

2016

Sa Group Properties, Inc., a Minnesota Corporation, Plaintiff and Appellee, v. Highland Marketplace, l.c., a Utah Limited Liability Company; High Noon, l.c. A Utah Limited Liability Company; Solana Beach Holdings, l.c., a Utah Limited Liability Company, Cr v Main-Main, l.p., a Delaware Limited Liability Partnership; Thomas A. Hulbert, and Individual and Bret B. Fox, and Individual, Defendants and Appellants

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

SA GROUP PROPERTIES, INC., a
Minnesota corporation,

Plaintiff and Appellee,

v.

HIGHLAND MARKETPLACE, L.C., a
Utah limited liability company; HIGH
NOON, L.C., a Utah limited liability
company; SOLANA BEACH HOLDINGS,
L.C., a Utah limited liability company;
THOMAS A. HULBERT, an individual;
and BRET B. FOX, an individual,

Defendants and Appellants.

BRIEF OF THE APPELLEE

Case No. 20151046-CA

Appeal from the Fourth Judicial District Court, County of Utah, State of Utah
Before the Honorable James R. Taylor, Case No. 120401312

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JURISDICTIONAL STATEMENT

The Utah Supreme Court has jurisdiction of this proceeding pursuant to Utah Code Ann. § 78A-3-102(3)(j). The Utah Supreme Court transferred this matter to the Utah Court of Appeals pursuant to Utah R. App. P. 42(a). Jurisdiction is also proper pursuant to Utah Code Ann. § 78A-4-103(2)(j).

STATEMENT OF ISSUES AND REVIEW STANDARDS

Issue No. 1: Whether the Trial Court committed clear error in finding that the fair market value of the foreclosed Highland Property (defined below) as of the May 22, 2012 foreclosure date was no greater than \$10,568,000.00 (the opined value by expert testimony), particularly where the Trial Court made this factual determination after weighing the evidence at trial, in which the Trial Court “considered the[] demeanor and credibility” of each expert witness and found that: (1) the valuation of Defendants’ expert appraiser (a) was “artificially inflated”; (b) was “based on unsupported and unreliable facts and data”; (c) used “un-established and unreliable valuation [methods]”; (d) “did not value the Highland Property in its ‘as is’ condition”; and (e) was “less credible than the valuations of [Plaintiff’s experts]”; and (2) the valuation of Plaintiff’s expert was “complete, based upon sound data, and based on established and reliable valuation methodologies.”

Standard of Review: Appeals challenging a district court’s factual findings are reviewed for clear error. *AmericanWest Bank v. Kellin*, 2015 UT App 300, ¶ 12, 364 P.3d 1055.

Issue No. 2: Whether the Trial Court abused its discretion in denying Defendants' March 2014 Second Motion for Leave to Amend (the "Second Motion to Amend"), pursuant to which Defendants first sought to assert counterclaims against Plaintiff, when the Trial Court specifically found that: (1) "Defendants were well aware of the [counterclaims] as early as 2010, as evidenced by the draw request, loan forms, and Hulbert Email . . . well before the case began and the Highland Property was foreclosed"; (2) "The . . . motion to amend relie[d] on draw requests, loan forms, and emails produced by Plaintiff and reviewed by Defendants prior to the first motion to amend being filed"; (3) "The issue of the failed draw requests [was] not new and Defendants acted with unreasonable neglect when the issue was not raised in prior proceedings"; and (4) at the time Defendants filed their Second Motion to Amend, "[e]xpert discovery [was] currently underway . . . [and] significant procedural stages in the litigation process ha[d] been underway."

Standard of Review: The standard of review for the Trial Court's denial of the Second Motion to Amend is abuse of discretion. *See Westley v. Farmer's Ins. Exch.*, 663 P.2d 93, 94 (Utah 1983) ("[W]e are not convinced that the trial court abused its discretion in refusing to grant the requested leave to amend. An amendment would certainly have delayed the trial and the substance of plaintiff's new allegations was known a full year earlier[.]"). Under an abuse of discretion standard, "a district court's ruling will not be reversed unless it was beyond the limits of reasonability or not based on an evaluation of the evidence." *Strohm v. ClearOne Commc'ns, Inc.*, 2013 UT 21, ¶ 52, 308 P.3d 424.

DETERMINATIVE STATUTES AND RULES

Utah Code Ann. § 57-1-32 governs deficiency actions after non-judicial foreclosure of real property. This provision states:

At any time within three months after any sale of property under a trust deed as provided in Sections 57-1-23, 57-1-24, and 57-1-27, an action may be commenced to recover the balance due upon the obligation for which the trust deed was given as security, and in that action the complaint shall set forth the entire amount of the indebtedness that was secured by the trust deed, the amount for which the property was sold, and the fair market value of the property at the date of sale. Before rendering judgment, the court shall find the fair market value of the property at the date of sale. The court may not render judgment for more than the amount by which the amount of the indebtedness with interest, costs, and expenses of sale, including trustee's and attorney's fees, exceeds the fair market value of the property as of the date of the sale. In any action brought under this section, the prevailing party shall be entitled to collect its costs and reasonable attorney fees incurred.

Utah R. Civ. P. 15(a) governs the amendment of pleadings. Rule 15(a) states:

A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 21 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 14 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

STATEMENT OF CASE

A. Nature of the Case

This is a deficiency action after non-judicial foreclosure of real property. Plaintiff is the successor-in-interest to the lender, First Community Bank ("FCB"). Defendants are the borrowers, or guarantors, under a Construction Loan Agreement and related

Promissory Note with FCB.¹ Defendants obtained a construction loan from FCB, the proceeds of which were to be used to develop certain commercial real property located in Highland, Utah (the “Highland Property”).² However, the project stalled, Defendants failed to fully develop the Highland Property project, and Defendants defaulted under their loan and guaranty obligations.³ Thereafter, Plaintiff, as successor, foreclosed on the Highland Property securing the loan.⁴

At the time of the foreclosure, the amount owing to Plaintiff by Defendants was \$14,685,370.37.⁵ At the foreclosure sale, the Highland Property was sold to an independent, third-party purchaser for \$8,565,000.00.⁶ Plaintiff subsequently commenced this deficiency action against Defendants pursuant to Utah Code Ann. § 57-1-32.⁷ Since the commencement of this case, the two core issues have always been (1) the amount of the debt owed by Defendants to Plaintiff at the time of foreclosure (eventually stipulated to by Defendants); and (2) the fair market value of the foreclosed Highland Property as of the foreclosure date.⁸

¹ Record at 3–4, 1386.

² Record at 3–4, 1386.

³ Record at 4–5, 1386–87.

⁴ Record at 5, 1387.

⁵ Record at 1788–90, 3762.

⁶ Record at 5, 1387.

⁷ Record at 1–54.

⁸ Record at 899–902, 1389.

B. Course of Proceedings and Disposition

1. Defendants' Untimely Second Motion for Leave to Amend

Plaintiff commenced this action on August 20, 2012.⁹ After this case had been pending about six months, Plaintiff filed a Motion for Summary Judgment.¹⁰ During the summary judgment hearing, Defendants stipulated to the dismissal of their affirmative defenses.¹¹ At no time during summary judgment proceedings did Defendants raise or hint that they had alleged counterclaims against Plaintiff for the purported failure of FCB to fund certain construction draws.¹² On December 23, 2013—over sixteen months after this case was filed—Defendants filed a motion for leave to amend, pursuant to which Defendants sought the Trial Court's approval to file an amended answer and counterclaim, alleging that FCB failed to fund several draw requests in August of 2010.¹³ On March 5, 2014—five days before the scheduled hearing on the motion, Defendants withdrew their motion because of futility.¹⁴

Thereafter, on March 10, 2014—nineteen months after the commencement of the case and three months after Defendants filed their first motion to amend, Defendants filed their Second Motion to Amend, pursuant to which Defendants sought to (1) re-assert

⁹ Record at 1–54.

¹⁰ Record at 83–84, 1673.

¹¹ Record at 769, 1674.

¹² Record at 1674.

¹³ Record at 903–920, 1674.

¹⁴ Record at 1180–81.

various affirmative defenses that the Trial Court previously dismissed at summary judgment; and (2) assert counterclaims against Plaintiff based on the alleged failure of FCB to fund Draw Request 23.¹⁵

As found by the Trial Court, however, and as evidenced by numerous documents (including documents to be attached to Defendants' proposed Amended Answer and Counterclaim): (1) Defendants had actual knowledge of the facts and circumstances surrounding their alleged counterclaims prior to the commencement of this case; (2) Plaintiff had produced, and Defendants had reviewed, several key documents evidencing Defendants' alleged counterclaims several months prior to Defendants filing their first motion for leave to amend, much less their Second Motion to Amend; and (3) Defendants unduly delayed in bringing the alleged claims.¹⁶ Accordingly, on May 20, 2014, the Trial Court entered an Order denying Defendants' untimely Second Motion to Amend.¹⁷

2. The Trial

The Trial Court held a three-day bench trial in this case on May 26-27 and August 12, 2015.¹⁸ By stipulation of the parties, the only issue at trial concerned the fair market value of the foreclosed Highland Property as of the foreclosure date. The Trial Court heard three days of testimony from three separate expert appraisers and considered the

¹⁵ Record at 1280–1301.

¹⁶ Record at 1676–80.

¹⁷ Record at 1673–81.

¹⁸ Record at 3154–56, 3739–40.

demeanor and credibility of each appraiser witness.¹⁹ On August 24, 2015, the Trial Court entered detailed findings of fact and conclusions of law regarding the three appraisers and the fair market value of the Highland Property as of the foreclosure date.²⁰

The Trial Court found and concluded that: (1) the expert opinion of Plaintiff's appraiser, Kerry Jorgensen, was complete, reliable and sound, and the Trial Court adopted Mr. Jorgensen's opinion as the fair market value of the Highland Property as of the foreclosure date; (2) the expert opinion of Plaintiff's second appraiser was less reliable than that of Mr. Jorgensen, but more reliable than the opinion of Defendants' appraiser; and (3) the expert opinion of Defendants' appraiser was biased, not reliable and contained numerous, fundamental flaws in methodology and in facts and data used to calculate value, as set forth in greater detail below.²¹ Thereafter, the Trial Court entered a deficiency Judgment against Defendants on December 2, 2015.²² Defendants filed their Notice of Appeal on December 10, 2015.²³

STATEMENT OF FACTS RELEVANT FOR ISSUES ON REVIEW

The Loan to Defendants

On September 5, 2007, Defendants Highland Marketplace, LC, High Noon, LC and Solana Beach Holdings, LC entered into various loan documents with FCB that

¹⁹ Record at 3740–41.

