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IN THE SUPREME COURT OF THE STATE OF IDAHO

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NATHON A. BAUGHMAN, and MELISSA K. KEMPTON-BAUGHMAN, husband and wife,

Plaintiffs/Appellants/Cross-Respondents,

v.

MORTGAGE ASSET SECURITIZATION TRANSACTIONS, INC., ET AL,

Defendants/Respondents/Cross-Appellants.

Supreme Court Docket No. 43640-2015

Kootenai County Case No. CV-13-4852

APPELLANTS/CROSS-RESPONDENTS COMBINED REPLY AND RESPONSE BRIEF

Appeal from the District Court
of the First Judicial District of the State of Idaho
in and for the County of Kootenai to the Supreme Court of the State of Idaho

HONORABLE LANSING L. HAYNES
District Judge, Presiding

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I.

INTRODUCTORY STATEMENT

Both parties have previously submitted detailed factual and procedural backgrounds on this matter. Plaintiffs/Appellants/Cross-Respondents MELISSA K. BAUGHMAN and NATHON A. BAUGHMAN will be referred to herein as "Baughmans". Defendants/Respondents/Cross-Appellants CAPITAL ONE, N.A., MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., CHEVY CHASE BANK, F.S.B. US BANK N.A., CORPORATE TRUST SERVICES, TRUSTEE and WELLS FARGO BANK, N.A., will be referred to herein as "Banking Entities".

With regards to the "Nature of the Case' as set forth by the Banking Entities states that "all the issues in this case involve the enforceability of the Deed of Trust" is unsupported by the lower Court's decision and the record on review herein. The Baughmans have consistently raised the issue of the Banking Entities' standing to bring the action of foreclosure which must be determined before the enforceability is determined by this Court-whether as a result of the statute of limitations or otherwise and breach of the terms of the Note and Deed of Trust as recognized by the Court in its Memorandum decision. See Vol. III, p. 627 the last sentence of the first full paragraph wherein the Court found "**Lastly the Baughmans asserted that the sale of the property breached the Deed of Trust".**

Further their statement that the Baughmans "executed a Deed of Trust against an investment property" is not supported by the facts and cites to no record supporting the same. Baughmans had purchased the property as their primary residence and in order to make ends meet they moved in with their parents and rented the property in the summer months. In their answers to Baughman's Complaint the Banking Entities admitted that the Baughman purchased the property as their residence. R., Vol I, p. 29 paragraph 11; R., Vol I, p. 48 paragraph 9. Further,

the Banking Entities' statement that Baughman's sued the lender to avoid the deed of trust and lien on the property, is not supported by citation to the record and the reasons for their bringing of the action are set out in their Complaint and Amended Complaint which clearly speak for themselves. R., Vol. I, pp. 26-32 and R., Vol., I pp. 87-94.

The Banking Entities efforts to paint this as a case were the Baughmans are attempting to get a 'windfall' diverts the attention from the Banking Entities failure to comport their actions with applicable regulations and applicable law, and for the Banking Entities to accept responsibility for bungling this foreclosure.

II.

ISSUES PRESENTED BY BANKING ENTITIES

The Banking Entities raise four issues on appeal:

1. Statute of Limitations and Maturity Date. The Banking Entities argument that the statute of limitations in I. C. § 5-214A can only begin to run from the maturity date, if a maturity date is stated on the face of the deed of trust, is erroneous and urges this court to adopt a meaning of 'maturity date' contradictory to the plain and accepted meaning of maturity date. See The Union Central Life Insurance Company v. Keith, 58 Idaho 471, 474-475, 74 P.2d 699, 700 (Idaho 1937). I. C. § 5-214A states that the five (5) year statute of limitations runs "...from the maturity date of the obligation *or indebtedness* secured by such mortgage."

In the case at hand the lender accelerated the indebtedness thus advancing the maturity date of the obligation and triggering the commencement of the running of the statute of limitation. See R., Vol. II, pp. 384-387; R., Vol. II, p. 389; R., Vol. II, pp. 393-394; That acceleration advances the maturity date and triggers the start of the statute of limitation is clear, see United States v. Dos Cabezas Corp., 995 F.2d 1486, 1490 (9th Cir. 1993):

> In the case of default on an instrument containing an automatic acceleration clause, "the debt is fully matured and the statute of limitations begins running when the debtor first defaults." 54 C.J.S. *Limitations of Actions* § 153. But if the acceleration clause in a note is optional, the debtor is not liable for payment on future nondelinquent installments "until the creditor chooses to take advantage of the clause and accelerate the balance. Unless the creditor exercises the option, the statute of limitations applies to each installment separately, and does not begin to run on any installment until it is due...." *Id.*[2]

The next issue that this presents is whether the District Court erred in determining that the date of acceleration was the date upon which the (first) Notice of Default was recorded, January 29, 2008. See *MEMORANDUM DECISION AND ORDER RE: MOTIONS FOR SUMMARY JUDGMENT*, (hereinafter referred to as '*DECISION*') R., Vol. III, p. 631. The District Court Judge cited to I.C. § 45-1506(12) as support for his conclusion that the recording of the Notice of Default was the trigger for the acceleration, this was error, see *DECISION* R., Vol. III pg. 631. I.C. § 45-1506(12) only deals with the statutory right to reinstate *after* the recording of the Notice of Default.

