Exhibit C and D

Judge Wilson's order and judgment

[WCU's loan to Thorco, Inc., personally guaranteed by the Thorntons, remains in default and owing.]pg.14 of 19

Exhibit C

DW

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MONTANA ELEVENTH JUDICIAL DISTRICT COURT
FLATHEAD COUNTY

DENNIS THORNTON and DONNA THORNTON, Plaintiffs, vs. WHITEFISH CREDIT UNION, Defendant.	Cause No. DV-18-336 (D) ORDER GRANTING WCU'S MOTION FOR SUMMARY JUDGMENT AND ORDER DENYING THORNTONS' UNTIMELY MOTION TO AMEND THE COMPLAINT

Defendant Whitefish Credit Union (WCU) has moved for summary judgment. Its "Motion for Summary Judgment and (incorporated) Brief in Support" was filed on July 24, 2018. WCU is represented by Sean S. Frampton.

Plaintiffs Dennis Thornton and Donna Thornton ("the Thorntons") filed their "Answer Brief Opposing WCU's Motion for Summary Judgment" (Response) on August 17, 2018. The Plaintiffs are represented by Michael Klinkhammer.

WCU filed its reply brief on August 31, 2018.

The motion is fully briefed, and the parties have waived the right to a hearing. Mont. R. Civ. P. 56(c)(2)(A). A hearing would not be beneficial to a determination of the Motion. WCU's Motion for Summary Judgment is deemed submitted and ready for decision. Unif. Dist. Ct. R. 2(d).

The Thorntons own 100% of the shares of Thorco, Inc. Dkt. No. 10, Pl.'s Mot. for Or. to File Mortg. Releases 4 (May 10, 2018). In March 2009, Thorco, Inc. borrowed $3.3 million from WCU to subdivide and develop real property in Somers, Montana. Dkt. No. 34, 2nd Aff. Aaron Archer ¶ 2 (July 24, 2018). As collateral, Thorco, Inc. pledged real property. *Id.* The Thorntons personally guaranteed the loan. *Id.* at ¶ 3; Dkt. No. 38, Response 19 (Aug. 17, 2018). Thorco, Inc. did not pay back the loan at maturity. Dkt. No. 34, 2nd Aff. Archer ¶ 4. Thorco, Inc. never applied for a preliminary plat and never completed the development. *Id.* at ¶ 5.

In February 2012, WCU commenced a foreclosure action against Thorco, Inc. and the Thorntons. The action involved two tracts of land – a 300 acre tract and a 200 acre tract ("the Property"). Pursuant to Mont. R. Evid. 202(6), the Court takes judicial notice of the proceedings in *Whitefish Credit Union v. Thorco, Inc., Dennis Thornton, Donna Thornton, and John Doe(s) 1-10*, Cause No. DV-12-174 in Department B of this District Court (hereinafter "DV-12-174). In DV-12-174, Thorco, Inc. and the Thorntons asserted a host of counterclaims against WCU, including bad faith, breach of contract, constructive fraud and negligence, and sought punitive damages. DV-12-174, Dkt. No. 6, Ans. and Countercl. to Pl.'s Compl. for Foreclosure at pp. 12-15. In March 2014, WCU was granted summary judgment on its claim for foreclosure and on Thorco, Inc.'s and the Thorntons' counterclaims, except their counterclaim for negligence and punitive damages. See DV-12-174 Dkt. No. 156, Or. and Rationale on Pending Mot.s (March 10, 2014). In April 2014, WCU was awarded attorney fees. DV-12-174 Dkt. No. 171, Or. and Rationale on Mot. for Atty Fees (April 21, 2014). Trial was scheduled for May 27, 2014. DV-12-174 Dkt. No. 163, Min. Entry (Mar. 27, 2014). In early May 2014, the trial date was vacated. DV-12-174 Dkt. No. 175, Or. Vac. Sched. Or. (May 06, 2014). On May 27, 2014 Thorco, Inc. filed for bankruptcy protection under Chapter 11. DV-12-174 Dkt. No. 181, Def.s' Not of Bankr.

Filing (May 29, 2014). Thorco, Inc.'s bankruptcy case was dismissed on March 03, 2015. DV-12-174, Dkt. No. 193, Def.s' Not. of Dismiss. of Thorco, Inc.'s Ch. 11 Bankr. (Sept. 18, 2015).

