Signed September 05, 2014.

H. CHRISTOPHER MOTT
UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

In Re:	§	CASE NO. 09-30881-hcm
JOE JESSE MONGE and	§	(Chapter 11)
ROSANA ELENA MONGE,	§	
Debtors.	§	

JOE JESSE MONGE and	§	
ROSANA ELENA MONGE,	§	
Plaintiffs,	§	
v.	§	ADVERSARY NO. 10-03019-hcm
ALICIA ROJAS; FRANCISCO JAVIER	§	
JAYME; MONROJ INVESTMENTS INC.;	§	
NORTHEAST PATRIOT PLAZA INC.	§	
Defendants.	§	

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW
WITH RESPECT TO TRIAL IN ADVERSARY PROCEEDING NO. 10-03019

TO THE HONORABLE U.S. DISTRICT COURT JUDGE:

In accordance with 28 U.S.C. § 157(c)(1) and Rule 9033 of the Federal Rules of Bankruptcy Procedure ("Bankruptcy Rules"), the U.S. Bankruptcy Court for the Western District of Texas, El Paso Division (Bankruptcy Judge H. Christopher Mott), submits the following Proposed Findings of Fact and Conclusions of Law ("Proposed Findings and

Conclusions") to the U.S. District Court for the Western District of Texas, El Paso Division ("District Court") for consideration and review.

On July 17 and 18, 2014, and August 4, 5, 7, and 8, 2014, this Court conducted a bench trial on the merits in this adversary proceeding no. 10-03019 ("Adversary Proceeding"). This Adversary Proceeding relates to and arises out of Chapter 11 bankruptcy case no. 09-30881 filed by Joe Jesse Monge and Rosana Elena Monge ("Monges") in this Court.

Appearing at the commencement of trial in the Adversary Proceeding were Joe Jesse Monge and Rosana Elena Monge, Plaintiffs and Counter-Defendants herein ("Monges"); Alicia Rojas and Francisco Javier Jayme, Defendants and Counter-Plaintiffs herein ("Rojas/Jayme"), Hugo Maynez Maldonado, a Defendant ("Maynez"), and Joe and Alison Villa, Defendants ("Villas"). During the course of trial, the Monges dismissed their claims against Defendant Maynez and Defendants Villas with prejudice, and Orders of Dismissal have been entered with respect to such parties. Thus, Defendant Maynez and Defendants Villas are no longer parties in this Adversary Proceeding.

Monroj Investments Inc. ("Monroj") and Northeast Patriot Plaza Inc. ("Northeast Patriot"), also named as Defendants herein, are defunct entities that did not appear at trial and an order for entry of default was previously entered against Monroj and Northeast Patriot.

Accordingly, the only remaining parties participating by the conclusion of the trial in the Adversary Proceeding were the Monges and Rojas/Jayme.

I.
INTRODUCTION

Jurisdiction and Constitutional Authority

1. This Court (a bankruptcy court) has ***statutory jurisdiction*** over the Adversary Proceeding under 28 U.S.C. § 1334(b) and 28 U.S.C. § 157(b)(1), as well as the Standing Order of Reference of Bankruptcy Cases and Proceedings entered in this District on October 4, 2013—which refers bankruptcy cases and proceedings from the District Court to this Court. However, as briefly explained below, it is very questionable at the present time whether this Court (a bankruptcy court) has the ***constitutional authority*** to enter a Final Judgment in this particular Adversary Proceeding—even though it has statutory authority. Accordingly, this Court is submitting these Proposed Findings of Fact and Conclusions of Law to the District Court for review and entry of a Final Judgment in this Adversary Proceeding under 28 U.S.C. § 157(c)(1) and Bankruptcy Rule 9033 .

2. This Adversary Proceeding involves some matters that are "core proceedings" as statutorily defined in 28 U.S.C. § 157(b)(2) and which arise directly under the provisions of the Bankruptcy Code (Title 11) in the bankruptcy case of the Monges—such as alleged violations of the automatic stay of 11 U.S.C. § 362, turnover of property of the bankruptcy estate under 11 U.S.C. § 542, and alleged rights under 11 U.S.C. § 365(i). This Adversary Proceeding also involves other matters that are only "related to" the bankruptcy case of the Monges under 28 U.S.C. § 157(c) that are not "core proceedings"—such as the various state law claims and defenses asserted by the Monges and other parties.

3. Under statute (28 U.S.C. § 157(c)(2)), this Court has the ***statutory authority*** to enter a Final Judgment with the consent of the parties to the Adversary Proceeding. Here, the remaining parties in the Adversary Proceeding (the Monges and Rojas/Jayme), prior to trial, have expressly consented to entry of a final judgment by this Court. *See* Statements Regarding Consent (dkt# 159, p. 3; dkt# 176, p. 2). However, due to recent U.S. Supreme Court and Fifth Circuit precedent briefly explained below, this Court may lack the ***constitutional authority*** (as an Article I court) to enter a Final Judgment, even though the parties have previously expressly consented to entry of a Final Judgment by this Court.

4. In *Stern v. Marshall*, 131 S.Ct. 2594, 2615-20 (2011), the Supreme Court held that while a bankruptcy court had the statutory authority under 28 U.S.C. § 157(b)(2) to enter a final judgment on a debtor's counterclaim against a creditor as a "core proceeding"—the bankruptcy court lacked the constitutional authority to enter a final judgment. In short, the high court in *Stern* determined that since the debtor's counterclaim was based on state law and was independent of federal bankruptcy law, only an Article III court (a district court) and not an Article I court (a bankruptcy court) had constitutional authority to enter a final judgment under those particular circumstances. Although the Supreme Court stated in *Stern* that its holding and the issue presented was "narrow" (131 S. Ct. at 2620), other courts (including the Fifth Circuit) have recently adopted a broad reading of the *Stern* decision.

5. In the wake of *Stern*, the Fifth Circuit recently issued a decision in the case of *BP RE L.P. v. RML Waxahachie Dodge L.L.C.* (*In re BP RE L.P.*), 735 F.3d 279 (5th Cir. 2013). In *BP RE,* a chapter 11 debtor-plaintiff filed an adversary proceeding

against multiple defendants based on various state law tort and breach of contract claims—which were not "core proceedings" but were "related to" the bankruptcy case. The debtor-plaintiff's claims were based on state law (not bankruptcy law) and did not stem from the bankruptcy itself. Before trial, the parties consented to entry of a final judgment by the bankruptcy court. After trial, the bankruptcy court entered a final judgment that the debtor-plaintiff take nothing on its claims. On appeal for the first time, the debtor-plaintiff argued that, based on *Stern*, the bankruptcy court lacked constitutional authority to enter a final judgment on its state-law based claims. In short, the Fifth Circuit agreed and held that even though the bankruptcy court had statutory authority under 28 U.S.C. § 157(c)(2) to enter a final judgment with the parties' consent—the bankruptcy court lacked constitutional authority as a non-Article III court to enter a final judgment on state law claims that did not stem from the bankruptcy itself. *BP RE*, 735 F.3d at 285-88. The Fifth Circuit stated that instead, the bankruptcy court could have issued proposed findings of fact and conclusions of law on the state law claims to the district court for review and entry of final judgment under 28 U.S.C. § 157(c)(1). *See BP RE*, 735 F.3d at 291.

6. The 2013 decision by the Fifth Circuit in *BP RE*—that express consent by the parties to a bankruptcy court's entry of a final judgment on state law claims related to the bankruptcy case was not effective and that the Supreme Court decision in *Stern* should be read more broadly—surprised many, including this Court. Then very recently, the Supreme Court had the opportunity to address the issue of the effectiveness of party consent to bankruptcy court final adjudication, but declined. *See Exec. Benefits Ins. Agency v. Arkinson (In re Bellingham Ins. Agency)*, 134 S.Ct. 2165, 2170 n.4 (2014)

("We reserve that question for another day").[1] In *Executive Benefits,* the Supreme Court stated that if a "*Stern* claim" is involved (i.e., a claim listed as a statutory core proceeding but where the bankruptcy court lacks constitutional authority to enter a final judgment)—a bankruptcy court should issue proposed findings of fact and conclusions of law to the district court for *de novo* review and entry of final judgment under 28 U.S.C. §157(c)(1). *See Executive Benefits*, 134 S.Ct. at 2174.

7. In sum, at the present time, it appears very questionable whether this Court (an Article I bankruptcy court) has the constitutional authority to render a Final Judgment in this Adversary Proceeding even though the parties have previously expressly consented—since this proceeding involves several state law claims that do not stem from the Monges' bankruptcy itself.

8. For these reasons, this Court is submitting these Proposed Findings of Fact and Conclusions of Law with respect to trial in this Adversary Proceeding to the District Court for *de novo* review to the extent required and entry of a Final Judgment by the District Court in accordance with 28 U.S.C. § 157(c)(1).[2]

[1] "Another day" may be coming soon, but it is not here yet. Very recently, the Supreme Court granted certiorari in another bankruptcy case—where the issue of the effectiveness of parties' consent to entry of a final judgment by a bankruptcy court on state law based causes of action may be definitively decided by the Supreme Court. *See Wellness Int'l Network v. Sharif (In re Sharif)*, 83 U.S.L.W. 3100 (July 1, 2014).

[2] Under 28 U.S.C. § 157(c)(1), any final judgment is to be entered by the district court, after considering the bankruptcy court's proposed findings and conclusions and after reviewing *de novo* those matters in which a party has timely and specifically objected. *See also* Bankruptcy Rule 9033(d).

Procedural Background

9. On April 27, 2009, Joe Jesse Monge and Rosana Elena Monge ("Monges"), as debtors, filed a voluntary Chapter 11 bankruptcy petition in this Court, case no. 09-30881.

10. On June 14, 2010, the Monges, as Plaintiffs, initiated this Adversary Proceeding by filing their original Complaint against Alicia Rojas and husband Francisco Javier Jayme ("Rojas/Jayme"), as Defendants (dkt# 1).[3] Very shortly thereafter, on June 24, 2010, the Monges filed an Amended Complaint against Rojas/Jayme (dkt# 6).

11. In the beginning, this Adversary Proceeding was relatively simple—the Monges were seeking turnover of real property located in New Mexico (known as the Thoroughbred Property) from Rojas/Jayme, and damages for rent allegedly owed by Rojas/Jayme. *See* Amended Complaint (dkt# 6). Rojas/Jayme answered the Amended Complaint and filed a counterclaim based on the Texas Property Code (dkt# 10).

12. The Adversary Proceeding then became considerably more complicated when the Monges retained new counsel. On October 20, 2011, the Monges and Rojas/Jayme filed a Joint Motion to Withdraw Reference of the Adversary Proceeding to District Court (dkt# 51). On December 27, 2011, the District Court (Honorable District Judge Frank Montalvo presiding), entered an Order denying the Joint Motion to Withdraw Reference (dkt# 54). The Order entered by the District Court denying withdrawal of the reference was appealed by the parties, and on June 6, 2012, the Fifth Circuit Court of Appeals dismissed the appeal. *See* District Court Case No. EP-MC-476-FM (dkt# 6).

[3] The docket number of the document maintained in CM/ECF by the Clerk of the Bankruptcy Court is referenced herein as "dkt#."

13. Then, on July 2, 2012, the Monges filed their Second Amended Complaint, which significantly expanded the scope of the Adversary Proceeding and the number of defendants. *See* Second Amended Complaint (dkt# 58). The Second Amended Complaint added causes of action based on three additional properties—known as "Country Cove Subdivision" in New Mexico, the "Transmountain Property" in El Paso, Texas, and the "Sierra Crest Property" in El Paso, Texas—in addition to the Thoroughbred Property in New Mexico. The Monges' Second Amended Complaint took a shotgun approach, containing about 18 "boilerplate" causes of action (some based on the Bankruptcy Code, but many based on state law). The Second Amended Complaint also added 5 new Defendants—Monroj Investments Inc. ("Monroj") and Northeast Patriot Plaza Inc. ("Northeast Patriot"), which are defunct entities, Joe and Alison Villa ("Villas"), and Hugo Maynez Maldonado ("Maynez"), a Mexican national residing in Juarez, Mexico.[4]

14. On November 1, 2012, the Monges again tried to drastically expand the scope of the Adversary Proceeding again—this time by filing a 112-page Third Amended Complaint (dkt# 96). The Third Amended Complaint filed by the Monges attempted to add about ten new additional defendants and several new legal theories and causes of action. Upon motion of Rojas/Jayme, the Court struck the Third Amended Complaint filed by the Monges as untimely (dkt# 111, 134). Thus, the Second Amended Complaint (dkt# 58) filed by the Monges was the Complaint that proceeded to trial.

[4] Ultimately, an Order of Default was entered against defunct corporate entities Defendants Monroj and Northeast Patriot (dkt# 168). During trial the Monges dismissed their claims with prejudice against Defendants Villas and Maynez and these defendants were subsequently dismissed with prejudice by agreed order (dkt# 341, 360). Thus, Rojas/Jayme were the only remaining participating Defendants by the end of trial.

15. On June 5, 2013, upon motion of the Monges, the Court entered an Order of Default against Defendants Monroj and Northeast Patriot (dkt# 160,168). Monroj and Northeast Patriot are defunct corporations that were previously formed by the Monges and Rojas/Jayme, and thus Defendants Monroj and Northeast Patriot did not answer or appear in the Adversary Proceeding.

16. Meanwhile, the primary Defendants—Rojas/Jayme—amended their Answer and Counterclaim numerous times. Rojas/Jayme's last Amended Answer was filed on January 18, 2013 (dkt# 147). Rojas/Jayme's last counterclaim was filed as a Fourth Amended Counterclaim against the Monges on September 19, 2013 (dkt# 221), and the Monges filed their final and Fourth Amended Answer on October 11, 2013 (dkt# 223).

17. Rojas/Jayme filed a Motion for Partial Summary Judgment based on the affirmative defense of statute of limitations with respect to the Monges' claims based on the Transmountain Property and Sierra Crest Property (dkt# 212). Upon motion of the Monges, the Court struck the Motion for Partial Summary Judgment of Rojas/Jayme as an untimely dispositive motion, and at that time the Court did not reach the merits of the statute of limitations defense asserted by Rojas/Jayme (dkt# 218, 230).

18. Numerous discovery disputes and procedural motions were filed by the parties and ruled upon by the Court. At the request of the parties, the Court extended deadlines and modified its Scheduling Order to permit additional discovery on multiple occasions (dkt# 26, 56, 93, 136, 157, 170, 214, 245, 246, 274).

19. Due to the inability of the parties to narrow the issues for trial, the Court required the parties to file specific proposed findings of fact and conclusions of law prior to trial. By Order, the Court twice warned the parties that:

> Each party must separately file proposed Findings of Fact and Conclusions of Law in accordance with Local Bankruptcy Rule 7016(d). *For each party that is asserting an affirmative claim for relief (by way of Complaint or Counterclaim) or an affirmative defense, such party must include in its proposed Findings of Fact and Conclusions of Law each necessary element (with statutory and caselaw citations) of all affirmative claims for relief or affirmative defenses that the party intends to pursue at trial.* ***Failure of any party to include each necessary element (with statutory and caselaw citations) of affirmative claims for relief or affirmative defenses in its proposed Findings of Fact and Conclusions of Law, may result in the Court determining that such affirmative claim for relief or affirmative defense has been waived by such party*** *and will not be pursued at trial by such party.* Failure of any party to file proposed Findings of Fact and Conclusions of Law by the Findings/Conclusions Deadline may result in the Court rendering a default against such party, dismissing any claims of such party, or such other relief as the Court finds appropriate ***(emphasis added)***. *See* Order Setting Final Pre-Trial Conference entered February 13, 2014, ¶4 (dkt# 246); Order Extending Deadline entered May 28, 2014, ¶2 (dkt# 274).

20. On June 3, 2014, prior to trial, the Monges filed their proposed findings of fact and conclusions of law (dkt# 283, 284); Rojas/Jayme (for a time acting *pro se*) filed their proposed findings of fact and conclusions of law (dkt# 279); Maynez filed his proposed findings of fact and conclusions of law (dkt# 281); and the Villas filed proposed findings of fact and conclusions of law (dkt# 277). Also on June 3, 2014, the Monges, Maynez, and the Villas filed a proposed Joint Pre-Trial Order (dkt# 282), and Rojas/Jayme (at that time acting *pro se*) filed their own proposed Pre-Trial Order (dkt# 278). On July 14, 2014, Rojas/Jayme (represented by counsel) filed a Trial Brief and Memorandum of Law (dkt# 316).

21. A Final Pre-Trial Conference was held on June 4, 2014, and the Adversary Proceeding was specially set for trial commencing July 17, 2014 (dkt# 286).

22. The trial in the Adversary Proceeding was conducted and specially set on July 17 and 18, 2014, and August 4, 5, 7, and 8, 2014. The Court and its staff made special trips to El Paso to conduct the trial. During the midst of trial, the Monges dismissed their claims against Defendants Maynez and Defendants Villas with prejudice, and orders of dismissal with prejudice were subsequently entered as to such defendants (dkt# 341, 360).

23. At the conclusion of trial, on August 8, 2014, the Court entered an Order Regarding Post-Trial Submissions, which set deadlines for filing any post-trial briefs and applications for award of attorneys' fees and expenses by the Monges and Rojas/Jayme (dkt# 345).

24. On August 18, 2014, the Monges filed a lengthy Post-Trial Brief (dkt# 354). Although provided the opportunity to do so, Rojas/Jayme did not file a post-trial brief.

25. On August 25, 2014, the Monges filed an Application for attorneys' fees (dkt# 358). On the same date, Rojas/Jayme also filed an Application for attorneys' fees (dkt# 357). On September 1, 2014, Rojas/Jayme filed an objection to the Application for attorneys' fees filed by the Monges (dkt# 362). On September 2, 2014, the Monges filed objections to the Application for attorneys' fees made by Rojas/Jayme (dkt# 363).

Considerations with respect to Proposed Findings and Conclusions

26. The following constitutes the Court's Proposed Findings of Fact and Conclusions of Law regarding the trial in the Adversary Proceeding. In reaching its

findings and conclusions, the Court has considered and weighed the testimony, demeanor and credibility of all witnesses, all admitted exhibits (to the extent a document in an admitted exhibit was identified by the parties at trial as directed by the Court or otherwise referred to herein), the record, and the pleadings and briefs filed by the parties—regardless of whether or not they are specifically referred to in these Proposed Findings of Fact and Conclusions of Law. To the extent deemed necessary, the Court has also conducted its own independent legal research.

27. To the extent any Proposed Finding of Fact is construed to be a Conclusion of Law, they are hereby adopted as such by the Court. To the extent any Proposed Conclusion of Law is construed to be a Proposed Finding of Fact, they are hereby adopted as such by the Court.

28. The Court has intentionally omitted pennies and cents in the dollar figures used in these Proposed Findings of Fact and Conclusions of Law.

II.
PROPOSED FINDINGS OF FACT

Trial and Exhibits

29. The Court conducted a six-day bench trial in this Adversary Proceeding on July 17 and 18, 2014, and August 4, 5, 7, and 8, 2014. The trial has recently been transcribed and the transcripts are located at dkt# 332, 333, 342, 350, 352, and 353.[5]

30. At the commencement of the trial, by stipulation and at the request of the parties, the Court admitted numerous and voluminous exhibits into the record. The

[5] References to the trial transcripts will be made in the following manner: Tr. [date], [page number], [line number] (if applicable). References to "dkt#" are the docket number of the document maintained in CM/ECF by the Clerk of the Bankruptcy Court.

Court admitted Plaintiffs' (the Monges) Exhibits P-1 through P-19, P-21 through P-45, P-47 through P-50.[6] Ultimately, Plaintiffs' Exhibit P-20, pages 1 through 51 and pages 103-129, as well as Plaintiffs' Exhibit P-46 pages 1, 13 through 23, and 24 through 26, were also admitted. Defendants (Rojas/Jayme) Exhibits RJ-1 through RJ-5 were also admitted. The Court also admitted Defendant Maynez's Exhibits HM-1 through HM-10.

31. The parties' exhibits contain literally thousands of pages of voluminous documents—in about 27 massive binders. The parties did not index or identify the exhibits by the name of the document. Instead, it appears that the parties just introduced most (if not all) of their discovery materials (many of which are duplicate copies) and indexed and identified them merely by the source of the documents with a bates-stamp. *See, e.g.*, Plaintiffs' List of Exhibits (dkt# 321). Most of the exhibits contain dozens of different documents in each exhibit relating to different transactions, and such documents contained in the exhibits were not indexed or identified by name.

32. Given the volume and unorthodox manner of identifying the exhibits, on the first day of trial, the Court specifically informed the parties that if they desired the Court to consider any admitted exhibit in its ruling, the parties needed to specifically reference and identify the document in the exhibit through a witness or in argument. *See* Tr. 7/17/14, p. 10, lines 9-25, p. 11, lines 1-4.

Witnesses and Credibility

33. During the course of trial, the following sixteen witnesses testified:

(A) Mr. Francisco Jayme ("Mr. Jayme"). Mr. Jayme is one of the Defendants and is the husband of Defendant Ms. Alicia Rojas. Mr. Jayme was one of the primary

[6] References to the exhibits herein will be made in the following manner: Ex. [exhibit number], [bate stamp number], [line number (if applicable)].

witnesses. The Court finds that most of Mr. Jayme's testimony lacked credibility, that his version of the events (particularly with respect to the Thoroughbred Property) were not supported by logic and were often contradicted by written documents, and was sometimes incomprehensible. The Court gives little probative value to much of the testimony of Mr. Jayme.

(B) Ms. Alicia Rojas ("Ms. Rojas"). Ms. Rojas is one of the Defendants and is the wife of Defendant Mr. Jayme. Ms. Rojas was also one of the primary witnesses. The Court finds that much of Ms. Rojas's testimony lacked credibility, that her view of many events was not believable, and that her testimony was often not understandable. The Court gives limited probative weight to much of the testimony of Ms. Rojas.

(C) Ms. Rosana Monge ("Ms. Monge"). Ms. Monge is one of the Plaintiffs and is the wife of Plaintiff Mr. Joe Monge. Ms. Monge was the "star witness" for the PIaintiffs, and she testified throughout the course of trial. Although the Court finds that Ms. Monge's testimony was often credible with respect to the Thoroughbred Property transactions, in the Court's view Ms. Monge then stretched the truth in many instances on the ancillary properties and transactions at issue (Country Cove Subdivision, Transmountain Property, and Sierra Crest Property)—apparently in an effort to really "get back" at Rojas/Jayme. Her testimony regarding the lack of the Monges' signatures on various documents was inconsistent and not entirely believable. Ms. Monge's testimony on the Country Cove Subdivision project was very inconsistent and largely unintelligible. Ms. Monge also evaded questions and provided testimony that was not consistent with documents, particularly with regard to the Country Cove Subdivision, Transmountain Property, and Sierra Crest Property. In short, Ms. Monge's testimony left

the Court uncomfortably numb. Although the Court is sympathetic to Ms. Monge's situation, the Court gives limited credibility to the testimony of Ms. Monge.

(D) Mr. Joe Monge ("Mr. Monge"). Mr. Monge is one of the Plaintiffs and is the husband of Plaintiff Ms. Monge. Unfortunately, at the time of trial Mr. Monge was undergoing cancer treatment, was taking multiple medications, and was not lucid. Accordingly, the Court gives very limited weight to Mr. Monge's testimony.

(E) Mr. Joe Villa ("Mr. Villa"). Mr. Villa was originally one of the Defendants, but was dismissed with prejudice as a party during the course of trial by agreement. Mr. Villa is a building contractor that worked, for a time, to try and teach Plaintiff Mr. Monge the construction business. The Court finds that Mr. Villa's testimony was generally credible, although not always comprehensible.

(F) Mr. Hugo Maynez Maldonado ("Mr. Maynez"). Mr. Maynez was originally one of the Defendants, but was dismissed with prejudice as a party during the course of trial by agreement. Mr. Maynez is a Mexican national that resides in Juarez, Mexico. Mr. Maynez is the owner of certain undeveloped property on Transmountain Road (the Transmountain Property). Mr. Maynez's testimony was received by an oral reading of his deposition, and his deposition and exhibits thereto were introduced into evidence at the trial. *See* Ex. P-48.

(G) Ms. Araceli Herrera ("Ms. Herrera"). Ms. Herrera was a non-party witness. Ms. Herrera worked as a loan processor and assistant at First Mortgage of El Paso, a business owned by Defendant Ms. Rojas. The Court finds that Ms. Herrera was a credible, albeit cautious, witness.

(H) Mr. James Thomas ("Mr. Thomas"). Mr. Thomas was a non-party witness. Mr. Thomas began the process of purchasing a home to be built in the Country Cove Subdivision, but the purchase was never completed. The Court finds that Mr. Thomas was a credible witness, although his accurate recollection of events (which happened many years ago) was limited.

(I) Mr. Alfonso Flores ("Mr. Flores"). Mr. Flores was a non-party witness who is the owner of Metal Building Specialties, LLC. Mr. Flores's company was hired to do construction in the Country Cove Subdivision. The Court finds that Mr. Flores was a credible witness, although his involvement with the relevant events was limited.

(J) Mr. Ronald Lucero ("Mr. Lucero"). Mr. Lucero was a non-party witness. Mr. Lucero is a building contractor that tried to teach Plaintiff Mr. Monge the construction business and how to build houses at the Country Cove Subdivision. The Court finds that Mr. Lucero's testimony was generally credible, although limited in scope.

(K) Mr. William Isaac ("Mr. Isaac"). Mr. Isaac was a non-party witness. Mr. Isaac and his group were secured lenders on the Country Cove Subdivision. Mr. Isaac and his secured lender group ultimately foreclosed on the Country Cove Subdivision. The Court finds that Mr. Isaac was a credible witness.

(L) Ms. Shawna Blount, formerly known as Shawna Gonzalez ("Ms. Blount"). Ms. Blount was a non-party witness. Ms. Blount is a branch manager of Dona Ana Title and was the escrow officer on the contract for the sale of the Thoroughbred Property to the Monges. The Court finds that Ms. Blount was a credible, albeit cautious, witness.

(M) Mr. Pedro Natividad ("Mr. Natividad"). Mr. Natividad was a non-party witness. Mr. Natividad allegedly executed a residential lease with the Monges for

property located on Fillmore Avenue. The Court finds that Mr. Natividad was a credible witness, and believes his testimony that he did not sign the lease for the Fillmore property.

(N) Dr. Luis Marioni ("Dr. Marioni"). Dr. Marioni was a non-party witness. Dr. Marioni allegedly executed a residential lease with the Monges on the Thoroughbred Property. Dr. Maroni also was, for a time, a shareholder in the Northeast Patriot corporation, an entity that was allegedly formed to attempt to build a clinic on the Transmountain Property. The Court finds that Dr. Marioni was a credible witness (although his recollection of Transmountain Property events was limited), and believes his testimony that he did not sign the lease for the Thoroughbred Property.

(O) Ms. Alejandra Hernandez, formerly known as Alejandra Marioni ("Ms. Hernandez"). Ms. Hernandez was a non-party witness. Ms. Hernandez, at one time, was the wife of Dr. Marioni. Ms. Hernandez (then Ms. Marioni) allegedly executed a residential lease with the Monges on the Thoroughbred Property, together with her then husband Dr. Marioni. The Court finds that Ms. Hernandez was a credible witness, and believes her testimony that she did not sign the lease for the Thoroughbred Property.

(P) Mr. David Garcia ("Mr. Garcia"). Mr. Garcia was a non-party witness. Mr. Garcia is a disabled veteran. Through a member of a disabled veteran's organization, Mr. Garcia had a contract to build a medical facility with J&M Builders, Inc. The Court finds that Mr. Garcia's testimony was generally credible, although his accurate recollection of events (which happened years ago) was limited.

Parties

34. The Court will next generally identify and define the parties in this Adversary Proceeding.

Plaintiffs Joe and Rosana Monge ("Monges")

35. The Plaintiffs, Counter-Defendants, and Debtors in this Adversary Proceeding are Joe Monge and Rosana Monge (collectively, the "Monges"). The Monges are husband and wife.

36. Ms. Monge works as a nurse practitioner at the El Paso Veterans Affairs Hospital. She also received a medical degree in Mexico in 2010.

37. Mr. Monge has served in the U.S. Army and is a veteran of the Vietnam War, and currently has cancer. The Monges have owned approximately five to six properties in the last twenty years, mostly residential houses. *See* Tr. 8/7/14, p. 185, lines 1-17.

38. The Monges filed for Chapter 11 bankruptcy in this Court on April 27, 2009, and their Plan of Reorganization was confirmed by the Court on July 13, 2010. *See* Monges main bankruptcy case no. 09-30881, dkt# 1, 69, 97.

Defendants Alicia Rojas and Francisco Jayme ("Rojas/Jayme")

39. The primary remaining Defendants and Counter-Plaintiffs in this Adversary Proceeding are Ms. Alicia Rojas and her husband Mr. Francisco Jayme (collectively, "Rojas/Jayme"). Rojas/Jayme reside on the Thoroughbred Property owned by the Monges, which is the source of the principal dispute in this Adversary Proceeding.

40. Ms. Rojas has been a licensed mortgage broker for approximately eighteen years and is the owner of First Mortgage of El Paso ("First Mortgage"). From

late 2005 through 2008, Ms. Rojas acted as a mortgage broker for the Monges. Ms. Rojas is also an attorney, having graduated from a law school in Mexico. For a time, Ms. Rojas practiced in the areas of both civil and criminal matters in Juarez, Mexico.

41. Mr. Jayme has been a licensed real estate agent in the State of Texas for about twenty-one years. Mr. Jayme served as the real estate agent on transactions for the Monges as well as other persons.

Defendants Joe and Alison Villa ("Villas") and Hugo Maynez Maldonado ("Maynez")

42. The secondary Defendants in this Adversary Proceeding were (1) Joe and his daughter Alison Villa (collectively, the "Villas"); and (2) Hugo Maynez Maldonado ("Mr. Maynez"). By agreement with Plaintiffs Monges during the course of trial, the Villas and Mr. Maynez were dismissed as parties with prejudice. Accordingly, the Villas and Mr. Maynez are no longer parties to this Adversary Proceeding.

Defendants Monroj Investment, Inc. ("Monroj") and Northeast Patriot Plaza, Inc. ("Northeast Patriot")

43. Monroj Investment, Inc. ("Monroj") and Northeast Patriot Plaza, Inc. ("Northeast Patriot") were also named as Defendants in this Adversary Proceeding. Monroj was a Texas corporation newly formed by the Monges and Rojas/Jayme in connection with the Country Cove Subdivision. Northeast Patriot was a Texas corporation newly formed by Mr. Monge, Ms. Rojas, and others in connection with the Transmountain Property.

44. Both Monroj and Northeast Patriot are defunct corporations that failed to appear and answer in this Adversary Proceeding. On June 5, 2013, upon motion of the Monges, the Court entered an Order of Default against Defendants Monroj and

Northeast Patriot (dkt# 160, 168). Although technically remaining as party Defendants, Monroj and Northeast Patriot did not appear or participate in the trial in this Adversary Proceeding.

45. As a result, Rojas/Jayme were the only remaining and participating Defendants by the end of trial.

Properties and Transactions—General Overview

46. Next, the Court will generally describe, as an overview, the four real properties and transactions at issue in this Adversary Proceeding.

Thoroughbred Property—New Mexico (Overview)

47. The primary transactions at issue in this Adversary Proceeding involve the "Thoroughbred Property"—real estate and a house located at 105 Thoroughbred Court, Santa Teresa, New Mexico. In general, the Monges and Rojas/Jayme entered into a sale and lease/option to purchase transaction with respect to the Thoroughbred Property.

48. In December 2005, the Monges executed a residential purchase agreement for the purchase of the Thoroughbred Property from Mr. Jayme. The sale closed and the Thoroughbred Property was sold and conveyed by Mr. Jayme to the Monges on February 3, 2006.

49. On the same day as the closing of the sale of the Thoroughbred Property to the Monges—February 3, 2006—Ms. Rojas entered into a residential lease ("Lease") with an option to purchase ("Option") with respect to the Thoroughbred Property (collectively "Lease/Option"). *See* Ex. P-32, pp. 57-65. In general, under the Lease/Option, Rojas/Jayme agreed to lease the Thoroughbred Property from the

Monges for one year and pay rent, and Rojas/Jayme received a one-year option to repurchase the Thoroughbred Property from the Monges. The Lease/Option was for a period of one year—from February 1, 2006 through January 31, 2007.

50. However, Rojas/Jayme continued to live in the Thoroughbred Property well after the Lease/Option expired in January 2007, and they still live on the Thoroughbred Property—some seven years later. Rojas/Jayme have not paid rent to the Monges on the Thoroughbred Property in over six years, and have been effectively living on the Thoroughbred Property for free for many years.

Country Cove Subdivision (Overview)

51. In late 2005 and 2006, the Monges and Rojas/Jayme desired to jointly develop largely unimproved real property in the Country Cove subdivision located in Dona Ana County, New Mexico ("Country Cove Subdivision"). On February 16, 2006, a purchase agreement was signed by Mr. Monge and Ms. Rojas, as buyers, and a Dr. Habib Asfahani as seller.

52. The Monges and Rojas/Jayme then formed a new Texas corporation (Monroj, technically a Defendant) to acquire and secure financing for the purchase of the Country Cove Subdivision. In 2006, Monroj purchased the Country Cove Subdivision lots and executed a Line of Credit Note secured by a Mortgage to finance the purchase with a secured lender group which included William Isaac ("Isaac Loan").

53. The development of the Country Cove Subdivision lots by Monroj, the Monges, and Rojas/Jayme failed. Ultimately, Monroj (and the Monges and Rojas/Jayme) were unable to make the payments on the Isaac Loan, and the Isaac

lenders foreclosed on the Country Cove Subdivision lots. Monroj's corporate charter was revoked and Monroj is now a defunct entity.

Transmountain Property (Overview)

54. In 2006, the Monges and Ms. Rojas, along with two doctors, formed a new Texas corporation (Northeast Patriot, technically a Defendant) with a view toward purchasing and developing land near Transmountain Road in El Paso, Texas ("Transmountain Property"). Apparently, the purpose of Northeast Patriot was primarily to eventually build and develop a medical clinic on the Transmountain Property.

55. In January 2006, Ms. Rojas executed a contract to purchase the Transmountain Property for the amount of $969,000 in the name of "Alicia Rojas and/or assigns" as buyer, and Patriot Castner Joint Venture, as seller. In April 2007, Ms. Rojas sent an email to the title company, advising the title company that Ms. Rojas and Mr. Maynez would be closing under their personal names until title was transferred to the Northeast Patriot corporation.

56. On April 18, 2007, the sale of the Transmountain Property to Ms. Rojas and Mr. Maynez closed. The Transmountain Property was conveyed by the seller to Ms. Rojas and Mr. Maynez by general warranty deed recorded in El Paso County, Texas on April 18, 2007. Mr. Maynez (and his wife) contributed all the cash necessary to pay the purchase price for the Transmountain Property. Neither the Monges, Ms. Rojas, nor any other member of Northeast Patriot, paid any funds to Mr. Maynez for the purchase of the Transmountain Property.

57. In October 2008, Ms. Rojas executed a general warranty deed by which Ms. Rojas conveyed her interest in the Transmountain Property to Mr. Maynez, making

him sole owner of the Transmountain Property. Mr. Maynez remains the owner of the Transmountain Property to date, he has not received any income on the Transmountain Property, and he has not been able to sell the property.

58. Within a few months after closing of the sale of the Transmountain Property to Ms. Rojas and Mr. Maynez in April 2007, the Monges started asking questions about the Transmountain Property transactions and Northeast Patriot corporation.

59. It was not until July 2012—with the filing by the Monges of their Second Amended Complaint in this Adversary Proceeding—that the Monges first asserted causes of action against Rojas/Jayme relating to the Transmountain Property and Northeast Patriot (dkt# 58). Northeast Patriot (the Texas corporation owned in part by Mr. Monge and Ms. Rojas) is now a defunct corporate entity.

Sierra Crest Property (Overview)

60. In May 2006, the Monges entered into a contract to purchase a home located at 51 Sierra Crest in El Paso, Texas ("Sierra Crest Property") from third-party sellers. The purchase by the Monges of the Sierra Crest Property closed in August 2006.

61. Mr. Jayme acted as the real estate agent and Ms. Rojas served as the mortgage broker for the Monges on the Sierra Crest Property transaction. The Monges received a Sellers Disclosure Notice before closing, which disclosed certain problems with the Sierra Crest Property. At closing, the Monges signed an Acceptance of Property document which acknowledged they had inspected the property and accepted the property "AS IS."

