No. 23-99

In the

Supreme Court of the United States

WENDY B. ADELSON,

Petitioner,

v.

OCWEN LOAN SERVICING, LLC, AND HSBC BANK USA, NA, individually and as Trustee on behalf of ACE Securities Home Equity Loan Trust Series 2007-HE1, asset backed *pass-through* certificates,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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July 31, 2023

Pro Se Petitioner

QUESTIONS PRESENTED

If after a mortgage lender's acceleration of the entire balance of the loan terminates borrower's duty to make periodic payments, then.

I. Can the lender create a $270,583.00 post-acceleration default representing future interest, late fees, and other charges? Are fraudulent sheriff sale adjournment notices in aid of the foreclosure sale violate the 11 USC §362 Stay? And if so, do the post-acceleration charges and fraudulent adjournment notices constitute irregularities in the foreclosure sale to warrant invalidating the Sheriff's Deed?

II. Can a Michigan district court create its own exception under Texas Law to the Michigan Fed. R. Civ. P. 13(a) to avoid a June 05, 2017, time-bar?

PARTIES TO THE PROCEEDING

The parties are, Petitioner Wendy Adelson, and Respondents, Ocwen Loan Servicing, LLC, aka PHH Mortgage Corporation, successor by merger, and HSBC BANK USA, NA, individually and as Trustee on behalf of ACE Securities Home Equity Loan Trust Series 2007-HE1, asset backed *pass-through* certificates.

STATEMENT OF RELATED PROCEEDINGS

This petition is taken from one judgment of the Federal Circuit and one related appeal to the Sixth Circuit as follows:

- Wendy Adelson v HSBC Bank USA, NA Case No. 20-2204 / 21-2972, 2021 - 2023 (Sixth Cir) final written decision entered January 31, 2023, and decision denying rehearing *en banc* entered April 10, 2023.

- Wendy Adelson v HSBC Bank USA, NA Case No 19-cv-13569, 2019 – 2023 (Fed. Cir), order adopting the report and recommendation August 25, 2021.

- In re: Wendy Adelson Case No. 19-bk-42478, order entered June 14, 2023, and order denying rehearing entered June 30, 2023.

- Wendy Adelson v Ocwen Loan Servicing, Case No. 07-cv-13142, 2007-2018 (Fed. Cir), judgment entered March 28, 2017, and order denying rehearing entered July 10, 2017.

- Wendy Adelson v Ocwen Loan Servicing, Case No. 17-1917 (Sixth Cir) final written decision entered August 20, 2018, and

decision denying rehearing entered October 10, 2018.

- Wendy Adelson v Ocwen Loan Servicing Case No. 07-C-7208 (Fed. Cir.)

- Wendy Adelson v Ocwen Loan Servicing Case No.14-3707 2014 – 2015 (Seventh Cir) final written decision entered on July 13, 2015.

- In re Ocwen Loan Servicing Case No. 04-C-2714 final written settlement entered December 10, 2010.

There are no other proceedings directly related to this case within the meaning of Supreme Court Rule 14.1(b)(iii).

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PETITION FOR WRIT OF CERTIORARI

Wendy Adelson respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Sixth Circuit's decision affirming the district court's granting motion to dismiss is unreported App 1. The Sixth Circuit's decision denying petition for rehearing *en banc* is unreported App 20. The District Court order Adopting Report & Recommendation is unreported. App 22.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. §1254(1) and 28 U.S.C. §2106. See *Int'l Union, United Auto., Aerospace v. Scofield,* 382 U.S. 205, 208 (1965).

STATUTORY PROVISIONS INVOLVED

The statutes at issue here are 12 C.F.R. §1024.41(f)(1)(i) requiring loan to be more than 120 days delinquent. 11 USC §1322(c), (1) a default that gave rise to, lien on debtor's principal residence may be cured under paragraph (3) or (5) of subsection (b) until such residence is sold at a foreclosure sale that is conducted in accordance with applicable non-bankruptcy law. 11 USC §362, provides the automatic

stay protects debtors from "commencement or continuation" of judicial action or proceeding.

INTRODUCTION

This case began as a challenge of a common law right to contest the wrongful foreclosure of a mortgage loan where no default occurred, but is now a dispute about lender's authority to create $270,583.00, post-acceleration default representing future interest, late fees and other charges, use of fraudulent sale adjournments notices to revive a cancelled sale, whether the notices in aid of sale were violate of the 11 USC §362 stay, and the district court's creation of its own novel exception to Rule 13(a) to avoid a time-barred foreclosure. Michigan has a substantial interest in courts enforcing their laws and court rules as plainly written. Under Michigan law, the courts have not only the power, but also the duty, to prevent exceptions that are not within manifest intent of the Legislature and Supreme Court.

The court paid little attention to the facts and details presented by Adelson. They focus their contentions instead on the face value of HSBC opinions, not on the facts of Adelson's underlying lawsuit. This cannot be justified under any circumstance, but it is especially intolerable here. Had the appeal been remanded for further proceedings, this case would not be over. This Court almost certainly should grant certiorari, vacate the judgment, and remand for further consideration. It is difficult to imagine a better candidate than in this case.

STATEMENT OF THE CASE

At this point, this case concerns HSBC utilizing a sheriff's deed obtained by fraud which conveyed no title and is invalid, to gain possession of Adelson's home. But the importance of this dispute can only be appreciated by understanding the nature of the underlying litigation.

In September 2006, Adelson purchased her long-time (50 years) family home executing a $178,500.00 mortgage with Sebring Capital Partners, L.P. (Sebring). On 12/01/06 Sebring's mortgage licenses were revoked. Nineteen days later Ocwen sent Adelson a letter indicating it was assigned her mortgage servicing rights although no such assignment was recorded in Oakland County records.

Adelson began tendering her mortgage payments to Ocwen. On 4/03/07, after accepting payment Ocwen claimed she owed a $105.00 fee, which she paid. Then on 04/05/07 Ocwen sent Adelson a default notice for $4,458.03, in response she sent proof of that exact amount paid to Sebring evidencing no default occurred. Instead of correcting its error, and **despite the loan being paid $588.00 into the 06/05/07**, installment with 10-days remaining in the 15-day payment grace period violate of 12 C.F.R. §1024.41(f)(1)(i) which requires loan to be more than 120 days delinquent. Thereafter, on 06/05/07 Ocwen accelerated the entire loan balance ($186,607.86), invoked the power of sale, published a notice of

foreclosure listing HSBC as the mortgagee [it wasn't] and scheduled a 07/03/07, sheriff sale.

A. 2007 Action

Adelson hired counsel and sued Ocwen and HSBC. Her state-court complaint claims arising under Michigan law, including breach of contract and wrongful foreclosure. The complaint attributed the loan arrearage to Ocwen's malfeasance, and that HSBC breached the loan and mortgage contracts by moving to foreclose a loan that was not delinquent. As relief her suit sought primarily to enjoin the foreclosure proceeding and quiet title to her home. After being served with the lawsuit, on 06/27/07, seven months after Sebring's mortgage license were revoked Scott Anderson Ocwen's Vice President of Mortgage Servicing, acting as a MERS, Vice President executed an assignment between Sebring and HSBC.

