7-11-2012

# Edwards v. Mortgage Electronic Registration Respondent's Brief 2 Dckt. 38604

**IN THE SUPREME COURT OF THE STATE OF IDAHO**

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LESLIE JENSEN-EDWARDS,

Appellant,

vs.

MORTGAGE 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,

Respondents.

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# RESPONDENT MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.'S OPENING BRIEF

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**Case Number 38604-2011**

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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Leslie Jensen-Edwards
2600 E. Seltice Way
Suite 144
Post Falls, ID 83854
*Appellant in Pro Per*

Derrick J. O'Neill, ISB No. 4021
Brian Langford, ISB No. 7747
Routh Crabtree Olsen P.S.
300 Main Street, Suite 150
Boise, ID 83702
(208.489.3035)

Robert J. Pratte, *pro hac vice application pending*
Brent R. Lindahl, *pro hac vice application pending*
Fulbright & Jaworski, L.L.P.
80 South 8th Street, Suite 2100
Minneapolis, MN 55402
(612.321.2244)
*Attorneys for Respondent Mortgage Electronic Registration Systems, Inc.*

Holger Uhl, Esq.
McCarthy & Holthus LLP
8995 SW Miley Road
Suite 103
Wilsonville, OR 97070
*Attorney for Quality Loan Service Corporation and Pioneer Lender Trustee Services LLC*

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## STATEMENT OF ISSUES ON APPEAL

**I.** Whether the district court properly afforded appellant sufficient opportunity to conduct discovery to oppose respondents' motion for summary judgment where: (1) discovery was unnecessary because appellant's claims fail as a matter of law under this Court's recent decision in *Trotter*; (2) respondents' motion to dismiss was treated as a motion for summary judgment solely because of affidavits submitted by appellant; (3) appellant failed to satisfy I.R.C.P. 56(f)'s requirements for continuance of a summary judgment motion hearing; and (4) appellant had months to conduct discovery and oppose summary judgment.

**II.** Whether the district court properly awarded summary judgment to respondents where: (1) appellant's claims fail as a matter of law under this Court's recent *Trotter* decision; and (2) it was undisputed, based on public records subject to judicial notice, that respondents complied with all requirements for non-judicial foreclosure under I.C. §§ 45-1505 and 45-1506.

## STATEMENT OF THE CASE

### A. Nature of Case

Although she admits defaulting on her residential mortgage loan, plaintiff/appellant Leslie Jensen Edwards ("Edwards") brought this lawsuit in an attempt to prevent non-judicial foreclosure under I.C. § 45-1505.

### B. Course of Proceedings and Disposition Below

Edwards filed her complaint *pro se* on April 1, 2010, in the Kootenai County District Court. (Clerk's Record on Appeal ("R._") at 1-4.) Named as defendants were respondents Mortgage Electronic Registration Systems, Inc. ("MERS"), Quality Loan Services ("QLS"), and Pioneer Lender Trustee Services, LLC ("Pioneer"), as well as Lehman Brothers Bank, FSB and Aurora Loan Services. (R.1) Seeking to stop the non-judicial sale scheduled for April 8, 2010, Edwards asserted two purported causes of action: (1) temporary and permanent injunction

(Count I); and (2) declaratory judgment (Count II). (R.8-18.) While far from a model of clarity, the gravamen of Edwards' complaint appeared to be that no defendant had "standing" to foreclose under Edwards' deed of trust because no defendant owned the promissory note, which purportedly had been sold or securitized. (R.4-7.)

On April 27, 2010, all defendants jointly filed a motion under I.R.C.P 12(b)(6) to dismiss the complaint for failure to state a claim upon which relief can be granted against any defendant. (R.32.) The next day, counsel filed a notice of appearance on behalf of Edwards. (Trial Court Docket Sheet ("D._") 1.) Although the district court previously had denied Edwards' motion for a temporary restraining order (R.29, R.31), on May 5, 2010, defendants nevertheless stipulated with Edwards to entry of an order postponing the foreclosure sale "until after the Court rules on Defendant's [sic] motion to dismiss." (R.35. *See also* Transcript on Appeal ("T._") 8-9, 16.) In addition, at Edwards' request, on May 6, 2010, defendants stipulated to continue the motion to dismiss hearing. (D.2.)

On May 14, 2010, Edwards, through her new counsel, responded to the motion to dismiss with a motion to amend the complaint. (R.37.) Over defendants' objection (R.65), on May 28, 2010, the district court allowed Edwards to amend her complaint and postponed the hearing on defendants' motion to dismiss. (R.96; T.15-16.) In large part, the amended complaint simply repeated the initial *pro se* pleading's conclusory allegations that no defendant had "standing" to foreclose because none of them owned the promissory note. (R.103-108.) The amended complaint did not alter the two purported causes of action or the requested relief. (R.108-201.) The only differences were that Edwards: (1) dropped claims against defendants Lehman Brothers

Bank, FSB[1] and Aurora Loan Services (R.101-103); and (2) added speculative and conclusory allegations (not causes of action) that the foreclosure was "fraudulent" because of purported improprieties in documents recorded in the land records (R.106-108) and the supposed bankruptcy of the original lender, Lehman Brothers Bank, FSB. (R.103, 106.)

On July 6, 2010, the remaining defendants—respondents MERS, Pioneer, and QLS—again moved to dismiss the amended complaint under I.R.C.P. 12(b)(6). (R.126; *see also* R.32; R.65.) In addition, to rebut the speculative and conclusory allegations raised by Edwards in her amended complaint, respondents asked the district court to take judicial notice of the following public documents: (1) Kootenai County land records relating to Edwards' loan and foreclosure; (2) United States Bankruptcy Court and Federal Reserve Board records relating to Lehman Brothers Holdings, Inc.'s bankruptcy filing, and Lehman Brothers Bank, FSB's name change to Aurora Bank, FSB; and (3) Idaho Secretary of State licensing records relating to QLS and Pioneer. (R.123; D.3.)

Edwards responded to respondents' motion to dismiss by filing: (1) two separate requests to convert respondents' motion to a motion for summary judgment and to continue the hearing to allow discovery (R.128, R.141); (2) an objection to judicial notice of public records submitted by defendants (R.143; D.4); and (3) an affidavit of a purported expert forensic loan examiner, Charles Horner. (T.24; D.4.) On August 9, 2010, in response to Edwards' attempt to convert the motion to summary judgment and objection to judicial notice, defendants submitted the supplemental affidavit of their trial counsel, Holger Uhl, attesting that the public records submitted by respondents were true and correct copies obtained by Uhl. (D.4.) On August 13,

[1] In her appeal brief, Edwards incorrectly refers to "Lehman Brothers Bank" as an "Appellee." (Appellant's Br. at 7.) Given that Edwards dropped Lehman Brothers Bank, FSB as a defendant when she amended her complaint, Lehman Brothers Bank, FSB, n/k/a Aurora Bank, FSB, is not properly a party to this appeal.

2010, Edwards moved to strike Uhl's affidavit, and the public records attached thereto, on the grounds that Uhl purportedly lacked personal knowledge and his testimony was inadmissible hearsay. (D.4.)

A hearing took place on August 20, 2010 (T.19), after defendants once again accommodated Edwards' request for a postponement of the hearing previously scheduled for July 29, 2010. (D.4.) The district court concluded that Edwards failed to satisfy the requirements for a continuance for discovery under I.R.C.P. 56(f). (T.21, T.29-30, T.32.) Nevertheless, the district court: (1) decided to treat the motion to dismiss as a motion for summary judgment; (2) postponed the summary judgment hearing to September 30, 2010; (3) allowed Edwards to pursue discovery in the interim; and (4) allowed Edwards to submit more affidavit testimony from purported expert loan forensic examiner Horner. (T.29, T.33, T.36.) The district court also indicated that it would hear and decide any motions to strike the Horner affidavit and/or the public records and Uhl affidavit in conjunction with summary judgment motion. (T.34, T.36.)

On September 16, 2010, Edwards submitted a second affidavit from Horner. (D.4.) Defendants moved to strike the Horner affidavits on the grounds that, among other things, Horner was not qualified as an expert and his report consisted of improper legal conclusions. (R.145.)

The motion for summary judgment and motions to strike were heard on September 30, 2010. (T.38.) By written order dated November 16, 2010, the district court granted defendants' motion for summary judgment. (R.154.) While it ostensibly treated the motion as one for summary judgment, the district court concluded that it could take judicial notice of the public records submitted by respondents (R.151) and that respondents were entitled to judgment as a

matter of law. (R.163.) Based on the undisputed public documents submitted by respondents, the district court found the following facts to be undisputed: (1) the original lender, Lehman Brothers Bank, FSB, had changed its name to Aurora Bank, FSB, and had not filed bankruptcy; (2) under Edwards' deed of trust, MERS was the beneficiary as the agent for Lehman Brothers Bank, FSB, n/k/a Aurora Bank, FSB, and its successors and assigns; (3) Pioneer was the trustee; (4) QLS was the agent/attorney in fact for Pioneer; (5) MERS, acting through Pioneer and its agent QLS, had the authority to foreclose on behalf of Lehman Brothers Bank, FSB, n/k/a Aurora Bank, FSB, and its successors and assigns; and (6) respondents complied with all statutory recording and notice requirements for non-judicial foreclosure. (R.156-161.) The district court thus concluded that respondents had the authority to foreclose and had complied with all statutory prerequisites to non-judicial foreclosure. (R.161-165.) The district court also denied Edwards' motion to strike the Uhl affidavit and objection to judicial notice of the public records, as well as respondents' motion to strike the Horner affidavit. (R.151-53.)

On December 1, 2010, Edwards moved for reconsideration of the summary judgment order. (R.167.) After receiving additional briefing from the parties (R.175, R.185, D.5), but without oral argument (R.180), the district court issued a written order denying reconsideration on February 18, 2011. (R.189.)

Judgment was entered in favor of respondents on January 24, 2011. (R.169.) On March 4, 2011, Edwards, through her trial counsel, filed a notice of appeal (R.198), though apparently she is now proceeding with the appeal *pro se* and looking for replacement counsel. (Appellant's Br. at 35.) Edwards filed her opening brief on November 16, 2011. By order of this Court, dated December 29, 2011, the due date for respondents' brief was stayed pending the Court's decision

in *Trotter v. Bank of N.Y. Mellon*, appeal no. 38022-2011. *Trotter* was decided on March 23, 2012. *See Trotter v. Bank of N.Y. Mellon*, 275 P.3d 857 (Idaho 2012).

### C. Statement of Facts

#### 1. Edwards' Mortgage Loan

On or about May 18, 2005, Lehman Brothers Bank, FSB, lent Edwards $345,000, at a 6% interest rate, to refinance her existing residential mortgage loan with American Gold Mortgage Corporation. (R.124 – Ex. A p. 2; *see also* R.124 – Exs. J & L.) In return, Edwards executed a promissory note in favor of Lehman Brothers Bank, FSB. (*Id.*) In addition, to secure repayment of the note, Edwards executed a uniform Fannie Mae/Freddie Mac deed of trust on residential real property at 17287 West Summerfield Road, Post Falls, Idaho, 83854 in Kootenai County (the "Property"). (R.124 – Ex. A at p. 3.) The deed of trust identifies Edwards as "borrower;" Lehman Brothers Bank, FSB as "lender;" MERS as "beneficiary" in a representative capacity as "nominee" on behalf of the lender and its "successors and assigns;" and Alliance Title and Escrow ("Alliance") as "trustee." (*Id.* at pp. 2-3.)

The deed of trust authorizes MERS to take all necessary actions on the lender's behalf, including foreclosure, discharge, or release of the security interest. (*Id.* at p. 4.) The deed of trust provides, in part:

> "MERS" is Mortgage Electronic Systems, Inc. MERS is a separate corporation that is acting solely as ***nominee for Lender and Lender's successors and assigns. MERS is the beneficiary under this Security Instrument***. MERS is organized and existing under the laws of Delaware, and has an address and telephone number of P.O. Box 2026, Flint, MI, 48501-2026, tel. (888) 679-MERS.

(*Id.* at p. 1 (emphasis added).)

> 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. This Security Instrument secures to Lender: (i) the repayment of the Loan, and renewals, extensions

> and modifications of the Note; and (ii) the performance of Borrower's covenants and agreements under this Security Instrument and the Note. For this purpose, Borrower ***irrevocably grants and conveys to Trustee, in trust, with power of sale***, the [Property]....
>
> ... 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 [Lender's] interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender***, including, but not limited to, releasing and canceling this Security Instrument.

(*Id.* at pp. 2-3 (emphasis added).)

The deed of trust also advised Edwards that "[t]he Note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times ***without prior notice to Borrower***." (*Id.* at p. 11 (emphasis added).)

At closing, Edwards initialed each page of the deed of trust, including those pages referencing MERS, and signed the deed of trust, which was then acknowledged by a notary. (*Id.* at pp. 2-3, 14-15.) The deed of trust was then duly recorded in the Kootenai County land records on May 25, 2005. (*Id.* at p. 1.)

With the loan from Lehman Brothers Bank, FSB, Edwards refinanced here prior mortgage loan with American Gold Mortgage Corporation, dated October 24, 2003. (R.124 – Ex. J at p. 2.) That prior loan was evidenced by a separate promissory note, as well as a deed of trust to the Property recorded in the Kootenai County land records on October 29, 2003. (*Id.* at pp. 1-3.) That prior deed of trust listed American Gold Mortgage Corporation as "lender;" MERS as "beneficiary" in a representative capacity as "nominee" on behalf of the lender and its "successors and assigns;" and Alliance as "trustee." (*Id.* at pp. 2-3.) Because the prior loan was paid off through the refinancing, MERS, in its capacity as beneficiary under the prior deed of

trust, executed a Substitution of Trustee, dated June 1, 2005, which replaced Alliance with Fidelity National Title Company ("Fidelity"). (R.124 – Ex. K.) Acting on behalf of MERS as beneficiary on behalf of American Gold Mortgage and its successors and assigns, Fidelity executed a Deed of Reconveyance, dated June 8, 2005, indicating that Edwards' prior loan "has been paid in full." (R.124 – Ex. L.) On June 21, 2005, Fidelity recorded both the Substitution of Trustee and the Deed of Reconveyance in the Kootenai County land records. (R.124 – Ex. K & L.)

### 2. Lehman Brothers Bank, FSB's Name Change

On April 27, 2009, Lehman Brothers Bank, FSB, changed its name to Aurora Bank, FSB. (R.124 – Exs. F & G.)

### 3. Edwards' Default and the Resulting Foreclosure

Edwards does not dispute[2] that she defaulted on her mortgage loan in August 2009, and has not made any payments since, despite continuing to occupy the Property. (R.124 – Ex. D.) As a result of Edwards' default, on or about November 30, 2009, MERS, as deed of trust beneficiary on behalf of the lender and its successors and assigns, executed an Appointment of Successor Trustee, replacing Alliance with Pioneer as trustee and QLS as attorney in fact for Pioneer. (R.124 – Ex. B.) The Appointment of Successor Trustee was recorded in the Kootenai County land records on December 3, 2009. (*Id.*) That same day, Pioneer, as trustee, and acting through its attorney in fact, QLS, recorded in the Kootenai County land records a Notice of Default and Election to Sell, which indicated that Edwards had been in default since August 2009. (R.124 – Ex. D.)

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[2] *See* number 22 of Plaintiff's Response QLS' First Set of Request for Admission, submitted to the district court on or about August 5, 2010, in connection with defendants' motion to compel discovery responses from plaintiff. (D.4.) *See also* Affidavit of Leslie Jensen Edwards, submitted to the district court on or about April 1, 2010. (D.1.)

On December 9, 2009, after the recording of the Notice of Default and Election to Sell, but more than 120 days before the trustee's sale, Pioneer, through QLS, sent to Edwards via registered or certified mail a Notice of Trustee's Sale stating that the Property would be sold at public auction on April 8, 2010. (R.124 – Ex. C.) In addition, personal service of the Notice of Trustee Sale was attempted, and the Notice was posted at the Property, on December 11, 19, and 29, 2009. (R.124 – Ex. C.) Further, the Notice of Trustee's Sale was published in the Coeur d' Alene Press, a print newspaper serving Kootenai County, for four consecutive weeks, beginning December 23, 2009, and ending January 13, 2010. (R.124 – Ex. C.) Affidavits of mailing, posting, and publication of the Notice of Trustee's Sale were recorded in the Kootenai County land records on or about February 10, 2010. (*Id.*) The sale did not take place on April 8, 2010 because Edwards filed this lawsuit.

**4. MERS and the MERS® System**

**a. Title Problems Prior to MERS**

At origination of a residential mortgage loan, a borrower executes a promissory note (obligating the borrower to repay the loan) and a separate security instrument (granting a security interest in the real estate as collateral in the event of default on the note). *Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1039 (9th Cir. 2011). Unlike the note, the security instrument—typically a mortgage or, as in this case, a deed of trust—is recorded in the county in which the property is located pursuant to state law. *Id.; Jackson v. Mortg. Elec. Registration Sys., Inc.*, 770 N.W.2d 487, 490-491 (Minn. 2009).

After origination, lenders routinely sell mortgage loans on the secondary mortgage market and such loans may be sold several times in whole or in part or bundled into mortgage-backed securities. *Cervantes,* 656 F.3d at 1038-39; *Jackson*, 770 N.W.2d at 490. The lender that owns the note has the right to receive repayment of the underlying indebtedness and ultimately

the sale proceeds in the event of a default and foreclosure of the security instrument. *Cervantes,* 656 F.3d at 1038. In addition, the contractual right to service the loan for the lender routinely changes hands. *Id.* After origination, the loan "servicer" deals directly with the borrower and administers the loan (*e.g.,* collects payments from the borrower, ensures that real estate taxes and insurance premiums are paid, and remits payments to the owner(s) of the note).[3] *Id.* Pursuant to UCC requirements for negotiable instruments, notes are negotiated either by indorsement and delivery, or in the event the note is bearer paper, just by delivery, *Horvath*, 641 F.3d at 621; Idaho Stat. §§ 28-3-201, 3-204, 3-205, while assignments of servicing rights typically occur by contract, *see* R.K. Arnold, *supra*, at 34.

Transfers of notes and assignments of servicing rights are not susceptible to recording in county land records. *See id.* Historically, transfer (*i.e.,* negotiation) of a note to a new lender often, but not always, was accompanied by a separate assignment of the trust deed (substituting a new beneficiary) that was recorded in the county land records. *Cervantes*, 656 F.3d at 1039; *Jackson*, 770 N.W.2d at 490. But as secondary market transfers increased, "[t]his recording process became cumbersome to the mortgage industry," *Cervantes,* 656 F.3d at 1039, because "multiple assignments of the security instrument commonly caused confusion, delays, and chain-of-title problems," *Jackson,* 770 N.W.2d at 490. These problems were exacerbated in the 1980s due to the inability to obtain assignments, satisfactions, and reconveyances from collapsed S&Ls.[4] MERS was formed in the aftermath of the S&L crisis, *Jackson*, 770 N.W.2d at 490, to eliminate the foregoing title problems and inefficiencies, which adversely affected the residential

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[3] *See also* R.K. Arnold, *Yes, There Is Life On MERS*, 11 PROB. & PROP. 32, 34 (1997).

[4] *E.g.,* Jeffrey J. Miller, *The Effect of the S&L Bailout on Title to Real Property*, 5 PROB. & PROP. 44, 47-49 (1991) (discussing various title-related issues with S&Ls in the 1980s); R.K. Arnold, *supra*, at 34 (discussing delays); *see also* Allen H. Jones, *Setting the Record Straight on MERS,* Mortg. Banking 34 (May 2011).

finance industry's ability to efficiently provide home financing to consumers. *Id.; Cervantes*, 656 F.3d at 1039.

### b. Role and Benefit of MERS

MERS does not originate, lend, service, or invest in home loans. *Cervantes*, 656 F.3d at 1039-40. Instead, MERS serves ***two primary functions*** for the residential lending industry. *First*, MERSCORP Holdings, Inc., operates the MERS® System, a private electronic database that tracks transfers of promissory notes (and changes in loan servicers), *Cervantes*, 656 F.3d at 1038, by a Mortgage Identification Number ("MIN") assigned to each loan, *Jackson*, 770 N.W.2d at 490-91.[5] The shareholders of MERSCORP and the members of the MERS® System include lenders who originate, invest in, or service loans, *Cervantes*, 656 F.3d at 1039 (citing *Jackson*, 770 N.W.2d at 490-91), including government sponsored enterprises Fannie Mae and Freddie Mac, *see MERSCORP, Inc. v. Romaine*, 861 N.E. 2d 81, 83 n.2 (N.Y. 2006). Borrowers can learn the identity of the lender who owns their note (referred to on the MIN Summary as the "investor") and the servicer by calling the toll-free number listed in the trust deed (or mortgage), *see, e.g.*, R.124 – Ex. A. (Edwards' deed of trust), or by accessing the MERS website, www.mersinc.org.[6] Prior to MERS, there was no system for tracking such interests, which are not reflected in county land records. *See* R.K. Arnold, *supra*, at 34.

*Second*, and wholly distinct from the MERS® System database, MERSCORP's subsidiary, Appellee MERS, acts as the "beneficiary" in the trust deed (or mortgagee in mortgage) as the agent (*i.e.* nominee) of the lender that owns the note and the lender's successors

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[5] *See* R.K. Arnold, *supra*, at 34.

[6] Although the disclosure of the note owner is optional, 97% of the over 3,000 MERS members disclose their identity. *E.g., Problems in Mortgage Servicing From Modification to Foreclosure*: Hearing Before the Sub. Comm. on Banking, Housing, and Urban Affairs, 111th Cong. (Nov. 16, 2010) (statement of R.K. Arnold, President and CEO, Mortgage Electronic Registration Systems, Inc.), http://banking.senate.gov.

and assigns. *Cervantes*, 656 F.3d at 1040; *see, e.g.*, R.124 – Ex. A. (Edwards' deed of trust). This is accomplished at origination, when the borrower, lender, and MERS all agree in the deed of trust (or mortgage)—including uniform deeds of trust (and mortgages) drafted by Fannie Mae and Freddie Mac—that MERS will serve this role. *See, e.g.*, R.124 – Ex. A. (Edwards' deed of trust). These security instruments are recorded in the public land records identifying MERS as the holder of legal and record title to the security interest. *Jackson*, 770 N.W.2d at 490; *see, e.g.*, R.124 – Ex. A. (Edwards' deed of trust as recorded in Kootenai County land records).

With MERS' two distinct functions, subsequent transfers of notes (and assignments of servicing rights) are tracked in the MERS database, but are not recorded in the public land records, *Cervantes*, 656 F.3d at 1040, because notes are not susceptible to recordation, *see* R.K. Arnold, *supra*, at 34. When a note is transferred—*i.e.*, negotiated (by endorsement and/or delivery) to a new lender—there is no separate assignment of the trust deed because there is no change in the beneficiary (or mortgagee) or holder of legal and record title. *Id.; Jackson*, 770 N.W.2d at 491 & n.2. Rather, MERS remains the trust deed beneficiary in the public land records on behalf of the new lender. *Cervantes*, 656 F.3d at 1040. These services MERS provides benefit lenders, borrowers, the title industry, and local governments in numerous ways, including, but not limited to: providing a source for information (*e.g.*, promissory note transfers and loan ownership) not otherwise available; reducing recording errors and delays and the resulting uncertainty and title problems; and increasing efficiency and reducing costs.

## ARGUMENT

### I. STANDARD OF REVIEW

This Court reviews for abuse of discretion a district court's decision on a request under I.R.C.P. 56(f) to allow time for discovery to oppose a summary judgment motion. *See Carnell v. Barker Mgmt., Inc.*, 48 P.3d 651, 658 (Idaho 2002) (citations omitted). "In determining whether

a trial court abused its discretion this Court considers: (1) whether the trial court correctly perceived the issue as one of discretion; (2) whether the trial court acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) whether the trial court reached its decision by an exercise of reason." *Id.* (internal quotations and citations omitted).

The Court reviews *de novo* a district court's decision to grant a motion for summary judgment, applying the same standard as the district court. *See Estate of Becker v. Callahan*, 96 P.3d 623, 626 (Idaho 2004). 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). The party opposing the motion "may not rest upon the mere allegations or denials of that party's pleadings, but that party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." I.R.C.P. 56(e). Thus, "while reasonable inferences must be drawn in favor of the non-moving party, the non-moving party cannot rest upon mere speculation," *Finholt v. Cresto*, 155 P.3d 695, 698 (Idaho 2007), or "conclusory assertions," *Partout v. Harper*, 183 P.3d 771, 776 (2008). "A mere scintilla of evidence is not enough to create a genuine issue." *Ryan v. Beisner*, 844 P.2d 24, 25 (Idaho 1992) (citations omitted). "[T]he moving party is entitled to judgment when the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to that party's case on which that party will bear the burden of proof at trial." *Partout,* 183 P.3d at 776 (citation omitted).