62. Soon after purchasing the Sierra Crest Property (in the years 2006 and 2007), the Monges began noticing issues with the Sierra Crest Property, including leaks, water damage, and electricity problems. The Monges then began noticing structural issues with the property, including cracks in the foundation. The Monges claim that Mr. Jayme was aware of all of these issues with the Sierra Crest Property prior to the sale of the property. The Monges claim that the Sierra Crest Property is now uninhabitable.

63. It was not until July 2012—with the filing by the Monges of their Second Amended Complaint in this Adversary Proceeding—that the Monges first asserted causes of action against Rojas/Jayme relating to the Sierra Crest Property (dkt# 58).

Thoroughbred Property transactions

64. Next, the Court will specifically address the Thoroughbred Property and related transactions in detail.

Jayme Ownership of Thoroughbred Property and Multiple Bankruptcies

65. In November 2002, Mr. Jayme originally acquired and obtained title to the Thoroughbred Property through a general warranty deed filed in Dona Ana County, New Mexico. *See* Ex. P-1, p. 339. Shortly thereafter, and beginning in 2003, Mr. Jayme filed a series of Chapter 13 bankruptcy cases in New Mexico and Texas. Mr. Jayme filed four bankruptcy cases in total, and each bankruptcy case was subsequently dismissed.

66. At the time of Mr. Jayme's first bankruptcy filing, on June 27, 2003, Mr. Jayme was in arrears on his mortgage on the Thoroughbred Property in the amount of about $24,867. *See* Ex. P-25, p. 43. Mr. Jayme's first bankruptcy case was dismissed on July 22, 2004.

67. On March 16, 2004, this Court lifted the automatic stay with regard to the Thoroughbred Property in Mr. Jayme's first bankruptcy case. Then on April 19, 2004, Citibank N.A. ("Citibank")—Mr. Jayme's mortgage lender on the Thoroughbred Property—filed its first Complaint of Foreclosure in New Mexico state court. *See* Ex. P-5, pp. 1-6. A civil suit was then commenced by Citibank against Mr. Jayme on May 11, 2004. On October 25, 2004—just one day before the foreclosure on the Thoroughbred Property was scheduled to take place—Mr. Jayme filed his second bankruptcy case. *See* Ex. P-26, p. 1. Consequently, the foreclosure sale originally scheduled for October 26, 2004, was canceled. *See* Ex. P-5, p. 76. Mr. Jayme's second bankruptcy case was then dismissed on January 20, 2005.

68. On September 13, 2005, Citibank was granted permission to reinstate the foreclosure sale on the Thoroughbred Property. On September 26, 2005, an Amended Default Judgment for Foreclosure and Order of Sale was entered against Mr. Jayme. A Notice of Sale of the foreclosure was subsequently filed on October 6, 2005, scheduling the foreclosure sale on the Thoroughbred Property for November 1, 2005. A copy of such Amended Default Judgment and Notice of Sale was mailed to Mr. Jayme and Mr. Jayme's bankruptcy attorney. *See* Ex. P-5, pp. 101-04.

69. On the date of this scheduled foreclosure sale (November 1, 2005), Mr. Jayme filed yet another Chapter 13 bankruptcy petition in New Mexico. *See* Ex. P-5, p. 106. On that same day (November 1, 2005), Citibank foreclosed on the Thoroughbred Property as scheduled.

70. At an emergency hearing held November 2, 2005—one day after the foreclosure sale—the Bankruptcy Court for the District of New Mexico entered an Order

acknowledging that the foreclosure sale of the Thoroughbred Property had taken place on November 1, 2005, and providing that Citibank agreed not to submit the Order Approving Sale of the Thoroughbred Property to the New Mexico state court until Jayme's Motion Concerning Automatic Stay was resolved. *See* Ex. P-28, p. 164.

71. At a final hearing on Mr. Jayme's Motion Concerning Automatic Stay, Mr. Jayme entered into a stipulation with Chase Home Finance LLC (loan servicer for Citibank) in which Jayme proposed to sell the Thoroughbred Property to a third party. The New Mexico Bankruptcy Court imposed the automatic stay, but conditioned it on several requirements. *See* Ex. P-28, pp.145-46. Mr. Jayme subsequently failed to comply with the New Mexico Bankruptcy Court's order, and Mr. Jayme's fourth bankruptcy case was dismissed on December 22, 2005. *See* Ex. P-28, p. 176.

72. On January 9, 2006, an Order Approving Sale and Special Master's Report was entered in the New Mexico state court, whereby the Special Master acknowledged the following: (1) that Citibank had purchased the Thoroughbred Property at the foreclosure sale on November 1, 2005; (2) that Mr. Jayme's fourth bankruptcy case had been dismissed allowing Citibank to proceed to confirm its sale; and (3) Mr. Jayme retained a one-month right of redemption on the Thoroughbred Property under New Mexico law. *See* Ex. P-5, pp. 112-19. The Special Master's Deed was filed and recorded on January 19, 2006, and made effective to November 1, 2005—the date of the foreclosure sale on the Thoroughbred Property by Citibank. *See* Ex. P-1, pp. 33-34.

73. Throughout his testimony during the trial, Mr. Jayme repeatedly denied ever knowing that the Thoroughbred Property was in foreclosure or that it was

eventually foreclosed on by Citibank in November 2005. Mr. Jayme also denied that the reason he filed for bankruptcy numerous times was to delay Citibank's foreclosure on the Thoroughbred Property. *See* Tr. 7/17/14, pp. 47-61.

74. The Court does not believe Mr. Jayme's testimony. The dates of Mr. Jayme's filings for bankruptcy coincide directly with the foreclosure proceedings by Citibank, and Mr. Jayme was mailed numerous notices that the Thoroughbred Property was scheduled for foreclosure sale. Indeed, Mr. Jayme's fourth and final bankruptcy filing was the very same day Citibank was scheduled to foreclose on the Thoroughbred Property—November 1, 2005. Moreover, in his bankruptcy petitions, Mr. Jayme lists that he was in serious payment arrears on the Thoroughbred Property mortgage with Citibank.

75. Accordingly, the Court finds that Mr. Jayme filed bankruptcy numerous times in an attempt to avoid foreclosure of the Thoroughbred Property. The Court also finds that Mr. Jayme knew of the foreclosure of the Thoroughbred Property by Citibank on or shortly after November 1, 2005, when it occurred.

Sale of Thoroughbred Property by Jayme to the Monges

76. At some time in late 2005, the Monges were referred to Rojas/Jayme by Mr. Villa regarding the possibility of purchasing a property. During one of the meetings between Rojas/Jayme and the Monges, they discussed the possibility of the Monges purchasing the Thoroughbred Property from Mr. Jayme.

77. On December 18, 2005, Mr. Jayme and the Monges executed a Purchase Agreement, by which the Monges agreed to purchase the Thoroughbred Property from Mr. Jayme for a purchase price of $775,000. *See* Ex. P-1, pp. 358-66. This Purchase

Agreement was executed by Mr. Jayme after the November 1, 2005, foreclosure sale by Citibank on the Thoroughbred Property owned by Mr. Jayme, but before Mr. Jayme's statutory right of redemption under New Mexico law had expired.

78. To finance their purchase of the Thoroughbred Property, the Monges obtained a mortgage loan for $697,500 with America's Wholesale Lender, which was arranged by Ms. Rojas as mortgage broker ("Thoroughbred Mortgage"). *See* Ex. P-2, pp. 6-21.

79. The closing of the sale of the Thoroughbred Property from Mr. Jayme to the Monges occurred on February 3, 2006. A general warranty deed conveying the Thoroughbred Property from Mr. Jayme to the Monges, as well as the Thoroughbred Mortgage, was first recorded in Dona Ana County, New Mexico, on February 6, 2006. *See* Ex. P-2, pp. 5-21.

80. On February 7, 2006, shortly after the closing of the Thoroughbred Property, a payoff redemption letter from Little & Dranttel, P.C. (the law firm that had handled the foreclosure of the Thoroughbred Property on behalf of Citibank) was sent to Mr. Jayme. The letter stated that the total amount necessary for Mr. Jayme to redeem the Thoroughbred Property from Citibank (and its loan servicer Chase) after the foreclosure sale was $567,440, and that Mr. Jayme's statutory redemption period under New Mexico law would expire on February 9, 2006. *See* Ex. P-1, p. 173. Using some of the proceeds from the sale of the Thoroughbred Property to the Monges, Mr. Jayme (through the title company) wired payoff funds in the amount $567,440 to Little & Dranttel P.C. (Citibank/Chase's law firm) on February 8, 2006. *See* Ex. P-1, p. 169.

81. It was not until June 27, 2006, months after the warranty deed conveying the Thoroughbred Property from Mr. Jayme to the Monges was first recorded, that Citibank executed a quit claim deed conveying the Thoroughbred Property back from Citibank to Mr. Jayme pursuant to his statutory right of redemption. *See* Ex. P-1, p. 321. The quit claim deed from Citibank to Mr. Jayme was recorded in Dona Ana County on July 28, 2006. *See* Ex. P-1, p. 323.

82. On the same day (July 28, 2006), shortly after the quit claim deed conveying the Thoroughbred Property from Citibank to Mr. Jayme was recorded, the general warranty deed from Mr. Jayme to the Monges along with the Thoroughbred Mortgage originally recorded on February 6, 2006, were re-recorded to "correct filing order." *See* Ex. P-2, pp. 22-38. Stated differently, the general warranty deed from Mr. Jayme to the Monges and the Thoroughbred Mortgage were re-recorded on July 28, 2006, to remove any possible cloud on the title due to Citibank's prior foreclosure.

83. Ultimately, an owner's title policy on the Thoroughbred Property was issued to the Monges insuring their title to the Thoroughbred Property, and a mortgagee title policy was issued to the Monges' lender. *See* Ex. P-1, pp. 342-57.

84. In theory, the Thoroughbred Property was being sold to the Monges so that Rojas/Jayme could obtain an estimated $300,000 in equity from the Thoroughbred Property. Rojas/Jayme were then going to use the $300,000 in equity to be realized from the sale toward the purchase and development of the Country Cove Subdivision—a new venture between the Monges and Rojas/Jayme discussed below. In reality, however, this projected $300,000 equity from the Thoroughbred Property did not materialize.

85. As the final HUD-1 Settlement Statement ("HUD-1") reflects, Mr. Jayme did not receive anywhere close to the estimated $300,000 in equity from the sale of the Thoroughbred Property to the Monges. Several different versions and copies of HUD-1 Settlement Statements were introduced into evidence at the trial; however, counsel for the parties stipulated that the HUD-1 Settlement Statement that appears at Exhibit P-4, pages 45-46, reflects the accurate numbers on the sale of the Thoroughbred Property.

86. This HUD-1 reflects that Mr. Jayme (seller) received zero in cash at the closing of the Thoroughbred Property. *See* Ex. P-4, pp. 45-46. Despite this document, Mr. Jayme testified that he received approximately $125,000 in cash as a result of the sale. This, according to Mr. Jayme, was because his mother-in-law (Tomasa De Rojas) held a second lien on the Thoroughbred Property in the amount of $125,179. *See* Ex. P-4, p. 45, line 505. Mr. Jayme testified that his mother-in-law's second lien was paid off at the closing and then she either loaned or gifted—the details of this arrangement were entirely unclear—the $125,000 back to Rojas/Jayme. *See* Tr. 7/17/14, p. 82, lines 2-25, p. 83, lines 1-5.

87. From the $125,000 Rojas/Jayme received after closing on the sale of the Thoroughbred Property, Ms. Rojas testified that she paid $20,000 to Mr. Joe Villa at the Monges' request. Ms. Rojas testified that Ms. Monge requested her to pay Mr. Villa $20,000 for some work Mr. Villa had done on a different project for the Monges. *See* Tr. 8/7/14, p. 97, lines 9-25, p. 98, lines 1-4. Ms. Monge disputed this contention and testified that she did not request Ms. Rojas to loan or pay $20,000 to Mr. Villa. *See* Tr. 8/5/14, p. 53, lines 13-21.

88. The Court finds that Ms. Rojas's testimony that Ms. Monge requested her to make a $20,000 payment to Mr. Villa from the Thoroughbred Property sales proceeds is not credible. Mr. Villa executed a note dated February 8, 2006, in the amount of $20,000 in which he promised to pay First Mortgage of El Paso—Ms. Rojas's company. *See* Ex. P-34, pp. 23-24. Ms. Rojas, on behalf of First Mortgage, and Mr. Villa signed the note—neither of the Monges signed the note. The Court therefore finds that Ms. Rojas made the payment from the sales proceeds to Mr. Villa of her own volition and not at the request of the Monges.

89. Ms. Rojas also testified they also used approximately $44,000 from the Thoroughbred sale proceeds to pay off a mortgage the Monges held on a property in Lordsburg, New Mexico. Ms. Rojas admitted that the Monges paid back Rojas/Jayme the $44,000 that Rojas/Jayme paid on their behalf. *See* Tr. 8/7/14, p. 98, lines 14-23, p. 99, lines 5-12; Tr. 8/5/14, p. 154, lines 6-12.

90. The Monges received about 90% financing through the Thoroughbred Mortgage for the purchase of the Thoroughbred Property, which was obtained by Ms. Rojas as mortgage broker. The Monges (and not Rojas/Jayme) personally signed a promissory note to America's Wholesale Lender which obligated the Monges to personally pay $675,500 (plus interest) to finance their purchase of the Thoroughbred Property. *See* Adjustable Rate Promissory Note, Ex. P-19, pp. 175-77; Mortgage and Adjustable Rate Rider, Ex. P-2, p. 6, 19. The Promissory Note signed by the Monges provided that the initial monthly payment on the Thoroughbred Mortgage would be $5,328 a month, with the first payment being due in March 2006. *See* Ex. P-19, p. 175.

91. To assist the Monges in making the 10% down payment, Mr. Jayme apparently arranged a loan from Edward Abraham (the "Abraham Loan") for approximately $78,000 to use as a down payment on the Thoroughbred Property. At closing, $80,500 was disbursed to satisfy and payoff the Abraham Loan. *See* Ex. P-4, p. 46, line 1307; Ex. P-1, p. 179. Rojas/Jayme testified that the Monges were to pay the $78,000 back to Rojas/Jayme because it was money that they should have received at the closing. At trial, Ms. Monge indicated that Rojas/Jayme had a second lien on the Thoroughbred Property in the amount of the $80,500 payment on the Abraham Loan for $78,000. However, no documents were provided at the trial demonstrating any such second lien on the Thoroughbred Property in favor of Rojas/Jayme, or an obligation of the Monges to pay Rojas/Jayme the amount of $78,000. Indeed, in their pleadings, Rojas/Jayme admitted that the Monges did not owe Rojas/Jayme this $78,000.[7]

92. Regardless, Rojas/Jayme did not obtain anywhere close to $300,000 in equity from the sale of the Thoroughbred Property to the Monges—which is what all parties apparently envisioned when they entered into the Purchase Agreement for the Thoroughbred Property back in December 2005. But Rojas/Jayme and the Monges must have ***both*** realized this by the time of closing of the Thoroughbred Property sale in February 2006, as demonstrated by the HUD-1 Settlement Statement reflecting the disbursements at closing with the seller (Mr. Jayme) receiving zero dollars at closing.

[7] This $78,000 is mentioned by Rojas/Jayme in their Trial Brief as a "down payment," and Rojas/Jayme state that Plaintiffs (the Monges) had no obligation to repay this amount to Defendants (Rojas/Jayme). See Trial Brief, dkt# 316, p. 3. In addition, Rojas/Jayme did not include any such affirmative claim for this $78,000 in their proposed findings of fact and conclusions of law filed with the Court (dkt# 279), and thus it may be considered waived pursuant to orders of the Court. *See* Orders of the Court (dkt# 246, ¶4; dkt# 274, ¶2) and discussion above by the Court in Procedural Background section. Given the foregoing, Rojas/Jayme are not entitled to recover $78,000 from the Monges.

93. After weighing the testimony and the evidence, the Court finds that Mr. Jayme and Ms. Rojas were in a desperate situation by early 2006. In the Court's view, Mr. Jayme sold the Thoroughbred Property to the Monges because he was about to lose the property forever—as Mr. Jayme's statutory right to redeem the Thoroughbred Property from the Citibank foreclosure would be cut-off on February 9, 2006. Mr. Jayme had already tried (unsuccessfully) to stop Citibank's foreclosure by filing multiple bankruptcies. So, Mr. Jayme sold the Thoroughbred Property to the Monges, used most of the sales proceeds to redeem the property from Citibank, and then Rojas/Jayme entered into the one-year Lease/Option (described below) with the Monges so that Rojas/Jayme could continue to live on the property and try to raise the money within a year to buy back the Thoroughbred Property from the Monges. Unfortunately for all concerned, that is not the way things worked out.

Lease and Option to Purchase the Thoroughbred Property

94. On the same day that the Monges purchased the Thoroughbred Property from Mr. Jayme—February 3, 2006—Mr. Monge and Ms. Rojas entered into a Residential Lease ("Lease") together with an Option to Purchase ("Option") (collectively "Lease/Option"). *See* Ex. P-32, pp. 57-65. Generally, under the Lease/Option, the Monges agreed to lease the Thoroughbred Property back to Rojas/Jayme for one year so that Rojas/Jayme could continue living on the property, and provided Rojas/Jayme with a one-year option to purchase the Thoroughbred Property back from the Monges.

95. At the trial, Ms. Rojas initially testified that Rojas/Jayme were unaware that the Monges would require them to sign a lease on the Thoroughbred Property until after the closing of the sale to the Monges had taken place. But Ms. Rojas later

admitted at trial that the Lease/Option reduced to writing a verbal agreement that Rojas/Jayme had made with the Monges to lease back the Thoroughbred Property from the Monges, and that Ms. Rojas signed the Lease/Option on the same day as the sale. *See* Tr. 8/8/14, p. 25, lines 3-25, p. 26, lines 1-2.

96. The relevant provisions of the Lease executed by Mr. Monge (as landlord) and Ms. Rojas (as tenant), include the following:

(A) The Lease was for a 12-month (one-year) term, commencing February 1, 2006, and terminating on January 31, 2007 ("Lease Term"). *See* Ex. P-32, p. 58, ¶3.01.

(B) The leased premises was the house and lot situated in Santa Teresa, New Mexico, commonly known as 105 Thoroughbred Court. *See* Ex. P-32, p. 57, ¶1.01.

(C) The amount of the rent to be paid to the Monges on the Thoroughbred Property would be equal to the amount of the Monges' payments to America's Wholesale Lender on the Thoroughbred Mortgage. Payments were to be made by the tenant directly to the lender by money order or cashier's check. The tenant was required to provide a copy of the money order or cashier's check to the landlord (Monges) by the first day of every month. *See* Ex. P-32, p. 58, ¶4.02. At the time the parties entered into the Lease, the payments on the Thoroughbred Mortgage were $5,328 per month. *See* Ex. P-19, p. 175.

(D) All the taxes and insurance, utilities, and maintenance and repairs on the Thoroughbred Property were to be paid by the tenant. *See* Ex. P-32, p. 58, ¶4.02, p. 61, ¶12.01.

(E) In the event that the tenant remained in possession and held over past the Lease Term, tenant would be charged the amount of the rent plus the amount of 50%. *See* Ex. P-32, p. 61, ¶14.01.

(F) The parties agreed to pay reasonable attorney's fees incurred by the prevailing party in any litigation over the Lease. *See* Ex. P-32, p. 61, ¶13.03.

(G) The Lease would not create any relationship between the parties other than a relationship of landlord and tenant. *See* Ex. P-32, p. 62, ¶16.02.

(H) The Lease and the Option (Addendum) contained the entire agreement of the parties and the Lease could not be modified unless the modification was

in writing and signed by the party against whom enforcement was sought. *See* Ex. P-32, p. 63, ¶16.08.

(I) The interpretation, validity, performance, and Lease would be governed by the laws of the State of Texas, and to the extent provided by applicable law, the provisions of the Lease would override applicable law to the contrary. Exclusive venue for any litigation over the Lease would be in El Paso County, Texas. *See* Ex. P-32, p. 63, ¶16.06.

(J) Time was of the essence with respect to the Lease. *See* Ex. P-32, p. 63, ¶16.10

97. The attached Addendum to the Lease sets forth the Option of Rojas/Jayme to purchase the Thoroughbred Property back from the Monges (herein "Option"). See Ex. P-32, pp. 64-65. The relevant provisions of the Option include:

(A) The Option to purchase the Thoroughbred Property had to be exercised by tenant not later than 15 calendar days prior to expiration of the Lease Term. *See* Ex. P-32, p. 64, ¶(a). As the Lease Term expired on January 31, 2007, the Option had to be exercised by January 16, 2007.

(B) To exercise the purchase Option, all rent due under the term of the Lease must be paid and tenant must not be in any monetary default under the Lease. *See* Ex. P-32, p. 64, ¶(a).

(C) To exercise the purchase Option, the tenant must send written notice to the landlord by certified mail and make a deposit with the title company. *See* Ex. P-32, p. 64, ¶(b).

(D) The purchase price under the Option to be paid for the Thoroughbred Property by the tenant was the balance owed by the Monges on the Promissory Note in the original amount of $697,500 to America's Wholesale Lender, plus $50. *See* Ex. P-32, p. 64, ¶(c).

(E) Time was of the essence with respect to the Addendum (Option). *See* Ex. P-32, p. 64, ¶(f).

98. The Court finds (and there was little or no dispute) that the Option to purchase the Thoroughbred Property was not exercised by Rojas/Jayme and that the

Option expired by its terms on January 16, 2007—fifteen days prior to expiration of the Lease Term on January 31, 2007.

Payments Made by Rojas/Jayme under the Lease and Thoroughbred Property

99. Rojas/Jayme were to begin making monthly payments under the Lease of the Thoroughbred Property beginning in March 2006. At the trial, the Monges introduced an accounting spreadsheet ("Thoroughbred Accounting") with supporting documentation, that apparently lists all of the payments Rojas/Jayme—and the Monges—made on the Thoroughbred Mortgage and to the Monges.[8] *See* Thoroughbred Accounting, Ex. P-31, pp. 1-2; supporting documentation; Ex. P-31, pp. 7-111.

100. The Thoroughbred Accounting was prepared by an accountant for the Monges and was the only list of payments introduced at the trial by either side. The Court finds that, with the exception of two payments described below, the Thoroughbred Accounting accurately sets forth the payments made by Rojas/Jayme and the Monges on the Thoroughbred Mortgage and Lease during the Lease Term (February 1, 2006 through January 31, 2007).

101. At the trial, Ms. Rojas and Mr. Jayme both testified that they made ***all*** of the payments under the Lease during the Lease Term, and they continued to make all payments under the Lease until April 2008. The Court does not believe their testimony

[8] The loan servicer for America's Wholesale Lender (the original lender on the Thoroughbred Mortgage) was Countrywide Home Loans. At some point after the origination of the Thoroughbred Mortgage, the note and Thoroughbred Mortgage were transferred from America's Wholesale Lender and its servicer Countrywide Home Loans. The Thoroughbred Mortgage is currently serviced by Bank of America. *See, e.g.*, Ex. P-35. The Thoroughbred Accounting lists the payments to Bank of America, and the loan statements the Monges received are from Bank of America. Therefore, subsequent discussions regarding payments on the Thoroughbred Mortgage may refer to payments made to Bank of America.

in this regard. The very first payment made by Ms. Rojas under the Lease (by check #1505 dated March 13, 2006) bounced and was returned for insufficient funds. *See* Ex. P-31, p. 1, lines 2-3, p. 7. Soon thereafter in May 2006, another check from Ms. Rojas for payment under the Lease in the amount of $5,328 bounced and was returned for insufficient funds. *See* Ex. P-46, p.1.

102. After their Lease payment checks started bouncing, Rojas/Jayme stated that they began making many of the Lease payments "in cash" directly to the Monges. Ms. Rojas stated she would get the cash to make the Lease payments by either cashing her commission checks or withdrawing cash out of her bank account. *See* Tr. 8/7/14, p. 95; Tr. 8/8/14, pp. 34-35. Mr. Jayme testified that he and Ms. Rojas would make cash payments to the Monges and then the Monges would make the Thoroughbred Mortgage payments to the lender. *See* Tr. 8/5/14, p. 182, lines 3-11, p. 183, lines 1-5; Tr. 8/7/14, p. 26, lines 10-25.

103. The Court does not believe the testimony of Mr. Jayme and Ms. Rojas that they made "cash payments" under the Lease to the Monges. Neither Ms. Rojas nor Mr. Jayme provided any specifics on the amount of or the date each of these cash payments were allegedly made, or the location of or other witnesses to these alleged cash payments. The only evidence of cash payments on the Lease were the very general, self-serving, and uncorroborated testimony of Rojas/Jayme. Rojas/Jayme did not provide any documentary evidence of making cash payments on the Thoroughbred Property Lease. Ms. Rojas's bank statements from City Bank did not show cash withdrawals in the amount of the Lease payments and Rojas/Jayme did not present any receipts or other documents evidencing cash payments. *See* Ex. P-18. Moreover, the

Monges' bank statements do not reflect cash deposits in the amount of the alleged cash Lease payments made by Rojas/Jayme. *See, e.g.*, Ex. P-31, pp. 12-14, 16-23. The only probative evidence showing the payments Rojas/Jayme made on the Thoroughbred Property Lease is reflected in the Thoroughbred Accounting and other supporting check and money order documentation.

104. During the Lease Term (from February 1, 2006 through January 31, 2007), the Thoroughbred Accounting shows that Rojas/Jayme made only one Lease payment of $5,620. *See* Ex. P-31, p.1, line 16. The Thoroughbred Accounting shows Rojas/Jayme made this payment by check #1642 on November 28, 2006, a copy of which appears at Exhibit P-18, p. 145. Rojas/Jayme did attempt to make other Lease payments during the Lease Term by check, but those checks bounced and were returned for insufficient funds. *See* Ex. P-31, p. 1, lines 2-3, 14-15, 19-20 and supporting documentation; Ex. P-46, p.1.

105. The Court finds that Rojas/Jayme did make two additional payments during the Lease Term (February 1, 2006 through January 31, 2007) that do not appear on the Thoroughbred Accounting, as described below.

106. First, Ms. Rojas made one full payment to Ms. Monge by check #1565 dated August 29, 2006, in the amount of $5,328. In the memo line of the check, Ms. Rojas wrote that the check was intended for the September 2006 Lease payment. This check does not appear on the Thoroughbred Accounting. Ms. Monge deposited check #1565 on September 8, 2006. *See* Ex. P-18, p. 135. Apparently, check #1565 did not clear the first time, though, because it was re-deposited on September 21, 2006. *See* Ex. P-18, p. 137. The Monges did not present any evidence refuting Ms. Rojas's

testimony (which was corroborated by a written check) that she made this particular payment by check and should be given credit in the amount of $5,328 on the Thoroughbred Accounting for this payment. And in their Post-Trial Brief, the Monges admitted that Rojas/Jayme made the payment of $5,328 on September 21, 2006. The Court therefore finds that Rojas/Jayme should also be given credit for a Lease payment in the amount of $5,328 for check #1565 that was re-deposited on September 21, 2006.

107. Second, Ms. Rojas made one partial payment of $1,620 during the Lease Term that Rojas/Jayme was not given credit for in the Thoroughbred Accounting. On October 31, 2006, Ms. Rojas wrote check #1614 to Ms. Monge. *See* Ex. P-18, p. 142. This payment of $1,620 does not appear on the Thoroughbred Accounting, and the Monges did not present any evidence that this check was returned or that this payment was not made. The Court therefore finds that Rojas/Jayme should also be given credit for an additional partial payment in the amount of $1,620 made by check during the Lease Term.

108. In sum, the Court finds that Rojas/Jayme made a total of only $12,568 in payments under the Lease during the Lease Term, i.e.—from February 1, 2006 through January 31, 2007. This $12,568 in Lease payments made by Rojas/Jayme is calculated by the Court as follows: check #1565 in the amount of $5,328; plus check #1614 in the amount of $1,620; plus check #642 in the amount of $5,620.

109. As a result, Rojas/Jayme were in serious monetary default under the Lease by the end of the Lease Term (January 31, 2007). Rojas/Jayme had not made all of the monthly Lease payments and repeatedly bounced checks for Lease payments. The total Lease payments due by Rojas/Jayme during the Lease Term was $58,608

(calculated as $5,328 a month due under the Thoroughbred Mortgage times 11 months from March 2006 through January 2007)—yet Rojas/Jayme had paid only $12,568 during the term of the Lease. Because of this monetary default, Rojas/Jayme did not have the right to exercise the Option to purchase the Thoroughbred Property by the end of the Lease Term (January 31, 2007). And in fact, Rojas/Jayme never even attempted to exercise the Option to purchase, and the Option expired on January 31, 2007.

110. To prevent falling behind on the Thoroughbred Mortgage payments due to Rojas/Jayme's failure to pay rent, the Monges attempted to make the remainder of the payments on the Thoroughbred Mortgage to the lender during the Lease Term. Specifically, the Monges made ten payments totaling $49,453 during the Lease Term (through January 31, 2007). The Monges made these payments through a bill pay system with First Light Federal Credit Union or by Western Union payment. *See* Ex. P-31, p. 1, lines 4-17, and pp. 4-22.

111. Next, the Court will move to payments made by Rojas/Jayme ***after*** the Lease Term expired on January 31, 2007. Even after the Lease Term expired on January 31, 2007, Rojas/Jayme continued living in the Thoroughbred Property. Although living in the Thoroughbred Property, Rojas/Jayme only made sporadic payments during the January 31, 2007, to April 2008 time period on the Thoroughbred Property. And both Ms. Rojas and Mr. Jayme admitted at trial that Rojas/Jayme completely stopped making any payments for the Thoroughbred Property to the Monges and on the Thoroughbred Property after April 2008. *See* Tr. 8/7/14, p. 51, lines 12-17, p. 55, lines 14-16, p. 56, lines 23-25, p. 58, lines 16-25, p. 59, lines 4-14, p. 93, lines 6-

9. Ms. Monge also confirmed that the last payment that Rojas/Jayme ever made was in April 2008. *See* Tr. 8/4/14, p. 54, lines 9-24.

112. After January 31, 2007 (expiration of the Lease Term), Rojas/Jayme made some payments via Western Union in 2007, which are generally reflected in the Thoroughbred Accounting. Specifically, after the Lease Term expired on January 31, 2007, the Thoroughbred Accounting and supporting documentation reflects that Rojas/Jayme made seven payments (two payments on the same date are treated as one payment)—totaling $47,096.[9] *See* Ex. P-31, pp. 1-2, lines 23, 42, 51, 55-56, 58-59, 61-62, and 67-68, and supporting documentation.

113. However, the Court finds that an additional $14,038 in payments were made by Rojas/Jayme after January 31, 2007, which were not credited to Rojas/Jayme on the Thoroughbred Accounting. Specifically, payments of $5,000,[10] $2019, $2019, and $5,000 were made by Rojas/Jayme through Western Union on July 31, 2007, and August 30, 2007, which were incorrectly listed in the Thoroughbred Accounting as being made by the Monges. *See* Ex. P-31, p. 1, lines 37-40 and supporting documentation. Mr. Jayme testified at the trial that even though the receipts from Western Union evidencing these payments were in Mr. Monge's name and were signed in the name of "Joe Monge," the receipts were in fact written out by Mr. Jayme and the payments were made by Mr. Jayme. *See* Ex. P-31, pp. 53-59; Tr. 8/7/14, pp. 5-11. The Monges did

[9] The Thoroughbred Accounting shows one additional payment of $3,000 made by Rojas/Jayme on July 26, 2007. Ex. P-31, p. 1, line 36. However, this payment was made from the J&M Builders account. *See* Tr. 8/4/14, p. 109, lines 1-19. Therefore, Rojas/Jayme should not be given credit for this $3,000 being a payment on the Thoroughbred Property.

[10] This payment of $5,000 is incorrectly listed on the Thoroughbred Accounting as being in the amount of $5,328. See Ex. P-31, p.1, line 37, p. 53.

not effectively dispute this testimony and corroborating documentary evidence, and it appears that the Western Union receipts were indeed filled out by Mr. Jayme.

114. In summary, the Court finds that after the expiration of the Lease Term in January 2007, Rojas/Jayme made a total of $61,134 in payments on the Thoroughbred Property from January 31, 2007, through the end of April 2008. This $61,134 in total payments was calculated by the Court as follows: payment of $7,000 on March 20, 2007; payment of $5,000 on July 31, 2007; payment of $2,019 on July 31, 2007; payment of $5,000 on July 31, 2007; payment of $2,019 on August 30, 2007; payment of $7,020 on October 5, 2007; payment of $5,000 on January 2, 2008; payment of $5,000 on January 23, 2008; payment of $2,019 on January 23, 2008; payment of $5,000 on January 31, 2008; payment of $2,019 on January 31, 2008; payment of $5,000 on April 1, 2008; payment of $2,019 on April 1, 2008; payment of $5,000 on April 29, 2008; and the final payment of $2,019 on April 29, 2008. *See* Ex. P-31, pp. 1-2, lines 23, 37, 38, 39, 40, 42, 51, 55, 56, 58, 59, 61, 62, 67, 68, and supporting documentation.

115. Rojas/Jayme continued to bounce checks for payments on the Thoroughbred Property after expiration of the Lease Term. See Ex. P-31, p. 1, lines 32, 33, 44, 45, and supporting documentation.

116. After the expiration of the Lease Term on January 31, 2007, the Monges made eleven payments totaling $44,538 on the Thoroughbred Mortgage. *See* Ex. P-31, pp. 1-2, lines 26, 27, 28, 29, 30, 31, 42, 43, 71, 72, 73 and supporting documentation.

117. In conclusion, the Court finds that Rojas/Jayme made a grand total of $73,702 in payments on the Thoroughbred Property from March 2006 through April

2008 to the Monges and on the Thoroughbred Mortgage.[11] This $73,702 in payments by Rojas/Jayme is calculated as set forth above, and consists of $12,568 in payments during the Lease Term of February 1, 2006 through January 31, 2007, and $61,134 in payments from January 31, 2007 through the end of April 2008.

118. Since April 2008, Rojas/Jayme have made ***no payments*** on the Thoroughbred Property to the Monges or on the Thoroughbred Mortgage. Rojas/Jayme have effectively been living free on the Thoroughbred Property owned by the Monges for over six years while making no payments.

Notices and attempts to evict Rojas/Jayme from Thoroughbred Property

119. Rojas/Jayme have lived in the Thoroughbred Property continuously since the Lease began in February 2006. Rojas/Jayme made partial payments during the term of the Lease and partial payments after the Lease Term expired, as set forth above.

120. Beginning in late 2007 (after the Lease Term and the Option to purchase had expired), the Monges began sending Rojas/Jayme a series of demand and eviction notices with respect to the Thoroughbred Property.

121. On November 15, 2007—approximately ten months after the Lease Term and Option expired—the Monges mailed Rojas/Jayme a letter demanding that Rojas/Jayme vacate the Thoroughbred Property. The letter requested that Rojas/Jayme vacate the property based on "continued delinquent monthly rent

[11] In contrast, the record demonstrated that the Monges have made a total of $93,991 in payments on the Thoroughbred Mortgage from inception through July 2008. This $93,991 amount was calculated as set forth above as follows: payments totaling $49,453 during the Lease Term (through January 31, 2007), and payments totaling $44,538 after January 31, 2007. *See* Ex. P-31, pp. 1-2, lines 4, 6-7, 9-13, 16-17, 26-31, 42-43, 71-73, and supporting documentation.

payment" and stated that Rojas/Jayme "are more than 45 days late on payments" on the Thoroughbred Property. *See* Ex. P-34, p. 285.

122. On May 21, 2008, the Monges mailed another letter demanding Rojas/Jayme to vacate the Thoroughbred Property and stated that the original lease "had expired over a year ago." *See* Ex. P-34, p. 286.

123. On August 28, 2008, the Monges served Rojas/Jayme with an eviction notice. The eviction notice cites the reason for the eviction as non-payment of rent and that rent "has not been paid since April 2008." *See* Ex. P-34, p. 287.

124. Then, through counsel, the Monges sent a certified letter to Rojas/Jayme on November 10, 2008, demanding Rojas/Jayme to vacate the property within ten days and making them aware that an eviction law suit might be filed if they did not vacate the Thoroughbred Property. *See* Ex. P-34, p. 288.

