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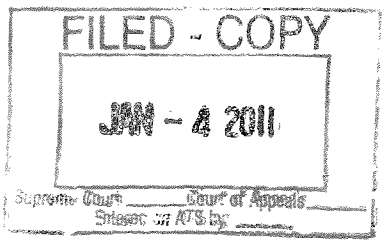
Trotter v. Bank of New York Mellon Respondent's Brief Dckt. 38022



IN THE SUPREME COURT OF THE STATE OF IDAHO

VERMONT TROTTER,

Appellant,

vs.

BANK OF NEW YORK MELLON F/K/A BANK OF NEW YORK AS TRUSTEE FOR THE CERTIFICATEHOLDERS OF CWALT, INC. ALTERNATIVE LOAN TRUST 2005-28CB MORTGAGE PASS-THROUGH CERTIFICATES SERIES 2005-28CB; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.; and RECONTRUST COMPANY, N.A.,

Respondents

BRIEF OF RESPONDENTS

Case Number 38022-2010
Appeal from the District Court of the First Judicial District for Kootenai County.
Appeal from the Honorable Lansing Haynes, District Judge, presiding.

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STATEMENT OF THE CASE

On or about June 17, 2005, in consideration for a mortgage loan, Appellant Vermont Trotter ("Trotter") executed a promissory note (the "Note") payable to Countrywide Home Loans, Inc. ("Countrywide"), and a deed of trust (the "Deed of Trust") in favor of Mortgage Electronic Registration Systems, Inc. ("MERS") as nominee for Lender, Countrywide Home Loans, Inc. ("Countrywide"), its successors and assigns. R., Vol. I, p. 3, L. 7-8.

On June 24, 2005, The Deed of Trust was recorded with the Kootenai County Recorder's Office ("Recorder's Office") as Instrument No. 1959776. R., Vol. I, p. 58. The Deed of Trust encumbers a piece of real property located in Kootenai County, Idaho, commonly known as 512 South 14th Street, Coeur D'Alene, Idaho 83814 (the "Property). R., Vol. I, p. 3, L. 5. All parties to the Deed of Trust agreed that Countrywide Home Loans, Inc. was the lender, and that MERS, Inc. as nominee for Countrywide Home Loans, Inc. would be the beneficiary of record as that term is defined in the Deed of Trust. *Id.* at L. 7-8.

On or about August 19, 2009, MERS executed an assignment of deed of trust (the "Assignment of Deed of Trust"), the effect of which was to name as the new beneficiary The Bank of New York Mellon fka The Bank of New York as Trustee for the Certificate Holders of CWALT, Inc. Alternative Loan Trust 2005-28CB Mortgage Pass-through Certificates Series 2005-28CB ("The Bank of New York Mellon"). R., Vol. I, p.58. On August 24, 2009, the Assignment of Deed of Trust was recorded with the Recorder's Office under Instrument No. 2228916000. *Id.*

On August 24, 2009, The Bank of New York Mellon fka The Bank of New York as Trustee for the Certificate Holders of CWALT, Inc. Alternative Loan Trust 2005-28CB Mortgage Pass-through Certificates Series 2005-28CB, as the new beneficiary, caused to be

recorded an appointment of successor trustee (the "Appointment of Successor Trustee") with the Recorder's Office, under Instrument No. 2228917000, naming ReconTrust Company, N.A. ("ReconTrust") the successor trustee for the Deed of Trust. R., Vol. I, p. 13.

On or about August 24, 2009, ReconTrust recorded a notice of default (the "Notice of Default") with the Recorder's Office under Instrument No. 2228918000. R., Vol. I, p. 12. ReconTrust also mailed a copy of the Notice of Default to Trotter. R., Vol. I, p. 4, L. 9. The Notice of Default identifies The Bank of New York Mellon fka The Bank of New York as Trustee for the Certificate Holders of CWALT, Inc. Alternative Loan Trust 2005-28CB Mortgage Pass-through Certificates Series 2005-28CB as beneficiary under the Deed of Trust, which is verified by the recorded Assignment of Deed of Trust. R., Vol. I, p. 12.

On or about September 2, 2009, ReconTrust executed and mailed a copy of the Notice of Trustee's Sale, which set the trustee's sale for January 11, 2010. R., Vol. I, p. 4, L. 11; p.14.

On January 6, 2010, Trotter filed a "Complaint for Declaratory and Injunctive Relief and to Cancel Trustee's Sale" in the District Court for the First Judicial District, in Kootenai County. R., Vol. I, p. 1. On January 8, 2010, The Hon. Judge Lansing Haynes issued a Temporary Restraining Order prohibiting the Trustee's Sale of the Property at issue. R., Vol. I, p. 15-17. On February 5, 2010, Judge Haynes extended the Temporary Restraining Order's term. R., Vol. I.[1]

On April 12, 2010, Respondents filed a Motion to Dismiss pursuant to I.R.C.P. 12(b)(6). R., Vol. I.[2] On July 2, 2010, the Court entered a decision, with findings of fact and conclusions of law. R., Vol. I, p. 57. On July 16, 2010, the Court entered a Judgment granting the Motion to Dismiss, ruling that "Trotter's Complaint fails to state a claim upon which relief can be granted as to all causes of action asserted, and for this reason, this case is dismissed with prejudice." R.,

[1] The docket in the record is not paginated. Said entry appears at p. 1 of 3 in the docket.
[2] Said entry appears at p. 2 of 3 in the docket.

