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7 **IN THE UNITED STATES DISTRICT COURT**
8 **FOR THE WESTERN DISTRICT OF WASHINGTON**
9 **AT SEATTLE**

10 CYMBIDIUM RESTORATION TRUST,

11 Plaintiff,

12 v.

13 AMERICAN HOMEOWNER PRESERVATION
14 TRUST SERIES AHP SERVICING; its Trustee, U.S.
15 BANK TRUST N.A.; AHP CAPITAL
16 MANAGEMENT, LLC; AMERICAN
HOMEOWNER PRESERVATION SERIES 2015A+;
its Trustee, U.S. BANK TRUST
NATIONAL ASSOCIATION; AHP SERVICING,
LLC; and JORGE NEWBERY,

Defendants.

Case No. 2:24-cv-00025-JNW

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18 **DEFENDANTS' ANSWER TO PLAINTIFF**
19 **CYMBIDIUM RESTORATION'S TRUST'S COMPLAINT**

20 Defendants American Homeowner Preservation Trust Series AHP Servicing, AHP Capital
21 Management, LLC, American Homeowner Preservation Trust Series 2015A+ (Incorrectly named as
22 "American Homeowner Preservation Series 2015A+"), and AHP Servicing, (collectively, the
23 "Defendants" or "AHP Entities"), by and through their attorneys, and for their Answer to Plaintiff
24 Cymbidium Restoration Trust's ("Plaintiff" or "Cymbidium") Complaint, answer as follows:

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I. PARTIES

1. Answering Paragraph 1, admit.

2. Answering Paragraph 2, admit.

3. Answering Paragraph 3, deny as to “American Homeowner Preservation Series 2015A+ (“AHP 2015A+”).” To the extent the misnomer is corrected, as to American Homeowner Preservation Trust Series 2015A+, admit.

4. Answering Paragraph 4, admit.

5. Answering Paragraph 5, Defendants deny that Jorge Newbery is CEO of AHP 2015A+, if properly named as American Homeowner Preservation Trust Series 2015A+. Defendants admit all remaining allegations as to AHP Servicing, AHP Capital Management, LLC, AHP Trust Servicing, and American Homeowner Preservation Trust Series 2015A+.

II. JURISDICTION AND VENUE

6. Answering Paragraph 6, deny. Answering further, this Court has subject matter jurisdiction pursuant to 28 U.S.C § 1332.

7. Answering Paragraph 7, deny. Answering further, venue is proper in United States District Court for the Western District of Washington pursuant to 28 U.S.C. § 1391(b) and 28 U.S.C. § 128(b).

8. Answering Paragraph 8, deny.

III. FACTUAL ALLEGATIONS

9. Answering Paragraph 9, Defendants admit only that American Homeowner Preservation Trust Series AHP Servicing and American Homeowner Preservation Trust Series 2015A+ entered into an agreement with Plaintiff on October 7, 2022, titled “MORTGAGE LOAN SALE AGREEMENT WITH REPURCHASE OBLIGATION” and that Defendants fulfilled their obligations under the Mortgage Loan Sale Agreement with Repurchase Obligations. Defendants deny any remaining allegations not expressly admitted.

10. Answering Paragraph 10, deny.

11. Answering Paragraph 11, Defendants admit only that American Homeowner Preservation Trust Series AHP Servicing and American Homeowner Preservation Trust Series 2015A+ amended their agreement with Plaintiff on March 15, 2023, and deny all remaining allegations contained in ¶ 11 not specifically admitted.

12. Answering Paragraph 12, Defendants admit only that a guaranty agreement was executed. Defendants deny any remaining allegations and legal conclusions in Paragraph 11.

13. Answering Paragraph 13, Defendants admit that the “MORTGAGE LOAN SALE AGREEMENT WITH REPURCHASE OBLIGATION” and “FIRST AMENDMENT TO MORTGAGE LOAN SALE AGREEMENT WITH REPURCHASE OBLIGATIONS” contain the aforementioned contractual provisions and deny all remaining allegations in ¶ 13 not specifically admitted.