Applying these familiar standards, this Court should affirm the district court's decision in all respects.

## II. THE DISTRICT COURT PROPERLY TOOK JUDICIAL NOTICE OF PUBLIC RECORDS AND DISMISSED EDWARDS' COMPLAINT WITHOUT EXTENSIVE DELAY FOR UNNECESSARY DISCOVERY

Edwards argues that the district court improperly converted respondents' motion to dismiss to a motion for summary judgment, and then accepted inadmissible evidence from respondents, while depriving Edwards of discovery necessary to oppose respondents' motion. (Appellant's Br. at 9-13, 34-35.) Nothing could be further from the truth.

### A. *Trotter* Confirms that Discovery Was Unnecessary

To begin with, Edwards only vaguely argued below, and repeats with the same imprecision here on appeal, that she was entitled to undefined discovery that she believes would enable her to uncover respondents' purported lack of "standing" to foreclose. (T.31; *see also* R.128, R.141, R.167.) As best as MERS can tell, Edwards wants discovery on ownership of her promissory note because, in her view, lack of ownership of the note means lack of standing to foreclose. But such "standing" or "note ownership" discovery was irrelevant and unnecessary for two reasons. ***First***, in its recent *Trotter* decision, this Court held, as a matter of law, that there is no requirement of "standing"—*i.e.*, no obligation to show an ownership interest in the note—to commence non-judicial foreclosure. *See Trotter*, 275 P.3d 857 (discussed *infra* § III.) Edwards even concedes that standing presents "questions of law" for the court. (Appellant's Br. at 14.) ***Second***, the indisputable public records, including the deed of trust Edwards signed in return for $345,000, established as a matter of law that MERS, as beneficiary on behalf of the lender that owns the note, had explicit authority to appoint Pioneer as successor trustee and direct Pioneer to foreclose on behalf of the note owner. (*See supra* § III.A.) In sum, the discovery sought by Edwards was irrelevant.

## B. Respondents' Motion Was Converted to Summary Judgment Because of Edwards' Affidavits

Furthermore, ***it was Edwards***, not respondents, who (1) twice asked the district court to covert the motion to dismiss to a motion for summary judgment (R.128, R.141, T.22) and (2) submitted evidence outside the pleadings—*i.e.*, two purported expert affidavits (T.24; D.4)—that led the district court to ostensibly treat the motion as one for summary judgment. (T.29.) Respondents maintain, as they did below (R.145), that the district court erred in considering the affidavits of Edwards' purported expert forensic loan examiner Charles Horner, on the grounds that, among other things: (1) Horner was not qualified as a expert and his affidavits contained inadmissible legal opinions;[7] and (2) the Federal Trade Commission has cautioned that such forensic loan audits are consumer scams.[8] But leaving that issue aside, it is clear that it was the Horner affidavits submitted by Edwards, not anything submitted by respondents, that were outside the pleadings and led the district court to treat respondents' motion as one for summary judgment.

Indeed, the district court correctly took judicial notice, under I.R.E. 201, of the "public records of Kootenai County [], the Idaho Secretary of State, the Federal Reserve Board, and the United States Bankruptcy Court for the Southern District of New York, sources whose accuracy

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[7] *See Nationwide Transp. Fin. v. Cass Info. Sys., Inc.*, 523 F.3d 1051, 1058 (9th Cir. 2008) (expert legal opinions are inadmissible and improper because interpretation of the law is exclusively within the province of the court).

[8] "Fraudulent foreclosure 'rescue' professionals use half-truths and outright lies to sell services that promise relief to homeowners in distress.... [T]he latest foreclosure rescue scam to exploit financially strapped homeowners pitches forensic mortgage loan audits. In exchange for an upfront fee of several hundred dollars, so-called forensic loan auditors ... offer to review your mortgage loan documents to determine whether your lender complied with state and federal mortgage lending laws. The 'auditors' say you can use the audit report to avoid foreclosure, accelerate the loan modification process, reduce your loan principal, or even cancel your loan." FTC Consumer Alert (March 2010), http://www.ftc.gov/bcp/edu/pubs/consumer/alerts/alt177.shtm .

cannot reasonably be questioned." (R.151.) It is well-settled that a court may take judicial notice of such public records in deciding a Rule 12(b)(6) motion to dismiss, ***without converting the motion to one for summary judgment.***[9] *See MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986) ("we may take judicial notice of matters of public record outside the pleadings"). Thus, it was the Horner affidavits submitted by Edwards, not the public records submitted by respondents, that must have led the district court to treat the motion as a summary judgment motion. Given that it was Edwards who requested that the motion be converted to summary judgment, based on extra-pleading evidence (expert affidavits) that she alone submitted, she should not be heard now to argue that the motion was improperly converted without allowing her time for discovery.

Edwards also argues that the district court improperly accepted hearsay testimony from respondents' trial counsel, Holger Uhl, and she makes the speculative argument that the public records attached to Uhl's affidavit "are ***most probably*** false, inaccurate, and grossly negligent." (Appellant's Br. at 34-35 (emphasis added).) These arguments lack merit. In his affidavit, Uhl merely attached the public records and attested, based on his personal knowledge, that the records were true and correct copies that he himself obtained. (D.4 – Supplemental Affidavit of Holger Ulh, dated August 9, 2010.) As the district court correctly concluded, not only does Uhl's affidavit satisfy the personal knowledge requirement of I.R.E. 602, it also meets hearsay exceptions under I.R.E. 803(6) ("records of regularly conducted activity"), 803(8) ("public records and reports"), and 803(14) and (15) ("documents affecting interests in property").

[9] *See also* 5B Charles Alan Wright & Arthur R. Miller, Fed. Prac. & Pro. § 1357 (3d ed. 1998) ("items subject to judicial notice, matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint whose authenticity is unquestioned; these items may be considered by the district judge without converting the motion into one for summary judgment").

Edwards' self-serving conjecture about purported fraudulent, without more, is insufficient to cast doubt on the veracity of these public records. *See Hien Phan v. Bank of N.Y.*, --- F. Supp. 2d ----, 2012 WL 1222572, at *7 (E.D. Va. Apr. 10, 2012) (rejecting as baseless the "bald assertion that the Note and other documents in the record are not authentic," "bare allegations that ... inclusion of MERS as beneficiary in Deed of Trust and the appointment of successor trustee were somehow 'fraudulent,'" and "speculative assertion that certain documents in the record are signed by individuals lacking authority").

### C. Edwards Failed to Comply With Rule 56(f)

In any event, Edwards failed to comply with Rule 56(f)'s prerequisites for postponing summary judgment and allowing discovery. Rule 56(f) gives the district court ***discretion*** to continue the hearing and allow discovery to oppose a summary judgment motion "[s]hould it appear from the ***affidavits of a party opposing*** the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition...." I.R.C.P. 56(f) (emphasis added). A continuance should not be granted unless the movant actually submits an affidavit as required by Rule 56(f). *See Golay v. Loomis*, 797 P.2d 95, 97, 99 (Idaho 1990) (district court acted within its discretion to deny continuance where moving party did not submit required Rule 56(f) affidavit); *Prather v. Indus. Inv. Corp.*, 429 P.2d 414, 415 (Idaho 1967) (district court acted within its discretion in denying Rule 56(f) motion where movant did not "present an affidavit containing reasons ... why he was then unable to state 'affidavit facts essential to justify his position'") (citations omitted).

In addition, any Rule 56(f) affidavit must clearly articulate the specific reasons for the continuance and the relevant discovery needed to oppose the motion. *See Jenkins v. Boise Cascade Corp.*, 108 P.3d 380, 386 (Idaho 2005) (affirming denial of Rule 56(f) motion that "did not specify what discovery was needed" and "did not set forth how the evidence he expected to

gather through further discovery would be relevant to preclude summary judgment"); *Taylor v. AIA Services Corp.*, 261 P.3d 829, 849 (Idaho 2011) (affirming denial of 56(f) motion when the request was "based on mere speculation and on presumptions unsupported by fact or law ... Plaintiff has provided the Court with no reasonable basis to believe additional discovery will produce new or relevant information not previously disclosed....").

Here, although Edwards filed two motions for a continuance (R.128, R.141), she never submitted any Rule 56(f) "affidavit," much less explained with the required specificity the particular discovery she purportedly needed to respond to respondents' motion. At the hearing on Edwards' motions for a continuance, the district court correctly explained to Edwards' counsel:

> Rule 56(f) does not stand for the proposition [that] if this becomes a summary judgment [motion] ... [Edwards] gets to complete discovery prior to the hearing. [Rule 56(f)] allows me upon a good showing ... to allow certain [discovery] to meet ... the summary judgment motion, but not to engage in just overall or incomplete discovery. So what exactly is it [Edwards] need to complete to meet the Motion for Summary Judgment?

(T.29.) But Edwards failed to articulate specifically any meaningful discovery she needed in order to respond to respondents' motion.

### D. Edwards Was Afforded Sufficient Opportunity to Oppose the Motion

Edwards takes isolated snippets of the district court's transcript out of context in a misleading attempt to (incorrectly) paint the district court as depriving her of the opportunity to oppose respondents' dispositive motion. (Appellant's Br. at 10.) In reality, however, Edwards was ***not*** denied sufficient time to prepare her case or to make arguments.

Edwards filed this lawsuit on April 1, 2010 (R.1), some ***seven months*** before it was dismissed on November 16, 2010. (R.147.) While the case was originally commenced by Edwards *pro se*, she had counsel by at least April 28, 2010. (D.1.) What is more, the hearing on

Respondents' motion to dismiss (originally filed on April 27, 2010) was delayed at least four times before it was ultimately heard on September 30, 2010. The hearing was delayed once because Edwards moved to amend her complaint. (T.16; R.37.) It was delayed twice more (on May 6 and July 28, 2010) because respondents consented to a postponement of the hearing at Edwards' request. (D.2, D.4.) And, in response to Edwards' Rule 56(f) motion, the district court again postponed the hearing from August 20, 2009 until September 30, 2009, and told Edwards she could engage in discovery in the interim. (T.32, T.36, T.38.) If that were not enough, the district court accepted and considered (improperly in respondents' view) two affidavits from Edwards' purported expert forensic loan examiner, Charles Horner. (T.153.) And, when Edwards finally got around to actually serving discovery in late August 2010, MERS and the other respondents properly and fully responded. (D.5 – Notices of Compliance, filed Sept. 29, 2010.)

Simply put, Edwards was afforded plenty of opportunity to conduct discovery and present arguments in opposition to respondents' dispositive motion. Her arguments to the contrary are baseless and should be rejected.

### E. The Authority Cited by Edwards Is Inapposite

In an apparent attempt to prejudice respondents with this Court, Edwards cites two cases from other jurisdictions for the sweeping and unfounded proposition that every entity associated with the lending industry is part of some massive conspiracy to deprive plaintiff borrowers of legitimate discovery. (Appellant's Br. at 11-12.) Of course, neither case is even close to germane to this appeal.

Neither case involved MERS or any other appellee, much less standing or authority to initiate non-judicial foreclosure, or even a Rule 56(f) motion to continue a motion for summary judgment for discovery purposes. *In re Wilson*, No. 07-11862 (Bankr. E.D. La. Apr. 7, 2011)

involved "contentious discovery" with "responses, oppositions and replies" to ten discovery motions, *id.* at *14, in a lawsuit about whether a lender processing service adequately tracked mortgage payments and verified information in affidavits before signing them, *id.* at 18-20. *Phillips v. U.S. Bank NA*, No. 11-CV-00504 (Ga. Super. Ct. Nov. 2, 2011), is a Georgia trial court denial of a motion to dismiss by a defendant bank who apparently had not provided plaintiff with the reason he was denied a modification under the federal HAMP program. Any conduct of the particular defendants in *In re Wilson* or *Phillips*, or any frustration of the judges with those defendants, is not applicable to, or justifiably directed against, MERS or any other respondents, who fully responded to Edwards' discovery and acted within their rights in filing a threshold Rule 12(b)(6) motion to dismiss in this case.

For all the foregoing reasons, the district court properly took judicial notice of public records, afforded Edwards sufficient time to oppose the motion, and then decided the motion without extensive delay for meaningless discovery.

## III. THE DISTRICT COURT CORRECTLY DETERMINED THAT RESPONDENTS HAD "STANDING" TO FORECLOSE NON-JUDICIALLY UNDER IDAHO CODE §§ 45-1505 AND 45-1506

### A. Respondents Were Not Required to Establish Note Ownership

Edwards argues, as she did below, that respondents lacked "standing" to foreclose on the deed of trust because no appellee "owned" the promissory note evidencing the underlying debt. (*See* Appellant's Br. at 14-22, 28-30.) Edwards standing or "show me the note" theory is incorrect as a matter of law. Indeed, this Court expressly rejected the ***exact same*** theory in a decision issued since the district court dismissed Edwards' complaint. *See Trotter*, 275 P.3d 857.

In *Trotter*, the borrower, like Edwards, executed a standardized deed of trust naming MERS as "beneficiary" on behalf of the originating lender and its successors and assigns. *Id.* at *3. After the borrower defaulted on the loan, MERS assigned the deed of trust to another lender,

the lender then appointed a successor trustee, and the successor trustee initiated non-judicial foreclosure under Idaho Code § 45-1505. *Id.* Like Edwards, the borrower sued the lender, MERS and the trustee, asserting claims for injunctive and declaratory relief, in an effort to prevent foreclosure. *Id.* at *3-4. Like Edwards, the borrower asserted that none of the defendants had "standing" to foreclose because none of them had established ownership of the promissory note memorializing the underlying debt. *Id.* Defendants moved to dismiss, and the district court granted their motion. *Id.* at *4.

On appeal, this Court affirmed, "hold[ing] that, pursuant to I.C. § 45–1505, a trustee ***may initiate nonjudicial foreclosure proceedings on a deed of trust without first proving ownership of the underlying note*** or demonstrating that the deed of trust beneficiary has requested or authorized the trustee to initiate those proceedings. *Id.* at *5 (emphasis added). In other words, "there is no statutory requirement [under § 45–1505] for the trustee to prove standing before initiating a nonjudicial foreclosure on a deed of trust...." *Id.* The Court explained: "***[N]othing in the text of the statute can reasonably be read to require the trustee to prove it has 'standing' before foreclosing***. Instead, the plain language of the statute makes it clear that the trustee may foreclose on a deed of trust if it complies with the requirements contained within the Act." *Id.* (emphasis added). Because there was no dispute that the defendants had complied with all the requirements for non-judicial foreclosure under the statute, the Court affirmed the district court's dismissal of the borrower's complaint. *Id.*

Edwards contends that there is "not yet controlling precedent in Idaho" (Appellant's Br. at 22), and that two decisions by the United States Bankruptcy Court for the District of Idaho constitute the "most persuasive case law relating to this appeal" (*id.* at 14) and "represent the current state of the law in Idaho." (*Id.* at 16.) Of course, Edwards filed her appeal brief ***before***

*Trotter,* which now represents the "controlling precedent in Idaho" she was looking for. Moreover, *Trotter* expressly rejected reliance on the same two bankruptcy cases—*In re Wilhelm* and *In re Sheridan*. *Trotter* described those bankruptcy cases as "relat[ing] to standing in bankruptcy proceedings and whether MERS met the statutory, constitutional, and prudential requirements to bring a motion in a bankruptcy court." *Id.* *Trotter* then explained that there are no such standing requirements for non-judicial foreclosure in Idaho:

> While it is true that a party must have standing before it may invoke the jurisdiction of a court, the [non-judicial] foreclosure process in [Idaho Code § 45–1505] ***is not a judicial proceeding***. Instead, "the procedures to foreclose on trust deeds ***outside of the judicial process*** provide the express-lane alternative to foreclosure in the judicial system and strip borrowers of protections embedded in a judicial foreclosure." Thus, as an "alternative" that is "outside the judicial process," [§ 45–1505 alone] sets forth ***all of the requirements to foreclose*** on a deed of trust.

*Id.* (emphasis added; citations omitted). *Trotter* thus distinguished *In re Wilhelm* and *In re Sheridan* as "federal bankruptcy cases that are ***inapplicable in the context of nonjudicial foreclosure***." *Id.* n.3 (emphasis added).

Not surprisingly, consistent with *Trotter*, numerous Idaho trial courts, both state and federal, have dismissed wrongful foreclosure claims virtually identical to those asserted by Edwards here. *See, e.g., Sprouse v. Mortg. Elec. Registration Sys., Inc.*, No. CV-11-4920, slip op. at 10-13 (Kootenai County Dist. Ct. April 11, 2012) (rejecting claims that (1) MERS was not proper beneficiary and could not assign deed of trust to foreclosing lender and (2) deed of trust unenforceable because the note was owned by a different party) (Attachment A); *Hobson v. Wells Fargo Bank N.A.*, No. 1:11-cv-00196-BLW, 2012 WL 505917, *3-5 (D. Idaho Feb. 15, 2012) (same); *Mortensen v. ACE Mortg. Funding, LLC*, No. CV-OC-2011-20448, slip op. at *12-15 (Ada County Dist. Ct. Mar. 26, 2012) (rejecting claims that (1) foreclosing party must

show it owns the note to initiate non-judicial and (2) MERS was not proper beneficiary and thus could not assign deed of trust to foreclosing lender) (Attachment B); *Russell v. One West Bank, FSB,* No. 1:11-cv-00222-BLW, 2012 WL 442903, at *1-2 (D. Idaho Feb. 10, 2012) (rejecting claim that foreclosing party must produce note to have standing to initiate non-judicial foreclosure); *Bacon v. Countrywide Bank*, No. No. 2:11–cv–00107–EJL–CWD, 2012 WL 639521, at *9-11 (D. Idaho Feb. 8, 2012) (dismissing claim that no defendant had authority to foreclose because note and deed of trust were split)*; see also Gordon v. Fed. Nat'l Mortg. Ass'n*, No. CV-2011-1069, slip op. at (Bingham County Dist. Ct. Feb. 17, 2012) (rejecting argument that MERS is not proper beneficiary and that note and deed of trust were split rendering it unenforceable) (Attachment C); *Washburn v. Bank of Am., N.A.*, No. 1:11-cv-00193-EJL-CWD, 2012 WL 139213, at *2 (D. Idaho Jan. 17, 2012) (rejecting note ownership standing argument)

As *Trotter* confirms, Idaho Code § 45–1505 permits a deed of trust beneficiary (*i.e.*, MERS) to direct the trustee (*i.e.*, Pioneer) to foreclose and auction the property, subject only to the strictures of the statute. Here, as in *Trotter*, the Kootenai County public land records irrefutably establish respondents' compliance with all statutory requirements for non-judicial foreclosure. First, pursuant to § 45–1505(1), the deed of trust executed by Edwards and naming MERS as "beneficiary," and MERS' subsequent appointment of Pioneer as successor trustee, were recorded in the public land records. (R.124 – Exs. A & B.) Second, as required by § 45–1505(2), Edwards' admitted failure to make payments constitutes a default under the express terms of the deed of trust authorizing sale of the property. (R.124 – Ex. A.) Third, the trustee, Pioneer, through its attorney in fact, QLS, recorded a Notice of Default and Election to Sell, as mandated by § 45–1505(2). (R.124 – Ex. D.) Fourth, consistent with § 45–1506(2), after recording the Notice of Default and Election to Sell, but more than 120 days before the

scheduled trustee sale, Pioneer, through QLS, sent a Notice of Trustee's Sale to Edwards via certified or registered mail. (R.124 – Ex. C.) Fifth, personal service of the Notice of Sale was attempted and then posted conspicuously at the Property on three separate occasions, per the command of § 45–1506(5). (*Id.*) Sixth, as directed by § 45–1506(5), the notice of sale was published in a newspaper covering Kootenai County. (*Id.*) Finally, affidavits of mailing, posting, and publication of notice of sale were recorded pursuant to § 45–1506(6). (*Id.*)

In sum, this Court's recent *Trotter* decision is dispositive of Edwards' appeal. The district court's decision below should be affirmed.

### B. MERS Is a Proper Beneficiary Under Idaho Law

Edwards also apparently challenges MERS ability to serve as "beneficiary." Edwards evidently claims that only the owner of the note can serve as beneficiary. She criticizes MERS as a "phantom beneficiary" (Appellant's Br. at 12), based on a "self-appointed designation" and "mere invocation of the term" (*id.* at 15), "empty words," (*id.* at 16), and "fabricated labels" (*id* at 30). MERS, she says, is not the "true" (*id.* at 22) or "actual" beneficiary (*id.* at 29) because MERS does not own the note. MERS is just a database that "tracks ownership of the lien" (*id.* at 15, 19) with no "authority to do anything" (*id.* at 16, 28), particularly "foreclose" (*id.* at 16, 17, 29). Edwards' improper beneficiary theory is simply a recasting of her baseless standing or "show me the note" theory. Her improper beneficiary theory turns entirely upon the same underlying premise that only the owner of the note may foreclose. This underlying premise was already rejected in *Trotter*. *See Mortensen*, supra, slip op. at *14 (reading *Trotter* as foreclosing argument that "MERS 'cannot demonstrate that it is the beneficiary as defined by statute, and as such, lacks the standing to assign [deed of trust]").

Even if *Trotter* were not dispositive, it is clear that MERS ***is*** a proper beneficiary. Idaho Code § 45–1502(1) defines "Beneficiary" as "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." (Emphasis added). Nothing in the statute mentions the note, much less requires that note owner be the beneficiary. Here, MERS is "the person named or otherwise designated in [Edwards'] trust deed as the person for whose benefit the trust deed is given." The deed of trust expressly states that "**MERS *is the beneficiary*** under this Security Instrument" (R.124 – Ex. A at p. 1 (emphasis added)), and that "***the beneficiary*** of this Security Instrument ***is MERS***" (*id.* at p. 2.) MERS serves a beneficiary and holder of record legal title to the security instrument in its representative agency capacity on behalf of the owner of the note. (*Id.* at pp. 1-3.) The deed of trust explicitly confers upon MERS the "***the right[] to exercise any or all of [Lender's] interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender***, including, but not limited to, releasing and canceling this Security Instrument." (*Id.* at p. 3 (emphasis added).)

"Benefit" is very broad and malleable word, *see* Webster's New International Dictionary 203 (3d ed. 2002),[10] and MERS clearly ***receives*** "benefit" from the trust deed even though MERS did not lend the money and ultimately does not have the right to receive repayment. The trust deed gives MERS a real "benefit" as holder of record legal title to the security instrument on behalf of the lender, with the delegated authority to take all necessary actions for the lender, including collecting payments and foreclosing. Indeed, as the beneficiary of record, MERS has the exclusive authority to direct the trustee to foreclose (unless and until it assigns away the deed of trust). As a matter of practice, MERS does not normally collect payments and no longer permits foreclosures in its own name (instead, MERS normally assigns the trust deed to the current note holder/owner or servicer who then directs the foreclosure in its name). But these

[10] Statutory construction principles permit resort to common dictionary usage to arrive at plain meaning of terms. *See, e.g., Huyett v. Idaho State Univ.*, 104 P.3d 946, 909 (Idaho 2004).

business practices do not negate the fact that MERS has these contractual rights under the deed of trust.

Idaho courts court have held that MERS may serve as a proper beneficiary under a deed of trust. *See Hobson*, 2012 WL 505917, at *4-5 (dismissing claim that MERS was not a proper beneficiary under I.C. § 45-1502); *Sprouse, supra*, slip op. at 7-9 (same). This is not surprising, given that the designation of MERS as the deed of trust beneficiary not only satisfies the statute, it fully comports with established contract law principles. In Idaho, as in every jurisdiction, "[t]he courts, both at law and in equity, must respect the provisions of a contract lawfully agreed to." *Howard v. Bar Bell Land & Cattle Co.*, 340 P.2d 103, 107 (Idaho 1959). And, as the Ninth Circuit recognized, plaintiffs "agreed to the terms [of trust deed] and were on notice" that MERS was beneficiary. *Cervantes*, 656 F.3d at 1042.