The Deed of Trust, in paragraph 22, see R., Vol. I, p. 76, beginning at L. 2, specifically provides that the Lender *must* give thirty (30) days written notice of its intent to accelerate, *prior* to the recording of a Notice of Default. If the lender opts to accelerate, the very terms of the Deed of Trust *requires* acceleration to occur *prior* to recordation of the Notice of Default. The Deed of Trust states "(d) that failure to cure the default on or before the date specified in the notice *may* result in acceleration of the sums secured by this Security Instrument and sale of the property", Deed of Trust Paragraph 22, R., Vol. I, p. 76, (emphasis added).

The January 22, 2008 letter, R., Vol. II, p. 384, was not equivocal at all but clearly states, "Your failure to cure said default on or before said date **shall** result in the acceleration (immediately becoming due and payable in full) of the entire sum secured by the loan security instrument....". The letter could not have been clearer or more plainly stated and in fact goes on

to explain how to reinstate the loan *after* the acceleration: "As provided in the loan security instrument, you have the right to reinstate the loan after loan acceleration...". Here are examples of letters that the courts have found to be unclear as to acceleration:

> In re Crystal Properties, Ltd., L.P., 268 F.3d 743, 751 (9th Cir. 2001):
>
> On February 23, 1995, the FDIC wrote:
>
> > The FDIC has not setoff any account, nor has it taken any action of any kind under either real property secured or personal property secured loans. All the FDIC has done is to freeze accounts for which there are delinquent loans outstanding. *Your loans however, are in default which invokls (sic) the default interest clause.*
>
> (emphasis in original). The letter is silent as to the FDIC's option to accelerate. If any inference is to be drawn from this letter, it is that the FDIC had not exercised its option to accelerate because it states that the FDIC had not used Crystal's accounts at Guardian to pay down the loan. Although the FDIC did warn Crystal that its loans were in default, it failed to discuss acceleration, a necessary predicate for invocation of the clause.
>
> The Eighth Circuit has found less ambiguous language in a letter from the lender to be insufficient to trigger an option to accelerate and a default interest clause. *See Tarkio Coll.,* 129 F.3d at 474-76. In *Tarkio College,* the holder of the note, First Bank, on May 14, 1991, wrote the debtor:
>
> > This is to advise you, ... that First Bank deems Tarkio College in default of its promissory note to First Bank with respect to the referenced loan transaction. Accordingly First Bank requests Tarkio College to now come forward within the next ten (10) days with full payment of the unpaid principal, $862,396.39, and unpaid and accrued interest of $38,793.70 as of this day, 05/14/91. Interest is accruing at a rate of $283.528 per day.
>
> *Id.* at 474. Even though this letter clearly stated that the debtor was required to come forward with the full amount within ten days and that interest was accruing at a higher rate, the Eighth Circuit concluded that it "was ambiguous and, therefore, was not a 'clear and unequivocal' statement of the bank's intent to accelerate the loan." *Id.* at 475.

The referenced letters cited in Crystal, differ substantially from the clear language of the letter at hand, using terms such as 'to come forward ... with full payment' and 'your loans are in

default', where the acceleration letter in this case specifically uses the terms 'acceleration', 'shall, 'No further notice': "Your failure to cure said default on or before said date **shall** result in the acceleration (immediately becoming due and payable in full) of the entire sum secured by the loan security instrument and the immediate institution of foreclosure proceedings....". and the closing paragraph of said letter states: "No further notice will be given prior to the initiation of legal action or foreclosure." See R., Vol. II, p. 384.

Further, the Banking Entities own internal records and conduct after the initial letter corroborates and demonstrates that acceleration of the obligation occurred *prior to* recordation of the Deed of Trust:

Chevy Chase Bank, F.S.B.'s own Collections/Customer Service Loan Activity Archive plainly shows that the loan was previously accelerated and a letter of the same was issued to Nathon Baughman on 09/04/08. See R., Vol III, p.600. The Activity Archive states that the '30-day letter' had to be re-issued with Nathon Baughman's name on it and that the 30 days would expire on October 4, 2008 and further that this was explained to Melissa Baughman on the telephone on October 1, 2008, that the foreclosure process would begin on October 4, 2008; and that the foreclosure was approved on October 31, 2008.