14. Answering Paragraph 14, including subparagraphs (a) through and including (d), deny.

IV. CAUSES OF ACTION

A. Breach of Contract

15. Answering Paragraph 15, Defendants incorporate by reference their previous answers to the allegations in paragraphs 1 through 14.

16. Answering Paragraph 16, Defendants deny.

17. Answering Paragraph 17, Defendants deny.

B. Conversion.

18. Answering Paragraph 18, Defendants incorporate by reference their previous answers to the allegations in paragraphs 1 through 17.

19. Answering Paragraph 19, Defendants deny.

V. PRAYER FOR RELIEF

Answering Section V., Defendants American Homeowner Preservation Trust Series AHP Servicing, AHP Capital Management, LLC, American Homeowner Preservation Trust Series 2015A+ (Incorrectly named as “American Homeowner Preservation Series 2015A+”), and AHP Servicing,

1 LLC deny that Plaintiff Cymbidium Restoration Trust is entitled to judgment against them in any
2 amount whatsoever, request judgment in their favor and against Plaintiff, and request such further or
3 other relief the Court deems just and proper.

4 **DEFENDANTS' AFFIRMATIVE DEFENSES TO PLAINTIFF'S COMPLAINT**

5 Defendants American Homeowner Preservation Trust Series AHP Servicing, AHP Capital
6 Management, LLC, American Homeowner Preservation Trust Series 2015A+ (Incorrectly named as
7 "American Homeowner Preservation Series 2015A+), and AHP Servicing, LLC (collectively, the
8 "Defendants" or "AHP Entities"), and pleading in the alternative and without prejudice to the denials,
9 objections, and other statements contained in these pleadings, states for its Affirmative Defenses to
10 Plaintiff's Complaint the following:

11 **FIRST AFFIRMATIVE DEFENSE**

12 **(Improper Damages)**

13 1. Plaintiff's Complaint seeks damages, including but not limited to attorney's fees, that
14 are not provided under the Mortgage Sale Agreement, First Amendment, applicable state or federal
15 law, or otherwise.

16 **SECOND AFFIRMATIVE DEFENSE**

17 **(Waiver)**

18 2. Plaintiff's claims are barred, in whole or in part, by the equitable doctrine of waiver.

19 **THIRD AFFIRMATIVE DEFENSE**

20 **(Unjust Enrichment)**

21 3. Plaintiff's claims are barred, in whole or in part, due to unjust enrichment.

22 **FOURTH AFFIRMATIVE DEFENSE**

23 **(Unclean Hands)**

24 4. Plaintiff's claims are barred, in whole or in part, by Plaintiff's unclean hands.

25 **FIFTH AFFIRMATIVE DEFENSE**

26 **(Failure to Mitigate)**

1 5. If Plaintiff recovers any damages, such award much be reduced by all damages
2 attributable to Plaintiff's failure to take appropriate action and mitigate damages prior to and
3 subsequent to the institution of this action.

4 **SIXTH AFFIRMATIVE DEFENSE**

5 **(Satisfied Terms, Conditions, Duties, and Obligations)**

6 6. Plaintiff's breach of contract claim (Count I) is barred, in whole or in part, because
7 Defendants complied with and satisfied all terms, conditions, duties, and obligations, of any and all
8 purported contracts or agreements, express or implied, to which they are a party.

9 **SEVENTH AFFIRMATIVE DEFENSE**

10 **(Substantial Performance and *De Minimis* Harm)**

11 7. Alternatively, if Plaintiff establishes a breach of the Mortgage Sale Agreement and
12 First Amendment, Plaintiff's Breach of Contract Claim (Count I) is barred in whole or in part because
13 Defendants' nonperformance or partial nonperformance is excused due to substantial performance and
14 to the *de minimis* harm caused to Plaintiff.

15 **EIGHTH AFFIRMATIVE DEFENSE**

16 **(Setoff)**

17 8. If Plaintiff is entitled to damages, Defendants are entitled to a setoff for any
18 consideration previously provided to Plaintiff.

