STATE OF MAINE SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

LAW DOCKET NO. CUM-24-360

DEUTSCHE BANK TRUST COMPANY AMERICAS, AS TRUSTEE FOR RESIDENTIAL ACCREDIT LOANS, INC., MORTGAGE ASSET-BACKED PASS-THROUGH CERTIFICATES, SERIES 2007-QA2,

Plaintiff-Appellant,

v.

S. SHERMAN B. KENDALL a/k/a SHERMAN B. KENDALL, JOHN M. KENDALL, et al.

Defendants-Appellees

ON APPEAL FROM JUDGMENT ENTERED BY MAINE SUPERIOR COURT, CUMBERLAND COUNTY DOCKET NO. PORSC-RE-17-303

BRIEF OF APPELLEES S. SHERMAN V. KENDALL and JOHN M. KENDALL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES Page

STATUTES

OTHER AUTHORITIES

I. STATEMENT OF FACTS AND PROCEDURAL HISTORY

On December 29, 2006, Defendants John and S. Sherman Kendall executed a note to Homecomings Financial, LLC (Homecomings) in the amount of $850,000. *See* App. 076. On that same date, the Kendalls "mortgaged, granted and conveyed" property to a different entity, Mortgage Electronic Registrations Systems, Inc, ("MERS") to secure the note. MERS was given the mortgage as a "nominee" of the lender, Homecomings. App. 108; App. 082 (Mortgage). The Mortgage recites on p. 3 (recorded in the local registry at Book 24738, p.21), that the Kendalls "mortgage grant and convey the Property to MERS (solely as nominee for Lender and Lenders successors and assigns)..." App. 084.

On February 1, 2010, Plaintiff Deutsche Bank's (DB)'s prior servicer, GMAC, sent defendants notice that unless a December 1, 2009, default was cured within 30 days, GMAC would accelerate the maturity of the loan; declare the obligation due and payable without further demand; and begin foreclosure proceedings. App. 226. After the Kendalls failed to cure the default within the 30-day window, DB accelerated the note and filed a foreclosure action against Defendants in 2010. App. 168-69. That action was thereafter dismissed without prejudice. *Deutsche Bank v. Kendall*, Me. Super. Ct., Docket No. CUMSC- RE-10-465. John Kendall testified that two more notices of default were sent to Defendants in 2012 and 2013, and another foreclosure action was commenced in

2013. TT Nov. 15, 77:20-23; App. 183; *Deutsche Bank v. Kendall*, Me. Super. Ct., Docket No CUMS- RE-13-235. On December 26, 2012, DB sent a default letter to the Kendalls before filing suit to foreclose. App 229. The second foreclosure case (Docket No CUMS- RE-13-235), was also voluntarily dismissed in 2015. App. 169.

Before filing suit in the instant case, on December 8, 2017, DB sent a new default letter on September 25, 2017, more than six years after default was first declared and the note accelerated. Exh. D-1 (Right to Cure letter dated September 25, 2017). DB's witness testified that no payments were made after acceleration in 2010. TT Nov. 15, 75:3-6. This action was filed in 2017, also more than six years after the note was accelerated.

A. Chain of Title to the Mortgage

1. Ocwen Financial served as Deutsche Bank's (DB) servicer and agent in this matter and DB's primary witness, Sally Torres, was an Ocwen employee.

DB's primary witness at trial, Sally Torres, was an employee of Ocwen Financial Corporation (Ocwen). TT Nov. 2, 110:7-17. She confirmed that Ocwen served as DB's servicer and agent in this matter. *Id.* TT Nov. 2, 110:7-17.

2. Ocwen executed a 2017 Quitclaim Assignment From Homecomings to Deutsche Bank (Exhibit C-2) as Attorney in Fact for Homecomings, pursuant to a 2013 Power of Attorney (Exhibit C-3).

The source of DB's claim of title to the Kendall mortgage is a "quitclaim assignment," dated July 20, 2017 (2017 Quitclaim Assignment) and executed by Ocwen. App. 109. The 2017 Quitclaim Assignment was premised on the authority

of a 2013 Power of Attorney (2013 POA) purporting to give powers to assign mortgages belonging to Homecomings. App. 109-110("WHEREAS Homecomings...wishes to convey and assign any and all rights it may have under the Mortgage..."). The 2013 POA, from no less than twelve lending entities, including Homecomings, purported to grant their alleged agent and servicer, Ocwen, the right to assign unspecified mortgages. App. 222- 225.

3. When it did so, Ocwen was serving as Attorney in Fact for an entity that had no corporate existence.

Ms. Torres testified that after the 2006 closing, Homecomings transferred the note and servicing rights to Residential Funding, which in turn became GMAC. TT Nov. 15, 31:5-8 ("This loan was originated by Homecomings, and Homecomings turned into Residential Funding at one point, and then they turned into GMAC Bank."). She testified that GMAC thereafter went into bankruptcy in 2012. TT Nov. 15, 30:6-16 ("I was part of GMAC when it went bankrupt. Actually, on November of 2012 is—I believe is when it occurred."). Ms. Torres testified that Homecomings had also gone through bankruptcy and liquidated its assets in November of 2012, because it had become GMAC. TT Nov. 15, 29:4-31:5-8.

She expressed her understanding that Ocwen purchased a number of notes and servicing rights as GMAC bankruptcy assets but did not provide any supporting evidence. TT Nov. 15, 30:6-16("they purchased—you know, they purchased the rights from—from within the—within the—within the bankruptcy. And I—of

course, I'm not a bankruptcy expert. I'm not sure exactly how it happens, but yes, and that's how—how this loan travelled from GMAC to Ocwen because it came from – well, because they went bankrupt, they took over those loans.")

DB produced no other admissible evidence to show what, if anything, Ocwen purchased after the 2012 bankruptcy. Similarly, it produced no admissible evidence to show what assets, if any, survived the 2012 Homecomings bankruptcy. The parties stipulated that Homecomings had ceased to do business in the State of Maine as of February 26, 2014. TT Nov. 15, 30:6-16; App. 029 (Judgment p. 4); Plf's Exh. A2; TT Nov. 2, 129:1—131:14.

4. Ocwen was previously sanctioned for similar conduct by Maine's Attorney General in a Consent Agreement signed on July 23, 2019.

On cross examination of Ms. Torres, the court admitted a "Consent Agreement" between Ocwen and the Maine Attorney General. App. 244 (Def. Exh. 33); TT Nov. 15, 49: 6-7. The Consent Agreement records Ocwen's admission that it repeatedly used mortgage assignments it executed as an "Attorney in Fact" for defunct corporations, a practice the Bureau found constitutes false, deceptive, or misleading conduct by a debt collector under 32 M.R.S. Sec. 11013(2). App. 250. That conduct dated back to 2014 and was the subject of Consent Agreements in other jurisdictions going back to 2014. App. 247-48. DB's attorney admitted awareness of the consent agreement at trial. TT Nov. 15, 46:4-25. As part of the consent agreement, Ocwen

agreed to ensure that assignments it used in Maine were properly executed with appropriate legal authority. App 251-252 (Def. Exh. 33, ¶ 48).

5. Ocwen executed the 2017 Quitclaim Assignment in this case after an earlier assignment to DB from MERS was held invalid by *Saunders* (2010) and *Greenleaf* (2014).