MERS status as beneficiary also fits with basic agency law principles. Indeed, the use of an agent or "nominee," which means "one designated to act for another as his representative in a rather limited sense," *Schuh Trading Co. v. Comm'r*, 95 F.2d 404, 411 (7th Cir. 1938), "has long been sanctioned as a legitimate practice" in real estate, where owners frequently confer rights on a "nominee" or "agent" for a variety of purposes, including to execute or hold security instruments. *In re Cushman Bakery*, 526 F.2d 23, 30 (1st Cir. 1975) (citing cases); *see also In re Childs Co.*, 163 F.2d 379, 382 (2d Cir. 1947); *Barkhausen v. Cont'l Ill. Nat'l Bank*, 120 N.E.2d 649, 655 (Ill. 1954). The Restatement (3d) of Property (Mortgages) confirms that agents may enforce a mortgage on behalf of a lender, even instructing courts to "be vigorous in seeking to find such [an agency] relationship, since the result is otherwise likely to be a windfall for the mortgagor and the frustration of [the lender's] expectation of security." *Id.* § 5.4, cmt. e (1997);

*see also id.* § 5.4(c) ("mortgage may be enforced only by, ***or in behalf of***, a person who is entitled to enforce the obligation the mortgage secures") (emphasis added).[11]

Recognizing that MERS properly may serve as beneficiary under Idaho law, Edwards argues that MERS is not a proper beneficiary here because MERS is also impermissibly acting as trustee. (Appellant's Br. at 31-32.) Edwards notes that "beneficiary" is defined as a person who "shall not be the trustee" and that "trustee" is defined as "a person to whom the legal title to real property is conveyed by trust deed." (*Id.* at 31.) She then points to the deed of trust language that "MERS holds only legal title to the interests granted by borrower in this Security Instrument." (R.124 – Ex. A at p. 3.) She claims that this "legal title" language means that MERS is acting as trustee and therefore MERS cannot also be the beneficiary. (Appellant's Br. at 32.) Once again, Edwards' argument is incorrect. The deed of trust plainly and unambiguously names Alliance (who has now been replaced by Pioneer) as "trustee" and provides that "Borrower ***irrevocably grants and conveys to Trustee, in trust, with power of sale***, the [Property]..." (R.124 – Ex. A at p. 3.) The "legal title" language relied upon by Edwards merely describes the agency relationship between the note owner and MERS, giving MERS legal title to the security instrument, not title to the real property.

Indeed, on this grounds, Idaho trial courts have correctly rejected this same "trustee" argument. For example, in *Payne v. Chase Home Fin., LLC*, No. CV-2011-451, slip op. at 7-8 (Jefferson County D. Ct. Nov. 15, 2011) (Attachment D), the court held that, reading the Deed of Trust as a whole, "it unmistakably defines Alliance Title as the trustee, and ***there is no***

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[11] *See also* MILTON R. FRIEDMAN, FRIEDMAN ON CONTRACTS & CONVEYANCES OF REAL PROPERTY, chapter 6, § 6:1:5 *Nominees* ("[I]t is familiar practice in real estate transactions to use a nominee.").

***reasonable interpretation of the Deed of Trust that would make MERS a trustee.***" (Emphasis added). The court explained:

> [The "legal title" language in the Deed of Trust] does nothing more than give MERS a legal interest in the Deed of Trust as nominee for the lender. In other words, the Deed of Trust gives MERS, as nominee for the lender, power to act on behalf of the lender to foreclose and sell the property or cancel the Deed of Trust. Thus, the language referring to legal interest held by MERS defines the agency relationship between the lender and MERS.... Even considering the provision in isolation, this Court does not believe the Deed of Trust purported to give MERS a legal interest in real property....

*Id.* at 7-8 (Jefferson County D. Ct. Nov. 15, 2011); *accord Gordon, supra,* slip op. at 15 (holding that deed of trust, when read as a whole, does not provide that MERS is acting as trustee, and selectively reading isolated language to the contrary would thwart the mutual intent of the parties, while allowing borrower to "shirk his responsibility"). This Court also should reject Edwards' meritless "trustee" argument.

Edwards also makes the confusing argument that there was an improper "assignment of Deed of Trust." (Appellant's Br. at 9.) But the deed of trust has never been assigned. MERS has been the beneficiary since the deed of trust was first recorded in the land records. To the extent Edwards is really claiming that her note was transferred, that claim appears to be based on the mistaken assumption that her loan was transferred from Lehman Brothers Bank, FSB, to Aurora Bank, FSB. In fact, Lehman Brothers Bank, FSB, merely changed its name to Aurora Bank, FSB. There is no allegation or evidence that the note was transferred.

In any event, contrary to Edwards' assertions, MERS's authority under the deed of trust—which expressly includes the right to foreclose or cancel the deed of trust—certainly includes the authority to assign its beneficiary interest if and when MERS chooses to do so. In *Trotter*, this Court declined to decide whether MERS had authority to assign the deed of trust

because the deed of trust was not in the appellate record. The *Trotter* court did, however, "presume that the deed of trust supports the district court's findings that MERS could assign its interests." 275 P.3d 857, at *6. *Trotter* specifically rejected that the two bankruptcy decisions support "the assertion that under Idaho law, MERS could not assign the deed of trust." *Id*; *see also Sprouse, supra*, at 8-10 (nothing under Idaho law prohibits MERS from assigning its interest in deed of trust to the note owner who then begins foreclosure); *Hobson*, 2012 WL 505917 at *4 (MERS has authority to assign deed of trust).

### C. The Note and Deed of Trust Were Not Impermissibly Split

In another twist on her "show me the note" premise, Edwards argues that the sale or securitization of her note and/or MERS' role as deed of trust beneficiary impermissibly "separated" the note from the deed of trust, rendering the note unsecured and the deed of trust "unenforceable." (Appellant's Br. at 25.) According to Edwards, the "note and deed of trust must be held by the same owner in order to be enforceable." (*Id.*) Again, this "show me the note" theory was rejected in, and cannot survive, *Trotter*. *See Russell*, 2012 WL 442903, at *1 (reading *Trotter* as precluding claim that no party had standing to foreclosure because no party owned both the deed of trust and note which were split as a result of securitization).

In any event, there was no separation between the note and the deed of trust in this case. As noted above, there is no evidence that Edwards' note was ever securitized or sold by the original lender, Lehman Brothers Bank, FSB, n/k/a Aurora Bank, FSB. But even if the note was sold or securitized, there was no legal separation of the note and deed of trust. Edwards argument ignores the indisputable fact that MERS was party to the original loan transaction and that note and deed of trust were executed contemporaneously as part of that single transaction. Thus, as the Ninth Circuit recognized, the note and deed of trust were "not irreparably split" because at all times MERS remained the agent of the lender and its successors and assigns.

*Cervantes*, 656 F.3d at 1044; a*ccord U.S. Bank v. Howie*, --- P.3d ----, 2012 WL 2053575, at *9 (Kan. Ct. App. June 8, 2012) ("Because MERS was acting as an agent of [the lender], the Mortgage and the Note were never severed....").

Numerous courts in Idaho and around the country likewise have rejected this Edwards' "split" argument:

> ***Horvath v. Bank of N.Y., N.A.***, 641 F.3d 617, 624 (4th Cir. 2011) (citations omitted) ("If [plaintiff] were correct [] that the transfer of a note splits it from the deed of trust [naming MERS as beneficiary], there would be little reason for notes to exist in the first place. One of the defining features of notes is their transferability, but on [plaintiff's] view, transferring a note would strip it from the security that gives it value and render the note largely worthless. This cannot be—and is not—the law.") (citations omitted).
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> ***Commonwealth Property Advocates, LLC v. Mortg. Elec. Registration Sys., Inc.***, --- F.3d ----, 2011 WL 6739431, at *6 (10th Cir. Dec. 23, 2011) (holding that general principle that security follows the debt does not "prohibit[] the original parties to the Note and Deed of Trust from agreeing to have someone other than the beneficial owner of the debt act on behalf of that owner and its successors and assigns to enforce rights granted in the trust deed").
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> ***Wade v Meridias Capital, Inc.***, No. 2:10-cv-998-DS, 2011 U.S. Dist. LEXIS 28414, at *6-7 (D. Utah Mar. 17, 2011) ("'split the note' theory has been heavily litigated in this district and in multiple other districts and has been rejected repeatedly").
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> ***In re MERS Litig.***, MDL Docket No. 09–2119–JAT, 2011 WL 4550189, at *3-4 (D. Ariz. Oct. 3, 2011) ("[T]he alleged falsity in this claim arises from the fundamental argument that the MERS recordation process splits the note from the deed of trust and renders the note unenforceable. However, as discussed above, this Court does not find legal support for the proposition that the MERS system of securitization is so inherently defective so as to render every MERS deed of trust completely unenforceable and unassignable.").
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> ***Meyer v. Bank of Am., N.A.***, No. 1:10–CV–00632–EJL–REB, 2011 WL 4584762, at *3 (D. Idaho Sept. 30, 2011) (collecting supporting authority and holding that "the securitization of the loan did not extinguish the security interest in the real property").
>
> ***Sprouse***, *supra*, slip op. at 10-13 (dismissing claim that securitization or role of MERS as beneficiary splits note from deed of trust rendering the deed of trust unenforceable).

For the same reasons, this Court should reject this tired "split" argument, too.

### D. The Overwhelming Majority of Courts in Other Jurisdictions Also Have Rejected Edwards' Theories

Given the dispositive force of this Court's apposite decision in *Trotter*, case law from other jurisdictions is not particularly meaningful to the resolution of this appeal. But this Court can take solace in that *Trotter* does not stand alone. The correctness in this Court's analysis is confirmed by the numerous decisions around the country rejecting defaulting borrower claims that MERS is not a proper beneficiary or that the involvement of MERS somehow destroys standing to foreclose or separates the note from the deed of trust rendering the note unsecured and the security instrument unenforceable. In addition to the cases cited in Section II.C, *supra*, the following are just examples from the growing collection of cases far too numerous to cite:

***Cervantes***, 656 F.3d at 1042, 1044 (affirming dismissal of claims that MERS's role as beneficiary was a "sham" and split the deed of trust from the note rendering the loan unsecured).

***Kiah v. Aurora Loan Servs.***, LLC, No 11-1010 (1st Cir. Dec. 14, 2011) (judgment affirming and attaching district court's order dismissing claims that MERS could not assign the mortgage because MERS did not have an interest in the note) (Attachment E).

***Ferguson v. Avelo Mortg., LLC***, 195 Cal. App. 4th 1618, 1626-27 (2011) (holding that MERS, as beneficiary under the deed of trust, was entitled to initiate foreclosure despite not owning the note).

***Residential Funding Co. v. Saurman***, 805 N.W.2d 183 (Mich. 2011) (rejecting claim that MERS was not proper mortgagee because it lacked ownership interest in the note).

***Commonwealth Prop. Advocates, LLC v. Mortg. Elec. Registration Sys., Inc.***, 263 P.3d 397, 402 (Utah Ct. App. 2011) (rejecting theory that MERS role as beneficiary "splits" deed of trust from note rendering the loan unsecured).

***Jackson v. Mortg. Elec. Registration Sys., Inc.***, 770 N.W.2d 487, 500-501 (Minn. 2009) (concluding that holder of record legal title to mortgage can foreclose even without an ownership in the note).

***Trent v. Mortg. Elec. Registration Sys., Inc.***, 288 F. App'x 571, 572 (11th Cir. 2008) (holding that under the terms of the mortgages, MERS has the authority to initiate foreclosure actions).

***Wiley v. U.S. Bank, N.A.***, No. 3:11-CV-1241-B, 2012 WL 1945614, at *4 (N.D. Tex. May 30, 2012) (dismissing as invalid under Texas law "show-me-the-note" and "split" theories challenging MERS assignment of deed of trust to servicer who then initiated foreclosure for note owner).

***In re MERS Litig.***, MDL Docket No. 09–2119–JAT, 2012 WL 1906503, at *3-4 (D. Ariz. May 25, 2012) ("Plaintiff does not cite to any authority in Hawaii, nor is the Court aware of any such authority, that requires that MERS prove 'standing,' through the production of a promissory note or otherwise, before it could initiate non-judicial foreclosure....").

***Hien Phan v. Bank of N.Y.***, --- F. Supp. 2d ----, 2012 WL 1222572, at *4 (E.D. Va. Apr. 10, 2012) (rejecting as a recast "show me the note theory" borrower claim that MERS could not assign deed of trust without establishing note owner's permission).

***Welk v. GMAC Mortgage, LLC***, --- F. Supp. 2d ----, 2012 WL 1035433, at *4 (D. Minn. Mar. 29, 2012) (stating that "'show-me-the-note' argument ... has been rejected by every federal and state court that has considered it under Minnesota law....").

***In re MERS Litig.***, MDL Docket No. 09–2119–JAT, 2011 WL 4550189, at *3-4 (D. Ariz. Oct. 3, 2011) (dismissing claims that, under Arizona, California, Neveda, and Oregon law, MERS is not true beneficiary and thus cannot foreclose under deeds of trust).

***Croce v. Trinity Mortg. Assur. Corp.***, NO. 208CV01612 KJD PAL, 2009 WL 3172119, *3 (D. Nev. Sep 28, 2009) ("Plaintiffs have cited no authority that is controlling upon this Court that holds that MERS cannot have standing as a nominee beneficiary in connection with a nonjudicial foreclosure proceeding under Nevada law. This Court has previously determined that MERS does have such standing. Courts around the country have held the same.) (citations omitted).

The district court's decision below is correct and should be affirmed.

### E. Alternative Grounds, Not Relied Upon by the District Court, Provide Independent Bases for Affirmance

The district court's decision below may be affirmed on any ground, not just those grounds relied upon by the district court in granting summary judgment to respondents. *See Lattin v. Adams County*, 236 P.3d 1257, 1264 n.7 (2010). Here, several independent grounds raised by respondents below, but not relied upon by the district court in dismissing Edwards'

complaint, provide independent, alternative grounds for affirmance of the district court's decision.

### 1. Edwards' Claims Are Equitable and Are Barred by Her Failure to Allege Ability to Cure Her Default

As respondents argued below (R.126), Edwards' claims for declaratory and injunctive relief to stop an allegedly wrongful foreclosure are equitable in nature, and those claims fail unless Edwards pleads (and ultimately proves) she can repay or at least reinstate her loan. It is well settled that claims for injunctive and declaratory relief are generally based in equity. *See Moon v. N. Idaho Farmers Ass'n*, No. CV 2002 3890, 2002 WL 32129530, at *12 n.5 (Kootenai County Dist. Ct. Nov. 30, 2002) ("[a]n injunction is an equitable remedy issued under established principles that guide courts of equity") (citing *Pacific Rivers Council v. Thomas*, 936 F. Supp. 738, 742 (D. Idaho 1996)); *Wood v. Yordy*, No. 1:07–cv–00350–EJL, 2012 WL 1252989, at *8 (D. Idaho Mar. 30, 2012) (noting that "declaratory judgment" is a "form[] of equitable relief") (citing *Eccles v. Peoples Bank of Lakewood Village*, 333 U.S. 426, 431 (1948)).

It is equally well settled that those who seek equity "must be required to do equity." *Haener v. Albro*, 249 P.2d 919, 925 (Idaho 1952). Under Idaho law, this means that a party cannot claim that a contract is invalid while continuing to reap the contract's benefits. *See, e.g., id.* at 260 ("Appellants ask full performance by respondents. By the same token, respondents are in equity entitled to full performance by appellants of all their obligations."); *Quayle v. Stone*, 251 P. 630, 630 (Idaho 1926) ("[H]aving enjoyed the benefits of the lease, the tenant cannot use the statute to defeat the payment of the balance of the rent which he agreed to pay."). This equitable principle applies fully to mortgage instruments. *See Shaner v. Rathdrum State Bank*, 161 P. 90, 93 (Idaho 1916) (equity requires a plaintiff to offer to satisfy the debt in exchange for the property); *MacHold v. Farnan*, 117 P. 408, 410 (Idaho 1911) (same).

Taken together, the foregoing bedrock legal principles stand for the proposition that there are no "free houses" just as there are no "free lunches." In other words, a defaulting borrower who comes to the court in equity seeking to stop foreclosure must do equity herself by pleading (and ultimately proving) the ability cure the default or payback the money. *See, e.g., Gordon, supra*, slip op. at 11 (borrower's failure to to tender loan proceeds required dismissal of quiet title claim predicated on theory that foreclosure was wrongful because MERS was not proper beneficiary) (citing *Trusty v. Ray*, 249 P.2d 814, 817 (Idaho 1952)). *See also Hogan v. NW Trust Servs., Inc.*, No. 10-6028-HO, 2010 WL 1872945, at *5 (D. Or. May 7, 2010) ("plaintiffs [do not] deny that they are in default on their loans [and do not] offer anything to indicate that they were able to tender the debt in order to disrupt the non-judicial foreclosure"), *aff'd,* 2011 WL 2601563, 441 F. App'x 490 (9th Cir. July 1, 2011); *White v. BAC Home Loans Servicing, LP*, No. 3:09-CV-2484-G, 2010 WL 4352711, at *5 (N.D. Tex. Nov. 2, 2010) ("to the extent [plaintiff] seeks equitable relief to avoid foreclosure, he cannot state a claim for such relief because he has not tendered the amount due on the loan"); *see also Keen v. Am. Home Mortg. Servicing, Inc.*, 664 F. Supp. 2d 1086, 1101 (E.D. Cal. 2009) (plaintiff failed to allege "any facts supporting her ability to tender any payment" and "an immediate ability or willingness to tender payment"). In sum, it makes no sense to stop an allegedly wrongful foreclosure if the defaulted borrower cannot cure because the inability to cure means foreclosure is an unfortunate eventuality.

Here, of course, Edwards has not plead (much less presented any evidence that she might be able to prove) that she can cure her default. On the contrary, she has lived in the Property since August 2009 without making so much as a single loan payment. Under these

circumstances, her equitable claims fail based on her own failure to do equity, which provides an alternative, independent grounds for affirming the district court's dismissal of her complaint.

### 2. Edwards Failed to Plead Any Fraud Claim with the Requisite Particularity Required by Idaho R. Civ. P. 9(b)

In her amended (and initial) complaint, Edwards asserted only two purported causes of action: (1) temporary and permanent injunction (Count I); and (2) declaratory judgment (Count II). (R.8-18; *see also* R.8-13.) Also woven throughout her amended complaint, however, are conclusory and speculative purported factual allegations of "fraud" and "fraudulent" conduct, apparently as supposed justification for the requested injunctive and declaratory relief. (R.4-6.) As respondents pointed out to the district court (R.126), Edwards' fraud allegations do not even satisfy the minimal notice pleading requirements of Idaho R. Civ. P. 8(a), much less Rule 9(b)'s heightened pleading requirement that fraud be plead with particularity. *See Dengler v. Hazel Blessinger Family Trust*, 106 P.3d 449, 453 (Idaho 2005) ("Fraud claims must be pled with particularity").

Under Idaho law, to prove fraud, a plaintiff must establish every one of the following nine elements:

> "(1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge about its falsity or ignorance of its truth; (5) his intent that it should be acted upon by the person and in the manner reasonably contemplated; (6) the hearers ignorance of its falsity; (7) his reliance on the [representation]; (8) his rights to rely thereon; (9) his consequent and proximate injury."

*Jenkins v. Boise Cascade Corp.*, 108 P.3d 380, 386 (Idaho 2005) (quoting *Witt v. Jones*, 722 P.2d 474, 477 (Idaho 1986)). In order to satisfy Rule 9(b), "'[t]he party alleging fraud ***must support the existence of each of the elements of the cause of action for fraud by pleading with particularity the factual circumstances constituting fraud.***'" *Id.* at 386 (emphasis added) (quoting *Estes v. Barry*, 967 P.2d 284, 288 (Idaho 1998)); *see, e.g.*, *Dengler*, 106 P.3d at 453

(affirming dismissal of fraud claim because "utterly general averments" without any particular allegations regarding "representations, falsity, materiality, intent, reliance or injury based on representations" fail to satisfy Rule 9(b)); *Jenkins*, 108 P.3d at 386-87 (affirming dismissal for failure to plead fraud with particularity where complaint only "generally alleged ... several ... false statements").

Here, the amended complaint contains nothing more than conclusory and speculative allegations of generalized "fraud" or "fraudulent" activities of respondents. There are no particularized allegations whatsoever as to any, much less all nine of the elements of a fraud claim. The amended complaint does not even name the elements of fraud. For similar reasons, in *Cervantes* the Ninth Circuit affirmed dismissal of a borrower's analogous fraud theory. *See* 656 F.3d at 1034 (noting that the borrowers' fraud allegations did not indicated that they "were misinformed about MERS's role as a beneficiary," that they "relied on any misrepresentations about MERS in deciding to enter into their home loans," or that "the designation of MERS as beneficiary caused them any injury"). Similarly, here, Edwards' amended complaint failed by wide margin to satisfy Rule 9(b)'s particularity requirement, which provides independent grounds for affirming the district court's dismissal below.

### F. Edwards' Meritless "Bankruptcy," "Substitute Trustee," and "Insurance Set Off" Theories Should be Deemed Abandoned

In her amended complaint (R.104, R.106, R.112), and in her arguments to the district court below, Edwards contended that the foreclosure could not go forward because: (1) her original lender, Lehman Brothers Bank, FSB, was in bankruptcy; (2) there had been an improper substitution of trustee involving MERS, Alliance, and American Gold Mortgage Corporation, Aurora Loan Services, LLC, and Fidelity National Title Insurance Company; and (3) the loan was securitized and was insured against default such that the note owner was paid in full.

Because Edwards has not continued with these theories on appeal, they should be deemed abandoned. *See generally State v. Prestwich*, 783 P.2d 298, 300 (Idaho 1989) (citations omitted) ("This Court and the Court of Appeals have held that the failure of the appellant to include an issue in the statement of issues required by I.A.R. 35(a)(4) will eliminate the consideration of that issue in the appeal."), *abrogated on other grounds by State v. Guzman*, 842 P.2d 660 (1992).

Even if not abandoned, Edwards' bankruptcy, trustee substitution, and insurance set off theories are at best completely meritless, at worst blatantly frivolous, and provide no basis whatsoever for reversal of the district court. As the district court correctly recognized, based on judicial notice of public records of the United States Bankruptcy Court for the Southern District of New York and the Federal Reserve Board, Lehman Brothers Holdings, Inc. filed for bankruptcy. (R.161; R.124 – Ex. F.) On the other hand, Edwards' lender, Lehman Brothers Bank, FSB, changed its name to Aurora Bank, FSB, and has never filed bankruptcy. (R.161; R.124 – Exs. G & I.) Similarly, as the district court concluded, based on judicial notice of public records from Kootenai County, the alleged improper substitution of trustee related to another loan—Edwards' prior loan that was paid off—which has nothing to do with the loan at issue in this lawsuit. (R.157, 162; R. R.124 – Exs. J, K, & L.) Finally, the district court correctly concluded that Edwards had "failed to provide any evidence to support the[] allegations" relating to insurance or set off. (R.163.) In sum, Edwards' questionable theories regarding bankruptcy and improper trustee substitution provide absolutely no grounds for reversal of the decision of the district court.

### G. Edwards' (Incorrect) Position, If Accepted, Would Have a Devastating Impact on Idaho's Residential Mortgage Industry

Lastly, it should not be lost on this Court that if it were to accept Edward's insupportable arguments that respondents lack standing to pursue non-judicial foreclosure against borrowers

who, like Edwards, are in undeniable and irreconcilable default, there would be adverse consequences for Idaho beyond just Edwards' loan. It is well documented that there are approximately 3,000 MERS members,[12] with tens of millions of MERS' security instruments (mortgages and deeds of trust) nationwide currently registered on the MERS system, and more than half of all new residential loan originations involve MERS. *See Mortg. Elec. Registration Sys., Inc. v. Brosnan,* No. C 09-3600 SBA, 2009 WL 3647125, at *1 (N.D. Cal. Sept. 4, 2009) (noting that there were 60 million MERS mortgages and deeds of trust on MERS system); *Jackson*, 770 N.W.2d at 491-92 (noting that approximately two-thirds of all new residential mortgage loans involve MERS security instruments). It is equally well known that residential mortgage loans are commonly sold on the secondary mortgage loan market after closing. *See Cervantes*, 656 F.3d at 1038; *Jackson*, 770 N.W.2d at 490. Thus, there are undoubtedly many such MERS loans in Idaho. Yet, if Edwards' position regarding MERS lack of standing were correct, most if not all of these MERS loans in Idaho would be subject to challenge.

Edwards not only challenges MERS authority or "standing" to foreclose, she seemingly challenges MERS' authority to take any action, such as assigning the deed of trust, and presumably even recording a reconveyance or satisfaction when the loan is paid off. If Edwards were correct, every time an Idaho borrower with a MERS deed of trust defaulted, the borrower could challenge the foreclosure for lack of standing on the grounds that the promissory note is unsecured and deed of trust is unenforceable because different parties hold the note and deed of trust. This would undoubtedly increase the number of foreclosure lawsuits currently pending before Idaho courts, and would likely even cause some number of performing borrowers to consider intentionally defaulting on their loans in hopes of avoiding altogether the obligation to

[12] *See supra* n.6.

repay the money they borrowed. County recorders would also be deluged with attempts to transfer beneficiary status out of the name of MERS and into the lender holding the promissory note.