19 **NINTH AFFIRMATIVE DEFENSE**

20 **(Unidentifiable Amount of Purportedly Converted Money)**

21 9. Plaintiff's claim for conversion (Count II) is barred in whole or in part if its claim is
22 based on the purported conversion of money.

23 **TENTH AFFIRMATIVE DEFENSE**

24 **(Plaintiff's Material Breach of Contract)**

25 10. Plaintiff's breach of contract claim (Count I) is barred if Plaintiff materially breached
26 contract obligations owed to Defendants.

RESERVATION OF RIGHTS

11. Defendants reserve the right to add additional defenses if warranted after discovery.

WHEREFORE, Defendants seek a judgment against Plaintiff and prays that the Court:

1. Deny all relief sought by Plaintiff and dismiss the Complaint in its entirety, with prejudice;
2. Enter judgment in favor of Defendants;
3. Award Defendants their costs of suit incurred in defense of this action to the maximum extent permitted by law; and
4. Grant Defendants any such other and further relief as the Court deems just and proper.

DEFENDANTS' COUNTERCLAIMS AGAINST PLAINTIFF

Defendants/Counter-Plaintiffs American Homeowner Preservation Trust Series AHP Servicing, AHP Capital Management, LLC, American Homeowner Preservation Trust Series 2015A+ (Incorrectly named as "American Homeowner Preservation Series 2015A+), and AHP Servicing, LLC (collectively, the "Counter-Plaintiffs"), and for their Counterclaims against Plaintiff/Counter-Defendant Cymbidium Restoration Trust ("Counter-Defendant" or "Cymbidium"), state as follows:

PARTIES, JURISDICTION, AND VENUE

1. Counter-Plaintiff AHP Servicing, LLC ("AHP Servicing") is a Delaware LLC with its principal place of business in Chicago, Cook County, Illinois. AHP Servicing's sole member is Neighborhoods United LLC, a Delaware Limited Liability Company with its principal place of business in Chicago, Illinois.

2. The members of Neighborhoods United, LLC are Echeverria Kelly and Jorge Newbery.

a. Echeverria Kelly is a resident of Barrington, Cook County, Illinois.

b. Jorge Newbery is a resident of Barrington, Cook County, Illinois.

3. Counter-Plaintiff American Homeowner Preservation Series 2015A+ ("2015A+

Trust”) is a Delaware Statutory Trust with its principal place of business in Chicago, IL. Its administrator is AHP Capital Management, LLC.

4. AHP Capital Management, LLC (“AHP Capital”) is an Ohio LLC with its principal place of business in Chicago, Cook County, Illinois.

5. The sole member of AHP Capital is Neighborhoods United, LLC. *See* ¶ 2.

6. The sole beneficiary of 2015A+ Trust is American Homeowner Preservation 2015 A+ LLC.

7. The sole member of American Homeowner Preservation 2015A+ LLC is American Homeowner Preservation Management, LLC.

8. The sole member of American Homeowner Preservation Management, LLC is Jorge Newbery, a resident of Barrington, Cook County, Illinois.

9. Counter-Plaintiff American Homeowner Preservation Trust Series AHP Servicing (“AHP Servicing Trust”) is a Delaware Statutory Trust with its principal place of business in Chicago, Cook County, Illinois.

10. The sole beneficiary of AHP Servicing Trust is AHP Servicing, LLC. *See* ¶¶ 1 and 2.

11. The administrator of AHP Servicing Trust is AHP Capital. *See* ¶¶ 4 and 5.

12. Cymbidium is a Delaware Statutory Trust with its principal place of business in King County, Washington.

13. Upon information and belief, the beneficial owner of Cymbidium is Cymbidium Restoration, LLC, a Delaware limited liability company with its principal place of business in Seattle, King County, Washington.

14. Upon information and belief, the members of Cymbidium Restoration, LLC are Oak Harbor Capital, LLC and Adam Henderson.

a. Adam Henderson is a resident of the State of Washington.

b. Oak Harbor Capital, LLC is a Delaware limited liability company with its principal place of business in Seattle Washington. Its sole member is Oak Harbor Holdings, LLC.