Ocwen invoking diversity jurisdiction, removed the suit to the Eastern District of Michigan. After filing an answer, Ocwen sought transfer to Chicago, where three years earlier the Judicial Panel on Multidistrict Litigation had consolidated for pretrial proceedings, numerous lawsuits accusing Ocwen of violating federal or state consumer-protection statutes. Adelson's suit was assigned case number 07-C-7208 in the Northern District of Illinois, where she hired local counsel. Judge Norgle, who presided over the MDL, denied Adelson's motion to remand the suit to Michigan state court and transfer her mortgage

escrow account into the court. That would be the last entry on the docket for the next six years.

Meanwhile, in another of the MDL suits against Ocwen, the plaintiffs sought class certification. The class complaint's lengthy list of claims all centered on Ocwen's alleged practice of charging and collecting late fees even when loan payments were timely, or the collection of late fees was statutorily barred. That litigation, case number 04-C-2714, did not involve HSBC but Adelson was a member of the putative class. The class action was certified and settled in late 2010. Under the terms of the settlement, which is governed by Illinois contract law, Ocwen agreed to forgive some of the late fees it had charged. In exchange, class members released all claims against Ocwen "arising out of, or related to, the facts and/or claims alleged in the MDL Actions arising out of state or federal law." **The release expressly exempted "statutory or common law rights against foreclosure, whether asserted in the form of a claim or defense."**

Three years later Adelson filed under Case No. 07-C-7208 a Rule 60(b) motion that precipitated a Seventh Circuit appeal. In that motion, she sought to vacate, solely as to her, the judgment in the class action, a step that she believed was necessary before she was entitled to move forward with her individual suit against Ocwen and HSBC. Adelson asserted she had not received notice of the settlement, and no judgment had entered in her individual suit. The district court denied the motion as untimely then declared the release included in the class settlement precludes further litigation of "all claims that were or

could have been brought against defendants based on the allegations in her complaint."

The Seventh Circuit noted Adelson's state complaint principally sought to stop the mortgage foreclosure. The foreclosure action was brought by HSBC who was not a defendant in the class action. It is inconceivable that settling the class claims against Ocwen extinguished Adelson's suit against HSBC not involved in the class action and not affiliated with Ocwen. At a minimum, Adelson's entire suit continues to pend against HSBC...The judgment in the class action does not fully resolve Adelson's individual suit and thus essentially functions much like an order authorizing an amended pleading that dismisses some but not all claims, Rule 15(a); *Taylor v. Brown*, No. 12-1710, 2014 WL 9865341, at *5 (7th Cir. 06/02/2015). The case involving Ocwen and its codefendants the court transferred from Michigan to the Northern District of Illinois remains pending, and the parties and the district court should get about the business of resolving it, whether by commencing discovery and motion practice in Chicago, or by suggesting to the JPML the case be returned to the Eastern District of Michigan. See 28 U.S.C. §1407(a); M.D.L. Rules 10.1(b), 10.3. The litigation is unfinished, and the district court will have to decide how much or how little is left of Adelson's claims against Ocwen. *Adelson v. Ocwen Fin. Corp.*, 621 F. App'x 348, 352 (7th Cir. 2015).

The 2007 action was returned to Michigan in September 2015. Upon its return Adelson amended her complaint. Thereafter HSBC filed its motion to

dismiss and the district court (*without the permission of the Northern District of Illinois, Judge Norgle, who presided over the MDL*) altered the terms of the Illinois settlement release that expressly exempted "statutory or common law rights against foreclosure" and included Adelson's foreclosure claims under *res judicata* of the class settlement and dismissed her complaint on 03/28/17. The Sixth Circuit affirmed the dismissal on 08/20/18 citing no authority in support of a Michigan court's authority to alter the terms and conditions of an Illinois class settlement to include provisions specifically exempted from the settlement.

On 11/07/18, Ocwen hired Trott Law to send Adelson a reacceleration for $445,627.80, based on the alleged default of 04/05/07 and scheduled a 01/08/19 sheriff sale. Adelson disputed the debt as time-barred, and the sale was rescheduled for 02/26/19. On 02/22/19 Adelson filed bankruptcy and sent notification to Trott who then informed her, **it cancelled the 02/26/19, sale**. To ensure the cancellation, Adelson went to Oakland County Courthouse, on 02/28/19, 03/07/19, and 03/14/19, to find no posting of sale or adjournment notices, this was verified by the sheriff department as it had no record of any request for adjournment. Thereafter, the bankruptcy was administratively dismissed on 04/04/19 for failure to file schedules and other related documents. Adelson searched online foreclosure websites and checked the legal news every day and no notice of a 05/07/19 sale was posted. On 05/07/19 HSBC sold her property to itself for $457,190.68.

On 06/15/19, a realtor contacted Adelson informing her, "he attended the 05/07/19, sale and her property sold to back to the bank [HSBC]," and wanted to list her property for sale during the redemption period. On 06/17/19 Adelson called Trott's and was told **"no sale occurred 05/07/19**. But for inclusion of post-acceleration charges of $270,583.00 and Trott's statements "the sale was not rescheduled" prevented Adelson from protecting her property before the sale and from redeeming it.

B. 2019 Action

On 10/22/19, Adelson filed a lawsuit challenging the sale. HSBC removed the suit to the federal court on 12/04/19, then filed its motion to dismiss claiming the February 2019 sale was adjourned week-by-week to 05/07/18. Attached to that motion were ten foreclosure sale adjournment notices from 02/26/19 to 05/07/19. The notices displayed the stamped signature of Thomas Rabette. (Rabette). However, since 2014 Rabette has resided in Sarasota, Florida and was not a deputy sheriff in Michigan. In March 2018 Rabette was the at fault driver in a motor vehicle accident in Sarasota, Florida. During the time Rabette is said to be in Michigan posting the adjournment notices, on 01/23/19, he was being served with that MVA lawsuit at his Sarasota, Florida residence.

This "sheriff sale" was news to Adelson and raises legitimate questions. First, Trott cancelled the 02/26/19 sale after it received notice of Adelson's bankruptcy on 02/22/19. How could Trott have

adjourned the sale if it was cancelled? Second, if Rabette was residing in the foreign State of Florida, why then, did someone think it was necessary to issue adjournment notices in the name of non-deputy sheriff to adjourn a Michigan sale? And third, how could the property be auctioned by Roger St. Jean when he was not a sheriff, undersheriff or deputy sheriff?

This sale process reveals a break in the chain of title between Adelson and HSBC. But for the title being illegally transferred to HSBC, there was no need for the creation of fraudulent adjournment notices. This fraudulent conduct created irregularities in the foreclosure by advertisement proceedings and a basis for challenging the sheriff's deed. The court denied *en banc* reconsideration on 04/10/23.