²⁰ Record at 3740–3763.

²¹ Record at 3740–3763.

²² Record at 4150–52.

²³ Record at 4168–69.

governed the terms of a \$28,000,000 Promissory Note (the “Loan”), with an original maturity date of September 5, 2008.²⁴

The Loan was secured by (1) Commercial Guaranty Agreements executed by Defendants Thomas Hulbert and Bret Fox; and (2) Deeds of Trust (together, the “Trust Deeds”) granting FCB a first position deed of trust lien on the Highland Property.²⁵ Pursuant to various extensions of the Loan granted by FCB, the Loan amount was reduced to \$15,479,410.00, and the Loan’s maturity was extended to January 5, 2011.²⁶

Defendants’ Default and the Receivership Action

On January 5, 2011, Defendants’ Loan matured, and Defendants failed to satisfy their obligations under the Loan.²⁷ On June 23, 2011, the trustee for U.S. Bank National Association (“U.S. Bank”), as successor-in-interest to FCB,²⁸ recorded a Notice of Default relating to the Loan and Highland Property, to which Notice of Default Defendants did not object.²⁹

²⁴ Record at 3, 1386.

²⁵ Record at 3–4.

²⁶ Record at 1386.

²⁷ Record at 4, 1386.

²⁸ On January 28, 2011, the New Mexico Financial Institutions Division closed FCB, and FDIC was named as receiver of FCB. The FDIC then sold assets of FCB, including the Loan and all documents relating thereto (collectively, the “Loan Documents”), to U.S. Bank, such that U.S. Bank obtained the rights to enforce the Loan Documents. Record at 4–5.

²⁹ Record at 1387.

On December 14, 2011, the Fourth Judicial District Court for Utah County, State of Utah, appointed Len Stillman (the “Receiver”), as receiver over the Highland Property.³⁰ Defendants failed to cooperate with the Receiver in many respects. For instance, and despite many requests from the Receiver, Defendants failed to provide the Receiver with required information and documents relating to the Highland Property, including but not limited to a signed lease agreement from Walgreen Co.³¹

Foreclosure of the Highland Property

On November 8, 2011, the trustee for Defendants’ mezzanine lender, CRV-Main Main, L.P. (“CRV”), recorded a Notice of Default relating to its second position interest in the Highland Property, and thereafter, the trustee of the CRV trust deed sold the Highland Property to the highest bidder, subject to U.S. Bank’s first priority trust deed.³²

On May 21, 2012, U.S. Bank assigned to Plaintiff its interest in the Loan Documents, as reflected by the Assignment of Deed of Trust that was recorded with the Utah County Recorder’s Office on May 22, 2012, entry number 42508:2012.³³

On May 22, 2012, the trustee of the Trust Deeds sold the Highland Property at public auction to an independent, third-party purchaser for a total of \$8,565,000.00 in

³⁰ Record at 108, 1387. The case number for the receivership action is Case No. 110403100.

³¹ Record at 668.

³² Record at 1387.

³³ Record at 5, 1387.

accordance with Utah law and the terms of the Loan Documents.³⁴ At no time did Defendants attempt to halt or stall the foreclosure based upon an alleged default by FCB for refusing to fully fund Defendants' draw requests under the Loan Documents.³⁵

The Commencement of the Case and Summary Judgment Proceedings

On August 20, 2012, Plaintiff properly commenced the deficiency action against Defendants pursuant to Utah Code Ann. § 57-1-32.³⁶ Defendants filed their Answer on September 19, 2012, which asserted numerous affirmative defenses.³⁷

On March 4, 2013, Plaintiff filed a Motion for Summary Judgment and Supporting Memorandum (the "Summary Judgment Motion").³⁸ Defendants filed a Memorandum in Opposition to Plaintiff's Summary Judgment Motion, as well as a Rule 56(f) Motion for Continuance.³⁹ Neither of these documents raised the issue that FCB had failed to fully fund Defendants' draw requests. At the hearing on Plaintiff's Summary Judgment Motion, Defendants stipulated to the dismissal of all their affirmative defenses.⁴⁰

³⁴ Record at 5, 1387.

³⁵ Record at 1387.

³⁶ Record at 1–54.

³⁷ Record at 64–70.

³⁸ Record at 83–101.

³⁹ Record at 490–511, 541–586.

⁴⁰ Record at 769, 1388, 1674.

On July 2, 2013, the Trial Court entered an Order, granting in part and denying in part Plaintiff's Summary Judgment Motion (the "Summary Judgment Order").⁴¹ Under the Summary Judgment Order, the Trial Court dismissed—based on Defendants' stipulation—the following affirmative defenses: estoppel and waiver, unjust enrichment, lack of standing, failure to mitigate damages and offset, self-infliction of damages, and unavoidable circumstances.⁴²

Discovery Deadlines and Defendants' Withdrawn First Motion to Amend

Fact discovery in the case was originally set to expire on June 7, 2013, and the certificate of readiness for trial was due on September 12, 2013.⁴³ Based on a motion filed by Defendants, the Trial Court extended fact discovery nine months, until February 28, 2014.⁴⁴ The Trial Court's Order extending fact discovery limited discovery to the two core issues of the case: (1) the amount of the debt; and (2) the value of the foreclosed Highland Property.⁴⁵ Defendants never voiced an objection to the scope of the case.

On December 23, 2013—over sixteen months after this case was filed—Defendants filed their first motion for leave to amend (the "First Motion to Amend"), pursuant to which Defendants sought Court approval to file an amended answer and

⁴¹ Record at 763-770.

⁴² Record at 769, 1674.

⁴³ Record at 72.

⁴⁴ Record at 899-902, 1389.

⁴⁵ Record at 899-902, 1389.

counterclaim, alleging that FCB failed to fund several draw requests in August of 2010 in the amount of \$114,240.00.⁴⁶

On March 5, 2014—five days before the March 10, 2014 scheduled hearing on Defendants' First Motion to Amend—Defendants withdrew their motion.⁴⁷ Defendants informed the Trial Court that the reason for the withdrawal was due to recently produced documents by Plaintiff.⁴⁸ In reality, Plaintiff produced documents as part of its initial disclosures that conclusively showed that FCB fully funded the draws at issue in Defendants' First Motion to Amend.⁴⁹

Defendants' Untimely Second Motion to Amend

On March 10, 2014—nineteen months after the commencement of the case and three months after Defendants filed their First Motion to Amend, Defendants filed their Second Motion to Amend.⁵⁰ Defendants attached their proposed Amended Answer and Counterclaim as Exhibit A to their Second Motion to Amend.⁵¹ Pursuant to the proposed Amended Answer and Counterclaim, Defendants sought to (1) re-assert various affirmative defenses that the Trial Court previously dismissed at summary judgment; and (2) assert counterclaims against Plaintiff based on FCB's alleged failure to fully fund

⁴⁶ Record at 903–920, 1389, 1674.

⁴⁷ Record at 1180–82, 1389, 1674.

⁴⁸ Record at 1390.

⁴⁹ Record at 1390.

⁵⁰ Record at 1280–1283, 1390, 1674.

⁵¹ Record at 1303–24.

Draw Request 23.⁵² Defendants filed their Second Motion to Amend, despite Defendants' actual knowledge of the facts and circumstances surrounding their alleged counterclaims prior to the foreclosure of the Highland Property and the commencement of this action, and despite Plaintiff's production of documents (and Defendants' review of such documents) early in the case relating to the purported counterclaims, as specifically found by the Trial Court and set forth below.⁵³ At the time Defendants filed their Second Motion to Amend, expert discovery was well underway.⁵⁴

Evidence of Defendants' Early Knowledge of Facts and Documents Relating to Their Proposed Amended Answer and Counterclaims

Defendants' proposed Amended Answer and Counterclaims relied on five documents, to be attached as Exhibits B–F to their proposed Counterclaims.⁵⁵ The five documents supporting Defendants' counterclaims are as follows (collectively, the "Five Key Documents"): (1) FCB's ledger; (2) a draw request dated October 28, 2009; (3) FCB's loan approval form dated 12/1/10; (4) FCB's summary of advance distributions dated 11/4/09; and (5) an email string dated April 19-20, 2010 among FCB loan officer, Marc Peterson, and Defendants Hulbert and Fox (the "2010 Hulbert Email").⁵⁶

⁵² Record at 1303–24, 1390, 1674, 1676.

⁵³ Record at 1676–77, 1680.

⁵⁴ Record at 1390–91, 1676.

⁵⁵ Record at 1676, 1391, 1311–24.

⁵⁶ Record at 1676, 1391, 1311–24.

Defendants made numerous misleading statements to the Trial Court, reiterated to this Court, stating the reason Defendants delayed in filing the Second Motion to Amend was because Plaintiff delayed and “recently” produced the key documents to Defendants just prior to Defendants filing their Second Motion to Amend.⁵⁷ However, and as found by the Trial Court, Plaintiff had produced each of the Five Key Documents to Defendants between April 9, 2013 and September 25, 2013—several months (and in some cases almost a year) before Defendants had even filed their First Motion to Amend, much less their Second Motion to Amend.⁵⁸ Plaintiff produced the Five Key Documents forming the basis for Defendants’ alleged counterclaims as follows:

- FCB’s Ledger, bearing Control No. USB21361, was produced to Defendants on December 6, 2012 as part of Plaintiff’s initial disclosures, as well as on August 23, 2013;⁵⁹
- The October 28, 2009 Draw Request, bearing Control No. USB3271, was produced to Defendants on April 9, 2013;⁶⁰
- FCB’s 12/1/10 Loan Approval Form, bearing Control No. USB16382, was produced to Defendants on April 9, 2013;⁶¹
- FCB’s 11/4/09 summary of advance distributions, bearing Control No. USB27907, was produced to Defendants on September 25, 2013;⁶² and

⁵⁷ Record at 1391, 1402; Appellants’ Brief at pp. 1, 6–7, 11, 16.

⁵⁸ Record at 1391, 1402–03, 1676.

