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**STATE OF MINNESOTA  
IN SUPREME COURT**

**CASE NO. A09-607**

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**UNITED PRAIRIE BANK – MOUNTAIN LAKE,**

**RESPONDENT,**

**vs.**

**HAUGEN NUTRITION & EQUIPMENT, LLC,  
LELAND HAUGEN AND ILENE HAUGEN,**

**APPELLANTS.**

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**RESPONDENT'S BRIEF AND APPENDIX**

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**STATEMENT OF ISSUES WITH RESULTS BELOW**

- 1. WHETHER THE COURT OF APPEALS CORRECTLY AFFIRMED THE DISTRICT COURT'S DETERMINATION THAT APPELLANTS WERE NOT ENTITLED TO A JURY TRIAL ON UPB'S REQUEST FOR A CONTRACTUAL AWARD OF ATTORNEYS' FEES?**

**RESULT BELOW:**

In affirming the district court, the Court of Appeals correctly determined that Appellants were not entitled to a jury trial on UPB's request for attorneys' fees under the subject promissory notes, security agreements, personal guarantees, mortgage and contract for deed/equitable mortgage.

**RELEVANT AUTHORITY:**

- *Ross v. Bernhard*, 396 U.S. 531 (1970)
- *O'Donnell v. McGee Trucks, Inc.*, 294 Minn. 110, 199 N.W.2d 432 (1972)
- *Kudon v. f.m.e. Corp.*, 547 A.2d 976 (D.C. 1988)
- *Resolution Trust Corp. v. Marshall*, 939 F.2d 274 (5th Cir. 1991)

- 2. WHETHER THE COURT OF APPEALS CORRECTLY AFFIRMED THE DISTRICT COURT'S DETERMINATION OF THE ATTORNEYS' FEES AWARDED TO UPB?**

**RESULT BELOW:**

In affirming the district court, the Court of Appeals correctly determined that UPB should be awarded \$286,711.58 in attorneys' fees and costs under the subject promissory notes, security agreements, personal guarantees, mortgage and contract for deed/equitable mortgage.

**RELEVANT AUTHORITY:**

- *Hensley v. Eckerhart*, 461 U.S. 424 (1983)
- *Milner v. Farmers Ins. Exch.*, 748 N.W.2d 608 (Minn. 2008)
- *Specialized Tours, Inc. v. Hagen*, 392 N.W.2d 520 (Minn. 1986)

## STATEMENT OF THE CASE

As part of a comprehensive refinancing in 2003-04 of their over \$900,000 in existing debt, Leland and Ilene Haugen ("Haugens") sold equipment and other assets, including 240 acres of real property ("Real Property"), to Mark Sahli ("Sahli"). Sahli then sold the equipment, assets and Real Property to Haugen Nutrition & Equipment, LLC ("HNE"), an entity formed by the Haugens and their attorney to avoid creditors' claims. Sahli conveyed the Real Property to HNE on a contract for deed.

Respondent United Prairie Bank – Mountain Lake ("UPB") made loans totaling more than \$1,000,000 to Appellants and Sahli to assist in Appellants' refinancing efforts, which loans were secured by promissory notes, security agreements, guarantees and mortgages. Appellants almost immediately defaulted on their repayment obligations, which caused Sahli's default on his repayment obligations to UPB. Rather than foreclose the Sahli mortgage, UPB accepted a deed in lieu of foreclosure, which gave UPB the vendor's interest in the HNE contract for deed.

UPB then proceeded to resolve Appellants' defaults. UPB commenced the underlying lawsuit to: (1) recover unpaid promissory notes; (2) recover collateral in which UPB had a security interest; (3) obtain a declaration that UPB was the owner of the Real Property via contract for deed cancellation or, alternatively, equitable mortgage foreclosure; and (4) to recover its attorneys' fees, as authorized by the promissory notes, security agreements, guarantees and mortgages.

After more than three years of protracted litigation regarding dozens of claims and defenses raised by Appellants, prior to trial, the district court entered summary judgment

dismissing all of Appellants' counterclaims and determining that Appellants were in breach of the promissory notes, security agreements, guarantees, mortgage and contract for deed. These agreements provided for an award of attorneys' fees upon default. The district court struck Appellants' jury trial demand on the grounds that there was no jury trial right on UPB's request for an award of attorneys' fees.

Following a court trial, the district court issued Findings of Fact, Conclusions of Law and Order for Judgment on January 26, 2009 ("1/26/09 Judgment") with the following determinations: (1) the contract for deed was an equitable mortgage between UPB and HNE, which UPB could foreclose; (2) UPB was entitled to recover outstanding principal and interest due under the loan documents; (3) UPB was entitled to \$175,000 in rent for the Real Property; and (4) UPB was entitled to recover \$286,711.58 of its attorneys' fees, but it was not entitled to recover the \$341,198.19 in attorneys' fees charged to the equitable mortgage balance.

In its May 11, 2010 decision, the Court of Appeals affirmed the district court's judgment in all respects. *See United Prairie Bank – Mountain Lake v. Haugen Nutrition & Equip., LLC*, 782 N.W.2d 263, 274 (Minn. App. 2010). On May 19, 2010, Respondents filed a Petition for Further Review of the Court of Appeals' decision and UPB filed its opposition on June 11, 2010. On June 29, 2010, this Court granted Respondents' petition.

## STATEMENT OF FACTS

### A. THE HAUGENS AND HNE

On January 14, 1987, the Haugens acquired a 160-acre parcel of land in Cottonwood County, Minnesota. (Ex. 1.<sup>1</sup>) On May 3, 2000, Ilene Haugen acquired a nearby 80-acre parcel. (Ex. 2.) These two parcels are referred to as the "Real Property."

In addition to farming the Real Property, the Haugens operated a feed mill business through Haugen Feeds, Inc. ("Haugen Feeds"). On July 15, 2002, the Haugens, with the assistance of their counsel, J. Brian O'Leary ("O'Leary"), formed HNE to "sell livestock feed and equipment." (Ex. 31; Tr. 62, 465, 477-78.<sup>2</sup>) O'Leary and Haugen confirmed that HNE was a "separate legal entity" and not an alter ego of Haugen Feeds or the Haugens. (Tr. 203, 465, 492.) O'Leary testified that HNE was formed so the feed operation could be operated without creditors "nipping at their heels." (Tr. 477.)

When the Haugens and Haugen Feeds experienced financial difficulties in 2002-2003, they executed a series of transactions that (i) refinanced their outstanding debts through UPB and (ii) transferred assets and property to HNE in order to continue the farming and feed mill operations through HNE, free from creditors' claims. Without this refinancing by UPB and the transfer of assets, the Haugens and Haugen Feeds would have lost all of their assets and the Real Property in 2003 through replevin and foreclosure. (Tr. 403, 466-68, 494.) UPB was the only lender who offered assistance. (Tr. 459.) Because of UPB, the Haugens were given an opportunity to avoid foreclosure

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<sup>1</sup> Citations to "Ex." refer to the exhibits admitted at trial.

<sup>2</sup> Citations to "Tr." refer to the trial transcript.

and liquidation, and HNE retained control of the Real Property for five years without making any substantial debt payments. (Tr. 420.)

## **B. UPB'S LOANS**

UPB made three loans in 2003 and 2004 that are the subject of this lawsuit.

### **1. Promissory Notes**

On August 19, 2003, UPB loaned \$220,025.00 to HNE to refinance existing bank debt at UPB and First Security Bank Canby ("Canby Bank"), as memorialized in promissory note #601480 ("Note 601480"). (Ex. 3.) Note 601480 was secured by a real estate mortgage ("Mortgage") and commercial security agreement ("Security Agreement"). The Mortgage granted UPB a mortgage interest in the Real Property. (Ex. 4.) The Security Agreement granted UPB a security interest in HNE's property. (Ex. 5.)

On November 5, 2003, Ilene Haugen borrowed another \$26,125.00 from UPB under promissory note #60160 ("Note 60160") to purchase grain. (Ex. 6.) Note 60160 was secured by a commercial security agreement with the same terms as the Security Agreement. (Ex. 8)

On July 2, 2004, HNE borrowed an additional \$77,334.82 from UPB under promissory note #60240 ("Note 60240") to purchase machinery and refinance other debt. (Ex. 9.) Note 60240 was secured by a commercial security agreement with the same terms as those executed with Notes 60148 and 60160. (Ex. 10.)

## 2. Guarantees

Ilene Haugen and Leland Haugen executed personal guarantees ("Guarantees") in which they each personally, jointly, severally, absolutely and unconditionally guaranteed the obligations under the Notes. (Exs. 82, 161.)

## 3. Appellants admit they are bound by the terms of the Loan Documents

Ilene Haugen was authorized to, and did, execute the Notes, Mortgage and Security Agreements (collectively, "Loan Documents") on behalf of herself and HNE. (Exs. 149-50; Tr. 201, 204, 208, 213-14, 216, 218.) Leland Haugen confirmed that the Haugens and HNE are bound by the Loan Documents, which incorporate their contracting intent. (*Id.*) The Haugens and HNE's attorney, O'Leary, confirmed that the parties' rights and obligations are outlined in the written agreements. (Tr. 481-82, 485-89.)

The Notes obligate the Haugens and HNE to reimburse UPB for all costs, expenses and attorneys' fees incurred in collection efforts:

I [HNE/Haugens] will pay all costs of collection, replevin [an action for the recovery of property wrongfully taken or detained], or any other or similar type of cost if I am in default.

In addition, if you [UPB] hire any attorney to collect this note, I will pay attorney's fees plus court costs (except where prohibited by law).

(Exs. 3, 6, 9.)

Upon a default, the Mortgage provides that UPB is entitled to take action to protect and preserve the Real Property:

If there is a default, Lender may, in addition to any other permitted remedy, advertise and sell the Property as a whole or in separate parcels at public auction to the highest bidder. . . Upon sale of the Property and to the extent

not prohibited by law, Lender shall make and deliver a deed to the Property sold which conveys absolute title to the purchaser.

(Ex. 4 § 16.) The Mortgage obligates HNE to reimburse UPB for costs, expenses and attorneys' fees:

Mortgagor [HNE] agrees to pay all of Lender's [UPB] expenses if Mortgagor breaches any covenant in this Mortgage. Mortgagor will also pay on demand all of Lender's expenses incurred in collecting, insuring, preserving or protecting the Property. Mortgagor agrees to pay all costs and expenses incurred by Lender in enforcing or protecting Lender's rights and remedies under this Mortgage, including, but not limited to, attorneys' fees, court costs, and other legal expenses.

