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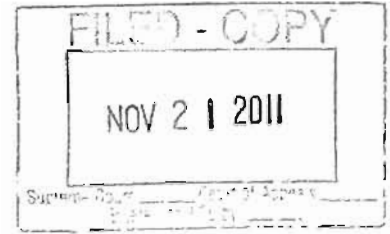
IN THE SUPREME COURT OF THE STATE OF IDAHO



LESLIE JENSEN-EDWARDS,

APPELLANT

Vs.

LEHMAN BROTHERS BANK, FSB AS LENDER; and MORTAGE ELECTRONIC REGISTRATION SYSTEMS, INC AS NOMINEE and BENEFICIARY and QUALITY LOAN SERVICES, AS ATTORNEY IN FACT AND SUCCESSOR TRUSTEE; and PIONEER LENDER TRUSTEE SERVICES, LLC AS TRUSTEE; and AURORA LOAN SERVICES AS SERVICER

RESPONDENTS

Appellant's Original Brief

Case Number 38604-2-11

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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COPY

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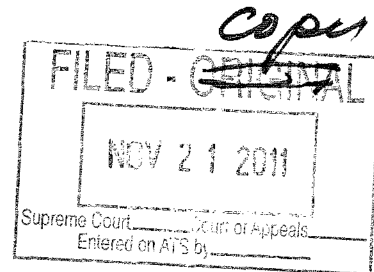
IN THE SUPREME COURT STATE OF IDAHO

LESLIE JENSEN EDWARDS Appellant v. LEHMAN BROTHERS BANK, FSB AS LENDER; and MORTAGE ELECTRONIC REGISTRATION SYSTEMS, INC AS NOMINEE and BENEFICIARY and QUALITY LOAN SERVICES, AS ATTORNEY IN FACT AND SUCCESSOR TRUSTEE; and PIONEER LENDER TRUSTEE SERVICES, LLC AS TRUSTEE; and AURORA LOAN SERVICES AS SERVICER Appellees	CASE NO. 38604-2-11 APPELLANT'S ORIGINAL BRIEF



IN THE SUPREME COURT OF THE STATE OF IDAHO

APPELLANT'S ORIGINAL BRIEF

Appeal from the District Court of the First Judicial District for Kootenai County the Honorable Lansing Haynes, District Judge presiding.

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Statement of Facts

1) On or about May 18, 2005, Appellant executed a Note and Deed of Trust (hereinafter DOT) in favor of Appellee Lehman Brothers Bank which listed Appellee MERS as nominee for Lehman Brothers Bank.

2) On or about December 3, 2009, Appellee Quality Loan Services mailed a "Notice of Default and Election to Sell under Deed of Trust" to Appellant (Record at 15-16). The Notice further alleged that MERS was the beneficiary and Nominee for Lehman Brothers Bank under the DOT and further purported to designate Pioneer Lender Trustee Services as Trustee and Pioneer Loan Services as Successor Trustee and Attorney in Fact.

3) In response, Appellant filed an action seeking Declaratory and Injunctive Relief with the First Judicial District Court, Kootenai County on April 1, 2010. (Record at 1-28).

4) The request for a Temporary Injunction was denied by the District Judge on April 7, 2010, however the parties submitted a stipulation for cancellation of the sale pending suit on May 6, 2010m later reduced to judgment, which remained in full force and effect until the Court's judgment on January 24, 2011.

5) In her Complaint, Appellant alleged that the actual owner of the note had not been established, and that MERS lacked standing to foreclose. Thereafter, Appellant was given leave to amend her Complaint. On June 10, 2010, she filed an amended Complaint adding allegation of fraud.

6) All defendants joined in the filing of a Motion to Dismiss filed on April 27, 2010. The motion was granted by the District Court pursuant to a Ruling on November 16, 2010, and a final judgment was entered on January 24, 2011. Three days before the Court's judgment on January

24, 2011, and without the required notices, Appellees sold Appellant's home at foreclosure sale on January 21, 2011 in violation of the order restraining the sale. [1]

7) The Court's judgment of January 24, 2011 is the subject of this appeal.

Issues Presented On Appeal

1) Whether the District Court erred in converting the Motion to Dismiss to a Motion for Summary Judgment before discovery enabled Appellant to acquire information to resist the Motion.
2) Whether the District Court erred in finding that Appellees had standing to foreclose.
3) Whether the District Court erred in concluding there were no genuine issues of disputed fact?
4) Whether the District Court erred in accepting hearsay testimony from opposing counsel via affidavit?
5) Whether Appellant is entitled to attorney fees and costs?

[1] The contest over the wrongful foreclosure arising out of the defective sale is not the subject of this appeal, as Appellant did not learn of it until well after the lower court's judgment. Appellant is currently embroiled in an unlawful detainer action, despite the pendency of this appeal.

Argument

Assignment of Error #1: Did the District Court err in converting the Motion to Dismiss to a Motion for Summary Judgment before discovery enabled Appellant to acquire information to resist the Motion?

The Complaint for Declaratory and Injunctive relief was filed on April 1, 2010 and served shortly thereafter. (Record at 1-31). A Motion to Dismiss for Failure to State a Claim was filed by all Defendants on April 27, 2010, 26 days later (although the motion lists its date of preparation as March 22, 2010, 9 days before suit was instituted by Appellant). (Record at 32).

Thereafter, Appellant was granted leave to file an Amended Complaint, which was subsequently filed on June 10, 2010 (Record at 101). All arguments in this appeal are based on the Amended Complaint, and the Court's decision relating to the allegations in that complaint.

Careful review of the Complaint reveals that Appellant alleged a lack of standing on the part of all Appellees, due to lack of proper assignment of the Deed of Trust, or lack of ownership interest in the note. (Record at 101-122). Her allegations are tied to the fact that her Deed of Trust, and/or the note which it secured were subjected to a process called securitization. While this appeal turns solely on the proper construction of Idaho law, it is not possible for an informed decision to be reached without some basic understanding of how the securitization process effectively destroys the long standing foundation of property law in

this State [2]. Without full discovery at the district court level, those facts could never be brought to light.

Repeatedly, Appellant asked the District Court to postpone decision on the Motion to Dismiss to permit her to obtain facts in discovery which are solely in the Appellees possession. (Record at 128 and 141) (Transcript at 23, 28, 29). Appellant submits it is manifestly unjust to permit one party to manipulate the outcome of a lawsuit in such a way as to deprive the other party of a full and fair opportunity to develop and present their case. Accepting the district court's suggestion that all plaintiffs must "have the evidence ready to prove this lawsuit. " (Transcript at 32, ll. 23-24, 36 ll. 18-22), discovery would never be appropriate. If that observation were legally sound, few if any plaintiffs could prevail absent evidence garnered from the opposing side during discovery. Rarely is it possible for any plaintiff to have all evidence from the other parties at the time of inception of suit. Instead, by filing a Motion to Dismiss immediately after service, then attaching self serving affidavits and documentation, Appellees created an untenable situation in which Appellant had no meaningful opportunity to obtain the proof she needed in which to prove her case. Given that Idaho law permits a Motion to Dismiss to be converted to a Motion for Summary Judgment, I. R. C. P. 12 (b), by filing the original motion quickly, and then adding additional documents to covert the motion, discovery can be averted. Indeed, one must wonder if the preparation date of the Motion to Dismiss, March 22, 2010, before Appellant even filed suit, suggests it is standard for banking entities to utilize advance prepared pleadings to implement this

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[2] Professor Peterson is one of the most noted authorities on property and consumer law particularly as it relates to MERS and its progress through the courts, see "Two Faces: Demystifying the Mortgage Electronic Registration System's Land Title Theory" http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1684729 See also http://www.law.utah.edu/faculty/faculty-profile/?id=christopher-peterson

strategy? The Court may find some guidance on this issue in the decision of Judge Magner, in *In Re: Wilson*, (Bankr.E.D.La., 2011) Case 07-11862. In awarding sanctions against LPS, she noted:

> The fraud perpetrated on the Court, Debtors, and trustee would be shocking if this Court had less experience concerning the conduct of mortgage servicers. One too many times, this Court has been witness to the shoddy practices and sloppy accountings of the mortgage service industry. With each revelation, one hopes that the bottom of the barrel has been reached and that the industry will self correct. Sadly, this does not appear to be reality. This case is one example of why their conduct comes at a high cost to the system and debtors.

Id at 25-26.

Judge Magner's ruling was partially in response to her sheer exasperation by the bank's refusal to provide documents which resulted in 10 discovery disputes in which the bank repeatedly attempted to keep the court from learning the real facts.

Rule 56(f) I.R.C.P. allows the District Court discretion to refuse a motion for summary judgment or to continue its hearing if it appears that the party resisting the motion cannot provide affidavits or documents to resist the motion, to permit discovery or it "may make such other order as is just." Despite repeated pleas from Appellant, the District Court insisted on deciding the motion without full fledged discovery. Appellant submits that this order was manifestly unjust when discovery would have uncovered precisely the facts she needed not only to resist the motion, but to prevail on the merits. Instead, Appellees implemented a procedure designed to insure her failure, and regrettably, it was approved by the Court. Appellant was faced with an impossible burden. Once the Motion for Summary judgment was filed, it was her duty to respond with specific affidavits, depositions or other competent evidence, *Tingley v. Harrison*, 125 Idaho 86, 867 P.2d 960 (Idaho, 1994). Without discovery, this burden could not be met. Appellant attempted to engage in discovery during the pendency of the motion for summary judgment, but

with little success in obtaining meaningful information, and no time was allotted for a motion to compel. (Transcript at 60, ll.15-25, 61, ll.1-4). While the District Judge ruled on the motion for reconsideration that he had repeatedly postponed hearings to permit discovery, (Record at 196), the only references in the record are to the contrary, (Transcript at 60, ll.15-25, 61, ll.1-4) (Transcript at 32, ll. 23-24, 36 ll. 18-22). Appellant submits that Idaho law requires a litigant be permitted to have full, meaningful discovery before their case is wrongfully aborted during motion practice, *Merrifield v. Arave*, 128 Idaho 306, 912 P.2d 674 (Idaho App., 1996). How could the district court have been in a position to construe the evidence liberally in favor of Appellant, when the most telling and relevant evidence had yet to be uncovered during discovery? See, *Ackerman v. Bonneville County*, 140 Idaho 307, 92 P.3d 557 (Idaho App., 2004). Appellant submits that the Appellees quickly filed a Motion to Dismiss in this matter in the hopes that they would never have to disclose their improper activities, much like the banks in *In Re Wilson, supra.* Resistance to discovery by US Bank in a loan modification challenge was the subject of much more pointed censure in *Phillips v. US Bank,* Superior Court of Carroll County Georgia, Case CV 00504 (November 2, 2011) (Courtesy Copy attached). In short, there is a consistent practice on the part of lenders and substitute trustees to rush to foreclosure before their wrongful practices can be uncovered by formal discovery.

Similarly, discovery would have permitted Appellant to derive competent evidence susceptible of being introduced into evidence that MERS admits it does not designate the real beneficiary in foreclosures until after the trustee's sale, which at one time was listed on their website, but now gone. Clearly, designation of a phantom beneficiary for purposes of foreclosure is a fact which is quite relevant to disposition of this suit. Moreover, it blatantly contradicts the repeated assertions of Appellees that all parties listed in the documents filed of record were the

proper parties to foreclose under Idaho law. Yet, without sworn depositions, Appellant could not provide this information in the form of admissible evidence.

Assignment of Error # 2: Did the District Court err in concluding Appellees had standing to foreclose?

The District Court, in essence, declined to address the issue of Appellees' standing to foreclose. The reasoning applied by the District Court presents an irreconcilable conflict on this issue. The Court indicated that it lacked the authority to create state or federal law and that it was up to federal appellate courts to resolve the issue. Conversely, the Court found that two Idaho federal bankruptcy opinions *In Re Wilhelm* 407 B.R. 392 (2009) and *In Re Sheridan*, 1 I.B.C.R. 24, 2009 WL 631355, were not binding on the Court, even though they both construed Idaho property law. It is hard to imagine how the court could conclude that federal law applied, then refuse to consider two federal bankruptcy decisions originating in Idaho.

If ever there were an issue which is not the subject of conflict in the federal court system, it would be the issue of standing. In order to properly present a claim the person seeking redress must have suffered an actual injury at the hands of the opponent which can be addressed by the entry of judgment, *DaimlerChrysler Corp. et al v. Cuno, et al.* 547. U.S. 332, 126 S. Ct. 1854, 164 L. Ed. 589 (2006). Moreover, the United States Supreme Court has spoken directly to the issue before this Court in a long line of cases which dictate that a litigant has standing to assert their own rights, but lacks standing to assert the rights of another, except for narrowly defined exceptions not applicable here, See *Miller v. Albright*, 523 U.S. 420, 118 S. Ct. 1428, 140 L. Ed 575 (1998); *Singleton v. Wulff*, 428 U.S. 106, 96 S. Ct. 2968, 49 L. Ed 2d 826(1976); *Barrows v. Jackson*, 346 U.S. 249, 73 S.Ct. 1031, 97 L. Ed 1586 (1953). Nor is there a conflict between this well developed body of jurisprudence and the current law relating to standing in Idaho.

Standing is a threshold issue. Lack of standing may not be waived and may be considered by the court *sua sponte. Christian v. Mason*, 219 P. 3d 473 (Idaho, 2009)

In *Christian*, *supra*, the court noted: "Jurisdictional issues, such as standing, and the interpretation of statutory language that confers standing are questions of law over which this Court exercises free review. See St. Luke's Reg. Med. Ctr. v. Bd. Of Comm'rs, 146 Idaho 753, 755, 203 P.3d 683, 685 (2009); *Taylor v. Maile*, 146 Idaho 705, 709, 201 P.3d 1282, 1286 (2009)."

These same principles were recently reiterated in *Martin v. Camas County*, Number 33605, (Idaho 2011) which stated:

> Standing is a jurisdictional issue, not an adjudicative fact of which the court may take judicial notice.

Id at 5.

Even if not binding on this Court, Appellant submits that the most persuasive case law relating to this appeal is to be found in the two decisions construing Idaho's law relating to enforcement of notes and deeds of trust, *In Re Wilhelm, supra* and *In Re Sheridan, supra,* and in a particularly well reasoned district court opinion from Minedoka County, *Ralph v. MET Life Home Loans*, Number 20100-0200 (courtesy copy attached). The *Ralph* decision relied on both *Sheridan, supra* and *Wilhelm, supra* along with a very soundly reasoned case from Oregon, *Hooker v. Northwest Trustee Services, Inc.* 2011 WL 2119103 (D. Or. May 25, 2011). At the time of preparation of this brief, Appellant believes *Ralph* is still in the district court, and appeal delays have not lapsed. She is uncertain of the status of appeal in *Hooker*.

