Appendix A

ORIGINAL

DA 17-0161

IN THE SUPREME COURT OF THE STATE OF MONTANA

2017 MT 274N

JOHN P. STOKES and PAMELA J. STOKES,

Petitioners and Appellants,

v.

FIRST AMERICAN TITLE COMPANY OF MONTANA, INC., a Montana Corporation; and US BANK TRUST, N.A., as Trustee for LSF8 MASTER PARTICIPATION TRUST,

Respondents and Appellees.

FILED
NOV 07 2017
Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

APPEAL FROM: District Court of the Twentieth Judicial District, In and For the County of Lake, Cause No. DV 14-223 Honorable James A. Manley, Presiding Judge

COUNSEL OF RECORD:

For Appellants:

John Patrick Stokes, Pamela Jeanne Stokes, self-represented; Bigfork, Montana

For Appellees:

Michael J. Lilly, Berg, Lilly & Tollefsen P.C.; Bozeman, Montana

Danielle A.R. Coffman, Crowley Fleck PLLP; Kalispell, Montana

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Submitted on Briefs: September 13, 2017

Decided: November 7, 2017

Filed:

Ed Smith
Clerk

A

¶3 The Stokes make a broad range of often outlandish accusations about how their case, and their past cases, have been handled. They assert, with no citation or explanation, that Appellees are "a mortgage scam enterprise and laundering front for the Drug Cartel" who have "fabricated" and "forged" evidence. These allegations aside, it is difficult to ascertain exactly what legal issues the Stokes are appealing. It appears they argued that the District Court lacked jurisdiction, given the 11 U.S.C. § 362(a) automatic stay arising from the bankruptcy petitions filed by both the Stokes. The District Court determined the stay related to John Stokes' bankruptcy did not prevent the court from ruling on an action brought by the debtors. *See, e.g.*, *Eisinger v. Way*, 229 B.R. 11, 13 (B.A.P. 9th Cir. 1998) (citations omitted) ("the automatic stay does not prohibit a defendant in an action brought by a plaintiff/debtor from defending itself in that action."). The Stokes argue the cases relied on by the District Court are factually distinguishable, but provide no citation to authority or legal analysis. They assert that Pamela Stokes' bankruptcy likewise removed jurisdiction from the District Court, but provide no citations to authority or cogent argument.

¶4 The Stokes also assert that Judge Manley was biased against them. With no citations to the record, they argue that bias arose from a case in which one of Judge Manley's former law partners was opposing counsel, over 23 years ago. They speculate that Appellees were previous clients of Judge Manley. We reject the allegation of bias for lack of any factual basis. Further, this issue is not properly before us, as it was not raised below.

Justices

Appendix B

FILED
12/12/2017
Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA
Case Number: DA 17-0161

IN THE SUPREME COURT OF THE STATE OF MONTANA

DA 17-0161

JOHN P. STOKES and PAMELA J. STOKES,

Petitioners and Appellants,

v.

FIRST AMERICAN TITLE COMPANY OF MONTANA, INC., a Montana Corporation; and US BANK TRUST, N.A., as Trustee for LSF8 MASTER PARTICIPATION TRUST,

Respondents and Appellees.

ORDER

FILED
DEC 12 2017
Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

Appellant John Stokes has filed a petition for rehearing of the Court's memorandum opinion, which affirmed the District Court, and our related published Opinion and Order, which declared Stokes a vexatious litigant and imposed a pre-filing restriction. The petition is not clear, but we discern the following arguments:

1. Disqualification

Stokes argues, as he did in the opening brief, that the Chief Justice must be disqualified for political reasons. Pursuant to this Court's internal operating rules, this case was assigned to a five-justice panel, which did not include the Chief Justice. Because the Chief Justice did not take part in the decisions, disqualification or substitution was not required. Stokes now contends the Chief Justice must preside over all cases, and thus a district court judge should have been substituted for him, citing Article VII, Section 3, of the Montana Constitution, which provides:

> (1) The supreme court consists of one chief justice and four justices, but the legislature may increase the number of justices from four to six. *A majority shall join in and pronounce decisions, which must be in writing.*
>
> (2) A district judge shall be substituted for the chief justice or a justice in the event of disqualification or disability, and the opinion of the district judge

> sitting with the supreme court shall have the same effect as an opinion of a justice.

(Emphasis added.)[1] However, while the text of Article VII, Section 3 requires the Supreme Court to include a chief justice, it does not require the chief justice to sit and preside over every case, and substitution was not necessary here.

2. Jurisdiction

Stokes again argues the state courts lack jurisdiction in this proceeding given the automatic stay arising from the federal bankruptcy filings. "A petition for rehearing is not a forum in which to rehash arguments made in the briefs and considered by the Court. *State ex rel. Bullock v. Philip Morris, Inc.*, No. DA 07-0299, Or. (Mont. Sept. 9, 2009) (citing M. R. App. P. 20(1)(a)). These are the same arguments already considered by this Court, and Stokes offers no new facts or law. He again fails to respond to the precedent that a bankruptcy stay does not prohibit the court from ruling on an action brought by the debtors. *See, e.g., Eisinger v. Way*, 229 B.R. 11, 13 (B.A.P. 9th Cir. 1998) (citations omitted) ("the automatic stay does not prohibit a defendant in an action brought by a plaintiff/debtor from defending itself in that action."). The argument is consistent with Stokes' history of wasting judicial resources by rehashing issues already decided by the Court.

3. Vexatious litigant

Stokes' petition for rehearing accuses this Court of bias; repeatedly threatens the Justices who presided over the case with litigation, suggesting judicial immunity will not apply; and refers to this Court's Order as new "Jim Crow laws." Such arguments, made with no citation to the record or other legal authority, are facially harassing and vexatious. Stokes' petition is illustrative of the need for a pre-filing order.

Stokes argues, citing no authority, that before a pre-filing order is entered, a hearing must be held to allow him to present his side. Stokes had an opportunity to respond to the Appellees' motion to have Stokes declared a vexatious litigant, *see* M. R. App. P 16(2),

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[1] The Legislature has increased the number of associate justices to six, for a total of seven justices including the chief justice. *See* Section 3-2-101, MCA.

and chose not to respond, and he did not request a hearing. Further, there is no legal requirement that a hearing be held prior to a court's vexatious litigant declaration.

Stokes also contends this Court improperly relied on settlement materials and cases in which he prevailed when entering the vexatious litigant order. However, the order was primarily supported by the harassing and vexatious briefs filed before this Court, and many examples from other cases of similar litigation tactics employed by Stokes.

In sum, Stokes has not raised any overlooked fact material to the decisions, any overlooked question presented that would have been decisive to the case, nor any law that conflicts with the opinions. *See* M. R. App. P. 20(1)(a). Therefore,

IT IS ORDERED that the petition for rehearing is DENIED.

The Clerk of this Court is directed to mail copies hereof to counsel of record for the Appellees and personally to the Appellants.

DATED this 12 day of December, 2017.