But that is not all. Edwards' position, if accepted, would affect subsequent bona fide purchasers who now own and live in a property where MERS was involved in the foreclosure or even a reconveyance at payoff. As to foreclosures that have already taken place, numerous foreclosed parties would undoubtedly commence lawsuits seeking to set aside the foreclosures. In such instances, it arguably would require the unwinding of the entire foreclosure process as well as the subsequent loan transaction between the bona fide purchasers and their lenders, and reverting title to the property back to someone who lost it solely because they failed to honor their loan obligations. Further, the tens of thousands of reconveyances and releases of lien that MERS has executed on behalf of lenders for borrowers who honored their obligations would be subject to challenge. This would include, for example, the reconveyance issued in connection with Edwards' prior loan with American Gold Mortgage Corporation. (D.124 – Ex. K.) Taking Edwards' position to its logical extreme, that reconveyance was never effective, and her prior loan was thus never satisfied of record.

All of this would increase litigation and recording errors and delays, unnecessary clouds on title, and ultimately make residential mortgage loans more expensive and less available for Idaho citizens. This is not hyperbole. This Court need look no further than Michigan as a real world example of what would be likely to occur in Idaho if the Edwards' view were adopted here. In Michigan, the state's intermediate appellate court reached an anomalous conclusion that MERS could not foreclosure because it held no interest in the promissory note. Not surprisingly, the court of appeal's fundamentally incorrect decision was quickly reversed by the Michigan

supreme court. *See Residential Funding Co. v. Saurman*, 805 N.W.2d 183, 183-84 (Mich. 2011). But for six months before that reversal, there was confusion and market illiquidity in Michigan (*e.g.*, title insurers stopped insuring properties making it difficult to obtain mortgage loans),[13] and widespread litigation challenging completed foreclosures, including 11 class actions.[14] This Court should not allow this same scenario to play out in Idaho. As was eventually acknowledged in Michigan, MERS is a valid beneficiary (and mortgagee) and MERS deeds of trust (and mortgages) are legally enforceable. As shown above, nothing in Idaho law supports the Edward's position that MERS lacks standing to foreclose on behalf of the lender on whose behalf MERS is acting as beneficiary. To avoid the foregoing unnecessary problems in Idaho, the district court's decision below should be affirmed.

## IV. MERS, NOT EDWARDS, IS ENTITLED TO FEES AND COSTS

Contrary to Edwards' assertions, MERS, not Edwards, are entitled to their fees and costs under I.A.R. 40 and 41. Edwards' claims lack any merit whatsoever and appear to have been brought without proper investigation and then continued in the face of indisputable public records that contradict her claims.

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[13] Cami Reister, *Home sales stay steady; But just for June, closed deals were 20% lower than a year ago*, GRAND RAPIDS PRESS (July 14, 2011) (MERS' Addendum at 5); Nick Tirimaos & Ruth Simon, *Effort on Home Loans Stalls*, WALL STREET JOURNAL (Sept. 19, 2011) (MERS' Addendum at 7.)

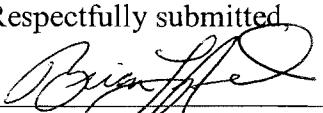
[14] *Banacki v. OneWest Bank, FSB*, No.11-cv-11864, 2011 U.S. Dist. LEXIS 119906, at *2 (E.D. Mich. Oct. 18, 2011).

## CONCLUSION

For the reasons stated herein, the district court's decision below should be affirmed in all respects.

Dated: July 10, 2012

Respectfully submitted,



Derrick J. O'Neill, ISB No. 4021
Brian Langford, ISB No. 7747
Routh Crabtree Olsen P.S.
300 Main Street, Suite 150
Boise, ID 83702
(208.489.3035)

Robert J. Pratte, *pro hac vice application pending*
Brent R. Lindahl, *pro hac vice application pending*
Fulbright & Jaworski, L.L.P.
80 South 8th Street, Suite 2100 Minneapolis, MN 55402
(612.321.2244)
*Attorneys for Respondents Mortgage Electronic Registration Systems, Inc.*

**IN THE SUPREME COURT OF THE STATE OF IDAHO**

---

LESLIE JENSEN-EDWARDS,

Appellant,

vs.

MORTGAGE 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,

Respondents.

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# ADDENDUM TO RESPONDENTS' OPENING BRIEF

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**Case Number 38604-2011**

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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Leslie Jensen-Edwards
2600 E. Seltice Way
Suite 144
Post Falls, ID 83854
*Appellant in Pro Per*

Derrick J. O'Neill, ISB No. 4021
Brian Langford, ISB No. 7747
Routh Crabtree Olsen P.S.
300 Main Street, Suite 150
Boise, ID 83702
(208.489.3035)

Robert J. Pratte, *pro hac vice application pending*
Brent R. Lindahl, *pro hac vice application pending*
Fulbright & Jaworski, L.L.P.
80 South 8th Street, Suite 2100
Minneapolis, MN 55402
(612.321.2244)
*Attorneys for Respondents Mortgage Electronic Registration Systems, Inc.*

Holger Uhl, Esq.
McCarthy & Holthus LLP
8995 SW Miley Road
Suite 103
Wilsonville, OR 97070
*Attorney for Quality Loan Service Corporation and Pioneer Lender Trustee Services LLC*

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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

| | |
|---|---|
| JOHN SPROUSE,<br><br>Plaintiff,<br><br>vs.<br><br>Mortgage Electronic Registration Systems, Inc. (MERS)<br><br>Defendant. | CASE NO. CV-11-4920<br><br>MEMORANDUM DECISION AND ORDER RE: DEFENDANT'S MOTION TO DISMISS |

John Sprouse, Pro Se, Plaintiff

Matthew McGee, MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHTD., for Defendant

## I. Factual and Procedural History

On August 25, 2006, Plaintiff John Sprouse ("Sprouse") executed a Promissory Note in favor of First Guaranty Mortgage Corporation for the purchase of real property commonly described as 5178 East Portside Court, Post Falls, Kootenai County, Idaho (the "Subject Property"). The Note provided that Sprouse agreed to pay First Guaranty

Mortgage Corporation, as Lender, $227,950.00 plus interest for the Subject Property. *Amended Complaint, Ex. B at p. 2.*

Also on August 25, 2006, Sprouse executed a Deed of Trust to serve as security for the payment obligation reflected in the Note. The Deed of Trust was recorded in the Kootenai County Recorder's Office on August 29, 2006, as Instrument No. 2052344000. *Amended Complaint, Ex. B.*

The Deed of Trust provided that Defendant Mortgage Electronic Registration Systems, Inc. ("MERS") was the nominee beneficiary for Lender First Guaranty and its successors and assigns. *Id. at p. 2.* The Deed of Trust also provided that if Sprouse breached any covenant or agreement contained in the Deed of Trust, the Property may be sold. *Id. at pp. 12-13, ¶¶ 20, 22.*

On January 4, 2011, MERS executed an Assignment of Deed of Trust, wherein MERS transferred all beneficial interest under the August 25, 2006, Deed of Trust to U.S. Bank National Association as Trustee for RAMP 2006RZ5 ("U.S. Bank"), along with the Promissory Note. The Assignment of Deed of Trust was recorded in the Kootenai County Recorder's Office on January 12, 2011, as Instrument No. 2298763000. *Amended Complaint, Ex. A.*

On June 17, 2011, Sprouse filed his Verified Complaint for Quiet Title and Declaratory Judgment, along with a Memorandum of Law. On July 14, 2011, MERS filed a Notice of Appearance. On July 15, 2011, Sprouse filed a Motion for Default Judgment. On July 18, 2011, MERS filed its Response in Opposition to the Motion for Entry of Default Judgment, along with a Motion for a Motion for Definite Statement. On July 20, 2011, this Court entered its Order Re: Plaintiff's Motion for Entry of Default

Judgment, wherein it denied Sprouse's motion finding that MERS had appeared in the action.

On August 1, 2011, MERS's Motion for Definite Statement came on for hearing and Sprouse agreed to file an Amended Complaint that comported with the Idaho Rules of Civil Procedure. On August 10, 2011, Sprouse filed his Amended Verified Compliant for Quiet Title and Declaratory Judgment. On August 24, 2011, MERS filed its Motion to Dismiss, pursuant to I.R.C.P. 12(b)(6), along with a Memorandum in Support. On October 13, 2011, Sprouse filed his Response Brief.[1] On October 13, 2011, MERS filed its Reply Brief.

On October 14, 2011, MERS Motion to Dismiss came on for hearing and this Court raised the issue of *Trotter v. Bank of New York Mellon, et al.*,[2] which had recently been fully argued to the Idaho Supreme Court. The parties agreed to stay the proceedings in the instant action pending a decision in the *Trotter* matter, and this Court entered its Order for Stay of Proceedings on October 17, 2011.

On March 30, 2012, Sprouse filed an Amended Response Brief. On April 4, 2012, MERS filed a Reply to Sprouse's Amended Response Brief. On April 6, 2012, MERS's Motion to Dismiss came on for hearing, and this Court took the matter under advisement.

## II. Legal Standard

When considering a motion to dismiss pursuant to I.R.C.P. 12(b)(6), the court determines the legal sufficiency of the plaintiff's statement of his claim. *Gallagher v*

[1] Sprouse has attached documents to his opposition and Amended opposition briefs, which this Court has not considered as part of its present decision. This Court is only considering the Amended Complaint in the matter and the two exhibits attached to the Amended Complaint that are incorporated into the pleading.
[2] *Trotter v. Bank of New York Mellon, et al.*, ---P.3d---, 2012 WL 975493 (Idaho March 23, 2012).

*State*, 141 Idaho 665, 667, 115 P.3d 756, 758 (2005). In determining whether a complaint adequately states a cause of action, every reasonable intendment will be made to sustain it. *Curtis v. Siebrand Bros. Circus & Carnival Co.*, 68 Idaho 285, 194 P.2d 281 (1948) (citations omitted). A motion under this section admits the truth of the facts alleged, and all intendments and inferences that reasonably may be drawn therefrom, and such will be considered in light most favorable to the plaintiff. *Walenta v. Mark Means Co.*, 87 Idaho 543, 394 P.2d 329 (1964). A motion to dismiss may be granted for failure to state a claim if it is absolutely clear that a plaintiff can prove no set of facts which would support any relief. *Harper v. Harper*, 122 Idaho 535, 835 P.2d 1346 (Ct. App. 1992). The issue is not whether the plaintiff will ultimately prevail, but whether the party is entitled to offer evidence to support the claims. *Sumpter v. Holland Realty, Inc.*, 140 Idaho 349, 351, 93 P.3d 680, 682 (2004) (citation omitted). The only facts that a court may consider on a motion to dismiss for failure to state a claim are those appearing in the complaint, along with any facts that are the proper subject of judicial notice because they are facts of common knowledge which controvert averments of the complaint. *Hellickson v. Jenkins*, 118 Idaho 273, 275, 796 P.2d 150, 152 (Ct. App. 1990).

## III. Analysis

In his Amended Complaint, Sprouse asserts that MERS is not a lawful beneficiary under the Deed of Trust according to "two recent Federal rulings regarding [MERS] as being an invalid party on the Deed of Trust"[3] and pursuant to I.C. §45-1502. *Amended Complaint at p. 2, ¶ 1.* Further, Sprouse alleges,

> [T]he true and beneficial owner of the promissory note that is associated with the Deed of Trust in this action is

[3] Sprouse cites the Court to *In re Wilhelm*, 407 B.R. 392 (Bankr. D. Idaho 2009) and *In re Sheridan*, No. 08-20381-TLM, 2009 WL 631355 (Bankr. D. Idaho Mar. 12, 2009).

> unknown and deliberately obfuscated, therefore clouding title to the subject property. Therefore, it is the purpose of this Quiet Title Action to compel any and all parties with real interest in this subject property to present their valid proof of claim, else release their claims.

*Amended Complaint at p. 2, ¶ 1.*

Essentially, in the Amended Complaint, Sprouse alleges that because MERS was not a lawful beneficiary, it had no authority to assign its interests in the August 25, 2006, Deed of Trust and Promissory Note to U.S. Bank. *Amended Complaint at p. 6, ¶ 19.* Further, Sprouse alleges that because MERS was not a lawful beneficiary, the assignment of the Deed of Trust split the Promissory Note from the Deed of Trust, which is impermissible pursuant to *Carpenter v. Longan*, 83 U.S. 271 (1872). Further, Sprouse asserts that he does not know who currently owns the Promissory Note. *Amended Complaint at p. 6, ¶¶ 20 -22.* As such, Sprouse prays that this Court "compel [MERS] to identify the real owner of the promissory note ... [and] enter a declaratory judgment ordering the Deed of Trust to be null and void." *Id. at pp. 8-9, ¶ 32.*

**A. Sprouse is Held to the Same Standards as a Licensed Attorney**

In his Amended Complaint and Response brief, Sprouse argues that a pro se litigant should not be held to the same standard as a licensed attorney, and that a pro se litigant's pleadings should be liberally construed to do substantial justice. Further, Sprouse asserts that the Court should aid a pro se litigant with amending his pleading to comport with the correct form. *Amended Complaint at p. 3; Response to Defendant's Motion to Dismiss at p. 2.*

In this Court's July 20, 2011, Order Re: Plaintiff's Motion for Entry of Default Judgment, this Court provided that Sprouse was being held to the standards of a licensed

attorney pursuant to the Idaho case law on the matter. The Idaho Supreme Court has held that "[p]ro se litigants are not accorded any special consideration simply because they are representing themselves and are not excused from adhering to procedural rules." *In re SRBA*, 149 Idaho 532, 237 P.3d 1 (2010). "Pro se litigants are held to the same standards and rules as those represented by an attorney." *Trotter*, 2012 WL 975493, at *3 (citation omitted).

**B. The Quiet Title Demand Fails to State a Claim**

MERS argues that it claims no interest in the August 25, 2006, Deed of Trust nor the August 25, 2006, Promissory Note, and this is evidenced by the Assignment of Deed of Trust. Therefore, no right, title or interest remains with MERS as nominee for First Guaranty Mortgage Corporation, its successors and assigns. *Memorandum in Support of Motion to Dismiss at pp. 2 and 4.*

Sprouse argues that the assignment was not valid because MERS was not a valid beneficiary under I.C. § 45-1502(1). Therefore, Sprouse argues, "it is [MERS's] assignment action which leaves the interest in the Deed of Trust with [MERS], creates the cloud on the title, and gives rise to this Quiet Title Action." *Response Brief at p. 4.*

I.C. § 6-401 provides, in pertinent part, that an action for quiet title may be maintained in the following circumstances:

> An action may be brought by any person against another who claims an estate or interest in real or personal property adverse to him, for the purpose of determining such adverse claim.

Idaho case law provides that Sprouse must show that he owns the property free of the mortgage in order to bring a claim to quiet title. In *Losee v. Idaho Co.*, 148 Idaho

219, 222, 220 P.3d 575, 578 (2009), the Idaho Supreme Court provided "to remove a cloud on title, the burden of proof is on the plaintiff to prove that it has title to the subject property free from any encumbrance." In *Trusty v. Ray*, 73 Idaho 232, 236, 249 P.2d 814, 817 (1952), the Idaho Supreme Court held that a mortgagor cannot quiet title against a mortgagee without showing that he has paid or tendered payment of the debt.

Since the January 12, 2011, Assignment of Deed of Trust was recorded, MERS, has not claimed any right, title or interest in the Subject Property. The Assignment shows that U.S. Bank now has a beneficial interest in the Subject Property. Further, Sprouse has failed to show that he has tendered full payment of his debt obligation in order to proceed on his quiet title action.

Therefore, Sprouse fails to state a claim for quiet title upon which relief may be granted against MERS. As such, Sprouse's request that this Court quiet title in his favor is denied, and MERS's Motion to Dismiss as to this claim is granted.

**C. Sprouse's Claims for Declaratory Relief Fail to State a Claim**

1. The Assignment of the Deed of Trust was Valid

Sprouse argues that the assignment of the Deed of Trust was not valid because MERS was not a valid beneficiary under I.C. § 45-1502(1), and courts within Idaho and across the United States are challenging MERS role as a beneficiary in a Deed of Trust. *Response Brief at p. 4.* Sprouse cites the Court to non-Idaho case law and two Idaho bankruptcy court decisions in support of his argument, to wit: *In re Wilhelm*, 407 B.R. 392 (Bankr. D. Idaho 2009) and *In re Sheridan*, No. 08-20381-TLM, 2009 WL 631355 (Bankr. D. Idaho Mar. 12, 2009).

The Idaho Supreme Court addressed *Sheridan* and *Wilhelm* in its *Trotter* decision,

> Those cases are related to standing in bankruptcy proceedings and whether MERS met the statutory, constitutional, and prudential requirements to bring a motion in bankruptcy court. *See Sheridan*, 2009 WL 631355, at *4; *Wilhelm*, 407 B.R. at 398. Neither case supports Trotter's assertion that under Idaho law, MERS could not assign its interest in the deed of trust.

*Trotter*, 2012 WL 975493, at *5.

I.C. § 45-1502(1) defines a beneficiary as "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" (emphasis added).

The August 25, 2006, Deed of Trust provides:

> "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. *Amended Complaint, Ex B at p. 2, ¶ (E).*
>
> TRANSFER OF RIGHTS IN THE PROPERTY
> The beneficiary of this Security Interest is MERS (solely as nominee for Lender and Lender's successors and assigns) and the successors and assigns of MERS. *Amended Complaint, Ex. B at p. 3.*

This Court held in *Trotter v Bank of New York Mellon* (Kootenai County Case No. CV-10-95), that MERS could assign its interest in the Deed of Trust as a nominee beneficiary. The Idaho Supreme Court provided that "[w]e therefore presume that the deed of trust supports the district court's finding that MERS could assign its interest to Bank of New York."[4] *Trotter*, 2012 WL 975493, at *5.

Further, this Court held in *Edwards v. Mortgage Electronic Registration System, Inc., et al.*, (Kootenai County Case No. CV-10-2745) that there was no statutory

[4] Neither party provided our Supreme Court with the Deed of Trust, causing the Supreme Court to presume that this Court's holding was not in error; however, the decision did not overrule this Court's conclusion.

provision in Idaho's Deed of Trust Act, I.C. § 45-1502, et seq., that prevented the beneficiary from assigning its interests in a Promissory Note or Deed of Trust to another beneficial party. Specifically, this Court held that "the Note and Deed of Trust may be sold one or more times without prior notice to the Borrower." *Memorandum Decision and Order (November 16, 2010) at p. 17.*

I.C. § 45-1502(1) apparently allows for an assignment via the "successor in interest" language. Further, the Deed of Trust provides that MERS may transfer its beneficial rights in the property.

This Court has also reviewed two recent U.S. District Court of Idaho decisions, and finds them persuasive, although not binding, to wit: *Russell v. OneWest Bank FSB*, 2012 WL 442903 (D. Idaho Feb. 10, 2012) and *Hobson v. Wells Fargo Bank, N.A.*, 2012 WL 505917 (D. Idaho Feb. 15, 2012). In *Hobson*, Chief Judge Winmill analyzed MERS role as a legitimate beneficiary under the Idaho Deed of Trust Act, and concluded that MERS was a beneficiary for the similar reasoning that this Court provided in its *Edwards* decision.[5] The *Hobson* court cited this Court's *Trotter* and *Edwards* decisions as authority in reaching its conclusion, and provided that "[a]lthough the *Trotter* [the Idaho Supreme Court's decision] court did not directly decide the issue of MERS's authority, the Court believes the Idaho Supreme Court would conclude in this case that MERS had authority to assign a beneficial interest in the Deed of Trust to Wells Fargo." *Hobson* at *4-5.

Sprouse has not cited this Court to any binding or persuasive case law that leads this Court to overturn its previous findings that MERS can assign its beneficial interests

[5] Hobson cited to *Ralph v. Met Life*, Mindoka County District Court Case No. CV 2010-0200 (Aug. 10, 2011) for the proposition that MERS is merely a sham beneficiary. Sprouse also made this argument at the April 6, 2012, hearing. This Court, like Judge Winmill, is unconvinced that MERS is a sham beneficiary.

in the Deed of Trust to another entity. Therefore, this Court finds that the Assignment of Deed of Trust, wherein MERS assigned its beneficial interest in the Deed of Trust to U.S. Bank, was valid.

2. The Note and Deed of Trust did not Split and Allegations of Unclear Ownership due to Securitization fails to State a Claim

In his Amended Complaint, Sprouse asserts that the Deed of Trust has become unenforceable because the Note and Deed of Trust were bifurcated or split at the time of the initial loan and at the assignment to U.S. Bank. As such, Sprouse alleges, the Deed of Trust is now unenforceable and defective. *Amended Complaint at p. 7, ¶ 25.* Sprouse cites this Court to *Carpenter v. Longan*, 83 U.S. 271 (1872) for the proposition that the Note and the Mortgage are inseparable.

Sprouse also alleges that the Note has now been securitized and currently owned by unknown shareholders, therefore, he does not know the true and beneficial owner of the Note that is associated with the Deed of Trust. *Amended Complaint at p. 2, ¶ 1; p.8, ¶ 31.*

MERS argues that Sprouse's allegations are known as the "split the note" theory, and that this theory has repeatedly been rejected in courts throughout the country. MERS cites the Court to *In re MERS*, 2011 WL 251453 (D. Ariz. Jan. 25, 2011) (a multi-district litigation) and *Wade v. Meridias Capital, Inc.*, 2011 WL 997161 (D. Utah March 17, 2011). *Memorandum in Support at p. 6.* Additionally, MERS argues that Sprouse does not allege any facts to suggest that U.S. Bank does not own the Note, regardless of securitization, nor does he allege the he does not know to whom to make payments, or that he has attempted to pay his loan and payment was refused or improperly credited. *Id. at p. 10.*

The Idaho appellate courts have not yet addressed the split the note theory; however, Idaho law provides for the transfer or assignment of loans. *See* I.C. & 28-3-201. Further, Idaho law provides that the security follows the debt. *See* I.C. §§ 45-911 and 28-9-203(g).

The August 25, 2006, Deed of Trust specifically provides that the Note together with the Deed of Trust can be sold one or more times without prior notice to Sprouse. *Amended Complaint, Ex. B at p. 11, ¶ 20.*

Sprouse heavily relies on *Carpenter v. Longan,* 16 Wall. 271, 83 U.S. 271, 274 (1872). This Court has reviewed the case and finds that it doesn't aid Sprouse. *Carpenter* is a U.S. Supreme Court appeal from the Colorado Territory, and is not binding on this Court. Additionally, the facts of the case concern a loan that had not yet matured and not a home mortgage in default as is apparently the case here. Lastly, numerous federal courts have reviewed *Carpenter* and found that it does not support a split the note claim. One example is in *Owens v. Recontrust Co., NA,* 2011 WL 3684473 (D. Ariz. Aug. 23, 2011), wherein the court provided:

> Plaintiff alternatively argues that if she signed the Deed of Trust on August 24, 2006, then it was not "together" with the Promissory Note that is dated August 23, 2006, which impermissibly "separates" the Deed of Trust and the Note "pursuant to *Carpenter v. Longan* (1872)". (Doc. 1–2, p. 11.) This Court previously has rejected foreclosure plaintiffs' attempts to rely on *Carpenter v. Longan*, 16 Wall. 271, 83 U.S. 271, 274, 21 L.Ed. 313 (1872) for their "impermissible separation" theory. See, e.g., *Maxa v. Countrywide Loans, Inc.*, 2010 WL 2836958 *4 (July 19, 2010). **Plaintiff's separation of the Deed of Trust and Promissory Note theory therefore fails to state a claim for relief.**

*Id.* at *3 (emphasis added).

This Court therefore finds that the Note and Deed of Trust in this matter have not split at any time. Further, this Court concludes that Sprouse's allegation that the bifurcation has caused the Deed of Trust to become defective and unenforceable does not state a claim of relief, because the Idaho appellate courts have not yet ruled on the issue and the federal courts that have addressed the issue have found rejected the theory.

Although not binding on this Court, the U.S. District Court of Idaho has recently addressed the "securitization" argument in *Meyer v. Bank of America, N.A.*, 2011 WL 4584762 (D. Idaho Sep. 30, 2011), and this Court finds the *Meyer* decision persuasive. In *Meyer*, the court held "[t]he Court finds the securitization of the loan did not extinguish the security interest in the real property." *Id.* at *3. The *Meyer* court then went on to cite to numerous other federal courts that came to the same conclusion.

Further, courts in Idaho's First Judicial District, have held that securitization of a promissory note does not state a valid claim for relief. *See McMullen v. JP Morgan Chase Bank, et al.*, Kootenai County Case No. CV11-3431, Memorandum Decision and Order Granting in Part and Denying in Part Defendants' Motion to Dismiss (February 6, 2012) (wherein District Judge Benjamin Simpson held that plaintiff cited no authority supporting his securitization conclusion and dismissed the securitization cause of action finding that "whether or not the loan was securitized does nothing to effect Plaintiff's obligations under the note").

In the present case, Sprouse has not cited this Court to any authority that supports his allegation that because the Note was securitized U.S. Bank does not own the Note. The Assignment of Deed of Trust provides that MERS, as a nominee beneficiary, transferred its beneficial interest in the Note and Deed of Trust to U.S. Bank. Therefore,

the allegation that Sprouse does not know who currently owns the Note does not set forth a cognizable claim upon which this Court can grant relief.