In late February 2016, the Court in DV-12-174, having granted summary judgment to WCU on its claim for foreclosure, entered judgment of foreclosure in favor of WCU and against Thorco, Inc. and the Thorntons and decreed that the total indebtedness, including accrued interest, due and owing by Thorco, Inc. and the Thorntons was $4,348,880.01, said amount to accrue interest at the statutory rate of 10% per annum until paid in full. DV-12-174 Dkt. No. 217, J. of Foreclosure and Or. of Sale (Feb. 23, 2016). The Court in DV-12-174 ordered the Property to be sold. *Id.* Thorco, Inc. appealed from the judgment and order of sale. DV-12-174, Dkt. No. 218, Not. of Filing (Mar. 03, 2016). WCU moved to dismiss the appeal. DV-12-174, Dkt. No. 223, Or. Mar. 23, 2016). On March 22, 2016, The Montana Supreme Court granted WCU's motion to dismiss. *Id.*

In early April 2016, DV-12-174 settled at mediation. DV-12-174 Dkt. No. 229, Mediator's Rep. (Apr. 12, 2016). On June 08, 2016, the parties executed a "Settlement Agreement and Mutual Release" (Settlement Agreement). The Settlement Agreement names "Thorco, Inc., Dennis Thornton, Donna Thornton (collectively '*Thorco*')" as "Releasors" and WCU as "Releasee." Dkt. No. 32.1, WCU's Mot. S.J. and Br. in Support (Opening Br.) (July 24, 2018), Ex. A, Settlement Agreement at p. 1.

On April 06, 2018, the Thorntons filed their Complaint in this action and allege the following. Pursuant to the Settlement Agreement, an escrow was to be opened with First American Title. Dkt. No. 1, Compl. and Demand for J. Tr. ¶¶ 4(4) (Apr. 06, 2018). Mortgage releases signed by WCU, along with Warranty Deeds and Realty Transfer Certificates signed by the Thorntons, were to be placed into escrow with First American Title. *Id.* WCU did not open

the escrow. *Id. at* ¶ 8. Under the Settlement Agreement, Thorco, Inc. received an option to purchase the Property for a specified amount ($1.4 million). *Id. at* ¶ 4(2). WCU should have recorded mortgage releases showing the amount owed on the Property had been reduced to the purchase option amount. *Id. at* ¶ 11. WCU's failure to open the escrow prevented the Thorntons from exercising the option under the Settlement Agreement. *Id. at* ¶ 19. WCU breached the covenant of good faith and fair dealing by refusing to open the escrow. *Id. at* ¶ 26. The Thorntons personally guaranteed the loans obtained by Thorco, Inc. at issue in DV-12-174. *Id. at* ¶ 30. The Thorntons assert that, by not opening the escrow and/or recording the mortgage releases, WCU clouded the title to the remaining real property owned by the Thorntons, which prevented them from securing financial assistance to develop their personally held real property. *Id.* at ¶¶ 31-32. The Thorntons allege that WCU falsely represented to potential lenders that the Thorntons and/or Thorco, Inc. owed more than the agreed purchase option price. *Id.* at ¶¶ 35-38. The Thorntons allege that WCU committed actual malice when it failed to open the escrow and misrepresented, to the Thorntons' potential lenders, the amount owed. *Id.* at ¶¶ 41-42.

The Thorntons assert claims against WCU for breach of contract (Count 1); breach of contract-specific performance (Count II); breach of the covenant of good faith and fair dealing (Count III); damages to the Thorntons personally due to breach of contract (Count IV); actual fraud (Count V); and actual malice (Count VI). Dkt. No. 1, Compl. and Demand for J. Tr. ¶¶ 1-42 (Apr. 06, 2018). The Thorntons seek actual and compensatory damages in the amount of approximately $80 million, as well as punitive damages and attorney fees and costs. *Id.* at pp. 9-10. In the alternative, if the Court does not award the Plaintiffs' consequential damages plus attorney fees and costs, the Thorntons seek specific performance, requiring WCU to open the

escrow and extending, from the date the escrow is opened, the time to exercise the purchase option under the Settlement Agreement. *Id.* at p. 10.

On May 03, 2018, the Clerk entered the default of WCU upon the Thorntons' application. Dkt. No. 5, Entry of Def. (May 03, 2018). On May 10, 2018, WCU moved to set aside the default. Dkt. No. 12, WCU's Mot. to Set Aside Def. (May 10, 2018). On June 18, 2018, this Court granted WCU's motion to set aside the default. Dkt. No. 24, Or. Setting Aside Def. (June 18, 2018). WCU filed its Answer on July 05, 2018. Dkt. No. July 05, 2018.