See R., Vol. III, p. 600:

LOG	09/04/08	COF	HAD TO RE-ISSUE 30 DAY LETTER WITH HUSBAND NATHON BAUGHMAN ADDED LETTER EXP 10/4/08
LET	09/04/08	COF XC046	056 - 30 day w/user options
LET	09/04/08	COF GC003	047 - C.Mail/Pulls Prop Add/2 Names
LET	09/04/08	COF GC004	052 - C.Mail/Pulls Mailing/1 Name

R. Vol. III, Pg. 599:

COL	10/01/08	CO7	MRS DOES NOT HAVE ANY

			BUYERS. XPLNED 30 DAY EXPIRES ON 10/04, WILL BEGAN PROCESS OF FCL.
...			
FOR FORECLOSURE	10/31/08	FCB	BEGIN ACTIVE
COL	10/31/08	CO7	INFORMED MRS LOAN HAS BEEN FORWARED (sic) TO FCL
LOG	10/31/08	RE1 FCAPPR	FORECLOSURE APPROVED

Further support that the stated maturity date is not the date to trigger the running of the statute of limitations is found in the unpublished opinion of Martin v. Pioneer Title Co. of Ada Cty., No. 96438, 1993 WL 381101, at *2 (Idaho Dist. July 8, 1993) which states that the statute of limitations begins to run at the date of *default*:

> As noted above, the last payment on the note was made on January 28, 1987; thus, the note went into default as of February 15, 1987, the date the next payment was due. Accordingly, the five year limitation period for an action to foreclose the deed of trust, I.C. §§ 5-214A, 45-1515, began running at that time, and had not expired when the FSLIC became the conservator of American Savings on March 9, 1989

See also, Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp. of California, 522 U.S. 192, 209, 118 S. Ct. 542, 552, 139 L. Ed. 2d 553 (1997)

> *Board of Trustees of Dist. No. 15 Machinists' Pension Fund v. Kahle Engineering Corp.,* 43 F.3d 852, 857 (C.A.3 1994) (" '[W]here there is an acceleration clause giving the creditor the right upon certain contingencies to declare the whole sum due, the statute begins to run, only with respect to each instalment, at the time the instalment becomes due, *unless the creditor exercises his option to declare the whole indebtedness due, in which case the statute begins to run from the date of the exercise of his option.*' ") (quoting 51 Am.Jur.2d, Limitation of Actions § 133 (1970)); see also 4 A. Corbin, Contracts § 951 (1951) (emphasis added).

There is strong support for the argument that the date of acceleration should be the date of default:

See, Canadian Birkbeck Inv. & Sav. Co. v. Williamson, 32 Idaho 624, 186 P. 916, 918 (1920)

> It is clear that the accrual of the cause of action must be determined from the acceleration clause in the mortgages. In the complaint filed in the court

> of Alberta, and also in this action respondent relied upon the acceleration clause to declare the principal, interest, and moneys paid by it under the mortgages as due and payable. Where a contract contains an acceleration clause, positive in its terms and without any optional features in it, a default under said clause renders the entire indebtedness due, and the statute of limitations runs from such default. Snyder v. Miller, 71 Kan. 410, 80 Pac. 970, 69 L. R. A. 250, 114 Am. St. Rep. 489; Buss v. Kemp Lumber Co., 23 N. M. 567, 170 Pac. 54, L. R. A. 1918C, 1015; Lovell v. Goss, 45 Colo. 304, 101 Pac. 72, 22 L. R. A. (N. S.) 1110, 132 Am. St. Rep. 184. The default of appellant, as interpreted by the respondent under the acceleration clause, rendered the entire indebtedness thereunder due and payable. Its right of action then accrued, and the statute of limitations began to run from such default. Pridgeon v. Greathouse, 1 Idaho, 359; Osburn v. Hopkins, 160 Cal. 501, 117 Pac. 519, Ann. Cas. 1913A, 413.

Gebrueder Heidemann, K.G. v. A.M.R. Corp., 107 Idaho 275, 688 P.2d 1180 (1984) deals with a deed of trust without a maturity date and deals with the type of situation that the 1999 change in I.C. § 5-214A was meant to remedy. Likewise, Elliott v. Darwin Neibaur Farms, 138 Idaho 774, 782, 69 P.3d 1035, 1043 (2003) dealt with an unstated maturity date.

Acceleration of an obligation changes the maturity date. See: In re Solutia Inc., 379 B.R. 473, 484 (Bankr. S.D.N.Y. 2007):

> Acceleration moves the maturity date from the original maturity date to the acceleration date and that date becomes the new maturity date. *See Federal National Mortgage Assn. v. Miller,* 123 Misc.2d 431, 432, 473 N.Y.S.2d 743 (Sup. Co., Nassau Co., N.Y., Spec. Term, Part 1 1984) ("*Federal Mortgage* ") and *Black's Law Dictionary* (8th ed.2004)(acceleration is defined as "the advancing of a loan agreement's maturity date so that payment of the entire debt is due immediately.")

