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**Bank of America, n.a. v. Samuel D. Adamson and Courtney D. Adamson and John Doe/Jane Doe/Occupant : Appellees' Replacement Brief Samuel D. Adamson and Courtney D. Adamson**

Utah Supreme Court

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IN THE UTAH SUPREME COURT

BANK OF AMERICA, N.A.,  
Appellant,

v.

SAMUEL D. ADAMSON AND  
COURNEY D. ADAMSON and  
JOHN DOE/JANE DOE/OCCUPANT  
Appellees and Defendants.

Appellate Case No. 2014 0861

District Court Case No. 140500067

APPELLEES' REPLACEMENT BRIEF

SAMUEL D. ADAMSON AND COURNEY D. ADAMSON

APPEAL FROM A FINAL ORDER OF DISMISSAL  
OF THE FIFTH JUDICIAL DISTRICT COURT, ST. GEORGE DEPARTMENT  
WASHINGTON COUNTY STATE OF UTAH BY  
THE HONORABLE JEFFREY C. WILCOX

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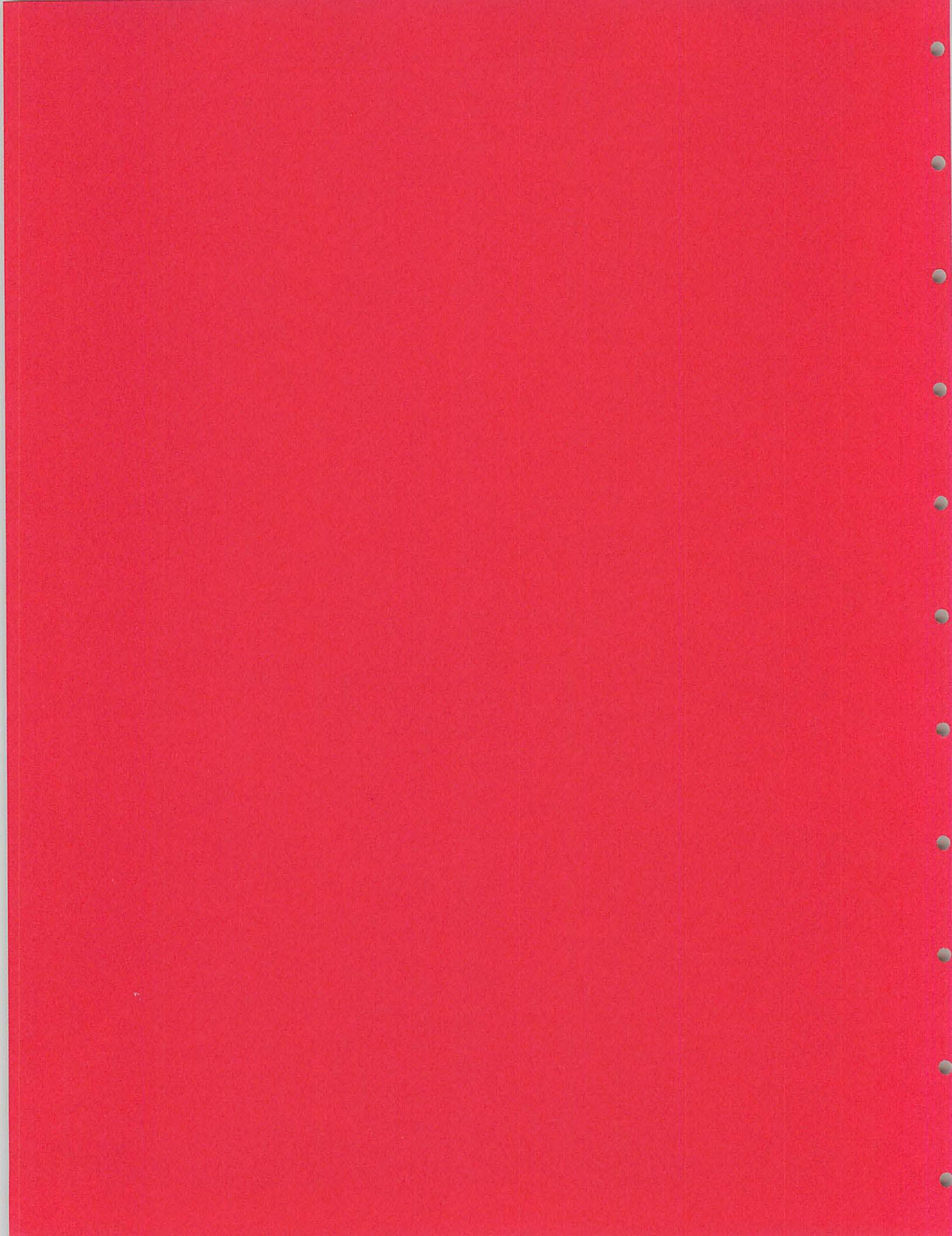
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## **LIST OF PARTIES**

Bank of America N.A. (Appellant)

Distressed Asset Solutions Fund I, LLC (Plaintiff)

Samuel D. Adamson (Appellee/Defendant)

Courtney D. Adamson (Appellee/Defendant)

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## JURISDICTION

This is an appeal from a final order of dismissal entered by Utah's Fifth Judicial District Court, Washington County, St. George Department. This Court has Appellate Jurisdiction pursuant to Utah Rules of Appellate Procedure 3(a) and Utah Code Ann. § 78-A-4-103(2)(j). This Court transferred this case to the Court of Appeals. The parties briefed and argued the case, but prior to the Court of Appeals issuing a decision, on November 20, 2015, this Court recalled the case.

## COUNTERSTATEMENT OF ISSUE PRESENTED

Appellees Samuel and Courtney Adamsons' (the "Adamsons") Issue Presented:

Did the District Court interpret correctly Utah Code Ann. §§ 57-1-21 and 23 to mean that when a trustee that is statutorily lacking the power of sale under §§ 57-1-21 and 23 moves forward and conducts a Foreclosure Sale in violation of the statute and issues a Trustee's Deed that the Foreclosure Sale and Trustee's Deed are null and void ab initio.

Appellant Bank of America N.A. ("BANA") presents an issue that is claiming that the Utah Supreme Court made a flawed ruling<sup>1</sup> and is asking this Court to revisit its prior well written rulings and change them. BANA offers no reason or justification for asking this Court to set aside its prior rulings and nullify State statute. This Court has already ruled that ReconTrust Company, N.A. ("ReconTrust") is not a statutorily qualified trustee with the power of sale. *Fannie Mae v. Sundquist* 2013 UT 45, 311 P.3d 1004, cert denied, ("ReconTrust is neither a member of the Utah State Bar nor a title insurance company or agency with an office in the State of Utah. ReconTrust was not a qualified

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<sup>1</sup> Footnote 1 of BANA's Original Opening Brief states: "Contrary to the flawed holding in *Sundquist...*" See Appellant's Original Opening Brief p5. fn. 1.

trustee with the power of sale under Utah Code Sections 57-1-21 and 57-1-23.”) BANA makes statements of issue that assume facts not proven or even considered by the District Court. This Court has already settled the issue that ReconTrust is not a qualified trustee with the power of sale (*Id*) and therefore this court cannot respond to BANA’s issues presented because of the doctrine of issue preclusion.

### **STANDARD OF REVIEW**

The District Court’s findings of fact are reviewed for clear error. *Fox v. Brigham Young Univ., Inc.*, 2007 UT App 406 ¶ 14, 176 P.3d 446.

This Court reviews a District Court’s interpretation of a statute for correctness. *McQueen v. Jordan Pines Townhomes Owners Ass’n, Inc.*, 2013 UT App. 53, 298 P.3d 666.

### **DETERMINATIVE UTAH STATUTES**

#### **78B-6-802.5. Unlawful detainer after foreclosure or forced sale.**

A previous owner, trustor, or mortgagor of a property is guilty of unlawful detainer if the person:

- (1) defaulted on his or her obligations resulting in disposition of the property by a trustee's sale or sheriff's sale; and
- (2) continues to occupy the property after the trustee's sale or sheriff's sale after being served with a notice to quit by the purchaser.

#### **Utah Code Ann. § 57-1-19. Trust deeds -- Definitions of terms.**

As used in Sections 57-1-20 through 57-1-36:

- (1) “Beneficiary” means the person named or otherwise designated in a trust deed as

the person for whose benefit a trust deed is given, or his successor in interest.

- (2) "Trustor" means the person conveying real property by a trust deed as security for the performance of an obligation.
- (3) "Trust deed" means a deed executed in conformity with Sections 57-1-20 through 57-1-36 and conveying real property to a trustee in trust to secure the performance of an obligation of the trustor or other person named in the deed to a beneficiary.
- (4) "Trustee" means a person to whom title to real property is conveyed by trust deed, or his successor in interest.

**Utah Code Ann. § 57-1-21. Trustees of trust deeds -- Qualifications.**

(1)(a) The trustee of a trust deed shall be:

- (i) any active member of the Utah State Bar who maintains a place within the state where the trustor or other interested parties may meet with the trustee to: (A) request information about what is required to reinstate or payoff the obligation secured by the trust deed; (B) deliver written communications to the lender as required by both the trust deed and by law; (C) deliver funds to reinstate or pay off the loan secured by the trust deed; or (D) deliver funds by a bidder at a foreclosure sale to pay for the purchase of the property secured by the trust deed;

\*\*\*

- (iv) any title insurance company or agency that: (A) holds a certificate of authority or license under Title 31A, Insurance Code, to conduct insurance business in the state; (B) is actually doing business in the state; and (C) maintains a bona fide office in the state;

\*\*\*

- (b) For purposes of this Subsection (1), a person maintains a bona fide office within the state if that person maintains a physical office in the state:
- (i) that is open to the public;
  - (ii) that is staffed during regular business hours on regular business days; and
  - (iii) at which a trustor of a trust deed may in person: (A) request information regarding a trust deed; or (B) deliver funds, including reinstatement or payoff funds.

\*\*\*

- (2) The trustee of a trust deed may not be the beneficiary of the trust deed, unless the beneficiary is qualified to be a trustee under Subsection (1)(a)(ii), (iii), (v), or (vi).
- (3) The power of sale conferred by Section 57-1-23 may only be exercised by the trustee of a trust deed if the trustee is qualified under Subsection (1)(a)(i) or (iv).
- (4) A trust deed with an unqualified trustee or without a trustee shall be effective to create a lien on the trust property, but the power of sale and other trustee powers under the trust deed may be exercised only if the beneficiary has appointed a qualified successor trustee under Section 57-1-22.

**Utah Code Ann. § 57-1-23. Sale of trust property -- Power of trustee -- Foreclosure of trust deed.**

The trustee who is qualified under Subsection 57-1-21(1)(a)(i) or (iv) is given the power of sale by which the trustee may exercise and cause the trust property to be sold in the manner provided in Sections 57-1-24 and 57-1-27, after a breach of an obligation for which the trust property is conveyed as security; or, at the option of the beneficiary, a trust deed may be foreclosed in the manner provided by law for the foreclosure of

mortgages on real property. The power of sale may be exercised by the trustee without express provision for it in the trust deed.

**Utah Code Ann § 57-1-23.5. Civil liability for unauthorized person who exercises power of sale.**

(1) As used in this section:

(a) "Unauthorized person" means a person who does not qualify as a trustee under Subsection 57-1-21(1)(a)(i) or (iv).

(b) "Unauthorized sale" means the exercise of a power of sale by an unauthorized person.

(2) (a) An unauthorized person who conducts an unauthorized sale is liable to the trustor for the actual damages suffered by the trustor as a result of the unauthorized sale or \$2,000, whichever is greater.

(b) In an action under Subsection (2)(a), the court shall award a prevailing plaintiff the plaintiff's costs and attorney fees.

**Utah Code Ann. § 57-1-28. Sale of trust property by trustee -- Payment of bid -- Trustee's deed delivered to purchaser -- Recitals – Effect (57-1-28(2) (b), (c))**

\*\*\*

(b) The trustee's deed may contain recitals of compliance with the requirements of Sections 57-1-19 through 57-1-36 relating to the exercise of the power of sale and sale of the property described in the trustee's deed, including recitals concerning: (i) any mailing, personal delivery, and publication of the notice of default; (ii) any mailing and the publication and posting of the notice of sale; and (iii) the conduct of sale.

(c) The recitals described in Subsection (2)(b): (i) constitute prima facie evidence of

compliance with Sections 57-1-19 through 57-1-36; and (ii) are conclusive evidence in favor of bona fide purchasers and encumbrancers for value and without notice.

\*\*\*

### **STATEMENT OF THE CASE**

This is an appeal from a final order issued September 2, 2014, dismissing an unlawful detainer action filed by Plaintiff Distressed Asset Solutions Fund I, LLC, (“Distressed Asset”) against Samuel D. and Courtney D. Adamson. R. 434-5. BANA, however, seeks to persuade this Court to overturn previous well written decisions handed down by this Court, and attempts to introduce new material, all of which is irrelevant and none of which was presented in their case in chief to the District Court. The material BANA seeks to introduce to this Court in their Replacement Brief is in no way binding and cannot even be considered persuasive, as it is in direct contravention to the holdings of this Court and the Utah Statutes. It appears that BANA is also seeking to introduce the material to preserve its positions for future appeals. Although the Adamsons do not seek to introduce material that was not part of their case in chief, the Adamsons preserve their right to do so in the event of a future appeal.

On April 5, 2010, ReconTrust recorded in the Washington County Recorder’s Office a void Trustee’s Deed purporting to have sold the Adamsons’ property at foreclosure sale on January 14, 2010. R. 8, Exhibit “A” to Complaint: ReconTrust Trustee’s Deed; Add. at 7. On January 5, 2014 Distressed Asset recorded in the Washington County Recorder’s Office a Quitclaim Deed that attempted to convey the Adamsons’ property from BANA to Distressed Asset. R. 10-13, Exhibit B to Complaint;

Add. at 10. On February 7, 2014, Distressed Asset, who is not a bona fide purchaser of the property, filed an unlawful detainer action against the Adamsons. R. 1-22, Complaint; Add. at 1-21.

During the Adamsons' case-in-chief, Mr. Samuel Adamson testified that he was in constant contact with BANA from December 2008 through April of 2010. R. 450, Trial Tr. 26:17-27:2, 27:21-29:15; Add. at 41-57. Mr. Adamson testified that even after the illegal foreclosure BANA continued to negotiate for a modification. R. 450, Trial Tr. 30:6-13; Add. at 48. The Adamsons presented evidence that they were prejudiced by the fact that ReconTrust illegally foreclosed on their home. Mr. Adamson testified that he was attempting to negotiate a work-out with BANA so that they could become current on their mortgage when ReconTrust conducted an illegal foreclosure sale without the statutory power of sale. *Id.*

On September 2, 2014 the District Court dismissed the unlawful detainer case. The Court found that according to *McQueen v. Jordan Pines Townhomes Owners Ass'n, Inc.*, 2013 UT App. 53, 298 P.3d 666, the "sale was void based only on the fact that the person who conducted it had not been appointed as a trustee as statutorily required." R. 409; App. at 29. The District Court also found that Distressed Asset is not a bona fide purchaser of the Adamsons' property. The District Court stated that under *Singer Mfg. Co. v. Chalmers*, 2 Utah 542 (1880) the status of a Bona Fide Purchaser "cannot validate a void sale." App. at 37; R. 417. The District Court concluded by holding that Distressed Asset did not meet their burden of proof of a showing that the Trustee's Sale was conducted in accordance with the Utah statutes, and that "Plaintiff has not overcome

Defendants' defense that there has been no disposition of the property by a trustee's sale," as required under Utah Code § 78B-6-802.5[.]" App. at 39; R 419.

### **STATEMENT OF THE FACTS**

The Adamsons purchased their dream home in 2003 on a 30 year fixed mortgage. R. 450, Trial Tr. 24:15, 24-25. In 2007 the Adamsons refinanced their home on a 30 year fixed mortgage with Guild Mortgage who in turn sold the loan to CountryWide Home Loan Servicing LP who in turn sold the loan to BANA. R. 450, Trial Tr. 25:2-25; Add. at 42-44. In year 2008 Mr. Adamson's landscape business declined due to the economy. Approaching winter, Mr. Adamson's work truck transmission went out and he had to spend his accumulated savings on the repairs. Before Mr. Adamson had missed a mortgage payment he contacted Bank of America to inform them of the hardship he was facing. Mr. Adamson was unable to pay the December 2008 mortgage payment. R. 450, Trial Tr. 26:13-21; Add. at 44.

