MONTANA EIGHTEENTH JUDICIAL DISTRICT COURT
GALLATIN COUNTY

MARY McCULLEY,	)	Cause No. DV 09-562C
Plaintiff,	)	Hon. John Brown
-vs-	)	
	)	**FINDINGS OF FACT, CONCLUSIONS OF**
US BANK OF MONTANA,	)	**LAW AND ORDER RE: PUNITIVE**
	)	**DAMAGES**
Defendant.	)	

INTRODUCTION

On February 7, 2014, the jury returned compensatory and punitive damage verdicts against Defendant US Bank ("US Bank" or "Bank"). The jury awarded damages for fraud and constructive fraud against US Bank in the amount of $1,000,000.00. The jury also found that punitive damages should be assessed against US Bank. In the second phase, the jury returned a verdict imposing punitive damages against US Bank in the amount of $5,000,000.

This matter now comes before the Court pursuant to § 27-1-221(7)(c), MCA, for review of the jury's punitive damage award. US Bank filed its Motion to Reduce Punitive Damages Award on February 24, 2014, along with a supporting brief. The parties have fully briefed the motion, as well as filed proposed findings of fact and conclusions of law. This Court declines to grant US Bank's request for a hearing, as a hearing is unnecessary. Having considered the

evidence presented at trial and the argument presented by the parties, this Court now makes the following:

FINDINGS OF FACT

1. In May of 2006, Mary McCulley ("McCulley") agreed to purchase a condominium on East Main Street in downtown Bozeman, Montana ("East Main Street condo"). The East Main Street condo was located on the top floor of a commercial building and was priced at $395,000. On May 25, 2006, the Buy-Sell Agreement was faxed to the Bank and it showed that the financing had to be approved by McCulley. Ex. 71.

2. On May 25, 2006, McCulley called Heritage Bank (later purchased by US Bank) from Florida, and Bank General Manager Jeff Mortenson took her 30-year (360 months) residential loan application for $300,000 over the phone, application #0632146. Apparently, the Bank later revised the 5/25/2006 loan application to $200,000. Ex. 2.

3. On May 26, 2006 – the following day – the Bank General Manager, Jeff Mortensen, prepared an internal credit memo and sent it by e-mail to the Bank Senior Vice-President Steve Feurt. The internal credit memo favorably analyzed McCulley's credit worthiness for a $300,000 loan, but noted that while the East Main Street condo was "residential," the lot upon which it was built was zoned "commercial B-2." The Bank stated that such commercial zoning precluded the use of "standard secondary market sources for financing a residential condominium." Ex. 73. At trial, the Bank provided no evidence that the internal credit memo was provided to McCulley or that it was a term sheet. The Bank only testified that it was prepared for the Bank file.

4. When Feurt received the internal credit memo, he responded via e-mail:

"It might be the only business we get from her," and that, "with the risk, might as well make it worth our while."

Ex. 73 (emphasis added).

5. The Bank categorized the proposed loan as an 18-month "consumer bridge" loan because it could not sell the loan on the secondary market. Feurt's e-mail response evidences that the Bank was more concerned with its own business than with McCulley's interests. Without discussing it with McCulley, the Bank changed the terms of the loan to an 18-month commercial interest-only demand note.

6. Also, in the May 26, 2006 internal credit memo, the Bank identified the "primary source" of repayment of the loan as a conversion of the loan to an in-house term loan upon the sale of a separate residential condominium owned by McCulley and located in Bozeman, referred to as the "Trakker Condo." Ex. 73.

7. Truth-in-Lending ("TIL") is a regulation that requires mortgage lenders to provide accurate information about the terms and conditions of a requested loan. The purpose of the TIL Disclosure is to allow borrowers to make informed choices when borrowing money. The Bank knew of the Truth-In-Lending regulations and understood that they needed to be accurate and had to be done within three (3) days of a loan application and sent to the borrower.

8. On May 30, 2006, the Bank sent McCulley the required statutory "Truth-In-Lending" disclosure statement for application #0632146. It was dated May 25, 2006 and provided the estimated monthly payment for the first 60 months, the estimated monthly payment for the next 299 months, and that the final payment was due on July 1, 2036 – a total of 360 months. The only Truth-in-Lending disclosure dated May 25, 2006 was the one e-mailed on May 30, 2006 with specific reference to application #0632146. Ex. 74. The Bank also generated

a Good Faith Estimate that expressly referenced 360 payments for McCulley's proposed loan specific to application #0632146. Ex. 75.