(*Id.* § 17.)

The Security Agreements permit UPB to protect and preserve its collateral:

After Debtor [Haugens/HNE] defaults, and after Secured Party [UPB] gives any legally required notice and opportunity to cure the default, Secured Party may at Secured Party's option do any one or more of the following...(3) enter upon Debtor's premises and take possession of all or any portion of Debtor's property for purposes of preserving the Property or its value and use and operate Debtor's property to protect Secured Party's interest, all without payment or compensation to Debtor....

(Exs. 5, 8, 10.) The Security Agreements obligate HNE to pay UPB's costs, expenses and attorneys' fees:

If Secured Party [UPB] repossesses the Property or enforces the obligations of an account debtor, Secured Party may keep or dispose of the Property as provided by law. Secured Party will apply the proceeds of any collection or disposition first to Secured Party's expenses of enforcement, which includes reasonable attorneys' fees and legal expenses to the extent not prohibited by law, and then to the Secured Debts. Debtor (or Borrower, if not the same) will be liable for the deficiency, if any.

(*Id.*)

The Guarantees also obligate Leland and Ilene Haugen to pay UPB's costs, expenses and attorneys' fees:

The liability of the Undersigned hereunder shall be limited to a principal amount of "Unlimited" (if unlimited or if no amount is stated, the Undersigned shall be liable for all indebtedness, without limitation as to amount), plus accrued interest thereon and all attorneys' fees, collection costs and enforcement expenses referable thereto.

\* \* \*

The Undersigned will pay or reimburse Lender for all costs and expenses (including reasonable attorneys' fees and legal expenses) incurred by Lender in connection with the protection, defense or enforcement of this guaranty in any litigation or bankruptcy or insolvency proceedings.

(Exs. 82, 161 ¶¶ 4-5.)

An event of default under any of the Loan Documents constitutes an event of default under all of the Loan Documents. (Exs. 3, 6, 9.) The terms of Notes, Security Agreements and Mortgage are standard in the banking industry and commercially reasonable. (Tr. 130-36, 434.)

**C. HAUGEN FEEDS' AND THE HAUGENS' FINANCIAL STATUS BEFORE UPB**

Prior to UPB's involvement, the Haugens and Haugen Feeds were having significant financial problems and were facing imminent foreclosure and liquidation of their real estate and other assets. (Tr. 403, 466-68, 494.) In May 2000, Mark Halverson docketed a \$10,655.06 judgment against Haugen Feeds. (Ex. 12.) By January 2002, Meadowland Farmers Cooperative ("Meadowland") obtained judgments against Leland Haugen and Haugen Feeds totaling over \$140,000. (Ex. 27.) In October 2002, New Vision Coop sued the Haugens and Haugen Feeds for nearly \$100,000. (Ex. 11.) John Morrell sued Leland Haugen in May 2003 for more than \$299,000 and had a judgment against Leland Haugen. (Ex. 15.) Prudential Insurance Company of America

("Prudential") held a mortgage in excess of \$138,000 on the 80-acre parcel, which was in foreclosure. (Ex. 19.)

The Haugens' and Haugen Feeds' most significant creditor was Canby Bank. Between 1997 and 2002, the Haugens and Haugen Feeds obtained a number of loans from Canby Bank and had executed various promissory notes, personal guarantees and security agreements. (Ex. 20.) Canby Bank also held three mortgages on the Real Property. (Greenway Depo. 34.<sup>3</sup>)

By January 2003, the Haugens and Haugen Feeds had defaulted with Canby Bank. (Greenway Depo. 11-12.) The Haugens and Haugen Feeds also were significantly overdrawn on their checking accounts. (*Id.*) The total amount owed in January 2003 was nearly \$950,000. (Ex. 20.) Because of these defaults, Canby Bank would no longer provide financing. (Ex. 21; Greenway Depo. 11-16; Tr. 468, 520.) On January 20, 2003, Canby Bank notified the Haugens and Haugen Feeds that "the bank is not interested in continuing the lending relationship on any sort of restructured terms" and that "[u]pon conclusion of the mediation period, we plan to proceed promptly with commencement of collection." (Ex. 21.) Canby Bank sued the Haugens and Haugen Feeds on February 10, 2003 to collect \$948,264.19. (Ex. 20.)

The Haugens and Haugen Feeds stipulated to the entry of a replevin order authorizing Canby Bank to seize and liquidate all of its secured assets, which was entered on March 6, 2003. (Exs. 22-23.) Enforcement of the replevin order was stayed until

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<sup>3</sup> Citations to "Greenway Depo." refer to the deposition of Canby Bank's Mark Greenway, which was admitted into evidence at trial.

March 17, 2003 by the parties' agreement. (*Id.*) The purpose of the stay was to allow negotiations for a buy-out transaction to liquidate the Canby Bank debt. (Greenway Depo. 16-19.)

#### **D. THE TWO-STEP CANBY BANK BUY-OUT**

The Haugens and Haugen Feeds entered into two separate four-part transactions to liquidate their debt to Canby Bank and resolve Canby Bank's lawsuit.

##### **1. Step One**

In the first step, the Haugens sold their property in four separate sales: (1) the Haugens sold hogs to Darren Haugen for \$58,500 (Ex. 37); (2) the Haugens sold personally-owned machinery and equipment to Sahli for \$60,000 (Exs. 45, 51); (3) Haugen Feeds sold its assets to Sahli for \$130,000 (Exs. 51, 55); and (4) the Haugens sold the Real Property via warranty deed to Sahli for \$460,500 (Exs. 59, 67, 73).

Each of the four transactions in this first step was financed by UPB. (Tr. 61-70.) UPB financed Darren Haugen's purchase of hogs through a promissory note, which was repaid. (Ex. 38.) UPB financed Sahli's purchase of the Haugens' machinery and equipment and HNE's assets with a \$190,000 promissory note and security agreement. (Exs. 52-53.) UPB financed Sahli's purchase of the Real Property via a promissory note, mortgage and security agreement. (Exs. 69-72.) The sale proceeds received by the Haugens and Haugen Feeds were used to pay off the promissory notes and satisfy the mortgages held by Canby Bank and Prudential. (Exs. 56, 75-79.)

The first step of the Canby Bank buy-out transaction provided substantial benefit to the Haugens and Haugen Feeds. (Tr. 73, 420, 478.) With financing provided by UPB,

the Haugens and Haugen Feeds were able to settle their nearly \$950,000 Canby Bank debt at the substantially-reduced price of \$611,000. (Tr. 420, 487.) Without UPB, the Haugens and Haugen Feeds would not have been able to maintain their personal property and real estate holdings. (Tr. 403.) All personal property would have been replevied and sold, and the Real Property would have been foreclosed. (Tr. 403, 494.)

## 2. Step Two

The second step of the Canby Bank buy-out also involved four transactions: (1) HNE acquired hogs from Darren Haugen for \$49,500 (Ex. 41); (2) HNE acquired machinery and equipment from Sahli for \$64,000 (Ex. 57); (3) HNE purchased the Haugen Feeds assets from Sahli for \$138,000 (Ex. 87); and (4) HNE bought the Real Property from Sahli via contract for deed for \$486,500 (Ex. 89).

UPB financed HNE's machinery and equipment purchase with promissory note #60126, which was repaid. (Ex. 80.) UPB also partially financed HNE's purchase of the machinery and equipment and Haugen Feeds assets with Note 601480, Mortgage and Security Agreement. (Exs. 3-5.)

Sahli sold the Real Property to HNE under a contract for deed drafted by O'Leary. (Ex. 89.) Haugen confirmed that Ilene Haugen signed the contract for deed on HNE's behalf and agreed to be bound by its terms. (Tr. 218-19.) Sahli testified that he intended that the contract for deed be valid and enforceable according to its terms. (Sahli Depo. 29, 36, 43.<sup>4</sup>)

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<sup>4</sup> Citations to "Sahli Depo." refer to the deposition of Mark Sahli, which was admitted into evidence at trial.

This second set of four transactions greatly benefited the Haugens by allowing them to continue their farming and feed mill operations through HNE without being burdened by creditors' claims. (Tr. 477-78.)

**E. HNE DEFAULTS ON THE CONTRACT FOR DEED AND SAHLI DEFAULTS ON HIS MORTGAGE TO UPB**

HNE made the required initial \$8,600 down payment on the contract for deed. (Ex. 90.) HNE did not make the required balloon payment on September 12, 2004. (Tr. 178.) HNE's contract for deed default caused Sahli to default on his note and mortgage to UPB. (Sahli Depo. 41-43; Exs. 69-72.) On October 20, 2004, Sahli conveyed the Real Property to UPB by deed in lieu of foreclosure. (Ex. 93.) UPB thus acquired Sahli's vendor rights under the contract for deed. (*Id.*) HNE made no subsequent contract for deed payments. (Tr. 178.)

**F. THE MEADOWLAND LAWSUIT**

On December 31, 2003, Meadowland sued the Haugens, Haugen Feeds, HNE, UPB and Sahli ("Meadowland Lawsuit"). (Ex. 94.) Meadowland, a judgment creditor of Leland Haugen and Haugen Feeds, claimed that the Canby Bank buy-out transactions were fraudulent transfers. (*Id.*)

UPB incurred \$117,110.24 in legal fees defending against the claims asserted in the Meadowland Lawsuit to preserve and protect its security interests in the hogs, machinery, equipment and Real Property. (Tr. 315; Exs. 145, 167.) These fees were incurred in: (1) responding to Meadowland's complaint; (2) written discovery and

depositions; (3) summary judgment motions; (4) settlement efforts; and (5) responding to the Haugens' litigation threat. (Tr. 315-21; Exs. 145, 167.)

All fees incurred by UPB in the Meadowland Lawsuit were reasonably and necessarily incurred to preserve and protect UPB's interest in the collateral and Real Property. (Tr. 315-24.) UPB's counsel, Joseph Roach, reviewed the legal invoices for the Meadowland Lawsuit and determined that the matter was appropriately staffed by UPB's attorneys and there were no duplicative charges. (Tr. 321-22.) The rates charged by UPB's attorneys were commensurate with other Twin Cities law firms. (Tr. 322-24.) UPB's banking expert, Frank Brosseau, confirmed that he saw no duplicative charges and that the legal fees were commensurate with market rates. (Tr. 435-36.)