Vol. I, p. 70-72. The Court also ordered that "the previous [*sic*] entered stays for foreclosure sales are lifted and vacated." *Id.*

On August 27, 2010, Trotter filed a Notice of Appeal with this Court.

ARGUMENT

I. Assignment of Error #1: "Did the District Court err by dismissing the appeal on a 12(b)(6) motion of Failure to State a Claim Upon Which Relief Can be Granted?"

A. Standard for I.R.C.P. 12(b)(6) Motions.

Idaho Rule of Civil Procedure 12(b)(6) provides that defenses and objections based upon the failure to state a claim upon which relief can be granted shall be made by motion. In a 12(b)(6) motion, "the question is whether the plaintiff has alleged sufficient facts in support of his claim, which if true, would entitle him to relief." *Orrock v. Appleton*, 147 Idaho 613, 213 P.3d 398 (2009), *citing Rincover v. Dep't of Fin.*, 128 Idaho 653, 917 P.2d 1293 (1996).

Although not necessarily attached to a complaint, "[w]here other matters are incorporated by reference in the pleadings, the court may properly consider such matters in passing on the [12(b)(6)] motion attacking the pleadings." *Stewart v. Arrington Const'r. Co.*, 92 Idaho 526, 446 P.2d 895 (1968). A court may take judicial notice of "*facts of common knowledge* which controvert averments of the complaint." *Taylor v. McNichols et al.*, 2010 WL 3448851, Slip Opin. Nos. 36130, 36131 (Sept. 3, 2010), *citing Hellickson v. Jenkins*, 118 Idaho 273, 796 P.2d 150 (1990) (emphasis in original). It is a long-standing principle that judicial notice may be taken of a public record. *See In re Corcoran*, 6 Idaho 657, 59 P. 18 (1899); *see also State, Dep't of Law Enforcement v. Engberg*, 109 Idaho 530, 708 P.2d 935 (1985); *Empire Mill Co. v. District Court of Eighth Judicial Dist. in and for Benewah County*, 27 Idaho 383, 149 P. 499 (1915), *citing Stanton v. Hotchkiss*, 157 Cal. 652, 108 Pac. 864 (1910).

B. The Deed of Trust Act Requirements to Effect Foreclosure.

The Idaho non-judicial foreclosure statutes set out the guidelines and procedures for carrying out a non-judicial foreclosure proceeding. *See* I.C. 45-15; *see also Frazier v. Neilsen & Co.*, 115 Idaho 739, 769 P.2d 1111 (1989). Under state law, the "beneficiary" means the person named or otherwise designated in a trust deed as the person for whose benefit a trust deed is given, or his successor in interest. *See* I.C. 45-1502. The statute also provides that the trustee may be replaced by the beneficiary, and that upon recording the appointment of a successor trustee in each county in which the deed of trust is recorded, the successor trustee shall be vested with all powers of an original trustee. *See* I.C. 45-1504(2).

Prior to foreclosure, three conditions must be met: 1) the trust deed, all assignments, and the appointment of successor trustee must be recorded in the mortgage records of the county where the property is located, 2) there must be default, and 3) the trustee or beneficiary must record a notice of default. *See* I.C. 45-1505(1)-(3). The statute also provides that following recordation of the notice of default, the trustee shall give notice of the trustee's sale by registered or certified mail. *See* I.C. 45-1506(2).

Contrary to Trotter's assertions, the question of "standing to prosecute" is not germane to a non-judicial foreclosure in Idaho. *See* Brief of Appellant at 7, 22. Trotter is also incorrect that a beneficiary must produce an original note. *Id.* at 21.[3] Trotter's arguments seek to turn a foreclosure action, conducted in accordance with I.C. 45-15, into a judicial process where

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[3] Idaho, among other states, does not require production of an original note to enforce a obligation. *See* I.C. §45-1505; *see also Newbeck v. Wash. Mut. Bank,* 2010 WL 291821 (N.D. Cal. 2010) ["to the extent [Plaintiffs] allege irregularities in the foreclosure sale based on [the] failure to produce the original promissory note... they do not state a claim."]; *Wayne v. HomeEq Serv.,* 2008 WL 4642595 (D. Nev. 2008) ["Courts across the country have rejected claims by plaintiffs asserting a duty... to provide the original note."]; *Mansour v. Cal-Western Reconveyance Corp.,* 618 F.Supp.2d 1178 (D. Ariz. 2008), *aff'd,* 09-16778 (9th Cir. 2010) ["Courts have routinely held that Plaintiff's 'show me the note' argument lacks merit."].

Respondents must "prove" ownership of a secured note to the Court. While several other states take the latter approach, Idaho has adopted a non-judicial framework. Thus, Trotter's disagreement with that process is best addressed to the State Legislature.

