Judgment.[11] First Bank filed its own Motion for Summary Judgment on January 2, 2018.[12] The District Court held a hearing and entered an Opinion and Order on Motions for Summary Judgment on March 22, 2018.[13] That Order granted Land Title's Motion for Summary Judgment based on the Full Credit Bid Rule. Final Judgment was entered in the case on April 3, 2018.[14] A Notice of Appeal of that decision was timely filed on April 30, 2018. On July 30, 2018, First Bank filed a Motion for Suspension before this Court seeking to suspend the appeal to await an alleged anticipated ruling in the

[5] R. 43-44.
[6] R. 147-48.
[7] R. 159-62.
[8] R. 189.
[9] R. 192.
[10] R. 193.
[11] R. 231.
[12] R. 265, 290.
[13] R. 647-53.
[14] R. 655.

aforementioned Montana District Court action. On August 20, 2018, this Court entered its Order Denying Motion for Suspension, and this appeal proceeded forward.

C. Statement of Facts.

Around January 27, 2011, First Bank loaned $440,000.00 to Donald Tuschoff ("Tuschoff"), in connection with his purchase of the Hotel Lincoln in Lincoln, Montana ("Hotel Lincoln"). Tuschoff signed a promissory note, secured by a deed of trust against the Hotel Lincoln Property ("Hotel Lincoln DOT").[15] As additional collateral, Tuschoff also executed an assignment of his beneficial interest in a Washington state deed of trust. The Washington state deed of trust was on a bowling alley in Clarkston, Washington, which Tuschoff financed and sold to a group of investors known as "Schwab" resulting in a promissory note ("Schwab/Tuschoff Note") and deed of trust ("Bowling Alley DOT").[16]

In June 2013, Schwab in turn sold the bowling alley to a buyer, Banana Belt Gaming, LLC ("Banana Belt").[17] First American Title Company ("First American") handled the closing of that sale.[18] Defendant Land Title of Nez Perce County ("Land Title") was contacted by First American because Land Title had been servicing the payments due on the Schwab/Tuschoff Note as part of a long-term escrow contract. Land Title attempted to secure the necessary

[15] R. 123, 13, 55-59, 61-70. All factual citations to the record in this brief by Land Title are simply citations to the record in the case on summary judgment for purposes of this appeal. Land Title by so citing in no way stipulates to said facts as accurate or releases any right to contest the facts as established in any future proceedings in this case in the event that this Court does not uphold the District Judge's summary judgment ruling in favor of Land Title.
[16] R. 13, 72-76.
[17] R. 13.
[18] *Id.*

request for reconveyance by Tuschoff as well as to come up with a payoff amount due on the Schwab/Tuschoff Note for the closing.[19] However, Land Title failed to obtain a reconveyance from Tuschoff.[20] The closing and sale to Banana Belt occurred, and funds were paid by First American to Land Title for the payoff of the Schwab/Tuschoff Note and Bowling Alley DOT and those funds were then disbursed by Land Title to Tuschoff around that time.[21]

Subsequent to the closing of the sale, during February 2014, First Bank contacted Land Title as part of an annual loan review and learned that the bowling alley property had been sold and the funds had not been disbursed to First Bank.[22] Thereafter, First Bank filed the first of what ultimately would be four lawsuits over this dispute. The first lawsuit was a lawsuit in Montana against Tuschoff and his daughter, Laurie Tuschoff, a co-signator on the original Note, filed on April 23, 2014 (and that lawsuit continues today).[23] On the same date, April 23, 2014, First Bank also instituted a suit in Washington State against the Tuschoffs, as well as the ultimate purchaser of the bowling alley, Banana Belt (the "First Washington Lawsuit").[24] The relief sought in the Complaint filed in the First Washington Lawsuit included a "Declaration that [First Bank]'s Deed of Trust remains a lien on the subject land [bowling alley in Washington].[25] After a decision by a Washington appellate court in the First Washington Lawsuit, and a stipulated

[19] R. 14-15.
[20] R. 437.
[21] R. 15.
[22] R. 16, 78-80.
[23] Affidavit of Thomas E. Dvorak in Support of Opposition to Appellant's Motion for Suspension filed August 9, 2018 ("Dvorak Aff.") at Ex. A.
[24] R. 82-85.
[25] R. 84.

dismissal of that lawsuit, First Bank then instituted a second Washington lawsuit, now against First American, case no. CV 16-2-00030 (the "Second Washington Lawsuit"),[26] and First Bank also instituted the Complaint in the present action, a Complaint which mirrored in many ways the Second Washington Lawsuit.[27]

As part of its collection efforts, First Bank, acting through its attorney, KD Feeback, who was also appointed as a Montana non-judicial sale trustee by First Bank, held a non-judicial foreclosure sale for the Hotel Lincoln on August 25, 2014 ("Hotel Lincoln Foreclosure Sale").[28] The Notice of Trustee's Sale of Real Property setting the sale for that date stated:

> THE SUM OWING ON THE OBLIGATION SECURED BY THE TRUST INDENTURE AS OF April 23, 2014 IS:
>
> | | | |
> |---|---|---|
> | Remaining Principal Balance: | $ | 400,430.42 |
> | Escrow Due: | $ | 0.00 |
> | Late Charges: | $ | 50.00 |
> | Delinquent Interest:* | $ | 1,055.94 |
>
> *(accrued against the Principal Balance at the rate of 6% percent per annum, which interest continues to accrue at $65.9957 per day) Other: **All unpaid balances**, including taxes and insurance, **together with all necessary and reasonable expenses incurred in collection, including trustees' and attorneys' fees**, and all costs and fees incurred for a foreclosure report, publication, posting and recording.
>
> THE BENEFICIARY HAS ELECTED AND DIRECTED IN WRITING THAT THE SUCCESSOR TRUSTEE SELL THE REAL PROPERTY ABOVE DESCRIBED TO SATISFY THE AFORESAID OBLIGATIONS.
>
> . . .

[26] R. 430.
[27] R. 498-500 (comparing these two complaints).
[28] R. 16.

> The Successor Trustee or his attorney will sell the real property at public auction to the highest bidder. This sale is a public sale and **any person, including the Beneficiary (excepting only the Successor Trustee), may bid at the sale**. The bid price **must be paid in cash** and conveyance will be made by a Trustee's Deed. . . . [29]

It is undisputed that First Bank made a credit bid at that foreclosure sale of all amounts due and owing to First Bank (the "Full Credit Bid").[30] A local reporter at that sale reported:

> [The Trustee] Feeback opened the auction with the bank's credit bid of $425,748.50, which he explained represented the outstanding principle [sic], interest, costs, property taxes and legal fees for the foreclosure.
>
> Feeback then asked if anyone was willing to pay more for the building. Hearing no response, he said "I guess in the vernacular of an auctioneer, which I ain't, that's the functional equivalent of 'going once, going twice, sold to the bank'."[31]

The President of First Bank, Kenny Martin, was present at the sale.[32] The Trustee's Deed recited that First Bank "has paid the purchase price due on the sale by credit bid." [33] Placing a credit bid was consistent with the Hotel Lincoln DOT, which also mandated application of the proceeds by the Trustee to the debt owed to First Bank, in this case, to payment in full of the debt owed:

> Upon sale of the property and to the extent not prohibited by law, Trustee **will apply the proceeds of the Property's sale in the following order:** to all fees, charges and costs, including those for expenses the power of sale and reasonable Trustee's fees and reasonable attorney's fees; to Lender for all moneys advances made for the repairs, taxes, insurance, liens, assessments and prior

[29] R. 90 (emphasis added).
[30] R. 99-103.
[31] R. 103, 299-300.
[32] R. 102.
[33] R. 99.

