No. _____

In The
Supreme Court of the United States

WILLIAM J. GOLZ,

Petitioner,

v.

MARCIA L. FUDGE,
in her official capacity as Secretary of the
United States Department of Housing
and Urban Development,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

WILLIAM GOLZ, Ph.D.
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TABLE OF APPENDICES

APPENDIX A

FILED
United States Court of Appeals
Tenth Circuit

September 21, 2020

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

BENJAMIN S. CARSON, Secretary of Housing and Urban Development,

Plaintiff - Appellee,

v.

WILLIAM J. GOLZ,

Defendant - Appellant,

and

MARCUS GOLZ; MATTHEW J. GOLZ,

Defendants.

No. 19-1242
(D.C. No. 1:17-CV-01152-RBJ-MEH)
(D. Colo.)

ORDER AND JUDGMENT*

Before **PHILLIPS**, **BALDOCK**, and **CARSON**, Circuit Judges.

Pro se appellant William J. Golz, Ph.D., appeals from the district court's judgment in favor of the Secretary of Housing and Urban Development (HUD) in this

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* After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

foreclosure action under 42 U.S.C. § 3535(i). Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

DISCUSSION

The parties are familiar with the facts, and we do not repeat them here. Dr. Golz argues that the district court usurped a probate court's jurisdiction when it delayed a ruling and that it erred in striking his affirmative defenses and in denying him leave to file a second amended answer and counterclaims. He further argues that this court should apply the unclean hands doctrine to sanction HUD for certain post-judgment arguments in the district court. Because Dr. Golz proceeds pro se, we construe his filings liberally, but he must comply with the same rules as other litigants. *See Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005). We do not act as his "attorney in constructing arguments and searching the record." *Id.*

I. Alleged Judicial Usurpation

Dr. Golz first argues that the district court usurped an Arizona probate court's jurisdiction when it delayed in dismissing the Estate of Verna Mae Golz (the Estate) as a defendant. A threshold issue is Dr. Golz's standing to appeal from a decision regarding the Estate. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997) ("The standing Article III requires must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance.").

The appellant here is Dr. Golz individually, not Dr. Golz as the personal representative of the Estate. Therefore, to challenge the delay in dismissing the

Estate, Dr. Golz must show he individually suffered injury from the delay. *See Thomas v. Metro. Life Ins. Co.*, 631 F.3d 1153, 1159 (10th Cir. 2011). ("[T]o have standing on appeal, one must be aggrieved by the order from which appeal is taken. . . . [P]arties generally do not have standing to appeal in order to protect the rights of third parties." (brackets and internal quotation marks omitted)). He has failed to do so. His averments of judicial usurpation do not establish any harm to him individually. And although he states that during the delay he could not amend pleadings to which the Estate was a party, he has not identified any authority restricting him, individually, from taking any action in the course of representing himself. Dr. Golz therefore has not established his standing to appeal from the delay in dismissing the Estate as a defendant.

II. Striking Affirmative Defenses

Dr. Golz next challenges the district court's grant of HUD's Fed. R. Civ. P. 12(f) motion to strike his affirmative defenses of equitable estoppel and unclean hands. Although we generally review a decision on a motion to strike for abuse of discretion, *see Durham v. Xerox Corp.*, 18 F.3d 836, 840 (10th Cir. 1994), here the district court considered evidence outside the pleadings and applied a summary-judgment standard. We therefore review the decision de novo. *See Whitesel v. Sengenberger*, 222 F.3d 861, 866 (10th Cir. 2000) (applying de novo review where district court converted motion to dismiss into motion for summary judgment).

A. Estoppel

The district court followed *FDIC v. Hulsey*, 22 F.3d 1472, 1489-90 (10th Cir. 1994), which holds that a party seeking to establish estoppel against the government must show affirmative misconduct. Dr. Golz argues that *Hulsey* is inapplicable because HUD's funds are not appropriated from the public treasury, but come from mortgage insurance premiums. He further posits that HUD should be subject to equitable defenses because, in this case, it is acting in the nature of a private party seeking to enforce a contract.

Hulsey recognized that "[c]ourts generally disfavor the application of the estoppel doctrine against the government and invoke it only when it does not frustrate the purpose of the statutes expressing the will of Congress or unduly undermine the enforcement of the public laws." *Id.* at 1489. "It is far from clear that the Supreme Court would ever allow an estoppel defense against the government under any set of circumstances." *Id.* at 1490. "However, even assuming estoppel could be applicable," *Hulsey* continued, "the Court has indicated that there must be a showing of affirmative misconduct on the part of the government." *Id.*

We are not persuaded by Dr. Golz's attempts to distinguish *Hulsey*. To the contrary, we see no reason why *Hulsey* should not apply. *See Wade Pediatrics v. Dep't of Health & Human Servs.*, 567 F.3d 1202, 1206 (10th Cir. 2009) ("Courts are parsimonious about estoppel claims against the government for good reason . . . ."); *Bd. of Cty. Comm'rs v. Isaac*, 18 F.3d 1492, 1498 (10th Cir. 1994) ("[T]he Supreme Court has alerted the judiciary that equitable estoppel against the government is an

extraordinary remedy."). Further, we agree with the district court that Dr. Golz failed to show affirmative misconduct by HUD. *See Hulsey*, 22 F.3d at 1490 ("[T]he erroneous advice of a government agent does not reach the level of affirmative misconduct."); *Isaac*, 18 F.3d at 1499 ("Mere negligence, delay, inaction, or failure to follow agency guidelines does not constitute affirmative misconduct."). Accordingly, the court did not err in striking the estoppel defense.

B. Unclean Hands

Dr. Golz asserts that HUD has unclean hands because it communicated in bad faith before ultimately filing for foreclosure and its agents committed trespass on the property. The magistrate judge doubted that unclean hands could apply to a foreclosure by HUD, but the district court assumed without deciding that the defense could apply. It held that Dr. Golz must show fraudulent and deceitful conduct, which must be pleaded with particularity. It concluded that "[t]he accusation that HUD acted in bad faith bordering on fraud is a conclusory allegation for which neither [the magistrate judge] nor [the district court] have found supportive facts alleged with particularity in the Amended Answer." R. Vol. 2 at 417.

Like the district court, we assume without deciding that the defense of unclean hands is not categorically barred against the government. *See Deseret Apartments, Inc. v. United States*, 250 F.2d 457, 458 (10th Cir. 1957) ("[T]he Government may not invoke the aid of a court of equity if for any reason its conduct is such that it must be said it comes into court with unclean hands."). *But see id.* (recognizing that equitable principles "will not be applied to frustrate the purpose of [the United

States'] laws or to thwart public policy" (internal quotation marks omitted)); *McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352, 360 (1995) (stating that "unclean hands . . . has not been applied where Congress authorizes broad equitable relief to serve important national policies"). Having reviewed the arguments and record, however, we are not persuaded that Dr. Golz satisfies the high standard for proceeding with the defense, either with regard to HUD's pre-foreclosure communications, *see Eresch v. Braecklein*, 133 F.2d 12, 14 (10th Cir. 1943) ("The [unclean hands] maxim refers to willful misconduct rather than merely negligent misconduct."), or its alleged trespasses, *see Ohio Oil Co. v. Sharp*, 135 F.2d 303, 308-09 (10th Cir. 1943) ("[N]ot every actionable wrong amounting to a trespass or an invasion of the property rights of others is iniquitous, inequitable or unconscionable," such as "to repel [the plaintiff] from a court of equity."). Accordingly, the district court did not err in striking the unclean hands defense.

III. Denial of Leave to Amend

Dr. Golz further argues that the district court erred in denying him leave to file a second amended answer and counterclaims. The district court found the request "was filed with unjustified delay, with a dilatory or bad faith motive and would be futile." R. Vol. 3 at 357. Because we need not go beyond the district court's first reason, unjustified delay, our review is for abuse of discretion. *See Miller ex rel. S.M. v. Bd. of Educ.*, 565 F.3d 1232, 1249 (10th Cir. 2009).

"It is well settled in this circuit that untimeliness alone is a sufficient reason to deny leave to amend, especially when the party filing the motion has no adequate

explanation for the delay." *Frank v. U.S. West, Inc.*, 3 F.3d 1357, 1365-66 (10th Cir. 1993) (citations omitted). Dr. Golz asserts that he did not complete administrative presentment of his Federal Tort Claims Act (FTCA) counterclaim until December 2018, and then he brought the claim in January 2019.

Our review of the record indicates, however, that Dr. Golz did not properly present any FTCA counterclaim(s) at any time after December 2018. His January 2019 filings referred to potential counterclaims, but those filings were not motions to amend, as required by the court's rules. He first formally moved to amend his answer on April 1, 2019, the due date for his objections to the magistrate judge's recommendation that the district court grant HUD's motion for summary judgment. But that motion contemplated changes only to the factual recitations and the affirmative defenses the district court had stricken six months earlier. According to the title of the motion, with regard to counterclaims, Dr. Golz merely intended to give "Notice of Intent to File Counterclaims and Add an Intervenor by May 1, 2019." R. Vol. 3 at 205 (capitalization and boldface omitted). The body of the motion failed to address any proposed counterclaims, and the proposed second amended answer failed to set forth any counterclaims. A week later, Dr. Golz submitted a further amended proposed second amended answer, which also failed to set forth any counterclaims.

Further, by the time Dr. Golz moved to amend, the litigation was twenty-three months old, and four months had passed since the alleged FTCA counterclaim(s) had been administratively presented. He himself acknowledged that allowing amendment

would moot the then-pending motion for summary judgment and the magistrate judge's recommendation. Allowing amendment also would negate the district court's earlier decision to strike affirmative defenses. As the district court stated, nearly two years into the suit, "Dr. Golz . . . attempts to restart this litigation from ground zero." *Id.* at 359. Under these circumstances, we are not persuaded that the district court abused its discretion in concluding that Dr. Golz unduly delayed in moving to amend. Having upheld the decision on this ground, we need not consider the district court's other reasons for denying amendment.

IV. Post-Judgment Conduct

Finally, Dr. Golz suggests the unclean hands doctrine should apply to sanction HUD for post-judgment arguments it made in the district court while seeking the court's approval of a judicial notice of sale. It does not appear that he made this argument in the district court. More importantly, even if he did raise the argument, we lack jurisdiction to hear it in this appeal.

This appeal arises from the notice of appeal Dr. Golz filed on July 8, 2019, from the final judgment and the orders denying his motion to alter or amend the judgment and his motion to correct the post-judgment order. The district court did not decide HUD's motion for approval until August 15, 2019, and Dr. Golz did not file a new or amended notice of appeal after the district court issued that order. We therefore lack jurisdiction to consider issues concerning that order. *See* Fed. R. App. P. 3; *Abbasid, Inc. v. First Nat'l Bank of Santa Fe*, 666 F.3d 691, 697 (10th Cir.

2012) ("A notice of appeal of a judgment or order is not effective with respect to judgments or orders entered after the challenged judgment or order.").

CONCLUSION

The district court's judgment is affirmed. Dr. Golz's motion to file an oversize reply brief is granted. His two motions to certify questions of state law to the Colorado Supreme Court are denied. His motions to disqualify the Chief Judge of this court and the panel assigned to decide a prior mandamus petition, *see In re Golz*, No. 19-1083 (10th Cir. May 13, 2019) (unpublished order), are denied as moot.

Entered for the Court

Bobby R. Baldock
Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT
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Christopher M. Wolpert
Clerk of Court

Jane K. Castro
Chief Deputy Clerk

September 21, 2020

William J. Golz
29714 North 152nd Way
Scottsdale, AZ 85262

RE: 19-1242, Carson v. Golz
Dist/Ag docket: 1:17-CV-01152-RBJ-MEH

Dear Appellant:

Enclosed is a copy of the order and judgment issued today in this matter. The court has entered judgment on the docket pursuant to Fed. R. App. P. Rule 36.

Please contact this office if you have questions.

Sincerely,

Christopher M. Wolpert
Clerk of the Court

cc: Jasand Patric Mock

CMW/lg

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge R. Brooke Jackson

Civil Action No 17-cv-01152-RBJ-MEH

BENJAMIN S. CARSON, Secretary of Housing and Urban Development,

Plaintiff,

v.

ESTATE OF VERNA MAE GOLZ,
WILLIAM J. GOLZ,
MARCUS J. GOLZ,
MATTHEW J. GOLZ, and
UNKNOWN HEIRS AND CLAIMAINTS OF THE ESTATE OF VERNA MAE GOLZ,

Defendants.

ORDER

This matter is before the Court on two recommendations of Magistrate Judge Michael E. Hegarty, ECF No. 156 and ECF No. 159. These recommendations are incorporated herein by reference. *See* 28 U.S.C. § 636(b)(1)(B); Fed. R. Civ. P. 72(b). The first recommendation addresses defendant William J. Golz's "Position Paper on Proceeding Pro Se and Motion to Dismiss the Estate as a Defendant," ECF No. 103. Judge Hegarty recommends that Dr. Golz's motion should be granted, and that the Estate of Verna Mae Golz ("Estate") should be dismissed as a defendant. ECF No. 156. The second recommendation addresses plaintiff's motion for summary judgment, ECF No. 127, and recommends that plaintiff's motion should be granted. ECF No. 159. After the issuance of both recommendations, Dr. Golz filed a "Motion for Leave to Amend and to Declare Certain Motions and Recommendations Moot without Prejudice and

Notice of Intent to File Counterclaims and Add an Intervenor by May 1, 2019." ECF No. 166. For the reasons discussed in this motion, I DENY Dr. Golz's motion, ECF No. 166, and I ACCEPT and ADOPT both of Judge Hegarty's recommendations, ECF Nos. 156, 159 in full.

STANDARD OF REVIEW

When a magistrate judge makes a recommendation on a dispositive motion, the district court "must determine de novo any part of the magistrate judge's disposition that has been properly objected to." Fed. R. Civ. P. 72(b)(3). For an objection to be proper, it must be timely and "sufficiently specific to focus the district court's attention on the factual and legal issues that are truly in dispute." *United States v. One Parcel of Real Prop.*, 73 F.3d 1057, 1060 (10th Cir. 1996). However, the district court need not consider frivolous, conclusive or general objections. *Id.* "In the absence of a timely objection, the district court may review a magistrate . . . [judge's] report under any standard it deems appropriate." *Summars v. Utah*, 927 F.2d 1165, 1167 (10th Cir. 1991).

Although the first recommendation was that Dr. Golz's motion to dismiss the Estate should be granted, Dr. Golz filed a timely objection to it. ECF No. 163. However, Dr. Golz did not file an objection as such to the second recommendation, ECF No. 159, which recommended that I grant plaintiff's motion for summary judgment. Instead, on the date an objection was due he filed a motion to amend his answer and to declare the recommendations moot. ECF No. 166.[1]

[1] Dr. Golz's objections to the recommendation on the motion for summary judgment were due on Saturday, March 30, 2019 - seventeen days (fourteen days plus three days for service by mail) from the filing of the recommendation on March 13, 2019. That was a Saturday, so the objection was due April 1, 2019.

This pleading also signaled his intent to file counterclaims and to add an intervenor by May 1, 2019. *Id.*

This Court takes into consideration that Dr. Golz proceeds pro se. "A pro se litigant's pleadings are to be construed liberally and held to a less stringent standard than formal pleadings drafted by lawyers." *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991) (citing *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972)). This rule applies to all proceedings involving a pro se litigant. *Id.* at 1110 n.3. At the same time, the Court cannot "assume the role of advocate for the pro se litigant." *Id.* at 1110. Pro se litigants must follow the same procedural rules that govern other litigants. *Nielsen v. Price*, 17 F.3d 1276, 1277 (10th Cir. 1994).

Without an objection to the recommendation on the motion for summary judgment, I am not required to conduct a de novo review of the motion. Nevertheless, in my discretion and because a pro se party's pleadings must be construed liberally, I have conducted a de novo review of both recommendations.

ANALYSIS

I. Defendant Golz's Motion for Leave to Amend

I will begin with Dr. Golz's motion for leave to amend his amended answer. ECF No. 166. A motion for leave to amend is governed by Fed. R. Civ. P. 15. Fed. R. Civ. P. 15(a)(1) permits a party to amend its pleading once as a matter of course within 21 days after serving it. Dr. Golz amended his answer on November 28, 2017. ECF No. 62. He now moves to amend his answer a second time. Fed. R. Civ. P. 15(a)(1) states that "a party may amend its pleading only with the opposing party's written consent or the court's leave." It further instructs that leave to amend should be freely granted when justice so requires. This Court freely permits parties to

amend their pleadings absent "a showing of undue delay, undue prejudice to the opposing party, bad faith or dilatory motive, failure to cure deficiencies by amendments previously allowed, or futility of amendment." *Frank v. U.S. West, Inc.*, 3 F.3d 1357, 1365 (10th Cir. 1993). In this case, I find that Dr. Golz's proposed second amended complaint was filed with unjustified delay, with a dilatory or bad faith motive and would be futile. For these reasons I DENY his motion for leave to amend his amended answer. ECF No. 166.

In his motion, Dr. Golz justifies his request by stating:

> Defendant's Second Amended Answer is needed to address facts, including but not limited to, those learned from plaintiff's February 11, 2019 reply in support of its motion for summary judgment, ECF 147, from the period December 18, 2018 to January 23, 2019, and issues concomitant to the time-period relating to the District Judge's March-1, 2019 order. ECF N155.

ECF No. 166 at ¶7. First, I have reviewed plaintiff's February 11, 2019 reply in support of its motion for summary judgment and see no new facts or arguments introduced that are material to the resolution of the summary judgment motion. In this reply, in response to Dr. Golz asking for discovery on a disputed $750 of loan charges, HUD offers evidence of these loan charges in exhibits but also offers to deduct this disputed charge plus interest, $825, from the debt owed in the interest of resolving this case. ECF No. 147 at 1-2. Given this stipulation, this evidence is not material to the summary judgment motion, and no other new evidence or arguments are introduced in this reply.