The Meadowland Lawsuit settled on April 15, 2005. (Ex. 156.) The settlement included a \$25,000 payment from UPB to Meadowland. (Ex. 95.) UPB also consented to the Haugens selling cattle to pay their portion of the settlement. (*Id.*)

## **G. THIS LAWSUIT**

### **1. Appellants' default**

On November 17, 2004, UPB notified HNE of its default under Note 60148. (Ex. 96.) UPB also specifically notified HNE that it was required to reimburse UPB for all costs, expenses and attorneys' fees incurred in any lawsuit. (*Id.*)

### **2. UPB initiates this lawsuit**

On May 2, 2005, UPB commenced this lawsuit to collect amounts owed under the Notes and recover collateral under the Security Agreements. (Ex. 153.) UPB also sought a determination that it was the owner of the Real Property or, alternatively, that the

contract for deed be canceled. (*Id.*) UPB incurred legal fees of \$18,417.47 for its initial review of the lawsuit. (Exs. 145, 167; Tr. 327-28.)

**3. The preliminary injunction**

UPB next filed motions for a temporary restraining order and preliminary injunction to protect and preserve its interest in personal property and real estate collateral. (Tr. 328-29.) On May 18, 2005, the district court entered a preliminary injunction enjoining the Haugens and HNE from encumbering, leasing or transferring the Real Property and other collateral. (5/18/05 Order.) The legal fees and expenses incurred by UPB to obtain the temporary restraining order and preliminary injunction totaled \$10,070.20. (Exs. 145, 167; Tr. 328.)

**4. Replevin**

UPB was also forced to file a replevin motion. (Tr. 329-30.) On June 30, 2005, the district court entered a replevin order authorizing UPB to seize and sell all collateral in which it held a security interest. (6/30/05 Order.) The Cottonwood County Sheriff's Office seized the collateral subject on July 1 and 11, 2005. (Exs. 97 and 98.) All collateral was properly inventoried. (*Id.*)

UPB retained Gehling Auctions to recover and sell the machinery and equipment, and it was sold at public auction in August 2005 for \$280,216.00. (Ex. 99.) After reimbursing Gehling Auctions, the net was \$193,811.30. (*Id.*) UPB retained Pro Pig to oversee the sale of livestock. (Tr. 87.) The cattle and hogs were sold at public auctions at market prices. (Tr. 87-88.) All replevin proceeds were applied to the outstanding Note

balances. (Exs. 146-47; Tr. 91.) Non-legal fees and expenses incurred by UPB for the replevin were applied to the outstanding Note balances. (Exs. 146-47, 152; Tr. 91.)

UPB was forced to incur legal fees relating to replevin issues, including a number of motions – UPB's motion for contempt, Appellants' motion for sanctions, UPB's motion for an order to show cause and UPB's motion regarding crop harvesting – all of which were resolved in UPB's favor. (Tr. 330-34.) UPB's legal fees and expenses incurred for the replevin totaled \$63,364.09. (Exs. 145, 167.)

#### **5. Appellants' Answer and Counterclaims**

On May 23, 2005, Faegre & Benson and O'Leary filed an Answer and 10 Counterclaims on behalf of the Haugens and HNE. (Ex. 103.) Additionally, Appellants sought to assert a punitive damages claim not once, but twice. (Def. Mem. in Supp. of Mot. to Amend, dated March 2, 2006 and May 12, 2008.)

UPB was forced to incur significant legal fees defending against Appellants' 10 counterclaims and punitive damages motions. (Tr. 337-39.) Without exception, UPB's defense was successful. On August 15, 2006, the district court summarily dismissed Appellants' counterclaims. (8/15/06 Order.) Prior to trial, Appellants attempted to assert their counterclaims again. (Tr. 339.) On April 14, 2008, pursuant to a stipulation, the district court dismissed with prejudice Counts VI, VII, VIII, IX and X of Appellants' counterclaims. (4/14/08 Order.) UPB then sought and received summary judgment on the remaining five counterclaims. (8/28/08 Order.)

The legal fees and expenses incurred by UPB in connection with Appellants' counterclaims totaled \$62,400.63. (Exs. 145, 167.)

**6. Mr. Mack's substitution as counsel**

John Mack was substituted as counsel for Appellants on August 2, 2005, after the district court issued the preliminary injunction and replevin orders. (Tr. 336.) Within days, Mr. Mack sought to overturn nearly all of the district court's prior decisions. (Tr. 336-37.) Mr. Mack also filed a motion to temporarily enjoin the replevin sale. (*Id.*) The district court denied each of these motions. (Tr. 337.) UPB incurred legal fees and expenses totaling \$17,416.99 to oppose the motions. (Exs. 145, 167; Tr. 337.)

**7. UPB's summary judgment motion on its judicial cancellation claim**

In July 2005, UPB sought summary judgment on its claim to judicially cancel the contract for deed. (Pl. Mot. for Partial Sum. Jud., dated July 22, 2005, at 1-2.) In their response, Appellants stated that the contract for deed from Sahli to HNE may constitute an equitable mortgage rather than a true contract for deed, a claim that never appeared in any prior pleading. (Def. Mem. in Reply to Pl. Mot. for Sum. Jud., dated August 10, 2005.) On February 10, 2006, the district court issued an Order that the contract for deed was not an equitable mortgage. (2/10/06 Order.) The court then determined that HNE defaulted under the Contract for deed, and ordered judicial cancellation. (*Id.*)

UPB incurred significant legal fees litigating the issue of whether the contract for deed constituted an equitable mortgage. Through February 10, 2006, UPB's efforts regarding the contract for deed/equitable mortgage issue were successful, as all of the relief UPB sought had been granted. (*Id.*) The total attorneys' fees incurred for the contract for deed/equitable mortgage issue were \$62,971.07. (Exs. 145, 167; Tr. 344.)

**8. The first appeal**

Appellants appealed the February 10, 2006 Order and, on May 22, 2007, the Court of Appeals reversed. "Although we have no criticism of the district court, we do not find the requisite clarity to support the conclusion that the parties conferred authority on the court to decide the equitable-mortgage issue on the record before it." *See United Prairie Bank-Mountain Lake v. Haugen Nutrition & Equip., LLC*, Nos. A06-722, A06-868, 2007 WL 1470219, at \*3 (Minn. App. May 22, 2007) (RA53-56). UPB's legal fees and expenses for the appeal totaled \$64,620.93. (Exs. 145, 167; Tr. 348-49.)

**9. Discovery**

UPB participated in significant discovery, which was aimed at narrowing the issues for trial. UPB drafted three sets of interrogatories and requests for production of documents and responded to two sets of interrogatories and requests for production of documents from Appellants. (Tr. 340-41.) UPB was also forced to serve subpoenas on O'Leary, the Haugens' accountant, Bruce Kaardal, and the Cottonwood County Auditor/Treasurer, Jan Johnson. (*Id.*) The parties took depositions of eight witnesses – Jan Johnson, Darren Haugen, Mark Sahli, Leland Haugen, Mark Greenway, Ted Devine, O'Leary and Jay Franz. (*Id.*; Ex. 167.) All of these discovery efforts were necessary for UPB to take appropriate action to protect and preserve its interest in collateral and Real Property, as well as narrow the issues for trial. (Tr. 340.) The total legal fees incurred by UPB in discovery was \$159,091.83, which represents just over \$4,400 per month for 36 months of litigation. (Exs. 145, 167; Tr. 341.)

## 10. Summary judgment motions

As a result of the facts uncovered through discovery, UPB filed a number of summary judgment motions to obtain judgment on certain claims and counterclaims. (Tr. 345-46.) UPB also responded to summary judgment motions filed by Appellants. (*Id.*)

As discussed above, UPB's initial summary judgment motion was successful. Following the appeal, UPB sought summary judgment on Appellants' equitable mortgage claim on the grounds that no genuine issue of material fact existed regarding the parties' intent to enter into an equitable mortgage transaction. (Pl. Mot. for Sum. Jud., dated July 19, 2007.) On October 31, 2007, the district court denied UPB's summary judgment motion and identified facts that, if proven, could establish that an equitable mortgage transaction was intended. (10/31/07 Order.)

The parties thereafter engaged in discovery aimed to address the potential fact issues identified by the district court. The deposition testimony and exhibits did, in fact, significantly narrow the issues for trial. UPB subsequently filed its final summary judgment motion seeking: (i) entry of judgment in UPB's favor on Appellants' breaches of the Loan Documents; (ii) entry of judgment in UPB's favor on Appellants' equitable mortgage claim; and (iii) dismissal of Appellants' counterclaims. (Pl. Mot. for Sum. Jud., dated May 12, 2008.) In its August 28, 2008 Order, the district court granted nearly all of UPB's requested relief. (8/28/08 Order.) Judgment was entered for UPB regarding Appellants' breach of contract and all of Appellants' counterclaims were dismissed with prejudice. (*Id.*) The only issues remaining for trial were Appellants' equitable mortgage defense and UPB's request for attorneys' fees under the Loan Documents. (*Id.*)

UPB incurred significant legal fees in the summary judgment motion practice, totaling \$97,969.36. (Exs. 145, 167; Tr. 345-47.) It was necessary for UPB to engage in this motion practice to protect and preserve its interest in the collateral and Real Property, as well as to narrow the issues for trial. (Tr. 345-47.)

#### **11. Rent deposits**

HNE and Darren Haugen farmed the land and used the buildings and equipment located on the Real Property in 2006, 2007 and 2008 without paying UPB any rent. (Tr. 351.) On April 27, 2006, the district court issued a Writ of Recovery granting UPB possession of the Real Property unless HNE posted a \$75,000 bond to cover rents, costs and other damages due to UPB by reason of Appellants' refusal to relinquish possession of the Real Property for the 2006 crop season. (4/27/06 Order.) Darren Haugen, who was renting the Real Property, posted the bond for the 2006 rent and retained possession of the Real Property. (Tr. 296-97.)

UPB subsequently moved to increase the security for rents associated with the 2007 crop year, and on March 28, 2007, the district court increased the required deposit by \$40,000 "in order to protect [UPB] . . . if Defendants chose not to release the Property to [UPB] or to again farm the premises or rent same for crops usage." (3/28/07 Order.) Darren Haugen again posted the \$40,000 rent bond. (Tr. 296-97.)

On August 28, 2008, the district court issued an Order that HNE "shall deposit in certified funds the sum of \$60,000.00 with the Court Administrator of Cottonwood County regarding land value usage or crop value as additional security for the 2008 crop year." (8/28/08 Order.) Darren Haugen deposited the 2008 rent. (Tr. 296-97.)

UPB incurred legal fees of \$37,312.63 on its motions regarding the rent. (Exs. 145, 167; Tr. 351.)