It is black letter law that the maturity date of a loan is advanced when the loan is accelerated. See, Am. Mut. Bldg. & Loan Co. v. Kesler, 64 Idaho 799, 137 P.2d 960, 962 (1943):

> But the court had no power or authority to defer maturity of installments *already matured* by election under the acceleration clause of the contract. Canadian Birkbeck Investment & Sav. Co. v. Williamson, 32 Idaho 624, 631, 186 P. 916.
>
> ...
>
> October 21, 1935, appellant availed itself of the benefits of the **acceleration** clause contained in the contract and "elected

> to **accelerate** the maturity on all the installments of the said note not then due." That election matured all installments of the contract sued upon for all purposes, not only in Utah but in Idaho as well. The bar of the statute of limitations then *began* to run against the *unmatured* installments and *continued* to run against *past due installments*, so it made no difference whether installments were then past due or not yet matured, as far as the statute of limitations was concerned in the foreclosure case.

Section 2. a of cross-appellant's argument would have you read the paragraph of the loan stating a precise maturity date in a vacuum and not as an integrated portion of a loan that has clauses that become triggered by the happening of a particular event, which event may or may not occur, but for which the loan provides a contingency for, such as default by the borrower resulting in acceleration by the lender. Cross-appellant cites the language of the loan dealing with acceleration and in the next breath attempts to state that said acceleration does not affect the maturity date of the loan, in contradiction to the plain unambiguous meaning of the very term, 'acceleration'

For a definition of maturity, see Gov't of the Virgin Islands v. Brown, 221 F.2d 402, 405 (3d Cir. 1955):

> 'Maturity, when applied to commercial paper, means the time when the paper becomes due and demandable, that is, the time when an action can be maintained thereon to enforce payment'

Prop. Acceptance Corp. v. Zitin, 414 F. Supp. 2d 534, 537 (E.D. Pa. 2005): 'absent acceleration, each missed installment payment is a separate default' citing, Bd. of Trustees of Dist. No. 15 Machinists' Pension Fund v. Kahle Eng'g Corp., 43 F.3d 852 (3d Cir. 1994).

The Banking Entities urge that the term 'maturity date' be viewed in isolation of the remainder of the Deed of Trust which is illogical. See Brobeck, Phleger & Harrison v. Telex Corp., 602 F.2d 866, 872 (9th Cir. 1979):

> In performing our judicial function of interpretation, we note that "it is beyond question that every provision of a contract should be examined to determine the meaning and intention of the parties. . . . the meaning of words contained in a contract is to be determined not from a consideration of the words alone but from a reading of the entire contract." Sunset Securities Co. v. Coward McCann, Inc., 47 Cal.2d 907, 911, 306 P.2d 777, 779 (1957).

> We seek to interpret the contract in a manner that makes the contract internally consistent.

Applied to the case at hand, the stated maturity date that the Banking Entities rely so heavily, is not in the Deed of Trust, pursuant to which they foreclosed, but in the Promissory Note. The Deed of Trust references the 2047 date as what it truly is, simply the last date the installments would be due if they had all been timely made *and if* the obligation had *not* been accelerated. The Banking Entities conducted a non-judicial foreclosure sale on January 13 of 2010, which sale was rescinded on May 20, 2011, see R., Vol. I p. 215, Notice of Rescission of Trustee's Deed Upon Sale.

What must be clear and what Appellants' believe is getting lost in the forest developed by all the foregoing arguments is that the Notice of Default recorded pursuant to the non-judicial foreclosure statutes was not the notice of default that accelerated the maturity date under the Deed of Trust for which Defendants bring their foreclosure action. The Baughmans' failure to pay pursuant to the Note and the letters from the lender thereafter proclaiming default and acceleration according to the lender's contractual rights under the Deed of Trust, was the relevant conduct defining the "maturity date". The only evidentiary value of the 1/29/2009 Notice of Default was corroboration that the lender previously accelerated the full amount due.

Further, that Deeds of Trust and Notes and violations as well as the interpretation thereof is governed by contract law and do not sound in equity and therefore conflicts in the evidence should be resolved by a jury and not the Court. As stated previously, the Court found that Baughmans brought an action for breach of contract as a result of violations by the lender of the terms of covenants of the contract-Deed of Trust and Note. R., Vol. III, p. 627, last sentence of the first full paragraph. The Court should have ruled on the Plaintiff's breach of Contract allegations initially under the standard of proof applied as if a jury were the ultimate trier of fact. See David Steed & Associates, Inc. v. Young, 115 Idaho 247, 248, 766 P.2d 717, 718 (1988). Under the

foregoing standard, the Banking Entities Motion for Summary Judgment should have been denied and the matter set first before a jury on the contract issues and thereafter the jury verdict to be used as advisory to the equitable issues of foreclosure. See Idaho First Nat. Bank v. Bliss Valley Foods, Inc., 121 Idaho 266, 824 P.2d 841 (1991).

The Courts, jumping from the standards of review applicable to actions to be tried by a jury and that of where a Court is the trier of fact was a misapplication of the law. The arguments as to when the acceleration occurred under the contract all relate to contract theories and whether lenders followed the terms of the agreement.