WCU now seeks summary judgment on all of the Thorntons' claims.

ARUGMENTS

WCU argues that it is entitled to summary judgment on all of the counts of the Thorntons' Complaint because (1) under the Settlement Agreement, WCU did not have a duty to open the escrow; (2) an escrow is not a cloud on title to property and WCU's duty to record the mortgage releases was conditioned upon Thorco, Inc.'s performance of an obligation that was not performed; (3) it was Thorco, Inc.'s and/or the Thorntons' duty to open the escrow account, not WCU's duty, and no language in the Settlement Agreement ties the purchase option period to the date the escrow is opened; (4) WCU's agents never spoke with any lenders, the alleged statements about the amount owed by Thorco, Inc. are not false, and the Thorntons cannot satisfy the elements of a "special relationship" that would entitle them to tort damages; (5) WCU is not causing any cloud on the real property held in the Thorntons' personal names; (6) the Thorntons failed to plead all nine elements of fraud and cannot satisfy all the elements of a fraud claim; and

(7) actual malice is not an independent cause of action and WCU had no duty to open the escrow account.[1] Dkt. No. 32.1, WCU's Mot. S.J. and Br. in Support (Opening Br.) (July 24, 2018).

The Thorntons maintain that (1) WCU unilaterally changed the terms of the Settlement Agreement by insisting on delivery of Thorco's original signed Non-Merger Warranty Deeds and Realty Transfer Certificates before WCU would disburse the $150,000 payment, and it was impossible for the Thornton's to open the escrow because the original documents were kept by WCU's counsel; (2) the Settlement Agreement represents an accord and satisfaction of the mortgage and Thorco, Inc. no longer owes the mortgage on the property and, consequently, the titles to the subject tracts were improperly clouded by the failure to open the escrow; (3) WCU's argument as to specific performance fails because its actions made it impossible for Thorco, Inc. and/or the Thorntons to open the escrow; (4) statements in affidavits in the record show that WCU's counsel represented to potential lenders that the Property was in foreclosure and the Thorntons owed WCU more than the purchase option price; (5) WCU's argument that it is unlikely the Thorntons applied for, were approved or denied "financial assistance to develop their real property" is insufficient and false and an ALTA Survey would reveal the 31 acres of the Thorntons' personal real property was encumbered by the their personal guarantee of the loan (from WCU); (6) the Thorntons pleaded fraud with sufficient particularity and actual malice pursuant to § 27-1-221(2), MCA and, if there is any error in the Thorntons' pleadings as to fraud and actual malice, they should be allowed to correct the error in the amended pleadings.

[1] In its Opening Brief, WCU also argues that the Thorntons lacked standing. In their Response, the Thorntons argue, among other things, that they have standing because, under the Settlement Agreement, they, individually, have/had the right to exercise the purchase option. In its Reply, WCU concedes that the Plaintiffs had the right to exercise the purchase option and therefore the Plaintiffs have standing.

ANALYSIS

Motions for summary judgment are governed by Rule 56 of the Montana Rules of Civil Procedure. A party moving for summary judgment must show no genuine issue of material fact exists and it is entitled to judgment as a matter of law. M. R. Civ. P. 56; *Butler v. Domin*, 2000 MT 312, ¶ 19, 302 Mont. 452, 15 P.3d 1189. The same rules apply to a party seeking summary judgment on an opposing party's pleaded affirmative defenses. *Brinkman & Lenon vs. P&D Land Ent.*, 263 Mont. 238, 242, 8/67 P.2d 1112, 1115 (1994). "The evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inferences are to be drawn...in favor of the party opposing summary judgment." *McLeod v. State ex rel. Dept. of Transp.*, 2009 MT 130, ¶ 12, 206 P.3d 956, 960, 350 Mont. 285, 289. If the movant does not establish the absence of any genuine issue of material fact, the opposing party has no duty to present counter-proof. *Matthews v. Glacier Gen. Assurance Co.*, 184 Mont 368, 382, 60 P.2d 232, 240 (1979). Once the moving party has met its burden, the party opposing summary judgment must present affidavits or other testimony containing material facts that raise a genuine issue as to one or more elements of its case. *Tin Cup Co. Water and/or Sewer Dist. v. Garden City Plumbing & Heating, Inc.*, 2008 MT 434, ¶ 22, 347 Mont. 468, 200 P.3d 60.