9. At trial, the Bank attempted to say that what was sent on May 30, 2006 was not a 360-month disclosure, but rather a disclosure of an 18-month loan. Despite this, there was clear and convincing evidence that the May 25, 2006 disclosures sent on May 30, 2006 were for 360 months. The Bank assigned the loan application #50601131 to the 18-month loan. Further, the Bank did not save the 360-month disclosures in its original Bank file, although it was its practice to do so, and there was evidence that the disclosures were in the US Bank file on October 23, 2007. Ex. 91.

10. Exhibit 91 was admitted into evidence. It is a US Bank fax dated October 23, 2007. On page 3 of Exhibit 91 there were two entries: one for "servicing Truth Disclosure" and one for "Good Faith Estimate." Each state that copies should be retained in the file. The date stated for the TIL disclosures is May 25, 2006. Exhibit 91. The only disclosures dated May 25, 2006 were the $200,000 360-month disclosures in Exhibits 74 and 75.

11. During October 2007, McCulley attempted to find out why she had an 18-month loan, not a 30-year loan. At that time, the evidence established that the May 25, 2006 disclosures were in the Bank file. Yet, the Bank did not produce the disclosures in discovery, even though they were specifically referenced in US Bank's file on October 23, 2007.

12. When McCulley received the initial May 25, 2006 Truth-in-Lending statement on May 30, 2006, the loan was for $200,000, so she called the Bank to discuss that issue. The Bank asked if she would put up another property she owned, the Trakker Condo, which had no debt, as additional collateral to get a $300,000 loan. The Bank explained it could just be added as

collateral and if she eventually sold it, she could pay down the debt by $100,000. McCulley agreed and pledged her Trakker Condo as additional collateral on the loan.

13. The initial handwritten Uniform Loan Application, taken over the telephone by Mortensen, was for $300,000 which was crossed out and $200,000 written over it. Ex. 2. The Bank never provided a written document explaining that the loan terms would be changed to 18 months. McCulley proceeded with the understanding that her home loan would be the 30-year loan she had applied for on May 25, 2006 as reflected on the May 25, 2006 TIL Disclosure and Good Faith Estimate.

14. At all times, McCulley believed she was getting the 360 month loan – the loan she applied for on May 25, 2006.

15. McCulley testified, without contradiction, that after her discussion in which she agreed to give the Trakker Condo as additional security, no further discussions occurred with the Bank. She testified, without contradiction, that at no time did the Bank tell her the loan would be for 18 months. McCulley testified, without contradiction, that the Bank did not inform her that long-term financing was unavailable due to the "non-conforming" use of the building.

16. A second set of TIL disclosures were provided at closing on June 16, 2006. They were in a stack of documents bound by a metallic clip, with directions to sign where the "sign here" stickies were on the documents.

17. The Bank knows that predatory lending is defined as giving people loans they cannot pay back. Predatory lending is taking unfair advantage of somebody. The Bank testified that it knew McCulley could not pay back a $300,000 loan in 18 months.

18. Included in the Bank documents at closing were three additional, different loan applications disclosing three different and inconsistent loans to McCulley. Ex. 3, 79, 80. Including the original loan May 25, 2006 application, there were four different and inconsistent loan applications as follows:

May 25, 2006 -	Original loan amount of $300,000 (later revised to $200,000); term 360 months; rate N/A.
June 16, 2006 -	Loan amount $300,000; term 18 months; rate 8.75% (signed at closing)
June 16, 2006 -	Loan amount $200,000; term 12 months; rate 8.75% (signed at closing)
June 16, 2006 -	Loan amount $200,000; term 360 months; rate 7.75% (signed at closing)

19. On June 16, 2006, the loan closed. The Bank indicated that it is not Bank procedure to have a borrower sign three different and inconsistent loan applications on the day of closing: "That would be misleading to the borrower because they are not the terms of the final loan." Yet, that is exactly what occurred at McCulley's closing, during which the Bank required McCulley to sign three different and inconsistent loan applications.