With the foregoing having been said, on page 22 of their Response/Opening Brief the Banking Entities state "The Baughmans cite to no evidence that acceleration occurred earlier than the January 29, 2009 notice." See Response Brief at pg. 22. This is incorrect. See Opening Brief at pg. 7 where the Baughmans reference the January 22, 2008 letter from Chevy Chase giving 30 days notice of acceleration and the 1/29/09 Notice of Default, R., Vol. 1 p. 289, which states that the loan had previously been accelerated.

Bakker v. Thunder Spring-Wareham, LLC, 141 Idaho 185, 190, 108 P.3d 332, 337 (2005), Cited by the Banking Entities, after the quotation cited by the Banking Entities, Combined Response Brief p. 10, ("When the language of a contract is clear and unambiguous, its interpretation and legal effect are questions of law."), goes on to state:

> The purpose of interpreting a contract is to determine the intent of the contracting parties at the time the contract was entered. In determining the intent of the parties, this Court must view the contract as a whole.

2. Breach of Trust Deed via rescission of a prior non-judicial foreclosure sale.

Rescission of Foreclosure Sale. The cases cited by the Banking Entities in support of their argument concerning the validity of their rescission of the non-judicial foreclosure which vested title of the subject property to UBS Investment, which they claim to be a non-entity, are not Idaho

cases; are distinguishable from the case at hand; and inapplicable. As to the conduct of the Banking Entities in sue-sponte rescission of the sheriff's Deed transferring the property to UBS, the matter seems to be of first impression as there appears to be no Idaho cases on point. The cases cited by the Banking Entities deal only with general points of law and are not fact specific to the issues at hand.

State of Or. By & Through Div. of State Lands v. Bureau of Land Mgmt., Dep't of the Interior, U.S., 876 F.2d 1419 (9th Cir. 1989), while stating a 'general rule of property law' dealt with the burden of proof at the lower court level, and while it cites to Moffat v. United States, 112 U.S. 24, 25, 5 S. Ct. 10, 11, 28 L. Ed. 623 (1884), the direct quote, cited in State of Or., cannot be found in Moffat, which was a suit to cancel patents.

The Banking Entities also cite to Buckeye Ret. Co., LLC., LTD v. Walter, 2012 Ark. App. 257, 404 S.W.3d 173 (2012), an Arkansas case, for the quotation: ("[I]n conveyances of real property the grantee must be a legal entity, so that title can vest in an individual, partnership, or a corporation."), see Response/Opening Brief at bottom of page 25. What the Banking Entities omitted from the quote was what preceded the section they quote: "In other words, *Arkansas* law requires ..." (emphasis added). Here is the full quote from Buckeye:

> In other words, Arkansas law requires that in conveyances of real property the grantee must be a legal entity, so that title can vest in an individual, partnership, or a corporation.

Likewise, with the Texas case cited, Parham Family Ltd. P'ship v. Morgan, 434 S.W.3d 774, 787 (Tex. App. 2014) the case stated: "in Texas, "a deed is void if the grantee is not in existence at the time the deed is executed", Parham.

Further, the Idaho Code under which the Banking Entities rescinded the Trustee's Deed upon Sale, I.C. § 45-1510(2), specifically states that the Notice of Recession shall state: "the reason

for rescission.". The Notice of Rescission of Trustee's Deed Upon Sale, R., Vol. I p. 215, states the reason for the rescission as:

> 5.) THAT THE TRUSTEE has been informed by the Beneficiary that the beneficiary desires to rescind the Trustee's Deed recorded upon the foreclosure sale which was conducted in error due to a failure to communicate timely, notice of conditions which would have warranted a cancellation for the foreclosure which did occur on 1/8/2010;

Now, the Banking Entities claim that the rescission was because title was held by a 'non-entity'. The language quoted above is from the Idaho Codes sample Notice of Recession of Trustee's Deed Upon Sale, which states that Notice 'shall be in substantially the following form'. The plain intent of the statute was that the actual reasons necessitating the rescission be stated.

The Banking Entities also fail to state any valid reason why it took them 16 months to discover their error and rescind the trustee sale. Every contract contains a covenant of good faith and fair dealing. See, Idaho First Nat. Bank v. Bliss Valley Foods, Inc., 121 Idaho 266, 287, 824 P.2d 841, 862 (1991):

> In *Luzar v. Western Surety,* 107 Idaho 693, 692 P.2d 337 (1984), this Court, without defining the nature of the covenant involved, stated that, "Good faith and fair dealing are implied obligations of every contract." 107 Idaho at 696, 692 P.2d at 340. In *Metcalf v. Intermountain Gas Co.,* 116 Idaho 622, 778 P.2d 744 (1989)

Which then goes on to define the covenant of good faith and fair dealing as 'Any action by either party which violated, nullifies or significantly impairs any benefit' to the contracting parties.