While there is a lengthy discussion in the opinion of Judge Haines concerning who may be a beneficiary under the Act, the decision does not address the issue raised by Appellant his pleadings: did any of the named Appellees have an interest in the note, not just the mortgage,

such that any of them had standing to prosecute. Appellant submits that mere invocation of the term "beneficiary" is not enough to establish the legal authority to fulfill the legal requirements of that term. As so thoughtfully expressed in *Armacost v. HSBC Bank*, 10-CV-274 ELT-LMB (District Court Idaho 2011)(Courtesy Copy attached) "One could not reasonably contend that compliance with a procedure gives substansive rights not otherwise possessed" *Id* at 21.

To date, the United States Bankruptcy Court for the District of Idaho, in two separate opinions, rejected the alleged authority of MERS. The first was the matter of *In Re Sheridan*, Case No. 08-20381-TLM (Opinion issued March 12, 2009). In analyzing the real party in interest requirements and the alleged "beneficiary" status of MERS in the Deed of Trust, the *Sheridan* court expressly rejected MERS' self-appointed designation as "beneficiary" in view of its declared status of "solely as nominee", and found that the securitized mortgage loan trust and its "trustee" had no interest in the Note or the Deed of Trust. The Court also found that there was no language in the Note giving MERS any rights whatsoever. The Court found that there were disputed factual issues as to who was the holder of the Note.

Later, the Idaho Bankruptcy Court went further in addressing the infirmities as to MERS in the matter of *In Re Wilhelm, supra*. In *Wilhelm* (as here), the Deeds of Trust named MERS as the alleged "beneficiary", but also stated that MERS was "solely as nominee" and that MERS held "only legal title". The Bankruptcy Court found that the Deeds of Trust did not state that MERS was authorized to transfer the promissory notes, but that nevertheless the movants in four of the five cases discussed in the opinion submitted assignments in which MERS purported to assign the Deed of Trust "together with" the note.

In again rejecting the alleged authority of MERS, the *Wilhelm* court noted that the moving parties "seem to presume that the assignments, standing alone, entitle them to enforce

the underlying notes". The Court found this assumption to be "unfounded", as the "nominal beneficiary" language in the Deeds of Trust did not, "either expressly or by implication", authorize MERS to transfer the promissory notes. The court premised its evaluation of standing based upon the clear provisions of Article 3 of Idaho's enactment of the Uniform Commercial Code governing negotiable instruments. See Idaho Code § 28-3-102(a); id. § 28-3-104(1). In other words, to decide the issue of standing, the Bankruptcy Court was required to evaluate Idaho law, not federal.

The *Wilhelm* Court cited *Saxon Mortgage Services v. Hillery*, 2008 WL 5170180 (N.D. Cal. Dec. 9, 2008) and *Bellistri v. Ocwen Loan Servicing, LLC*, 2009 WL 531057 (Mo. Ct. App. March 3, 2009) in support of its position. These cases, as well as the *Wilhelm* decision, as will be seen later, reflect the numerous courts throughout the United States which, like *Sheridan* and *Wilhelm*, have resoundingly rejected MERS' purported authority to do anything.

Appellant still maintains the findings by the Court in *Sheridan* and *Wilhelm* represent the current state of the law in Idaho as to the lack of authority on the part of MERS to effect foreclosures. Significantly, the conclusions reached in those cases have been repeated in multiple jurisdictions around the United States.

Perhaps to fully understand the issues before this Court, it would be helpful to understand what MERS is, and how their business operates. These facts were not fully before the District Court because discovery never transpired, and it is not possible for this Court to consider if the grant of summary judgment was proper without understanding what facts will be uncovered in that process. While the Deed of Trust lists MERS as the "beneficiary" on the security instrument, and as "nominee" for the lender, those are essentially empty words inserted to suggest a patina of authority to act in the foreclosure process. Nothing in the record before this

Court shows that MERS owned the note, had any interest in the Deed of Trust other than its own, superficial, self serving declarations that is holds those interests. Instead, there is ample case law reflecting that MERS is due no monies from Appellant for payments on the note, is not entitled to receive any monies from that source and never held any actual authority to execute upon the Deed of Trust. By comparison, the Court should consider MERS own forceful denials of its functions arising out of the following line of cases.

MERS operational structure was clearly described by the Supreme Courts of Kansas and Nebraska and the Court of Appeals of New York (New York's highest court):

> "MERS is a private corporation that administers the MERS System, a national electronic registry that tracks the transfer of ownership interests and servicing rights in mortgage loans. Through the MERS system, MERS becomes the Mortgagee of record for participating members through assignment of the Member's interests to MERS. MERS is listed as the grantee in the official records maintained at country register of deeds offices. *The lenders retain the promissory notes, as well as the servicing rights to the mortgages.* The lenders can then sell these interests to investors without having to record the transaction in the public record. MERS is compensated for its services through fees charged to participating members."

Landmark Nat. Bank v. Kessler, 216 P.3d `58, 164 (Kan. 2009)(emphasis supplied), citing *Mortgage Electronic Registration Systems, Inc. v. Nebraska Dept. of Banking & Finance*, 704 N.W.2d 784, 785 (Neb. 2005) (in which MERS forcefully disclaimed a beneficiary's rights in order to avoid payment of fees by registering as a business entity.)

> "In 1993, members of the real estate mortgage industry created MERS, an electronic registration system for mortgages. Its purpose is to streamline the mortgage process by eliminating the need to prepare and record paper assignments of mortgage, as had been done for hundreds of years. To accomplish this goal, MERS acts as nominee and as mortgagee of record for its members nationwide and appoints itself nominee, as mortgagee, for its members' successors and assigns, thereby remaining nominal mortgagee of record no matter how many times loan servicing, or the mortgage itself, may be transferred. MERS hopes to register every residential and commercial home loan nationwide on its electronic system."

Merscorp, inc. v. Romaine, 861 N.E.2d 81, 86 (N.Y. 2006).

Similarly, in scrutinizing the operational standing of MERS against the standard MERS language in a mortgage document, the Court in *Mortgage Electronic Registration Systems, Inc. v. Johnston*, Docket No. 420-6-09-Rdcv (2009), conducted a thorough examination of the current law as to MERS. The Court began by first examining the definition of "nominee" from Black's Law Dictionary, 1076 (8th Edition, 2004). Black's states: "a person designated to act in place of another in a very limited way" and as "a party who holds bare legal title for the benefit of others and distributes funds for the benefit of others". Legal title is defined as "a title that evidences apparent ownership but does not necessarily signify full and complete title or a beneficial interest", Black's Law Dictionary at 1523. This is in contrast to "equitable title", which is "a title that indicates a beneficial interest in property and gives the holder the right to acquire formal legal title", the Court noted.

Johnston, supra, held that the mortgage deed consistently referred to MERS "solely as a nominee" and that it holds "only legal title", but it then purported to expand MERS' authority as a "nominee" to act as in essence an agent or power-of-attorney to carry out the rights of the lender, including foreclosure and sale of the property. The court held that this purported expansion of authority was restricted to that "necessary to comply with law or custom", and that, importantly, MERS and the lender purposely chose to use the specific legal term "nominee" and <u>*not*</u> "agent" or "power of attorney", and that MERS chose to define the term "nominee". Further, the court observed that the mortgage deed consistently referred to the *Lender's* rights to the property, and not MERS', lending additional credence to the conclusion that MERS had only limited authority to act "solely as nominee".

Against this backdrop of established decisional law and admissions of MERS, the Vermont court held that MERS could not enforce the underlying obligation, and may not enforce the mortgage deed it holds in its name with only "bare legal title". Appellees in this case have acknowledged the presence of this same MERS language in Appellant's Deed of Trust the should force a similar result in finding MERS lack of authority to foreclose as in *Johnston, supra.*

The Vermont court was further persuaded by the *Nebraska Dept. of Banking & Finance*, *supra* where affirmative representations were made by MERS that:

(a) it does not acquire mortgage loans because it only holds bare legal title in a nominee capacity;

(b) it is contractually prohibited from exercising any rights with respect to the mortgages, i.e. foreclosure, without the authorization of its members;

(c) it does not own the promissory notes secured by the mortgages and has no rights to payments on the notes; and

(d) it does not take applications, underwrite loans, make decisions on whether to extend credit, collect mortgage payments, hold escrows for taxes and insurance, or *provide any loan servicing functions whatsoever. MERS merely tracks the ownership of the lien* and is paid for its services through membership fees charged to its members, concluding that MERS does not acquire "any loan or extension of credit secured by a lien on real property", and that MERS "does not itself extend credit or acquire rights to receive payments on mortgage loans; that the *lenders retain the promissory notes* and servicing rights to the mortgage, while *MERS acquires legal title to the mortgage for recordation purposes."*

The Vermont court went on to note that counsel for MERS in *Kessler, supra* "explicitly declined to demonstrate to the trial court a tangible interest in the mortgage", citing the case at *Kessler, supra* at 167, and that the Kansas court found that MERS had no stake in the outcome of an independent action for foreclosure, as it did not lend money, nor was anyone involved in the case required to pay MERS any money. The *Kessler, supra* court concluded by holding that "If MERS is only the mortgagee, without ownership of the mortgage instrument, it does not have an enforceable right", adding that while the note is essential, the mortgage itself is only "an incident" to the note.

The Vermont court, expounding further on the holding of the *Kessler* decision which itself noted what MERS argued to the Nebraska Supreme Court, found that MERS was not authorized engage in practices that it would make it a party to either the enforcement of mortgages or the transfer of mortgages. The Vermont court also noted that MERS and the lender intentionally split the obligation and the mortgage deed, and held that MERS lacked standing to bring a foreclosure action in its own name, or as "nominee" on behalf of the lender.

The Court of Common Pleas for the State of South Carolina in the matter of *Mortgage Electronic Registration Systems, Inc. v. Girdvainis*, Civil Action No. 2005-CP-43-0278 (Jan. 20, 2006) also held MERS to its representations previously made to the Supreme Court of Nebraska as to its non-ownership of the promissory notes; not extending any credit; not having any independent right to collect on any debt because MERS did not extend any credit and that the mortgage debtor does not owe MERS any money; etc. and held that since MERS prevailed in the Nebraska litigation, MERS was "judicially estopped to disavow the positions it advanced during the litigation process in Nebraska or avoid the findings and conclusions articulated by the Nebraska court."

The South Carolina court, citing the caveat on MERS' authority by MERS' own contract, held that the representation as to the assignment of the note and mortgage to MERS "for valuable consideration" was "*diametrically opposed to the way MERS operates*". The operative language in the MERS contract to which the *Girdvainis, supra* court refers is that within MERS' own contract which it has with its lenders and servicers, which specifically limits MERS' authority as to mortgage loans and properties the subject thereof:

MERS shall have no rights whatsoever as to any payments made on account of such mortgage loans, to any servicing rights related to such mortgage loans, or any mortgaged properties securing such mortgage loans. *MERS agrees not to assert any rights with respect to such mortgage loans or mortgaged properties.*

The United States Bankruptcy Court for the District of Nevada in the matter of *In re Joshua and Stephanie Mitchell*, Case No. BK-S-07-16226-LBR (Decision of August 19, 2008), in analyzing what MERS stated it was according to its own website; the testimony of the Secretary of MERS; and the definition of "beneficiary" from Black's Law Dictionary 165 (8th Edition 2004, the same as that used by the Vermont Court), held that "MERS is not a beneficiary as it had no rights whatsoever to any payments, to any servicing rights, or to any of the properties secured by the loans." The Court cited the same MERS "Terms and Conditions" set forth in *MERS v. Girdvainis_, supra* decision from 2006.

Indeed, counsel for MERS in this case openly admitted that MERS did

> ". . . not claim that they own the loan. There is no evidence that MERS does make this claim. And, we specifically deny that. " (Transcript at 52)

These are the earlier cases from Courts which first had the opportunity to review MERS authority to institute foreclosures. The trend has continued and expanded as Courts throughout the United States have insisted upon the enforcement of not only foreclosure statutes but

traditional concepts of property law. At this juncture, there is not yet controlling precedent in Idaho, and many of the extra territorial decisions are certainly persuasive and useful in assisting this Court in deciding the instant case.

Recently, the Supreme Court of Massachusetts rendered a compelling decision which has particular merit in disposing of the merits of this appeal. It demonstrates how the fraudulent title practices and improper record keeping of most major lending institutions is becoming legendary around the country. Even when pressed to gain quiet title for their own purposes in an action they brought, neither US Bank nor Wells Fargo could produce adequate documentation to win their own case, *U.S. Bank v. Ibanez*, 458 Mass. 637 (Mass. 2011). This case is remarkably similar to *Ibanez, supra* in the pertinent legal aspects. In *Ibanez*, the Massachusetts Supreme Court found that the plaintiffs were not entitled to foreclose on the property of two sets of homeowners because they were unable to prove they had any actual interest in the mortgages via assignment before the foreclosure sale was completed. Here, Appellees have produced no documents which conclusively establish they held any legally sound interest in the original note executed by Appellant at the time of foreclosure. As Appellant set forth earlier, she is entitled to know that the person with proper standing to foreclose is doing so.

A similar result was reached in *Hooker v. Northwest Trustee Service, Inc. et al.* 2011 WL 2119103 (D. Or. May 25, 2011). The Court found that the failure on the part of the foreclosing entities, a substitute trustee service, MERS, and Bank of America was not adequate to meet the threshold requirement of the Oregon Foreclosure Statute, ORS 86.705(1) that only the true beneficiary may act to foreclose. Of particular note, Judge Panner compelled the defendants to provide a "complete chain of title for the note and the deed of trust." *Id* at 3. As in *Ibanez, supra*, and here, the provided documents failed to establish any proper capacity for the

defendants to foreclose. However, unlike *Hooker* and *Ibanez*, supra, in this case the district court did not require production of a full chain of title, and proceeded to decision nonetheless, over the objection of Appellant (Transcript at 33 and 36). Apparently, MERS believes that by invoking the mantra of the status "nominee" it can defy the law, and expect the Courts to decline to enforce it. Nor has MERS argued the Idaho Foreclosure statute grants any authority to a "nominee" of the beneficiary. MERS has not made this argument because it cannot. Careful review of the entire Idaho Foreclosure Statute, Idaho Code 45 § 1502 *et seq*. reveals no powers or authority granted to any entities but beneficiaries or trustees. (Transcript at 57-58).