Jim Rice

Laurie McKinnon

James Jeremiah Shea

Dirk M. Sandefur

Beth Baker

Justices

Appendix C

FILED
11/07/2017
Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA
Case Number: DA 17-0161

DA 17-0161

IN THE SUPREME COURT OF THE STATE OF MONTANA

2017 MT 275

JOHN P. STOKES and PAMELA J. STOKES,

Petitioners and Appellants,

v.

FIRST AMERICAN TITLE COMPANY OF MONTANA, INC., a Montana Corporation; and US BANK TRUST, N.A., as Trustee for LSF8 MASTER PARTICIPATION TRUST,

Respondents and Appellees.

APPEAL FROM: District Court of the Twentieth Judicial District, In and For the County of Lake, Cause No. DV 14-223 Honorable James A. Manley, Presiding Judge

COUNSEL OF RECORD:

For Appellants:

John Patrick Stokes, Pamela Jeanne Stokes, self-represented; Bigfork, Montana

For Appellees:

Michael J. Lilly, Berg, Lilly & Tollefsen P.C.; Bozeman, Montana

Danielle A.R. Coffman, Crowley Fleck PLLP; Kalispell, Montana

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Submitted on Briefs: September 13, 2017

Decided: November 7, 2017

Filed:

Ed Smith

Clerk

OPINION AND ORDER

Justice Jim Rice delivered the Opinion and Order of the Court.

¶1 While the appeal in this matter was pending, Appellees First American Title Company and U.S. Bank Trust, N.A. (Appellees) filed a joint motion requesting an order declaring Appellant John P. Stokes (Stokes) to be a vexatious litigant and requiring either anything he files be pre-approved by the district court or, alternatively, certified by a licensed Montana lawyer in good standing as meritorious under M. R. Civ. P. 11.

¶2 In the appeal, John and Pamela Stokes (Mr. and Mrs. Stokes) challenged an order that had been entered by the Twentieth Judicial District Court, Lake County, Honorable James Manley presiding, which dismissed their lawsuit against the Appellees. We affirmed the District Court's dismissal order in a memorandum opinion, issued in conjunction herewith. *Stokes v. First American Title Co.*, 2017 MT 274N, DA 17-0161. Mr. and Mrs. Stokes were initially represented by counsel, who withdrew early in the case.

¶3 Article II, Section 16 of the Montana Constitution guarantees every person access to the courts of Montana: "Courts of justice shall be open to every person, and speedy remedy afforded for every injury of person, property, or character . . . Right and justice shall be administered without sale, denial, or delay." However, the right to access Montana's legal system is not absolute, and may be limited with the showing of a rational relationship to a legitimate state interest. *Peterson v. Great Falls Sch. Dist. No. 1 & A*, 237 Mont. 376, 380, 773 P.2d 316, 318 (1989) (collecting cases).

¶4 The Rules of Appellate Procedure provide that litigants can be sanctioned for frivolous or vexatious litigation conduct:

> The supreme court may, on a motion to dismiss, a request included in a brief, or sua sponte, award sanctions to the prevailing party in an appeal, cross-appeal, or a motion or petition for relief determined to be frivolous, vexatious, filed for purposes of harassment or delay, or taken without substantial or reasonable grounds. Sanctions may include costs, attorney fees, or such other monetary or non-monetary penalty as the supreme court deems proper under the circumstances.

M. R. App. P. 19(5). We have previously cited Rule 19 in the imposition of pre-filing orders for vexatious litigants. *See, e.g.*, *Hartsoe v. Tucker*, 2013 MT 256, ¶¶ 14-18, 371 Mont. 539, 309 P.3d 39. Montana does not have a statute specifically authorizing the imposition of restrictions upon vexatious litigants, but our common law includes such authority.[1] *Motta v. Granite Cty. Comm'rs*, 2013 MT 172, ¶¶ 19-23, 370 Mont. 469, 304 P.3d 720. In *Motta*, we cited a five-factor test utilized by the Ninth Circuit Court of Appeal to determine whether a pre-filing order is justified: (1) the litigant's history of litigation and, in particular, whether it has entailed vexatious, harassing, or duplicative lawsuits; (2) the litigant's motive in pursuing the litigation; e.g., whether the litigant has an objective good faith expectation of prevailing; (3) whether the litigant is represented by counsel; (4) whether the litigant has caused needless expense to other parties or has posed an unnecessary burden on the courts and their personnel; and (5) whether other sanctions

[1] Section 37-61-421, MCA, does provide that "[a]n attorney or party to any court proceeding who, in the determination of the court, multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorney fees reasonably incurred because of such conduct."

would be adequate to protect the courts and other parties. *Motta*, ¶ 20 (*citing Molski v. Evergreen Dynasty Corp.*, 500 F.3d 1047, 1058 (9th Cir. 2007)).[2]

¶5 Under the first factor, Stokes' history of litigation in the district courts is significant and has entailed vexatious, harassing, or duplicative lawsuits.[3] Stokes has been before this Court ten times.[4] In several of these cases, Stokes was represented by counsel, and there was no assertion that the appeals had been taken unreasonably. However, Stokes' *pro se* appeals have repeatedly been found to be insufficiently presented, including a failure to provide a sufficient record or a failure to raise cognizable arguments, and have usually been affirmed in a memorandum opinion based upon the failure to meet the appellant's burden. In this matter, we conclude that Mr. and Mrs. Stokes' appeal was taken without substantial

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[2] In *Motta*, we adopted a similar four-factor test to review the entry of a pre-filing order by a trial court, which considered: (1) whether the litigant was given notice and a chance to be heard before the order was entered; (2) whether the trial court has compiled an adequate record for review; (3) whether the trial court has made substantive findings about the frivolous or harassing nature of the plaintiff's litigation; and (4) whether the vexatious litigant order is narrowly tailored to closely fit the specific vice encountered. *Motta*, ¶ 20 (citing *Molski*, 500 F.3d at 1057-58). We utilized that test and considered the findings entered by the District Court. *Motta*, ¶ 21. However, because we are here not reviewing the entry of a pre-filing order in the trial court, but instead undertaking initial consideration of the matter based upon the motion made in this Court, we will utilize the five-factor test.

[3] We are here only addressing John Stokes' status as a vexatious litigant, and not Pamela Stokes. Although Pamela has been involved as a co-party in much of John Stokes' litigation, her status was not raised as part of the motion and we do not consider it here.

[4] *See Amco Bldg. Sys. v. Stokes*, No. 98-635, 2000 MT 66N, 2000 Mont. LEXIS 463; *Stokes v. State*, 2005 MT 42, 326 Mont. 138, 107 P.3d 494; *Anderson v. Stokes*, 2007 MT 166, 338 Mont. 118, 163 P.3d 1273; *Stokes v. State*, 2007 MT 169, 338 Mont. 165, 162 P.3d 865; *State v. Stokes*, No. DA 06-0629, 2007 MT 318N, 2007 Mont. LEXIS 568; *State v. Skyline Broadcasters, Inc.*, 2009 MT 193, 351 Mont. 127, 211 P.3d 189; *Stokes v. Duncan*, 2015 MT 92, 378 Mont. 433, 346 P.3d 553; *Stokes v. State*, No. OP 06-0647, Or. (Mont., Oct. 25, 2006); *Stokes v. Anderson*, No. OP 06-0756, Or. (Mont., Nov. 29, 2006); and the memorandum opinion in the underlying case here.

or reasonable grounds. As noted in our memorandum opinion, their briefing lacked citations to the record, citations to authority, and cognizable legal argument.