C. 2019 Bankruptcy

While the Sixth Circuit Rule 62 automatic 30 day stay of judgment was in force, HSBC sent Adelson a 10-day notice to vacate. In response on 05/10/23 she filed two ex-parte emergency motions in her 2019 bankruptcy (i) Rule 60(b) to reopen for the specific purpose of filing an adversary proceeding against HSBC for violating 11 U.S.C. §362 stay and (ii) for injunctive relief. While waiting 34-days for the hearing, HSBC held an online auction with Hubzu for the sale of Adelson's property which resulted in a successful bidder at $215,00.00, altering the status quo.

On 06/14/23, HSBC's counsel Scott Gies misrepresented the Sixth Circuit's opinion to the bankruptcy court and the motions were denied.

REASONS FOR GRANTING PETITION

I. POST-ACCELERATION DEFAULT

The Sixth Circuit concluded: "even assuming as she alleges, she did not have notice of the May 7 sale until June 15 and was under the impression that the sale was cancelled (and not just adjourned pending the bankruptcy proceedings), a June 15 notice date still gave her more than four months to redeem the property. She doesn't allege that she made any effort to redeem the property. *See Sweet Air Inv.*, 739 N.W.2d at 662...Because Adelson cannot show she would have been in a better position to preserve her interest in the property without the alleged defects, her prejudice argument fails."

The prejudice results from HSBC's post-acceleration default. But for the inclusion of the additional $270.583.00, Adelson would have redeemed her property for the actual amount owed $186,607.86.

The installments owed from 11/01/06 to 06/01/07 was **$11,888.08**, the total **paid was $10,990.56**.

Ocwen's failure to properly apply payments was a substantial material breach, thus rendering the performance by Adelson ineffective. A breach is considered substantial when it "undermines the very essence of contract or goes to the heart of agreement."

Able Demolition v. Pontiac, 275 Mich. App. 577, 586 (2007); *Michaels v. Amway Corp.*, 206 Mich. App. 644, 650 (1994); *McCarty v Mercury Metalcraft Co,* 372 Mich 567, 573; 127 NW2d 340 (1964).

On 06/05/07 Ocwen accelerated the loan for a sum of $897.52 when there were 10-days remaining in the 15-day payment grace period and the loan wasn't more than 120 days delinquent as required by 12 C.F.R. §1024.41(f)(1)(i). Regardless, Ocwen invoked the power of sale, accelerated the loan and scheduled a 07/03/07 sale, even though neither Ocwen nor HSBC had any interest in the indebtedness.

The court reasoned, the lack of default was unrelated to the procedural aspects of the foreclosure and therefore did not constitute prejudice. *Conlin v. MERS,* 714 F.3d 355, at 360 (6th Cir. 2013) ("misconduct must relate to foreclosure procedure itself"). This was incorrect. MCL §600.3204(a) requires a default before foreclosure can be initiated, thus, a lack of default is certainly the most important procedural aspect of the foreclosure. HSBC could not progress its foreclosure to sale without a default on the debt obligation.

This acceleration terminated Adelson's duty to make periodic payments and determined the final amount owed to be $186,607.86 which accelerated the maturity date from October 2036 to June 2007. HSBC's choice to accelerate due to borrower's alleged default constituted a voluntary waiver of right. *United*

States v. Harris, 246 F.3d 566 (6th Cir. 2001); *Kirk v Kitchens* 49 P.3d 1189 (Colo. App. 2002).[1]

The court relied upon HSBC's argument rather than the contract itself. The fact Adelson has not paid her mortgage in over a decade is irrelevant and does not warrant HSBC's inclusion of $270,583.00 in post-acceleration charges. During the past 16 years, HSBC has refused to reinstate the loan for payment of $2,384.02 representing the $898.01 due for June 2007 and $1,486.01 due for July 2007. Adelson demanded HSBC produce proof of its mortgage purchase from Sebring. Upon verification Adelson was ready and able to pay the entire loan balance. No proof was produced and in December 2015 HSBC's counsel admitted no proof was available. HSBC prevented Adelson from paying the loan in its entirety when it demanded hundreds of thousands of dollars in post-acceleration charges and she ceased efforts to reinstate or pay-off the loan.

The mortgage requires mortgagor to pay late charges that are properly due under the mortgage, and conditions mortgagor's right to reinstate mortgage after acceleration upon mortgagor "paying Lender all sums which then would be due under this Security Instrument and Note as if no acceleration occurred." The Seventh Circuit interpreted such language to require mortgagor seeking **reinstatement of**

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[1] In re *Pinebrook, Ltd.*, 85 B.R. 160 (Bankr. M.D. Fla. 1988; *Tan v. California Fed. Sav. & Loan Ass'n*, 140 Cal.App.3d 800, 189 Cal. Rptr. 775 (1983); *Kilpatrick v. Germania Life Ins. Co.*, 183 N.Y. 163, 75 N.E. 1124 (1905); *American Fed. Sav. & Loan Ass'n v. Mid-America Service*, 329 N.W.2d 124 at 124 (S.D. 1983).

mortgage following acceleration to pay late fees for each monthly payment missed prior to acceleration. *Rizzo v. Pierce & Associates,* 351 F.3d 791, 793-94 (7th Cir. 2003).

This would be the same as if HSBC sent letter stating the loan, previously accelerated and scheduled for sale, was de-accelerated and reinstituted as an installment loan in order to restart the limitation period. Despite the fact the "mortgage speaks for itself," and does not provide for such inclusion post-acceleration. HSBC's choice to accelerate in 2007, lost their right to any claimed future interest, late fees, or recover contested amounts.

The reacceleration did not establish a 'new limitations period' for which HSBC could act upon. In November 2018 there remained no enforceable debt to 'accelerate,' and no equity to foreclose. Once a loan is accelerated and the entire amount is due, absent agreement of parties, the outstanding balance remains the exact amount claimed at acceleration. *Fed. Nat'l Mortgage Ass'n v. Herren*, 2017-Ohio-8401, ¶40, 99 N.E.3d 1071 (Ohio. Ct. App. 8th Dist.2017). Here, the mortgage was never reinstated and remained in the same accelerated status for 12 years. MCL 600.5827. *Boyle v Gen Motors Corp*, 468 Mich. 226, 231; 661 NW2d 557 (2003); Whether to apply equitable principles, such as equitable estoppel. *Beach v. Lima Twp.*, 489 Mich. 99, 106; 802 NW2d 1 (2011).

This is exactly what has occurred here. HSBC improperly based its 11/07/18 reacceleration on the alleged 04/05/07 default then demanded $445,627.80, for the purpose of avoiding the statute of limitations

and creating an illusion of an ability to include $270,583.00, in future interest, late fees and other charges to which it voluntarily waived on 06/05/07. *53rd St., LLC v. U.S. Bank Nat'l Ass'n*, 8 F.4th 74 (2d Cir. 2021). Then on 05/07/19, HSBC sold the property to itself for $457,190.68. HSBC's inclusion of post-acceleration charges not permitted under the mortgage constitute an irregularity in the sale.