Second, it seems that Dr. Golz wishes to relitigate issues I have already ruled upon in my March 1, 2019 order, ECF No. 155. I issued this order denying Dr. Golz's motion to disqualify the magistrate judge, and I addressed a number of concerns that Dr. Golz raised about the magistrate judge's conduct of pre-trial proceedings in the period between December 18, 2018 to

January 23, 2019, finding "absolutely nothing indicating any improper conduct by Magistrate Judge Hegarty." *Id.* at 4. I have addressed Dr. Golz's complaints about the hearings conducted in this time period and have issued an order finding these complaints to be groundless. Relitigation of these issues is not a justifiable basis upon which to grant leave to file an amended answer.

Moreover, this case has been pending for twenty-three months, and Dr. Golz offers no reasoned justification for expressing an intention to file new counterclaims for the first time on the day his objections to the recommendation on summary judgment are due.[2] Dr. Golz has previously, and improperly, moved to amend his Amended Answer to add counterclaims in his response brief to the motion for summary judgment. ECF No. 144 at 9, 14. Magistrate Judge Hegarty addressed this issue in his recommendation on the motion for summary judgment. ECF No. 159 at 11. Judge Hegarty highlighted that to the extent Dr. Golz wishes to amend his answer to express "this defense as 'unclean hands,' Judge Jackson struck this affirmative defense on October 4, 2018 for Dr. Golz's failure to plead the defense with particularity as required by Fed. R. Civ. P. 9(b). ECF No. 125. Dr. Golz took no action to attempt to amend the Amended Answer following Judge Jackson's order." *Id.* Judge Hegarty also pointed out that "despite mentioning in a January 3, 2019 motion for extension of time that he intended to file a 'motion for leave to amend his answer,' [Dr. Golz] has not done so." ECF No. 159 at 11-12 (referring to ECF No. 129 at 2).

[2] Dr. Golz states in his motion that he has business travel planned the weeks of April-1, April-8, and April 15, 2019, but this does not explain why he was unable to file these counterclaims in the year and a half since plaintiff filed its amended complaint on August 18, 2017 or in the six months since I struck his affirmative defenses on October 4, 2018.

Further, though Dr. Golz moved to amend his answer in his response brief, plaintiff stated in its February 11, 2019 reply brief that "Dr. Golz's request to amend has not been properly presented. The Local Rules require a separate motion to amend, accompanied by a redline." EF No. 147 at 4. However, between this reply and Judge Hegarty's recommendation issued on March 13, 2019, Dr. Golz still filed no motion. In moving for leave to file once again, Dr. Golz offers no reasoned justification for his failure to amend his amended answer prior to this point in the litigation.

In addition, instead of expressing his arguments in an objection to Magistrate Judge Hegarty's recommendation which addressed Dr. Golz's attempts to file a second amended answer, Dr. Golz expresses these arguments in a motion that attempts to restart this litigation from ground zero. ECF No. 166 at 3 (Though proceeding pro se, Dr. Golz is aware that "[i]f the Court grants Defendant's Motion for Leave to Amend, the Second Amended Answer will render Plaintiff's pending motion[] . . . for summary judgment, ECF 127, and the recommendation of the United States Magistrate Judge, ECF 159, moot. These would be dismissed without prejudice . . ."). To file a motion declaring an intention to file counterclaims on the day that objections to the recommendation are due, asking the court to "declare certain motions and recommendations moot without prejudice" after these motions have been fully briefed, and without any compelling circumstances as justification, is an eleventh-hour tactic that borders on bad faith. The fact that Dr. Golz justifies this motion by raising arguments that I have previously ruled on, and some that I have deemed frivolous and groundless, *see* ECF No. 155 at 3, push Dr. Golz firmly into bad faith territory.

The untimeliness of this motion and my doubts that this motion was filed in good faith would be sufficient reason alone to deny leave to amend. However, I have also reviewed Dr. Golz's proposed second amended answer, ECF Nos. 166, 167, and have determined that his filing of such an answer would be futile.

I'll discuss the proposed changes to Dr. Golz's second amended answer, referring to the exhibit Dr. Golz submitted that is a black-lined version of the second amended answer, ECF No. 167. Many of the proposed changes to the second amended answer merely describe the procedural history of this case. *Id.* at 1-4. I am already familiar with the procedural history of this case and do not need this history described in his answer to take note of it. Within this procedural history, Dr. Golz also reiterates his jurisdictional argument that he discusses in his objection to the first recommendation, ECF No. 163. ECF No. 167 at 7. I consider this argument below in evaluating his objections, and a second amended complaint is unnecessary to raise this argument.

Dr. Golz changes the wording of some of his admissions, denials and factual allegations. Many alterations are to form rather than substance, and none of these alterations affect my evaluation of the motion to dismiss or the motion for summary judgment. ECF No. 167 at 8-53. Dr. Golz also changes the word "defendants" to "defendant" and "estate" to "defendant" consistent with Judge Hegarty's recommendation to dismiss the Estate as a defendant. *See, e.g.*, *id.* at 37. Those changes that are to substance, rather than simply to form, I also find futile because they restate arguments that have been raised and addressed by the court already or are not relevant to the issues in either the motion to dismiss or the motion for summary judgment.

Within this section, Dr. Golz's substantive changes only reiterate many of the arguments he made in his response to the plaintiff's motion to strike his affirmative defenses or in response to plaintiff's motion for summary judgment concerning issues such as plaintiff's entry into the home, unclean hands and plaintiff's adherence to its agency regulations. *See e.g.*, *id.* at 17, 20, 23. Dr. Golz had the opportunity to make these arguments in his response to the plaintiff's motion for summary judgment, did make the arguments, *see* ECF No. 144 at 7-13, and the issues were addressed in Judge Hegarty's recommendation, ECF No. 159. Those issues that were not raised and addressed in the briefing for the motion for summary judgment were addressed in the briefing concerning plaintiff's motion to strike affirmative defenses, ECF Nos. 71, 81, 84 and in the recommendation and order striking Dr. Golz's affirmative defenses from his first amended answer, ECF Nos 118, 125 (striking the affirmative defenses of (1) foreclosure being contrary to agency regulations; (2) failure to state a claim; (3) estoppel; (4) laches; (5) waiver; (6) plaintiff's final agency action is arbitrary, capricious, and contrary to law; (7) unclean hands). Raising these issues again in a second amended answer would be futile.

In his proposed second amended answer, Dr. Golz also adds the affirmative defense of "fraud upon the court," in which he restates his complaints about Magistrate Judge Hegarty's efforts to assist the Estate in obtaining counsel and his complaints about a courtroom deputy not recording the January 23 conference. I have already ruled on Dr. Golz's motion to recuse Magistrate Judge Hegarty based on these events, ECF No. 155, and Dr. Golz's attempt to add these issues back into the litigation as an affirmative defense would be futile.

Moreover, Dr. Golz restates these arguments, almost identically, in his objections to the recommendation on the motion to dismiss, ECF No. 163 at 5-16, and I address them in ruling on

the recommendation. Dr. Golz then elaborates in his proposed second amended complaint upon affirmative defenses that I have previously stricken. ECF No. 167 at 64-80; *see* ECF Nos. 118, 125 (striking affirmative defenses). I find that reasserting these affirmative defenses would be futile. To the extent that these additions are related to affirmative defenses I have stricken under Fed. R. Civ. P. 9(b) for failure to plead with sufficient particularity, I find that these amendments are filed with unjustified delay given that I struck those affirmative defenses on October 4, 2018, well before any briefing on the motion for summary judgment.

In sum, I find that Dr. Golz's proposed second amended answer would be futile, was filed with undue and unjustified delay, and was not filed in good faith. As such, I DENY this motion, ECF No. 166.

II. Defendant Golz's Motion to Dismiss the Estate as a Defendant.

Judge Hegarty describes the factual background of this case in his recommendations, ECF No. 156; ECF No. 159 at 1-4, and I have also described the factual background of this case in prior orders, *see, e.g.,* ECF No. 125. Briefly, in 2002 Verna Mae Golz entered into a federally insured Home Equity Conversion Mortgage loan with a private lender. Ms. Golz's home, the real property at issue in this case, is located at 130 Beaver Creek Drive Nederland, Colorado, 80466, with a legal address of Lot 19, Beaver Valley Estates, County of Boulder, State of Colorado (the "Property"). The loan, sometimes called a "reverse mortgage," allowed Ms. Golz to convert the equity in her home into cash through periodic advance payments that increased her loan balance but limited the mortgage holder's recourse to foreclosure on the property if the loan were not repaid. The lender obtained mortgage insurance from the Department of Housing and Urban Development ("HUD" or "plaintiff"), and Ms. Golz executed a second note and deed of

trust in favor of HUD. Later the lender submitted an insurance claim to HUD and assigned its rights under the mortgage to HUD in exchange for a payment by HUD of $242,013.

Ms. Golz did not repay any portion of the loan balance after that assignment, and it became due and payable upon her death on May 16, 2014. The loan had a balance of $288,260.83 as of August 18, 2017. Plaintiff HUD brought this action to foreclose on its deeds of trust. The active defendants initially were her Estate and Ms. Golz's son, William J. Golz, Ph.D., who was the personal representative of the Estate and, he indicated, her sole heir. Dr. Golz is proceeding pro se, and the Estate has also acted pro se, in effect represented by Dr. Golz.

There was always a question whether Dr. Golz, not a lawyer, could represent the Estate in these circumstances. On April 25, 2018 Dr. Golz submitted what he called, in part, a position paper, in which he argued that the Estate could proceed pro se. In the same document he moved to dismiss the Estate as a defendant. ECF No. 103. The court liberally construed this motion as a motion to dismiss filed pursuant to Fed. R. Civ. P. 12(b)(6) or 12(c). Because Dr. Golz chose to support his motion to dismiss with documents outside the pleadings, the court informed the parties that it would convert the motion into a motion for summary judgment pursuant to Fed. R. Civ. P. 56 and gave the parties an opportunity to respond to materials submitted by Dr. Golz with any "material that is pertinent to the motion," Fed. R. Civ. P. 12(d). ECF No. 105. Plaintiff did not oppose Dr. Golz's motion. *See* ECF No. 152.

Magistrate Judge Hegarty found as follows:

> It is undisputed that (1) the only asset belonging to the Estate was the real property at 130 Beaver Creek Drive, Nederland, Colorado, (2) such property was transferred to Dr. Golz by a Personal Representative's Deed (ECF No. 103 at 27), and (3) probate on the Estate closed on May 2, 2018 (ECF No. 108 at 6-7); thus, the Court finds the existence of no genuine issue of material fact demonstrating that Plaintiff's claim for foreclosure *against the Estate* remains viable.

ECF No. 156 at 3 (emphasis added).

Judge Hegarty recommended that I dismiss the Estate, granting Dr. Golz the relief he sought in his motion. ECF No. 156. Dr. Golz objects. ECF No. 163.

A) Objection to Jurisdiction over the Estate.

Dr. Golz argues that the Court lacks jurisdiction to maintain a cause of action against an estate once probate has been closed, citing *Jenkins v. Estate of Thomas*, 800 P.2d 1358, 1359 (Colo. App. 1990), for support. ECF No. 156 at 2. Dr. Golz points to the fact that the probate on the Estate closed on May 2, 2018. There are a few problems with this objection. *Jenkins* concerned a negligence lawsuit based upon an automobile accident which occurred between plaintiff and a decedent, ten months prior to the decedent's death. Two and a half years after the decedent's death and one and a half year after the personal representative was discharged, plaintiff filed his complaint against the decedent's estate, without seeking to reopen the estate. The appellate court upheld the dismissal of the action, concluding that because the alleged tortfeasor was dead and the personal representative had been discharged at the time the action was filed, there was no legal entity that could be named as a party defendant. 800 P.2d at 1359. However, *Jenkins* was abrogated twenty years later by the Colorado Supreme Court in *Currier v. Sutherland*, 218 P.3d 709 (Colo. 2009), which held that a deceased defendant's lack of capacity to be sued does not divest a court of subject matter jurisdiction over the case. *Id.* at 713-714 (Colo. 2009). Notwithstanding the fact that the law Dr. Golz cites is no longer good law on this issue, I am unconvinced that this line of case law is relevant here. HUD filed suit against the Estate and filed its amended complaint well before probate had closed.

Even more perplexing, however, is Dr. Golz's objection to Judge Hegarty's recommendation to dismiss the Estate on the basis that the Estate should be dismissed. Any arguments that Dr. Golz has about the Court's jurisdiction over the Estate, whether meritorious or not, are moot in light of the Estate's being dismissed as a party in this action, especially given that the Estate was dismissed on Dr. Golz's own motion.

Reading Dr. Golz's objection very broadly as he is proceeding pro se, I infer that perhaps Dr. Golz might be arguing that the lawsuit be dismissed against him personally as well, not just the Estate, though he does not ask for this relief in his motion or the objection. After analyzing the record, I agree with Judge Hegarty's findings of fact in the recommendation on Dr. Golz's motion, ECF No. 156, and in his subsequent recommendation on plaintiff's motion for summary judgment. Significantly, the deeds of trust held by HUD encumber the property. ECF No. 159 at 1-2. The notes and deeds of trust provide that the loan balance becomes immediately due and payable upon Ms. Golz's death. *Id.* at 3. The property, originally an asset of the Estate, was transferred to Dr. Golz by a Personal Representative's Deed. *Id.* at 4. Probate on the Estate closed on May 2, 2018 and the loan balance has not been paid. *Id.* Dr. Golz, as the owner of the property on which HUD holds the notes and deeds of trust encumbering the property, is properly designated as a party in this case. Dr. Golz offers no credible argument or competent summary judgment evidence that the promissory notes and deeds of trust that HUD holds on the property became invalid upon the property's transfer to Dr. Golz. This lawsuit continues against Dr. Golz upon the dismissal of the Estate.

B) <u>Dr. Golz's Other Objections.</u>

The bulk of Dr. Golz's remaining objections, ECF No. 163 at 5-15, are aimed not at Judge Hegarty's recommendation but instead at the order I issued denying Dr. Golz's motion to disqualify Judge Hegarty. *See* ECF Nos. 150, 155. Dr. Golz has claimed that Judge Hegarty's conduct of pretrial proceedings reflected both actual bias and the appearance of bias twice now, and, as I indicated earlier in this order, I have (twice) found that claim to be entirely without merit. ECF Nos. 125 at 5-8, 155 at 2-3. In the second order in which I had to address these claims, I warned Dr. Golz that "[a]sserting the same points again in the pending motion is nothing short of groundless, frivolous and vexatious litigation conduct. I would sanction this conduct were it not for the fact that Dr. Golz is an unrepresented party. I will not tolerate it in the future." ECF No. 155 at 3.

I have previously addressed Dr. Golz's concerns regarding the hearings and conferences conducted by Judge Hegarty in his case between December 18, 2018 and February 28, 2018. ECF No. 155 at 3-4. In his objections, Dr. Golz asserts the same theories about a conspiracy behind a nine-minute status conference on January 23 not being recorded by courtroom personnel and Judge Hegarty's efforts to assist the Estate in obtaining counsel from this district's civil pro bono panel. ECF No. 163 at 5-14. Because these objections merely restate arguments that I have previously found to be frivolous, groundless and vexatious on two other occasions, I overrule these objections.

Dr. Golz also requests that I bring a motion before the Court to disqualify myself from this case. ECF No. 163 at 16. The local rules of this district specify that "[a] motion shall not be included in a response or reply to the original motion. A motion shall be filed as a separate document." D.C.COLO.LCivR. 7.1(d). Similarly, a motion cannot be included in an objection

to a recommendation but needs to be filed as a separate document. This court has already informed Dr. Golz of this rule, *see* ECF No. 159 at 11 n.7, and though proceeding pro se, Dr. Golz must follow the same procedural rules as all other litigants. *See, e.g., Nielsen v. Price*, 17 F.3d 1276, 1277 (10th Cir. 1994). Dr. Golz's grounds for this motion are that "one need look no further than the facts recounted in this Objection to recognize that the District Judge is automatically disqualified." ECF No. 163 at 16. Though Dr. Golz does not properly file this motion, in the interest of judicial economy, I note that he has made no allegations or arguments that would support disqualifying myself.

There are no objections to the remainder of the recommendations. Based on my de novo review, this Court ADOPTS the recommendation, ECF No. 156, as the findings and conclusions of this Court.

III. Plaintiff's Motion for Summary Judgment.

On December 12, 2018 plaintiff moved for summary judgment against Dr. Golz. ECF No. 127. Dr. Golz responded to this motion, ECF No. 144, and plaintiff filed a reply, ECF No. 147. Judge Hegarty recommended that I grant plaintiff's motion for summary judgment. ECF No. 159. No party filed an objection.

Nevertheless, as indicted earlier, I have conducted a de novo review of Magistrate Judge Hegarty's Recommendation on the motion for summary judgment. Based upon that review, which involved again reading the plaintiff's amended complaint, ECF No. 31, the amended answer, ECF No. 64, the plaintiff's motion for summary judgment, ECF No. 127, the parties' briefs, ECF No. 144, 147, and the recommendation, ECF No. 159, I agree with Judge Hegarty's factual and legal conclusions. Therefore, the Court ADOPTS the recommendation, ECF No.

159, as the findings and conclusions of this Court. Accordingly, plaintiff is entitled to foreclose on the subject Home Equity Conversion Mortgage in this matter.

ORDER

1) The Recommendations of Magistrate Judge Hegarty, ECF Nos. 156, 159 are AFFIRMED and ADOPTED.
2) Defendant William J. Golz's Motion to Dismiss the Estate, ECF No. 103, is GRANTED and the Estate is dismissed as a party.
3) Plaintiff's Motion for Summary, ECF No. 127, is GRANTED and the Court enters judgment in plaintiff's favor.
4) The Court orders the Property to be foreclosed and orders a judicial sale in the manner specified in 28 U.S.C. §§ 2001-2002 and in the Amended Complaint, ECF No. 31 at 12-14.
5) As the prevailing party, plaintiff is awarded costs to be taxed by the Clerk of Court pursuant to Fed. R. Civ. P. 54 (d)(1) and D.C.COLO.LCivR 54.1.

DATED this 8th day of April, 2019.

BY THE COURT:

R. Brooke Jackson
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 17-cv-01152-RBJ-MEH

BENJAMIN S. CARSON, Secretary of Housing and Urban Development,

Plaintiff,

v.

WILLIAM J. GOLZ,
MARCUS J. GOLZ,
MATTHEW J. GOLZ, and
UNKNOWN HEIRS AND CLAIMAINTS OF THE ESTATE OF VERNA MAE GOLZ,

Defendants.