Lastly, the present lawsuit is not an action to terminate a pending foreclosure action. The parties have mentioned that non-judicial foreclosure proceedings under the Idaho Deed of Trust Act have begun, but Sprouse has not made any allegations that the non-judicial foreclosure is defective or the provisions of the Act are not being complied with. He has not named U.S. Bank nor the trustee as a party to this action. In the Amended Complaint, Sprouse does allege that certain documents have not been filed in the Kootenai County Recorder's Office, but he does not explain what those documents are or how they relate to a quiet title/declaratory judgment action. Further, he does not allege that MERS, as the previous nominee beneficiary, has anything to do with those documents or their alleged lack of recording.

Therefore, this Court concludes that Sprouse's allegations that the Promissory Note and Deed of Trust split are not supported by the record, and even if the allegation was supported, the allegation fails to establish a cognizable claim. Additionally, the securitization allegation also fails to set forth a valid claim. As such, Sprouse's claims for declaratory judgment are dismissed.

## IV. Conclusion and Order

Based upon the foregoing analysis, it appears beyond doubt that Sprouse can prove no set of facts in support of his claims that would entitle him to relief. As such, MERS's Motion to Dismiss is granted.

It appears to the Court that good cause for the entry of this Order has been shown; now therefore,

IT IS ORDERED that Sprouse's Complaint fails to state a claim upon which relief can be granted as to all causes of action asserted, and this case is hereby dismissed with prejudice *in toto*.

IT IS FURTHER ORDERED that the *lis pendens* Sprouse has filed against the Subject Property is hereby expunged.

IT IS FURTHER ORDERED that MERS will prepare and submit to this Court a judgment consistent with this Memorandum Decision and Order.

DATED this 11 day of April, 2012.

Lansing L. Haynes
LANSING HAYNES, District Judge

CERTIFICATE OF MAILING

I hereby certify that on the 11 day of April 2012, a true and correct copy of the foregoing was mailed, postage prepaid, sent by interoffice mail, or faxed to:

John Sprouse
Pro Se
1601 N. Sepulveda Blvd., #631
Manhattan Beach, CA 90266
Facsimile: 310-921-5673 Fax

Matthew McGee
Moffatt, Thomas, Barrett, Rock & Fields
PO BOX 829
Boise, ID 83701
Facsimile: 208-385-5384 Fax

Clifford T. Hayes
Clerk of the District Court

By Shari Carr
Deputy Clerk

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

ERIC MORTENSEN,

Plaintiff,

vs.

ACE MORTGAGE FUNDING, LLC; STEWART TITLE CO.; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. (MERS); COUNTRYWIDE HOME LOANS SERVICING, LP aka BANK OF AMERICA CORP., N.A. aka BAC HOME LOAN SERVICING, LP; RECONTRUST; BANK OF NEW YORK MELLON CORP., fka BANK OF NEW YORK,

Defendants.

Case No. CV-OC-2011-20448

MEMORANDUM DECISION AND ORDER DENYING MOTION TO STRIKE, GRANTING REQUEST FOR JUDICIAL NOTICE, AND GRANTING MOTION TO DISMISS

This matter comes before the Court on (1) Defendants Mortgage Electronic Registration Systems, Inc. ("MERS"), Bank of America, N.A. for itself and as successor by merger to BAC Home Loans, LP, fka Countrywide Home Loans Servicing, LP (erroneously sued as "Bank of America Corp., N.A.") ("BANA"), ReconTrust Company, N.A. (erroneously sued as "Reconstrust") ("ReconTrust"), and The Bank of New York Mellon fka The Bank of New York, as Trustee for Certificateholders, CWABS, Inc., Asset-backed Certificates, Series 2007-BC3 (erroneously sued as "Bank of New York Mellon Corp., fka Bank of New York") ("BONY") (collectively, "Defendants") Motion to Dismiss; (2) Defendants' Request for Judicial Notice; and

(3) Plaintiff Eric Mortensen's Motion to Strike. Oral argument was heard on March 5, 2012. Eric Mortensen appeared *pro se*. Amber Dina appeared on behalf of Defendants. At the conclusion of oral argument, the Court took the matter under advisement.

## BACKGROUND AND PROCEDURAL HISTORY

On February 7, 2007, Plaintiff Eric Mortensen ("Mortensen" or "Plaintiff") borrowed $148,000 from Defendant Ace Mortgage Funding, LLC ("Ace Mortgage") as evidenced by an Adjustable Rate Note ("Note") and secured by a Deed of Trust ("DOT") on real property located at 549 Longford in Meridian, Idaho ("Property"). (Compl. ¶ 3.1; Aff. of Amber N. Dina in Supp. of Req. for Judicial Notice ("Dina Aff.") Exs. A [Note], B [DOT].) The DOT lists MERS as "nominee for the Lender and Lender's successors and assigns" and Defendant Stewart Title Company ("Stewart Title") as the Trustee. (Dina Aff. Ex. B, p 2.) On January 24, 2011, MERS assigned the Deed of Trust to BONY. (Compl. Attach. 14.) BONY then appointed ReconTrust successor trustee. (*Id.* Attach. 15.)

Plaintiff experienced "a dramatic decrease in income in 2008" and tried to sell the Property, but could not. (*Id.* ¶¶ 3.2-3.3.) Plaintiff then attempted to sell the Property via short sale, but "all offers were rejected...by Countrywide." (*Id.* ¶¶ 3.4-3.6.) Plaintiff sought a loan modification and was offered a trial payment plan; Plaintiff does not allege that he made all of the payments under the trial plan or that he qualified for a permanent modification. (*Id.* ¶¶ 3.8-3.10, Attach. 6.) Plaintiff failed to make the required monthly payments under the Note and DOT, and ReconTrust recorded a Notice of Default on January 25, 2011. (*Id.* Attach. 22.) On May 19, 2011, ReconTrust issued a Notice of Trustee's Sale setting the foreclosure sale for

September 26, 2011. (*Id.* Attach. 23.) The Property was sold in October 2011 to BONY. (Dina Aff. Ex. C [Trustee's Deed].)

Plaintiff filed his Verified Complaint for Declaratory and Injunctive Relief and Damages on October 26, 2011. In his complaint, Mortensen alleges causes of action for (1) Breach of Fiduciary Duty against Ace Mortgage Funding, Stewart Title Company, and Bank of America Home Loans; (2) Breach of Fiduciary Duty against ReconTrust and Bank of America; (3) Violation(s) of Truth in Lending Act; (4) Violation(s) of Deed of Trust Act; (5) Violation(s) of Real Estate Settlement Procedures Act; (6) Violation(s) of Consumer Protection Act; (7) Intentional Infliction of Emotional Distress; (8) Negligent Infliction of Emotional Distress; (9) Misrepresentation by Trustee; and (10) Violation(s) of Title 26, Subtitle-A, Chapter-1, Subchapter M, Part-II §§ 850-862 and Securities Fraud.

## MOTION TO STRIKE

Admissibility of evidence is a matter within the Court's discretion. *Burgess v. Salmon River Canal Co., Ltd.*, 127 Idaho 565, 574, 903 P.2d 730, 739 (1995). To determine whether a trial court has abused its discretion, the appellate courts will consider whether the trial court "correctly perceived the issue as discretionary, whether it acted within the boundaries of its discretion and consistently with applicable legal standards, and whether it reached its decision by an exercise of reason." *Reed v. Reed*, 137 Idaho 53, 57, 44 P.3d 1108, 1112 (2002).

Plaintiff requests the Court strike the Affidavit of Amber N. Dina. Plaintiff asserts that Ms. Dina cannot testify in place of Defendants or on Defendants' behalf, and that the Idaho State Bar Code of Conduct and Code of Ethics and the America Bar Association condemn such

testimony in affidavit form when the actual Defendants are capable of submitting an affidavit themselves. The Court rejects these assertions. Plaintiff's Motion to Strike is DENIED.

## REQUEST FOR JUDICIAL NOTICE

Defendants request, pursuant to I.R.C.P. 44(d), that the Court take judicial notice of the Note, Deed of Trust, and Trustee's Deed. These documents were provided to the Court in the Affidavit of Amber N. Dina in Support of Request for Judicial Notice on December 22, 2011. Plaintiff signed the Note on February 7, 2007. Plaintiff relies on the Note in his Verified Complaint for Declaratory and Injunctive Relief and Damages. Plaintiff executed the Deed of Trust, and it was recorded on February 13, 2007. The Trustee's Deed was recorded on November 1, 2011.

The Deed of Trust and Trustee's Deed are copies of the records of the Ada County Recorder's Office. These are the type of documents that are not subject to reasonable dispute and are capable of accurate and ready determination by resort to sources whose accuracy cannot be readily questioned. Additionally, Plaintiff relies on the Note for multiple claims in his complaint.

The Court will take judicial notice of the Note, Deed of Trust, and Trustee's Deed pursuant to I.R.E. 201. Defendants' Request for Judicial Notice is GRANTED.

## MOTION TO DISMISS

### A. Legal Standard

An Idaho Rule of Civil Procedure 12(b)(6) motion to dismiss is appropriate when there are no genuine issues of material fact and the case may be decided as a matter of law. *Coghlan v. Beta Theta Pi Fraternity*, 133 Idaho 388, 398, 987 P.2d 300, 310 (1999). The non-moving party

is entitled to have all inferences viewed in his favor and only then may the question be asked whether a claim for relief has been stated. *Id.* "The issue is not whether the plaintiff will ultimately prevail, but whether the party is 'entitled to offer evidence to support the claims.'" *Id.* (quoting *Orthman v. Idaho Power Co.*, 126 Idaho 960, 962, 895 P.2d 561, 563 (1995)). If the plaintiff can prove no set of facts upon which the court could grant relief, the complaint should be dismissed. *Johnson v. Boundary Sch. Dist. No. 101*, 138 Idaho 331, 334, 63 P.3d 457, 460 (2003).

It is clear that the court may not consider evidence or facts outside the scope of the pleadings when determining if the petition states a claim upon which relief may be granted. The court, however, may consider facts that supplement those stated in the complaint, of which the court may properly take judicial notice. *Hellickson v. Jenkins*, 118 Idaho 273, 276, 796 P.2d 150, 153 (Ct. App. 1990). Where matters outside the pleadings are submitted in support of a party's motion to dismiss, a court must treat the motion to dismiss as a motion for summary judgment. *Id.* at 273, 150; *Masi v. Seale*, 106 Idaho 561, 562, 682 P.2d 102, 103 (1984).

**B. Breach of Fiduciary Duty**

Plaintiff's first and second causes of action allege breach of fiduciary duty against Defendants Ace Mortgage Funding, Stewart Title Company, Bank of America Home Loans, ReconTrust, and Bank of America. While Plaintiff names both Bank of America Home Loans and Bank of America, the Court's understanding of the parties is that that the appropriate party is Bank of America, N.A. ("BANA"). Only Defendants MERS, BANA, BONY, and ReconTrust have filed a Motion to Dismiss; Ace Mortgage has not appeared in this suit yet, and Stewart Title filed a Notice of Appearance on March 16, 2012. Therefore, the Court will consider the breach of fiduciary duty claims only as against Defendants BANA and ReconTrust.

"To establish a claim for breach of fiduciary duty, the plaintiff must first establish that a fiduciary relationship existed at the time of the breach." *Beaudoin v. Davidson Trust Co.*, 151 Idaho 701, 705, 263 P.3d 755, 759 (2011). "A fiduciary relationship exists when one party is under a duty to act or to give advice for the benefit of the other upon a matter within the scope of the relation." *Id.* "Such a relationship does not exist when parties are dealing with one another at 'arm's length.'" *High Valley Concrete, L.L.C. v. Sargent*, 149 Idaho 423, 428, 234 P.3d 747, 752 (2010). "Whether a fiduciary relationship exists is a question of law." *Beaudoin v. Davidson Trust Co.*, 151 Idaho at 705, 263 P.3d at 759.

Plaintiff alleges that BANA owes him a fiduciary duty because BANA "solicited and intentionally induced the trust, confidence and reliance of the Plaintiffs" and "had superior knowledge regarding the consequences of the failure to procure the original loan, as well as the loan modification and delay of the sale" and that Plaintiffs relied on BANA's advice, just as BANA "knew or should have known Plaintiff would." (Compl. ¶ 4.3.) Plaintiff contends BANA "refused to cooperate with Plaintiff's efforts at a resolution to this matter." (*Id.* ¶ 4.4.) Plaintiff alleges a trustee (presumably ReconTrust) "has a fiduciary duty toward the Plaintiffs to insure that the [DOT] does not get split from the Note and pooled and securitized outside the State of Idaho." (*Id.* ¶ 5.1.) Plaintiff alleges ReconTrust breached that fiduciary duty "by continuing the sale when Plaintiff was seeking loan modification." (*Id.* ¶ 5.2.) Plaintiff alleges both BANA and ReconTrust breached their fiduciary duties "by failing to provide meaningful contact information regarding who actually had the promissory note and [DOT] to prevent the trustee's sale" and by "failing to enjoin the August 7, 2010, trustee's sale despite receiving numerous telephone calls, e-mail and faxes...and being served on the day of the sale with the original Complaint, Summons and Lis Pendent." (*Id.* ¶¶ 5.3-5.4.)

ReconTrust, the successor trustee, sent the Notice of Default to Plaintiff. Idaho Code § 45-1504(2) states, "[u]pon recording the appointment of a successor trustee in each county in which the deed of trust is recorded, the successor trustee shall be vested with all powers of an original trustee." The Court interprets this to mean that all powers and all responsibilities rest with the successor trustee, ReconTrust. However, it is clear that to the extent any trustee owed the plaintiff a fiduciary duty, that duty only extended to the borrower's attempts to tender the amount due to cure the default. *Diamond v. Sandpoint Title Ins., Inc.*, 132 Idaho 145, 151, 968 P.2d 240, 250 (1998). Idaho Code § 45-1502 does not articulate a fiduciary duty owed by a trustee to a borrower. It is not clear to this court that the trustee has the power or duty over any aspect other than the trustee's sale triggered by certain contingencies, such as a default by the borrower. *Long v. Williams*, 105 Idaho 585, 586, 671 P.2d 1048, 1049 (1983). Indeed, other courts have held that "a trustee in a nonjudicial foreclosure is 'not a true trustee with fiduciary duties, but rather a common agent for the trustor and beneficiary.'" *Gaitan v. Mortgage Electronic Registration Systems*, 2009 WL 3244729 at *12 (C.D. Cal. 2009) (quoting *Hendrickson v. Popular Mortg. Servicing, Inc.*, 2009 WL 1455491, at *7 (N.D. Cal. May 21, 2009)).

Plaintiff has not asserted that he attempted to cure the default by offering a tender of payment, nor that he is capable of doing so. The Court is not aware of, nor has it been provided with, any case law that provides the trustee with a fiduciary duty to postpone or enjoin the trustee's sale without an attempt by the borrower to cure the default by tendering payment, to prevent the split of the deed of trust and note, or to provide the plaintiff with the location of the promissory note and DOT. Because Plaintiff did not allege that he attempted to cure the default

by paying the amount due, it cannot be said that the trustee violated a fiduciary duty to the plaintiff.

Likewise, the Court is not aware of, and has not been presented with, any case law assigning a fiduciary duty between a bank and a borrower. Generally, the relationship between a bank lender and a borrower is a debtor-creditor relationship, not a fiduciary relationship. *Idaho First Nat. Bank v. Bliss Valley Foods, Inc.*, 121 Idaho 266, 277, 824 P.2d 841, 852 (1991). The Idaho Supreme Court previously considered cases from other jurisdictions which held that there are some instances in which a fiduciary relationship may arise between a lender and borrower, but the Court ultimately rejected the claim of a fiduciary relationship. *Id.*; *see also Black Canyon Racquetball Club v. First National Bank*, 119 Idaho 171, 804 P.2d 900 (1991).

Additionally, the Court is not aware of, nor has it been presented with, any case law that prescribes a fiduciary duty on the servicing agent. In *Castaneda*, the court, when referring to the lender, the beneficiary, and the loan servicer, stated, "'[a]bsent special circumstances a loan transaction is at arms-length and no duties arise from the loan transaction outside of those in the agreement." *Castaneda v. Saxon Mortg. Services, Inc.*, 687 F.Supp.2d 1191, 1198, (E.D. Cal. 2009) (quoting *Rangel v. DHI Mortgage Co., Ltd.*, 2009 WL 2190210, at *3 (E.D.Cal. July 21, 2009)). Plaintiff has not alleged that any such special circumstances exist. BANA's role as the loan servicer does not impose any fiduciary duty upon it.

Plaintiff also asserts that BANA created a fiduciary duty by intentionally inducing the trust, confidence and reliance of Plaintiff. Plaintiff argues that this duty was breached when BANA refused to cooperate with Plaintiff to resolve the matter. The Court has taken judicial notice of the Note. The Note specifically states how much was due, when it was due, and where Plaintiff was to send payment. The Note addresses default, stating that upon a Notice of Default

the past due amount becomes due and, possibly, the entire principal remaining due. Plaintiff has never alleged that he offered or was able to pay the past due amount or the principal upon the default. The Court has also taken judicial notice of the DOT. The Court does not see, nor has it been made aware of, any provisions in the loan documents that create a fiduciary duty to the borrower or require that the lender must modify the loan upon default. There is no evidence that the servicing agent did not engage in the modification process with Plaintiff. In fact, Plaintiff sought a loan modification and was offered a trial payment plan, but Plaintiff chose to not make the payments. (Compl. ¶¶ 3.8-3.10, Attach. 6.)

Plaintiff fails to allege any facts which give rise to a fiduciary duty owed to him by Defendants or that any such duty has been breached. Plaintiff alleges nothing more than an arms-length loan transaction and an ordinary lender-borrower relationship between himself and Defendants. Therefore, Plaintiff has failed to state a claim for breach of fiduciary duty.

**C. Violation of Truth in Lending Act**

Plaintiff alleges Defendants violated the Truth in Lending Act ("TILA") because "Plaintiffs [sic] did not receive documents and disclosures from Countrywide Home loan, [BANA], [MERS], and [ReconTrust], as required under the Truth in Lending Act, the RESPA Standards," and therefore, Plaintiff is "entitled to damages and/or rescission rights." (Compl. ¶ 6.2.) In Plaintiff's response brief in opposition to Defendants' Motion to Dismiss, Plaintiff also contends that he was "rushed through the lending process, not given a signed copy by lender of the Loan Note or Deed of Trust, not notified that his Loan and/or Deed of Trust was being placed in a Pooling and Servicing Agreement, not clearly informed of the contents of the loan note, and when Plaintiff offered to make a payoff of the note by requesting it under a [QWR] the

Defendants refused, in writing, to provide the documents that would have allowed Plaintiff to settle his debt." (Pl.'s Opp. Br. 22.)

The statute of limitations for a TILA damage claim is "within one year from the date of the occurrence of the violation." 15 U.S.C.A. § 1640(e); *Shaw v. Lehman Bros. Bank*, FSB, 2009 WL 790166, at *4 (D. Idaho 2009) (stating "[t]he 'occurrence of the violation' is presumably the date the loan was finalized" and dismissing plaintiff's time-barred TILA damages claim); *see also Monaco v. Bear Stearns Resid. Mortg. Corp.*, 554 F.Supp.2d 1034, 1039 (C.D. Cal. 2008) (dismissing the time-barred TILA claim for damages). The limitations statute is triggered when a borrower enters into a loan agreement with a creditor. *See e.g., King v. Cal.*, 784 F.2d 910, 915 (9th Cir. 1986).

A TILA rescission claim is subject to a three-year statute of limitations. 15 U.S.C.A. § 1635(f) ("an obligor's right of rescission shall expire three years after the date of consummation of the transaction...."). The statute of limitations for rescission is also triggered when the borrower enters into the loan agreement with the creditor. *See, e.g., King*, 784 F.2d at 915.

Plaintiff obtained his loan in February 2007. (Compl. ¶ 3.1.) The instant action was not filed until October 26, 2011, over three years too late to assert a claim for TILA damages. Plaintiff's rescission claim is also barred by the applicable limitations period, which expired in February 2010. Plaintiff contends the statute of limitations does not apply to his case because Defendants' "TILA violations are defensive in nature to enjoin foreclosure." (*Id.* ¶ 6.3.)

The Idaho Supreme Court has stated that it is generally disfavored to file a motion to dismiss on the grounds of the statute of limitations. *Singleton v. Foster*, 98 Idaho 149, 151, 559 P.2d 765, 767 (1977). But, the concurrence in *Singleton* stated, "I do not wish to be construed as adhering to the view that a statute of limitations can never be raised by a motion to dismiss under

I.R.C.P. 12(b)(6)." *Id.* There are multiple cases in which the Idaho Supreme Court has found it appropriate to raise the affirmative defense of the statute of limitations in a motion to dismiss. The Court finds there is no ambiguity or dispute regarding when the applicable statute of limitations began to run, nor whether or not they have been tolled to prevent dismissal of the applicable claims. Plaintiff is the initiator of this cause of action. Therefore, his case is not "defensive" and Defendants may raise statute of limitations issues. Plaintiff obtained his loan in February of 2007. Plaintiff has asserted no alternative date as the occurrence of the violation; therefore, the Court finds the statute of limitations began to run at the time the loan was finalized in 2007, and Plaintiff's TILA claim is time-barred.

Even if Plaintiff's TILA claim is not time-barred, Plaintiff's TILA claim fails because Plaintiff does not and cannot allege tender. Rescission is a party's unilateral unmaking of a contract and is generally a defense for a nondefaulting party. *Black's Law Dictionary* 1332 (8th ed. 2004). "A claim for rescission requires plaintiffs to allege they can or will tender the borrowed funds back to the lender." *Kamp v. Aurora Loan Services*, 2009 WL 3177636 (C.D.Cal. 2009); *see Yamamoto v. Bank of N.Y.*, 329 F.3d 1167, 1171 (9th Cir. 2003) ("rescission should be conditioned on repayment of the amounts advanced by the lender"); *see Garza v. Am. Home Mortg.*, 2009 WL 188604, at * 5 (E.D. Cal. 2009) (dismissing TILA claim in light of failure to allege tender because "[r]escission is an empty remedy without [plaintiff]'s ability to pay back what she has received"). Plaintiff has been consistently in default; it does not appear he would be able to meet the tender requirement of TILA, nor has he argued such ability, thus preventing rescission.

Plaintiff's TILA claim also fails because Plaintiff has failed to allege how Defendants violated TILA. *Tarasanta v. Homecomings Financial, LLC*, 2009 WL 3055227, at * 3 (S.D. Cal.

2009) (TILA claim dismissed because "[p]laintiffs do not allege which provisions of the TILA were violation by which [d]efendant nor do [p]laintiffs allege 'non-conclusory factual content' which is 'plausibly suggestive of a [TILA] claim entitling the plaintiffs to relief.'"). Mortensen only sets forth a vague, conclusory statement that he is entitled to damages and rescission under TILA because he "did not receive documents and disclosures." But, Plaintiff does not plead any facts describing what "documents and disclosures" he believes he should have received.

Finally, Plaintiff's TILA claim fails because he has failed to plead detrimental reliance on any allegedly inadequate disclosure – also a necessary element of any claim for actual damages based upon an alleged TILA violation. 15 U.S.C.A. § 1640(a); *Gold Country Lenders v. Smith*, 289 F. 3d 1155, 1157 (9th Cir. 2005).

The Court finds that Plaintiff can prove no set of facts upon which the Court could grant relief. Plaintiff's Truth in Lending Act claim is dismissed.

**D. Violation of Deeds of Trust Act**

Plaintiff asserts that ReconTrust lacked standing to foreclose on his property. (Compl. ¶ 7.3.) The Idaho Supreme Court recently considered this issue in *Trotter v. Bank of New York Mellon et al.* and ultimately rejected the contention that a party must have "standing" to initiate non-judicial foreclosure:

> Trotter asks the Court to find a standing requirement in the Act, without providing a textual basis or citing to controlling precedent. However, nothing in the text of the statute can reasonably be read to require the trustee to prove it has "standing" before foreclosing. Instead, the plain language of the statute makes it clear that the trustee may foreclose on a deed of trust if it complies with the requirements contained within the Act.
>
> The Act states that "a deed of trust executed in conformity with this act may be foreclosed by advertisement and sale" in accord with the procedures it describes. I.C. § 45–1503(1). Those procedures are set forth in I.C. § 45–1505....