On September 9, 2010, MERS, as nominee, had assigned its rights in the mortgage to DB. App. 108; TT Nov. 28, 24:8-15. However, after these types of MERS assignments were invalidated by this Court in *Saunders* (2010) and *Greenleaf* (2014), DB abandoned its 2010 and 2013 foreclosure actions against the Kendalls.[1] *Mortgage Elec. Registration Sys. v. Saunders*, 2010 ME 79, 2 A.3d 289; *Bank of Am., N.A. v. Greenleaf*, 2014 ME 89, 96 A.3d 700. Although DB held the original note, there was no evidence offered at trial that DB attempted to obtain an assignment of the mortgage from any entity until 2017, shortly before this foreclosure action, when it obtained the 2017 Quitclaim Assignment. App. 109.

B. Evidentiary Issues

1. Deutsche Bank failed to lay a proper foundation to admit a Pooling and Servicing Agreement, Exhibit 1-1; an Assignment and Assumption Agreement, Exhibit I-3 (the "I" Exhibits); and Bankruptcy Evidence, Exhibit K.

DB failed to lay a proper foundation for the admissibility of a number of Exhibits as it sought to prove ownership of the mortgage. These included a Pooling

[1] According to DB's counsel, one of the dismissals was a "consented dismissal, and the other was without prejudice." TT Nov. 2, 91:14-17.

and Servicing Agreement (Exhibit 1-1), an Assignment and Assumption Agreement (Exhibit I-3), and Bankruptcy Evidence, (Exhibit K). DB marked the "I" Exhibits for identification but offered no testimony from a custodian of the records, explaining only: they were "taken directly from the SEC website, the EDGAR site, and they are readily available to the public at no charge." TT Nov. 2, 186:20-188:4. DB then asked the trial court to take judicial notice of the "I" Exhibits. *Id.*

On the first day of trial, counsel for the Kendalls objected to admission of Exhibit I-1 because it was unsigned. TT Nov. 2, 187: 12-15. DB then asked the Court to take judicial notice of Exhibit I-1 instead. TT Nov. 2, 188: 3-4. After reviewing exhibits-- I-1, I-2, and I-3-- the Court stated: "I'm going to take the motion [for admission] under advisement." TT Nov. 2, 192: 23-24.

On the third day of trial, there were further objections to Exhibit I-1. Defendant objected: "But this document, obviously, it has not been authenticated, there's no certification label, there's been no custodian from Deutsche Bank." TT Nov. 28, 8:8-22. Defendant also disputed Exhibit I-1 could fit within the business records hearsay exception, stating: "Obviously, Ms. Torres has no basis to claim it's a business record. . .." TT Nov. 28, 8:8-22. Defendant explained:

> . . . we clearly knew, we all knew in this case that business records were going to be an issue and that certification was going to be required. That simply wasn't done. And under the Rules of Evidence, without proper certification and authentication, this document cannot be admitted. And just getting it off a website is certainly not enough. Having a lawyer

> say, I downloaded it from a website—I mean, we still don't know any of the pertinent details or that the document was not modified or changed or what was even applicable to the mortgage at issue.

TT Nov. 28, 9:13-22.

The trial court warned DB that it had failed to lay a foundation for admission of the exhibits: "I agree with the defendant that it does not—that the foundation for the business records exception to the hearsay rule has not been established." TT Nov. 28, 11:17-20. It took the matter under advisement, stating: "I am ruling that if that doesn't get around the hearsay exception or if it fails to meet the elements of something I can take judicial notice of, then I'm not going to do it. . . it'll be excluded." TT Nov. 28, 12:2-7.

DB also marked Exhibit K, an unauthenticated 532 page bankruptcy order taken from the internet. TT Nov 28, 14:2-15:12. Counsel described the documents as "it's all from PACER," and "there's just a slew of information there." *Id.* Defendant objected there was no authentication of the documents from the bankruptcy court:

> I don't see that this order has been signed. Sometimes in bankruptcy court, there are proposed orders, the court looks at them, some of the creditors object, then three months later, there's a completely different order after another conference with the creditors. We don't know that this is a final order, and we don't know if it was modified.

TT Nov. 28, 16:1-10. Defendant also objected that the document had not been marked or introduced in DB's case in chief, instead of being introduced on the third day of trial after DB had rested, to plug an evidentiary gap in the case in chief. TT Nov. 28, 15:19- 15:25; 16:11-16. The trial court took under advisement the "objections to me taking judicial notice of this document." TT Nov. 28, 18-19. Defendant argued that Exhibit K could not be used to prove title to the mortgage, given that DB had the burden of proof on that issue in the case in chief and failed to introduce Exhibit K then. TT Nov. 28, 18:20-19:3.

2. DB Chose Not to Argue Admissibility of Exhibits "I" and K in Closing, conceding the "I" Exhibits Were Not Necessary to its Case and Exhibit K Was Inadmissible.

DB never argued the admissibility of the three "I" Exhibits in its Closing Brief, stating only that the documents were not necessary to its foreclosure case. App. 038 (Rule 52/59 Order p. 4); App. 111 (DB's Post Trial Brief). As to Exhibit K, DB only asked the trial court to take judicial notice of the document App. 134-135 ("Plaintiff asks the court to take judicial notice. . . ").

The trial court's judgment did not address the "I" exhibits, as it reasoned DB's foreclosure claim failed on other grounds. App. 037-38. The trial court noted DB had "requested the court take judicial notice of Exhibit K" at trial. App. 031. It held Exhibit K was not appropriate for judicial notice because the documents represented

the docket and orders of another court, which could be noticed only for the limited purpose of recognizing the judicial act represented by the documents. App. 032.

After trial, DB filed a post-trial motion under Rules 52 and 59 but articulated no arguments in the initial motion about admissibility of the "I" Exhibits or Exhibit K. *See* App. 051 *et seq*. Its reply brief argued for the first time that the "I" exhibits should have been admitted into evidence because they were not hearsay. App. 207. As an alternative, DB asked the trial court to take judicial notice of the "I" exhibits. App. 208.

The trial court found that DB had waived its admissibility arguments regarding the "I" exhibits by failing to timely raise them. Therefore, it considered only judicial notice of the "I" exhibits.

> Plaintiff does not argue in the instant motion itself the bases for admissibility of the "I" exhibits' rather, it argues for admissibility in its reply memorandum. Plaintiff did not identify any other bases for admissibility of the "I" exhibits at trial or in its closing brief, therefore the court only considers whether judicial notice of these exhibits is proper.

A 038 (Order p. 4 n.1)(emphasis added). The trial court concluded its Order by stating: "Plaintiff waived any argument based on the "I" exhibits because it did not provide the proper information for admissibility under M.R. Evid 201 at trial or in closing." App. 041.