A. Fraudulent Adjournment Notices in Aid of Sale Violate of 11 USC §362 Stay

Courts of equity have large powers for relief against the consequences of inevitable accident in private dealings and may doubtless control their own process and decrees to that end. But we think there is no such power to relieve against statutory forfeitures. Where a valid legislative act has determined the conditions on which rights shall vest or be forfeited, and there has been no fraud in conducting the legal measures, no court can interpose conditions or qualifications in violation of the statute. The parties have a right to stand upon the terms of the law. This principle has not been open to controversy and is familiar and elementary. *See Heimerdinger v Heimerdinger*, 299 Mich 149, 154; 299 NW 844 (1941).

The court incorrectly reasoned, "throughout the bankruptcy proceedings, the foreclosure sale was adjourned. Finally, on 05/07/19, HSBC purchased the property for $457,190.68 at a Sheriff's sale. Adelson alleges she did not receive notice of the Sheriff's sale

until 06/15/19...she questions HSBC's adherence to Michigan's adjournment notice procedures. Recall the foreclosure sale was noticed for 02/26/19 but was adjourned pending bankruptcy procedures and subsequently took place on 05/07/19...Adelson argues HSBC did not comply with Michigan's adjournment notice procedures because it did not post notices of adjournment for the weeks between February 26 to 05/07/19. MCL §600.3220...But HSBC complied with Michigan's adjournment notice procedures by publishing notices of adjournment each week in the Detroit Legal News. Contrary to what Adelson asserts, MCL §600.3220 does not require HSBC to serve other kinds of foreclosure notices."

The court simply accepted the assertion by HSBC the week-by-week adjournments were proper, ignoring the showing by Adelson of the blatant irregularity relating to the authority of the alleged deputy sheriff. After the statutory redemption period lapses, courts can entertain setting aside a foreclosure sale only if the mortgagor makes a "'clear showing of fraud or irregularity.'" *Id. (quoting Schulties* v. *Barron*, 167N.W.2d784, 785 (Mich. App. 1969); *Sweet Air Inv., Inc.* v. *Kenney*, 739 N.W.2d 656, 659 (Mich. App. 2007). The alleged misconduct must relate to the foreclosure procedure itself. *Conlin*, at 360.

The court concluded, "Adelson alleges defendants violated 11 U.S.C. §362(a). We have held under that provision, "filing a petition for bankruptcy operates as 'stay' of actions that could have been filed against the [person] to recover claims. . . and the debtor's property cannot be repossessed or foreclosed

on... In re *Global Technovations Inc.*, 694 F.3d 705,711 (6th Cir. 2012)...she seems to allege the adjournment notices were attempts to collect a debt in violation of the bankruptcy stay, as opposed to efforts to respect the stay (by postponing the foreclosure sale). But the adjournment of a foreclosure sale does not violate a bankruptcy stay, and, in fact, shows the party looking to foreclose is respecting the stay. See *Worthy v. Worldwide Fin. Servs., Inc.*, 347 F.Supp.2d 502, 508–09 (E.D. Mich. 2004), aff'd,192 F. App'x 369 (6th Cir. 2006); *Stein v. U.S. Bancorp*, No. 10-14026,2011 WL 740537, at *6–7 (E.D. Mich. Feb. 24, 2011)." This was incorrect.

It referenced the posting and publication of notices **that never occurred** then **wrote about general adjournments** of sale not being violate of the stay and **doesn't even mention Rabette.** Then erroneously created its own argument that "...Adelson alleged the adjournment notices were attempts to collect a debt in violation of the bankruptcy stay..." That reasoning doesn't resolve **"whether the fraudulent adjournment notices by a non-deputy sheriff residing in the foreign State of Florida utilized in aid of the sale violated the 11 USC 362 stay? whether the adjournment notices fraudulently misrepresented Rabette was a "deputy sheriff? or whether the fraudulent notices constitute irregularities in the foreclosure process?** The notices are improper and violated 11 USC §1322(c), MCL §51.73, MCL §51.70 and MCL §600.3216, because Rabette was neither a sheriff, undersheriff, nor deputy sheriff. The sale was

not properly adjourned and violated the 11 USC §362 stay and conveyed no title. *Easley* at 990 F.2d 912.

The first of the ten fraudulent weekly notices covered the period February 26 to March 5, 2019, and the tenth and final notice for April 30, to May 7, 2019. The first six notices were issued while the case was pending, and the automatic stay was in force and thus violated the stay. The property was sold on 05/07/19. But for the fraudulent adjournment notices, the property could not have been sold as they constituted a violation of the foreclosure process.

The notices fraudulently misrepresented Rabette as a "deputy sheriff," the notices are improper, because Rabette was neither a sheriff, undersheriff, nor deputy sheriff. Thus, the sale was not properly adjourned and violated the 11 USC §362 stay. This error requires the sheriff deed to be invalided and the status quo of the title returned to Adelson, as it existed when the bankruptcy was filed."

This is exactly what Adelson presented for resolution. The prejudice was caused by the notices produced in December 2019, to revive the cancelled 02/26/19, sale. The production of the notices on their face preserved HSBC's ability to sell immediately after dismissal. If a sale during pendency would be a violation, acts in aid of sale are likewise violative of the stay. *Easley* at 990 F.2d 912.

Rabette was not a deputy sheriff under MCL §§51.70 or 51.73. Rabette was not appointed as a Deputy Sheriff of Oakland County and did not take his oath of office. No Appointment and Oath of Office . . . were filed with the Oakland County Clerk. The files

and records of the County Clerk do not contain the Appointment or Oath of Office for Rabette. Rabette was not a "duly constituted Oakland County Deputy Sheriff" at the time he auctioned Adelson property. Therefore, the adjournment notices are defective.

B. Foreclosures Must be Conducted by Sheriff, Undersheriff or Deputy Sheriff

The purpose of 11 USC §1322(c), MCL §51.73, MCL §51.70 and MCL §600.3216, is to prohibit deceptive practices aimed at frustrating or impeding the legitimate functions of private or government departments or agencies. Statute prohibits the "perversion which might result from the deceptive practices described". The statutes are required to be viewed as seeking to protect both the operation and the integrity of the foreclosure process and cover all matters confided within that authority in the process. The court misstates: "Adelson alleges the deputy sheriff who conducted the foreclosure proceedings wasn't a deputy sheriff at the time of the foreclosure sale because his oath of office wasn't filed and recorded at the Oakland County Clerk's office before the foreclosure sale...At least one Michigan court has held that a violation of a similar appointments clause "would not amount to a defect or irregularity in the foreclosure proceeding itself." *New Jerusalem Deliverance Church v. Evangelical Christian Credit Union*, No. 309571, 2014 WL 238474, at *2 (Mich. App. 01/21/14). But even if it did, and assuming there was a defect in the sheriff's appointment or with posting the

notices of adjournment Adelson hasn't plausibly alleged that she was prejudiced."