⁵⁹ Record at 1391–92, 1402–03, 1676.

⁶⁰ Record at 1391–92, 1402–03, 1676.

⁶¹ Record at 1391–92, 1402–03, 1676.

⁶² Record at 1391–92, 1402–03, 1676.

- The 2010 Hulbert Email, bearing Control Nos. 22571–72, was produced to Defendants on September 25, 2013.⁶³

Indeed, Defendants’ memorandum in support of their First Motion to Amend states: “Defendants have now completed the review of the newly produced documents [referring to documents produced through September 25, 2013—including all of the Five Key Documents].”⁶⁴ This admission by Defendants shows that even prior to the filing of their First Motion to Amend, Defendants had possession—and had reviewed—each of the Five Key Documents forming the basis for Defendants’ proposed counterclaims.

Additionally, Plaintiff produced several other documents to Defendants earlier in the case showing that Defendants were aware of the alleged counterclaims prior to the commencement of this case, as follows:

- In the 2010 Hulbert Email (one of the five documents supporting Defendants’ counterclaims), Defendant Hulbert (copied to Defendant Fox) writes to Marc Peterson of FCB: “Marc: The general contractor is threatening to lien building H if he doesn’t get payment by the end of the week. We submitted a draw for this amount and we need to get him paid!! . . . The property tax situation is not changing for 4.5 years.” Mr. Peterson replied: “[T]he bank is not going to allow me to process the draw until the property taxes on the parcel are current.”⁶⁵
- Email dated October 26, 2011 from Defendant Fox to Ed Wendler, a project manager at CRV, stating: “There are two unpaid contractors. . . . The amount was approved by the lender, and included in the loan. *The lender paid all other loan draws associated*

⁶³ Record at 1391–92, 1402–03, 1676.

⁶⁴ Record at 916, 1392–93, 1407–08, 1676, 1680.

⁶⁵ Record at 1393, 1676, 1680. Plaintiff denies that FCB wrongfully refused to fund any draw request. Plaintiff asserts that the evidence would conclusively demonstrate that portions of Draw Request 23 were refused because Defendants did not comply with the Loan Documents and approved budget. Plaintiff only references these emails to show that Defendants were fully aware of their alleged counterclaims as early as 2010, *prior to the commencement of this action*.

*with the construction of this building, and then for no reason, refused to fund the last requested draw!” (the “CRV Email”).*⁶⁶

Further, *Defendants produced the following documents to Plaintiff in this case, demonstrating Defendants’ knowledge of their alleged counterclaims prior to the commencement of this case (collectively with the 2010 Hulbert Email and the CRV Email, the “Defendants’ Emails”).*

- Email dated January 5, 2011 from Danny Shelton to Defendants Fox and Hulbert, in which Mr. Shelton is responding to a previous email that stated: “Bret is going to fund this outside of the loan, *so there wouldn’t be the problems with the bank funding like on Building H.*”⁶⁷
- Email dated March 17, 2011 from Danny Shelton to Defendants Fox and Hulbert, stating: “I have attached a letter per your request to handle the follow-up issues with regards to building H and Highland Market . . . We look forward to *putting this issue with your bank and payments to rest so we can construct more projects for you.*”⁶⁸
- Email dated December 15, 2011 from Mike Evans to Defendants Fox and Hulbert, stating: “I feel that I was induced into building out this space and there never was a plan as to how you were going to pay me. *I have heard a lot of comments about the bank being slow but I am not sure what to believe.*”⁶⁹

As specifically found by the Trial Court, there is no doubt that Defendants had actual knowledge of the facts and circumstances forming the basis of their proposed counterclaims prior to the start of this case but unduly delayed in asserting them.

⁶⁶ Record at 1394, 1676, 1680.

⁶⁷ Record at 1393–95, 1676, 1680.

⁶⁸ Record at 1393–95, 1676, 1680.

⁶⁹ Record at 1393–95, 1676, 1680.

Defendants' Non-Compliance with Plaintiff's Narrow Discovery Requests

In March of 2013, Defendants served Plaintiff with broad discovery requests.⁷⁰ Despite the breadth of the discovery requests, not a single request focused on Defendants' alleged counterclaims in any way.⁷¹ Plaintiff diligently produced over 29,000 pages of documents to Defendants under the broad discovery requests, which required Plaintiff to produce and search documents from the files of Plaintiff, U.S. Bank, FDIC and FCB.

In contrast, in July of 2013—eight months before Defendants filed their Second Motion to Amend—Plaintiff served limited, narrow, written discovery on Defendants, consisting of a single interrogatory and two requests for documents.⁷² The lone interrogatory stated: “State the amount you assert was owing to Plaintiff by Defendants on May 22, 2012—the date Plaintiff foreclosed on the Property—and state the factual basis for such assertion.”⁷³ The two document requests asked for (1) documents supporting Defendants' answer to interrogatory 1 (Defendants' accounting of amounts owed at the time of the foreclosure); and (2) documents evidencing the fair market value of the Highland Property on the foreclosure date, including any appraisals or valuations on the Property.⁷⁴ Despite Plaintiff's limited and narrow written discovery, Defendants

⁷⁰ Record at 824–831.

⁷¹ See Record at 824–831.

⁷² Record at 1395, 1580–86.

⁷³ Record at 1395, 1580–86.

⁷⁴ Record at 1395, 1580–86.

failed to produce any documents to Plaintiffs at the time they filed their Second Motion to Amend—eight months after receiving Plaintiff’s discovery requests.⁷⁵

The Trial Court’s Ruling on the Second Motion to Amend

On May 20, 2014, the Trial Court entered detailed findings of fact and conclusions of law relating to Defendants’ Second Motion to Amend.⁷⁶ Among other things, the Trial Court—based on the specific facts of the case—found and concluded as follows: (1) “Defendants were aware of the [counterclaims] as early as 2010, as evidenced by the draw request, loan forms, and Hulbert Email . . . well before the case began and the Highland Property was foreclosed”; (2) “The . . . motion to amend relie[d] on draw requests, loan forms, and emails produced by Plaintiff and reviewed by Defendants prior to the first motion to amend being filed”; (3) “The issue of the failed draw requests is not new and Defendants acted with unreasonable neglect when the issue was not raised in prior proceedings”; and (4) at the time of the Second Motion to Amend, “[e]xpert discover [was] currently underway . . . [and] significant procedural stages in the litigation process ha[d] been underway.”⁷⁷

⁷⁵ Record at 1395–96, 1637.

⁷⁶ Record at 1673–81.

⁷⁷ Record at 1676–77, 1680.

The Trial

On May 26-27 and August 12, 2015, the Trial Court held a trial in this case.⁷⁸ At the time of trial, Defendants stipulated to Plaintiff's calculation of the amount of the debt owed at the time of the foreclosure sale.⁷⁹ Thus, the only issue at trial concerned the fair market value of the Highland Property at the time of the foreclosure. The Court admitted into evidence numerous documentary exhibits (collectively, the "Exhibits"), including the expert reports of Plaintiff's expert appraisal witnesses, Kerry Jorgensen ("Mr. Jorgensen") and Darrin Liddell ("Mr. Liddell"), and the expert reports of Defendants' expert witness, Phillip Cook ("Mr. Cook").⁸⁰ Over the course of the three-day trial, the Trial Court heard live testimony from Messrs. Jorgensen, Liddell and Cook, and specifically considered the demeanor and credibility of each witness.⁸¹

⁷⁸ Record at 3154–56, 3739–40. Appellants' Brief states that the third day of trial was required because Plaintiff's expert witness, Kerry Jorgensen, had to leave the second day of trial at 3:00 p.m. *See* Appellants' Brief at p. 8 ("Kerry Jorgensen indicated with no advance notice . . . that he would have to leave at 3:00 p.m. on the then-final day of trial. Jorgensen did in fact leave the trial early, *requiring* a third day of trial to be scheduled months later, on August 12, 2015.") (emphasis added). This is a red herring. It is true that Mr. Jorgensen had to leave the May 27th trial date at 3:00 p.m. to catch a flight, but this in no way "required" the third day of trial, which was needed regardless of Mr. Jorgensen's May 27th travel schedule. The trial date was previously rescheduled at the request of the Court. Indeed, the third day of trial began at 9:04 a.m. and concluded at 3:44 p.m., a period of 6 hours and 40 minutes. Record at 3765, 4006. This is a simple example of misleading statements and "half-truths" that permeate Appellants' Brief.

⁷⁹ Record at 1788–90.

⁸⁰ Record at 3740.

⁸¹ Record at 3740–41.

Prior to foreclosure, and prior to the commencement of this case, Mr. Liddell was retained to provide a contemporaneous market valuation of the Highland Property.⁸² Subsequently, Plaintiff relied on Mr. Liddell's valuation in determining the amount to credit bid on the Highland Property at the foreclosure sale.⁸³ Mr. Liddell valued the Highland Property as of the foreclosure date in the amount of \$9,240,000.00.⁸⁴

As part of this litigation, Mr. Jorgensen provided a retroactive valuation of the Highland Property.⁸⁵ Mr. Jorgensen initially valued the Highland Property as of the foreclosure date in the amount of \$9,800,000.00.⁸⁶ Subsequently, after being made aware of a signed lease agreement with Walgreen Co. that Defendants withheld and failed to provide earlier, Mr. Jorgensen increased his valuation of the Highland Property as of the foreclosure date by \$768,000.00, to the amount of \$10,568,000.00.⁸⁷ The Trial Court found that "the valuation of the Highland Property by Mr. Jorgensen is complete, based upon sound data, and based on established and reliable methodologies."⁸⁸ As such, the

⁸² Record at 4187 (Trial Exhibit 28.4–28.6).

⁸³ Record at 4187 (Trial Exhibit 28.4–28.6).

⁸⁴ Record at 170, 376, 2596, 2802, 3375 and 4187 (Trial Exhibit 10-7).

⁸⁵ Record at 2858, 3759, 4187 (Trial Exhibit 11-2).

⁸⁶ Record at 2858, 3761, 4187 (Trial Exhibit 11-2).

⁸⁷ Record at 3761, 3955, 4187 (Trial Exhibit 12-31).

⁸⁸ Record at 3760.