While Appellant has given this Court a small sampling of the cases in which MERS was found not to have standing to foreclose due to its lack of status as beneficiary, they are only presented to assist the Court in seeing the rationale applied by other courts. In addition, they provide some historical perspective relating to the beginning phases of litigation challenging MERS ability to assert rights it does not have. The issues raised on this appeal are being furiously litigated throughout the United States, often with five or more new cases coming out each day. It is anticipated that Appellees will submit a significant number of cases in which Courts around the country have erroneously ruled MERS has standing. At the end of the day, no cases cited are more than perhaps persuasive because in Idaho, there are really only three cases which have addressed the issue: *Sheridan, Wilhelm* and *Ralph, supra.*

Of great note, however, is the April 13, 2011 order of the Office of the Comptroller of the Currency (OCC) requiring MERS and its member banks (which includes Lehman Brothers Bank) cease and desist from their foreclosure practices, stating:

> The Agencies have identified certain deficiencies and unsafe or unsound practices by MERS and MERSCORP that present financial, operational, compliance, legal and reputational risks to MERSCORP and MERS, and to the participating Members. Members are institutions that

use MERSCORP's and MERS' services and have agreed to abide by MERSCORP's Rules of Membership (the "Rules"). The Members include depository institutions regularly examined by, or subsidiaries or affiliates of depository institutions subject to examination by the OCC, the Board of Governors, the FDIC, the OTS, and other appropriate Federal banking agencies, as defined by subsection 1(b)(1) of the Bank Service Company Act, 12 U.S.C. § 1861(b)(1), and Fannie Mae and Freddie Mac, which are subject to examination by the FHFA, (collectively "Examined Members").

http://www.occ.gov/news-issuances/news-releases/2011/nr-occ-2011-47h.pdf

This Order was rendered after the decision by the District Court in this matter, and so was not available for its consideration. Indeed, the law surrounding the issue of fraudulent foreclosure practices changes at mind numbing speed. Appellant anticipates that by the time of oral argument, she will have to request to supplement her listed authorities because there will be significant new developments by that time. [3]

Careful review of the record in this matter reveals the kinds of practices which the Order was designed to address.

The Notice of Default and Election to Sell under Deed of Trust was filed into the Kootenai County records by Pioneer Lender Trustee Services purporting to be appointed by Quality Loan Services a supposed "duly appointed Successor Trustee" and further alleges that the deed was to secure "certain obligations in the amount of $345,000.00 in favor of MERS" (*emphasis added*). Record at 15. Yet, at oral argument on the Motion to Dismiss, counsel for Appellees openly admitted to the Court that MERS had no interest in the note and that

> "MERS does not claim that they own the loan. There is no evidence that MERS does make this claim And, we specifically deny that. (Transcript at 52).

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[3] An example of the frequency of change in this area of the law is best illustrated by the article contained at the following link. It came out just as Appellant was in the early phases of preparation of this brief, http://www.nytimes.com/2011/09/02/business/us-is-set-to-sue-dozen-big-banks-over-mortgages.html?pagewanted=2&_r=1&emc=na. Within minutes, Appellant also obtained a very recent filing by the Attorney General of Arizona, challenging these same kinds of fraudulent practices before the Arizona courts. Less than one hour later, Appellant also received an Order from the US District Court for the District of Seattle certifying questions relating to MERS standing to foreclose to the Washington Supreme Court. It is difficult to overstate how quickly this area of the law moves.

While the Deed of Trust clearly states that Appellant has "obligations to MERS" in an amount equal to her loan, it is difficult to comprehend how she owes that obligation to a person or entity with no rights to the loan. Nor is it comprehensible that the Court can overlook the conflicting argument of counsel which directly contradicts the Deed of Trust, although the former is probably more accurate. (Record at 15).

Instead, it is more likely that the allegations in Appellant's First Amended Complaint are correct, (Record at 39-46) and that the Deed of Trust was securitized and assigned separately from the note and that MERS is seeking to enforce a security device, the Deed of Trust, which has now been rendered invalid. It is certainly a factual inquiry necessary for resolution of this case.

Indeed, Appellees' position flies in the face of firmly established law which requires that the note and the deed of trust be held by the same owner in order to be enforceable.

The United States Supreme Court stated "The note and mortgage are inseparable; the former as essential, the latter as an incident. An assignment of the note carries the mortgage with it, while an assignment of the latter alone is a nullity," *Carpenter v. Longan* 83 US 271,274, (1872) citing: *Jackson v. Blodget*, 5 Cowan, 205; *Jackson v. Willard*, 4 Johnson, 43. cited with approval in *Hooker, supra.* See also *Armacost, supra.*

While the United States Supreme Court has not addressed the issue since *Carpenter, supra* there is a long, solid history of jurisprudence from around the country both before and after the 1872 ruling which holds that a mortgage and a debt cannot be separated. The mortgage without the note is unenforceable. See, *Southerin v Mendum*, 5 NH 420 1831 WL 1104, at PP 7 (NH 1831)); *Merritt v. Bartholick*, 36 NY 44 (NY, 1867); *First Nat Bank v. Vagg*, 65 Mont. 34,212 P.509,511 (Mont. 1922); *West v First Baptist Church f Taft*, 123 TX 388 71 S.W.2d

1090, 1098 (TX 1934); *Denniston v C.I.R.*, 37 B.T.A. 834, 1938 WL 373 (B.T.A. 1938); *Hill v Favour* 52AZ 561, 84 P.2d 575 (Ariz 1938); *Kelley v. Upshaw*, 39 Cal2d 179, 192 246 P2d 23 (1952); *Kirby Lumber Corp v. Williams*, 230 f2d 330, 333 (5th Cir. 1956); *Trane Co. v. Wortham*, 428 S.W.2d 417,419 (TX Civ. App, 1968); *Barton v. Perryman*, 577S.W.2d 596, 600 (Ark,. 1979); *In re AMSCO, Inc.*, 26 B.R. 358, 361 (Bkrtcy.Conn., 1982); *Kluge v. Fugazy*, 145 AD2d 537, 536 NYS2d 92 (2nd Dept., 1988); *Yoi –Lee Realty Corp. v 177th Street Realty Associates*, 208 A.D.2d 185, 626 N.Y.S.2d 61,64 (N.Y.A.D. 1 Dept,1995); *In re BNT Terminals, Inc.*, 125 B.R. 963 Bankr.N.D. (Ill. 1990); *In re Leisure Time Sports, Inc.* 194 B.R. 859859,861 (9th Cir 1996); *In re Bird*, 2007 WL 2684265, at PP 2-4 (Bkrtcy.D.MD,2007); *In Re: Walker*, Case No. 10-21656-E-11 (CA – 2010).

None of the Appellees have established by competent evidence that they are the current owners of the actual note and mortgage, which is an indispensible legal requirement before I.C. § 45:1502 *et seq.* can come into play. Yet, they ask this Court, as the one below, to overlook the law and instead accept their self declared labels without question.

The many deficiencies in the foreclosure process were pointed out to the District Court, and apparently ignored. Yet, they persist in establishing the flaws in the foreclosure process. There is no evidence that the supposed "Assistant Vice President" Tara Donzella of Pioneer Trustee Lender Services had the knowledge or skill to evaluate the propriety of any assignments, nor that she made any effort to do so, (Record at 16, Transcript 62); see *In Re Wilson, supra.* Similarly, there is the possibility that the alleged notary on the same document, Michelle Nguyen, is probably the same person who is under a Cease and Desist Order from the Securities and Exchange Commission for engaging in recordation practices which were "misleading." http://www.sec.gov/litigation/admin/2009/34-59317.pdf. These are facts that could

be uncovered during discovery, had the motion not been granted. Appellant believes they are facts that Appellees do not want brought to light. (Transcript at 62). Indeed, these items were very carefully set forth in the Affidavits of Charles Horner, Forensic Auditor, and while accepted as an expert, the recording deficiencies he noted were ignored by the district court (Note Ref: Affidavit filed by L.J.E. on June 21, 2011, and Motion to Augment record name of doc: Examinations by Charles Horner (1st & 2nd Affidavits (with exhibits). (Record at 164)

Under Idaho law, these are not idle inquiries. While it is generally presumed that a notary, operating in a position of public trust, discharges their duties properly, when it can be shown that

> ". . . the notary conspires with a forger, or fails to require the personal appearance of the acknowledger, or is negligent in ascertaining the identity of the acknowledger, the statutory scheme is frustrated whether the form is completely filled in or not."

In the Matter of New Concept Realty & Development, Inc. 692 P.2d 355, 107 Idaho 711 at 357 (Idaho 1984), citing *Farm Bureau Fin. Co., Inc. v. Carney*, 100 Idaho 745, 750, 605 P.2d 509, 514 (1980). The very integrity of the judicial system is called into question if sloppy or fraudulent recordation procedures are accepted by the Courts.

Other similar deficiencies are readily apparent on the face of the documents which were filed of record, and argued at the district level. Tara Donzella was listed on the appointment of successor trustee as an Assistant Vice President of MERS on November 30, 2009, and the document was notarized by Michelle Nguyen on that same date. (Record at 52-60) The same day, Tara Donzella was listed again as an Assistant Vice President of Quality Loan Services and notary Nguyen again attested Ms. Donzella was the representative she stated she was.(Record at 15) These facts are certainly suggestive of robo-signing as argued to the District Court, see *In Re Wilson, supra.* (Transcript at 61-64).

Given that MERS has confessed it has no interest in the note, that it does not own the note, and that none of the Appellees have shown by competent evidence a similar interest, it is clear that none of the Appellees are aggrieved in a manner to confer standing upon them to enforce the Deed of Trust as an incident to a debt owed, *Carpenter, supra, Christian, supra.*

Appellees completely ignore this wealth of recent decisional law, including that from the state of Idaho, with its consistent findings and holdings negating any alleged authority of MERS to do anything other than electronically track mortgage loans. In fact, at trial counsel for MERS conceded its only function was . . . "simply a tracking system to help lenders track loans. " (Transcript at 54). By what legal principle does an electronic tracking service stand to assert rights to a note or deed of trust in which it has no interest?

The long standing, firmly established law completely negates the entirety of Appellees' positions as to MERS and completely destroys the very foundation of Appellees' assertions. Indeed, it is hard to imagine that the OCC would have sought to restrain MERS' practices in the presence of legally sound foreclosure procedures.

Appellees' entire premise rests on the unfounded (and legally incorrect) assumption that MERS assigned the Deed of Trust and that simply because "MERS role was fully disclosed" that the alleged Assignment was legally proper. Appellees' assertions are not only unfounded, but have been expressly rejected in the law not only in Idaho but by a multitude of jurisdictions, both state and Federal, across the United States, with several of these jurisdictions relying in part for their decisions on the findings of the Idaho Federal Bankruptcy Court in the *Wilhelm, supra,* See *Hooker, supra.*

Whether Appellees' allegedly "complied with" the Idaho foreclosure procedure is irrelevant to the inquiry and issues raised by the Complaint. Standing is a totally separate issue

and one which the Court cannot ignore, given its jurisdictional nature, *Christian, supra.* The real issue, which Appellees have ignored and continue to ignore, is whether they had any alleged authority to even undertake actions toward foreclosure. The decisional law of Idaho and numerous jurisdictions throughout the United States have patently held that MERS lacks the capacity to foreclose as a matter of law. To contend that a non-judicial foreclosure is not a taking of property under the dictates of the United States Constitution is highly improper.

Assignment of Error # 3: Did the District Court Err in Concluding there were no genuine issues of material fact?

The District Court, utilizing the standards for disposition of a motion for summary judgment, concluded that the pleadings and exhibits showed no genuine issue of material fact, and that Appellees were entitled to judgment as a matter of law, citing, *Argyle v. Slemaker*, 107 Idaho 668, 691 P. 2d 1283(Ct. App. 1984); *Berg v. Fairman*, 107 Idaho 668, 691 P.2d 896 ((1984).

There is patent error in this conclusion. Appellant's original and amended complaint contains extensive allegations concerning the overall securitization practices of MERS, which result in selling the mortgage and separating it from the underlying note which it secures. (Record at 39-60 and Transcript at 61-64) Moreover, the complaint specifically states that the actual owner of the original note Appellant signed is unknown, and alleges that the ownership of the original note and Deed of Trust precludes Appellees, absent proof of ownership of the original note, from foreclosing until they can demonstrate full legal standing to do so. (Record at 1-20 and 37-60)

Clearly, there are genuine issues of disputed facts, such as:

1) Who currently owns the original note?
2) Has ownership of the note been severed from ownership of the mortgage?

3) Does MERS or any defendant have any ownership interest in the note?

4) If neither MERS nor any defendant have no ownership interest in the original note, can standing to foreclose exist?

5) Were the documents signed by a robo-signer (declarant for hire), Tara Donzella?

6) Was the notarization process fraudulent?

7) Was the chain of title properly established sufficient to identify the owner of the note and actual beneficiary of the Deed of Trust?

8) Did MERS deliberately purport to allege compliance with the Idaho Foreclosure statute without actually complying with traditional concepts of property law and rely instead on fabricated labels?

No competent evidence was produced by any Appellees which establishes answers to the questions above. Appellant attempted to obtain this information via discovery, and was denied that opportunity, (Transcript at 60, ll.15-25, 61, ll.1-4) (Transcript at 32, ll. 23-24, 36 ll. 18-22) Without establishing these critical facts, it is simply impossible to conclude that Appellees are entitled to judgment as a matter of law. The arguments presented to the District Court raised genuine, unanswered facts, and are piercingly material to proper disposition. See *Arygle, supra* and *Berg, supra*. Moreover, the decision of the District Court impliedly suggests that rendition of a judgment "as a matter of law" could not have been appropriate if there was no settled law in Idaho which would have resolved the disputed facts. The opinion reflects that the Court refused to consider federal law which "this Court cannot address . . . . " (Record at 163). Appellees heavily contested not only the facts listed above, but also Appellant's right to raise them. (Transcript at 68-69) Regrettably, the District Court seemed unduly persuaded by Appellees' repeated reminders that her loan was not current, and refused to

evaluate the real, underlying issues in noting: "There are no genuine issues of material fact that Edwards has breached her agreement with Aurora by not making her monthly payments. "

(Record at 163). Whether a homeowner is in default on a note is not a dispositive fact when the real issue is the standing of parties seeking to enforce rights they do not have. As Judge Panner thoughtfully and properly reasoned:

> While I recognize that plaintiffs have failed to make any payments on the note since September 2009, that failure does not permit defendants to violate Oregon law regulating non-judicial foreclosure. The Oregon Trust Deed Act "represents a well coordinated statutory scheme to protect grantors from the unauthorized foreclosure and wrongful sale of property, while at the same time providing creditors with a quick and efficient remedy against a defaulting grantor." *Staffordshire Investments, Inc. v. Cal-Western Reconveyance Corp.*, 209 Or.App. 528, 542, 149 P.3d 150, 157 (2006).

Hooker, supra at 10.

This Court should also note that the requirements of the Idaho Foreclosure Statute were not met. Idaho Code § 45-1502 (1) states: "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, and who shall not be the trustee.

Furthermore, Idaho Code § 45-1502 (4) - "Trustee" means a person to whom the legal title to real property is conveyed by trust deed, or his successor in interest.

The Deed of Trust signed by Appellant states that:

> Page 2, Definition E: "MERS" is Mortgage Electronic Registration Systems, Inc. MERS is a separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns. MERS is the beneficiary under this Security Instrument.
>
> Page 3: Transfer of Rights in the Property – "The beneficiary of this Security Instrument is MERS (solely as nominee for Lender and Lender's successors and assigns) and the successors and assigns of MERS. (...)