DB made no argument in its reply brief about admissibility of Exhibit K, stating only it was "not dispositive" to DB's case, "not central to any determination

of standing," and "peripheral to the issue" of Homecoming's bankruptcy and cessation of operations. App. 204-205. The trial court ultimately decided to judicially notice Exhibit K "for the limited purpose of shedding light on the powers of attorney and not to prove title to the mortgage or possession of the loan." App. 041.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

A. Whether the Trial Court's Entry of Judgment Against DB was Supported by Sound Rationales

B. Whether DB Failed to Prove Ownership of the Kendall Mortgage with Admissible Evidence

C. Whether DB Waived the Issue of Admissibility of Exhibits

SUMMARY OF ARGUMENT

This Court can uphold judgment for any reason, if judgment for the Kendalls and against DB was the right result. *Precise v. Elec. Mut. Liab. Ins. Co.*, 494 A.2d 1375, 1381 (Me. 1985).

DB brought two prior foreclosure actions against the Kendalls, in 2010 and 2013, but abandoned them due to inability to prove title to the mortgage. After a delay of three years from the second dismissal in 2014, DB attempted to solve its problem of title to the mortgage through its agent and servicer, Ocwen, and Ocwen's use of an expired and unlawful power of attorney. Ocwen was previously sanctioned for similar conduct by Maine's Attorney General in a Consent Agreement signed on

July 23, 2019. Before trial, DB knew or should have known that it could not prove title to the mortgage. Yet it chose to proceed through a full trial.

The trial court had discretion and authority to enter judgment for the Kendalls due to DB's lack of good faith in this litigation; DB's lack of any viable claim against the Kendalls on the note due to expiration of the statute of limitations; and the burden and expense imposed on the Kendalls and the trial court by multiple, fruitless attempts at foreclosure.

The trial court's entry of judgment was also appropriate because DB made a colorable claim of right to the mortgage through the 2013 POA and the 2017 Quitclaim Assignment, sufficient to establish standing. This *de facto* finding of standing satisfied the standing test established in Section 6321, *Bank of Am. v. Cloutier*, and *Greenleaf I*. Thorough consideration of all the evidence-- particularly in the context of the bankruptcy evidence—led the trial court to conclude that DB failed to prove ownership of the mortgage on the merits, to a more probable than not standard.

No compelling evidence justifies overturning the trial court's factual finding that DB ultimately failed to prove ownership of the Kendall mortgage. All the evidence adduced at trial supported the trial court's finding that Ocwen had no authority to execute the 2017 Quitclaim Assignment because the 2013 POA it relied

on had expired and the 2017 Quitclaim Assignment conveyed nothing because Homecomings no longer owned the Kendall mortgage, or any mortgage, by 2017.

DB lost at trial due to its failure to authenticate, except from hearsay, and admit necessary evidence. It cannot use this appeal to admit evidence for which it failed to lay an evidentiary foundation at trial, and it cannot make arguments about admissibility on appeal that it waived below.

ARGUMENT

A. The Trial Court's Entry of Judgment Against DB Was Supported by Sound Rationales

1. Standard of Review.

This Court will uphold judgment when judgment is appropriate, based on rationales not articulated by the trial court. *Precise*, 494 A.2d at 1381 (Me. 1985).

2. The trial court had discretion pursuant to *Finch* and 14 M.R.S. Section 6113 to enter judgment against DB based on DB's dilatory tactics prior to filing suit; its two prior failed attempts to foreclose; and DB's conduct in the litigation.

DB's agent and servicer, Ocwen, waited years after the 2010 *Saunders* and 2014 *Greenleaf I* decisions and its two failed foreclosure attempts, to take any action against the Kendalls. In 2017 DB and Ocwen attempted to "solve" the mortgage title problem for the 2017 foreclosure action by unlawfully relying on an expired 2013 POA (App. 222) as authority to execute a fictitious or void 2017 "Quitclaim

Assignment" (App. 109), in which Ocwen, as the agent of a defunct Homecomings purported to assign the mortgage to DB. App. 029.

a. DB, through its agent Ocwen, attempted to prove title to the mortgage using an unlawful quitclaim assignment after the State of Maine found Ocwen's prior, similar conduct to be false, deceptive, or misleading.

Ocwen and DB knew this practice was improper. The evidence in the case showed that DB, acting through Ocwen, was relying on the same type of 'zombie' assignment that was deemed unlawful in the 2019 Consent Agreement. In both instances, Ocwen, purporting to act as an "Attorney in Fact" for a corporation that no longer existed, executed an assignment to try an end run around the *Saunders* and *Greenleaf* rulings, which had voided the effectiveness of the earlier 2010 MERS assignment.

Before trial, the State of Maine, with Ocwen's consent, found Ocwen's prior, similar conduct to be false, deceptive, or misleading conduct by a debt collector under 32 M.R.S. Sec. 11013(2). App. 250. The conduct dated back to 2014 and was the subject of Consent Agreements in other jurisdictions going back to 2014. App. 247-48. Based on Ocwen's signature on the Consent decree, and DB's use of Ocwen personnel to present its foreclosure case in this trial, it was clear that DB knew it was seeking to admit invalid documents, and that using them was a false, deceptive, or misleading practice. The court was well within its discretion to find that improper

conduct was occurring in this case, and to enter judgment for defendants. *Finch v. U.S. Bank, N.A.*, 2024 ME 2, ¶ 47, 307 A.3d 1049.

After a three year delay following its second failed foreclosure attempt, DB failed to show up to court for the third attempt with necessary documents and witnesses to prove it held title to the mortgage. DB's dilatory tactics, disorganization, and failure to follow the rules of evidence were an additional reason justifying judgment for the Kendalls. *United States Bank v. Sawyer*, 2014 ME 81, ¶ 14, 95 A.3d 608 (citing *Bartlett*, 2014 ME 37, ¶ 25, 87 A.3d 741). DB's trial in this case was a failed "third strike" at proving the elements of foreclosure.

b. Before trial, DB knew or should have known it could not prove title to the mortgage. Its sole basis for judgment was the note, yet DB's dilatory tactics allowed the statute of limitations on the note to expire before trial.

When DB elected to file suit on December 8, 2017, without title to the mortgage, the die was cast. Without the ability to prove ownership of the mortgage, DB's only available action against the Kendalls was an action on the note. Such an action is barred by the applicable six-year statute of limitations for civil actions. 14 M.R.S. §752. Yet the date of filing was more than six years after default was first declared *via* the February 1, 2010, default notice. DB testified no payments were made after that default letter. App. 226 (default letter); TT Nov. 15, 75:3-6.

During the proceedings below the Kendalls moved for summary judgment on the statute of limitations issue, and then for judgment as a matter of law on the same

issue after developing the evidence at trial. App 167, 172. Justice Horton's October 4, 2019, Summary Judgment Order, was referenced in the Motion for Judgment as a Matter of Law and attached to the Motion as Exhibit I; it is App 182-185.

The trial court's summary judgment decision reserved judgment on the issue of whether *Pushard v. Bank of America* justified judgment in favor of Defendants. *Pushard* recognized that a "unitary obligation" occurs after default, when a bank accelerates payment on the note, and converts periodic payment obligations into a "unitary obligation." *Pushard v. Bank of America, N.A.*, 2017 ME 230, ¶ 32, 175 A.3d 103. The court held that *Pushard* "could mean that the first acceleration of the debt in 2010 created a unitary obligation which would indicate that the subsequent notices of default and subsequent accelerations were surplus or null. That question need not be decided here." App 185.