Trial Court adopted the expert opinion of Mr. Jorgensen as the fair market value of the Highland Property.⁸⁹

As part of Defendants' litigation team, Mr. Cook provided a retroactive valuation of the Highland Property.⁹⁰ Mr. Cook valued the Highland Property as of the foreclosure date in the amount of \$14,710,000.00, which is approximately \$4 million more than Mr. Jorgensen's valuation, approximately \$5 million more than Mr. Liddell's valuation, and approximately \$6 million more than the price paid by an independent, third-party buyer at the foreclosure sale.⁹¹ The Trial Court found that (1) Mr. Cook typically reads the pleadings in the litigation action and generally understands the issues involved in a deficiency action; and (2) "Mr. Cook was aware of, and observed a [second] deficiency action that Defendants are involved in relating to the Highland Property with CRV-Main Main, L.P. . . . the mezzanine lender that foreclosed Defendants' interest in the Highland Property prior to SAGP's foreclosure."⁹² The Trial Court found that "Mr. Cook's valuation of the Highland Property was artificially inflated and less credible than the valuations of Mr. Liddell *and* Mr. Jorgensen."⁹³ Specifically, the Trial Court found: (1) "Mr. Cook's valuation was based on unsupported and unreliable facts and data"; (2) "Mr.

⁸⁹ Record at 3760.

⁹⁰ Record at 3755–56.

⁹¹ Record at 3757, 4187 (Trial Exhibit 18.2).

⁹² Record at 3757, 3603, 3649–50. This shows Mr. Cook had an incentive to value the Highland Property in an amount exceeding (1) Defendants' debt to Plaintiff, *plus* (2) Defendants' debt to CRV Main.

⁹³ Record at 3757 (emphasis added).

Cook's valuation was based on un-established and unreliable valuation [methods]"; and (3) "Mr. Cook did not value the Highland Property in its 'as is' condition as of the May 22, 2012 foreclosure date."⁹⁴

The Trial Court found that the fair market value of the Highland Property as of the foreclosure sale was no greater than \$10,568,000.00 (the value assigned to the Property by Mr. Jorgensen),⁹⁵ and the Trial Court awarded a deficiency judgment to Plaintiff against Defendants in the amount of \$4,747,891.39 as of August 12, 2015.⁹⁶

SUMMARY OF ARGUMENT

Defendants ask this Court to ignore the Trial Court's findings of fact and challenge the Trial Court's discretion. The Trial Court's findings of fact were not clearly erroneous, and the Trial Court did not abuse its discretion in denying Defendants' untimely Second Motion to Amend.

A. The Trial Court Made Proper and Detailed Findings and Conclusions Regarding the Fair Market Value of the Highland Property

The Trial Court did not commit clear error in determining the fair market value of the Highland Property. After hearing three days of expert testimony, and after considering the numerous exhibits received at trial, the Trial Court made detailed findings and conclusions regarding the fair market value of the Highland Property.⁹⁷

⁹⁴ Record at 3757–58.

⁹⁵ Record at 3761.

⁹⁶ Record at 3762.

⁹⁷ Record at 3740–3763.

The Trial Court stated three main reasons why the expert opinion of Defendants' appraiser, Mr. Cook, was unreliable and less credible than both of Plaintiff's appraisers: (1) Mr. Cook's valuation was based on unsupported and unreliable facts and data; (2) Mr. Cook's valuation was based on unreliable methods not supported by appraisal literature; and (3) Mr. Cook did not value the Highland Property in its "as is" condition as of the May 22, 2012 foreclosure date.⁹⁸ The Trial Court gave examples of each of the types of flaws found in Mr. Cook's valuation.⁹⁹

In contrast, the Trial Court found that the expert opinion of Plaintiff's appraiser, Mr. Jorgensen, was "complete, based upon sound data, and based on established and reliable valuation methodologies."¹⁰⁰ The three-day trial record and trial exhibits support the Trial Court's findings and conclusions.

Defendants seek to have this Court read the cold transcript of the expert testimony and substitute its judgment for that of the Trial Court in determining the fair market value of the Highland Property to reach their desired result. Defendants' request is improper. Because the Trial Court's findings and conclusions are supported by the record—regardless of whether Defendants agree with the outcome—the Trial Court's Order must be affirmed.

⁹⁸ Record at 3757–3760.

⁹⁹ Record at 3757–3760.

¹⁰⁰ Record at 3760.

B. The Trial Court's Proper Denial of Defendants' Untimely Second Motion to Amend

The Trial Court did not abuse its discretion, based on the specific facts of this case, in denying Defendants' untimely and unjustified Second Motion to Amend. From the commencement of this case in August 2012, the parties focused properly on the two issues required by the deficiency statute: (1) the amount of the debt owed by Defendants to Plaintiff; and (2) the fair market value of the Highland Property as of the May 22, 2012 foreclosure date.

Defendants' Answer to Plaintiff's Complaint made no mention or reference regarding a purported failure by FCB to fund a particular construction draw.¹⁰¹ Likewise, when defending against Plaintiff's motion for summary judgment six months into this case, Defendants did not mention any purported funding issue by FCB.¹⁰² To the contrary, Defendants consented to the dismissal of all their affirmative defenses at the summary judgment hearing.¹⁰³ Further, none of Defendants' discovery in the case related to a purported failure by FCB to fund a construction draw. Even when Defendants filed a motion to extend fact discovery (which the Trial Court granted), there was no indication or mention of a purported funding failure by FCB.¹⁰⁴ Indeed, in the Trial Court's order granting Defendants' motion to extend fact discovery until February 28, 2014, the Trial

¹⁰¹ See generally Record at 64–71.

¹⁰² Record at 1674.

¹⁰³ Record at 1674.

¹⁰⁴ See generally Record at 780–875.

Court again reiterated that “the core issues of the case are the balance due [Plaintiff] prior to the foreclosure sale and the fair market value of the property as of the sale.”¹⁰⁵

It wasn’t until December 23, 2013—over sixteen months after this case was filed—that Defendants filed their First Motion to Amend, pursuant to which Defendants sought to file an Amended Answer and Counterclaim, alleging for the first time that FCB failed to fund draw requests in August of 2010 – events of more than three years prior.¹⁰⁶ On March 5, 2014—after briefing on the First Motion to Amend was complete and five days before the scheduled hearing on the Motion—Defendants withdrew the Motion because of futility.¹⁰⁷

Thereafter, on March 10, 2014—nineteen months after the commencement of the case, three months after Defendants filed their first motion to amend, after the conclusion of extended fact discovery, and while expert discovery was underway, Defendants filed their Second Motion to Amend, pursuant to which Defendants sought to (1) re-assert various affirmative defenses that the Trial Court previously dismissed during summary judgment proceedings; and (2) assert counterclaims against Plaintiff based on the alleged failure of FCB to fund Draw Request 23.¹⁰⁸ Defendants’ proposed Amended Answer and

¹⁰⁵ Record at 901.

¹⁰⁶ Record at 903–920, 1674.

¹⁰⁷ Record at 1180–81.

¹⁰⁸ Record at 1280–1301.

Counterclaims relied on the Five Key Documents, to be attached as Exhibits B–F to their proposed Counterclaims.¹⁰⁹

As found by the Trial Court, however, Defendants were fully aware of their alleged counterclaims as early as 2010—prior to the commencement of this action.¹¹⁰ The Trial Court also found that Plaintiff produced—and Defendants admitted to reviewing—several documents relating to Defendants’ alleged counterclaims, including each of the Five Key Documents, several months prior to Defendants filing their First Motion to Amend, much less their Second Motion to Amend.¹¹¹ Thus, the Trial Court did not abuse its discretion in holding that Defendants unduly delayed in asserting their alleged counterclaims, and Defendants’ delay in asserting the claims was not justified.

DETAIL OF ARGUMENT

I. THE TRIAL COURT PROPERLY FOUND THE FAIR MARKET VALUE OF THE HIGHLAND PROPERTY AND DID NOT CLEARLY ERR

Defendants seek to have this Court supplant the judgment of the Trial Court in determining the fair market value of the Highland Property to reach a desired result. This is not proper.

In making its determination of the fair market value of the Highland Property, the Trial Court heard three days of live testimony from three expert appraisers concerning the

¹⁰⁹ Record at 1676, 1391, 1311–24.

¹¹⁰ Record at 1676–77, 1680.

¹¹¹ Record at 1676, 1680.

Property's fair market value as of the foreclosure date.¹¹² Weighing conflicting evidence is the exclusive province of the trier of fact. The Trial Court specifically "considered [the appraisers'] demeanor and credibility."¹¹³ At the end of the trial, the Trial Court determined the credibility and reliability of the three appraisers' expert opinions in the following order: (1) Mr. Jorgensen, SAGP appraiser (complete, credible and reliable); (2) Mr. Liddell, SAGP appraiser (appraisal prior to foreclosure sale was less reliable than the appraisal of Mr. Jorgensen but more reliable than that of Mr. Cook); and (3) Mr. Cook, Defendants' appraiser ("The Court finds that Mr. Cook's valuation of the Highland Property was artificially inflated and less credible than the valuations of Mr. Liddell and Mr. Jorgensen.").¹¹⁴

The Trial Court then entered detailed, individual Findings of Fact and Conclusions of Law regarding the soundness of Mr. Jorgensen's expert opinion, and the many, fundamental flaws of Mr. Cook's biased expert opinion, including the following:

(1) "Mr. Cook's valuation was based on unsupported and unreliable facts and data."¹¹⁵ For example, in valuing an empty parcel, Mr. Cook gave significant value to a Jack-in-the Box Letter of Intent (the "JIB LOI")¹¹⁶ that was (a) "dated days prior to the foreclosure sale"; and (b) "signed by Highland as the Landlord, even though CRV-Main

¹¹² Record at 3740.

¹¹³ Record at 3741.

¹¹⁴ Record at 3757, 3760 (emphasis added).

¹¹⁵ Record at 3757. See also, Utah R. Evid. 702(b).

¹¹⁶ Record at 4187 (Trial Exhibit 75).

[the mezzanine lender] owned the Highland Property at the time the JIB LOI was signed.”¹¹⁷ Additionally, the Trial Court found and concluded that Mr. Cook valued the “Anchor Pads” of the Highland Property using the “hypothetical condition”¹¹⁸ that the Anchor Pads would be used for multi-family housing, even though (a) the Highland Property was not zoned for multi-family housing;¹¹⁹ (b) the Highland Property was not equipped with a sewer system or other necessary infrastructure to handle multi-family housing; (c) Highland City stated that it is against re-zoning the Property;¹²⁰ and (d) there was no indication, other than Defendants’ own statements to Mr. Cook, that Highland City was ever willing to re-zone the Highland Property for multi-family use.¹²¹ Defendants deny that Mr. Cook valued the anchor pads as multi-family housing because

¹¹⁷ Record at 3758.