**12. Miscellaneous issues and trial preparation**

UPB incurred legal fees totaling \$34,274.57 through July 2008 in connection with a number of other issues, including responding to Appellants' motion to sell the Real Property, motions to amend pleadings, settlement efforts and trial preparation. (Exs. 145, 167; Tr. 352-54.) Significantly, UPB did not seek any of its trial preparation, trial or post-trial legal fees and expenses.

**13. UPB's total attorneys' fees**

All told, UPB incurred \$627,909.77 in legal fees in this lawsuit through July 2008. (Exs. 145, 167; Tr. 355.) All legal fees were incurred to collect the amounts due and owing under the Notes, as well as to protect and preserve UPB's interest in the collateral and Real Property. (Tr. 355-56.) These legal fees were charged to the outstanding balances due under each of the Notes, on a pro rata basis. (Tr. 143-44, 355.) In addition, after the equitable mortgage issue was raised in October 2005, UPB began charging its legal fees to the outstanding balance due under the contract for deed. (Tr. 143-44, 356-57.) UPB charged only 100% of its legal fees to the Notes and contract for deed; there was no "double dipping." (Tr. 143-44, 357.) UPB retained Larson Allen and Debra Thompson to calculate the outstanding balances of the Notes and the Contract for deed, including the attorneys' fees and costs incurred by UPB. (Tr. 91-92, 122; Ex. 116.)

## **H. THE DISTRICT COURT'S 1/26/09 JUDGMENT**

Following a two-day trial on September 10 and 11, 2008, the district court issued the 1/26/09 Judgment. A-1-21. The district court determined that: (1) the contract for deed constituted an equitable mortgage; (2) HNE had breached the contract for deed and the amount due was the initial loan advance of \$486,200, minus any payments made by HNE, plus interest; (3) UPB could foreclose the contract for deed in this lawsuit; and (4) UPB was entitled to receive the \$175,000 in rent deposited with the district court.

With respect to UPB's request for an award of attorneys' fees, the district court determined that UPB was not entitled to recover legal fees incurred to litigate the contract for deed/equitable mortgage issue. A-20 ¶ 6. The district court also determined that all other legal fees incurred by UPB were reasonably incurred to collect amounts due under the Loan Documents and to protect and preserve the collateral and Real Property and were therefore recoverable. A-12 ¶¶ 52-53 and A-15 ¶¶ 71-75.

Following the 1/26/09 Judgment, UPB submitted the revised expert report of Debra Thompson to the district court on February 13, 2009, which confirmed that UPB removed the \$341,198.19 in attorneys' fees that had been allocated to the contract for deed/equitable mortgage balance. RA17-25. Thus, the total attorneys' fees and costs awarded by the district court in this lawsuit was \$286,711.58, which is just 38% of the total attorneys' fees incurred by UPB.

## I. UPB'S FORECLOSURE OF THE EQUITABLE MORTGAGE AND SHERIFF'S SALE

On February 24, 2009, UPB filed a motion for entry of a judgment of foreclosure with respect to the equitable mortgage. As set forth above, UPB submitted the revised expert report of Debra Thompson to provide an updated calculation of the outstanding amount due under the equitable mortgage, which did not include the \$341,198.19 in attorneys' fees that had been previously allocated. RA17-25. Neither HNE nor the Haugens contested Ms. Thompson's revised calculations or opposed UPB's motion.

On March 30, 2009, the district court issued Findings of Fact, Conclusions of Law and Order for Judgment, in which it entered a judgment of foreclosure with respect to the contract for deed/equitable mortgage in underlying lawsuit ("3/30/09 Foreclosure Judgment"). RA26-31. The 3/30/09 Foreclosure Judgment confirms that "no attorneys' fees were included in the calculation." RA28 ¶ 8 (emphasis added).

On May 14, 2009, the Cottonwood County Sheriff sold the Real Property in separate parcels. UPB was the only and highest bidder, with bids of \$445,689.66 for Parcel 1 and \$222,844.33 for Parcel 2. RA39-42. At the subsequent confirmation hearing, counsel for HNE and the Haugens did not raise any objection to the 3/30/09 Foreclosure Judgment or the sheriff's sale. RA43-48. The district court thus confirmed the sheriff's sale in its Order Confirming Foreclosure Sales ("5/14/09 Confirmation Order"). RA49-52. The 5/14/09 Confirmation Order provides that the applicable statutory redemption period for each parcel was 12 months. *Id.* The redemption period

began on May 14, 2009 and expired on May 14, 2010 without any redemption. UPB is now the fee owner of the Real Property.<sup>5</sup>

**J. APPELLANTS' APPEAL OF THE 1/26/09 JUDGMENT**

After the district court denied Appellants' motion for a new trial, Appellants filed a Notice of Appeal on April 3, 2009. A-75. As confirmed by the Notice of Appeal (and Appellants' subsequent appellate briefs), Appellants appealed from only the 1/26/09 Judgment. Appellants did not appeal the 3/30/09 Foreclosure Judgment or the 5/14/09 Confirmation Order. *Id.* All applicable post-judgment relief and appeal deadlines have expired and, thus, both decisions are final and unappealable as a matter of law.

In its May 11, 2010 decision, the Court of Appeals affirmed the 1/26/09 Judgment in all respects. *See United Prairie Bank*, 782 N.W.2d at 274. First, the Court of Appeals concluded that "[A]ppellants do not have a right to a jury trial on the issue of attorney fees" because UPB's request for an award of attorneys' fees was akin to "a claim for restitution than for compensation" which did not implicate the jury trial right. *Id.* at 271. The Court of Appeals also reasoned that "resolution of attorney-fees claims is best left to the courts" because "courts have experience and expertise in determining the reasonableness of fees" and "[s]ubmissions of these questions to juries could create delay and compromise efficiency." *Id.* Second, the Court of Appeals concluded that the

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<sup>5</sup> Because UPB is now the fee owner of the Real Property as a result of the unappealed 3/30/09 Foreclosure Judgment and 5/14/09 Confirmation Order, UPB believes this appeal should be dismissed as moot. While this Court denied UPB's motion to dismiss, UPB nonetheless incorporates herein the arguments in its motion to dismiss memorandum and reply brief.

district court's attorneys' fee award was reasonable because: (a) UPB properly incurred fees under the Loan Documents to protect and preserve its interests in the collateral and Real Property; (b) attorneys' fees were appropriately awarded for UPB's successful efforts in the lawsuit and disallowed for UPB's unsuccessful efforts; and (c) the hourly rates charged by UPB's attorneys were appropriate. *Id.* at 271-73. Third, the Court of Appeals concluded that the district court properly awarded to UPB the \$175,000 in deposited rent. *Id.* at 273-74.

## ARGUMENT

### **I. STANDARD OF REVIEW**

The standard of review on appeal from judgment is whether the evidence supports the trial court's findings, and whether the findings support the trial court's conclusions of law. *See Gruenhagen v. Larson*, 310 Minn. 454, 458, 246 N.W.2d 565, 569 (1976). A trial court's findings of fact are not disturbed unless they are clearly erroneous. *See Minn. R. Civ. P. 52.01; Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 101 (Minn. 1999). In actions tried without a jury, the trial court's factual findings must be sustained unless they are "manifestly and palpably contrary to the evidence." *State v. Bentley*, 245 Minn. 334, 345, 71 N.W.2d 780, 787 (1955). This Court gives due regard to the trial court's judgment as to witness credibility. *See Toombs v. Daniels*, 361 N.W.2d 801, 805 (Minn. 1985). This Court should not reverse the trial court's findings unless it is "left with the definite and firm conviction that a mistake has been committed." *Id.* (quotation omitted); *see also Cherne Indus., Inc. v. Grounds & Assocs., Inc.*, 278 N.W.2d 81, 88 (Minn. 1979). The evidence and its reasonable inferences must be viewed in the light most favorable to the prevailing party. *See State v. Thibert*, 279 N.W.2d 53, 56 (Minn. 1979).

### **II. APPELLANTS' MISSTATEMENTS, MISREPRESENTATIONS AND UNSUPPORTED ALLEGATIONS CANNOT BE IGNORED**

As an initial matter, Appellants' brief is littered with numerous misstatements, misrepresentations and unsupported allegations, many of which form the heart of Appellants' arguments. While UPB does not wish to waste the Court's time with an item-

by-item recitation of Appellants' misstatements, the following chart briefly identifies the more egregious examples:

	<u>Appellants' Statement</u>	<u>Accurate Statement</u>
1.	"At least some of the appellants still have significant assets, and the amount of the attorneys' fees awarded prevented appellants from obtaining a loan which would have redeemed their property." App. Br. at 1.	There is no evidence in the record to establish that (a) Appellants are solvent, (b) Appellants attempted to obtain a loan or (c) Appellants were unable to obtain a loan because of the 1/26/09 Judgment.
2.	"On Devine's recommendation, the Haugens formed a corporation, Haugen N & E, and obtained an operating loan in its name from UPB." App. Br. at 3.	The evidence shows that the Haugens, with the assistance of their counsel, O'Leary, formed HNE in July 2002, nearly 15 months before UPB made the loans that are at issue in this lawsuit. Ex. 31; Tr. 62, 465, 477-78.
3.	"The Haugens also transferred their farm to Haugen N & E." App. Br. at 3.	The Haugens did not transfer any property or assets to HNE. Transfers were made to Sahli, who then made the transfers to HNE.
4.	"Haugen N & E sold the farm to Mr. Sahli on a contract for deed." App. Br. at 3.	The Haugens conveyed the Real Property to Sahli via warranty deed. Ex. 73. Sahli then conveyed the Real Property to HNE via contract for deed. Ex. 89.
5.	"Neither the bank nor Mr. Sahli brought an action to cancel the contract for deed." App. Br. at 4.	UPB began this lawsuit as a quiet title action based on the Haugens' statement in the Meadowland Lawsuit that neither the Haugens nor HNE had any interest in the Real Property. Ex. 106. UPB's Complaint nonetheless sought a determination that the statutory cancellation period for the contract for deed had commenced. A-28 at ¶ h. And Count VI of UPB's Amended Complaint is entitled "Judicial Cancellation of Contract for deed." RA66-81.
6.	"Appellants brought a motion demanding an accounting, and UPB produced a partial accounting, the gist	UPB produced a full accounting of the assets and livestock sold as a result of the replevin. Exs. 97-99. The total sale