¶6 Further, the briefing asserted numerous serious and unsupported accusations against party opponents, judges, and officials. With no citation to the record, Mr. and Mrs. Stokes alleged fraud, fabrication, collusion, harassment, and intimidation by their bankruptcy trustees; bias and prejudice by Judge Manley; and that Appellees were a "scam enterprise and laundering front for the Drug Cartel . . . ." The brief also stated that John Stokes personally removed a majority of the judges in Flathead County and implied a threat to initiate a federal suit against Judge Manley in California. We find such serious and wholly unsupported statements to be harassing and vexatious.

¶7 Appellees also attached complaints in four other suits brought by Stokes *pro se*, one which was entitled "COMPLAINT FOR EMBEZLEMENT [sic], EXTORTION AND DAMAGES." They include outlandish allegations of a harassing and abusive nature. Appellees quote from district court orders expressing frustration with Stokes' litigation tactics:

> Stokes' brief is a litany of confused "facts," in which he attempts to intertwine at least three separate lawsuits . . . Stokes wholly fails to respond to the Plaintiffs' argument that Stokes has pled no actual cause of action . . . Once again, Stokes mixes motions, relies on outdated case law and in general impermissibly attempts to re-litigate matters . . . Stokes seeks to add the individual attorneys and the law firm as third party defendants. He alleges that the individuals and the law firm have prepared false affidavits, have withheld documents in a separate lawsuit, and have a financial interest in continuing the litigation . . . Once again, the Court is faced with superfluous pleadings, which have no basis in fact or law and which consume limited Court resources.

Gardner v. Stokes, No. DV 07-0729(B) (Mont. 11th Judicial Dist. July 17, 2008). A different district court judge stated, "Stokes has filed an incomprehensible motion, accompanied by an equally convoluted brief . . ." and concluded it was "yet another example of [Stokes'] blatant disregard of legal procedures and rules." *Anderson v. Stokes*, No. DV 01-023C (Mont. 11th Judicial Dist. April 28, 2008).

¶8 Stokes did not file a response to the motion seeking his declaration as a vexatious litigant, but argued in his appellate reply brief that, by citing his filings in other cases, Appellees have offered inadmissible evidence in support of their motion. However, this Court may take judicial notice of other court proceedings, and we do so here. M. R. Evid. 202. While it would be preferable for a pre-filing order to be entered by a trial court upon fact-finding, we cannot ignore vexatious actions, particularly those that occur in this Court. We conclude the first factor of the *Motta* test is satisfied.

¶9 Under the second factor, we find Stokes does not have an objective good faith expectation of prevailing in the foreclosure matter that was the subject of his appeal. His *pro se* motions and briefs were procedurally unrecognizable and lacking in proper legal arguments. One federal judge commented: "Stokes is not an attorney, and while he zealously argues his positions, the record of his unsuccessful results in litigation is uniform and speaks for itself." *In re Stokes*, No. 09-60265-11, 2009 Bankr. LEXIS 3030, at *52 (U.S. Bankr. D. Mont. Sep. 21, 2009).

¶10 The third factor, whether Mr. Stokes is represented by counsel, is an important consideration here and affects the breadth of the remedy ordered. The vexatious behavior exhibited by Stokes has occurred prevalently while he was acting *pro se*, exemplified by the present appeal, wherein his counsel withdrew and Stokes thereafter filed a number of harassing pleadings while representing himself. Similarly, in *Motta*, we concluded that the pre-filing order at issue, which restricted Motta's *pro se* filings, was narrowly tailored and appropriately entered. *Motta*, ¶¶ 17, 22.

¶11 Under the fourth factor, it is clear from the actions described above that Stokes has caused needless expense to other parties and posed an unnecessary burden on the courts. In the litigation at issue in this appeal, Stokes filed an action to prolong the foreclosure process, and then later argued the court lacked jurisdiction to address the very action he initiated, an effort that merely caused confusion and turmoil.

¶12 Finally, we conclude that sanctions other than a pre-filing order would be inadequate. Stokes has previously litigated over significant debt and initiated bankruptcy proceedings. A financial sanction of costs or fees would appear to give a litigant with Stokes' history little pause in pursuing further vexatious behavior in the courts. Indeed, district courts have imposed such fees on Stokes in the past, with little or no discernible impact. In his appellate briefing here, Stokes has already threatened future litigation against the same parties and the presiding judge. Further, given the broad range of litigation Stokes has brought in multiple judicial districts, we see no way to effectively narrow the pre-filing order to a particular type of claim.

¶13 We conclude the applicable *Motta* test is satisfied and that the necessity of a pre-filing order has been established when Stokes is litigating *pro se*. Consistent with the

Montana Constitution, an order has a direct relationship to the state interest of protecting other parties from the unnecessary expense of litigating against Stokes and protecting the courts from the unnecessary expenditure of judicial resources. Therefore,

¶14 IT IS HEREBY ORDERED that the joint motion to declare John P. Stokes a vexatious litigant is GRANTED IN PART. Before Stokes can file any pleading *pro se* in a Montana district court or the Montana Supreme Court, he is required to obtain pre-filing approval from the court in which he seeks to file. The court may prohibit any such filing upon a determination that the claims asserted are harassing, frivolous, or legally not cognizable. This pre-filing requirement also applies to *pro se* filings by Stokes in cases where his counsel, if any, has withdrawn from representation of Stokes. Although this order does not apply to Pamela Stokes, courts should not permit John Stokes to engage in vexatious litigation tactics under her name.

¶15 The Clerk of this Court is directed to provide copies of this Order to counsel of record, all Montana district courts, and to John P. Stokes and Pamela J. Stokes, personally.

DATED this 7th day of November, 2017.

/S/ JIM RICE

We concur:

/S/ JAMES JEREMIAH SHEA
/S/ DIRK M. SANDEFUR
/S/ LAURIE McKINNON
/S/ BETH BAKER

IN THE

SUPREME COURT OF THE UNITED STATES

JOHN P. STOKES and PAMELA J. STOKES — PETITIONER PRO SE

VS.

FIRST AMERICAN TITLE COMPANY OF MONTANA, INC. MONTANA CORPORATION and U.S.BANK N.A. as TRUSTEES FOR LSF8 MASTER PARTICIPATION TRUST — RESPONDENT(S

PROOF OF SERVICE

I, John P. Stokes, do swear or declare that on this date, March 8, 2018, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows:

FIRST AMERICAN TITLE COMPANY OF MONTANA c/o appearing attorney Danielle Coffman, 1667 Whitefish Stage #101 Kalispell, MT 59901.