> encumbrances and interests thereon; to the Secured Debt's principal and interest; and paying any surplus as required by law. **Lender or its designee may purchase the Property**.[34]

The First Washington Lawsuit proceeded all the way to the Court of Appeals in the State of Washington. In a published decision entered on April 14, 2016, Division 3 of the Court of Appeals of Washington ruled in favor of First Bank, holding that the assignment was effective, that the Bowling Alley DOT remained valid and enforceable, and remanding for further proceedings. *First Bank of Lincoln v. Tuschoff and Banana Belt Gaming, LLC*, 375 P.3d 687 (Wash. App. 2016). In that case, the Washington court characterized the proceedings as follows (and did not know that a full credit bid had in fact been made been made):

> First Bank sued Tuschoff and Banana Belt in Asotin County Superior Court, seeking a declaratory judgment that Tuschoff's assignment of his beneficial interest in the [Bowling Alley DOT] remained a valid lien against the bowling alley property.
>
> First Bank held a nonjudicial foreclosure sale for the Hotel Lincoln property on August 25, 2014. First Bank was the only bidder at the trustee's sale, and successfully purchased the property. First Bank asserts that a $250,000 balance will remain unpaid in connection with the Montana note after First Bank liquidates the Hotel Lincoln property. ***First Bank never disclosed during discovery the amount it bid at the trustee's sale to reacquire Hotel Lincoln*.**

Id. at 692 (emphasis added). However, since the Washington court did not know that a full credit bid had been made (resulting in no deficiency judgment being possible), the Washington court engaged in an analysis of whether any deficiency judgment was even allowed under Montana law. *Id.* at 694. It first noted that the Montana code did not seem on its face to allow a

[34] R. 65 (emphasis added).

deficiency in any kind of non-judicial foreclosure of any type of real property, residential or commercial. *Id.*

However, the Washington appellate court went on to give, in an unpublished portion of its opinion, a discourse on Montana's anti-deficiency statute. In that recitation, the court first said that it appeared under Montana law that no deficiency judgments were allowed in a non-judicial foreclosure. The court then went on to say that it was not clear to the Washington court what Montana law was on this issue and that the Washington Court was "tak[ing] the unusual step of declining to answer a dispositive issue, but instead requir[ing] Banana Belt to file suit in Montana so a Montana court can answer the dispositive issue. Only if the Montana court determines that First Bank is entitled to a deficiency judgment, it will also need to determine the amount of the judgment, which will require resolution of how much First Bank bid to purchase the Hotel Lincoln at foreclosure." *Id.* at 694. The court went on to say that the trial court on remand was to

> [S]tay further proceedings for Banana Belt to file suit in Montana. We deem it would be prudent for a Montana court to determine whether First Bank has a right to a deficiency judgment on its promissory note with Tuschoff following its election to foreclose against the Hotel Lincoln by advertisement and sale, and if so, the amount of the deficiency judgment.
>
> If the Montana court determines First Bank has no right to a deficiency judgment against Tuschoff, the trial court is directed to enter judgment in favor of Banana Belt and to enter such orders as necessary to clear title of the assigned deed of trust that currently encumbers the bowling alley property. ***This is because First Bank's lien against the bowling alley property is extinguished without an existing obligation secured by the assigned [Bowling***

> ***Alley DOT]***. See 18 Stoebuck & Weaver, supra, § 17.1, at 253 (explaining that a security cannot exist without an obligation).
>
> If the Montana court declines to render a decision on the identified issue of Montana law despite (in our opinion) the parties having a justiciable controversy, the trial court is directed to determine these questions of Montana law.

Id. at 694 (emphasis added). But First Bank and Banana Belt did not follow these instructions, and did not file suit to determine: (a) if a deficiency was allowed under Montana law, and (b) if so, in what amount. Instead and inexplicably, First Bank voluntarily dismissed its First Washington Lawsuit with prejudice, and the stipulated order on May 20, 2016, provided:

> all of Plaintiff's claims against Defendant Banana Belt, all cross-claims of Defendant Banana Belt against Defendants Donald C. Tuschoff and Jane Doe Tuschoff, all counterclaims of Defendant Banana Belt against Plaintiff, and any claim that Plaintiff has made seeking authority to foreclose on the [bowling alley] property situated in Asotin County, Washington, which is the subject of this lawsuit (the "subject property"), are dismissed with prejudice and without attorneys' fees or costs. **Any remedy seeking to void Defendant Banana Belt's interest in, or seeking to restore Plaintiff's right to the subject property is also abandoned and dismissed with prejudice.**[35]

Around this same time, on April 25, 2016, new counsel for First Bank wrote to the bank's former counsel and its former trustee KD Feeback, presenting a claim for malpractice on the basis of a full credit bid having been made.[36] Apparently not satisfied with its malpractice claim, First Bank shortly thereafter filed the Second Washington Lawsuit against First American and filed the Complaint in the present action against Land Title.

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[35] R. 105 to 110 (emphasis added).
[36] R. 112.

II. ADDITIONAL ISSUES PRESENTED ON APPEAL

A. Whether a deficiency judgment of any sort is allowed in a non-judicial foreclosure case under the express language of Montana statutory law, and if a deficiency is allowed, does the full faith and credit rule apply in this instance?

B. Whether alternative grounds as follows, which were raised on summary judgment but not reached by the District Court, nevertheless provide an independent basis to uphold all or portions of the District Court's decision, including : (i) election of remedies by First Bank or judicial estoppel bars First Bank from pursuing this action; (ii) prohibited economic damages are sought; (iii) Washington law provides a statute of limitations barring a negligence claim; (iv) no duty in negligence was owed to First Bank by Land Title; (iv) no third party beneficiary claim will lie; and (vi) specific performance is a remedy, not its own cause of action?

C. Whether Land Title should receive an award of attorney's fees and costs on appeal?[37]

III. ATTORNEY FEES ON APPEAL

Pursuant to I.R.C.P. 54(d)-(e) and I.C. §§ 12-121 and 12-120(3), Land Title requests appellate attorney fees and costs and will present its argument on the issue of the same supported by citation to authorities, statutes, and the record in Section IV herein.

IV. ARGUMENT

A. Standard of Review.

"This Court reviews a ruling on summary judgment under the same standard as the trial court." *Hayes v. City of Plummer*, 159 Idaho 168, 357 P.3d 1276, 1278 (2015). "Summary judgment is proper 'if the pleadings, depositions, and admissions on file, together with the

[37] By raising the issue of attorney fees, Land Title simply seeks said fees if this Court finds it appropriate under law to award them; neither the fact of seeking such fees or any other action of Land Title should be construed as an admission on the part of Land Title that such fees are appropriate.

affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Id*. (quoting I.R.C.P. 56(c)). "Summary judgment is appropriate if the plaintiff fails to demonstrate the existence of a genuine issue of material fact as to causation and damages." *J-U-B Engineers, Inc. v. Sec. Ins. Co. of Hartford*, 146 Idaho 311, 317, 193 P.3d 858, 864 (2008) (quoting *McPheters v. Maile*, 138 Idaho 391, 396, 64 P.3d 317, 322 (2003)). With respect to a case involving application of the law of another state, this Court has noted:

> Idaho appellate standards of review apply even when a contract's choice of law provision requires the application of the law of another state. In reviewing a grant of summary judgment, this Court's standard of review is the same as the district court's standard in ruling upon a motion.

Harmon v. State Farm Mut. Auto. Ins. Co., 162 Idaho 94, 98, 394 P.3d 796, 800 (2017)(citations omitted). Further, a district court decision may be upheld on "alternate grounds from those stated in the finding of fact and conclusions of law on appeal." *Martel v. Bulotti*, 138 Idaho 451, 453, 65 P.3d 192, 194 (2003)(citations omitted).

B. No Dispute Exists that Montana Law Applies to the Hotel Lincoln Foreclosure Sale, But Significant Dispute Exists Over the Import and Meaning of that Law

There is no dispute between the parties here that the effect of a full credit bid made at the Hotel Lincoln Foreclosure Sale is determined under Montana law, assuming that a deficiency judgment is allowed under Montana law. The lower court ruled that the Full Credit Bid Rule prevented further recovery by First Bank. Implicit in that District Court decision was a ruling that a deficiency judgment is possible for a commercial type non-judicial foreclosure under Montana law. If no such deficiency were possible, that would be grounds to reach the decision

reached by the District Court without application to the Full Credit Bid Rule. Additionally, a number of alternative grounds under Idaho law and even the law of the state of Washington were raised by Land Title during this case but not reached by the District Court.[38] Those additional grounds would provide a basis to independently uphold a portion of or the entirety of the District Court decision granting summary judgment in favor of Land Title. Each of these arguments will be addressed by Land Title in turn.

1. The Plain Language of the Montana Anti-Deficiency Statute Justifies Upholding the District Court's Decision

There are two reasons why the Hotel Lincoln Foreclosure Sale bars the entirety of the present action. Either (a) the unavailability of a deficiency action under Montana law, or (b) if a deficiency action is available under Montana law, the Full Credit Bid Rule, each here independently prevent there from being any amount due to First Bank. In other words, these each create an independent complete defense meriting summary judgment in favor of Land Title. Here, the District Court implicitly found that there was an exception to the Montana anti-deficiency statute in order to even address the application of the Full Credit Bid Rule. Such finding was in error.

As noted by the Washington Court of Appeals, Montana statutory law is clear that when there is a non-judicial foreclosure by trustee's sale—as was the case here—no deficiency judgment is allowed against any person obligated on the note, bond, or other obligation. The applicable statute provides:

[38] See R. at 471-475 regarding Land Title's position on applicable Choice of Law, which is incorporated herein by reference and restated as if set forth in full.

> When a trust indenture executed in conformity with this part is foreclosed by **advertisement and sale**, other or further action, suit, or proceedings ***may not be taken*** or judgment entered for any deficiency against the grantor or the grantor's surety, guarantor, **or successor in interest**, if any, on the note, bond, or other obligation secured by the trust indenture **or against any other person obligated on the note,** bond, **or other obligation**.