125. Rojas/Jayme still did not vacate the Thoroughbred Property. A notice of non-payment of rent was sent to Rojas/Jayme under New Mexico law on January 6, 2009, which stated that rent of $70,190 was due. At about the same time, the Monges (through a real estate agent) filed a Petition for Restitution against Rojas/Jayme in the magistrate court for Dona Ana County, New Mexico. *See* Ex. P-21, pp. 37-38. On January 23, 2009, however, the Monges' Petition for Restitution was dismissed without prejudice because the New Mexico magistrate judge in his Order stated "there are issues that property might be in Texas." *See* Ex. P-21, p. 44.

126. Through a Texas attorney, the Monges then attempted to file a petition to evict Rojas/Jayme in Texas justice court, which was not accepted by the Texas court

apparently because the Thoroughbred Property was located in New Mexico. *See* Ex. P-21, p. 45.

127. This ping-pong between the state courts in New Mexico and Texas led the Monges to file this Adversary Proceeding in federal bankruptcy court against Rojas/Jayme to obtain possession of the Thoroughbred Property. *See* Tr. 8/4/14, p. 156, lines 9-25, p. 157.

Foreclosure action against the Monges on the Thoroughbred Property

128. Meanwhile, as a result of Rojas/Jayme's sporadic and partial payments on the Thoroughbred Property, the Monges began falling behind on payments on the Thoroughbred Mortgage in December 2006.

129. In late February 2007, the Monges received a statement from Countrywide Home Loans ("Countrywide")—the servicer of the Thoroughbred Mortgage at the time—that the Thoroughbred Property and the Monges' loan was in foreclosure. *See* Ex. P-31, p. 31. In March 2007, the Monges' lender filed a complaint and notice of lis pendens in New Mexico state court against the Monges to foreclose on the Thoroughbred Property. *See* Ex. P-6, pp. 25-44.

130. To stop the foreclosure, Ms. Monge negotiated a repayment plan with Countrywide, and she wired $10,000 to begin the repayment plan. *See* Ex. P-31, pp. 30, 32. But when Ms. Monge called to confirm the status of this repayment plan, she was told by Countrywide that the first offer had expired, the $10,000 payment would be returned, and she would need to enter into a second repayment plan. *See* Ex. P-31, p. 30.

131. On April 26, 2007, the Monges entered into a second repayment plan with Countrywide to avert foreclosure on the Thoroughbred Property. At the time, the Thoroughbred Mortgage was due for the December 2006 through April 2007 payments, for a total of $40,286, including late fees and other charges. *See* Ex. P-6, pp. 45-49. For the Monges to catch up on the payments under the Thoroughbred Mortgage, the repayment plan required the Monges to make an immediate $20,000 cash payment (which the Monges paid) and increased their monthly mortgage payments to $7,019 per month until April 2008. *See* Ex. P-6, pp. 47, 48; Ex. P-31, p. 1, lines 26-29 and supporting documentation.

132. Ms. Monge informed Rojas/Jayme that the Thoroughbred Mortgage payment had increased because of this repayment plan. Indeed, Rojas/Jayme were aware of the increase in payments, because when Rojas/Jayme did make occasional payments in 2007 and 2008, they made payments in the amount of $7,019 rather than the original $5,328 mortgage payment amount. See Ex. P-31, p. 1, lines 42, 55-56, 58-59, 61-62, 67-68.

133. The Monges subsequently entered into a third payment plan with Countrywide on June 28, 2008—this time, a loan modification—to lower the Thoroughbred Mortgage monthly payments to $6,745. *See* Ex. P-10, pp. 172-75. Then effective December 2008, the Thoroughbred Mortgage interest rate was reduced, which lowered the monthly payment to $5,476. *See* Ex. P-10, pp.176-77.

134. But by then it was too late, as the Monges could not maintain the monthly payments on the Thoroughbred Mortgage. Rojas/Jayme had stopped making any

payments whatsoever in April 2008 on the Thoroughbred Property. On April 27, 2009, the Monges filed a Chapter 11 bankruptcy petition in this Court.

135. As of June 2012, according to a payoff statement from Bank of America, the Monges owed a total of $1,018,888 on the Thoroughbred Property mortgage, consisting of outstanding principal of $702,190, accrued interest of $275,788, and other charges and shortages. *See* Ex. P-49. By July 2014, the unpaid balance of the Thoroughbred Mortgage had increased further to over $1.2 million, according to a payoff statement from Bank of America. *See* Ex. P-50.

136. To date, Rojas/Jayme have not given any written notice to the Monges to exercise the Option to purchase the Thoroughbred Property (which expired by its terms in January 2007). At trial, Rojas/Jayme made no showing of any financial ability whatsoever to pay the purchase price to exercise the Option to buy the Thoroughbred Property from the Monges (which would be in the amount of the outstanding balance of the Thoroughbred Mortgage—now over $1 million). *See* Option, Ex. P-32, p. 64, ¶(c). Rojas/Jayme also made no showing of any financial ability whatsoever to pay the monthly Thoroughbred Mortgage payments and cure their significant monetary defaults. Instead, the only financial ability that Rojas/Jayme showed at trial was poor—as demonstrated by bounced checks and overdrawn bank accounts. *See, e.g.*, Bank Statements, Ex. P-18, pp. 7-10,15, 21, 34, 45, 48, 51-52, 63, 77, 218, 220; Thoroughbred Accounting, Ex. P-31, p. 1, lines 14-15, 19-22, 32-33; Ex. P-46, p. 1.

137. Meanwhile, Rojas/Jayme have continued to reside on the Thoroughbred Property since expiration of the Lease in January 2007 through the date of trial in

August 2014—more than seven years. And Rojas/Jayme have not made any payment on the Thoroughbred Property since April 2008—more than six years ago.

Location of Thoroughbred Property

138. At trial, Mr. Jayme testified that it was his belief that the Thoroughbred Property is located partly in the State of New Mexico and also partly in the State of Texas. *See* Tr. 7/17/14, p. 35, lines 1-24. However, other than Mr. Jayme's very general and completely uncorroborated testimony, Rojas/Jayme failed to present any evidence at trial that any part of the Thoroughbred Property is located in the State of Texas.

139. Importantly, the relevant documents—such as court orders, warranty deeds, mortgages, and title policies—all demonstrate that the Thoroughbred Property is located wholly in the State of New Mexico. There was no probative and believable evidence that the Thoroughbred Property is also located partly in the State of Texas.

140. For example, the legal description of the Thoroughbred Property that is set forth in the Order Approving Sale and Special Master's Report in 2006 is all in the State of New Mexico. *See* Ex. P-5, p. 118. Similarly, the legal description in the original warranty deed, note, and mortgage executed by Mr. Jayme to purchase the Thoroughbred Property way back in 2002 describes the Thoroughbred Property as being all in New Mexico; the bankruptcy petitions filed by Mr. Jayme (under oath) list the Thoroughbred Property as being in New Mexico; and Citibank posted publication of their foreclosure sale and the foreclosure sale while Mr. Jayme owned the Thoroughbred Property all took place in New Mexico. *See* Ex. P-1, p. 339; Ex. P-28, p. 120; Ex. P-5, pp. 7-30, 112-21.

141. Most importantly, and key to the instant dispute with the Monges, the legal descriptions in the Warranty Deed, Title Policy, Mortgage, and Purchase Agreement—whereby Mr. Jayme sold and conveyed the Thoroughbred Property to the Monges in February 2006—all describe the Thoroughbred Property as being only in the State of New Mexico. *See* Warranty Deed (Ex. P-2, p. 5); Title Policy (Ex. P-1, p. 343); Mortgage (Ex. P-2, pp. 8, 18); Purchase Agreement (Ex. P-1, p. 358).

142. Therefore, the Court finds that the Thoroughbred Property is located solely in the State of New Mexico, and not in Texas. The Court further specifically finds that the legal description and address of the Thoroughbred Property is as follows: "Lot 17 in Block 3 of Los Ranchos Del Rio, located in Dona Ana, New Mexico, as the same is shown and designated on the plat thereof filed for record in the office of the County Clerk of Dona Ana, New Mexico on November 27, 1984 and recorded in Book 13 at Pages 344-345, Plat Records, with the property address of 105 Thoroughbred Court, Santa Teresa, New Mexico." *See* Warranty Deed, Ex. P-2, p. 5; Title Policy, Ex. P-1, p. 342; Mortgage, Ex. P-2, pp. 8, 18.

Country Cove Subdivision transactions

143. Next, the Court will specifically address the Country Cove Subdivision transactions.

144. In late 2005 and early 2006, the Monges and Rojas/Jayme began discussions regarding their desire to jointly acquire and develop largely unimproved real property lots in the Country Cove subdivision, which is located in Dona Ana County, New Mexico ("Country Cove Subdivision").

145. In theory, the Thoroughbred Property was sold to the Monges so that Rojas/Jayme could obtain an estimated $300,000 in equity from the Thoroughbred Property for the purchase and development of the Country Cove Subdivision. In reality however, this $300,000 in equity from the Thoroughbred Property did not materialize.

146. Rojas/Jayme did not obtain anywhere close to $300,000 in equity from the sale of the Thoroughbred Property to the Monges—which is what all parties apparently envisioned when they began discussions regarding the Country Cove Subdivision venture and entered into the Purchase Agreement for the Thoroughbred Property back in December 2005. By February 2006 (the closing of the sale of Thoroughbred Property to the Monges), Rojas/Jayme and the Monges must have ***both*** realized there was not going to be $300,000 in equity that could be used for the acquisition and development of the Country Cove Subdivision. This is demonstrated by the HUD-1 settlement statement reflecting the disbursements at closing of the Thoroughbred Property with the seller (Mr. Jayme) receiving zero dollars at closing. *See* Findings of Fact regarding Thoroughbred Property set forth above.

147. So, the acquisition and development of the Country Cove Subdivision by Rojas/Jayme and the Monges was doomed from the very start.

Purchase of Country Cove Subdivision lots

148. Prior to their discussions with the Monges, Rojas/Jayme had already been in negotiations with Dr. Habib Asfahani ("Dr. Asfahani"), the seller, to purchase several undeveloped lots in the Country Cove Subdivision. But Rojas/Jayme had not been able to reach an agreement with Dr. Asfahani. Ms. Monge returned to Dr. Asfahani, however, and was able to get Dr. Asfahani to sign a purchase agreement. On February

16, 2006, a purchase agreement was signed by Mr. Monge and Ms. Rojas, as buyers, and was signed by Dr. Asfahani, as seller. *See* Ex. P-7, pp. 219-24.

149. On June 6, 2006, after the agreement for the purchase of the lots in the Country Cove Subdivision was executed and months after the Monges had purchased the Thoroughbred Property, the Monges and Rojas/Jayme formed a new Texas corporation called Monroj Investments, Inc. ("Monroj"). Monroj was formed to purchase and obtain financing for the purchase of the Country Cove Subdivision lots. *See* Ex. P-7, pp. 180-81. The parties agreed that each (the Monges and Rojas/Jayme) would own a 25% share in the Monroj corporation.

150. When the Monroj corporation was formed, the Monges and Rojas/Jayme were listed as the initial directors of Monroj, in addition to Joe and Alison Villa. *See* Ex. P-7, pp. 180-81. Four days later, on June 10, 2006, a Certificate of Correction to the Certificate of Formation of Monroj was filed, which removed the Villas as directors. *See* Ex. P-34, pp. 294-95.

151. Monroj adopted a corporate resolution dated June 23, 2006, in which Monroj was authorized to purchase the lots in the Country Cove Subdivision in Dona Ana County, New Mexico. *See* Ex. P-7, p. 38. The corporate resolution was signed by Mr. Jayme as Secretary and Ms. Rojas as President of Monroj, and it states that all shareholders of Monroj unanimously consented to the transaction.

152. However, at trial Ms. Monge testified that she and Mr. Monge were never made aware of such a corporate meeting, they did not attend a meeting on June 23, 2006, and they did not provide written consent to purchase the Country Cove Subdivision lots. But then Ms. Monge turned around and testified that she took the

agreement for the purchase of the Country Cove Subdivision lots to Dr. Asfahani and was able to get him to sign the agreement, Mr. Monge himself signed the purchase agreement, and the Monges indeed wanted to purchase the Country Cove Subdivision lots. *See* Tr. 7/18/14, p. 82, lines 24-25, p. 83, lines 1-2, p. 85, lines 2-3; Tr. 8/5/14, pp. 54-55. The Court finds that the Monges were aware that Monroj was going to purchase the lots in the Country Cove Subdivision and consented to such transaction.

153. On June 23, 2006, the sale of the Country Cove Subdivision lots to Monroj closed. *See* Ex. RJ-4, pp. 1-3. Dr. Asfahani, as seller, executed a special warranty deed conveying certain Lots in Block 1 and 2 and a 3.32 acre tract of land in the Country Cove Subdivision, to Monroj, as buyer. *See* Ex. P-7, p. 16-18.

154. To finance the purchase from Dr. Asfahani and development of the Country Cove lots, on June 26, 2006, Monroj entered into a line of credit note in the principal amount of $450,000 (the “Isaac Loan”). The lenders were William and Deann Isaac, Ray and Carol Williams, and William Thomas (“Isaac Lenders”). *See* Ex. P-7, pp. 26-32. The initial principal amount of the Isaac Loan made to Monroj was $350,000, and the Isaac Loan also contained a $100,000 draw feature.

155. Ms. Rojas signed the Isaac Loan note as President on behalf of Monroj. There were no personal guarantees of the Isaac Loan by the Monges or Rojas/Jayme. To secure payment of the Isaac Loan, on the same day (June 26, 2006), Monroj also executed a Mortgage/Deed of Trust granting a lien to the Isaac Lenders on the Country Cove Subdivision property purchased by Monroj. *See* Ex. P-7, pp. 7-15. All of the relevant documents regarding the initial purchase and financing of the lots in Country Cove were signed by Monroj.

Attempts to Sell and Develop Lots in Country Cove Subdivision

156. The Monges proposed to Rojas/Jayme that Mr. Monge enter into an arrangement with Mr. Villa to build homes on the Country Cove Subdivision lots. At the time, Mr. Monge desired to learn the construction business, but he did not have any experience in building, nor did he have a builder's license. Nevertheless, the Monges insisted that Mr. Monge participate in any of the development with Mr. Villa, if Mr. Villa was going to build in the Country Cove Subdivision. Mr. Villa apparently initially agreed to mentor Mr. Monge in the home construction business. Mr. Monge and Mr. Villa then formed an entity, J&M Builders, Inc. ("J&M") on March 16, 2006, for the purpose of building homes in the Country Cove Subdivision. *See* Ex. P-24, p. 3-6.

157. J&M was to build the first home in the Country Cove Subdivision. Ms. Rojas assisted J&M in obtaining a construction loan for the building. J&M, through Mr. Monge, executed a contract to purchase Lot 2, Block 2 from Monroj. *See* Ex. P-29, pp. 27-35. J&M was supposed to build a home on Lot 2, Block 2 in Country Cove for Mr. James Thomas. In August and October 2006, Mr. Thomas executed two contracts for the purchase of the lot and construction of a home in Country Cove with J&M. *See* Ex. P-22, pp. 175-84; Ex. P-29, pp. 36-45. Both of these contracts eventually fell through due to financing issues, delays, and poor construction. *See* Tr. 7/17/14, p. 162-63; Tr. 8/4/14, pp. 66-67, 141-43.

158. After the Thomas contracts fell through, Monroj continued to have problems developing and building on the Country Cove Subdivision lots. Mr. Villa left J&M, and Mr. Monge could not build because he did not have a license or the experience. At the time J&M was formed, Mr. Villa was the only named director.

However, after Mr. Villa left J&M, the Monges filed a Certificate of Amendment to the Certificate of Formation on August 9, 2006, in which they removed Mr. Villa as a director and named themselves as directors of J&M. *See* Ex. P-24, p. 16.

159. The Monges then attempted to partner with Mr. Ronald Lucero of Agave Builders. Similar to Mr. Villa, Mr. Lucero was to help Mr. Monge learn the construction business and teach him how to build homes. Mr. Lucero executed contracts in February 2007 to purchase Lot 2, Block 2 in Country Cove Subdivision so he could build and purchase a home which he was then going to sell to Mr. Thomas. *See* Ex. P-22, pp. 186-93; Ex. P-29, pp. 48-52. However, this contract fell through and was never completed. Mr. Lucero also brought a potential buyer, Cathy Hawthorne, to purchase Lot 3, Block 2 in Country Cove in June 2007, but again this contract fell through. *See* P-22, pp. 297-06.

160. After Mr. Lucero left the Country Cove Subdivision project, Mr. Monge entered into a verbal agreement to partner with another builder, Tom Quintana. However, the Monges were never able to build any houses with Mr. Quintana.

161. By this point, Monroj had owned the Country Cove Subdivision lots for about one year without developing or selling any of the lots. In an attempt to breathe some life into the Country Cove Subdivision project, in March 2007, Ms. Rojas executed a purchase agreement whereby she would individually purchase a lot from Monroj for $100,000. The purchase agreement was signed by Mr. Monge on behalf of Monroj as seller. *See* Ex. RJ-4, pp. 115-22. However, this sale never closed, as Ms. Monge blocked it by contacting the title company. *See* Tr. 8/7/14, pp. 83-84.

162. Then in April 2007, Ms. Rojas entered into a contract to hire Mr. Alfonso Flores, the owner of Metal Building Specialties, LLC for the construction of a home in the Country Cove Subdivision. *See* Ex. P-39, p. 1. Mr. Flores testified that although he dealt with Ms. Rojas and she made the payments to Mr. Flores, he believed he was dealing with Monroj—Ms. Rojas was simply the representative. However, Ms. Rojas and Mr. Jayme both admitted that Monroj did not approve the construction and Ms. Rojas did not personally own the lot upon which Mr. Flores started building. Nevertheless, Ms. Monge testified that Mr. Flores was an acceptable builder, and the Monges did not object to Mr. Flores building a home on the Country Cove lot. *See* Tr. 8/5/14, p. 146, lines 11-25.

163. Mr. Flores never completed the construction on the Country Cove lot, however, because he stopped getting paid for his work. On May 21, 2008, Flores filed a lien on the Country Cove Subdivision for the unpaid work in the total amount of $36,280. *See* Ex. P-39, pp. 24-26.

164. In sum, the Court finds that efforts were made by both Rojas/Jayme and the Monges to sell and develop lots in the Country Cove Subdivision. Those efforts proved to be unsuccessful and this speculative venture failed. The Monges blame Rojas/Jayme for the failure and Rojas/Jayme blame the Monges for the failure. Based on the evidence and this record, the Court cannot conclusively allocate blame between the parties as to who is at fault for the failed Country Cove Subdivision venture and the development and sale of lots. The Country Cove Subdivision was a highly speculative venture between the Monges and Rojas/Jayme and was doomed from the start.

Permit Ready Lots in Country Cove Subdivision

165. When first discussing the possibility of purchasing and developing the Country Cove Subdivision with the Monges, Rojas/Jayme apparently told the Monges that the several of the lots were "permit ready." At the trial, however, a parade of witnesses—including Mr. Villa, the Monges, Mr. Isaac, Ms. Rojas, and Mr. Jayme—all gave varying, conflicting, and irreconcilable accounts as to the condition of the lots and the meaning of "permit ready."

166. For example, Mr. Villa testified that when he went to inspect the Country Cove Subdivision property, none of the lots were ready to be built upon—or in his view, "permit ready." Mr. Villa explained that the first person that had built a home in the Country Cove Subdivision had encroached on a pond—an area designated for run off—resulting in a distortion in the survey. The distortion included the six lots that Monroj purchased. *See* Tr. 7/17/14, p. 124, lines 5-20. Mr. Villa also testified that the City of Sunland had place a "red tag" on the water meter, which indicated that the property had failed inspection and the issues with the utilities would need to corrected before anyone could build on the property. *See* Tr. 7/17/14, p. 142, lines 1-16, p. 144, lines 9-25, p. 145, lines 1-10.

167. On the other hand, Ms. Monge and Mr. Isaac testified that, in their view, three of the lots were permit ready. *See* Tr. 8/4/14, p. 96, lines 12-25; Tr. 8/5/14, p. 146, lines 2-4. Then Mr. Monge testified that, in his view, none of the lots were permit ready. *See* Tr. 8/8/14, p. 104, lines 1-16. And then Ms. Rojas and Mr. Jayme testified that, in their view, all of the lots were permit ready. *See* Tr. 7/17/14, p. 70, lines 22-25. p. 90, lines 15-17; Tr. 8/7/14, p. 77, line 2.

168. Based on this record, the lack of any expert testimony, and this irreconcilable and largely incoherent lay witness testimony, the Court is unable to make any conclusive findings as to whether the lots in the Country Cove Subdivision were "permit ready" or not.

Foreclosure of Country Cove Subdivision

169. Although never reduced to writing and the terms of any agreement were never made clear to the Court, the Monges and Rojas/Jayme each started making half the Isaac Loan payments for the purchase of the Country Cove Subdivision. This is curious, as the Isaac Loan was made to Monroj (the corporation) and not to the Monges and Rojas/Jayme, who had no personal liability for the Isaac Loan.

170. The Isaac Loan on the Country Cove Subdivision went into default only months after it was made. *See* Payment History, Ex. P-40. The Monges and Rojas/Jayme apparently planned to make the payments on the Isaac Loan through the sale of the lots in Country Cove—but those sales never materialized.

171. Starting in May 2007, the Isaac Lenders started sending numerous letters to Monroj (as well as Ms. Rojas and Mr. Monge) informing them of the defaults on the Isaac Loan. *See* Ex. P-29, pp. 60, 70, 73, 76. The Isaac Lenders ultimately conducted a foreclosure sale in New Mexico state court on the Country Cove Subdivision lots owned by Monroj by public auction in October 2009. The Isaac Lenders were the purchaser of the Country Cove Subdivision lots at foreclosure. *See* Ex. P-7, p. 326-27. Eventually, the Isaac Lenders re-sold the Country Cove Subdivision lots "as-is." *See* Tr. 8/4/14, p. 96, lines 6-25.

172. Meanwhile, Monroj's corporate charter was revoked and Monroj is now a defunct entity. *See* Ex. P-34, p. 300.

Lack of Agreement on Country Cove Subdivision

173. Although the Monges and Rojas/Jayme testified extensively about their anger and frustration with each other regarding the acquisition and attempted development of the Country Cove Subdivision, the testimony of the parties failed to prove to the Court what the actual terms of their agreement was with respect to the Country Cove Subdivision. *See for example*, Tr. 7/17/14, p. 69, lines 2-7, pp. 72-73 (Mr. Jayme's testimony); Tr. 7/18/14, pp. 79-81 (Ms. Monge's testimony); Tr. 8/8/7/14, pp. 67-90 (Ms. Rojas's testimony); Tr. 8/8/14, pp. 94-96 (Mr. Monge's testimony).

174. Given the deep personal animosity that has developed between the Monges and Rojas/Jayme and the passage of nearly eight years since many of the events in question occurred, the Court gives very little credibility to the testimony of the Monges and Rojas/Jayme regarding any agreements regarding the Country Cove Subdivision and the blame game for its failure.

175. Indeed, the parties never reduced their alleged agreements to writing with respect to their respective responsibilities and duties with respect to the Country Cove Subdivision project. The written documentation identified regarding the terms of a possible agreement were the basic Monroj corporate formation documents (which primarily just reflected that the Monges and Rojas/Jayme each owned 25% of Monroj) and a "loan proposal" that Ms. Rojas put together when the parties first began soliciting funding for the Country Cove project. *See* Ex. RJ-4, pp. 228-31; Ex. P-7, pp. 180-81; Ex. P-22, pp. 6-8.

176. The evidence at trial did demonstrate to the Court that the Monges and Rojas/Jayme did not have much (if any) experience in developing and building residential lots and homes. The purchase and development of the Country Cove Subdivision lots was a highly speculative venture. Mr. Monge was attempting to learn the residential construction business, but was not a licensed or experienced home builder. And although Ms. Rojas was a residential mortgage broker and Mr. Jayme a residential real estate agent, they did not appear to have any real experience developing real property like the Country Cove Subdivision.

177. The Monges and Rojas/Jayme formed Monroj—a new corporate entity with no history of success in residential development—for the purpose of obtaining the financing to purchase and develop the Country Cove Subdivision lots. The corporation that was formed by the Monges and Rojas/Jayme—Monroj—never made any profit, appears to have never been adequately capitalized, was largely ignored, and is now defunct.

178. In sum, the respective testimony from Ms. Rojas, Mr. Jayme, and the Monges regarding any alleged agreement on the Country Cove Subdivision was inconsistent, incomprehensible, and lacked credibility. The Court cannot decipher what was intended or agreed to by the parties with respect to the Country Cove venture based on their testimony. There was never a written agreement identified setting forth the actual agreement and their respective responsibilities and duties on the Country Cove Subdivision between the Monges and Rojas/Jayme. The Court is unable to determine, based on the evidence and the testimony of the parties which lacked credibility, the material terms of any agreement or even if there was a mutual agreement

between the Monges and Rojas/Jayme with respect to the acquisition and development of the Country Cove Subdivision.

Transmountain Property transactions

179. Next, the Court will specifically address the Transmountain Property and related transactions.

180. In 2006, the Monges and Rojas/Jayme began discussions regarding building a medical clinic in Northeast El Paso. The Monges and Ms. Rojas would form a corporation with two other investors, Dr. Robert Martinez and Dr. Luis Marioni, to purchase real property near Transmountain Road in El Paso, Texas, and eventually construct a medical clinic and related facilities.

181. On January 24, 2006, Ms. Rojas executed a contract to purchase certain unimproved property near Transmountain Road in El Paso, Texas (the "Transmountain Property") for the price of $969,000. The contract was signed in the name of "Alicia Rojas and/or assigns" as buyer, and Patriot Castner Joint Venture, as seller. *See* Ex. RJ-1, pp. 128-39.

182. On February 20, 2006, Mr. Monge, Ms. Rojas, Dr. Martinez, and Dr. Marioni formed a new Texas corporation called Northeast Patriot Plaza, Inc. ("Northeast Patriot"). *See* Ex. P-22, pp. 108-34. Ms. Rojas was named president of Northeast Patriot and Mr. Monge, Dr. Martinez, and Dr. Marioni were listed as directors. *See* Ex. P-22, pp. 109. Northeast Patriot had identified the Transmountain Property with a sales price of approximately $1 million as the location for the Transmountain project and solicited "new partners" for the project. *See* Ex. P-22, pp. 4-5. However, Northeast Patriot would "require these funds up front" from partners to purchase the

Transmountain Property. *See* Ex. P-22, p. 4. No evidence was provided at trial that the Monges or Rojas/Jayme had the funds available or necessary to purchase the Transmountain Property.

183. Dr. Marioni subsequently decided to leave Northeast Patriot. By Redemption Agreement dated April 11, 2007, Dr. Marioni transferred his 25% interest in Northeast Patriot back to the corporation, for $750. *See* Ex. HM-1, pp. 122-24. At trial, Dr. Marioni testified that other members of Northeast Patriot bought out his interest for roughly the amount he originally put into the corporation. *See* Tr. 8/4/14, p. 19, lines 14-25, p. 20, lines 1-20.

184. Ms. Rojas sent an email to Mr. David Puente (who worked for Sierra Title and served as the escrow officer on the Transmountain Property) on March 30, 2007, requesting Mr. Puente to have an attorney draft documents to substitute Mr. Hugo Maynez Maldonado ("Mr. Maynez") [12] as a 25% owner in Northeast Patriot to replace Dr. Marioni. *See* Ex. P-22, p. 211. The Monges were copied on this email requesting that Mr. Maynez become a 25% owner of Northeast Patriot. Ms. Rojas sent a second email to attorney Hector Philips on April 9, 2007, again requesting to add Mr. Maynez as a 25% voting member of Northeast Patriot, and the Monges were also copied on this email. *See* Ex. P-22, p. 222.

185. On April 13, 2007, Ms. Rojas sent an email to the seller of the Transmountain Property, requesting an extension of closing until April 16, 2007, so that the closing documents could be reviewed by an attorney and finalized. The Monges were copied on this email from Ms. Rojas. *See* Ex. P-22, p. 250.

[12] Mr. Maynez is a Mexican national that resides in Juarez, Mexico. Mr. Maynez was a named Defendant in this Adversary Proceeding, but Mr. Maynez was dismissed as party with prejudice by Plaintiffs Monges during the course of trial.

186. On April 14, 2007, the members of Northeast Patriot held an official meeting regarding the Transmountain Property. The Monges were made aware, prior to this meeting on April 14, 2007, that Ms. Rojas was proposing to bring Mr. Maynez in as an investor on the Transmountain Property. At the meeting, the members verbally approved Ms. Rojas obtaining a loan and putting the deed in her name until the Transmountain Property could be transferred to Northeast Patriot. Apparently, the members of Northeast Patriot approved Ms. Rojas putting her personal name "and assigns" on the documents because there were issues with the corporate formation and ownership of Northeast Patriot. *See* Tr. 8/4/14, p. 180, lines 3-21; Tr. 8/8/14, p. 55, lines 6-15.

187. On April 16, 2007, Ms. Rojas sent an email to the title company advising the title company that Ms. Rojas and Mr. Maynez would be closing under their personal names until title was transferred to the corporation. *See* Ex. P-22, p. 251. At trial, Ms. Rojas credibly testified that title to the Transmountain Property was not transferred by her to Northeast Patriot because of an ongoing dispute with the Monges regarding the ownership percentages in Northeast Patriot, and that she had to close the purchase immediately or the purchase would be lost. *See* Tr. 8/8/14, p. 70, lines 4-14, p. 71, lines 14-25, p. 72, lines 1-5.

188. On April 17, 2007, Ms. Rojas executed an Assignment of her rights under the purchase contract for the Transmountain Property with Patriot Castner Joint Venture, as seller, to herself and Mr. Maynez. *See* Ex. P-48; Ex. 5, p. 13.

189. On April 18, 2007, the sale of the Transmountain Property to Ms. Rojas and Mr. Maynez closed. The Transmountain Property was conveyed by the seller

(Patriot Castner Joint Venture) to Ms. Rojas and Mr. Maynez by general warranty deed recorded in El Paso County, Texas, on April 18, 2007. *See* Ex. HM-2, pp. 1-8. Ms. Rojas and Mr. Maynez signed a promissory note dated April 10, 2007, for $710,707 payable to Patriot Castner Joint Venture, representing a loan for the purchase of the Transmountain Property. *See* Ex. P-22, pp. 231-32. The Promissory Note was due in one year—by April 10, 2008. At the same time, Ms. Rojas and Mr. Maynez also executed a Deed of Trust on the Transmountain Property in favor of the lender and seller Patriot Castner Joint Venture, which was recorded in El Paso County, Texas, on April 18, 2007. *See* Ex. HM-2, pp. 9-17.

190. Ms. Rojas and Mr. Maynez also executed a second Deed of Trust dated April 10, 2007, on the Transmountain Property granting a second lien to Mr. Maynez (who had provided the cash down payment to purchase the Transmountain Property) to secure a promissory note payable to Mr. Maynez from Ms. Rojas, which was also due in one-year. *See* Ex. RJ-1, pp. 88-93, 111-13; Ex. P-34, pp. 337-43. This second lien Deed of Trust on the Transmountain Property in favor of Mr. Maynez was also recorded in El Paso County, Texas, on April 18, 2007. *See* Ex. HM-2, pp. 18-24.

191. Mr. Maynez (and his wife) contributed all the cash necessary to pay the purchase price for the Transmountain Property. Neither the Monges, Ms. Rojas, nor any member of Northeast Patriot paid any funds for the purchase of the Transmountain Property. *See* Ex. P-48, p. 58, lines 1-11.

192. Within a few months after closing of the sale of the Transmountain Property to Mr. Rojas and Mr. Maynez, the Monges started asking questions about the Transmountain Property and Northeast Patriot corporation. On December 17, 2007,

Ms. Monge sent an email to Ms. Rojas about an offer relating to Country Cove and the Thoroughbred Property, where Ms. Monge specifically stated "this doesn't include any settlement on the Transmountain property and the Patriot Corporation . . . these items will be discussed separately at a later date." *See* Ex. P-34, p. 244.

193. Then on May 27, 2008, the Monges sent an email to Mr. Puente at the title company about the Transmountain Property, requesting all documents regarding the real estate contract on the Patriot Property (the Transmountain Property) from the title company. *See* Ex. RJ-4, pp. 232-33.

194. In his deposition read at trial, Mr. Maynez claimed Ms. Rojas told him that the Transmountain Property would be purchased solely in his name. *See* Ex. P-48, pp. 14-15. Mr. Maynez stated that when he discovered he owned the Transmountain Property with Ms. Rojas, he insisted Ms. Rojas transfer the property to him. *See* Ex. P-48, pp. 18-20. Mr. Maynez also held a second lien on the Transmountain Property to secure a promissory note for the cash down payment on the property made by Mr. Maynez, which had become due in April 2008, and Mr. Maynez had contributed all the cash to purchase the Transmountain Property. *See* Ex. RJ-1, pp. 88-93, 111-13; Ex. P-34, pp. 337-43; Ex. P-48, p. 58, lines 1-11.

195. So, on October 6, 2008, Ms. Rojas executed a general warranty deed by which Ms. Rojas conveyed her interest in the Transmountain Property to Mr. Maynez, making him sole owner of the Transmountain Property. This warranty deed was recorded in El Paso County, Texas, on October 6, 2008. *See* Ex. P-22, pp. 400-03.

196. To date, Mr. Maynez remains the owner of the Transmountain Property and he continues to pay the property taxes on the property. *See* Ex. P-48, pp. 28-30,

64, lines 9-11. Mr. Maynez has not received any income on the Transmountain Property and has not been able to sell the property. *See* Ex. P-48, pp. 58-59. The Transmountain Property remains undeveloped and had a tax appraised value of $746,782 as of the year 2014. *See* Ex. HM-10, p. 1.

197. The evidence at trial demonstrated to the Court that the Monges and Rojas/Jayme did not have any experience in developing and building commercial property like the Transmountain Property and the envisioned medical clinic. The potential purchase and development of the Transmountain Property through Northeast Patriot was a highly speculative venture. Mr. Monge was not a licensed or experienced commercial builder or developer. And although Ms. Rojas was a residential mortgage broker and Mr. Jayme a residential real estate agent, they did not appear to have any real experience developing commercial real property like the Transmountain Property and envisioned medical clinic.

198. The Monges and Ms. Rojas initially formed Northeast Patriot—a new corporate entity with no history of success in commercial property development—in an attempt to purchase the Transmountain Property and develop it. But the Monges did not sufficiently prove to the Court that they had the financial ability, funds, or a loan to succeed in this highly speculative venture to acquire and develop the Transmountain Property. The corporation that was formed by the Monges and Ms. Rojas—Northeast Patriot—never got off the ground, never found other partners, never made any profit, never got a loan, and was not capitalized as needed to purchase and develop the Transmountain Property.

199. The only person that ever provided cash funds to purchase the Transmountain Property was Mr. Maynez, who was never made a partner in Northeast Patriot. And Mr. Maynez has never made any income or profit from the Transmountain Property.

200. Northeast Patriot (the Texas corporation owned in part by Mr. Monge and Ms. Rojas) is now a defunct corporate entity. Northeast Patriot never owned or developed the Transmountain Property. No contract was ever entered into by Northeast Patriot (or the Monges) to purchase the Transmountain Property.

201. It was not until July 2012—with the filing by the Monges of their Second Amended Complaint in this Adversary Proceeding—that the Monges first asserted causes of action against Rojas/Jayme relating to the Transmountain Property and Northeast Patriot (dkt# 58).

Sierra Crest Property transaction

202. Next, the Court will specifically address the Sierra Crest Property and related transactions.

203. On May 3, 2006, the Monges entered into a residential sales contract ("Sierra Crest Contract") to purchase a home at 51 Sierra Crest, El Paso, Texas ("Sierra Crest Property") from Enrique and Martha Gutierrez. *See* Ex. P-8, pp. 76-83. Mr. Jayme acted as the Monges' real estate broker on the Sierra Crest transaction, and Ms. Rojas acted as the Monges' mortgage broker on the transaction. The Monges and the sellers (the Gutierrezes) signed the Sierra Crest Contract. Although the Monges testified that it did not look like their signatures on the Sierra Crest Contract, Ms. Monge

agreed that she did in fact sign a contract to purchase the Sierra Crest Property. *See* Tr. 8/8/14, p. 111, lines 1-8, p. 138, lines 23-25, p. 139, lines 1-13.

204. With the help of Ms. Rojas, the Monges began applying for financing to purchase the Sierra Crest Property. On June 7, 2006, the Monges signed a partial loan application with First Mortgage of El Paso ("First Mortgage"), Ms. Rojas's mortgage company. Ms. Rojas signed this loan application and it was apparently faxed from First Mortgage to a potential lender on July 18, 2006. *See* Ex. P-11, p. 769. This application did not have any information filled in for the Monges in the Assets and Liabilities section. *See* Ex. P-11, p. 769.