C. The Role of MERS in a Foreclosure.

MERS is named as beneficiary in a deed of trust as a nominee (i.e. agent) of the lender, its successors and assigns. Black's Law Dictionary defines "nominee" in relevant part as "[a] person designated to act in place of another, usually in a very limited way[,] [or] [a] party who holds bare legal title for the benefit of others[.]" *See* Black's Law Dictionary (9th ed. 2009), at 1149. Therefore, as deed of trust beneficiary in a nominee capacity, MERS is a limited agent and is generally understood as a person designated to act in place of another. *See Birkland v. Silver State Fin. Servs., Inc.*, 2010 WL 3419372 (D. Nev. Aug. 25, 2010) ["MERS, as nominee on a deed of trust, is granted authority as an agent on behalf of the nominator (holder of the promissory note) as to the administration of the deed of trust, which would include substitution of trustees."]

Using agency law principles, the holder or owner of the note is the principal, and MERS, as agent, simply stands in the shoes of the principal for limited purposes, such as assigning a trust deed on the lender's behalf. The role of MERS and its agency relationship with the lender is also clear from the language of the deed of trust, which the borrower acknowledges and consents to upon executing the deed of trust.

By contrast, Trotter inappropriately relies on Idaho Bankruptcy Court opinions, among other extra-jurisdictional cases, for the argument that MERS had no authority, as nominee for the Lender, to assign MERS' interest under the Deed of Trust to The Bank of New York Mellon. *See*

Brief of Appellant at 9.[4]

But *In re Sheridan*, 2009 WL 631355 (Bankr. D. Idaho Mar. 12, 2009), and *In re Wilhelm*, 407 B.R. 392 (Bankr. D. Idaho Jul. 7, 2009), are not "the current state of the law in Idaho," as Trotter asserts. *See* Brief of Appellant at 11. First, both decisions are legally inapplicable, as failing to offer any comment on the Idaho Trust Deed Act. Second, the cases are factually distinguishable, as they were concerned with standing in a specific judicial proceeding - relief from stay.

The Idaho Legislature has specifically provided a non-judicial alternative to enforcement of a trust deed. Title 45, Chapter 15 of state law is a complete set of rules and requirements providing a limited relief to a creditor seeking enforcement of a trust deed. Trotter appears to suggest that MERS' involvement in a security agreement should always lead to unenforceability of the interest contained within it; however, such a result is nonsensical because MERS' capacity as beneficiary is no different than any other agent's capacity to act on behalf of its principal. Trotter asks this Court to believe that the mere presence of MERS should absolve him of his loan obligation and invalidate the Deed of Trust, despite his assent to all terms thereof.

1. *In re Sheridan* is Inapposite to the Legal Issues Presented.

First, Trotter inappropriately relies on *In re Sheridan* for the notion that MERS could not be named as a beneficiary. 2009 WL 631355, *supra.*, *citing* Fed. R. Bankr. P. 4001(a)(1), 9014; LBR 4001.2(a), (b).[5] *Sheridan* discusses the judicial standing of a creditor seeking relief from

[4] Trotter's reference to – and three-page discussion of – an unreported Vermont Superior Court ruling, considering MERS' ability to bring a judicial foreclosure in its own name, should not be persuasive. In that case, there was no evidence of MERS interest in the promissory note, which was necessary to show MERS standing to commence foreclosure and a requirement under MERS' rules and procedures. Regardless, the Court still found that MERS held "legal title for the benefit of the lender and its successors and assigns." *See* Brief of Appellant at 12, *citing MERS v. Johnston*, Docket No. 420-6-09-Rdcv (2009).

[5] A copy of this opinion is available at http://www.id.uscourts.gov/decisions-bk/Sheridan_decision.pdf.

stay, not non-judicial foreclosure in Idaho by a current beneficiary.

In the bankruptcy context, a motion for relief from stay must be brought by a party who has a pecuniary interest in the case and, in connection with the debt secured, by the entity that is entitled to payment from the debtor and to enforce security for such payment. *Id.* at 8-9. In short, when deciding a motion for relief from the automatic bankruptcy stay, courts are focused on the documentation submitted with the motion, such as the payment history and the endorsed note. In comparison, a non-judicial foreclosure does not require evidence of the promissory note as a prerequisite to the process; rather, the language in the deed of trust and Idaho's Deed of Trust Act controls.

In *Sheridan*, MERS identified itself as a "secured creditor and Claimant," unlike MERS' role in this case. *Id.* at 3. *Sheridan* holds that MERS had not provided "an adequate record" to show it was a "party in interest with standing entitled to seek... relief;" this is because the note submitted with MERS' motion for relief from stay was made payable to the original lender, and there was no endorsement on the note to MERS or the alleged new note owner. The Bankruptcy Court ruled on MERS' motion for stay relief based strictly on "evidence submitted at the §362(e) final hearing," which consisted solely of a single exhibit containing the note and deed of trust, and no other assignments or affidavits. *Id.* at 6. The Court added that the note holder would be entitled to enforce the note, and move for relief from stay, but there was no evidence to identify the holder under the facts presented. *Id.*

The central question in *Sheridan* was not whether MERS could independently seek relief from a bankruptcy stay when it was the note holder, but whether MERS was entitled to seek relief from stay in that particular case, when the Court was presented with no evidence of which entity actually held the note at the time the motion was filed. Thus, the *In re Sheridan* opinion

has no value to determining the validity of a non-judicial foreclosure, and the Court states nothing as to the requirements under state law for enforcement of the trust deed.[6]

2. *In re Wilhelm* Also Does Not Apply to the Facts in This Case.