> Additionally, once the notice of default has been recorded, the trustee must give formal notice of the trustee's sale to parties specified in the statute. *See* I.C. § 45–1506. These are the only requirements that precede foreclosure. We hold that, pursuant to I.C. § 45–1505, a trustee may initiate nonjudicial foreclosure proceedings on a deed of trust without first proving ownership of the underlying note or demonstrating that the deed of trust beneficiary has requested or authorized the trustee to initiate those proceedings.
>
> The record confirms that the Appointment of Successor Trustee, Notice of Default, and Notice of Trustee's Sale complied with the statutory requirements and were recorded as specified in the statute, and the district court found that the defendants met the requirements of I.C. §§ 45–1505 and 45–1506. Because there is no statutory requirement for the trustee to prove standing before initiating a nonjudicial foreclosure on a deed of trust, we affirm the district court's order dismissing Trotter's claims.

--- P.3d ---, 2012 WL 206004, at *3-4 (2012).

Like in *Trotter*, the record here confirms that the Appointment of Successor Trustee, Notice of Default, and Notice of Trustee's Sale complied with the statutory requirements and were recorded as specified in the statute. The Deed of Trust, which Plaintiff signed on February 7, 2007, specifically authorized Stewart Title Co. as the trustee and MERS as the nominee for the lender. (Dina Aff. Ex. B, p. 2.) Idaho Code § 45-1505 specifically grants the trustee the ability to foreclose upon a default. Idaho Code § 45-1504 specifically gives the trustee the ability to resign and be replaced and that any successor trustee shall have the powers of the original trustee. Plaintiff was provided notice that Stewart Title Co. had been replaced by a successor trustee in January 2011 as evidenced by the Appointment of Successor Trustee. (Compl. Attach. 15.) ReconTrust recorded a Notice of Default on January 25, 2011. (*Id.* Attach. 22.) On May 19, 2011, ReconTrust issued a Notice of Trustee's Sale setting the foreclosure sale. (*Id.* Attach. 23.) Defendants met the requirements of I.C. §§ 45-1505 and 45-1506. Plaintiff's assertions regarding ReconTrust's standing to initiate foreclosure fail.

Plaintiff also alleges MERS "cannot demonstrate that it is the beneficiary as defined by statute, and as such, lacks the standing to assign any of its alleged interests to the subject property due to the unlawful splitting of Plaintiff's wet ink note and deed of trust, and removal from the State of Idaho." (*Id.* ¶ 7.2.) Plaintiff specifically agreed to MERS' role as the nominee for the lender in the DOT. (Dina Aff. Ex. B.) Further, Plaintiff has not provided any controlling precedent to support his assertion that MERS, as the lender's nominee cannot assign its interest in the DOT. Plaintiff discusses *In re Veal* at length in his opposition. But, *In re Veal* is a bankruptcy court case from Arizona and, as such, does not trump the binding *Trotter* decision. *Trotter*, 2012 WL 206004, at *3 n.3 (decisions relating to standing in bankruptcy proceedings are "inapplicable in the context of nonjudicial foreclosure.").

Additionally, Plaintiff has not provided support for his assertion that both the Note and DOT must not be securitized. In *Cervantes v. Countrywide Home Loans, Inc.*, the 9th Circuit Court of Appeals specifically upheld a foreclosure in which MERS was the nominee for the lender, regardless of whether the note was split from the deed. 656 F.3d 1034, 1044 (9th Cir. 2011). The court stated, "[e]ven if we were to accept the plaintiffs' premises that MERS is a sham beneficiary and the note is split from the deed, we would reject the plaintiffs' conclusion that, as a necessary consequence, no party has the power to foreclose." *Id.* "Further, even if we were to accept the plaintiffs' contention that MERS is a sham beneficiary and the note is split from the deed in the MERS system, it does not follow that any attempt to foreclose after the plaintiffs defaulted on their loans is necessarily 'wrongful.'" *Id.* at 1047.

Plaintiff also claims that MERS is no longer registered in the State of Idaho and therefore, "is prohibited from engaging in any business practices." (Compl. ¶ 7.2.) According to I.C. § 30-1-1501(2)(g), "[c]reating or acquiring indebtedness, mortgages and security interests in

real or personal property" does not constitute transacting business within the state, requiring a certificate of authority from the Secretary of State.

Plaintiff fails to state a claim under the Deed of Trust Act.

**E. Violation(s) of Real Estate Settlement Procedures Act**

12 U.S.C. § 2605 requires that borrowers be notified if there is a change in the servicer of their loan. Section 2605 also requires the loan servicer to respond to borrower inquiries; § 2605(e)(1) states:

> (A) In general
>
> If any servicer of a federally related mortgage loan receives a qualified written request from the borrower (or an agent of the borrower) for information relating to the servicing of such loan, the servicer shall provide a written response acknowledging receipt of the correspondence within 20 days (excluding legal public holidays, Saturdays, and Sundays) unless the action requested is taken within such period.
>
> (B) Qualified written request
>
> For purposes of this subsection, a qualified written request shall be a written correspondence, other than notice on a payment coupon or other payment medium supplied by the servicer, that--
>
> **(i)** includes, or otherwise enables the servicer to identify, the name and account of the borrower; and
>
> **(ii)** includes a statement of the reasons for the belief of the borrower, to the extent applicable, that the account is in error or provides sufficient detail to the servicer regarding other information sought by the borrower.

Section 2605(f)(1) states:

> Whoever fails to comply with any provision of this section shall be liable to the borrower for each such failure in the following amounts:
>
> (1) Individuals
>
> In the case of any action by an individual, an amount equal to the sum of--

> **(A)** any actual damages to the borrower as a result of the failure; and
>
> **(B)** any additional damages, as the court may allow, in the case of a pattern or practice of noncompliance with the requirements of this section, in an amount not to exceed $1,000.

Plaintiff asserts he repeatedly contacted Defendants to obtain a loan modification, to validate Defendants' standing to foreclose, and to identify the physical location of the "wet ink" Note and DOT, which constituted qualified written requests (QWRs) under RESPA. (*See e.g.*, Compl. ¶¶ 3.13, 3.14, 3.16, 3.24, 3.27, 8.2.) Plaintiff also alleges that BANA's failures enumerated in paragraphs 3.40 – 3.45 of the complaint constitute a violation of RESPA. (*Id.* at ¶ 8.4.)

Section 2605 specifically applies to requests for information relating to loan servicing. Plaintiff does not assert he sent Defendants qualified written requests regarding the servicing of his loan or that his account was in error. A qualified written request must contain an inquiry or request for the loan servicer relating to loan servicing. Just because Plaintiff sent a letter to the loan servicer does not mean the substance of his requests had anything to do with loan servicing. Indeed, case law would indicate that correspondence requesting a loan modification does not itself qualify as a qualified written request under RESPA. *In re Thorian*, 387 B.R. 50, 70 (D. Idaho 2008).

Plaintiff also fails to assert any "actual damages." He only requests the additional damages authorized under § 2605(f), which are intended as punitive damages for repeated violations of RESPA, in addition to actual damages. In addition, Plaintiff alleges Defendants' failures "warrant injunctive relief against the foreclosure sale" and "any additional remedies this court finds equitable." (Id. ¶ 8.4-8.5.) But, "RESPA does not provide for injunctive relief or other equitable remedies." *Serrano v. World Sav. Bank, FSB*, 2011 WL 1668631 at *3 (N.D. Cal.

2011) (holding that the plaintiff's claim that she is entitled to enjoin foreclosure and obtain other relief based on RESPA violations fails).

Plaintiff has failed to allege a claim for relief under RESPA upon which relief may be granted.

**F. Violation(s) of Consumer Protection Act**

Plaintiff's complaint claims a violation of the Idaho Consumer Protection Act. The ICPA only allows recovery for "certain specific prohibited actions that are deemed to be unfair or deceptive." *Taylor v. McNichols*, 149 Idaho 826, 846, 243 P.3d 642, 662 (2010); see also I.C. § 48-603(1)-(19). The statute of limitations under this Act is two years. I.C. § 48-619.

Plaintiff's complaint fails to state which specific prohibited unfair or deceptive practice Defendants engaged in. The complaint is also unclear as to when the alleged violations occurred, which acts were unfair and deceptive, and which of the four defendants he believes misled or deceived him. In *Taylor v. McNichols*, the Idaho Supreme Court found that because the plaintiff failed to allege which specific prohibited unfair or deceptive practices the defendants had engaged in, he had failed to state a claim for which relief could be granted. 149 Idaho at 846, 243 P.3d at 662.

Furthermore, the Idaho Supreme Court has held that debts arising from the sale of goods and services are subject to the Idaho Consumer Protection Act, but other debts are not covered. *In re Western Acceptance Corp., Inc.*, 117 Idaho 399, 401, 788 P.2d 241, 243 (1990) (stating that "[d]ebts that do not arise out of the sale of goods and services subject to the provisions of the Act are not covered.") The loan transaction in question is not a debt that "arose out of the sale of goods or services" and is therefore not covered under the Act.

Plaintiff fails to state a claim under the Idaho Consumer Protection Act upon which relief may be granted.

**G. Intentional infliction of Emotional Distress**

Plaintiff must show four elements to be able to recover for intentional infliction of emotional distress: (1) the conduct must be intentional or reckless; (2) the conduct must be extreme and outrageous; (3) there must be a causal connection between the wrongful conduct and the emotional distress; and (4) the emotional distress must be severe. *Evans v. Twin Falls County*, 118 Idaho 210, 220, 796 P.2d 87, 97 (1990).

"Merely exercising a legal right does not satisfy the outrageousness element of an emotional-distress claim. To be actionable, the conduct must be so extreme as to "arouse an average member of the community to resentment against the defendant," and "must be more than unreasonable, unkind, or unfair." *Mortensen v. Stewart Title Guar. Co.*, 149 Idaho 437, 446-47, 235 P.3d 387, 396-97 (2010) (quoting 86 C.J.S. *Torts* § 74 (2009)). "The law intervenes only where the distress inflicted is so severe that no reasonable man could be expected to endure it." *Alderson v. Bonner*, 142 Idaho 733, 741, 132 P.3d 1261, 1269 (Ct. App. 2006).

Plaintiff alleges that BANA and ReconTrust's "callous attitude and clear unwillingness to work with [him] caused [him] significant emotional distress." (Compl. ¶ 10.2.) Plaintiff also alleges that he was emotionally distressed by BANA and ReconTrust's "poor treatment of [him] during this difficult time" and that his distress was manifested "by depression, sadness, frustration, anger, affecting everyone in the family including 4 children." (*Id.* ¶¶ 10.2-10.3.)

Plaintiff's intentional infliction of emotional distress claim fails because Plaintiff has failed to allege what conduct Defendants engaged in that was extreme and outrageous. Plaintiff has only made conclusory allegations that Defendants treated him poorly, had a "callous

attitude," and were unwilling to work with Plaintiff. Defendants merely exercised their right under the DOT, which Plaintiff granted, to initiate foreclosure proceedings after Plaintiff failed to make his monthly payments. (Dina Aff. Ex. B.)

Additionally, while economic distress resulting in default and foreclosure would cause a borrower sadness or frustration or anger, the emotional distress alleged must be severe. The loan documents made clear that default would result from a failure to make the loan payments. Plaintiff failed to make the loan payments, and default resulted.

Plaintiff has failed to allege any facts to support his cause of action for intentional infliction of emotional distress, and therefore, Plaintiff fails to state a claim upon which relief may be granted.

**H. Negligent Infliction of Emotional Distress**

Plaintiff must show four elements to be able to recover for negligent infliction of emotional distress: (1) a duty recognized by law requiring the defendant to conform to a certain standard of conduct; (2) a breach of that duty; (3) a causal connection between the conduct and the plaintiff's injury; and (4) actual loss or damage. In addition to these four elements, there must be some physical manifestation of the plaintiff's emotional injury. *Johnson v. McPhee*, 147 Idaho 455, 466, 210 P.3d 563, 574 (Ct. App. 2009). "The 'physical injury' requirement is designed to provide some guarantee of the genuineness of the claim in the face of the danger that claims of mental harm will be falsified or imagined." *Czaplicki v. Gooding Joint School Dist. No. 231*, 116 Idaho 326, 332, 775 P.2d 640, 646 (1989).

Plaintiff alleges Defendants' conduct was negligent "insofar as the defendants failed to take reasonable care to avoid causing Plaintiffs, a family with children, emotional distress and anxiety." (Compl. ¶ 11.2.) "While Idaho recognizes the tort of negligent infliction of emotional

distress...there must be a breach of a recognized legal duty in order to support a claim for negligent infliction of emotional distress." *Nation v. State, Dept. of Correction*, 144 Idaho 177, 191, 158 P.3d 953, 967 (2007). Additionally, "[i]n order for a cause of action to arise in tort, Claimants must establish the breach of a tort duty, separate and apart from any duty allegedly created by the contract." *Baccus v. Ameripride Serv., Inc.*, 145 Idaho 346, 350, 179 P.3d 309, 313 (2008). Other than asserting Defendants treated him poorly, Plaintiff has not pled any of the elements of a negligence claim, nor claimed Defendants had any duty to him outside of the contract. And, as the Court has already discussed, a lender-borrower relationship does not impose any duty of care upon Defendants. *See* (B) above. As no duty is owed, none has been breached.

Additionally, while Plaintiff has alleged his emotional distress and anxiety is evidenced by "depression, sadness, frustration, anger, and time away from employment and being with the family," it is unclear that Plaintiff has suffered an injury beyond the economic loss of his home. (Compl. ¶¶ 11.2- 11.3.) Plaintiff's assertion that he is "entitled to compensation because of the poor treatment that [he] received" does not identify damages he supposedly incurred. (*Id.* ¶ 11.4.) "Unless an exception applies, the economic loss rule prohibits recovery of purely economic losses in a negligence action, because there is no duty to prevent economic loss to another." *Blahd v. Richard B. Smith, Inc.*, 141 Idaho 296, 300, 108 P.3d 996, 1000 (2005). An exception applies if there is a "special relationship," but Plaintiff has not asserted such a relationship exists. *Id.* at 301. Absent non-economic damages, no relief could be granted to Plaintiff under this claim regardless of its validity.

Plaintiff's negligent infliction of emotional distress claim fails because he has not adequately pled its elements.

**I. Misrepresentation by Trustee**

Idaho Rule of Civil Procedure 9(b) states that claims of fraud must be pled with particularity. The nine elements of fraud are:

> (1) a statement or a representation of fact; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity; (5) the speaker's intent that there be reliance; (6) the hearer's ignorance of the falsity of the statement; (7) reliance by the hearer; (8) justifiable reliance; and (9) resultant injury.

*Gray v. Tri-Way Const. Services, Inc.*, 147 Idaho 378, 386, 210 P.3d 63, 71 (2009) (quoting *Glaze v. Deffenbaugh*, 144 Idaho 829, 833, 172 P.3d 1104, 1108 (2007)). The absence of any one of the elements is fatal to recovery. *Id.* The party alleging fraud must specify the factual circumstances that constitute the fraud in their pleadings. *Glaze v. Deffenbaugh*, 144 Idaho at 833, 172 P.3d at 1108.

Plaintiff alleges Defendants "held the authority to postpone the foreclosure sale and to allow Plaintiff to receive a modification" and that their alleged failure to "inform the Plaintiff of this fact" "deprived [him] the chance to be qualified for HAMP" and constituted a misrepresentation. (Compl. ¶ 12.2.) A failure to inform cannot constitute an actionable misrepresentation. Plaintiff also alleges the information Defendants provided "was material because reliance on such facts would result in the wrongful foreclosure sale of Plaintiffs' house." (*Id.* ¶ 12.3.) Plaintiff fails to show how his lack of knowledge that Defendants could postpone the sale was material or how that lack of knowledge caused the foreclosure. Plaintiff also fails to state how any alleged representations Defendants made were false.

Plaintiff contends he "relied on the information and [he was] justified in [his] reliance because of the fiduciary relationship between" Plaintiff and Defendant. (*Id.* ¶ 12.4.) Plaintiff's

conclusory contention that he relied upon the lack of information and that he was justified in his reliance is based on Plaintiff's failed claim that Defendants owe him a fiduciary duty.

Finally, Plaintiff states he is "entitled to be compensated for the damages they suffered as a result of" Defendants' conduct. *(Id.* ¶ 12.5.) But, Plaintiff fails to state what injury and damages he incurred. Plaintiff has asserted that he could not make his loan payments and he was offered a trial loan modification, but failed to follow through with it.

Plaintiff alleges no facts to support the elements of a fraud claim. Because Plaintiff has failed to plead fraud with the requisite particularity pursuant to I.R.C.P. 9(b), Plaintiff's fails to state a claim for misrepresentation upon which relief may be granted.

**J. Violation(s) of Title 26, Subtitle-A, Chapter-1, Subchapter M, Part-II §§ 850-862 and Securities Fraud.**

Plaintiff claims Defendants engaged in securities fraud because (1) "the loan was sold, pooled and turned into a security"; (2) "once the Note was converted into a stock, or stock equivalent, it is no longer a note"; and (3) securitization deprives the Note of its security "and the right to foreclose through the [DOT] is forever gone." (Compl. ¶¶ 13.3-13.5.) This claim fails because Plaintiff's loan does not fall within the protections of federal securities law. *See Reves v. Ernst & Young*, 494 U.S. 56, 65, 110 S.Ct. 945, 951 (1990) (adopting Second Circuit Court of Appeal's "family resemblance" approach which begins with a presumption that any note with a term of more than nine months is a "security," but in recognizing that not all notes are securities, creates a list of notes that are obviously not securities, which includes notes secured by a mortgage on a home).

Plaintiff's securities fraud claim is essentially premised on allegations that the securitization process split the note and DOT and stripped the Note of its security and ownership

by any of the defendants. But, securitization does not invalidate the DOT or have a negative impact on ownership of the Note; the Note states it may be transferred without notice to the borrower. (Dina Aff. Exs. A, B.)

Plaintiff's securities fraud claim fails.

## CONCLUSION

Plaintiff's Motion to Strike is DENIED, Defendants' Request for Judicial Notice is GRANTED, and Defendants' Motion to Dismiss is GRANTED.

IT IS SO ORDERED.

Dated this 23rd day of March 2012.

Ronald J. Wilper
District Judge

CERTIFICATE OF MAILING

I, HEREBY CERTIFY that on the 26 day of March, 2012 I caused a true and correct copy of the foregoing MEMORANDUM DECISION AND ORDER DENYING MOTION TO STRIKE, GRANTING REQUEST FOR JUDICIAL NOTICE, AND GRANTING MOTION TO DISMISS to be served by the method indicated below, and addressed to the following:

Eric Mortensen
4282 N. Forest Meadow Ave.
Boise, ID 83704

(X) U.S. Mail, Postage Prepaid
( ) Hand Delivered
( ) Overnight Mail
( ) Facsimile

Kelly Greene McConnell
Amber N. Dina
Givens Pursley LLP
P.O. Box 2720
Boise, ID 83701-2720

(X) U.S. Mail, Postage Prepaid
( ) Hand Delivered
( ) Overnight Mail
( ) Facsimile

CHRISTOPHER D. RICH
Clerk of the District Court

By _____
Deputy Clerk

COURT 4TH JUDICIAL DISTRICT - OF - IDAHO IN AND FOR ADA COUNTY

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BINGHAM**

DALE GORDON, an individual,

Plaintiff,

vs.

FEDERAL NATIONAL MORTGAGE ASSOCIATION, "Fannie Mae;" IBM LENDER BUSINESS PROCESS SERVICES, INC., believed to be a foreign corporation registered in Idaho; FIRST HORIZON HOME LOANS, a Division of First Tennessee Bank, N.A.; PIONEER TITLE COMPANY OF ADA COUNTY, an Idaho Corporation; ALLIANCE TITLE AND ESCROW CORP., an Idaho Corporation; FIRST AMERICAN TITLE, an Idaho Corporation; and MORTGAGE ELECTRONIC REGISTRATION SYSTEM, INC.,

Defendants.

**CASE NO. CV-2011-1069**

**ORDER DISMISSING PLAINTIFF'S COMPLAINT AND DISSOLVING TEMPORARY RESTRAINING ORDER/INJUNCTION**

## I. STATEMENT OF THE CASE

Defendants Federal National Mortgage Association, "Fannie Mae" (hereinafter "FNMA"); Seterus, Inc. (formerly known as IBM Lender Business Process Services, Inc.) (hereinafter "Seterus"); and Mortgage Electronic Registration Systems, Inc. (hereinafter "MERS"), move to dismiss the Complaint filed by Plaintiff Dale Gordon

(hereinafter "Gordon")[1] wherein Gordon seeks quiet title to certain real estate in Bingham County, Idaho.[2] Gordon objects to the Motion to Dismiss.[3] FNMA, Seterus, and MERS also moved to dissolve the preliminary injunction issued in this matter.[4]

A hearing was held on the Motion to Dismiss and the Motion to Dissolve Injunction on January 4, 2012.[5] Based upon the record, the arguments of the parties, and the relevant authorities, the Motion to Dismiss, considered as a motion for summary judgment, shall be granted.

## II. ISSUES

By its Motion to Dismiss, FNMA, Seterus, and MERS argue that the Complaint fails to state a claim upon which relief can be granted.[6] Gordon maintains that the relevant deed of trust is illegal and unenforceable and therefore Gordon should receive quiet title to the real estate at issue.[7]

The questions raised by the Motion to Dismiss and Gordon's Objection include:

1. Should the Motion to Dismiss be considered as a motion for summary judgment?

---

[1] See: Motion to Dismiss, *Gordon v. Federal National Mortgage Association,* Bingham County case no. CV-2011-1069 (filed December 6, 2011) (hereinafter the **"Motion to Dismiss"**); Complaint to Quiet Title, *Gordon v. Federal National Mortgage Association,* Bingham County case no. CV-2011-1069 (filed May 20, 2011) (hereinafter the **"Complaint"**).

[2] See: Complaint, generally and at p. 2, ¶ 2.

[3] Memorandum in Objection to Dismissal & in Support of Motion for Declaratory Judgment and/or Summary Judgment, *Gordon v. Federal National Mortgage Association,* Bingham County case no. CV-2011-1069 (filed December 28, 2011) (hereinafter **"Gordon's Objection"**).

[4] Motion to Dissolve Preliminary Injunction, *Gordon v. Federal National Mortgage Association,* Bingham County case no. CV-2011-1069 (filed December 6, 2011) (hereinafter the **"Motion to Dissolve Injunction"**). See also: Temporary Restraining Order/Injunction, *Gordon v. Federal National Mortgage Association,* Bingham County case no. CV-2011-1069 (filed May 23, 2011) (hereinafter the **"Temporary Restraining Order"**).

[5] Minute Entry, *Gordon v. Federal National Mortgage Association,* Bingham County case no. CV-2011-1069 (filed January 5, 2012).

2. Does Gordon raise a material fact issue with his allegation that the defendants failed to maintain and produce the original promissory note?

3. Does Gordon raise a material issue of fact as to quiet title?

4. Does Gordon raise a material fact issue regarding unjust enrichment?

## III. FINDINGS OF FACT

The following facts are viewed in a light most favorable to Gordon and with all inferences drawn in his favor.[8]

1. On December 6, 2007, Gordon, by and through Bonnie Gordon who signified herself as "attorney in fact," borrowed $342,900.00 from First Horizon Home Loans, a Division of First Tennessee Bank N.A. (hereinafter "First Horizon").[9] This loan was memorialized in a promissory note (hereinafter the "Note").[10]

2. Also on December 6, 2007, Gordon by and through Bonnie Gordon, signed a Deed of Trust (hereinafter the "Trust Deed") whereby Gordon agreed to pay the principal and interest due on the Note and conveyed in trust, with the power of sale, the real estate in issue.[11]

---

[6] Memorandum in Support of Motion to Dismiss, *Gordon v. Federal National Mortgage Association,* Bingham County case no. CV-2011-1069 (filed December 6, 2011) (hereinafter the **"Memorandum Supporting Motion to Dismiss"**).

[7] Gordon's Objection, at pp. 1-2.

[8] *Losser v. Bradstreet,* 145 Idaho 670, 673, 183 P.3d 758, 761 (2008); *Idaho Schools for Equal Educational Opportunity v. Evans,* 123 Idaho 573, 578, 850 P.2d 724, 729 (1993).

[9] Complaint, at Exhibit C.

[10] Id.

[11] Complaint, at Exhibit D. The real estate at issue is formally described as:

> A PORTION OF THE SOUTHEAST QUARTER SOUTHWEST QUARTER OF SECTION 23, TOWNSHIP 2 SOUTH, RANGE 34, EAST, BOISE MERIDIAN, BINGHAM COUNTY, IDAHO, AS FOLLOWS:
> COMMENCING AT THE NORTHEAST CORNER OF THE SOUTHEAST QUARTER SOUTHWEST QUARTER OF SAID SECTION 23, AND RUNNING THENCE NORTH 599 FEET, THENCE WEST 2040 FEET, THENCE SOUTH 24°45' WEST 660 FEET, THENCE EAST 1005 FEET, THENCE SOUTH 40 RODS, THENCE EAST 40 RODS TO THE TRUE POINT OF BEGINNING; RUNNING THENCE SOUTH 40

3. Gordon made *some* payments of principal and interest to the defendants.[12] FNMA notified Gordon of Gordon's failure to pay the August 1, 2009 installment of principal and interest and all subsequent installments of principal and interest.[13] Gordon was then notified of the trustee's intent to sell the Property.[14]

4. In his Complaint, Gordon alleges that should the defendants fail to show that the Note has been kept by the lender and produced upon demand of the borrower,

---

RODS; THENCE EAST 20 RODS; THENCE NORTH 40 RODS; THENCE WEST 20 RODS TO THE TRUE POINT OF BEGINNING.