Mr. Adamson attempted several times to obtain a loan modification. In the spring of 2009 Mr. Adamson's work had picked back up and he had the means to make the monthly payments, but, according to Mr. Adamson, BANA would not accept his payments. In the fall of 2009, Mr. Adamson hired Fortified Financial to assist him in his efforts to obtain a loan modification. Because ReconTrust nor bank of America has an office in the State of Utah, Mr. Adamson paid Fortified Financial the sum of \$3700.00 to make contact with Bank of America and assist the Adamsons with negotiations for a loan modification. R. 450 Trial Tr. 27:21-28:25; Add. at 45-46.

In about January 2010 the property was illegally foreclosed upon by ReconTrust

acting as Trustee of the Deed of Trust. R. 8, Exhibit "A" to Complaint: ReconTrust Trustee's Deed; Add. at 7. The property was sold to BAC Home Loans Servicing, LP FKA CountyWide Home Loans Servicing LP, as Grantee. *Id*, Void ReconTrust Trustee's Deed.

Prior to the foreclosure and up through April of 2010 the Adamsons kept in contact with Bank of America and ReconTrust as they were attempting to obtain a home loan modification. Add. at 47-48; R. 450, Trial Tr. 29:1-30:17. At one point Mr. Adamson was told that his payments would not be accepted and that he should not make any payments. Add. at 56; R 450, Trial Tr. 38:11-22.

On or about April 5, 2010 BANA attempted eviction proceedings through an unlawful detainer action. Add. at 3 ¶ 12; R. 5 ¶12. The District Court dismissed the Unlawful Detainer Action. Add. at 4 ¶ 21; R. 6 ¶21. That is not the issue of this appeal.

Four years later BANA issued a Quitclaim Deed to Distressed Asset, who attempted eviction proceedings through an Unlawful Detainer Action. Add. at 1-21; R. 1-22, Complaint. Judge Jeffrey Wilcox of the Fifth District Court ruled that eviction could not go forward because the Plaintiff, Distressed Asset, had not met the required elements of proof of a valid sale. Add. at 22-39; R. 402-420, Decision and Order Dismissing Action for Unlawful Detainer.

Because of the illegal foreclosure sale and issuance of a void Trustee's Deed by ReconTrust, the Adamsons claim that their rights were affected, their interests were sacrificed, and that there was unfair dealing by BANA and ReconTrust. Add. at 45-48; R. 450, Trial Tr. 27:21-30:17, R. 5 ¶12, R. 6 ¶21, R. 1-22, R. 402-419. Adamsons take

issue with the fact the lender did not appoint a qualified trustee with the statutory power of sale and that an unqualified trustee sold the real property and that the lender is claiming that the Trustee's Deed is valid and voidable rather than null and void ab initio.

### **SUMMARY OF THE ARGUMENT**

The Adamsons agree that the District Court correctly dismissed the unlawful detainer action against them because Distressed Asset was unable to show fulfillment of the first element: disposition of the property by a valid Trustee's Sale as required under Utah Code Ann. § 78B-6-802.5. The Adamsons defended against the Unlawful Detainer action arguing that the ReconTrust foreclosure sale and Trustee's Deed are null and void an initio, and the Court agreed. Add. at 39; R. 419.

This Court cannot overturn the District Court's ruling. The District Court based its ruling on Utah Supreme Court case precedents of *Singer Mfg. Co. v. Chalmers*, 2 Utah 542 (1880), *Fannie Mae v. Sundquist*, 2013 Utah 45, 311 P.3d 1004, and *McQueen v. Jordan Pines Townhomes Owners Ass'n Inc.*, 2013 UT App 53, 298 P.3d 666. In *Singer* the Utah Supreme Court held that a foreclosure sale performed by one not authorized to do so is void. See *Singer*. Under *McQueen*, there are three elements required by the Trust Deed Act for a proper disposition of real property through a trustee's sale: 1) a valid trust relationship, 2) a statutorily authorized trustee, and 3) the adherence to correct procedural requirements. *McQueen* at 670 ¶ 11. A violation of the first two elements would render a foreclosure sale and trustee's deed null and void out of operation of law. If the Court finds a violation of the third element then the court tests the amount of harm incurred by the trustor to determine if the foreclosure sale and Trustee's deed is voidable.

ReconTrust does not have the power of sale granted under UCA 57-1-21 (*Sundquist*), which is a fatal flaw under the second element of the Trust Deed Act (*See McQueen*), and therefore renders the foreclosure sale and trustee's deed null and void ab initio (*See Singer*).

The Adamsons suffered prejudice as a result of the foreclosure sale by ReconTrust. The Adamsons were in the process of obtaining a loan modification and bringing their mortgage current when they were foreclosed upon by ReconTrust who did not have the power of sale as given under Utah Code Ann. § 57-1-21(3) (*See Sundquist*). R. 450 27:21-30:17. ReconTrust is in violation of the statute which was crafted and amended to protect the rights of all parties involved (*Kleinsmith v. Shurtleff*, 571 F.3d 1033 (10<sup>th</sup> Cir. 2009)).

Distressed Asset is not a bona fide purchaser. BANA cannot overcome the fatal flaw that ReconTrust did not have the power of sale as required by a qualified trustee. And therefore, under *Singer*, and *McQueen*, an unqualified trustee cannot conduct a valid trustee's sale and no property passes to the buyer.

## ARGUMENT

I. THE UTAH STATE FIFTH DISTRICT COURT DID NOT ERR WHEN THEY INTERPRETED THE TRUST DEED ACT AND RULE THAT THE FORECLOSURE SALE AND TRUSTEE'S DEED IS VOID AB INITIO.

Adamsons agree that the district court issued a correct opinion when it declared the Foreclosure Sale conducted by ReconTrust and Trustee's Deed issued by ReconTrust null and void ab initio and dismissed the unlawful detainer action. Recon Trust does not have the power of sale to enable it to conduct a valid foreclosure sale (*Sundquist* (*In four*

*cases, however, the federal district courts have reached the contrary result and held that Utah law is not preempted. Cox v. ReconTrust Co., N.A., 2011 WL 835893, at 6 (D.Utah 2011) (stating that “[u]nder a straight forward reading of [section] 92a(b), this court must look to Utah law in its analysis of whether ReconTrust's activities in Utah exceed ReconTrust's trustee powers”); Coleman v. ReconTrust Co., N.A., U.S. Dist. LEXIS 138519 (D.Utah 2011) (agreeing with the reasoning applied in Cox); Loomis v. Meridias Capital, Inc., 2011 WL 5844304 (D.Utah 2011) (same); Bell v. Countrywide Bank, N.A., 860 F.Supp.2d 1290 (D.Utah 2012) (same). We find Judge Jenkins' analysis in Bell to be particularly persuasive, and follow much of this same analysis here. Like Judge Jenkins, we conclude that ReconTrust is subject to the laws of Utah when exercising the power to sell property located in Utah.), therefore cannot issue a trustees deed other than a void trustee's deed (Singer and McQueen).*

A. The Trust Deed Act Is Interpreted As Requiring Three Elements Before A Proper Foreclosure Sale Can Be Held And Valid Trustee's Deed Issued.

Adamsons argue that in McQueen the Court held that the trust deed act dictates the necessity of three elements to effectuate a valid foreclosure sale: 1) creation of a trust relationship; 2) a qualified trustee; and 3) the adherence to correct procedural requirements. *McQueen* at 670 ¶ 11, holding that “The Trust Deed Act, in addition to other procedural requirements like proper notice, requires the creation of a trust relationship and the appointment of a qualified trustee.”

1. The Creation Of A Trust Relationship.

The language of the Utah Trust Deed Act is clear. Utah Code Ann. § 57-1-19

defines the parties necessary to the creation of the trust relationship, and subsection (3) defines the relevant statutory parameters of the Trust Deed Act. A fatal flaw results without the formation of a trust relationship between parties, and there would be no further inquiry necessary. *See McQueen*. The Adamsons do not contend that there was not a valid trust relationship between the parties.

## 2. A Qualified Trustee.

After the creation of the trust deed relationship, *McQueen* states that one must look to the qualifications of the Trustee, and an unqualified trustee possesses a fatal flaw. The controlling statutes that determine the qualification of the trustee are Utah Code Ann. §§ 57-1-21, and 23. After analysis of the statutes, the *Sundquist* court decided that ReconTrust is not a qualified Trustee under §§ 57-1-21, and 23. *Sundquist* at 49.

Section 57-1-21 prescribes the qualifications of the trustee under the trust deed act. Section 57-1-23 is a reiteration of 57-1-21(3), and gives further clarification of how the power of sale is to be carried out.

The importance and significance of the appointment of a qualified trustee is described as follows “The purpose of requiring the appointment of a qualified trustee is to provide an independent third party who can objectively execute a foreclosure or sale in the absence of judicial oversight. *See generally Russell v. Lundberg*, 2005 UT App 315, ¶ 22, 120 P.3d 541 (“[A] trustee has a duty to act with reasonable diligence and good faith on [the trustor's] behalf consistent with [the trustee's] primary obligation to assure payment of the secured debt.” (alterations in original) (citation and internal quotation marks omitted)). Indeed, while a trustee's obligations in a trust deed relationship do not

normally rise to the level of fiduciary duty, a trustee is not without any duty whatsoever. *See id.* ("While a trustee's primary duty and obligation is to the beneficiary of the trust, the trustee's duty to the beneficiary does not imply that the trustee may ignore the trustor's rights and interests." (citations and internal quotation marks omitted)); *Blodgett v. Martsch*, 590 P.2d 298, 302 (Utah 1978) ("The duty of the trustee under a trust deed is greater than the mere obligation to sell the pledged property in accordance with the default provision of the trust deed instrument, it is a duty to treat the trustor fairly and in accordance with a high punctilio of honor."). "This underlying rationale behind the trustee requirement thus strengthens our conclusion that a party must appoint a qualified trustee in order to enforce an assessment lien without judicial intervention." *McQueen* at 673. The appointed trustee, ReconTrust, ignored the Adamsons' rights and interest as trustors, and that the Adamsons were not treated fairly as required under case law as cited above.

In his decision to dismiss the unlawful detainer action, Judge Wilcox of the Fifth District Court stated "Plaintiff's arguments are unpersuasive. First, the provisions in Utah Code section 57-1-21 and 57-1-23 restricting who is authorized to conduct a trustee's sale are clearly comparable to the trust deed provisions identifying who was authorized to conduct a trustee's sale in *Singer*, particularly since 'a contract,' such as the trust deed here, 'implicitly contains the laws existing at the time it was entered.'

*Washington Nat. Ins. Co v. Sherwood Associates*, 795 P.2d 665, 669 (Utah Ct. App 1990) (citing, among other cases, *Beehive Med. Elecs., Inc. v. Indus. Comm'n*, 583 P.2d 53, 60 (Utah 1978) (citing *Edwards v. Kearzey*, 96 U.S. 595 601, 24 L.Ed 793 (1878), holding

that contracts embrace laws which affect their validity, construction, discharge, and enforcement)); 59 C.J.S Mortgages § 739 (WestlawNext Database updated June 2014) (The power to sell under deed of trust is [a] matter of contract between the mortgagor and mortgagee under the terms and conditions expressed in [the] deed of trust instrument. It cannot be enlarged beyond the terms of the contract and the incorporated relevant statutes.)” (emphasis omitted). Add. at 27-28; R. 407-8, Decision and Order page 6-7.

The District Court followed statutory law and case precedent holding that an unqualified trustee renders the foreclosure sale and trustees deed null and void ab initio and made factual findings that ReconTrust did not have the power of sale necessary to effectuate a real property sale in Utah and therefore the Foreclosure Sale on the Adamsons’ home and the ReconTrust Trustee’s Deed is null and void ab initio.

Case law fortifies the District Courts interpretation of the Utah statutes. In *Sundquist* the Utah Supreme Court held “In four cases, [ ] the federal district courts have reached the contrary result and held that Utah law is not preempted. *Bell v. Countrywide Bank, N.A.*, 860 F.Supp.2d 1290 (D. Utah 2012) (holding that a national bank is subject to Utah law); *Loomis v. Meridias Capital, Inc.*, No. 2:11-cv-363-PMW, 2011 WL 5844304 (D. Utah Nov. 18, 2011) (same); *Coleman v. ReconTrust Co., N.A.*, No. 2:10-cv-1099-DB, 2011 U.S. Dist. LEXIS 138519 (D. Utah Oct. 4, 2011) (same); *Cox v. ReconTrust Co., N.A.*, No. 2:10-CV-492 CW, 2011 WL 835893, at 6 (D. Utah Mar. 3, 2011) (stating that ” [u]nder a straight forward reading of § 92a(b), this court must look to Utah law in its analysis of whether ReconTrust's activities in Utah exceed ReconTrust's trustee powers” ). We find Judge Jenkins's analysis in *Bell* to be particularly persuasive,

and follow much of this same analysis here. Like Judge Jenkins, we conclude that ReconTrust is subject to the laws of Utah when exercising the power to sell property located in Utah.”

The *McQueen* Court did not enter into an analysis of the obstacles to setting aside a trustee's sale that were mentioned, and indeed dispositive, in the *RM Lifestyles* ( *RM Lifestyles, LLC v. Ellison* 2011 UT App 290, 263 P.2d 1152) and *Reynolds* (*Reynolds v. Woodall*, 2012 UT App 206, 285 P.3d 7) cases, rather the court simply addressed the claimed defect – the absence of the statutorily required qualified appointed trustee – on its merits, and agreed that it rendered the sale void. Judge Wilcox made the same determination as the *McQueen* court, that is, no analysis is required to determine whether or not the sale and Trustee's Deed is voidable because the Sale and Trustee's Deed are void out of operation of statutory law.

Therefore, a court faced with an unqualified trustee need not progress to an analysis of the obstacles to setting aside a trustee's sale, since, under operation of statutory law, there never was a foreclosure sale because there never was an authorized trustee.

3. *A Valid Trustee Must Adhere To Correct Procedural Requirements As Stated Under The Code.*

After determining that because ReconTrust did not have the power of sale and that the Foreclosure Sale and Trustee's Deed was null and void ab initio, the District Court did not move onto the next analysis and look for errors in procedure. The District Court was correct in not moving into an analysis for setting aside the sale because in order to

set aside the sale, the first two requisites of the Trust Deed Act must have been fulfilled (which in this case they were not), and the court correctly pointed out that the sale was void. *Id; See Sundquist, McQueen, and Singer.*

Adamsons agree with the District Court that because there was no foreclosure sale on their home, that no inquiry into the procedural requirements should be entertained. However, for purposes of this brief, Adamsons will enter into an analysis of the cases under the third element of the Trust Deed Act so that the Court can see how a proper analysis should take place and that the cases do not apply to the Adamsons' case.

After finding that the first two elements of the Trust Deed Act are fulfilled then the courts start the analysis to determine if the valid trustee's sale is voidable and that is when the burden of proof shifts to the property owner. *See RM Lifestyles* (requiring a showing of fraud or unfair dealing); *Reynolds* (requiring a showing of fraud or unfair dealing); and *Timm v. Dewsnip*, 2003 UT 47, 86 P.3d 699 (A party who *Seeks* to have a trustee sale set aside for irregularity, want of notice, or fraud has the burden of proving his contention[.]).

Adamsons argue that at no time before this point in the analysis are the following cases activated, and prior to entering into the analysis to determine if the Foreclosure sale is voidable the burden of proof that the statutory requirements are met is on the shoulders of the entity invoking the power of sale. “[T]he presumption of validity of sale is not conclusive and may be rebutted.” *Concepts Inc., v First Sec Realty Serv. Inc.*, 843 P.2d 1158 (Utah 1987) (per curiam), quoting *Houston First American Savings v. Musick*, 650 S.W.2d 764 (Tex. 1983).

