

# EXCERPT OF LEGAL MOTION SUBMITTED TO A COURT REGARDING FORECLOSURE

## X. DECLARATORY RELIEF DUE TO PAYMENT

**10.1** Payment in full is an affirmative defense to a judicial foreclosure. ( See *Edwards v. White*, 120 S.W. 914,917 (Tex. Civ. App.-Texarkana 1909, no writ.) As stated above, the Note calls for payments to be made in the form of "cash, check or money order". On August 3, 2018, Petitioner [REDACTED] [REDACTED] tendered payment in the full amount of the Note into an escrow account at NVC Fund for the benefit of Rushmore without restriction (ref. [REDACTED] Letter).

**10.2** The term "cash" is ordinarily and usually construed to mean not only coins and paper money, but also checks and demand deposits in banks and savings institutions (see *Stewart v. Selder*, 473 S.W.2d 3, 8-9 (Tex. 1971); *Thompson v. Thompson*, 149 Tex.632,236 S.W.2d 779,790 (1951)). Other cases have given the term a broader construction to avoid partial intestacy [*Flower v. Dort*, 260 S.W.2d 685, 688 (Tex. Civ. App.-Fort Worth 1953, writ refd n.r.e.) (construing "cash" to mean "cash" value," including value of stocks, bonds, and other personal property); see *Stewart v. Selder*, 473 S.W.2d 3, 9 (Tex. 1971); *Hancock v. Krause*, 757 S.W.2d 117,121 (Tex. App.-Houston 1st Dist.] 1988, no writ. The word "money" has also generally been given a flexible meaning and has often been construed in Will cases to mean wealth or property [*Stewart v. Selder*, 473 S.W.2d 3,9 (Tex. 1971); see *In re Estate of Haldiman*, 653 S.W.2d 337, 341 (Tex. App.-San Antonio 1983, no writ) phrase "money left over after all is paid" construed to mean wealth and property, so that phrase functioned as general residuary clause); *Haynes v. Henderson*, 345 S.W.2d 857, 861 (Tex. Civ. App.-Austin 1961, writ refd n.r.e.) (terms "money" construed to include all kinds of real and personal property)]. For example, a will provision leaving "all stocks, bonds, annuities, etc." to a specified beneficiary was held to encompass the testator's lump sum death benefit and income tax refund, because all of the specific assets given to this beneficiary were relatively liquid financial assets, and the death benefit and tax refund fell into this category [*In re Estate of Anderegg*, 360 S.W.3d 677,680 (Tex. App.-El Paso 2012, no pet.)]. As such, Petitioner Carlos A. Ryerson's payment to Rushmore of funds on deposit at NVC Fund constitute "cash" and payment under the Note.

**10.3** Notably, the Bankruptcy Code, on which TRCP Rule 736.11 is based, deals with the concept of cash primarily in the area of cash collateral, which comprises the proceeds from the sale of assets to obtain needed funds for the debtor. The Bankruptcy Code defines cash collateral as "cash, negotiable instruments, documents of title, securities, deposit accounts [emphasis added], or other cash equivalents whenever acquired in which the estate and an entity other than the estate have an interest." Section 363(a). This definition also includes proceeds that enter the estate after the petition is filed. See H.R. REP. NO. 595, supra note 3, at 344-45, reprinted in 1978 U.S. CODE CONG. & AD. NEWS at 6300-02 (stating that money from mortgage property coming into the estate after the petition is filed is cash collateral).

10.4 Petitioners request the Court declare the payment offered by Petitioner [REDACTED] to US Bank and Rushmore, as reflected in the [REDACTED] Letter and attachments, constitutes actual and full payment under the Note, and that Petitioners' liability under the Security Agreement, and the lien created thereunder have been released and payment.

## XI. STAY OF FORECLOSURE

11.1 Any expedited foreclosure proceeding or order respondent files a separate original proceeding in a court of issue an, matter related to the origination, servicing, or enforce contract, or lien sought to be foreclosed prior to 5:00 p.m. on the foreclosure sale [Tex. R. Civ. P. 736.11(a); see Wells Fargo 912,914 (Tex. 2015) (borrower's separate and original action in default judgment that lender was not entitled to foreclose automatically expedited foreclosure)]; In re Dominguez, 416 S.W.3d 700, 706 (Tex. 2013) (stay is automatic and mandatory, and court hearing has no discretion to continue that proceeding); see also Tex. R. Civ. P. 736.11(a) (sale of property while stay is in effect is void)1.