~~U.S.BANK N.A. as TRUSTEES FOR LSF8 MASTER PARTICIPATION TRUST~~ c/o appearing attorney Mike Lilly, One West Main Street **Bozeman**, MT 59715.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 8, 2018

May 9, 2018

John P. Stokes

Pamela J. Stokes

STATE COURT ORDER

JUDICAL NOTICE OF TWO ATTACHED EMAILS AND DOCUMENTED PROOF OF PRIOR ACTUAL KNOWLEDGE OF BANKRUPTCY PROCEEDINGS ON JULY 15, BK 16-607202016. PAGES 26,27,28 OF PAGES 204

JUDICAL NOTICE OF STATE ORDER SETTING HEARING DATED JULY 26, 2016, NINE DAYS AFTER ACTAUL NOTICE OF BANKRUPTCY FILING ON JULY 15, 2016, WITHOUT LEAVE OF BANKRUPTCY COURT OR REQUEST FROM ANY PARTY, SET FOR HEARING ON AUGUST 10, 2016, DURING ACTIVE BANKRUPTCY. (page 2, p. 4)

THE COURT ORDER, PAGE 2, P 4 IS BLATANTLY FALSE. ALL PARTIES INCLUDING THE COURT HAD ACTUAL KNOWLEDGE

JUDICAL NOTICE OF 11 USC 363. AUTOMIC STAY. ALL STATE PROCEEDINGS IN VIOLATION OF AUTOMICTIC STAY ARE VOID AD INITO FROM JULY 15, 2016.

CLERK OF DISTRICT COURT
LYN FRICKER

DEC 15 2016

FILED BY__________
CLERK/DEPUTY

MONTANA TWENTIETH JUDICIAL DISTRICT COURT,
LAKE COUNTY

JOHN P. STOKES and PAMELA J. STOKES, Plaintiffs, vs. FIRST AMERICAN TITLE COMPANY OF MONTANA, INC., a Montana corporation; and US BANK TRUST, N.A. as trustee for LSF8 MASTER PARTICIPATION TRUST, Defendants.	Case No. DV-14-223 THE HONORABLE JAMES A. MANLEY **ORDER**

On November 21, 2016, this Court held a hearing on various pending motions of the parties involved in this case, including, but not limited to, Defendant First American Title Company of Montana, Inc.'s ("First American") Motion to Dismiss, and the Motion for Summary Judgment filed by U.S. Bank Trust, N.A. as trustee for LSF8 Master Participation Trust ("U.S. Bank Trust"). This Order reflects the rulings this Court made at that hearing.

RECEIVED
DEC 19 2016
CROWLEY FLECK PLLP

Procedural History

Plaintiffs John Patrick Stokes and Pamela J. Stokes ("Plaintiffs") filed a Verified Complaint on October 7, 2014, seeking to enjoin the named Defendants from foreclosing on Plaintiffs' residential real property (the "Property") and declaratory judgment as to the parties' rights and status pertaining to the foreclosure. *Verified Compl. & Demand for Jury Trial*, (Dkt. 1). Plaintiffs filed an Amended Complaint on October 19, 2015, (Dkt. 4), which asserted additional claims against U.S. Bank Trust. Plaintiffs were initially represented by Mark Evans. However, Mr. Evans withdrew as Plaintiffs' counsel effective May 3, 2016, and Plaintiffs proceeded *pro se*. *Order Auth. Withdrawal of Counsel*, (Dkt. 14).

On May 12, 2016, Plaintiffs filed a Request for Entry of Default, (Dkt. 16), which the Clerk of Court entered against First American and U.S. Bank Trust.

On July 15, 2016 Mr. Stokes filed a Chapter 13 Bankruptcy Petition with the United States Bankruptcy Court for the District of Montana, Case No. 16-60720-13 (the "Bankruptcy Case").[1] *Ch. 13 Vol. Pet.*, (Bankruptcy Case Dkt. 1). Plaintiffs did not notify this Court, First American, or U.S. Bank Trust of this bankruptcy filing.

By its Order on July 26, 2016, this Court set a hearing on Plaintiffs' Request for Entry of Default for August 10, 2016. *Order Setting Hearing on Default*, (Dkt. 26). The basis of that Order was the Court's inability to discern which Defendants the Plaintiffs were requesting default against; which Defendants had been served with the summons;

[1] This Court takes judicial notice of the docket and proceedings the Bankruptcy Case. *See* Mont. R. Evid. 201(b), (c) (providing that a court may take judicial notice of facts that are generally known or capable of accurate and ready determination, whether requested or not); Mont. R. Evid. 202(6), (c) (Providing that courts may take judicial notice of "[r]ecords of any court of this state or of any court of record of the United States or any court of record of any state of the United States," whether requested or not).

whether the agent served on behalf of First American was the agent authorized to accept service; and whether Plaintiffs were in Bankruptcy Court. *See id.*

Both Defendants filed motions to set aside the entry of default. *Def. U.S. Bank Trust's Mot. to Set Aside Default* (July 28, 2016), (Dkt. 27); *First American's Mot. to Set Aside Default & Brief in Support* (July 29, 2016), (Dkt. 31).

On August 10, 2016, this Court held the hearing set in the July 26 Order (the "August 10 Hearing"). *Minute Entry*, (Dkt. 33). Despite having received notice of the August 10 Hearing, Plaintiffs failed to appear. First American and U.S. Bank Trust, through their respective counsel, appeared. The Court questioned the parties whether it had jurisdiction due to the bankruptcy filing and requested they submit briefing on that issue.

In the Bankruptcy Case just two days later, on August 12, 2016, Mr. Stokes failed to attend the "341 meeting" in connection with the Bankruptcy Case. *See Notice of Debtor's Failure to Appear at 341 Meeting & Request for Dismissal*, (Bankruptcy Case Dkt. 18). Consequently, the Bankruptcy Court entered an order dismissing the Bankruptcy Case. *Order Dismissing Case for Debtor's Failure to Appear at the 341 Meeting*, (Bankruptcy Case Dkt. 19). As a result of the dismissal of the Bankruptcy Case, First American filed a Notice of that dismissal with this Court, requesting that the entry of default be set aside. *Notice of Dismissal of Bk. Proceedings & Proposed Order Setting Aside Entry of Default* (Aug. 16, 2016), (Dkt. 34). The Court granted First American's and U.S. Bank Trust's motions to set aside the default. *Order Setting Aside Entry of Default* (Aug. 17, 2016), (Dkt. 35). Thereafter, on August 18, 2016, a Trustee Sale was held and the Property was sold. *See First American's Mot. to Dismiss & Supporting Brief, Ex. A (Trustee's Deed)*, (Dkt. 38).

On September 1, 2016, Plaintiffs filed a motion requesting this Court to vacate its Order Setting Aside Default. *Plaintiff's Request to Vacate Order*, (Dkt. 37). Plaintiffs argued in that Motion that this Court lacked jurisdiction to conduct the August 10 Hearing and to afford First American or U.S. Bank Trust any relief. *Id.* First American subsequently filed a motion to dismiss Plaintiffs' Amended Complaint. *First American's Mot. to Dismiss*, (Sept. 7, 2016), (Dkt. 38).