205. Another loan application was filled out and faxed from First Mortgage on July 25, 2006, apparently to a potential lender. *See* Ex. P-11, pp. 766-68. This application (or at least the copy provided at trial) was not signed by the Monges—it was signed only by Ms. Rojas. *See* Ex. P-11, pp. 768. This time, on the third page of this application, the section entitled "Assets and Liabilities" for the Monges was filled in. *See* Ex. P-11, p. 768. This application states that the Monges earned $7,500 per month in gross rental income on the Thoroughbred Property and $2,000 per month in gross rental income on a property located at 2708 Fillmore, El Paso, Texas ("Fillmore Property"). *See* Ex. P-11, p. 768.

206. Two residential leases for the Thoroughbred Property and Fillmore Property accompanied this application and were also faxed from First Mortgage on July 25, 2006. *See* Ex. P-11, pp. 673-76. Ms. Araceli Herrera, an employee of Ms. Rojas who worked as a loan processor at First Mortgage, testified at trial. Ms. Herrera stated that she filled out the two residential leases using information provided to her by Ms.

Rojas and that when she completed filling out the leases, she returned the leases to Ms. Rojas unsigned. According to Ms. Herrera, Ms. Rojas later returned the leases back to Ms. Herrera with signatures; Ms. Herrera never saw any parties sign any of the leases. *See* Tr. 8/5/14, pp.14-18.

207. The first residential lease was supposedly entered into between the Monges (as lessors) and Dr. Luis and Alejandra Marioni (as lessees), and purported to lease the Thoroughbred Property to the Marionis. *See* Ex. P-11, pp. 673-674. According to the face of this residential lease, it was purportedly signed by the Monges and the Marionis on July 10, 2006, and the lease term was supposed to begin August 1, 2006 and end July 31, 2009. However, at all times during the term of the purported lease, Rojas/Jayme lived in the Thoroughbred Property. At trial, Dr. Marioni and Alejandra Hernandez (formerly Ms. Marioni) both credibly testified that the signatures on this residential lease were not theirs, and that they have never lived in the Thoroughbred Property. *See* Tr. 8/4/14, p. 16, lines 15-25, p. 17, lines 1-15, p. 23, lines 3-20; Ex. P-11, p. 674. Similarly, the Monges also testified that they never entered into a lease with the Marionis and the signatures on this residential lease were not their signatures.

208. The second residential lease was supposedly entered into between the Monges (as lessors) and Mr. Joe Villa (as lessee), and purported to lease the Fillmore Property to Mr. Villa. *See* Ex. P-11, pp. 675-76. According to the face of this residential lease, it was purportedly signed by the Monges and Mr. Villa on February 15, 2006, for a lease term of five years—from February 15, 2006 to February 28, 2011. At trial, Ms. Monge denied that she never entered into this residential lease with Mr. Villa, and that

she did not sign this residential lease for the Fillmore Property. *See* Tr. 8/4/14, p. 119, lines 20-25, p. 120.

209. At trial, Ms. Rojas testified and denied that she ever signed any loan documents for the Monges. With respect to these two residential leases, Ms. Rojas testified that she did not sign the residential leases; instead, she provided the unsigned leases to Ms. Monge and when Ms. Monge returned the leases to Ms. Rojas, the leases had been signed. *See* Tr. 8/7/14, p. 64, lines 10-22.

210. From the evidence presented at trial, it is clear to the Court that these two residential leases of the Thoroughbred Property and Fillmore Property were fictitious—in the sense that they were not true leases and that the Marionis never actually leased the Thoroughbred Property from the Monges and Mr. Villa never actually leased the Fillmore Property from the Monges. *See* Ex. P-11, pp. 673-676. It is also clear to the Court that the signature of Dr. and Ms. Marioni on the residential lease of the Thoroughbred Property was forged—in the sense that Dr. and Ms. Marioni did not sign such lease, according to their credible and unbiased testimony. *See* Ex. P-11, p. 674.

211. What is not clear, and the Court cannot make any findings on, is who actually signed these two fictitious residential leases. At trial, the Monges seemed to be accusing Ms. Rojas of forging the signatures on leases and submitting false loan applications. Yet no handwriting expert was called by the Monges (or anyone else) to testify at trial as to signatures on the leases or the other documents that the Monges denied signing. The testimony of Ms. Monge and Ms. Rojas—as to the signatures and the circumstances surrounding the preparation, execution, and return of these

residential leases—lacked specificity and credibility such that the Court could only speculate, which the Court cannot do.[13]

212. In any event, financing was obtained and the Monges closed and purchased the Sierra Crest Property on August 8, 2006. *See* Ex. P-8, pp. 6-8. A Warranty Deed from the Gutierrezes (as sellers) to the Monges (as buyers), together with a Deed of Trust in favor of New Century Mortgage (the Monges' lender), were filed and recorded on August 14, 2006. *See* Ex. P-8, pp. 333-69. The Monges purchased the Sierra Crest Property for the purchase price of $605,000, and New Century Mortgage financed, through first and second liens, virtually the entire purchase price for the Monges. *See* Ex. P-8, p. 6, lines 202, 205, pp. 333-69.

213. The Monges obtained a home warranty and buyer's protection plan on the Sierra Crest Property, which was paid for at the closing. *See* Settlement Statement, Ex. P-8, p. 7, line 1303, pp. 13, 26. Mr. Jayme (Advance Realty) received a $13,100 real estate broker's commission paid from the sellers' funds at closing, and Ms. Rojas (First Mortgage) received a $10,029 loan origination fee paid from $1,175 of the buyer's funds and $8,854 from the seller's funds at closing. *See* Settlement Statement, Ex. P-8, p. 7, lines 702-03, 801.

214. A Sellers Disclosure Notice dated January 18, 2006, was completed and signed by the sellers of the Sierra Crest Property. At least two copies of the Sellers

[13] In a similar vein—although apparently unconnected to the Sierra Crest Property purchase—two other residential leases were purportedly entered into by the Monges for property located in Lordsburg, New Mexico and the Fillmore Property, which appear to have been faxed from First Mortgage back in January 2006. *See* Ex. P-10, pp. 276-77, 279-80. Mr. Natividad, the purported lessee of the Fillmore Property, credibly testified that he did not sign the lease for the Fillmore Property, and the Court believes his testimony. *See* Tr. 8/4/14, p. 9, lines 24-25, p. 10. The Monges testified that the signature on these two leases were also not their signatures. For the same reasons set forth above, the Court cannot speculate and make a finding on who actually signed these two leases.

Disclosure Notice were introduced into evidence. *See* Ex. RJ-2, pp. 13-16; Ex. P-11, pp. 104-07.

215. One copy of the Seller's Disclosure Notice appears to be initialed by the Monges (as buyers) on the first page only, and the Monges' signature appears on the last page. *See* Ex. RJ-2, pp. 13, 16. The other copy of the Sellers Disclosure Notice was initialed and signed on all pages by the Monges (as buyers). *See* Ex. P-11, pp. 104-07. At trial, Ms. Monge repeatedly stated that she did not sign the Sellers Disclosure Notice, but then later stated that although her signature appeared on the Sellers Disclosure Notice, she did "not remember" signing it and believes her signature was somehow "cut and pasted" or forged onto the document. *See* Tr. 8/4/14, p. 131-33; Tr. 8/4/14, p. 195, lines 5-9.

216. Again no handwriting expert was called to testify by the Monges to support their contention that it was not their signature on the Sellers Disclosure Notice. And this Notice was signed over eight years ago, so it is not surprising that Ms. Monge would not remember signing this particular Notice. From comparing the signatures of the Monges on other documents and weighing the credibility of the testimony, the Court finds that the Monges signed the Sellers Disclosure Notice.

217. At trial, Ms. Monge initially indicated that she did not receive a copy of the Sellers Disclosure Notice. Later, Ms. Monge testified and admitted that she did receive a copy of the Sellers Disclosure Notice prior to the closing on the Sierra Crest Property. *See* Tr. 8/4/14, p. 131-33; Tr. 8/4/14, p. 198, lines 12-17. The Court finds that the Monges did in fact receive a copy of the Sellers Disclosure Notice on the Sierra Crest

Property prior to the closing of their purchase of the Sierra Crest Property on August 8, 2006.

218. In the Sellers Disclosure Notice, the sellers disclosed to the Monges that there were "hair line cracks" in the windows and front door on the Sierra Crest Property, as well as termites had been found and there was previous treatment for termites. *See* Ex. RJ-2, pp. 14-15; Ex. P-11, pp. 105-06. The Sellers Disclosure Notice also advised the Monges that the Notice was not a substitute for any inspections the buyer (the Monges) may wish to obtain, and that the Sierra Crest Property was at least thirteen years old. *See* Ex. RJ-2, p. 13; Ex. P-11, p. 104. At trial, Ms. Monge testified that they requested an inspection of the Sierra Crest Property. *See* Tr. 8/4/14, p.198, lines 18-20.

219. At the closing of the sale in August 2006, the Monges signed an "Acceptance of Property" document with regard to the Sierra Crest Property. *See* Ex. RJ-2, p. 20. In part, this Acceptance document provides that the Monges (as purchasers) of the Sierra Crest Property, "have inspected the property personally and/or through professionals we have selected. The results of the inspections have been satisfactory to us and we accept the property in its "AS IS" condition." This Acceptance document also provides that the Monges "acknowledge that neither . . . the Real Estate Brokers . . . have made any warranties or representations as to the condition of the [Sierra Crest] property, and accordingly we release and hold them harmless from any and all liability in regard to the same now or at any time in the future." *See* Ex. RJ-2, p. 20.

220. At trial, Ms. Monge first testified that she signed this Acceptance of Property document and that it was her signature, then later said she did not remember

signing the document, then later she said there was possible "cutting and pasting," and then said she thought it was forged. *See* Tr. 8/4/14, p. 194, lines 3-25, p. 195, lines 1-12. From comparing the signatures of the Monges on other documents and weighing the credibility of Ms. Monge's inconsistent testimony, the Court finds that the Monges signed the Acceptance of Property document on the Sierra Crest Property.

221. Beginning in the year 2006, soon after they purchased the property, the Monges began noticing problems with the Sierra Crest Property. In 2006, the Monges experienced problems with leaks, water damage to the walls, and electricity at the Sierra Crest Property. Then, in the year 2007—within a year of the Monges moving in—the Monges began noticing structural issues with the Sierra Crest Property and made a claim on their insurance company. *See* Tr. 8/4/14, p. 196, lines 13-25, p. 197, lines 1-13.

222. According to Ms. Monge, the leaks and structural issues at the Sierra Crest Property continued to get worse, including water leaking through the walls and basement and the growth of black mold. *See* Tr. 8/8/14, p. 122, lines 4-25, p. 123, lines 1-6. Ms. Monge also testified that the Sierra Crest Property is now uninhabitable. *See* Tr. 8/8/14, p. 124, lines 22-24.

223. Mr. Jayme (the real estate agent for the Monges) was accused of never disclosing any of these problems with the Sierra Crest Property to the Monges. But there was no believable proof provided to the Court that Mr. Jayme was even aware of the problems with the Sierra Crest Property.

224. On July 13, 2010, the Monges' Plan of Reorganization ("Plan") filed in their bankruptcy case was confirmed by order of the Court (Judge Leif M. Clark presiding).

Under the Plan, the Monges surrendered the Sierra Crest Property to their lender in full satisfaction of their lender's claim. *See* Monges main bankruptcy case no. 09-30881, Order (dkt# 97); Plan of Reorganization (dkt# 69), pp. 4-5.

225. It was not until July 2012—with the filing by the Monges of their Second Amended Complaint in this Adversary Proceeding—that the Monges first asserted causes of action against Rojas/Jayme relating to the Sierra Crest Property (dkt# 58).

III.
PROPOSED CONCLUSIONS OF LAW

226. Following are the Court's conclusions of law, which are also organized by the property and related transactions.

227. The Monges' Second Amended Complaint filed by the Monges took a shotgun approach and set forth about eighteen different "boilerplate" causes of action, but (for the most part) the Complaint fails to identify which property was associated with what causes of action (dkt# 58). Rojas/Jayme's last Amended Answer (dkt# 147), Rojas/Jayme's last and Fourth Amended Counterclaim (dkt# 221), and the Monges' final and Fourth Amended Answer (dkt# 223), suffered (to a lesser extent) from the same problem. To the extent decipherable by the Court, the causes of action, counterclaims, and defenses of the parties, to the extent necessary or preserved for trial,[14] are addressed below.

THOROUGHBRED PROPERTY

228. First, the Court will set forth its conclusions of law with respect to the causes of action, counterclaims, and defenses of the parties with respect to the Thoroughbred Property and related transactions to the extent necessary.

229. Initially, it is important to recognize that the Thoroughbred Property is real property that is located entirely in the State of New Mexico. *See* Findings of Fact above. For the reasons set forth below in the section regarding alleged Texas Property Code

[14] Due to this shotgun method of pleading and the inability of the parties to narrow the issues for trial, the Court (by Orders) required the parties to file proposed findings of fact and conclusions of law prior to trial. Such Orders basically provided that the failure of a party to properly include an affirmative claim for relief or affirmative defense (including necessary elements) in such proposed findings and conclusions, may result in the Court determining that such affirmative claim or defense had been waived. *See* Orders of the Court (dkt# 246, ¶4; dkt# 274, ¶2) and discussion above by the Court in Procedural Background section.

violations, the Court concludes that New Mexico law applies to the Lease/Option of the Thoroughbred Property, as the Thoroughbred Property is real property wholly located in the State of New Mexico. The Monges have repeatedly admitted in their pleadings that New Mexico law applies to the Thoroughbred Property, since it is located in the State of New Mexico. *See for example* Monges Answer (dkt# 233, p. 3); Monges Proposed Pre-Trial Order (dkt# 282, pp. 6-7); Monges Proposed Findings (dkt# 258, p. 21); Monges Post-Trial Brief (dkt# 354, p. 115). Inexplicably however, the Monges have asserted several causes of action relating to the Thoroughbred Property based on Texas law.

Monges Claims (Thoroughbred Property)

Rightful Owners of Thoroughbred Property

230. The Monges seek a determination from the Court that the Monges (and not Rojas/Jayme) are the rightful and legal owners of the Thoroughbred Property and are entitled to possession of the Thoroughbred Property. Bankruptcy Rule 7001(2) permits a debtor (like the Monges) to file an adversary proceeding to determine the validity and extent of interest in their property.

231. Here, the Monges purchased the Thoroughbred Property from Mr. Jayme on February 3, 2006. A general warranty deed conveying the Thoroughbred Property from Mr. Jayme to the Monges was recorded in Dona Ana County, New Mexico, on February 6, 2006, and re-recorded again on July 28, 2006. *See* Ex. P-2, pp. 5-21, pp. 22-38; Findings of Fact above.

232. Although the Option to purchase the Thoroughbred Property back from the Monges was executed, Rojas/Jayme never exercised the Option to repurchase the Property and were not eligible to exercise the Option before it expired. The Option

required that Ms. Rojas be current on the rent and not be in monetary default under the Lease as of January 31, 2007 (the expiration date of the Option). *See* Ex. P-32, p. 64, ¶(a). Yet Rojas/Jayme did not make all of the rent payments due under the Lease and were in serious monetary default under the Lease for much of the Lease Term. Indeed, Rojas/Jayme made a total of only $12,568 in payments of the $58,608 in payments that were actually due during the Lease Term. *See* Findings of Fact above. Because Ms. Rojas was in monetary default by the end of the Option period (January 31, 2007), Rojas/Jayme did not have the right to exercise the Option to purchase the Thoroughbred Property.

233. The Option also required Ms. Rojas to send written notice to the Monges notifying them of her election to exercise the Option to purchase the Thoroughbred Property no later than fifteen calendar days prior to the expiration of the Lease Term—which would have been January 16, 2007. *See* Ex. P-32, p. 64, ¶¶(a), (b). Rojas/Jayme have never sent written notice to the Monges of their election to exercise the Option. The Option also required Ms. Rojas to make deposits with the title company, which Rojas/Jayme did not do. *See* Ex. P-32, p. 64, ¶(b); Findings of Fact above.

234. Rojas/Jayme made no showing that they had the financial ability to exercise the Option—by paying the purchase price for the Thoroughbred Property (the outstanding amount of the Thoroughbred Mortgage). *See* Ex. P-32, p. 64, ¶(c). In fact the evidence showed the opposite—that Rojas/Jayme did not have the financial ability to exercise the Option. *See* Findings of Fact above.

235. The Option expressly provided that time was of the essence; the Option expired by its terms on January 31, 2007. *See* Ex. P-32, p. 64, ¶¶(a), (f).

236. The corresponding Lease of the Thoroughbred Property by Rojas/Jayme also expired by its terms on January 31, 2007. *See* Ex. P-32, p. 58, ¶3.01. Rojas/Jayme did not make all of the rent payments due under the Lease and were in serious monetary default under the Lease for much of the Lease Term. Rojas/Jayme made a total of only $12,568 in payments of the $58,608 in payments that were actually due during the Lease Term and bounced multiple checks. *See* Findings of Fact above.

237. Since April 2008, Rojas/Jayme have made ***no payments*** on the Thoroughbred Property. *See* Findings of Fact above. Rojas/Jayme have been effectively living for free on the Thoroughbred Property owned by the Monges for more than six years, while making no payments.

238. In conclusion, the Court determines that the Option and the Lease of the Thoroughbred Property by Rojas/Jayme have long since expired. As a result, Rojas/Jayme have no legal right to ownership or possession of the Thoroughbred Property.

239. For any and all of these reasons, the Court concludes that the Monges are the rightful legal owners of and are entitled to possession of the Thoroughbred Property from Rojas/Jayme.

<u>Turnover of Thoroughbred Property—Section 542 of the Bankruptcy Code</u>

240. The Monges have also invoked section 542 of the Bankruptcy Code to require turnover of the Thoroughbred Property by Rojas/Jayme to the Monges.

241. In pertinent part, section 542(a) of the Bankruptcy Code provides that "an entity, in possession, custody or control, during the case, of any property that the trustee[15] may use, sell, or lease…shall deliver to the trustee…such property." *See* 11 U.S.C. § 542(a).

242. The Thoroughbred Property is property that is rightfully owned by the Monges and the Lease/Option on the Thoroughbred Property by Rojas/Jayme expired by its terms on January 31, 2007, as set forth above. The Thoroughbred Property can be used by the Monges, and the property is in the possession of Ms. Rojas and Mr. Jayme.

243. Accordingly, the Court concludes that turnover and delivery of the Thoroughbred Property by Ms. Rojas and Mr. Jayme to the Monges is also required under section 542(a) of the Bankruptcy Code.

Violation of Automatic Stay of the Bankruptcy Code (Thoroughbred Property)

244. The Monges have also asserted that Rojas/Jayme violated the automatic stay imposed by section 362(a) of the Bankruptcy Code by exercising control over the Thoroughbred Property, and they seek recovery from Rojas/Jayme under section 362(k) of the Bankruptcy Code.

245. In pertinent part, section 362(a)(3) of the Bankruptcy Code provides that the filing of a bankruptcy petition by a debtor (like the Monges) "operates as a stay, applicable to all entities, of-- . . . any act . . . to exercise control over property of the estate." *See* 11 U.S.C. § 362(a)(3). Here, the Thoroughbred Property is owned by the

[15] Section 1107(a) of the Bankruptcy Code basically provides that a debtor in possession in a Chapter 11 case has the powers of a trustee. *See* 11 U.S.C. § 1107(a). The Monges were debtors in possession in their Chapter 11 bankruptcy case, and thus have the powers of a "trustee" as the term is used in section 542(a) of the Bankruptcy Code.

Monges and is property of their bankruptcy estate. *See* 11 U.S.C. § 541(a)(1) (defining property of the estate broadly as including all property, "wherever located and by whomever held," in which the debtor has any "legal or equitable interest" as of the date of commencement of the bankruptcy case); *see also Brown v. Chesnut* (*In re Chesnut*), 422 F.3d 298, 303 (5th Cir. 2005) (recognizing that the automatic stay of section 362(a) has "broad application" to property of a bankruptcy estate).

246. The Monges (as debtors) filed their Chapter 11 bankruptcy petition on April 27, 2009, and on that date the automatic stay was imposed on all of the Monges' property under section 362(a) of the Bankruptcy Code. The Thoroughbred Property was owned by the Monges on the date of their bankruptcy filing, and thus is property of their bankruptcy estate protected by the automatic stay. Ms. Rojas and Mr. Jayme have continually exercised control over the Thoroughbred Property—by exercising control over and remaining in possession of the Thoroughbred Property after the April 27, 2009, bankruptcy filing by the Monges. Accordingly, the Court concludes that both Ms. Rojas and Mr. Jayme have violated the automatic stay of section 362(a)(3) in the Monges' bankruptcy case.

247. Section 362(k) of the Bankruptcy Code grants a debtor (like the Monges) the right to sue for a violation of the automatic stay. In pertinent part, section 362(k) provides: "an individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages." *See* 11 U.S.C. § 362(k)(1) (formerly 11 U.S.C. §362(h)).

248. As the Fifth Circuit has held, a willful violation of the automatic stay does not require specific intent by the defendant to violate the automatic stay, and whether the defendant believes in good faith that it has a right to the property is not relevant. Instead, the three elements to prove a willful violation of the automatic stay under section 362 of the Bankruptcy Code are (1) the defendant knew of the existence of the automatic stay; (2) the defendant's acts were intentional; and (3) the defendant's acts violated the automatic stay. *See Chesnut,* 422 F.3d at 302 (supporting citation omitted).

249. Here, both Ms. Rojas and Mr. Jayme knew that the Monges had filed Chapter 11 bankruptcy and of the existence of the automatic stay.[16] Both Ms. Rojas and Mr. Jayme intentionally exercised control over the Thoroughbred Property, which was property of the Monges' bankruptcy estate, and their acts of control by living and maintaining possession of the Thoroughbred Property violated the automatic stay of section 362(a)(3). The fact that Ms. Rojas and Mr. Jayme may have believed in good faith that they had a right to possession and control over the Thoroughbred Property by virtue of the Lease is not relevant, and the Lease expired by its terms on January 31, 2007—well before the bankruptcy filing by the Monges in April 2009. And Ms. Rojas and Mr. Jayme could have requested relief from the automatic stay from the Court under section 362(d) of the Bankruptcy Code, but they did not.

250. Accordingly, the Court concludes that both Ms. Rojas and Mr. Jayme have willfully violated the automatic stay and that the Monges are entitled to recover from Ms.

[16] *See* Monges main bankruptcy case no. 09-30881, dkt# 5, pp. 1, 7 (demonstrating that notice of the automatic stay and the Monges bankruptcy filing was mailed to Mr. Jayme and Ms. Rojas on May 1, 2009); dkt# 21 (notice of appearance of counsel for Ms. Rojas and Mr. Jayme filed with the Bankruptcy Court on June 2, 2009).

Rojas and Mr. Jayme for such stay violation under section 362(k) of the Bankruptcy Code.

251. Under section 362(k) of the Bankruptcy Code, the Court concludes that the Monges are entitled to recover actual damages from Ms. Rojas and Mr. Jayme for their violation of the automatic stay with respect to the Thoroughbred Property. As set forth below, the Court finds that Ms. Rojas and Mr. Jayme are liable to the Monges for $712,178 in actual damages relating to the Thoroughbred Property, and so any additional actual damage award under section 362(k) of the Bankruptcy Code beyond this amount would be duplicative and excessive.

252. The Court also concludes that, under section 362(k) of the Bankruptcy Code, the Monges are entitled to recover attorneys' fees and costs from Ms. Rojas and Mr. Jayme for their violation of the automatic stay with respect to the Thoroughbred Property. As set forth below, the Court finds that Ms. Rojas and Mr. Jayme are liable to the Monges for $240,238 in attorneys' fees and expenses relating to the Thoroughbred Property, and so any additional attorneys' fees and expense award under section 362(k) beyond this amount would be duplicative and excessive.

253. Finally, section 362(k) of the Bankruptcy Code provides for recovery of punitive damages in "appropriate circumstances." *See* 11 U.S.C. § 362(k)(1). The Fifth Circuit has held that punitive damages are available for a stay violation only if there has been "egregious conduct" by the defendant—such as continuing to violate the automatic stay after being repeatedly warned about the stay violation by the debtor and court and keeping the debtor in jail. *See Young v. Repine* (*In re Repine*), 536 F.3d 512, 521 (5th Cir. 2008).

254. The Court concludes that the conduct here by Rojas/Jayme in exercising control over the Thoroughbred Property and violating the automatic stay does not rise to the level of "egregious" conduct. Rojas/Jayme believed that they had the right to the Thoroughbred Property and there were no repeated warnings by the Monges or the Court regarding their violation of the automatic stay. Accordingly, the Court concludes that "appropriate circumstances" are not present here, and that no award of punitive damages against Ms. Rojas and Mr. Jayme should be made under section 362(k) of the Bankruptcy Code.

255. In summary, the Court concludes that both Ms. Rojas and Mr. Jayme have willfully violated the automatic stay in the Monges' bankruptcy case, and are liable to the Monges for such stay violation under the Bankruptcy Code as set forth above.

Breach of Contract (Thoroughbred Property)

256. The Monges have also asserted claims against Rojas/Jayme for breach of contract (the Lease) relating to the Thoroughbred Property.[17]

257. A valid, enforceable contract consists of an offer, an acceptance, consideration, and mutual assent under New Mexico law. *See, e.g., Salazar v. City of Albuquerque*, 2013 WL 5554185, at *25 (D. N.M. Aug. 20, 2013) (citing N.M.R.A., Civ. UJI 13-801)). Incomplete performance or the failure to perform a contractual obligation constitutes a breach of contract. *See Salazar*, 2013 WL 5554185, at *25-26. In New Mexico, the elements of a breach of contract claim include the following (1) existence of

[17] The Monges may also allege a breach of an "oral" contract or agreement with Rojas/Jayme on the Thoroughbred Property. Such claim lacks merit. The Lease of the Thoroughbred Property provides that the Lease and the Option contained the entire agreement of the parties and could not be modified unless the modification was in writing. *See* Ex. P-32, p. 63, ¶16.08. No proof of any written modification to the Lease/Option was provided, and no believable proof of the existence or terms of an oral contract was established by a preponderance of the evidence.

a valid contract; (2) the defendant breached the contract; (3) causation; and (4) damages as a result of the breach. *See, e.g., Walker v. THI of N.M. at Hobbs Center*, 803 F. Supp. 2d 1287, 1319 (D. N.M. 2011) (citing *Camino Real Mobile Home Park P'ship v. Wolfe*, 891 P.2d 1190, 1196 (N.M. 1995)); *Abreu v. N.M. Children, Youth & Families Dept.*, 797 F. Supp. 2d 1199, 1247 (D. N.M. 2011) (citing *Camino Real,* 891 P.2d at 1196).

258. In the event and to the extent Texas law applies, the elements for a breach of contract claim are similar to New Mexico law. Under Texas law, the elements for a breach of contract claim include the following: (1) the existence of a valid, enforceable contract; (2) the plaintiffs are the proper party to sue on the contract; (3) the plaintiffs performed, tendered performance, or have a valid excuse from performing their contractual obligations; (4) the defendants breached the contract; and (5) the defendants' breach caused the plaintiffs injury. *See, e.g.*, *Mullins v. TestAmerica, Inc.*, 564 F.3d 386, 418 (5th Cir. 2009) (applying Texas law); *Curtis v. AGF Spring Creek/Coit II, Ltd.*, 410 S.W.3d 511, 518 (Tex. App.—Dallas 2013, no pet.); *Winchek v. Am. Express Travel Related Servs. Co., Inc.*, 232 S.W.3d 197, 202 (Tex. App.—Houston [1st Dist.] 2007, no pet). A party breaches a contract when it fails to perform an act that the party expressly promised to perform. *See McGraw v. Brown Realty Co.*, 195 S.W.3d 271, 276 (Tex. App.—Dallas 2006, no pet.).

259. Here, the Lease on the Thoroughbred Property is a valid and enforceable contract, which satisfies the first element of a breach of contract claim. And the Monges proved the other elements for a breach of contract claim—breach, causation, and damages. The Court also finds that the Monges performed under the Lease.

Rojas/Jayme were already living in the Thoroughbred Property at the time they executed the Lease with the Monges, and Rojas/Jayme continued living in the Thoroughbred Property after execution of the Lease. The Monges therefore delivered the Thoroughbred Property to Rojas/Jayme under the Lease, and Rojas/Jayme had exclusive possession of the property. *See generally Grogan v. N.M. Taxation & Revenue Dept.*, 62 P.3d 1236, 1242-43 (N.M. Ct. App. 2002) (explaining that a lease conveys exclusive possession of the leased premises to a tenant).

260. The Court concludes that Rojas/Jayme breached the Lease on the Thoroughbred Property by failing to perform their contractual obligations. Under the Lease, Rojas/Jayme were required to make monthly rent payments in the amount of the Monges' mortgage payment on the Thoroughbred Property. As set forth in the Findings of Fact, Rojas/Jayme failed to make all payments required under the Lease and were in monetary default. In sum, the Court concludes that Rojas/Jayme failed to perform as required under the Lease resulting in a breach of the Lease.

261. Moreover, Rojas/Jayme's breach of the Lease was the proximate cause of damages to the Monges. By their own admission, Rojas/Jayme have not made a payment on the Thoroughbred Property to the Monges since April 2008. Yet Rojas/Jayme continue to live in the Thoroughbred Property. In effect, Rojas/Jayme have been living in the Thoroughbred Property for free for over six years. Due to Rojas/Jayme's failure to pay rent, the Monges fell behind on payments on the Thoroughbred Mortgage, causing them to go into foreclosure on the Thoroughbred Property. As a result of Rojas/Jayme's breach of contract, the Monges have incurred actual economic damages, which are discussed and awarded below.

262. In sum, the Court concludes that the Monges have met their burden of proof with respect to a claim for breach of contract under the Thoroughbred Property Lease, regardless of whether New Mexico or Texas law applies.

Actual Damages (Thoroughbred Property)

263. A party may recover actual damages for a breach of contract. *See Whitehead v. Allen*, 313 P.2d 335, 335-36 (N.M. 1957); *see also Mead v. The Johnson Grp., Inc*., 615 S.W.2d 685, 687 (Tex. 1981). Based on the breach of the Lease of the Thoroughbred Property, the Monges are entitled to recover actual damages.

264. Under the Lease, the rent due to the Monges during the Lease Term (through January 31, 2007) was the amount of the Monges' monthly mortgage payment on the Thoroughbred Mortgage. The Lease of the Thoroughbred Property expired by its terms on January 31, 2007—yet both Ms. Rojas and Mr. Jayme continued to stay on the Thoroughbred Property. Both Ms. Rojas and Mr. Jayme became holdover tenants on February 1, 2007, and remain holdover tenants to this day.

265. As a holdover tenant, a lessee is obligated to pay the reasonable rental value of the property to the landlord for the time the lessee held over. *See, e.g.*, *Salcido v. Pacheco (In re Salcido)*, 2012 WL 3904535, at *11 (Bankr. D. N.M. Sept. 7, 2012); *Economy Rentals, Inc. v. Garcia*, 819 P.2d 1306, 1319 (N.M. 1991); *Hofmann v. McCanlies*, 413 P.2d 697, 697-98 (N.M. 1966). A court may use the rental payment provided in a lease as the "reasonable rental value" of the property for the holdover period. *See Salcido*, 2012 WL 3904535, at *11; *Economy Rentals*, 819 P.2d at 1319. Texas law appears to be similar. *See, e.g., Standard Container Corp. v. Dragon Realty*, 683 S.W.2d 45, 47-48 (Tex. App.—Dallas 1984, writ ref'd n.r.e.) (holding damages for a

tenant's holdover is reasonable market value, and affirming trial court's use of holdover rent set forth in lease); *Meridian Hotels Inc. v. LHO Fin. P'ship I, L.P.*, 255 S.W.3d 807, 822-23 (Tex. App.—Dallas 2008, no writ) (recognizing that holdover rent in the amount of 50% of the regular rent is not a penalty and enforceable, in the context of awarding prejudgment interest).

266. The Court will next address the amount of actual damages to be awarded to the Monges regarding the Thoroughbred Property and the Lease. Both Ms. Rojas and Mr. Jayme have been in continuous possession of the Thoroughbred Property from February 1, 2006 (the commencement of the Lease), well past January 31, 2007 (the expiration of the stated term of the Lease), and all the way through the month of trial in August 2014.

267. As set forth in the Findings of Fact above, the total Lease payments due to the Monges during the Lease Term (the period of February 1, 2006, through January 31, 2007) was $58,608—calculated as $5,328[18] per month due under the Thoroughbred Mortgage times eleven months from March 2006 through January 2007. Rojas/Jayme paid $12,568 during the term of the Lease (February 1, 2006, through January 31,

[18] The rent payments owed under the Lease were the amount of the monthly payments due by the Monges on the Thoroughbred Mortgage to their mortgage lender. *See* Lease, Ex. P-32, p. 58, ¶4.02. At the inception of the Lease in February 2006, the evidence demonstrated that the Monges' monthly mortgage payment was $5,328 per month. *See* Promissory Note, Ex. P-19, p. 175. This monthly mortgage payment fluctuated under the Promissory Note, and increased for some period of time, due to modification of the loan and fluctuations in the interest rate, as generally mentioned above in the Findings of Fact. However, based on the record, the Court is unable to determine the exact amount of the monthly mortgage payment increase and for what period of time the mortgage payment increased for the lengthy time period at issue (over eight years). Accordingly, in calculating actual damages, the Court will use the $5,328 a month initial mortgage payment amount, which is lower than the actual mortgage payment for some period of time. The Court realizes that using $5,328 a month to calculate actual damages likely benefits Rojas/Jayme, but the Monges did not provide sufficient evidence of the amount that the monthly mortgage payment increased for the lengthy period of time that Rojas/Jayme have remained in possession of the Thoroughbred Property (February 2006 through trial in August 2014).

2007), as set forth in the Findings of Fact above. Accordingly, the Court concludes that the actual damages recoverable by the Monges for the time period of February 1, 2006, through January 31, 2007 (the stated term of the Lease) is $46,040—calculated as $58,608 in payments due under the Lease for such period, less $12,568 in payments actually made by Rojas/Jayme during such period.

268. Both Ms. Rojas and Mr. Jayme continued to live on and remain in possession of the Thoroughbred Property after the term of the Lease expired on January 31, 2007, and through the trial in August 2014, as holdover tenants. The Lease provides that if the tenant remains in possession of the Thoroughbred Property after expiration of the Lease on January 31, 2007, the monthly amount owed would be the monthly rent plus 50% of the monthly rent. *See* Lease, Ex. P-32, p. 58, ¶14.01.

269. Although this may seem harsh at first blush, this is what the Lease provides, is what was agreed to by the parties in writing, and is permitted under the law. The Lease also provides that time is of the essence, and Ms. Rojas and Mr. Jayme have stayed in possession of the Thoroughbred Property for over seven years after the Lease term expired on January 31, 2007, and Rojas/Jayme have not made any payments since April 2008—for more than six years. Thus, the Court concludes that actual damages after the January 31, 2007, expiration of the Lease should be as provided for in the Lease—at the rate of $7,992 per month—calculated as $5,328 a month plus $2,664 a month (50% of $5,328). The Court also finds that this amount ($7,992 a month) is the reasonable rental value of the Thoroughbred Property for the holdover period.

270. After the expiration of the Lease Term on January 31, 2007, Rojas/Jayme made a total of $61,134 in payments on the Thoroughbred Property, as set forth in the Findings of Fact above. The last payment made by Rojas/Jayme on the Thoroughbred Property was on April 29, 2008. *See* Ex. P-31, p. 2, lines 67-68, pp. 84-85. Rojas/Jayme made no payments on the Thoroughbred Property after April 2008.

271. Both Ms. Rojas and Mr. Jayme have remained in possession of the Thoroughbred Property after the Lease Term expired on January 31, 2007, for an additional ninety-one months (February 2007 through the trial month of August 2014). As set forth above, actual damages should be calculated at the rate of $7,992 per month during such holdover time period under the Lease. Accordingly, the Court concludes that the actual damages recoverable by the Monges for the time period of February 2007 through the trial month of August 2014 is the amount of $666,138—calculated as $727,272 in payments due for the ninety-one month time period from February 2007 through August 2014 at $7,992 per month, less the amount of $61,134 in payments made by Rojas/Jayme during such time period.