Under the third element of the Trust Deed Act, the factors the court generally looks to in determining if the foreclosure sale is voidable are ““if the interests of the debtor were sacrificed or there was some attendant fraud or unfair dealing.”” *RM Lifestyles* ¶ 16 (quoting *Concepts*).

In *RM Lifestyles* the home owner did not claim that the foreclosure sale was void due to lack of power of sale, but rather claimed that the sale was voidable because the Notice of Default was improperly recorded. The Court did not find that the trustee had violated the first two prongs of the Trust Deed Act.<sup>2</sup> The issue in *RM Lifestyles* is distinguishable from the issue presented by the Adamsons. In *RM Lifestyles* the property owner asked the court to determine if the lack of adherence to the statute requiring a properly recorded Notice of Default rendered the foreclosure sale voidable, and in this case the Adamsons are claiming that a fatal flaw in trustee rendered the sale and resulting trustee’s deed null and void ab initio. *See RM Lifestyles.*

In *Reynolds*, the home owner, Reynolds, did not claim that the power of sale had been violated. Reynolds asserted that the trustee's sale is void because Woodall recorded the notice of default and held the trustee's sale before Citibank executed and recorded a written substitution of trustee. Reynolds further argues that because there was no written substitution of trustee when Woodall carried out the nonjudicial foreclosure, the subsequent attempt at ratification violates the statute of frauds. The court found that Reynolds arguments need not be addressed and held that Reynolds has not alleged that

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<sup>2</sup> eTitle Insurance Agency is a valid title insurance company in the State of Utah with a with a brick and mortar location in Utah.

the challenged substitution of trustee impacted her rights. Again, the issue in *Reynolds* is distinguishable from the present case in that *Reynolds* did not allege that Woodall did not have authority to conduct a foreclosure sale on the property, whereas the Adamsons have alleged that their rights were impacted by the fact that ReconTrust is not a valid trustee with the power of sale. *Reynolds* is further distinguishable in that the Trustee, James Woodall<sup>3</sup>, who conducted the *Reynolds* foreclosure sale is a valid trustee in the State of Utah with the power of sale and the lender was able to ratify Woodall's actions by filing a substitution of trustee, whereas ReconTrust is not a valid trustee with the power of sale and there is no document that the lender could file that would ratify the void foreclosure sale and void trustee's deed.

*Reynolds* is also distinguishable from *McQueen*. In *McQueen*, the Court held that the trustee did not have the power of sale because he never received proper appointment, and that the condominium act fell under the Trust Deed Act for the requirements to conduct a foreclosure sale. In *McQueen* the condominium association did not ratify their actions by latter appointing the foreclosing attorney as trustee. In *Reynolds*, the lender appointed the foreclosing attorney as trustee after the foreclosure sale.

In *Blodgett* the Court refused to set aside a trustee's sale because of irregularities in the posting of the Notice of Sale. See *Blodgett*, ("Such a sale cannot be set aside because of irregularities in the publication or posting of notice.") The Adamsons case is not like the *Blodgett* case. The Adamsons are not claiming irregularities in publication or posting of sale, but rather claim that the sale itself was void.

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<sup>3</sup> James Woodall is a Utah licensed attorney with a brick and mortar office in Utah.

In *Timm* the court stated “the remedy of setting aside a trustee’s sale is appropriate only in cases which reach unjust extremes.” *Id* at ¶36. *Timm* accurately describes the prevailing case law in Utah when the first two elements of the Trust Deed Act articulated under *McQueen* have been met. In *Timm*, the fact that the trustee was validly appointed and validly exercised the power of sale is a fact that distinguishes that case and places it under the analysis of element three of the Trust Deed Act. In *Timm* the property owner claimed that the sale was defective and voidable because of defective notice of sale. At no time did the property owner raise the issue of the lack of the power of sale in the trustee.

In *Concepts* the property owner claimed that a mistake in the publication of notice of sale prevented the trustee from invoking the power of sale. Again, *Concepts* falls into the third element of the Trust Deed Act because the property owner is claiming that there was a flaw in the procedure and not that the statutes prevented the trustee from exercising the power of sale.

The line of cases that move through an analysis of the obstacles to setting aside a foreclosure sale and a Trustee’s Deed are distinguishable from the Adamson case. Adamson falls under the *Singer*, *McQueen*, *Sundquist* line of case which deal with the fatal flawed trustees that do not have the power of sale, whereas *RM Lifestyles*, *Reynolds*, *Timm*, and *Concepts* all deal with irregularities in the conduct of the trustee, but do not deny that the trustee has the power of sale.

- i. *The Adamsons Have Suffered Great Harm And Prejudice At The Hands Of BANA And ReconTrust.*

Although the Adamsons agree that the District Court correctly held that the Trustee's Foreclosure Sale and Trustee's Deed is null and void ab initio, and that the District Court did not need to enter into a test to determine the extent the Adamsons have been harmed, for purposes of this brief the Adamsons state their harm.

Mr. Adamson testified in court that he and his wife were attempting to negotiate with the lender to allow them to come current on their mortgage when ReconTrust foreclosed on their property. Mr. Adamson testified that he paid a substantial amount of money to a company to assist him in his negotiations with BANA because BANA refused to accept any payments from him. Mr. and Mrs. Adamson further suffered at the hands of BANA when they attempted to evict the Adamsons in 2010 and failed, then attempted to convey the Adamson property to Distressed Asset who again attempted to evict the Adamsons.

B. The Result Of A Proper Analysis Of The Trust Deed Act Requires A Finding That The ReconTrust Foreclosure Sale and Trustee's Deed Is Null And Void Ab Initio.

Adamsons argue that there are three possible outcomes when litigating a trustee's deed: 1) the Trustee's Deed is void, 2) the Trustee's Deed is voidable, and 3) the Trustee's Deed is valid. A finding by the District Court that either of the first two elements of the Trust Deed Act have been violated requires a ruling that the Foreclosure Sale and resulting Trustee's Deed is null and void ab initio. *Singer* and *McQueen*; Grant S. Nelson, Dale A. Whitman et al, REAL ESTATE FINANCE LAW § 7:21 at 953-57 (6th ed. 2014). Lacking either of the first two elements would render the foreclosure sale and the resulting Trustee's deed null and void ab initio. *Singer* at 547 ("The fact that no injury or

fraud in the sale has been shown, does not affect the question. Nor is it affected by the fact, that the purchaser was an innocent party. The sale was made by one not authorized to make it, and cannot be upheld. It is simply void, and no one gains any rights under it.”).

A determination that the first two elements are met, that there is a valid trust relationship and a statutorily authorized trustee would then move the court into a fact finding that may render the foreclosure sale and resulting trustee's deed voidable. As the Court stated in *McQueen* “We employ plain language analysis to carry out the legislative purpose of the statute as expressed through the enacted text.’ *Richards v. Brown*, 2012 UT 14, ¶ 23, 274 P.3d 911 (footnote citations omitted). Based on this basic rule of statutory construction, we agree with the district court's application of the Trust Deed Act to a nonjudicial foreclosure of an assessment lien and its determination that the appointment of a qualified trustee with the power of sale is necessary to conduct a nonjudicial foreclosure or sale[.]” *McQueen*, p. 672-3 ¶15. “The District Court correctly construed [ ] the Trust Deed Act to require the appointment of a qualified trustee with the power of sale. Because the Association failed to comply with this requirement, we affirm the district court's summary judgment ruling that the nonjudicial foreclosure sale was ineffective and void.” *McQueen*, p 675 ¶ 28.

When interpreting a statute, our goal " is to give effect to the legislature's intent." *State v. Harker*, 2010 UT 56, ¶ 12, 240 P.3d 780 (internal quotation marks omitted). “To discern legislative intent, we look first to the statute's plain language. Also, when interpreting statutes, [w]e presume that the legislature used each word advisedly and read

each term according to its ordinary and accepted meaning. Additionally, [w]e read the plain language of [a] statute as a whole and interpret its provisions in harmony with other statutes in the same chapter and related chapters. Furthermore, if the plain meaning of the statute can be discerned from its language, no other interpretive tools are needed." *Id.* (alterations in original) (internal quotation marks and footnotes omitted). Courts "should avoid adding to or deleting from statutory language, unless absolutely necessary to make it a rational statute." *Lorenzo v. Workforce Appeals Bd.*, 2002 UT App 371, ¶ 11, 58 P.3d 873.

*Singer, McQueen, and Sundquist* require that the ReconTrust Trustee's Deed is void ab initio. BANA asks the Court to make a determination that the ReconTrust Trustee's deed is voidable. But, such a ruling would be contrary to established law. Reviewing the history behind the amendments that refined the power of sale is enlightening. The most recent amendments to § 57-1-21 are discussed in the *Kleinsmith* case. The case deals with an out of State trustee challenging the Utah foreclosure statutes, just as BANA is doing here. As the 10<sup>th</sup> Circuit Court of Appeals worked through § 57-1-21, the Court stated:

"A trust deed conveys real property in trust to secure a debt; the debtor, who typically has used the loan proceeds to purchase a home, is also the trustor. See §57-1-19. In the event of default, the trustee may conduct a nonjudicial sale of the property or institute foreclosure proceedings. See §57-1-23. According to Mr. Kleinsmith's complaint, as a trustee he could "prepare trustee foreclosure sale documents, supervise their recording, service, mailing and posting and supervise a crier to conduct foreclosure sales, all without personally being present in the state of Utah."

The initial amendment that harmed his business became effective in April 2001. It required licensed Utah attorneys to reside in the state in order to

qualify as trustees. See 2001 Utah Laws ch. 236 §2. Mr. Kleinsmith successfully challenged the constitutionality of the residency requirement under the Privileges and Immunities Clause of Article IV of the Constitution. See *Kleinsmith v. Shurtleff*, No. 2:01cv0310 ST, slip op. at 15 (D.Utah Aug. 13, 2001).

The legislature then amended the statute effective May 6, 2002, to require that attorney trustees either reside in Utah or “maintain[ ] a bona fide office in the state.” 2002 Utah Laws ch. 209 §1. The amendment defined a bona fide office as a physical office open to the public and staffed during regular business hours, at which a trustor could request information and deliver funds in person. Mr. Kleinsmith again challenged the statute's constitutionality and again prevailed, this time on the ground that it violated the federal Constitution's dormant Commerce Clause by discriminating against out-of-state economic interests. See *Kleinsmith v. Shurtleff*, No. 2:03-CV-63TC, slip op. at 1-2 (D.Utah July 3, 2003). In response, the Utah legislature amended the statute a third time. See 2004 Utah Laws ch. 177 §1. As to the current foreclosure statute the court held: “Making it easier for Utahns to meet with trustees, who play a pivotal role in nonjudicial foreclosures, is a legitimate state interest. And Utah's legislature could rationally have concluded that this interest would be served by requiring attorney-trustees to maintain a place within Utah for meeting with trustors and other interested persons.

*See Kleinsmith.*

As subsection (2), and (3) of § 57-1-21 make clear the power of sale is reserved for those that do not have an interest in the real property. *See UCA § 57-1-21(2), (3).* The legislature carved out a narrowly defined existence for the exercise of the power of sale. This is significant—and illustrates the point that a violation of the power of sale has severe consequences.

Upon examination of the Trust Deed Act and interpreting the Statute, Judge Jeffrey Wilcox determined that the ReconTrust Foreclosure Sale and Trustee's Deed is null and void ab initio. This is the correct determination according to statute and case law.

II. THE LACK OF A STATUTORILY AUTHORIZED TRUSTEE WITH THE POWER OF SALE RESULTS IN NOTHING MORE THAN A LIEN ON THE PROPERTY.

Without the appointment of a qualified trustee there can be nothing more than a lien on the real property. Subsection (4) of § 57-1-21 dictates the limitations upon an unqualified trustee such as ReconTrust, and states that at most a lien on the property is created when there is present an unqualified trustee, such as ReconTrust.

A trust deed with an unqualified trustee or without a trustee shall be effective to create a lien on the trust property, but the power of sale and other trustee powers under the trust deed may be exercised only if the beneficiary has appointed a qualified successor trustee under Section 57-1-22.

*See* § 57-1-21(4).

The District Court was correct when it stated that the foreclosure sale and Trustees Deed is null and void ab initio.

A. Section 57-1-23.5 Authorizes The Court To Declare The Foreclosure Sale And Trustees Deed Null And Void Ab Initio.

Section 57-1-23.5 defines “Unauthorized person” as a person who does not qualify as a trustee under Section 57-1-21(1)(a)(i) or (iv). *See* UCA § 57-1-23.5. Section 57-1-23.5 then states under subsection (2)(a) “An unauthorized person who conducts an unauthorized sale is liable to the trustor for actual damages suffered by the trustor as a result of the unauthorized sale or \$2000.00, whichever is greater. *Id.*

Adamsons agree with the District Court in determining that the statute had no retroactive effect and indeed a plane reading of the statute clearly shows that it is not written to have such an effect. However, even if the statute were to be intended to be retroactive the damage awarded would still render the trustee’s sale and deed void as UCA § 57-1-23.5 gives the Court authority to declare the ReconTrust Foreclosure Sale and Trustee’s Deed null and void ab initio

BANA's reading of the statute is in conflict with the Subsection (4) of § 57-1-21 which states the absence of an unauthorized trustee only operates to render a lien on the property. The court's ruling that the Trustee's Deed is void is in harmony with both statutes where § 57-1-23.5(2)(a) gives actual damages and § 57-1-21(4) gives a lien on the property. By ruling that the Trustee's Deed is void ("actual damages" § 57-1-23.5(2)(a)), BANA returns to the position of mortgage holder ("A trust deed with an unqualified trustee or without a trustee shall be effective to create a lien on the trust property[.]" § 57-1-21(4)).

III. BANK OF AMERICA IS IGNORING THE FACT THAT RECONTRUST VIOLATED THE STATUTES AND IS ASKING THIS COURT TO IGNORE STATUTE AND CASE PRECEDENT.

Case precedent is well established and has consistently held that a Trustee without the power of sale can sell nothing. In the 1880 *Singer* case, the Utah Supreme Court recognized that no interest in real property could be passed if the foreclosure sale was void. Quoting *Singer*, "The sale was made by one not authorized to make it, and cannot be upheld. It is simply void, and no one gains any rights under it." See *id.* "As Judge Jenkins stated in *Bell v. Countrywide Bank, N.A.*, '[a] state bank which seeks to foreclose on real property in Utah must comply with Utah law. A federally chartered 'bank' which seeks to foreclose on such property must comply with Utah law as well.'" *Sundquist* p 17 ¶ 51. See Also *McQueen*.

IV. ADAMSONS ARE NOT BARRED BY THE DOCTRINE OF WAIVER AND ESTOPPEL BECAUSE THERE WAS NEVER A VALID FORECLOSURE SALE OR TRUSTEES DEED.

Adamsons have not nor can they waive their right to challenge the foreclosure

sale. A party may not waive the right to challenge or be stopped from challenging a sale wholly void. *Am. Falls Canal Sec. Co. V. Am. Sav. & Loan As'n*, 775 P.2d 412, 414 (Utah 1989).

V. THE DISTRICT COURT DID NOT ERROR IN ITS USE OF LEGAL AUTHORITY AS A MEANS TO ILLUSTRATE THE FACT THAT THE TRUSTEES DEED IS VOID.

BANA has presented no rule that disallows the District court from using legal authority to illustrate a point. "The challenging party must marshal all relevant evidence presented at trial which tends to support the findings and demonstrate why the findings are clearly erroneous." *West Valley City v. Majestic Inv. Co.*, 818 P.2d 1311, 1313 (Utah Ct.App.1991) (citations omitted). The District Court used the additional legal authority to demonstrate that the trail court's ruling is not unique but is well established law.

VI. BANA'S ACTIONS ARE ADVERSE TO THE PUBLIC INTEREST.

The State of Utah holds in high regard the power of sale within the Trust Deed Act. The reason for strict compliance with the statute "is to protect the property of the debtor", *See Concepts* citing *University Savings Association v. Springwood Shopping Center*, 644 S.W.2d 705, 706 (Tex. 1982). After performing a complete analysis of § 57-1-21 the 10th Circuit Court of Appeals in *Kleinsmith* held that Utah law provides that the "power of sale" for trustees of trust deeds conducting non-judicial foreclosures is limited to active members of the Utah State Bar and title insurance companies having a place of business in the State. *See §§ 57-1-21, 57-1-23. See Kleinsmith* (upholding the narrow power of sale codified as §§ 57-1-21, 57-1-23 as a "legitimate State interest").