The following day, Plaintiffs moved the Court for an Order to Show Cause. *Pl.'s Mot. for Order to Show Cause for Damages*, (Sept. 8, 2016), (Dkt. 39). In that Motion, Plaintiffs sought damages for a violation of the automatic stay based on the Bankruptcy Case. *Id.* Plaintiffs again argued that this Court did not have jurisdiction to conduct the August 10 Hearing and that the Defendants' appearance at that hearing violated U.S. Bankruptcy Code. *Id.* In that Motion, Plaintiffs sought over two million dollars in damages for the alleged stay violation. *Id.* Both Defendants filed a response to Plaintiffs' Motion for Order to Show Cause. *U.S. Bank Trust's Response to Pl.'s Mot. for Order to Show Cause for Damages*, (Dkt. 41); *First American's Combined Response to Pl.'s Request to Vacate Order & Mot. to Show Cause*, (Dkt. 42).

On September 19, 2016, Plaintiffs filed a response to First American's Motion to Dismiss and requested an award of damages. *Response to Mot. to Dismiss Request for Award of Damages*, (Dkt. 43). The following day, Plaintiffs filed a response to Defendants' pleadings. *Pl.'s Response to Def.'s Pleadings*, (Dkt. 44). On October 3, 2016, U.S. Bank Trust filed a motion for summary judgment. *Mot. for Summ. J.*, (Dkt. 45).

On October 12, Plaintiffs moved this Court to take judicial notice of facts. *Judicial Notice of Facts*, (Dkt. 49). U.S. Bank Trust filed a response to the judicial notice of facts on October 21, 2016, and First American filed a motion to strike the judicial notice of facts on October 26, 2016. *U.S. Bank Trust's Response to Judicial Notice of Facts*, (Dkt. 50); *First American's Mot. to Strike Judicial Notice of Facts*, (Dkt. 52).

This Court subsequently entered an Order setting a hearing on all pending motions for November 21, 2016. *Order Setting Hearing Date on Pending Motions*, (Dkt. 54).

On November 4, 2016, Mr. Stokes moved the Bankruptcy Court to reopen his Bankruptcy Case. *Mot. to Reopen Ch. 13 Case*, (Bankruptcy Case Dkt. 23). On November 7, 2016, the Bankruptcy Court entered an order granting Mr. Stokes's motion to reopen the Bankruptcy Case and granting to and through November 18, 2016 for Mr. Stokes to request the Bankruptcy Court to set aside its prior order dismissing his Bankruptcy Case. *Order Granting Mot. to Reopen Ch. 13 Case*, (Bankruptcy Case Dkt. 24).

On November 18, 2016, Mr. Stokes filed his Motion to Vacate Dismissal with the Bankruptcy Court. *Mot. to Vacate Dismissal*, (Bankruptcy Case Dkt. 28).

This Court held its Hearing on Pending Motions on November 21, 2016 (the "November 21 Hearing"). *See Nov. 21, 2016 Tr.* Plaintiffs did not appear at that hearing. At that hearing, this Court first heard argument regarding its jurisdiction over the August 10 Hearing and over the matters that were pending before the Court. Upon hearing argument regarding jurisdiction, this Court determined it had jurisdiction over the August

10 Hearing as well as the matters that were before it. This Court then heard arguments on the merits of Defendants' motions. At the conclusion of those arguments, this Court orally granted the Defendants' Motions and denied Plaintiffs' request for judicial notice of facts. This Order reflects those rulings.

ANALYSIS

There are several motions pending before this Court. However, before turning to the merits of those motions, there are preliminary jurisdictional issues that must be addressed. First, whether this Court had jurisdiction over the November 21 Hearing. Second, whether this Court had jurisdiction over the August 10 Hearing. Once those issues are resolved, the Court will turn to the merits of the motions pending before it.

1. This Court had Jurisdiction over the November 21 Hearing Because There Was No Stay in Effect.

As a preliminary matter, this Court must determine whether it had jurisdiction to conduct the November 21 Hearing due to the reopening of the Bankruptcy Case.

It is well-recognized that the dismissal of a Chapter 13 case terminates the automatic stay. 11 U.S.C. § 362(c)(2)(B); *In re Sewell*, 345 B.R. 174, 179 (B.A.P. 9th Cir. 2006); *Bullard v. Blue Hills Bank*, 135 S. Ct. 1686, 1693 (2015) (noting that the dismissal of a Chapter 13 case lifts the automatic stay entered at the start of bankruptcy). Thus, when the Bankruptcy Court dismissed the Bankruptcy Case on August 12, 2016, the stay was automatically terminated. However, on November 4, 2016, Mr. Stokes filed a motion to reopen the Bankruptcy Case, which the Bankruptcy Court granted on November 7, 2016. *Mot. to Reopen Ch. 13 Case*, (Bankruptcy Case Dkt. 23); *Order Granting Mot. to Reopen*

Ch. 13 Case, (Bankruptcy Case Dkt. 24). Thus, this Court must determine the effect, if any, the re-opening of the Bankruptcy Case had on the proceedings before this Court. More specifically, whether the automatic stay was in effect thus precluding this Court from conducting a hearing or entering an order on the pending motions.

The re-opening of a bankruptcy case does not automatically re-impose the automatic stay—rather, the re-opening of a bankruptcy case is purely a ministerial act. *In re Menk*, 241 B.R. 896, 913 (B.A.P. 9th Cir. 1999) ("We have repeatedly held that the reopening of a closed bankruptcy case is a ministerial act that functions primarily to enable the file to be managed by the clerk as an active matter and that, by itself, lacks independent legal significance and determines nothing with respect to the merits of the case."). Thus, "[r]eopening the case does not undo any of the statutory consequences of closing." *Id.* This includes the termination of the automatic stay—to the extent that the automatic stay is terminated in conjunction with the dismissal of a bankruptcy case, it does not automatically spring back into effect. *Id.* at 914. If protection is warranted after a case is reopened, then an injunction needs to be imposed. *Id.*

Here, although the Bankruptcy Case was re-opened on November 7, 2016, the re-opening of the case did not undo any of the statutory consequences of the August 12, 2016 dismissal. Specifically, the re-opening of the Bankruptcy Case did not cause the stay to automatically spring back into effect. Mr. Stokes was required to seek, and obtain, an injunction to be afforded protection, which he did not do. Because the stay did not automatically spring back into effect, and because there was no injunction imposed, this Court had jurisdiction over the November 21 Hearing.

2. <u>This Court had Jurisdiction Over the August 10 Hearing Because the Hearing Was Purely to Address Defensive Motions Filed by the Defendants, Which Were Not Prohibited by the Bankruptcy Stay.</u>

Throughout their pleadings, Plaintiffs argued that this Court did not have jurisdiction to conduct the August 10 Hearing or to grant Defendants' request for relief, and that Defendants violated the automatic stay by appearing at that hearing. This Court disagrees.