> Page 3: "Together with all the improvements now or hereafter .... Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclosure and sell the Property; and to take any action required of Lender including, but not limited to, releasing and canceling this Security Instrument. (Record at 80)

Clearly, therefore, MERS cannot be both the beneficiary and the trustee. Even so, the language in the Deed of Trust patently declares they are claiming the status of both. To pose as both violates not only the statute itself, but also the obligation of trustees to operate by providing truthful information, not only to the trustor, but even more so to the courts, *Diamond v. Sandpoint Title*, 968 P. 2d 240, 246, 132 Idaho 145 (Idaho 1998); Rehearing denied 1998. Counsel for MERS advised the trial court that MERS had no interest in the note, and specifically disclaimed that interest, yet the Deed of Trust states that MERS holds "legal title" meaning it stands as trustee under I.C 45-1502, while at the same time purporting to act as nominee for the beneficiary. (Transcript at 52) MERS cannot, under Idaho law be both the trustee, and the beneficiary's representative for purposes of foreclosure. This dual capacity negates the propriety of the attempted foreclosure, Moreover, the language indicates that MERS is the "beneficiary of the security instrument", and has to power to assign that interest to its successors, which lends great force to Appellant's contention that MERS did in fact assign the Deed of Trust after separation from the note.

A default on payment alone does not dispense with proper compliance with the legal requirements set forth in the Idaho Foreclosure Statute if a homeowner is to lose their

home; a fact that Appellees seem to hope this Court will ignore. See *Hooker, supra, Armacost, supra.*

Even if the Deed of Trust is invalidated, the issue of non-payment remains alive on the note, the actual obligation itself. To lump the two together ignores the fact that they are two entirely separate legal creatures, even if tied together with a small thread allowing expedited enforcement. Failure to recognize this distinction has resulted in much muddled thinking and has caused homeowners around the country to be unlawfully deprived of their rights. Invocation of the mantra "he just wants a free house" by attorneys for MERS has been invidiously prejudicial, often causing courts to turn a blind eye to other legal requirements. Invalidation of the Deed of Trust does not void the underlying note, absent other defenses. See *Vanoski v. Thomson*, 757 P.2d 244, 114 Idaho 381 (Idaho App. 1988); Petition for Review denied, 1988; *Ibanez, supra.* See also *Armacost v. HSBC Bank*, 10-CV-274 ELT-LMB (United States District Court, District of Idaho, 2011) (courtesy copy attached)(no objection was filed to the Magistrate's Report, and it became the order of the District Court)

If for no other reason, Appellant submits that it is appropriate for the Court to require proof of the validity of the documents filed of record because this Court should be able to rely on the truthfulness and accuracy of the county's system of recordation. Anything less risks a potential fraud upon not only Appellant, but also on this Court. It has long been the law in Idaho that documents reflecting claims to property may not be recorded by strangers to title, *Maxwell et al. v. Twin Falls Canal*, 292 P.2d 232, 49 Idaho 806 (1930). As cited above, Appellant alleged in her amended complaint and at oral argument that the recorded documents reflected fraudulent practices. Unfortunately, the District Court failed to heed its own reading of the law in finding that the Idaho Foreclosure Statute, IC 45-1505 et seq. required "recordation of all assignments"

while ignoring the patent discrepancies in those documents. (Record at 164). Appellant also deserves to know she will not be sued in the future by the real owner of the note, or sued for damages for failure to deliver clear title, should foreclosure eventually occur.

Recently, the Supreme Court of Massachusetts addressed the harm arising out of improper foreclosures in *Bevilacqua v. Rodriguez,* SJC-10880 (Mass. 2011). In that case, Mr. Bevilacqua purchased a home at a foreclosure sale which had previously been owned by Mr. Rodriguez. Mr. Rodriguez was never located. Originally, Mr. Rodriguez had signed a deed of trust naming MERS as beneficiary. Through inadequately handled assignments, the property listed U.S. Bank as the assignee, and it instituted foreclosure proceedings. Mr. Bevilacqua sued to quiet title, and the Supreme Court ruled he lacked standing, since he possessed no title due to the improper foreclosure. The suit was dismissed without prejudice. Mr. Bevilacqua's position was heavily supported by Amicus briefs from the Attorney General of Massachusetts, Professors Adam Levitin (Georgetown), Christopher Petersen (University of Utah) and Katherine Porter (University of California). It should be clear that a ruling affirming the decision of the district court in this matter would leave thousands of Idaho property purchasers at risk of a similar fate should traditional concepts of property law be held to be meaningless.

Assignment of Error # 4: Did the District Court err in accepting hearsay affidavits from counsel for Appellees?

Over objection from Appellant's attorney, the District Court accepted affidavits from counsel for Appellees (Record at 143-144) (Transcript at 41-42). These affidavits and attachments are all hearsay, as there was no showing counsel had personal knowledge of the contents contained there. While he attested to the court that he was only saying the documents

were those in the public record (Transcript at 42), as noted above, the documents filed of record are most probably false, inaccurate or grossly negligent. There is no indication that counsel contacted the "assistant secretaries" who signed the purported assignments to ascertain if they were properly signed by proper officers. Rule 56 has long been construed to require more than hearsay in terms of the competence of the evidence submitted *Sprinkler Irrigation Company, Inc. v. John Deere Insurance Company, Inc.* 85 P.3d 667, 139 Idaho 691 (Idaho, 2004); *State v. Sharma Resources Limited Partnership* 899 P.2d 977, 127 Idaho 267 (Idaho 1995). Indeed, *Sharma* accurately states the long standing rule that documents which would not be admissible at trial may not form the basis for proper evidence on a summary judgment. *Id* at 981. The affidavit submitted on behalf of Appellees, not only fails to show that counsel did not know the facts contained therein of his own personal knowledge, his testimony could never be admissible at trial for so long as he served as counsel of record. Idaho Rules of Professional Conduct, Rule 3.7. Mr. Uhl's affidavit was not only self serving, but involved issues and facts which are being directly contested on this appeal, as they were below. As a consequence, Appellant submits that a remand for discovery is the only proper course of action in this matter.

Assignment of Error #5: Is Appellant entitled to attorney fees and costs?

Appellant hereby moves the Court for an award of attorney fees as provided by Idaho Appellate Rules 41 and will submit the appropriate memorandum of costs as provided by Idaho Appellate Rule 40 upon decision. While she is not currently represented by counsel, she hopes to have retained an attorney by the time of oral argument, or earlier. Should she succeed, she wishes to preserve her claim for all appropriate fees and costs. Should she not succeed, she prays only for costs.

A prevailing party is entitled to costs, and need not specify them in the manner a request for attorney fees might require, I.A.R. 40 and I.C. 12-107.

Rule 41(a) also provides:

> (a) Application for Attorney Fees - Waiver. Any party seeking attorney fees on appeal must assert such a claim as an issue presented on appeal in the first appellate brief filed by such party as provided by Rules 35(a)(5) and 35(b)(5); provided, however, the Supreme Court may permit a later claim for attorney fees under such conditions as it deems appropriate.

Appellant is entitled to attorney fees (and/or paralegal expenses) if it is shown that the Court concludes Appellees resisted the appeal when the court finds that Appellee defended it frivolously, unreasonably, or without foundation. *In Re Matter of Encroachments*, 2010 Opinion 15 (Idaho App. 3/4/2010) 2010, citing *Rendon V. Paskett*, 126 Idaho 944, 894 P.2d 775 (Ct. App.1995).

Careful review of the record reveals this is the overwhelming conclusion. Appellees drafted all foreclosure documents in such a manner that I.C. 45-1502 *et. seq* appeared to be applicable, without regard to the necessary legal underpinnings needed to establish their proper status. Rather than produce the documents necessary to establish standing, none of the documents given to Appellant, or for that matter the court, established the assignment history of her note and deed of trust, whether the proper endorsements had been made prior to foreclosure, Appellees' standing as actual owners of the note and deed of trust, nor their entitlement by valid documents establishing a binding assignment were not a part of the record.

One must wonder why these critical documents were not produced if Appellees actually had the proof necessary to satisfy the court of their standing? Instead, Appellees persistently hid

behind the smoke screen of supposed compliance with the superficial requirements by using labels which suggest propriety. It is difficult not to wonder why if competent evidence necessary to win a case exists, it would not be readily produced?

Rather than establish their claim with competent evidence at the trial proceeding, Appellees prefer to continue to assert that their position is legally valid on the basis of labels alone.

To defend this appeal absent the proper proof at the lower level conclusively shows their position is unreasonable.

CONCLUSION

In summary, Appellant submits that in a case this complex, with so many facts hotly contested and affecting such substantial property rights, no grant of a motion for summary judgment could ever be proper. For whatever reason, the district court chose to prevent Appellant from full participation in the litigation process in a manner that resulted in substantial injustice. Appellees desire to prevent the true facts from coming to light through full blown discovery in which truly relevant documents establish that the proper parties were not the ones seeking foreclosure. Instead, Appellees hide behind labels that give the appearance of proper compliance, when if exposed to the light of full fledged litigation, would show that they fall far short of the requirements of Idaho law. Appellant asks this Court to follow the traditional concepts of Idaho property law and prevent her from being yet one more victim of a fraudulent foreclosure.

RELIEF SOUGHT

1) Appellant prays the court overrule the District Court and grant her a declaratory judgment on the issue of lack of standing.
2) In the alternative, Appellant prays that this court overrule the District Court's decision and remand with an order that the matter proceed to trial.
3) Further in the alternative, Appellant prays this Court for an order remanding this case back to District Court with an order requiring Appellees comply with all present and future discovery requests so the case may move forward to trial and proper resolution.
4) For all other general and equitable relief to which Appellant may be entitled.

Leslie Edwards
Appellant Pro Se
2600 E Seltice Way Suite 144
Post Falls, Idaho 83854:
Phone: 208-440-2001

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have on this 16th day of November, 2011, caused a true and correct copy of the attached APPELLANT'S ORIGINAL BRIEF postage prepaid, to the following parties: MERS, Inc.; Quality Loan Service Corporation of Washington; Pioneer Lender Trustee Services, LLC.

_____ Facsimile (FAX)　　　　　__✓__ US Mail

Counsel for opposing parties

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McCarthy & Holthus, LLP
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Poulsbo, WA 98370

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Appellant Pro Se
2600 E Seltice Way Suite 144
Post Falls, Idaho 83854:
Phone: 208-440-2001

In The Superior Court of Carroll County

State of Georgia

FILED
GA. CARROLL COUNTY
CLERK______COURT
2011 NOV -2 PM 1: 35
CLERK SUPERIOR COURT
CARROLL COUNTY GEORGIA

Otis Wayne Phillips

Vs Case #11 CV 00504

U.S. Bank, NA

Order Denying Defendant's Motion to Dismiss

Sometimes, only the courts of law stand to protect the taxpayer. Somewhere, someone has to stand up. Well, sometimes is now, and the place is the Great State of Georgia. The defendant's motion to dismiss is hereby denied.

The court finds the following to be the facts and law applicable to this motion:

1.

- Otis Phillips is behind on his house payments and is in grave danger of foreclosure.

-The United States Government paid taxpayer dollars to the largest of our financial institutions, and to the European Union Banks, in order to prop up those poorly run organizations.

-Twenty Billion of those dollars were handed over to the defendant, U. S. Bank.

-U. S. Bank agreed to participate in the U. S. Government's HAMP program to help struggling homeowners.

-U. S. Bank signed a Service Participation Agreement (SPA), in which the bailed out bank agreed to comply with the HAMP Guidelines for loan modification.

-The HAMP guidelines require U. S. Bank to perform modification services for all mortgage loans it services.

-Otis Phillips applied to modify his mortgage with U. S. Bank.

-U. S. Bank denied the request, without numbers, figures, or explanation, reasoning, comparison to the guidelines, or anything. U. S. Bank would not reveal to Mr. Phillips how his income, or his house, or his expenses would make him ineligible according to HAMP guidelines.

> (This court cannot imagine why U. S. Bank will not make known to Mr. Phillips, a taxpayer, how his numbers put him outside the federal guidelines to receive a loan modification. Taking $20 Billion of taxpayer money was no problem for U. S. Bank. A cynical judge might believe that this entire motion to dismiss is a desperate attempt to avoid the discovery period,

where U. S. Bank would have to tell Mr. Phillips how his financial situation did not qualify him for a modification. Or, perhaps he **was** qualified, yet didn't receive the modification, in violation of U. S. Bank's Service Participation Agreement (SPA). A cynical judge might think that, if the **guidelines** clearly prevented Mr. Phillips from getting his modification, then U. S. Bank would have trotted out that fact in mathematic equations, pie charts, and bar graphs, all on 8 by 10 glossy photo paper, with circles and arrows and paragraphs on the back explaining each winning number.[1] U. S. Bank's silence on this issue might heighten the suspicions of such a cynical jurist. I, on the other hand, am sure that nothing of the sort could be true. Maybe U. S. Bank no longer has any of the $20 billion dollars left, and so their lack of written explanation might be attributed to some kind of ink reduction program to save money. I'm sure there is a perfectly reasonable explanation for why the U. S. Bank will not print out the ONE page of figures that show Mr. Phillip's financials compared to the HAMP guidelines to clear all this up.)

[1] Apologies to Arlo Guthrie, Alice's Restaurant

-Otis Phillips claims to have suffered as a result of U. S. Bank's actions, and

-Otis Phillips wishes to avoid foreclosure.

2.

Georgia law allows third party beneficiaries to sue on contracts that are clearly intended to benefit a third party. Multiple courts from a variety of jurisdictions have extended such standing to third parties harmed as a result of HAMP violations. (HAMP is not old enough to have generated a huge volume of cases.) Clearly, U. S. Bank cannot take the money, contract with our government to provide a service to the taxpayer, violate that agreement, and then say no one on earth can sue them for it. That is not the law in Georgia. In fact, since no administrative review is provided within HAMP, the courts are the only recourse. The Bank claims that the intended beneficiaries of HAMP are the very people who CAN'T sue. Such argument is absurd.

3.

Georgia law allows a third party to sue for negligence. Negligently implementing HAMP could sustain a claim in Georgia.

4.

Georgia law allows claims for breach of a duty of good faith and fair dealing. Here, there are two contracts, the SPA and the loan with Mr. Phillips. U. S. Bank, like all parties to any contract, has a duty of good faith and fair dealing. While difficult to define, jurors know good faith and fair dealing when they see it, and jurors can spot the absence of same.

5.

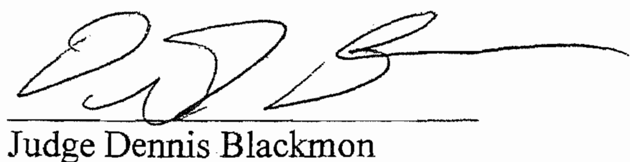
Georgia allows claims for Negligent Infliction of Emotional Distress by persons who are victim's of malicious, willful, or wanton conduct specifically directed at them, even if not a party to the contract whose breach causes such injury. This is a question for the jury.