272. In sum, the Court concludes that the total amount of actual damages recoverable by the Monges against Rojas/Jayme with respect to the Thoroughbred Property and the Lease is the total sum of **$712,178**—calculated as follows: the amount of $46,040 as set forth above for the period of February 1, 2006, through January 31, 2007 (the stated term of the Lease), plus the amount of $666,138 as set forth above for the period of February 2007 through the trial month of August 2014. Actual damages in the amount of $7,992 per month will continue to accrue post-trial from September 2014

until the date of entry of Final Judgment requiring Rojas/Jayme to turnover possession of the Thoroughbred Property to the Monges.

273. The Court recognizes that the Monges have sought other actual and consequential damages (largely unspecified and unliquidated in amount) from Rojas/Jayme in connection with the Thoroughbred Property and related transactions on the claims described below. However, the Court declines to award any additional actual and consequential damages to the Monges relating to the Thoroughbred Property for several reasons. First, the Monges did not meet their burden of proof (as Plaintiffs) with sufficient and believable probative evidence, for the Court to award any additional actual and consequential damages. Second, the Monges did not provide sufficient and probative evidence to determine the amount of any additional actual and consequential damages. Third, the amount of actual damages awarded by the Court above is a significant sum that adequately compensates the Monges for the actual and any consequential damages they have suffered. Fourth, as set forth below, such additional claims relating to the Thoroughbred Property made by the Monges do not have merit.

Attorneys' fees and expenses (Thoroughbred Property)

274. After trial, counsel for the Monges filed an Application for an award of attorneys' fees and expenses ("Fee Application") (dkt# 358).[19] The Fee Application was

[19] Counsel for Rojas/Jayme also filed an Application for attorney's fees and expenses (dkt# 357), to which the Monges filed an objection (dkt# 363). The Court concludes that no award of attorney's fees to Rojas/Jayme should be made as Rojas/Jayme have not prevailed on any of their Counterclaims and there is no legal basis for awarding attorney's fees to Rojas/Jayme.

filed pursuant to order of the Court (dkt# 345, ¶2).[20] Rojas/Jayme filed an Objection to such Fee Application (dkt# 362). The Fee Application by counsel for the Monges seeks an award of attorneys' fees in the total amount of $376,465 and attorney expenses in the total amount of $33,877—for a grand total of $410,342.

275. The Court has carefully considered the Fee Application and the Objection thereto, and concludes that attorneys' fees and expenses should be awarded to the Monges to the extent set forth below.

276. As directed by the Court, the Fee Application filed by the Monges properly allocates the attorneys' fees and expenses incurred by property (i.e., Thoroughbred Property, Country Cove Subdivision, Transmountain Property, Sierra Crest Property) and other matters to the extent possible. The Fee Application is sufficiently detailed and sets forth the amount of time spent, hourly rate charged, description of services, the qualifications of the professionals rendering the services, the identity of the professional rendering the services, the expenses incurred, and includes supporting documentation. The Fee Application also describes the "lodestar method" that federal courts use to award attorneys' fees (the reasonable number of hours expended times a reasonable hourly rate), and the so-called *Johnson* factors adjustment that may be made by a court to the lodestar amount. *See* Fee Application, pp. 15-19, citing *Gagnon v. United Technisource, Inc*., 607 F. 3d 1036, 1043-44 (5th Cir. 2010); *Hopwood v. Texas*, 236

[20] This Court recognizes that under Rule 54(d)(2)(B) of the Federal Rules of Civil Procedure (made applicable to bankruptcy adversary proceedings by Bankruptcy Rule 7054), normally a motion for award of attorneys' fees is to be filed within 14 days after entry of judgment, unless otherwise ordered by the court. Here, this Court ordered otherwise—requiring that an application for attorneys' fees be filed by August 25, 2014, after trial but before the entry of judgment (dkt# 345). This was done because this Court realized that the District Court must enter the judgment in this Adversary Proceeding, and this Court wanted to lessen the burden on the District Court by reviewing the fees and making proposed findings and conclusions on award of attorneys' fees to the District Court.

F.3d 256, 281 (5th Cir. 2000); *Johnson v. Ga. Highway Express, Inc.* 488 F.2d, 714, 717-19 (5th Cir. 1974).

277. The Fee Application reflects that attorneys with the law firm of Michael Nevarez (trial counsel for the Monges in this Adversary Proceeding) expended a total of about 694 hours in rendering services relating to the Thoroughbred Property, at hourly rates ranging from $100 for associate attorneys to $250 an hour for senior attorneys. All told, professionals with the Nevarez law firm (including paralegals and legal assistants with hourly rates ranging from $30 to $50 an hour) expended about 2,538 hours in rendering services relating to the Thoroughbred Property. *See* Fee Application, dkt# 358, p. 15, Ex. 14. Although the number of hours spent is quite significant, the litigation over the Thoroughbred Property was the primary focus of this lengthy Adversary Proceeding (which lasted four years and included a six-day trial), was document and fact-intensive, and required counsel for the Monges to not only pursue affirmative claims for relief but to successfully defeat the defenses raised by Rojas/Jayme with respect to the Thoroughbred Property. And, given the literally hundreds of hours spent by this Court and its staff in this Adversary Proceeding, the number of hours expended by attorneys for the Monges is reasonable.

278. The Court concludes that the Monges should be awarded attorneys' fees in the amount of $216,168 for professional services rendered by the Nevarez law firm relating to the Thoroughbred Property. This amount was calculated by the Court using the lodestar method, taking the hourly rates for such professionals (ranging from $30 to $250 an hour, which the Court finds reasonable) times the number of hours expended by professionals relating to the Thoroughbred Property (2,538 hours, which the Court

finds reasonable). *See* Fee Application, dkt# 358, p. 15, Ex. 14. The Court also concludes, using the lodestar method that professional fees for the small amount of services rendered by the law firm of Sidney Diamond (original trial counsel for the Monges that initially filed the Adversary Proceeding seeking turnover of the Thoroughbred Property), should also be awarded in the amount of $1,777. *See* Fee Application, dkt# 358, p. 15. No adjustment to these lodestar fee awards should be made or is appropriate under the circumstances.

279. With regard to attorneys' expenses, the Fee Application provides sufficient detail of the type and amount of expenses incurred by counsel for the Monges. *See* Fee Application, dkt# 358, Ex. 15. The Fee Application then appropriately allocates expenses attributable to the Thoroughbred Property in the amount of $22,293. *See* Fee Application, dkt# 358, Ex. 16. In this Adversary Proceeding, there were numerous depositions taken, document productions conducted, witnesses subpoenaed, copies of voluminous documents made, and hearings held. The Court concludes that attorneys' expenses in the amount of $22,293 are both reasonable and necessary expenses. Accordingly, the Court awards attorneys' expenses to the Monges in the amount of $22,293 attributable to the Thoroughbred Property.

280. In summary, the Court concludes that the Monges should be awarded the total amount of **$240,238** in reasonable attorneys' fees and expenses against Rojas/Jayme attributable to the Thoroughbred Property. This total amount was calculated as follows: $216,168 for professional services rendered by the Nevarez law firm as set forth above, plus $1,777 for professional services rendered by the Diamond law firm as set forth above, plus $22,293 in attorney expenses as set forth above.

281. There are several independent legal bases for this award of attorneys' fees and expenses in favor of the Monges and against Rojas/Jayme relating to the Thoroughbred Property.

282. First, the Lease of the Thoroughbred Property provides that the prevailing party shall recover reasonable attorneys' fees. *See* Lease, Ex. P-32, p. 61, ¶13.03. Second, the Monges are entitled to recover reasonable attorneys' fees for Rojas/Jayme's violation of the automatic stay with respect to the Thoroughbred Property under the Bankruptcy Code, as set forth above. *See* 11 U.S.C. § 362(k)(1). Third, under New Mexico law—where the Thoroughbred Property is located—the Monges are entitled to recover attorneys' fees since the contract (the Lease) provides for such a recovery by the prevailing party. *See Fortier v. Dona Anna Plaza Partners,* 747 F.2d 1324, 1337-38 (10th Cir. 1984) (applying New Mexico law). And finally, to the extent and in the event that Texas law could be deemed to apply to the Thoroughbred Property, reasonable attorneys' fees are recoverable for a claim based on a written contract (breach of Lease) against Rojas/Jayme. *See* TEX. CIV. PRAC. & REM. CODE § 38.001(8).

283. The Court concludes that an award of the remaining balance of the attorneys' fees and expenses sought by counsel for the Monges in the Fee Application (about $170,104) must be denied for the following reasons.

284. Many of these additional fees and expenses are attributable to claims relating to the Country Cove Subdivision, Transmountain Property, and Sierra Crest Property—claims which the Monges did not prevail on, as set forth below. *See* Fee Application, dkt# 358, Exs. 14, 16.

285. Some of these additional fees and expenses may be attributable to claims made by the Monges against dismissed Defendants Maynez and Villas. *See* Fee Application, dkt# 358, Exs. 14, 16 (also reflecting adjustments). The Monges agreed to (and did) dismiss their claims against Defendants Maynez and Villas with prejudice, and Rojas/Jayme should not have to pay any attorneys' fees and expenses incurred by the Monges with regard to those dismissed defendants.

286. Some of these additional fees are attributable to legal services rendered for the Monges in their main Chapter 11 bankruptcy case. *See* Fee Application, dkt# 358, Exs. 14, 16. But the Court was not convinced that the Monges' bankruptcy filing was caused solely by Rojas/Jayme—the Monges had other financial problems that contributed to their bankruptcy filing.

287. And some of the additional fees were attributable to the Third Amended Complaint which added multiple other defendants that was filed by the Monges and was struck by the Court; Rojas/Jayme should not have to pay those fees and expenses. *See* Fee Application, dkt# 358, Exs. 14, 16.

288. In conclusion, the Court sees no legal basis or factual justification for awarding these additional attorneys' fees and expenses (about $170,104) against Rojas/Jayme. Instead, for the reasons set forth above, the Court concludes that the Monges should be awarded the total amount of **$240,238** in reasonable attorneys' fees and expenses against Rojas/Jayme attributable to the Thoroughbred Property.

Exemplary Damages (Thoroughbred Property)

289. The Monges have also sought an award of exemplary damages against Rojas/Jayme with respect to the Thoroughbred Property and related transactions.

290. Under New Mexico law, a Court may award punitive damages on a breach of contract claim only upon a showing of a culpable mental state. *See Constr. Contracting & Mgmt., Inc. v. McConnell*, 815 P.2d 1161, 1165 (N.M. 1991). A mere breach of contract—even if the breach is intentional—does not provide the basis for punitive damages, unless the breaching party intended to inflict harm or otherwise engage is some sort of malicious, reckless, wanton, or overreaching conduct. *See McConnell*, 815 P.2d at 1165; *Econ. Rentals, Inc. v. Garcia*, 819 P.2d 1306, 1322 (N.M. 1991). Under Texas law, exemplary damages are not recoverable for breach of contract. *See Jim Walters Homes, Inc. v. Reed*, 711 S.W. 2d 617, 618 (Tex. 1986). In general, under Texas statute, exemplary damages may be awarded only if the court finds by clear and convincing evidence that the plaintiff's harm resulted from fraud, malice, or gross negligence. *See generally* TEX. CIV. PRAC. & REM. CODE § 41.003.

291. Here, the Court concludes that the Monges failed to meet their burden of proof, by probative evidence believed by the Court, that Rojas/Jayme breached the Lease of the Thoroughbred Property wantonly, maliciously, or recklessly. The Court also concludes that the Monges failed to convince the Court by clear and convincing evidence that the Monges' harm resulted from the fraud, malice, or gross negligence of Rojas/Jayme, to the extent Texas law applies. Although some of the conduct of Rojas/Jayme with regard to the Thoroughbred Property transactions and Lease was distasteful and inequitable, the Court concludes that the conduct of Rojas/Jayme does not rise to the level required to award exemplary damages.

292. Therefore, the Court concludes that no award of exemplary damages in favor of the Monges and against Rojas/Jayme for the breach of the Lease or any other Thoroughbred Property claims should be granted.

Fraud and Fraud by Non-Disclosure (Thoroughbred Property)

293. In their Second Amended Complaint, the Monges make various fraud-based claims, including fraud and fraud by non-disclosure (dkt# 58, pp. 25-26). The Monges pled these fraud-based claims under Texas law (dkt# 58, 354). Yet the Monges have repeatedly admitted in their pleadings that New Mexico law applies to the Thoroughbred Property, since it is located in the State of New Mexico.[21] And the Court has concluded that New Mexico law applies to the Thoroughbred Property Lease, as set forth below. For this reason, Texas-based fraud claims of the Monges must fail.

294. But even if Texas law were applied, the Court concludes that the Monges failed to adequately prove that Rojas/Jayme committed fraud or fraud by non-disclosure. In Texas, a claim for fraud requires a showing of the following elements: (1) defendant made a representation to the plaintiff; (2) the representation was material; (3) the representation was false; (4) the defendant knew the representation was false when the defendant made it; (5) the defendant made the representation intending the plaintiff to act on it; and (6) the plaintiff relied on the representation, causing injury to the plaintiff. *See, e.g., Aquaplex, Inc. v. Rancho La Valencia, Inc.*, 297 S.W.3d 768, 774 (Tex. 2009); *Formosa Plastics Corp. USA v. Presidio Eng'rs & Contractors, Inc.*, 960 S.W.2d 41, 47 (Tex. 1998).

[21] *See, e.g.*, Monges' Answer (dkt# 233), p. 3; Monges' Proposed Pre-Trial Order (dkt# 282), pp. 6-7; Monges' Proposed Findings (dkt# 258), p. 21; Monges' Post-Trial Brief (dkt# 354), p. 115.

295. The Monges argue that Mr. Jayme falsely represented to the Monges that he owned the Thoroughbred Property at the time of the February 2006 sale to the Monges, when in fact Mr. Jayme knew the Thoroughbred Property had been foreclosed on by Citibank in November 2005. Thus, the Monges argue Mr. Jayme knew he did not own the Thoroughbred Property at the time he sold it to the Monges. However, Mr. Jayme still had the statutory right to redeem the Thoroughbred Property under New Mexico law at the time of the sale. But even assuming Mr. Jayme made a false representation to the Monges, the Monges failed to establish that they relied on Mr. Jayme's representation and that Mr. Jayme's representation caused them injury.

296. At closing and in their Post-Trial Brief, the Monges argue that they would not have purchased the Thoroughbred Property had they known that Mr. Jayme did not hold fee title to the Thoroughbred Property. However, based on Ms. Monge's testimony, the Court is not convinced that the Monges would not have purchased the Thoroughbred Property but for Mr. Jayme's representation that he owned fee title to the Thoroughbred Property. The Monges would have had (and got) a title search performed on the Thoroughbred Property and a title policy insuring the Monges' title from Mr. Jayme. And, Ms. Monge admitted on cross examination that the Monges purchased the Thoroughbred Property because it was a good investment, and they wanted to use the Thoroughbred Property as a rental property. *See* Tr. 8/5/14, p. 67, lines 1-25. Ms. Monge also stated that she entered into the Thoroughbred Property transaction so the Monges would have the opportunity to invest with Rojas/Jayme in the Country Cove Subdivision. *See* Tr. 8/5/14, p. 68, lines 18-25; p. 69, lines 1-19.

297. After weighing the evidence and considering the credibility of the witnesses, the Court concludes that the Monges purchased the Thoroughbred Property not because they relied on Mr. Jayme's representation that he owned fee title to the property at the time, but because the Monges believed the Thoroughbred Property was a good investment and they also desired to join with Rojas/Jayme in the possible development of the Country Cove Subdivision.

298. But even if the Monges did rely on Mr. Jayme's representation that he owned the Thoroughbred Property, the Court concludes that Monges were not damaged by the representation. After the Thoroughbred Property transaction closed—on February 6, 2006—a general warranty deed conveying the Property from Mr. Jayme to the Monges was recorded. *See* Ex. P-2, pp. 5-21; Findings of Fact above. While Mr. Jayme did not own fee title to the Thoroughbred Property at the time he sold it to the Monges, Mr. Jayme still had his statutory right to redeem the Thoroughbred Property from Citibank, and Mr. Jayme in fact redeemed the Property. Mr. Jayme used the funds from the sale to the Monges to statutorily redeem the Thoroughbred Property from Citibank. Citibank then issued a quit claim deed to Mr. Jayme, and after it was recorded, the general warranty deed to the Monges was recorded again on July 28, 2006, to cure any defects in the chain of title. *See* Ex. P-2, pp. 22-38; Findings of Fact above.

299. Significantly, an owner's title policy on the Thoroughbred Property was issued to the Monges insuring their title to the Thoroughbred Property. *See* Ex. P-1, pp. 342-57; Findings of Fact above. Because the Monges ultimately received fee simple title and a title policy on the Thoroughbred Property—precisely what they would have

received had Mr. Jayme owned fee title to the Thoroughbred Property at the time the purchase agreement was signed in November 2005 and the closing occurred on February 3, 2006—the Monges were not damaged by any false representation Mr. Jayme may have made regarding his ownership of the Thoroughbred Property.

300. Similarly, the Monges have also failed to establish that Rojas/Jayme committed fraud by non-disclosure. First, the Monges again base this theory under Texas law, when the Monges have pled (and the Court has determined) that New Mexico law applies. But even if Texas law does apply, the Monges have failed to establish a claim for fraud by non-disclosure under Texas law.

301. In Texas, a claim of fraud by non-disclosure requires a showing of the following elements: (1) defendant concealed or failed to disclose certain facts to the plaintiff; (2) the defendant had a duty to disclose the facts; (3) the facts were material; (4) the defendant knew the plaintiff did not know the facts or could not discover the facts; (5) the defendant intended the plaintiff to rely on the defendant's omissions; and (6) the plaintiff did in fact rely on the defendant's omissions causing injury to the plaintiff. *See, e.g., Bradford v. Vento*, 48 S.W.3d 749, 754-55 (Tex. 2001); *Ins. Co. of N. Am. v. Morris*, 981 S.W.2d 667, 674 (Tex. 1998); *Formosa Plastics Corp.*, 960 S.W.2d at 47.

302. The Monges did not establish fraud by non-disclosure for multiple independent reasons. First, although the Monges argue that Mr. Jayme should have disclosed the fact that he had filed several bankruptcies prior to selling the Thoroughbred Property and that Rojas/Jayme were struggling to make the mortgage payments on the Thoroughbred Property, Mr. Jayme did not have a duty to disclose that information to the Monges. Bankruptcies are of public record, and if the Monges had

any concerns about Mr. Jayme they could have easily checked the public records. Second, as the Court has already discussed, the Monges failed to convince the Court that they relied on Mr. Jayme's representation that he owned fee title to the Thoroughbred Property and that Mr. Jayme's failure to disclose the prior Citibank foreclosure caused the Monges any damages. In sum, the Monges have not provided sufficient proof that convinced the Court that Rojas/Jayme committed fraud by non-disclosure.

303. For any and all of these reasons, the Court concludes that any claim by the Monges for fraud, fraud by non-disclosure, and any other fraud-based claims against Rojas/Jayme with respect to the Thoroughbred Property must be denied.

Texas Deceptive Trade Practices Act (Thoroughbred Property)

304. The Monges also contend that Rojas/Jayme violated the Texas Deceptive Trade Practices Act ("Texas DTPA") by engaging in false, misleading, or deceptive acts that were a producing cause of the Monges' damages. *See* TEX. BUS. & COM. CODE §§ 17.45(4), 17.46(b), 17.50(a).

305. Again, the Monges pled these Texas DTPA claims based on Texas law. Yet the Monges have repeatedly admitted in their pleadings that New Mexico law applies to the Thoroughbred Property, since it is located in the State of New Mexico, as discussed above. And the Court has concluded that New Mexico law applies to the Thoroughbred Property. For this reason, the Texas DTPA claims of the Monges must fail.

306. But even if the Texas DTPA applied, the Court concludes that the Monges have not proven, by a preponderance of credible evidence believed by the Court, a

violation of the Texas DTPA by Rojas/Jayme. To prevail on a claim under the Texas DTPA, in general a plaintiff must establish the following elements: (1) plaintiff is a consumer; (2) defendant may be sued under the DTPA; (3) the defendant committed a wrongful act under § 17.46(b) (the "Laundry List"); and (4) defendant's action was a producing cause of the plaintiff's damages. *See* TEX. BUS. & COM. CODE §§ 17.45, 17.46, 17.50(a).

307. The Monges failed to establish and convince the Court that Rojas/Jayme committed a false, misleading, or deceptive act on which the Monges relied under the DTPA Laundry List. *See* § 17.50(b) (listing specific acts that are considered false, misleading, or deceptive under the DTPA). Mr. Jayme granted the Monges a general warranty deed to the Thoroughbred Property, and the Monges received fee simple title to the Property. Therefore, while there might have been a "cloud" on the title at the time Mr. Jayme initially conveyed the Thoroughbred Property to the Monges, this cloud was cleared and the Monges presently hold clear fee title and an owner's title policy on the Thoroughbred Property. *See* Findings of Fact above. Therefore, the Monges have not been harmed by any potential violation—of which the Court finds does not exist—under the Texas DTPA.

308. For any and all of these reasons, the Court concludes that any claim by the Monges for violation of the Texas DTPA with respect to the Thoroughbred Property must be denied.

Breach of Fiduciary Duty (Thoroughbred Property)

309. The Monges also contend that Rojas/Jayme breached their fiduciary duty to the Monges primarily by falsely stating that they held title to the Thoroughbred Property when Mr. Jayme in fact did not hold title to the Thoroughbred Property.

310. Again, at the outset, the Court notes that the Monges pled this breach of fiduciary duty cause of action based on Texas law. Yet the Monges have repeatedly admitted in their pleadings that New Mexico law applies to the Thoroughbred Property, since it is located in the State of New Mexico. And the Court has concluded that New Mexico law applies to the Thoroughbred Property, as set forth below. For this reason, the Monges' Texas-based breach of fiduciary duty claim must fail.

311. But even if Texas law were to apply, the Monges have not met their burden of convincing the Court that Rojas/Jayme have breached any fiduciary duty. In Texas, the elements for a breach of fiduciary duty claim are the following: (1) the plaintiff and defendant had a fiduciary relationship; (2) the defendant breached that fiduciary duty; and (3) the defendant's breach caused the plaintiff injury or economic harm. *See, e.g., Navigant Consulting, Inc. v. Wilkinson*, 508 F.3d 277, 283 (5th Cir. 2007) (quoting *Jones v. Blume*, 196 S.W.3d 440, 447 (Tex. App.—Dallas 2006, pet. denied)); *Graham Mortg. Corp. v. Hall*, 307 S.W.3d 472, 479 (Tex. App.—Dallas 2010, no pet.).

312. Here, the Court concludes there was insufficient believable evidence to find the existence of a fiduciary relationship between the Monges and Rojas/Jayme with respect to the Thoroughbred Property. The Monges argue that Rojas/Jayme, as a mortgage broker and real estate agent, held superior knowledge regarding the Thoroughbred Property, and the Monges relied on this superior knowledge. However,

"not every relationship involving a high degree of trust and confidence rises to the stature of a fiduciary relationship." *Douglass v. Beakley*, 900 F. Supp. 2d 736, 751 (N.D. Tex. 2012) (quoting *Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 176-77 (Tex. 1997)). The Monges failed to establish to the Court that Rojas/Jayme owed a special fiduciary duty to the Monges.

313. And, even if Rojas/Jayme did owe the Monges a fiduciary duty, the Monges have not established and convinced the Court that they were damaged by breach of any such duty. As the Court has already stated, the Monges received fee simple title and a title policy on the Thoroughbred Property—the Monges have not suffered any additional damages. Thus, the Monges have not established a claim for breach of fiduciary duty.

314. For any and all of these reasons, the Court concludes that the claims by the Monges for breach of fiduciary duty with respect to the Thoroughbred Property must be denied.

Negligence and Gross Negligence (Thoroughbred Property)

315. The Monges assert that Rojas/Jayme acted with negligence and/or gross negligence, primarily because they failed to inform the Monges that the Thoroughbred Property had been foreclosed on by Citibank prior to the sale to the Monges and that Mr. Jayme did not hold fee title to the Property.

316. At the outset, the Court again notes that the Monges pled a cause of action for negligence and gross negligence based on Texas law, yet the Monges have repeatedly admitted in their pleadings that New Mexico law applies to the Thoroughbred Property, since it is located in the State of New Mexico. And the Court has concluded

that New Mexico law applies to the Thoroughbred Property, as set forth below. For this reason, the Monges' Texas-based negligence and gross negligence claims must fail.

317. But even if Texas law were to apply, the Monges have not met their burden of convincing the Court that Rojas/Jayme have committed negligence or gross negligence with respect to the Thoroughbred Property. Under Texas law, a claim for negligence or gross negligence requires a showing of the following elements: (1) defendant owed a legal duty to the plaintiff; (2) defendant breached the duty; and (3) the breach proximately caused the plaintiff's injury. *See, e.g.*, *Nabors Drilling, U.S.A., Inc. v. Escoto*, 288 S.W.3d 401, 404 (Tex. 2009).

318. The Monges failed to convince the Court, by believable evidence, that Rojas/Jayme had a duty to disclose the prior foreclosure by Citibank for many of the same reasons set forth above. And, simply put, the Monges ended up owning fee title to the Thoroughbred Property and obtaining an owners title policy on the Thoroughbred Property. Further, if somehow there was a duty owed by Rojas/Jayme and the duty was breached, any damages based on negligence and gross negligence would be duplicative to the damages already awarded by the Court.

319. For any and all of these reasons, the Court concludes that the claims by the Monges for negligence and gross negligence against Rojas/Jayme with respect to the Thoroughbred Property must be denied.

Breach of Good Faith and Fair Dealing (Thoroughbred Property)

320. In the same vein, the Monges assert that Rojas/Jayme breached their duty of good faith and fair dealing, primarily because Rojas/Jayme failed to inform the

Monges that the Thoroughbred Property had been foreclosed on by Citibank and that Mr. Jayme did not hold title to the property.

321. Again, at the outset, the Court notes that the Monges pled a cause of action based on Texas law, while repeatedly admitting in their pleadings that New Mexico law applies to the Thoroughbred Property. And the Court has concluded that New Mexico law applies to the Thoroughbred Property, as set forth below. For this reason, the Monges' Texas-based breach of duty of good faith and fair dealing claims must fail.

322. But even if Texas law were to apply, the Monges have not met their burden of convincing the Court that Rojas/Jayme have committed a breach of any duty and fair dealing with respect to the Thoroughbred Property. Under Texas law, breach of a fiduciary duty of good faith and fair dealing requires a showing of the following elements: (1) a special relationship exists between the plaintiff and defendant such that the defendant had a duty to act in good faith; and (2) the defendant breached that duty. *See, e.g.*, *Arnold v. Nat'l Cnty. Mut. Fire Ins. Co.*, 725 S.W.2d 165, 167 (Tex. 1987).

323. The Monges failed to convince the Court, by believable evidence, that Rojas/Jayme had a special relationship that gave rise to a duty of good faith and fair dealing and that they breached any such duty if it did exist. Rojas/Jayme had no duty to disclose the prior foreclosure by Citibank for many of the same reasons already set forth above by the Court. And again, the Monges ended up owning fee title to the Thoroughbred Property and obtained an owners title policy on the Thoroughbred Property. Further, if somehow there was a special duty owed by Rojas/Jayme and the

duty was breached, any damages based on breach of the special duty of good faith and fair dealing would be duplicative to the actual damages already awarded by the Court.

324. For any and all of these reasons, the Court concludes that the claims by the Monges for breach of the duty of good faith and fair dealing with respect to the Thoroughbred Property must be denied.

Money Had/Received Based on Non-Payment of Rent (Thoroughbred Property)

325. The Monges next assert that they are entitled to damages based on a claim of "money had and received" for Rojas/Jayme's failure to pay rent on the Thoroughbred Property.

326. Once again, the Court notes that the Monges pled this cause of action based on Texas law, when the Monges have repeatedly admitted in their pleadings that New Mexico law applies to the Thoroughbred Property. And the Court has concluded that New Mexico law applies to the Thoroughbred Property, as set forth below. For this reason, the Monges' Texas-based money had and received claims must fail.

327. But even if Texas law were to apply, the Monges have not met their burden of proof. Under Texas law, a claim for money had and received requires a showing of the following elements: (1) the defendant holds money; and (2) the money belongs to the plaintiff in equity and good conscience. *See, e.g.*, *Staats v. Miller*, 243 S.W.2d 686, 687-88 (Tex. 1951). And in Texas, a claim based on money had and received is an equitable claim. *See Doss v. Homecoming Fin. Network, Inc.*, 210 S.W.3d 706, 711 (Tex. App.—Corpus Christi 2006, pet. denied). Here, the Court concludes that the Monges did not establish that Rojas/Jayme was holding money that belongs to the Monges, and there is a contract governing their relationship (the Lease).

328. More importantly, any claim by the Monges based on money had and received for failure to pay rent on the Thoroughbred Property is merely duplicative. The Court has already concluded that the Monges are entitled to actual damages for rent based on Rojas/Jayme's breach of contract (the Lease) on the Thoroughbred Property. Awarding damages based on a claim of money had and received—a claim that is typically pled in the alternative to another claim—would be duplicative and excessive.

329. For any and all of these reasons, the Court concludes that the claims by the Monges for money had and received with respect to the Thoroughbred Property must be denied.

Unjust Enrichment Based on Non-Payment of Rent (Thoroughbred Property)

330. The Monges also assert a claim for unjust enrichment based on non-payment of rent by Rojas/Jayme under Texas law.

331. At the risk of being repetitive, at the outset the Court notes that the Monges pled this cause of action based on Texas law, yet have admitted that New Mexico law applies to the Thoroughbred Property. And the Court has concluded that New Mexico law applies to the Thoroughbred Property, as set forth below. For this, the Monges' Texas-based unjust enrichment claim must fail.

332. But even if Texas law were applied, the Monges are not entitled to recover on an unjust enrichment claim. "When a defendant has been unjustly enriched by the receipt of benefits in a manner not governed by contract, the law implies a contractual obligation upon the defendant to restore the benefits to the plaintiff." *Burlington N. R. Co. v. Sw. Elec. Power Co.*, 925 S.W.2d 92, 97 (Tex. App.—Texarkana 1996, writ granted). Here, there is a contract—the Lease of the Thoroughbred Property—that

governs and provides for the payment of rent for Rojas/Jayme's use of the Thoroughbred Property. Thus, unjust enrichment just simply does not apply.

333. Just as importantly, any claim based on unjust enrichment for failure to pay rent on the Thoroughbred Property is merely duplicative. The Court has already concluded that the Monges are entitled to actual damages for rent based on the Lease of the Thoroughbred Property. Awarding additional damages based on a claim of unjust enrichment would be duplicative and excessive.

334. For any and all of these reasons, the Court concludes that the claims by the Monges for unjust enrichment must be denied.

Conversion of Rental Proceeds (Thoroughbred Property)

335. The Monges also assert that Rojas/Jayme converted rental proceeds that are due and owing to the Monges under Texas law.

336. Again the Court notes that the Monges pled this cause of action based on Texas law, yet the Monges have repeatedly admitted in their pleadings that New Mexico law applies to the Thoroughbred Property. For this reason, the Monges' Texas-based conversion claim must fail.

337. But even if Texas law were to apply, the Monges claim for conversion must fail. Under Texas law, to establish a claim for conversion the following elements must be established: (1) the plaintiff owned, possessed, or had the right to immediate possession of property; (2) the property was personal property; (3) the defendant wrongfully exercised dominion or control over the property; and (4) the plaintiff suffered injury. *See, e.g.*, *Green Int'l v. Solis*, 951 S.W.2d 384, 391 (Tex. 1997); *Smith v. Maximum Racing, Inc.*, 136 S.W.3d 337, 341 (Tex. App.—Austin 2004, no pet.). Rental

proceeds are subject to conversion under Texas law. *See Hoenig v. Tex. Commerce Bank, N.A.*, 939 S.W.2d 656, 664 (Tex. App.—San Antonio 1996, no writ).

338. There was insufficient evidence to convince the Court that Rojas/Jayme were in possession or control of rental proceeds, in the sense of rents paid to Rojas/Jayme for the Thoroughbred Property that were in the possession or control of Rojas/Jayme.

339. As importantly, a claim based on conversion of rental proceeds on the Thoroughbred Property appears to be merely duplicative. The Court has already concluded that the Monges are entitled to actual damages for rent from Rojas/Jayme based on breach of the Lease of the Thoroughbred Property. Awarding additional damages based on some type of conversion claim would be duplicative and excessive.

340. For any and all of these reasons, the Court concludes that the claims by the Monges for conversion of rental proceeds must be denied.

Conclusion—Monges Claims (Thoroughbred Property)

341. In conclusion, the Court determines that the Monges are the rightful and legal owners of the Thoroughbred Property and that Rojas/Jayme should turnover possession of the Thoroughbred Property to the Monges. The Court also determines that, based on breach of contract and violation of the bankruptcy automatic stay, the Monges should recover total actual damages from Rojas/Jayme in the amount of **$712,178**, plus actual damages in the amount of $7,992 per month accruing post-trial from September 2014 until the date of entry of Final Judgment requiring Rojas/Jayme to turnover possession of the Thoroughbred Property to the Monges. The Court also determines that the Monges should be awarded the total amount of **$240,238** in

reasonable attorneys' fees and expenses against Rojas/Jayme attributable to the Thoroughbred Property.

342. The Monges may have asserted some other claims against Rojas/Jayme with respect to the Thoroughbred Property in their Second Amended Complaint (dkt# 58), which is incredibly difficult for the Court to decipher. But since such any additional affirmative claims were not properly included in the Monges' proposed findings of fact and conclusions of law, any other affirmative claims are deemed waived.[22] In any event, the Court also concludes that any and all other claims by the Monges against Rojas/Jayme relating to the Thoroughbred Property should be denied, except as granted herein.

Rojas/Jayme Counterclaims and Affirmative Defenses (Thoroughbred Property)

Violations of the Texas Property Code (Thoroughbred Property)

343. In their Fourth Amended Counterclaim (dkt# 221), Rojas/Jayme contend that sections 5.061-5.065 of the Texas Property Code—which relate to executory contracts for the conveyance of real property—apply because the Lease/Option of the Thoroughbred Property was a residential lease with an option to purchase. Rojas/Jayme assert that the Monges have violated the Texas Property Code and have asserted counterclaims and affirmative defenses under the Texas Property Code.

344. For the multiple and independent reasons set forth below, the Court concludes that Rojas/Jayme's counterclaims and defenses based on the Texas Property Code lack merit.

[22] *See* Monges' Proposed Findings of Fact and Conclusions of Law (dkt# 283); Orders of the Court (dkt# 246, ¶4; dkt# 274, ¶2) and discussion above by the Court in Procedural Background section.

The Thoroughbred Property is located in the State of New Mexico, so the Texas Property Code does not apply

345. The Texas Property Code has no applicability to the Thoroughbred Property for a simple factual reason—the Thoroughbred Property is real property that is located wholly in the State of New Mexico (not Texas). *See* Findings of Fact above. Indeed, legal research did not reveal any cases (and certainly no cases were cited by Rojas/Jayme) that have applied sections 5.061-5.065 of the Texas Property Code (which relate to executory contracts for the conveyance of real property) to real property located completely outside of the State of Texas.

346. The Court recognizes that the Lease of the Thoroughbred Property provides that the laws of the State of Texas would govern the Lease, to the extent permitted by applicable law. *See* Lease, Ex. P-32, p. 63, ¶16.06. Although parties may generally contract for terms and a choice of law, the rule is different with respect to real property. The location—or situs—of the real property determines which jurisdiction's laws control issues concerning the real property.

347. Indeed, with respect to real property, the "law of the situs rule is so ingrained in the common law" that there are very few reported decisions dealing with a contract that calls for the application of a foreign (non-situs) law. *Santander Bank, Nat'l Ass'n v. Sturgis*, 2013 WL 6046012, at *6 (D. Mass. Nov. 13, 2013). A choice of law provision in a real property contract that applies another jurisdiction's laws to the real property is ineffective. *See, e.g.*, *Sturgis*, 2013 WL 6046012, at *7 (holding when real property was located in Massachusetts, choice of law in the contract that laws of the state where the contracting party was located (Pennsylvania) is ineffective). "It is clear that as a general matter, real property questions, including those concerning real estate

foreclosures, are governed by the law of the jurisdiction within whose territory the property is located." *Sturgis*, 2013 WL 6046012, at *7 (RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 228, 229, 254 (1971)).