FINAL JUDGMENT

In accordance with the orders filed during the pendency of this case, and pursuant to Fed. R. Civ. P. 58(a), the following Final Judgment is hereby entered.

Pursuant to the ORDER [ECF No. 169] of Judge R. Brooke Jackson entered on April 8, 2019, it is

ORDERED that the Recommendations of United States Magistrate Judge [ECF Nos. 156 and 159] are AFFIRMED and ADOPTED. It is

FURTHER ORDERED that Defendant William J. Golz's Motion to Dismiss the Estate [ECF no. 103] is GRANTED. It is

FURTHER ORDERED that Plaintiff's Motion for Summary Judgment [ECF No. 127] is GRANTED. It is

FURTHER ORDERED that judgment is entered in favor of the plaintiff and against the defendants. It is

FURTHER ORDERED that the property is to be foreclosed and orders a judicial sale in the manner specified in 28 U.S.C. §§ 2001-2002 and in the Amended Complaint, ECF No. 31 at 12-14. It is

FURTHER ORDERED that as the prevailing parties, the plaintiff is awarded reasonable costs pursuant to Fed. R. Civ. P. 54(d)(1) and D.C.COLO.LCivR 54.1.

Dated at Denver, Colorado this 8th day of April, 2019.

FOR THE COURT:
JEFFREY P. COLWELL, CLERK

By: s/ J. Dynes

J. Dynes
Deputy Clerk

APPENDIX C

FILED
United States Court of Appeals
Tenth Circuit

December 14, 2020

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

BENJAMIN S. CARSON, Secretary of Housing and Urban Development,

Plaintiff - Appellee,

v.

WILLIAM J. GOLZ,

Defendant - Appellant,

and

MARCUS GOLZ, et al.,

Defendants.

No. 19-1242
(D.C. No. 1:17-CV-01152-RBJ-MEH)
(D. Colo.)

ORDER

Before **PHILLIPS**, **BALDOCK**, and **CARSON**, Circuit Judges.

This matter is before the court on Appellant's Petition for Rehearing En Banc ("Petition")[1]. The Petition was transmitted to all judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the

[1] On December 4, 2020, Appellant filed a "Motion to the Clerk to Correct The Docket: Petition Requested ONLY Rehearing En Banc NOT Panel Rehearing". The docket entry for the Petition has been modified.

court requested that the court be polled, the Petition is DENIED.

Entered for the Court,

CHRISTOPHER M. WOLPERT, Clerk

APPENDIX D

12 U.S.C. § 1702 PROVIDES:

Administrative provisions

The powers conferred by this chapter shall be exercised by the Secretary of Housing and Urban Development (hereinafter referred to as the "Secretary"). In order to carry out the provisions of this subchapter and subchapters II, III, V, VI, VII, VIII, IX-B, and X, the Secretary may establish such agencies, accept and utilize such voluntary and uncompensated services, utilize such Federal officers and employees, and, with the consent of the State, such State and local officers and employees, and appoint such other officers and employees as he may find necessary, and may prescribe their authorities, duties, responsibilities, and tenure and fix their compensation. The Secretary may delegate any of the functions and powers conferred upon him under this subchapter and subchapters II, III, V, VI, VII, VIII, IX-B, and X to such officers, agents, and employees as he may designate or appoint, and may make such expenditures (including expenditures for personal services and rent at the seat of government and elsewhere, for law books and books of reference, and for paper, printing, and binding) as are necessary to carry out the provisions of this subchapter and subchapters II, III, V, VI, VII, VIII, IX-B, and X, without regard to any other provisions of law governing the expenditure of public funds. All such compensation, expenses, and allowances shall be paid out of funds made available by this chapter: Provided, That notwithstanding any other provisions of law except provisions of law hereafter enacted expressly in limitation hereof, all expenses of the Department of Housing and Urban Development in connection with the examination and insurance of loans or investments under any subchapter of this chapter all properly capitalized expenditures, and other necessary expenses not attributable to general overhead in accordance with generally accepted accounting principles shall be considered nonadministrative and payable from funds made available by this chapter, except that, unless made pursuant to specific authorization by the Congress therefor, expenditures made in any fiscal year pursuant to this proviso, other than the payment of insurance claims and other than expenditures (including services on a contract or fee basis, but not including other personal services) in connection with the acquisition, protection, completion, operation, maintenance, improvement, or disposition of real or personal property of the Department acquired under authority of this chapter, shall not exceed 35 per centum of the income received by the Department of Housing and Urban Development from premiums and fees during the preceding fiscal year. Except with respect to subchapter III, for the purposes of this section, the term "nonadministrative" shall not include contract expenses that are not capitalized or routinely deducted from the proceeds of sales, and such expenses shall not be payable from funds made available by this chapter. *The Secretary shall, in carrying out the provisions of this subchapter and subchapters II, III, V, VI, VII, VIII, IX-B, and X, be authorized, in his official capacity, to sue and be sued in any court of competent jurisdiction, State or Federal.* [(emphasis added).]

D.C.COLO.LATTYR 15 PROVIDES:

Civil Pro Bono Representation

(a) Court Appointed Pro Bono Representation in Civil Actions. The Civil Pro Bono Program provides for the selection and appointment of eligible, volunteer attorneys to represent without compensation eligible, unrepresented parties in civil actions to provide general or limited representation when requested by the court. The program is implemented through the Standing Committee on Pro Se Litigation (Standing Committee), the Civil Pro Bono Panel (Panel) and the Faculty of Federal Advocates (FFA).

(b) Standing Committee: Composition, Mission, and Authority.

(1) The Chief Judge shall appoint the members of the Standing Committee. The committee shall include one district judge, one magistrate judge, the Legal Officer of the court, and one representative each from the following organizations: the FFA, the Colorado Bar Association, a private law firm, Colorado Legal Services, the clinical program of the University of Denver Sturm College of Law, the clinical program of the University of Colorado Law School, and the Pro Se division of the court.

(2) The purpose and mission of the Standing Committee is to oversee the Panel, report annually to the court on the status of the program, and promote access to the court by unrepresented parties.

(3) Decisions of the Standing Committee shall be made by majority vote of those present at a meeting of the committee. A majority of the district judges may vacate a decision of the Standing Committee.

(c) Panel Membership and Removal.

(1) A member of the Panel shall be an attorney who is a member in good standing of the bar of this court.

(2) A member of the Panel shall be available and willing to accept an appointment when reasonable and appropriate.

(3) A member of the Panel may be removed from the Panel by the Standing Committee for the following reasons:

(A) an excessive number of declinations of appointment or requests by an attorney for relief from appointment after entering an appearance; or

(B) failure to comply with the local rules of the court during the pro bono representation of an unrepresented party.

(4) A member may withdraw from the Panel at any time by letter to the clerk.

(d) Attorney Eligibility.

(1) An attorney, law firm, non-profit legal organization, or clinical legal education program at a law school accredited by the American Bar Association (Clinic) may apply for membership on the Panel. The application form is available on the court website HERE. Information on an application may be amended at any time by letter to the clerk.

(2) An application shall include the following:

(A) for a law firm, non-profit legal organization, or Clinic, the name of an individual within the organization to act as Panel Liaison and to receive notices and information from the clerk;

(B) a statement that the applicant, i.e., attorney, Panel Liaison, or Clinic supervisor, is a member in good standing of the bar of this court;

(C) a summary of the civil trial experience or trial advocacy training of the applicant;

(D) the number of appointments per calendar year the applicant will accept; and

(E) the specific types of civil actions or causes of action the applicant will accept.

(e) Pro Se Party Eligibility.

(1) The following unrepresented parties are eligible for appointment of pro bono counsel:

(A) an unrepresented non-prisoner who has been granted leave to proceed in forma pauperis (IFP) under 28 U.S.C. ' 1915;

(B) an unrepresented prisoner; and

(C) after demonstrating limited financial means, an unrepresented nonprisoner who has paid any filing fee in full.

(2) A defendant or party responding to a complaint, petition, or appeal who satisfies the criteria above shall be eligible for appointment of pro bono counsel.

(f) Appointment Procedure.

(1) Prerogatives of judicial officers.

(A) A judicial officer to whom the civil action is assigned may on motion by an eligible, unrepresented party or on his or her own initiative enter an Appointment Order authorizing appointment of a member of the Panel to provide general or limited

representation, directing the clerk to select an attorney with a relevant subject matter preference or expertise.

(B) In deciding whether to appoint counsel, the judicial officer should consider all relevant circumstances, including, but not limited to, the following:

(i) the nature and complexity of the action;

(ii) the potential merit of the claims or defenses of the unrepresented party;

(iii) the demonstrated inability of the unrepresented party to retain an attorney by other means; and

(iv) the degree to which the interests of justice, including the benefits to the court, will be served by appointment of counsel.

(2) Duties of the clerk.

(A) No later than 14 days after the filing of an Appointment Order, the clerk shall select a member of the Panel to represent the unrepresented party using an automated, random selection process.

(B) In making the selection, the clerk shall consider the following:

(i) the existence of counsel who is willing to accept appointment who is already representing the unrepresented party in another action in this court;

(ii) the relevant preference and expertise of the members of the Panel; and

(iii) the equitable distribution of appointments among the members of the Panel, with preference given to counsel already representing the unrepresented party in another action in this court.

(C) On selection of a member of the Panel, the clerk shall contact the member and provide relevant, case-specific documents, e.g., complaint, answer, pending motions, etc. For a law firm, clinic, or non-profit legal organization, the Panel Liaison shall select and maintain assignment of eligible counsel. No later than five days after contact, the member shall notify the clerk whether the member is available for appointment.

(D) On receipt of notice of availability for and acceptance of appointment from the member of the Panel, the clerk shall file a Notice of Appointment and shall serve the unrepresented party

with the Appointment Order, the Notice of Appointment, and this rule.

(E) If after four attempts, the clerk is unable to select a member of the Panel who is available and willing to accept appointment, the clerk shall notify the judicial officer who entered the Appointment Order of the unavailability of counsel.

(g) Duties of Court-Appointed Counsel.

(1) On receipt of the Notice of Appointment, the attorney shall communicate promptly with the unrepresented party to determine whether any actual or potential conflict of interest exists and whether the action can be resolved more appropriately in another forum or by other means.

(2) Unless ordered otherwise, no later than 30 days after receipt of the Notice of Appointment, the attorney shall file:

(A) an Entry of Appearance under D.C.COLO.LAttyR 5(a); or

(B) a Notice Declining Appointment stating good cause for declining the appointment.

(3) The appointment of pro bono counsel in the designated civil action does not extend to an appeal after final judgment or in any other civil action.

(4) An attorney appointed under this rule shall represent the unrepresented party from the date of the Entry of Appearance until

(A) the court permits the attorney to withdraw;

(B) the case is dismissed;

(C) the case is transferred to another district or remanded to state court; or

(D) final judgment is entered.

(h) Fee Agreements.

(1) As a general rule, the attorney shall represent the unrepresented party without remuneration.

(2) However, if the unrepresented party is entitled to recover attorney fees or a monetary award or settlement, the attorney and the unrepresented party may enter into a fee agreement permitting the attorney to receive attorney fees that are earned.

(3) Alternatively, the attorney and the unrepresented party may enter into a contingent fee agreement that complies with the Colorado

Rules Governing Contingent Fees.

(4) Any fee agreement shall be entered into before an Entry of Appearance is filed.

(5) When a statute authorizes an award of attorney fees to the prevailing party, the attorney shall advise the unrepresented party of the potential award.

(i) Reimbursement of Litigation Expenses from the Reimbursement Fund.

(1) A member of the Panel providing representation to an unrepresented party may apply to the FFA for reimbursement of litigation expenses.

(2) The FFA shall have exclusive, final, non-appealable authority over the funds available to it for reimbursement of litigation expenses and the reimbursement of litigation expenses incurred by a member of the Panel in the representation of an unrepresented party.

(3) The court periodically shall determine the contribution, if any, to the reimbursement fund.

(j) Withdrawal from Representation. An attorney may seek to withdraw from the representation of an unrepresented party by motion to withdraw under D.C.COLO.LAttyR 5(b).

(k) Other Pro Bono Representation. This rule does not preclude an attorney, law firm, or legal organization from providing pro bono representation to an unrepresented party in the absence of court appointment, nor does this rule prevent a judicial officer from requesting an attorney, law firm, or legal organization that is not a member of the Panel to represent an unrepresented party.

ARIZ. REV. STAT. § 14-3707 PROVIDES:

Employment of appraisers

The personal representative may employ a qualified and disinterested appraiser to assist him in ascertaining the fair market value as of the date of the decedent's death of any asset the value of which may be subject to reasonable doubt. Different persons may be employed to appraise different kinds of assets included in the estate. The names and addresses of any appraiser shall be indicated on the inventory with the item or items he appraised.

COLO. REV. STAT. §§ 13-40-101, *ET SEQ.*, (2016) PROVIDES:

Forcible entry and detainer – General provisions

13-40-101. Forcible entry and detainer defined.

(1) If any person enters upon or into any lands, tenements, mining claims, or other possessions with force or strong hand or multitude of people, whether any person is actually upon or in the same at the time of such entry, or if any person by threats of violence or injury to the party in possession or by such words or actions as have a natural tendency to excite fear or apprehension of danger gains possession of any lands, tenements, mining claims, or other possessions and detains and holds the same, such person so offending is guilty of a forcible entry and detainer within the meaning of this article.

(2) If any person enters peaceably upon any lands, tenements, mining claims, or other possessions, whether any person is actually in or upon the same at the time of such entry and by force turns the party in possession out or, by threats or by words or actions which have a natural tendency to excite fear or apprehension of danger, frightens the party out of possession and detains and holds the same, such person so offending is guilty of a forcible detainer within the meaning of this article.

(3) If any person enters upon or into any lands, tenements, mining claims, or other possessions by force or by threats of violence, or words or actions which have a natural tendency to excite fear or apprehension of danger, and intimidates the party entitled to possession from returning upon or possessing the same, such person so offending is guilty of a forcible entry within the meaning of this article.

13-40-102. Forcible entry prohibited.

No person shall enter into or upon any real property, except in cases where entry is allowed by law, and in such cases not with strong hand or with a multitude of people, but only in a peaceable manner.

13-40-103. Forcible detention prohibited.

No person, having peaceably entered into or upon any real property without right to the possession thereof, shall forcibly hold or detain the same as against the person who has a lawful right to such possession.

13-40-104. Unlawful detention defined.

(1) Any person is guilty of an unlawful detention of real property in the following cases:

(a) When entry is made, without right or title, into any vacant or unoccupied lands or tenements;

(b) When entry is made, wrongfully, into any public lands, tenements, mining claims, or other possessions which are claimed or held by a person who may have located, entered, or settled upon the same in conformity with the laws, rules, and regulations of the United States, or of this state, in relation thereto;

(c) When any lessee or tenant at will, or by sufferance, or for any part of a year, or for one or more years, of any real property, including a specific or undivided portion of a building or dwelling, holds over and continues in possession of the demised premises, or any portion thereof, after the expiration of the term for which the same were leased, or after such tenancy, at will or sufferance, has been terminated by either party;

(d) When such tenant or lessee holds over without permission of his landlord after any default in the payment of rent pursuant to the agreement under which he holds, and three days' notice in writing has been duly served upon the tenant or lessee holding over, requiring in the alternative the payment of the rent or the possession of the premises. No such agreement shall contain a waiver by the tenant of the three days' notice requirement of this paragraph (d). It shall not be necessary, in order to work a forfeiture of such agreement, for nonpayment of rent, to make a demand for such rent on the day on which the same becomes due; but a failure to pay such rent upon demand, when made, works a forfeiture.

(d.5) When such tenant or lessee holds over, without the permission of the landlord, contrary to any condition or covenant the violation of which is defined as a substantial violation in section 13-40-107.5, and notice in writing has been duly served upon such tenant or lessee in accordance with section 13-40-107.5;

(e) When such tenant or lessee holds over, without such permission, contrary to any other condition or covenant of the agreement under which such tenant or lessee holds, and three days' notice in writing has been duly served upon such tenant or lessee requiring in the alternative the compliance with such condition or covenant or the delivery of the possession of the premises so held;

(e.5) (I) When a tenant or lessee has previously been served with the notice described in paragraph (e) of this subsection (1) requiring compliance with a condition or covenant of the agreement, and subsequent to that notice holds over, without permission of the tenant or lessee's landlord, contrary to the same condition or covenant.

(II) A tenancy may be terminated at any time pursuant to this paragraph (e.5) on the basis of a subsequent violation. The ter-

mination shall be effective three days after service of written notice to quit.

(f) When the property has been duly sold under any power of sale, contained in any mortgage or trust deed that was executed by such person, or any person under whom such person claims by title subsequent to date of the recording of such mortgage or trust deed, and the title under such sale has been duly perfected and the purchaser at such sale, or his or her assigns, has duly demanded the possession thereof;

(g) When the property has been duly sold under the judgment or decree of any court of competent jurisdiction and the party or privies to such judgment or decree, after the expiration of the time of redemption when redemption is allowed by law, refuse or neglect to surrender possession thereof after demand therefor has been duly made by the purchaser at such sale, or his or her assigns;

(h) When an heir or devisee continues in possession of any premises sold and conveyed by any personal representative with authority to sell, after demand therefor is duly made;

(i) When a vendee having obtained possession under an agreement to purchase lands or tenements, and having failed to comply with his agreement, withholds possession thereof from his vendor, or assigns, after demand therefor is duly made.

(2) and (3) Repealed.

(4)

(a) It shall not constitute an unlawful detention of real property as described in paragraph (d.5), (e), or (e.5) of subsection (1) of this section if the tenant or lessee is the victim of domestic violence, as that term is defined in section 18-6-800.3, C.R.S., or of domestic abuse, as that term is defined in section 13-14-101 (2), which domestic violence or domestic abuse was the cause of or resulted in the alleged unlawful detention and which domestic violence or domestic abuse has been documented by the following:

(I) A police report; or

(II) A valid civil or emergency protection order.

(b) A person is not guilty of an unlawful detention of real property pursuant to paragraph (a) of this subsection (4) if the alleged violation of the rental or lease agreement is a result of domestic violence or domestic abuse against the tenant or lessee.