The non-moving party must provide material and substantial evidence setting forth specific facts to raise a genuine issue of material fact, rather than relying on speculative, conclusory, or fanciful statements. *Hiebert v. Cascade Co.*, 2002 MT 233, ¶ 21, 311 Mont. 471, 56 P.3d 848 (internal quotation and other citation omitted). The non-moving party cannot create a genuine issue of material fact by putting his or her own "conclusions and interpretations on an otherwise clear set of facts." *Sprunk v. First Bank System*, 252 Mont. 463, 466, 830 P.2d 103, 105 (1992). If the non-moving party fails to raise a genuine issue of material fact, the court must

then determine whether summary judgment is appropriate as a matter of law based on the presented facts. *Hiebert*, ¶ 21 (citing *Scott v. Robson*, 182 Mont. 528, 535, 597 P.2d 1150, 1154 (1979)).

The Thorntons' claims for breach of contract and breach of the covenant of good faith and fair dealing (Counts I through IV) are premised on their allegations that (1) failure to record the mortgage releases clouded the title to the Property and to real property held in their personal names and (2) failure to open the escrow clouded the title to the Property and to real property held in their personal names. Dkt. No. 1, Compl. ¶¶ 11, 31.

> A grant may be deposited by the grantor with a third person, to be delivered on performance of a condition, and on delivery by the depositary, it will take effect. While in the possession of the third person and subject to condition, it is called an escrow.

§ 70-1-511, MCA. An escrow is a legal term of art to describe *a transaction* where a grantor delivers something of value to a third person, to be held by that third person until the performance of a prescribed condition (or the happening of a specified contingency), whereupon the third person is to then deliver the thing of value to a grantee. See also § 32-7-102(2), MCA; § 1-2-107, MCA. An instrument is deemed to be recorded when, being duly acknowledged or proved and certified, it is deposited in the county clerk's office with the proper officer for record. § 70-21-209, MCA. An instrument held in escrow does not become part of the public record until it is recorded. However, when an instrument is placed in escrow, the recording of the instrument before strict performance of the condition precedent or happening of the contingency is unauthorized and, even though the grantee or another records the instrument, no right or title passes. *Hart v. Barron*, 122 Mont. 350, 370-72, 204 P.2d 797 (1949) (citing 30 C.J.S. *Escrows* §§ 9-11 and 19 Am, Jur. *Escrows* §§ 20-21)).

A clear title means a good title and a good title means a martketable or merchantable title. *First Mont. Title Co. v. N. Point Square Assoc.*, 240 Mont. 33, 37-38, 782 P.2d 376, 378 (1989) (citing *Ogg v. Herman, et al.*, 71 Mont. 10, 15-16, 227 P. 476, 477 (1924)). "Marketable title is one of such character as assures to the purchaser the quiet and peaceable enjoyment of the property and one which is free from encumbrances." *Id.* Whether title is marketable is a question of law for the court. *West v. Club at Spanish Peaks, LLC*, 2008 MT 183, ¶ 19, 343 Mont. 434, 186 P.3d 1228. A "cloud on title" impairs the ability to sell the property to others. *Id.* "In order to constitute a cloud on a title to real property, the instrument must be one which, if valid, would affect or impair the title of the owner of a particular estate and which apparently on its face has that effect, but which can be shown by extrinsic evidence to be invalid or inapplicable to the estate in question." *Poulos v. Lyman Bros. Co.*, 63 Mont. 561, 567, 208 P. 598, 599 (1922).

In pertinent part, the Settlement Agreement provides the following:

> 1. **Cash Component**
>
> WCU shall pay one hundred fifty thousand dollars ($150,000) to Releasors within three days of the execution of this Settlement Agreement and Mutual Release.
>
> 2. **Option to Purchase**
>
> a. Within 18 months of the date of this Settlement Agreement and Mutual Release, Thorco may exercise an option to purchase the properties…for one million four hundred thousand dollars ($1,400,000). The option price is allocated to each parcel as follows…Within the 18 months, Thorco may exercise its option to purchase either [tract], or both.
>
> b. WCU shall execute releases of its mortgages for the…tracts… At execution of this agreement the executed releases shall be deposited into escrow with First American Title Company. If Thorco timely exercises its option, First American Title shall record the appropriate release or releases.
>
> c. Thorco shall execute Non-Merger Warranty Deeds conveying all of Thorco's right, title and interest in the …. tracts to WCU along with a Realty Transfer Certificate… At execution of this agreement, the executed Non-Merger Warranty Deeds shall be deposited into escrow with First American Title Company. If Thorco fails to timely exercise its option(s), First American Title shall record the appropriate deed(s).