1 15. Oak Harbor Holdings, LLC is a Delaware limited liability company with its principal
2 place of business in Seattle, Washington.

3 16. Upon information and belief, the individual members of Oak Harbor Holdings are
4 Courtney Dodd, a resident of the State of Texas and Ophrys, LLC (now known as Oak Harbor Capital,
5 LLC, *See* ¶ 14b).

6 17. Defendant U.S. Bank Trust N.A. (“USBT”), named as a nominal party in the State
7 Court Action, is upon information and belief an abbreviation for U.S. Bank Trust National
8 Association, a Delaware corporation with its principal place of business in Minneapolis, Minnesota.

9 18. The above-entitled case is a civil action of which the United States District Court for
10 the Western District of Washington has original jurisdiction under the provisions of 28 U.S.C. Section
11 1332 and is an action of a civil nature between citizens of different states, wherein the Counter-
12 Plaintiffs have a good faith belief that the amount in controversy exceeds \$75,000.00.

13 19. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b) and 28 U.S.C. § 128(b).
14 Under Local Civil Rule 3(e)(1), removal to the Western District of Washington at Seattle is proper
15 because a substantial part of the alleged events or omissions that give rise to the claims occurred in
16 King County.

17 **FACTS COMMON TO ALL COUNTERCLAIMS**

18 20. On October 7, 2022, 2015A+ trust and AHP Servicing Trust entered into a Mortgage
19 Loan Sale Agreement with Repurchase Obligation (“MLSA”) with Cymbidium Restoration Trust. *See*
20 MLSA to be filed under as Exhibit A.

21 21. The MLSA was executed by AHP Capital, administrator of the 2105A+ Trust and AHP
22 Servicing Trust.

23 22. The MLSA was thereafter amended on or about March 15, 2023 (“First Amendment”
24 and collectively with the MSLA, “MLSA and First Amendment”). *See* First Amendment to be filed
25 under seal as Exhibit B.

26 23. The MLSA and First Amendment transferred a sum of money to 2015A+ Trust and

1 AHP Servicing Trust in consideration for the transfer to Cymbidium of certain rights over a designated
2 group of residential loans held by 2015A+ Trust and AHP Servicing Trust.

3 24. The First Amendment extinguished a repurchase obligation on the part of 2015A+
4 Trust and AHP Servicing Trust and in exchange, gave Cymbidium certain rights over additional loans.

5 25. The MLSA and First Amendment prohibit Cymbidium from engaging in less than
6 arm's length transactions.

7 26. The MLSA and First Amendment required the parties to execute those agreements in
8 good faith.

9 27. 2015A+ Trust and AHP Servicing Trust have fulfilled their obligations under the
10 MLSA and First Amendment insofar as any debts and interest owed to Counter-Defendant have been
11 paid by 2015A+ Trust and AHP Servicing Trust.

12 28. The MLSA contains a provision that requires its terms remain confidential except in
13 enumerated circumstances.

14 29. In spite the requirement that the parties to the MLSA keep its terms confidential,
15 Counter-Defendant, through its agents, has disseminated the MLSA's terms by quoting them verbatim
16 in its Complaint and disseminating the Complaint to third parties around the United States.

17 **COUNTERCLAIM # 1 FOR DECLARATORY RELIEF**

18 30. Counter-Plaintiffs restate and reallege paragraphs 1 through and including 29 as though
19 fully set forth herein as paragraph 30.

20 31. Counter-Plaintiffs have satisfied their obligations under the MLSA and First
21 Amendment by their repayment of all debts and interest more fully described in the MLSA and First
22 Amendment.

23 32. A dispute exists between Counter-Plaintiffs and Cymbidium as to whether 2015 A+
24 Trust and AHP Servicing Trust satisfied their obligations owed to Cymbidium pursuant to the terms
25 of the MLSA and First Amendment.

26 33. Counter-Plaintiffs therefore seek a declaration that 2015A+ Trust and AHP Servicing

1 Trust satisfied all obligations allegedly owed to Cymbidium pursuant to the express terms of the
2 MLSA and First Amendment.