Likewise, Trotter attempts to extend the holding of *In re Wilhelm* beyond its question of standing for multiple creditors in the Bankruptcy stay relief context. 407 B.R. 392, *supra.*, *citing* 11 U.S.C. § 362, *In re Hayes*, 393 B.R. 259 (Bankr. D. Mass. 2008).[7] In that case, MERS was not seeking relief from stay, but rather assigned its interest in the deeds of trust. Instead of providing the court with endorsed promissory notes, the moving parties relied only on a deed of trust assignment from MERS as evidence of their interest in the note and standing to seek relief.

In denying the motions for relief, *In re Wilhelm* notes that declarations of at least two parties seeking relief did not comply with "basic evidentiary rules." *Id.* at 15. In one instance, no note was attached to a declaration, and a note submitted with the motion contained different dates and principal amounts. *Id.* at 21. The Court notes that there was no evidence demonstrating compliance with Local Bankruptcy Rule 4001.2, requiring copies of documents evidencing the obligation. *Id.* at 22.

Wilhelm also relies on cases from other jurisdictions where *the record as presented* failed to show an assignee's standing to prosecute a judicial action following an assignment from MERS when there was no evidence of the assignee's interest in the related promissory notes. *Id.* at 23, *citing Saxon Mortgage Servs. v. Hillery*, 2008 WL 5170180 (N.D.Cal.2008), *Bellistri v. Ocwen Loan Servicing*, 284 S.W.3d 619 (Mo.App. E.D. 2009), *In re Vargas*, 396 B.R. 511

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[6] Likewise, the holding of *In re Joshua and Stephanie Mitchell*, 2009 WL 1044368 (Bankr. D. Nev. Mar. 31, 2008) was simply that MERS could not file motions to lift a bankruptcy stay when it was not the note holder. *See* Brief of Appellant at 15. The *In re Mitchell* case was the lead case in a consolidation of seventeen (17) other similar bankruptcy matters.

[7] This matter was a consolidation of five cases. A copy of this opinion is available at http://www.id.uscourts.gov/decisions-bk/Wilhelm_decision_rev.pdf.

(Bankr. C.D.Cal. 2008). Neither of the cases the *In re Wilhelm* Court cites stand for the proposition that MERS cannot be a deed of trust beneficiary, or make a valid deed of trust assignment.[8]

In re Wilhelm does not rely on any authority that addresses the Idaho definition of "beneficiary," or a beneficiary's authority to assign a security interest in the non-judicial foreclosure context.

3. *Kesler* Also Relies on Facts That are Different From This Case.

Trotter also cites the Kansas decision of *Landmark Nat'l Bank v. Kesler,* 289 Kan. 528, 216 P.3d 158 (2009), which is readily distinguishable. *See* Brief of Appellant at 11. The very narrow issue before the Court was whether the trial court judge abused his discretion when he refused to vacate a default judgment against the lender in a judicial foreclosure action after the property had been sold to a third-party.

In *Kesler,* Landmark instituted a judicial foreclosure against Kesler and Millenia Mortgage Corp., the original lender of a second mortgage on Kesler's property. Neither Kesler nor Millenia responded, and following their default, Kesler's property was sold. Subsequently, MERS, the mortgagee as nominee of Sovereign Bank (the current owner of the second mortgage, after purchasing the second mortgage loan from Millenia), unsuccessfully moved to set aside the default judgment on the basis that MERS was a necessary party.

The *Kesler* Court emphasized the narrowness of its holding, expressly stating, "[w]hether MERS may act as a nominee for the lender, either to bring a foreclosure suit or for some other

[8] *Bellistri* was a decision in a judicial action to set aside a tax sale judgment. 284 S.W.3d 619 (Mo.App. E.D. 2009). The Court found that, while Ocwen Loan Servicing provided evidence of MERS' assignment of the mortgage, Ocwen failed to set forth evidence of its interest in the promissory note. *Id.* Similarly, in *Saxon Mortgage Servs.*, a declaratory relief action, the party seeking relief did not proved evidence of its interest in the note. However, the Court acknowledged the principal-agency relationship between MERS and the lender, and had no issue with the MERS assignment of the deed of trust. 284 S.W.3d 619 (Mo. App. 2009).

purpose, is not at issue...." *Id.* at 180.[9] *Kesler* was fact-specific, and focused on Kansas law and civil procedure standards. Nothing in the decision states that MERS cannot commence a judicial, or non-judicial, foreclosure in its own name, or assign its interest in a deed of trust.

Because Idaho does not require a party to prove it is the note holder in order to protect a trust deed security interest, the claims in *Kesler* are not present in this case; and therefore, the holding should not apply.

4. Trotter's Arguments Have Been Rejected by Federal and State Courts.

a. Federal Courts Support Respondents' Argument.

Numerous courts from non-judicial foreclosure jurisdictions specifically reject Trotter's arguments in non-judicial foreclosure proceedings. In *Chilton v. Federal Nat. Mortg. Ass'n.*, 2009 WL 5197869 (E.D.Cal. 2009), the Court stated that *Kesler* "is inapposite," and "did not consider the requirements of California's non-judicial foreclosure process." *Id.*

Chilton held that "it is well-established that non-judicial foreclosures can be commenced without producing the original promissory note." Distinguishing *Kesler* and *Bellistri*, the *Chilton* Court found that "one possessing the deed of trust cannot foreclose on a mortgage without (1) also possessing some interest in the promissory note, or (2) obtaining permission to act as agent of the note-holder. This has nothing whatsoever to do with possession of the "original" promissory note document...." *Id.* at 2.