Dkt. No. 32.1, WCU's Opening Br., Ex. A, Settlement Agreement at ¶¶ 1-2.

If the language of a contract is unambiguous, or reasonably susceptible to only one construction, the duty of the court is to apply the language as written. *Mary J. Baker Revocable Trust v. Cenex Harvest States, Coops., Inc.*, 2007 MT 159, ¶ 19, 338 Mont. 41, 164 P.3d 851 (citations omitted). The above quoted language of the Settlement Agreement is clear and unambiguous: Thorco, Inc. and/or the Thorntons had an 18-month period, beginning from the date of execution of the Settlement Agreement, to exercise the option to purchase one or both tracts of the Property and, upon such timely exercise of its option to purchase, the appropriate mortgage release(s) were to be recorded. Accordingly, Thorco, Inc.'s and/or the Thorntons timely exercise of the purchase option is a condition precedent[2] to the recording of the mortgage release or releases. The Thorntons do not dispute that the purchase option expired in late December 2017. It is undisputed that neither Thorco, Inc. nor the Thorntons timely exercised the purchase option. As a matter of law, no obligation accrued for any party to undertake the recording of the mortgage release(s), because Thorco, Inc. and/or the Thorntons failed to perform the condition precedent. Opening an escrow does not, of itself, establish or verify marketable title to the Property. The Thorntons rely on the testimony of Darren Breckenridge, a professional surveyor. However, Breckenridge does not testify that title to the Property or any property held personally by the Thorntons was clouded by failing to open an escrow. Even if an escrow had been opened and the mortgage releases were held in it, the title of the Property would have been unaffected because documents held in escrow are not part of the public record. Regardless where the documents were held (whether in escrow or by WCU or its counsel), the mortgage releases

[2] "A condition precedent is one which is to be performed before some right dependent thereon accrues or some act dependent thereon is performed." § 28-1-403, MCA.

were not to be recorded unless and until Thorco, Inc. and/or the Thorntons performed the condition precedent. It is undisputed that performance of the condition precedent did not occur. Consequently, even if the Settlement Agreement was construed to impose a duty upon WCU to open an escrow and/or to place the mortgage releases in the escrow, any alleged failure of WCU to do either act was of no consequence.

In November 2017, Thorco, Inc. obtained a preliminary commitment for title insurance for the Property from Alliance Title & Escrow Corp. Dkt. No. 32.10, WCU's Opening Br., Ex. M, Prelim. Title Commit. (November 29, 2017). Among the "exceptions" shown is WCU's original mortgage in the amount of $3,360,000.00 recorded on March 24, 2009. *Id.* at Schedule B, Exception 25. Under Montana law, the recording of a mortgage of real property is authorized and is required in transfers of property in trust for the benefit of creditors. §§ 71-1-207, 70-21-202, MCA. The original mortgage is securing an unpaid debt and its recording is authorized by law. If the Thorntons wanted the mortgage releases recorded prior to performance of the condition precedent, they could have (and must have) included language to that effect in the Settlement Agreement. When interpreting a contract, a court's role is merely to construe the instrument according to its terms and may neither insert nor omit terms to the contract. *Sayegusa v. Rogers*, 256 Mont. 269, 271, 846 P.2d 1005, 1006 (1993) (citing *Martin v. Laurel Cable TV, Inc.*, 215 Mont. 229, 696 P.2d 454 (1985); § 1-4-101, MCA). The Thorntons did not enter into a settlement requiring WCU to record the bargained-for mortgage releases before WCU was paid the $1.4 million option price. Because the terms of the Settlement Agreement are plain and unambiguous, this Court may not now insert that omitted provision into the Settlement Agreement. In short, Thorco, Inc. and/or the Thorntons are not entitled to have the mortgage

releases recorded, because they failed to perform the condition precedent, and the original mortgage is not a cloud on the title of the Property.