VII. THIS COURT CANNOT ENTERTAIN THE ISSUE RAISED IN APPELLANT'S BRIEF REGARDING THE NEGATIVE IMPLICATIONS OF THE VOID TRUSTEES DEED BECAUSE THE ISSUE WAS NOT RAISED IN THE DISTRICT COURT.

The Court of Appeals does not have original jurisdiction allowing it to entertain the issues raised by BANA regarding the implications of the void trustee's deed on current occupants because the issue was not raised or addressed in the District Court. *See* § 78A-4-103.

VIII. BANA CANNOT PREVAIL BECAUSE THEY ARE PRECLUDED FROM RELYING UPON THE STATUTE ALLOWING THEM TO FORECLOSE UPON THE REAL PROPERTY AND OBTAIN A TRUSTEES DEED.

BANA is requesting this court to validate what they feel is their statutory relief under the Trust Deed Act; however, the right to recover damages is statutory, it can only be availed of when there has been a compliance with the conditions upon which the right is conferred. *See Hurley v. Town of Bingham*, 63 Utah 589, 228 P. 213. "Where a right is purely statutory and is granted upon conditions, one who seeks to enforce the right must by allegation and proof bring himself within the conditions." *Johnson v. City of Glendale*, 12 Cal.App.2d 389, 55 P.2d 580. Quoting *Hamilton v. Salt Lake City*, 106 P.2d 1028, 99 Utah 362 (Utah 1940).

IX. DISTRESSED ASSET IS NOT A BONA FIDE PURCHASER.

Judge Wilcox determined that protection afforded to BFP's by § 57-1-28 is not intended to extend, and does not extend, to protect against defects traditionally viewed as fundamental, such as the one at issue here. *Singer* holds that such status cannot validate a void sale. *See Singer. McQueen* holds the same, and does not validate a void sale regardless of the status of the purchaser. *See McQueen.*

Plaintiff BANA attempts to argue that *RM Lifestyles* holds that there is a “presumption that a trustee’s deed, which states that it complies with the statutory requirements, is ‘conclusive evidence in favor of bona fide purchasers’ of the trustee’s deed’s validity.” See *RM Lifestyles* ¶17 (quoting Utah Code Ann. § 57-1-28(2)(c)(ii)). However, section 57-1-28 is not meant to be inclusive of fundamental defects such as a trustee without the power of sale but conducting a foreclosure sale and issuing a trustee’s deed. In the District Court’s decision, Judge Wilcox cites *Main I Ltd. P’ship v. Venture Capital Const. & Dev. Corp.*, 154 Ariz. 256, 260, 741 P.2d 1234, 1238 (Ariz. Ct. App. 1987) (observing, with reference to an Arizona conclusive presumption statute similar to that of Utah, and without apparent disagreement, that “[w]hen the California cases hold that recitals in a deed of trust are conclusive, they qualify that they are conclusive ‘in the absence of grounds for equitable relief,’” but finding equitable relief inappropriate in a case where there was no fraud, misrepresentation, concealment,” bad faith or breach of fiduciary duty). Add. at 38; R. 418. Judge Wilcox then turns to 5 Tiffany REAL PROP. § 1550 (3d ed.), to illustrate the statutory intent. Tiffany states, “It appears that the sale will ordinarily be set aside in equity on grounds on which it would have been previously enjoined, as for instance where the debt never existed, or has been extinguished, or was conducted by a party without authority to do so, or where the notice of sale was substantially defective.” R. 419.

#### X. POLICY CONSIDERATIONS

No cases cited by BANA support a policy that is good for the public and does not create confusion. No case cited by BANA can justify its position that *Sundquist* is an

errant decision.

Yet, in a vain attempt at justification, BANA takes the position that *Sundquist* is an errant decision by attempting to convince this Court that it is good policy to overlook the 8000-plus illegal foreclosures that BANA performed through ReconTrust. This runs contrary to the policy that this Court and the legislature have created and upheld for over 100 years: that a property owner cannot be taken advantage of because they are in distress.

Ruling that the ReconTrust Trustee's Deed is void, however, brings to light another issue: what happens to the homeowner that purchased the home in reliance on the title company's statements that the Trustee's Deed is valid. The title insurance company has an obligation to determine if the documents existing in a chain of title comply with statutes and indicate a clean title to real property. As one of the members of the group that has the power of sale, the title insurance companies should have been on notice that the ReconTrust Trustee's Deed is void. Therefore, either the current homeowner or the previous home owner who was the subject of a void ReconTrust Trustee's Deed can, by using §57-1-23.5, seek damages against the title insurance company issuing the title policy. And, the title insurance company can in turn seek damages against BANA and ReconTrust, thereby laying the burden of responsibility for violating the Utah Statutes on whom it belongs.

## CONCLUSION

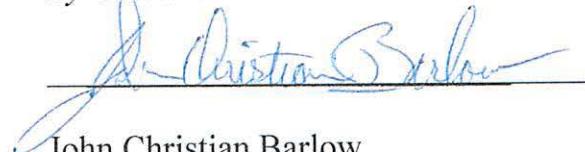
This Court should not reverse the District Court's decision dismissing Distressed Asset's unlawful detainer. The Adamsons are entitled to receive and should be awarded their attorney's fees resulting from this appeal.

Dated this February 2<sup>nd</sup>, 2016

Respectfully Submitted

Samuel D. and Courtney D. Adamson

*By Counsel*



John Christian Barlow  
Barlow Law PLLC  
321 N Mall Drive R290  
St. George UT 84790  
435-634-1200  
[jcb@johnchristianbarlow.com](mailto:jcb@johnchristianbarlow.com)

## CERTIFICATE OF SERVICE

I John Christian Barlow, certify that on February 2<sup>nd</sup>, 2016, I served a true and correct copy of the foregoing Brief of **APPELLEES SAMUEL D. AND COURTNEY D. ADAMSON** by email and first class mail, postage prepaid, to the following:

Robert H. Scott  
Akerman LLP  
170 South Main Street  
Suite 950  
Salt Lake City, UT 84101  
[Robert.scott@akerman.com](mailto:Robert.scott@akerman.com)  
*Counsel for Appellants*

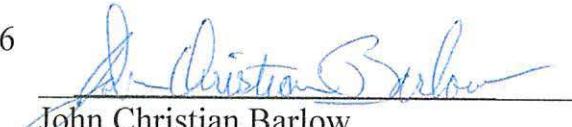
  
John Christian Barlow  
321 N Mall Drive R290  
St. George UT 84790  
435-634-1200  
[jcb@johnchristianbarlow.com](mailto:jcb@johnchristianbarlow.com)  
*Counsel for Defendants/Appellees*

## CERTIFICATE OF COMPLIANCE WITH RULE 24(f)(1)

Certificate of Compliance with Type-Volume Limitations,  
Typeface Requirements, and Type Style Requirements.

1. This Brief complies with the type-volume limitations of Utah R. App. P. 24(f)(1) because:
  - This Brief contains 8935 words, excluding the parts of the brief exempted by Utah R. App. P. 24(f)(1)(B).
2. This Brief complies with the typeface requirements of Utah R. App. P 27(b) because:
  - This Brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007, 13 point Times New Roman Font.

Dated this 2nd day of February 2016

  
John Christian Barlow  
321 N Mall Drive R290  
St. George UT 84790  
435-634-1200  
[jcb@johnchristianbarlow.com](mailto:jcb@johnchristianbarlow.com)

**ADDENDUM**

Complaint.....	A-1
ReconTrust Trustee's Deed.....	A-7
Decision and Order.....	A-22
Trial Transcript (cited portions).....	A-41

Brad G. DeHaan (USB No. 8168)  
Richard Gunnerson (USB No. 10862)  
LUNDBERG & ASSOCIATES  
Attorneys for Plaintiff  
3269 South Main Street, Suite 100  
Salt Lake City, Utah 84115  
Telephone: (801) 263-3400  
[brad.dehaan@lundbergfirm.com](mailto:brad.dehaan@lundbergfirm.com)

L&A Case No. 14-40881/VV

FIFTH JUDICIAL DISTRICT COURT, ST. GEORGE DEPARTMENT  
WASHINGTON COUNTY, STATE OF UTAH

DISTRESSED ASSET SOLUTIONS FUND I, LLC,  Plaintiff,  vs.  SAMUEL D. ADAMSON, COURTNEY D. ADAMSON; and JOHN DOE/JANE DOE/OCCUPANT,  Defendants.	COMPLAINT  Civil No. Judge
---	-------------------------------------

Plaintiff Distressed Asset Solutions Fund I, LLC, by and through its counsel, complains of Defendants Samuel D. Adamson, Courtney D. Adamson, and John Doe/Jane Doe/Occupant and alleges as follows:

PARTIES

1. Plaintiff is a corporation with its principal place of business in the State of California.

2. Defendants are individuals residing in Washington County, State of Utah.

#### JURISDICTION

3. This Court has jurisdiction over the subject matter of this action pursuant to §78A-5-102, *Utah Code Annotated*.

#### VENUE

4. Venue is proper in this case pursuant to §78B-3-301, *Utah Code Annotated*.

#### CAUSE OF ACTION

5. On or about August 31, 2007, Samuel D. Adamson as trustor, executed and delivered to Scott Lundberg, as Trustee, and Mortgage Electronic Registration Systems, Inc., as nominee for Guild Mortgage Company its successors and assigns, as beneficiary, a Trust Deed to secure the performance by the trustor of his obligation under a Trust Deed Note (the "Note") executed and delivered for valid consideration to the beneficiary.

6. The Trust Deed covered real property situated in Washington County, State of Utah, located at 70 West Orchard Lane, Washington, UT 84780, more particularly described as follows:

ALL OF LOT THIRTY ONE (31), THE FIELDS – PHASE 1, according to the official plat thereof, on file in the office of the recorder of Washington County, State of Utah.

7. The trustor defaulted in performing the provisions of the Trust Deed and Note, and, pursuant to a Notice of Default and Election to Sell recorded in the Washington County Recorder's Office on June 25, 2009, as Entry No. 20090024680, and a Notice of Sale, the property described in said Trust Deed (the "Property") was sold at a trustee's sale on January 14, 2010 to BAC Home

Loans Servicing, LP FKA Countrywide Home Loans Servicing LP (“BAC Home Loans”). A copy of the Trustee’s Deed is attached as Exhibit A.

8. On December 18, 2013, Bank of America, N.A., successor by merger to BAC Home Loans, transferred title to Plaintiff by virtue of a Quit Claim Deed (“Quitclaim Deed”). A copy of the Quitclaim Deed is attached as Exhibit B.

9. On January 6, 2014, the Quitclaim Deed was recorded with Washington County Recorder’s Office, as Entry No. 20140000387.

10. Plaintiff gave good and valuable consideration for the Property without notice of any claims to the Property.

11. Plaintiff is a bona fide purchaser of the Property.

12. Notably, on April 22, 2010, BAC Home Loans filed its own action against Defendants in the Fifth District Court, Washington County for the State of Utah, identified as Case No. 100501437, for unlawful detainer (the “2010 Eviction Case”).

13. Defendants Samuel D. Adamson and Courtney D. Adamson in this action were the same Defendants in the 2010 Eviction Case.

14. The Property involved in this action is the same Property involved in the 2010 Eviction Case.

15. On July 7, 2010, Defendants, through their counsel at the time, filed in the 2010 Eviction Case, a Motion and Memorandum in Support to Set Aside Sale.

16. On August 4, 2010, BAC Home Loans filed an Objection to the Motion to Set Aside the Sale in the 2010 Eviction Case.

17. On August 16, 2010, the Court in the 2010 Eviction Case scheduled a hearing on September 1, 2010 to hear all pending motions, including Defendants' Motion to Set Aside Sale in the 2010 Eviction Case.

18. Neither BAC Home Loans, nor Defendants Samuel D. Adamson, Courtney D. Adamson, appeared at the hearing on September 1, 2010 in the 2010 Eviction Case.

19. On October 22, 2010, the Court in the 2010 Eviction Case entered an Order denying Defendants' Motion to Set Aside Sale.

20. But for a Notice of Office Relocation and Address Change filed on September 13, 2011 in the 2010 Eviction Case, no substantive action was taken by Defendants after October 22, 2010, the date the Court denied Defendants' Motion to Set Aside Sale.

21. On June 21, 2012, the Court dismissed the 2010 Eviction Case.

22. Although Defendants were aware of possible claims to the Property as of July 7, 2010, the date they filed their Motion to Set Aside Sale in the 2010 Eviction Case, Defendants failed to assert such rights, if any, after October 22, 2010, the date the Court denied Defendants' Motion to Set Aside Sale.

23. Defendants failed to take any action to set aside the trustee's sale on January 14, 2010 after October 22, 2010, the date the Court denied Defendants' Motion to Set Aside Sale.

24. Defendants have failed to pay any value to Plaintiff for possession of the Property after January 6, 2014.

25. Defendants have failed to pay any value to any party for possession of the Property after January 14, 2010.

26. Defendants have failed to pay property taxes on the Property after January 14, 2010.

27. Defendants failed to record a lis pendens upon the Property after January 14, 2010.

28. Defendants have occupied the Property since January 14, 2010.

29. From and since January 14, 2010, Defendants have been tenants-at-will.

30. On January 27, 2014, pursuant to Sections §78B-6-802.5, §78B-6-802 and §78B-6-805, *Utah Code Annotated*, Plaintiff caused to be served on Defendants Notices to Quit, copies of which are attached hereto as Exhibit C.

31. The Notices to Quit informed the Defendants that the Plaintiff had elected to terminate the tenancy-at-will and notified Defendants that their failure to vacate the Property within five (5) days would result in their being in unlawful detainer.

32. Defendants have failed to vacate and yield possession of the Property to the Plaintiff.

33. Defendants are, therefore, in unlawful detainer of the Property as provided in Section §78B-6-802.5 and §78B-6-802, *Utah Code Annotated*.

34. The fair rental value for the Property is \$1,200.00 per month. Said amount constitutes damage to the Plaintiff occasioned by the Defendants' unlawful detainer.

WHEREFORE, the Plaintiff demands judgment against Defendants as follows:

A. Judgment in favor of the Plaintiff and against the Defendants ordering said Defendants to vacate the Property located at 70 West Orchard Lane, Washington, UT 84780, more particularly described as follows:

ALL OF LOT THIRTY ONE (31), THE FIELDS – PHASE 1, according to the official plat thereof, on file in the office of the recorder of Washington County, State of Utah

B. Judgment in favor of the Plaintiff and against the Defendants in the amount equal to the daily fair rental value multiplied by the number of days Defendant remains in the home calculated from the expiration of the Notice to Quit. This amount to be trebled pursuant to U.C.A. §78B-6-811 et seq., plus any damages occasioned to the Plaintiff as a result of the Defendants' unlawful detention of the Subject Property.

C. For Plaintiff's attorney's fees and costs incurred herein.

D. Judgment for such additional and further relief as may be equitable.

DATED this 7<sup>th</sup> day of February, 2014.

LUNDBERG & ASSOCIATES  
  
Printed Name: Brad De Haan  
Attorney for Plaintiff

Plaintiff's Address: 7045 Larkspur Drive, Corona Del Mar, CA 92625

## **EXHIBIT "A"**

Trustee's Deed Page 1 of 2  
Russell Shirts Washington County Recorder  
04/05/2010 10:42:32 AM Fee \$12.00  
Backman, ERCP

**RECORDING REQUESTED BY:  
BAC HOME LOANS SERVICING, LP FKA  
COUNTRYWIDE HOME LOANS SERVICING LP**

WHEN RECORDED MAIL DOCUMENT  
TAK STATEMENT TO:  
BAC HOME LOANS SERVICING, LRFA  
COUNTRYWIDE HOME LOANS SERVICING LP,  
400 COUNTRYWIDE WAY SV33, SIMI VALLEY,  
CA 93065

TS#: 09-0081584  
TSG# 5-051603

**SPACE ABOVE THIS LINE FOR RECORDER'S USE**

TRUSTEE'S DEED

This Deed is made by RECONTRUST COMPANY, N.A., as successor Trustee under the hereinafter described Trust Deed, in favor of BAC HOME LOANS SERVICING LP FKA COUNTRYWIDE HOME LOANS SERVICING LP, 300 COUNTRYWIDE WAY SVCS, SIMI VALLEY, CA 93065; Grantee.

