

CAUSE NO. C-6048-13-E

RICARDO DIAZ MIRANDA	§	IN THE DISTRICT COURT OF
	§	
vs.	§	HIDALGO COUNTY, TEXAS
	§	
PLAINSCAPITAL BANK	§	275 <sup>TH</sup> JUDICIAL DISTRICT

**SECOND AMENDED ORIGINAL ANSWER OF PLAINSCAPITAL BANK**

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES PlainsCapital Bank ("PCB"), and files this, its Second Amended Original Answer to Plaintiffs' Fifth Original Petition,<sup>1</sup> and for such answer would respectfully show unto the Court the following:

I.

Reserving the right to file other and further pleadings, exceptions and denials, PCB denies each and every material allegation contained in Plaintiff's Fifth Original Petition and demands that the plaintiff be required to prove the same, if he can, by a preponderance of the evidence in accordance with the laws and the Rules of Civil Procedure of the State of Texas.

II.

PCB denies that it was formerly known as First National Bank ("FNB"). Instead, it is the successor in interest to certain assets of FNB, including the notes described in PlainsCapital Bank's First Amended Counterclaim, pursuant to that certain Purchase and Assumption Agreement, effective as of September 13, 2013 by and between PCB and the Federal Deposit Insurance Corporation, as receiver for FNB. Accordingly, PCB is not liable in the capacity in which it is sued and there is a defect in parties defendant.

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<sup>1</sup> This petition, filed on December 7, 2015, is erroneously labeled Plaintiff's Third Amended Original Petition.



III.

PCB is not responsible for the misconduct, if any, of Saul Ortega or FNB. Further, PCB is not liable for the alleged wrongful foreclosure, wrongful acceleration, wrongful refusal of payment, refusal to provide information, breach of contract, negligence, duress, fraud, or other misconduct because such alleged wrongful foreclosure, wrongful acceleration, wrongful refusal of payment, refusal to provide information, breach of contract, negligence, duress, fraud, or other misconduct are not written and documented as required by 12 U.S.C. §1823(e).

IV.

The plaintiff's claims are barred by §26.02 of the Texas Civil Practice & Remedies Code and by the Statute of Frauds.

V.

Saul Ortega is a settling party and his misconduct, if any, should be submitted to the jury pursuant to Chapter 33 of the Texas Civil Practice and Remedies Code.

VI.

The plaintiff's claims are barred by the defense of misrepresentation.

VII.

The plaintiff's claims are barred by the doctrine of estoppel.

VIII.

The plaintiff's claims are barred by the doctrine of waiver.

IX.

The plaintiff's claims are barred by the doctrine of ratification.



X.

The plaintiff's claims are barred by the defense of comparative negligence.

XI.

The plaintiff's claims are barred by the doctrine of laches.

XII.

The plaintiff's claims are barred by the doctrine of sole proximate cause.

XIII.

The plaintiff's claims are barred by the statute of limitations.

XIV.

The plaintiff is guilty of breach of contract.

XV.

With regard to the proceeds from the sale of the apartments, PCB asserts it is entitled to such proceeds pursuant to the Court's order of sale and the plaintiff's request for such order.

XVI.

The plaintiff has failed to mitigate his damages.

XVII.

Because of the settlement with Saul Ortega, PCB should be given a credit in accordance with §33.012(b) of the Texas Civil Practice & Remedies Code.

XVIII.

PCB is entitled to set off and recoupment for the amount owing on the notes as described in PlainsCapital Bank's First Amended Counterclaim.



XIX.

Any award for punitive damages will be arbitrary, unreasonable, excessive and in violation of PCB's rights to due process of the law and equal protection of the law and an excessive fine under the Fifth, Eighth, and Fourteenth Amendments of the United States Constitution and Article 1, Section 13 and 19 of the Texas Constitution.

XX.

PCB hereby pleads the limitations on recovery of exemplary damages contained in §41.008(b) Tex. Civ. Prac. & Rem. Code.

WHEREFORE, PREMISES CONSIDERED, PCB prays that the plaintiff take nothing by this suit, that PCB recover its court costs and that it have such other and further relief to which it may be entitled.

Respectfully submitted,

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Attorneys for PlainsCapital Bank




STATE OF TEXAS       §  
                                  §  
COUNTY OF DALLAS   §

Before me, the undersigned Notary Public, on this day personally appeared Arthur E. Nienhueser, II, and after being duly sworn, stated under oath that he is a Senior Vice President of PlainsCapital Bank, the defendant in this cause; that he has read paragraph II of the foregoing Answer and that every statement contained in it is within his personal knowledge and is true and correct.

  
ARTHUR E. NIENHUESER, II

SUBSCRIBED AND SWORN TO BEFORE ME on the 11<sup>th</sup> day of January, 2016, to certify which witness my hand and official seal.



  
Notary Public, State of Texas  
My commission expires: 3/12/14



### **CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the above and foregoing document was sent by electronic mail on January 12, 2016 to opposing counsel as follows:

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/s/ Charles C. Murray  
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