In *Blau v. America's Servicing Company*, the District Court for Arizona also distinguished *Kesler* in a case where the Deed of Trust named MERS as "both the lender's nominee and 'beneficiary' of the agreement." 2009 WL 3174823 (Sept. 29, 2009). The Court

[9] After the *Kesler* decision, the Kansas Legislature completed a comprehensive overhaul of the Kansas Civil Procedure Code, which in part, requires the joining of any party in an action to determine title or affecting a security interest in real property if that party is a nominee of record on behalf of a beneficial owner.

found that "MERS, acting on behalf of the lender," was entitled to transfer the lender's interest to a subsequent beneficiary. *Id.*; *see also Pazmino v. LaSalle Bank, N.A.*, 2010 WL 2039163 (E.D.Va. May 20, 2010).

In *Vawter v. Quality Loan Service Corp.*, the District Court for the Western District of Washington provides a persuasive conclusion that MERS can act as a beneficiary, stating:

> [t]he deed of trust act allows a beneficiary, such as MERS, to appoint a successor trustee, which MERS did in this case. Plaintiff argues, however, that MERS cannot be a beneficiary and therefore MERS' appointment of a new trustee was invalid.... Plaintiff provides a printout from MERS' website stating that it is an electronic registry that tracks the ownership of loans. Plaintiff argues that because MERS only registers documents it does not actually hold them. Plaintiff's argument is unconvincing. Simply because MERS registers documents in a database does not prove that MERS cannot be the legal holder of an instrument.

707 F.Supp.2d 1115, 1122 (April 22, 2010), *quoting Moon v. GMAC Mortgage Corp.*, 2008 WL 4741492, at *5 (W.D. Wash. 2008). *Vawter* follows numerous other courts that have held MERS may, as a nominee for the lender or lender's successor, hold legal title to the deed of trust as the beneficiary and has standing to assign the deed of trust, substitute trustees, and even foreclose to enforce the property interest granted to it in the mortgage or deed of trust.[10]

In *McGinnis v. GMAC Mortgage Corp.*, the District Court for the Central District of Utah

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[10] *See*, e.g., *Ciardi v. Lending Co., Inc.*, 2010 WL 2079735 (D. Ariz. May 24, 2010) [deed of trust, freely entered into by plaintiff, designates MERS as beneficiary with authority to foreclose and sell the property]; *Commonwealth Property Advocates, LLC v. Mortgage Elect. Registration Systems, Inc.*, 2010 WL 3743643 (D. Utah Sept. 20, 2010) [MERS as nominee has authority to foreclose]; *In re Tucker*, 2010 WL 3733916 (Bankr. W.D. Mo. Sept. 20, 2010) [Court finds that the Note and Deed of Trust were not split because of MERS' status as agent for the note holders.]; *Taylor v. Deutsche Bank Nat'l Trust Co.*, 2010 WL 3056612 (Fla. App. Aug. 6, 2010) ["MERS was lawfully acting in the place of the holder and was given explicit and agreed upon authority to make... an assignment."]; *Elias v. HomeEq Servicing*, 2009 WL 481270, 1 (D. Nev. 2009) [deeds of trust confirmed the standing of the loan servicer, the loan owner, and MERS as the nominee beneficiary to seek foreclosure]; *Diessner v. Mortgage Elect. Registration Systems, Inc.*, 618 F.Supp.2d 1184 (D. Ariz. 2009) [MERS and trustee are authorized to institute non-judicial foreclosure proceedings]; *Cervantes v. Countrywide Home Loans Inc.*, 2009 WL 3157160, 11 (D. Ariz. 2009) [rejecting claim that MERS could not act as beneficiary under a deed of trust]; *Derakshan v. Mortgage Electronic Registration Systems, Inc.*, 2009 U.S. Dist. LEXIS 63176, 17-18 (C.D. Cal. 2009); *Mortgage Electronic Registration Systems, Inc. v. Revoverdo*, 955 So.2d 33, 34 (Fla.App.3d 2007); *Reynoso v. Paul Financial, LLC*, 2009 WL 3833298 (N.D.Cal. Nov. 16, 2009) [naming MERS as beneficiary, as nominee for the lender, did not invalidate subsequent transfer of the deed of trust from MERS to a transferee, and did not hinder transferee's right to foreclose.]; *MERSCORP, Inc. v. Romaine*, 8 N.Y.3d 90, 101, 828 N.Y.S.2d 266, 271, 861 N.Ed.2d 81 (2006).

points out that:

> [c]ourts have consistently held that [language naming MERS as a beneficiary in a security instrument]... gives MERS the authority to foreclose in behalf of the lender and that MERS need not possess the note in order to appoint a trustee in behalf of the lender who does hold the note." 2010 WL 3418204 (Aug. 27, 2010).

In *Burnett v. MERS, Inc.*, the District Court for the Northern District of Utah found that "MERS had authority to 'take any action' required of Lender...," which included appointing a successor trustee and even selling the property. 2009 WL 3582294 (Oct. 27, 2009).