The bank's cause of action on the note accrued at the time it suffered an injury, defined in contract law as the moment the contract was breached. *Johnston v. Dow & Coulombe Inc.*, 686 A.2d 1064, 1065-66 (Me.1996) ("The general test for determining when a cause of action accrues is when a plaintiff received a judicially recognizable injury."); *Burke v. Hamilton Beach Div., Scovill Mfg. Co.*, 424 A.2d 145, 149 (Me.1981)(in contract, injury occurs at the moment of breach). A promissory note is a contract to which basic principles of contract law apply.

QAD Investors, Inc. v. Kelly, 2001 ME 116, ¶ 13, 776 A.2d 1244, 1248; *Briggs v. Briggs,* 1998 ME 120, ¶ 6, 711 A.2d 1286, 1288.

Acceleration of a promissory note is an unequivocal indication that breach or default of the note has occurred and that the cause of action has accrued. *See, e.g., inter alia, Holy Cross Church of God in Christ v. Wolf,* 44 S.W.3d 562, 44 Tex.Sup.Ct.J. 605 (Tex. 2001) ("[A]bsent evidence of abandonment or a contrary agreement between the parties, a clear and unequivocal notice of intent to accelerate and a notice of acceleration is enough to conclusively establish acceleration and therefore accrual [of the cause of action.]") Filing of a suit for foreclosure is clear indication that default has occurred and the note has been accelerated. *Pushard,* 2017 ME 230, ¶ 32 (acceleration creates a 'unitary obligation' starting the SOL running).

The bank admitted at trial there was no evidence the note's acceleration was ever rescinded subsequent to its acceleration in 2010. TT Nov. 15, 11:4-21. Mr. Kendall also confirmed this in his testimony. TT Nov. 15, 75:3-6 . As a result of the evidence proving the statute of limitations on the note had expired and DB had failed to prove ownership of the mortgage, the court was compelled to enter judgement for the Kendalls, a point the Kendalls argued in their post-trial Motion for Judgment as a Matter of Law and Incorporated Closing Argument. App. 172-73. The trial court did not err by entering judgment for the Kendalls to prevent DB from bringing repeated failing foreclosure actions. *See Finch,* 2024 ME 2, ¶ 47.

c. 14 M.R.S. 6113 and the requirement of good faith in foreclosure actions support affirmation of the judgment.

This Court has recognized that trial courts are empowered by 14 M.R.S. Section 6113 to dismiss foreclosure actions with prejudice as a consequence of lenders' and servicers' failure to act in good faith. *Finch*, 2024 ME 2, ¶ 47. The *Finch* Court specifically envisioned dismissal with prejudice as a sanction for "abusive foreclosure practices," including bringing "repeated failed foreclosure actions." *Id.*

Maine's federal district court dismissed a foreclosure case with prejudice for similar reasons, when the foreclosing entity failed to prove it owned the mortgage despite "adequate opportunities—including at a trial" and despite being "on notice at the trial and from my January 7, 2020, Order that its evidence was falling short." *Carrington Mortg. Servs. LLC v. Gionest*, No. 2:16-cv-00534-NT, 2020 U.S. Dist. LEXIS 47781, at *10-11, 2020 WL 1303554 (D. Me. Mar. 19, 2020). Similar to DB's knowing use of false, deceptive, or misleading documents without legal validity, the foreclosing entity in Carrington "misrepresented the evidence that was introduced at trial." *Id.* Just like DB, the foreclosing entity in Carrington "could have attempted to reopen the evidence to introduce documents or testimony that proved that it owned the mortgage. It did not do so." *Id.* In the instant case, the trial was held over three non-consecutive days giving DB opportunity to provide

additional foundation for Exhibits K and "I" or call additional witnesses. As in *Carrington*, DB is not entitled to "another bite at the apple." *Id.*

Fairly benign dilatory practices, such as repeated failures to attend or participate meaningfully in mediation, have been affirmed as grounds for dismissal with prejudice in Maine foreclosure actions. *Sawyer*, 2014 ME 81, ¶ 14 (citing *Bartlett*, 2014 ME 37, ¶ 25, 87 A.3d 741). DB's dilatory and misleading conduct in this case warranted judgment for the Kendalls as a sanction.

d. The principles of Claim Preclusion / Res Judicata support affirmation of the judgment.

Claim preclusion applies "once a valid final judgment has been entered" to prohibit "relitigation of an entire cause of action between the same parties." *Beegan v. Schmidt*, 451 A.2d 642, 643-44 (Me. 1982). As this Court noted in *Finch*, "the touchstone of the *res judicata* doctrine is fairness" to litigants. *Finch*, ¶ 50. Another concern is judicial economy. *Tungate v. Gardner*, 2002 ME 85, ¶ 4, 797 A.2d 738.

In this case, after more than thirteen years of legal wrangling, DB attempted to present evidence on all the requisite elements of a foreclosure action over the course of three trial days. The Kendalls defended, at significant expense and burden to them. DB chose to proceed all the way through trial knowing that ownership of the mortgage would be a significant issue-- it had dismissed two prior foreclosure attempts due to its inability to prove ownership. Given the procedural posture of the case and the absence of admissible evidence at trial, the trial court's judgment in

favor of the Kendalls was within its discretion. Future actions, purporting to give DB yet more bites at the apple, would be grossly unfair, oppressive, and a waste of judicial resources.

B. DB Had Standing to Bring the Foreclosure Action But Failed to Prove Its Ownership of the Kendall Mortgage Through Admissible Evidence at Trial.

1. DB, as possessor of the note and holder of a potentially valid quitclaim assignment, had a colorable claim of right sufficient to establish standing.

As a threshold matter, DB had standing to bring this action. The Complaint asserts colorable claims of right in both the note and the mortgage. "Standing requires that the plaintiff have a minimum legal interest in both the note and the mortgage to *seek* a foreclosure, including ownership of the mortgage." *Greenleaf*, 2014 ME 89, ¶ 22 n.13(emphasis in the original).

Standing to bring suit is not the same as a finding of ownership in the note and mortgage after a full evidentiary hearing. "The requirement of proof on the merits instead regards what evidentiary burden the plaintiff must satisfy to *obtain* a foreclosure judgment once the plaintiff's standing has been established." *Greenleaf*, 2014 ME 89, ¶ 22 n.13(emphasis in the original).

This distinction comes from the plain language of the foreclosure statute, which "creates two requirements": to "produce evidence of various documents and transactions" and to "certify proof of ownership" of the note and mortgage. *Bank of*

Am. v. Cloutier, 2013 ME 17, ¶ 13, 61 A.3d 1242. Standing is controlled by the first sentence of Section 6321, which states that "*any person claiming under the mortgagee*" may bring a foreclosure action. *Id.* ¶ 15(emphasis in original). The "proof of ownership" language in the third paragraph of Section 6321 addresses the burden of proof "that an entity with standing must satisfy to maintain an action." *Id.*

As this Court explained in *Greenleaf I*, "[a]lthough the documentation considered for each issue may be the same, the process of review of that documentation is distinct." *Greenleaf*, 2014 ME 89, ¶ 22 n.13. The trial court below properly went through a similar two-step process.