Notably, the issue presented for review was the auctioneer St. Jean was not a deputy sheriff under MCL §§51.70 and 51.73. St. Jean was not appointed as a Deputy Sheriff of Oakland County. Although he did take his oath of office on 12/16/16, The **Oath was not recorded** with the County Clerk **until 09/11/19, four months after the sale.**

No Appointment or Oath of Office . . . were filed with the Oakland County Clerk. The files and records of the Oakland County Clerk did not contain the Appointment and Oath of Office for St. Jean. St. Jean was not a "duly constituted Oakland County Deputy Sheriff" at the time he auctioned Adelson's property. Therefore, because St. Jean's appointment and oath had not been filed and recorded in the county clerk's office before the sale, the 05/07/19 sheriff's sale is defective.

Under MCL §600.3216, a sheriff's foreclosure sale "**shall be made by the person appointed for that purpose in the mortgage, or by the sheriff, undersheriff, or a deputy sheriff of the county**, to the highest bidder." Concerning appointment of deputy sheriffs by the sheriff, MCL §51.70 provides that: Each sheriff may appoint 1 or more deputy sheriffs at the sheriff's pleasure and may revoke those appointments at any time. Persons may also be **deputed by a sheriff, by an instrument in writing, to do particular acts**, who shall be known as special deputies and each sheriff may revoke those appointments at any time.

Similarly, concerning appointments, MCL §51.73 provides that: **Every appointment** of an undersheriff, or of a deputy sheriff, and every revocation thereof, **shall be in writing under the hand of the sheriff,** and **shall be filed and recorded in the office of the clerk of the county;** and every such undersheriff or deputy shall, **before he enters upon the duties of his office, take the oath prescribed by the twelfth article of the constitution of this state.**

Here, the sheriff's deed specifically states, "the indenture was made between St. Jean Deputy Sheriff in and for Oakland County..." This deed fraudulently misrepresents St. Jean is a "deputy sheriff." The deed is unequivocally improper because St. Jean was neither the sheriff, undersheriff, nor deputy sheriff. Adelson's mortgage fails to provide a power of sale provision in the name of St. Jean. Therefore, the deed plainly violates the statute.

Undoubtedly, counsel for HSBC will attempt to argue the administrative function has been assigned to individuals that have been "deputized" by the sheriff. This argument must fail since the statute is clear and unambiguous and does not allow for this very important duty to be delegated or outsourced by the county in order to save money. The statute is clear in that only three individuals are authorized to conduct a sale in accordance with MCL §600.3216. None of the authorized individuals signed the Sheriff's Deed.

Even if St. Jean was deputized, there **is no written agreement** that prescribes particular acts to be performed by St. Jean signed by Sheriff Michael

Bouchard that authorized them to sell lands on the foreclosure of a mortgage by advertisement, execute deeds or perform related services required on sale of property. Clearly, the Legislature did not intend MCL §51.73 to allow such flippant, and virtually unrestricted appointment procedures. Case law interpreting MCL §51.73 has held any such appointment must in fact be recorded with the Oakland County Clerk's Office. However, no such record of appointment exists.

The Sixth Circuit's reliance on *New Jerusalem Deliverance Church* conflicts with *Trombley v. Czap*, 1999 Mich. App. LEXIS 502 (Mich. App. 03/12/99). Unlike this case where Adelson made all of the allegations *New Jerusalem* didn't claim such as allegations of failure to comply with statutory foreclosure requirements, Adelson's claimed defects in notice and manner the foreclosure was conducted and challenged Rabette and St. Jean as neither were sheriffs, undersheriffs or deputy sheriffs.

In *Trombley* the trial court found that *Larry Nielson* was not a 'duly constituted Arenac County Deputy Sheriff' at the time he served the notices of the right to redeem on defendant because *Nielson's* appointment had not been filed and recorded in the county clerk's office service on defendant was therefore defective. Guided by the principles that strict compliance with the notice statute was required and the law abhors forfeiture, the court 'reluctantly' concluded that dismissal of plaintiff's complaint was proper.

As a result, neither **Rabette nor St. Jean qualify as special deputies**, and the provisions of MCL §51.73 requiring filing and recording of an appointment are applicable. The validity of the Sheriff's Sale is critical since 11 USC §1322 states: (c) Notwithstanding subsection (b)(2) and applicable non-bankruptcy law--(1) a default with respect to, or that gave rise to, a lien on the debtor's principal residence may be cured under paragraph (3) or (5) of subsection (b) until such residence is **sold at a foreclosure sale *that is conducted in accordance with applicable non-bankruptcy law***. The 05/07/19 sale was not conducted in accordance with applicable non-bankruptcy law.

Fraud pertaining to the conduct of the foreclosure process provides a basis for relief from the effects of the sheriff's deed and expiration of the redemption period. See *Senters, v Ottawa Savings Bank, FSB, 443 at 55; 503 NW2d 639 (1993)*; *Kubicki v Mtg Electronic Registration Sys*, 292 Mich App 287, 289; 807 NW2d 433 (2011).

In this case, all of the allegations concerning the fraudulent adjournment notices and sheriffs deed misrepresenting Rabette and St. Jean were deputy sheriffs when they were not, involve fraud and irregularities pertaining to the conduct of the foreclosure process.

C. Lack of Notice Due Under Mortgage ¶19 and ¶22

On 11/07/18 HSBC failed to give Adelson the notice she was due under mortgage. HSBC was required to provide notice of default and intent to accelerate, but instead the notice Adelson received notified her debt was already accelerated. The 12-year time gap between accelerations based on the same default was too long of period to have relied upon. Thus, HSBC failed to provide Adelson with the notice she was due under mortgage ¶19 and ¶22.

Failure to give notice where there is a contractual obligation amounts to failure of condition precedent or estoppel, thereby forming basis barring exercise of power...;" *Wood v. Carpenter,* 101 U.S. (11 Otto) 135, 143, 25 L. Ed. 807 (1879); *Dewberry v. Bank of Standing Rock*, 227 Ala. 484, 492, 150 So. 463, 469 (1933) ('Sale under power of sale in mortgage must be conducted in strict compliance with terms of power); *Bank of New Brockton v. Dunnavant*, 204 Ala. 636, 638, 87 So. 105, 107 (1920) "In court of law power of sale is merely part of legal contract executed according to terms. Powers of person foreclosing under mortgage...are limited and defined by instrument under which he acts and has only such authority thus expressly conferred upon him together with incidental and implied powers necessarily included therein." *Harmon v. Dothan Nat'l Bank*, 186 Ala. 360, 369, 64

So. 621, 624 (1914)[2] *Ogden v. Gibraltar Sav. Ass'n*, 640 S.W.2d 232, 233–34 (Tex. 1982). A mortgagee must see in all material matters he keeps within his powers and **must execute trust in strict compliance therewith.** *Jackson**5 90 So.3d at 173."