¹¹⁸ As testified by Mr. Cook, a “hypothetical condition” is an appraisal term of art, which means that “something is known to be contrary to fact but is assumed for purposes of analysis.” Record at 3609–10.

¹¹⁹ Mr. Cook testified that his zoning assumption with the Anchor Pads was not a “hypothetical condition” but merely an “extraordinary assumption,” another appraisal term of art that means an assumption “that is unknown. It could be right, it could be wrong.” Record at 3610. Because an “extraordinary assumption” could be true for purposes of an analysis, it is less problematic and controversial than a “hypothetical condition,” which is an assumption known to be false. However, as set forth by the appraisal guidelines published pursuant to FIRREA [Trial Exhibit 52], “an example of a hypothetical condition is when an appraiser assumed a particular property zoning is different than what the zoning actually is.” Record at 4187 (Trial Exhibit 52-24).

¹²⁰ See Record at 3493 (“When I talk with the City, they say, ‘we don’t want apartments there.’”).

¹²¹ Record at 3758.

the Trial Court permitted Mr. Cook to submit a new exhibit not within his appraisal, and contrary to the limits on experts imposed by Utah R. Civ. P. 26(a)(4)(B).¹²²

(2) “Mr. Cook failed to use established and reliable valuation methodologies, and used, instead, a land residual technique not supported in appraisal literature.”¹²³

(3) “Mr. Cook did not value the Highland Property in its ‘as is’ condition as of the May 22, 2012 foreclosure date.”¹²⁴ This is because Mr. Cook used hypothetical conditions and false assumptions in valuing the Highland Property, including the following: (a) the relied-upon JIB LOI would be valid, executed and a Jack-in-the-Box would be constructed; (b) the zoning of the Anchor Pads would be changed to multi-family housing, despite Highland City’s statements to the contrary; (c) a Walgreen’s would be timely constructed; (d) a certain vacant parcel known as “Pad I” would be subdivided; (e) Defendants would terminate a lease with a fitness club located at the Highland Property and would be able to convert that fitness club space to retail space; and (f) the Highland Marketplace would be leased to stabilized occupancy.¹²⁵

Despite the Trial Court’s perception that Mr. Cook was biased,¹²⁶ and despite the several pages of text in the Trial Court’s Order devoted to the many, material flaws in

¹²² Appellants’ Brief at 34–35, 44–45; Record at 3493–95.

¹²³ Record at 3759. *See also* Utah R. Evid. 702(b).

¹²⁴ Record at 3758. *See also* Utah R. Evid. 702(b).

¹²⁵ Record at 3758–59.

¹²⁶ Record at 3757 (noting that Mr. Cook typically reads the pleadings in a litigation action, generally understands the issues involved in a deficiency action, and was aware of

Mr. Cook's expert opinion, Defendants ask this Court to second guess the Trial Court on this factual valuation issue, in which there is strong evidence in the record that supports the Trial Court's findings of fact. This is not appropriate. *See AmericanWest Bank v. Kellin*, 2015 UT App 300, ¶ 25, 364 P.3d 1055 ("Determinations regarding the weight to be given to the testimony of expert witnesses 'are within the province of the finder of fact, and we will not second guess a court's decisions about evidentiary weight and credibility if there is a reasonable basis in the record to support them.'") (quoting *Fullmer v. Fullmer*, 2015 UT App 60, ¶ 25, 347 P.3d 14).

In this Court's recent decision in *AmericanWest Bank*, the appellant challenged the trial court's valuation of certain real property in a deficiency action. This Court noted that while the appellant "mines the district court's order and points to observations the district court made in its findings of fact and conclusions of law," appellant "ignores other statements in the district court's order that more completely reflect the court's evaluation of [the expert appraiser's] credibility." *Id.* at ¶¶ 26-27.

Defendants repeat the same mistake in this case. Defendants scour the Trial Court's Order and the three-day record in an attempt to nit-pick and find fault with the minor aspects of the Trial Court's detailed Order.¹²⁷ Defendants do this by (a) wholly

and observed a second deficiency action against Defendants filed by CRV-Main, the mezzanine lender).

¹²⁷ Defendants protest the Trial Court's finding as to the price paid at the foreclosure sale as irrelevant. However, Defendants never objected to the evidence before the Trial Court and the issue was not preserved. Further, the price paid at the sale was not the basis for the Trial Court's finding of value but only a reference point. In fact, the amount paid at

ignoring relevant statements in the Trial Court's Order and the three-day record that contradict their arguments; and (b) mischaracterizing the testimony and record and, in some instances, blatantly misrepresenting the record. Just a few of these examples are shown below.

A. Mr. Cook's Expert Opinion Was Flawed in Part Because He Used an Unreliable Valuation Method

The Trial Court specifically found that Mr. Cook's expert opinion was unreliable because, among other reasons, he used a valuation methodology called the "land residual analysis" to value large portions of the Highland Property.¹²⁸ The "land residual method" takes the projected future value of a hypothetical project on land (i.e., when Mr. Cook assumed multi-family housing would be built on the Property's Anchor Pads), and then deducts the costs of building the project to reach the value of the land.¹²⁹ "Courts have shown a clear disdain" for this valuation methodology because small variations in the variables used "can result in a dramatic change in the land value estimate."¹³⁰

Without any support, Defendants make the bold claim that the Trial Court "ignored" the entire third day of trial, including Defendants' cross-examination of Mr.

the foreclosure sale was a necessary element for the Trial Court to make the determination under the applicable statute, Utah Code Ann. § 57-1-32.

¹²⁸ Record at 3758–59. *See also* Utah R. Evid. 702(b).

¹²⁹ Record at 3615–16, 3758.

¹³⁰ Record at 4187 (Trial Exhibit 22.383—The Appraisal of Real Estate 14th Edition), 3758, 3734, 3643.

Jorgensen.¹³¹ Defendants believe this is important because, according to them, “Jorgensen made important concessions . . . including for example a concession that Cook did not use a disfavored land residual method of valuation.”¹³² However, a review of the actual transcript pages cited by Defendants to support their false assertion shows that Mr. Jorgensen stated the exact opposite (i.e., Mr. Jorgensen stated that Mr. Cook did use the unreliable land residual valuation technique):

A. I can tell you that in the income capitalization courses, because I teach them, we refer to the method Mr. Cook uses as a land residual technique. This example is a different one, a different land residual technique whereby the – the income of the land is separated and is capitalized at a different rate.

Q. Right. And that—

A. So this is a – this is a slightly different technique.

Q. It’s a slightly different technique. So let’s go back to the Exhibit 133 [The Appraisal of Real Estate Handbook]. So am I correct, then, that this critique that talks about the clear disdain for the land residual method is actually talking about the land residual method we’ve described here which you have now told us was not done by Mr. Cook, right?

A. The – I – I – I acknowledge the point you’re trying to make, that they’ve said the land residual technique, the Courts have disdain, and then they’ve shown an example that is not precisely the technique that Mr. Cook used. I would say to you that what he used was still a land residual technique, and I believe this comment is still applicable to – to all land residual techniques. They all have that same problem.¹³³

¹³¹ Appellants’ Brief at p. 23.

¹³² Appellants’ Brief at p. 23.

¹³³ Record at 3855-56 (emphasis added).

Mr. Jorgensen specifically reiterated that Mr. Cook used the unreliable land residual technique to value large portions of the Highland Property, although in a different manner than the specific example shown in The Appraisal of Real Estate Handbook. Defendants' misleading statement that Mr. Jorgensen conceded that Mr. Cook did not use the unreliable land residual technique is incorrect. Further, Mr. Cook could never show any appraisal literature demonstrating support for his technique.¹³⁴ Moreover, Defendants' blind assertion that the Trial Court forgot, or ignored, the entire third day of trial, apparently because the Trial Court disagreed with their position, is unsupportable, untenable and untrue.

B. The Trial Court Correctly Found that Mr. Cook Did Not Perform an "As Is" Valuation of the Highland Property

Utah Code Ann. §57-1-32 requires a trial court to find the fair market value of a foreclosed property "at the date of sale." This requires an "as is" valuation of the subject property as of the foreclosure date, free of hypothetical conditions and false assumptions that arbitrarily increase or decrease the fair market value of the subject property. For Mr. Cook's expert opinion to be reliable, the property must be valued "as is" at the time of the foreclosure sale. Once the Trial Court finds any instance in which Mr. Cook's opinion did not constitute an "as is" valuation of the Highland Property, it is unreliable. The Trial

¹³⁴ When Plaintiff's counsel asked Mr. Cook to find support for his land residual methodology in the more than 800 pages of the Appraisal Institute's treatise, The Appraisal of Real Estate 14th Edition (Trial Exhibit 22), Mr. Cook could not find support for his methodology. Record at 3631-3636.

Court found seven specific instances.¹³⁵ Indeed, Mr. Cook's own Expert Report states: "We have been asked to estimate *hypothetical value as if the subject improvements were stabilized occupancy as of the effective date of the appraisal. This assumes the proposed construction of the Walgreens and the Jack and the Box buildings, as well as tenant improvements for vacant space, are complete. This limiting condition affects the assignment results.*"¹³⁶ In his report, Mr. Cook provides the definition of "as is":

"As Is" Value Premise. "Market Value 'as is' on appraisal date means an estimate of the market value of a property in the condition observed upon inspection and as it physically and legally exists without hypothetical conditions, assumptions, or qualifications as of the date the appraisal is prepared."¹³⁷

Mr. Cook did not even satisfy the definition within his own report. Some of the hypothetical conditions and false assumptions used in Mr. Cook's expert opinion follow.

(1) *The Absurdity of the JIB LOI and the Extraordinary Value Placed Upon it By Mr. Cook*

Mr. Cook gave significant value to the JIB LOI, despite (a) it was dated just days prior to Plaintiff's noticed foreclosure sale; and (b) it was signed by Defendants as the landlord of the Highland Property, even though Defendants did not own the Highland Property at the time (Defendants' ownership interest in the Property had been foreclosed

¹³⁵ Record at 3758–59.