The reasoning of *Chilton*, *Blau*, *Vawter*, *McGinnis*, and *Burnett* rejects *Kesler*, and dispels the notion that MERS' involvement as the beneficiary of record creates any impediment to foreclosures under a power of sale. *See also Silvas v. GMAC Mortgage, LLC*, 2009 WL 4573234 (D. Ariz. Jan. 5, 2010) [MERS can foreclose where MERS is designated on a deed of trust as the beneficiary]. These cases demonstrate that the requirements of non-judicial foreclosure statutes are completely different from those necessary to support a beneficiary's authority in a judicial foreclosure action or motion for relief from stay in Bankruptcy Court. With a non-judicial foreclosure, there is no requirement for the production of documentation to "prove" who holds a note, or the basis for the assertion of authority, other than what is specifically articulated as necessary in the Trust Deed Act.

Recently, a federal court handling multidistrict litigation challenging numerous aspects of MERS' conduct in non-judicial foreclosure states issued a decision that affirmed MERS' ability, as a specifically-named beneficiary, to make assignments, appoint trustees, or take other acts in connection with a foreclosure. *See In re MERS Litigation*, 2010 WL 4038788 (D. Ariz. Sept. 30, 2010). The decision rejects the argument that MERS could not appoint substitute trustees, refutes the contention that MERS's status as nominee beneficiary somehow "split" the note from the deed of trust (rendering the loan unsecured), and denies a claim for wrongful foreclosure. *Id.*

b. State Courts Also Support Respondents' Argument.

State courts have also recognized that MERS itself can invoke the power of sale. In *Jackson v. MERS, Inc.*, the Minnesota Supreme Court upheld MERS' ability to proceed with non-judicial foreclosure of a property, stating: "any disputes that arise between the mortgagee holding legal title and the assignee of the promissory note holding equitable title do not affect the status of the mortgagor for purposes of foreclosure by advertisement." 770 N.W.2d 487 (2009).

The Georgia Supreme Court has likewise approved of MERS' power to directly commence a non-judicial foreclosure on a lender's behalf when the debtor defaulted on her loan. *See Taylor, Bean & Whitaker Mortg. Corp. v. Brown*, 276 Ga. 848, 583 S.E.2d 844 (2003). In reversing a judgment in favor of the Plaintiff, the Court concluded:

> [t]he trial court ruled that Brown was entitled to... cancellation of that deed because the original lender... sold the original loan in the secondary market and is therefore not owed any money at the present time; because MERS, as the nominee of TB&W and its assigns, is not owed any money under the note; and because there was no evidence of any other entity that is owed money under the note. We disagree with this ruling. *Id.* at 850.

The Court found that the Plaintiff's admission of failing to pay off a promissory note "showed that she was not entitled to the relief of cancellation of the security deed." *Id.* at 851. As such, the Court recognized that a person may not seek to avoid payment obligations, and remain in default, simply by alleging the transfer or sale of a note in a secondary market.

Trotter also briefly mentions *MERS v. Nebraska Dept. of Banking and Finance*, 704 N.W.2d 784 (Neb. 2005), another opinion that does not further Trotter's argument. The Court held MERS is not a "mortgage broker" subject to the Nebraska Mortgage Bankers Registration and Licensing Act, and concluded that "lenders retain the promissory notes and servicing rights to the mortgage, while MERS acquires legal title to the mortgage for recordation purposes." *Id.*

at 787-88. The Nebraska case has no application here.

Likewise, Trotter's reliance on *MERS v. Southwest Homes of Arkansas* is misplaced. *See* Brief of Appellant at 17, *citing* 2009 WL 723182 (Ark. 2009). In that case – an appeal of a decision denying judicial foreclosure – the Court found that MERS was not a necessary party "in the action to recover the debt and foreclose the mortgage." *Id.* The facts of the case before this Court do not involve a judicial decree of foreclosure, and MERS is not seeking to recover a debt.

Trotter is improperly attempting to graft judicial rules and procedures onto a non-judicial foreclosure.[11] Incredibly, Trotter infers that the trial court should not have relied on the Trust Deed Act in dismissing the case. *See* Brief of Appellant at 7. In other words, this claim makes the Act wholly irrelevant legislation, as no party may rely on the provisions of that act to enforce a trust deed. In theory, this would also mean that no borrower whose liabilities have been extinguished by compliance with the Act is safe from further action, as the general laws of Idaho would allow for judgment on any debt remaining.

Trotter, seemingly misunderstanding the nature of a 12(b)(6) motion, puts forward a list of "genuine issues of disputed facts" as questions posed to the Court. *See* Brief of Appellant at 8. However, these issues are affirmatively and directly answered by the laws controlling non-