20. The Bank also provided a disclosure at closing on June 16, 2006 for McCulley to sign captioned: **"NON ASSUMABLE FIXED RATE LOAN DISCLOSURE."** The disclosure described the term of McCulley's loan as 360 months and the interest rate of 7.75%. Ex. 8. Mortensen admitted the Non-Assumable Fixed Rate Disclosure was a disclosure signed by McCulley at closing at the Bank's request.

21. The 360-month disclosures were false representations of the terms of the loan that the Bank funded to McCulley, without disclosure to her, and is a bait-and-switch from 360

months at 7.75% to 18 months at 8.75%. The Bank's bait-and-switch was to the substantial and continuing financial detriment of McCulley.

22. The Bank knows that a customer relies on what the Bank tells them. Here, the Bank knew that McCulley trusted the Bank's representations and that she trusted the Bank. McCulley was a relatively unsophisticated buyer and was vulnerable to the Bank's predatory practices.

23. McCulley signed the documents the Bank put in front of her. She did not read them all, nor did she read all the small print because she trusted the Bank. The Bank claims the Promissory Note, which specifies an 18-month loan, controls and McCulley is bound to it.

24. At closing, McCulley signed all documents in reliance on the terms and conditions contained in the initial May 25, 2006 Good Faith Estimate and the Truth-in-Lending disclosure statements the Bank provided on May 30, 2006 whereby it represented that the loan was for a term of 30 years.

25. Customary banking practice is for a lender to provide a Loan Commitment Letter that indicates the buyer's home loan has been approved. The Bank failed to provide McCulley with a Loan Commitment Letter. Ex. 86. The Bank's land loan audit sheet is a checklist and the second line on that document is as follows: **"Loan Commitment Letter to Borrower."** Contrary to the other items on the checklist, this line item was not checked; the Bank failed to have that document in its file after the loan was closed and funded. The Bank failed to provide McCulley with a term sheet or any type of written commitment letter that contained the substantially changed terms and conditions before the closing of the loan.

26. The Bank knew McCulley could not pay back a $300,000 loan in 18 months, and that she would find refinancing at the end "very difficult." Ex. 26, at p. M000103.

27. At the time the Bank approved the loan, it knew that the East Main Street Condo was a mixed use building so the mortgage loan would not meet the underwriting standards of the secondary market into which such loans are sold. The consequence of this, which was known to the Bank, was that McCulley would be unlikely to obtain long-term financing. The Bank failed to disclose this fact to McCulley, either verbally or in writing.

28. The Bank acted with indifference to McCulley by altering the terms of the loan, reducing the payoff period from 360 months to 18 months, with the knowledge that McCulley would find refinancing in 18 months "very difficult."

29. McCulley made monthly payments to the Bank throughout 2006 and 2007 and thought she was making normal mortgage payments. The Bank claims she was making the required monthly interest payments.

30. In 2007, the Bank sent McCulley notice that a balloon payment on her 18-month loan was due in December 2007. Only then did McCulley discover that she did not have the 30-year residential mortgage for which she had applied.

31. Previously, the Bank required that it take a first lien on McCulley's Trakker Condo. In a Bank comment sheet, Ex. 18, and in communications to McCulley in 2007, the Bank agreed to release the lien on the Trakker Condo after McCulley made a principal reduction in the amount of $100,000 and that it was the Bank's intent to convert the loan to a term loan at that point. Yet, when McCulley offered to pay $100,000, the Bank gave McCulley written

notice in October of 2007 that it would instead require a principal reduction of $200,000, not the $100,000 previously stated to convert to a term loan. Ex. 26, at p. M000099.

32. Because she was not able to find suitable long-term residential financing, the loan went into foreclosure. McCulley sold the East Main Street condo to a buyer one week before the foreclosure sale.

33. Based on the Bank's actions in structuring loan terms that were different from what McCulley requested, McCulley was forced to sell her home, the East Main Street condo, at a substantial loss. Because the Bank substantially changed the loan terms, failed to inform McCulley of those changes, failed to disclose that McCulley would not be able to refinance in 18 months, and doubled the amount required to convert the loan to a term loan, McCulley incurred substantial and continuing tangible and intangible damages.