6.

Georgia prohibits wrongful foreclosures. In fact, Federal law also prohibits wrongful foreclosures. Mr. Phillips claims that U. S. Bank is not the proper party to pursue such an action, and is merely the servicer of the loan, not the holder. Further, Mr. Phillips asserts that compliance with HAMP guidelines is a condition precedent to foreclosure.

Conclusion

There is no merit to Defendant's motion to dismiss, and same is hereby denied.



Judge Dennis Blackmon

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF MINIDOKA

Virgil Ralph,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CASE NO. CV 2010-0200
	)	
Met Life Home Loans, a division of Met Life Bank, NA,	)	
	)	
Defendants.	)	

ORDER GRANTING IN PART AND DENYING IN PART MOTIONS FOR SUMMARY JUDGMENT

In this matter both parties moved for partial summary judgment. The plaintiff moved for summary judgment on the basis that defendant lacked statutory authority to maintain a non-judicial foreclosure, defendant failed to comply with I.C. § 45-1505 prior

to initiating the foreclosure and defendant is not the real party in interest. The defendant moved for summary judgment on three issues: defendant properly proceeded with the foreclosure, defendant has complied with HAMP, and defendant is the proper party in interest.

MERS INTRODUCTION

Transfers of real property have traditionally required a public proclamation of the transfer of ownership with a memorialization of the transfer. The historical and long obsolete method was by livery of seisin, where the parties to the transaction would enter the property and the transferor would physically hand over dirt to the transferee in the presence of witnesses. Recordation of title in the legal system the United States inherited from English common law dates to the Domesday Book, a project completed in 1087, although it did not include all counties in England. Historically, land transfers must involve the government in some way. Currently, land transfers are recorded pursuant to the laws of the State of Idaho, and the other United States. In an attempt to streamline mortgage transfers for investors and speculators, the Mortgage Electronic Registration System (MERS) was created. *Mersorp, Inc. v. Romaine,* 8 N.Y.3d 90, 861 N.E.2d 81 (N.Y. 2006). MERS is a private corporation formed by members who trade titles within the system by various means.

The creation of MERS and the difficulties encountered during foreclosures in which MERS transfers are involved have created problems for courts around the country. There is a split of authority on some of the issues presented by this case. After a careful examination of the documents reflecting the chain of title in this case, an analysis of the Idaho statute on trust deed foreclosures, and the persuasive authority found in case law

from other states or the federal courts, it appears that MetLife, the defendant in this action, does not have the ability to foreclose on the plaintiff's property at this time. MetLife does not now have any recorded beneficial interest in the real property at issue, although it probably now has the beneficial interest of the trust deed at issue. For that reason partial summary judgment for the plaintiff is appropriate for the reasons set forth below.

PROCEDURAL HISTORY

On October 1, 2006 the plaintiff, Virgil Ralph (Ralph), executed a note (Note) in the amount of $50, 232.00 payable to First Horizon Home Loans, a division of First Tennessee Bank N.A. (First Horizon). The Note contains no reference to MERS. This note was secured with a Deed of Trust on the real property located at 908 A Street, Rupert, Idaho 83350. The Deed of Trust identifies Ralph as the "borrower", First Horizon as the "Lender, Land Title and Escrow as the "Trustee", and MERS as the "beneficiary".

The Deed of Trust further states "The beneficiary of this Security Instrument is MERS (solely as the nominee for Lender and Lender's successors and assigns) and the successors and assigns of MERS." Further in the Deed of Trust it states "Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclosure and sell the Property; and to take any action required of Lender including, but not limited to, releasing and cancelling this Security Instrument."

Ralph failed to make the payments required under the Note beginning on November 1, 2008. On February 23, 2009 an assignment of the Deed of Trust was executed by MERS assistant secretary Michael Fisher to MetLife. The language of the assignment states that "For value received, the undersigned corporation hereby grants, assigns, and transfers to MetLife Home Loans, a division of MetLife Bank, N.A. all beneficial interest under that certain Deed of Trust...together with the Promissory Note secured by said Deed of Trust and also all rights accrued or to accrue under said Deed of Trust." This assignment was recorded in Minidoka County on March 4, 2009.

A Notice of Default was prepared by Lynn Darling of Transnation Title and Escrow on March 3, 2009 and recorded on March 4, 2009. A Notice of Trustee's Sale was also prepared by Lynn Darling of Transnation Title and Escrow on March 3, 2009 which set a foreclosure sale date of July 16, 2009. On March 4, 2009 an Appointment of Successor Trustee was recorded in Minidoka County in which Michael Fisher of MetLife appointed Transnation Title and Escrow as the successor trustee.

The scheduled foreclosure date was postponed multiple times. At some point proceedings were begun on a HAMP loan modification. On March 26, 2010 a Verified Complaint was filed by Ralph. An Order Confirming Temporary Restraining Order was entered on April 20, 2010 effectively staying the foreclosure sale. On June 3, 2011, the defendant, MetLife, filed a Motion for Summary Judgment And For Release Of Order Continuing Temporary Restraining Order. On June 6, 2011 the plaintiff, Ralph, filed a Motion for Summary Judgment. This Order is in response to those motions.

ANALYSIS

A. Summary Judgment Standard

Summary judgment is proper "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." I.R.C.P. 56(c); *Scona, Inc. v. Green Willow Trust*, 133 Idaho 283 (1999). The court must liberally construe all disputed facts in favor of the non-moving party, and draw all reasonable inferences and conclusions supported by the record in favor of the party opposing the motion. *Bonz v. Sudweeks*, 119 Idaho 539, 541 (1999). If conflicting inferences are possible, summary judgment should be denied. Only if there is no genuine issue of material fact after the affidavits, pleadings, and depositions have been construed in the light most favorable to the non-moving party should summary judgment be awarded. *Loomis v. City of Hailey*, 119 Idaho 434 (1991).

B. Defendant Lacks Statutory Authority to Maintain a Non-Judicial Foreclosure

Under I.C. 45-1505(1) the trustee may foreclose a trust deed if "The trust deed, any assignments of the trust deed by ... the beneficiary ... are recorded in mortgage records in counties in which the property described in the deed is situated". The only recorded assignment of the trust deed is by Mortgage Electronic Registration Systems, Inc. (MERS) to MetLife Bank, N.A. dated February 23, 2009. That document purports to transfer all beneficial interest MERS had to MetLife.

In order to comply with I.C. 45-1505(1) then, MERS must have been the beneficiary of the trust deed and must have had a beneficial interest to transfer. The definition of beneficiary under I.C. 45-1502(1) is "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, and who shall not be the trustee". While Idaho's statute allows a designated beneficiary, and MERS is given the title "beneficiary" under the deed of trust, in no way is it the party whose benefit the trust deed is given. This is because the lender is retaining all the hallmarks of the beneficiary and the language in the deed limits what MERS is. This interpretation of I.C. 45-1502(1) is similar to that of a federal district court's interpretation of ORS 86.705(1), an Oregon statute nearly identical to I.C. 45-1502(1), when applying identical MERS language in a deed of trust. *Hooker v. Northwest Trustee Services, Inc.*, 2011 WL 2119103 (D.Or. May 25, 2011). In one case in an Idaho District bankruptcy court, counsel for MERS has conceded that it is not an "economic beneficiary" as it will receive no value from the foreclosed property or collect money under the note. *In re Sheridan*, No. 08-20381-TLM (Bkrtcy.D.Idaho March 12, 2009). Under that concession, it is difficult to see any benefit that MERS receives from the deed of trust. Pursuant to I.C. 45-1502(1), the real beneficiary under this deed of trust is the lender, First Horizon Home Loans, a Division of First Tennessee Bank N.A. (First Horizon) and any of its assigns.

The specific language of the deed of trust states that MERS holds only the legal title in the deed of trust, not the equitable title. This language clearly states that MERS has no beneficial interest in the deed of trust. There is also nothing in the deed of trust to suggest that MERS has authority to transfer the Note. *In re Wilhelm*, 407 B.R. 392 (Bankr. D. Idaho 2009). As such, the only interest MERS was capable of assigning was its legal interest in the deed of trust. This is the only interest that MERS was capable of assigning when it recorded the February 23, 2009 Assignment of Deed of Trust. While

this may be sufficient to allow for non-judicial foreclosure in some states, under Idaho law the assignment of the beneficial interest, or equitable title, in the deed of trust must be recorded prior to initiating a non-judicial foreclosure. Once again this same conclusion was reached by a federal district court when applying ORS 86.735(1), an Oregon statute nearly identical to I.C. 45-1505(1). *Hooker*, 2011 WL 2119103 at *3.

This interpretation of the statute is also in line with the longstanding rule that the security follows the note. *Hooker*, 2011 WL 2119103 at *4 citing: *Carpenter v. Longan*, 83 U.S. 271, 274 (1872). Transferring the security without the note is a legal nullity. *Id.* If the defendant's interpretation of MERS's abilities was correct, MERS would be able to transfer the deed of trust to an infinite number of parties without any public record. However, these transfers, absent a simultaneous transfer of the note, result in nothing more than an infinite number of legal nullities under federal and Idaho law. *Id.*; I.C. 45-1505(1). The language in the deed of trust regarding MERS does not expressly, or implicitly, grant MERS that authority to transfer any interest in the note. *In re Wilhelm*, 407 B.R. 392 (Bankr. D. Idaho 2009). So even if MERS was capable of transferring a beneficial interest in the deed of trust, a legal nullity would arise. It appears that MetLife is now the holder of the note. However, MetLife conceded it could not prove the date of the transfer.

The defendant has cited case law from different jurisdictions that have reached varying conclusions. In *Gomes v. Countrywide Home Loans, Inc.*, 192 Cal.App.4th 1149 (Cal.App. 2011), a court found that MERS had authority to foreclose on behalf of the note holder because of the authority granted to it under the Deed of Trust. While the language in that Deed of Trust is identical to the language found in the current Deed of

Trust, the issues are very different. Rather the current issue is similar to that found in *Doble*, a California Bankruptcy case that distinguished *Gomes*. *In re Doble*, No. 10-11296-MM13 (Bkrtcy.S.D.Cal. April 14, 2011)[1]. In *Doble* that court found MERS had no statutory authority to assign the beneficial interest of the deed of trust under identical deed of trust language. *Id.*

This court is not deciding whether MERS does, or does not, have the authority to foreclose on behalf of the note holder. Rather this court must determine whether a beneficiary, as defined under Idaho law, has the ability to foreclose prior to recording its beneficial interest in the property. Hypothetically, assuming this court was to adopt the *Gomes* interpretation of MERS authority, MetLife would have been able to foreclose on the property on the behalf of First Horizon, as MERS was capable of assigning its nominee status to MetLife. Yet under Idaho law, MetLife would be unable to foreclose on its own behalf until its beneficial interest was recorded in Minidoka County. As this is not the present issue, *Gomes* is inapplicable in this situation.

Another case cited by the defense is a federal district court decision applying Utah law, *Fowler v. Recontrust Company, N.A.*, 2011 WL 839863 (D. Utah March 10, 2011). In that decision, the court found that in applying Utah law, identical Deed of Trust language made MERS the beneficiary, and as such, MERS was able to transfer that beneficial interest to another bank. *Id. Fowler* highlights the struggle of the courts over MERS. Utah courts looking at the same trust deed language have come to the opposite conclusion of this court and the cases cited in this order. This court finds the reasoning in *Wilhelm, Hooker, Doble, and Sheridan* more persuasive. *In re Wilhelm*, 407 B.R. 392

[1] *Staff of the Idaho Real Estate Commission v. Nordling*, 135 Idaho 630 (2001) (considering unpublished opinions as an example, not as binding precedent, is appropriate).

(Bankr. D. Idaho 2009); *Hooker v. Northwest Trustee Services, Inc.*, 2011 WL 2119103 (D.Or. May 25, 2011); *In re Doble*, No. 10-11296-MM13 (Bkrtcy.S.D.Cal. April 14, 2011); *In re Sheridan*, No. 08-20381-TLM (Bkrtcy.D.Idaho March 12, 2009). An important reason is the conflicting language in the deed of trust injecting MERS into the transaction. Essentially MERS wants to limit its status on one hand but gain all the rights of a beneficiary or the lender if something goes wrong on the other. There is no good reason to allow MERS to define itself in a conflicting manner to the detriment of the grantor of the deed of trust, or potentially to the lender, or in derogation of the Idaho statute.

Additionally, neither party argued the Statute of Frauds. However, to be an agent for the purposes of a transfer of real property, the authority of the agent must be in writing. I.C. §9-505(4). The ambiguous language as to MERS in the deed of trust poses a problem on this issue. Nothing in the deed of trust suggests MERS itself has the authority to sell or assign the beneficial interest. Thus, it is not clear how MERS could purport to transfer First Horizon's beneficial interest in the deed of trust to MetLife.

There is also nothing in the record showing how MERS's actions were necessary to comply with law or custom, as the language in the deed of trust describes. Commercial convenience does not equal necessity, and the law in Idaho can be followed. *In re Salazar*, 448 B.R. 814, 824 (Bankr. S.D. Cal. 2011). A bit of work by First Horizon does not make the transaction impossible.

As there is no recorded assignment from First Horizon, the lender under the deed of trust that holds the beneficial interest, to the defendant, Met Life Home Loans, a

division of Met Life Bank, N.A. (MetLife), the defendant lacks statutory authority to proceed with a non-judicial foreclosure at this time.

C. MetLife Not In Compliance I.C. 45-1505

Since MetLife was incapable of initiating a non-judicial foreclosure, they are incapable of complying with I.C. 45-1505.

D. Summary Judgment Denied as to the HAMP Issue

There is no evidence in the record to determine at which time MetLife became the holder of the note, and thus the beneficiary of the deed of trust. As such, the court is unable to determine at what point in time MetLife became capable of initiating HAMP proceedings with the plaintiff. Summary judgment on the matter is thus inappropriate at this time.

CONCLUSION

Plaintiff's motion for partial summary judgment is granted because of defendant's lack of statutory authority to foreclose. Defendant's motion for partial summary judgment is denied regarding statutory compliance and HAMP compliance.

IT IS SO ORDERED

Dated: 8/10/11

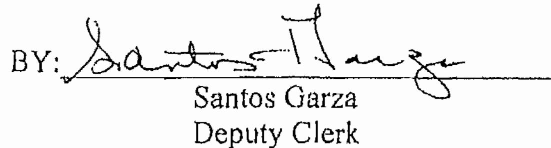
Signed:
Jonathan Brody, District Judge

CERTIFICATE OF SERVICE

I, Santos Garza, Deputy Clerk for the County of Minidoka, do hereby certify that on the 10 day of August, 2011, I filed the original and caused to be served a true and correct copy of the above and foregoing document: ORDER GRANTING IN PART AND DENYING IN PART SUMMARY JUDGMENT to each of the persons as listed below:

Laura E. Burri Ringert Law Chartered 455 S. Third Street, P.O. Box 2773 Boise, ID 83701-2773	✓ U.S. Mail, Postage Prepaid ___ Hand Delivery ___ Overnight Mail ___ Via Facsimile
Michael F. McCarthy Idaho Legal Aid Services, Inc. 475 Polk Street Twin Falls, ID 83301	✓ U.S. Mail, Postage Prepaid ___ Hand Delivery ___ Overnight Mail ___ Via Facsimile

CLERK OF THE DISTRICT COURT

BY: 

Santos Garza
Deputy Clerk

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

BRET ARMACOST,

Plaintiff,

v.