EXCEPTING THEREFROM THE FOLLOWING:
PART OF THE SOUTHEAST QUARTER SOUTHWEST QUARTER OF SECTION 23, TOWNSHIP 2 SOUTH, RANGE 34, EAST, BOISE MERIDIAN, BINGHAM COUNTY, IDAHO, DESCRIBED AS;
BEGINNING AT A POINT THAT IS NORTH 89°37'56" WEST 513.63 FEET ALONG THE SECTION LINE AND NORTH 00°15'08" EAST 37.00 FEET TO THE NORTH RIGHT-OF-WAY LINE OF PARKS ROAD FROM THE SOUTH QUARTER CORNER OF SAID SECTION 23 AND RUNNING THENCE NORTH 89°37'56" WEST 150.00 FEET ALONG SAID RIGHT-OF-WAY LINE; THENCE NORTH 00°15'08" EAST 290.40 FEET; THENCE SOUTH 89°37'56" EAST 150.00 FEET; THENCE SOUTH 00°15'08" WEST 290.40 FEET TO THE POINT OF BEGINNING.

ALSO INCLUDED IS THE FOLLOWING:
COMMENCING AT A POINT 23 RODS EAST OF THE SOUTHWEST CORNER OF THE SOUTHEAST QUARTER SOUTHWEST QUARTER OF SAID SECTION 23, AND RUNNING THENCE EAST 17 RODS; THENCE NORTH 40 RODS; THENCE WEST 23 RODS; THENCE SOUTH 20 RODS, THENCE EAST 6 RODS; THENCE SOUTH 20 RODS TO THE PLACE OF BEGINNING.

EXCEPTING THEREFROM THE FOLLOWING:
COMMENCING AT A POINT 23 RODS EAST OF THE SOUTHWEST CORNER OF THE SOUTHEAST QUARTER SOUTHWEST QUARTER OF SAID SECTION 23, TOWNSHIP 2 SOUTH, RANGE 34, EAST, BOISE MERIDIAN, BINGHAM COUNTY, IDAHO. AND RUNNING THENCE EAST 17 RODS, THENCE NORTH 315 FEET; THENCE WEST 17 RODS; THENCE SOUTH 315 FEET TO THE POINT OF BEGINNING. (Hereinafter the "Property.")
Complaint, at Exhibit A.

[12] Complaint, at p. 2, ¶ 4 (emphasis added).
[13] Complaint, at Exhibit B. This Court notes that the property description attached to FNMA's Notice of Default does not match the description of the Property attached to the Trust Deed. Compare: Complaint, at Exhibit B, p. 2 to Complaint, at Exhibit D, p. 16.
[14] Complaint, at Exhibit E.

then this Court should declare that the defendants are not entitled to a non-judicial foreclosure of the Property.[15]

5. By Count Two of his Complaint, Gordon seeks quiet title to the Property.[16] Gordon alleged that the Trust Deed does not comply with Idaho Code § 45-1502, the Note and the Trust Deed are split, the Note does not comply with the Idaho Statute of Frauds, and title in the Property should be quieted to Gordon because the Note is unsecured.[17]

6. Gordon alleged in Count Three of his Complaint that he is entitled to damages for unjust enrichment in the event that the defendants fail to produce the original Note.[18] He also claims that, if after discovery, defendants or their assigns cannot show they had the right to enforce the Note, then they should pay Gordon all sums he paid to them on the Note.[19]

7. On July 19, 2011, counsel for FNMA, Seterus, and MERS presented the original Note to Gordon's attorney.[20] Gordon's attorney took the opportunity to inspect the original Note and the original Trust Deed.[21]

## IV. APPLICABLE PRINCIPLES OF LAW

### A. Dismissal under Idaho Rule of Civil Procedure 12(b)(6).

1. The standard for reviewing a dismissal for failure to state a cause of action pursuant to Idaho Rule of Civil Procedure 12(b)(6) (hereinafter "Rule 12(b)(6)) is the

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[15] Complaint, at p. 6, ¶ 25.
[16] Complaint, at p. 7.
[17] Complaint, at pp. 7-8.
[18] Complaint, at pp. 8-9.
[19] Complaint, at p. 9.
[20] Affidavit of Derrick J. O'Neill, *Gordon v. Federal National Mortgage Association,* Bingham County case no. CV-2011-1069 (filed December 6, 2011) (hereinafter the **"O'Neill Affidavit"**), at p. 2.
[21] Id.

same as the standard for adjudicating a motion for summary judgment.[22] In other words, Gordon (the non-moving party) is entitled to have all inferences from the record and pleadings viewed in his favor and only then can the question be asked whether a claim for relief had been stated.[23]

2. The only facts which may be considered on a motion to dismiss are those appearing in the Complaint, supplemented by those facts of which a court may properly take judicial notice.[24]

3. Dismissal of Gordon's Complaint is appropriate only if it appears beyond doubt that Gordon can prove no set of facts in support of his claims that would entitle him to relief.[25]

4. If matters outside the pleadings are considered on a Rule 12(b)(6) motion to dismiss, such motion must be treated as a motion for summary judgment and the proceedings thereafter must comport with the hearing and notice requirements of Idaho Rule of Civil Procedure 56(c).[26]

**B. Summary Judgment pursuant to Idaho Rule of Civil Procedure 56(c).**

1. A party against whom a summary judgment is sought cannot merely rest on its pleadings.[27] When faced with supporting affidavits or depositions, the opposing

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[22] *Gallagher v. State*, 141 Idaho 665, 667, 115 P.3d 756, 758 (2005); *Idaho Schools for Equal Educational Opportunity v. Evans*, 123 Idaho 573, 578, 850 P.2d 724, 729 (1993).
[23] *Losser v. Bradstreet*, 145 Idaho 670, 673, 183 P.3d 758, 761 (2008); *Idaho Schools for Equal Educational Opportunity*, 123 Idaho at 578, 850 P.2d at 729.
[24] *Owsley v. Idaho Industrial Commission*, 141 Idaho 129, 133, 106 P.3d 455, 459 (2005).
[25] *Taylor v.* Maile, 142 Idaho 253, 257, 127 P.3d 156, 160 (2005).
[26] *Gibson v. Bennett*, 141 Idaho 270, 273, 108 P.3d 417, 420 (Ct. App. 2005).
[27] *Partout v. Harper*, 145 Idaho 683, 688, 183 P.3d 771, 776 (2008); *R.G. Nelson, A.I.A. v. Steer*, 118 Idaho 409, 410, 797 P.2d 117, 118 (1990).

party must show material issues of fact which preclude the issuance of summary judgment.[28]

2. While the moving party must prove the absence of a genuine issue of material fact,[29] the opposing party cannot simply speculate.[30] A mere scintilla of evidence is not enough to create a genuine factual issue.[31] Summary judgment is appropriate when the non-moving party cannot establish the essential elements of the claim.[32]

3. If reasonable persons could reach differing conclusions on material issues, or draw conflicting inferences therefrom, then a motion for summary judgment must be denied.[33]

**C. Quiet Title to Real Property.**

1. A mortgagor cannot, without paying his debt, quiet title as against the mortgagee.[34]

2. According to the Idaho Supreme Court, "[t]here is no more firmly established rule than that the liability to pay a mortgage debt rests upon the mortgaged land as well as upon the mortgagor. A mortgagor cannot without paying his debt quiet title as against the mortgagee; and the same rule applies to the grantee of a mortgagor, who takes the land while it is still burdened with a lien for the security of a debt."[35]

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[28] *Esser Electric v. Lost River Ballistics Technologies, Inc.*, 145 Idaho 912, 919, 188 P.3d 854, 861 (2008).
[29] *Watkins v. Peacock*, 145 Idaho 704, 708, 184 P.3d 210, 214 (2008); *Wait v. Leavell Cattle, Inc.*, 136 Idaho 792, 798, 41 P.3d 220, 226 (2001).
[30] *Cantwell v. City of Boise*, 146 Idaho 127, 133, 191 P.3d 205, 211 (2008).
[31] *Van v. Portneuf Medical Center*, 147 Idaho 552, 556, 212 P.3d 982, 986 (2009); *West v. Sonke*, 132 Idaho 133, 138, 968 P.2d 228, 233 (1998).
[32] *Summers v. Cambridge Joint School District No. 432*, 139 Idaho 953, 956, 88 P.3d 772, 775 (2004); *Dekker v. Magic Valley Regional Medical Center*, 115 Idaho 332, 333, 766 P.2d 1213, 1214 (1989).
[33] *Van v. Portneuf Medical Center*, 147 Idaho at 556, 212 P.3d at 986; *Cramer v. Slater*, 146 Idaho 868, 873, 204 P.3d 508, 513 (2009).
[34] *Trusty v. Ray*, 73 Idaho 232, 236, 249 P.2d 814, 817 (1952)
[35] *Trusty v. Ray*, 173 Idaho at 236, 249 P.2d at 817 [citing: *Gerken v. Davidson Grocery Co.*, 50 Idaho 315, 321, 296 P. 192, 193 (1931)].

**D. Non-Judicial Foreclosure.**

1. Pursuant to Idaho Code § 45-1503(1), a trustee (under a trust deed) may pursue non-judicial foreclosure of a deed of trust, but only if the deed of trust has been "executed in conformity with [the Idaho Trust Deeds Act.]"

2. The Idaho Trust Deeds Act is codified under Idaho Code §§ 45-1502-1515.

**E. Contract Interpretation.**

1. Trust deeds create a contractual power of sale.[36]

2. The objective in interpreting contracts is to ascertain and give effect to the intent of the parties.[37] The intent of the parties should, if possible, be ascertained from the language of the documents.[38]

3. A contract must be read as a whole and meaning must be given to all of its terms to the extent possible.[39]

4. The determination of a contract's meaning and legal effect is a question of law when the contract is clear and unambiguous.[40]

5. Where two clauses are inconsistent and conflicting, they should be construed so as to give effect to the intention of the parties as gathered from the whole

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[36] Memorandum Decision and Order re: Motion to Dismiss, Motion to Dissolve Preliminary Injunction, & Motion for Declaratory Judgment or Summary Judgment, *Carter v. IBM Lender Business Process Services, Inc.*, Bonneville County case no. CV-2011-646 (filed January 12, 2012), at p. 9; Memorandum Decision and Order re: Motion to Dismiss, *Payne v. Chase Home Finance, LLC*, Jefferson County case no. CV-2011-451 (filed November 15, 2011), at p. 6; Memorandum Decision and Order re: Motions for Summary Judgment, *Federal Home Loan Mortgage Corporation v. Robinson*, Bonneville County case no. CV-2010-2922 (filed January 12, 2012), at p. 10.

[37] *Twin Lakes Village Property Association v. Crowley*, 124 Idaho 132, 135, 857 P.2d 611, 614 (1993) [citing: *Luzar v. Western Surety Company*, 107 Idaho 693, 697, 692 P.2d 337, 341 (1984)].

[38] *Twin Lakes Village Property Association v. Crowley*, 124 Idaho at 135, 857 P.2d at 614 [citing: *Suchan v. Suchan*, 106 Idaho 654, 660, 682 P.2d 607, 613 (1984)].

[39] *Twin Lakes Village Property Association v. Crowley*, 124 Idaho at 138, 857 P.2d at 617.

contract.[41] "Apparently conflicting provisions must be reconciled so as to give meaning to both, rather than nullifying any contractual provision, if reconciliation can be effected by any reasonable interpretation of the entire instrument."[42] Thus, where possible, a construction will be placed upon ambiguous or apparently inconsistent provisions of a contract as will give protection to both parties, as against a construction which would only be in the interest of one of the parties to the contract.[43]

**F. Statute of Frauds.**

The Idaho Statute of Frauds reads as follows:

> No estate or interest in real property, other than for leases for a term not exceeding one (1) year, nor any trust or power over or concerning it, or in any manner relating thereto, can be created, granted, assigned, surrendered, or declared, otherwise than by operation of law, or a conveyance or other instrument in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized by writing.[44]

**G. Unjust Enrichment.**

1. The three elements of a claim for unjust enrichment are: (a) a benefit conferred upon the defendant by the plaintiff; (b) appreciation by the defendant of such benefit; and (c) acceptance of the benefit under circumstances that would be inequitable for the defendant to retain the benefit without payment to the plaintiff for the value thereof.[45]

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[40] *Twin Lakes Village Property Association v. Crowley*, 124 Idaho at 135, 857 P.2d at 614 [citing: *Bond v. Levy*, 121 Idaho 993, 996-7, 829 P.2d 1342, 1345-6 (1992)].
[41] *Madrid v. Roth*, 134 Idaho 802, 806, 10 P.3d 751, 755 (Ct. App. 2000).
[42] *Madrid v. Roth*, 134 Idaho at 806, 10 P.3d at 755 [citing: 17A C.J.S. Contracts § 324 (1999)].
[43] *Madrid v. Roth*, 134 Idaho at 806, 10 P.3d at 755 [citing: *Allen v. Ruby Co.*, 87 Idaho 1, 11, 389 P.2d 581, 587 (1964)].
[44] Idaho Code § 9-503.
[45] *Pines Grazing Association, Inc. v. Flying Joseph Ranch, LLC*, 151 Idaho 924, ___, 265 P.3d 1136, 1143 (2011).

2. The doctrine of unjust enrichment is not permissible where there is an enforceable express contract between the parties which covers the same subject matter.[46]

## V. ANALYIS

### A. The Motion to Dismiss shall be Treated as a Motion for Summary Judgment.

Along with the Motion to Dismiss, FNMA, Seterus, and MERS filed the Affidavit of Derrick J. O'Neill.[47] The O'Neill Affidavit attests that the original Note and the original Trust Deed were presented to Gordon's counsel on July 19, 2011.[48] This evidence is beyond the parties' pleadings, and relied upon by FNMA, Seterus, and MERS in their effort to dismiss the Complaint. Accordingly, the Motion to Dismiss shall be considered as a motion for summary judgment.

### B. Unrebutted Evidence Disproves Count One of the Complaint.

In his first count, Gordon argues that, if the defendants fail to produce the original Note and the original Trust Deed, then this Court should declare that they are not entitled to foreclose upon the Property.[49] However, counsel for FNMA, Seterus, and MERS affied that he tendered the original Note and the original Trust Deed to Gordon's attorney for inspection.[50] Gordon did not rebut this evidence. Accordingly, Gordon has not raised a material issue of fact with regard to the original Note and the original Trust Deed, and Count I of the Complaint shall be adjudicated summarily in favor of the defendants.

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[46] *Vanderford Company, Inc. v. Knudson*, 144 Idaho 547, 558, 165 P.3d 261, 272 (2007).
[47] See: O'Neill Affidavit.
[48] O'Neill Affidavit, at p. 2.
[49] Complaint, at p. 6, ¶ 25.
[50] O'Neill Affidavit, at p. 2.

### C. Count Two Fails to State a Claim upon which Relief May be Granted.

Gordon contends that the Trust Deed does not comport with the statutory requirements of Idaho Code § 45-1502, therefore the defendants, their assigns or successors, are not entitled to non-judicial foreclosure.[51] Gordon proceeds from this premise to declare that the defendants' failure to comply with § 45-1502 separates the Trust Deed and the Note, therefore foreclosure can never occur.[52] Gordon adds that a failed trust deed is not a mortgage under Idaho law and that the Note does not comply with the Idaho Statute of Frauds.[53] Gordon concludes that the Note is unsecured, therefore title to the Property should be quieted in Gordon.[54]

Initially, the law does not permit Gordon to receive the relief he requests because he has not satisfied the tender rule. A mortgagor cannot quiet title against a mortgagee without paying and tendering payment for his debt.[55] This is true even if the mortgage is unenforceable under the Idaho Statute of Frauds.[56]

Gordon does not dispute that he received $342,900.00 in loan proceeds, which allowed him to purchase the Property. Nor does he dispute defaulting on the loan. Gordon does not allege that he has paid (or is willing to pay) the amounts still owing on the Note. This pleading failure dispenses with Gordon's quiet title action.[57]

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[51] Complaint, at p. 7, ¶ 24.
[52] Complaint, at pp. 7-8, ¶¶ 27, 24, 25 (these are consecutive paragraphs, but apparently misnumbered).
[53] Complaint, at p. 8, ¶¶ 26-27.
[54] Complaint, at p. 8, ¶ 28.
[55] *Trusty v. Ray*, 73 Idaho 232, 236, 249 P.2d 814, 817 (1952).
[56] *Trusty v. Ray*, 73 Idaho at 236, 249 P.2d at 817.
[57] See: *Washburn v. Bank of America, N.A.*, 2012 WL 139213, *2 (D. Idaho January 17, 2012); *Meyer v. Bank of America, N.A.*, 2011 WL 4584762, *3 (September 30, 2011).

Even if Gordon had tendered the amount owing on the Note, his Count II cause of action fails. To illustrate the point, each link in the chain Gordon constructs must be analyzed.

First, Gordon takes the position that the Trust Deed names MERS as both the beneficiary and the legal title holder, in violation of Idaho Code § 45-1502(1). Idaho Code § 45-1502(1) defines the beneficiary under a trust deed as "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." A "trustee" is defined as "a person to whom the legal title to real property is conveyed by trust deed, or his successor in interest."[58]

In the Trust Deed, Alliance Title & Escrow Corp. (hereinafter "Alliance Title") is named as the trustee.[59] MERS is defined as "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.**"[60] The named lender under the Trust Deed is First Horizon Home Loans, a division of First Tennessee Bank N.A. (hereinafter "First Horizon").[61]

Thus, at first blush, MERS is named as the beneficiary on behalf of the lender, First Horizon. The dispute arises under Paragraph R of the Trust Deed, which states:

> 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. This Security Instrument secures to Lender: (i) the repayment of the Loan, and all renewals, extensions and modifications of

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[58] Idaho Code § 45-1502(4).
[59] Complaint, at Exhibit D, p. 2, ¶ D.
[60] Complaint, at Exhibit D, p. 2, ¶ E (emphasis in original).
[61] Complaint, at Exhibit D, p. 1, ¶ C.

> the Note; and (ii) the performance of Borrower's covenants and agreements under this Security Instrument and the Note. For this purpose, Borrower irrevocably grants and conveys to Trustee, in trust, with power of sale, the [Property] ....
>
> TOGETHER WITH all the improvements now or hereafter erected on the property, and all easements, appurtenances, and fixtures now or hereafter a part of the property. All replacements and additions shall also be covered by this Security Instrument. All of the foregoing is referred to in this Security Instrument as the "Property." **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 [sic] the Property; and to take any action required of Lender including, but not limited to, releasing and canceling this Security Instrument.**[62]

By use of Paragraph R's phrase "MERS holds only legal title," Gordon concludes that MERS is also the trustee under the Trust Deed, a position inconsistent with its status as the beneficiary, and prohibited by Idaho Code § 45-1502(1).

To better understand the role of MERS in the real estate lending industry, it is helpful to refer to the Ninth Circuit Court of Appeals opinion in *Cervantes v. Countrywide Home Loans, Inc.*,[63] wherein Circuit Judge Callahan wrote:

> MERS is a private electronic database, operated by MERSCORP, Inc., that tracks the transfer of the "beneficial interest" in home loans, as well as any changes in loan services. After a borrower takes out a home loan, the original lender may sell all or a portion of its beneficial interest in the loan and change loan servicers. The owner of the beneficial interest is entitled to repayment of the loan. For simplicity, we will refer to the owner of the beneficial interest as the "lender." The servicer of the loan collects payments from the borrower, sends payments to the lender, and handles administrative aspects of the loan. Many of the companies that participate in the mortgage industry – by originating loans, buying or

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[62] Complaint, at Exhibit D, p. 3 (emphasis added).
[63] 656 F.3d 1034 (9th Cir. 2011).

> investing in the beneficial interest in loans, or servicing loans – are members of MERS and pay a fee to use the tracking system.[64]
>
> When a borrower takes out a home loan, the borrower executes two documents in favor of the lender: (1) a promissory note to repay the loan, and (2) a deed of trust, or mortgage, that transfers legal title in the property as collateral to secure the loan in the event of default. State laws require the lender to record the deed in the county in which the property is located. Any subsequent sale or assignment of the deed must be recorded in the county records, as well.
>
> This recording process became cumbersome to the mortgage industry, particularly as the trading of loans increased.[65] It has become common for original lenders to bundle the beneficial interest in individual loans and sell them to investors as mortgage-backed securities, which may themselves be traded.[66] MERS was designed to avoid the need to record multiple transfers of the deed by serving as the nominal record holder of the deed on behalf of the original lender and any subsequent lender.[67]
>
> At the origination of the loan, MERS is designated in the deed of trust as a nominee for the lender and the lender's "successors and assigns," and as the deed's "beneficiary" which hold legal title to the security interest conveyed. If the lender sells or assigns the beneficial interest in the loan to another MERS member, the change is recorded only in the MERS database, not in county records, because MERS continues to hold the deed on the new lender's behalf. If the beneficial interest in the loan is sold to a non-MERS member, the transfer of the deed from MERS to the new lender is recorded in county records and the loan is no longer tracked in the MERS system.[68]

In this action, the Trust Deed designates MERS as the beneficiary, solely as nominee for First Horizon, its successor and assigns. Alliance Title is named as the

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[64] *Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d at 1038-9 [citing: *Jackson v. Mortg. Elec. Registration Sys., Inc.*, 770.N.W.2d 487, 490 (Minn. 2009)].

[65] *Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d at 1038-9 [citing: Robert E. Dordan, *Mortgage Electronic Registration Systems (MERS), Its Recent Legal Battles, and the Chance for a Peaceful Existence*, 12 Loy. J. Pub. Int. L. 177, 178 (2010)].

[66] *Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d at 1039 [citing: Robert E. Dordan, *Mortgage Electronic Registration Systems (MERS), Its Recent Legal Battles, and the Chance for a Peaceful Existence*, 12 Loy. J. Pub. Int. L. at 180; *Jackson v. Mortg. Elec. Registration Sys., Inc.*, 770 N.W.2d at 490.

[67] *Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d at 1039 [citing: *Jackson v. Mortg. Elec. Registration Sys., Inc.*, 770 N.W.2d at 490].

[68] *Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d at 1039.

trustee. However, where the Trust Deed states "Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument," Gordon alleges that MERS is latently designated as the trustee.

The Trust Deed clearly identifies Alliance Title as the trustee and MERS as the beneficiary. In the "Transfer of Rights in the Property" section, Gordon "irrevocably grants and conveys to Trustee [Alliance Title], in trust, with power of sale, the [Property]."[69] No such granting language in the Trust Deed transfers the same interest to MERS, as co-trustee or otherwise. Instead, in the definitions portion of the Trust Deed, in bold letters, the Trust Deed designates MERS as the beneficiary. Indeed, in the same paragraph granting the Property in trust to Alliance Title, MERS is again named as the beneficiary, solely as nomine for the lender, First Horizon, and First Horizon's successors and assigns. The inconsistency comes with the phrase "MERS holds only legal title to the interests granted by Lender and Lender's successors and assigns."

Thus, when read as a whole, and in light of the inconsistency between the designation of MERS as the beneficiary and the phrase "MERS holds only legal title," the Trust Deed must be construed such that MERS is the beneficiary and Alliance Title is the trustee. To hold otherwise thwarts the intention of the parties: to secure Gordon's loan with the Property. Moreover, to disregard two previous, unambiguous statements in the Trust Deed that MERS is the beneficiary, and to hold that MERS is the trustee, would only serve Gordon's interest. Gordon seeks to shirk his responsibility under the terms of the Trust Deed and the Note by raising the inconsistent language as a bar to the validity of the Trust Deed. Under Gordon's construction of the inconsistent clause, First

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[69] Complaint, at Exhibit D, p. 3.

Horizon's interest in the Trust Deed, which is a means of recouping its losses should Gordon default, would be disregarded altogether.

In addition, our sister courts in Bonneville and Jefferson counties have held that the "legal title" clause is an expression of the relationship between MERS and the lender, which gives MERS power, if necessary to act on behalf of the lender as its representative.[70] Indeed, Judge Harding opined, and this Court agrees, that the "legal title" clause

> ... does nothing more than give MERS a legal interest in the Deed of Trust as nominee for the lender. In other words, the Deed of Trust gives MERS, as nominee of the lender, power to act on behalf of the lender to foreclose and sell the property or cancel the Deed of Trust. Thus, the language referring to a legal interest held by MERS defines an agency relationship between the lender and MERS regarding lender's rights under the Deed of Trust. Even considering the provision in isolation, this Court does not believe the Deed of Trust purported to give MERS a legal interest in real property. This Court must read the Deed of Trust as a whole. Upon doing so, this Court concludes the Deed of Trust unmistakably defines Alliance Title as the trustee, and there is no reasonable interpretation of the Deed of Trust that would make MERS a trustee.[71]

Nothing in the Trust Deed grants the Property to MERS in trust. Accordingly, the Trust Deed does not inherently name MERS as the trustee.