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[11] Even in the *judicial* context, there is support for MERS' ability to seek direct enforcement of a security interest. In *MERS v. Azize*, 965 So.2d 151 (Fla.App. 2 Dist. 2007), the Florida Court of Appeals overturned a lower court decision that dismissed MERS' attempt to judicially foreclose on several mortgages. The Court of Appeals stated: "[t]he trial court found that even if MERS was the holder of the note based on a transfer by the lender or a servicing agent, MERS could never be a proper plaintiff because it did not own the beneficial interest in the note. This was an erroneous conclusion." *See also US Bank, N.A. v. Flynn*, 897 N.Y.S.2d 855 (N.Y. Sup. 2010) ["a written assignment of the note and mortgage by MERS, in its capacity as nominee, confers good title to the assignee and is not defective for lack of an ownership interest in the note at the time of the assignment. In such cases, MERS is acting as the nominee of the owner of the note and of the mortgage, in which MERS is additionally designated as the mortgagee of record. No disconnect between the note and mortgage occurs when MERS acts, at the time of the assignment, as the nominee of the original lender or a successor owner or holder of the note and mortgage."]; *MERS v. Bellistri*, 2010 WL 2720802 (E.D.Mo. July 1, 2010) ["as the nominee of the original lender... or the lender's assigns, MERS has bare legal title to the note and deed of trust securing it, and this is sufficient to create standing." *Bellistri* holds that MERS has a Due Process right to receive notice of actions on real property encumbered by a MERS lien, because MERS has a protected property interest when it holds a deed of trust]; *Trent v. MERS, Inc.*, 288 Fed. App'x. 571 (11th Cir. 2008) [MERS "has the legal right to foreclose on the debtor's property" and "is the mortgagee."].

judicial foreclosure, governed solely by I.C. § 45-15. It is this law, and not the law of judicial foreclosure in another state, or bankruptcy procedure in a bankruptcy court, that should control the outcome of this case.

D. Respondents Satisfied All Statutory Requirements for Foreclosure.

In this case, all conditions required under I.C. 45-1506(1)-(3) were met.

First, the Deed of Trust was recorded under Instrument No. 1959776, the Assignment of Deed of Trust was recorded under Instrument No. 2228916000, and the Appointment of Successor Trustee was recorded under Instrument No. 2228917000. R., Vol. I., p. 13, 71. These documents were all recorded prior to the foreclosure, thereby meeting the first requirement under the statute.

Second, Trotter acknowledges that he is indebted under the Note and that he delivered a Deed of Trust to secure repayment of that Note. R., Vol. I, p. 3, L. 7. Furthermore, at no time has Trotter disputed that he is in default or that he has failed to tender a payment since April of 2009, almost one year ago. R., Vol. I, p. 12.

Third, ReconTrust, as successor trustee, recorded the Notice of Default under Instrument No. 2228918000 prior to when the Notice of Sale was sent and the sale was scheduled. *Id.* The Notice of Trustee Sale also complied with the statute by including the required information under I.C. 45-1506(4). R., Vol. I, p. 14.

In sum, Respondents were authorized under the governing statutes to foreclose on the Property; and in taking that action, Respondents complied with the legal requirements for carrying out a non-judicial foreclosure proceeding within the State of Idaho. Respondents' authority and compliance are further verified through Trotter's recount of the facts in his

Complaint, the documents attached thereto, and those facts of which the trial court was permitted to take judicial notice.

Trotter failed to state a claim that would entitle him to any relief prayed for in the Complaint. Trotter's contentions that Respondents "lack the legal authority to prosecute a foreclosure action" are thoroughly refuted by the plain language of the Trust Deed Act. Trotter suggests that this Court reverse the ruling below, and despite being antithetical to the rule of law that a *plaintiff* has the sole burden of proving a case, force Respondents to prove something that is unnecessary for a non-judicial foreclosure in Idaho. Such an argument undermines both legislative enactments and existing case law.

As Judge Haynes' Order states, "Plaintiff failed to cite to any controlling case, statute, contract, or other authority to support his allegations and therefore has not stated a valid cause of action." R., Vol. I, p. 71. Trotter's Complaint lacked sufficient facts which would suggest a legal remedy. As such, the decision to dismiss the action under I.R.C.P. 12(b)(6) should be affirmed.

II. Assignment of Error #2: "Did the District Court Err in Refusing Appellant Discovery?"

Trotter asks this Court to also remand the case for "full discovery." *See* Brief of Appellant at 24. Trotter infers that Respondents should not have been allowed to file a Motion to Dismiss until after discovery was complete. *Id.* at 25.

I.R.C.P. 26(b)(1) permits discovery that is "reasonably calculated to lead to the discovery of admissible evidence." The Court has broad authority to decide if a motion to compel should be granted or denied. *See Kirk v. Ford Motor Co.*, 141 Idaho 697, 116 P.3d 27 (2005); *see also*

Roe v. Doe, 129 Idaho 663, 931 P.2d 657 (1996), *Farr v. Mischler*, 129 Idaho 201, 923 P.2d 446 (1996) [imposition of discovery sanctions is discretionary].

The recent opinion in *Villa Highlands, LLC v. Western Community Ins. Co.*, 148 Idaho 598, 226 P.3d 540 (2010), upheld a trial judge's decision to deny a motion to compel where the documents sought were irrelevant to the claims asserted.[12]

Here, none of Trotter's Requests for Production were relevant to the default of his payment obligations, or whether Respondents can proceed with non-judicial foreclosure of the Property. Also, Trotter also appears to recognize that the trial court's ruling made his Motion to Compel moot. *See* Brief of Appellant at 25.[13]

Respondents provided Trotter with hundreds of pages of documents, including the entire loan file. R., Vol. I, p. 31-41. Nonetheless, Respondents objected to the numerous requests for, *inter alia*, information more appropriately sought under I.R.C.P. 34, or irrelevant materials that Respondents were not aware of. *Id.* If Trotter still could not know for sure whether he has underlying factual support for his claims, then he cannot state them plausibly in the first place.