HSBC BANK USA, NATIONAL ASSOCIATION, NORTHWEST TRUSTEE SERVICES, INC.,

Defendants.

Case No. 10-CV-274-EJL-LMB

REPORT AND RECOMMENDATION

This case has been referred by presiding District Judge Edward J. Lodge to undersigned Magistrate Judge Larry M. Boyle for all pretrial matters. (Dkt. 18). Currently pending is a Motion to Dismiss Pursuant to F.R.C.P. 12(b)(6) made by Defendant Northwest Trustee Services, Inc. (NWTS) (Dkt. 5) and Motion for Entry of Final Default Judgment (Dkt.17) against the other Defendant, HSBC Bank USA, National Association. The Court has reviewed the motions, the parties' briefing and arguments, as well as all of the referenced documents, and finds that oral argument will not further aid the decisional process on this motions. The Court therefore enters the following Report and Recommendation that Defendant's Motion to Dismiss be granted in part and denied in part, and Plaintiff's Motion for Entry of Final Default Judgment be denied.

BACKGROUND

The following facts are taken from Plaintiff's Complaint (Dkt. No. 1) and attached exhibits, and documents of public record attached to Defendant's Motion to Dismiss of which the Court takes judicial notice.[1]

In February 2007, David and Angela Carlyle executed a Deed of Trust on a residential property in McCall, Idaho (hereafter "the Property"), to secure a $1 million loan (the "Note") used to purchase the property. Wells Fargo Bank, National Association ("Wells Fargo") was the lender and the beneficiary of the Deed of Trust. *See Cmplt*, ¶¶ 2, 5, 6 & Ex. 1. The Property consists of two parcels – Parcel 1 is located in Adams County and Parcel 2 is located in Valley County. The Deed of Trust was duly recorded in both counties on February 14, 2007. *See Cmplt*, Exh. 1.

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[1] A description of each of the documents attached to both Plaintiff's Complaint and to Defendants' Motion to Dismiss are listed in chronological order in Attachment 1 to this Report and Recommendation. Plaintiff does not dispute the authenticity of the documents or that they were filed when and where they purport to have been. Plaintiff also specifically requests that the Court take judicial notice of the documents attached to Defendant's Motion that were not also attached to the Complaint. *See Plaintiff's Objection to Defendant's Motion to Dismiss [sic] Pursuant to F.R.C.P. 12(b)(6)*, Dkt. 8, pp. 2 - 3. The Court will take judicial notice of the public record documents filed with the Valley and Adams County Recorders offices. *See Lyon v. Gila River Indian Community,* 626 F.3d 1059, 1079 (9th Cir. 2010) ("Courts may take judicial notice of facts whose existence is capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."); *Lee v. City of Los Angeles*, 250 F.3d 668, 888-89 (9th Cir. 2001) (court may take judicial notice of matters of public record); *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994) (court may take judicial notice of documents central to allegations in complaint whose authenticity is not at issue); Fed. R. Evid. 201. *See also Horne v. Potter*, 329 Fed.Appx. 800, 2010 WL 3245149, *2 (11th Cir. 2010) (affirming trial court taking judicial notice of public document on motion to dismiss).

The Carlyles defaulted on the Deed of Trust on or around April 2009. *See Cmplt*, ¶¶ 2, 3; Exh. 5. Wells Fargo then, on July 23, 2009, (1) appointed Defendant Northwest Trustee Services, Inc. (NWTS) as successor Trustee to Pioneer Title on the Deed of Trust and (2) assigned the Deed of Trust "[t]ogether with note or notes therein described or referred to, the money due and to become due thereon, with interest, and all rights accrued or to accrue under said Deed of Trust" to HSBC Bank USA, National Association "as Trustee for Wells Fargo Asset Securities Corporation, Mortgage Pass-Through Certificates, Series 2007-4 ("Current Beneficiary")." *Motion to Dismiss*, Exhs. 2, 3. On that same date, NWTS, as successor Trustee, executed a Notice of Default stating that the Current Beneficiary declared the Deed of Trust in default and intends to sell the property to satisfy the obligation. *Cmplt.*, Exh. 5; *Motion to Dismiss*, Exh. 4. On October 9, 2009, NWTS issued a Notice of Trustee's Sale of the Property which was to be held on February 8 and 9th in the respective counties. *Motion to Dismiss*, Exh. 5.

Shortly thereafter, on or about October 23, 2009, Plaintiff Bret Armacost purchased the Property from the Carlyles. *Cmplt.*, Exh. 2 ("Purchase and Sale Agreement"). Plaintiff alleges that he entered into the Purchase and Sale Agreement with the Carlyles in order "to provide asset protection pending discovery of the identity and location of the present creditor or Note Holder, or agent thereof, of the original Note and Deed of Trust" to attempt negotiations with the holder of the Note. *Cmplt.*, ¶ 3. The Carlyles actually transferred the Property by Warranty Deed, however, to a commercial entity, Second Ventures West, Inc. *See Cmplt.*, Exh. 3.

The Trustee's sale apparently did not go forward in February 2010, and NWTS issued a second Notice of Trustee's sale dated February 1, 2010, for the sale to be held on June 3 and 4, 2010. *Cmplt.*, Exh. 6. On June 1, 2010, Second Ventures, Inc. transferred its interest in the Property by Warranty Deed into Plaintiff's name, so that he could "represent himself in the preservation of his interest." *Id.*, ¶ 4 & *Exh.* 4. Plaintiff filed this action pro se against Defendants on the same date. *Cmplt.*, (Dkt. 1).

Plaintiff alleges that Defendants violated the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C.A. §§ 1962 *et seq.*, by foreclosing on the Property through the trustee sale, and/or making false representations in connection with their foreclosure efforts, without "standing" or authority to do so. Plaintiff also seeks a Declaratory Judgment that Defendants have no legal or equitable rights in the Note or mortgage for purposes of the foreclosure and no standing to execute the foreclosure. Defendant NWTS now moves to dismiss this action pursuant to Fed. R. Civ. P. 12(b)(6) arguing that Plaintiff has failed to state a claim against it under the FDCPA. (Dkt. 5).

Defendant HSBC Bank failed to appear. The Clerk entered Default against this Defendant on September 7, 2009. (Dkt. 16). Plaintiff filed a Motion for Entry of Default Final Judgment against HSBC Bank on November 19, 2010. (Dkt. 17).

MOTION TO DISMISS

A. Standard of Law

A Rule 12(b)(6) motion to dismiss tests the sufficiency of a party's claim for relief. When considering such a motion, the Court's inquiry is whether the allegations in a

pleading are sufficient under applicable pleading standards. Rule 8(a) of the Federal Rules of Civil Procedure sets forth the minimum pleading requirement, which is that the plaintiff provide only a "short and plain statement of the claim showing that the pleader is entitled to relief," and "giv[ing] the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955(2007).

When reviewing a motion to dismiss, a district court must accept as true all non-conclusory, factual (not legal) allegations made in the complaint. *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1950 (2009); *Erickson v. Pardus*, 551 U.S. 89 (2007). Based upon these allegations, the court examining a complaint for sufficiency of information must draw all reasonable inferences in favor of the plaintiff. *See Mohamed v. Jeppesen Dataplan, Inc.*, 579 F.3d 943, 949 (9th Cir. 2009). However, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 129 S.Ct. at 1949.

After any conclusory statements have been removed, the court must then analyze the remaining factual allegations in the complaint "to determine if they plausibly suggest an entitlement to relief." *Delta Mech., Inc.*, 345 Fed. Appx. at 234. "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Iqbal*, 129 S. Ct. at 1949 (*citing Twombly*, 550 U.S. at 555). In addition,

"[f]actual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Twombly*, 550 U.S. at 555. In sum, a party must allege "enough facts to state a claim to relief that is plausible on its face." *Id.* at 570; *Iqbal*, 129 S. Ct. at 1949.

In discussing this standard, a recent Tenth Circuit Court of Appeals opinion stated that "the mere metaphysical possibility that some plaintiff could prove some set of facts in support of the pleaded claims is insufficient; the complaint must give the court reason to believe that this plaintiff has a reasonable likelihood of mustering factual support for these claims." *Robbins v. Oklahoma*, 519 F.3d 1242, 1247 (10th Cir. 2008). In this way, while "[s]pecific facts are not necessary," a plaintiff must allege enough facts to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Erickson v. Pardus*, 551 U.S. 89 (2007) (*per curiam*) (internal citation omitted).

Generally, with respect to Rule 12(b)(6) motions, the Court may not consider any evidence contained outside the pleadings without converting the motion to one for summary judgment under Fed. R. Civ. P. 56, and allowing the non-moving party an opportunity to respond. *See* Fed. R. Civ. P. 12(b); *United States v. Ritchie*, 342 F.3d 903, 907-908 (9th Cir. 2003). "A court may, however, consider certain materials– documents attached to the complaint, documents incorporated by reference in the complaint, or matters of judicial notice– without converting the motion to dismiss into a motion for summary judgment." *Id.* at 908 (*citing Van Buskirk v. CNN*, 284 F.3d 977, 980 (9th Cir.

2002); *Barron v. Reich*, 13 F.3d 1370, 1377 (9th Cir.1994); 2 James Wm. Moore et al., Moore's Federal Practice § 12.34[2] (3d ed.1999)).

B. Discussion

Plaintiff alleges that Defendant NWTS violated two provisions of the FDCPA. First, Plaintiff alleges Defendant wrongfully facilitated an "eminent" foreclosure sale of Plaintiff's property "by filing and causing to be filed foreclosure documents into the public record without standing to do so in direct violation of the Note, Deed of Trust" and 15 U.S.C. § 1692f. This section of the FDCPA proscribes generally unfair or unconscionable means of collecting or attempting to collect any debt. *Id.*

Next, Plaintiff alleges that Defendant NWTS, "in the capacity of a third party debt collector executed a power of sale foreclosure without standing under the terms of the Note and Deed of Trust" in violation of 15 U.S.C. § 1692e(10). This provision specifically prohibits "[t]he use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer."

Defendant NWTS argues that Plaintiff's Complaint fails to state a claim for relief as a matter of law under the FDCPA primarily because Defendants had the right to execute a non-judicial foreclosure on the Property under both the Deed of Trust and the Idaho non-judicial foreclosure statutes, I.C. § 45-1502 *et seq.* Defendant further argues that "most federal courts" have held that the FDCPA does not apply to enforcement of security interests, such as in the context of a non-judicial foreclosure. *See Motion to Dismiss*, (Dkt. 5), p. 11 (*citing Hulse v. Ocwen Federal Bank, FSB,* 195 F. Supp.2d 1188

(D. Or. 2002); *Jordan v. Kent Recovery Services*, 731 F. Supp. 652, 657-58 (D. Del. 1990)). Regardless, Defendant argues further, that because it complied with the Idaho non-judicial foreclosure statute, it was well within its legal rights to foreclose on the Property, and Plaintiff has failed to state any fact of a false or misleading practice, or unconscionable means of collecting a debt, that would be actionable under the FDCPA. *Id.*

As discussed fully below, this Court agrees that the FDCPA generally does not apply to non-judicial foreclosure actions. However, there is an exception in the context of enforcing a security interest, which would include a non-judicial foreclosure action, a claim for which Plaintiff's Complaint adequately pleads and Defendant's motion to dismiss failed to address. For the foregoing reasons, it is recommended here that the Court grant Defendant's motion in part and deny the motion in part at this time consistent with the following Report and Recommendation.

1. Non-judicial foreclosure proceedings are not "debt collection" generally under the FDCPA.

Congress enacted the Fair Debt Collection Practices Act (FDCPA) "to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses." 15 U.S.C.A. § 1692. In furtherance of this goal, the FDCPA requires and prohibits certain activities by "debt collectors" that are done "in connection with the

collection of any debt." 15 U.S.C. § § 1692c (prohibits certain communications), 1692d (prohibits harassment or abuse), 1692e (prohibits false or misleading representations), 1692f (prohibits unfair practices) & 1692g (requiring validation of debts).

A central issue in this case is whether or not Defendant's complained of actions – which all relate to instituting non-judicial foreclosure proceedings on the Property – constitute "debt collection" activities under the FDCPA.[2] Courts conflict on this issue in general. *Cf. Brown v. Morris*, 243 Fed. Appx. 31, 35-36 (5th Cir. 2008) (finding that a foreclosure action is not *per se* debt collection under the FDCPA and no error in jury instruction that "[o]rdinarily, the mere activity of foreclosing ... under a deed of trust is not the collection of a debt within the meaning of the [FDCPA] unless other actions are taken beyond those necessary to foreclose under the deed of trust, and were taken in an effort to collect a debt" (brackets in appellate order)) and *Heinemann v. Jim Walter Homes, Inc.*, 47 F.Supp.2d 716, 722 (D. W.Va.1998) (same), *aff'd*, 173 F.3d 850 (4th Cir.1999), with *Wilson v. Draper & Goldberg*, 443 F.3d 373 (4th Cir. 2006)(concluding

[2] Courts deciding this issue have also looked to the definition of a "debt collector," versus "debt collection" activity. Numerous district courts in this Circuit have held that "the FDCPA does not apply to non-judicial foreclosure proceedings since a debt collector for the purposes of the Act does not include the consumer's creditors, a mortgage servicing company, or an assignee of a debt, as long as the debt was not in default at the time it was assigned." *Allen v. United Financial Mortgage Corp*, 2010 WL 1135787, *6 n. 7 (N.D. Cal. 2010) (*quoting Suetos v. Bank of Am. Nat'l Ass'n, No. 09-727*, 2010 U.S. Dist. LEXIS 20538, *11-12 (E.D. Cal. Mar. 8, 2010) (internal quotations omitted)). These cases relying on the definition of "debt collector" do not apply in this case because the allegations of the Complaint and the documents filed with Defendant's Motion establish that Defendants' interests in the Deed of Trust clearly arose after the debt was in default and presumably for the purpose of instituting foreclosure actions.

> [A]ny person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another.... For purposes of section 1692f(6) of this title,[[5]] such term also includes any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests.