(c) A rental, lease, or other such agreement shall not contain a waiver by the tenant or lessee of the protections provided in this subsection (4).

(d) Nothing in this subsection (4) shall prevent the landlord from seeking judgment for possession against the tenant or lessee of the premises who perpetuated the violence or abuse that was the cause of or resulted in the alleged unlawful detention.

13-40-105. Crops of possessor.

In all cases arising under section 13-40-104 (1) (c) to (1) (i), the person in possession is entitled to cultivate and gather the crops, if any, planted or sown by him previous to the service of the demand to deliver up possession, and then grown or growing on the premises, and shall have the right to enter such premises for the purpose of cultivating or removing such crops, first paying or tendering to the party entitled to the possession of said premises a reasonable compensation for the use of the land before removing such crops.

13-40-106. Written demand.

The demand required by section 13-40-104 shall be made in writing, specifying the grounds of the demandant's right to the possession of such premises, describing the same, and the time when the same shall be delivered up, and shall be signed by the person claiming such possession, his agent, or his attorney.

13-40-107. Notice to quit.

(1) A tenancy may be terminated by notice in writing, served not less than the respective period fixed before the end of the applicable tenancy, as follows:

(a) A tenancy for one year or longer, ninety-one days;

(b) A tenancy of six months or longer but less than a year, twenty-eight days;

(c) A tenancy of one month or longer but less than six months, seven days;

(d) A tenancy of one week or longer but less than one month, or a tenancy at will, three days;

(e) A tenancy for less than one week, one day.

(2) Such notice shall describe the property and the particular time when the tenancy will terminate and shall be signed by the landlord or tenant, the party giving such notice or his agent or attorney.

(3) Any person in possession of real property with the assent of the owner is presumed to be a tenant at will until the contrary is shown.

(4) No notice to quit shall be necessary from or to a tenant whose term is, by agreement, to end at a time certain.

(5) Except as otherwise provided in section 38-33-112, C.R.S., the provisions

of subsections (1) and (4) of this section shall not apply to the termination of a residential tenancy during the ninety-day period provided for in said section.

13-40-107.5. Termination of tenancy for substantial violation - definition - legislative declaration.

(1) The general assembly finds and declares that:

(a) Violent and antisocial criminal acts are increasingly committed by persons who base their operations in rented homes, apartments, and commercial properties;

(b) Such persons often lease such property from owners who are unaware of the dangerous nature of such persons until after the persons have taken possession of the property;

(c) Under traditional landlord and tenant law, such persons may have established the technical, legal right to occupy the premises for a fixed term which continues long after they have demonstrated themselves unfit to coexist with their neighbors and co-tenants; furthermore, such persons often resist eviction as long as possible;

(d) In certain cases it is necessary to curtail the technical, legal right of occupancy of such persons in order to protect the equal or greater rights of neighbors and co-tenants, the interests of property owners, the values of trust and community within neighborhoods, and the health, safety, and welfare of all the people of this state.

(2) It is declared to be an implied term of every lease of real property in this state that the tenant shall not commit a substantial violation while in possession of the premises.

(3) As used in this section, "substantial violation" means any act or series of acts by the tenant or any guest or invitee of the tenant that, when considered together:

(a) Occurs on or near the premises and endangers the person or willfully and substantially endangers the property of the landlord, any co-tenant, or any person living on or near the premises; or

(b) Occurs on or near the premises and constitutes a violent or drug-related felony prohibited under article 3, 4, 6, 7, 9, 10, 12, or 18 of title 18, C.R.S.; or

(c) Occurs on the tenant's leased premises or the common areas, hallway, grounds, parking lot, or other area located in the same building or complex in which the tenant's leased premises are located and constitutes a criminal act in violation of federal or state law or local ordinance that:

(I) Carries a potential sentence of incarceration of one hundred eighty days or more; and

(II) Has been declared to be a public nuisance under state law or local ordinance based on a state statute.

(4)

(a) A tenancy may be terminated at any time on the basis of a substantial violation. The termination shall be effective three days after service of written notice to quit.

(b) The notice to quit shall describe the property, the particular time when the tenancy will terminate, and the grounds for termination. The notice shall be signed by the landlord or by the landlord's agent or attorney.

(5)

(a) In any action for possession under this section, the landlord has the burden of proving the occurrence of a substantial violation by a preponderance of the evidence.

(b) In any action for possession under this section, it shall be a defense that:

(I) (Deleted by amendment, L. 2005, p. 402, § 2, effective July 1, 2005.)

(II) The tenant did not know of, and could not reasonably have known of or prevented, the commission of a substantial violation by a guest or invitee but immediately notified a law enforcement officer of his or her knowledge of the substantial violation.

(c)

(I) The landlord shall not have a basis for possession under this section if the tenant or lessee is the victim of domestic violence, as that term is defined in section 18-6-800.3, C.R.S., or of domestic abuse, as that term is defined in section 13-14-101 (2), which domestic violence or domestic abuse was the cause of or resulted in the alleged substantial violation and which domestic violence or domestic abuse has been documented pursuant to the provisions set forth in section 13-40-104 (4).

(II) Nothing in this paragraph (c) shall prevent the landlord from seeking possession against a tenant or lessee of the premises who perpetuated the violence or abuse that was the cause of or resulted in the alleged substantial violation.

13-40-108. Service of notice to quit.

A notice to quit or demand for possession of real property may be served by delivering a copy thereof to the tenant or other person occupying such premises, or by leaving such copy with some person, a member of the tenant's family above the age of fifteen years, residing on or in charge of the premises, or, in case no one is on the premises at the time service is attempted, by posting such copy in some conspicuous place on the premises.

13-40-109. Jurisdiction of courts.

The district courts in their respective districts and county courts in their respective counties have jurisdiction of all cases of forcible entry, forcible detainer, or unlawful detainer arising under this article, and the person entitled to the possession of any premises may recover possession thereof by action brought in any of said courts in the manner provided in this article. On and after January 1, 1991, in all actions brought before county courts under section 13-40-104 (1) (f) to (1) (i), where the allegations of the complaint are put in issue by a verified answer and in actions in which the verified answer alleges a monthly rental value of the property in excess of fifteen thousand dollars, the county court, upon the filing of said answer, shall suspend all proceedings therein and certify said cause and transmit the papers therein to the district court of the same county. Causes so certified by the county court shall be proceeded within the courts to which they have been so certified in all respects as if originally begun in the court to which they have been certified. On and after January 1, 1991, the jurisdiction of the county court to enter judgment for rent, or damages, or both and to render judgment on a counterclaim in forcible entry and detainer shall be limited to a total of fifteen thousand dollars in favor of either party, exclusive of costs and attorney fees.

13-40-110. Action - how commenced.

(1) An action under this article is commenced by filing with the court a complaint in writing describing the property with reasonable certainty, the grounds for the recovery thereof, the name of the person in possession or occupancy, and a prayer for recovery of possession. The complaint may also set forth the amount of rent due, the rate at which it is accruing, the amount of damages due, and the rate at which they are accruing and may include a prayer for rent due or to become due, present and future damages, costs, and any other relief to which plaintiff is entitled.

(2) In an action for termination of a tenancy in a mobile home park, the complaint, in addition to the requirements of subsection (1) of this section, shall specify the particular reasons for termination as such reasons are stated in section 38-12-203, C.R.S. Such complaint shall specify the approximate time, place, and manner in which the tenant allegedly committed the acts giving rise to the complaint. If the action is based on the mobile home or mobile home lot being out of compliance with the rules and

regulations adopted pursuant to section 38-12-203 (1) (c), C.R.S., the complaint shall specify that the home owner was given thirty days from the date of service or posting of the notice to quit to cure the noncompliance and that thirty days have passed and the noncompliance has not been cured.

13-40-111. Issuance and return of summons.

(1) Upon filing the complaint as provided in section 13-40-110, the clerk of the court or the attorney for the plaintiff shall issue a summons. The summons shall command the defendant to appear before the court at a place named in such summons and at a time and on a day which shall be not less than seven days nor more than fourteen days from the day of issuing the same to answer the complaint of plaintiff. The summons shall also contain a statement addressed to the defendant stating: "If you fail to file with the court, at or before the time for appearance specified in the summons, an answer to the complaint setting forth the grounds upon which you base your claim for possession and denying or admitting all of the material allegations of the complaint, judgment by default may be taken against you for the possession of the property described in the complaint, for the rent, if any, due or to become due, for present and future damages and costs, and for any other relief to which the plaintiff is entitled. If you are claiming that the landlord's failure to repair the residential premises is a defense to the landlord's allegation of nonpayment of rent, the court will require you to pay into the registry of the court, at the time of filing your answer, the rent due less any expenses you have incurred based upon the landlord's failure to repair the residential premises."

(2) Repealed.

(3) For actions commenced pursuant to section 13-40-104 (1) (f) and (1) (g) only, if no answer to the complaint is filed as provided in subsection (1) of this section, the court shall examine the complaint, and, if satisfied that venue is proper and the plaintiff is entitled to possession of the premises, the court shall dispense with appearances by the plaintiff or a hearing and shall forthwith enter a judgment for possession, present or future damages, and costs.

13-40-112. Service.

(1) Such summons may be served by personal service as in any civil action. A copy of the complaint must be served with the summons.

(2) If personal service cannot be had upon the defendant by a person qualified under the Colorado rules of civil procedure to serve process, after having made diligent effort to make such personal service, such person may make service by posting a copy of the summons and the complaint in some con-

spicuous place upon the premises. In addition thereto, the plaintiff shall mail, no later than the next business day following the day on which he or she files the complaint, a copy of the summons, or, in the event that an alias summons is issued, a copy of the alias summons, and a copy of the complaint to the defendant at the premises by postage prepaid, first-class mail.

(3) Personal service or service by posting shall be made at least seven days before the day for appearance specified in such summons, and the time and manner of such service shall be endorsed upon such summons by the person making service thereof.

(4) For purposes of this section, "business days" means any calendar day excluding Saturdays, Sundays, and legal holidays.

13-40-113. Answer of defendant - additional and amended pleadings.

(1) The defendant shall file with the court, at or before the time specified for his appearance in the summons, an answer in writing setting forth the grounds on which he bases his claim for possession and admitting or denying all of the material allegations of the complaint and presenting every defense which then exists and upon which he intends to rely, either by including the same in his answer or by filing simultaneously therewith motions setting forth every such defense.

(2) The court for good cause may permit the filing of additional and amended pleadings where such will not result in delay prejudicial to the defendant.

13-40-114. Delay in trial – undertaking.

If either party requests a delay in trial longer than five days, the court in its discretion may, upon good cause shown, require either of the parties to give bond or other security approved and fixed by the court in an amount for the payment to the opposite party of such sum as he may be damaged due to the delay.

13-40-115. Judgment - writ of restitution.

(1) Upon the trial of any action under this article if service was had only by posting in accordance with section 13-40-112 (2) and if the court finds that the defendant has committed an unlawful detainer, the court shall enter judgment for the plaintiff to have restitution of the premises and shall issue a writ of restitution. The court may also continue the case for further hearing from time to time and may issue alias and pluries summonses until personal service upon the defendant is had.

(2) Upon such trial or further hearing under this article after personal service is had upon the defendant in accordance with section 13-40-112 (1), if the court or jury has not already tried the issue of unlawful detainer, it may do so, and, if it finds that the defendant has committed an unlawful detainer, the court shall enter judgment for the plaintiff to have restitution

of the premises and shall issue a writ of restitution. In addition to such judgment for restitution, the court or jury shall further find the amount of rent, if any, due to the plaintiff from the defendant at the time of trial, the amount of damages, if any, sustained by the plaintiff to the time of the trial on account of the unlawful detention of the property by the defendant, and damages sustained by the plaintiff to the time of trial on account of injuries to the property, and judgment shall enter for such amounts, together with reasonable attorney's fees and costs, upon which judgment execution shall issue as in other civil actions. Nothing in this section shall be construed to permit the entry of judgment in excess of the jurisdictional limit of the court.

(3) A writ of restitution that is issued by the court pursuant to subsection (1) or (2) of this section shall remain in effect for forty-nine days after issuance and shall automatically expire thereafter.

13-40-116. Dismissal.

If the plaintiff's action brought for any of the causes mentioned in this article, upon the trial thereon, is dismissed or the action fails to prove the plaintiff's right to the possession of the premises described in the complaint, the defendant shall have judgment and execution for his costs.

13-40-117. Appeals.

(1) If either party feels aggrieved by the judgment rendered in such action before the county court, he may appeal to the district court, as in other cases tried before the county court, with the additional requirements provided in this article.

(2) Upon the court's taking such appeal, all further proceedings in the case shall be stayed, and the appellate court shall thereafter issue all needful writs and process to carry out any judgment which may be rendered thereon in the appellate court.

(3) If the appellee believes that he may suffer serious economic harm during the pendency of the appeal, he may petition the court taking the appeal to order that an additional undertaking be required of the appellant to cover the anticipated harm. The court shall order such undertaking only after a hearing and upon a finding that the appellee has shown a substantial likelihood of suffering such economic harm during the pendency of the appeal and that he will not adequately be protected under the appeals bond and the other requirements for appeal pursuant to sections 13-40-118, 13-40-120, and 13-40-123.

13-40-118. Deposit of rent.

In all appeals from the judgment of a county court, in an action founded upon section 13-40-104 (1) (d), the defendant, at the time of the filing thereof, shall de-

posit with the court the amount of rent found due and specified in such judgment. Unless such deposit is made, the appeal is not perfected, and proceedings upon such judgment shall thereupon be had accordingly. If the appeal is perfected, the court shall transmit such deposit to the clerk of the appellate court, with the papers in such case; and the appellant thereafter, at the time when the rents become due as specified in the judgment appealed from and as often as the same become due, shall deposit the amount thereof with the clerk of such appellate court. In case the appellant, at any time during the pendency of such appeal and before final judgment therein, neglects or fails to make any deposit of rent, falling due at the time specified in the judgment appealed from, the court in which such appeal is pending, upon such fact being made to appear and upon motion of the appellee, shall affirm the judgment appealed from with costs; and proceedings thereupon shall be had as in like cases determined upon the merits.

13-40-119. Rules of practice.

In all actions brought under any provision of this article in any court, the proceedings shall be governed by the rules of practice and the provisions of law concerning civil actions in such court, except as may be otherwise provided in this article.

13-40-120. Appellate review.

Appellate review of the judgment of the district courts of this state, in proceedings under this article, is allowed as provided by law and the Colorado appellate rules. In cases of appeal from judgments founded upon causes of action embraced in section 13-40-104 (1) (d), the deposit of rent money during pendency of appeal shall be made, or judgment of affirmance shall be entered, in the manner provided in section 13-40-118.

13-40-121. When deposit of rent is paid.

The rent money deposited, as provided for in this article, shall be paid to the landlord entitled thereto, upon the order of the court wherein the same is deposited and at such time and in such manner as the court determines necessary to protect the rights of the parties.

13-40-122. Writ of restitution after judgment.

(1) No writ of restitution shall issue upon any judgment entered in any action under the provisions of this article out of any court until after the expiration of forty-eight hours from the time of the entry of such judgment; and such writs shall be executed by the officer having the same only in the daytime and between sunrise and sunset. Any writ of restitution governed by this section may be executed by the county sheriff's office in which the property is located by a sheriff, undersheriff, or deputy sheriff, as described in section 16-2.5-103 (1) or (2), C.R.S., while off duty or on duty at rates charged by the employing sheriff's office in accordance with section 30-1-104 (1) (gg), C.R.S.

(2) The officer that executes a writ of restitution under subsection (1) of this section and the law enforcement agency that employs such officer shall be immune from civil liability for any damage to a tenant's personal property that was removed from the premises during the execution of the writ. A landlord who complies with the lawful directions of the officer executing a writ of restitution shall be immune from civil and criminal liability for any act or omission related to a tenant's personal property that was removed from the premises during or after the execution of a writ of restitution.

(3) A landlord has no duty to store or maintain a tenant's personal property that is removed from the premises during or after the execution of a writ of restitution. Regardless of whether a landlord elects to store or maintain the personal property so removed, the landlord shall have no duty to inventory the personal property or to determine ownership of or the condition of the personal property. Such storage shall not create either an implied or express bailment of the personal property, and the landlord shall be immune from liability for any loss or damage to the personal property.

(4) A landlord who elects to store a tenant's personal property that was removed from the premises during or after the execution of a writ of restitution may charge the tenant the reasonable costs of storing the personal property. To recover such costs, the landlord may either dispose of the personal property under any lien rights the landlord has under part 1 of article 20 of title 38, C.R.S., or the landlord may allow the tenant to recover the personal property after paying the reasonable storage charges incurred by the landlord.

13-40-123. Damages.

The prevailing party in any action brought under the provisions of this article is entitled to recover damages, reasonable attorney fees, and costs of suit; except that a residential landlord or tenant who is a prevailing party shall not be entitled to recover reasonable attorney fees unless the residential rental agreement between the parties contains a provision for either party to obtain attorney fees. Nothing in this section shall be construed to permit the entry of judgments in any single proceeding in excess of the jurisdictional limit of said court.

13-40-124. Qualified farm owner-tenant defined. (Repealed)

13-40-125. Rights of qualified farm owner-tenant. (Repealed)

13-40-125.5. Possession pursuant to agreement - enforcement. (Repealed)

13-40-126. Priority of proceedings. (Repealed)

COLO. REV. STAT. § 18-4-203 (2016), PROVIDES:

Second degree burglary.

(1) A person commits second degree burglary, if the person knowingly breaks an entrance into, enters unlawfully in, or remains unlawfully after a lawful or unlawful entry in a building or occupied structure with intent to commit therein a crime against another person or property.

(2) Second degree burglary is a class 4 felony, but it is a class 3 felony if:

(a) It is a burglary of a dwelling; or

(b) It is a burglary, the objective of which is the theft of a controlled substance, as defined in section 18-18-102 (5), lawfully kept within any building or occupied structure.

COLO. REV. STAT. §§ 18-4-501–504.5 (2016), PROVIDE:

18-4-501. Criminal mischief.

(1) A person commits criminal mischief when he or she knowingly damages the real or personal property of one or more other persons, including property owned by the person jointly with another person or property owned by the person in which another person has a possessory or proprietary interest, in the course of a single criminal episode.