WHEREAS, on August 11, 2007, SAMUEL D. ADAMSON, A MARRIED MAN, AS HIS SOLE AND SEPARATE PROPERTY, as Trustor, executed and delivered to SCOTT LUNDBERG, A MEMBER OF THE UTAH STATE BAR, as Trustee, for the benefit of MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., as Beneficiary, a certain Trust Deed to secure the performance by said Trustor of the obligations under a Promissory Note. The Trust Deed was recorded in the office of the Recorder of Washington County, State of Utah, on September 6, 2007, as Instrument No. 20070044838, and covered the property described below; and

WHEREAS, breach and default was made under the terms of the Trust Deed in the particulars set forth in the Notice of Default referred to below; and

WHEREAS, RECONTRUST COMPANY, N.A., executed and filed for record in the office of the County Recorder of Washington County, a written Notice of Default containing an election to sell the trust property, which Notice of Default was recorded on June 25, 2009, as Instrument No. 20090024680; and

WHEREAS RECONTRUST COMPANY, N.A., the successor Trustee in consequence of the declaration of default, election and demand for sale, and in accordance with said Trust Deed, executed the Notice of Trustee's Sale stating that it would sell at public auction to the highest bidder the property therein and hereafter described, and fixing the time and place of said sale as January 14, 2010, at 1:00 PM, of said day, and did cause copies of said notice to be posted for not less than 20 days before the date of sale therein fixed, at the office of the county recorder in the county wherein said property is located, and also in a conspicuous place on the property to be sold; and said successor Trustee did cause a copy of the notice to be published once a week for three consecutive weeks before the date of sale in the ST. GEORGE SPECTRUM; and

WHEREAS, all applicable statutory provisions of the State of Utah and all of the provisions of said Trust Deed have been complied with as to the acts to be performed and the notices to be given; and

WHEREAS, the successor Trustee did, at the time and place of sale, then and there sell, at public auction, to Grantee above named, being the highest bidder therefor, the property described for the sum of

20100010774 04/05/2010 11:42:32 AM

Page 2 of 2 Washington County

**\$278,530.03.**

NOW, THEREFORE, RECONTRUST COMPANY, N.A., successor Trustee, in consideration of the premises recited and of the sum above mentioned, bid and paid by Grantee, the receipt whereof is hereby acknowledged, and by virtue of the authority in it by said Trust Deed grants and conveys unto Grantee above named, but without any covenant or warranty, express or implied, all of that certain property situated in Washington County, State of Utah, described as follows:

ALL OF LOT THIRTY ONE (31) THE FIELDS - PHASE 1, ACCORDING TO THE OFFICIAL PLAT THEREOF, ON FILE IN THE OFFICE OF THE RECORDER OF WASHINGTON COUNTY, STATE OF UTAH.

Dated: March 22, 2010

By: RECONTRUST COMPANY, N.A.

Kathy Newland Team Member  
Asst Sec.

**STATE OF** Texas  
**COUNTY OF** Tarrant

312210 before me Marin Morris, personally appeared Kathy  
Henderson, known to me or proved to me on the oath of \_\_\_\_\_ or through  
\_\_\_\_\_) to be the person whose name is subscribed to the foregoing instrument and  
acknowledged to me that he/she executed the same for the purposes and consideration therein expressed.  
WITNESS MY HAND AND OFFICIAL SEAL.

~~WITNESS MY HAND AND OFFICIAL SEAL~~

Notary Public's Signature



## **EXHIBIT "B"**

**DOC # 20140000387**

Quit Claim Deed  
Russell Shirts Washington County Recorder  
01/06/2014 09:48:53 AM Fee \$ 14.00  
By SERVICED



Recording Requested By & Return To:  
Chicago Title ServiceLink Division  
1400 Cherrington Parkway  
Coraopolis, PA 15108

Commitment Number: 3232102  
Seller's Loan Number: 173420414

**PROPERTY APPRAISAL (TAX/ABN) PARCEL IDENTIFICATION NUMBER**  
**TS#000081584 TSG#5-051603**

**QUITCLAIM DEED**

Bank of America, N.A., successor by merger to BAC Home Loans Servicing, LP (FKA Countrywide Home Loans Servicing LP), whose mailing address is 2375 N. Glenville Drive (Mail Code: TX 993-01-01), Richardson, TX 75082, hereinafter grantor, for \$10.00 (Ten Dollars and Zero Cents) in consideration paid grants and quitclaims to Distressed Asset Solutions Fund I, LLC, hereinafter grantee, whose tax mailing address is 3412 Russell Street, San Diego, CA 92106, with quitclaim covenants, all right, title, interest and claim to the following land in the following real property:

**ALL OF LOT THIRTY ONE (31), THE FIELDS-PHASE 1, ACCORDING TO THE  
OFFICIAL PLAT THEREOF ON FILE IN THE OFFICE OF THE RECORDER OF  
WASHINGTON COUNTY STATE OF UTAH.**

Property Address is: 10 W Orchard Lane, Washington, UT 84780

Seller makes no representations or warranties, of any kind or nature whatsoever, other than those set out above, whether expressed, implied, imposed by law, or otherwise, concerning the condition of the title of the property prior to the date the seller acquired title.

The real property described above is conveyed subject to and with the benefit of: All easements, covenants, conditions and restrictions of record; in so far as in force applicable.

The real property described above is conveyed subject to the following: All easements, covenants, conditions and restrictions of record; All legal highways; Zoning, building and other laws, ordinances and regulations; Real estate taxes and assessments not yet due and payable; Rights of tenants in possession.

TO HAVE AND TO HOLD the same together with all and singular the appurtenances thereunto belonging or in anywise appertaining, and all the estate, right, title interest, lien equity and claim whatsoever of the said grantor, either in law or equity, to the only proper use, benefit and behalf of the grantees forever.

Prior instrument reference: 20100010774

Executed by the undersigned on DECEMBER 18 2013:

Bank of America, N.A., successor by merger to BAC Home Loans Servicing, LP  
(FKA Countrywide Home Loans Servicing LP)

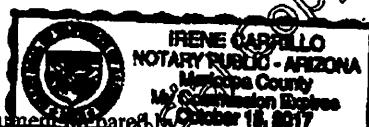
By: 

Name: KERRI STEPHEN

RS: AVP

STATE OF ARIZONA  
COUNTY OF MARICOPA

The foregoing instrument was acknowledged before me on DECEMBER 18, 2013,  
KERRI STEPHEN its AVP on behalf of Bank of America, N.A., successor by merger to BAC Home Loans Servicing, LP (FKA Countrywide Home Loans Servicing LP) who is personally known to me or has produced D.L. as identification, and furthermore, the aforementioned person has acknowledged that his/her signature was his/her free and voluntary act for the purposes set forth in this instrument.



Notary Public  
IRENE CASTILLO

This instrument executed on October 18, 2017

Jay A. Rosenberg, Esq., Rosenberg LPA, Attorneys At Law, 3805 Edwards Road, Suite 550, Cincinnati, Ohio 45219 (513) 247-9605 Fax: (866) 611-4400

## **EXHIBIT "C"**

**NOTICE TO QUIT**

Samuel D Adamson  
70 West Orchard Lane  
Washington, UT 84780

You are notified, pursuant to provisions of sections §78B-6-802.5 and §78B-6-802, Utah Code Annotated, that you are required to vacate the property located at 70 West Orchard Lane, Washington, UT 84780, more particularly described as follows:

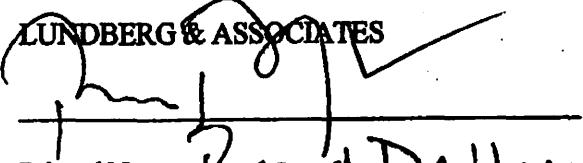
ALL OF LOT THIRTY ONE (31), THE FILEDS - PHASE 1, according to the official plat thereof, on file in the office of the recorder of Washington County, State of Utah

and surrender the possession thereof to Distressed Asset Solutions Fund I, LLC ("DAS") within five (5) days after service of this notice upon you.

On January 14, 2010, at 1:00 p.m., Recontrust Company, N.A., Trustee under a Trust Deed dated August 31, 2007, and executed by Samuel D. Adamson, as trustor, in favor of Mortgage Electronic Registration Systems, Inc., as nominee for Guild Mortgage Company its successors and assigns, caused the above referenced property to be sold at a public sale. At the sale, the property was sold to DAS. Bank of America, N.A. subsequently transferred to Distressed Asset Solutions Fund I, LLC by virtue of a Quit Claim Deed dated December 18, 2013 and recorded January 6, 2014. From and since that time, you have been a tenant at will. DAS has elected to terminate said tenancy.

In the event that you fail to vacate the property within five (5) days from the date on which you receive this notice, you will be guilty of unlawful detainer as provided by sections §78B-6-802.5 and §78B-6-802, Utah Code Annotated, and appropriate legal action will be instituted against you for possession of the premises and for treble damages as provided for by section §78B-6-811, Utah Code Annotated.

DATED this 27 day of January, 2014.

LUNDBERG & ASSOCIATES  
  
Printed Name: Brad DeHaan  
Attorneys for DAS  
3269 South Main Street, Suite 100  
Salt Lake City, Utah 84115  
Telephone: (801) 263-3400

**IMPORTANT NOTICE TO SERVICEMEMBERS AND THEIR DEPENDENTS:  
PROTECTIONS UNDER THE SERVICEMEMBERS CIVIL RELIEF ACT**

Servicemembers on "active duty" or "active service," or a dependent of such a servicemember may be entitled to certain legal protections, including eviction protection, pursuant to the Servicemembers Civil Relief Act (50 USC App. §§ 501-596), as amended, (the "SCRA") and, possibly, certain related state statutes.

**Who may be entitled to Legal Protections under the SCRA:**

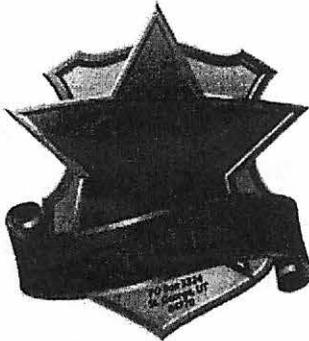
- Active duty members of the Army, Navy, Air Force, Marine Corps, Coast Guard and active service National Guard;
- Active service members of the commissioned corps of the National Oceanic and Atmospheric Administration;
- Active service members of the commissioned corps of the Public Health Service;
- United States citizens servicing with the armed forces of a nation with which the United States is allied in the prosecution of a war or military action; and
- Their spouses.

Servicemembers and dependents with questions about the SCRA should contact their unit's Judge Advocate, or their installation's Legal Assistance Officer. A military legal assistance office locator for all branches of the Armed Forces is available at <http://legalassistance.law.af.mil/content/locator.php>.

"Military OneSource" is the U.S. Department of Defense's information resource. If you are listed as entitled to legal protections under the SCRA, please go to [www.militaryonesource.com/scra](http://www.militaryonesource.com/scra) or call 1-800-342-9647 (toll free from the United States) to find out more information. Dialing instructions for areas outside the United States are provided on the website.

If you are such a servicemember, or a dependent of such a servicemember, you should contact Lundberg & Associates eviction department at (801) 263-3400 ext 398 to discuss your status under the SCRA.

L&A Case No: 14-40881/VV



CSR Investigations  
PO Box 3324  
St. George, Utah 84771

**PROOF OF SERVICE**  
**(NOTICE TO QUIT)**  
Case No.14-40881 / VV

I, **Fredrick Neilson**, being a resident of the state of UTAH, and a citizen of the United States of at least 18 years or age at the time of service herein, and not a part of or interested in the within action.

I received the within and hereto annexed, (NOTICE TO QUIT) on January 27, 2014 and served the same upon **Samuel D. Adamson**, a within named occupant in said article(s) by posting a true copy of said article(s) for the occupant the front door of the residence located at 70 West Orchard Lane, Washington, Utah 84780 on January 28, 2014 at 7:35 AM

I further certify that at the time of service of the said article(s), I endorsed the date and place of service and added my name and official title thereto.

UCA 78B-5-705, I declare under criminal penalty that the foregoing is true and correct.  
Executed on: **January 28, 2014**.



Fredrick Neilson  
Private Investigator  
Utah License No. G-102697

TOTAL CHARGES: \$40.00

---

NOTES

NOTICE TO QUIT

John Doe/Jane Doe/Occupant  
70 West Orchard Lane  
Washington, UT 84780

You are notified, pursuant to provisions of sections §78B-6-802.5 and §78B-6-802, Utah Code Annotated, that you are required to vacate the property located at 70 West Orchard Lane, Washington, UT 84780, more particularly described as follows:

ALL OF LOT THIRTY ONE (31), THE FILEDS – PHASE 1, according to the official plat thereof, on file in the office of the recorder of Washington County, State of Utah

and surrender the possession thereof to Distressed Asset Solutions Fund I, LLC ("DAS") within five (5) days after service of this notice upon you.

On January 14, 2010, at 1:00 p.m., ReconTrust Company, N.A., Trustee under a Trust Deed dated August 31, 2007, and executed by Samuel D. Adamson, as trustor, in favor of Mortgage Electronic Registration Systems, Inc., as nominee for Guild Mortgage Company its successors and assigns, caused the above referenced property to be sold at a public sale. At the sale, the property was sold to DAS. Bank of America, N.A. subsequently transferred to Distressed Asset Solutions Fund I, LLC by virtue of a Quit Claim Deed dated December 18, 2013 and recorded January 6, 2014. From and since that time, you have been a tenant at will. DAS has elected to terminate said tenancy.

You must immediately advise Lundberg and Associates if you are a tenant occupying this property within 10 days from receipt of this notice.

In the event that you fail to vacate the property within ninety (90) days if you are a bona fide tenant, as defined by Title VII-Protecting Tenants at Foreclosure Act or within five (5) days from the date on which you receive this notice, if you are not a bona fide tenant, you will be guilty of unlawful detainer as provided by sections §78B-6-802.5 and §78B-6-802, Utah Code Annotated, and appropriate legal action will be instituted against you for possession of the premises and for treble damages as provided for by section §78B-6-811, Utah Code Annotated. A bona fide tenant is

defined as a renter or leasehold occupant paying fair market rental resulting from an arms length transaction.

DATED this 27 day of January, 2014.

LUNDBERG & ASSOCIATES

Printed Name:

Attorneys for DAS

3269 South Main Street, Suite 100

Salt Lake City, Utah 84115

Telephone: (801) 263-3400



L&A Case No: 14-40881/VV

**IMPORTANT NOTICE TO SERVICEMEMBERS AND THEIR DEPENDENTS:  
PROTECTIONS UNDER THE SERVICEMEMBERS CIVIL RELIEF ACT**

Servicemembers on "active duty" or "active service," or a dependent of such a servicemember may be entitled to certain legal protections, including eviction protection, pursuant to the Servicemembers Civil Relief Act (50 USC App. §§ 501-596), as amended, (the "SCRA") and, possibly, certain related state statutes.

**Who may be entitled to Legal Protections under the SCRA:**

- Active duty members of the Army, Navy, Air Force, Marine Corps, Coast Guard and active service National Guard;
- Active service members of the commissioned corps of the National Oceanic and Atmospheric Administration;
- Active service members of the commissioned corps of the Public Health Service;
- United States citizens servicing with the armed forces of a nation with which the United States is allied in the prosecution of a war or military action; and
- Their spouses.

Servicemembers and dependents with questions about the SCRA should contact their unit's Judge Advocate, or their installation's Legal Assistance Officer. A military legal assistance office locator for all branches of the Armed Forces is available at <http://legalassistance.law.af.mil/content/locator.php>.