Id. § 1692a(6). And so the argument goes, if "debt collection" generally included the enforcement of a security interest, the language specifying so for the purposes of §1692f(6) would be surplusage, and such a construction would violate a "long standing canon of statutory construction that terms in a statute should not be construed so as to render any provision of that statute meaningless or superfluous." *Beck v. Prupis*, 529 U.S. 494, 506, 120 S.Ct. 1608, 1617 (2000).[6]

This Court is persuaded by the reasoning and agrees with the its sister district courts that a non-judicial foreclosure action generally does not constitute a "debt collection activity" under the FDCPA. This Court disagrees, however, that actions to enforce a security action–including a non-judicial foreclosure–can never be actionable

[5] Section 1692f(6) specifies that "taking or threatening to take any nonjudicial action to effect dispossession or disablement of property if (A) there is no present right to possession of the property claimed as collateral through an enforceable security interest; (B) there is no present intention to take possession of the property; or (C) the property is exempt by law from such dispossession or disablement" constitute unfair practices under this section of the FDCPA.

[6]The Idaho statute governing mortgage foreclosures "and other liens" draws a similar distinction between debt recovery and enforcement of a security interest. *See* I.C. § 6-101 ("There can be but one action for the recovery of any debt, or the enforcement of any right secured by mortgage upon real estate which action must be in accordance with the provisions of this chapter.")

under the FDCPA. This Court finds an exception to this general rule stated in § 1692f(6) of the Act, as discussed below. *See also Montegomery v. Huntington Bank*, 346 F.3d 693, 700-01 (6th Cir. 2003) (noting exception for a security enforcer under § 1692f(6)); 15 U.S.C. § 1692i(a)(1)(venue provision applicable in case of an action to enforce a security provision).

Accordingly, to the extent Plaintiff's Complaint attempts to make a claim under the FDCPA other than under § 1692f(6), Defendant's motion to dismiss should be granted. *See Hulse*, 195 F.Supp.2d at 1204 (finding that allegations of wrongful foreclosure activity including filing notice of sale without beneficial interest in deed of trust, falsely stating appointment as trustee and that plaintiff failed to make payments, fail to state a claim under § 1692f(1)); *Gwin*, 2010 WL 1691567, *6 (S.D. Cal. 2010) (filing notices of default and of trustee's sale not "debt collection" activities within the scope of § 1692e).[7]

2. Section 1692f(6) applies to the enforcement of a security instrument, including nonjudicial foreclosure proceedings, and the record is insufficient to establish that Defendant had the right to institute the foreclosure proceedings on the Property as a matter of law.

Several courts recognize that § 1962f(6) is one provision in the FDCPA that does

[7] The Court notes, that in this case, the Notices of Trustee's Sale bore obvious disclaimers identifying the sales as "AN ATTEMPT TO COLLECT A DEBT." *See Cmplt.*, Exh. 6, *Motion to Dismiss*, Exh. 5. However, the statement "does not automatically trigger the protections FCDPA, just as the absence of such language does not have dispositive significance." *Gburek v. Litton Loan Servicing, LP*, 614 F.3d 380, 386 n. 3 (7th Cir. 2010) (*citing Lewis v. ACB Bus. Servs., Inc.*, 135 F.3d 389, 400 (6th Cir. 1998)).

apply to the enforcement of a security interest. *See, e.g., Chomilo v. Shapiro, Nordmeryer & Zielke, LLP*, 2007 WL 2695795, *3 (D. Minn. 2007); *Jordan v. Kent Recovery Services, Inc.*, 731 F.Supp. 652, 657 (D. Del. 1990); *James v. Ford Motor Credit Co.*, 47 F.3d 961, 962 (8th Cir.1995) (citing to *Jordan* and finding that repossession companies are generally not subject to the FDCPA except for section 1692f(6)). *See also Statements of General Policy or Interpretation Staff Commentary on the Fair Debt Collection Practices Act,* 53 Fed.Reg. 50097 (1988) (December 13, 1988) ("If a party falls only within the security interest provisions of the definition, then they "are subject only to this provision [§ 1692f(6)] and not the rest of the FDCPA.")[8]

The Fair Debt Collection Practices Act prohibits a "debt collector" from using any "unfair or unconscionable means to collect or attempt to collect any debt." 15 U.S.C.A. § 1692f. Among other conduct, this section specifically prohibits a debt collector from "[t]aking or threatening to take any nonjudicial action to effect dispossession or disablement of property if . . . there is no present right to possession of the property claimed as collateral through an enforceable security interest . . ." 15 U.S.C.A. § 1692f(6)(a).

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[8]Courts also disagree on limiting the applicability of the FDCPA in the context of a debt collector enforcing a security interest to only § 1692f(6) claims. *See, e.g., Katlenback v. Richards*, 464 F.3d 524 (5th Cir. 2006)(holding that a party who satisfies section 1692a(6)'s general definition of "debt collector" is a debt collector for the entire FDCPA even if only enforcing a security interest). This issue is not presented in this case because there are no facts alleged suggesting that Defendant(s) meet the general definition of "debt collector."

Plaintiff does not specify which section of § 1692f he claims Defendant violated. He lists § 1692f generally. Broadly construing both the allegations of his Complaint, and the Act, the Court is of the view that Plaintiff's allegations that Defendant "lacks standing" to institute the foreclosure actions could equate to a claim that Defendant took nonjudicial action to effect dispossession . . . of property . . . [with] no present right to possession of the property claimed as collateral through an enforceable security interest. . . . ." *Accord Riordan v. Jaburg & Wilk, P.C.*, 2010 WL 3023292, *4 (D. Ariz. 2010) *(citing McMillan v. Collection Professionals Inc.*, 455 F.3d 754, 763-64 (7th Cir. 2006); *see also Clark v. Capital Credit & Collection Services, Inc.*, 460 F.3d 1162, 1176 (9th Cir. 2006)(Remedial nature of FDCPA requires liberal construction by the courts.) Accordingly, the Court reviews the sufficiency of the Complaint under 15 U.S.C.A. § 1692f(6).

Plaintiff makes two claims as to how Defendant(s) "lack standing" to foreclose on the Property. First, Plaintiff suggests that Defendants violated the FDCPA because Wells Fargo "transferred" its beneficial interest in the Deed of Trust before it appointed NWTS as the successor trustee and before assigning the Deed of Trust to Defendant HSBC Bank, *see Cmplt.*, ¶ 9, and thus, neither Defendant received its interest (assignment/appointment) by a party authorized to transfer it under the Deed of Trust, *see Cmplt.*, ¶ ¶ 9, 13, 14. Plaintiff's second basis for the claim is that neither Defendant is "in possession of the required instruments Note and Deed of Trust, the instruments of evidence of an obligation and authority to enforce that obligation." *Cmplt.,* ¶ 14(c) & (d).

As such, Plaintiff alleges the Defendants had no legal right or "standing" to foreclose on the property. *Id.*

a. Plaintiff's allegations that Wells Fargo lost authority to transfer its interest in the Deed of Trust are insufficient as a matter of law.

Wells Fargo, as the original lender and beneficiary to the Deed of Trust, was clearly vested under the Deed of Trust with the authority to remove the Trustee, appoint a successor trustee and assign the Deed of Trust. The question presented, however, is whether Plaintiff's Complaint sets forth sufficient allegations to challenge Wells Fargo's ongoing authority, or to establish, for the purposes of this motion, that Wells Fargo somehow lost its authority prior to making the assignment or appointment. The Court is of the opinion that it is not.

Plaintiff's specific allegation is that:

> Wells Fargo, N.A., not a party to this action, lost all authority, right of enforcement and beneficial interest rights when the Note and Deed of Trust were released for processing under the standard banking procedures for negotiable instruments pursuant to UCC 3-203 Transfer of Instruments; Rights Acquired by Transfer. . . .

Id.

Defendant's motion to dismiss does not address Plaintiff's apparent allegation that Wells Fargo lost its rights to transfer under the Deed of Trust. However, the Court finds that Plaintiff's allegations are too vague to meet the minimal pleading requirements of Fed. R. Civ. P. 8(3), and do not give Defendant notice of the basis for the claim alleged. Plaintiff alleges that the documents were "released for processing" but cites a Uniform

Commercial Code provision, adopted by Idaho as I.C. § 28-3-203, which discusses the transfer of a negotiable instrument "for the purpose of giving to the person receiving delivery the right to enforce the instrument." I.C. § 28-3-203(1). Plaintiff's Complaint provides no clear factual statement as to how Wells Fargo's processing of documentation amounted to an intentional transfer of its interest, or otherwise may have resulted in Wells Fargo's loss of its interest in the Note or Deed of Trust.

Without sufficient allegations to the contrary, the record is clear that Wells Fargo, as the original beneficiary to the Note and the Deed of Trust, had the right under the Deed of Trust to assign its interest in the Deed of Trust, remove the Trustee and appoint a successor trustee. Any claim to the contrary is not sufficiently plead in Plaintiff's Complaint.[9]

Without setting forth any factual basis or belief supporting his theory that the original beneficiary lost the authority clearly delegated by the Deed of Trust, Plaintiff cannot maintain his claim under the FDCPA on this basis.

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[9]Plaintiff argues in response to the Motion to Dismiss that this fact is in doubt because Defendant did not file some document proving the authority of the individual's signature on behalf of Wells Fargo in the Assignment of the Deed of Trust or the Appointment of Successor Trustee. *See Objection to Motion to Dismiss*, (Dkt. 8), pp. 3 - 4. Plaintiff's Complaint does not contain these allegations, nor would they state an independent claim. Plaintiff makes no affirmative allegation and appears to contend that he is entitled to pursue a claim to discover whether or not the person signing the document had the authority to act for Wells Fargo. The pleading standard is not an onerous one, but it does require more than a mere speculative suggestion that a fraudulent act may have been committed. *See also* Fed. R. Civ. P. 9(b).

b. The record is insufficient at this time to determine as a matter of law that Plaintiff's Complaint fails to state a claim for relief based on Defendant's lack of possession of the Note.

In his Complaint, Plaintiff also claims that because "HSBC did not have actual possession of the Note signed by the Carlyles, it did not have standing to foreclose and the foreclosure is void as a matter of law." *Plaintiff's Objection to Motion to Dismiss*, at p. 4.

Plaintiff's claims are similar to the "show me the Note" defense to foreclosure that is the subject of many judicial decisions in both federal and state courts nationwide.[10] By way of background:

> Generally, a mortgage loan consists of a promissory note and security instrument, usually a mortgage or a deed of trust, which secures payment on the note by giving the lender the ability to foreclose on the property. Typically, the same person holds both the note and deed of trust. In the event that the note and the deed of trust are split, the note, as a practical matter becomes unsecured. The practical effect of splitting the deed of trust from the promissory note is to make it impossible for the holder of the note to foreclose, unless the holder of the deed of trust is the agent of the holder of the note. Without the agency relationship, the person holding only the note lacks the power to foreclose in the event of default. The person holding only the deed of trust will never experience default because only the holder of the note is entitled to payment of the underlying obligation. The mortgage loan [becomes] ineffectual when the note holder [does] not also hold the deed of trust.

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[10]Plaintiff's allegations that Defendants "lack standing" refers to the claims made in the bankruptcy context. Specifically, foreclosing entities file a motion for relief from the automatic bankruptcy stay in order to foreclose on the debtor's property. In those cases, the bankruptcy generally courts have required to the foreclosing entity to produce the original Note to prove sufficient interest in the debtor's estate to have standing to seek the relief from the stay. *See, e.g.*, *In re Wilheim*, 407 B.R. 392 (Bkrptcy. D. Idaho 2009); *In re Sheridan*, 2009 WL 631355 (Bkrtcy. D. Idaho 2009); *In re Jacobson*, 402 B.R. 354 (Bkrtcy. W.D. Wash. 2009); *In re Box*, 2010 WL 2228289, *5 (Bkrtcy. W.D. Mo. 2010).

Bellistri v. Ocwen Loan Servicing, LLC, 284 S.W.3d *619* (Mo. Ct. App. 2009).

Debtors, or their representatives, across the country are defending residential foreclosures, with a great degree of success particularly in the bankruptcy context, with the argument that the foreclosing entity must have possession of both the note and the deed of trust to have the authority to foreclose on the Property.

The issue is one of state law. Plaintiff's claim is based on the Uniform Commercial Code provision which specifies persons entitled to enforce a negotiable instrument, adopted by Idaho as I.C. § 28-3-30. Such persons include:

> (i) the holder of the instrument, (ii) a nonholder in possession of the instrument who has the rights of a holder, or (iii) *a person not in possession of the instrument who is entitled to enforce the instrument pursuant to section 28-3-309 or 28-3-418(4).* A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument.

Id. Under the Uniform Commercial Code, one becomes a "holder" of a negotiable instrument either by "transfer" or "negotiation," but both require obtaining possession of the instrument. *See Bank of NY v. Raftogianis*, 10 A.3d236, 2010 WL 5087866, *3 (N.J. Super Ch. 2010). A person not in possession of the instrument, therefore, must fall under one of the exceptions referenced in I.C. § 28-3-301(iii) to be entitled to enforce the instrument.[11]

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[11]Section 28-3-309 appears to be misnumbered or an outdated reference, and was intended to be § 28-3-308 addressing the circumstances under which a person not in possession of an instrument may enforce an instrument that has been lost, destroyed or stolen persons not in possession of a lost or stolen instrument. *See* I.C. § 28-3-301, *Uniform Commercial Code Comment.*

Defendant suggests that it qualifies as a person not in possession of a negotiable instrument but otherwise entitled to enforce it under I.C. § 28-3-301(iii). Defendant sets forth no explanation or argument establishing this fact as a matter of law. Rather, Defendant argues further that there is no requirement under Idaho law that it produce the Note, or to do anything else beyond that which is specifically articulated in the Idaho Trust Deed Act, I.C. §§ 45-1502 *et seq.*, in order to conduct a non-judicial foreclosure.

The Court agrees that the procedural requirements Defendant must meet to foreclose on the Property are those set forth in Idaho Trust Deed Act, *id. See Roos v. Belcher*, 79 Idaho 473, 321 P.2d 210 (1958). Moreover, there is no separate requirement under Idaho law that Defendant produce the original Note and Deed of Trust in order to do so. As Defendant points out, several courts in other jurisdictions have dismissed a similar claim on this basis. *See Chilton v. Fed. Mortg. Ass'n*, 2009 WL 5197869 (E.D. Cal. 2009); *Ernestberg v. Mortgage Investors Group*, 2009 WL 160241 (D. Nev. 2009)(Finding allegations that defendant's failure to produce note insufficient to invalidate foreclosure.); *Putkkuri v. Recontrust Co.*, 2009 WL 32567 (S. D. Cal. 2009) (same); *Wayne v. HomEq Servicing, Inc.,* 2008 WL 4642595 (D. Nev. 2008)(Defendant loan servicer not required to produce *original* of note; copies of note and deed of trust were sufficient to establish its interest.)

This Court does not believe, however, that the inquiry ends with Defendant's compliance with the Idaho non-judicial foreclosure statute. Liberally construing Plaintiff's complaint, as this Court must, Plaintiff is not challenging Defendant's

procedure – he is challenging Defendant's right to initiate the procedure. One could not reasonably contend that compliance with a procedure gives substantive rights not otherwise possessed. The question remains whether Defendant's right or authority to foreclose on the Property remains.