34. McCulley tried to convince the Bank to restructure the loan with a long-term payoff. The Bank's refusal and ultimate foreclosure created a great deal of emotional distress for McCulley. She was embarrassed and became depressed and reclusive. Before this happened, McCulley was a healthy person, physically and mentally. She was an accomplished photographer, an avid fisherwoman, and loved the outdoors. The Bank's conduct against her caused her to suffer depression, isolation and a near-successful suicide. Ex. 97.

35. During the course of the litigation, the Bank filed an affidavit and made statements that were unsupported by the Bank's file. Ex. 46. Exhibit 46 was the May 25, 2011 Affidavit of US Bank Senior Vice-President Steve Feurt which had been filed with this Court in 2011. In his affidavit, Feurt attested that he acquired personal knowledge of the matters by examining the business records. *Id.*, ¶ 3. Feurt stated the Bank provided notification of the

terms of McCulley's loan in a term sheet. *Id.*, ¶ 3.a. Feurt claimed the terms were never changed or altered. *Id.*, ¶ 3.k. He further attested that the Bank never promised McCulley, verbally or in writing, that she would be given a thirty (30) year mortgage. *Id.*, ¶ 3.m.

36. Exhibit 98 - which the Bank represented as the original Bank file - establishes that Feurt misled the Court and McCulley in 2011. Exhibit 98 and witness testimony established that there was no term sheet. Exhibit 98 included a Bank Construction Loan Closing Checklist, and a loan commitment letter to borrower was not checked. Ex. 98, p. 0004. Exhibit 98 contains a Land Loan Audit Sheet and there was no loan commitment letter to borrower. Exhibit 98, p. 194. The Bank misrepresented to this Court that it had never provided McCulley a 30-year mortgage. This is evidenced by the fact that there were documents showing disclosures for a 30-year mortgage in the Bank's own file. Exhibit 98 has a new loan flow for $300,000 360-month loan. Ex. 98, p. 194. Exhibit 98, p. 26-29 has a Residential Loan Application for $300,000 for Loan # 0632146. Exhibit 98, p. 34-37 has a $200,000 360-month loan application. Exhibit 98 has a Fixed Rate loan disclosure for 360 months. Ex. 98, p. 112. In the Bank file, there is a New Loan Flow dated June 27, 2006 which has the loan amount of $300,000 and the loan term 360 months. Ex. 98, pp. 187-188. These documents establish that Feurt misled the Court to McCulley's detriment in 2011.

37. In 2011, the Bank represented that the credit memo created for the file was a "letter" to McCulley, but there was no evidence of that at trial. The only evidence was that it was a Bank file credit memo, not a letter. The Bank made these false statements to the Court in 2011, and the Court relied on the false statements in its summary judgment order. When McCulley heard the Bank's misstatements, she lost all hope and attempted suicide in July 2011.

38. Throughout the trial, this Court paid careful attention to the testimony of witnesses and the numerous exhibits upon which the parties relied. The Court also had the opportunity to observe the witnesses on direct and cross-examination and paid careful attention to the demeanor of each witness, as well as their reactions to the questions of counsel and the exhibits used in evidence. These Findings of Fact are based on the substance of the witnesses' testimony and the numerous exhibits in the original bank file that make up the record.

39. Based upon the foregoing Findings, McCulley proved the Bank's actual fraud by clear and convincing evidence.

40. Any factual findings contained in the following Conclusions of Law are incorporated by reference herein.

CONCLUSIONS OF LAW

1. Any conclusions of law stated in the above Findings of Fact are incorporated by reference herein.

2. Pursuant to § 27-1-221(7)(c), MCA, this Court must review the jury's award of punitive damages considering the factors set forth in § 27-1-221(7)(b), MCA. Upon review, the Court may increase, decrease, or affirm the punitive damages award and must make findings of fact and conclusions of law stating the reasons for either affirming, decreasing, or increasing the jury award. § 27-1-221(7)(c), MCA; *Seltzer v. Morton*, 2007 MT 62, ¶ 165, 336 Mont. 225, 154 P.3d 561; *Marie Deonier & Assocs. v. Paul Revere Life Ins. Co.*, 2004 MT 297, ¶ 42, 323 Mont. 387, 101 P.3d 742 (*Deonier II*).