The Thorntons seek to rely on Breckenridge's opinion that, until mortgage releases are filed, the Thorntons' personal guarantee of the loan clouds the title to their personal real property assets. Dkt. No. 38, Pl.s' Resp., Ex. 6, Aff. Darren Breckenridge ¶ 16 (Aug. 09, 2018). "District courts need consider only admissible evidence when determining whether to grant a motion for summary judgment." *N. Cheyenne Tribe v. Roman Catholic Church*, 2013 MT 24, ¶ 21, 368 Mont. 330, 296 P.3d 450. A witness, expert or otherwise, is not allowed to give a legal conclusion and an expert may not express an opinion on a conclusion of law. *Heltborg v. Modern Mach.*, 244 Mont. 24, 29-31, 795 P.2d 954, 955-958 (1990). Whether a title is clear/marketable is a question of law. *First Mont. Title Co.*, 240 Mont. at 37-38, 782 P.2d at 378; *West*, ¶ 19. Breckenridge's opinion is inadmissible. The Thorntons have failed to show that the original mortgage is a cloud on the title of any of their personally-held real property.

As of the filing of WCU's Reply brief on August 31, 2018, the non-merger warranty deeds had not yet been recorded. If the Settlement Agreement had been followed according to its plain terms, WCU would have come into full ownership of the Property after Thorco, Inc. and/or the Thorntons failed to pay the option price in December 2017. The Thorntons cannot show that continuing to own the Property – presently free of the recording of the Non-Merger Warranty Deeds conveying all of *Thorco's* right, title, and interest in the Property to WCU – has caused them any compensable damages.

As discussed above, even if the Settlement Agreement was construed to impose a duty on WCU to open an escrow and/or to place the mortgage releases in escrow, any alleged failure of WCU to do either act was of no consequence. Even if an escrow had been opened and the

mortgage releases were held in escrow as contemplated by the Settlement Agreement, the title of the Property would have been unaffected because documents held in escrow are not part of the public record. Regardless where the documents were held (whether in escrow or by WCU or its counsel), the mortgage releases were not to be recorded unless the condition precedent was performed, and Thorco, Inc. and/or the Thorntons failed to perform and satisfy the condition precedent. The original mortgage is not a cloud on the title of the Property and the Thorntons failed to show that it is a cloud on the title of any real property held personally by them. The Thorntons have not shown that continuing to own the Property has caused them to suffer any compensable damages. For these reasons, the Thorntons' breach of contract claims (Counts I, II and IV) and their claim of breach of the covenant of good faith and fair dealing (Count III) (to the extent it is based on the allegation that WCU failed or refused to open an escrow) fail as a matter of law. The Thorntons have not raised any genuine issue of material fact as to the same.

The Thorntons further allege that WCU, either directly or through its agents, misrepresented to potential lenders that the loan is in default and remains owing. WCU disputes that it communicated with any potential lenders and that, even if it did, such information is not a misrepresentation. The statements in the various affidavits on which the Thorntons rely either constitute inadmissible hearsay or are based on assumption or speculation or have been mischaracterized and do not actually say what it is the Thorntons claim they say. The Thorntons have not offered competent evidence showing that WCU was dishonest and/or misrepresented the status of the loan to potential lenders. It is undisputed that Thorco, Inc. and/or the Thorntons did not pay the loan which is secured by the original mortgage on the Property. WCU's agreement to accept a steeply-discounted amount ($1.4 million) in satisfaction of the loan was contingent upon Thorco, Inc. and/or the Thorntons timely exercising the purchase option.

Because they failed to perform, Thorco, Inc. and the Thorntons have not satisfied the loan. WCU's loan to Thorco, Inc., personally guaranteed by the Thorntons, remains in default and owing. For these reasons, the Thorntons' claims of actual fraud (Count V) and breach of the covenant of good faith and fair dealing (Count III) (to the extent it is based on WCU's alleged misrepresentation) fail as a matter of law. The Thorntons have not raised any genuine issue of material fact as to the same.

The Thorntons finally assert a claim for "actual malice," pursuant to § 27-1-221(2), MCA. Section 27-1-221(2) provides the definition of "actual malice," presented in the context of statutory standards for punitive damage awards. Section 27-1-221, MCA does not establish an independent cause of action for "actual malice." Rather, it provides that a finding of actual malice or actual fraud is a required prerequisite to an award of punitive damages by the fact finder. § 27-1-221(1), MCA. "Contract claims do not provide an avenue for punitive damages." *Masters Group Intl., Inc. v. Comerica Bank*, 2015 MT 192, ¶ 77, 380 Mont. 1, 352 P.3d 1101 (citing § 27-1-220(2), MCA). Punitive damages are not recoverable absent a valid compensatory damages award on a predicate claim for relief. *Folsom v. Mont. Pub. Employees Assn.*, 2017 MT 204, ¶ 52, 388 Mont. 307, 400 P.3d 706. For the reasons discussed above, WCU is entitled to judgment in its favor on all of the Thorntons' claims against it. The Thorntons' claim for "actual malice" (Count VI) fails as a matter of law because "actual malice" is not an independent cause of action. Further, WCU's lack of liability on the Thorntons' underlying claims forecloses the Thorntons' punitive damages claim against WCU, as a matter of law.