MCA 71-1-317 (emphasis added). It was in fact this language as interpreted in *First State Bank of Forsyth v. Chunkapura*, 734 P.2d 1203 (Mont. 1987), that prompted the Washington Court of Appeals in the *First Bank of Lincoln v. Tuschoff* case to become concerned that the *Chunkapura* decision may have created ambiguity as to whether a deficiency is allowed in non-judicial foreclosures of commercial deeds of trust. Specifically, the Washington Court of Appeals stated:

> The *Chunkapura* court later restricted its opinion in an order on rehearing. It is this restriction that creates the ambiguity for this court. On rehearing, the *Chunkapura* court restricted the nondeficiency rule to future foreclosures of *residential* property. *Id.* at 67, 734 P.2d 1203. The restrictive language seemingly allows a deficiency judgment following any foreclosure of nonresidential property, i.e., commercial property. However, it can be argued that the rehearing order was intended only to permit a deficiency judgment following a ***judicial*** foreclosure of commercial property, and did not alter the earlier unanimous statements from the majority and dissent which agreed that under the plain language of MCA § 71–1–317 there cannot be a deficiency judgment following a *nonjudicial* (advertisement and sale) foreclosure. *See Trs. of the Wash.–Idaho–Mont. Carpenters–Emp'rs Ret. Trust Fund v. Galleria P'ship*, 239 Mont. 250, 257–58, 780 P.2d 608 (1989) ("When a lender holding a trust indenture as security *chooses to foreclose under the mortgage laws, Chunkapura* as modified holds that except for occupied single family residential property, lenders can obtain a deficiency judgment even on trust indentures.").

First Bank of *Lincoln*, 375 P.3d at 694 (emphasis in bold added, emphasis in italics in original quote). Again, as noted above, Banana Belt did not follow the Washington Court of Appeal's instruction to file in a Montana court "to determine whether First Bank has a right to a deficiency judgment on its promissory note with Tuschoff following its election to foreclose against the

Hotel Lincoln by advertisement and sale, and if so, the amount of the deficiency judgment." *Id.* Instead, First Bank stipulated with Banana Belt to a resolution of that case that involved First Bank voluntarily giving up the relief it had just obtained, vindication of its right to maintain a deed of trust on the bowling alley property.

From the Idaho Supreme Court's perspective, looking at the murky state of Montana caselaw, plain meaning statutory construction should carry the day. The plain language of MCA Section 71-1-317 shines through as clearly stating that there is no deficiency judgment allowed, i.e., when a trust indenture is foreclosed by advertisement and sale—a trustee's non-judicial foreclosure sale—no further action may be taken to recover on the debt. The facts of the *Chunkapura* case involved a residential, **judicial** foreclosure of a trust deed and that court was only in dicta discussing a trustee's non-judicial foreclosure of a trust deed on commercial real property. The Court's holding that the anti-deficiency protections applied to a judicial foreclosure of a residential trust deed and its later reservation of that holding to residential sales should be read in this light. Neither the *Chunkapura* cases, nor any Montana case since then, has done violence to the plain meaning of Section 71-1-317 and its prohibition against deficiencies in all situations where a trust deed is foreclosed by non judicial "advertisement and sale." In the absence of a clear holding in Montana case law otherwise, this Court should apply the plain meaning of the Montana Anti-Deficiency statute, i.e., that after a **non-judicial sale** of the type that occurred here, "that other or further action, suit, or proceedings may not be taken." Therefore First Bank's debt is extinguished and no claim whatsoever lies against Land Title. *Cf. First Bank of Lincoln v. Tuschoff*, 193 Wash. App. 413, 426, 375 P.3d 687, 694 (2016)

(". . . First Bank's lien against the bowling alley property is extinguished without an existing obligation secured by the assigned Bowling Alley DOT.")(unpublished portion of decision).

2. The Full Credit Bid Rule Is Dispositive and Justifies Upholding the District Court's Decision

(a) The Full Credit Bid Rule Exists Not Only to Avoid a Double Recovery and Associated Windfall to a Creditor, But to Ensure the Integrity of Bidding at Non-Judicial Foreclosure Sales

In the event this Court determines that a deficiency is possible under Montana law, nevertheless, the effect of the foreclosure sale and the full credit bid was to extinguish any debt that could form the basis of such a claimed recovery. As noted in *Corpus Juris Secundum*,

> When a lender bids at a foreclosure sale, it is not required to pay cash, but rather is permitted to make a credit bid because any cash tendered would be returned to it. If this credit bid is equal to the unpaid principal and interest on the mortgage plus the costs of foreclosure, this is known as a "full credit bid."

59 A.C.J.S. Mortgages § 1138.[39] In this case, the amount so bid and required to be credited as cash payment on the debt was a full credit bid, the entire amount of the debt then due. This brings into effect what is known as the "Full Credit Bid Rule," one justification for which is avoiding a double recovery to the lender. In *Najah v. Scottsdale Ins. Co.*, 230 Cal. App. 4th 125, 133, 178 Cal. Rptr. 3d 400, 407 (2014), the Court stated:

> Under the Full Credit Bid Rule, when the lienholder obtains a property at a foreclosure sale by making a full credit bid—bidding an amount equal to the unpaid debt, including interest, costs, fees, and other expenses of foreclosure**—*"it***

[39] See also *U.S. National Bank Assn. v. American General Home Equity, Inc.*, 387 S.W.3d 345 (Ct. App. Ken. 2012) ("Although there is no statutory or case law on the subject, the parties agree that credit bids are commonly used at judicial sales. The purpose of allowing a credit bid is to avoid the inefficiency of requiring a bidder to tender cash where a portion of it would be immediately returned.").

> ***is precluded for purposes of collecting its debt from later claiming that the property was actually worth less than the bid. [Citations.]"*** (*Alliance Mortgage, supra*, 10 Cal.4th at p. 1238, 44 Cal.Rptr.2d 352, 900 P.2d 601.) After acquiring the property in this manner, the beneficiary is generally unable to pursue "'any other remedy regardless of the actual value of the property on the date of the sale.'"[12] (*Passanisi v. Merit–McBride Realtors, Inc.* (1987) 190 Cal.App.3d 1496, 1503, 236 Cal.Rptr. 59, italics omitted, quoting 1 Miller & Starr, Current Law of Cal. Real Estate (rev. ed., 1986 supp.) Deeds of Trust and Mortgages, § 3:126, p. 354.) "This is because the lender's only interest in the property is the repayment of the debt. [Citation.] The lender's interest having been satisfied, any other payment would result in a double recovery." (*Track Mortgage Group, Inc. v. Crusader Ins. Co*. (2002) 98 Cal.App.4th 857, 864, 120 Cal.Rptr.2d 228 (*Track Mortgage*); accord, *Cornelison v. Kornbluth, supra*, 15 Cal.3d at p. 606, 125 Cal.Rptr. 557, 542 P.2d 981 [full credit bid at foreclosure sale "establishes the value of the [liened property] as being equal to the outstanding indebtedness" and "the nonexistence of any impairment of the security"]; *Countrywide Home Loans, Inc. v. Tutungi* (1998) 66 Cal.App.4th 727, 731, 78 Cal.Rptr.2d 203 ["Under the Full Credit Bid Rule, a foreclosing lender that has purchased the real property security for such a bid is precluded from pursuing further claims to recoup its debt, because the bid has established that the foreclosed security is equal in value to the debt, which therefore has been satisfied."].) "Thus, the lender is not entitled to insurance proceeds payable for prepurchase damage to the property, prepurchase net rent proceeds, or damages for waste, ***because the lender's only interest in the property, the repayment of its debt, has been satisfied, and any further payment would result in a double recovery***." (*Alliance Mortgage, supra*, at p. 1238, 44 Cal.Rptr.2d 352, 900 P.2d 601.)