348. It is well established that "the law of the situs is generally applied in determining issues involving real property." *See B A Props., Inc. v. Aetna Cas. & Surety Co.*, 273 F. Supp. 2d 673, 680 (D. V.I. 2003) (citing RESTATEMENT (SECOND) CONFLICTS OF LAWS §§ 222-243). This is because "each state and territory has a strong expectation that its law will be applied to questions involving interests in real property lying within its jurisdictional boundaries. A choice-of-law rule that would apply another jurisdiction's law to the effect of a change in an interest in real property would contradict established norms." *See B A Props.,* 273 F. Supp. 2d at 680; *see also In re Estate of Janney*, 446 A.2d 1265, 1266 (Pa. 1982) (explaining "the situs state of realty is generally entitled to the severest deference"). This makes sense, because otherwise parties could simply contract for a state's more favorable or different laws—despite the location of the real property in the state.

349. Here, the Thoroughbred Property Lease provides that "laws of the State of Texas shall govern the interpretation, validity, performance, and enforcement of the Lease." *See* Lease, Ex. P-32, p. 63, ¶16.06. Yet as this Court has already found, the Thoroughbred Property is real property located wholly in the State of New Mexico; none of the real property is in the State of Texas. And all of the relevant conveyance documents—such as court orders, warranty deeds, mortgages, and title policies—demonstrate that the Thoroughbred Property is located wholly in the State of New Mexico (not Texas). *See* Findings of Fact above. And the Purchase Agreement

executed by the parties whereby the Monges purchased the Thoroughbred Property states that New Mexico (not Texas) law governs. *See* Ex. P-1, p. 365.

350. As a result, the Court concludes that the choice of law provision in the Lease of the Thoroughbred Property (which is real property located wholly in the State of New Mexico), which purports to apply the laws of the State of Texas, is not controlling. Because the Thoroughbred Property is wholly located in the State of New Mexico, the laws of the State of New Mexico (the situs of the real property) control—not the laws of the State of Texas. Accordingly, the Texas Property Code (a Texas law) is inapplicable to the Thoroughbred Property since the Thoroughbred Property is real property located in the State of New Mexico.

351. Further, the Texas Property Code is also inapplicable because it is a Texas statute designed to govern real property located in the State of Texas—not real property located in another state (like New Mexico). *See* TEX. PROP. CODE § 1.001 (Purpose of Code). Indeed, the very title of the statute is the "***Texas Property***" Code.

352. For these reasons alone, the Court concludes that the counterclaims and defenses of Rojas/Jayme based on the Texas Property Code with respect to the Lease/Option of the Thoroughbred Property have no merit, and must be denied.

Alternatively, the Texas Property Code (even if it does apply) has not been violated

353. Even if the Texas Property Code did apply to the Thoroughbred Property Lease/Option—which the Court has already concluded it does not—the Texas Property Code has not been violated in this particular case.

354. Section 5.062(a) of the Texas Property Code provides that Subchapter D of Chapter 5 applies to an "executory contract" for the conveyance of real property that

is used as the purchaser's residence. A lot that is one acre or less is presumed to be a residential property. *See* TEX. PROP. CODE § 5.062(a)(1). Here there is no dispute that the Thoroughbred Property was used, and continues to be used, as Rojas/Jayme's residence. Additionally, the Texas Property Code defines an "executory contract" to include an option to purchase real property that is executed concurrently with a residential lease agreement. *See* TEX. PROP. CODE § 5.062(a)(2). In this case, Mr. Monge and Ms. Rojas executed the Lease and the Option to purchase the Thoroughbred Property ("Lease/Option") at the same time on February 3, 2006. *See* Lease/Option, Ex. P-32, pp. 57-65.

355. But, when a contract is for three years or less or is a contract for an option to purchase executed concurrently with a residential lease—only limited sections of Subchapter D of the Texas Property Code apply. *See* TEX. PROP. CODE § 5.062(e), (f). Here, the Lease/Option for the Thoroughbred Property was for only one year (February 1, 2006, through January 31, 2007), and both the Lease and Option were executed at the same time. *See* Lease/Option, Ex. P-32, p. 58, ¶3.01, p. 64, ¶(a). As a result, only limited sections of the Texas Property Code would possibly apply to the Thoroughbred Property Lease/Option, as follows: sections 5.063-5.065; section 5.073 (except for 5.073(a)(2)); and sections 5.083 and 5.085. *See* TEX. PROP. CODE §5.062(e), (f)(1)-(3). Thus, the Court will only review the sections listed in section 5.062(f)(1)-(3) in its analysis.

356. Section 5.063 of the Texas Property Code provides that in the event of a default by the potential purchaser (here, Rojas/Jayme), the potential seller (the Monges)—if the potential seller desires to enforce its right of rescission or forfeiture and

acceleration—must send a specific written notice of default (including bold capitalized language) by certified mail to the potential purchaser. *See* TEX. PROP. CODE §§ 5.063, 5.064. Once the potential seller has sent the written notice required under section 5.063, the potential purchaser then has thirty days with which to cure the default. *See* TEX. PROP. CODE § 5.065.

357. Here, the potential seller (the Monges) never sent a written notice of default to the potential purchaser (Rojas/Jayme) that complied with the requirements of section 5.063 of the Texas Property Code (which notice is to include bold capitalized language). But by the time the Monges first sent a notice of default to Rojas/Jayme—November 15, 2007—the Lease/Option had *already expired* by its terms months before on January 31, 2007. *See* Ex. P-34, p. 285; Ex. P-32, p. 58, ¶3.01, p. 64, ¶(a), and Findings of Fact above. Thus, on the dates that notices of default were sent by the Monges, the Lease/Option had expired and was no longer an "executory" contract that would be governed by the Texas Property Code requirements. *See* TEX. PROP. CODE § 5.061(a) (subchapter only applies to an "executory contract"); § 5.064 (requiring the 30-day opportunity to cure a default after statutory notice only if there is a default under an "executory contract for conveyance of real property"). And the Monges were not trying to enforce a remedy of rescission or forfeiture and acceleration under section 5.064 of the Texas Property Code by sending notices of default; the Monges did not need to, as the Lease/Option had already expired by its terms many months before. Accordingly, the Court concludes that there has been no violation of sections 5.063, 5.064, or 5.065 of the Texas Property Code (even if the statute applied) by the Monges.

358. Further, as a practical matter, Rojas/Jayme did not have the financial ability to cure the substantial monetary default under the Lease and exercise the Option to purchase—even if they were (or are) entitled to and received the Texas Property Code statutory notice. The evidence at trial demonstrated repeated bounced checks for Lease payments and no financial ability to exercise the Option and pay the purchase price by Rojas/Jayme. *See* Findings of Fact above.

359. In several pleadings filed in this Adversary Proceeding, Rojas/Jayme assert that they are "ready, willing and able to comply" with the terms of the Lease/Option. *See, e.g.*, Rojas/Jayme Fourth Amended Counterclaim and Original Counterclaim (dkt# 221, ¶¶ 5, 9; dkt# 10, ¶¶ 1, 5).[23] Yet nothing could be further from the truth. No evidence was provided at trial demonstrating that Rojas/Jayme had the financial ability to cure the Lease payments and pay the substantial Option purchase price for the Thoroughbred Property. Instead, the evidence demonstrated that Rojas/Jayme have been living for free on the Thoroughbred Property for more than six years, having made their last payment back in April 2008. Giving Rojas/Jayme an additional thirty days under the Texas Property Code to cure the default in the Lease/Option at this point—when they have already had over six years to do so—would be a mere exercise in futility.

360. Moving back to the other provisions of Texas Property Code, section 5.073 provides certain contract terms that may not be included in an executory

[23] Starting with their first Answer and Counterclaim filed in July 2010 and carrying through their final Amended Counterclaim, Rojas/Jayme also request an "abatement" of this Adversary Proceeding for 30 days so that Rojas/Jayme can cure any monetary default (dkt# 10, ¶7; dkt# 221, ¶7). No abatement is warranted. This Adversary Proceeding has been pending for four years, and Rojas/Jayme have had those four years to cure any default, and have not made any payment on the Thoroughbred Property since April 2008 (more than 6 years ago).

contract—but the Lease/Option contains none of those prohibited terms and Rojas/Jayme have not pled that the Lease/Option contains any prohibited terms. And section 5.083 provides that a purchaser may cancel and rescind an executory contract if the seller improperly platted or subdivided the property—there has been no suggestion or mention of that by Rojas/Jayme with respect to the Lease/Option on the Thoroughbred Property.

361. Finally, section 5.085 of the Texas Property Code basically provides that a potential seller (here, the Monges) must own and maintain the property to be sold (the Thoroughbred Property) free and clear of liens and encumbrances. *See* TEX. PROP. CODE § 5.085(a)(b). Here, the Thoroughbred Property is encumbered by the Thoroughbred Mortgage—the loan originally made by America's Wholesale Lender to the Monges that enabled the Monges to purchase the Thoroughbred Property from Mr. Jayme. *See* Findings of Fact above.

362. However, section 5.085 of the Texas Property Code does not apply if the lien or encumbrance is "placed on the property because of the conduct of the purchaser." *See* TEX. PROP. CODE § 5.085(b)(1). Here, the potential purchaser of the Thoroughbred Property under the Option is technically Ms. Rojas. And Ms. Rojas was the mortgage broker that obtained the loan for the Monges from America's Wholesale Lender secured by the Thoroughbred Mortgage, as set forth above in the Findings of Fact. Accordingly, the conduct of the potential purchaser (Ms. Rojas) caused the Thoroughbred Mortgage to be placed on the Thoroughbred Property. As a result, the Court concludes that there has been no violation of section 5.085 of the Texas Property Code by the Monges.

363. Further, it would be the height of absurdity to find that the Monges had violated section 5.085 of the Texas Property Code under the facts and circumstances of this particular case. The Monges bought the Thoroughbred Property from Mr. Jayme, who was about to lose the property forever to Citibank. Mr. Jayme and Ms. Rojas arranged the financing for the Monges to purchase the Thoroughbred Property (through America's Wholesale Lender), and Rojas/Jayme immediately used most of the proceeds of that financing to pay off Citibank (Mr. Jayme's lender). Rojas/Jayme knew about the America's Wholesale Lender loan and the Thoroughbred Mortgage that secured it, as Ms. Rojas arranged it and it was an integral part of the transaction of which Rojas/Jayme participated. Rojas/Jayme cannot come back now and claim a technical violation of section 5.085 of the Texas Property Code because the Thoroughbred Mortgage was on the property.

364. In addition, the Texas Property Code has not been violated as the Lease/Option is no longer an executory contract—and ceased being one back on January 31, 2007, when it expired by its terms. The Lease/Option that was executed by the parties was for a period of one year. The Option expired by its terms on January 31, 2007—years prior to the initiation of this Adversary Proceeding. *See* Ex. P-32, pp. 64-65. The Option is no longer effective, and does not remain an executory contract. And prior to the expiration of the Option, Rojas/Jayme did not exercise the Option to purchase the Thoroughbred Property. Because the Option is expired and no longer in effect, the Texas Property Code is inapplicable to the Option. Indeed, subchapter D of Chapter 5 of the Texas Property Code only applies to "*executory*" contracts for the conveyance of real property. *See* TEX. PROP. CODE § 5.062(a), (b). It is axiomatic that a

contract that has expired by its terms can no longer be considered "executory." Therefore, the Texas Property Code does not apply to the Lease/Option, as it has already expired by its terms.

365. Finally, the Texas Property Code does not apply to the Lease/Option because it is not (and never has been) an "executory contract" within the scope of the Texas Property Code. As at least one Texas court has found, a contract that provides for payment of the purchase price in full on a date certain, is not an "executory contract" under the Texas Property Code. *See Shook v. Walden*, 368 S.W.3d 604, 624-627 (Tex. App.—Austin 2012, pet. denied). Here, the Option provided just that—payment of the entire purchase price for the Thoroughbred Property (the outstanding amount of the Thoroughbred Mortgage) in full by a date certain (January 31, 2007) by Rojas/Jayme. *See* Option, Ex. P-32, p. 64, ¶(c). The Option did not contemplate the payment of the purchase price over an extended period of time (like an executory contract for deed), and thus never has been an "executory contract" under the Texas Property Code.

366. In conclusion, for any and all of these multiple and independent reasons—even if the Texas Property Code applied to the Lease/Option of the Thoroughbred Property—the Monges have not violated the Texas Property Code. Accordingly, the Court concludes that all counterclaims, defenses, and relief asserted and sought by Rojas/Jayme based on the Texas Property Code must be denied.

Deed is a Mortgage (Thoroughbred Property)

367. In their Fourth Amended Counterclaim, Rojas/Jayme assert that they did not intend the transfer of the Thoroughbred Property to the Monges as a "sale." Rather, Rojas/Jayme argue that they intended the deed conveying the Thoroughbred Property

to the Monges to serve as a "mortgage" to secure Rojas/Jayme's payment of the Thoroughbred Mortgage. *See* dkt# 221, p. 5. In other words, Rojas/Jayme argue that the Thoroughbred Property deed to the Monges should be construed as a mortgage. The Court rejects these claims by Rojas/Jayme for multiple and independent reasons.

368. Rojas/Jayme rely heavily on a Texas Supreme Court case for their "deed is a mortgage" theory. *See Johnson v. Cherry*, 726 S.W.2d 4, 6 (Tex. 1987); Trial Brief, dkt# 316, pp. 11-12. Under Texas case law, where an instrument appears on its face to be a deed for the sale of property, the instrument may be construed as a mortgage in certain circumstances. Courts construe a deed as a mortgage as a type of equitable remedy when parties attempt to contract around the homestead protections provided by the Texas Constitution. *See, e.g.*, *Mansfield v. Roy*, 1999 WL 1015543, at *3 (Tex. App.—Texarkana 1999).

369. The question of whether a written instrument is a deed or a mortgage is a question of fact. *See Johnson*, 726 S.W.2d at 6 (citing *Wilbanks v. Wilbanks*, 160 S.W.2d 607, 608 (Tex. 1960)). To determine the true nature of the written instrument, the Court should determine the intent of the parties, which may be ascertained by admitting parol evidence. *See Johnson*, 726 S.W.2d at 6. Stated differently, the Court must determine whether the parties intended the transaction to be a sale of real property, or a loan for real property. *See Johnson*, 726 S.W.2d at 6; *In re Cadengo*, 370 B.R. 681, 696 (Bankr. S.D. Tex. 2007). If a court finds that the real purpose of the transaction was to secure the payment of a debt, "and that finding is supported by probative evidence, the law will impute the existence of a debt." *Johnson*, 726 S.W.2d at 6.

370. The Texas Supreme Court case of *Johnson v. Cherry* is one of the leading cases on this issue. In *Johnson*, the owner of real property—property that was the landowner's homestead—sued to cancel a deed given by him to a creditor. The owner argued that the deed was not actually a deed, but was security for a "loan"; thus, the "deed" was in fact a mortgage. *See Johnson*, 726 S.W.2d at 5. To support his argument, the landowner presented the following types of evidence: (1) three documents executed at the time of the transaction, including a general warranty deed, a one-year lease agreement on the land from the creditor to the landowner, and an option for the landowner to repurchase the land; (2) landowner's testimony that he understood the transaction to be a loan even though it was written as a sale; (3) the repurchase price for the land was exactly 10% more than the original purchase price, the land was worth twice as much as the alleged "sale" price, and the lease price equaled exactly 18% interest on the alleged purchase price; (4) the landowner was one week away from his original lender foreclosing on the property; and (5) the landowner told a real estate agent he was not interested in selling his property. *See Johnson*, 726 S.W.2d at 6-7.

371. Relying on this parol evidence, the Texas Supreme Court ultimately concluded that the evidence supported the jury's finding that the deed was disguised as a mortgage, despite the instrument's language that apparently conveyed the property in fee simple. *See Johnson*, 726 S.W.2d at 7. Consequently, the court imputed the debt owed by the landowner to the creditor and held that the mortgage on the property was void because it violated the homestead protections of the Texas Constitution. *See*

Johnson, 726 S.W.2d at 6-7 (citing TEX. CONST. art. XVI, § 50) ("A mortgage of a homestead not expressly permitted by the [Texas] Constitution is invalid.").[24]

372. Relying on the rationale established in *Johnson*, some lower courts have construed deeds as mortgages where the evidence established that the intent of the parties was to create a mortgage. *See, e.g.*, *RBS Mortgage, LLC v. Gonzalez*, 2013 WL 749730, at *3-5 (Tex. App.—San Antonio 2013); *Alvarado v. Alvarado*, 2002 WL 1072067, at *5 (Tex. App.—Corpus Christi 2002).

373. Here, the Court concludes that the Texas theory argued by Rojas/Jayme that the deed constitutes a mortgage ("Texas Mortgage Theory") is not applicable to the Thoroughbred Property for multiple and independent reasons.

374. First, the Thoroughbred Property is wholly located in the State of New Mexico—not Texas—and thus the Texas Mortgage Theory has no applicability to the Thoroughbred Property. *See* discussion above regarding New Mexico law (not Texas law) applying to the Thoroughbred Property.

375. Second, the deed to the Monges that Rojas/Jayme want reformed to a mortgage under their Texas Mortgage Theory—was executed with the New Mexico statutory form of deed. *See* Ex. P-2, p. 5. And the Purchase Agreement executed by the parties whereby the Monges purchased the Thoroughbred Property states that New Mexico (not Texas) law governs. *See* Ex. P-1, p. 365. Thus Texas law (and the Texas Mortgage Theory) does not apply to the Thoroughbred Property deed and purchase.

[24] Article XVI, section 50(a) of the Texas Constitution provides that homesteads are protected from a forced sale for the payment of a debt except in certain circumstances, including: (1) purchase money; (2) ad valorem taxes; (3) an owelty partition order or agreement; (4) a refinanced lien against the homestead; (5) a lien used for construction improvements; and (6) a credit extension. *See* TEX. CONST. art. XVI, § 50(a); *Chase Manhattan Mortgage Corp. v. Cook*, 141 S.W.3d 709, 713 (Tex. App.—Eastland 2004).

376. Third, the Texas Mortgage Theory is an equitable remedy that Texas courts apply to transactions where the parties have attempted to contract around the Texas homestead protections set forth in the Texas Constitution. *See, e.g.*, *Johnson v. Cherry*, 726 S.W.2d 4, 6-7 (Tex. 1987). But the Thoroughbred Property is *not* a Texas homestead and cannot be—it is located in the State of New Mexico. Therefore, the Texas Mortgage Theory does not apply to the Thoroughbred Property because it is located in New Mexico and is not afforded the Texas homestead protections of the Texas Constitution.

377. Moreover, New Mexico apparently does not recognize a "deed is a mortgage" theory. Indeed, the Court could not locate, and Rojas/Jayme certainly did not cite, any New Mexico law to support their "deed is a mortgage" theory.

378. Fourth, Rojas/Jayme did not prove, by sufficient probative evidence believed by the Court, that they intended the Thoroughbred Property transaction to be a loan with mortgage rather than a sale under the Texas Mortgage Theory. Mr. Jayme did testify that he never wanted to sell the Thoroughbred Property, and Ms. Monge did testify that she did not want the Thoroughbred Property. However, both Mr. Jayme and Ms. Monge testified that they entered into the transaction so that Rojas/Jayme could attempt to get about $300,000 in equity out of the Thoroughbred Property. Toward that end, the Monges purchased the Thoroughbred Property from Rojas/Jayme for the supposed market value of the Property—$775,000. No probative evidence was provided to the Court that the Thoroughbred Property was worth more than the $775,000 purchase price at the time. So, this is unlike the transaction in the *Johnson* case, where the property was worth almost twice as much as the sale price. *See*

Johnson, 276 S.W.2d at 6. Additionally, unlike the *Johnson* case, there was no evidence that the Monges charged interest or a premium on the option and the rent payments under the Lease/Option, which again evidences that the transaction was intended as a sale through deed and not a loan with a mortgage. *See* Tr. 8/5/14, pp. 68-69; *Johnson*, 276 S.W.2d at 6-7.

379. Fifth, Texas courts that apply the Texas Mortgage Theory have done so when the original landowner (in our case, Rojas/Jayme) transfers the deed to the property to a party (in our case, the Monges) in return for a loan from the party (the Monges). *See, e.g.*, *Johnson*, 726 S.W.2d at 5 (where the landowner transferred the property by deed to a creditor in exchange for $120,000 cash and an assumption of a $38,000 note on the property). In our case, the evidence does not show that the Monges acted as a lender. The Monges did not finance the transaction—a third party lender (America's Wholesale Lender) financed the transaction and took a mortgage on the Thoroughbred Property executed by the Monges. In other words, the Thoroughbred transaction does not look like a "loan" from the Monges to Rojas/Jayme, because the Monges did not loan Rojas/Jayme any money. Instead, the Monges borrowed money from a third party secured by a mortgage on the Thoroughbred Property—which also makes the transaction more like a sale of the property.[25]

380. Finally, the Texas Mortgage Theory is an "equitable remedy" that Texas courts have imposed when a transaction would otherwise violate the Texas Constitution. *See, e.g.*, *Johnson*, 276 S.W.2d at 8 (explaining that equity converts a

[25] Indeed, if the Court were to reform the deed to the Monges into a mortgage as requested by Rojas/Jayme, what would that do to the real third party lender (now Bank of America) that holds a real mortgage on the Thoroughbred Property? This is just another reason that the "deed is a mortgage" theory does not and cannot apply to the facts of this case.

deed to a mortgage). However, Rojas/Jayme do not come to this Court with clean hands sufficient to invoke an equitable remedy with respect to the Thoroughbred Property. Put simply, in Texas, the clean hands doctrine requires that "one who seeks equity, does equity." *In re Francis*, 186 S.W.3d 534, 551 (Tex. 2006). Where the party requesting equitable relief "engaged in unlawful or inequitable conduct with regard to the issue in dispute," equitable relief is not warranted. *Francis*, 186 S.W.3d at 551.

381. Here, Rojas/Jayme have engaged in inequitable conduct with regard to the Thoroughbred Property. Rojas/Jayme defaulted under the Lease within the very first month and failed to make monthly payments on the Lease. This caused the Thoroughbred Mortgage to go into default and the Thoroughbred Property owned by the Monges to go into foreclosure proceedings, which partly contributed to the bankruptcy filing by the Monges. Rojas/Jayme then violated the automatic stay of the Bankruptcy Code. And then Rojas/Jayme stayed on the Thoroughbred Property for years after the expiration of the Lease Term, and have been living on the Thoroughbred Property for over six years for free and without making any payments. Rojas/Jayme's inequitable conduct prevents them from obtaining an equitable remedy such as reforming the deed into a mortgage under the Texas Mortgage Theory.

382. For any and all of these reasons, the Court concludes that the "deed is a mortgage" claims and defense made by Rojas/Jayme do not have merit, and must be denied.

Resulting or Constructive Trust (Thoroughbred Property)

383. Next, Rojas/Jayme claim that the Monges hold title to the Thoroughbred Property in a "resulting" or "constructive trust" for the benefit of Rojas/Jayme.

Rojas/Jayme point to the fact that they continue to occupy the Thoroughbred Property and that they made payments on the Thoroughbred Mortgage, as support for this argument that the Monges hold title to the Thoroughbred Property in trust for their benefit. The Court rejects these claims by Rojas/Jayme for multiple and independent reasons.

384. Rojas/Jayme did not meet their burden of proof with respect to the imposition of a "resulting trust" on the Thoroughbred Property. A resulting trust is an equitable remedy primarily involving consideration. *See Troxel v. Bishop*, 201 S.W.3d 290, 298 (Tex. App.—Dallas 2006, no pet.). When title to a property is conveyed to one person but the purchase price of the property is paid by another, a resulting trust can arise by operation of law. *See Troxel*, 201 S.W.3d at 298. However, the law is generally "suspicious of resulting trusts, and consequently a heavy burden of proof is placed on the party attempting to establish the existence" of a resulting trust. *See Troxel*, 201 S.W.3d at 298 (supporting citations omitted).

385. The Court concludes that a "resulting trust" theory does not apply in this case for multiple and independent reasons.

386. First, Rojas/Jayme did not pay the purchase price (the consideration) for the purchase of the Thoroughbred Property. The Monges obtained a substantial mortgage loan from America's Wholesale Lender—which was taken out in the Monges' name and personally obligated the Monges (not Rojas/Jayme)—on the Thoroughbred Property to finance the purchase of the Property. While Rojas/Jayme did arrange for a loan of about $78,000 by Mr. Abraham (the Abraham Loan) to fund the down payment for the purchase of the Thoroughbred Property on behalf of the Monges, this loan was

repaid to Mr. Abraham at closing.[26] Thus, Rojas/Jayme did not contribute much (if any) funds toward the Monges' initial purchase of the Thoroughbred Property.

387. The Court recognizes that under the Lease, Rojas/Jayme were to make rent payments in the amount of the Monges monthly mortgage payment on the Thoroughbred Property, but Rojas/Jayme made very few of the payments as set forth in the above Findings of Fact. And the Court recognizes that under the Option, Rojas/Jayme could purchase the Thoroughbred Property back from the Monges by paying the outstanding balance of the mortgage, but Rojas/Jayme did not exercise the Option, did not pay the outstanding balance of the mortgage, and did not demonstrate any financial ability to do so. Thus, the "consideration" paid by Rojas/Jayme necessary to impose a "resulting trust" is woefully lacking, and Rojas/Jayme did not meet their heavy burden of proof to establish a resulting trust.

388. Second, Rojas/Jayme did not meet their heavy burden of proof and did not establish that the Monges (as grantees) intended to hold title to the Thoroughbred Property for the benefit of Rojas/Jayme as the true owner, another requirement to impose a resulting trust. *See Troxel*, 201 S.W.3d at 298 (supporting citation omitted).

389. Third, Rojas/Jayme rely upon Texas law to impose their resulting trust remedy. For the reasons already set forth by the Court above, Texas law does not apply to the Thoroughbred Property, as it is wholly located in the State of New Mexico.

390. Finally, imposition of a resulting trust is an "equitable remedy." *See Troxel*, 201 S.W.3d at 298 (supporting citation omitted). For the reasons already set forth by

[26] This $78,000 is mentioned by Rojas/Jayme in their Trial Brief as a "down payment," and Rojas/Jayme state that Plaintiffs (the Monges) had no obligation to repay this amount to Defendants (Rojas/Jayme). *See* Trial Brief, dkt# 316, p. 3.

the Court above, Rojas/Jayme do not have clean hands and cannot invoke an equitable remedy like a "resulting trust" with respect to the Thoroughbred Property.

391. The Court next moves to the "constructive trust" claim made by Rojas/Jayme with regard to the Thoroughbred Property. Under Texas law, a constructive trust is also a type of equitable remedy, designed to prevent unjust enrichment. *See, e.g., Hubbard v. Shankle*, 138 S.W.3d 474, 485 (Tex. App.—Fort Worth 2004, pet. denied). To establish that a constructive trust exists, the proponent (here Rojas/Jayme) must prove the following elements (1) breach of a special trust, fiduciary relationship, or actual fraud; (2) unjust enrichment of the wrongdoer; and (3) tracing to an identifiable res. *See Hubbard*, 138 S.W.3d at 485 (citing *Mowbray v. Avery*, 76 S.W.3d 663, 681 n.27 (Tex. App.—Corpus Christi 2002, pet. denied)). The proponent of a constructive trust (here Rojas/Jayme) must "strictly" prove the elements necessary to establish a constructive trust, and whether a constructive trust should be imposed is within the discretion of the trial court. *See Hubbard*, 138 S.W.3d at 485 (supporting citations omitted).

392. The Court concludes for multiple and independent reasons that a "constructive trust" in favor of Rojas/Jayme cannot be imposed on the Thoroughbred Property.

393. First, Rojas/Jayme did not present sufficient evidence establishing that the Monges owed or breached a special trust or fiduciary relationship to Rojas/Jayme, nor did they established that the Monges committed actual fraud. These are essential elements of a constructive trust claim, which Rojas/Jayme did not strictly prove.

394. Second, the evidence did not establish that the Monges have been unjustly enriched; in fact, the opposite is true. The Monges made more payments on the Thoroughbred Property and Mortgage than Rojas/Jayme made. *See* Findings of Fact above. And the Monges are obligated on a loan obtained to finance their purchase of the Thoroughbred Property—which has an outstanding balance of some $1 million. *See* Findings of Fact above. Finally, Rojas/Jayme (not the Monges) have been in possession and control of the Thoroughbred Property for years, but Rojas/Jayme have not made any payments to the Monges on the property in over six years. Rojas/Jayme did not prove that the Monges have been unjustly enriched, another necessary element for imposition of a constructive trust.

395. Third, Rojas/Jayme rely upon Texas law to impose their constructive trust remedy. For the reasons already set forth by the Court above, Texas law does not apply to the Thoroughbred Property, as it is wholly located in the State of New Mexico.

396. Finally, imposition of a constructive trust is an "equitable remedy" that may be imposed in the discretion of the trial court. *See Hubbard*, 138 S.W.3d at 485 (supporting citations omitted). For the reasons already set forth by the Court above, Rojas/Jayme do not have clean hands and cannot invoke an equitable remedy like a "constructive trust" with respect to the Thoroughbred Property. And the Court in its discretion will not impose a "constructive trust" on the Thoroughbred Property based on the facts and circumstances of this case, which include a third party lender that has a mortgage on the Thoroughbred Property and inequitable conduct by Rojas/Jayme.

397. For any and all of these reasons, the Court concludes that the claims made by Rojas/Jayme for imposition of a "resulting trust" and "constructive trust" on the Thoroughbred Property must be denied.

Right to Possession—Section 365(i) of the Bankruptcy Code
(Thoroughbred Property)

398. As a defense, Rojas/Jayme have attempted to invoke the provisions of section 365(i) of the Bankruptcy Code, arguing that under this statute they have the right to remain in possession of the Thoroughbred Property. In short, the Court concludes that section 365(i) has no applicability to the Thoroughbred Property.

399. In general, section 365(i) of the Bankruptcy Code provides that if a debtor in bankruptcy (here the Monges) rejects an "executory contract" for the sale of real property, the purchaser of the property (here Rojas/Jayme) may elect to remain in possession of such real property or treat the contract as terminated. *See* 11 U.S.C. § 365(i)(1). If a purchaser (here Rojas/Jayme) elects to remain in possession of the real property, the purchaser must continue to make all payments due under such contract. *See* 11 U.S.C. § 365(i)(2)(A).

400. Here, the Option of Rojas/Jayme to purchase the Thoroughbred Property is not an "executory contract" under section 365 of the Bankruptcy Code for the simple reason that the Option had expired long before the Monges filed bankruptcy.

401. The Option of Rojas/Jayme to purchase the Thoroughbred Property expired by its terms on January 31, 2007, and Rojas/Jayme did not exercise such Option before it expired. *See* Option, Ex. P-32, p. 64, ¶(a); Findings of Fact above. The Monges filed bankruptcy in April 2009—well after the Option expired by its terms.

402. Thus, the Court concludes that the Option was not an "executory contract" to purchase real property at the time the Monges filed bankruptcy—rendering section 365(i) of the Bankruptcy Code inapplicable. *See, e.g.*, *In re Murexco Petroleum, Inc.,* 15 F.3d 60, 63 (5th Cir. 1994) (explaining that whether a contract is still "executory" and governed by the executory contract rules of section 365 is determined as of the date of the debtor's filing of its bankruptcy petition); *In re e2 Commc'ns, Inc.,* 354 B.R. 368, 402 (Bankr. N.D. Tex. 2006) (supporting citations omitted) (noting that an executory contract under section 365 is a contract where performance remains due on both sides, and whether a contract is still executory is determined as of the date of the debtor's bankruptcy filing); *In re CG Realty Invs. Inc.,* 79 B.R. 249, 253 (Bankr. E.D. Pa. 1987) (holding that when an option to purchase real property had expired by its terms, the option could not be enforced and purchaser had no right to remain in possession of property under section 365(i) of Bankruptcy Code).[27]

403. Even if somehow the Option to purchase the Thoroughbred Property could be considered an "executory contract" under section 365(i), Rojas/Jayme cannot remain in possession of the Thoroughbred Property anyway. This is because Rojas/Jayme (purchaser) have failed to make all the payments due under the Option and accompanying Lease. *See* 11 U.S.C. § 365(i)(2)(A) ("if such purchaser remains in possession . . . such purchaser shall continue to make all payments due under such contract"). Rojas/Jayme have not made the purchase price payment due under the Option, have not made any payments on the Lease since April 2008 (for more than six

[27] *See also generally, In re Escarpment Entities L.P.*, 423 Fed. Appx. 462, 465-66 (5th Cir. 2011) (unpublished) (holding that failure to timely exercise the right to purchase real property within the time period provided by contract renders the contract unenforceable under section 365 of the Bankruptcy Code).

years), are in serious monetary default, and did not show any financial ability to pay the purchase price required under the Option or cure the monetary defaults. *See* Findings of Fact set forth above.

404. For any and all of these reasons, the Court concludes that Rojas/Jayme have no right to remain in possession of the Thoroughbred Property under section 365(i) of the Bankruptcy Code.

Conclusion-Rojas/Jayme Counterclaims and Defenses (Thoroughbred Property)

405. In conclusion, the Court finds that all counterclaims and defenses asserted by Rojas/Jayme with respect to the Thoroughbred Property should be denied.

406. Rojas/Jayme may allege a few other related counterclaims and affirmative defenses with respect to the Thoroughbred Property in their Fourth Amended Counterclaim (dkt# 221) and last Amended Answer (dkt# 147), which are difficult for the Court to decipher. But since any such additional affirmative claims and affirmative defenses were not included in Rojas/Jayme proposed findings of fact and conclusions of law or their Trial Brief, any other counterclaims and affirmative defenses are deemed waived.[28] The Court also concludes that any and all other counterclaims and affirmative defenses by Rojas/Jayme relating to the Thoroughbred Property should be denied on the merits.

Conclusion—Thoroughbred Property

407. In sum, the Court concludes that the Monges are the rightful legal owners of the Thoroughbred Property and are entitled to possession of the Thoroughbred Property. The Monges are entitled to turnover of the Thoroughbred Property from

[28] *See* Rojas/Jayme Proposed Findings of Fact and Conclusions of Law (dkt# 246); Trial Brief (dkt# 316); Orders of the Court (dkt# 246, ¶4; dkt# 274, ¶2) and discussion above by the Court in Procedural Background section.

Rojas/Jayme. The Monges are entitled to recover damages from Rojas/Jayme for breach of contract and violation of the automatic stay in the total amount of: (1) **$712,178** in actual damages, plus actual damages in the amount of **$7,992** per month accruing post-trial from September 2014 until the date of entry of Final Judgment requiring Rojas/Jayme to turnover possession of the Thoroughbred Property to the Monges; and (2) **$240,238** in attorneys' fees and expenses.

408. All of Rojas/Jayme's counterclaims and defenses with regard to the Thoroughbred Property are denied. Any and all other relief sought by any party relating to the Thoroughbred Property transactions are denied.

COUNTRY COVE SUBDIVISION

409. Next, the Court will set forth its conclusions of law with respect to the causes of action, counterclaims, and defenses of the parties with respect to the Country Cove Subdivision[29] and related transactions to the extent necessary.

Monges Claims (Country Cove Subdivision)

Breach of Contract (Country Cove Subdivision)

410. In their Second Amended Complaint, the Monges allege that they agreed upon the material terms of a contract with Rojas/Jayme concerning the Country Cove Subdivision, and that Rojas/Jayme breached the contract (dkt# 58).

411. According to the Monges, a claim for a breach of contract requires a showing of the following elements: (1) the existence of a valid agreement between the parties; (2) plaintiffs are the proper party to sue; (3) defendants breached the contract; and (4) the breach resulted in damages to plaintiffs. *See* Monges' Post-Trial Brief (dkt# 354), pp. 86-87; *Winchek v. Am. Express Travel Related Servs.*, 232 S.W.3d 197, 202 (Tex. App.—Houston [1st Dist.] 2007, no pet.).

412. The Court concludes that the Monges failed to meet their burden of proof, by a preponderance of evidence believed by the Court, with respect to the first element of a breach of contract claim—i.e., the existence of a valid agreement between the

[29] Although the Country Cove Subdivision is real estate located in New Mexico, few (if any) of the claims asserted by the parties relate directly to such real estate. This is unlike the claims of the parties with respect to the Thoroughbred Property—which largely revolved around conveyances of and title to New Mexico real estate (the Thoroughbred Property) by lease, option, deeds, and mortgages. And the Country Cove Subdivision was owned by Monroj, a Texas corporation formed by the parties under the laws of the State of Texas. Further, none of the parties have pled or suggested that New Mexico law applies to any claims relating to Country Cove Subdivision (unlike the Thoroughbred Property); instead, the parties have asserted claims regarding the Country Cove Subdivision based on Texas law. Given all this, the Court will use Texas law in analyzing the claims made by the parties with respect to the Country Cove Subdivision.