First, DB established its standing as a person "claiming under the mortgagee" by introducing certain documents into evidence-- the original mortgage to Homecomings (App. 082); the 2013 POA form from twelve entities, including Homecomings Financial LLC, to Ocwen (App. 222); and the 2017 Homecomings Financial LLC Quitclaim Assignment to DB (App. 109). As the trial court noted: "Taken together, the exhibits appear to grant Ocwen Loan Servicing LLC the right to assign the Kendall's mortgage to Plaintiff on behalf of Homecomings Financial, LLC." App. 029 (Judgment p. 40). This *de facto* finding of standing, despite the trial court's somewhat confusing rationale, was properly based on "evidence of various documents" and satisfied the standing test established in Section 6321, *Cloutier*, and *Greenleaf I*. It cannot be disturbed by this Court.

2. DB failed to meet its burden on the merits of the case, to prove through admissible evidence that it actually owned the mortgage.

Scrutiny of the admitted evidence outside the mortgage documents, particularly of Homecomings' bankruptcy, led the trial court to conclude, as a factual matter, that DB failed to sustain its burden to prove it owned the mortgage.

> "[T]he court was not presented with sufficient evidence to persuade the court that it is more likely than not that Homecomings Financial, LLC owned the mortgage at the time of the bankruptcy or the time of the quitclaim assignment. The evidence of ownership of the mortgage leads the court to speculate as to how, if at all, Plaintiff Deutsche Bank Trust Company Americas came to be the owner of the Kendall mortgage."

App. 33-34 (Judgment pp. 8-9).

Although DB produced documents that on their face appeared to show a potential chain of title in the mortgage, an evidence based "process of review" for those documents—considered in the context of the bankruptcy evidence—led the trial court to conclude that DB failed to prove its case on the merits. The fact to be proven—proof of ownership—is exactly the proof "that an entity with standing must satisfy to maintain an action." *Cloutier*, 2013 ME 17, ¶ 15. The burden of proof applied by the trial court—a more likely than not standard as to proof of mortgage ownership—is the same standard required for proof on the merits in any civil action. *Guardianship of Chamberlain*, 2015 ME 76, ¶ 22, 118 A.3d 229. The trial court's decision, after three days of trial, was a decision on the merits.

DB concedes it had standing. Appellant's Br. at 35. The relief it requests—remand for entry of judgment in its favor—presupposes an entry of judgment on the merits. Appellant's Br. At 35. DB's concession that it had standing but lost on the merits reflects the realities of the evidence put on at trial.

C. There is No Basis to Overturn the Trial Court's Finding That the Bank Failed to Prove Ownership of the Mortgage.

1. Standard of review

This Court "will not vacate a trial court's determination that a party failed to carry that party's burden of proof *unless the evidence compelled a contrary finding*." *Thompson v. Pendleton*, 1997 ME 127, par. 11, 697 A.2d 56 (emphasis added). This court reviews the trial court's factual findings in a foreclosure action for clear error. *Wilmington Trust, N.A. v. Berry*, 2020 ME 95, ¶ 15, 237 A.3d 167. The party with the burden of proof at trial must establish on appeal "that contrary findings were compelled by the evidence." *Id.*

2. DB produced no admissible evidence that Homecomings still owned the Kendall mortgage in 2017, at the time it was allegedly assigned by the 2017 Quitclaim Assignment (Exh. C-2).

A quitclaim deed assigns property only to the extent the property is owned by the assignor. 33 MRS 161; *United States Bank, N.A. Beedle*, 2020 ME 84, ¶ 11, 286 A.3d 433. "A quitclaim deed is a nullity when it purports to convey real property not then owned by the purported grantor." *Deutsche Bank Nat'l Tr. Co. v. Wilk*, 2013 ME 79, ¶ 12, 76 A.3d 363, 367.

Homecomings could only convey the Kendall mortgage to DB through the 2017 Quitclaim Assignment if it proved ownership of the mortgage in 2017. All the evidence supported the trial court's holding that it could not find Homecomings "still had ownership rights in the Kendall mortgage in particular or any mortgage by the time Ocwen purported to assign it to Plaintiff on Homecoming's behalf in 2017." App. 31 (Judgment p. 6). The trial court "simply does not know the ownership of the mortgage coming out of the bankruptcy." *Id.*

DB produced no admissible evidence that Homecomings assigned or sold the Kendall's mortgage to Ocwen, or anyone else, as part of Homecoming's 2012 bankruptcy. Under the business records exception to Maine Rule of Evidence 803(6) and *Bank of New York Mellon v. Shone*, DB was required to lay a foundation for this crucial fact, possibly by a business record DB had: a) integrated into its own records, b) verified or otherwise established as accurate; and c) relied on in the conduct of its operations. 2020 ME 122 ¶ 1, 239 A.3d 671. Without these foundational pre-requisites, DB could not adduce evidence to establish what happened to the Kendall mortgage coming out of Homecoming's bankruptcy. Its attempted reliance on Exhibits "I" and K is an improper attempt to satisfy its burden of proof through non-admissible, unauthenticated hearsay.

DB's arguments on page 26-28 of its brief, on Homecomings' purported ability to assign the mortgage in 2017, are unsupported by the cases it cites. In

Lowell there was a 2012 assignment from MERS as nominee of the original mortgagee Wachovia, to JP Morgan, the foreclosing entity. *JP Morgan Chase Bank, N.A. v. Lowell*, 2017 ME 32, ¶ 2, n.2, 156 A.3d 727. As in this case, that 2012 assignment became ineffective after this Court's decision in *Greenleaf I*. After that ineffective assignment, Wachovia merged with Wells Fargo in 2011. Subsequent to the merger Wells Fargo executed a quitclaim assignment to JP Morgan. The quitclaim assignment gave JP Morgan title to the mortgage, despite the fact that the post-merger entity, Wells Fargo, gave the assignment and not the original mortgagee, Wachovia.

DB appears to contend that if the post-merger entity Wells Fargo had authority to assign a mortgage originally given to a different, pre-merger entity, then Homecomings had the power to assign a mortgage it originally owned, even after it had gone through bankruptcy and dissolved. But bankruptcy is factually different from merger.

As this Court explained in the foreclosure case *United States Bank N.A. v. Beedle*, title to a bank's assets, such as a mortgage, passes automatically from the pre-merger to the post-merger entity by operation of federal and state banking law, obviating the need for a foreclosing bank to produce evidence on that point. 2020 ME 84 ¶ 16, 236 A.3d 433. DB has not and cannot cite a similar law that applies here.

The fact that both this case and the *Lowell* case reference a document titled 'Quitclaim Assignment' is irrelevant. The issue is whether DB called all necessary witnesses, laid a foundation for, and authenticated the necessary documents to prove Homecoming's ownership interest in the Kendall mortgage in 2017. It did not.

The bank's reliance on *Deutsche Bank Trust Company Americas v. Clifford* is also misplaced. 2021 ME 11, 246 A. 3d 597. The *Clifford* case did not address the issues this Court considers here on appeal, because they were not preserved for review. Although *Clifford* involved a foreclosure that relied on a similar power of attorney and quitclaim assignment as in this case, it focused solely on whether DB laid a sufficient foundation for admissibility of the POA and quitclaim deeds as business records. *Id.* ¶ 12, n.6. There was no similarity between the foundation laid in *Clifford* and the lack of foundation in this case.