D. Alternatively, Adelson is Entitled to Overbid Surplus of $270,583.00

At a nonjudicial foreclosure sale, if the lender chooses to bid, it does so in the capacity of a purchaser. *Passanisi v. Merit-McBride Realtors, Inc.* (1987) 190 Cal. App. 3d 1496, 1503 [236 Cal. Rptr. 59].

HSBC's selling the property to itself for $457,190.68, was so overstated it renders sale nugatory. The relevant principle of *de minimis non curate lex* in deciding whether amount of overstatement is enough to necessitate setting aside sale. *Hall v. Meisner*, 51 F.4th 185 (6th Cir 2022). Id. at 690, 165 N.W. 835. *Flax v. Mut. Bldg. & Loan Ass'n of Bay Co.*, 198 Mich. 676, 691, 165 N.W. 835 (1917); *Cf. Worthy v. World Wide Fin. Servs., Inc.*, 347 F.Supp.2d 502, 508-09, (6th Cir. 2004), aff'd, 192 F. App'x 369 (6th Cir. 2006) (determined if contractual language is unambiguous, courts must interpret and enforce contract as written, because an unambiguous contract reflects parties' intent as matter of law.)

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[2] *Fairfax Cnty. Redev. & Hous. Auth v Riekse*, 281 Va. 441, 446, 707 S.E.2d 826, 829 (2011). *Jackson v. Wells Fargo Bank, N.A.*, 90 So.3d 168 (Ala. 2012).

The accelerated amount established in June 2007, to satisfy this debt was $186,607.86. HSBC seized the title to Adelson's home through a Sheriff Sale to itself for $457,190.68 which satisfied mortgage debt and it retained the $270,583.00 overbid funds received in excess of the $186,607.86 required to pay the debt. Questions of contract interpretation are questions of law for court. *Spec's Fam. Partners, Ltd. v. First Data Merch. Servs. LLC,* 777 F. App'x 785, 787 (6th Cir. 2019).

The Sixth Circuit recently issued an opinion reaffirming mortgagors' post-foreclosure rights to the equity built in their mortgaged property after the creditor's debt is paid in full. *Hall v. Meisner*, 51 F.4th 185 (6th Cir 2022). The plain meaning of statute, "surplus" is "...amount that remains once mortgagor carries out terms of mortgage and meets its financial obligation under mortgage note," plus costs and expenses of foreclosure, sale, and amount for which property is sold." MCL §600.3252; *Horicon State Bank v. Kant Lumber Co., Inc.*, 478 N.W.2d 26 (Wis. App.991). ("[O]ne who overbids at sheriff's sale through unilateral mistake must bear consequences." and "[w]e will not intervene if an overbid at sale results from bidder's ignorance.") Id. at 28; *Pulleyblank v. Cape*, 446 N.W.2d 348 (Mich.App.1989); *Bank of Three Oaks v. Lakefront Properties,* 444 N.W.2d 217, 553 (Mich.App.1989).

In 1843 the Supreme Court nicely summarized the creditor and debtor's respective property interests when land served as security for a debt, particularly in the instance of the debtor's default. "According to the

long-settled rules of law and equity in all the states whose jurisprudence has been modelled upon the common law," the Court wrote, "legal title to the premises in question vested" in the creditor upon the debtor's default; yet the landowner still held "equitable title" to the property. *Bronson v. Kinzie*, 42 U.S. 311, 318 (1843). To "extinguish the equitable title of the" debtor, the creditor was required "to go into the Court of Chancery and obtain its order for the sale of the whole mortgaged property (if the whole is necessary,) free and discharged from the equitable interest of the" debtor. Id. at 318–19. The sale, moreover, was required to be a public one. *Thomas M. Cooley, A Treatise on the Law of Taxation, Including the Law of Local Assessments*, 489 (1886). Under those same long-settled principles, the debtor would then be entitled to any surplus proceeds from the sale, which represented the value of the equitable title thus extinguished. *Resolution Trust Corp.*, 511 U.S. at 541.

Adelson alleged facts in her complaint to support the mortgage did not include any provision for inclusion of post-acceleration late fees, future interest, or other charges in event of default and acceleration. Specifically, **mortgage ¶22, provides any surplus must be paid to Adelson**. In this case, the property had to sell for $186,607.68. HSBC successfully bid and it sold, for $457,190.68, satisfying mortgage and creating $270,583.00 surplus, now owed to Adelson, unless the sheriff's deed invalidated, and title is returned to Adelson.

II. DISTRICT COURT CREATED ITS OWN EXCEPTION TO RULE 13(a) TO AVOID JUNE 05, 2017, TIME-BAR

The Sixth Circuit failed to determine whether lack of exception in Rule 13(a) prevented district court from attempting to rewrite Rule 13(a) and add an exception the Supreme Court elected not to include. The Supreme Court, as matter of public policy, has determined in its wisdom and in order to preserve the limited resources of the courts, as well as to reduce the burden on parties, ALL related available claims "shall" be presented at same time or be waived, without any exception. The district court had no authority to say otherwise. Consequently, Rules as adopted by Supreme Court may by design affect contractual "choices" of parties. *Harris Corp. v. Comair, Inc.*, 712 F.2d 1069, 1071 (6th Cir.1983); *Slis v. Michigan,* 332 Mich.App.312, at 335336; 956 NW2d 569 (2020).

When statutory language is clear and unambiguous, **we must apply the statute as it is written**. The **court isn't permitted to read** anything into an unambiguous statute that isn't within manifest intent of Legislature. The **Court may not rewrite the plain statutory language or substitute its own policy decisions for decisions already made by the Legislature.** *Cf. Kent Barnett & Christopher J. Walker, Chevron in the Circuit Courts*, 116 Mich. L. Rev. 1, 33–34 (2017) ("When courts find ambiguity where none exists, they abdicate their judicial duty. The judiciary is obligated to interpret statutes as they are crafted, not to redesign

them."); *Third Nat'l Bank in Nashville v Impac Ltd, Inc*, 432 US 312, 322; 97 S Ct 2307 53 L Ed 2d 368 (1977); *Beecham v United States*, 511 US 368, 371; 114 S Ct 1669; 128 L Ed 2d 383 (1994); *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008).

The court cannot recognize any exception to plain language: Pleadings **shall** state as counterclaim **any claim.** Its duty and practice were to adhere to the plain language of the rule. Where **the text of the rule is clear and unambiguous, our inquiry ends,** and we need not resort to additional methods of interpretation.

The court's reliance on interpretation of Federal Rule 13(a) in Texas may not be applied to create an exception in Michigan's Rule 13(a). The court improperly held it may resort to federal case law regarding interpretation of Rule 13(a) of Federal Rules of Civil Procedure in order to interpret Michigan's Rule 13(a) on its flawed theory there was no applicable Michigan law interpreting that, Rule. There's plenty of law on point, it's just contrary to what the district court wanted to do, because it clearly holds **there are no exceptions**. Nevertheless, the district court relied on *Douglas v. NCNB Texas Nat'l Bank,* 979 F.2d 1128 (5th Cir. 801) for proposition since Rule 13(a) did not require judicial foreclosure to be filed as compulsory counterclaim in Texas, Michigan's Rule 13(a) also should be interpreted so as to not require filing of judicial foreclosure action as compulsory counterclaim.