(2) and (3) Repealed.

(4) Criminal mischief is:

(a) A class 3 misdemeanor when the aggregate damage to the real or personal property is less than three hundred dollars;

(b) A class 2 misdemeanor when the aggregate damage to the real or personal property is three hundred dollars or more but less than seven hundred fifty dollars;

(c) A class 1 misdemeanor when the aggregate damage to the real or personal property is seven hundred fifty dollars or more but less than one thousand dollars;

(d) A class 6 felony when the aggregate damage to the real or personal property is one thousand dollars or more but less than five thousand dollars;

(e) A class 5 felony when the aggregate damage to the real or personal property is five thousand dollars or more but less than twenty thousand dollars;

(f) A class 4 felony when the aggregate damage to the real or personal property is twenty thousand dollars or more but less than one hundred thousand dollars;

(g) A class 3 felony when the aggregate damage to the real or personal property is one hundred thousand dollars or more but less than one million dollars; and

(h) A class 2 felony when the aggregate damage to the real or personal property is one million dollars or more.

18-4-502. First degree criminal trespass.

A person commits the crime of first degree criminal trespass if such person knowingly and unlawfully enters or remains in a dwelling of another or if such person enters any motor vehicle with intent to commit a crime therein. First degree criminal trespass is a class 5 felony.

18-4-503. Second degree criminal trespass.

(1) A person commits the crime of second degree criminal trespass if such person:

(a) Unlawfully enters or remains in or upon the premises of another which are enclosed in a manner designed to exclude intruders or are fenced; or

(b) Knowingly and unlawfully enters or remains in or upon the common areas of a hotel, motel, condominium, or apartment building; or

(c) Knowingly and unlawfully enters or remains in a motor vehicle of another.

(2) Second degree criminal trespass is a class 3 misdemeanor, but:

(a) It is a class 2 misdemeanor if the premises have been classified by the county assessor for the county in which the land is situated as agricultural land pursuant to section 39-1-102 (1.6), C.R.S.; and

(b) It is a class 4 felony if the person trespasses on premises so classified as agricultural land with the intent to commit a felony thereon.

(3) Whenever a person is convicted of, pleads guilty or nolo contendere to, receives a deferred judgment or sentence for, or is adjudicated a juvenile delinquent for, a violation of paragraph (c) of subsection (1) of this section, the offender's driver's license shall be revoked as provided in section 42-2-125, C.R.S.

18-4-504. Third degree criminal trespass.

(1) A person commits the crime of third degree criminal trespass if such person unlawfully enters or remains in or upon premises of another.

(2) Third degree criminal trespass is a class 1 petty offense, but:

(a) It is a class 3 misdemeanor if the premises have been classified by the county assessor for the county in which the land is situated as agricultural land pursuant to section 39-1-102 (1.6), C.R.S.; and

(b) It is a class 5 felony if the person trespasses on premises so classified as agricultural land with the intent to commit a felony thereon.

18-4-504.5. Definition of premises.

As used in sections 18-4-503 and 18-4-504, "premises" means real property, buildings, and other improvements thereon, and the stream banks and beds of any nonnavigable fresh water streams flowing through such real property.

COLO. REV. STAT. § 38-35-117 (2016), PROVIDES:

Mortgages, not a conveyance - lien theory.

Mortgages, trust deeds, or other instruments intended to secure the payment of an obligation affecting title to or an interest in real property shall not be deemed a conveyance, regardless of its terms, so as to enable the owner of the obligation secured to recover possession of real property without foreclosure and sale, but the same shall be deemed a lien.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 17-cv-01152-RBJ-MEH

BENJAMIN S. CARSON, Secretary of Housing and Urban Development,

Plaintiff,

v.

ESTATE OF VERNA MAE GOLZ,
WILLIAM J. GOLZ,
MARCUS J. GOLZ,
MATTHEW J. GOLZ, and
UNKNOWN HEIRS AND CLAIMANTS OF THE ESTATE OF VERNA MAE GOLZ,

Defendants.

RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Michael E. Hegarty, United States Magistrate Judge.

Before the Court is Plaintiff's Motion for Summary Judgment [filed December 12, 2018; ECF No. 127]. Following review and consideration of the motion, briefs, and attached exhibits, the Court respectfully recommends that the Honorable R. Brooke Jackson grant the Plaintiff's motion.

I. FINDINGS OF FACT

1. The real property at issue in this case is located at 130 Beaver Creek Drive, Nederland, Colorado, 80466, with a legal address of Lot 19, Beaver Valley Estates, County of Boulder, State of Colorado (the "Property").

2. On January 18, 2002, Verna Mae Golz entered into a loan agreement (the "Loan Agreement") with Financial Freedom Senior Funding Corporation ("Financial Freedom"). ECF No. 49 at ¶ 10.6 (undisputed facts); ECF No. 127-1.

3. Ms. Golz executed a promissory note with Financial Freedom. ECF No. 49 at ¶ 10.7;

see also ECF No. 127-2.

4. Ms. Golz executed a promissory note with the Department of Housing and Urban Development ("HUD" or "Plaintiff"). ECF No. 49 at ¶ 10.7; see also ECF No. 127-3.

5. The First Note is secured by a deed of trust naming Financial Freedom as the beneficiary (the "First Deed of Trust"). ECF No. 49 at ¶ 10.8; see also ECF No. 127-4.

6. The Second Note is secured by a deed of trust naming the Secretary of HUD as the beneficiary. ECF No. 49 at ¶ 10.8; see also ECF No. 127-5.

7. The Deeds of Trust encumber the Property and were recorded with the Boulder County Clerk on January 26, 2002 as Record Nos. 2246751 and 2246752, respectively. ECF No. 49 at ¶ 10.8; see also ECF Nos. 127-4, 127-5.

8. In December 2011, the mortgagee servicer (OneWest Bank FSB, parent company of First Financial) submitted an insurance claim to HUD under the provisions in 24 C.F.R. § 206.123(a)(1) and § 206.107, which allow a lender to submit a claim if the loan balance exceeds 98% of the maximum claim amount. ECF No. 127-6 at 9.

9. In December 2011, HUD paid out $242,013.06 on the insurance claim for Ms. Golz's loan. ECF No. 127-7.

10. Financial Freedom then assigned the First Note to HUD. *See* ECF No. 127-2 at 3.

11. The First Deed of Trust was also assigned to the Secretary of HUD. ECF No. 49 at ¶¶ 10.9, 10.10; *see also* ECF No. 127-8.

12. HUD holds the Notes and Deeds of Trust. *See* ECF Nos. 127-2 – 127-5; ECF No. 49 at ¶¶ 5, 10; ECF No. 64 at ¶ 1 (admitting allegation (ECF No. 31 ¶ 1) that HUD "brings this foreclosure action as the holder of promissory notes and deeds of trust on the property").

13. There are no other encumbrances on the Property and HUD is the only lienholder. ECF No. 49 at ¶ 10.5.

14. Ms. Golz passed away on May 16, 2014. ECF No. 49 at ¶ 10.11.

15. The Notes and Deeds of Trust provide that the loan balance becomes immediately due and payable upon Ms. Golz's death. ECF No. 127-2 at ¶ 7; ECF No. 127-3 at ¶ 7; ECF No. 127-4 at ¶ 9; ECF No. 127-5 at ¶ 9.

16. At the time of Ms. Golz's death, the loan balance was $258,675. *See* ECF No. 127-9.

17. Interest, fees, and costs continue to accrue to the loan balance after Ms. Golz's death. *See* ECF No. 127-2 at ¶ 2 ("Interest will be charged on the unpaid principal ... until the full amount of principal has been paid...."); ECF No. 127-1 at ¶ 2.4 (charges and fees considered loan advances).

18. HUD made demand for payment of the loan balance on August 20, 2015 and June 15, 2016. *See* ECF Nos. 127-10, 127-11.

19. Defendant, William Golz, Ph.D., one of Ms. Golz's sons ("Dr. Golz"), was the personal representative of the Estate of Verna Mae Golz (the "Estate"). *See* ECF No. 64 at 1 and ¶ 81.

20. Dr. Golz received both notices demanding payment on the loan. ECF No. 64 at ¶ 119 (Amended Answer stating that "[o]n August 25, 2015, Dr. Golz received NOVAD's August-20 'Notice of Intent to Foreclose and Accelerate Mortgage Balance'"), ECF No. 64 at ¶ 125 ("Defendants, in June 2016, had received a demand letter advising that Verna Mae's Loan had been assigned for collection to the United States Attorney's Office.").

21. A work order dated December 1, 2016 notes the Property's address and "FHA Case No. 052-196507," but does not identify the "worker" or describe the type of work purportedly

performed (if any) under that order. ECF No. 64-2.

22. A HUD Property Access Record listing the Property's address and "FHA Case No. 052-196507" reflects that, on December 2, 2016, a representative of BLM CO, LLC "visited" the Property. ECF No. 64-1.

23. In or about December 2016, Dr. Golz filed a complaint with the Boulder County Sheriff's Office with respect to "employees of BLM entering into the property in order to provide winterization." ECF No. 64-3.

24. On December 27, 2016, Sergeant Manes with the Boulder County Sheriff's Office sent an email to Tracy Willingham, Field Service Manager of BLM of Colorado, advising that "[a] Boulder County Sheriff's Office case number 16-7379 has been initiated in response to a complaint of burglary/trespass, criminal mischief and other property damage associated with two persons employed by BLM CO, LLC entering into the property to do 'winterization' on 12/1/2016. . . . We need to speak with you ASAP to see what documented authority you have to perform the work attempted on 12/1." ECF No. 64-4.

25. The Property, originally an asset of the Estate, was transferred to Dr. Golz by a Personal Representative's Deed on April 23, 2018. ECF No. 103 at 27.

26. Probate on the Estate closed on May 2, 2018. ECF No. 108 at 6-7.

27. The loan balance has not been paid. See ECF No. 127-9 at 4; ECF No. 127-12 at 2, ¶ 4.

28. The loan balance as of December 12, 2018 was $304,086. *Id.*

II. LEGAL STANDARDS

A motion for summary judgment serves the purpose of testing whether a trial is required.

Heideman v. S. Salt Lake City, 348 F.3d 1182, 1185 (10th Cir. 2003). The Court shall grant summary judgment if the pleadings, depositions, answers to interrogatories, admissions, or affidavits show there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). A fact is material if it might affect the outcome of the suit under the governing substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

The moving party bears the initial responsibility of providing to the Court the factual basis for its motion. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). "The moving party may carry its initial burden either by producing affirmative evidence negating an essential element of the nonmoving party's claim, or by showing that the nonmoving party does not have enough evidence to carry its burden of persuasion at trial." *Trainor v. Apollo Metal Specialties, Inc.*, 318 F.3d 976, 979 (10th Cir. 2002). Only admissible evidence may be considered when ruling on a motion for summary judgment. Fed. R. Civ. P. 56(c); *World of Sleep, Inc. v. La–Z–Boy Chair Co.*, 756 F.2d 1467, 1474 (10th Cir. 1985).

The non-moving party has the burden of showing there are issues of material fact to be determined. *Celotex*, 477 U.S. at 322. That is, if the movant properly supports a motion for summary judgment, the opposing party may not rest on the allegations contained in his complaint, but must respond with specific facts showing a genuine factual issue for trial. Fed. R. Civ. P. 56(e); *Scott v. Harris*, 550 U.S. 372, 380 (2007) ("[t]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact.") (citation omitted); *see also Hysten v. Burlington N. & Santa Fe Ry.*, 296 F.3d 1177, 1180 (10th Cir. 2002). These specific facts may be shown " 'by any of the kinds of evidentiary materials listed in Rule 56(c), except the mere

pleadings themselves.'" *Pietrowski v. Town of Dibble*, 134 F.3d 1006, 1008 (10th Cir. 1998) (quoting *Celotex*, 477 U.S. at 324). "[T]he content of summary judgment evidence must be generally admissible and...if that evidence is presented in the form of an affidavit, the Rules of Civil Procedure specifically require a certain type of admissibility, i.e., the evidence must be based on personal knowledge." *Bryant v. Farmers Ins. Exch.*, 432 F.3d 1114, 1122 (10th Cir. 2005). "The court views the record and draws all inferences in the light most favorable to the non-moving party." *Pepsi–Cola Bottling Co. of Pittsburg, Inc. v. Pepsico, Inc.*, 431 F.3d 1241, 1255 (10th Cir. 2005).

III. ANALYSIS

Plaintiff filed this action seeking "judicial foreclosure of the Property" arguing that "[t]he obligations on the Notes [secured by Deeds of Trust on the Property] are due and payable, and [Plaintiff] is entitled to judgment on them." Am. Compl. ¶ 68, ECF No. 31. The present motion seeks judgment for Plaintiff and a judicial foreclosure of the mortgage on the Property. Defendant Dr. Golz[1] challenges Plaintiff's attempt to foreclose arguing that (1) Plaintiff engaged in improper conduct by entering the property without permission; (2) Plaintiff's motion referenced expense information for which Dr. Golz requests additional discovery; and (3) the undersigned should be prohibited from issuing further orders in this case pending an investigation into his attempts to secure counsel for the Defendant Estate. Plaintiff replies that it would agree to subtract the expenses for which Dr. Golz seeks additional discovery, and any other arguments are insufficient to rebut the

[1]With respect to other named Defendants in this case, on March 5, 2019, I recommended that Defendant Estate of Verna Mae Golz be dismissed from the case. ECF No. 156. Default has been entered against the remaining Defendants, Marcus J. Golz, Matthew J. Golz, and the Unknown Heirs and Claimants of the Estate. *See* ECF Nos. 30, 33. Despite the entry of default, these Defendants were listed in the caption of the Amended Complaint; however, they did not file an Answer, nor have they filed (or joined in) any briefs in this matter.

fact that Plaintiff is entitled to foreclosure.

All parties agree that the loan at issue in this case is a Home Equity Conversion Mortgage ("HECM"). "The HECM program was originally authorized by the Housing and Community Development Act of 1987, Pub. L. No. 100-242, 101 Stat. 1815 (1988), for the purpose of meeting 'the special needs of elderly homeowners by reducing the effect of the economic hardship caused by the increasing costs of meeting health, housing and subsistence needs at a time of reduced income.'" *Johnson v. World Alliance Fin. Corp.*, 830 F.3d 192, 195 (5th Cir. 2016) (citing 12 U.S.C. § 1715z-20(a)). "The HECM program meets this goal by allowing older homeowners to access their home equity without risking foreclosure, eviction, and homelessness." *Id.* An HECM is the "reverse" of a traditional mortgage (and, thus, commonly characterized as a "reverse mortgage") because the borrower is not required to make monthly or other periodic payments to repay the loan. *Id.* at 195-96 (citing 12 U.S.C. § 1715z-20(b)(3)). Rather, the loan balance increases over time and does not become due and payable until a specific event occurs, including the death of the mortgagor. *Id.* at 196 (citing 12 U.S.C. § 1715z-20(j)).

It is undisputed that Ms. Golz passed away in May 2014; however, before that time, she apparently defaulted on the loan, her mortgage servicer of the first note and deed submitted an insurance claim to HUD, and HUD paid out $242,013.06 on the insurance claim for Ms. Golz's loan. *See Bennett v. Donovan*, 703 F.3d 582, 585 (D.C. Cir. 2013) ("Congress . . . authorized HUD to administer a mortgage-insurance program, which would provide assurance to lenders that, if certain conditions were met, HUD would provide compensation for any outstanding balance not repaid by the borrower or covered by the sale of the home."). Accordingly, HUD is the undisputed holder of both notes and deeds on the Property, which seeks foreclosure on the HECM for which no payment

has been made.

The parties did not cite, and the Court could not find, any case in the Tenth Circuit addressing a request from HUD for judicial foreclosure against a defaulting mortgagor participating in the HECM program. In arguing it is entitled to an order of judicial foreclosure, the Plaintiff cites to *United States v. Victory Highway Village, Inc.*, 662 F.2d 488, 494 (8th Cir. 1981), which concludes that "[5 U.S.C. section] 702 of the [Administrative Procedure Act] governs judicial review of the action by the Secretary of HUD in proceedings to foreclose under [section] 1713(k)." *See also United States v. Winthrop Towers*, 628 F.2d 1028, 1034-35 (7th Cir. 1980) ("HUD's decision to foreclose may be reviewed to determine whether it is consistent with national housing objectives . . ." and review "should be narrowly limited to the question whether HUD's actions were 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . .'"). However, Plaintiff does not appear to seek judicial review of any decision to foreclose in this case and fails to explain whether and/or how 12 U.S.C. §1713 (titled, "Rental housing insurance")[2] is implicated here. In addition, some courts disagree with the Seventh and Eighth Circuits, concluding that HUD decisions to foreclose are not reviewable. *See United States v. Yellowbird Ltd.*, No. C-3-82-570, 1992 WL 1258511, at *3 (S.D. Ohio Dec. 23, 1992) (collecting cases).

Plaintiff also cites to *LNV Corp. v. Hook*, No. 14-cv-00955-RM (D. Colo. Mar. 13, 2017),[3]

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[2]Subsection (b), titled "Insurance of additional mortgages" provides, in pertinent part, "The insurance of mortgages under this section is intended to facilitate particularly the production of rental accommodations, at reasonable rents, of design and size suitable for family living." The Court found no case law citing or referencing 12 U.S.C. § 1713 with respect to a HECM.

[3]The orders cited herein are not published on Westlaw and, thus, the Court will attach copies of such orders to its Recommendation.

asserting that the court in *LNV Corp.* "grant[ed] summary judgment on a claim for foreclosure where the note was in default." Mot. 6. Indeed, citing 28 U.S.C. 2410(a)(2), which governs actions on real properties on which the United States has or claims a mortgage or lien, the *LNV Corp.* court found the plaintiff was entitled to a judicial foreclosure (for a property on which the United States held a tax lien), but cited no standard by which to determine the propriety of foreclosure. *LNV Corp.*, No. 14-cv-00955-RM, ECF No. 301 at 13. In addition, the court questioned under what procedure the foreclosure should proceed. *Id.* at 14. After further briefing, the court determined that the foreclosure should proceed pursuant to federal statute, 28 U.S.C. §§ 2001-2007, rather than to state rules of procedure (Colo. R. Civ. P. 105), as initially suggested by the plaintiff. *See id.* ECF No. 320.