This Court in *Clifford* did not consider the issues in this appeal—whether Homecomings' bankruptcy invalidated the 2013 POA and whether Homecomings owned anything to convey in 2017. Those arguments were not preserved in *Clifford. Id.* ¶ 7 "Clifford's remaining arguments about the power of attorney are waived because he failed to make those arguments at the trial level." *Id.* ¶ 12, n.6.

Monzel is an unpublished Mem. Dec. decision. Its only apparent similarity to this case is the presence of DB as a party. *Deutsche Bank Nat'l Trust Co. v. Monzel,* No. OXF-17-181, 2017 Me. Unpub. LEXIS 110 (Me. Dec. 7, 2017). The Law

Court's decision does not have precedential value and does not reference any specific issues on appeal, instead relying on "the deferential standards of review that we apply on appeal" in holding the evidence was sufficient to support the trial court's judgment. *Id.* At *1. Rather than supporting DB's position, *Monzel* simply reinforces that DB's challenge to the trial court's findings of fact after a full trial must fail, when there was sufficient evidence to support the trial court's findings.

This case is on point with *Wilk*, in which DB's foreclosure failed because it relied on a quitclaim assignment that assigned nothing. *Wilk*, 2013 ME 79, ¶ 12. In *Wilk*, the assignor OneWest executed a quitclaim assignment to DB two weeks before OneWest acquired the mortgage. *Id.* Because OneWest did not own the mortgage at the time it executed the quitclaim assignment, the document assigned nothing. The same finding is required here.

The 2017 Quitclaim Assignment in this case was the sole avenue pursued by DB to prove ownership of the Kendall mortgage at trial. DB bore the burden to prove Homecomings owned the mortgage it purported to convey to DB in 2017. *See Wilk*, 2013 ME 79, ¶ 12. No compelling evidence supports overturning the factfinder's discretion and considered judgment.

3. Ocwen had no right to execute the 2017 Quitclaim Assignment (Exh. C-2), as an agent of Homecomings because Homecomings no longer existed.

The trial court did not err in holding that the powers Homecomings gave Ocwen in the 2013 Power of Attorney had vanished by 2017. "When a principal

that is not an individual ceases to exist or commences a process that will lead to cessation of its existence. . . the agent's actual authority terminates except as provided by law." *Restatement (Third) of Agency* § 3.07(4)(Am. Law. Inst. 2006).

The law of Delaware, Homecomings' state of organization, governs the extent of any authority to act on behalf of Homecomings while it wound down its corporate existence. *Id.* cmt. c; Plf.'s Exh. A-2 (stating Homecomings was organized under Delaware law). Delaware's Limited Liability Company Act fixes the filing of a certificate of cancellation as the outer time limit for an agent's authority to transfer the dissolving LLC's property. Del. Code Ann. Tit 6 § 18-803(b)(West 2025). All the evidence presented at trial pointed to Homecomings' complete liquidation and extinction, and cancellation of its entire business by, at the latest, February 26, 2014, when the parties stipulated Homecomings right to do business had expired in Maine. There was no evidence offered whatsoever to support any alternative finding of fact. *See* App. 030.

The factfinder may draw all reasonable inferences from the evidence presented at trial, including circumstantial evidence. *Allen v. Rae*, 2019 ME 53, ¶ 7, 206 A.3d 902. This Court "will affirm those findings if there is competent evidence in the record to support them, even if the evidence might support alternative findings of fact." *Id.* There was competent evidence to support the trial court's finding that Ocwen had no authority to act as Homecomings' agent in 2017.

Maine law follows black letter law on the termination of an agent's authority. As this Court has explained, a defining element of agency law is that the agent must be continuously subjected to the will of the principal. *Page v. Boone's Transp.*, 1998 ME 105, ¶ 5, 710 A.2d 256 (citing Restatement (Second) of Agency § 1.1 (1958)). Thus, when the principal no longer exists, the agent can no longer act under Maine law. All the cases cited by DB to the contrary predate 1960, and several date to before Maine's statehood. The trial court did not err in relying on current black-letter law to hold that Ocwen's powers under the 2013 POA terminated when Homecomings filed its cancellation of business in Maine.

4. Homecomings' "intent" that the 2013 POA survive its dissolution is unproven and irrelevant.

DB cannot point to any evidence at trial to support its assertion on appeal that "Homecomings intended the Limited Power of Attorney to survive its dissolution." Appellant's Br. At 10. Its only evidentiary support is Exhibit K, an unauthenticated 532 page order of a bankruptcy court in the Southern District of New York, taken from the internet without any certification, or any evidence of whether subsequent orders affirmed, modified or rescinded this order.[2] The court ultimately took judicial notice of it only "for the limited purpose of shedding light on the powers of attorney and not to prove title to the mortgage. . ." App. 041. As discussed in depth in Section

[2] Ex K did not appear to be listed in DB's Supplemental Exhibit List dated September 26, 2023.

D.4, *infra*, Exhibit K cannot be used for the truth of the matters allegedly asserted in it. Judicial notice is not a means to import disputed evidence from a prior, separate proceeding without evidentiary safeguards such as authentication, hearsay analysis, and cross-examination. *Cabral v. L'Heureux*, 2017 ME 50, ¶ 11, 157 A.3d 795.

Even if Exhibit K had been admitted for the truth of the matter asserted (it was not), the brief quotations from the document provided by DB on pages 21-22 of its brief make no mention of any intent for the POA to survive Homecoming's dissolution.

DB's argument also fails as a matter of law. In *Matter of Maplewood Poultry Company,* Maine's Bankruptcy Court rejected an argument that the parties' intent controlled whether a power of attorney survived Chapter 11 bankruptcy. 2 B.R. 550 (Bankr. D. Me. 1980). Although "[i]t seems clear that the parties intended" one party could use the power of attorney granted it-- to cancel insurance policies in case of default on payment of premiums-- the defaulting party's Chapter 11 bankruptcy rendered the power of attorney invalid. *Id.* at 553. Citing to Supreme Court precedent, the *Maplewood* court explained that "contracts of agency are revoked upon bankruptcy" and an irrevocable power of attorney is only viable "if coupled with an interest in the subject property superior to that of the trustee in bankruptcy." *Id*; see also *In re Columbia Shoe Co.*, 289 F. 465, 467 (2nd Cir. 1923)(automatically revoking power of attorney by operation of bankruptcy law). As discussed in

Section B.5 below, Ocwen had no interest in the subject matter of the 2013 POA. Any intent that the 2013 POA survive Homecomings' dissolution was irrelevant, just as intent was irrelevant to the outcome in *Maplewood Poultry Company*.

5. The 2013 POA granted Ocwen, as servicer, the right to transfer Homecomings' mortgages, but not an interest *in* the mortgages.

Powers of attorney are revoked upon bankruptcy of the principal, unless an irrevocable power of attorney is "coupled with an interest in the subject property superior to that of the trustee in bankruptcy." *Matter of Maplewood Poultry Co.*, 2 B.R. 550, 553 (Br. Ct. Me. 1980). The 2013 POA gave Ocwen only the right to *transfer* Homecomings' mortgages. This right to transfer was not an interest *in* the mortgages. *In re Canuso*. 2021 WL 2144197, *8., No.: 18-23619-ABA (Bankr. D. N.J. May 26, 2021)(holding that a power of attorney granting the right to transfer shares did not survive bankruptcy because "[a] right to control transfer of the shares is not an interest *in* the shares."). DB has cited no case to the contrary. Because Ocwen had no interest in the mortgages that were the subject of the POA, the POA ceased to be effective after Homecoming's bankruptcy and dissolution.