3. The Court has broad discretion in deciding whether to increase, decrease, or affirm the jury's punitive damage verdict. *Cartwright v. Equitable Life Assurance Society*, 276

Mont. 1, 37, 914 P.2d 976, 997 (1996). Still, the trial court must give deference to the jury's findings of fact. While the trial court can and must exercise its own judgment with respect to the statutory criteria, its determination cannot be based on findings of fact that are inconsistent with findings that are implicit in the jury's verdict. *Debruycker v. Guarantee National Ins. Co.*, 266 Mont. 294, 300, 880 P.2d 819, 822 (1994); *Deonier II.*

4. All elements of a claim for punitive damages must be proven by clear and convincing evidence. This is defined as "evidence in which there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence." § 27-1-221(5), MCA. Clear and convincing evidence is "more than a preponderance of evidence but less than beyond a reasonable doubt." *Id.*

§ 27-1-221(7)(b)(I) - Nature and Reprehensibility of Defendants' Conduct.

5. The first factor to apply is the "nature and reprehensibility of the defendant's wrongdoing." § 27-1-221(7)(b)(i), MCA. To determine reprehensibility, the trial court must consider whether: (a) the harm was physical rather than economic, (b) the conduct evinced indifference for the health and safety of others, (c) the victim is financially vulnerable, (d) the defendant is a repeat or first time offender, and (e) any intentional deceit or trickery that may exist. *Seltzer*, ¶ 167 (citing *State Farm Mutual Auto Ins. Co. v. Campbell*, 538 U. S. 408, 419, 123 S. Ct. 1513, 1521 (2003)).

6. "Truth-in-Lending" is a regulation requiring mortgage lenders to provide accurate information about the terms and conditions of a requested loan. The Bank officers in this case were aware of the TIL regulations and understood that TIL disclosures were to be done within three (3) days of a loan application and sent to the borrower.

7. The Bank sent out the May 25, 2006 TIL Disclosures to McCulley for a 360-month loan on May 30, 2006, after the Bank had already decided on an 18-month loan. Those documents were missing from the Bank file, although there was clear and convincing evidence that they were e-mailed to McCulley on May 30, 2006. There was also clear and convincing evidence those documents were to be retained in the file as shown in US Bank's Exhibit 91. Exhibit 91 also establishes that US Bank had the May 25, 2006 disclosures as of October 23, 2007, but the same were missing from the original Bank file formally produced to McCulley on January 26, 2014 - a week before trial. When, as here, there is concealment of evidence of improper motive, the Court will consider this in assessing reprehensibility of the Bank's conduct. *Seltzer*, ¶ 171 (citing *BMW of North America v. Gore*, 517 U.S. 559, 579 (1996).

8. Further, US Bank "blatantly misrepresented an important fact" in one of its briefs filed with this Court. *Seltzer*, ¶ 174, n. 26. In 2011, Feurt attested that the Bank provided McCulley with a term sheet for an 18-month loan. In its summary judgment reply brief filed on or about May 27, 2011, US Bank represented that Ex. 73 was a letter sent to McCulley. Relying upon Feurt's Affidavit, this Court granted summary judgment, in part, to the Bank on its fraud claim. McCulley appealed to the Montana Supreme Court, which reversed on this issue. Subsequently, there was no evidence at trial that the Bank provided McCulley with a term sheet for an 18-month loan. Instead, the evidence at trial revealed that Ex. 73 was an internal credit memo to the Bank file which was attached to an e-mail from Mortensen to Feurt. The Bank never sent this memo to McCulley. This egregious behavior by the Bank constitutes intentional deceit and supports the conclusion that the Bank's conduct was reprehensible:

> Abusive conduct toward an individual which causes the type of harm at issue here merits considerable punishment regardless of the setting in which it takes place.

> However, the fact that [the Bank] utilized the judicial system as a tool to accomplish intimidation and oppression makes this behavior uniquely egregious."

Id., ¶ 175.

9. Contrary to the Bank's misrepresentation, described above, the second set of TIL disclosures identifying an 18-month loan were not provided until closing, along with many other documents.

10. Contrary to the Bank's standard procedure, the Bank had McCulley sign three different and inconsistent loan applications on the day of closing. The Bank knew this would be misleading to the borrower because such abnormal practice did not inform the buyer of the terms of the final loan. Yet, this occurred at McCulley's closing. In all, the Bank file contained four different signed loan applications:

> May 25, 2006 - Original loan amount of $300,000; term 360 months; rate N/A
> June 16, 2006 - Loan amount $300,000; term 18 months; rate 8.75%
> June 16, 2006 - Loan amount $200,000; term 12 months; rate 8.75%
> June 16, 2006 - Loan amount $200,000; term 360 months; rate 7.75%

11. The Bank knew that its customer - here, McCulley - relied on what the Bank told her.

12. The Bank testified that it knew McCulley could not pay back a $300,000 loan in 18 months. The Bank's loan to McCulley was predatory. As such, the Bank engaged in predatory lending.