Next, Gordon alleges that the Note and the Trust Deed were split at inception because the lender on the Note is First Horizon, whereas the beneficiary under the terms

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[70] Memorandum Decision and Order re: Motion to Dismiss, Motion to Dissolve Preliminary Injunction, & Motion for Declaratory Judgment or Summary Judgment, *Carter v. IBM Lender Business Process Services, Inc.*, Bonneville County case no. CV-2011-646 (filed January 12, 2012), at p. 11; Memorandum Decision and Order re: Motion to Dismiss, *Payne v. Chase Home Finance, LLC*, Jefferson County case no. CV-2011-451 (filed November 15, 2011), at p. 7; Memorandum Decision and Order re: Motions for Summary Judgment, *Federal Home Loan Mortgage Corporation v. Robinson*, Bonneville County case no. CV-2010-2922 (filed January 12, 2012), at p. 11.

[71] Memorandum Decision and Order re: Motion to Dismiss, *Payne v. Chase Home Finance, LLC*, Jefferson County case no. CV-2011-451 (filed November 15, 2011), at pp. 7-8.

of the Trust Deed is MERS.[72] Gordon argues that MERS "attempts to rectify the split by stating that it is acting in some form of restricted agency relationship solely as the nominee for the lender."[73]

First Horizon is named as the lender under both the Note and the Trust Deed.[74] MERS is the designated beneficiary as a "nominee for Lender [First Horizon] and Lender's successors and assigns."[75] Idaho Code § 45-1502(1) defines "beneficiary" as the person named *or otherwise designated* in a trust deed as the person for whose benefit a trust deed is given. Furthermore, the Trust Deed "secures to [First Horizon]: (i) the repayment of the Loan, and all renewals, extensions and modifications of the Note; and (ii) the performance of [Gordon's] covenants and agreements under this Security Instrument and the Note."[76] The relevant granting language secures First Horizon's Note and the Gordon's repayment of the Note.

As explained by the Ninth Circuit Court of Appeals, in *Cervantes v. Countrywide Home Loans, Inc.*, MERS acts as the nominal record holder of the Trust Deed on behalf of First Horizon and any of its successors or assigns who are also MERS members. (If the Note and the Trust Deed are assigned to a non-MERS member, then the transfer will be recorded in the Bingham County records.) First Horizon, its successors and/or assigns, retains the legal benefit of the Trust Deed. Thus, both the Note and the Trust Deed secured First Horizon's rights, and those instruments were not split as alleged by Gordon.

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[72] Complaint, at p. 7, ¶ 27.
[73] Id.
[74] Complaint, at Exhibit C, p. 1; and at Exhibit D, p. 1.
[75] Complaint, at Exhibit D, p. 2, ¶ E. See also: Complaint, at Exhibit D, p. 3.
[76] Complaint, at Exhibit D, p. 3.

Idaho law allows the assignment of loans.[77] When a note secured by a deed of trust is assigned, the deed of trust follows the note.[78] The mere fact that the transfer occurs does not sever the note from the deed of trust.[79] Gordon had neither argued nor demonstrated that an entity other than the Note holder holds the Trust Deed.

Finally, Gordon argues that the Note fails to comply with the Idaho Statute of Frauds.[80] However, the Note is not subject to the statute of frauds. It does not convey an interest in real property. Instead, it is a unilateral contract acknowledging the borrower's absolute obligation to repay loaned funds.[81]

Gordon also contends the Note was not duly executed.[82] But Gordon does not deny his signature on the Note.[83] As a unilateral contract, only the obligor's (or the borrower's in this case) signature is necessary for enforcement.[84] Furthermore, under Chapter 3 of Idaho's Uniform Commercial Code, a negotiable instrument only requires the signature of "the person undertaking to pay."[85] Gordon does not contend that the Note is not a negotiable instrument.

Since Gordon has not shown that the Trust Deed fails to comply with Idaho law, and has not demonstrated a legal defect in the Note, Alliance Title or its successors or assigns may proceed with non-judicial or judicial foreclosure. Gordon fails to raise a material issue of fact upon which relief may be granted in Count Two of his Complaint.

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[77] Idaho Code § 28-3-201.
[78] RESTATEMENT (THIRD) OF PROPERTY (MORTGAGES) § 5.4(A) (1997) ("A transfer of an obligation secured by a mortgage also transfers the mortgage unless the parties to the transfer agree otherwise.")
[79] *In re Tucker*, 441 B.R. 638 (Bkrtcy. W.D. Mo. 2010) at *6.
[80] Complaint, at p. 8, ¶ 27.
[81] See: *E.B.C. Trust Corp. v. JB Oxford Holdings, Inc.*, 2004 WL 5641999, *1 (C.D.Cal. October 26, 2004).
[82] Complaint, at p. 8, ¶ 27.
[83] See: Complaint, generally and at Exhibit C.
[84] See: *Forsman Real Estate Co. v. Hatch*, 97 Idaho 511, 515, 547 P.2d 1116, 1120 (1976).

**D. Gordon's Unjust Enrichment Claim does Not Raise a Material Issue of Fact.**

Gordon alleges, in Count Three of his Complaint, "[s]hould [FNMC] fail to produce the note as demanded by [Gordon] and if after further discovery any of the Defendants or their assigns or successors cannot properly show that they had the right to enforce the Note they should be required to pay over to [Gordon] any sums paid by [Gordon] as payments made on the Note or any payments made to such Defendants. To allow Defendants to retain such payments that were collected without lawful authority would unjustly enrich them and [Gordon] should be compensated for bestowing that benefit upon them."[86]

As noted above, FNMC produced the Note. Gordon concedes this point, but argues that the defendants have failed to "prove the transaction" or otherwise show that they have the right to enforce the Note.[87] Gordon does not dispute that he borrowed the money and agreed to become obligated to repay it. Nothing in this case reveals that multiple parties demand payment or claim to hold the Note. Gordon does not allege that any of his payments were not properly credited toward repayment of the Note. FNMC holds the Note and has produced it to Gordon. The Note is an enforceable express contract between Gordon and FNMC. Therefore, Gordon's unjust enrichment action fails to raise a material fact issue and will be dismissed.

Since dismissal of Gordon's Complaint is appropriate under the facts and the law presented, the Temporary Restraining Order, entered May 23, 2011, shall be dissolved and shall be of no further effect as between the parties.

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[85] Idaho Code § 28-3-103(1)(i).
[86] Complaint, at pp.8-9, ¶ 25.
[87] Gordon's Objection, at p. 7.

## VI. CONCLUSIONS OF LAW

1. The Motion to Dismiss should be considered as a motion for summary judgment.

2. Gordon does not raise a material fact issue with his allegation that the defendants failed to maintain and produce the original promissory note.

3. Gordon does not raise a material issue of fact as to quiet title.

4. Gordon does not raise a material fact issue regarding unjust enrichment.

## VII. ORDER

Based upon the foregoing findings and conclusions, FNMA's, Seterus's, and MERS' Motion to Dismiss is hereby **granted**. Gordon's Complaint is hereby dismissed. Gordon shall take nothing by his lawsuit against the defendants named therein.

The Motion, filed by FNMA, Seterus, and MERS, to Dissolve Preliminary Injunction is **granted**.

**IT IS SO ORDERED.**

DATED this 17TH day of February 2012.

Darren B. Simpson
District Judge

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a full, true and correct copy of the foregoing Order Dismissing Plaintiff's Complaint and Dissolving Temporary Restraining Order/Injunction was served on the parties listed below by first class mail with prepaid postage and/or hand delivered and/or sent by facsimile this 17 day of February 2012, to:

Rocky L. Wixom, Esq.
Wixom Law Office
P.O. Box 51334
Idaho Falls, ID 83405

☑ U.S. Mail ☐ Courthouse Box ☐ Facsimile

Lance E. Olsen, Esq.
Derrick J. O'Neill, Esq.
ROUTH CRABTREE OLSEN, PS
300 Main Street, Suite 150
Boise, ID 83702

☑ U.S. Mail ☐ Courthouse Box ☐ Facsimile

SARA J. STAUB, Clerk of the Court

By: Marielle Pratt
Deputy Clerk

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF JEFFERSON

JOSHUA R. PAYNE and CARI J. PAYNE, a married couple,

Plaintiffs,

vs.

CHASE HOME FINANCE, LLC, believed to be a foreign Corporation registered in Idaho; NORTHWEST TRUSTEE SERVICES, INC., an Idaho Corporation; ALLIANCE TITLE AND ESCROW CORP., an Idaho Corporation; FIRST AMERICAN TITLE, an Idaho Corporation; and MORTGAGE ELECTRONIC REGISTRATION SYSTEM, INC.

Defendants.

Case No. CV-2011-451

**MEMORANDUM DECISION AND ORDER RE: MOTION TO DISMISS**

FILED IN CHAMBERS
at Idaho Falls
Bonneville County
Honorable Judge Harding
Date 11-15-11
Time 3:30pm
Deputy Clerk JM

## I. FACTUAL AND PROCEDURAL BACKGROUND

On August 19, 2008, Plaintiffs executed a promissory note (hereafter, "Note") in favor of CCSF LLC (hereafter, "CCSF") in exchange for a loan in the amount of $202,040.00. Plaintiffs concurrently executed a deed of trust (hereafter, "Deed of Trust") to secure repayment of the Note. The Deed of Trust lists Plaintiffs as "Borrower," CCSF as "Lender," Alliance Title as "Trustee," and Mortgage Electronic Registration Systems, Inc. (hereafter, "MERS") as "[t]he beneficiary . . . (solely as nominee for [CCSF and [CCSF's] successors and assigns)." On August 26, 2008, the Deed of Trust was recorded against the property that Plaintiffs purchased with the loan money.

In March 2010, Plaintiffs stopped making payments on the Note. On December 29, 2010, MERS assigned all beneficial interest under the Deed of Trust to Chase Home Finance

LLC (hereafter, "Chase"). Also on December 29, 2010, Chase appointed a successor trustee, replacing Alliance Title with Northwest Trustee Services, Inc. (hereafter, "NTS").

NTS recorded a notice of default on December 30, 2010, declaring Plaintiffs had failed to make any payments on the Note since before March 2010. Plaintiffs currently maintain possession of the property and have not made any payments for approximately eighteen months.

In January 2011, Chase caused NTS to post and publish notice of a trustee's sale of the property that would occur on May 16, 2011.

Plaintiffs filed the complaint to quiet title in this action on May 13, 2011. That same day, this Court entered a temporary restraining order (hereafter, "TRO"). On May 23, 2011, this Court denied Plaintiffs' motion for preliminary injunction, based in part on Chase's agreement to voluntarily postpone the trustee's sale of the property during the pendency of this action.

On September 1, 2011, Chase, MERS, and First American Title and Escrow Corporation (hereafter collectively, "Defendants") jointly filed the motion to dismiss that is now before this Court. On September 12, 2011, NTS also filed a motion to dismiss. On October 17, 2011, Plaintiffs filed a brief in opposition to Defendants' motion to dismiss. Defendants filed a reply brief on October 20, 2011. This Court heard oral argument regarding the matter on October 24, 2011.

## II. STANDARD OF ADJUDICATION

A court may grant a motion for judgment on the pleadings when there are no material issues of fact or law. *Davenport v. Burke*, 27 Idaho 464, 149 P. 511 (1915). A court may grant a motion to dismiss for failure to state a claim "when it appears beyond doubt that the plaintiff can prove no set of facts in support of [the] claim which would entitle [the plaintiff] to relief." I.R.C.P. 12(b)(6).

The non-moving party is entitled to have all inferences viewed in his or her favor. *Miles v. Idaho Power Co.*, 116 Idaho 635, 637, 778 P.2d 757, 759 (1989). Yet, the non-moving party's case must be anchored in something more than speculation. *Petricevich v. Salmon River Canal Company*, 92 Idaho 865, 452 P.2d 362 (1969). "Factual allegations must be enough to raise a right to relief above the speculative level." *Williams ex rel. Tabiu v. Gerber Products Co.*, 523 F.3d 934, 938 (9th Cir. 2008) quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 927 (2007). The allegations must be more "than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic*, 550 U.S. at 555.

A claim has facial plausibility only when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.* at 556. It asks for more than sheer possibility that a defendant has acted unlawfully. *Id.* Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Id.* at 557. The United States Supreme Court explained the analysis a court must take when considering a motion for judgment on the pleadings:

> Two working principles underlie [our decision in] *Twombly*. First, the tenet that a court must accept a complaint's allegations as true is inapplicable to threadbare recitals of a cause of action's elements, supported by mere conclusory statements. Second, determining whether a complaint states a plausible claim is context-specific, requiring the reviewing court to draw on its experience and common sense. A court considering a motion to dismiss may begin by identifying allegations that, because they are mere conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the complaint's framework, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.

*Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1940, 173 L. Ed. 2d 868 (2009).

## III. DISCUSSION

In this quiet title action, Plaintiffs intend to prove the invalidity of both the Note and the Deed of Trust. Defendants assert Plaintiffs have failed to state a claim upon which relief can be granted.

### A. Promissory Note

#### 1. Statute of Frauds

Plaintiffs assert the Note is invalid because it does not comply with the statute of frauds.

Defendants assert the Note is not subject to the statute of frauds because it is a negotiable instrument and not a real-estate sales contract.

Idaho Code § 9-503, Idaho's codification of the statute of frauds for real estate transactions, states:

> No estate or interest in real property, other than for leases for a term not exceeding one (1) year, nor any trust or power over or concerning it, or in any manner relating thereto, can be created, granted, assigned, surrendered, or declared, otherwise than by operation of law, or a conveyance or other instrument in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized by writing.

While this action involves an interest in property, the Note itself is not an instrument of conveyance. As a result, this Court concludes the Note is not subject to the statute of frauds.

A promissory note is a unilateral contract acknowledging the borrower's absolute obligation to repay loaned funds. *See E.B.C. Trust Corp. v. JB Oxford Holdings, Inc.*, 2004 WL 5641999, at *1 (C.D. Cal. Oct. 26, 2004). Only the obligor's signature is necessary for enforcement of a unilateral contract. *See Forsman Real Estate Co. v. Hatch*, 97 Idaho 511, 515 547 P.2d 1116, 1120 (1976).

In this case, Plaintiffs concede they signed the Note. This Court concludes the Note is a unilateral contract bearing the obligors signature, and as such, it is enforceable. Moreover,

Plaintiffs have not contested the Note's qualification as a negotiable instrument. Pursuant to Chapter 3 of Idaho's Uniform Commercial Code, a negotiable instrument only requires the signature of "the person undertaking to pay." I.C. § 28-3-103(1)(i).

This Court concludes Plaintiffs' statute of frauds argument does not present a viable means of sustaining their cause of action.

**2. "Wet Ink" Original**

Plaintiffs assert Defendants cannot proceed with foreclosure without first proving enforceability of the note, and Defendants cannot enforce the note unless they present the "wet ink" original version of it.

Defendants assert that production of the original note is not required to proceed in foreclosure.

Plaintiffs cite *Nielson v. Westrom*, 46 Idaho 686, 270 P. 1054 (1928) for the proposition that "payment to a person who is not in possession of the paper is wholly at the risk of the payor." Regardless of that rule, the issue in this case is not whether Defendants are actually in possession of the original note. The issue, rather, is whether Defendants can proceed in foreclosure without producing the original note. To answer that, this Court must consider the statutory requirements for non-judicial foreclosure of a deed of trust. Those requirements are set out in Idaho Code §§ 45-1505 and 45-1506. This Court has conducted a thorough review of those statutes and concludes there is no requirement that the original note be produced prior to foreclosure. Furthermore, other courts have held that "production of the note is not required to proceed in foreclosure." *Tang v. California Reconveyance Co.*, 2011 WL 2581416, at * 5 (N.D. Cal. 2011); *see also Roque v. Suntrust Mortg., Inc.*, 2010 WL 546896 (N.D.Cal. 2010).

This Court concludes Plaintiffs' "wet ink" argument does not present a viable means of sustaining Plaintiffs' cause of action in this case.

**B. Deed of Trust**

Plaintiffs assert the Deed of Trust is void because it purports to make MERS both a beneficiary and a trustee in violation of the Idaho Trust Deeds Act.

Defendants assert the Deed of Trust is valid and enforceable because, when read as a whole, the Deed of Trust does not assign an impermissible dual role to MERS.

> Compared to mortgage requirements, the Deed of Trust Procedures authorized by statute make it far easier for lenders to forfeit the borrower's interest in the real estate securing a loan, and also abrogate the right of redemption after sale guaranteed under a mortgage foreclosure. [Citation omitted.] A mortgage generally may be foreclosed only by filing a civil action while, under a Deed of Trust, the trustee holds a power of sale permitting him to sell the property out of court with no necessity of judicial action. The Deed of Trust statutes thus strip borrowers of many of the protections available under a mortgage. Therefore, lenders must strictly comply with the Deed of Trust statutes, and the statutes and Deeds of Trust must be strictly construed in favor of the borrower.

*Security Pacific Finance Corp. v. Bishop*, 109 Idaho 25, 28, 704 P.2d 357, 360 (Ct. App. 1985).

A deed of trust creates a contractual power of sale, and like other contracts, is ambiguous if it is "reasonably subject to conflicting interpretation." *Rutter v. McLaughlin*, 101 Idaho 292, 293, 612 P.2d 135, 136 (1980). The construction of an ambiguous instrument is a question of fact to be resolved by the jury in this case. The court must construe the instrument "as a whole and consider it in its entirety to determine whether it is reasonably subject to conflicting interpretations." *Murr v. Selag Corp.*, 113 Idaho 773, 781, 747 P.2d 1302, 1310 (1987).

Pursuant to Idaho Code § 45-1503, the trustee of a deed of trust may pursue non-judicial foreclosure only if the deed of trust has been "executed in conformity with the Idaho Trust Deeds Act." That Act defines "beneficiary" as "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." I.C. § 45-1502. The parties agree the Deed of Trust designates MERS as the beneficiary. The parties dispute, however, whether the Deed of Trust also designates MERS as a trustee. "Trustee" is defined as "a person to whom the legal title to real property is conveyed by trust deed, or his successor in interest." I.C. § 45-1502(4).

> Although for practical purposes a deed of trust is only a mortgage with power of sale, title to the real estate does pass for the purpose of the trust. *Long v. Williams*, 105 Idaho 585, 587-88, 671 P.2d 1048, 1050-51 (1983). Legal title to the property is conveyed by the deed of trust to the trustee. I.C. § 45-1502(4).

*Defendant A v. Idaho State Bar*, 132 Idaho 662, 665, 978 P.2d 222, 225 (1999).

In this case, Page 1 of the Deed of Trust unambiguously designates Alliance Title as "Trustee." The Deed of Trust also 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 foreclose and sell the Property; and to take any action required of Lender including, but not limited to, releasing and canceling this Security Instrument.

Deed of Trust at 3.

Plaintiffs assert the foregoing language "inherently defines MERS as a trustee." Plaintiffs' Brief in Opposition at 12. The issue is whether the foregoing provision purports to give MERS a legal interest in the real property or in something else. This Court believes the language does nothing more than give MERS a legal interest in the Deed of Trust as nominee for the lender. In other words, the Deed of Trust gives MERS, as nominee of the lender, power to act on behalf of the lender to foreclose and sell the property or cancel the Deed of Trust. Thus the language referring to a legal interest held by MERS defines an agency relationship between the lender and MERS regarding lender's rights under the Deed of Trust. Even considering the

provision in isolation, this Court does not believe the Deed of Trust purported to give MERS a legal interest in real property. This Court must read the Deed of Trust as a whole. Upon doing so, this Court concludes the Deed of Trust unmistakably defines Alliance Title as the trustee, and there is no reasonable interpretation of the Deed of Trust that would make MERS a trustee.

This Court concludes Plaintiffs have failed to present law and facts sufficient to maintain their argument that the deed of trust is void.

## IV. CONCLUSION AND ORDER

In addition to the conclusions reached above, this Court notes that Plaintiffs have never presented any argument that they are not in default, that they made payments that were not credited, that the amount owed is inaccurate, or any other cognizable legal claim. Plaintiffs admit they have not made loan payments for approximately eighteen months, and they have not asserted they are currently able to afford their loan.

It appears beyond doubt that Plaintiffs can prove no set of facts in support of their claim that would entitle them to relief, and there exist no triable issues of material fact that preclude this Court form granting Defendants' motion for dismissal.

It appears to the Court that good cause for the entry of this Order has been shown; now therefore,

IT IS ORDERED, ADJUDGED, AND DECREED that:

Plaintiffs' complaint fails to state a claim upon which relief can be granted as to all causes of action asserted, and there are no genuine issues of material fact existing. For these reasons, this case is dismissed with prejudice.

IT IS FURTHER ORDERED that Defendants prepare and submit to this Court a judgment consistent with this Memorandum Decision and Order.

DATED this 15th day of November 2011.

Don L. Harding

DON HARDING
Senior District Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 15 day of November 2011, I did send a true and correct copy of the foregoing document upon the parties listed below by mailing, with the correct postage thereon; by causing the same to be placed in the respective courthouse mailbox; or by causing the same to be hand-delivered.

Rocky L. Wixom
WIXOM LAW OFFICE
P.O. Box 51334
Idaho Falls, ID 83405

Sheila R. Schwager
HAWLEY TROXELL ENNIS & HAWLEY LLP
877 Main Street, Suit 1000
P.O. Box 1617
Boise, ID 83701-1617

RONALD LONGMORE
Clerk of the District Court
Bonneville County, Idaho

By _____
Deputy Clerk

# United States Court of Appeals
## For the First Circuit

No. 11-1010

DAVID KIAH,

Plaintiff, Appellant,

v.

AURORA LOAN SERVICES, LLC, ET AL.,

Defendants, Appellees.

Before

Torruella, Boudin and Thompson,
Circuit Judges.

**JUDGMENT**

Entered: December 14, 2011

Appellant David Kiah filed this removed and dismissed action to void a mortgage and its assignment to defendant Aurora Loan Services, LLC, and to obtain damages for "fraudulent conveyance and slander of title." Essentially for the reasons explained in the district court's Amended Memorandum and Order, entered March 4, 2011, the judgment of dismissal and the denial of post-judgment relief are affirmed. We add only that removability is determined under federal, not state law; and that there is no meaningful overlap between the service members action and the removed action such as would justify abstention under any doctrine.

Affirmed.

By the Court:

/s/ Margaret Carter, Clerk.

cc:
David Francis Kiah
John A. Doonan
Reneau Jean Longoria
Erin P. Severini
Stephen M. Valente

**IN THE SUPREME COURT OF THE STATE OF IDAHO**

---

LESLIE JENSEN-EDWARDS,

Appellant,

vs.

MORTGAGE 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,

Respondents.

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# RESPONDENT MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.'S OPENING BRIEF – CERTIFICATE OF SERVICE

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**Case Number 38604-2011**

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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Leslie Jensen-Edwards
2600 E. Seltice Way
Suite 144
Post Falls, ID 83854
*Appellant in Pro Per*

Derrick J. O'Neill, ISB No. 4021
Brian Langford, ISB No. 7747
Routh Crabtree Olsen P.S.
300 Main Street, Suite 150
Boise, ID 83702
(208.489.3035)

Robert J. Pratte, *pro hac vice application pending*
Brent R. Lindahl, *pro hac vice application pending*
Fulbright & Jaworski, L.L.P.
80 South 8th Street, Suite 2100
Minneapolis, MN 55402
(612.321.2244)
*Attorneys for Respondents Mortgage Electronic Registration Systems, Inc.*

Holger Uhl, Esq.
McCarthy & Holthus LLP
8995 SW Miley Road
Suite 103
Wilsonville, OR 97070
*Attorney for Quality Loan Service Corporation and Pioneer Lender Trustee Services LLC*

## CERTIFICATE OF SERVICE

The undersigned does hereby certify that two copies of the Respondents' Opening Brief and this certificate of service was served upon the following designated parties, by first class mail, at the address listed below:

Leslie Jensen-Edwards
2600 E. Seltice Way
Suite 144
Post Falls, ID 83854
*Appellant in Pro Per*

Holger Uhl, Esq.
McCarthy & Holthus LLP
8995 SW Miley Road
Suite 103
Wilsonville, OR 97070
*Attorney for Quality Loan Service Corporation and Pioneer Lender Trustee Services LLC*

Dated and certified this 10th day of July, 2012

ROUTH CRABTREE OLSEN, P.S.

Brian R. Langford