	<b>Appellants' Statement</b>	<b>Accurate Statement</b>
	of which is that its expenses and attorneys fees exceeded the value of the property sold at the replevin sale." App. Br. at 5.	proceeds were \$416,899.25. Exs. 99, 146, 147. UPB's attorneys' fees associated with the replevin actions totaled just \$63,364.09.
7.	"The District Court held that respondent was entitled to attorneys' fees in the amount of \$601,567.65." App. Br. at 7.	This is the amount of the total judgment against HNE, <u>not</u> the amount of UPB's attorneys' fee award. The amount of attorneys' fees that UPB was ultimately awarded in this lawsuit was just \$286,711.58. <sup>6</sup>
8.	"Once it was determined that the contract for deed was an equitable mortgage, a separate, later action was brought to foreclose it." App. Br. at 16.  "UPB chose not to foreclose its equitable mortgage as part of the action appealed." App. Br. at 16.  "As adjudicated, this was not a mortgage foreclosure case – no mortgage was foreclosed." App. Br. at 21.	UPB's foreclosure of the equitable mortgage and the district court's 3/30/09 Foreclosure Judgment and 5/14/09 Confirmation Order occurred in this lawsuit. <i>See above.</i> Appellants' decision not to appeal the 3/30/09 Foreclosure Judgment or 5/14/09 Confirmation Order does not change this fact.
9.	"Actions to recover money, including actions by attorneys to recover money for breach of contract, have always been actions at law." App. Br. at 21.	This is not a lawsuit by UPB's attorneys to recover money for breach of contract. Rather, UPB seeks reimbursement for the attorneys' fees it incurred in this lawsuit.
10.	"The requested award was in excess of the value of all the property ever mortgaged or secured to UPB." App. Br. at 32.	The 240 acres of Real Property were appraised in 2003 at \$650,000. Ex. 65. And the other collateral (machinery, equipment, livestock) was sold for more than \$400,000 (Exs. 199, 146, 147), meaning that the value of the assets and property at issue far exceeded the attorneys' fees awarded to UPB.

<sup>6</sup> Appellants' misrepresentation is particularly surprising given that they were chastised by the Court of Appeals for this very same error. *See United Prairie Bank*, 782 N.W.2d at 271 n.5.

	<u>Appellants' Statement</u>	<u>Accurate Statement</u>
11.	"Indeed, Meadowlands, in its lawsuit, did its best to assert the innocence of the Haugens." App. Br. at 37.	Meadowlands asserted two fraudulent transfer claims against Darren Haugen, four fraudulent transfer claims against HNE, one fraudulent transfer claim against Ilene Haugen and a temporary restraining order and temporary injunction claim against Ilene Haugen, Darren Haugen and HNE. RA82-95.

Whether done intentionally or inadvertently, Appellants' briefing practices cannot be condoned. The Court should evaluate the merits of Appellants' legal arguments with a healthy amount of skepticism.

### **III. APPELLANTS HAVE NO RIGHT TO A JURY TRIAL ON UPB'S REQUEST FOR AN AWARD OF ATTORNEYS' FEES**

#### **A. The Court of Appeals' decision**

Minnesota law is clear that lenders may receive a contractual award of attorneys' fees and costs incurred in seeking to collect outstanding debts and enforce their property interests. "Where loan documents authorize a lender to recover legal expenses associated with collection . . . Minnesota courts will enforce the provision as long as the fees are reasonable." *State Bank of Cokato v. Ziehwein*, 510 N.W.2d 268, 270 (Minn. App. 1994) (citing *O'Donnell v. McGee Trucks, Inc.*, 294 Minn. 110, 113, 199 N.W.2d 432, 434-35 (1972)). Lenders are entitled to recover attorneys' fees incurred even in defense of claims asserted by their borrowers. *See Boone v. Wells Fargo Bank, N.A.*, Civil No. 07-3922 (DWF/AJB), 2009 WL 2461736, at \*1 (D. Minn. Aug. 10, 2009) (RA57-58) (citations omitted).

While there are relatively few Minnesota appellate decisions addressing a request for a contractually-authorized attorneys' fee award – and none of which directly address the precise issue of whether a jury trial right exists for such a request – each of the decisions indicate that the trial court, not a jury, is to decide the amount of attorneys' fees to be awarded. *See, e.g., O'Donnell*, 294 Minn. at 113-14, 199 N.W.2d at 434-35 (following entry of default judgment, trial court awarded attorneys' fees pursuant to provisions in subject promissory notes); *Northfield Care Ctr., Inc. v. Anderson*, 707 N.W.2d 731, 736 (Minn. App. 2006) (following entry of summary judgment, trial court awarded attorneys' fees under subject nursing home admissions contract); *State Bank of Cokato*, 510 N.W.2d at 270 (following the conclusion of trial, trial court awarded of attorneys' fees pursuant to loan documents); *Oleisky v. Midwest Fed. Sav. and Loan Ass'n*, 398 N.W.2d 627, 629-30 (Minn. App. 1986) (on bank's motion, trial court awarded attorneys' fees under subject promissory note); *Potter v. Am. Bean & Grain Corp.*, 388 N.W.2d 22, 25 (Minn. App. 1986) (following jury verdict, trial court awarded attorneys' fees under subject promissory note); *Interstate One Realty v. Crippa*, No. C4-95-1253, 1996 WL 22319 (Minn. App. Jan. 23, 1996) (RA59-62) (remanding to district court to determine the reasonableness of attorneys' fees awarded under loan documents); *C.J. Duffey Paper Co. v. Reger*, 588 N.W.2d 519, 528 (Minn. App. 1999) (affirming jury's award of damages and remanding to trial court to determine attorneys' fees because the "[d]etermination of the amount of fees will involve a factual inquiry more appropriately conducted by the trial court").

Courts from other jurisdictions to address the precise issue of whether a contractually-authorized attorneys' fee award have held that the award of reasonable attorneys' fees is to be made by the trial court, not a jury. *See, e.g., Ideal Elec. Sec. Co. v. Int'l Fid. Ins. Co.*, 129 F.3d 143, 150 (D.C. Cir. 1997) ("[O]nce a contractual entitlement to attorney's fees has been ascertained, the determination of a reasonable fee award is for the trial court in light of the relevant circumstances"); *The Scotts Co. v. Cent. Garden & Pet Co.*, 256 F. Supp. 2d 734, 748 (S.D. Ohio 2003) ("Attorneys fees and costs are matters traditionally reserved for court determination"); *Redshaw Credit Corp. v. Diamond*, 686 F. Supp. 674, 676 (E.D. Tenn. 1988) ("Attorney fees and costs have been traditionally viewed as a determination to be made by the courts"); *Kolupar v. Wilde Pontiac Cadillac, Inc.*, 683 N.W.2d 58, 65 (Wis. 2004) (holding that the reasonableness of requested attorneys' fees is for the trial court to decide); *Glamann v. St. Paul Fire & Marine Ins. Co.*, 424 N.W.2d 924 (Wis. 1988) (holding that well-settled Wisconsin law directs trial courts, not the jury, to ascertain an attorney fee award).

After a thorough examination of this case law, the trial court record and the parties' arguments, the Court of Appeals concluded that a lender's right to receive a contractually-authorized award of its attorneys' fees does not implicate the jury trial right. *See United Prairie Bank*, 782 N.W.2d at 269-71. The Court of Appeals summarized its determination as follows:

Applying the analysis of *Olson*, *Abraham*, and *Ross* leads us to conclude that appellants do not have a right to a jury trial on the issue of attorney fees. It is undisputed that claims for recovery of attorney fees under a contract did not exist in the territorial courts of Minnesota, so we look to "the nature and character of the controversy, as determined from the

pleadings and by the relief sought." *Abraham*, 639 N.W.2d at 350. The thrust of UPB's complaint is to compel appellants to perform under the various contracts or to obtain damages occasioned by appellants' breach. UPB is entitled to reimbursement of its attorney fees only if it demonstrates that appellants have defaulted under the terms of the contract. This reimbursement claim is more like a claim for restitution than for compensation. *See A.G. Becker-Kipnis*, 553 F. Supp. at 124. In some respects, UPB's attorney-fees claim is akin to a request for specific performance of a contract, for which a jury trial is not required. *See Indianhead Truck Line, Inc. v. Hvidsten Transp., Inc.*, 268 Minn. 176, 193, 128 N.W.2d 334, 346 (1964) (explaining that a demand for payment of monetary penalties allowed by contract is a request for specific performance, and although specific performance is an equitable remedy, "award of [monetary] damages was within the power of the court of equity").

*Id.* at 270-71.

**B. Appellants' four arguments do not justify reversal**

Appellants admitted at trial that the Loan Documents are binding according to their terms. Appellants also do not dispute that they breached the Loan Documents or that UPB was entitled to an award of attorneys' fees. Appellants did not contest below, and they do not contest on appeal, that the Loan Documents plainly provide for an award of attorneys' fees to UPB. Rather, the only issue Appellants challenge is the amount of the attorneys' fees to be awarded. Appellants contend they were entitled to have a Cottonwood County jury evaluate and determine the amount of UPB's attorneys' fees award. *See App. Br.* at 7-31. Although somewhat difficult to ascertain, Appellants appear to make four arguments to support their contention, none of which provides a basis to reverse the Court of Appeals.

**1. The Court of Appeals correctly analyzed *Ross v. Bernhard* to determine that no jury trial right exists**

Appellants' principal attack on the Court of Appeals' decision is that its analysis of the three factors in *Ross v. Bernhard*, 396 U.S. 531 (1970) was erroneous. See App. Br. at 18-22. Appellants' arguments are unpersuasive.

a. Ross Factor No. 1: How the issue was customarily treated

With respect to the first *Ross* factor, the Court of Appeals determined that "courts have concluded that pre-merger custom did not view attorney fees as an issue to be decided by a jury." *United Prairie Bank*, 782 N.W.2d at 269-70 (citing *Kudon v. f.m.e. Corp.*, 547 A.2d 976, 978 (D.C. 1988); *Resolution Trust Corp. v. Marshall*, 939 F.2d 274, 275-76 (5th Cir. 1991)). Appellant responds with the following argument:

As adjudicated this was not a mortgage foreclosure case – no mortgage was foreclosed. So the amount awarded could not have been ancillary to an equitable action. It was the primary action. Actions to recover money, including actions by attorneys to recover money for breach of contract, have always been actions at law.

App. Br. at 21. This argument is specious.