THORNTONS' UNTIMELY MOTION TO AMEND THE COMPLAINT

The Thorntons made an improper attempt to amend their Complaint by filing an amended complaint on September 14, 2018, the last day under the scheduling order for the amendment of

pleadings. Their filing was stricken by order entered September 20, 2018, for two reasons. First, the Thorntons did not seek leave to file an amended complaint as required by Mont. R. Civ. P. 15(a). Second, the Thorntons filed their amended pleading after WCU's motion for summary judgment was fully briefed. See *Peuse v. Malkuch*, 275 Mont. 221, 911 P.2d 1153, 1157 (1996) (once a summary judgment motion has been briefed, only extraordinary circumstances justify granting motion to amend pleading). There are no such extraordinary circumstances.

In apparent response to the striking of the Thorntons' improperly filed amended complaint, they have since filed their Motion for Leave to File Amended Complaint on September 27, 2018, nearly two weeks after the deadline to amend pleadings expired. Although the time for briefing of the motion has not expired, the motion will be denied for the following reasons. First, the purported amendment would be futile. Second, the proposed, amended complaint seeking to add WCU's attorney and the attorney's law firm as party defendants would be futile. Third, because this Order dismisses this action with prejudice, there is no surviving action in which the Thorntons' proposed, amended complaint may be adjudicated.

The proposed, amended complaint repeats the claims against WCU that are dismissed by this Order. The new claims the Thorntons wish to assert against WCU, including Breach of Contract-Impossibility, Tortious Interference with Contract, and Commercial Interference with Contract, are merely derivative of the Thorntons' claims against WCU which are dismissed by this Order. In particular, the proposed, new claims are based on WCU's alleged failure to open the escrow and alleged misrepresentation concerning the status of the loan and mortgage. As the above analysis demonstrates, however, it is immaterial whether any party opened an escrow for the eventual recording of documents, because Thorco, Inc. and/or the Thorntons failed to satisfy the condition precedent by failing to pay the option price by the deadline in the Settlement

Agreement. Further, it is not disputed that the underlying loan is in default and that the mortgage on the Property merely secures payment of the loan. Finally, any allegation in the Thorntons' proposed, amended complaint that WCU violated the Montana recording statutes by failing to record an abstract of the Settlement Agreement or notice of the Thorntons' purchasers' interest in the option, is both tenuous and immaterial. First, in their Motion for Leave to Amend Complaint, the Thorntons represent they "believe" that if an escrow had been opened, the escrow agent would have recorded an abstract of the Settlement Agreement. However, the plain language of the Settlement Agreement calls for only for the mortgage releases, non-merger warrant deeds, and real estate transfer certificate to be deposited in escrow and recorded only upon the Thorntons' payment of the option price. In their motion to amend their Complaint the Thorntons have not cited any language from the Settlement Agreement requiring that an abstract of the agreement, itself, or notice of the Thorntons' purchasers' interest in the option to be deposited in escrow. Nor do the Thorntons cite any language from the Settlement Agreement purporting to impose such a duty upon WCU, its agents or attorneys, or an escrow agent. Second, in support of this allegation, the Thorntons have cited to a non-existent section of the Montana Code Annotated ("71-21-101, et seq." is not a statute, part, or chapter codified within the Code).[3] Although the Thorntons seek to justify their untimely request to amend their pleading on the basis that the new claims only came to light during discovery conducted after the original

[3] The Thorntons have failed to cite to any statute, in particular, which sets out the alleged duty by which WCU should have recorded an abstract of the Settlement Agreement or notice of the Thorntons' purchasers' interest in the option. Although it is not generally the duty of a court to conduct research on behalf of a party or to guess as to a party's precise position or legal theory (*State v. Chavez-Villa*, 2012 MT 250, ¶ 29, 366 Mont. 519, 289 P.3d 113), it appears the Thorntons may be relying on § 70-21-202, MCA, which generally provides for the recording of abstracts of documents accomplishing a transfer of property or an interest in property, but the statute is silent as to the identity of any party required to make such a recording.