¹³⁶ Record at 4187 (Trial Exhibit 18.3) (emphasis added).

¹³⁷ Record at 4187 (Trial Exhibit 18.187) (emphasis added).

previously by the mezzanine lender).¹³⁸ Yet, Mr. Cook testified that he valued the JIB LOI in the approximate amount of \$475,000.00:

Q. Staying with Exhibit 105, pad I split in two, the remaining portion is a little smaller than the portion to be used for Jack in the Box, is that correct, or vice versa? One is .44 acres and the other is .49.

A. So .49 is the larger of the two, right, larger than .44. And that is the vacant portion, the non-LOI portion.

Q. And it has, as you show on Exhibit 105, a value of 416,000. I think you say 410,000 in your report. \$6,000 among friends.

A. Okay. Yes, it says 416 here.

Q. But the mirror image parcel has a value of \$880,000?

A. With the value I placed on it because of the LOI.

Q. You think Exhibit 75 has a value of roughly \$475,000?

A. That was the way I treated that.¹³⁹

In short, Mr. Cook more than doubled the value of a single, vacant parcel based on the hypothetical condition that the JIB LOI was valid, enforceable and that the restaurant would be built—even though Defendants had no authority to sign the letter and no ability to build the restaurant as they were divested of ownership of the Highland Property at that point in time. The Trial Court did not commit clear error in concluding that Mr. Cook's appraisal was unreliable because it was not an accurate "as is" valuation of the Highland Property with regard to the Jack-in-the Box parcel.

¹³⁸ Record at 3758, 4187 (Trial Exhibit 75).

¹³⁹ Record at 3652–53.

(2) *Mr. Cook's Reliance on a Hypothetical Zoning Change for the Anchor Pads*

Mr. Cook appraised the Highland Property on the premise that the Anchor Pads would be re-zoned for multi-family housing, even though the Highland Property was not equipped with a sewer system or other necessary infrastructure to handle multi-family housing, and Highland City stated it was against re-zoning the Property. Because of this hypothetical (known to be false) condition, the Trial Court properly concluded that Mr. Cook did not value the Highland Property in its “as is” condition.

Defendants argue that the Trial Court committed clear error in reaching this conclusion because “Cook did not actually rely on the zoning change in valuing the Highland Property but, instead, appraised the anchor pads as commercial property.”¹⁴⁰ Notably, while Mr. Cook’s expert report [Trial Exhibit 18] contains a lot of analysis relating to multi-family housing (based on the hypothetical re-zoning), there is no analysis regarding the valuation of the Anchor Pads as commercial property. Rather, there is a single, unsupported conclusion that states: “It is assumed that zoning of the anchor pad is changed to allow multifamily uses. This appears to be reasonably probable. This . . . does not affect the assignment results because the value of the underlying land for commercial use is roughly the same as the value of the underlying land for multifamily use.”¹⁴¹

¹⁴⁰ Appellants’ Brief at p. 44.

¹⁴¹ Record at 4187 (Trial Exhibit 18.3, 18.190).

Indeed, it wasn't until trial—after Mr. Jorgensen had submitted his rebuttal critique of Mr. Cook's report—that Defendants and Mr. Cook first tried to “fill in” Mr. Cook's statement that the value of the Anchor Pads for commercial use was the same as the value for multi-housing.¹⁴² This led to the following exchange between Plaintiff and Mr. Cook at trial:

Q. Which reminds me, if the land value under your [commercial use] scenario is the same as multi-family as it is commercial, then why would you do multi-family that would require more time and cost to change the zoning?

A. That's a great question. I think it was because –

Q. Finally one.

A. And just go – and, you know, I've been wondering that myself. And it goes back, actually, to when I first got the assignment and I was interviewing the previous property owner and they – they said we were going to do multi-family, and so I started down that road, couldn't verify it with the current people at the City because they were new and I – I just sort of finished it on that basis.¹⁴³

The Trial Court did not clearly err when it concluded that Mr. Cook's appraisal was unreliable and did not give an accurate “as is” valuation of the Highland Property with respect to the Anchor Pads.

(3) *Other Factors Demonstrating that Mr. Cook Did Not Perform an “As Is” Valuation of the Highland Property*

The Trial Court found that Mr. Cook's opinion also assumed the following conditions and circumstances, thereby preventing an accurate “as is” valuation of the Highland Property: (1) a Walgreen's would have to be timely constructed; (2) Pad I

¹⁴² Record at 3494–95.

¹⁴³ Record at 3654–55.

would have to be subdivided; (3) the current lease with a fitness club would have to be terminated and the fitness space could, and would be converted to retail space; and (4) the Highland Marketplace would be leased to stabilized occupancy.¹⁴⁴

Defendants argue that these assumed conditions do not prevent Mr. Cook's opinion from being an "as is" valuation of the Highland Property.¹⁴⁵ Defendants make a distinction without a difference. It does not matter whether the above assumed conditions prevented an "as is" valuation of the Highland Property, or whether they simply made Mr. Cook's expert opinion unreliable. What matters is that the Trial Court found these assumptions affected the credibility and reliability of Mr. Cook's valuation and made it less credible than the expert opinions of both Mr. Jorgensen and Mr. Liddell. The Trial Court did not commit clear error in determining that the assumed factors prevented an "as is" valuation of the Highland Property and made Mr. Cook's expert opinion unreliable.

C. The Trial Court Did Not Clearly Err By Failing to Cite to the Trial Transcript or Exhibits In Rendering its Decision

Defendants repeatedly assert that the Trial Court committed clear error because it did not cite to the trial transcript or other evidence for every finding reached by it.¹⁴⁶ Defendants attempt to impose a requirement on the Trial Court where none exists. Utah R. Civ. P. 52(a), which governs a trial court's findings and conclusions, does not impose a requirement that the trial court cite to a particular piece of evidence when making

¹⁴⁴ Record at 3758.

¹⁴⁵ Appellants' Brief at p. 29, 42–47,

¹⁴⁶ *See, e.g.*, Appellants' Brief at pp. 24–25, 42–43.

factual findings or legal conclusions. To the contrary, Rule 52(a) allows findings and conclusions to be made orally on the record.

Moreover, a trial court's findings need not be meticulously detailed. In fact, the Advisory Committee Notes to Fed. R. Civ. P. 52(a), upon which Utah's companion rule is patterned, clarify that "the judge need only make brief, definite, pertinent findings and conclusions upon the contested matters; there is no necessity for over-elaboration or particularization of facts." Fed. R. Civ. P. 52(a), Advisory Committee Notes, Thomson Reuters 2016 (citing *United States v. Forness*, 125 F.2d 928 (2d Cir. 1942); *United States v. Crescent Amusement Co.*, 323 U.S. 173 (1944)).

In this case, the Trial Court made detailed factual findings—based on three days of expert testimony, numerous exhibits, perceiving the credibility of the witnesses and weighing the evidence. At the conclusion of the trial, the Trial Court found that due to the many, fundamental flaws contained in Mr. Cook's biased expert opinion, Mr. Cook was the least reliable of the three appraisers heard and considered by the Court.¹⁴⁷ The role of the expert is to assist the trier of fact, not to be an additional advocate for a party. Defendants impermissibly ask this Court to second guess the Trial Court and to usurp the Trial Court's findings of fact after having weighed the credibility of the experts.

D. The Trial Court Did Not Clearly Err In Adopting Mr. Jorgensen's Complete and Reliable Expert Opinion

The Trial Court specifically found that Mr. Jorgensen's expert opinion was "complete, based upon sound data, and based on established and reliable valuation

¹⁴⁷ Record at 3757.

methodologies.”¹⁴⁸ Therefore, the Trial Court “adopted by reference” Mr. Jorgensen’s valuation of the Highland Property.¹⁴⁹ Defendants persevere for 30 pages making the same, repeated arguments that the Trial Court clearly erred in finding that Mr. Cook’s opinion was unreliable and flawed, yet Defendants devote only a few pages to attacking Mr. Jorgensen’s opinion.

Defendants’ biggest criticism of Mr. Jorgensen’s expert opinion is that some of the “comparable properties” used by Mr. Jorgensen to derive value for the Highland Property “were not reasonable comparable to the Highland Marketplace.”¹⁵⁰ Defendants attempt to make a mountain out of a molehill. While Mr. Jorgensen acknowledged, and the Trial Court agreed, that some of Mr. Jorgensen’s “comparables” were “inferior in appearance” and “did not look as modern as the Highland Marketplace,” the Trial Court specifically found that “Mr. Jorgensen adequately compensated for these variations” by increasing the value to the Highland Property to account for the differences.¹⁵¹ In short, no property remains new for 20-30 years.

Finally, in one last attempt to discredit Mr. Jorgensen’s expert opinion, Defendants make the blanket statement that “Jorgensen repeatedly drove down his appraised value by relying on unsupported and ultra-conservative choices.”¹⁵² The problem with

¹⁴⁸ Record at 3760.

¹⁴⁹ Record at 3760.

¹⁵⁰ Appellants’ Brief at p. 49.

¹⁵¹ Record at 3760–61.

¹⁵² Appellants’ Brief at p. 53.

Defendants' argument is that just because Mr. Jorgensen's "adjustments" were different from those of Mr. Cook, does not mean that Mr. Jorgensen undervalued the Highland Property. Rather, the Trial Court specifically found that the flip-side was true when it stated: "The Court finds that Mr. Cook's valuation of the Highland Property was artificially inflated."¹⁵³ The Trial Court did not commit clear error in agreeing with Mr. Jorgensen's adjustments and valuation of the Highland Property, as opposed to Mr. Cook's artificially inflated upward adjustments.

E. Defendants Make No Critique of the Pre-Foreclosure Expert Opinion of Mr. Liddell

As discussed above, Plaintiff's other expert appraiser, Mr. Liddell, provided a contemporaneous fair market valuation of the Highland Property just prior to the foreclosure date, long before this case was commenced. Interestingly, Defendants' Brief does not critique or criticize the Trial Court's opinion with respect to Mr. Liddell's valuation of the Highland Property. This is noteworthy because even though the Trial Court found that Mr. Liddell's expert opinion was not as credible as Mr. Jorgensen's opinion, it found that Mr. Liddell's opinion was more credible than Mr. Cook's opinion.¹⁵⁴ Thus, there is no basis to adopt Mr. Cook's opinion as the fair market value of the Highland Property, as requested by Defendants. Simply put, Defendants improperly argue to have this Court substitute its judgment for that of the Trial Court in determining the fair market value of the Highland Property to reach a desired result.