Monges and Rojas/Jayme regarding the acquisition and development of the Country Cove Subdivision. The Court also concludes that the Monges failed to meet their burden of proof, by a preponderance of evidence believed by the Court, with respect to another essential element of a breach of contract claim—that there was a meeting of the minds on the material terms of any agreement. *See, e.g.*, *Potcinske v. McDonald Prop. Invs., Ltd.*, 245 S.W. 3d 526, 529-30 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (defining a meeting of the minds as a mutual understanding and mutual assent to the agreement and essential terms of the contract). For a contract to be legally binding, a contract must be sufficiently definite in its terms so that a court can understand what the promisor undertook. The material terms of a contract must be agreed upon before the court can enforce a contract and find that the contract has been breached. *See, e.g.*, *T.O. Stanley Boot Co. v. Bank of El Paso*, 847 S.W. 2d 218, 221 (Tex. 1992).

413. Here, although the Monges and Rojas/Jayme testified extensively about their anger and frustration with each other regarding the acquisition and attempted development of the Country Cove Subdivision, the testimony of the parties and the documents identified at trial failed to prove to the Court what the actual terms of their agreement were with respect to the Country Cove Subdivision. The parties never reduced their alleged agreements to writing with respect to their respective responsibilities and duties with respect to Country Cove Subdivision project. And the respective testimony from Ms. Rojas, Mr. Jayme, and the Monges regarding any alleged agreement on the Country Cove Subdivision was inconsistent, incomprehensible, and lacked credibility. *See* Findings of Fact above.

414. Simply put, the Court is unable to determine, based on the documentary evidence identified and the testimony of the parties (which lacked credibility), the material terms of any agreement, or even if there was a mutual agreement, between the Monges and Rojas/Jayme with respect to the acquisition and development of the Country Cove Subdivision. From the evidence and the testimony presented at trial, the Court is not convinced that there was ever a meeting of the minds between the Monges and Rojas/Jayme regarding the material terms of any agreement regarding the Country Cove Subdivision. Indeed, in their answer filed in this Adversary Proceeding, the Monges themselves state that they are not liable for breach of contract relating to the Country Cove Subdivision because "the alleged agreements and contracts were discharged by mutual mistake of material fact." *See* Monges' Answer (dkt# 233), p. 8.

415. The evidence at trial did not demonstrate to the Court that there was ever a meeting of the minds between the Monges and Rojas/Jayme on the material terms of any agreement regarding the Country Cove Subdivision, as the parties all gave varying and inconsistent accounts (even in their own testimony) of what the material terms of the agreement were supposed to be. *See* Findings of Fact above. All that the Court can find, based on the evidence presented, is that the Monges and Rojas/Jayme desired to jointly acquire and develop the largely unimproved real property lots in the Country Cove Subdivision. But that is not enough to find that a valid contract was reached between the parties and that the parties agreed on the material terms of a contract on the Country Cove Subdivision—which are necessary elements that must be proved to support a breach of contract claim by the Monges (as well as by Rojas/Jayme, addressed below).

416. The material terms of any agreement the Monges and Rojas/Jayme might have had regarding the development and the acquisition of the Country Cove Subdivision were never reduced to writing. The written documentation identified regarding the terms of any possible agreement were the basic Monroj corporate formation documents (which primarily just reflected that the Monges and Rojas/Jayme each owned 25% of Monroj) and a "loan proposal" that Ms. Rojas put together when the parties first began soliciting funding for the Country Cove project. *See* Ex. RJ-4, pp. 228-31; Ex. P-7, pp. 180-81; Ex. P-22, pp. 6-8; Findings of Fact above.

417. The Court gives little or no weight to the credibility of the testimony of Ms. Monge, Mr. Monge, Mr. Jayme, and Ms. Rojas regarding the existence or the material terms of any alleged agreement regarding the Country Cove Subdivision for many reasons. The respective testimony of these party witnesses regarding the Country Cove Subdivision project was inconsistent and largely incomprehensible. The events in question occurred in 2005 through 2007, so accurate recollection of, and testimony regarding, events some seven to nine years later by biased party witnesses at trial in this Adversary Proceeding is difficult for the Court to completely believe.

418. Ms. Monge stretched the truth considerably regarding the Country Cove Subdivision, which in the Court's view, was to try and really get back at Rojas/Jayme for what they had done to the Monges with regard to the Thoroughbred Property. Mr. Monge gave limited testimony about the Country Cove Subdivision, and since he was undergoing cancer treatment and taking multiple medications at the time of his trial testimony, the Court cannot give any weight to his testimony. Ms. Rojas and Mr. Jayme were both poor witnesses, that were shown at trial to have little credibility and only

convenient memories. And given the deep personal animosity that has developed between the Monges and Rojas/Jayme over the passage of years, the Court gives very little credibility and weight to the oral testimony of the Monges and Rojas/Jayme regarding any oral agreements or representations on the Country Cove Subdivision.

419. So what the Court is left with is documentary evidence regarding the Country Cove Subdivision, which was substantial in volume, but extremely limited in setting forth the actual material terms of any agreement that may have been reached between the parties regarding the acquisition and development of the Country Cove Subdivision. Simply put, this is not enough for the Court to conclude that a valid agreement existed between the Monges and Rojas/Jayme and that there was a meeting of the minds on the material terms of any agreement regarding the Country Cove Subdivision.

420. For any and all of these reasons, the Court concludes that the claims of the Monges against Rojas/Jayme for breach of contract regarding the Country Cove Subdivision development must be denied.

Breach of Oral Agreement and Oral Debt (Country Cove Subdivision)

421. The Monges also allege that Rojas/Jayme made several oral agreements with the Monges regarding the costs for development of the Country Cove Subdivision, which Rojas/Jayme subsequently breached. According to the Monges, the elements of a claim for an oral debt include the following: (1) defendants made a valid and enforceable oral promise, agreement, and contract to pay the oral debt, payment of which was performable and promised to be timely tendered within one year; and (2) defendants breached and failed to comply with their oral promise, agreement, and

contract to pay the oral debt. *See* Monges' Post-Trial Brief (dkt# 354), pp. 85-86; *Gulf Liquid Fertilizer Co. v. Titus*, 354 S.W.2d 378, 382 (Tex. 1962); *Chrissikos v. Chrissikos*, 2002 WL 342653, at *6 (Tex. App.—Dallas Mar. 6, 2002, pet. denied).

422. However, just like a claim based on breach of a written contract, to prove a claim for breach of an oral agreement, a plaintiff must prove a meeting of the minds as to the material terms of the oral agreement. *See, e.g.*, *Buxani v. Nussbaum*, 940 S.W.2d 350, 352-53 (Tex. App.—San Antonio 1997, no writ) (supporting citations omitted).

423. The Court concludes that the Monges failed to meet their burden of proof, by a preponderance of credible evidence, that there was a meeting of the minds as to the material terms of any oral agreement with Rojas/Jayme regarding the Country Cove Subdivision. This conclusion is reached by the Court for the same reasons set forth above with respect to the Monges' breach of contract claim against Rojas/Jayme. In short, the lack of credibility and incoherent testimony by the party witnesses, and the lack of documents identified for the Court that would establish a meeting of the minds on the material terms of an oral agreement regarding the Country Cove Subdivision, precludes the Court from finding that enforceable oral agreements and oral promises existed.

424. For any and all of these reasons, the Court concludes that the claims of the Monges against Rojas/Jayme for breach of oral agreement and based on oral debt regarding the Country Cove Subdivision development must be denied.

Fraud and Fraud by Non-Disclosure (Country Cove Subdivision)

425. Continuing with their plethora of claims, the Monges assert that Rojas/Jayme committed fraud and fraud by non-disclosure with respect to the Country

Cove Subdivision. These claims are centered on the Monges' contentions that Rojas/Jayme did not actually have $300,000 in equity in the Thoroughbred Property to put toward the acquisition and development of the Country Cove Subdivision, and because Rojas/Jayme falsely stated that six lots in the Country Cove Subdivision were "permit ready."

426. According to the Monges, the elements of fraud include the following: (1) defendants made, or recklessly made, false, misleading, and fraudulent statements, promises, agreements, or contracts; (2) defendants knew that such representations were false when made; (3) defendants intended for plaintiffs to act upon the false representations, or such false representations were recklessly made so as to induce plaintiffs to act; and (4) plaintiffs reasonably and justifiably relied upon defendants' false, misleading, or fraudulent representations and conduct to the plaintiffs' financial injury and detriment. *See* Monges' Post-Trial Brief (dkt# 354), p. 98; *Formosa Plastics* Corp. *USA v. Presidio Eng'rs & Contractors, Inc.*, 960 S.W.2d 41, 47 (Tex. 1998).

427. The Monges also assert that Rojas/Jayme committed fraud by non-disclosure. According to the Monges, the elements of fraud by non-disclosure include the following: (1) defendants failed to disclose that a statement, promise, agreement, or contract that they made to plaintiffs was false, misleading, or fraudulent; (2) defendants knew or should have known that such a material omission of fact constituted false, misleading, or fraudulent conduct; (3) defendants intended for plaintiffs to act upon the defendants' omissions and non-disclosure of material facts; and (4) plaintiffs reasonably and justifiably relied upon defendants' false, misleading, and fraudulent conduct and

omissions of material facts, to the financial injury and detriment of plaintiffs. *See* Monges' Post-Trial Brief (dkt# 354), pp. 100-01; *Formosa Plastics*, S.W.2d at 47.

428. First, the Court will address the Monges' contention that Rojas/Jayme's statement that they had an estimated $300,000 in equity in the Thoroughbred Property was false. The Monges have failed to meet their burden of proof with respect to the second and fourth elements of fraud and fraud by non-disclosure with respect to this statement. The Monges did not present believable evidence that Rojas/Jayme knew or should have known that Rojas/Jayme would not be able to obtain approximately $300,000 in equity from the sale of the Thoroughbred Property at the time that Rojas/Jayme made that statement to the Monges. Although Rojas/Jayme never actually realized $300,000 in equity from the sale of the Thoroughbred Property, hindsight is always twenty-twenty.

429. More importantly, the evidence at trial established that the Monges knew as of the date of closing of the Thoroughbred Property (which occurred on February 3, 2006) that Rojas/Jayme had not actually obtained the estimated $300,000 in equity from the Thoroughbred Property. This is demonstrated by the HUD-1 settlement statement reflecting the disbursements at closing of the Thoroughbred Property with the seller (Mr. Jayme) receiving zero dollars at closing. *See* Ex. P-4, pp. 45-46; Findings of Fact above. Therefore, by the time Mr. Monge signed the purchase agreement to acquire the Country Cove Subdivision lots (February 16, 2006) and the formation of the Monroj corporation to purchase the lots and the closing of the purchase of the lots (June 2006), the Monges ***already knew*** that Rojas/Jayme did not get $300,000 in equity from the

Thoroughbred Property to contribute to the Country Cove Subdivision. *See* Ex. P-7, pp. 219-24; Ex. P-7, pp. 180-81; Ex. RJ-4, pp. 1-3; Findings of Fact above.

430. Accordingly, the Court concludes that the Monges could not have reasonably and justifiably relied on any potentially false or misleading statement or omission that Rojas/Jayme might have made with respect to the $300,000 equity in the Thoroughbred Property—yet another essential element with respect to their fraud-based claims.

431. Next, the Court will address Rojas/Jayme's statement that the six lots in the Country Cove Subdivision were "permit ready" and whether this constituted a false and fraudulent statement. The Court concludes that the Monges failed to meet their burden of proof with respect to the first element of fraud and fraud by non-disclosure—i.e., that the statement was false, misleading, or fraudulent.

432. At the trial, a parade of witnesses, including Mr. Villa, the Monges, Mr. Isaac, Ms. Rojas, and Mr. Jayme, all gave varying, conflicting and irreconcilable accounts as to the condition of the lots and the meaning of "permit ready." As set forth above in the Findings of Fact, Mr. Villa and Mr. Monge testified that (in their view) none of the lots in Country Cove were "permit ready," but then Ms. Monge and Mr. Isaac testified (in their view) that some of the lots were "permit ready," and then Ms. Rojas and Mr. Jayme both testified that (in their view) all of the lots were permit ready. In addition, all of these lay witnesses gave varying accounts as to their definition of "permit ready," and the documents identified in the record did not reflect whether or not the lots were permit ready.

433. Based on this record, the lack of any expert testimony, and this irreconcilable and largely incoherent lay witness testimony, the Court is unable to make any findings as to whether the lots in the Country Cove Subdivision were "permit ready" or not "permit ready." As a result, the Court concludes that the Monges failed to meet their burden of proof that the statement made by Rojas/Jayme that six lots were "permit ready" was false, misleading or fraudulent.

434. For any and all of these reasons, the Court concludes that the Monges' claims against Rojas/Jayme for fraud, fraud by non-disclosure, and any other fraud-based claims regarding the Country Cove Subdivision must be denied.

Breach of Fiduciary Duty (Country Cove Subdivision)

435. Next, the Monges assert that Rojas/Jayme breached their fiduciary duty with respect to the Country Cove Subdivision. In sum, the Monges allege that as shareholders in Monroj, Rojas/Jayme owed the Monges a fiduciary duty, and that Rojas/Jayme failed to make payments on loans secured to fund the business operations of Monroj and diluted the Monges' shares in Monroj, all of which (in the Monges' view) constitutes a breach of fiduciary duty.

436. According to the Monges, the elements of breach of fiduciary duty include the following: (1) defendants owed a fiduciary duty to plaintiffs; (2) defendants violated that duty; and (3) defendants' violation of their fiduciary duty caused plaintiffs economic harm. *See* Monges' Post-Trial Brief (dkt# 354), pp. 107-08; *Beck v. Law Office of Edwin J. (Ted) Terry, Jr., P.C.*, 284 S.W.3d 416, 429 (Tex. App.—Austin 2009, no pet.).

437. The Court concludes that these claims by the Monges lack merit. There is no probative and believable evidence that Rojas/Jayme breached any fiduciary duty to

the Monges associated with Monroj that caused the Monges damages. Monroj (not the Monges or Rojas/Jayme) was liable on the Isaac Loan for the funding of the acquisition and development of the Country Cove Subdivision. *See* Ex. P-7, pp. 26-32; Findings of Fact above. It is true that the Monges and Rojas/Jayme each started making half the Isaac Loan payments for the purchase of the Country Cove Subdivision, but the reasons why they started making the payments individually and the terms of any agreement between the Monges and Rojas/Jayme in this regard were never made clear to the Court. Rojas/Jayme were not obligated to pay one half of the Isaac Loan merely because they were 50% shareholders and officers in Monroj.

438. And the acquisition and development of the Country Cove Subdivision by Rojas/Jayme and the Monges (through Monroj) was doomed from the very start, as set forth in the above Findings of Fact. Monroj was not capitalized to pay the Isaac loan, both the Monges and Rojas/Jayme knew that the $300,000 in equity from the Thoroughbred sale did not materialize to fund the Isaac Loan or the acquisition and development, and neither the Monges nor Rojas/Jayme had any experience or financial wherewithal to pay for the acquisition and development of the Country Cove Subdivision. Moreover, both Rojas/Jayme and the Monges made efforts to sell and develop lots in the Country Cove Subdivision. Based on this record, the Court cannot conclusively determine that Rojas/Jayme were to blame for the failed Country Cove Subdivision venture and Monroj. Indeed it appears to the Court that both parties—the Monges and Rojas/Jayme—are to blame for the failure of the Country Cove Subdivision and Monroj. *See* Findings of Fact above.

439. Accordingly, the Court concludes that the Monges failed to prove to the Court that Rojas/Jayme breached any fiduciary duty owed to the Monges associated with the Country Cove Subdivision and Monroj, and failed to prove that any such breach caused the Monges damages.

440. For any and all of these reasons, the Court concludes that the claims of the Monges against Rojas/Jayme for breach of fiduciary duty regarding the Country Cove Subdivision and Monroj must be denied.

Breach of Duty of Good Faith and Fair Dealing (Country Cove Subdivision)

441. Next, the Monges assert that Rojas/Jayme breached a duty of good faith and fair dealing with respect to the Country Cove Subdivision. The Monges allege that as shareholders in Monroj, Rojas/Jayme owed the Monges a duty, and that Rojas/Jayme failed to make payments on loans secured to fund the business operations of Monroj and diluted the Monges' shares in Monroj, all of which constitutes a breach of duty of good faith and fair dealing.

442. According to the Monges, the elements of breach of duty of good faith and fair dealing include the following: (1) a special relationship existed between plaintiffs and defendants where defendants had a duty to act in good faith, to exercise reasonable diligence to protect the rights of plaintiffs, and to provide accurate documentation and information; and (2) defendants failed to meet that duty. *See* Monges' Post-Trial Brief (dkt# 354), p. 110; *Arnold v. Nat'l Cnty. Mut. Fire Ins. Co.*, 725 S.W.2d 165 (Tex. 1987).

443. The Court concludes that the Monges failed to meet their burden of proof with respect to the second element. The Monges did not establish that Rojas/Jayme breached a duty of good faith to the Monges—assuming such a duty was even owed.

Both Rojas/Jayme and the Monges made efforts to sell and develop lots in the Country Cove Subdivision. Those efforts proved to be unsuccessful and this speculative venture failed. The Monges blame Rojas/Jayme for the failure and Rojas/Jayme blame the Monges for the failure. But based on the evidence and this record, the Court cannot conclusively allocate blame between the parties as to who is at fault for the failed Country Cove Subdivision venture and the development and sale of lots. The Country Cove Subdivision and Monroj was a highly speculative venture between the Monges and Rojas/Jayme and was doomed from the start. *See* Findings of Fact above.

444. Further, this claim by the Monges against Rojas/Jayme is essentially the same claim made by the Monges against Rojas/Jayme for breach of fiduciary duty discussed and rejected by the Court above. And for the same reasons that the Monges' breach of fiduciary duty claim fails, the Court concludes that the Monges' breach of duty of good faith and fair dealing fails.

445. For any and all of these reasons, the Court concludes that the claims of the Monges against Rojas/Jayme for breach of any duty of good faith and fair dealing regarding the Country Cove Subdivision and Monroj must be denied.

Money Had and Received and Unjust Enrichment (Country Cove Subdivision)

446. The Monges next assert a claim against Rojas/Jayme for "money had and received" and a claim for "unjust enrichment" with respect to the Country Cove Subdivision. According to the Monges, Rojas/Jayme hold money that, in equity and good conscience, belongs to the Monges. The Monges also generally allege that Rojas/Jayme caused the Monges economic loss and damages in the Country Cove Subdivision due to Rojas/Jayme's actions and inactions.

447. At trial, the Monges failed to prove and identify what money Rojas/Jayme "had and received" that belongs to the Monges relating to the Country Cove Subdivision. Accordingly, the Court concludes that this "boilerplate" claim by the Monges must be denied.

448. As to unjust enrichment, this claim of the Monges also fails. Rojas/Jayme were not unjustly enriched by the Country Cove Subdivision. The evidence at trial demonstrated that Rojas/Jayme contributed money and services to the Country Cove Subdivision project (as did the Monges), and that Rojas/Jayme lost that money when the Country Cove Subdivision was foreclosed upon by the Isaac Lenders. It is hard to even imagine how one could suggest that Rojas/Jayme were unjustly enriched from the failed Country Cove Subdivision venture.

449. For any and all of these reasons, the Court concludes that the claims of the Monges against Rojas/Jayme for money had and received and unjust enrichment regarding the Country Cove Subdivision must be denied.

Negligence and Gross Negligence (Country Cove Subdivision)

450. The Monges continue, next asserting that Rojas/Jayme were negligent or grossly negligent with respect to their actions regarding the Country Cove Subdivision. This goes back to the same contention by the Monges that Rojas/Jayme had a duty to inform the Monges that six lots were not "permit ready" in Country Cove. The Monges also contend that Rojas/Jayme added additional directors to Monroj, which diluted the Monges' shares in Monroj.

451. According to the Monges, the elements of negligence are: (1) defendants owed a duty to plaintiffs to provide accurate information and documentation; (2)

defendants failed to meet that duty by acting with reckless disregard and gross negligence; and (3) plaintiffs suffered harm as a result of defendants' actions/inactions. *See* Monges' Post-Trial Brief (dkt# 354), pp. 109-10; *Willis v. Marshall*, 401 S.W.3d 689, 700 (Tex. App.—El Paso 2013, no pet.) (citing *Praesel v. Johnson*, 967 S.W.2d 391, 394 (Tex. 1998)).

452. With respect to their negligence and gross negligence claims based on the "permit ready" lots, the Court concludes that the Monges failed to meet their burden of proof. As already set forth by the Court above with respect to the Monges' fraud-based claims, at the trial, a parade of witnesses (including Mr. Villa, the Monges, Mr. Isaac, Ms. Rojas, and Mr. Jayme) all gave varying, conflicting, and irreconcilable accounts as to the condition of the lots and the meaning of "permit ready."

453. Based on this record, the lack of any expert testimony, and this irreconcilable and largely incoherent lay witness testimony, the Court is unable to make any findings as to whether the lots in the Country Cove Subdivision were "permit ready" or not "permit ready." As a result, the Court concludes that the Monges failed to meet their burden of proof that the statement made by Rojas/Jayme that six lots were "permit ready" was negligent, grossly negligent, or not accurate information.

454. Next, the Court will address the Monges' contention that Rojas/Jayme added additional directors to Monroj that caused the dilution of the Monges' shares in Monroj. When the Monroj corporation was first formed on June 6, 2006, it is true that Joe and Alison Villa were listed with the Monges and Rojas/Jayme as the initial directors of Monroj. *See* Ex. P-7, pp. 180-81. But just four days later, on June 10,

2006, a Certificate of Correction to Monroj was filed, which removed the Villas as directors. *See* Ex. P-34, pp. 294-95.

455. The Court concludes that the Monges failed to sufficiently prove or explain how the listing of the Villas as additional directors of Monroj for a mere four days caused the Monges any damage. Just as importantly, the evidence showed that the Villas were merely added as *directors* of Monroj—the Villas were not added as shareholders of Monroj. Thus, the Court concludes that the Monges' shares in Monroj were not diluted by the mere addition of the Villas as directors of Monroj for four days.

456. For any and all of these reasons, the Court concludes that the claims of the Monges against Rojas/Jayme for negligence and gross negligence regarding the Country Cove Subdivision and Monroj must be denied.

Speculative Damages (Country Cove Subdivision)

457. Alternatively, and in addition to the fact that the Monges have not met their burden of proof with regard to their claims against Rojas/Jayme relating to the Country Cove Subdivision, any damages suffered by the Monges would be speculative. The Monges assert that they are entitled to damages for lost profits on the Country Cove Subdivision. But, the "fervent hope" that a venture will be successful is not enough to warrant a recovery for damages and lost profit. *See Ramco Oil & Gas Ltd. v. Anglo-Dutch (Tenge) L.L.C.*, 207 S.W.3d 801, 824 (Tex. App.—Houston [14th Dist.] 2006, pet. denied).

458. Here, the evidence showed that the Monges and Rojas/Jayme formed Monroj—a new corporate entity with no history of success in residential development—for the purpose of obtaining the financing to purchase and develop the Country Cove

Subdivision lots. The evidence showed that the Country Cove venture was highly speculative; the Monges and Rojas/Jayme did not have much (if any) experience in developing and building residential lots and homes. The corporation that was formed by the Monges and Rojas/Jayme—Monroj—never made any profit, appears to have never been adequately capitalized, was largely ignored, and is now defunct. *See* Findings of Fact above.

459. Without a history of profits or some other form of objective, non-speculative evidence, there is nothing in the record upon which this Court may base a damage award. *See Tex. Instruments, Inc. v. Teletron Energy Mgmt., Inc.*, 877 S.W.2d 276, 280 (Tex. 1994) (holding that even though there was evidence of a market in which to sell the product, the party failed to prove lost profits because the product was new and there was no history of profits); *Holt Atherton Indus., Inc. v. Heine*, 835 S.W.2d 80, 84 (Tex. 1992); *see also In re H&M Oil & Gas, LLC*, 2014 WL 3617448, at *12-13 (Bankr. N.D. Tex. July 21, 2014) (holding that an award of damages was not appropriate because the trustee failed to present objective evidence regarding lost profits). Further, speculative or conjectural damages are not recoverable. *See Reardon v. LightPath Techs., Inc.,* 183 S.W.3d 429, 442 (Tex. App.—Houston [14th Dist.] 2005, pet. denied) (supporting citation omitted).

460. Therefore, even if the Court had concluded that the Monges had met their burden with respect to one or more of their causes of action regarding the Country Cove Subdivision (which it has not), the Monges have failed to prove any recoverable damages. In sum, the evidence did not show sufficient objective facts or data from

which the Court may calculate damages and lost profits on the Country Cove Subdivision, and any damages would be speculative and conjecture.

Conclusion—Monges Claims (Country Cove Subdivision)

461. In conclusion, the Court determines that the Monges should recover nothing based on their claims and causes of action against Rojas/Jayme based on the Country Cove Subdivision and Monroj.

462. The Monges may have asserted some other claims against Rojas/Jayme with respect to the Country Cove Subdivision in their Second Amended Complaint (dkt# 58), which is very difficult for the Court to decipher. But since such any additional affirmative claims were not properly included in the Monges' proposed findings of fact and conclusions of law, any other affirmative claims are deemed waived.[30] The Court also concludes that any and all other claims by the Monges against Rojas/Jayme relating to the Country Cove Subdivision should be denied.

Rojas/Jayme Counterclaim (Country Cove Subdivision)

Breach of Contract (Country Cove Subdivision)

463. In their Fourth Amended Counterclaim, Rojas/Jayme assert that the Monges are liable to Rojas/Jayme for a breach of contract claim on the Country Cove Subdivision (dkt# 221, p. 4). Specifically, Rojas/Jayme assert that they entered into a contractual agreement with the Monges to develop and sell lots in the Country Cove Subdivision, and the Monges breached this agreement by failing to cooperate in the sale of the lots to third parties. This breach, Rojas/Jayme assert, caused Rojas/Jayme

[30] *See* Monges' Proposed Findings of Fact and Conclusions of Law (dkt# 283); Orders of the Court (dkt# 246, ¶4; dkt# 274, ¶2) and discussion above by the Court in Procedural Background section.

damages, including loss of the lots, loss of the down payment on the purchase of the Country Cove Subdivision, and fees and charges.

464. For the same reasons set forth above denying the Monges' claim for breach of contract on the Country Cove Subdivision, the Court concludes that the breach of contract claim by Rojas/Jayme must be denied.

465. In short, Rojas/Jayme failed to meet their burden of proof, by a preponderance of evidence believed by the Court, with respect to the existence of a valid agreement between the Monges and Rojas/Jayme regarding the acquisition and development of the Country Cove Subdivision, and did not prove that there was a meeting of the minds on the material terms of any agreement. *See, e.g.*, *Potcinske v. McDonald Prop. Invs., Ltd.*, 245 S.W.3d 526, 529-30 (Tex. App.—Houston [1st Dist.] 2007, no pet.). For a contract to be legally binding, a contract must be sufficiently definite in its terms so that a court can understand what the promisor undertook. The material terms of a contract must be agreed upon before the court can enforce a contract and find that the contract has been breached. *See T.O. Stanley Boot Co. v. Bank of El Paso*, 847 S.W. 2d 218, 221 (Tex. 1992).

466. In sum, the testimony of the parties and the documents identified at trial failed to prove to the Court what the actual terms of any agreement were between Rojas/Jayme and the Monges with respect to the Country Cove Subdivision. The parties never reduced their alleged agreements to writing with respect to their respective responsibilities and duties with respect to Country Cove Subdivision project. And the respective testimony from Ms. Rojas, Mr. Jayme, and the Monges regarding any alleged agreement on the Country Cove Subdivision was inconsistent,

incomprehensible, and lacked credibility. *See* Conclusions of Law set forth above regarding Breach of Contract claim by the Monges, which is incorporated herein by reference.

467. For these reasons, and the reasons set forth above in the Conclusions of Law regarding the Breach of Contract claim by the Monges, the Court concludes that the claims of Rojas/Jayme against the Monges for breach of contract regarding the Country Cove Subdivision development must be denied.

Speculative Damages (Country Cove Subdivision)

468. Even if there was enough evidence for the Court to conclude that the Monges had breached a contract with Rojas/Jayme on the Country Cove Subdivision (which it has not), any award of damages to Rojas/Jayme would be merely speculative. As set forth above by the Court, a party must present objective, non-speculative evidence on a claim for damages and speculative damages are not recoverable. *See, e.g.*, *Tex. Instruments, Inc. v. Teletron Energy Mgmt., Inc.*, 877 S.W.2d 276, 280 (Tex. 1994); *Reardon v. LightPath Techs., Inc.,* 183 S.W. 3d 429, 442 (Tex. App.—Houston [14th Dist.] 2005, pet. denied) (supporting citation omitted).

469. Here, the evidence showed that the Monges and Rojas/Jayme formed Monroj—a new corporate entity with no history of success in residential development—for the purpose of obtaining the financing to purchase and develop the Country Cove Subdivision lots. The evidence showed that the Country Cove venture was highly speculative; the Monges and Rojas/Jayme did not have much (if any) experience in developing and building residential lots and homes. The Country Cove Subdivision was ultimately foreclosed upon. The corporation that was formed by the Monges and

Rojas/Jayme—Monroj—never made any profit, appears to have never been adequately capitalized, was largely ignored, and is now defunct. *See* Findings of Fact above.

470. For these reasons, and the reasons set forth by the Court in the Conclusions of Law regarding Speculative Damages on the claims made by the Monges with regard to the Country Cove Subdivision, the relief and damages sought by Rojas/Jayme against the Monges must be denied.

Conclusion—Rojas/Jayme Counterclaims (Country Cove Subdivision)

471. In conclusion, the Court determines that Rojas/Jayme should recover nothing based on their counterclaims against the Monges based on the Country Cove Subdivision.

Conclusion—Country Cove Subdivision

472. In sum, the Court concludes that neither the Monges nor Rojas/Jayme should recover any relief against the other for any of their causes of action and counterclaims relating to the Country Cove Subdivision and Monroj.

TRANSMOUNTAIN PROPERTY

473. Next, the Court will set forth its conclusions of law with respect to the causes of action and defenses of the parties with respect to the Transmountain Property, Northeast Patriot, and related transactions to the extent necessary. It should be noted that the Transmountain Property is located in the State of Texas.

Monges Claims (Transmountain Property)

474. The Monges assert the following causes of action against Rojas/Jayme with respect to the Transmountain Property and Northeast Patriot: (1) breach of duty of

good faith and fair dealing; (2) breach of contract; (3) money had and received; (4) unjust enrichment; and (5) breach of fiduciary duty (collectively, the "Transmountain Claims").[31] *See* Monges' Second Amended Complaint (dkt# 58). It was not until July 2012—with the filing by the Monges of their Second Amended Complaint in this Adversary Proceeding—that the Monges first asserted causes of action against Rojas/Jayme relating to the Transmountain Property and Northeast Patriot (dkt# 58).

Rojas/Jayme Statute of Limitations Defense (Transmountain Property)

475. In their Answer and Trial Brief, Rojas/Jayme assert that the Monges' claims relating to the Transmountain Property are barred by the statute of limitations as set forth in Texas Civil Practice and Remedies Code §§ 16.001-16.004. *See* First Amended Answer (dkt# 147), pp. 4-5; Trial Brief (dkt# 316, pp. 15-16).[32] Rojas/Jayme bear the burden of proving their affirmative defense, including their argument that the Transmountain Claims are barred by the statute of limitations. *See, e.g.*, *Elmo v. Oak Farms Dairy*, 2008 WL 2200265, at *1 (N.D. Tex. May 14, 2008).

[31] It is possible that the Monges are also making a claim for "Fraud in a Real Estate Transaction" with respect to the Transmountain Property. *See* Second Amended Complaint (dkt# 58), p. 27; Post-Trial Brief (dkt# 354), pp. 104-05. This is apparently based on the notion that Ms. Rojas failed to disclose that she was not "actually interested" in conveying the Transmountain Property to Northeast Patriot and instead purchased the property in her name and the name of Mr. Maynez (dkt# 345, p. 104). To the extent that this claim is not also barred by Statute of Limitations as set forth above, it is denied by the Court on the merits. There never was a contract entered into by the Monges or Northeast Patriot for the Transmountain Property, which is an essential element of any Fraud in a Real Estate Transaction claim. *See* TEX. BUS. COM. CODE §§ 27.01(a)(1)(A),(B), 27.01(a)(2)(C),(D).

[32] It may be noted that Rojas/Jayme also filed a Motion for Partial Summary Judgment based on the statute of limitations defense with regard to claims relating to the Transmountain Property and Sierra Crest Property (dkt# 212). Upon motion of the Monges, the Court struck the Motion for Partial Summary Judgment of Rojas/Jayme as an untimely dispositive motion, and at that time the Court did not reach the merits of the statute of limitations defense (dkt# 218, 230).

476. Under Texas law, a party must bring any cause of action against another within four years—or two years on some actions—of the alleged breach. TEX. CIV. PRAC. & REM. CODE §§ 16.003(a) (generally, tort claims), 16.004(a)(1)-(5) (generally, contract claims); *Elledge v. Friberg-Cooper Water Supply Corp.*, 240 S.W.3d 869, 869 (Tex. 2007) (affirming that unjust enrichment claims are governed by the two-year statute of limitations); *Merry Homes, Inc. v. Luc Dao*, 359 S.W.3d 881, 882 (Tex. App.—Houston [14th Dist.] 2012, no pet.) (holding that a two-year statute of limitations period applies to claims for money had and received). Causes of action generally accrue "when a wrongful act causes an injury, regardless of when the plaintiff learns of that injury or if all resulting damages have yet to occur." *Childs v. Haussecker*, 974 S.W.2d 31, 36 (Tex. 1998).

477. Here, the Monges assert various causes of action—including breach of contract and breach of fiduciary duty—against Rojas/Jayme based on the Transmountain Property transactions and Northeast Patriot. Essentially, the Monges argue that Ms. Rojas diverted an opportunity by purchasing the Transmountain Property in her name and the name of Mr. Maynez rather than the corporation (Northeast Patriot), and that Ms. Rojas owed a duty to the Monges because she was a shareholder and director of Northeast Patriot.

478. Here, the alleged wrongful act causing injury was the purchase of the Transmountain Property by Ms. Rojas and Mr. Maynez, which occurred and closed on April 18, 2007. *See* Warranty Deed recorded in El Paso County, Texas, Ex. HM-2, pp. 1-8; Findings of Fact above. But it was not until July 2012—more than 5 years later—that the Monges first asserted their causes of action against Rojas/Jayme regarding the

Transmountain Property and Northeast Patriot by filing their Second Amended Complaint (dkt# 58).

479. Accordingly, the Court concludes that the statute of limitations bars any claim by the Monges against Rojas/Jayme relating to the Transmountain Property and Northeast Patriot.

480. However, the Monges have asserted the "discovery rule" in their Second Amended Complaint, which will next be addressed by the Court. *See* Monges' Second Amended Complaint (dkt# 58) p. 23.

481. The discovery rule is a very limited exception to the general rule that a cause of action accrues when the wrongful act causes injury. *See, e.g.*, *Beavers v. Metro. Life Ins. Co.,* 566 F.3d 436, 439 (5th Cir. 2009) (quoting *Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 918 S.W.2d 453, 455 (Tex. 1996)). Under the discovery rule, "a cause of action does not accrue until a plaintiff knows or, through the exercise of reasonable care and diligence, 'should have known of the wrongful act and resulting injury.'" *Childs*, 974 S.W.2d at 37 (quoting *S.V. v. R.V.*, 933 S.W.2d 1, 4 (Tex. 1996)). Whether the discovery rule applies to a cause of action is a question of law. *TIG Ins. Co. v. Aon Re, Inc.*, 521 F.3d 351, 357 (5th Cir. 2008) (citing *Moreno v. Sterling Drug, Inc.*, 787 S.W.2d 348, 351 (Tex. 1990)). The party asserting the "discovery rule" bears the burden of establishing it applies. *See Woods v. William M. Mercer, Inc.*, 769 S.W.2d 515, 518 (Tex. 1988).

482. In Texas, the discovery rule applies if two elements are met (1) the nature of the injury incurred is inherently undiscoverable; and (2) the evidence of injury is

objectively verifiable. See *Beavers*, 566 F.3d at 439 (summarizing two Texas Supreme Court cases that clarified the discovery rule in Texas).