Complaint was filed, the Thorntons never moved to extend the deadline to amend pleadings and never moved under Mont. R. Civ. P. 56(f) to extend the briefing schedule on the pending motion for summary judgment to conduct further discovery. Moreover, the content of any recording statutes the Thorntons now seek to rely on to impute a duty by WCU or its agents or attorneys to record an abstract of the Settlement Agreement or notice of the Thorntons' purchasers' interest in the option, were matters of public record at all times relevant to this action and could, with due diligence, have been asserted or raised by the Thorntons in a timely fashion in their original Complaint.

Adding WCU's attorney and his law firm as defendants would, likewise, be futile, because the claims the Thorntons wish to assert against Frampton and the law firm are the same claims (or derived from the same claims) originally asserted against WCU. The Tortious Interference with Contract claim against Frampton and his firm is based on the alleged misrepresentation concerning the amount owed under the original loan agreement and the failure to open the escrow, both theories this Court has rejected in this Order. As the above analysis shows, it is immaterial that no party opened an escrow for the eventual recording of documents, because Thorco, Inc. and/or the Thorntons failed to satisfy the condition precedent and the Settlement Agreement does not operate to reduce the indebtedness on the original loan unless and until Thorco, Inc. and/or the Thorntons timely exercised the purchase option. It is undisputed that the Thorntons failed to do so. Accordingly, if the Thorntons' amended complaint were allowed, both Frampton and his law firm would be entitled to summary judgment on the same basis that summary judgment is granted by this Order upon the claims asserted in the Thorntons' original Complaint. Any allegation in the Thorntons' proposed, amended complaint that Frampton and the law firm violated the Montana recording statutes by failing to record an

abstract of the Settlement Agreement or notice of the Thorntons' purchasers interest in the option, is tenuous and immaterial. As discussed above, nothing in the plain language of the Settlement Agreement calls for an abstract of the agreement or notice of the Thorntons' purchasers interest in the option to be deposited in escrow and the Thorntons fail to cite to any language in the Settlement Agreement imposing a duty on WCU, its agents or attorneys, or an escrow agent to record an abstract of the Settlement Agreement or notice of the Thorntons' purchasers' interest in the option. As also stated, above, in support of their allegations against Frampton and his law firm the Thorntons have cited to a section of the Montana code ("§ 71-21-101, et seq.") which does not exist.[4]

Finally, the amendment of the Thorntons' pleading also would be futile, because the dismissal of the original Complaint by this Order is a dismissal with prejudice, the effect of which is to dispose of the entire action.

CONCLUSION

For the reasons discussed above, WCU has shown that all the Thorntons' claims asserted in the Complaint, including their claim for punitive damages against WCU, fail as a matter of law, and it is entitled to summary judgment as to each.

WCU's Motion for Summary Judgment (Dkt. No. 32.1) is GRANTED, and the Complaint (Dkt. No. 1) is DISMISSED with prejudice. Further, the Thorntons' Motion for Leave to File Amended Complaint (Dkt. No. 55) is DENIED, and the scheduling Order (Dkt. No. 37) is VACATED.

SO ORDERED.

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[4] See n. 3.

DATED: October 4, 2018.

Dan Wilson
District Court Judge

c: Sean S. Frampton
Michael Klinkhammer

10/4/18 CC

Exhibit C and D

Judge Wilson's order and judgment

Exhibit C and D

Judge Wilson's order and judgment

10/5/18

Exhibit D

Judge Dan Wilson
District Court Judge
Department No. 4
Flathead County Justice Center
920 South Main, Suite 310
Kalispell, Montana 59901
406-758-5906

MONTANA ELEVENTH JUDICIAL DISTRICT COURT, FLATHEAD COUNTY

DENNIS THORNTON and DONNA THORNTON, Plaintiffs, -vs- WHITEFISH CREDIT UNION, Defendant.	Cause No. DV-18-336D Judge Dan Wilson **JUDGMENT**

The above cause came before this Court on Defendant Whitefish Credit Union's Motion for Summary Judgment and Plaintiffs Dennis Thornton and Donna Thornton's Motion for Leave to File Amended Complaint. In its *Order Granting WCU's Motion for Summary Judgment and Order Denying Thorntons' Untimely Motion to Amend the Complaint*, the Court granted Defendant's Motion for Summary Judgment and denied Plaintiffs' Motion for Leave to Amend.

JUDGMENT IS HEREBY ENTERED in favor of Defendant Whitefish Credit Union and against the Plaintiffs Dennis Thornton and Donna Thornton.

DATED this 9 day of October, 2018.

Judge Dan Wilson

cc: Sean S. Frampton
Michael Klinkhammer
10/10/18 CL