Not only did the Notice of Rescission (R., Vol., II, p. 390) fail to state that the reason the deed was rescinded was that the property had been sold to a non-entity, but that there was no valid proof that UBS was a non-entity under the rules of evidence nor a proper foundation laid as to the status of UBS as the affidavits of Amber Dina and JoJo Mensah should have been stricken and allowing them in was an abuse of discretion. The Affidavits lack foundation and contain

inadmissible hearsay pursuant to IRE Rules 701, 801 and 802.

3. The Baughmans were entitled to damages for loss of mesne profits. An owner of property is entitled to mesne profits when they are kept from utilizing their property due to its being wrongfully possessed by another. See United States v. Langendorf, 322 F.2d 25, 25 (9th Cir. 1963).

If the Court accepts the Banking Entities arguments above that UBS was a non-entity and the sale which dispossessed the Baughman's from their property invalid, the Banking Entities knew or should have known that the Trustee's Deed on Sale was to an entity that could not hold title. See Banking Entities Memorandum in Support of Defendants Motion for Summary Judgment and Alternative Motion for Summary Adjudication of Issues, R. Vol. II p. 321, where they refer to the assignments to UBS Investment Bank as 'the "Errant Assignments"'. The Banking Entities now claim that the entity doesn't exist when, in fact it clearly does. See Combined Response/Opening Brief at pg. 30.

Based upon the foregoing, the Banking Entities wrongfully deprived the Baughmans of the use of the property for the 16 months prior to their attempts to unwind what they now refer to as 'the invalid foreclosure sale'. They dispossessed the Baughmans of the property and did not inform them of the wrongful foreclosure after having set aside the sale and deprived them of their mesne profits. See Combined Response/Opening Brief at pg. 26.

Again, the foregoing is a breach of the lenders' duties under the Note and Deed of Trust and should have been reviewed under the standard as if the trier of fact would be a jury not the Court. Baughmans should have been given the benefit of all favorable inferences which might be reasonably drawn from the evidence as, clearly, the evidence propounded by Baughmans in objection to the motion for summary judgment contained conflicting inferences which in view

thereof reasonable minds might reach different conclusions. Therefor Defendant's motion for summary judgment should have been denied.

4. US Bank is not the proper holder of the Deed of Trust entitled to foreclose the Property. See Combined Response/Opening Brief at pg. 7. In support of this argument the Banking Entities claim that "The Baughmans Produced No Evidence to Contradict US Bank's Evidence that it is the Holder of the Note and Deed of Trust.", see Combined Response/Opening Brief at pg. 28. This claim is not supported by the record.

The, unopposed, Affidavit of Melissa K. Baughman in Support of Plaintiffs; Motion for Reconsideration R. Vol. III pp. 648-686, including Exhibits, has several items of proof that US Bank is **not** the proper holder of the Deed of Trust. Said Affidavit has exhibits from the MERS website, https://www.nmers.com, accessed by Melissa K. Baughman on July 15, 2015 which show that on that date the Servicer for the Deed of Trust was Capital One. N.A., and not US Bank. See R., Vol. III, p. 661, printout from MERS website of Baughman Mortgage, see also R., Vol. III, p. p. 660, phone log from Chevy Chase Bank. The Affidavit further stated that Melissa K. Baughman, on the same web site accessed her loan/Deed of Trust for investor information and found that on July 15, 2015 the MERS website reported that the investor for this loan/Deed of Trust was UBS Real Estate Securities, Inc. see R., Vol. III, p. 652, and p. 661-662. The exhibits referred to in Melissa K. Baughman's Affidavit were not objected to by the Banking Entities and demonstrate that there is indeed a material issue of fact as to whether US Bank has any connection to the loan/Deed of Trust and whether they are a proper party to be conducting a foreclosure sale on the subject property. As has become more common, this loan and deed of trust have been securitized, pooled and assigned so many times that it is not surprising the chain of title is convoluted.

The Banking Entities cite to the record at R., Vol. II, p. 343 for the proposition that UBS Investment Bank is not a legal entity, see Combined Response/Opening Brief at pg. 5,. The argument is misleading as the document at the cited location is the objected to, self-serving, hearsay Affidavit of Amber M. Dina. See R., Vol. II pps. 370-374, Appellants Baughmans' Objection and Motion to Strike Portions of Affidavits of JoJo Mensah and Amber Dina.

In support of the hearsay nature of the aforesaid affidavits and the inadmissibility of the attachments please see discussion of admissibility of website information in In re Ancona, No. 14-10532 CGM, 2016 WL 828099, at *11 (Bankr. S.D.N.Y. Mar. 2, 2016), re-argument denied, No. 14-10532-CGM, 2016 WL 1399265 (Bankr. S.D.N.Y. Apr. 6, 2016): (please note that this is an unpublished opinion):

> ("An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated."); *accord Presbyterian Church of Sudan v. Talisman Energy, Inc.,* 582 F.3d 244, 264 (2d Cir. 2009) ("only admissible evidence need be considered by the trial court in ruling on a motion for summary judgment."); *cf. Madanat v. First Data Corp.,* 282 F.R.D. 304, 311 (E.D.N.Y.2012) (finding that "information displayed on a website is hearsay that is not admissible under any exception"); *Novak v. Tucows, Inc.,* No. 06–CV–1909, 2007 U.S. Dist. LEXIS 21269, at *15–19 (E.D.N.Y. Mar. 26, 2007) (granting motion to strike certain exhibits of web page printouts as hearsay and for lack of authentication under Fed.R.Evid. 901); *U.S. v. Jackson,* 208 F.3d 633, 637 (7th Cir. 2000) ("The web postings were not statements made by declarants testifying at trial, and they were being offered to prove the truth of the matter asserted. That means they were hearsay.") (citing Federal Rule of Evidence 801).