"Military OneSource" is the U.S. Department of Defense's information resource. If you are listed as entitled to legal protections under the SCRA, please go to [www.militaryonesource.com/scra](http://www.militaryonesource.com/scra) or call 1-800-342-9647 (toll free from the United States) to find out more information. Dialing instructions for areas outside the United States are provided on the website.

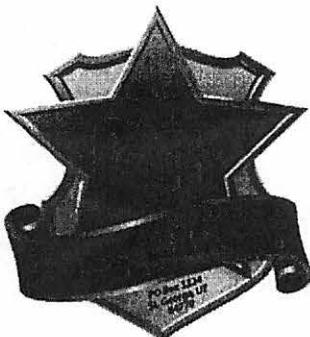
If you are such a servicemember, or a dependent of such a servicemember, you should contact Lundberg & Associates eviction department at (801) 263-3400 ext 398 to discuss your status under the SCRA.

**DISCLOSURE REGARDING:  
PROTECTING TENANTS AT FORECLOSURE ACT**

If you are a tenant, you may be allowed under Federal law to continue to occupy your rental unit until your rental or lease agreement expires, or until 90 days after the sale of the property at auction, whichever is later. If your rental or lease agreement expires after the 90-day period, you may need to provide a copy of your rental or lease agreement to the new owner to prove your right to remain on the property longer than the 90 days after the sale of the property.

You must continue to pay your rent and comply with all other requirements of your rental or lease agreement or you will be subject to eviction for violating your rental or lease agreement.

L&A Case No: 14-40881/VV



CSR Investigations  
PO Box 3324  
St. George, Utah 84771

### PROOF OF SERVICE

(NOTICE TO QUIT)  
Case No.14-40881 / VV

I, Fredrick Neilson, being a resident of the state of UTAH, and a citizen of the United States of at least 18 years or age at the time of service herein, and not a part of or interested in the within action.

I received the within and hereto annexed, (NOTICE TO QUIT) on January 27, 2014 and served the same upon John Doe / Jane Doe / Occupant, a within named occupant in said article(s) by posting a true copy of said article(s) for the occupant the front door of the residence located at 70 West Orchard Lane, Washington, Utah 84780 on January 28, 2014 at 7:35 AM

I further certify that at the time of service of the said article(s), I endorsed the date and place of service and added my name and official title thereto.

UCA 78B-5-705, I declare under criminal penalty that the foregoing is true and correct.  
Executed on: **January 28, 2014.**



Fredrick Neilson  
Private Investigator  
Utah License No. G-102697

**TOTAL CHARGES: \$10.00**

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### NOTES

*FILED  
2014 SEP -2 PM 1:21  
5TH DISTRICT COURT  
ST. GEORGE*

IN THE FIFTH JUDICIAL DISTRICT COURT, IN AND FOR

WASHINGTON COUNTY, STATE OF UTAH

DISTRESSED ASSET SOLUTIONS FUND  
I, LLC,

Plaintiff,

vs.

SAMUEL D. ADAMSON; COURTNEY D.  
ADAMSON; et al.,

Defendants.

**DECISION AND ORDER DISMISSING  
ACTION FOR UNLAWFUL DETAINER**

Case No. 140500067

Judge Jeffrey C. Wilcox

This is an action for unlawful detainer, which came on for trial on August 7, 2014, after which the court took the matter under advisement. The court now dismisses this action for the reasons given below.

Pursuant to Utah Code section 78B-6-802.5,

A previous owner, trustor, or mortgagor of a property is guilty of unlawful detainer if the person:

- (1) defaulted on his or her obligations resulting in disposition of the property by a trustee's sale or sheriff's sale; and
- (2) continues to occupy the property after the trustee's sale or sheriff's sale after being served with a notice to quit by the purchaser.

At trial, Plaintiff presented as exhibits certified copies of the notice of default, the trust

deed, and its own quitclaim deed, thus making out a *prima facie* case under the statute.<sup>1</sup>

In defense, however, Defendants raised the issue of whether subdivision (1)'s requirement of "disposition of the property by a trustee's sale" has been satisfied.<sup>2</sup> There appears to be no question that Defendants defaulted on their obligations under a note secured by a trust deed, and that ReconTrust, acting as trustee, gave notice of default and intention to sell the property, and ultimately conducted a trustee's sale in January 2010, purporting to sell the property to Plaintiff's predecessor in interest.

Defendants argue that because the 2010 trustee's sale was conducted by ReconTrust, who was not a qualified trustee with the power of sale under Utah Code sections 57-1-21 and 57-1-23, see Fed. Nat. Mortgage Ass'n v. Sundquist, 2013 UT 45, ¶ 13, 311 P.3d 1004 ("ReconTrust is neither a member of the Utah State Bar nor a title insurance company or agency with an office in the State of Utah. ReconTrust was therefore not a qualified trustee with the power of sale under Utah Code sections 57-1-21 and 57-1-23."); id., ¶ 49 ("As a national bank operating in Utah

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<sup>1</sup> Plaintiff also agreed to file, after trial, a certified copy of the 2007 trust deed, but thus far has not done so.

<sup>2</sup> In addressing this defense, the court considers, in addition to the evidence and arguments presented at trial, the briefing submitted on Defendants' Motion for Declaratory Judgment. At trial, the court indicated that it would not grant such motion at that time because there was nothing in Defendants' pleadings suggesting that they were seeking declaratory relief. However, also as indicated at trial, the motion addresses the substance of Defendants' defense, so the court references such briefing as a matter of convenience. Plaintiff's opposition memorandum filed May 23, 2014, is referenced herein as "Mem. Opp."

under the [National Banking Act], ReconTrust is precluded from exercising the power of a trustee under Utah statute for purposes of conducting a nonjudicial foreclosure.”), the sale and resulting trust deed are null and void ab initio.

As Plaintiff correctly notes, the Sundquist court expressly declined to decide what effect, if any, its determination that ReconTrust did not qualify as a trustee with the power of sale would have on the validity of the sale and resulting trust deed. See id., ¶ 50 (“Our opinion in this matter is limited to the narrow issue of whether Utah law regarding the qualification of trustees is preempted by the [National Banking Act]. In briefing and oral argument, the parties have attempted to raise a variety of other issues relating to the validity of the nonjudicial foreclosure sale, the validity of the trustee’s deed, and the propriety of the order of restitution. Because these issues were not fully litigated below, we decline to reach them on interlocutory appeal.”).

However, as Plaintiff also points out, the Court of Appeals has been presented with arguments similar to those of Defendants, and has not even considered it necessary to reach them where the party attacking the validity of a trustee’s sale failed to allege or prove how its rights were affected by the defect complained of. For example, in RM Lifestyles, LLC v. Ellison, 2011 UT App 290, 263 P.3d 1152, the defendants in an unlawful detainer action “argued that the trust deed sale was void because [the trustee] recorded the notice of default before it had been substituted as trustee, that the statute did not allow [the beneficiary] to ratify [the trustee’s] action, and that the execution of the substitution of trustee violated the statute of frauds.” Id., ¶

15. On review, the Court of Appeals declined to “reach the merits of these issues because the [defendants], in attacking the trust deed sale’s validity after the sale, ha[d] not met their burden of proving that the alleged irregularity affected their rights,” id. (footnote omitted), and “[did] not claim that they were denied the right to cure the default or ever planned on or were capable of curing the default.” Id., ¶ 18 (citation omitted).

Similarly, in Reynolds v. Woodall, 2012 UT App 206, 285 P.3d 7, the plaintiff argued “that the trustee’s sale [was] void” because the individual who “recorded the notice of default and held the trustee’s sale” did so “before [the beneficiary] executed and recorded a written substitution of trustee.” Id., ¶ 13. The plaintiff also challenged the beneficiary’s later “attempt to ratify [this individual’s] actions after the trustee sale.” Id. In other words, like Defendants here, the plaintiff attacked the validity of the sale based on the questionable authority of the one who conducted it. Again, the Court of Appeals declined to decide these issues on their merits based on the fact that, “in attacking the validity of the trustee’s sale, [the plaintiff] ha[d] not alleged that the challenged substitution of trustee impacted her rights.” Id.

In contrast to RM Lifestyles and Reynolds are two cases cited by Defendants. First, in an early Utah Supreme Court case, the court held a trust sale void where it was not performed by the person authorized under the deed of trust:

The deed of trust authorized the sale to be made by the United States Marshal. This was not done. One of his deputies made the sale as auctioneer. It is not claimed that he acted as deputy, but simply that a person who was a deputy acted

as the auctioneer. Nor do we think that the marshal could have acted by deputy, unless the deed of trust had shown express authority to that effect, which it did not do. The fact that no injury or fraud in the sale has been shown, does not affect the question. Nor is it affected by the fact, that the purchaser was an innocent party. The sale was made by one not authorized to make it, and cannot be upheld. It is simply void, and no one gains any rights under it. A purchaser must know that the sale is made by the proper person. The deed of trust shows who could make the sale. A trustee can no doubt employ an auctioneer to act for him in crying off the property; but the trustee must be present and superintend the sale. The trustee in the present instance says that he does not think he was present at the sale.

Singer Mfg. Co. v. Chalmers, 2 Utah 542, 546-47 (Utah Terr. 1880) (emphasis added).

More recently, the Court of Appeals affirmed a trial court ruling that a nonjudicial foreclosure sale for delinquent assessments owed to a condominium association was void where the sale was conducted by the association's attorney because "[t]he record reveal[ed] that, though its attorney may have qualified as a trustee under the Trust Deed Act, the Association failed to appoint its attorney as such." McQueen v. Jordan Pines Townhomes Owners Ass'n, Inc., 2013 UT App 53, ¶¶ 19-21 & 28, 298 P.3d 666.

Notably, the McQueen court does not discuss the obstacles to setting aside a trustee sale that were mentioned, and indeed dispositive, in the RM Lifestyles and Reynolds cases, as summarized above. Rather, the court simply addressed the claimed defect – the absence of the statutorily required qualified appointed trustee – on its merits, and agreed that it rendered the sale void. Reconciliation of these cases is difficult.

Reconciliation of Singer with RM Lifestyles and Reynolds is also difficult. To say, as do

these later cases, that a party attacking the validity of a trustee sale must allege that the claimed defect resulted in an injury to “the interests of the debtor,” or “some attendant fraud or unfair dealing.” RM Lifestyles, 2011 UT App 290, ¶ 16, or a circumstance “reach[ing] unjust extremes,” id.; Reynolds, 2012 UT App 206, ¶ 15, is plainly at odds with Singer’s statement that, where an unauthorized person conducts the sale, “[t]he fact that no injury or fraud in the sale has been shown, does not affect the question.” 2 Utah at 547.

Plaintiff attempts to distinguish Singer on the ground that the deed of trust in that case specified who could conduct the sale, and that there is no such provision in the trust deed here. Plaintiff also notes that Singer was decided well before the current governing statutes, and criticizes Defendants for not providing any additional authority to support their argument that the sale here is void.

Plaintiff’s arguments are unpersuasive. First, the provisions in Utah Code sections 57-1-21 and 57-1-23 restricting who is authorized to conduct a trustee’s sale are clearly comparable to the trust deed provision identifying who was authorized to conduct the sale in Singer, particularly since “a contract,” such as the trust deed here, “implicitly contains the laws existing at the time it was entered.”<sup>3</sup> Washington Nat. Ins. Co. v. Sherwood Associates, 795 P.2d 665, 669 (Utah Ct.

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<sup>3</sup> It is unnecessary to decide which law to apply here (i.e., the law in effect in August 2007, when the trust deed was executed, or the law in effect in January 2010, when the trust sale occurred) since the statutory provisions defining a qualified trustee did not change between these periods.

App. 1990) (citing, among other cases, Beehive Med. Elecs., Inc. v. Indus. Comm'n, 583 P.2d 53, 60 (Utah 1978) (citing Edwards v. Kearzey, 96 U.S. 595, 601, 24 L.Ed. 793 (1878) (holding that contracts embrace laws which affect their validity, construction, discharge, and enforcement))); 59 C.J.S. Mortgages § 739 (WestlawNext database updated June 2014) ("The power to sell under deed of trust is [a] matter of contract between [the] mortgagor and mortgagee under the terms and conditions expressed in [the] deed of trust instrument. It cannot be enlarged beyond the terms of the contract and the incorporated relevant statutes.") (emphasis added and footnotes omitted). Thus, this attempted distinction fails.

Second, while Singer is an older case, it is consistent with prevailing law on the subject today, as well as with current Utah statutory law. As a leading treatise on real estate financing explains:

Generally, defects in the exercise of a power of sale can be categorized in at least three ways – void, voidable, or inconsequential.

Some defects are so substantial that they render the sale *void*. In this situation, neither legal nor equitable title transfers to the sale purchaser or subsequent grantees, except perhaps by adverse possession. . . . A sale . . . is void when someone other than the named trustee conducts the sale, including a successor who has not been validly appointed, or, conversely, if the original trustee conducts the sale after a successor-trustee has been appointed.

Most defects render the foreclosure *voidable* and not void. When a voidable error occurs, bare legal title passes to the sale purchaser, subject to the redemption rights of those injured by the defective foreclosure. Typically, a voidable error is "an irregularity in the execution of a foreclosure sale" and must be "substantial or result in a probable unfairness." . . . If the defect only renders the sale voidable,

the redemption rights can be cut off if a bona fide purchaser for value acquires the land. When this occurs, an action for damages against the foreclosing mortgagee or trustee may be the only remaining remedy.

Finally, some defects are so *inconsequential* that they render the sale neither void nor voidable. These defects commonly involve minor discrepancies in the notice of sale. . . .

Grant S. Nelson, Dale A. Whitman et al, Real Estate Finance Law § 7:21 at 953-957 (6th ed. 2014) (hereinafter Nelson & Whitman) (underscoring added and footnotes omitted; italics in original).

Viewed within this framework, Singer clearly takes its place in the first category, and the prerequisites to setting aside a sale identified in RM Lifestyles and Reynolds are seen to be applicable only to those defects properly categorized as rendering a sale voidable rather than void. This is consistent with Singer, which expressly disavows any such prerequisites as to a sale conducted by one not authorized to do so. It is also consistent with McQueen, which affirmed that a sale was void based only on the fact that the person who conducted it had not been appointed as a trustee as statutorily required.

The limited applicability of the prerequisites stated in RM Lifestyles and Reynolds is also shown by examination of the cases cited therein. For instance, both cases quote the statement made in Concepts, Inc. v. First Sec. Realty Servs., Inc., 743 P.2d 1158, 1160 (Utah 1987) (per curiam), that “[a] sale once made will not be set aside unless the interests of the debtor were sacrificed or there was some attendant fraud or unfair dealing.” 2011 UT App 290, ¶ 16; 2012

UT App 206, ¶ 14. Concepts involved the attempted invalidation of a sale based on the fact that the notice of sale, which was printed in 1983, incorrectly stated that the sale was to be conducted on a given date in 1982, see 743 P.2d at 1159 – a defect that the court ultimately characterized as a “minor typographical error.” Id. at 1161. Thus, the statement quoted is clearly taken from a case falling into the third category described above (one involving “minor discrepancies in the notice of sale”), not one involving what Singer held to be a fundamental error.<sup>4</sup>

Similarly, RM Lifestyles and Reynolds each state that a trustee’s sale should be set aside “only in cases which reach unjust extremes.” 2011 UT App 290, ¶ 16; 2012 UT App 206, ¶ 15. For this proposition, RM Lifestyles cites Thomas v. Johnson, 801 P.2d 186, 188 (Utah Ct. App. 1990), which in turn cited Concepts, see id., and which involved only a challenge to the manner in which the sale was conducted – namely, the trustee’s acceptance of a bid offering to pay “fair market value” (rather than a specific dollar amount) for the property. The court rejected this challenge, holding that the statute was satisfied by the bid and “find[ing] no evidence that [the

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<sup>4</sup> Significantly, Concepts actually reiterates the underlying principle from Singer (although with a different focus in mind—namely, the party intended to benefit from statutory notice requirements), that “[t]he maker of the deed of trust with power of sale may condition the exercise of the power upon such conditions as he may describe.” 743 P.2d at 1160 (citing Houston First American Savings v. Musick, 650 S.W.2d 764, 768 (Tex. 1983)) (emphasis omitted). The cited case elaborates, as noted in Concepts, saying that “[t]he grantor of the power [of sale] is entitled to have his directions obeyed; to have the proper notice of sale given; to have it to take place at the time and place, and by the person appointed by him.” 650 S.W.2d at 768 (emphasis added and citation omitted).

debtor's] interests were sacrificed by the trustee's action . . ." Id. at 189.<sup>5</sup> RM Lifestyles and Reynolds also cite Timm v. Dewsnap, 2003 UT 47, ¶¶ 36-37, 86 P.3d 699, which again merely reiterated the holding of Concepts, and which, like Concepts, involved – as pertinent here – only a challenge to the sufficiency of the notice of the sale given to the debtor. Id.