13. Notably, Feurt's e-mail with respect to approving loan terms for McCulley, in which he stated, "Might be the only business we get from her" and, "With the risk, may as well make it worth our while" was never relayed to McCulley. Nor did the Bank ever provide any writing in which it explained the changed loan terms to McCulley.

14. The Bank knew that McCulley trusted the Bank and its representations. It is the Bank's practice at closing to provide documents in loose form. That was not done in this case. At closing, the documents were presented to McCulley clamped at the top in a booklet, such that she was just asked to sign all of the tabbed pages. McCulley thought she was signing for a 30-year mortgage.

15. McCulley was never provided with a complete set of the closing documents.

16. The Bank contended that if McCulley would pay down the Note by $100,000, it would convert it to a term loan. Its policy is to explain that to McCulley before she signed any documents, but here, the Bank never explained this at closing. At all relevant times, McCulley thought she was obtaining the 30-year mortgage for which she had originally applied. Instead, the Bank kept important information from McCulley. For instance, the Bank did not disclose that the term of the loan was only 18 months, nor did it disclose that the loan refinancing would be "very difficult."

17. Additionally, the Bank informed McCulley, shortly after she learned the loan had an 18-month term, that if she made a $100,000 principal reduction, it would convert the loan to a term loan. But as soon as McCulley offered to pay $100,000, the Bank immediately increased the required payment to $200,000. Based upon the facts in evidence, this conduct is further proof of intentional deceit or trickery by the Bank. *See Seltzer,* ¶ 167.

18. The Bank was well collateralized at all times. At the time the Bank decided on an 18-month term, the loan-to-value ratio was 41%; before closing, the Bank increased the value of the Trakker Condo reducing the loan-to-value ratio to 36%. In its foreclosure analysis, the Bank calculated that it stood to recover a net gain of $346,800 on a foreclosure.

19. The Bank knew that McCulley's income was low relative to the amount of the loan.

20. Based upon the foregoing, this Court concludes that the foregoing actions of the Bank toward McCulley are reprehensible and weighs in favor of the jury's punitive damages award.

§ 27-1-221(7)(b)(ii) - Extent of the Defendant's Wrongdoing.

21. Considering that McCulley was losing her home and that the Bank refused to correct the situation as it stated was its intent, US Bank acted in conscious or intentional disregard or indifference to the high probability of causing McCully to suffer financial damage and emotional distress. The Bank knew that McCulley trusted it, yet the Bank never provided any document that showed it was changing the term from 360 months to 18 months even though it misrepresented that fact to the Court in 2011. That misrepresentation was wrong. Consequently, and unable to afford legal counsel, McCulley had file a *pro se* appeal. The Montana Supreme Court reversed, and the jury trial established the Bank's wrongdoing.

22. US Bank suppressed information that McCulley would be able to refinance only with "great difficulty." Further, the Bank had stated it intended to give McCulley a term loan if she paid $100,000. Yet, when she made that offer, the Bank required $200,000 and provided no reason or evidence for its decision. McCulley repeatedly requested the Bank work with her, and the Bank denied her requests and changed the rules. McCulley was financially vulnerable and ended up losing her home as a result of the Bank's misconduct.

23. The Bank's failure to honor its original intent promised to its client and then to further require $200,000 to convert to a term loan is evidence of the Bank's wrongdoing and weighs in favor of the jury's punitive damages award.

§ 27-1-221(7)(b)(iii) - Intent of the Defendant in Committing the Wrong.

24. The jury found that the Bank had committed actual fraud. Fraudulent intent can be proven by circumstantial evidence. The jury determined that McCulley could not be held to the promissory note because the Bank was fraudulent and deceptive in obtaining her signature.

The Bank's fraud was three-fold:

(i) Misrepresenting the terms of the loan;

(ii) Suppressing the fact that refinancing at the maturity of the loan would be "very difficult," and

(iii) arbitrarily and substantially increasing the amount of the principal reduction required for the Bank to convert the loan to a term loan.