The automatic stay provisions of the Bankruptcy Code prohibit the continuation of a judicial action "against the debtor" that was commenced before the bankruptcy. 11 U.S.C.A. § 362(a)(1); *In re White*, 186 B.R. 700, 703 (B.A.P. 9th Cir. 1995). "Essentially, the policy behind § 362 is to protect the estate from being depleted by creditors' lawsuits and seizures of property before the trustee has had a chance to marshal and distribute the assets." *Id.* at 704. "The automatic stay is also intended to give debtors breathing room by stopping 'all collection efforts, all harassment, and all foreclosure actions.' " *Id.* (quoting *In re Bloom*, 875 F.2d 224, 226 (9th Cir.1989)). Finally, the automatic stay prevents "piecemeal dismemberment" and allows the debtor time to reorganize. *Id.* (citing *In re Comput. Commc'n, Inc.*, 824 F.2d 725, 729–30 (9th Cir.1987). Thus, it is clear the bankruptcy stay is intended to protect debtors from affirmative action by their creditors. *In re Way*, 229 B.R. 11, 13–15 (B.A.P. 9th Cir. 1998).

The stay is not intended to preclude creditors from defending themselves in state court actions that the debtor initiated pre-petition. *Id.* This is because the primary purpose of § 362 is not applicable to offensive actions by the debtor, and the same policy considerations do not exist in such actions. *In re Merrick*, 175 B.R. 333, 336–37. (B.A.P. 9th Cir. 1994).

The Seventh Circuit aptly explained:

> [T]he automatic stay is inapplicable to suits *by* the bankrupt ("debtor," as he is now called). This appears from the statutory language, which refers to actions "against the debtor," 11 U.S.C. § 362(a)(1), and to acts to obtain possession of or to exercise control over "property of the estate," § 362(a)(3), and from the policy behind the statute.... There is ... no policy of preventing persons whom the bankrupt has sued from protecting their legal rights. True, the bankrupt's cause of action is an asset of the estate; but as the defendant in the bankrupt's suit is not, by opposing that suit, seeking to take possession of it, subsection (a)(3) is no more applicable than (a)(1) is.

Martin–Trigona v. Champion Fed. Sav. and Loan Ass'n, 892 F.2d 575, 577 (7th Cir.1989). Consistent with this premise, case law has uniformly held that the bankruptcy stay does not preclude creditors from taking defensive action in a case in state court that was initiated pre-petition.

For instance, in *In re Way*, the Bankruptcy Appellate Panel of the Ninth Circuit held that defendants in a state court action, which debtor had commenced pre-petition, did not violate the automatic stay when they continued to prosecute their motion to dismiss after receiving notice of the bankruptcy filing. 229 B.R. at 13–14. The court reasoned:

> The primary purposes of § 362 do not apply, however, to offensive actions by a debtor or bankruptcy trustee, as the same policy considerations do not exist where the debtor has initiated a prepetition lawsuit against a creditor. Therefore, we have clearly held that the automatic stay does not prohibit a defendant in an action brought by a plaintiff/debtor from defending itself in that action.

Id. Because the Defendants were defending themselves in the state court action, the court held that they did not violate the automatic stay. *Id; see also, In re Merrick*, 175 B.R. at

338 ("Given this freedom for the debtor or the trustee to prosecute the debtor's claims, an equitable principle of fairness requires a defendant to be allowed to defend himself from the attack without imposing on him a gratuitous impediment in dealing with an adversary who suffers no correlative constraint. The automatic stay should not tie the hands of a defendant while the plaintiff debtor is given free rein to litigate.").

Case law makes clear that where a debtor files an action pre-petition against a creditor, the creditor may defend against that action post-petition without violating the automatic stay. This is precisely what occurred in this case. Plaintiffs filed a state action for injunctive and declaratory relief against First American and U.S. Bank Trust on October 7, 2014. *Verified Compl. & Demand for Jury Trial*, (Dkt. 1). On May 12, 2016, Plaintiffs obtained a default against First American and U.S. Bank Trust. *Entry of Default*, (Dkt. 17). Then, on July 15, 2016, Mr. Stokes filed his Chapter 13 Bankruptcy Petition in the United States Bankruptcy Court for the District of Montana, which triggered the automatic stay. *Ch. 13 Vol. Pet.*, (Bankruptcy Case Dkt. 1).

This Court set a hearing on default for August 10. *Order Setting Hearing on Default*, (Dkt. 26). It was incumbent upon First American and U.S. Bank Trust to appear at that hearing to defend against the entry of default. Case law makes clear that this Court had jurisdiction to set and conduct the August 10 Hearing, and First American and U.S. Bank Trust did not violate the automatic stay by appearing at the hearing. With the jurisdictional issues resolved, the Court now turns to the merits of the pending motions.

3. Plaintiffs' Request for Judicial Notice of Facts.

Plaintiffs requested this Court to take judicial notice of certain facts on October 12, 2016. *Judicial Notice of Facts*, (Dkt. 49). Both Defendants requested that this Court strike Plaintiffs' Judicial Notice of Facts. *U.S. Bank Trust's Response to Judicial Notice of Facts*, (Dkt. 50); *First American's Mot. to Strike Judicial Notice of Facts*, (Dkt. 52).

Montana Rule of Evidence 201(b) provides that courts may take judicial notice of facts that are "not subject to reasonable dispute." The facts must be "either (1) generally known within the territorial jurisdiction of the trial court; or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned." Mont. R. Evid. 201(b). Judicial notice should only be granted if the trial court can "ascertain either the correctness or the completeness of the sources of information." *State v. Ditton*, 2006 MT 235, ¶ 45, 333 Mont. 483, 492, 144 P.3d 783, 790.

Here, both Defendants dispute the accuracy and truth of the facts Plaintiffs requests this Court to take judicial notice of. *See U.S. Bank Trust's Response to Judicial Notice of Facts*, (Dkt. 50); *First American's Mot. to Strike Judicial Notice of Facts*, (Dkt. 52). This Court agrees. The facts Plaintiffs request this Court to take judicial notice of are certainly not generally known, nor are they capable of accurate and ready determination by reliable and accurate sources. Rather, they are argumentative and speculative, at best. Therefore, this Court denies Plaintiffs' request for judicial notice of facts.

4. First American's Motion to Dismiss.

First American moved this Court to dismiss the claims asserted against it, which sought to restrain foreclosure of the Property (Count I), and to obtain a declaratory judgment related to the foreclosure (Count II).[2] *First American's Mot. to Dismiss*, (Dkt. 38). First American argued that the claims asserted in Counts I and II are now moot because the Property was sold at a trustee's sale on August 18, 2016. *Id.*

This Court's judicial power is limited to justiciable controversies. *Progressive Direct Ins. Co. v. Stuivenga*, 2012 MT 75, ¶¶ 16–17, 364 Mont. 390, 396, 276 P.3d 867, 871–72. In other words, "[t]he parties must present a justiciable controversy before a court can consider the merits of an issue." *Chipman v. Nw. Healthcare Corp.*, 2012 MT 242, ¶ 19, 366 Mont. 450, 455–56, 288 P.3d 193, 200. Thus, a justiciable controversy is a threshold requirement for this court to grant relief. *Id.*

"A justiciable controversy is one upon which a court's judgment will effectively operate, as distinguished from a dispute invoking a purely political, administrative, philosophical, or academic conclusion." *Progressive Direct*, 2012 MT at ¶ 16, 364 Mont. at 396, 276 P.3d at 871. "The central concepts of justiciability have been elaborated into more specific doctrines—namely, advisory opinions, feigned and collusive cases, standing, ripeness, mootness, political questions, and administrative questions—each of which is governed by its own set of substantive rules." 2012 MT at ¶ 16, 364 Mont. at 396, 276 P. 3d at 871–72. Mootness is at issue here.