At least one federal district court has addressed a request by HUD for judicial foreclosure on an HECM and asserted that "[i]n the usual course, once a plaintiff mortgagee in a foreclosure action has established a prima facie case by presenting a note, a mortgage, and proof of default, it has a presumptive right to foreclose that can only be overcome by an affirmative showing by the mortgagor." *United States v. Leap*, No. CV 11-4822 (DRH) (WDW), 2014 WL 1377505, at *2 (E.D. N.Y. Feb. 18, 2014), *adopted by* 2014 WL 1383139 (E.D. N.Y., Apr. 8, 2014) (finding the lender of an HECM demonstrated a prima facie case against a defaulting borrower). *LNV Corp.*'s opinion is consistent with *Leap*'s standard; the court in *LNV Corp.* concluded that the evidence presented showed the mortgagor had failed to make loan payments for several years, the mortgagee sent written notice of its intent to accelerate the loan, and the default remained uncured at the time of the order. *LNV Corp.*, ECF No. 301 at 13-14.

In this case, Plaintiff has presented unrebutted evidence that Ms. Golz entered into an HECM

loan agreement and executed promissory notes with First Financial and HUD; the first note was secured by a deed of trust naming First Financial as beneficiary and the second note was secured by a deed of trust naming HUD as a beneficiary; the deeds of trust both encumber the Property; in December 2011, the mortgagee servicer (parent company of First Financial) submitted an insurance claim to HUD, and HUD paid out $242,013.06 on the insurance claim for Ms. Golz's loan; HUD is currently the holder of both notes and both deeds of trust; Ms. Golz passed away on May 16, 2014; the notes and deeds of trust provide that the loan balance becomes immediately due and payable upon Ms. Golz's death; Dr. Golz, Ms. Golz's heir and executor of her Estate, received HUD's August 2015 and June 2016 notices demanding payment on the loan; and, no payment has been made since that time. This Court finds Plaintiff has demonstrated a prima facie case and, thus, has a presumptive right to foreclose on Ms. Golz' HECM.

Dr. Golz objects and contends that Plaintiff is not entitled to foreclosure[4] because it engaged in improper conduct by entering the Property without Dr. Golz's permission.[5] In support of his argument, Dr. Golz has referenced copies of four documents previously submitted in this case: a December 1, 2016 work order noting the Property's address; a HUD Property Access Record

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[4]Construing the response brief liberally, the Court finds that Dr. Golz also appears to assert the Plaintiff itself already foreclosed on the loan when it "forcibly entered" the Property in December 2016 and, thus, it cannot seek a judicial foreclosure here. *See* Resp. 8-9. Dr. Golz cites no authority for this proposition and the Court has found none supporting it.

[5]The Court will not engage in a lengthy analysis of Dr. Golz's other stated challenges – that Plaintiff referenced expense information in the motion for which Dr. Golz requested additional discovery and that the undersigned should be prohibited from issuing further orders in this case pending an investigation into his attempts to secure counsel for the Defendant Estate – since the first has been rendered moot by the Plaintiff's withdrawal of the expenses (ECF No. 147 at 2-3) and the second has been rejected by Judge Jackson in his March 1, 2019 order (ECF No. 155).

reflecting that, on December 2, 2016, a representative of BLM CO, LLC "visited" the Property; a Boulder County Sheriff's Office record reflecting that, in or about December 2016, Dr. Golz filed a complaint with respect to "employees of BLM entering into the property in order to provide winterization"; and, a December 27, 2016 email from Boulder County Sergeant Manes to Tracy Willingham, Field Service Manager of BLM of Colorado, advising that "[a] Boulder County Sheriff's Office case number 16-7379 has been initiated in response to a complaint of burglary/trespass, criminal mischief and other property damage associated with two persons employed by BLM CO, LLC entering into the property to do 'winterization' on 12/1/2016." ECF Nos. 64-1 – 64-4.[6] Dr. Golz asserts that the "balance of the file for [Boulder County Sheriff's Office] Case No. 16-7379 is admissible under Fed. R. Evid. 803(8)" (Resp. 8), but he does not submit a copy (or copies) of any additional documents from the file.

To the extent that Dr. Golz expresses this defense as "unclean hands," Judge Jackson struck this affirmative defense on October 4, 2018 for Dr. Golz's failure to plead the defense with particularity as required by Fed. R. Civ. P. 9(b). ECF No. 125. Dr. Golz took no action to attempt to amend the Amended Answer following Judge Jackson's order. Notably, in his response brief, Dr. Golz improperly seeks leave[7] to amend his Amended Answer to add counterclaims for alleged violations of the Fourth Amendment and the Federal Tort Claims Act based on his claim that Plaintiff "forcibly entered" the Property on December 2, 2016. Resp. 9, 14. However, despite mentioning in a January 3, 2019 motion for extension of time that he intended to file a "motion for

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[6]Plaintiff does not dispute the authenticity of these documents. *World of Sleep, Inc.*, 756 F.2d at 1474.

[7]Requests for relief must be sought by motion. Fed. R. Civ. P. 7(b); D.C. Colo. LCivR 7.1(d) ("A motion shall not be included in a response or reply to the original motion.").

leave to amend his answer,"[8] he has not done so. *See* Mot. ¶ 3, ECF No. 129 at 2.

Nevertheless, the Court finds that, even if Dr. Golz were permitted to proceed on his "unclean hands" defense, the evidence he has submitted in response to the present motion fails to raise a genuine issue of material fact as to whether Plaintiff engaged in an unlawful entry onto the Property. Dr. Golz submitted no affidavit nor declaration in support of this argument[9] and the documents he submitted reflect only that BLM of Colorado LLC logged a "visit" to the Property on December 2, 2016 and that Dr. Golz made a complaint to the Boulder County Sheriff's Office concerning the December 2, 2016 entry. *See* ECF Nos. 64-1 – 64-4.

Moreover, Plaintiff contends that any entry on the Property, even if improper or unlawful, cannot serve as a defense to foreclosure on a loan that has not been paid. The Court agrees. As set forth above, Dr. Golz does not affirmatively rebut evidence that the Property is encumbered by deeds of trust securing promissory notes executed by Ms. Golz for an HECM that has not been repaid pursuant to the terms of the notes. *See Leap*, 2014 WL 1377505, at *2. He does not contend that HUD's December 2016 entry onto the Property somehow nullified the notes or prevented him from repaying the loan. In that respect, any claim involving entry onto the Property is separate and distinct from HUD's request for foreclosure; Dr. Golz neither argues nor articulates how his potential Fourth Amendment claim and/or FTCA claim relates to the foreclosure claim. Thus, even

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[8]In addition, Plaintiff stated in its February 11, 2019 reply brief that "Dr. Golz's request to amend has not been properly presented. The Local Rules require a separate motion to amend, accompanied by a redline." However, Dr. Golz has filed no motion since that time. *See* ECF No. 147 at 4.

[9]*See* Fed. R. Civ. P. 56(c)(1). Dr. Golz generally cites, only by ECF number, to filings he has made in this case, which consist of hundreds of pages of motions, briefs, and exhibits, but include no affidavit nor declaration in support of arguments he makes in his response to the summary judgment motion.

if Dr. Golz were to assert a constitutional or tort claim against HUD for its December 2, 2016 entry onto the Property, such claim itself does not prohibit HUD from proceeding to foreclosure on the unpaid loan. *See Yellowbird Ltd.*, 1992 WL 1258511, at *5 (finding that, even if the mortgagor's defenses were valid, they did not alter the fact that the loan was delinquent and, thus, HUD was entitled to foreclose).

Plaintiff argues that Dr. Golz's purported counterclaims cannot serve to defend against a claim for foreclosure since Dr. Golz has failed to demonstrate they are claims for recoupment. "It is recognized ... that when the sovereign sues it waives immunity as to claims in recoupment ...." *F.D.I.C. v. Hulsey*, 22 F.3d 1472, 1486 (10th Cir. 1994) (quoting *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324, 1344 (10th Cir.1982)). The Tenth Circuit has ruled that, "to constitute a claim in recoupment (1) the claim must arise from the same transaction or occurrence as the plaintiff's suit; (2) the claim must seek relief of the same kind or nature; and (3) the claim must seek an amount not in excess of the plaintiff's claim." *Id.* at 1487 (citing *Frederick v. United States*, 386 F.2d 481, 488 (5th Cir. 1967)). The Court agrees that, with the information provided in response to the present motion, Dr. Golz has failed to demonstrate his Fourth Amendment and/or FTCA claims arise from the loan agreement between HUD and Ms. Golz; seek the same relief as the foreclosure action; and seek "an amount not in excess" of Plaintiff's claim.

The Court concludes that Dr. Golz has failed to raise material factual issues sufficient to overcome the presumption that Plaintiff is entitled to foreclose on the HECM.

IV. CONCLUSION

In sum, the Court finds that Plaintiff has demonstrated its entitlement to foreclose on the subject HECM in this matter, and Dr. Golz has failed to raise genuine issues of material fact

demonstrating that Plaintiff's request for foreclosure should, instead, proceed to trial. Accordingly, this Court respectfully recommends that Judge Jackson grant Plaintiff's motion, enter judgment in Plaintiff's favor, and issue an order of foreclosure and judicial sale in the manner specified in 28 U.S.C. §§ 2001-2002 and in the Amended Complaint (ECF No. 31).[10]

Respectfully submitted this 13th day of March, 2019, at Denver, Colorado.

BY THE COURT:

Michael E. Hegarty

Michael E. Hegarty
United States Magistrate Judge

[10]Be advised that all parties shall have fourteen (14) days after service hereof to serve and file any written objections in order to obtain reconsideration by the District Judge to whom this case is assigned. Fed. R. Civ. P. 72. The party filing objections must specifically identify those findings or recommendations to which the objections are being made. The District Court need not consider frivolous, conclusive or general objections. A party's failure to file such written objections to proposed findings and recommendations contained in this report may bar the party from a de novo determination by the District Judge of the proposed findings and recommendations. *United States v. Raddatz*, 447 U.S. 667, 676-83 (1980); 28 U.S.C. § 636(b)(1). Additionally, the failure to file written objections to the proposed findings and recommendations within fourteen (14) days after being served with a copy may bar the aggrieved party from appealing the factual and legal findings of the Magistrate Judge that are accepted or adopted by the District Court. *Duffield v. Jackson*, 545 F.3d 1234, 1237 (10th Cir. 2008) (quoting *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991)).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 17-cv-01152-RBJ-MEH

BENJAMIN S. CARSON, Secretary of Housing and Urban Development,

Plaintiff,

v.

ESTATE OF VERNA MAE GOLZ,
WILLIAM J. GOLZ,
MARCUS J. GOLZ,
MATTHEW J. GOLZ, and
UNKNOWN HEIRS AND CLAIMANTS OF THE ESTATE OF VERNA MAE GOLZ,

Defendants.

RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Michael E. Hegarty, United States Magistrate Judge.

Before the Court is Defendant William J. Golz's Position Paper on Proceeding Pro Se and Motion to Dismiss the Estate as a Defendant [filed April 25, 2018; ECF No. 103]. The day after the motion was filed, the Court informed the parties that, because Dr. Golz chose to support his Motion to Dismiss (liberally construed as filed pursuant to Fed. R. Civ. P. 12(b)(6) or 12(c)) with documents outside the pleadings, the Court would convert the motion into a Motion for Summary Judgment pursuant to Fed. R. Civ. P. 56. *See David v. City & Cty. of Denver*, 101 F.3d 1344, 1352 (10th Cir. 1996); *see also Nelson v. State Farm Mut. Auto Ins. Co.*, 419 F.3d 1117, 1119 (10th Cir. 2005) (a motion for judgment on the pleadings under Rule 12(c) of the Federal Rules of Civil Procedure is governed by the same standards as a motion to dismiss under Rule 12(b)(6)).

A motion for summary judgment serves the purpose of testing whether a trial is required. *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1185 (10th Cir. 2003). The Court shall grant

summary judgment if the pleadings, depositions, answers to interrogatories, admissions, or affidavits show there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). A fact is material if it might affect the outcome of the suit under the governing substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

The moving party bears the initial responsibility of providing to the Court the factual basis for its motion. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). "The moving party may carry its initial burden either by producing affirmative evidence negating an essential element of the nonmoving party's claim, or by showing that the nonmoving party does not have enough evidence to carry its burden of persuasion at trial." *Trainor v. Apollo Metal Specialties, Inc.*, 318 F.3d 976, 979 (10th Cir. 2002). Only admissible evidence may be considered when ruling on a motion for summary judgment. Fed. R. Civ. P. 56(c); *World of Sleep, Inc. v. La–Z–Boy Chair Co.*, 756 F.2d 1467, 1474 (10th Cir. 1985).

The non-moving party has the burden of showing there are issues of material fact to be determined. *Celotex*, 477 U.S. at 322. That is, if the movant properly supports a motion for summary judgment, the opposing party may not rest on the allegations contained in his complaint, but must respond with specific facts showing a genuine factual issue for trial. Fed. R. Civ. P. 56(e); *Scott v. Harris*, 550 U.S. 372, 380 (2007) ("[t]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact.") (citation omitted); *see also Hysten v. Burlington N. & Santa Fe Ry.*, 296 F.3d 1177, 1180 (10th Cir. 2002). These specific facts may be shown " 'by any of the kinds of evidentiary materials listed in Rule 56(c), except the mere pleadings themselves.'" *Pietrowski v. Town of Dibble*, 134 F.3d 1006, 1008 (10th Cir. 1998)

(quoting *Celotex*, 477 U.S. at 324). "[T]he content of summary judgment evidence must be generally admissible and...if that evidence is presented in the form of an affidavit, the Rules of Civil Procedure specifically require a certain type of admissibility, i.e., the evidence must be based on personal knowledge." *Bryant v. Farmers Ins. Exch.*, 432 F.3d 1114, 1122 (10th Cir. 2005). "The court views the record and draws all inferences in the light most favorable to the non-moving party." *Pepsi–Cola Bottling Co. of Pittsburg, Inc. v. Pepsico, Inc.*, 431 F.3d 1241, 1255 (10th Cir. 2005).

At this juncture, the Plaintiff does not oppose the motion. *See* Courtroom Minutes, Feb. 28, 2019, ECF No. 152. It is undisputed that (1) the only asset belonging to the Estate was the real property at 130 Beaver Creek Drive, Nederland, Colorado, (2) such property was transferred to Dr. Golz by a Personal Representative's Deed (ECF No. 103 at 27), and (3) probate on the Estate closed on May 2, 2018 (ECF No. 108 at 6-7); thus, the Court finds the existence of no genuine issue of material fact demonstrating that Plaintiff's claim for foreclosure against the Estate remains viable.

Therefore, this Court respectfully recommends that the Honorable R. Brooke Jackson **grant** Defendant William J. Golz's Motion to Dismiss the Estate as a Defendant [filed April 25, 2018; ECF No. 103] and **dismiss** Defendant Estate of Verna Mae Golz from this case.[1]

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[1]Be advised that all parties shall have fourteen (14) days after service hereof to serve and file any written objections in order to obtain reconsideration by the District Judge to whom this case is assigned. Fed. R. Civ. P. 72. The party filing objections must specifically identify those findings or recommendations to which the objections are being made. The District Court need not consider frivolous, conclusive or general objections. A party's failure to file such written objections to proposed findings and recommendations contained in this report may bar the party from a de novo determination by the District Judge of the proposed findings and recommendations. *United States v. Raddatz*, 447 U.S. 667, 676-83 (1980); 28 U.S.C. § 636(b)(1). Additionally, the failure to file written objections to the proposed findings and recommendations within fourteen (14) days after being served with a copy may bar the aggrieved party from appealing the factual and legal findings of the Magistrate Judge that are accepted or adopted by the District Court. *Duffield v. Jackson*, 545 F.3d 1234, 1237 (10th Cir.

Respectfully submitted and dated this 5th day of March, 2019, at Denver, Colorado.

BY THE COURT:

Michael E. Hegarty

Michael E. Hegarty
United States Magistrate Judge

2008) (quoting *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991)).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 17-cv-01152-RBJ-MEH

BENJAMIN S. CARSON, Secretary of Housing and Urban Development,

Plaintiff,

v.

ESTATE OF VERNA MAE GOLZ and
WILLIAM J. GOLZ,

Defendants.

RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Michael E. Hegarty, United States Magistrate Judge.

Verna Mae Golz took out a reverse mortgage that was secured by her property in Nederland, Colorado. Ms. Golz's loan became due and payable upon her death, but it was not paid off by her estate, family members, or other heirs. Accordingly, the sole lienholder, Plaintiff Benjamin S. Carson, Secretary of Housing and Urban Development ("HUD"), initiated this foreclosure action, alleging an unpaid loan balance of $288,260.83. Although Plaintiff sued a number of Defendants, only two remain after entry of default judgments: (1) Ms. Golz's son, Dr. William J. Golz, who represents that he is the personal representative of the Estate and Ms. Golz's sole heir; and (2) the Estate (collectively, "Defendants").

In their Amended Answer, Defendants allege that the failure to pay off the loan stemmed from HUD's own failure to schedule a timely appraisal, which was necessary because the appraisal performed at the time of the loan's origination did not account for material construction defects that were obscured by snow; had that appraisal been performed as required, Defendants would have satisfied the debt by paying an appropriate percentage of the revised valuation. Defendants also

assert the following affirmative defenses: (1) the foreclosure is avoidable and contrary to Regulations of the National Housing Act ("NHA") and the Federal Housing Administration ("FHA"); (2) Plaintiff fails to state a claim; (3) estoppel; (4) laches; (5) waiver; (6) Plaintiff's final agency action is arbitrary, capricious, and contrary to law; and (7) unclean hands. Am. Answer ¶¶ 132–41, ECF No. 64. The stated goal of these affirmative defenses is to preclude HUD from capitalizing on its own neglect and misdeeds through a grant of foreclosure.

Plaintiff has filed a Motion to Strike Defendants' Affirmative Defenses to Plaintiff's Foreclosure Claim, which contends that none of these affirmative defenses are "legally valid." Mot. to Strike at 3, ECF No. 71. Plaintiff argues that some of the affirmative defenses are no more than boilerplate recitals that do not provide adequate notice as to their grounds, whereas others cannot succeed because they are legally insufficient. *Id.* at 3. For the reasons that follow, I respectfully recommend that the motion be **granted** in its entirety.