Idaho has adopted the Federal Rules of Evidence, see State v. Woodbury, 127 Idaho 757, 760, 905 P.2d 1066, 1069 (Ct. App. 1995). Baughmans objected to the Affidavits of JoJo Mensah and Amber Dina as hearsay and lacking foundation. See R., Vol. II, p. 370-374, Baughmans Objection and Motion to Strike Portions of Affidavits of JoJo Mensah and Amber Dina. Amber Dina and JoJo Mensah's affidavit did not include their qualifications and experience as to laying

the appropriate foundation as to interpretation of the internet web information nor as to how it was compiled and by whom. The portions of the Amber Dina and JoJo Mensah Affidavits and the exhibits, print-outs from websites, was not within Amber Dina's personal knowledge; were clearly hearsay, if not hearsay within hearsay; lacked foundation; self- serving, and should have been stricken.

Further, when an attorney files an affidavit in a case they represent: In re Meeker, No. 10-04927-MAM-13, 2011 WL 2650686, at *3 (Bankr. S.D. Ala. July 6, 2011), report and recommendation adopted, No. 10-04927-MAM-13, 2011 WL 7178926 (Bankr. S.D. Ala. July 6, 2011):

> Mr. Wooten's affidavit contains a variety of statements, some of which that could have been attested to by other witnesses. At times, Mr. Wooten states his opinion or belief regarding potential issues and evidence in this case. Overall, it is not clear which portions of Mr. Wooten's affidavit should be taken as fact statements and which portions are advocacy on behalf of his client, and the affidavit is improper. Even if were proper for Mr. Wooten to submit an affidavit in a case where he is also the lawyer for one of the parties, it contains inadmissible hearsay. It is proper to strike the Affidavit of Nicholas Wooten.
>
> ...
>
> *(e) Printout from Standard & Poor's website*
> This printout that is apparently from the Standard & Poor's website has not been authenticated in accord with Federal Rule of Evidence 901, nor is it a self-authenticating document in accord with Federal Rule of Evidence 902. It appears that the Plaintiff is offering it for the truth of its content, making it inadmissible hearsay.
> It is proper to strike the printout from the Standard & Poor's website.

It should be noted that Idaho Rules of Evidence 901 and 902 are substantially the same as Federal Rules of Evidence 901 and 902.

III.
THE STATUTE OF LIMITATIONS WAS NOT TOLLED BY THE BAUGHMANS' BANKRUPTCY

The Banking Entities argument that the Baughmans bankruptcy filing tolled the running of

the statute of limitations is in error. Case law states that the automatic stay does not toll, stay or otherwise suspend the running of a creditors statute of limitations. See In re Bigelow, 393 B.R. 667, 670 (B.A.P. 8th Cir. 2008):

> Mitchell contends that the automatic stay suspends, and thus extends, the limitations period. But this argument misconstrues the operation and effect of § 108(c)(1).[8] **Section 108(c)(1) does not independently toll or suspend statutes of limitations which have not expired as of a bankruptcy petition date.**[9] (emphasis added)
>
> The reference in § 108(c) to 'suspension' of time limits clearly does not operate in itself to stop the running of a statute of limitations; rather, this language merely incorporates suspensions of deadlines that are expressly provided in other federal or state statutes.[10]
>
> Mitchell has not identified any non-bankruptcy federal or state statute that suspends or tolls the statute of limitations applicable to his claim against the Debtors, nor has he provided any grounds to justify a departure from this well-established interpretation of § 108(c). Therefore, we conclude that § 108(c) did not extend the statute of limitations on Mitchell's cause of action against the Debtors beyond October 29, 2007. In this case, the automatic stay had no effect on the statute of limitations, and the bankruptcy court had no authority to extend it.[11]

See also, In re Michael Angelo Corry Inn, Inc., 297 B.R. 447, 451 (Bankr. W.D. Pa. 2003); In re Bodenstein, 248 B.R. 808, 817 (Bankr. W.D. Ark.) aff'd, 253 B.R. 46 (B.A.P. 8th Cir. 2000) both holding that absent a separate agreement with the debtor, a creditors statute of limitation is not tolled by a debtor's bankruptcy. See also, In re Roth, 171 B.R. 357, 364 (Bankr. D.S.D. 1994), citing to In re Morton, 866 F.2d 561 (2d Cir.1989), which also discussed the length of time the creditor had when the debtors were *not* in bankruptcy and found it inequitable to toll the running of the statute of limitations. Here the creditor had *years* to file an action and not only chose not to, but did not file a Relief From Stay Motion in the Baughmans bankruptcy.