Id. at 133-34, 178 Cal. Rptr. at 407-08 (emphasis added). The *Najah* court also noted that an additional policy justification was to protect the integrity of the public non-judicial foreclosure auction and encourage proper and competitive bidding by the lender in its credit bid:

> Apart from preventing double recovery, the Full Credit Bid Rule serves to protect the integrity of the foreclosure auction. In discussing the Full Credit Bid Rule, our Supreme Court has said, "'[t]he purpose of the trustee's sale is to resolve the question of value ... through competitive bidding....'" (*Cornelison v. Kornbluth, supra*, 15 Cal.3d at p. 607, 125 Cal.Rptr. 557, 542 P.2d 981, quoting Hetland, Cal. Real Estate Secured Transactions (Cont. Ed. Bar 1970) p. 255.) In order to ensure that a "fair price" is obtained for the foreclosure property, it must be "sold at public sale to the highest bidder, and at least 20 days' notice of the sale must be

> given." (*Smith v. Allen* (1968) 68 Cal.2d 93, 96, 65 Cal.Rptr. 153, 436 P.2d 65.) These procedures guarantee that foreclosure auctions are conducted in a "fair and open manner," with the property going to the party placing the highest value on it, and that any interested member of the public has the opportunity "to participate in setting the price for the property." (*Dreyfuss v. Union Bank of California* (2000) 24 Cal.4th 400, 411, 101 Cal.Rptr.2d 29, 11 P.3d 383.) A lender who intends to later claim that the value of the property was impaired due to waste, fraud or insured damage, but nonetheless makes a full credit bid, interferes with that process by impeding bids from third parties willing to pay some amount between the value the lender places on the property and the amount of its full credit bid. (See 4 Miller & Starr, Cal. Real Estate (3d ed. 2000) § 10:265, p. 10–1067 ["The beneficiary controls the sale, and the full-credit bid by the beneficiary discourages other bidders who may be willing to pay a substantial sum, although less than the beneficiary's bid."].) The Full Credit Bid Rule may act to limit recovery by a foreclosing lender who hopes to pursue a legal claim for injury to the property. ***But "[i]f there were no repercussions for making a full credit bid, lenders could manipulate the sale and discourage prospective purchasers who might have been willing to pay just under the value of the lien."*** (*Michelson v. Camp* (1999) 72 Cal.App.4th 955, 964, 85 Cal.Rptr.2d 539.)

Id. at 133-34, 178 Cal. Rptr. at 407-08 (emphasis added). Put differently, "[t]o allow the [lender], after effectively cutting off or discouraging lower bidders, to take the property—and then establish that it was worth less than the bid—encourages fraud, creates uncertainty as to the [borrower]'s rights, and most unfairly deprives the sale of whatever leaven comes from other bidders." *Whitestone Sav. & Loan Ass'n v. Allstate Ins. Co.,* 28 N.Y.2d 332, 337, 321 N.Y.S.2d 862, 270 N.E.2d 694, 697 (1971).[40] It only makes sense that there are "repercussions for making

[40] *See also In Re: Charles D. Stapp of Nevada, Inc.*, 641 F.2d 737 (9th Cir. 1981)(applying Nevada law)(Holding that an assignment of rents to creditor was no longer enforceable after a "full credit bid" because "there was no deficiency after the sale. In other words, the bankrupt's obligations to Equitable and Kelban had been fully paid. Accordingly, appellants have no claim to the rents."); *In re Oklahoma P.A.C. First Ltd. Partnership*, 168 B.R. 212 (Bankr. D. Ariz. 1993), aff'd, 174 B.R. 350 (B.A.P. 9th Cir. 1994) (lenders who made full credit bid had no claim to rents sequestered in bankruptcy; their lien on this additional collateral was only operative if an indebtedness was extant); *Najah v. Scottsdale Insurance Company*, 230 Cal.App.4th 125 (2nd

a full credit bid," *Michelson*, 72 Cal.App.4th at 964, 85 Cal.Rptr.2d at 545, including ending a lender's rights as against parties outside the lender-borrower relationship, such as insurers, appraisers, escrow agents and brokers, except in very limited circumstances. *See e.g.*, *Smith v. Gen. Mortg. Corp.*, 402 Mich. 125, 128, 261 N.W.2d 710, 712 (1978)(full credit bid terminates the borrower's rights to insurance proceeds for damage to the property); *Whitestone*, 28 N.Y.2d at 336–37, 321 N.Y.S.2d 862, 270 N.E.2d at 696–97 (same); *Cornelison v. Kornbluth*, 15 Cal.3d 590, 606, 125 Cal.Rptr. 557, 542 P.2d 981, 992–93 (1975)(no action for waste would lie after full credit bid).

In the unpublished portion[41] of *First Bank of Lincoln v. Tuschoff and Banana Belt Gaming, LLC*, 375 P.3d 687 (Wash, App. 2016), the Washington Appeals Court alluded to the common sense, common thread that demands dismissal of First Bank's complaint if the Montana anti-deficiency statute applies: "First Bank's lien against the bowling alley property is extinguished without an existing obligation secured by the assigned [Bowling Alley DOT]." *Id.* at 694. This principle holds true for the Full Credit Bid Rule as well. If the underlying obligation is paid, any over-secured position becomes moot—no creditor should be paid twice.

Dist., Div. 4., Cal. 2014)("Because a mortgage debt is extinguished by a full credit bid, it is well established that a mortgagee who purchases an encumbered property at a foreclosure sale by making a full credit bid is not entitled to insurance proceeds payable for preforeclosure damage to the property.").

[41] As to First Bank, a party to that Washington proceeding and the dismissal with prejudice of the same immediately after entry of this decision, this unpublished decision should be binding under claim or issue preclusion principles of *res judicata*. *Farmers Nat. Bank v. Shirey*, 126 Idaho 63, 70, 878 P.2d 762, 769 (1994)(*res judicata).*

(b) Montana has Applied The Full Credit Bid Rule Since Early Times

The idea of a credit bid being equivalent to a cash payment of that much of the debt not only as between the debtor and the creditor, but as between the creditor and third parties, has been recognized in the state of Montana since earliest times. In the case of *Jurgens v. Hauser*, 47 P. 809 (Mont. 1897), the court held that a sheriff when accepting a judgment creditor's credit bid at a judicial foreclosure sale had indeed received payable money on process under the relevant statute, thus earning his commission under the applicable statute:

> The practice of crediting the amount of the mortgagee's bid, if the mortgagee purchased, upon the sheriff's return of the execution, is well spoken of by *Gilfillan C.J.* in *Sharvey v. Iron Mountain Co.* (Minn.) 58 N.W. 864: "When an execution creditor bids upon property levied on, he bids as anyone else does, except that, if it be struck off to him, to avoid circuity of action, and as a matter of convenience, he is not required to go through the ceremony of paying the money to the sheriff, and receiving it back from him. But he is presumed, as anyone else would be, ***to bid the property off at what he deems to be its value***; there is secured to him, by means of execution and sale, the amount of the bid, less the fees and expenses, by acquiring title to the property if the sale become absolute, and by actual receipt of money if there be redemption. ***Whatever he acquires by the execution of the sale is deemed to be a collection***, not only **as between him and the judgment debtor**, but as between him and the sheriff.

Id. at 810 (emphasis added). The same principle was applied more recently by the Montana Supreme Court in the case of *Rocky Mountain Bank v. Stuart*, 928 P.2d 243 (Mont. 1996). There, in the context of a non-judicial foreclosure sale, the court considered whether the bank could properly pay with a "credit bid" or whether the sale was improperly conducted because the bank did not "pay the price bid in cash" as required by the applicable statute. *Id.* at 80 (citing

MCA § 71-1-315(4)). After noting that courts generally define "cash as the antonym of credit," the court went on to say that:

> [The bank] bid $69,900 on the trust property at the foreclosure sale and after acceptance of its bid by the trustee, credited the bid amount to the outstanding indebtedness owed to it by [the debtor]. Application of the bid amount to Stuart's outstanding **indebtedness is the equivalent of a money payment of the bid amount** because it reduced the amount of Stuart's outstanding indebtedness to the bank in precisely the same way that a payment in cash to the trustee—followed by the trustee turning over that amount to the bank for application to Stuart's indebtedness—would reduce the amount Stuart owed to the bank. We conclude, therefore, **that an accepted "credit bid" by the trust indenture beneficiary at a non-judicial STFA foreclosure sale, defined by the prompt application of the bid amount to the trust indenture of grantor's outstanding debt, constitutes payment by the purchaser of the price bid in cash** as required by § 71-1-315(4), MCA.

Id. at 81 (emphasis added). Thus, it is clear that the credit bid is the equivalent of bidding that much cash and also under Montana law that by making such a credit bid, the lender is obligated to apply the amount so bid as payment against the indebtedness. First Bank attempts to distinguish *Rocky Mountain Bank* on the basis that that case allegedly did not involve an over secured lender. But that offered distinction does not change the import of the *Rocky Mountain Bank* case. A lender could have pledged to it all of the security in the free world for a debt, but once the debt is paid, whether paid in official tender, or in its equivalent in gold bullion, bit coin, or in the form of a credit bid, and the lender has accepted that payment in full, there is no more debt. The rest of the security is instantly freed and released from the pledge.

The Notice of Trustee's Sale in this case provided that "the bid price must be paid in cash and conveyance will be made by a Trustee's Deed . . . ." and that Trustee's Deed provided that First Bank "has paid the purchase price due on the sale by credit bid." Given that First Bank

made a full credit bid, the Full Credit Bid Rule operates to extinguish any further claims it may have, as First Bank has told that to the world and agreed to receive the Hotel Lincoln property for its entire debt. In contrast to the trustee attorney Feeback who potentially negligently advised a full credit bid (and against whom a claim may lie under the exception to the Full Credit Bid Rule, *see infra* IV.A.ii.(d)), Land Title had nothing to do with the value that First Bank voluntarily chose to put on the value of the Hotel Lincoln in the Hotel Lincoln Foreclosure Sale. Land Title's alleged conduct only has to do with the Washington state Bowling Alley DOT. Under the Full Credit Bid Rule as it should be applied under Montana law, First Bank does not get to go back and claim ignorance or that it bid too much. What is done is done and that sale is final. The debt is extinguished and to allow First Bank to recover again would be to allow it a double recovery and threaten the integrity of the trustee sale process.