¹⁵³ Record at 3757.

¹⁵⁴ Record at 3757.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING DEFENDANTS' UNTIMELY SECOND MOTION TO AMEND

Rule 15(a) of the Utah Rules of Civil Procedure provides that a party may amend its complaint after filing of a responsive pleading “only by leave of court or by written consent of the adverse party.” Leave to amend “shall be freely given *when justice so requires*.” Utah R. Civ. P. 15(a) (emphasis added). This is a fact-specific analysis. *Kelly v. Hard Money Funding, Inc.*, 2004 UT App 44, ¶ 42, 87 P.3d 734 (“This sort of case-specific weighing is precisely the kind of decision left to the trial court under rule 15(a)’s grant of discretion.”). Thus, the determination of whether justice requires an amendment to the pleadings “remains in the sound discretion of the trial court,” and the trial court’s decision will not be disturbed unless there is an abuse of discretion. *Westley v. Farmer’s Ins. Exchange*, 663 P.2d 93, 94 (Utah 1983). Under that standard, an appellate court will not reverse the trial court’s decision “unless the decision exceeds the limits of reasonability.” *Neztsosie v. Meyer*, 883 P.2d 920, 922 (Utah 1994).

Utah courts typically look at three factors when deciding a motion for leave to amend: “(1) the timeliness of the motion; (2) the justification for the delay; and (3) any resulting prejudice to the responding party.” *Turville v. J&J Properties, L.C.*, 2006 UT App 305, ¶ 31, 145 P.3d 1146. Additionally, the Utah Supreme Court has stated: “[W]e recognize that many other factors, such as delay, bad faith, or futility of the amendment, may weigh against the trial court’s allowing amendment.” *Aurora Credit Servs., Inc. v. Liberty West Dev., Inc.*, 970 P.2d 1273, 1282 (Utah 1998); *see also Kelly*, 2004 UT App 44, ¶ 42 (stating that “a court is under no obligation to consider any or all of the specific

factors” but the court abuses its discretion when it “fail[s] to explain its decision regarding a motion to amend with reference to the appropriate principles of law or the factual circumstances that necessitate a particular result”).

The Trial Court did not abuse its discretion in denying Defendants’ Second Motion to Amend. This is because (1) Defendants knew of their alleged counterclaims prior to the commencement of the case, but unduly delayed in asserting the counterclaims; (2) Defendants were not justified in asserting their proposed counterclaims late in the proceeding; and (3) allowing the amendment would unduly delay and prejudice Plaintiff. The Trial Court carefully considered the particular facts and evidence of this case. In denying Defendants’ Second Motion to Amend, the Trial Court entered a detailed, written decision based on the facts and evidence. The Trial Court’s decision did not exceed the limits of reasonability.

A. Defendants’ Proposed Counterclaims and Affirmative Defenses Were Untimely

In applying the federal equivalent of Utah R. Civ. P. 15(a),¹⁵⁵ the Tenth Circuit Court of Appeals stated: “We have often found untimeliness alone a sufficient reason to deny leave to amend, especially when the party filing the motion has no adequate explanation for the delay.” *Pallottino v. City of Rio Rancho*, 31 F.3d 1023, 1027 (10th Cir. 1994). This is consistent with the Utah Supreme Court’s holding in *Westley v.*

¹⁵⁵ See *State v. Webster*, 2001 UT App 238, ¶ 22 n.1 (“Since the advisory committee generally sought to achieve uniformity between Utah’s rules of evidence and the federal rules of evidence, this court looks to the interpretations of the federal rules by the federal courts to aid in interpreting the Utah rules.”).

Farmer's Ins. Exch., where the Supreme Court affirmed the trial court's denial of a plaintiff's motion for leave to amend because "amendment would certainly have delayed the trial and *the substance of plaintiff's new allegation was known a full year earlier. . . .*" 663 P.2d 93, 94 (Utah 1983) (emphasis added).

Additionally, in *Atcitty v. Board of Educ. of the San Juan County School Dist.*, this Court affirmed the trial court's denial of a plaintiff's untimely motion for leave to amend because (1) "appellant attempted to set forth new issues in his amended complaint"; (2) appellant filed his motion after the discovery deadline and after the parties had filed summary judgment briefs; and (3) "appellant was aware of the new issues raised in the amended complaint long before his motion was filed." 967 P.2d 1261, 1264–65 (Utah Ct. App. 1998). Likewise, in *Neztsosie v. Meyer*, the Utah Supreme Court affirmed the trial court's denial of an untimely motion for leave to amend because (1) the amount of time the case was pending; and (2) "the fact that plaintiffs knew or should have known about the [new] claim. . . ." 883 P.2d 920, 922 (Utah 1994).

Defendants' proposed counterclaims were based on FCB's alleged failure to fund Draw Request 23 in October 2009.¹⁵⁶ Defendants knew of this claim as soon as FCB allegedly refused to fully fund the draw request. Indeed, the Five Key Documents attached to Defendants' Amended Answer and Counterclaim, as well as the Defendants' Emails, clearly evidence that Defendants knew of FCB's alleged refusal to fully fund the

¹⁵⁶ Record at 1303–24, 1390, 1674, 1676.

draw request at least a year prior to the commencement of this case.¹⁵⁷ Moreover, Defendants admitted that they received—and reviewed—each of the Five Key Documents supporting their counterclaims several months before filing their First Motion to Amend, much less their Second Motion to Amend.¹⁵⁸ Defendants assert delay in Plaintiff's production of documents, but Defendants never explain why the draw requests that Defendants prepared were never part of their own business records and why they never produced their own records.

Despite Defendants' actual knowledge of the alleged counterclaims no later than 2010, Defendants did not attempt to assert the claims until March 2014—over four years after the alleged funding failure, twenty-two months after the Highland Property was foreclosed (to which Defendants did not object), nineteen months after the case was filed, seven months after the Trial Court's summary judgment decision (in which Defendants did not raise the issue), three months since filing their First Motion to Amend (ultimately withdrawn five days before the scheduled hearing due to admitted futility), two weeks after the nine-month extension of fact discovery concluded, and after expert discovery was underway.

Even though Defendants had actual knowledge of their proposed claims prior to this case's commencement, Defendants did not raise the issue at any time earlier in the proceeding, including during summary judgment when Defendants stipulated to the

¹⁵⁷ Record at 1391–95, 1402–03, 1676, 1680.

¹⁵⁸ Record at 916, 1391–95, 1407–08, 1676, 1680.

dismissal of the same affirmative defenses they sought to re-assert in their proposed Amended Answer.¹⁵⁹ It would be unjustifiable, and patently unfair, for Defendants—with actual knowledge—to delay the case and spring new proposed claims when the case is near its end. Because of these factual reasons, the Trial Court found and concluded:

The proposed Amended Answer and Counterclaim is based on allegedly failed draw requests and a resulting failure to make the property tax payments. Defendants argue that the amendment is necessary because new information on the draw requests was discovered in documents recently produced by plaintiff, SAGP. The amended answer and counterclaim relies on five documents. . . . SAGP produced these five documents between April 9, 2013 and September 25, 2013. Defendants reviewed all documents produced through September 25, 2013, including the five key documents, prior to filing the first motion to amend on December 23, 2013. . . . Because the first motion to amend was based on the draw request issue, Defendants cannot claim that they just learned of the failed payments. Defendants were aware of the funding problems as early as 2010, as evidenced by the draw request, loan forms, and 2010 Hulbert Email. This was well before the case began and the Highland Property was foreclosed. . . . Despite Defendant's knowledge of the failed draw requests, discovery on the draw requests was not pursued even after the extension on fact discovery was granted. The motion to amend is untimely based on Defendants' previous knowledge of the failed draw requests and the completion of significant procedural stages in the case.¹⁶⁰

Defendants cite the *Kelly* case for the proposition that motions to amend are only untimely when they are filed in the advanced procedural stages of litigation *or* when they are filed several years into the litigation. Defendants then state: "In this case, neither circumstance was present and thus, it was an abuse of discretion to deny Defendants' [Second] Motion to Amend."¹⁶¹ Defendants mislead this Court.

¹⁵⁹ Record at 1388, 1674.

¹⁶⁰ Record at 1676–77.

¹⁶¹ Appellants' Brief at p. 15.

In *Kelly*, this Court gave specific examples of when motions to amend were filed (and denied) during various stages of litigation, including a case “where the motion was filed one month after summary judgment had already been granted.” *Kelly*, 2004 UT App 44, ¶ 29 (citing *Neztsosie*, 883 P.2d at 920). In this case, the original fact discovery deadline was June 7, 2013, and the certificate of readiness for trial was due on September 12, 2013.¹⁶² The Trial Court heard argument on summary judgment proceedings in June 2013,¹⁶³ and entered its Summary Judgment Order in July 2013.¹⁶⁴ Based on a motion filed by Defendants, the Trial Court extended fact discovery nine months, until February 28, 2014.¹⁶⁵ Defendants then filed their Second Motion to Amend in March 2014—after the case had been pending nineteen months,¹⁶⁶ after the conclusion of summary judgment proceedings, after the conclusion of extended fact discovery, after withdrawing their First Motion to Amend just days before the hearing on the motion, and while expert discovery was underway, just prior to a trial date being set. The case was in its final stages when Defendants filed their Second Motion to Amend—based on facts and allegations known prior to the commencement of the case.

¹⁶² Record at 72.

¹⁶³ Record at 762.

¹⁶⁴ Record at 763–770.

¹⁶⁵ Record at 899–902, 1389.

¹⁶⁶ This is approximately the same amount of time that the *Westley* case had been pending when the plaintiff moved to amend the pleadings in that case. See 663 P.2d at 94 (stating that the complaint was filed on April 23, 1980 and the motion to amend was filed in approximately November 1981). As set forth above, the Utah Supreme Court affirmed the trial court’s denial of the motion to amend in that case.

For the factual reasons set forth above, and consistent with *Westley*, *Atcitty* and *Neztsosie*, the Trial Court did not abuse its discretion in denying Defendants' untimely Second Motion to Amend. The Trial Court's decision was based on the particular facts and evidence in the case. Therefore, the Trial Court's decision did not exceed the bounds of reasonability.