483. As to the first element of the discovery rule, when an injury is, "by its nature, unlikely to be discovered within the prescribed limitations period despite due diligence," it is considered inherently undiscoverable. *Beavers*, 566 F.3d at 439 (quoting *Wagner & Brown, Ltd. v. Horwood*, 58 S.W.3d 732, 734-35 (Tex. 2001)). The focus is not on whether the particular plaintiff discovered his or her injury within the limitations period, but whether the injury is "the type of injury that generally is discoverable by the exercise of reasonable diligence." *See Wagner & Brown*, 58 S.W.3d at 735 (quoting *HECI Exploration Co. v. Neel*, 982 S.W.2d 881, 886 (Tex. 1998)). In other words, the focus is on a categorical basis rather than an individual basis. *See Beavers*, 566 F.3d at 439; *Wagner & Brown*, 58 S.W.3d at 735.

484. In addition to the discovery rule, the Monges claim that Rojas/Jayme are estopped from asserting a statute of limitations defense because Rojas/Jayme fraudulently concealed material facts regarding the Transmountain Property. To establish the defense of fraudulent concealment, the Monges must show (1) a false representation or concealment of material facts; (2) made with knowledge, actual or constructive, of those facts; (3) with the intention that it should be acted on; (4) to a party without knowledge or means of obtaining knowledge of the facts; (5) who detrimentally relies on the representations. *Johnson & Higgins of Tex., Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507, 515-16 (Tex. 1998).

485. At trial, Ms. Monge testified that she did not become aware of the actions of Ms. Rojas with respect to the Transmountain Property that gave rise to their alleged

injuries until sometime in 2012, when she was informed by her attorney.[33] *See* Tr. 8/7/14, p. 182, lines 14-22. However, the probative evidence presented at trial reveals quite a different story and demonstrates knowledge by the Monges as far back as 2007.

486. On March 30, 2007, and April 9, 2007, Ms. Rojas sent two emails, respectively, to Mr. David Puente (who worked for Sierra Title and served as the escrow officer on the Transmountain Property) requesting Mr. Puente to have an attorney draft documents to substitute Mr. Maynez as a 25% owner in Northeast Patriot. The Monges were copied on both of these emails that requested that Mr. Maynez become a 25% owner of Northeast Patriot. *See* Ex. P-22, pp. 211, 222; Findings of Fact above.

487. Then, on April 13, 2007, Ms. Rojas sent an email to the seller of the Transmountain Property, requesting an extension of closing until April 16, 2007, so that the closing documents could be reviewed by an attorney and finalized. The Monges were copied on this email from Ms. Rojas as well. *See* Ex. P-22, p. 250; Findings of Fact above.

488. On April 14, 2007, the members of Northeast Patriot held an official meeting regarding the Transmountain Property. The Monges were made aware, prior to this meeting on April 14, 2007, that Ms. Rojas was proposing to bring Mr. Maynez in as an investor on the Transmountain Property. At the meeting, the members verbally approved Ms. Rojas obtaining a loan and putting the deed in her name until the Transmountain Property could be transferred to Northeast Patriot. Apparently, the members of Northeast Patriot approved Ms. Rojas putting her personal name “and

[33] Ms. Monge was not a director or shareholder in Northeast Patriot anyway—Mr. Monge was the director and shareholder in Northeast Patriot. *See* Ex. P-22, pp. 108-34. And Mr. Monge did not testify that it was not until the year 2012 that he learned about Ms. Rojas’s actions. This is another reason that the discovery rule fails.

assigns" on the documents because there were issues with the corporate formation and ownership of Northeast Patriot. *See* Tr. 8/4/14, p. 180, lines 3-21; Tr. 8/8/14, p. 55, lines 6-15; Findings of Fact above.

489. On April 18, 2007, the sale of the Transmountain Property to Ms. Rojas and Mr. Maynez closed. The Transmountain Property was conveyed by the seller (Patriot Castner Joint Venture) to Ms. Rojas and Mr. Maynez by general warranty deed publicly recorded in El Paso County, Texas, on April 18, 2007. *See* Ex. HM-2, pp. 1-8.

490. Within a few months after the sale of the Transmountain Property to Mr. Rojas and Mr. Maynez in April 2007, the Monges started asking questions about the Transmountain Property and Northeast Patriot corporation. On December 17, 2007, Ms. Monge sent an email to Ms. Rojas about an offer relating to Country Cove and the Thoroughbred Property, where Ms. Monge specifically stated "this doesn't include any settlement on the Transmountain property and the Patriot Corporation . . . these items will be discussed separately at a later date." *See* Ex. P-34, p. 244.

491. Then on May 27, 2008, the Monges sent an email to Mr. Puente at the title company about the Transmountain Property, requesting all documents regarding the real estate contract on the Patriot Property (the Transmountain Property) from the title company. *See* Ex. RJ-4, pp. 232-33.

492. Based on the evidence, the Court concludes that by December 2007, at the very latest, the Monges had knowledge of the actions of Ms. Rojas that gave rise to the Monges' claims regarding the Transmountain Property and Northeast Patriot. And more likely, the Monges were aware of Ms. Rojas's alleged conduct back in April 2007. But the Monges first asserted their causes of action against Rojas/Jayme on the

Transmountain Property and Northeast Patriot in July 2012 when they filed their Second Amended Complaint—which is more than four years after the latest date that the Monges learned of Ms. Rojas's conduct. Consequently, the discovery rule does not apply to the Transmountain Property claims, as the Monges discovered the actions that form the basis of their claims against Rojas/Jayme within the statute of limitations period. Even for those claims in which the statute of limitations period is two years—unjust enrichment, for example—the Monges discovered the actions well within the statute of limitations period and could have brought their claims prior to the expiration of the period.

493. Further, the Court also concludes that the Monges did not meet their burden of proof of establishing that the fraudulent concealment doctrine applies in this case. Specifically, there was insufficient proof that Rojas/Jayme fraudulently concealed material facts about the Transmountain Property from the Monges. More importantly, it was demonstrated at trial that the Monges had knowledge, or the means of obtaining knowledge, of the facts. *See Johnson & Higgins*, 962 S.W.2d at 515-16.

494. The Monges were copied on several emails in which Ms. Rojas requested that Mr. Maynez be added as a 25% owner in Northeast Patriot. *See* Findings of Fact above. In addition, Ms. Monge was present at an official meeting of Northeast Patriot in which Ms. Rojas was proposing to bring Mr. Maynez in as an investor on the Transmountain Property. *See* Findings of Fact above. The emails from Ms. Rojas, on which the Monges were copied, put the Monges on notice that they needed to investigate the Transmountain Property transaction. By April 2007, the Monges had enough knowledge to investigate the transaction, and a reasonable investigation would

have led the Monges to discover the actions of which they now complain. *See Thomas v. Barton Lodge II, Ltd.*, 174 F.3d 636, 640-47 (5th Cir. 1999) (holding that district court did not err in holding statute of limitations applied where general partner communicated with limited partners regarding potential self-dealing).

495. On April 18, 2007, the warranty deed selling the Transmountain Property to Ms. Rojas and Mr. Maynez was publicly recorded in El Paso County, Texas. *See* Ex. HM-2, pp. 1-8.

496. Within a few months after the sale of the Transmountain Property closed in the name of Ms. Rojas and Mr. Maynez—in December 2007—Ms. Monge began asking questions about the Transmountain Property and Northeast Patriot corporation by sending an email to Ms. Rojas, and later, an email to David Puente. *See* Ex. P-34, p. 244.; Ex. RJ-4, pp. 232-33; Findings of Fact above.

497. Accordingly, the Court concludes that the Monges did not prove, by a preponderance of credible evidence, that Rojas/Jayme's statute of limitations defense is defeated by the discovery rule or the doctrine of fraudulent concealment.

498. As a result, the Court concludes that the Monges' claims against Rojas/Jayme relating to the Transmountain Property and Northeast Patriot are barred by the statute of limitations, and must be denied.

Speculative Damages (Transmountain Property)

499. Alternatively, and in the event that the statute of limitations defense does not bar the Monges' claims, any damages that the Monges incurred with respect to the Transmountain Property and Northeast Patriot would be speculative and are not recoverable.

500. The "fervent hope" that a venture will be successful is not enough to warrant a recovery for lost profit, as the Monges claim here. *See Ramco Oil & Gas Ltd. v. Anglo-Dutch (Tenge) L.L.C.*, 207 S.W.3d 801, 824 (Tex. App.—Houston [14th Dist.] 2006, pet. denied). Here, Mr. Monge and Ms. Rojas, along with other potential investors, formed Northeast Patriot—a new corporate entity with no history of success in commercial property development—for the purpose of obtaining the financing to purchase and develop the Transmountain Property. The potential purchase and development of the Transmountain Property through Northeast Patriot was a highly speculative venture. Mr. Monge was not a licensed or experienced commercial builder or developer. And although Ms. Rojas was a residential mortgage broker and Mr. Jayme a residential real estate agent, they did not appear to have any real experience developing commercial real property like the Transmountain Property and envisioned medical clinic. *See* Findings of Fact above.

501. What the evidence did show is that Mr. Maynez remains the owner of the Transmountain Property, he has not received any income or profit on the Transmountain Property, he has not been able to sell the property, and it remains undeveloped. *See* Ex. P-48, pp. 28-30, 64, lines 9-11; pp. 58-59; Findings of Fact above.

502. And the Monges did not sufficiently prove to the Court that they had the financial ability, funds, or a loan to succeed in this highly speculative venture to acquire and develop the Transmountain Property. The corporation that was formed by the Monges and Ms. Rojas—Northeast Patriot—never got off the ground, never found other partners, never made any profit, never got a loan, and was not capitalized as needed to

purchase and develop the Transmountain Property. *See* Findings of Fact above. Without a history of profits or some other form of objective, non-speculative evidence, there is insufficient evidence in the record upon which this Court may base a damage award. *See Tex. Instruments, Inc. v. Teletron Energy Mgmt., Inc.*, 877 S.W.2d 276, 280 (Tex. 1994) (holding that even though there was evidence of a market, the party failed to prove lost profits because the product was new and there was no history of profits); *Holt Atherton Indus., Inc. v. Heine*, 835 S.W.2d 80, 84 (Tex. 1992); *see also In re H&M Oil & Gas, LLC*, 2014 WL 3617448, at *12-13 (Bankr. N.D. Tex. July 21, 2014) (holding that an award of damages was not appropriate because the trustee failed to present objective evidence regarding lost profits).

503. The Monges failed to prove that their claim for damages against Rojas/Jayme and Northeast Patriot was anything other than mere speculation. Northeast Patriot had no history of profits, and was unsuccessful. Indeed, Northeast Patriot never owned or developed the Transmountain Property. Without objective evidence or a history of profits, the Court has no information upon which it may base a damages award. *See In re H&M Oil & Gas*, 2014 WL 3617448, at *12-13.

504. As a result, the Court concludes that any award of damages to the Monges relating to the Transmountain Property and Northeast Patriot would be speculative and inappropriate.

Conclusion—Transmountain Property

505. In sum, the statute of limitations bars any claims by the Monges against Rojas/Jayme relating to the Transmountain Property and Northeast Patriot. In the alternative, any damages suffered by the Monges would be speculative and are not

recoverable. Accordingly, the Court concludes that the Monges should take nothing on their claims against Rojas/Jayme relating to the Transmountain Property and Northeast Patriot.

SIERRA CREST PROPERTY

506. Next, the Court will set forth its conclusions of law with respect to the causes of action and defenses of the parties with respect to the Sierra Crest Property and related transactions to the extent necessary. It should be noted that the Sierra Crest Property is located in the State of Texas.

Monges Claims (Sierra Crest Property)

507. In general, the Monges assert that Rojas/Jayme (primarily Mr. Jayme) were negligent or grossly negligent due to Rojas/Jayme's duty to inspect, failure to properly inspect, and failure to inform the Monges about defects in the Sierra Crest Property purchased by the Monges in August 2006. *See* Monges' Second Amended Complaint (dkt# 58).

508. It was not until July 2012—with the filing by the Monges of their Second Amended Complaint in this Adversary Proceeding—that the Monges first asserted causes of action against Rojas/Jayme relating to the Sierra Crest Property (dkt# 58).

Rojas/Jayme Statute of Limitations Defense (Sierra Crest Property)

509. In their Answer and Trial Brief, Rojas/Jayme assert that the Monges' cause of action on the Sierra Crest Property is barred by the statute of limitations as set forth in Texas Civil Practice and Remedies Code §§ 16.001-16.004. *See* Rojas/Jayme's First Amended Answer (dkt# 147), p. 5; Trial Brief (dkt# 316), pp. 15-16. Rojas/Jayme

bear the burden of proving their affirmative defenses, including their argument that the Sierra Crest Property claims are barred by the statute of limitations. *See, e.g.*, *Elmo v. Oak Farms Dairy*, 2008 WL 2200265, at *1 (N.D. Tex. May 14, 2008).

510. Under Texas law, the statute of limitations for a negligence or gross negligence claim is two years. TEX. CIV. PRAC. & REM. CODE § 16.003(a) (generally, tort claims); *Askanase v. Fatijo*, 130 F.3d 657, 668 (5th Cir. 1997) ("The statute of limitations for negligence in Texas is two years from the time the tort was committed."); *FDIC v. Dawson*, 4 F.3d 1303, 1307 (5th Cir. 1993) (same). Causes of action generally accrue "when a wrongful act causes an injury, regardless of when the plaintiff learns of that injury or if all resulting damages have yet to occur." *Childs v. Haussecker*, 974 S.W.2d 31, 36 (Tex. 1998).

511. Here, the alleged wrongful act causing injury—Rojas/Jayme's alleged failure to inspect and disclose the condition of the Sierra Crest Property to the Monges—occurred at or sometime prior to the purchase of the Sierra Crest Property by the Monges—on August 8, 2006. *See* Ex. P-8, pp. 6-8, pp. 333-69; Findings of Fact above. But it was not until July 2012—more than 5 years later—that the Monges first asserted their causes of action against Rojas/Jayme regarding the Sierra Crest Property by filing their Second Amended Complaint (dkt# 58). So the two year statute of limitations (or even the four year statute of limitation if it applied to the Monges' claims) bars any recovery by the Monges against Rojas/Jayme relating to the Sierra Crest Property.

512. Accordingly, the Court concludes that the statute of limitations bars any claim by the Monges against Rojas/Jayme relating to the Sierra Crest Property.

513. However, the Monges have asserted the "discovery rule" in their Second Amended Complaint, which will next be addressed by the Court. *See* Monges' Second Amended Complaint (dkt# 58), p. 23.

514. As already set forth by the Court, the discovery rule is a very limited exception to the general rule that a cause of action accrues when the wrongful act causes injury. *See Beavers v. Metro. Life Ins. Co.,* 566 F.3d 436, 439 (5th Cir. 2009) (quoting *Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 918 S.W.2d 453, 455 (Tex. 1996)). Under the discovery rule, "a cause of action does not accrue until a plaintiff knows or, through the exercise of reasonable care and diligence, 'should have known of the wrongful act and resulting injury.'" *Childs*, 974 S.W.2d at 37 (quoting *S.V. v. R.V.*, 933 S.W.2d 1, 4 (Tex. 1996)). Whether the discovery rule applies to a cause of action is a question of law. *TIG Ins. Co. v. Aon Re, Inc.*, 521 F.3d 351, 357 (5th Cir. 2008) (citing *Moreno v. Sterling Drug, Inc.*, 787 S.W.2d 348, 351 (Tex. 1990)). The party asserting the discovery rule bears the burden of establishing it applies. *See Woods v. William M. Mercer, Inc.*, 769 S.W.2d 515, 518 (Tex. 1988).

515. In Texas, the discovery rule applies if two elements are met: (1) the nature of the injury incurred is inherently undiscoverable; and (2) the evidence of injury is objectively verifiable. See *Beavers*, 566 F.3d at 439 (summarizing two Texas Supreme Court cases that clarified the discovery rule in Texas).

516. As to the first element of the discovery rule, when an injury is, "by its nature, unlikely to be discovered within the prescribed limitations period despite due diligence," it is considered inherently undiscoverable. *Beavers*, 566 F.3d at 439 (quoting *Wagner & Brown, Ltd. v. Horwood*, 58 S.W.3d 732, 734-35 (Tex. 2001)). The

focus is not on whether the particular plaintiff discovered his or her injury within the limitations period, but whether the injury is "the type of injury that generally is discoverable by the exercise of reasonable diligence." *See Wagner & Brown*, 58 S.W.3d at 735 (quoting *HECI Exploration Co. v. Neel*, 982 S.W.2d 881, 886 (Tex. 1998)). In other words, the focus is on a categorical basis rather than an individual basis. *See Beavers*, 566 F.3d at 439; *Wagner & Brown*, 58 S.W.3d at 735.

517. In addition to the discovery rule, the Monges claim that Rojas/Jayme are estopped from asserting a statute of limitations defense because Rojas/Jayme fraudulently concealed material facts regarding the Sierra Crest Property. To establish the defense of fraudulent concealment, the Monges must show (1) a false representation or concealment of material facts; (2) made with knowledge, actual or constructive, of those facts; (3) with the intention that it should be acted on; (4) to a party without knowledge or means of obtaining knowledge of the facts; (5) who detrimentally relies on the representations. *Johnson & Higgins of Tex., Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507, 515-16 (Tex. 1998).

518. In this case, the Monges assert they did not become aware of the actions of Rojas/Jayme that gave rise to their alleged injuries until sometime in 2012, when they were informed of the facts by their attorney. *See* Tr. 8/7/14, p. 118, lines 3-6, p. 122, lines 9-16, p. 195, lines 3-21. However, the probative evidence presented at trial reveals a different story.

519. The Monges received a copy of the Sellers Disclosure Notice prior to purchasing the Sierra Crest Property in August 2006. *See* Findings of Fact above. In the Sellers Disclosure Notice, the sellers disclosed to the Monges that there were "hair

line cracks" in the windows and front door on the Sierra Crest Property, as well as termites had been found and there was previous treatment for termites. *See* Ex. RJ-2, pp. 14-15; Ex. P-11, pp. 105-06. The Sellers Disclosure Notice also advised the Monges that the Notice was not a substitute for any inspections the buyer (the Monges) may wish to obtain, and that the Sierra Crest Property was at least thirteen years old. *See* Ex. RJ-2, p. 13; Ex. P-11, p. 104. At trial, Ms. Monge testified that they requested an inspection of the Sierra Crest Property. *See* Tr. 8/4/14, p. 198, lines 18-20. Thus, the Monges were aware of issues with the Sierra Crest Property prior to purchasing the property in 2006.

520. What is more, at the closing of the Sierra Crest Property in August 2006, the Monges signed an "Acceptance of Property" document, which states that they had the Property inspected and were agreeing to purchase the property "as is." *See* Ex. RJ-2, p. 20; Findings of Fact above. This Acceptance document also provides that the Monges "acknowledge that neither . . . the Real Estate Brokers . . . have made any warranties or representations as to the condition of the [Sierra Crest] property, and accordingly we release and hold them harmless from any and all liability in regard to the same now or at any time in the future." *See* Ex. RJ-2, p. 20.[34]

521. By signing this Acceptance of Property document, the Monges acknowledged that they had the Sierra Crest Property inspected—whether they actually did is of no concern to this analysis. The fact is that the Monges signed a document that stated they had the Sierra Crest Property inspected and were agreeing to purchase

[34] This is yet another reason that the Monges' claims against Mr. Jayme (their real estate agent) for failure to inspect and inform the Monges of the condition of the property has no merit. Through this Acceptance document, the Monges acknowledged that Mr. Jayme made no representations about the condition of the Sierra Crest Property and released him from liability.

the Property as is. Through this Acceptance, the Monges assumed responsibility for evaluating the condition of the Sierra Crest Property as of August 2006. *See Williams v. Dardenne*, 345 S.W.3d 118, 123 (Tex. App.—Houston [1st Dist.] 2011, pet. denied). If the sellers or the inspector failed to inform the Monges of any discoverable defects in the Sierra Crest Property, the Monges' complaint lies against the seller or the inspector—not Rojas/Jayme.

522. Furthermore, Ms. Monge testified that in the year 2007—within a year of moving into the Sierra Crest Property—that the Monges began to notice defects in the Property. In 2006, the Monges experienced problems with leaks, water damage to the walls, and electricity at the Sierra Crest Property. Then, in the year 2007, the Monges began noticing structural issues with the Sierra Crest Property and made a claim to their insurance company. *See* Tr. 8/4/14, p. 196, lines 13-25, p. 197, lines 1-13. According to Ms. Monge, the leaks and structural issues at the Sierra Crest Property continued to get worse, including water leaking through the walls and basement and the growth of black mold, and as a result, the Property is now uninhabitable. *See* Tr. 8/8/14, p. 122, lines 4-25, p. 123, lines 1-6, p. 124, lines 22-24; Findings of Fact above.

523. Based on the testimony and the evidence at trial, the Court concludes that the Monges were aware—or through reasonable discovery could have been aware—of the defects that now form the basis of their claims against Rojas/Jayme on the Sierra Crest Property sometime in 2007, at the very latest. The Monges received a copy of the Sellers Disclosure Notice and signed the Acceptance of Property document prior to and at closing on the Sierra Crest Property in August 2006. At the very earliest then, the Monges were aware—or should have been aware through the inspection—of the

defects that now give raise to their claims in August 2006. And at the very latest, the Monges were aware of the defects sometime in 2007, when they began noticing leaks and structural issues with the Sierra Crest Property.

524. Because the Monges were aware in 2007, at the very latest, that they might have had a claim against Rojas/Jayme, the statute of limitations began to run on their claims at that time, and the discovery rule did not toll the running of the statute of limitations period.

525. Accordingly, the Court concludes that the discovery rule does not defeat Rojas/Jayme's statute of limitations defense.

526. Nor does the fraudulent concealment doctrine apply either. First, there was no evidence identified at trial demonstrating that Rojas/Jayme were even aware of any defects or problems with the Sierra Crest Property. Mr. Jayme acted only as a real estate agent for the Monges and Ms. Rojas acted only as a mortgage broker. *See* Findings of Fact above. Moreover, the Monges received the Sellers Disclosure Notice and signed the Acceptance of Property prior to their purchase of the Sierra Crest Property. Both of these documents, along with the inspection that the Monges acknowledge they had conducted, provided the Monges with enough facts such that they should have conducted a reasonable investigation, and a reasonable investigation would have led the Monges to file a claim for the same wrongful acts of which they now complain. *See Thomas v. Barton Lodge II, Ltd.*, 174 F.3d 636, 640-47 (5th Cir. 1999). Consequently, the fraudulent concealment doctrine does not apply and did not prevent the statute of limitations period from expiring.

527. Accordingly, the Court concludes that the Monges did not prove, by a preponderance of credible evidence, that Rojas/Jayme's statute of limitations defense is defeated by the discovery rule or the doctrine of fraudulent concealment. As a result, the Monges' claims against Rojas/Jayme relating to the Sierra Crest Property are barred by the statute of limitations, and must be denied.

Failure of Burden of Proof by Monges (Sierra Crest Property)

528. Even if the statute of limitations does not bar the Monges' claims against Rojas/Jayme relating to the Sierra Crest Property, the Monges' claims must fail for other independent reasons. The Monges did not prove, by a preponderance of the evidence believed by the Court, that Mr. Jayme (or Ms. Rojas for that matter) even had a duty to inspect the Sierra Crest Property or that either of them were even aware of problems with the Sierra Crest Property—which are essential elements of a negligence or gross negligence claim. *See Willis v. Marshall*, 401 S.W.3d 689, 700 (Tex. App.—El Paso 2013, no pet.) (citing *Praesel v. Johnson*, 967 S.W.2d 391, 394 (Tex. 1998)) (listing the elements of a negligence claim).

529. The Monges accuse Mr. Jayme (the real estate agent for the Monges) of never disclosing any of the defects on the Sierra Crest Property to the Monges. But the Monges provided no believable proof to the Court that Mr. Jayme was even aware of the problems with the Sierra Crest Property. *See* Findings of Fact above. As Texas courts have held, a real estate agent has no duty to disclose facts that he does not know, nor is a real estate agent liable for failing to disclose only what he should have known. *See Wyrick v. Tillman & Tillman Realty, Inc.*, 2001 WL 123877, at *4 (Tex. App.—Austin 2001, no pet.) (citing *Kubinsky v. Van Zandt Realtors*, 811 S.W.2d 711,

715 (Tex. App.—Fort Worth 1991, writ denied)) (explaining that Texas law does not impose a duty on buyer's agent to disclose facts not known to the agent); *see also Sims v. Century 21 Capital Team, Inc.*, 2006 WL 2589358, at *4 (Tex. App.—Austin Sept. 8, 2006, no pet.) (holding a seller's agent could not be liable for failure to disclose to buyer existence of an underground mine because seller's agent was unaware of the mine).

530. Without probative evidence to demonstrate that Mr. Jayme even knew of the defects with the Sierra Crest Property, the Court cannot conclude that Mr. Jayme had a duty to disclose the defects to the Monges.

Conclusion—Sierra Crest Property

531. In sum, the statute of limitations bars any claims by the Monges against Rojas/Jayme relating to the Sierra Crest Property. In the alternative, the Monges did not meet their burden of proof as to a duty and a breach of any duty relating to the Sierra Crest Property by Rojas/Jayme. Accordingly, the Court concludes that the Monges should take nothing on their claims against Rojas/Jayme relating to the Sierra Crest Property.

DEFAULTING DEFENDANTS- MONROJ AND NORTHEAST PATRIOT

532. Monroj Investments Inc. ("Monroj") was a Texas corporation that was technically named as a Defendant by the Monges in this Adversary Proceeding. Monroj was the corporation formed by the Monges and Rojas/Jayme to purchase and develop the Country Cove Subdivision. Monroj is now defunct, and its corporate charter has been revoked. *See* Findings of Fact above.

533. Northeast Patriot Plaza Inc. ("Northeast Patriot") was a Texas corporation that was also technically named as a Defendant by the Monges in this Adversary

Proceeding. Northeast Patriot was the corporation formed by the Monges and Ms. Rojas with a view toward purchasing the Transmountain Property and developing a medical clinic. Northeast Patriot never got off the ground, never purchased any property, and is now defunct. *See* Findings of Fact above.

534. Not surprisingly, Defendants Monroj and Northeast Patriot did not answer or appear in this Adversary Proceeding. On June 5, 2013, upon Motion of the Monges and without hearing, the Court entered an Order of Default against Defendants Monroj and Northeast Patriot (dkt# 160, 168). Neither the Monges' Motion for default nor the Order of Default set forth any amount of liquidated damages and did not seek or award a sum certain against Defendants Monroj and Northeast Patriot. *See* Rule 55(b) of the Federal Rules of Civil Procedure, incorporated by reference into Bankruptcy Rule 7055 governing adversary proceedings.

535. Accordingly, it was the burden of the Monges (as Plaintiffs) to prove and liquidate the amount of damages to be awarded against Defendants Monroj and Northeast Patriot at a hearing in this Adversary Proceeding. *See* Rule 55(b)(2) of the Federal Rules of Civil Procedure; *James v. Frame*, 6 F.3d 307, 310 (5th Cir. 1993) (explaining that in the context of a default judgment, unliquidated damages are not awarded without an evidentiary hearing).

536. Here, the Court set a final trial on the merits in this Adversary Proceeding commencing July 17, 2014 (dkt# 286). At the final trial in this Adversary Proceeding, the Monges did not meet their burden and did not establish, liquidate, or identify evidence sufficient to establish the amount of any damages to be awarded against Monroj and Northeast Patriot.

537. As a result, the Court concludes that the Monges should take nothing on their claims against defunct entities Defendants Monroj and Northeast Patriot.

OTHER POSSIBLE CLAIMS OF PARTIES

538. It is possible that there may be other claims, causes of action, and counterclaims asserted by the parties relating to the Thoroughbred Property, Country Cove Subdivision, Transmountain Property, and Sierra Crest Property. The Monges' Second Amended Complaint that went to trial took a shotgun approach and set forth about eighteen different "boilerplate" causes of action, but (for the most part) failed to identify which property was associated with which causes of action (dkt# 58). Rojas/Jayme's last Amended Answer (dkt# 147), Rojas/Jayme's last and Fourth Amended Counterclaim (dkt# 221), and the Monges' final and Fourth Amended Answer (dkt# 223), suffered (to a lesser extent) from the same problem.

539. Due to this shotgun method of pleading and the inability of the parties to narrow and identify the issues for trial, the Court (by Orders) required the parties to file proposed findings of fact and conclusions of law prior to trial. Such Orders basically provided that the failure of a party to properly include an affirmative claim for relief or affirmative defense (including necessary elements) in such proposed findings and conclusions, may result in the Court determining that such affirmative claim or defense had been waived. *See* Orders of the Court (dkt# 246, ¶4; dkt# 274, ¶2) and discussion above by the Court in above Procedural Background section.

540. To the extent decipherable by the Court, the causes of action, counterclaims, and defenses of the parties, to the extent necessary and preserved for trial, have been addressed by the Court in the above lengthy Conclusions of Law. To

the extent that any causes of actions, counterclaims, and affirmative defenses are not specifically addressed by the above Conclusions of Law, they are hereby denied by the Court.

IV.
CONCLUSION

541. The Monges and Rojas/Jayme have certainly had their fair share of days in the federal court system. This is amply demonstrated by the four-year span of this Adversary Proceeding, the numerous hearings, the attorneys' fees incurred by all sides, the voluminous pleadings filed by the parties, the hundreds of hours in judicial resources spent, a six-day trial that included hundreds of documents and featured the parties testifying about their grievances and many other witnesses, and the (unfortunate) girth of this Court's Proposed Findings of Fact and Conclusions of Law set forth above.

542. For the District Court's convenience, this Court has prepared a proposed form of Final Judgment, which is attached hereto as Exhibit A. This proposed Final Judgment is respectfully submitted to the District Court for review and consideration, and, if deemed appropriate by the District Court, for entry by the District Court. The proposed Final Judgment is consistent with and implements this Court's Proposed Findings of Fact and Conclusions of Law set forth above.

543. With respect to the Thoroughbred Property transactions, in summary the proposed Final Judgment: (a) determines that the Monges are the rightful owners and are entitled to possession of the Thoroughbred Property; (b) requires Rojas/Jayme to turnover possession of the Thoroughbred Property to the Monges; (c) based on breach

of contract and violation of the automatic stay, awards actual damages to the Monges in the amount of $712,178 through the trial month of August 2014, with damages continuing to accrue at $7,992 a month from September 2014 until entry of Final Judgment by the District Court requiring turnover of possession of the Thoroughbred Property by Rojas/Jayme to the Monges; and (d) awards reasonable attorneys' fees and expenses to the Monges in the amount of $240,238. This Court proposes that pre-judgment interest on the award of actual damages begin to accrue on April 29, 2008 (the date of the last payment made by Rojas/Jayme on the Thoroughbred Property), at a rate deemed appropriate by the District Court. Post-judgment interest is proposed to accrue from the date of entry of the Final Judgment by the District Court as provided by federal statute. The other relief sought by the parties with respect to the Thoroughbred Property transactions (whether claim by the Monges or counterclaim by Rojas/Jayme) would be denied.

544. With respect to the Country Cove Subdivision, Transmountain Property, and Sierra Crest Property transactions, the proposed Final Judgment provides that the parties take nothing against each other (whether claim by the Monges or counterclaim by Rojas/Jayme). Finally, the proposed Final Judgment provides that the Monges recover nothing against the defunct and defaulting corporate Defendants Monroj Investments, Inc. and Northeast Patriot Plaza, Inc.

545. Further, this Court sayeth naught.

END OF PROPOSED FINDINGS AND CONCLUSIONS

(Attached as Exhibit A is a proposed form of Final Judgment)

EXHIBIT A--PROPOSED FORM OF FINAL JUDGMENT

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

JOE JESSE MONGE and	**§**	
ROSANA ELENA MONGE,	**§**	
Plaintiffs,	**§**	
	§	
v.	**§**	**Cause No. EP-_____**
	§	
ALICIA ROJAS; FRANCISCO JAVIER	**§**	
JAYME; MONROJ INVESTMENTS INC.;	**§**	
and NORTHEAST PATRIOT PLAZA INC.	**§**	
Defendants.	**§**	

FINAL JUDGMENT

On this day, this Court considered and reviewed the Proposed Findings of Fact and Conclusions of Law With Respect to Trial in Adversary Proceeding No. 10-03019 ("Proposed Findings and Conclusions") filed and submitted by the U.S. Bankruptcy Court for the Western District of Texas, El Paso Division ("Bankruptcy Court") in adversary proceeding no. 10-03019 styled *Monge et al. v. Rojas et al.* ("Adversary Proceeding") which was filed in bankruptcy case no. 09-30881 styled *In re Joe Monge and Rosana Monge* in the Bankruptcy Court.

In accordance with and to the extent required by 28 U.S.C. § 157(c)(1) and Rule 9033(d) of the Federal Rules of Bankruptcy Procedure, this Court has made a de novo review of the Proposed Findings and Conclusions of the Bankruptcy Court in the Adversary Proceeding as to which any written specific objections have been properly and timely made. Any objections to the Proposed Findings and Conclusions filed by Plaintiffs and Counter-Defendants Joe Jesse Monge and Rosana Elena Monge, Defendants and Counter-Plaintiffs Alicia Rojas and Francisco Javier Jayme, and any

other party, are hereby denied. The Proposed Findings and Conclusions of the Bankruptcy Court in the Adversary Proceeding are hereby accepted, approved, and adopted by this Court, and this Court finds that following Final Judgment should therefore be entered by this Court.

ACCORDINGLY, IT IS THEREFORE ORDERED AND ADJUDGED, AND FINAL JUDGMENT IS HEREBY RENDERED AS FOLLOWS:

1. As between Plaintiffs Joe Jesse Monge and Rosana Elena Monge and Defendants Alicia Rojas and Francisco Javier Jayme, the Court determines that Plaintiffs Joe Jesse Monge and Rosana Elena Monge are the rightful and legal owners of and are entitled to possession of the real property and improvements described as: Lot 17 in Block 3 of Los Ranchos Del Rio, located in Dona Ana, New Mexico, as the same is shown and designated on the plat thereof filed for record in the office of the County Clerk of Dona Ana, New Mexico on November 27, 1984 and recorded in Book 13 at Pages 344-345, Plat Records, with the property address of 105 Thoroughbred Court, Santa Teresa, New Mexico (herein “Thoroughbred Property”).

2. Plaintiffs Joe Jesse Monge and Rosana Elena Monge are entitled to immediate possession of the Thoroughbred Property, and Defendants Alicia Rojas and Francisco Javier Jayme shall immediately turnover possession of the Thoroughbred Property to Plaintiffs Joe Jesse Monge and Rosana Elena Monge.

3. Plaintiffs Joe Jesse Monge and Rosana Elena Monge recover from Defendants Alicia Rojas and Francisco Javier Jayme, jointly and severally, actual damages in the sum of $712,178 [plus the amount of $7,992 a month from September 2014 through the month of entry of this Final Judgment], with pre-judgment interest of __% accruing on such sum from April 29, 2008, until the date of entry of this Final

Judgment. Pre-judgment interest on this sum shall be computed as simple interest and shall not be compounded.

4. Plaintiffs Joe Jesse Monge and Rosana Elena Monge also recover from Defendants Alicia Rojas and Francisco Javier Jayme, jointly and severally, the sum of $240,238 in attorneys' fees and expenses, and all costs of court. No pre-judgment interest on such sum is awarded.

5. Post-judgment interest is awarded to Plaintiffs Joe Jesse Monge and Rosana Elena Monge and against Defendants Alicia Rojas and Francisco Javier Jayme on all sums recovered hereunder, at the rate of __ per annum until paid in full, and shall be compounded annually pursuant to the provisions of 28 U.S.C. § 1961(b).

6. Plaintiffs Joe Jesse Monge and Rosana Elena Monge shall be entitled to such writs and processes from this Court as necessary to enforce and collect this Final Judgment.

7. Any and all other relief requested by Plaintiffs Joe Jesse Monge and Rosana Elena Monge against Defendants Alicia Rojas and Francisco Javier Jayme is denied.

8. All relief requested by Defendants and Counter-Plaintiffs Alicia Rojas and Francisco Javier Jayme against Plaintiffs and Counter-Defendants Joe Jesse Monge and Rosana Elena Monge is denied.

9. Plaintiffs Joe Jesse Monge and Rosana Elena Monge shall recover nothing on their claims against Defendants Monroj Investments, Inc. and Northeast Patriot Plaza, Inc.

10. All relief not expressly granted herein is denied.

11. This is a Final Judgment and disposes of all issues, claims, and parties.

SO ORDERED.

SIGNED this __ day of _____, 201_.

_____
UNITED STATES DISTRICT JUDGE