(c) The *Galleria Partnership* and *AVCO* Cases are Distinguishable and Inapposite, Primarily Because Neither Involve Protecting a Creditor from the Consequences of a Full Credit Bid.

First Bank attempts to argue based on several cases that a lender, in this case a very sophisticated lender, should be protected from the repercussions of its making a full credit bid. None of the three cases cited by First Bank for this proposition so hold. Nor do any of these three cases give good grounds to overturn the universal application of the Full Credit Bid Rule that other courts have seen fit to make on the basis of (a) avoiding a double recovery to a lender; and (b) avoiding unscrupulous underbidding by lenders at foreclosure sales to drive the price down.

The case of *Trustees of Washington-Idaho-Montana-Carpenters-Employers Ret. Tr. Fund v. Galleria P'ship*, 780 P.2d 608, 609 (Mont. 1989)("*Galleria I*"), is cited for the notion that a gross underbid by a lender should not be allowed to stand where it would have the effect of crediting for example only $1,000 against a million dollar property. After noting that Montana's statutes have no direct provisions to determine fair market value at the time of the sale, the Court noted that most of Montana's surrounding states have "statutes show[ing] that predominantly, a deficiency judgment is limited to the difference between the fair market value of the secured property at the time of the foreclosure sale, regardless of **a lesser amount realized at the sale**, and the outstanding debt for which the property was secured." *Id.* at 610 (citing *First State Bank of Forsyth v. Chunkapura*, 734 P.2d 1203, 1208 (Mont. 1987)). Notably, the law of Idaho to which *Galleria I* was likely referring is Idaho Code Section 45-1512, which says almost exactly these words in setting the deficiency judgment. The *Galleria I* court cited with approval that the purpose of these types of statutes is "to prevent the injustice that occurs when a debtor's property is sold on foreclosure sale for a price significantly less than its fair market value."

But it pushes this reasoning beyond the breaking point to say that a sophisticated lender too, such as a bank, deserves protection from paying too much in the form of a credit bid for the property. If a lender does not have encouragement to bid at the auction what is in fact the fair market value of the property, the lender has incentive to bid up the price of the property, obtain the property to resell it at its leisure, all to the detriment of other bidders who would pay cash, and then claim that it made a mistake. Neither *Galleria I* nor any of the statutes or case law that the court relied upon held that a lender—in contrast to a borrower—is worthy of protection from

a high credit bid in the same way that a borrower should be protected from a low one; the protection is for the borrower from a low credit bid, not for a lender from making a high credit bid. *Accord Bank of Baker v. Mikelson Land Co.*, 979 P.2d 180, 182 (Mont. 1999)(in judicial foreclosure action, seemingly low cash bid upheld as intrinsic value of property in part due to fact it was from a third party, arms-length buyer and not a credit bid by bank).

AVCO Fin. Servs. of Billings One, Inc. v. Christiaens, 201 Mont. 117, 118, 652 P.2d 220, 221 (1982), and its supposed recognition of a creditor's "ability to be paid efficiently" adds nothing here. In *AVCO*, the lender had loaned money and received security on various household goods and two older automobiles. It had also received a second position deed of trust on certain real property owned by the debtor, with a company called Nationwide in first position for its loan and deed of trust. Nationwide had a non-judicial foreclosure sale on its first position deed of trust. AVCO, evidently to protect its interest, paid cash in the amount owed on the first position at that sale and received a trustee's deed. The efficient choice of foreclosure language in that case is in the context of discussing whether AVCO under its personal property security documentation could elect to pursue a judgment lien prior to going after personal property. That ruling does not speak to the Montana anti-deficiency statute or calculation of the fair market value on AVCO's second position. In fact, the closest the court comes to the deficiency issues is simply to say that the Montana anti-deficiency statute only applied to the sale by the first position Nationwide and barred Nationwide from seeking a deficiency, but that as the purchaser for cash receiving a trustee's deed, of course, AVCO was not so bound on other debt it was owed. But again, this had no bearing whatsoever on cases that hold the Full Credit Bid Rule

means that a lender should not be protected from the consequences of it imprudently making a full credit bid.

(d) No General Exception for Causes of Action again Non-Borrower Third Parties Is Recognized in Montana or As a Majority Rule, and If An Exception Were to Be Recognized The Scope Should be Limited to Cases Involving Fraud Affecting the Making of a Full Credit Bid as Montana's Statutory Scheme Makes The Amount Bid Binding as to Third Parties.

First Bank argues for the first time on appeal that the Full Credit Bid Rule has an exception for all causes of action against non-borrower third parties such as First Bank. As an initial point, the fact that no such law exists in the state of Montana is grounds for this Court not to even delve into that claimed exception. Indeed, the *Jurgens v. Hauser*, 47 P. 809 (Mont. 1897), case, *supra*, stands as an example in Montana for the contrary proposition, where a credit bid at sale was binding for determining the commission owed a third party, i.e., the Sheriff. *Id*.

Second, as was openly pointed out by Land Title in the proceeding below without dispute at that point by First Bank, the one well-recognized limited exception where an action against a third party will still lie in the face of the Full Credit Bid Rule is where an erroneous full credit bid was proximately caused by the defendant's fraudulent misrepresentations or misconduct. As stated in *All. Mortg. Co. v. Rothwell*, 10 Cal. 4th 1226, 1247, 900 P.2d 601, 614 (1995):

> As with any purchaser at a foreclosure sale, by making a successful full credit bid or bid in any amount, the lender is making a generally irrevocable offer to purchase the property for that amount. The lender, perhaps more than a third party purchaser with fewer resources with which to gain insight into the property's value, generally bears the burden and risk of making an informed bid. It does not follow, however, that being intentionally and materially misled by its own

> fiduciaries or agents as to the value of the property prior to even making the loan is within the realm of that risk.

Id. at 1246, 900 P.2d at 613 (citations omitted). There is no dispute in the present case that Land Title had absolutely nothing to do with the Hotel Lincoln Foreclosure Sale or the decision of First Bank to make a full credit bid at that sale, so this fraud exception does not apply here. Again, as noted elsewhere in this brief, First Bank's trustee/attorney may bear responsibility in this respect and this was the subject of a malpractice insurance claim by First Bank on April 25, 2016. [42]

This well-recognized limited exception—i.e., that fraud or wrongful conduct affecting the credit bid is the only exception—finds application in the holdings of a number of cases from throughout the country that apply the Full Credit Bid Rule with full force to bar claims against third parties. *Fed. Deposit Ins. Corp. v. Chicago Title Ins. Co.*, 2015 WL 5276346, at *6 (N.D. Ill. Sept. 9, 2015) (holding that, under Illinois law, "[u]nder the Full Credit Bid Rule, where the property is obtained for a full credit bid, the underlying debt is deemed satisfied and the foreclosing lender is not entitled to either a deficiency judgment or related damages. Where the property is obtained by the foreclosing lender for a partial credit bid (*i.e.*, the credit bid is for an amount less than the full value of the loan) and there is no fraud or irregularity in the foreclosure proceeding, the amount of the lender's successful credit bid "is deemed to be the conclusive measure of the property's value for purposes of determining the value of any deficiency. In that circumstance, the lender is limited to recovering the sum of the deficiency judgment and

[42]R. 112.

collaterally estopped from claiming greater losses."); *Farmers & Merchants Bank of Long Beach v. Cohen*, 2016 WL 5787259, at *1 (Cal. Ct. App. 2016) (holding that "the Full Credit Bid Rule is not limited to borrowers" and that "in the absence of fraud, the Full Credit Bid Rule applies and prevents post sale remedies against not only the borrower but third parties"). Underpinning the policy behind this limited exception to the Full Credit Bid Rule is the notion that the cause of action alleged against a third party has to cause damages independent of value of the property received in the foreclosure sale and valued by virtue of the full credit bid before the Full Credit Bid Rule is disregarded. *See e.g., ING Bank, FSB v. Mata*, 2009 WL 4672797, at *4 (D. Ariz. Dec. 3, 2009) ("If a credit-bid fully satisfies the obligation, then the creditor cannot sue third parties for damages based on any alleged deficiency in the payment of that obligation" and holding that summary judgment in favor of party who originated loan was appropriate on "negligence, breach of contract, and breach of fiduciary duty claims because those claims were 'predicated entirely upon [the lender's] interest under the deed of trust,' which 'were fully and expressly satisfied by the full-credit bid.'"); *First Dakota Nat. Bank v. Graham*, 864 N.W.2d 292 (S.D. 2015) (holding that guarantor's obligations were "unambiguously connected to the existence of the indebtedness of [Borrower] to [Lender]," and therefore, the Lender's full credit bid extinguished the guaranties.).