The district court's interpretation and reliance on *Douglas* is misplaced because there was key federal legislative provision in effect Rules Enabling Act,

adopted by Congress – which expressly provides Federal Rules "shall not abridge, enlarge or modify any substantive right." (22 USC §2072). The Fifth Circuit therefore observed in *Douglas* that "federal counterclaim rule, Rule 13(a), is inapplicable if it abridges, enlarges, or modifies plaintiff's or defendant's substantive rights."

The **Fifth Circuit then proceeded to analyze Texas law (not the Federal Rule itself)** and concluded applying Federal Rule 13(a) to judicial foreclosures in Texas would impermissibly "abridge lender's substantive rights and enlarge debtor's substantive rights" under Texas law. This would be an impermissible violation of the Rules Enabling Act. It concluded: "Thus, we believe it's appropriate **in this case** to follow the ***state's practice*** **of permitting lender to refrain from filing counterclaim on overdue notes** and to wait to pursue either judicial or non-judicial foreclosure remedy." In considering lender's "rights" under Texas law, the Fifth Circuit looked to *Kasper v. Keller,* 466 S.W.2d 326, 329 (Tex. Civ. App. Waco 1971) which held Rule 13 could not be applied to modify substantive rights because of Rule 815, Texas Rules of Civil Procedure, which similarly "directs that 'These rules shall not be construed to enlarge or diminish any substantive rights or obligations of any parties to any civil action.'"

Douglas doesn't help HSBC or justify the district court's exemption because Michigan law required filing of a compulsory counterclaim. This Court should reach totally different result in applying

Rule 13(a) to Michigan case and hold Rule 13(a) does demand filing of compulsory counterclaim.

The court based its exception on its unsupported legal conclusion, the "lender has the option of selecting judicial or nonjudicial foreclosure, and because **borrower isn't entitled to deprive the lender of its choice**, then concluded a counterclaim for judicial foreclosure wasn't compulsory and HSBC wasn't obligated to assert it in 2007 action." The court failed to identify any Michigan law holding debtor may not "deprive lender of its choice." Instead, the court slides right past the fact its conclusion lacks any legal support and is contrary to reality that Rules routinely affect parties' "choices." Rule13(a) in particular this obviously affects every defendant's "choice" whether to bring an available counterclaim or not. It doesn't matter under Rule13(a) whether the defendant wants to pursue its claim at that particular time or not. If defendant wants to use Michigan courts to pursue its claim, it must do so at time courts require. That is simply the "cost" of utilizing courts to pursue one's judicial remedies.

The district court's policy exception is contrary to Supreme Court's policy decision to not have any exceptions. The Supreme Court, as matter of public policy, has determined in its wisdom in order to preserve the limited resources of the courts, as well as to reduce the burden on parties, **ALL related available claims "shall" be presented at same time or be waived, without any exception. The district court had no authority to say otherwise.** Consequently, Rules as adopted by Supreme Court

may by design affect contractual "choices" of parties. *Harris Corp. v. Comair, Inc., 712 F.2d 1069, 1071 (6th Cir.1983).*

Here, the Lender agreed to be bound by Michigan law, including Rule 13(a). Contrary to the district court's summary conclusion Adelson did not have any right to "deprive" the lender of its choice, **Adelson did have that right by contract when it agreed in the Mortgage to be bound by "Applicable" Michigan law.**

> This Security Instrument shall be governed by federal law and **the law of jurisdiction in which Property is located.** All rights and obligations contained in this **Security Instrument are subject to any requirements and limitations of Applicable Law.**

Lender had thereby conceded by contract any possible option or "right" it may have to choose between judicial and non-judicial foreclosure may be controlled by Adelson filing suit because it's "subject" to "any requirements and limitations" of Michigan law, such as Rule 13(a). The court's assumption Lender's right to choose was unlimited is flawed. Due to all flaws in the court's analysis, and since its novel exception is directly contrary to plain language of Rule 13(a), and governing law interpreting them. Thus, HSBC was required under Rule 13(a), to file compulsory counterclaim in the 2007 action.

HSBC through its bad faith, engaged in fraudulent behavior in foreclosure of Adelson's property, HSBC's behavior was directly related to foreclosure, "to Adelson detriment." 'He who seeks equity must do equity.' HSBC's "unclean hands" in equitable sense would justify sale reversal. The Doctrine of unclean hands applies where the party applying for relief engaged in nefarious conduct related to matter at issue and adversely affected other party. *Sakhawati v. Lynch,* 823 F.3d 852, 858–59 (6th Cir. 2016). **Equity will not defeat applicable statute of limitation in enforcing stale demands where party has slept on its rights**. *Petrie v. Torrent,* 88 Mich. 43 (1891).

A. The Foreclosure was a Compulsory Counterclaim to Breach of Contract

The Supreme Court in *Baker* plainly held Rule 13(a) applies to "any" available claim without exception: [T]hey likewise had the obligation under rule 13(a) to raise any available counterclaims arising out of the same transaction. To hold otherwise would eviscerate the purposes of Rule 13(a) and allow party to gain full advantage of the affirmative defenses afforded a genuine party in interest, while avoiding any obligation to raise counterclaims in the same action. *Baker v. Gold Seal Liquors, Inc.*, 417 U.S. 467, 469 n.1 (1974); The court in *Goss & Goss Dev. Co. v. First Union Nat. Bank of Ga.*, 196 Ga. App. 436, 437(1), 396 S.E.2d 19 (1990), reasoning, "the claim for wrongful foreclosure is logically related to the action to

collect on the same note. The suit for wrongful foreclosure constituted a compulsory counterclaim to suit on the note.

The Sixth Circuit concluded: Adelson did not properly preserve the issue in asserting the claim for the first time in response to a motion to dismiss. This was incorrect. The **Complaint ¶76** alleges "The prior action, did not toll the statute of limitations, because it did not effectively prevent Defendants from pursuing a legal remedy while the proceeding was pending, as **they were not precluded from suing Adelson for a judicial foreclosure...**"

HSBC filed an answer on 8/06/07 and amended affirmative defenses on 8/17/07 and asserted no counterclaim, although it was necessarily asserting right to do so because it was asserting right to pursue non-judicial foreclosure. It thereby made its election of remedies and waived any right to bring judicial or non-judicial foreclosure. The Utah Supreme Court held Rule 13(a) applies to "any" available claim without exception. Thus, HSBC had an obligation to raise any available counterclaims arising out of the same transaction. *Raile Family Trust v. Promax Dev. Corp.*, 24 P.3d 980, 983.