3 WHEREFORE, Counter-Plaintiffs respectfully request this Court enter an order declaring that
4 American Homeowner Preservation Trust Series AHP Servicing, and American Homeowner
5 Preservation Trust Series 2015A+ have satisfied their obligations under the MLSA and First
6 Amendment.

7 **COUNTERCLAIM # 2 FOR ACCOUNTING**

8 34. Counter-Plaintiffs restate and reallege paragraphs 1 through and including 33 as though
9 fully set forth herein as paragraph 34.

10 35. Counter-Plaintiffs have repeatedly requested and offered to pay for an independent
11 audit to:

- 12 a. Confirm Plaintiff's allegations that any obligations owed under the MLSA and
13 First Amendment have been satisfied;
- 14 b. Determine the value of assets transferred by Cymbidium to Cymbidium's
15 owners or affiliates for no consideration to Counter-Plaintiffs;
- 16 c. Determine the value of services engaged by Cymbidium via less than arm's
17 length transactions; and
- 18 d. Otherwise reconcile the consideration received by Cymbidium under the terms
19 of the MLSA and First Amendment.

20 36. Despite Counter-Plaintiff's requests, Cymbidium has refused to permit an independent
21 audit of its records.

22 37. The only way to determine, with specificity, the amount of money Counter-Defendants
23 have been compensated under the terms of the MLSA and First Amendment is with an accounting.

24 38. To the extent there is no adequate remedy or means by which the amounts owed by
25 Cymbidium to Counter-Plaintiffs can be quantified, Counter-Defendants seek a full accounting of
26 Cymbidium and its owner/affiliates to whom monies have been transferred as a result of the MLSA

1 and First Amendment.

2 WHEREFORE, Counter-Plaintiffs respectfully request an order for an accounting of the books
3 and records of Cymbidium and its owner/affiliates to whom monies have been transferred.

4 **COUNTERCLAIM # 3 FOR BREACH OF CONTRACT**

5 39. Counter-Plaintiffs restate and reallege paragraphs 1 through and including thirty-38 as
6 though fully set forth herein as paragraph 39.

7 40. 2015 A+ Trust, AHP Servicing Trust, and Cymbidium agreed to the terms set forth in
8 the MLSA and First Amendment, which constitute a valid and enforceable contract. Exhibit A and
9 Exhibit B (to be filed under seal).

10 41. 2015 A+ Trust and AHP Servicing Trust have at all material times hereto performed
11 and complied with all conditions required to be performed by them under the MLSA and First
12 Amendment.

13 42. Despite its obligation to do so, Cymbidium breached the terms of the MLSA and First
14 Amendment by knowingly failing to execute the MLSA and First Amendment in good faith and in
15 particular:

- 16 a. Made assignment to entities affiliated with or owned by Cymbidium for no
17 consideration;
- 18 b. Transacted with entities owned by or affiliated with Cymbidium for the servicing of
19 loans that were the subject of the MLSA and First Amendment; and
- 20 c. Failed to adequately account for monies received by Cymbidium from the assignment,
21 servicing, or other enumerated activities related to the loans as required by the MLSA
22 and First Amendment.

23 43. As a direct and proximate result of Cymbidium's breach of the terms of the MLSA and First
24 Amendment, Counter-Plaintiffs have been compelled to initiate this counterclaim and incur attorneys'
25 fees, court costs, and other expenses in connection with this counterclaim, and in the future, may be
26 compelled to incur additional liability, expenses, and fees.

COUNTERCLAIM # 4 FOR BREACH OF CONTRACT

44. Counter-Plaintiffs restate and reallege paragraphs 1 through and including 43 as though fully set forth herein as paragraph 44.

45. 2015 A+ Trust, AHP Servicing Trust, and Cymbidium agreed to the terms set forth in the MLSA and First Amendment, which constitutes a valid and enforceable contract. Exhibit A & Exhibit B (to be filed under seal).

46. 2015 A+ Trust and AHP Servicing Trust have at all material times hereto performed and complied with all conditions required to be performed by them under the MLSA and First Amendment.