In the *Fed. Deposit Ins. Corp. v. Chicago Title Ins. Co.* case for example, the FDIC alleged that the defendants Chicago Title Insurance Co. and Chicago Trust and Title Insurance Co. (the "Chicago Entities") acted negligently and breached contractual duties in their role as closing agents. The court reasoned that:

> [**A]pplying the credit bid rule to limit recovery against third parties makes sound policy sense***:* absent proof of fraud or negligence that caused the lender to submit a credit bid that was too high, '[t]o allow the [lender], after effectively cutting off or discouraging lower bidders, to take the property—and then establish that it was worth less than the bid—encourages fraud, creates uncertainty as to the [borrower]'s rights, and most unfairly deprives the sale of whatever leaven comes from other bidders.'

Id. (emphasis added).[43] The court also noted that the defendant could not produce any policy argument why application of the credit bid rule to recoveries against third parties is unfair, "especially given the acknowledged exception when a credit bid is the product of a defendant's malfeasance." *Id.*

In the present case, the note and deed of trust on the Washington state Bowling Alley serves as a second form of security. First Bank cannot make a full credit bid on its first form of security and still collect payment from the Bowling Alley collateral. The underlying obligation to First Bank is extinguished by the initial full credit bid sale of the Hotel Lincoln and the Washington Bowling Alley DOT is released from its pledge as a function. It stands to reason that because First Bank cannot recover funds from the Bowling Alley, it cannot bring an intertwined suit against Land Title over this same extinguished obligation for negligently releasing the Bowling Alley DOT or the proceeds of the sale of the Bowling Alley.

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[43] *Accord ING Bank, FSB v. Mata*, 2009 WL 4672797, at *4 (D. Ariz. Dec. 3, 2009) ("If a credit-bid fully satisfies the obligation, then the creditor cannot sue third parties for damages based on any alleged deficiency in the payment of that obligation. . . . As against third parties, a full-credit bid would prevent a lender from asserting any damages based on the loan because the difference between the amount owed on the debt and the amount bid (and thus the price to which the lender voluntarily agreed) would be zero. Plaintiff chose its price, and it would be unjust to allow it to seek to recover the loan deficiency from a third party after already extinguishing the entire debt at the deed of trust sale.").

Equity Income Partners, LP v. Chicago Title Ins. Co., 387 P.3d 1263, 1264 (Ariz. 2017), is another example of a court finding the line should be drawn as to third parties on whether the third parties were "persons who were either indirectly or contingently liable under the loan or whose actions directly contributed to the lender's loss," in which case the Full Credit Bid Rule would apply. *Equity Income Partners, LP* involved a claim for recovery under a title insurance policy. At issue was whether the lender's full credit bid constituted "actual payments" within the terms of the title insurance policy, thereby extinguishing Chicago Title's liability under the policy. The Arizona Supreme Court found that the full credit bid did not act as "actual payment" for purposes of reducing Chicago Title's liability to the lender. The court explained that Arizona's statutory scheme protects "the borrower and any other person directly, indirectly, or contingently liable under the loan such as partners and guarantors, from deficiency judgments." *Id.* The court distinguished other Arizona cases which found a full credit bid extinguished the liability of third parties. The court reasoned that those cases "**all deal with claims against persons who were either indirectly or contingently liable under the loan or whose actions directly contributed to the lender's loss."** *Id.* (emphasis added). The court reasoned that in this case, Chicago Trust was not indirectly or contingently liable under the loan, nor were its actions in any way responsible for the defect in title that reduced the parcel's value and ultimately caused the borrowers to default, and therefore, the anti-deficiency rule did not apply.

Appellant's reliance on *Bank of America, NA v. First American Title Ins. Co.*, 878 N.W.2d 816 (Mich. 2016), is misplaced. *Bank of America* provides a limited exception to the Full Credit Bid Rule where the creditor seeks recovery arising from a separate contractual

obligation against "any loss" and "actual loss." In that case, the Michigan Supreme Court considered whether a mortgagee, Bank of America, who acquired a property at the foreclosure sale through credit-bidding the full value of its debt could pursue claims against third parties for a breach of contract. As to the original loans which later were the subject of the foreclosure, Bank of America had sent closing instructions to two closing agents on the loans, defendants Westminster Abstract Company ("Westminster") and Patriot Title Agency ("Patriot"). The closing instructions required that a closing protection letter ("CPL"), apparently a type of indemnity, be issued in connection with each closing. Defendant First American Title Insurance Co. ("First American") was the title insurance company for all four sales and agreed to issue CPLs for all four closings. The closing instructions to Westminster and Patriot read that "as a closing agent you are financially liable for any loss resulting from your failure to follow these instructions." *Id*. at 84, 878 N.W.2d 816. Similarly, under the CPLs, First American agreed to reimburse Bank of America for its "actual losses" incurred in connection with the closing if the losses arose out of, among other things, the fraud or dishonesty of the closing agents. At the time it made the loans, Bank of America did not know that the values of the properties had been inflated by fraudulent appraisals and "straw buyers" who were paid for their participation. Shortly after closing, all four borrowers defaulted. When the debtors defaulted on the loans, Bank of America acquired the property at the foreclosure sale by a full credit bid. "During the foreclosure proceedings, Bank of America discovered the underlying fraud in each of the four loans." Thereafter, Bank of America brought a breach of contract claim against Patriot and Westminster, alleging that they violated the specific terms of the closing instructions because of

their allegedly fraudulent activity.[44] Bank of America also brought a claim against First American for recovery under the CPLs for the **actual losses** arising from Westminster's and Patriot's fraud and dishonesty during the closings. Both Westminster and First American moved for summary judgment, and the Michigan Court of Appeals granted summary judgment, in part, based on the Full Credit Bid Rule. On appeal, the Michigan Supreme Court held that (1) the closing instructions between Bank of America and Westminster constituted a contract, and that Bank of America's damages under that contract were not barred by the Full Credit Bid Rule; and (2) the Full Credit Bid Rule did not bar Bank of America's ability to recover damages from First American under the CPL. The court reasoned that Bank of America's right to recover damages for the alleged breaches of contract was different and independent of its right to recover a deficiency from the mortgagor. The court reasoned that:

> [H]olding that Bank of America's full credit bids meant that it suffered no damages whatsoever and thus could not recover under any theory would impinge on the parties' ability to contract as they see fit and would nullify the protections for which Bank of America contracted. Through the contracts at issue, Bank of America sought to protect itself from the very activity that allegedly occurred in this case—fraud by those individuals involved in closing the mortgage. Bank of America's ability to recover under the contracts is not limited by its bids on the properties; instead, as discussed later in this opinion, the parties agreed that Bank of America could recover for **any loss** resulting from Westminster's failure to follow the closing instructions and its **actual losses** arising out of the fraud or dishonesty of Westminster in connection with the closings

[44] By the time the case went to the Supreme Court, Patriot had been dismissed or otherwise defaulted from the action. See n. 5.

Id. at 98, 878 N.W.2d at 828 (emphasis in original). The court explained that "the Full Credit Bid Rule is related to the anti-deficiency statute, and its purpose is merely to resolve the question of the value of the property for purposes of determining whether the mortgage debt was satisfied." The *Bank of America* court found that where there is a contractual obligation and relationship, separate and apart from the right to recover from the mortgagee, the full-credit bid does not bar recovery of damages from the breach of that contractual obligation.

Unlike the bank in *Bank of America*, whose right to recover from First American and Westminster was derived from a separate contractual agreement, here, First Bank's alleged right to recover from Land Title is entirely derived from its right to recover a deficiency after its non-judicial foreclosure sale. The Complaint does not allege there was a contract between First Bank and Land Title in the nature of a contract indemnity, assuming liability for any actual loss from the loan First Bank made.[45] Yes, First Bank did bring a third party beneficiary breach of contract claim based on the escrow instructions between First American and Land Title, but even if the escrow instructions do create a contractual obligation between First Bank and Land Title, it is only a contract with respect to the payoff and reconveyance of the Bowling Alley DOT. The alleged "contract" does not give First Bank an independent right to recover from Land Title if the underlying obligation on the Bowling Alley DOT is satisfied and extinguished. As explained by the *Bank of America* court, when a mortgagee makes a full credit bid, the mortgage debt is satisfied, and the mortgage is extinguished. When First Bank made the full credit bid, it would no longer be able to recover from Tuschoff. Here, Appellant's full credit bid meant that the

[45] R. 241–245.