B. No Sufficient Justification Exists for Defendants' Undue Delay

Justification to amend pleadings does not exist when a party had knowledge of the facts and issues giving rise to the proposed amendment, but unreasonably neglected in seeking the amendment. *Kelly v. Hard Money Funding, Inc.*, 2004 UT App 44, ¶ 38, 87 P.3d 734. In *Turville v. J & J Properties, L.C.*, this Court upheld the trial court's denial of a motion to amend because the plaintiff "knew or should have known" the additional claims he sought to include when the original claim was filed, and that the late inclusion was "nothing more than the result of his own negligence." 2006 UT App 305, ¶ 35, 145 P.3d 1146. This Court further stated that because the plaintiff "failed to exercise reasonable diligence in bringing claims it had knowledge of or should have had knowledge of long before the filing of the Motion to Amend," the plaintiff "failed to demonstrate any valid reason for the considerable delay." *Id.* at ¶ 32.

As set forth above, there is no dispute—as found by the Trial Court—that Defendants were fully aware of their alleged counterclaims before this case began.¹⁶⁷ It is also undisputed—as found by the Trial Court—that Plaintiff produced documents to

¹⁶⁷ Record at 1677, 1680.

Defendants relating to Defendants' alleged counterclaims early in the case, which Defendants admitted they received and reviewed several months prior to filing their First Motion to Amend.¹⁶⁸

Defendants repeatedly make the same faulty statements to this Court that they made to the Trial Court, namely that Plaintiff delayed in producing documents to Defendants, which caused Defendants' delay in filing their Second Motion to Amend.¹⁶⁹ As found by the Trial Court, this argument has no factual basis.

First, as clearly evidenced by the Defendants' Emails, Defendants had actual knowledge of FCB's alleged refusal to fully fund Draw Request 23 as early as 2010, well prior to this case's commencement.¹⁷⁰ Second, while Plaintiff continually supplemented its document productions throughout the case as a result of finding additional documents in FCB's old files and computers, the documents produced in those productions were not necessary to Defendants' proposed counterclaims. Third, all of the Five Key Documents that Defendants relied upon in asserting their proposed counterclaims were produced to Defendants between April 9, 2013 and September 25, 2013—several months (and in some cases close to a year) before Defendants even filed their First Motion to Amend, much less the Second Motion to Amend.¹⁷¹ Fourth, Defendants admitted to receiving—

¹⁶⁸ Record at 1680, 1676–77, 1407–08, 1391–95.

¹⁶⁹ Appellants' Brief at pp. 1, 6–7, 11, 16; Record at 1391, 1402, 1285–86, 1295–97, 1299–1300.

¹⁷⁰ Record at 1677, 1680.

¹⁷¹ Record at 1391–92, 1402–03, 1676–77, 1680.

and reviewing—each of the Five Key Documents prior to filing their First Motion to Amend.¹⁷² Fifth, as previously stated, the draw requests were prepared by Defendants, and Defendants do not explain their failure to produce the documents. Thus, Defendants’ argument that Plaintiff is to blame for Defendants’ delay in asserting the alleged counterclaims is false and misleading.

Defendants also argue that before they could sufficiently raise the proposed new defenses and counterclaims, “Defendants were entitled to vet their claims.”¹⁷³ As the Trial Court found, this argument is likewise flawed.

Unlike fraud and other types of claims where the motive of parties may be important or additional facts required to satisfy pleading standards, Defendants’ proposed defenses and counterclaims arise from FCB’s alleged contractual breach of the Loan Documents—of which Defendants were provided copies, and which were attached to Plaintiff’s Complaint. Thus, to the extent Defendants believed FCB improperly failed to fund Draw Request 23 in October 2009, Defendants could, and should have asserted those alleged claims at the proper time—when FCB refused to fully fund the draws in 2009, prior to foreclosure of the Highland Property in 2012, when Defendants filed their Answer in 2012, during summary judgment proceedings in 2013 or, at the very latest, when Defendants filed their First Motion to Amend based on the same contractual failure theory. Instead, even though Defendants had actual knowledge of the facts supporting

¹⁷² Record at 1680, 1676–77, 1407–08, 1391–95.

¹⁷³ Appellants’ Brief at pp. 14, 17–18.

their proposed counterclaims since no later than 2010—prior to this case being filed—Defendants sat on the counterclaims, which could and should have been raised much earlier. For this reason, the Trial Court found and concluded:

Defendants argue that there is no unreasonable neglect because ‘while Defendants were obviously aware of some of the events that are implicated in the proposed counterclaim . . . they were not in possession of the evidence which substantiated the new claims and clarified which draws were not actually funded until Plaintiff’s recent document production. . . .’ Defendants had more than minimal knowledge of the failed payments long before the most recent discovery was received. The companies knew that some of the Draw Requests failed as early as 2010. The current motion to amend relies on draw requests, loan forms, and emails produced by Plaintiff and reviewed by Defendants prior to the first motion to amend being filed in December 2013. No further “reliable confirmation” was necessary to include the allegations in a previous pleading, yet Defendants did not raise the issue of accounting or draw requests in the answer or in response to the motion for summary judgment. The issue of the failed draw requests is not new and Defendants acted with unreasonable neglect when the issue was not raised in prior pleadings.¹⁷⁴

The Trial Court did not abuse its discretion in holding that there was no justification for Defendants’ delay in asserting their alleged counterclaims. The Trial Court’s decision—based on specific evidence, documents and facts—did not exceed the limits of reasonability.

C. Allowing Defendants’ Proposed Amendment Would Unduly Delay and Prejudice Plaintiff

Since Plaintiff commenced the case against Defendants, Plaintiff focused on the two core statutory issues of the case: (1) fair market value of the Highland Property on the date of the foreclosure sale; and (2) the amount of the debt owed by Defendants on that date. All of Plaintiff’s written discovery, summary judgment papers, and motions

¹⁷⁴ Record at 1680.

focused on those two issues. Defendants even admitted in summary judgment proceedings that the “central disputed issue in this case” is the “fair market value of the real property that was subject to foreclosure and on which the amount of any claimed deficiency must be based.”¹⁷⁵ Indeed, the Trial Court’s November 19, 2013 Ruling and Order states: “The core issues of the case are the balance due [Plaintiff] prior to the foreclosure sale and the fair market value of the property as of the sale.”¹⁷⁶

After nineteen months of targeted focus, and after expert discovery had begun (after the conclusion of a nine-month extension of fact discovery), Defendants sought to renew affirmative defenses dismissed on summary judgment, and assert new counterclaims of which they had actual knowledge prior to the commencement of the case. Allowing Defendants’ proposed amendment at that time would require Plaintiff to: (1) locate and interview former FCB and Highland Marketplace employees with knowledge of the new issues, whose memories of the issues may have faded during the years of Defendants’ delay; (2) re-review tens of thousands of documents for information relating to Defendants’ newly alleged counterclaims, which documents were not previously relevant; (3) conduct discovery from Defendants that could have been accomplished earlier and more efficiently in the case; and (4) wait even longer for a judgment and recovery against Defendants. Allowing Defendants to amend their pleadings late in the proceeding—based on alleged counterclaims and defenses known

¹⁷⁵ Record at 508.

¹⁷⁶ Record at 901.

prior to the commencement of the case—would unduly delay the case and unduly prejudice Plaintiff.

The Trial Court found that Plaintiff would not be unduly prejudiced if the proposed amendment were allowed.¹⁷⁷ While Plaintiff disagrees with the Trial Court on this issue, prejudice does not need to be shown to deny a motion to amend. As this Court stated in *Kelly*: “[T]he circumstances of a particular case may be such that a court’s ruling on a motion to amend can be predicated on only one or two of the particular factors.” 2004 UT App 44, ¶ 42. This Court went on to positively cite a case from the Tenth Circuit Court of Appeals that states: “[A] district court acts within the bounds of its discretion when it denies leave to amend for untimeliness or undue delay. Prejudice to the opposing party need not be shown also.” *Id.* (citing *First City Bank, N.A. v. Air Capitol Aircraft Sales, Inc.*, 820 F.2d 1127, 1133 (10th Cir. 1987)). Thus, while Plaintiff submits it would be unduly prejudiced if Defendants’ Second Motion to Amend were granted, the Trial Court did not abuse its discretion in denying the Motion based on the timeliness and justification factors.

CONCLUSION

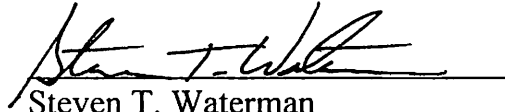
The Trial Court heard the expert witness testimony, evaluated the credibility and demeanor of the experts, and weighed the evidence. As the trier of fact, the Trial Court made findings of fact for which there is ample basis in the record. The Trial Court’s findings of fact were not clearly erroneous.

¹⁷⁷ Record at 1679.

Additionally, the Trial Court did not abuse its discretion in denying Defendants' untimely Second Motion to Amend. For the foregoing reasons, this Court should (1) affirm the Trial Court's Trial Order and deficiency Judgment; and (2) affirm the Trial Court's Order denying Defendants' untimely Second Motion to Amend. Based upon Plaintiff's contractual right as determined by the Trial Court, this Court should also award Plaintiff its attorneys' fees on appeal.

Dated this 9th day of June, 2016.

DORSEY & WHITNEY LLP

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Steven T. Waterman

Nathan S. Seim

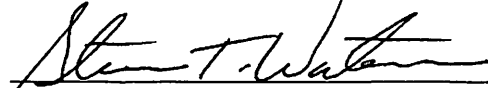
Attorneys for Plaintiff and Appellee

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing **BRIEF OF APPELLEE** contains 13,706 words (jurisdictional statement through conclusion), as determined by Microsoft Word's word counting tool. Thus, the Brief complies with Utah Rule of Appellate Procedure 24(f)(1)(A).

DATED this 9th day of June, 2016.

DORSEY & WHITNEY LLP

A handwritten signature in black ink, appearing to read "Steven T. Waterman", is written over a horizontal line.

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Nathan S. Seim

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CERTIFICATE OF SERVICE

I hereby certify that on June 9, 2016, I caused true copies of the foregoing **BRIEF OF APPELLEE** to be served via electronic mail and hand delivery (two copies) to the following:

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