There is a logical relationship between breach of contract and foreclosure which arises out of the same transaction or occurrence for purposes of Rule 13(a), *Bauman, v. Bank of Am., N.A.*, 808 F.3d 1097, 1101 (6th Cir.2015). Both claims are exactly the same and have exactly same evidence to support or refute both claims." *Id; Sanders v. First Nat'l Bank & Tr. Co.*, 936

F.2d 273, 277 (6th Cir. 1991); *Moore v. N.Y. Cotton Exch.*, 270 U.S. 593 (1926).

HSBC's foreclosure was a compulsory counterclaim to the 2007 breach of contract action. To prove breach of note-mortgage, defendant must show plaintiff defaulted on a payment obligations or otherwise breached terms of mortgage, giving rise to a right to accelerate and ultimately foreclose. But to establish breach of contract plaintiff must show: (1) valid contract, (2) plaintiff performed, (3) defendant breached, and (4) plaintiff suffered damages. *Pavlovich v. Nat'l City Bank*, 435 F.3d 560,565 (6th Cir. 2006). The note-mortgage serves as the contract. The June 2007, foreclosure was predicated on whether Adelson failed to perform her obligations under the same note-mortgage, as Adelson based her breach of contract claim.

The claims involve exactly the same set of occurrences, same evidence and arose out of same transaction or occurrence. Adelson alleged HSBC breached the mortgage ¶¶ 1, 2, 19 and 22, and ¶¶ 3(A) and 7(A) of the note. HSBC predicated its ability to foreclose under those same exact paragraphs. The foreclosure claim existed and was ripe at time HSBC was served with and answered 2007 action. The claims are logically related in such a way as to make the counterclaim compulsory. The claims have parallel overlap, of legal, factual, and evidentiary questions. Its clear interests of judicial economy and efficiency would be served by requiring two claims be heard together.

It was incumbent upon HSBC to file its compulsory counterclaim in the 2007 action. Its failure

to do so precluded it from attempting to recover in any form and **forever barred it**. *Kane v. Magna Mixer Co.*, 71 F.3d 555, 562 (6th Cir. 1995); *Sanders v. First Nat'l Bank & Trust Co. in Great Bend,* 936 F.2d 273, 277 (6th Cir. 1991). Instead of barring HSBC's claim, the court created its own novel exception to Rule 13(a) in order to protect HSBC from its voluntary decision to not comply with Rule 13(a).

The court essentially stated, even though judicial foreclosure would be based on same transaction at issue in 2007 action, and available when HSBC filed its answer, it nevertheless wasn't compulsory counterclaim based on its novel policy conclusion "borrower isn't entitled to deprive lender of its choice" between non-judicial and judicial foreclosure. There's not any legal support in Michigan Law for the court's holding and is directly contrary to plain language and governing Michigan law interpreting Rule 13(a).

B. Under the Fact of this Case, MCL §600.5807(4) Controls the Limitation Period Foreclosure was Time-Barred

In Michigan the limitations for an action premised upon a covenant in mortgage of real estate is ten-years. MCL 600.5807(4). The period of limitation on breach of contract action is six years. MCL 600.5807(9). Regardless of which period is applied, a claim filed more than two years after accrual is time-barred. *Cordova Chem Co v Dep't of Natural Resources*, 212 Mich App 144, 153; 536 NW2d 860 (1995); *Visioneering Inc. Profit Sharing Tr. v. Belle*

River Joint Venture, 386 N.W.2d 185, 187 (Mich.App.1986); *Joliet v. Pitoniak*, 475 Mich. 30, 35; 715 NW2d 60 (2006).

The 6/05/07 acceleration triggered the limitations to begin running under MCL 600.5807(4)(9) with a **deadline to seek collection of 6/05/13** and **deadline to liquidate equity under mortgage of 6/05/17**. Here the parties agree since 06/05/07, HSBC took no affirmative act to revoke the acceleration during the six-year limitation period. HSBC knew or should have known the time-bar became effective on 06/05/17. After Adelson emerged from conclusion of 2007 action and even if the mortgage remained enforceable, HSBC hasn't pointed to any contract provision or cited any law to support its 11/07/18, reacceleration of an unenforceable mortgage or its ability to resurrect a lien under facts in this case. Which is exactly what has occurred here. HSBC took advantage of an unrepresented homeowner in order to slide its time-barred foreclosure through courts, which must fail.

The terms of mortgage are unambiguous and clearly provide, in event default; defendant "may, at its option, (a) terminate loan and declare balance outstanding immediately due and payable." The acceleration clause was a discretionary remedy to accelerate debt and was accorded to lender by the parties' contract in event of default; when and if lender chose to accelerate debt was solely within lender's discretion, provided discretion was exercised before maturity date of note.

Under MCL §600.5827 HSBC's claim accrual began on 06/05/07. The Sixth Circuit agreed with the district court that MCL §600.5803 15-year limitations period was controlling. That was incorrect. The court failed to explore Adelson's Rule13(a) claim under the facts of this case rendering MCL §600.5807(4)(9) controlling. *Stephens v Dixon*, 449 Mich 531, 538; 536 NW2d 755 (1995).

On 6/05/07, HSBC elected to accelerate loan. Ocwen took all necessary steps to proceed with foreclosure. Ocwen claimed default, sent 30-day notice with intent to accelerate, after Adelson didn't cure default, the loan was accelerated, hastening the maturity from 10/01/36 to 6/05/07, invoked the power of sale and scheduled a 07/03/07, sale, which were clear and unequivocal actions to declare full amount due under note, and acceleration became complete. These actions triggered limitations period under MCL §5807(4)(9), to begin running.

The district court improperly gave HSBC a second bite at the apple under MCL §600.5803 which was inequitable and prejudicial to Adelson. HSBC's foreclosure claim was ripe for adjudication as of 6/05/07, in conjunction with Adelson's 2007 action. The crucial question is whether HSBC had full opportunity to raise foreclosure as counterclaim in 2007 action? If so, then *res judicata* would serve as bar to any judicial or non-judicial foreclosure. HSBC contends it had until April 2022, to foreclose under MCL §600.5803. If Adelson is correct, the right to foreclose mortgage became time-barred at latest 06/05/17, and therefore Sheriff's Deed is void.

Even if HSBC is correct the sale is still void because an equity foreclosure is required to be in rem, and no right to engage non-judicial foreclosure exists. Thus, because the mortgage is only a lien to secure the debt the non-judicial foreclosure commenced after the applicable 10-year limitations was prejudicial to Adelson as it deprived her of the right to contest foreclosure in court of law. *Stock Bldg Supply, LLC v Crosswinds Communities, Inc*, 317 Mich App 189, 207; 893 NW2d 165 (2016); First of *America Bank-Oakland Macomb, NA v Brown,* 158 Mich App 76, 81; 404 NW2d 706 (1987).

CONCLUSION

The Court should grant the petition and vacate the judgment and remand for further consideration.

Respectfully submitted,

July 31, 2023 /s/ *Wendy B. Adelson*

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