"mortgage debt was satisfied" as to Tuschoff and First Bank could not pursue further remedies against Tuschoff, ***including foreclosing on the deed of trust on the bowling alley***. Because First Bank made a full credit bid, it no longer had any interest in the bowling alley; because the bowling alley was security for the First Bank loan, it was now extinguished. Accordingly, even if Land Title had breached the "contract" and its escrow instructions and mishandled the payoff or not released the deed of trust, after the Hotel Lincoln DOT sale and full credit bid, First Bank would not be able to foreclose on the bowling alley interest, because the Bowling Alley DOT was extinguished. Unlike the contracts in *Bank of America*, the alleged "contract"/escrow agreement here does not provide Appellant a right to recover from Land Title independent of what it would be able to recover from Tuschoff. Looking at it from another angle, First Bank claims that "due to Land Title's negligence" First Bank was unable to take advantage of [its security interest, the bowling alley] that oversecured its Hotel loan." App. Brief at p. 19. This is not true. Even if First Bank had *not* released the deed of trust, Appellant still would not be able to "take advantage" of its interest in the bowling alley because doing so would require it to bring a deficiency against Tuschoff, which the full credit bid would bar it from doing. Unlike the contracts between Bank of America and First American and Westminster, which gave Bank of America the independent right to recover its "actual" and "any losses," here, First Bank's claim for damages against Land Title is derived solely from losses between First Bank and Tuschoff. The alleged "contract"/escrow agreement here cannot give Appellant greater rights than it would have received had no alleged "breach" (i.e. dispersing the funds to Tuschoff or releasing the deed of trust) taken place.

Bank of America is further distinguishable because that court relied upon the Michigan deficiency statute, saying that the "Full Credit Bid Rule is related to the anti-deficiency statue." *Id.* at 827-28 ("[W]hen enacting Michigan's anti-deficiency statute, the Legislature clearly limited its effect to the rights of the parties to the mortgage debt. We have recognized that the Legislature enacted the anti-deficiency statute in an attempt "to safeguard *the rights of the debtor* and secure to the creditor that which is his due." Indeed, only "the mortgagor, trustor or other maker of any such obligation, or any other person liable thereon" may defend against a mortgagee's suit to recover a deficiency by showing "that the property sold was fairly worth the amount of the debt secured by it at the time and place of sale or that the amount bid was substantially less than its true value[.]").[46] In the present case, however, Montana's anti-deficiency statute states that it is for the benefit of the "grantor's successor in interest" or "any other person obligated on [any] other obligation:

> When a trust indenture executed in conformity with this part is foreclosed by advertisement and sale, other or further action, suit, or proceedings may not be taken or judgment entered for any deficiency against the grantor **or the grantor's surety, guarantor, or successor in interest, if any, on the note, bond, or other obligation secured by the trust indenture or against any other person obligated on the note, bond, or other obligation.**

MCA 71-1-317 (emphasis added). Even if the Montana statute is not applied as a complete bar against such persons for a deficiency judgment, it still informs the scope of who or what persons

[46] *See also Fed Dep. Ins. Corp.*, 2015 WL 5276346, at *6 (Regarding the language of the Illinois credit bid statute, the court reasoned there was "no wording in the Illinois law that would limit the application of the Illinois credit bid rule only to recoveries against borrowers," but acknowledged some other courts have found the credit bid rule does not apply to third parties because the statutory language of other states implies that it does not apply to third parties.).

should be considered "indirectly or contingently liable under the loan or whose actions directly contributed to the lender's loss," and therefore who deserve the benefit of the Full Credit Bid Rule. Land Title's actions in this case are alleged to have impacted First Bank by contributing to the lenders' loss or impairment of security. Accordingly, the Full Credit Bid Rule should apply.

The *Alliance Mortgage Co. v. Rothwell*, 900 P.2d 601, 603 (Cal. 1995), and *Kolodge v. Boyd*, 88 Cal. App. 4th 349, 105 Cal. Rptr. 2d 749 (Cal. App. 2001), cases cited by First Bank stand simply for the well-recognized and previously discussed fraud exception to the Full Credit Bid Rule, not for any general exception to the rule whenever a third party is sued. In other words, these cases hold that where a lender is induced by the intentional or negligent misrepresentation of third parties to make loans, that lender can recover tort damages from those parties provided that the lender can show that the misrepresentation induced not just the loan but also the full credit bid. These cases were also influenced by the statutory language of these states' deficiency statutes. In *Alliance*, defendant Rothwell, a real estate appraiser and broker, and other defendants including North American and Ticor, implemented a scheme to fraudulently induce Alliance to lend money for the purchase of nine residences. Defendants prepared false residential purchase agreements and loan applications in the names of fictitious borrowers, deliberately inflated fair market value property appraisals and invented comparable property values to support the inflated and fraudulent appraisals. Relying on defendants' representations, and unaware of their fraudulent conduct, Alliance loaned the Rothwell group the funds to purchase the properties. The loans were secured by deeds of trust to the respective properties. Soon after, the fictitious borrowers defaulted. Still not aware of the true market value of the properties,

Alliance purchased many of the properties at non judicial foreclosure sales by bidding the full credit value of the outstanding indebtedness on the notes. The court held that the fraud claims were not barred by the Full Credit Bid Rule, reasoning that "the Full Credit Bid Rule is not concerned with the relationship between the lender and third parties but only the relationship between the lender and the borrower[.]"

In *Kolodge*, a lender made a series of loans totaling $660,000 that were secured by real property, which was appraised by the defendant at a value of $1.8 million. The borrower later defaulted and filed for bankruptcy. At the time of the bankruptcy, the property was appraised at a value of $985,000. The lender foreclosed on one loan for $180,000 and obtained the property at a trustee's sale. The trustee's deed stated that the unpaid debt on that particular loan was $180,000. The *Kolodge* court explained that "the record is unclear whether appellant introduced and relied on the new appraisal in the bankruptcy proceeding." The lender then brought an action for negligent misrepresentation against the appraiser that had evaluated the property in 1992. The trial court granted summary judgment for defendant, finding that plaintiff had made a full credit bid at the foreclosure sale, which barred his causes of action. The *Kolodge* court held that the Full Credit Bid Rule did not foreclose plaintiff's causes of action, provided he reasonably relied on defendant's alleged misrepresentations when he entered his bid at the foreclosure sale. Relying on *Alliance*, the *Kolodge* court reasoned:

> Appellant's claim, like that of the appellant in *Alliance*, is that respondent's misrepresentations "induced [him] to make loans that far exceeded the [security] properties' actual worth *at the time the loans were made*, and that as a result of these misrepresentations [he] purchased the properties. In other words, [respondent] did not

> damage or impair [appellant's] security interest; rather [respondent] deceived [appellant] at the outset as to what that security was."

Id. The court remanded the case to determine whether the Appellant reasonably relied on the misrepresentation of the values of the properties when he entered his full credit bit. The court held that if it is found that Appellant reasonably relied on the misrepresentations, the Full Credit Bid Rule did not bar the action for negligence. *Id.*[47]

Glenham v. Palzer, 58 Wash. App. 294, 792 P.2d 551 (1990), is likewise fully distinguishable**.** That case involved an action brought against defendants who were alleged to have participated in a scheme to defraud investors by getting them to invest in real estate loans which were inadequately secured and proceeds of loans were diverted to unauthorized uses. Various investors sued the defendants on claims for violations of state securities and consumer protection acts, common-law fraud, negligence, breach of fiduciary duty, and civil conspiracy in connection with a real estate investment offering. The lower court dismissed the claims on the basis that the borrowers' obligations were all satisfied by plaintiffs making full credit bids at a non-judicial foreclosure sale or accepting deeds to the secured property in lieu of foreclosure. The court noted that the complaint alleged that the investors did not know about the fraudulent scheme before the foreclosure proceedings were brought. The court held that it would not use

[47]*See also Farmers & Merchants Bank of Long Beach v. Cohen*, 2016 WL 5787259, at *1 (Cal. Ct. App. 2016) (holding that "the Full Credit Bid Rule is not limited to borrowers" and that "in the absence of fraud, the Full Credit Bid Rule applies and prevents post sale remedies against not only the borrower but third parties" and distinguishing *Kolodge*, saying "[c]ontrary to appellant's implicit claims, *Kolodge* does not limit the full credit bid between a lender and borrower," and that *Kolodge* "stand[s] for nothing more than that the Full Credit Bid Rule is inapplicable where the lender is fraudulently or negligently induced to make the bid.").

the Full Credit Bid Rule to immunize the defendants from liability by the statutory satisfaction for the secured debt. The court reasoned that it found "no indication [in the Washington statute} of a legislative intent to allow strangers to the loan transaction to be protected by the deficiency statue." *Id.*

Unlike the plaintiffs in *Kolodge* and *Alliance*, whose damage was caused by the respondents' misrepresentations that "induced [them] to make loans that far exceeded the [security] properties' actual worth at the time the loans were made, and that as a result of these misrepresentations [they] purchased the properties," here the undisputed facts demonstrate that First Bank learned of the Bowling Alley sale, and the released deed of trust ***before*** First Bank foreclosed on the Hotel. First Bank made the full credit bid with full knowledge that the deed of trust had been released. Under the rules of *Alliance* and *Kolodge*, the exception for negligent or fraudulent misrepresentation applies only if the creditor relies on the misinformation or the negligence. The *Glenham* decision is not entirely clear as to whether the creditors relied on the fraud and/or negligence of the defendants in making the full credit bids. However, the court did note that the complaint alleged that the investors were not made aware of the fraudulent scheme before the foreclosure proceedings were brought, implying that the scheme must at least impact the credit bid.