Thus, none of the cases cited to support the prerequisites identified in RM Lifestyles and Reynolds involved "a purported sale by an unauthorized person," which is to be distinguished from cases in which there is merely "a question of procedural irregularities in a trustee's sale." Citizens Bank of Edina v. W. Quincy Auto Auction, Inc., 742 S.W.2d 161, 165 (Mo. 1987) (en banc). Where, as here (and as in Singer), there is "a completely unauthorized sale conducted by an individual who was powerless to sell the property," it is irrelevant "[w]hether in point of fact, the sale of the property was conducted in all respects judiciously or not, or in a manner most conducive to the interests of those concerned," although "[t]his would be a legitimate inquiry in a proceeding to set aside a sale made under the power conferred by the instrument. . ." Id. (citation omitted). This conclusion is inconsistent with Reynolds, but that case must yield to Singer based on the principle that "[t]he Court of Appeals simply cannot overrule the law as

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<sup>5</sup> Thomas also included a footnote summarily rejecting the debtor's additional challenge in that case to the trustee's acceptance of a credit bid rather than "requir[ing] the bid to be 'payable in lawful money of the United States at the time of sale,' as allegedly instructed in the trust deed"— a provision that, if it existed, the court held to be satisfied by the credit bid. See 801 P.2d at 188 n.1.

announced by the highest court in the state, even if the announcement was made decades ago.”

Sentry Investigations, Inc. v. Davis, 841 P.2d 732, 735 (Utah Ct. App. 1992).

Plaintiff also relies on the holding in Reynolds that, “[a]bsent such exceptional circumstances [i.e., harm to the interests of the debtor, fraud, unfair dealing, or unjust extremes], the proper remedy is to seek an injunction prior to a sale, which allows a debtor to challenge irregularities and protect her rights before the sale is completed and a trustee’s deed is executed and delivered to the purchaser.” 2012 UT App 206, ¶ 15 (citing RM Lifestyles, 2011 UT App 290, ¶ 15 n.4 (internal citation omitted)) (emphasis added). Because, as just discussed, Reynolds’s requirement of harm, etc. as a prerequisite to setting aside a trustee’s sale must be limited (under Singer) to those cases involving defects rendering a sale voidable rather than void, the companion requirement that challenges to irregularities be raised via a pre-sale injunction proceeding, except where harm, etc., is shown, must likewise be so limited. To hold otherwise would be to say that a debtor need not attempt to obtain a pre-sale injunction in a case in which the sale is only voidable (because it may be set aside thereafter by a showing of harm, etc.), but that such an attempt must be made where the sale is utterly void.

Additionally, Plaintiff argues that “the doctrines of waiver and estoppel bar Defendants’ claim that the Foreclosure Sale is void and should be set aside.” Mem. Opp. at 9. To support this argument, Plaintiff observes that

Defendants did not challenge the Foreclosure Sale before it occurred. It is

undisputed that the Foreclosure Sale took place in January 2010. It is also undisputed that although the Defendants in this case filed a class-action suit in federal court in November 2010, they have not prosecuted their claims in the Federal Action since the ruling in *Garrett* in September 2013, which ruled that a foreclosure sale done in Utah by ReconTrust was valid. It is undisputed that Defendants filed a Motion to Set Aside the Foreclosure Sale in the Prior State Case in July 2010, but failed to prosecute this claim, and allowed the case to be dismissed on June 21, 2012. Importantly, although the Defendants in this case were, or are, parties in the Prior State Action and Federal Action respectively, they failed to ever record a lis pendens on the Property. It is also undisputed that Defendants have failed to pay any value, and have failed to pay property taxes, for the Property since June 2009. Like the mortgagor in *American Falls Canal Securities Co.*, the Defendants in this case have failed to properly and timely assert their rights to defeat the rights of Plaintiff, an innocent bona fide purchaser. Defendants have knowingly and silently sat on any alleged rights they have to the Property, and most importantly, have allowed Plaintiff to expend money purchasing the Property. Defendants do not claim they had the ability to cure the default and stop the Foreclosure Sale. Defendants did not challenge the sale before it occurred, and therefore, the Trustee's Deed from ReconTrust must remain valid.[FN]1

[FN]1 Even if the court considered a trustee's deed voidable, "[a] voidable deed . . . is unassailable in the hands of a [bona fide purchaser]."*"See SEC v. Madison Real Estate Group, LLC*, 647 F. Supp. 2d 1271, 1279 (D. Utah 2009) (citation omitted).

Mem. Opp. at 9-10.

In the American Falls case cited, the Supreme Court recognized that "a party otherwise in position to object to a mortgage foreclosure sale may well be precluded from doing so based upon conduct sufficient to bring into operation the doctrines of waiver and estoppel." Am. Falls Canal Sec. Co. v. Am. Sav. & Loan Ass'n, 775 P.2d 412, 414 (Utah 1989) (footnotes omitted). The court indicated, however, that a party may not waive the right to challenge, or be estopped

from challenging, a sale wholly void, see id. (“[E]xcept where non-compliance results in a complete legal nullity, one otherwise entitled to object to a judicial sale in mortgage foreclosure proceedings as involving a defect or irregularity based upon a lack of or insufficient process, notice, advertisement or other designation with respect to the sale, designed for his benefit and protection, may waive, or be estopped from asserting, such defect or irregularity.”) (emphasis added and citation omitted); see also Ockey v. Lehmer, 2008 UT 37, ¶ 22, 189 P.3d 51, 57 (distinguishing “. . . between an illegal or void contract and one merely ultra vires,’ which could become enforceable by ratification or estoppel”) (quoting Millard Cnty. Sch. Dist. v. State Bank of Millard Cnty., 80 Utah 170, 14 P.2d 967, 971-72 (1932)), which, under Singer, is what results from a trustee’s sale conducted by one not having authority.<sup>6</sup>

Moreover, even where it has been said that “[a] want of authority in the trustee making the sale may be waived by the parties in interest, or they may estop themselves by their conduct to object to such want of authority, at least as against the purchaser at the sale,” 59 C.J.S. Mortgages § 764 (WestlawNext database updated June 2014) (citing Reynolds v. Kroff, 144 Mo. 433, 46 S.W. 424 (1898); Spencer v. Hawkins, 39 N.C. 288, 4 Ired. Eq. 288, 1846 WL 1113

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<sup>6</sup> Plaintiff relies on Ockey, which held that a conveyance effected by trustees after the termination of the trust “was merely voidable” rather than void, see 2008 UT 37, ¶ 24, and on Millard County, which held that securities issued by a bank in excess of its statutory authority were likewise only voidable, see id., ¶ 22, but these cases did not involve a trustee’s foreclosure sale, in which context the clear rule is shown by Singer and the other authorities discussed above.

(1846); Schwarz v. Kellogg, 243 S.W. 179 (Mo. 1922)), the conduct giving rise to the waiver or estoppel in the cited cases was considerably more affirmative than anything Defendants are alleged to have done here.

Certainly, Defendants' failure to pay taxes or any other value for the property since June 2009,<sup>7</sup> while remaining in possession, is understandably frustrating for the foreclosure sale purchaser (or its successor in interest), but it is not inconsistent with their claim that the sale is void,<sup>8</sup> nor can their failure to affirmatively pursue judicial vindication of their position during this period properly be so characterized.<sup>9</sup> Cf. Hammon v. Hatfield, 192 Minn. 259, 261, 256

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<sup>7</sup> At trial, Mr. Adamson actually acknowledged not having made payments since December 2008, explaining that, since April 2010, their lender refused to accept any payments.

<sup>8</sup> Indeed, under the circumstances, it would be the making of payments to the purchaser at the sale, or to its successor in interest, that would be inconsistent with Defendants' claim.

<sup>9</sup> Defendants' federal class-action lawsuit (initiated in November 2010), was stayed pending the outcome of Garrett v. ReconTrust Co., N.A., 546 F. App'x 736 (10th Cir. 2013) (which, contrary to Plaintiff's suggestion, did not unqualifiedly hold "that ReconTrust had the authority to act as a trustee in Utah, and therefore, the foreclosure sale that took place in the Garrett case was valid," Mem. Opp. at 3), and appears to remain pending. Resolution of the "Prior State Case" (case number 100501437 in this court) is difficult to follow. This was an unlawful detainer action filed against Defendants by Plaintiff's predecessor in interest, and appears to have been dismissed due to the failure of both sides to appear at a hearing on or about June 19, 2012. (The Order of Dismissal is a minute entry for a hearing that appears to have been held on June 19, 2012 (the date of the caption), but the signature line on the order is dated June 20, 2012, which is also the file stamp date, and the order was filed in CORIS on June 21, 2012.) However, the parties in the case had previously stipulated to continue the scheduled trial "without date," an order to that effect was entered on November 17, 2011, and no prior notice of any hearing scheduled thereafter appears in CORIS.

N.W. 94, 95 (1934) (property occupants claiming under mortgagor one year after void foreclosure sale were "rightfully in possession" and could not be barred from challenging the validity of such sale by statute requiring any challenge to be brought "with reasonable diligence," the principle being that "one who is himself in the legal enjoyment of his property cannot have his rights therein forfeited to another, for failure to bring suit against that other within a time specified to test the validity of a claim which the latter asserts, but takes no steps to enforce. It has consequently been held that a statute which, after a lapse of five years, makes a recorded deed purporting to be executed under a statutory power conclusive evidence of a good title, could not be valid as a limitation law against the original owner in possession of the land. Limitation laws cannot compel a resort to legal proceedings by one who is already in the complete enjoyment of all he claims.") (citation and internal quotation marks omitted). The same is true of Defendants' failure to file a lis pendens, as they have explained, since a void sale transfers no title under Singer, and there was no need to bring their challenge prior to the sale, as discussed above.

Plaintiff argues that some of the same conduct just discussed also constituted a ratification of the foreclosure sale, but the court disagrees for the same reasons such conduct is not an estoppel or waiver, not least of which is the fact that, as Plaintiff itself recognizes, "[a] contract or a deed that is void cannot be ratified or accepted . . ." Ockey, 2008 UT 37, ¶ 18 (footnote omitted).

Plaintiff also argues that the statutory remedy set forth in Utah Code section 57-1-23.5 is exclusive, but this section was not added until 2011, the year after the sale at issue here, and Plaintiff has made no argument to show its retroactive applicability.

Finally, Plaintiff stresses that it is a bona fide purchaser for value. Assuming that to be true,<sup>10</sup> however, Singer clearly holds that such status cannot validate a void sale. This determination is not altered by Utah Code section 57-1-28's provision stating that trust deed "recitals of compliance with the requirements of Sections 57-1-19 through 57-1-36 relating to the exercise of the power of sale and sale of the property described in the trustee's deed" "are conclusive evidence in favor of bona fide purchasers and encumbrancers for value and without notice." Utah Code Ann. § 57-1-28(2)(c)(ii).

For obvious reasons, such provisions cannot be taken completely at face value. See Nelson & Whitman § 7.22 at 982 (describing "[t]he literal language of this . . . type of statute" as "breathtakingly broad in its impact on BFPs" as it "arguably applies even when the mortgagee had no substantive right to foreclose," such as where "a lender forecloses though the secured obligation is not in default or if the mortgage is forged" – a result that would be "fundamentally unfair and is probably legislatively unintended"). In an earlier treatment of the subject, Nelson

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<sup>10</sup> Such an assumption may be unduly generous, given that Defendants have remained in possession of the property challenging the validity of the sale at all times since the sale, thereby giving notice to Plaintiff, prior to Plaintiff's purchase, of the claimed defect in the exercise of the power of sale.

and Whitman went as far as to assert that “the conclusive impact” of such statutes should be limited “to procedural defects in the foreclosure process,” consistent with the likely legislative intent. See Grant S. Nelson & Dale A. Whitman, Reforming Foreclosure: The Uniform Nonjudicial Foreclosure Act, 53 Duke L.J. 1399, 1506-1507 (2004).

Although this suggested bright-line limitation did not find its way into the most recent version of Nelson and Whitman’s treatise, it appears to accurately reflect how these “conclusive” statutory presumptions should be understood. See Main I Ltd. P’ship v. Venture Capital Const. & Dev. Corp., 154 Ariz. 256, 260, 741 P.2d 1234, 1238 (Ariz. Ct. App. 1987) (observing, with reference to an Arizona conclusive presumption statute similar to that of Utah, and without apparent disagreement, that “[w]hen the California cases hold that recitals in a deed of trust are conclusive, they qualify that they are conclusive ‘in the absence of grounds for equitable relief,’” but finding equitable relief inappropriate in a case where there was no “fraud, misrepresentation, . . . concealment,” bad faith, or breach of fiduciary duty) (emphasis added and citation omitted). Among the traditional grounds for equitable relief not specifically mentioned in Main I is, as previously indicated, the absence of a power of sale in the party conducting such sale. See 5 Tiffany Real Prop. § 1550 (3d ed.) (WestlawNext database updated September 2013) (“It appears that the sale will ordinarily be set aside in equity on grounds on which it would have been previously enjoined, as for instance where the debt never existed, or has been extinguished, or was conducted by a party without authority to do so, or where the notice of sale was substantially

defective.”) (emphasis added and footnotes omitted). Thus, the court concludes that the protection afforded to BFPs by Utah Code section 57-1-28 is not intended to extend, and does not extend, to protect against defects traditionally viewed as fundamental, such as the one at issue here.

For these reasons, the court holds that Plaintiff has not overcome Defendants’ defense that there has been no “disposition of the property by a trustee’s sale,” as required under Utah Code section 78B-6-802.5, and accordingly dismisses this unlawful detainer action.

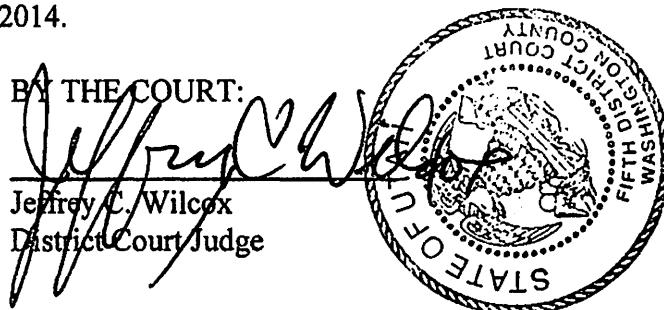
#### ORDER

For the foregoing reasons, it is hereby ORDERED, ADJUDGED, and DECREED that:

1. Plaintiffs’ unlawful detainer action is dismissed.

Dated this 2nd day of September, 2014.

BY THE COURT:  
Jeffrey C. Wilcox  
District Court Judge



CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 140500067 by the method and on the date specified.

EMAIL: JOHN C BARLOW  
EMAIL: BRAD G DEHAAN

Date: 09/02/2014

/s/ TIPPY LASTOWSKI

Deputy Court Clerk

1 to know what they did when they received the  
2 notice of default. I would like some evidence  
3 from your clients as to what they did, whether  
4 they attended the sale. I have no idea on that,  
5 and I think I need that background to help me.

6 MR. BARLOW: Okay, yes, Judge, we can do  
7 that. What I would like to do is call Mr. Sam  
8 Adamson to the stand.

9 THE COURT: Thank you. Mr. Adamson, if  
10 you'd raise your right hand, the clerk will  
11 administer an oath, and then you can come take a  
12 seat in the witness stand.