This is not an "action[] by attorneys to recover money for breach of contract." It is an action by a lender against a borrower and guarantors to (a) collect outstanding amounts owed under a promissory note, (b) enforce security interests and collect collateral and (c) obtain title to mortgaged real estate. And this lawsuit was, in fact, a foreclosure action. In its original Complaint, UPB sought an order that the contract for deed be judicially cancelled. A-28 at ¶ h. After Appellants later argued that the contract for deed was not truly a contract for deed but instead was an equitable mortgage that UPB

was obligated to foreclose, UPB amended its Complaint to include an alternative count to foreclose the equitable mortgage. RA66-81. And, following the 1/26/09 Judgment, UPB sought and obtained in this lawsuit a judgment of foreclosure of the equitable mortgage. *See* 3/30/09 Foreclosure Judgment. Accordingly, the Court of Appeals correctly determined that the first *Ross* factor did not support the right to a jury trial.

b. Ross Factor No. 2: The remedy sought

With respect to the second *Ross* factor, the Court of Appeals determined that "the *Kudon* court determined that an award of attorney fees authorized by a private contract provision is in the nature of an equitable remedy" and that "[o]ther courts have reasoned that attorney fees are equitable because they are more restitutionary than compensatory and are collateral to the contract issue." *United Prairie Bank*, 782 N.W.2d at 270.

Appellants respond with the following argument:

The trouble with this logic is that most of UPB's claims for attorneys' fees were not for reimbursement of litigation costs, at least for litigation costs in connection with the foreclosure of its mortgages. . . . It was the request for a money judgment based upon "costs of collection" which was the principle reason for their vigorous defense of the case.

App. Br. at 21. Appellants' argument erroneously assumes that UPB's request for an award of attorneys' fees under the Loan Documents is subsumed within, and is an inseparable part of, its damages claim.

This Court has recognized that attorneys' fees are separate and distinct from recoverable damages of the underlying action. *See, e.g., Fownes v. Hubbard Broadcasting, Inc.*, 310 Minn. 540, 545, 246 N.W.2d 700, 703 (1976) (the Minnesota legislature will "explicitly provid[e] for the recovery of 'reasonable attorneys' fees' in

addition to 'damages' when it so desires") (emphasis added); *AMF Pinspotters, Inc. v. Harkins Bowling, Inc.*, 260 Minn. 499, 507, 110 N.W.2d 348, 353 (1961) (damages from wrongful issuance of an injunction are recoverable and that "[r]easonable attorneys' fees may also be recovered") (citations omitted) (emphasis added); *Prior Lake State Bank v. Groth*, 259 Minn. 495, 496, 108 N.W.2d 619, 620 (1961) (attorneys' fees and expenses incurred in action for damages may be recovered by the injured party in subsequent action against person whose tortious conduct gave rise to such damages). Notably, even where a jury awards damages for the underlying action, the trial court determines the reasonableness of attorneys' fees. *See, e.g., C.J. Duffey Paper Co.*, 588 N.W.2d at 528.

Other courts have likewise determined that a request for attorneys' fees under a contract or statute does not implicate the constitutional right to a jury trial. *See, e.g., Kudon*, 547 A.2d at 978 (where claim for attorneys' fees arises under private contract provision, award of fees is more in nature of equitable rather than legal remedy and, thus, such a claim does not embody a right to trial by jury under the Seventh Amendment); *Ideal Elec. Sec. Co.*, 129 F.3d at 150 ("Where a claim for attorney's fees arises from a private contract provision, such a claim does not embody a right to trial by jury"); *Resolution Trust Corp.*, 939 F.2d at 279 ("Since there is no common law right to recover attorneys fees, the Seventh Amendment does not guarantee a trial by jury to determine the amount of reasonable attorneys fees"); *A.G. Becker-Kipnis & Co. v. Letterman Commodities, Inc.*, 553 F. Supp. 118, 119 (N.D. Ill. 1982) ("[W]e agree [] that a jury trial is not available for the determination of costs and attorneys' fees"); *State ex rel. Chase Resorts, Inc. v. Campbell*, 913 S.W.2d 832 (Mo. Ct. App. 1995) (holding that there is no

common-law right to jury trial to determine reasonable attorney fees once liability therefore has been established).

UPB's request for its attorneys' fees is not part of its underlying damages claim to recover principal and interest due under the Loan Documents, but rather is separate and distinct from its damages claim. Accordingly, the Court of Appeals correctly determined that the second *Ross* factor did not support any jury trial right.

c. Ross Factor No. 3: The abilities and limitations of juries

With respect to the third *Ross* factor, the Court of Appeals determined that "[s]ubmitting fees to the court at the end of a trial is considered to be a better practice because judges 'are better equipped than juries to make computations based on details about billing practices,' and because, where only the prevailing party is allowed fees, it is efficient to wait until after the verdict to submit proof of fees." *United Prairie Bank*, 782 N.W.2d at 270. Appellant's response is as follows:

Every judge was a lawyer once. A large award of attorneys' fees by a Court runs the risk of being perceived by the public as judges favoring their former colleagues. . . . Furthermore, there appears to be no doubt but that a 1<sup>st</sup>-person attorney fee contract (such as a retainer agreement between an attorney and a client) is subject to a determination by a jury.

App. Br. at 22. This argument, too, is meritless.

First, this is not a lawsuit involving a direct claim by an attorney for recovery of unpaid attorneys' fees. This lawsuit involves a request by a lender for contractually-authorized reimbursement of the attorneys' fees incurred in successfully pursuing claims against a borrower and guarantors. Second, Appellants' hyperbole regarding the alleged "risk" of having judges determine attorneys' fees awards is entirely invented for this

appeal. Pretending there is a risk that Judge Gross, the Court of Appeals panel or any other Minnesota judge would inflate the amount of attorneys' fees awarded to a litigant because of some allegiance to, or dislike of, the lawyers handling the case lacks any credibility and, frankly, is insulting to the bench and the bar. The Court of Appeals correctly determined that the third *Ross* factor did not support the right to a jury trial.

## **2. Appellants' reliance on *Simplot* is misplaced**

For their second argument, Appellants provide five pages of quotations from *J.R. Simplot v. Chevron Pipeline, Inc.*, 563 F.3d 1102 (10th Cir. 2009), with little substantive analysis. *See* App. Br. at 22-29. But, as the Court of Appeals correctly determined, *Simplot* is inapposite and does not support Appellants' jury trial claim.

In *Simplot*, 563 F.3d at 1105, Chevron owned and operated a 97-mile pipeline between its phosphate mine and fertilizer processing facility. Ashley owned undeveloped phosphate leases adjacent to Chevron's mine, and sought access to Chevron's pipeline. *Id.* Chevron subsequently published a tariff for its pipeline. *Id.* Ashley sued Chevron, alleging that the pipeline tariff violated antitrust laws. *Id.* During the litigation, Chevron entered into discussions with Simplot to purchase Chevron's entire phosphate operation, including the pipeline. *Id.* at 1106. After extensive negotiations, Simplot and Chevron entered into various purchase agreements which provided, among other things, that Chevron would indemnify and defend Simplot for liabilities arising from the operation of the pipeline before the closing date, while Simplot would indemnify and defend Chevron for liabilities arising from the operation of the pipeline after the closing date. *Id.*

After acquiring the pipeline, Simplot adopted Chevron's pipeline tariff. *Id.* Ashley subsequently sued Simplot for antitrust violations. *Id.* at 1106-07. Simplot then notified Chevron of its contractual duty to defend and indemnify Simplot from and against Ashley's claims on the grounds that they arose before the closing date, and Chevron refused. *Id.* at 1107. After the Ashley litigation was resolved in Simplot's favor, Simplot sued Chevron for breach of contract and sought damages in the amount of the attorneys' fees and costs it incurred in the Ashley litigation. *Id.* at 1107-08. The trial court denied Chevron's request for a jury trial on the amount of Simplot's attorneys' fees and costs and granted summary judgment in favor of Simplot. *Id.* at 1108. Chevron appealed. *Id.*

On appeal, the Tenth Circuit determined that the trial court erroneously denied Chevron's request for a jury trial. The appellate court held that "[u]nlike cases in which attorneys' fees are allowable to the prevailing party, here Simplot's attorneys' fees and costs are themselves part of the merits of their contract claim." *Id.* at 1115. The court reasoned that "[t]his action is, at bottom, a legal action for compensatory damages resulting from a breach of contract. That the measure of damages happens to be attorneys' fees does not . . . change the nature of Simplot's claim." *Id.* at 1116. Thus, the court held that because "[t]his case is like an insurance case where the insurer has breached its duty to defend a lawsuit against the insured by a third party and the insured sues the insurer for payment of the costs of its defense, particularly attorneys' fees," Chevron was entitled to a jury trial. *Id.* at 1117.

Unlike *Simplot*, UPB's claims against Appellants are not in the nature of an insured against an insurer for breach of a duty to defend or indemnify. Rather, UPB's breach of contract claim against Appellants seeks damages consisting of unpaid principal and interest due under the Loan Documents and cancellation/foreclosure of the contract for deed. In *Simplot*, there was no contractual provision for an award of attorneys' fees; that case involved an indemnity provision. In contrast, UPB's claim for attorneys' fees arises out of the Loan Documents and is separate and distinct from its damages claim. *See supra* § III.B.1.b. The Court of Appeals correctly recognized the significant distinction between the claims in *Simplot* and the claims in this case:

We consider *Simplot* inapposite based on this significant distinction. Where the contract breach is premised on an obligation to provide a legal defense, attorney fees are the direct consequence of the breach and the measure of damages. Where, as here, the substance of the contract claim is nonpayment of a promissory note, the damages directly caused by nonpayment is the balance due under the note: the issue of fees is collateral.

*United Prairie Bank*, 782 N.W.2d at 271.

Without any real response to the Court of Appeals' recognition of the critical distinction between *Simplot* and this case, Appellants are left to argue that it "is a distinction without a difference." App. Br. at 28. Appellants speculate that "[i]f this were truly an award of attorneys' fees collateral to enforce a debt on collateral, the amount of attorneys' fees would be considerably less" because "[a]ctions to enforce obligations which incidently [sic] invoke attorneys fees are ordinarily modest." *Id.* at 29.