6. DB failed to prove the 2013 POA and the 2017 Quitclaim Assignment affected the Kendall mortgage.

DB's burden at trial included proof the Kendall mortgage was covered by the 2013 POA and 2017 Quitclaim Assignment. *Carrington Mortg. Servs., LLC v. Gionest*, 2020 U.S. Dist. LEXIS 47781 at *7-8 (D. Me. March 19, 2020). Even if

DB could prove the documents were valid to transfer some unidentified group of mortgages (a burden they failed to meet), that proof would be meaningless without proof the documents were valid to assign the Kendall mortgage. DB failed to authenticate and lay a foundation for the necessary records to prove this.

The 2013 POA to Ocwen, dated November 15, 2013, and purportedly effective November 1, 2013, was from twelve large mortgage companies controlling trillions of dollars in completely unidentified assets all over the country. App. 222. It appointed Ocwen Attorney-In-Fact "in connection with mortgage loans and mortgage loan servicing rights purchased by Ocwen pursuant to the Asset Purchase Agreement." App. 223. DB failed to lay an evidentiary foundation for any documents explaining the Asset Purchase Agreement or proving the Kendall mortgage was among those Ocwen was given the power to assign. Exhibit K, containing bankruptcy documents purportedly relevant to the Asset Purchase Agreement was not admitted in evidence and cannot be used for the truth of the matter asserted. *See* Section D.4 *infra.* The "I" Exhibits, containing a Pooling and Servicing Agreement allegedly covering the Kendall mortgage, were not admitted in evidence and DB waived their admissibility. *See* Section D.4 *infra*.

Without documents proving the 2013 POA governed the Kendall mortgage, DB could not prove the 2017 Quitclaim Assignment, executed under the 2013 POA's authority, was effective to transfer the Kendall mortgage. In *Gionest*, a

foreclosing mortgagee attempted to prove title to the mortgage through a power of attorney authorizing the agent to act "in connection with Ginnie Mae-owned mortgage pooled loans described in that certain Contract Number DU100G-14-C-01." 2020 U.S. Dist. LEXIS 47781 at *7-8, 2019 WL 1373647 (D. Me. March 19, 2020). The mortgagee "failed to present any evidence demonstrating that Ms. Haynes's loan was covered by that contract and, thus, failed to establish that the Limited Power of Attorney was in any way connected to the quitclaim assignment or this case."

Due to that failure, the *Gionest* power of attorney could not be used to prove that the agent under the power of attorney was authorized to assign the mortgage at issue in that case. DB's case fails for the exact same reasons.

7. Beneficial ownership of the mortgage is irrelevant to DB's failure to prove ownership of the mortgage for foreclosure.

Under established precedent, beneficial ownership of a mortgage is insufficient to support proof of ownership of the mortgage. *Beal Bank USA v. New Century Mortg. Corp.*, 2019 ME 150, ¶¶ 12, 15, 217 A.3d 731 (rejecting Beal Bank's argument that an entity with equitable interest in the mortgage because it holds the note, has ownership and can assign title in the mortgage). DB's attempt to admit and rely upon evidence of beneficial ownership allegedly in the "I" exhibits only

underscores the bank's own lack of faith that the 2017 Quitclaim Assignment transferred title to the mortgage.

During the trial and in closing arguments, DB did not explain how evidence of beneficial ownership was relevant to its right to foreclosure. DB admitted to the trial court that the "I" exhibits were not necessary to its foreclosure case. App. 038. The trial court rightly rejected the bank's proposed findings of fact based on the "I" exhibits and relating to beneficial ownership, for that reason. *Id.*

The trial court did go on to consider whether it could take judicial notice of the "I" exhibits but determined it could not, because the facts in the exhibits are subject to reasonable dispute. App. 039. After that clear and unambiguous ruling, any further consideration of the "I" exhibits was *dicta* by the trial court. In *dicta*, the trial court noted that even if the "I" exhibits were considered for their truth, they did not establish DB's beneficial interest in the Kendall mortgage dating to 2007.

DB attempts to use the *dicta* described above in the trial court's Rule 52/59 Order to sow confusion and generate an issue for appeal where none exists. DB argues the trial court erred because it conflated beneficial interest and title ownership of the mortgage, using DB's failure to prove beneficial interest as evidence of failure to prove title ownership. Appellant's Br. P. 22 (referencing App. 037).

The trial court did no such thing. Its ultimate conclusion was that DB proved neither beneficial interest nor title ownership to the mortgage. The trial court was

not convinced that beneficial ownership of the mortgage passed from Homecomings to Residential Accredit Loans, Inc. and then to DB's trust in 2007, and it was not convinced that "Homecomings Financial, LLC, despite bankruptcy, still had some interest in the mortgage to convey in 2017." App. 040. The trial court was not confused and did not err when it found DB had proven nothing.

D. DB Failed to Preserve the Admissibility of the "I" Exhibits and Exhibit K as an Issue for Appeal; Even If DB Preserved the Issue, the Exhibits Are Unauthenticated Hearsay.

1. Standard of review

Failure to object to the exclusion of evidence at trial means the party has not preserved this issue for appellate review. *Anderson v. O'Roarke*, 2008 ME 42, par. 12-13, 942 A.2d 680. Failing to raise an issue in a posttrial motion likewise results in the issue not being preserved for appeal. *Landmark Realty v. Leasure*, 2004 ME 85, ¶ 10, 853 A.2d 749. This Court does not review unpreserved issues on appeal, absent special circumstances. *Id.*

2. DB waived the issue of admissibility of Exhibits I-1, I-2, I-3, and K

The Kendalls repeatedly objected at trial to admission of Exhibit I-1 at trial as unauthenticated hearsay not falling into the business records hearsay exception. Despite the trial court's warning that DB failed to lay a foundation for the "I" exhibits, DB never called a witness to authenticate or lay a foundation for Exhibits "I" or K. Its closing brief stated only that the "I" exhibits were not necessary to the

case, thereby waiving rights to appeal admissibility. "Irrelevant evidence is not admissible." M.R. Evid. 402 (2025). DB never asked for admission of Exhibit K.

DB argued admissibility of the "I" exhibits only on reply in support of its Rule 52/59 motion. App. 038. An argument raised for the first time in a reply brief is waived. *Bayview Loan Servicing v. Bartlett*, 2014 ME 37, ¶ 24, 87 A.3d 741; *see also* M.R. Civ. P. 7(e)(2025)(reply memorandum "shall be strictly confined to replying to new matter raised in the opposing memorandum"). The trial court did not err in holding DB waived the issue of admissibility below. App. 038 (Order p. 4 n.1).[3] Due to DB's waiver, the trial court never ruled on the admissibility of the "I" exhibits.[4]

DB cannot appeal from an evidentiary ruling that never happened in the trial court record and it cannot make arguments for the first time on appeal. "An appeal is not a new trial." Donald G. Alexander, *Maine Appellate Practice*, § 401(b), p. 236 (6th ed. 2022). DB waived admissibility of the "I" exhibits and Exhibit K in the trial below; this failure waives the issue on appeal. *Brown v. Town of Starks*, 2015 ME 47, ¶ 6, 114 A.3d 1003("In order to preserve an issue for appellate review, a

[3] DB further waived its arguments about admissibility and judicial notice of the "I" exhibits by failing to include selected pages of Exhibit I-1 in the Appendix, for this Court's reference. Although it was not obligated to include the entire voluminous exhibit in the Appendix, it should have included the pages with the information relevant to its argument and briefing. *Your Home, Inc. v. Portland*, 432 A.2d 1250, 1256 (Me. 1981).