25. The Bank was well collateralized. The intent apparent from the Bank's internal communications and from the circumstantial evidence was to make the loan profitable and safe for the Bank without regard to the injury to McCulley. The Bank's profit motive trumped any concern it had for McCulley, which establishes intent that is consistent with the award of punitive damages in this case.

§ 27-1-221(7)(b)(iv) - Profitability of the Defendants' Wrongdoing.

26. The fourth factor under § 27-1-221(7)(b) is the "profitability of the defendant's wrongdoing." Here, the Bank profited from its wrongful acts. The exact extent of the Bank's profit was unclear at trial, but the evidence demonstrated that the Bank calculated its net gain

from foreclosure would have been $346,800.00. Ex. 40. The Bank also profited by the interest payments McCulley paid to the Bank.

§ 27-1-221(7)(b)(v) - Amount of Actual Damages Awarded by the Jury.

27. Section 27-1-221(7)(b)(v), MCA, requires the Court to consider the amount of actual damages awarded by the jury. Applying *BMW of North America v. Gore*, 517 U.S. 559, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996), the Montana Supreme Court has recognized that no "particular mathematical formula or ratio of compensatory to punitive damages" governs the constitutionality of a punitive damages award. *Deonier II*, ¶ 65 (rejecting trial court's "application of a 5:1 ratio of punitive damages to compensatory damages as a determination of the constitutionality of the jury's award," and reversing reduction of punitive damages award). In *State Farm Mutual Auto Ins. Co. v. Campbell*, 538 U.S. 408, 425, 123 S. Ct. 1513, 1524 (2003), the United States Supreme Court held that although "there are no rigid benchmarks that a punitive damages award may not surpass . . .few awards exceeding a single digit ratio between compensatory and punitive damages, to a significant degree, will satisfy due process. . . ." Citing *Campbell*, the Montana Supreme Court rejected a defendant's claim that a 9:1 ratio is in almost all cases the constitutional limit. *Seltzer*, ¶ 184.

28. Here, the jury awarded McCulley $1,000,000 in actual damages and $5,000,000 in punitive damages. This computes to a ratio of 5 to 1 and is within the statutory limitations. The single digit ratio is constitutional and not excessive, especially since the Bank's conduct was particularly reprehensible. *See, e.g., Seltzer*, ¶ 199 (determining 7 to 1 ratio in penalty award "adequately serves Montana's interest in punishment and deterrence, thereby protecting its citizens and preserving the integrity of the judicial systems, while comporting with the

constraints of due process"); *see also Deonier II*, ¶ 67 (re-instating 7 to 1 ratio after district court reduction to 5 to 1).

§ 27-1-221-(7)(b)(vi) - Defendant's Net Worth.

29. The sixth factor under § 27-1-221(7)(b), MCA, is the defendant's net worth.

30. The Bank had the burden of producing competent and reliable evidence at trial for this purpose. *Blue Ridge Homes, Inc. v. Thein*, 2008 MT 264, ¶ 68, 345 Mont. 125, 191 P.3d 374; *Cartwright v. Equitable Life Assurance Society*, 276 Mont. 1, 37, 914 P.2d 976, 999 (1996).

31. In *Maurer v. Clausen Distrib. Co.*, 275 Mont. 229, 912 P.2d 195 (1996), the Montana Supreme Court reversed a trial court's order for a new trial on the issue of punitive damages, after the trial court concluded that an absence of net worth evidence required it to order a new trial. The Montana Supreme Court stated:

> In *Gurnsey v. Conklin Co.*, Inc. (1988), 230 Mont. 42, 55, 751 P.2d 151, 158, "we stated a plaintiff is not required to show proof that a defendant's net worth supports an award of punitive damages. If the defendant's net worth does not support an award of punitive damages, the defendant must produce evidence to that fact." *Gurnsey*, 751 P.2d at 158. Tucker should not gain an advantage from failing to produce evidence of his net worth. Accordingly, there was no evidence that Tucker's net worth could not support a punitive damage award of $75,000, and so, the District Court erred in vacating the jury's award of punitive damages against Tucker.

Maurer, 275 Mont. at 235-236.