Not only is Appellants' argument unsupported by any record evidence or law, but it is also premised on the erroneous assumption that UPB's contractual right to seek an

award of its attorneys' fees is limited to an action to "enforce a debt on collateral." The attorneys' fees provisions in the Loan Documents are much broader:

- Under the Note, UPB is entitled to recover "all costs of collection, replevin [an action for the recovery of property wrongfully taken or detained], or any other or similar type of cost." Exs. 3, 6, 9.
- Under the Mortgage, UPB is entitled to recover "all of Lender's expenses if Mortgagor breaches any covenant in this Mortgage" and "all of Lender's expenses incurred in collecting, insuring, preserving or protecting the Property" and all costs and expenses incurred by Lender in enforcing or protecting Lender's rights and remedies under this Mortgage." Ex. 4 § 17.
- Under the Security Agreements, UPB is entitled to recover its "expenses of enforcement, which includes reasonable attorneys' fees and legal expenses to the extent not prohibited by law." Exs. 5, 8, 10.
- Under the Guarantees, UPB is entitled to recover, "all attorneys' fees, collection costs and enforcement expenses" and "all costs and expenses (including reasonable attorneys' fees and legal expenses) incurred by Lender in connection with the protection, defense or enforcement of this guaranty in any litigation or bankruptcy or insolvency proceedings." Exs. 82, 161 ¶¶ 4-5.

Here, there were many more issues involved than simple "enforce[ment of] a debt on collateral." While Appellants accuse UPB of litigating the "kitchen sink" in this lawsuit solely for the purpose of driving up its attorneys' fees expenses (App. Br. at 29), nothing could be further from the truth. What began as a straightforward debt collection and quiet title action quickly became a full-blown commercial lawsuit by virtue of Appellants' litigation efforts to resist UPB's claims. In addition to asserting 10 counterclaims (which UPB had to get dismissed twice) and two attempted punitive damages claims (which UPB had to oppose twice), Appellants filed numerous motions contesting, among other things, UPB's (a) enforcement of a preliminary injunction, (b)

right to replevin of its collateral, (c) enforcement of its security interests, (d) collection of outstanding Note indebtedness, and (e) obtaining title to the Real Property.

The fact that Appellants raised every "kitchen sink" defense they could muster to stonewall UPB does not change the fact that the attorneys' fees UPB incurred were, as the Court of Appeals correctly determined, collateral to its enforcement of rights and remedies under the Loan Documents. By virtue of the attorneys' fees provisions in the Loan Documents, UPB's contractual right to an award of its attorneys' fees encompasses all of the actions it was forced to take.

### **3. This lawsuit is not an attorneys' breach of contract claim**

Borrowing concepts from Minnesota's attorney lien statute, Appellant argues that "[w]hile there is a special proceeding permitting an attorney to in effect recover for his legal services in a summary action before the bench, this right does not extend to the common law breach-of-contract claim by an attorney." App. Br. at 12. Appellants' attempt to morph UPB's request for an award of its attorneys' fees into a direct claim by UPB's attorneys against Appellants is disingenuous. Appellants know full well that UPB's request for an award of attorneys' fees under the Loan Documents is not a "common law breach-of-contract claim by an attorney" against his or her client. Indeed, Appellants concede that "the attorney's lien statute does not apply directly to this case, because [Appellants] were not the clients of [UPB's] attorneys." *Id.* at 11.

### **4. No jury trial right existed by virtue of UPB's "legal claims"**

Appellants begin their final jury-trial argument with the unremarkable proposition that where a case involves "both an equitable component and a legal component . . . a

party is entitled to a jury trial on the legal component unless the two components are inseparable." App. Br. at 13. Appellants state that they were entitled to a jury trial on UPB's attorneys' fee request because "[t]he action on the note is an ordinary contract debt collection case and thus entitles the debtor to a jury trial." *Id.* While confusing, Appellants appear to be arguing that since they were entitled to a jury trial on the "ordinary contract debt collection case," they were also entitled to a jury trial on UPB's request for an award of attorneys' fees relating to its "collection case."

The premise of Appellants' argument is wrong. There is no support for the notion that because a lawsuit involves legal claims (for which the jury trial right exists) there is also a jury trial right with respect to a party's request for contractually-authorized attorneys' fees. And even if the premise of Appellants' argument was sound, Appellants would not be entitled to a jury trial on UPB's request for an award of attorneys' fees because they were not entitled to a jury trial on UPB's "ordinary contract debt collection case." That is because the district court granted summary judgment on UPB's claims for breach of the Notes, Security Agreements, Guarantees and contract for deed. Since the court appropriately granted summary judgment, Appellants were not entitled to a jury trial on those claims. *See State ex rel. Pillsbury v. Honeywell, Inc.*, 291 Minn. 322, 333, 191 N.W.2d 406, 413 (1971) ("No constitutional or statutory right to a jury trial exists where there is no issue of fact").

**C. Public policy and pragmatism support the Court of Appeals' decision**

In determining that the jury trial right did not extend to a lender's request for an award of attorneys' fees under its loan documents, the Court of Appeals properly considered public policy:

The courts have experience and expertise in determining the reasonableness of fees, including the necessity of the services and appropriate billing rates. Submissions of these questions to juries could create delay and compromise efficiency. And recoverable attorney fees would continue to accrue during and after trial, making resolution by a jury difficult, if not impossible.

*United Prairie Bank*, 782 N.W.2d at 271.

With the number of foreclosures and foreclosure-related lawsuits rising in this state,<sup>7</sup> courts would be subject to a significant burden if a jury trial was required for each case in which the foreclosing lender sought a contractually-authorized attorneys' fee award. Moreover, as the Court of Appeals noted, achieving finality in such lawsuits would be difficult if a jury trial was required for attorneys' fee requests because successful lenders would be required to empanel (or re-empanel) a jury after final judgment and appeal to determine the appropriate attorneys' fee award. And it can hardly be disputed that courts are inherently more experienced and better equipped to make determinations of attorneys' fees. Indeed, that is precisely the reason for enactment of Minn. R. Gen. Prac. 119 to uniformly govern attorneys' fee requests in civil litigation

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<sup>7</sup> See Scott Carlson, *Minnesota foreclosure filings up 28 percent*, FINANCE AND COMMERCE, April 16, 2010 (RA 96-97) ("Foreclosure filings in Minnesota rose 28 percent for the first quarter of 2010 compared with the same period a year ago, nearly double the pace of the national average, according to data from California-based RealtyTrac in its monthly U.S. foreclosure market report"); see also *Executive Summary of Program Results in Federal Fiscal Year 2009*, University of Minnesota Extension (RA98-99).

matters not governed by other statutes. See Minn. R. Gen. Prac. 119, Advisory Committee Comment. Accordingly, principles of public policy support the Court of Appeals' determination that requests for contractually-authorized attorneys' fee awards do not implicate the right to a jury trial.

In sum, the Loan Documents plainly provide for an award of attorneys' fees to UPB, a point that Appellants do not contest. And the law is clear that a contractual award of attorneys' fees does not implicate any jury trial right. Accordingly, the district court and Court of Appeals properly determined that Appellants were not entitled to a jury trial on UPB's request for an award of attorneys' fees. This Court should affirm.

#### **IV. THE DISTRICT COURT'S ATTORNEYS' FEE AWARD WAS REASONABLE**

Using the same five arguments presented to the Court of Appeals, Appellants' theme in challenging the amount of the attorneys' fees award is that UPB's attorneys "ha[d] an incentive to 'run up the bill'" in the lawsuit. App. Br. at 32. That suggestion is as ridiculous and insulting as it is unfounded. None of Appellants' five recycled arguments has any merit.

##### **A. UPB submitted sufficient evidence of its attorneys' fees**

In Minnesota, courts use the "lodestar method" to determine the reasonableness of attorneys' fees. See *Specialized Tours, Inc. v. Hagen*, 392 N.W.2d 520, 542 (Minn. 1986) (citing *Hensley v. Eckerhart*, 461 U.S. 424 (1983)). While Appellants argue that "it is questionable whether the *Lodestar* or the enhanced attorneys' fees method of determining a right to such fees applies in 'reasonable attorneys' fees' contract cases" (App. Br. at 34),

later in their brief Appellants state that "[t]he District Court correctly laid out the factors to be considered in determining reasonable attorneys' fees." *Id.* at 44 (emphasis added). Regardless, it has been confirmed that the lodestar analysis applies to a contractual attorneys' fees claim. *See River Ridge Dairy, L.L.P. v. Hammers Constr. Co.*, No. C1-02-2, 2002 WL 31057405, at \*3 (Minn. App. Sept. 11, 2002) (RA63-65).

In applying the lodestar method to determine UPB's attorneys' fees, the district court made the following findings:

73) That Defendants did not dispute any of the non-legal replevin expenses incurred by UPB. Nor did Defendants raise any other fact issue at trial relating to the execution of the June 30, 2005 replevin order or the resulting sale of the machinery and equipment and livestock. Likewise, Defendants did not dispute that the attorneys' fees and expenses were actually incurred and paid by UPB to collect amounts due under the Loan Documents, to protect and preserve the collateral securing Defendants' repayment obligations to UPB and/or to defeat adverse claims made against the Real Property. Finally, Defendants did not challenge UPB's testimony that the instant litigation has been appropriately staffed and that there have been no duplicative charges.

74) That the Court has reviewed UPB's claimed attorneys' fees and expenses incurred in collecting amounts due under the various notes in default and to protect and preserve the collateral securing Defendants' repayment obligations to UPB.

75) That after considering all relevant circumstances, including: (1) the time and labor required to suitably litigate the issues in the instant case, the (2) nature and difficulty of the responsibility assumed by UPB and its attorneys in bringing the instant litigation, in obtaining and executing a replevin order, in responding to the Defendants' answer and numerous counterclaims, in defending against various motions brought by Defendants, and in bringing various motions of its own, (3) the difficulty and complicated issues raised in the instant case, (4) the customary fees charged for similar legal services, (5) the large amount of monies due on the defaulted notes, (6) and the experience, reputation, and ability of the attorneys retained by UPB, the Court concludes that the attorneys' fees and

costs incurred by UPB in collecting on Notes 601480, 60160, and 60240, and as accounted for in Exhibits 145 and 147, have been reasonable.

A-15 ¶¶ 73-75. In order to sustain their burden on appeal, Appellants must establish that the district court's findings were "manifestly and palpably contrary to the evidence" (*Bentley*, 245 Minn. at 345, 71 N.W.2d at 787) such that the award amounts to an abuse of discretion. *See Milner v. Farmers Ins. Exch.*, 748 N.W.2d 608, 620 (Minn. 2008). Appellants cannot do so.

The trial record contains exhaustive, unrebutted evidence to support the determinations of the district court and Court of Appeals regarding UPB's attorneys' fees. First, Exhibit 145 consists of copies of all invoices from UPB's attorneys, which provide specific detail of the tasks performed by UPB's attorneys, the identity of the attorneys, the amount of time and the attorneys' billing rates. Exhibit 167 provides, in summary form, a break-down of discrete subject matter issues and tasks performed by UPB's attorneys.