[4] DB asserts on page 30 of its brief that the trial court "made a blatant mistake in ruling that the PSA documents are hearsay." The trial court made no ruling on their admissibility. *See* A 038.

party must timely present that issue to the original tribunal; otherwise, the issue is deemed waived.")(emphasis added). DB cannot ask this Court to hold the "I" exhibits admissible, or to consider Exhibit K for the truth of the matter asserted.

3. Even if DB preserved the admissibility issue for appeal, Exhibits I-1, I-2, I-3, and K were inadmissible because they were hearsay and not authenticated.

Exhibit K and the three "I" exhibits are out-of-court statements offered to prove the truth of the matter asserted, and therefore inadmissible hearsay. M.R. Evid. 801(c)(hearsay is an out-of-court statement offered to prove the truth of the matter asserted); M.R. Evid. 802 (hearsay inadmissible unless a hearsay exception applies).

Contrary to DB's contention on page 30 of its brief, the Pooling and Servicing Agreement is not a 'verbal act' falling outside the hearsay rule. Maine law exempts verbal acts from hearsay because they are "not offered for the truth of the matter asserted." *State v. Ellis*, 297 A.2d 91, 93 (Me. 1972). Instead, "the mere fact that the words were uttered is itself a material fact." *Id.* n.1. For contracts, the fact of the utterance "gives rise to legal consequences," for the contracting parties. *United States v. Diaz*, 597 F.3d 56, 65 n.9 (1st Cir. 2010)(citing 5 *Weinstein's Federal Evidence* § 801.11[3], at 801-18-20). Here, DB is offering the "I" exhibits for the truth of statements in them, purportedly as "further evidence of Deutsche Bank's interest as a beneficiary owner of the mortgage." Appellant's Br. at 34. The fact the

words in the agreements were uttered has no legal consequences for DB because it was not a contracting party and did not execute the agreements.

DB also failed to satisfy Maine Rule of Evidence 901(a)'s requirement to prove the "I" exhibits were what DB claimed they were. "A writing ordinarily does not speak for itself. It cannot be assumed that it is in fact what it purports to be..." Richard H. Field, Peter L. Murray, *Maine Evidence* § 901.1 (6th ed. 2007). DB explained only that the "I" exhibits were downloaded from the SEC website, and Exhibit K was from PACER. Exhibit I-1 was unsigned. The lack of a signature is fatal to the authenticity of documents relied on for foreclosure. *See US Bank v. Ibanez*, 941 NE 2d 40, 48 (Mass. 2011)(unexecuted copy of a mortgage loan purchase agreement was not adequate to prove assignment of a mortgage).

Assuming the trial court ruled on the admissibility of Exhibit K and the "I" exhibits (it did not) and DB preserved the issue of their admissibility for appeal (it did not), DB cannot meet its burden to overturn this alleged ruling. As the proponent of evidence not admitted at trial, DB must demonstrate that admission of Exhibit K and the "I" exhibits "was compelled by the evidence." Donald G. Alexander, *Maine Appellate Practice*, § 419(a), p. 267 (6th ed. 2022)(citing *KeyBank National Assoc. v. Estate of Quint*, 2017 ME 237, ¶ 13, 176 A.3d 717). DB adduced no evidence at trial, let alone compelling evidence, to lay a foundation for Exhibit K and the "I" exhibits as business records or authenticate them.

4. The trial court did not abuse its discretion in declining to take judicial notice of the "I" Exhibits for the truth of the matters asserted.

This Court reviews the trial court's decision not to take judicial notice of a document for abuse of discretion. *Seymour v. Seymour*, 2021 ME 60, ¶ 9, 263 A.3d 1079. Judicial notice of information on a website may be solely for the fact the information appears on the website, or for the truth of the matter asserted. *Id.* ¶ 10. The proponent of judicial notice must establish the information is "not reasonably subject to dispute" and must supply "necessary information" about the proposed subject of judicial notice. *Id.* ¶ 11; M.R. Evid. 201(c)(2)(2025).

The First Circuit and this Court prohibit judicial notice of a government website for the truth of the matter asserted, when the subject matter can be reasonably disputed, and the proponent fails to provide any information about it. *Bean Me. Lobster, Inc. v. Monterey Bay Aquarium Found.*, 2024 U.S. Dist. LEXIS 219954 at *17 (D. Me. Dec. 5, 2024)(citing *Torrens v. Lockheed Martin Servs. Group, Inc.*, 396 F.3d 468 (1st Cir. 2005)). *Torrens* explains that Federal Rule of Evidence 201 allows courts to judicially notice the content of government websites that are not subject to reasonable dispute, but the government record "is not relevant for the truth of anything asserted in it…". *Id.* at 473.

A fact is not subject to reasonable dispute when it can "be accurately and readily determined from sources whose accuracy cannot reasonable be questioned." *Cabral*, 2017 ME 50, ¶ 10.

Here, DB's only information about "I" Exhibits was that they came "directly from the SEC website, the EDGAR site." TT Nov. 2: p.188. The trial court did not err in finding this was not enough for judicial notice, because the contents are "subject to reasonable dispute." App. 039. There was no evidence of finality and the documents could have been subsequently amended or modified as part of ongoing proceedings. The Kendalls made the same objection at trial to Exhibit K, which contained unsigned bankruptcy court orders taken from PACER, with no evidence of finality. TT Nov. 28: p. 16.

The documents in the "I" exhibits from the SEC website are similar to documents from a prior court proceeding because they represent filings in a different forum; the bankruptcy order in Exhibit K is from a bankruptcy proceeding in another state. This Court has drawn a clear line of demarcation between "the *fact* that a pleading, docket entry, or order exists in separate proceedings" and "the actual *evidence* submitted in the earlier proceedings." *Cabral*, 2017 ME 50, ¶ 11. The former is a proper subject of judicial notice and the latter is not, because judicial notice cannot be used as a means to wholesale import disputed evidence into a case without evidentiary safeguards such as authentication, hearsay analysis, and cross-examination. *See id.* The trial court did not abuse its discretion in declining to take judicial notice of the "I" exhibits, and in judicially noticing Exhibit K only for the

limited purpose of providing context for the 2013 POA, but not to prove title to the mortgage.

3. CONCLUSION

Because multiple, sound rationales support the trial court's entry of judgment for the Kendalls and because Deutsche Bank failed to meet its burden on the merits of its foreclosure case to prove ownership of the Kendalls and has failed to identify any evidence compelling this Court to overturn the trial court's decision, Defendants respectfully request this Honorable Court AFFIRM the trial court's Judgment in favor of the Kendalls.

February 4, 2025,

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