The Montana Supreme Court has explained:

> Mootness is the doctrine of standing set in a time frame: the requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness). Thus, if the issue presented at the outset of the action has ceased to exist or is no longer

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[2] The remaining Counts—Counts III and IV—are directed solely towards U.S. Bank Trust and do not involve First American.

"live," or if the court is unable due to an intervening event or change in circumstances to grant effective relief or to restore the parties to their original position, then the issue before the court is moot. Because the constitutional requirement of a "case" or "controversy" contemplates real controversies and not abstract differences of opinion or moot questions, courts lack jurisdiction to decide moot issues insofar as an actual case or controversy no longer exists.

2012 MT at ¶ 17, 364 Mont. at 396, 276 P.3d at 872 (internal citations omitted). Therefore, if the claims in Counts I and II of the Amended Complaint are moot, this Court does not reach the merits of those claims.

Here, Count I of the Amended Complaint seeks to restrain foreclosure of the Property. *See Amended Compl.*, (Dkt. 4). Count II requests declaratory judgment to determine the parties' rights, status, and other legal relations as they relate to the foreclosure the Property. *See id.* However, the Property was sold at a trustee's sale on August 18, 2016.[3] At that time, the Bankruptcy Case had been dismissed, so there was no stay in effect. Moreover, there was no appeal pending on that dismissal, nor was there a pending request for an injunction under applicable rules of the Bankruptcy Code. Thus, there was nothing that precluded the trustee's sale from occurring.

Nevertheless, Plaintiffs argued in their pleadings that the stay was somehow extended past the date of dismissal of the Bankruptcy Case. Specifically, Plaintiffs argued in their Response to Motion to Dismiss Request for Award of Damages (Dkt.43) that the Bankruptcy Court's Order of Dismissal "did not take effect until 14 days, August 26,

[3] This Court takes judicial notice of the August 18, 2016 Trustee's Sale pursuant to Mont. R. Evid. 201 on the basis that the documents evidencing the sale are recorded public records that are "capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned." Mont. R. Evid. 201.

2016." Plaintiffs do not cite to any authority to support this proposition, but this Court surmises that Plaintiffs were relying on Fed. R. Civ. P. 62 in reaching that conclusion. However, Fed. R. Civ. P. 62 is wholly inapplicable here.

Fed. R. Bank. P. 7062 provides that Fed. R. Civ. P. 62 applies in adversary proceedings. Therefore, the provisions of Fed. R. Civ. P. 62, including the fourteen-day automatic stay of the enforcement of a judgment provided by Rule 62(a), are only applicable in adversary proceedings. *See* Fed. R. Bankr. P. 9014. Clearly, a bankruptcy case dismissal for failure to attend a 341 meeting of creditors is not an adversary proceeding. *See In re Heghmann*, 316 B.R. 395, 401 (B.A.P. 1st Cir. 2004) (citing *Lugo v. de Jesús Saez (In re de Jesús Saez)*, 721 F.2d 848, 851–52 (1st Cir.1983)). Therefore, Bankruptcy Rule 7062, and in turn, Fed. R. Civ. P. 62, are not applicable here, and there was no additional protection afforded Plaintiffs following the dismissal of the Bankruptcy Case. Since the Bankruptcy Court dismissed the Bankruptcy Case on August 12, 2016, there was no stay in effect from that date going forward, and at present, there continues to be no stay in effect.

Because there was nothing preventing the foreclosure sale from occurring, and because the Property was sold at the Trustee's Sale on August 18, 2016, there is no foreclosure sale to enjoin. Nor is there any basis for requiring a judgment declaring the rights, status, and legal relations of the parties as they relate to the foreclosure of the Property. Consequently, the claims asserted in Counts I and II against First American are moot and must be dismissed.

5. **<u>U.S. Bank Trust's Motion for Summary Judgment.</u>**

U.S. Bank Trust moved for summary judgment on all claims asserted against it in Counts I, II, III, and IV of the Amended Complaint. *U.S. Bank Trust's Mot. for Summ. J.*, (Dkt. 45).

Under Rule 56(c), summary judgment will be granted if the moving party can show there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Mont. R. Civ. P. 56(c)(3); *Flathead Bank of Bigfork v. Masonry by Muller, Inc.*, 2016 MT 269, ¶ 5, 383 P.3d 215, 217. The moving party has the initial burden of establishing these requirements. *Pearson v. McPhillips*, 2016 MT 257, ¶ 6, 385 Mont. 171, 173, 381 P.3d 579, 582. "Once the moving party has met this burden, the opposing party must present substantial evidence essential to one or more elements of its case in order to raise a genuine issue of material fact. *Id.* (quoting *Rich v. Ellingson*, 2007 MT 346, ¶ 12, 340 Mont. 285, 174 P.3d 491).

U.S. Bank Trust's Motion for Summary Judgment tracks First American's Motion to Dismiss as to Count I (declaratory judgment), and Count II (injunctive relief). *See U.S. Bank Trust's Mot. for Summ. J.*, (Dkt. 45). For the same reasons discussed above, there are no genuine issues of material fact as to either Count I or Count II, and U.S. Bank Trust is entitled to judgment as a matter of law on the claims asserted therein. However, this Court must determine whether summary judgement is appropriate as to the remaining claims asserted in the Amended Complaint against U.S. Bank Trust.

Count III of the Amended Complaint alleges that U.S. Bank Trust violated Mont. Code Ann. § 35-5-201 because it was a foreign business trust that failed to file a verified application with the Montana Secretary of State. *See Amended Compl.*, (Dkt. 4). Plaintiffs argued that because U.S. Bank Trust failed to register to do business with the Montana Secretary of State, it could not enforce the Deed of Trust or take title to the Property. *Id.*

Mont. Code Ann. § 35-5-201(2) provides that a foreign trust must register with the Montana Secretary of State to "transact business" in the state, and must also file a "verified application in the office of the secretary of state as provided in the case of foreign corporations under 35-1-1028. . . ." *Id.* Mont. Code Ann. § 35-1-1028, in turn, provides that "[a] foreign corporation may apply for a certificate of authority to *transact business* in this state by delivering an application to the secretary of state for filing." (Emphasis added). If approved, the foreign trust receives a "license *to do business* in this state, and the business trust may thereupon commence business." Mont. Code Ann. § 35-5-202 (emphasis added).