This Court should decline to entertain this Assignment of Error, and instead, affirm the trial court's decision to dismiss.

III. Assignment of Error #3: Is Appellant Entitled to Attorney Fees and Costs?

"[I]n order to be entitled to attorney fees on appeal, authority and argument establishing a right to fees must be presented in the first brief filed by a party with this Court. *Carroll v. MBNA*

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[12] This Court states, "that the district court did not abuse its discretion in denying, in part, Villa Highlands's Motion to Compel. At the stage in the case in which the Motion to Compel was filed, there were no claims directly against Western Community regarding any sort of breach of fiduciary duty, breach of contract, or bad faith. Western Community's adjustment process was not at issue."

[13] Trotter's Motion to Compel was also untimely. I.R.C.P. 7(b)(3) requires that a written motion and supporting brief be served "so that it is received by the parties no later than fourteen (14) days before the time specified for the hearing." With a May 26, 2010 hearing, Trotter provided the Motion to Compel to opposing counsel via fax on May 13, 2010, as shown on the certificate of service. R. Vol. I, p. 28. Therefore, the Motion violated I.R.C.P. 7(b)(3) and should have been stricken in any event.

America Bank, 148 Idaho 261, 220 P.3d 1080 (2009), *citing* I.A.R. 36(b)(5), 41; *Goldman v. Graham,* 139 Idaho 945, 88 P.3d 764 (2004). "A citation to statutes and rules authorizing fees, without more, is insufficient." *Id., citing Goldman,* 139 Idaho at 947-48, 88 P.3d at 766-67.

Moreover, "[n]either rule [I.A.R. 40 or I.A.R. 41] provides the authority for awarding attorney fees." *Athay v. Stacey,* 146 Idaho 407, 196 P.3d 325 (2008), *citing Gilman v. Davis,* 138 Idaho 599, 67 P.3d 78 (2003). The failure to cite either a statutory or contractual basis for attorneys fees is fatal to a request for an award. *Id.*

Trotter merely asks for costs and fees under I.A.R. 41. *See* Brief of Appellant at 25. Aside from the fact that this Court should rule against Trotter on all issues, and therefore not provide him with a monetary award, Trotter offers no further basis for his claim. Trotter's request should be denied.

IV. Respondents Should be Awarded Attorneys Fees Based on Trotter's Frivolous Appeal.

Under I.C. 12-121, "in any civil action, the judge may award reasonable attorney's fees to the prevailing party or parties...." *See Lovelass v. Sword,* 140 Idaho 105, 90 P.3d 330 (2004). When the Court has "the abiding belief that the appeal was brought or defended frivolously, unreasonably or without foundation," then a responding party is entitled to recover fees. *Id., citing Minich v. Gem State Developers, Inc.,* 99 Idaho 911, 591 P.2d 1078 (1979); *see also Taylor v. McNichols, supra.* at 24 ["The complaints... are overly conclusive in nature with insufficient factual allegations, even under Idaho's notice-pleading standard, and demonstrate an often-incorrect understanding of the law."], *MBNA America Bank, N.A. v. McGoldrick,* 148 Idaho 56, 218 P.3d 785 (2008), *Teton Peaks Inv. Co., LLC v. Ohme,* 146 Idaho 394, 195 P.3d 1207 (2008).

In this case, the trial court found that Trotter's allegations were completely unsupported by authority. R., Vol. I, p. 71. Trotter's Complaint misstated the law, and he does so again on appeal. Given the unreasonableness of the issues presented, and their lack of both a legal and factual foundation, Respondents are entitled to attorneys' fees, and respectfully request that this Court grant them the same.[14]

CONCLUSION

Trotter's Complaint did not state a valid claim. Respondents were not required to establish proof of their ability to foreclose on the Property to the trial court; rather, Respondents complied with each and every requirement of non-judicial foreclosure in the Trust Deed Act, I.C. 45-15. Recognizing these facts, Judge Haynes dismissed the case pursuant to I.R.C.P. 12(b)(6).

Thus, for the above-mentioned reasons, Respondents ask this Court to affirm the decision below, and award attorneys' fees to them for defending against a frivolous appeal.

DATED this 3rd day of January, 2011.

ROUTH CRABTREE OLSEN, P.S.

By: _____
Lance E. Olsen, ISB No. 7106;

By: _____
Joshua S. Schaer, WSBA No. 31491,
appearing pursuant to I.A.R. 9

Attorneys for Defendant Bank of New York Mellon, Mortgage Electronic Registration Systems, Inc. and Recontrust Company, N.A.

[14] Upon grant of the award, Respondents will supply an affidavit in accordance with I.A.R. 41(d).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of January, 2011, a true and correct copy of the foregoing document was served upon the following individuals, by the method indicated below, and addressed as follows:

[**X**] U.S. Mail
[ ] Hand Delivered
[ ] Overnight Mail
[ ] Facsimile

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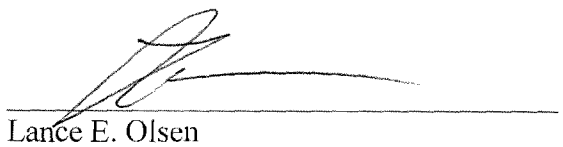

Lance E. Olsen