BACKGROUND

I. Facts

When Verna Mae Golz was seventy-five years old, mounting expenses led her to seek a reverse mortgage. Am. Answer ¶ 73. On January 18, 2002, she entered into a federally insured Home Equity Conversion Mortgage ("HECM") loan with a private lender named Financial Freedom Senior Funding Corp. ("Financial Freedom"). Am. Compl. ¶¶ 2, 29, ECF No. 31; *see also* ECF No. 31-1 (loan agreement); ECF No. 31-2 (promissory note with Financial Freedom); ECF No. 31-4 (deed of trust listing Financial Freedom as beneficiary). After issuing the loan, Financial Freedom assigned its deed of trust to Mortgage Electronic Registration Systems, Inc. ("MERS"). Am. Compl. ¶ 37; *see also* ECF No. 31-6 (assignment to MERS). The assignment was duly recorded with the Boulder County Clerk. Am. Compl. ¶ 37.

The loan, which is commonly referred to as a "reverse mortgage," allowed Ms. Golz to

convert the equity in her home into cash by providing her with periodic advance payments. *Id.* ¶¶ 19–20. The mortgage holder's only recourse for this type of loan is to foreclose on the property, as opposed to the borrower's other assets. *Id.* ¶¶ 21–22. Here, the loan was secured by real property in Nederland, Colorado. *Id.* ¶ 1. The home on that property was constructed back in 1963. Am. Answer ¶ 72. To alleviate the risk of nonpayment, Financial Freedom obtained mortgage insurance from HUD. Am. Compl. ¶¶ 27, 36. Pursuant to that transaction, Ms. Golz executed a second promissory note with HUD and provided HUD with its own deed of trust. *Id.* ¶¶ 30–32; *see also* ECF No. 31-3 (promissory note with HUD); ECF No. 31-5 (deed of trust listing HUD as beneficiary). There was some initial confusion because the lender mistakenly encumbered a different lot known as "Lot 2"; that error was not corrected in full until 2011. Am. Answer ¶¶ 76–79.

After executing the loan, Ms. Golz received loan advances for years. Am. Compl. ¶¶ 38–40. By the end of 2011, she had accrued a loan balance of over $241,080. *Id.* ¶ 40. At that time, Financial Freedom submitted an insurance claim based on the size of the loan balance and assigned its rights and interests under the mortgage to HUD in exchange for payment of $242,013.06 on the claim in December 2011. *Id.* ¶¶ 42–43. Likewise, MERS assigned its deed of trust to HUD. *Id.* ¶ 43; *see also* ECF No. 31-7 (assignment to HUD). Here, too, the assignment was duly recorded with the Boulder County Clerk. Am. Compl. ¶ 43. HUD currently holds both promissory notes and deeds of trust. *Id.* ¶ 44.

Ms. Golz did not repay any of the loan balance after the assignment; meanwhile, interest and fees continued to accrue. *Id.* ¶ 45. The notes and deeds specify that the loan balance is in default, and thus becomes immediately due and payable, upon Ms. Golz's death. *Id.* ¶ 47 (listing specific provisions). She passed away on May 16, 2014. *Id.* ¶ 48. The notes and deeds also state that the loan is in default, and immediately due and payable, if Ms. Golz ceases to principally reside on the

property. *Id.* ¶ 49 (listing specific provisions). Plaintiff alleges the latter event occurred when Ms. Golz became a domiciliary of Maricopa County, Arizona—the county where Dr. Golz later filed a probate action on September 11, 2014. *Id.* ¶ 50; *see also* ECF No. 31-8 (application for probate).

The parties present differing accounts as to what happened regarding the debt after Ms. Golz's death. Plaintiff alleges it advised the Estate that the loan was fully due and payable and tried to recover the balance owed without proceeding to foreclosure. Am. Compl. ¶¶ 53–54. According to Plaintiff, the loan servicer notified the Estate that HUD might consider accepting a deed in lieu of foreclosure or a short sale for ninety-five percent of the appraised value of the property under certain conditions, which were never satisfied. *Id.* ¶ 56. Plaintiff also alleges that Dr. Golz requested an appraisal on behalf of the Estate but did not cooperate in getting it scheduled, such that HUD was unable to procure an appraisal despite numerous attempts. *Id.* ¶¶ 58–62. Plaintiff further alleges that it sent notice to Dr. Golz on May 18, 2015, informing him that HUD was referring the loan for foreclosure. *Id.* ¶ 63. Plaintiff states that the amount owing, due, and payable under the note was $288,260.83 as of August 18, 2017, with interest and fees continuing to accrue until entry of judgment. *Id.* ¶ *65.*

By contrast, Defendants allege that Dr. Golz was the one pushing for a prompt appraisal. They were eager for an appraisal because the one performed on November 30, 2001 (shortly before the loan's origination) is inaccurate because it does not account for two material construction defects that were obscured by snow at the time of inspection. Am. Answer ¶¶ 72–73, 77, 79. Those defects are (1) a hand-dug well, which ran dry after a historic drought in 2004, leaving the site with no potable water; and (2) a lodgepole foundation for the entryway that rests on the ground. *Id.* Had the appraiser noticed the defects, Defendants contend, the appraisal would have been "as repaired" or the loan would have been conditioned on repairing these defects (i.e., digging a deep well and rebuilding the lodgepole foundation) per a HUD handbook. *Id.* ¶¶ 74–75.

Defendants further allege that the loan servicer (Deval, Inc.) and HUD failed to respond to Dr. Golz's repeated inquiries about the loan balance and his ongoing requests for an appraisal, thereby frustrating Defendants' efforts to pay off the loan. *Id.* ¶¶ 80–121. They state that Dr. Golz promptly notified Deval of his mother's death and asked for the payoff balance for the loan, but Deval did not respond to his repeated inquiries. *Id.* ¶¶ 80–84. Therefore, Dr. Golz next contacted HUD at its Denver Home Ownership Center. *Id.* ¶ 84. Again receiving no response, he contacted HUD at its National Servicing Center, precipitating a series of communications that were plagued with administrative errors such as missing enclosures in mailings. *Id.* ¶¶ 86–87. Dr. Golz unilaterally provided several deadlines for an appraisal, none of which were met. *Id.* ¶¶ 88–92. HUD ultimately contacted Dr. Golz about an appraisal, but Dr. Golz resisted the dates proffered and asked to defer the foreclosure, citing his desire to first obtain an engineering inspection and his concerns about the weather and the accumulating snow. *Id.* ¶¶ 94–103.

Ultimately, Defendants hired an appraiser on their own to inspect the property on May 6, 2015. *Id.* ¶ 104. Then, on June 3, 2015, they sought to exercise their "right" to purchase the property by paying ninety-five percent of the most recent appraisal value. *Id.* ¶ 109. The total amount tendered was $118,750. *See* ECF No. 71-6 at 4. HUD rejected their attempt to purchase the property on the ground that it only accepts appraisals that are ordered by and delivered directly to HUD or its loan servicer. Am. Answer ¶ 112. Defendants unsuccessfully disputed HUD's position through counsel. *See id.* ¶¶ 120–21.

On three occasions in May and June 2015, HUD's new servicer, Novad Management Consulting LLC, entered the property and placed unspecified documents on the door of the home. *Id.* ¶ 122. Dr. Golz accused Novad and HUD of criminal trespass and demanded that their agents not come on the property again. *Id.* ¶¶ 122–26. But a federal contractor forcibly entered the home on December 2, 2016, and installed a "HUD lock" to exclude Defendants. *Id.* ¶¶ 128–29. BLM

Companies LLC acquired the property from HUD during this timeframe. *See id.* ¶¶ 129–30. Defendants allege that BLM staff and HUD administrators committed a number of crimes by forcibly entering the home and taking possession of the property. *Id.* ¶ 131.

II. Procedural History

Plaintiff initiated this foreclosure action against Defendants on May 9, 2017, *see* ECF No. 1, and then filed the operative Amended Complaint on August 18, 2017, *see* ECF No. 31. Two Defendants—Estate of Verna Mae Golz and William Golz—filed an Answer and Counterclaims to the Amended Complaint on September 25, 2017, *see* ECF No. 46, and later filed the operative Amended Answer on November 29, 2017, *see* ECF No. 64—dropping the counterclaims and raising seven affirmative defenses. Default has been entered against the remaining Defendants: Marcus J. Golz, Matthew J. Golz, and the Unknown Heirs and Claimants of the Estate. *See* ECF Nos. 30, 33. Despite the entry of default, these Defendants were listed in the caption of the Amended Complaint; however, they did not file an Answer, nor have they filed (or joined in) any briefs in this case.

On December 13, 2017, Plaintiff filed this Motion to Strike Defendants' Affirmative Defenses. ECF No. 71. Defendants filed their Response on February 2, 2018. ECF No. 81. Plaintiff then filed a Reply on February 16, 2018. ECF No. 84.

LEGAL STANDARDS

An "affirmative defense" is "[a] defendant's assertion of facts and arguments that, if true, will defeat the plaintiff's or prosecution's claim, even if all the allegations in the complaint are true." Black's Law Dictionary (10th ed. 2014). Rule 8(c) of the Federal Rules of Civil Procedure instructs, "In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense . . . ." Fed. R. Civ. P. 8(c). Additionally, Rule 8(b)(1)(A) requires that, in responding to a pleading, a party must "state in short and plain terms its defenses to each claim asserted against it." Fed. R. Civ. P. 8(b)(1)(A). Although Rule 8(b)(1)(A) does not require that the pleading show entitlement

to relief, "the defenses must be stated so as to give notice to a claimant, 'who can then use the discovery process to investigate more fully the factual basis supporting the defense.'" *United States Welding, Inc. v. Tecsys, Inc.*, No. 14-cv-00778-REB-MEH, 2015 WL 3542702, at *2 (D. Colo. June 4, 2015) (quoting *Michaud v. Greenberg & Sada, P.C.*, No. 11-cv-01015-RPM-MEH, 2011 WL 2885952, at *4 (D. Colo. July 18, 2011)).

Rule 12(f) of the Federal Rules of Civil Procedure permits the Court—on its own or on motion by a party—to strike from a pleading an "insufficient" defense. Fed. R. Civ. P. 12(f). "An affirmative defense is insufficient if, as a matter of law, the defense cannot succeed under any circumstance." *Unger v. U.S. West, Inc.*, 889 F. Supp. 419, 422 (D. Colo.1995); *see also S.E.C. v. Nacchio*, 438 F. Supp. 2d 1266, 1287 (D. Colo. 2006) ("A motion to strike an affirmative defense is adjudicated under the same standard as a motion to dismiss: namely, the Court must strike the defense only if it cannot be maintained under any set of circumstances."); *Malibu Media, LLC v. Butler*, No. 13-cv-02707-WYD-MEH, 2014 WL 4627454, at *1 (D. Colo. Sept. 16, 2014) (characterizing the appropriate inquiry for whether to strike a defense as whether the defense "could succeed as a matter of law").

Generally, courts "do not consider whether a defendant has presented evidence in support of a particular defense" when applying this standard; instead, courts "decide the motion on the basis of the pleadings alone." *Quick v. Grand Junction Lodging, LLC*, No. 13–cv–02917–RBJ, 2014 WL 7205417, at *2 (D. Colo. Dec. 18, 2014). But when both parties have submitted evidence outside the pleadings in connection with a Rule 12(f) motion to strike, as they have done here, the Court will consider "both legal insufficiency and factual insufficiency on the record before the Court." *Id.* at *2–3. In so doing, the Court looks to the standard applied in considering a summary judgment motion. *See* Fed. R. Civ. P. 56(a) ("The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a

matter of law."). The Court considers the factual record and all inferences derived therefrom in the light most favorable to the non-moving party. *Utah Lighthouse Ministry v. Found. for Apologetic Info. & Research*, 527 F.3d 1045, 1050 (10th Cir. 2008).

"The purpose of Rule 12(f) is to save the time and money that would be spent litigating issues that will not affect the outcome of the case." *Kimpton Hotel & Rest. Grp., LLC v. Monaco Inn, Inc.*, No. 07–cv–01514–WDM-BNB, 2008 WL 140488, at *1 (D. Colo. Jan. 11, 2008) (quoting *United States v. Smuggler–Durant Mining Corp.*, 822 F. Supp. 873, 875 (D. Colo.1993)). Striking a portion of a pleading is "a severe remedy," so it is "generally disfavored." *Sender v. Mann*, 423 F. Supp. 2d 1155, 1163 (D. Colo. 2006); *see also Quick*, 2014 WL 7205417, at *2 (explaining that a Rule 12(f) motion "will not be granted unless it appears to a certainty that plaintiffs would succeed despite any state of the facts which could be proved in support of the defense" (quoting *Dixie Yarns, Inc. v. Forman*, No. 91 CIV. 6449 (CSH), 1993 WL 227661, at *4 (S.D.N.Y. June 21, 1993))). Even so, whether to strike an affirmative defense rests within the sound discretion of the trial court. *Anderson v. Van Pelt*, No. 09–cv–00704–CMA, 2010 WL 5071998, at *1 (D. Colo. Dec. 7, 2010) (citing *Vanderhurst v. Colo. Mountain Coll. Dist.*, 16 F. Supp. 2d 1297, 1303 (D. Colo. 1998)).

ANALYSIS

Plaintiff asks the Court to strike all of Defendants' affirmative defenses as being insufficient as a matter of law under Fed. R. Civ. P. 12(f). Plaintiff challenges the second and sixth affirmative defenses as boilerplate and contends they do not provide the requisite notice as to their grounds. Plaintiff challenges the first, third, fourth, fifth, and seventh affirmative defenses as legally invalid because they cannot succeed under any circumstances. Defendants do not address the affirmative defenses in an orderly fashion. The bulk of Defendants' response reiterates their theory that Plaintiff failed to conduct a prompt appraisal and then misled Defendants to believe they would be able to purchase the subject property for a fraction of the payoff price, to be calculated based on current

appraisal value. Defendants touch briefly on the related estoppel/laches/waiver/unclean-hands defenses, but do not address the purported deficiencies of the second affirmative defense head-on. I consider each of the affirmative defenses in turn, combining my analysis where appropriate.

I. First and Sixth Affirmative Defenses: The Foreclosure Is Avoidable and Contrary to NHA and FHA Regulations, and Plaintiff's Final Agency Action Is Arbitrary, Capricious, and Contrary to Law

The first affirmative defense is that "foreclosure is avoidable and contrary to NHA and FHA regulations." Am. Answer ¶¶ 132–35. To support this defense, Defendants allege that Plaintiff failed to comply with the time requirements for a prompt appraisal, as spelled out in the "HECM Servicing Frequently Asked Questions (FAQs)." *See id.* ¶¶ 134–35. Those FAQs provide guidance on 24 C.F.R. § 206.125(b) and (c),[1] among other topics. More specifically, Defendants allege that Plaintiff violated one of HUD's regulations, 24 C.F.R. § 206.125, as interpreted in a HUD handbook.

The sixth affirmative defense appears to be based on the same purported violations, though it is lacking in details. Defendants state generally, "The FAD that Ms. Potts issued on September 8, 2015 as program counsel for the Office of Insured Housing is a final agency action that is arbitrary, capricious and contrary to law." Am. Answer ¶ 140. The factual basis for this affirmative defense must be pieced together from the rest of the responsive pleading. Millicent Potts is alleged to be the Associate General Counsel for the Office of Insured Housing. *See id.* ¶ 112. She purportedly corresponded with Defendants' former attorney, Mark Cohen. *See id.* ¶¶ 87, 106–117. The "FAD" referenced is the final agency determination that HUD was going to foreclose on the property. *See id.* ¶ 117. The legal basis for this defense seems to stem from the scope of review for agency decisions, which is set forth in 5 U.S.C. § 706(2)(A).

The Court might choose to strike the sixth defense based on its lack of specificity and failure

[1] This regulation was amended effective September 19, 2017. The parties' briefs rely on the pre-September 2017 version because of the timing of the underlying events, so I do the same.

to provide fair notice alone. *See Qarbon.com Inc. v. Ehelp Corp.*, 315 F. Supp. 2d 1046, 1049 (N.D. Cal. 2004) (stating that "[a] reference to a doctrine, like a reference to statutory provisions, is insufficient notice" of the grounds for a defense). But the first and sixth defenses seem to be inextricably linked, and the preceding allegations in the Amended Answer arguably provide the minimal short and plain terms. Therefore, I choose to consider these related defenses in tandem and to resolve whether both are sufficient as a legal matter, rather than recommending that the latter be stricken based on a pleading deficiency. Though this is a complicated area of law, replete with regulations and agency interpretations thereof, it seems clear to me after a painstaking review that neither the first nor the sixth affirmative defense can succeed under any circumstances for a host of reasons.

First, as a threshold matter, Defendants seek to apply Section 206.125 out of context. This regulation is part of HUD's HECM insurance-claim procedure, which mortgage lenders must follow to submit an insurance claim to HUD. *See* 24 C.F.R. §§ 206.123–129 (discussing claim procedures for the payment of mortgage insurance benefits); *see, e.g.*, *id.* § 206.125(b) ("The mortgagee shall obtain an appraisal of the property no later than 30 days after the mortgagor is notified that the mortgage is due and payable, or no later than 30 days after the mortgagee becomes aware of the mortgagor's death . . . "). An entirely different section of the regulations addresses HUD's responsibility to mortgagors. *See* 24 C.F.R. §§ 206.117–121.

Second, looking beyond context and to the text, it is evident from the language of Section 206.125 and the related regulations that they govern lenders, as distinguished from HUD, and thus do not apply to Defendants' scenario. Granted, "mortgagee" is not defined within 24 C.F.R. §§ 206.123–129, and the parties spar over whether the lender or HUD is the "mortgagee" here. But the remaining language of Section 206.125, its context, and historical documents all clearly support Plaintiff's position that the lender is the mortgagee. Of particular note, the terms "mortgagee" and

"HUD" are not used interchangeably in these sources. Both terms often appear in the same sentence, reflecting the fact that the mortgagee and HUD are effectively counterparties to a mortgage insurance contract. *See, e.g.*, 53 Fed. Reg. 43,156-01, 43,159-60 (Oct. 25, 1988) (discussing the mortgagee's initiation of a foreclosure action and differentiating between the mortgagee and HUD in stating that "[t]he mortgagee may delay foreclosure up to three months, or longer without HUD consent, without affecting its rights under the insurance contract"); *see also Aetna Cas. & Sur. Co. v. United States*, 655 F.2d 1047, 1057 (Ct. Cl. 1981) (noting in the context of non-HECM regulations that "the distinct terms 'Commissioner' and 'mortgagee' are used in contrast to each other" and thus are not "interchangeable"). In my opinion, Defendants' response dodges the critical question: Is HUD the mortgagee for purposes of Section 206.125? I conclude that HUD and the"mortgagee" are not one and the same within that regulation.