47. Pursuant to the express terms of the MLSA and First Amendment, Cymbidium agreed to, *inter alia*, refrain from disclosing and/or disseminating the terms of the MLSA and First Amendment to any third party. Exhibit A (to be filed under seal).

48. Cymbidium deliberately and maliciously disclosed and/or disseminated the terms of the MLSA and First Amendment to third parties, evidenced by the inclusion of these terms in its Complaint against Counter-Plaintiffs, which is public record. *See, e.g.*, Cymbidium's Complaint at ¶ 11.

49. Cymbidium's disclosure and/or dissemination of the terms of the MLSA and First Amendment constitutes a material breach of the MLSA and First Amendment.

50. Upon information and belief, Cymbidium disseminated copies of its Complaint, which expressly includes terms subject to the aforesaid confidentiality provision, to third parties throughout the United States.

51. As a direct and proximate result of Cymbidium's material breach of the MLSA and First Amendment, Counter-Plaintiffs have been compelled to initiate this counterclaim and incur attorneys' fees, court costs, and other expenses in connection with this counterclaim, and in the future, may be compelled to incur additional liability, expenses, and fees.

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COUNTERCLAIM # 5 FOR CONVERSION

52. Counter-Plaintiffs restate and reallege paragraphs 1 through and including 51 as though fully set forth herein as paragraph 52.

53. Due to inadvertence, Counter-Plaintiffs overpaid Cymbidium approximately \$3,000,000.00 pursuant to their performance under the MLSA and LPA (“Overpayment”).

54. Counter-Plaintiffs own the Overpayment and have a right to the return of those funds upon demand.

55. Cymbidium has no right to the Overpayment.

56. Counter-Plaintiffs demanded Cymbidium return the Overpayment, but Cymbidium refused.

57. Cymbidium has improperly and intentionally taken and used the Overpayment with the intent to deprive Counter-Plaintiffs of the use and possession of the Overpayment.

58. Cymbidium’s conduct has caused Counter-Plaintiffs damage by the loss of the Overpayment, along with other damages to be proven at trial, including interest, attorney’s fees, and costs to prosecute this Counterclaim.

PRAYER FOR RELIEF

WHEREFORE, Counter-Plaintiffs pray for the following relief:

1. A judgment in favor of Counter-Plaintiffs and against Cymbidium on Counterclaim # 3.
2. An award of compensatory damages in an amount to be determined by the Court;
3. An award of reasonable attorneys’ fees and costs of prosecuting this action;
4. Interest on damages as allowed by law; and
5. Such other and further relief as the Court deems just and appropriate.

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1 DATED this 12th day of January 2024.

2 **HARRIS SLIWOSKI LLP**

3
4 By: s/ Dan Harris

5 Daniel P. Harris, WSBA #16778

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7 Seattle, WA 98101

8 Tel: 206-224-5657

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10 *Attorneys for Defendants American Homeowner*

11 *Preservation Trust Services AHP Servicing, AHP*

12 *Capital Management, LLC, American Homeowner*

13 *Preservation Series 2015A+, AHP Servicing, LLC,*

14 *and Jorge Newberry*

Exhibit A

TO BE FILED PENDING MOTION TO SEAL

Exhibit B

TO BE FILED PENDING MOTION TO SEAL

DECLARATION OF SERVICE

I hereby certify that on January 12, 2024, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system and will send a true and correct copy of notification of such filing to:

Attorneys for Plaintiff	Nominal Defendants
Bradley S. Keller, WSBA # 10665 Byrnes Keller Cromwell LLP 1000 Second Avenue, 38 th Floor Seattle, Washington 98104 Telephone: (206) 622-2000 Facsimile: (206) 622-2522 Email: bkeller@byrneskeller.com	U.S. Bank Trust N.A. and U.S. Bank Trust National Association U.S. Bank Trust N.A. U.S. Bank Trust National Association 800 Nicollet Mall Minneapolis, Minnesota 55402

DATED this 12th day of January 2024, at Seattle, Washington.

/s/ Staci Black

Staci Black, Paralegal
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