However, Montana law provides that a business, including a foreign trust, may engage in mortgage related activities without obtaining a license or registering with the Secretary of State because such activities do not constitute "transacting business." Specifically, Mont. Code Ann. § 35-1-1026 provides:

> (1) A foreign corporation may not transact business in this state until it obtains a certificate of authority from the secretary of state.
>
> (2) The following activities, among others, *do not constitute transacting business* within the meaning of subsection (1):
>
> (a) maintaining, defending, or settling any proceeding;
>
> . . .
>
> (g) creating or acquiring indebtedness, mortgages, and security interests in real or personal property;
>
> (h) securing or collecting debts or enforcing mortgages and security interests in property securing the debts;

(i) owning real or personal property that is acquired incident to activities described in subsection (2)(h) if the property is disposed of within 5 years after the date of acquisition does not produce income, or is not used in the performance of a corporate function;

. . .

Mont. Code Ann. § 35-1-1026(1), (2)(a), (g), (h), (i) (emphasis added).

Plaintiffs' theory for relief was advanced in, and rejected by, the U.S. District Court for the District of Montana in *Lemieux v. CWALT, Inc. Alternative Loan and Trust 2006-22CB*, CV 15-77-BU-JCL, 2016 WL 4059210 (D. Mont. July 28, 2016). In that case, a borrower challenged a mortgage backed security trust's standing to enforce a deed of trust because the trust was not registered with the Montana Secretary of State pursuant to Mont. Code Ann. § 35-1-1028. *Id.* at *2. The district court rejected the borrower's argument and held that "in accordance with section 35-1-1026, a foreign business entity need not first obtain a certificate of authority from the Montana Secretary of State to secure its authority to collect a debt by foreclosing on a secured real estate transaction and pursuing litigation activities because those activities do not qualify as 'transacting business.' " *Id.* at *7.

The foregoing makes clear that U.S. Bank Trust was not required to register with the Montana Secretary of State to acquire Plaintiffs' mortgage debt or to enforce the mortgage. There is no genuine issue of material fact as to Count III, and it is clear that U.S. Bank Trust is entitled to judgment as a matter of law. Consequently, the claims in Count III against U.S. Bank Trust are dismissed.

As to Count IV, the Amended Complaint alleges that the loan in this case includes an illegal usury interest rate under Montana law, and cites to Mont. Code Ann. § 31-1-107 in support of that assertion. *See Amended Compl.*, (Dkt. 4).

However, federal law expressly preempts state usury laws for any loan, mortgage, credit sale, or advance that is secured by a first lien on residential real property. 12 U.S.C. § 1735f-7a. The Montana Supreme Court has recognized that one of the ways in which federal law preempts state law is Congress includes a preemption clause in a federal statute that provides expressly that state law will not apply in the area governed by the federal statute. *Fenno v. Mountain W. Bank*, 2008 MT 267, ¶ 11, 345 Mont. 161, 164, 192 P.3d 224, 227. As counsel for U.S. Bank Trust points out, it is clear that federal law preempts state law under the facts of this case. More specifically, the federal Depository Institutions Deregulation and Monetary Control Act of 1980 ("DIDMCA") provides:

> **(a) Applicability to loan, mortgage, credit sale, or advance; applicability to deposit, account, or obligation**
>
> **(1)** The provisions of the constitution or the laws of any State expressly limiting the rate or amount of interest, discount points, finance charges, or other charges which may be charged, taken, received, or reserved shall not apply to any loan, mortgage, credit sale, or advance which is--
>
> **(A)** secured by a first lien on residential real property. . . . ;
>
> **(B)** made after March 31, 1980; and
>
> **(C)** described in section 527(b) of the National Housing Act (12 U.S.C. 1735f-5(b)). . . .

12 U.S.C.A. § 1735f-7a(a)(1)(A)–(C); *see also Brown v. Investors Mort. Co.*, 121 F.3d 472, 475 (9th Cir. 1997). 12 U.S.C.A. § 1735f-5(b), in turn, provides that a "federally related mortgage loan" means any loan that (1) is secured by residential real property designed principally for the occupancy of from one to four families; and (2)(D) is made in whole or in part by any "creditor", as defined in section 1602(f) of Title 15, who makes or invests in residential real estate loans aggregating more than $1,000,000 per year." 12 U.S.C.A. § 1735f-5. Finally, 15 U.S.C. § 1602 defines "creditor" to include "a person who

both (1) regularly extends . . . consumer credit . . . and (2) is the person to whom the debt arising from the consumer credit transaction is initially payable. . . ." 15 U.S.C.A. § 1602(g).

In this case, the subject loan was secured by a Deed of Trust on the Stokes' home. Thus, 12 U.S.C. § 1735f-7a(a)(1)(A) is met. Additionally, the Amended Complaint states that the loan was made on July 13, 1998, which was after March 31, 1980. Thus. 12 U.S.C. § 1735f-7a(a)(1)(B) is met. Finally, 12 U.S.C. § 1735f-7a(a)(1)(C) is met because the loan was secured by the Stokes' residence, and WMC Mortgage, whom the Stokes' affirmatively alleged was the lender who originated the loan, is a creditor under 15 U.S.C. § 1602. Indeed, WMC Mortgage is a creditor for purposes of 15 U.S.C. § 1602 because (1) WMC Mortgage regularly extends consumer credit; (2) the debt arising from the mortgage was initially payable to WMC Mortgage; and (3) WMC Mortgage makes or invests in residential real estate loans aggregating more than $1,000,000 per year.[4]

Because all of the provisions of 12 U.S.C. § 1735f-7a have been met, federal law clearly preempts Montana's usury laws as they apply to the mortgage in this case. Consequently, U.S. Bank Trust is entitled to judgment on Count IV as a matter of law.

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[4] This Court takes judicial notice of the fact that WMC Mortgage is an entity that regularly extends consumer credit and that it "makes or invests in residential real estate loans aggregating more than $1,000,000 per year" because U.S. Bank Trust's affidavit included as exhibits an American Banker study finding that in 1998 WMC originated $3,215,000 in mortgage loans, as well as a U.S. Department of Housing and Urban Development 1998 "Loss Mitigation Performance Analysis" stating that in 1998, HUD scored 3,143 loans originated by WMC Mortgage as part of its loss mitigation analysis. Thus, the fact that WMC Mortgage is an entity that regularly extends consumer credit and that it makes or invests in residential real estate loans aggregating more than $1,000,000 is not subject to reasonable dispute as the facts are capable of accurate and ready determination by resorting to the foregoing sources, whose accuracy cannot be reasonably questioned. *See* Mont. R. Evid. 201.

In summary, U.S. Bank Trust is entitled to summary judgment on all claims asserted against it in the Amended Complaint. Based on the foregoing conclusions of law, the remaining pending motions are moot and will not be addressed.

CONCLUSION

For the foregoing reasons, Plaintiffs' request for Judicial Notice of Facts is DENIED and stricken. First American's motion to dismiss is GRANTED, and U.S. Bank Trust's Motion for Summary Judgment is GRANTED.

DATED this 15 day of DECEMBER, 2016.

JAMES A. MANLEY
The Honorable James A. Manley

cc: Danielle Coffman/Lindy Hornberger
Michael J. Lilly
John P. Stokes