Third, Defendants rely extensively on an outdated, non-binding HUD handbook. Without responding to Plaintiff's textual argument, Defendants cite to handbook excerpts that refer to HUD as a mortgagee in the course of discussing HUD's post-assignment responsibilities. *See* Resp. at 8–10. Plaintiff counters that the handbook cited is outdated and establishes that it does not even address the applicable version of the regulation. Reply at 5–6. Plaintiff also correctly points out that HUD's handbooks are not binding. *See id.* at 8–9. The Supreme Court has characterized handbooks and booklets issued by HUD as containing mere "instructions," "technical suggestions," and "items for consideration." *Thorpe v. Housing Auth. of City of Durham*, 393 U.S. 268, 275 (1969). And the Tenth Circuit has reaffirmed, "[T]he HUD Handbook . . . is not law." *United States v. Hauck*, 980 F.2d 611, 614 (10th Cir. 1992). Rather, it is "intended for internal use for the information and guidance of HUD officials" and "has no binding force." *Id.* (quoting *Burroughs v. Hills*, 741 F.2d 1525, 1529 (7th Cir. 1984)); *accord Williams v. Hanover Hous. Auth.*, 871 F. Supp. 527, 531–34 (D. Mass. 1994) (collecting cases that show how "[c]ourts have consistently held that government

agenc[ie]s' handbooks are not legally binding, but merely advisory").

Fourth, it seems beyond dispute that the regulation relied upon by Defendants does not confer any benefits upon them, as the heir and estate of the borrower. Decades ago, the Supreme Court emphasized that the appraisal system was designed primarily to protect the government and its insurance funds, that the mortgage insurance program was not designed to insure anything but the repayment of loans made by lender-mortgagees, and that the FHA and the individual mortgagor do not have a legal relationship. *United States v. Neustadt*, 366 U.S. 696, 709 (1961) (citing legislative history); *see also Bennett v. Donovan*, 703 F.3d 582, 589 (D.C. Cir. 2013) (explaining that § 206.125 was "intended to protect the lenders"); *Fed. Nat'l Mortg. Ass'n v. Takas*, No. 2:17-CV-204-DAK, 2017 WL 3016785, at *5 (D. Utah July 14, 2017) (citing cases for the proposition that no private right of action exists under the NHA). More recently, the Fifth Circuit aptly explained in *Johnson v. World Alliance Financial Corporation*, 830 F.3d 192, 196 (5th Cir. 2016), that "HUD regulations govern the relationship between the reverse-mortgage lender and HUD as insurer of the loan." They do not, however, "give the borrower a private cause of action *unless the regulations are expressly incorporated into the lender-borrower agreement*." *Id.* (emphasis added). The record shows that is not the case here. *See* ECF Nos. 31-1, 31-2, 31-4. Similarly, the Tenth Circuit has rejected the argument that the regulations "impose an obligation on HUD to any party in a mortgage transaction other than the mortgagee." *Anderson v. U.S. Dep't of Hous. & Urban Dev.*, 701 F.2d 112, 114 (10th Cir.1983). If the HUD regulations do not confer a cause of action on a borrower under such circumstances, I do not see how they could confer an affirmative defense to a borrower's heir or estate as a means of averting foreclosure when a reverse mortgage becomes due and payable.

Fifth, and finally, these two affirmative defenses cannot succeed because their viability depends on Defendants' ability to pay off the outstanding loan balance by tendering only ninety-five

percent of the appraised value of the property, based on an appraisal they procured themselves. HUD has provided a policy clarification on a "borrower's recourse for repayment of HECM loan debt and termination of a HECM mortgage," which seems to state that this type of partial payment is not even permissible. *See* Mot. to Strike, Exh. 71-5 at 2 (HUD Mortgagee Letter 2008-38, dated Dec. 5, 2008). The clarification addresses a statement from the HUD handbook on HECMs, which provides: "The HECM is a 'non-recourse loan.' This means that the HECM borrower (or his or her estate) will never owe more than the loan balance or value of the property, whichever is less . . . ." *Id.* (quoting ¶ 1-3C of the handbook). HUD goes on to interpret that statement in a way that rejects Defendants' position that the Estate could have paid off the loan balance for less than the full amount due:

> Some program participants mistakenly infer from this language that a borrower (or the borrower's estate) could pay off the loan balance of a HECM for the lesser of the mortgage balance or the appraised value of the property while retaining ownership of the home. This is not correct and is not the intended meaning of the quoted provision. Non-recourse means simply that if the borrower (or estate) does not pay the balance when due, the mortgagee's remedy is limited to foreclosure and the borrower will not be personally liable for any deficiency resulting from the foreclosure.

Id. HUD goes on to address a variety of scenarios, including the one the Court confronts here: "If the mortgage is due and payable and the borrower (or estate) desires to retain ownership of the property, the mortgage debt must be repaid in full. Lenders may assist the borrower (or estate) in obtaining other financing to pay off the HECM loan in full." *Id.* at 3. Courts defer to an agency's interpretation of its own regulation as "controlling" unless it is plainly erroneous or inconsistent with the regulation. *Auer v. Robbins*, 519 U.S. 452, 461 (1997). It does not strike me as either. Accordingly, even assuming that (1) HUD was required to procure a timely appraisal and failed to do so and (2) an agent told Defendants they could pay off the loan for less than the full amount, HUD's actions would not warrant voiding the foreclosure.

For all of these compelling reasons, I find that Defendants's first and sixth affirmative defenses are insufficient and cannot be maintained under any set of circumstances that exist in this case. Because the defenses, as stated, "cannot succeed" in defeating Plaintiff's foreclosure claim, I recommend that the Court strike them. To the extent Plaintiff is simply articulating the relevant legal standard within the sixth defense, I note that striking the defense would not preclude Plaintiff from asserting a more detailed argument as to how that standard should be applied when the merits of Plaintiff's claim are under consideration.

II. Second Affirmative Defense: Failure to State a Claim

Defendants' Second Affirmative Defense is that "Plaintiff's Amended Complaint fails to state a claim upon which relief can be granted." Am. Answer ¶ 136. Plaintiff moves to strike this defense as well, characterizing it as a "one-sentence recital" that is part of an unacceptable "laundry list." Mot. to Strike at 12.

I agree that this bare-bones, boilerplate defense does not give adequate notice to Plaintiff. As explained above, Rule 8(b)(1)(A) requires a party responding to a pleading to "state in short and plain terms its defenses to each claim asserted against it." Fed. R. Civ. P. 8(b)(1)(A). In addition, an affirmative defense "must be stated so as to give notice to a claimant, 'who can then use the discovery process to investigate more fully the factual basis supporting the defense.'" *United States Welding, Inc. v. Tecsys, Inc.*, No. 14-cv-00778-REB-MEH, 2015 WL 3542702, at *2 (D. Colo. June 4, 2015) (quoting *Michaud v. Greenberg & Sada, P.C.*, No. 11-cv-01015-RPM-MEH, 2011 WL 2885952, at *4 (D. Colo. July 18, 2011)). The second affirmative defense does not come close to meeting these requirements.

I recognize that Defendants are currently proceeding pro se. But it would be improper for the Court to construct arguments on their behalf simply because of that status, *see Whitney v. New Mexico*, 113 F.3d 1170, 1173–74 (10th Cir. 1997), and Defendants do not provide any additional

details regarding the substance of this defense in their response. Although Defendants parse through some of the other affirmative defenses individually, they do not attempt to substantiate this one. It may be that they inserted this defense as a placeholder, seeking to satisfy the mandate in Federal Rule of Civil Procedure 12(b)(6) that "[e]very defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required" or asserted by motion. *See Echostar Satellite, L.L.C. v. Persian Broadcasting Co., Inc.*, No. 05-cv-00466-PSF-MEH, 2006 WL 446087, at *2 (D. Colo. Feb. 22, 2006); Fed. R. Civ. P. 12(b)(6). Nonetheless, "issues will be deemed waived if they are not adequately briefed." *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 841 (10th Cir. 2005). Furthermore, my review of the Amended Complaint and the Motion to Strike convinces me that Plaintiff has adequately stated a claim for foreclosure. Plaintiff has alleged a continuing default and "the fact of [a borrower's] continuing default is, by itself, justification and support for HUD's decision to foreclose." *United States v. Victory Highway Vill., Inc.*, 662 F.2d 488, 496 (8th Cir. 1981).

Accordingly, I recommend striking the second affirmative defense as well. I note that striking this defense would not preclude Defendants from raising it later in this litigation as permitted by Federal Rule of Civil Procedure 12(h)(2) or otherwise. "The defense of failure to state a claim can be raised at any time, including at trial." *Chavez v. Thornton*, No. 05-cv-00607-REB-MEH, 2007 WL 2908293, at *1 (D. Colo. Oct. 3, 2007).

III. Third Affirmative Defense: Estoppel

The third affirmative defense is estoppel.[2] Am. Answer ¶ 137. Defendants allege that they

[2]Although estoppel substantially overlaps with the waiver, laches, and unclean-hands defenses, I deem these defenses to be distinct enough to warrant a separate analysis and address each one independently.

continued to pay for property taxes, homeowners' insurance, utilities, and maintenance for over three and one-half years in reliance upon Plaintiff's representation that they could pay off the loan for ninety-five percent of the appraised value as of 2014. *Id.*; *see also* Resp. at 3. But even if Plaintiff's agent did make such a representation, an estoppel defense cannot succeed.

The Tenth Circuit has stated that "[i]t is far from clear that the Supreme Court would ever allow an estoppel defense against the government under any set of circumstances." *FDIC v. Hulsey*, 22 F.3d 1472, 1490 (10th Cir. 1994). Assuming it is even available, the defense requires a showing of "affirmative misconduct"—which "is a high hurdle for the asserting party to overcome." *Id.* "Affirmative misconduct means an affirmative act of misrepresentation or concealment of a material fact. Mere negligence, delay, or failure to follow agency guidelines does not constitute affirmative misconduct." *Bd. of Cty. Comm'rs v. Isaac*, 18 F.3d 1492, 1499 (10th Cir. 1994). Here, Defendants focus extensively on appraisal delays caused by Plaintiff and describe Plaintiff's conduct in terms of negligence and neglect. *See, e.g.*, Am. Answer at 9 n.8 (discussing "HUD's negligent refusal to timely appraise the Property"); Resp. at 7 (stating that "the agency neglected its responsibility to Defendants and to the public purse" by refusing to let them pay off the loan at the reduced rate); *id.* at 19 (characterizing HUD's treatment of Defendants as "a multi-year neglect of its responsibilities"). It is clear from *Hulsey*, however, that neither a lengthy delay in processing nor erroneous advice of a government agent constitutes affirmative misconduct. *See* 22 F.3d at 1490.

Because estoppel is rarely applied against the government, and because Defendants have not convinced me that they could satisfy the "high hurdle" of showing affirmative misconduct by Plaintiff even if such a defense was available, I recommend that the estoppel defense be stricken.

IV. Fourth Affirmative Defense: Laches

The fourth affirmative defense is laches. Laches may be asserted to deny relief to a party whose unexcused or unreasonable delay in enforcing his or her rights has prejudiced the party

against whom he or she seeks relief. *Robbins v. People*, 107 P.3d 384, 388 (Colo. 2005); *see also Jacobsen v. Deseret Book Co.*, 287 F.3d 936, 949 (10th Cir. 2002) ("[T]he defendant must demonstrate that there has been an unreasonable delay in asserting the claim and that the defendant was materially prejudiced by that delay.") (quoting *Hutchinson v. Pfeil*, 105 F.3d 562, 564 (10th Cir. 1997)). Here, Defendants assert that Plaintiff's delay in filing this action was unreasonable and caused them prejudice. *See* Am. Answer ¶ 138.

I see no unreasonable delay, given that the pleadings establish that bad weather played a significant role in the time required to secure an appraisal. Nor do I see prejudice to Defendants, as any delay in filing the suit actually afforded them continued access to (and enjoyment of) the property. Besides, this defense, too, is legally insufficient. The government is not subject to laches when it brings a lawsuit, such as this one, to enforce its rights. This notion has been well established for almost two centuries. *See Chesapeake & Del. Canal Co. v. United States*, 250 U.S. 123, 125 (1919) ("That the doctrine of laches is not applicable to the government was announced . . . in 1821."). It has been applied to a claim assigned to the Federal Housing Administrator acting on behalf of the United States. *See United States v. Summerlin*, 310 U.S. 414, 416 (1940) ("It is well settled that the United States is not bound by state statutes of limitations or subject to the defense of laches in enforcing its rights."). It has also been applied in a lawsuit by the government to recover defaulted student loans. *See United States v. Distefano*, 279 F.3d 1241, 1245 n.2 (10th Cir. 2002) ("[L]aches may not be asserted against the United States in an action brought to enforce a public right or a public interest."). I see no reason why these rulings should not be extended to this foreclosure case, so I recommend that the laches defense be stricken.

V. Fifth Affirmative Defense: Waiver

For their fifth affirmative defense, Defendants state: "From paragraphs 137 and 138 and the allegations above, the Secretary's unreasonable delay and prior statements upon which Defendants

relied constituted a voluntary and intentional waiver of the Secretary's right to bring this action." Am. Answer ¶ 139.

The waiver defense fares no better than its counterparts, as it runs afoul of yet another well-established principle: The law does not permit government employees to waive statutory requirements by their actions. *Wilber Nat'l Bank of Oneonta v. United States*, 294 U.S. 120, 123 (1935). "[T]he general rule is that the United States are neither bound nor estopped by the acts of their officers and agents in entering into an agreement or arrangement to do or cause to be done what the law does not sanction or permit." *Id.*; *accord Sanders v. Comm'r of Internal Revenue*, 225 F.2d 629, 634 (10th Cir. 1955) ("It is equally well established that the United States may not be estopped by the unauthorized acts of its agents nor may such agents waive the rights of the United States by their unauthorized acts."). "[T]hose dealing with an agent of the United States must be held to have had notice of the limitation of his authority." *Wilber Nat'l Bank*, 294 U.S. at 123–24.

Moreover, I am not persuaded that under the circumstances presented here Defendants were deceived or misled to their detriment or that they had adequate reason to suppose Ms. Golz's loan agreement would not be enforced or that the foreclosure provided for by that agreement could be waived. *See id.* at 124. To the contrary, it appears from the record that although Plaintiff was actively seeking to avoid foreclosure if at all possible for Defendants' benefit, it never relinquished its right to foreclose. For these reasons, I recommend that the waiver defense also be stricken.

VI. Seventh Affirmative Defense: Unclean Hands

Defendants' seventh and final affirmative defense is an unclean-hands defense. Defendants allege that "Plaintiff committed numerous acts of bad faith," which include a series of mailing and clerical errors and forcible entry into Ms. Golz's former home. *See* Am. Answer ¶ 141. Defendants cannot succeed on this defense either.

Simply put, unclean hands is not a valid defense to HUD foreclosure. The Supreme Court

has "rejected the unclean hands defense where a private suit serves important public purposes." *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 360 (1995). And courts across the country have found protecting the public treasury through foreclosure by HUD to be an important public purpose. *See, e.g.*, *United States v. Winthrop Towers*, 542 F. Supp. 1042, 1044 (N.D. Ill. 1982) ("In deciding whether to foreclose on a seriously defaulting mortgagor, it is appropriate that HUD consider as a predominant factor the federal policy to protect and preserve public monies which make up the assets of HUD's insurance fund."); *accord United States v. Winthrop Towers*, 628 F.2d 1028, 1038 (7th Cir. 1980) (recognizing "HUD's unarguable duty to protect the public treasury"). Against this backdrop, the Honorable William J. Martinez applied *McKennon* and struck an unclean-hands defense in the context of the FHA in *McFadden v. Meeker Housing Authority*, No. 16-cv-2304-WJM-GPG, 2018 WL 3368411, at *3 (D. Colo. July 10, 2018) (citing cases).

Because it is so clear to me that an unclean-hands defense is not available under the present circumstances, I do not conduct a detailed analysis of the parties' supplemental arguments. I do find it compelling, though, that the deeds of trust explicitly provide HUD with the right to enter and manage the Property. *See* Mot. to Strike at 19–20 & Exhs. 71-1 & 71-2. Consequently, I recommend striking Defendants' seventh affirmative defense as well.

CONCLUSION

I respectfully recommend that the Court grant Plaintiff's Motion to Strike Defendants' Affirmative Defenses to Plaintiff's Foreclosure Claim [filed December 13, 2017; ECF No. 71] in its entirety.[3]

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[3]Be advised that all parties shall have fourteen (14) days after service hereof to serve and file any written objections in order to obtain reconsideration by the District Judge to whom this case is assigned. Fed. R. Civ. P. 72. The party filing objections must specifically identify those findings or recommendations to which the objections are being made. The District Court need not consider frivolous, conclusive or general objections. A party's failure to file such written objections to proposed findings and recommendations contained in this report may bar the party from a de novo

Dated at Denver, Colorado, this 28th day of August, 2018.

BY THE COURT:

Michael E. Hegarty

Michael E. Hegarty
United States Magistrate Judge

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determination by the District Judge of the proposed findings and recommendations. *United States v. Raddatz*, 447 U.S. 667, 676–83 (1980); 28 U.S.C. § 636(b)(1). Additionally, the failure to file written objections to the proposed findings and recommendations within fourteen (14) days after being served with a copy may bar the aggrieved party from appealing the factual and legal findings of the Magistrate Judge that are accepted or adopted by the District Court. *Duffield v. Jackson*, 545 F.3d 1234, 1237 (10th Cir. 2008) (quoting *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991)).