There appear to be two sub-issues that may be dispositive on this point. The first issue regards whether or not Idaho requires that a foreclosing entity be in possession of the Note in order to have the right to enforce the Deed of Trust. Volumes, including two bankruptcy decisions from this district, have been written on this topic espousing a view consistent with Plaintiff's position that possession of the Note is a requirement to its enforcement. *See In re Wilheim*, 407 B.R. 392 (Bkrptcy. D. Idaho 2009) (Denying motion for relief from stay to institute foreclosure on basis that movant who could not prove status as holder of Note and Deed of Trust lacked authority to foreclose necessary to establish standing.); *In re Sheridan*, 2009 WL 631355 (Bkrtcy. D. Idaho 2009)(Holding movant lacked sufficient financial interest to seek a stay to foreclose on property where movant could not show it had possession of the Note.); *see also Laboissiere v. GMAC Mortgage*, 2010 WL 2836107, *2 (Noting that I.C. § 45-911 is in accord with *In re Jacobson*, 402 B.R. 354 (Bkrtcy. W.D. Wash. 2009), which held that assignment of a deed of trust was insufficient to confer standing "because security follows the obligation secured, rather than the other way around."); *In re Box*, 2010 WL 2228289, *5 (Bkrtcy. W.D. Mo. 2010) ("Possession of the note insures that this creditor, and not an unknown one, is the one entitled to exercise rights under the deed fo trust, and that the debtor will

not be obligated to pay twice."); *U.S.Bank National Association v. Ibanez*, 458 Mass. 637, __N.E.2d__(Mass. 2011) (decided on state law grounds). Some authority exists also rejecting the position, but as discussed above, these decisions tend not to analyze whether or not the foreclosing entity must hold the note, only whether or not the note must be produced prior to conducting a non-judicial foreclosure. *See, e.g.*, *Mansour v. Cal-Western Reconveyance Corp*, 618 F.Supp.2d 1178, 1181 (D. Ariz. 2009). Again, the Court is not able to conclude that Plaintiff's complaint is limited to this procedural claim.

The second issue relevant here concerns Defendant's contention that it obtained the authority to foreclose on the Property based on the recorded Assignment of Deed of Trust from Wells Fargo to HSBC Bank. *Motion to Dismiss,* Exh. 3. There are two views on the consequence of the assignment of the Deed of Trust.

Regarding assignments, the first view is that without the assignment of the debt, the assignment of the security is a nullity. *See Laboissiere v. GMAC Mortgage*, 2010 WL 2836107 (D. Idaho) (*quoting In re Jacobson*, 402 B.R. 359, 367 (Bkrtcy. W. D. Wash. 2009) ("[H]aving an assignment of the deed is not sufficient, because the security follows the obligation secured, rather than the other way around."*). See also* Restatement (Third) Property, § 5.4, *Reporters' Note, Transfer of the mortgage also transfers the obligation, Comment c* (*citing In re Hurricane Resort Co.*, 30 B.R. 258 (Bkrtcy. D. Fla.1983); *Hill v. Favour*, 84 P.2d 575 (Ariz. 1938); *Domarad v. Fisher & Burke, Inc.*, 76 Cal.Rptr. 529 (Cal. Ct. App.1969) (dictum); *Hamilton v. Browning*, 94 Ind. 242 (1883); Pope & *Slocum v. Jacobus*, 10 Iowa 262 (1859); *Van Diest Supply Co. v. Adrian State Bank*, 305 N.W.2d

342 (Minn.1981); *Kluge v. Fugazy*, 536 N.Y.S.2d 92 (N.Y. App. Div.1988); *Miller v. Berry*, 104 N.W. 311 (S.D.1905)).[12]

The second view is that the assignment of the security also assigns the debt unless there is an indication of the parties' intent not to assign the debt. *See* Restatement (Third) Property, Mortgages § 5.4(b) (1997). This approach is adopted by the Restatement (Third) Property, Mortgages § 5.4(b) (1997). The Restatement section in its entirety states:

> (a) A transfer of an obligation secured by a mortgage also transfers the mortgage unless the parties to the transfer agree otherwise.
> (b) Except as otherwise required by the Uniform Commercial Code, a transfer of a mortgage also transfers the obligation the mortgage secures unless the parties to the transfer agree otherwise.
> (c) A mortgage may be enforced only by, or on behalf of, a person who is entitled to enforce the obligation the mortgage secures.

Restatement (Third) Property, Mortgages § 5.4(b) (1997).[13]

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[12] Among the "gems" and "free offerings" of the late Professor Chester Smith of the University of Arizona College of Law was the following analogy. The note is the cow and the mortgage the tail. The cow can survive without a tail, but the tail cannot survive without the cow.

Best Fertilizers of Arizona, Inc. v. Burns, 571 P.2d 675, 676 (Ariz. Ct. App. 1977), *reversed on other grounds*, 570 P.2d 179 (Ariz. 1977); *see also Carpenter v. Longan*, 83 U.S. 271, 21 L.Ed. 313 (1872)).

[13]But even under the well established principal that the assignment of the security without the debt renders such assignment a nullity, common law recognizes the parties' intent otherwise controls. *See Merritt v. Bartholich*, 26 N.Y. 44, 45 (N.Y. 1867) (Noting that "the incident shall pass by the grant of the principal, but not he principal by the grant of the incident" unless "such was the intent of the parties.") The Reporters' Note to the Restatement commentary nonetheless recognizes substantial authority to the contrary, holding that an assignment of the mortgage (security) without the obligation is a nullity, and distinguishes the Restatement approach. *See* Restatement (Third) Property, § 5.4,

Idaho Code § 45-911 states that "[t]he assignment of a debt secured by mortgage carries with it the security." This provision appears to codify the common law rule regarding the result to the security of an assignment of the debt, but does not address the reverse. There does not appear to be any Idaho state court case law on this point of assignment.

In this case, the only reference to Defendants' interest in the Note itself is a generic statement that the Assignment of Deed of Trust also included the "note or note(s)" referenced in the Deed of Trust. Under the common law and the Restatement (Third) Property, § 5.4 approach, such an evidence of intent to assign the note might be sufficient to conclude that a valid assignment occurred as between Wells Fargo and HSBC Bank, the assignor and assignee. *See United Home Loans, Inc. v. McGinnis*, 71 B.R. 885, 889 & n. 1 (W.D. Wash. 1987)(*citing Geffen v. Paletz*, 312 Mass. 43, 48 (N.E.2d 133 (1942); 59 C.J.S. Mortgages § 359 (1949)("where there is something to indicate that such was the intention of the parties, an assignment of a mortgage will carry the debt with it, as where the assignment purports to assign the mortgage note"); G.S. Nelson & D.A. Whitman, *Real Estate Finance Law*, at 366 (2d ed. 1985) ("[i]f the 'assignment' also mentions that the debt is being transferred . . . the transfer is unquestionably complete.")).

Whether the Assignment of Deed of Trust in this case is sufficient to allow enforcement of the Note against the debtor in view of the Uniform Commercial Code requirements for negotiable instruments, however, is yet another question.

Reporters' Note, Transfer of the mortgage also transfers the obligation, Comment c

Because Defendant's arguments on Motion to Dismiss focused on (1) denying the application of the FDCPA to its actions en totale, or alternatively, (2) asserting its compliance with the Idaho non-judicial foreclosure statutes, Defendant did not address in its Motion to Dismiss the countervailing case law on the requirement that it be a holder of the Note, or the issue of the validity of the assignment as a matter of law, or attempt to reconcile what appears to be two competing and conflicting bodies of law – important issues of Idaho law impacting residential home foreclosures.

Based on the record before the Court, it may well be that the Assignment of the Deed of Trust indicates sufficient intent on the part of Wells Fargo to also assign the Note and to otherwise establish Defendant's authority to foreclose on the Property under Idaho law. However, the Court is reluctant to recommend this finding on the record on a motion to dismiss without any statement of such from the Defendant, briefing on the issue as to the adequacy of the assignment under Idaho law, or without having been provided a copy of the Note which the Court would be required to construe, in part, in determining a valid assignment thereof. *See, e.g., JPMorgan Chase & Co. v. Casarano*, 2010 WL 3605427, *5 (Mass. Land Ct. 2010) (finding lost promissory note not negotiable instrument and reviewing assignment under general contract terms).

Accordingly, it is recommended that Defendant's motion to dismiss be denied in part with respect to the claim brought pursuant to 15 U.S.C. § 1692f(6).

MOTION FOR ENTRY OF FINAL DEFAULT JUDGMENT

Also pending is Plaintiff's Motion for Entry of Final Default Judgment (Dkt. 17) against non-appearing Defendant HSBC Bank USA, National Association under Federal Rule of Civil Procedure 55(b)(2). Under this Rule, a court may enter a default judgment against a party who is not a minor, incompetent, or in military service where the clerk, under Rule 55(a), has already entered the party's default based upon failure to plead or otherwise defend the action. A plaintiff is not entitled to entry of default as a matter of right; a court has discretion whether or not to enter a default judgment. *Lau Ah Yew v. Dulles*, 236 F.2d 415 (9th Cir.1956). A district court may consider the following factors in exercising its discretion to enter a default judgment, including: "(1) the possibility of prejudice to the plaintiff, (2) the merits of plaintiff's substantive claim, (3) the sufficiency of the complaint, (4) the sum of money at stake in the action, (5) the possibility of a dispute concerning material facts, (6) whether the default was due to excusable neglect, and (7) the strong policy underlying the Federal Rules of Civil Procedure favoring decisions on the merits." *Eitel v. McCool*, 782 F.2d 1470, 1471-1472 (9th Cir.1986).

In considering the sufficiency of the complaint and the merits of the plaintiff's substantive claim, facts not relating to damages alleged in the complaint generally are deemed to be true by virtue of the defendant's default. *Geddes v. United Fin. Group*, 559 F.2d 557, 560 (9th Cir.1977). A defendant is not held to admit facts that are not well-pleaded or to admit conclusions of law. *Nishimatsu Constr. Co., LTD. v. Houston Nat'l Bank*, 515 F.2d 1200, 1206 (5th Cir.1975) (holding that allegations concerning

existence and terms of a contract did not support liability where allegations were contradicted by actual contract). As a result, where the allegations in a complaint are not "well-pleaded," liability is not established by virtue of the defendant's default. *Id.*

In light of the foregoing and considering the factors above in view of the Court's recommendation regarding the appearing Defendant's Motion to Dismiss, the Court is of the view that default judgment should not be entered against HSBC Bank at this time. Several claims and allegations in the Complaint are not well plead. The one surviving claim does so in part due to the Court's obligation to construe a pro se complaint liberally. As such, HSBC Bank's liability may not be established by default. *See id.* Similarly, the claims and arguments against both Defendants are the same, and the Court's conclusion that Plaintiff's Complaint fails to state a claim for relief, in part, applies equally as against both named Defendants.

Further, considering another important factor, Plaintiff will not likely suffer prejudice at this time because the appearing Defendant's authority to foreclose on the Property is predicated upon the non-appearing Defendant's authority – and both issues must be fully litigated and resolved with or without the appearance of HSBC Bank. This fact further supports the Court's decision not to enter default judgment at this time as it is likely that the results against each defendant may be inconsistent and lead to further litigation, which will be inefficient given the narrow issues presented in this case.

Finally, the strong policy in favor of favoring decisions on the merits point toward the Court declining to enter default judgment against a non-appearing defendant in this

case. For the foregoing reasons, it is recommended that Plaintiff's Motion for Entry of Final Default Judgment against HSBC Bank be denied.

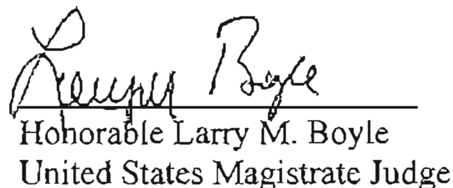
RECOMMENDATION

Consistent with the foregoing REPORT,

IT IS HEREBY RECOMMENDED:

1. Defendant's Motion to Dismiss (Dkt. 5) be GRANTED IN PART AND DENIED IN PART;
2. Plaintiff's Complaint alleging any claim for relief under the Fair Debt Collection Practices Act other than for an unfair or unconscionable practice under 15 U.S.C. § 1692f(6) based on the Defendants' authority to enforce the Note;
3. Plaintiff's Motion for Entry of Final Default Judgment (Dkt. 17) be DENIED;
4. Plaintiff be granted leave to file an amended complaint setting forth any additional facts which would support his claims for relief against Defendants under 15 U.S.C.A. § 1692f(6) within 30 days of the date of any order adopting this Report and Recommendation.

DATED: **February 9, 2011.**



Honorable Larry M. Boyle
United States Magistrate Judge

ATTACHMENT 1

Exh.	Description/parties	Recorded date Valley County	Recorded date Adams County
Cmplt. 1 MtD 1	Original Deed of Trust, 2/14/2010 Beneficiary: Wells Fargo NA Trustee: Pioneer Title	2/14/2007	2/14/2007
Mtd 2	Appointment of Successor Trustee - Northwest Trustee Services, Inc. Executed by Beneficiary Wells Fargo NA on _______	7/30/2009	1/7/2010
Mtd 3	Assignment of Deed of Trust to HSBCExecuted by Beneficiary Wells Fargo NA on _______	7/30/2009	1/7/2010
Cmplt 5	Notice of Default by Northwest Trustee Services, Inc. dated July 23, 2009, with HSBC Bank USA, NA as Trustee for Wells Fargo Asset Securities Corp, Mortgage Pass-Through Certificates, Series 2007-4 ("Current Beneficiary")	7/30/2009	9/3/2009
Mtd 4	Notice of Default by Northwest Trustee Services, Inc. dated July 23, 2009, with HSBC Bank USA, NA as Trustee for Wells Fargo Asset Securities Corp, Mortgage Pass-Through Certificates, Series 2007-4 ("Current Beneficiary")	7/30/2009	1/7/2010
Cmplt 2	Residential Real Estate Contract dated 10/4/2009, Sellers: Carlylses Buyer: Bret Armacost		

Mtd 5	Notice of Trustee's Sale dated 10/9/2009 by Successor Trustee Northwest Trustees Services, Inc.; sale to be held 2/8/2010 and 2/9/2010		
Cmplt 3	Warranty Deed conveying property to Second Ventures West, Inc. executed by Carlyles 12/__/2009	12/7/2009	12/8/2009
Cmplt 6	Notice of Trustee's Sale dated 2/1/2010 by Successor Trustee Northwest Trustees Services, Inc.; sale to be held 6/3/2010 and 6/4/2010		
Cmplt 4	Warranty Deed conveying property to Bret Armacost, executed by Donald Perry, President, Second Ventures West, Inc. On May 18, 2010.	6/1/2010	5/21/2010