13 Whereupon,

14 **SAMUEL ADAMSON,**  
15 was administered the following oath by the court  
16 clerk.

17 THE CLERK: You do solemnly swear that  
18 the testimony you give in the case now pending  
19 before the court will be the truth, the whole  
20 truth, and nothing but the truth.

21 THE WITNESS: I do.

22

23 DIRECT EXAMINATION

24 BY MR. BARLOW:

25 Q Mr. Adamson, will you please state and

1 spell your name for the record.

2 A Samuel Don Adamson.

3 Q Please spell your name for the record.

4 A S-A-M-U-E-L, Don D-O-N, Adamson

5 A-D-A-M-S-O-N.

6 Q Mr. Adamson, you've heard the judge ask  
7 specific questions. Let's go through those. Will  
8 you please tell the Court when you moved into the  
9 property and where -- will you please first state  
10 where the property is located?

11 A The property is located at 70 West  
12 Orchard Lane, Washington, Utah 84780.

13 Q Will you please state when you moved  
14 into the property.

15 A We moved into the property May of 2003.

16 Q May of 2003?

17 A Correct.

18 THE COURT: And just tell me briefly,  
19 you purchased the home. How much you purchased it  
20 for, if you financed it and what the terms of  
21 your -- what your payments were.

22 THE WITNESS: Originally?

23 THE COURT: Yeah.

24 THE WITNESS: It was right around  
25 154,000, and the terms were 30 years, and the

1 payments were \$1,190.

2 THE COURT: And I don't mean to take  
3 over the questioning, but did you refinance, I  
4 take it?

5 THE WITNESS: Correct, in 2007.

6 THE COURT: And can you tell me about  
7 that just a little bit?

8 THE WITNESS: We refinanced to  
9 consolidate some debt.

10 THE COURT: And what were the terms; do  
11 you remember?

12 THE WITNESS: I might be off on this a  
13 little bit, but -- our payment was right around  
14 \$1,900 a month for 30 years. I can't remember the  
15 amount financed.

16 THE COURT: And that's fine. And who  
17 did you refinance it through? Not the mortgage  
18 company but do you remember who your debt was to?  
19 Was it Bank of America?

20 THE WITNESS: It was Guild Mortgage  
21 originally, and then it sold to Bank of America.

22 MR. BARLOW: Judge, I think I have on  
23 here that Guild Mortgage was the finance company  
24 and then it sold to -- not Bank of America but  
25 Countrywide and then Bank of America.

1           THE COURT: I'm sorry. It was who  
2 initially?

3           THE WITNESS: Guild Mortgage.

4           THE COURT: It was Countrywide do you  
5 think?

6           MR. BARLOW: That's what I have.

7           THE WITNESS: That sounds right.

8           THE COURT: I'm going to allow both  
9 counsel to follow up on questions, so if you  
10 wouldn't mind, Mr. Adamson, I'm going to ask a few  
11 more. And I take it that at some point you were  
12 having trouble making payments; is that right?

13           THE WITNESS: Correct. In December of  
14 2008 I owned a landscape maintenance company. At  
15 that time the transmission went out on my work  
16 truck and took my funds that I had set aside for  
17 the winter since it's a seasonal business. I  
18 contacted Bank of America before I even missed my  
19 first payment and let them know of my hardship.  
20 They continued to tell me that they would work  
21 with me and to stay in contact, for which I did.

22           MR. DeHAAN: I'm going to object to  
23 that, Your Honor, on the basis of hearsay. Bank  
24 of America is not a party.

25           THE COURT: It's not coming in for the

1 truthfulness of the matter asserted. It's coming  
2 in for background, and I'm going to allow it.

3                 And I guess at some point you learned  
4 that there was a foreclosure. Did you receive a  
5 notice of default?

6                 THE WITNESS: Correct.

7                 THE COURT: Counsel, would you ask him  
8 if this would be the document that he received.

9 BY MR. BARLOW:

10               Q         Mr. Adamson, I believe you've just been  
11 handed Exhibit No. 1. Is that the document that  
12 you received issued by ReconTrust?

13               A         It looks familiar. It's been a few  
14 years since I reviewed it but, yes.

15               Q         Was this document sent to you or taped  
16 to your door? How did you receive this document?

17               A         Recalling, taped to my door.

18               THE COURT: What did you do after you  
19 found that it had been taped to your door; do you  
20 recall?

21               THE WITNESS: I did try several times to  
22 do a loan modification at that time. Can I go  
23 back a little bit on time frame?

24               THE COURT: Sure.

25               THE WITNESS: I did originally miss

1 December's payment of 2008. Stayed in contact  
2 with Bank of America January and February because  
3 those were still my slow months. In March I had  
4 started picking back up for the year and contacted  
5 them to make a payment because they agreed every  
6 month that I had contacted them that they would  
7 work with me to get caught back up.

8           At that point I was notified that I  
9 would have to come up with the 7,000 that I was  
10 behind, and I simply stated that that's not really  
11 working with me. That's me just getting caught  
12 back up. So not really knowing what to do being  
13 young in life, I did try loan modifications by  
14 myself, was told by Bank of America that I did  
15 qualify; that they would be sending me paperwork  
16 to sign, and that I was to get it right back to  
17 them which I never saw any paperwork to sign and  
18 get back to them.

19           In fall of 2009 I hired a company that  
20 was a loan modification specialist called  
21 Fortified Financial and paid them a large sum of  
22 money to help them assist to figure this out.

23 BY MR. BARLOW:

24 Q       How much did you pay that company?

25 A       \$3,700.

1                 THE COURT: Did you ever try and contact  
2 ReconTrust company or counsel about the notice of  
3 default?

4                 THE WITNESS: I never would have thought  
5 to call or contact ReconTrust. Fortified  
6 Financial and me did get Bank of America and  
7 ReconTrust on a three-way call because we had a  
8 concern about the sale date. I can't remember  
9 exactly the year. You might have it on record.  
10 One company is stating it was sold in February  
11 where the other company is stating it sold in  
12 March. They did continue to get into an argument  
13 on the phone with us about it but later hung up on  
14 us because they found out we were recording their  
15 phone call.

16                 THE COURT: Did you ever hear or get a  
17 copy of a notice of trustee sale?

18                 THE WITNESS: Sorry, what was that?

19                 THE COURT: Did you ever receive or get  
20 a copy of a notice of trustee sale that told you  
21 when the date of the sale would be?

22                 THE WITNESS: I received one in February  
23 but not on the day that I believe it was  
24 ReconTrust states in March. I never saw a posting  
25 or received anything on that date.

1                 THE COURT: Did you attend the trustee  
2 sale?

3                 THE WITNESS: I did not.

4                 THE COURT: Did you know that it was  
5 occurring?

6                 THE WITNESS: Not the one in March. We  
7 were working with Bank of America at the time. We  
8 were actually in the middle of another loan  
9 modification when we received our eviction notice  
10 on April 1<sup>st</sup>, 2010, and it was a surprise to us  
11 because we were working with them up to that date  
12 on the phone several times a week with Fortified  
13 Financial to resolve this problem.

14                 THE COURT: The trustee's deed says that  
15 the sale occurred on January 14<sup>th</sup> of 2010, and  
16 you're saying that you didn't attend that sale?

17                 THE WITNESS: No, I did not.

18                 THE COURT: All right. Those are the  
19 questions I have.

20                 Mr. Barlow, I'm going to allow you to  
21 provide any other questions that you think would  
22 be necessary and then I'll allow  
23 cross-examination.

24 BY MR. BARLOW:

25 Q                 Mr. Adamson, you mentioned a couple of

1 dates when it came to the trustee sale. If I  
2 remember correctly, you said that you were told  
3 the property was sold in March; is that correct?

4 A Correct.

5 Q You were told it by who that it was sold  
6 in March?

7 A I want to say ReconTrust. It was either  
8 Bank of America or ReconTrust. When we had them  
9 on a three-way phone call, they would not agree to  
10 a sale date.

11 MR. DeHAAN: Your Honor, just for the  
12 record, I'd like to make an objection as to  
13 hearsay as well. Again, ReconTrust is not a party  
14 and neither is Bank of America, so what ever they  
15 allegedly said I think is hearsay.

16 MR. BARLOW: Well, its, in fact, a  
17 statement against interest, Judge.

18 THE COURT: But the interest -- it's a  
19 statement not against the defendant. An interest  
20 is a statement against someone who's not here, and  
21 so I am going to sustain that objection. That's  
22 hearsay.

23 BY MR. BARLOW:

24 Q So you were aware of a sale that was  
25 supposed to have occurred in March. Were there

1 any other sale dates that you were aware of?

2 A All others were not carried through. I  
3 don't know the correct word.

4 Q Let me turn your attention to Exhibit  
5 No. 2.

6 THE COURT: He doesn't have that. I've  
7 got it.

8 MR. BARLOW: Do you have copies of  
9 those, Judge?

10 THE COURT: I just gave him mine. If  
11 you have one I could follow along with, I'd  
12 appreciate it.

13 MR. BARLOW: In the folder that I gave  
14 you -- I don't have them marked -- there's a  
15 stapled -- this is the front page of the stapled  
16 section, and then if you turn to page 4 -- I'm  
17 sorry, page 5 is the exhibit that we're referring  
18 to which is Exhibit 2.

19 THE COURT: Thank you. So go ahead.

20 BY MR. BARLOW:

21 Q If you look down at the paragraph that  
22 starts with "Whereas ReconTrust Company" and then  
23 you follow that down, it says that the time and  
24 place of the sale as January 14<sup>th</sup> at 1:00 p.m.

25 Were you aware of that date prior to

1 that date? Were you aware that there was going to  
2 be a sale on your home conducted prior to  
3 January 14<sup>th</sup>?

4 A Yes.

5 Q Were you aware that the sale date was  
6 January 14<sup>th</sup>?

7 A Yes.

8 Q And how were you aware of that?

9 A On this sale date I actually got this  
10 taped to my garage door.

11 Q On January 14<sup>th</sup>?

12 A I'd say it was a few days before. I  
13 don't remember the exact date.

14 Q However, you mentioned a couple other  
15 dates that came to mind. So you were unaware that  
16 the property -- you were unaware of the actual  
17 sale date; is that correct?

18 A We were told by the Bank of America that  
19 it did not sell on that date.

20 MR. DeHAAN: I'm going to object to the  
21 question. I think that's been asked and answered.  
22 I think his testimony was that he was aware of the  
23 sale date.

24 MR. BARLOW: I was trying to find out  
25 exactly when he became aware of the sale date,

1 Judge.

2 THE COURT: And when he became aware was  
3 sometime before that date, right?

4 MR. BARLOW: That's correct.

5 THE COURT: Okay, then go ahead.

6 BY MR. BARLOW:

7 Q Now I'd like to draw your attention up  
8 to the very top of this document three lines down  
9 from the top. The first line is doc ID and then  
10 trustee's deed and then the county recorder, and  
11 then the fourth line is the date on which this  
12 document was recorded. Will you please tell us  
13 the date on which this document was recorded? Do  
14 you see that? What's the date that this document  
15 was recorded?

16 A 4/5 of 2010.

17 Q So this document was recorded on  
18 April 5<sup>th</sup> of 2010 which is approximately four  
19 months after the sale date; is that correct?

20 A Correct.

21 Q Now, you still occupy the home; is that  
22 correct?

23 A Correct.

24 Q Are you paying the HOA fees on the home?

25 A Correct.

1 Q Is that correct?

2 A Yes.

3 Q Have you attempted since the sale to  
4 negotiate with any party for a modification?

5 A Since the sale?

6 Q Yeah. You stated -- I'm just trying to  
7 clarify this in my notes. You stated that you  
8 were still working with Bank of America and also  
9 the company that took \$3,700.

10 A Fortified Financial. Correct. We were  
11 told that the sale in January on January 14<sup>th</sup>  
12 did not happen, and we continued with the loan  
13 modification at that point. So when we received  
14 our eviction notice on April 1<sup>st</sup>, 2010, it came  
15 to a surprise to us.

16 MR. DeHAAN: Again, Your Honor, I'm  
17 going to object to the statement. Any statement  
18 indicating what Bank of America told him is  
19 hearsay.

20 THE COURT: I agree it is hearsay, and  
21 I'm not sure that it's relevant. And I know I've  
22 hit you cold, Mr. Barlow. I wanted some idea of  
23 what was happening before and after the sale.

24 BY MR. BARLOW:

25 Q Did you continue to pay the HOA fees on

1 the property?

2 A Yes.

3 Q And then what have you done also to  
4 protect your interest in the property? Have you  
5 filed any other litigation?

6 A Not with this property. Well,  
7 beforehand we had litigation with Bank of America  
8 but.

9 Q I guess the question is, are you aware  
10 of the federal suit?

11 A Yes.

12 Q In your name; is that correct?

13 A Correct.

14 Q So you're a party to a federal action  
15 against Bank of America and ReconTrust?

16 A Correct.

17 Q And then -- give me a second.

18 THE COURT: Counsel, when was that  
19 litigation initiated; do you know?

20 MR. BARLOW: I can find the date.

21 THE COURT: Approximately. If either  
22 counsel.

23 MR. DeHAAN: Counsel, I have a docket of  
24 that case if you'd prefer. It was filed  
25 November 5, 2010. The case is 2:10-CV-01099.

1                   THE COURT: Thank you. I just wanted  
2 the date. Thanks.

3 BY MR. BARLOW:

4                   Q     Let me turn your attention again to  
5 Exhibit No. 2 which is the trustee's deed. Do you  
6 consider this deed to be valid, this trustee's  
7 deed?

8                   A     No.

9                   MR. DeHAAN: Objection, Your Honor.

10                  THE COURT: It calls for a conclusion of  
11 law, so I'm going to sustain the objection.

12                  MR. BARLOW: I understand that, Your  
13 Honor. That's all the questions that I have right  
14 now, Your Honor.

15                  THE COURT: All right. One final  
16 question. Have you made any efforts to make  
17 payments on the loan since you fell behind?

18                  THE WITNESS: I have not since I was  
19 told that they wouldn't accept them.

20                  THE COURT: And have you paid the taxes  
21 on the property?

22                  THE WITNESS: They were included in the  
23 escrow, so I would have loved to, but I have not  
24 been able to.

25                  THE COURT: Does counsel know if there's

1 been any tax sale initiated by the county for  
2 failure to pay taxes?

3 MR. DeHAAN: I'm unaware if there's been  
4 a tax sale or a tax notice regarding the unpaid  
5 taxes.

6 THE COURT: That's really all I have.  
7 And so.

8 MR. BARLOW: May I ask a follow-up  
9 question?

10 THE COURT: Sure.

11 BY MR. BARLOW:

12 Q Your Honor asked you if you had made any  
13 effort to make payment. You stated that they told  
14 you you couldn't make a payment. Will you expand  
15 upon that a little bit.

16 A Basically if I made a payment it  
17 wouldn't do anything to better my case or assist  
18 me in getting a loan modification. At one point  
19 in time I was told not to make a payment because  
20 of when you're going through the loan modification  
21 program it can mess up the numbers, so they  
22 advised me not to.

23 MR. BARLOW: All right, thank you.

24 THE COURT: Mr. DeHaan, go ahead.

25 / / /

1                           CROSS-EXAMINATION

2 BY MR. DeHAAN:

3           Q     Just one followup question, Mr. Adamson.  
4 I understand your testimony you missed a payment  
5 in December 2008; is that correct?

6           A     Correct.

7           Q     And then have you -- and then you've not  
8 made any payments since that date, correct?

9           A     I have not.

10               MR. DeHAAN: Thank you. No further  
11 questions, Your Honor.

12               THE COURT: All right, thanks. You can  
13 step down unless Mr. Barlow has any more  
14 questions.

15               We really now -- based on that, do you  
16 have any more evidence that you would like to  
17 present? I think mostly it's legal argument,  
18 isn't it?

19               MR. BARLOW: Judge, it is oral argument.  
20 I would, however, like to present, if the Court  
21 would allow me, I'd like to present evidence of --  
22 well, it would be oral argument, and I would  
23 submit this to the Court, the Fannie Mae v  
24 Sundquist case. I'd like the Court to take notice  
25 of this case. This is directly to the point that