Simply put, there are no facts to avoid the impact of the Full Credit Bid Rule here. The cases cited by First Bank are based on statutory schemes and facts dissimilar to the instant facts. The main damages in the Complaint in this case describe Land Title as having caused First Bank harm in the form of First Bank not being able "to take advance of all of its collateral after the

Tuschoff default," and measure damages by the fair market value of the Hotel Lincoln.[48] This case is about alleged impairment to First Bank's security interest, and the Full Credit Bid Rule renders moot any such alleged impairment.

C. Alternative Grounds Exist to Independently Support the District Court's Decision, Especially Election of Remedies, Judicial Estoppel or Quasi Estoppel.

A number of independent grounds exist, each of which would potentially bar all or some of the claims in this case if the Montana anti-deficiency statute or the Full Credit Bid Rule does not apply. The following grounds would bar some of the claims brought, and Land Title hereby incorporates by reference and restates as if set forth in full its arguments made on these grounds in its briefing below: (1) economic loss rule applies to bar negligence claim;[49] (2) Washington state statute of limitations bars a negligence claim; [50] (3) no duty owed as per *Chavez v. Barrus*, 146 Idaho 212, 192 P.3d 1036 (2008); [51] (4) no requisite intent to benefit third party beneficiary; and (5) specific performance is a remedy not a cause of action.[52] Moreover, First Bank's choice to proceed to enforce the Bowling Alley DOT and then to voluntarily give up that deed of trust constituted an election of remedies, or raised a judicial estoppel or quasi estoppel or prevents proof of any damages against Land Title. As noted in the fact section, First Bank treated the Bowling Alley DOT as still effective and pursued the First Washington Lawsuit to the end of foreclosing against buyer Banana Belt. Yet in 2016, shortly after First Bank fought its way to a

[48] R. 241-42 (paras. 4.7 & 5.7), and R. 116-118.
[49] R. at 130 to 133, 484 to 489, 606-607.
[50] R. at 473-474, 483.
[51] R. at 483-484.
[52] R. at 489-490, 608.

victory on appeal affirming the validity of that deed of trust, First Bank stipulated to the dismissal of that First Washington Lawsuit and voluntarily released the deed of trust. The elements of the election of remedies bar against proceeding in a second action or for a second remedy are as follows:

> (1) There must be in fact two or more coexisting remedies between which the party has the right to elect; (2) the remedies thus open to him must be inconsistent; and (3) he must, by actually bringing his action or by some other decisive act, with knowledge of the facts, indicate his choice between two inconsistent remedies.

Wolford v. Tankersley, 107 Idaho 1062, 1066–67, 695 P.2d 1201, 1205–06 (1984)(quoting *United States Fidelity & Guaranty Co. v. Clover Creek Cattle Co.*, 92 Idaho 889, 899, 452 P.2d 993, 1003 (1969) (quoting *Largilliere Co., Bankers v. Kunz*, 41 Idaho 767, 772, 244 P. 404, 405 (1925))). The doctrine is "[g]enerally limited to a choice by a party between inconsistent remedial rights; the assertion of one being necessarily repugnant to or a repudiation of the other." *United States Fidelity and Guaranty Co., supra*, 92 Idaho at 899, 452 P.2d at 1003, (quoting *Largilliere Co., Bankers v. Kunz,* 41 Idaho 767, 772, 244 P. 404, 405 (1925)). Further, "[i]nconsistency of remedies is defined not as an inconsistency between the remedies, but as an inconsistency in the facts relied upon. 'To make actions inconsistent one action must allege what the other denies, or the allegation in one must necessarily repudiate or be repugnant to the other.'" *Wolford*, 107 Idaho at 1067, 695 P.2d at 1206 (quoting *Taylor v. Robertson Petroleum Co.*, 156 Kan. 822, 137 P.2d 150, 154 (Kan.1943)).

In the Washington action filed against Tuschoff, First Bank took the position to the effect that "Tuschoff et. al. had no power to reconvey any part of the [Bowling Alley] Deed of Trust

they assigned" and "[First Bank] seeks a declaration that its Deed of Trust remains a lien on the subject land."[53] But once the Washington court vindicated that position on appeal, First Bank voluntarily gave up its Bowling Alley DOT. Then, in the present action against Land Title, First Bank now takes the position that "[a]s a direct and proximate result of Land Title's negligent acts, First Bank was unable to take advantage of all of its collateral following the Tuschoff Default . . . " and also that "First Bank suffered damages in the amount of the original loan to Tuschoff, less the fair-market value of the Hotel Lincoln."[54] By first electing to pursue the remedy of having its lien declared valid and enforceable, then releasing the lien itself, First Bank itself caused the Bowling Alley DOT to be released, and may not now assert that by virtue of Land Title's inaction the lien should have been released earlier, and now attempt to recover damages for the alleged wrongful failure to release.

For these same reasons, the doctrine of judicial estoppel and quasi-estoppel also bar First Bank's action. Judicial estoppel is applied "when a litigant obtains a judgment, advantage, or consideration from one party, through means of sworn statements, and subsequently adopts inconsistent and contrary allegations or testimony to obtain a recovery or a right against another party, arising out of the same transaction or subject matter." *Heinze v. Bauer*, 145 Idaho 232, 240, 178 P.3d 597, 605 (2008) (citations omitted). In the Washington action filed against Tuschoff, First Bank obtained an advantageous ruling from the Court stating that the lien it possessed on the bowling alley was still valid. Instead of pursuing that case further in Montana,

[53] R. 82-85, at paragraphs 13 and 15 (emphasis added).
[54] R. 241-242 (paras. 4.7 and 5.7), and R. 116-118.

First Bank then took the inconsistent position and released the lien, and made the claim in this action that Land Title should have released it much sooner. According, judicial estoppel and quasi-estoppel may both be applied to prevent First Bank from taking a different position from one it already gained an advantage from.

D. Land Title is Entitled to its Costs and Attorney Fees on Appeal.

Land Title if it prevails in this appeal is entitled to costs pursuant to I.A.R. 40 and attorney fees pursuant to I.C. §§ 12-121 and 12-120(3). An "award of attorney fees under Idaho Code § 12-121 is not a matter of right to the prevailing party, but is appropriate only when the court, in its discretion, is left with the abiding belief that the case was brought, pursued, or defended frivolously, unreasonably, or without foundation." *Teurlings v. Larson*, 156 Idaho 65, 75, 320 P.3d 1224, 1234 (2014)(citation omitted). In this case, First Bank itself released the Bowling Alley DOT when it voluntarily settled the First Washington Lawsuit and did so at a time when its right to foreclose on that Deed of Trust—assuming the secured obligation had not been extinguished—was vindicated on appeal. As its whole claim against Land Title was brought later and appears to be premised on Land Title having caused that deed of trust to be improperly released, an award of costs and attorney fees on appeal is proper under I.C. § 12-121. "Idaho Code Section 12-120(3) provides for attorney fees to the prevailing party in a civil action to recover on 'any commercial transaction.' Commercial transactions are all transactions except for personal or household purposes." *De Groot v. Standley Trenching, Inc.*, 157 Idaho 557, 566–67, 338 P.3d 536, 546 (2014). Where a commercial transaction is the "gravamen of the lawsuit," I.C. § 12-120(3) "compels" an award of attorney fees and costs. *See e.g. Edged In Stone, Inc. v.*

Nw. Power Sys., LLC, 156 Idaho 176, 181, 321 P.3d 726, 731 (2014). In *Goodman*, the Court equated the gravamen issue to a "but for cause" analysis stating that without the underlying commercial transaction, "the lawsuit would not have been brought." 148 Idaho at 592, 226 P.3d at 534. In this case, Land Title is entitled to attorney fees pursuant to I.C. § 12-120(3) because First Bank's claims in this lawsuit arise out of a commercial transaction and such commercial transaction is the gravamen of this lawsuit. At the heart of this lawsuit are the First Bank Loan and the Bowling Alley DOT, which were executed as part of a series of commercial lending transactions, meriting application of costs and attorney fees pursuant to I.C. § 12-120(3).

V. CONCLUSION

Land Title respectfully requests that the decision of the District Court be upheld.

RESPECTFULLY SUBMITTED this 22nd day of October, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of October, 2018, I caused to be served a true and correct copy of the foregoing document to the persons listed below the method indicated:

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