32. Following the verdict awarding McCulley compensatory damages and finding an award of punitive damages appropriate, this Court held a hearing regarding US Bank's financial affairs, financial condition, and net worth. At that hearing, the Court heard evidence, offered by McCulley, through the United States Securities and Exchange Commission, September 2013, Form 10-Q, filed by US Bank. The Form 10-Q shows the net worth of US Bank, as of

September 30, 2013, as $41,552,000,000. The Form 10-Q also shows net income for the nine months ending September 30, 2013 of $4,261,000,000; the net income shows an improvement over the same period for the preceding year. The Court finds US Bank has a strong financial condition, good financial affairs, and a substantial net worth.

33. The failure of US Bank to offer any evidence of its financing standing, profitability, or net worth justifies reliance on Form 10-Q. The Bank's financial condition, financial affairs, and net worth supports the jury's award of $5,000,000 in punitive damages.

§ 27-1-221(7)(b)(vii) - Previous Awards of Punitive or Exemplary Damages Against Defendant Based on the Same Wrongful Act

34. Section 27-1-221(7)(b)(vii), MCA, requires the Court to consider any previous awards of punitive damages against a defendant based upon the same wrongful conduct. There is no evidence of a prior punitive damage award against US Bank based on the wrongful conduct at issue here. Thus, there is no indication that upholding the punitive damage award will result in the Bank being punished more than once for the same conduct. *See Cartwright,* 276 Mont. at 42, 914 P. 2d at 1001. This weighs in favor of upholding the jury's punitive damage award.

§ 27-1-221(7)(b)(viii) - Potential or Prior Criminal Sanctions Against the Defendant Based Upon the Same Wrongful Act

35. Section 27-1-221(7)(b)(viii), MCA, requires the Court to consider any potential or prior criminal sanctions based upon the defendant's same conduct. There is no evidence to suggest that the Bank has been or is at risk of being subjected to double punishment by virtue of any criminal sanction applicable to the harm caused to McCulley. Therefore, the punitive damage award is the only punishment that the Bank will face for its misconduct in this case and is the only practical way of making an example of the Bank and deterring further conduct of this

type. *See Cartwright,* 276 Mont. at 27, 914 P.2d at 992. This weighs in favor of the $5,000,000 punitive damage award.

§ 27-1-221(7)(b)(ix) - Any Other Circumstances that May Operate to Increase or Reduce, Without Wholly Defeating, Punitive Damages.

36. Section 27-1-221(7)(b)(ix), MCA, requires the Court to consider any other circumstances that tend to increase or decrease the punitive damage award. After considering all of the evidence presented, there is no reason to either increase or decrease the jury's award of punitive damages.

37. Pursuant to § 27-1-220(3), MCA, an award of punitive damages may not exceed $10 million or 3% of the defendant's net worth, whichever is less.

38. The verdict form in this case made only one punitive damages award and specifically states: "We the jury, by a vote of at least 8 to 4, answers as follows: What amount of punitive damages do you award to Plaintiff Mary McCulley? Answer $5,000,000. *See* Special Verdict For Punitive Damages. Therefore, based upon the statutory limitation of § 27-1-220(3), MCA, the punitive damages may not exceed $10,000,000. The punitive damages verdict in this case is well below the statutory limitation.

39. In conclusion, US Bank's wrongful treatment of McCulley is consistent with the purpose of punitive damages. The amount of punitive damages awarded by the jury is commensurate with the nature and degree of harm caused to McCulley by the Bank. Based on this Court's review of the record and the statutory factors above, the jury's punitive damages assessment against US Bank is affirmed in the amount of $5,000,000. US Bank's Motion to Reduce Punitive Damages Award is therefore denied.

Based upon the foregoing Findings of Fact and Conclusions of Law, the Court enters the following order:

ORDER

THEREFORE, IT IS HEREBY ORDERED:

1. US Bank's Motion to Reduce Punitive Damages Award is DENIED.

2. Plaintiff Mary McCulley is entitled to JUDGMENT against Defendant US Bank for punitive damages in the amount of $5,000,000.

DATED this 14th day of APRIL, 2014.

HON. JOHN BROWN
DISTRICT COURT JUDGE

Cc: Patricia D. Peterman/James A. Patten
Mark C. Sherer
Peter W. Carter/F. Matthew Ralph/Matt Woleske