Second, Joe Roach and Frank Brosseau gave detailed testimony at trial that (1) all of UPB's legal fees were incurred to collect the amounts due and owing under the Notes and to protect and preserve UPB's interest in the collateral and Real Property (Tr. 355-56); (2) the legal fees were charged to the outstanding balances of the Notes on a pro rata basis (Tr. 143-44, 355); (3) the matters were appropriately staffed and UPB was not assessed with duplicative charges (Tr. 358. 435-36); and (4) the rates charged by UPB's attorneys were commensurate with other Twin Cities law firms<sup>8</sup> (Tr. 322-24).

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<sup>8</sup> In fact, Judge James Rosenbaum determined last year that in the Twin Cities market, the reasonable hourly rate for a partner is \$500, which is well below the rates

None of these exhibits or testimony were rebutted at trial. Appellants contest the district court's findings by arguing that "[t]hey vigorously disputed the claim that the fees were incurred to collect amounts due." App. Br. at 39. Yet Appellants' brief is conspicuously devoid of citations to any exhibits or testimony to support their alleged "vigorous" defense. Nor do Appellants provide any evidentiary support for their speculative musings about how long it should have taken to resolve issues in this lawsuit. *Id.* at 39-40. The reason is simple: there is no such evidence. Appellants did not contest any of UPB's testimony or exhibits at trial.<sup>9</sup>

**B. The Security Agreements and Mortgage permit UPB to recover attorneys' fees for the Meadowland Lawsuit**

Appellants challenge the attorneys' fees incurred by UPB in the Meadowland Lawsuit. *See* App. Br. at 36-37. Appellants argue that the award was improper because Appellants were not in default under the Notes at the time Meadowland initiated its lawsuit. *Id.* Appellants' argument is erroneous for at least two reasons.

First, Appellants never challenged at trial the attorneys' fees incurred by UPB in the Meadowland Lawsuit. Indeed, Appellants' brief does not contain citations to any testimony, exhibits or briefs to show that it raised the issue before the district court.

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charged by UPB's attorneys here. *See In re UnitedHealth Group Incorporated PSLRA Litig.*, 643 F. Supp. 2d 1094, 1106 (D. Minn. 2009).

<sup>9</sup> Appellants' failure to contest this issue below waives any contrary argument on appeal. *See Toth v. Arason*, 722 N.W.2d 437, 443 (Minn. 2006); *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

Appellants' failure to raise this argument below is fatal. *See Toth*, 722 N.W.2d at 444; *Thiele*, 425 N.W.2d at 582.

Second, whether Appellants were in default under the Notes at the time of the Meadowland Lawsuit is immaterial because the operative agreements are three Security Agreements and Mortgage executed by Appellants. *See* Exs. 4, 5, 8, 10. As set forth above, these agreements authorize UPB's recovery of attorneys' fees incurred to protect and preserve the collateral and Real Property. *Id.* Meadowland sought to unwind the Canby Bank buy-out transactions, which included the hogs, machinery and equipment and Real Property in which UPB had a security interest.<sup>10</sup> UPB was forced to defend against the claims to protect and preserve its collateral. Thus, the district court and Court of Appeals correctly concluded that UPB was entitled to recover its attorneys' fees incurred in defending the Meadowland Lawsuit.

**C. UPB's ultimate success warranted recovery of attorneys' fees**

Appellants' third failed argument is that UPB was unsuccessful in many aspects of its litigation against Appellants and, therefore, the district court erred in awarding attorneys' fees under the Loan Documents. *See* App. Br. at 41-42.

As the Court of Appeals correctly confirmed, there is no case law in Minnesota that a party may recover attorneys' fees only for specific issues, matters or motions which

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<sup>10</sup> Appellants' statement that "Meadowlands, in its lawsuit, did its best to assert the innocence of the Haugens" (App. Br. at 37) is false. Meadowlands asserted two fraudulent transfer claims against Darren Haugen, four fraudulent transfer claims against HNE, one fraudulent transfer claim against Ilene Haugen and a temporary restraining order and temporary injunction claim against Ilene Haugen, Darren Haugen and HNE. *See* RA82-95. These allegations hardly "assert the innocence of the Haugens."

are ultimately successful. Courts do not conduct an issue-by-issue or motion-by-motion analysis; rather "[t]he results obtained in the litigation are relevant to a determination of the ultimate fee award." *Musicland Group, Inc. v. Ceridian Corp.*, 508 N.W.2d 524, 535 (Minn. App. 1993) (emphasis added) (citing *Hensley*, 461 U.S. at 430; *Specialized Tours, Inc.*, 392 N.W.2d at 541). Attorneys' fees expended on specific issues or matters that are unsuccessful are nonetheless recoverable if the litigation as a whole was successful and the unsuccessful matters were interrelated and based on similar facts. *See Musicland*, 508 N.W.2d at 535; *Specialized Tours, Inc.*, 392 N.W.2d at 541; *Reome v. Gottlieb*, 361 N.W.2d 75, 78-79 (Minn. App. 1985); *see also Ryther v. KARE 11*, 864 F. Supp. 1525, 1532-33 (D. Minn. 1994) (plaintiff could recover for unsuccessful reprisal claim, in part because of common core of facts).

Appellants did not dispute that all of the legal fees awarded to UPB were the result of UPB's litigation efforts to collect the outstanding amounts owed under the Loan Documents, and to protect and preserve UPB's interest in the collateral and Real Property. And UPB was ultimately successful on all of its primary claims.<sup>11</sup> The district court determined that UPB was entitled to: (1) a damage award for Appellants' breaches

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<sup>11</sup> As set forth above, the district court did determine that the contract for deed constituted an equitable mortgage, and precluded UPB from recovering any attorneys' fees incurred in litigating that issue. UPB removed those legal fees from the contract for deed/equitable mortgage balance. *See RA17-25*.

and (2) recovery of the Real Property via foreclosure of the equitable mortgage. The district court also dismissed all of Appellants' counterclaims.<sup>12</sup>

Moreover, if this Court chooses to re-examine specific issues relating to discovery and motion practice in this lawsuit, UPB was successful on virtually all accounts. UPB twice obtained the dismissal of Appellants' counterclaims on summary judgment and twice defeated Appellants' punitive damages motions. UPB successfully obtained a temporary restraining order and preliminary injunction. UPB also obtained a replevin order, successfully enforced the replevin order and successfully resisted Appellants' efforts to have the replevin order overturned. UPB's three motions regarding the deposit of rent deposited into the Court for the 2006, 2007 and 2008 crop years were also successful. Finally, Appellants' statement that UPB's efforts have been unsuccessful because Appellants was willing to settle with UPB by "proffer[ing] a check for \$525,000 in payment of their obligations to UPB" (App. Br. at 26-27), is not only factually unsupported, but it was expressly rejected by the district court at trial. *See* Tr. 364-65.

Because UPB was ultimately successful in obtaining the relief it sought – *i.e.*, an award of the outstanding amounts due under the Loan Documents and recovery of the Real Property – the district court and Court of Appeals correctly determined that UPB's attorneys' fee award was reasonable.

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<sup>12</sup> All of UPB's legal fees incurred to defend against Appellants' counterclaims are recoverable. *See Boone*, 2009 WL 2461736, at \*1.

**D. The Loan Documents permit recovery of attorneys' fees incurred in settlement efforts**

Appellants' fourth argument is that the district court should not have awarded UPB its attorneys' fees incurred in numerous, statutorily-required mediation efforts. *See* App. Br. at 43-44. This argument should be rejected out of hand because Appellants did not raise it below. *See Toth*, 722 N.W.2d at 444; *Thiele*, 425 N.W.2d at 582. Regardless, UPB's participation in mediation required by the Farmer-Lender Mediation Act and other attempts to settle this lawsuit are part of its efforts to collect amounts due and owing under the Notes and to protect and preserve UPB's collateral and the Real Property. Under the unambiguous attorneys' fee provisions of the Loan Documents, UPB's attorneys' fees are recoverable.

**E. The hourly rates of UPB's attorneys were reasonable**

Appellants' final protestation regarding the hourly rates charged by UPB's attorneys also fails. *See* App. Br. at 45. To support its argument that UPB is entitled to recover attorneys' fees commensurate with the hourly rates charged by attorneys in Cottonwood County, Appellants cite *Reome v. Gottlieb*, 361 N.W.2d 75 (Minn. App. 1985). But, as the Court of Appeals noted, this case is inapposite because it addressed attorneys' fees awards in civil-rights cases, which are governed by federal statutes that mandate use of the local prevailing rate. *Id.* at 77-78. The Loan Documents have no such requirement.

The reasonableness of attorneys' fees is not a function of geography, but rather is to be determined by an examination of "all relevant circumstances." *Milner*, 748

N.W.2d at 621. This case involved complicated factual and legal issues concerning the refinancing of the Haugens' and Haugen Feeds' debts to Canby Bank and Prudential, the Sahli transactions, the Notes, Security Agreements, Mortgage and Guarantees executed by the Haugens and HNE, and the Contract for deed and related issues. More than \$1,000,000 and ownership of 240 acres of farmland was at stake. UPB was free to retain counsel of its choice, and Appellants did not and cannot dispute, the skill, experience, reputation and ability of UPB's counsel in handling this case. Appellants' initial retention of Faegre & Benson constitutes an acknowledgement that Twin Cities law firm rates are reasonable. And the rates charged by UPB's attorneys were below the \$500 hourly rates affirmed by Judge James Rosenbaum in Minnesota federal district court. *See In re UnitedHealth Group Incorporated PSLRA Litig.*, 643 F. Supp. 2d at 1106. Therefore, the attorneys' fee award should be affirmed.

**CONCLUSION**

Appellants again have failed to raise any factual or legal issue requiring reversal of the district court's judgment. Accordingly, Appellants' appeal should be denied and the judgment should be affirmed.

DATED: September 7, 2010

**BRIGGS AND MORGAN, P.A.**

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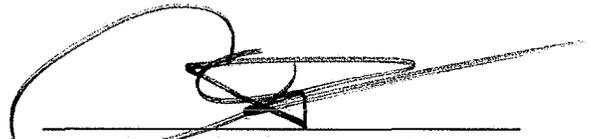
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**CERTIFICATE OF COMPLIANCE**

The undersigned counsel for Respondent certifies that this Opening Brief and Addendum complies with the requirements of Minn. R. App. P. 132.01 in that it is printed in a 13-point, proportionately spaced typeface utilizing Microsoft Word 2003 and contains 13,783 words, excluding the Table of Contents, Table of Authorities, and Appendix.

DATED: September 7, 2010

  
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