Further the District Court Decision being appealed from *did not address the issue of the tolling of the statute of limitations,* therefore there is no issue/error to appeal from. However, Baughmans assert, as per the cited cases that their bankruptcy did NOT toll the running of the

statute of limitations. See McPheters v. Maile, 138 Idaho 391, 397, 64 P.3d 317, 323 (2003):

> [Appellant]... raises several other issues on appeal....[issues] To properly raise an issue on appeal there must either be an adverse ruling by the court below or the issue must have been raised in the court below, an issue cannot be raised for the first time on appeal. Whitted v. Canyon County Bd. of Comm'rs., 137 Idaho 118, 121–22, 44 P.3d 1173, 1176–77 (2002).

Baughmans filed for Chapter 7 on June 4, 2009, R., Vol. II, p. 446 and received their Discharge on September 4, 2009, R., Vol. II, p. 492. (92 days). Even, if this Court accepted that at the minimum the acceleration date clearly and unequivocally occurred and began on October 4, 2008 as argued above, the action for judicial foreclosure action should have been brought by the Banking Entities as of October 4, 2014. As it stands, the Banking Entities action for judicial foreclosure was filed as of January 24, 2014-five (5) years and one hundred and twelve days (112) days. One Hundred and Twelve (112) days after the statute of limitations had run. If the Court agrees with their arguments that the statute of limitations was tolled by the bankruptcy by the 92 days, they are still 20 days beyond the statute of limitations.

IV.
IT WAS ERROR TO CONCLUDE THAT THE DATE OF THE NOTICE OF DEFAULT WAS THE DATE OF ACCELERATION

The Notice of Default plainly states that "the Beneficiary under said Deed of Trust...*has declared* ... all sums secured thereby immediately due and payable..." (emphasis added). See R. Vol. I, p. 289. Each and every Notice of Default references the past due amount as being owing from January 1, 2008 stating "The monthly installment of principal and interest plus impounds which became due on 1/1/2008 *and all subsequent installments*..." (emphasis added). See R. Vol. I, p. 385, Notice of Default recorded June 28, 2011 as instrument number 2316374000- Kootenai County, Idaho;

While the Notice of Default was *recorded* on January 29, 2009, it was prepared *prior* to

the date of recordation, having been signed on January 26, 2009 and in fact the banks activity log shows the account was sent to the attorney to start the foreclosure on November 10, 2008, see R., Vol. III, p. 598.

V.
ATTORNEY FEES AND COSTS

The Baughmans have requested an award of attorney fees and costs on appeal pursuant to I.C. § 12-121 and if they prevail in this appeal and pursuant to Rule 41 of the Idaho Appellate Rules as previously set out in its initial briefing and argues the same standards apply here in addressing a response to the Banking Entities reply arguments and arguments as to their cross appeal.

VI.
CONCLUSION

The Banking Entities inflammatory comments about Baughmans seeking a 'windfall' are red herrings meant to cloud the true issues of their failure to comply properly with the legal requirements imposed upon them and obfuscate their failure to timely or properly foreclose on the subject property. This case isn't about a windfall to the Baughmans, it is about the Banking Entities being legally accountable for their failure to comport with the law. While the numerous errors at the district court which are herein appealed, the most significant and impacting is the trial courts erroneous ruling on the date on which acceleration occurred.

The Banking Entities spurious and inflammatory comments about a 'windfall' to the Baughmans seek to redirect the proper inquiry here, which is whether the Banking Entities have complied with what is required of them pursuant to the terms of the Deed of Trust and controlling law, which they have not. The banking industry is a highly regulated industry for a reason. When a lender/servicer does not follow the established rules they claim that the borrower is trying to get a 'free house', as if the emotional turmoil caused by the banking systems ignoring of failed

compliance and being in a state of flux due to the lenders errors and/or omissions for years on end is just something the borrowers should have to put up with, they did, after all, default on their payments and that alone should absolve the lender from having to adhere to proper procedures, such as deal with transfers, assignments, securitization, pooling, etc. Of course most lenders cannot even attempt to untangle the web of documents associated with their loans/deeds of trusts.

A windfall is not the issue, the issues are, did the Court apply the correct standard of review to the causes of action?; did the Court error in its application of the evidentiary rules as to the affidavits supplied by the Banking Entities and the Baughmans?; did the Court apply the case law correctly as to the evidence and thereafter abuse its discretion as to its interpretation of the evidence?; and as a result of the foregoing should the Court have granted Defendant's motion for summary judgment; denied the Baughman's motion for summary judgment and dismissed their claims. Further, the Court should grant Baughman's their attorney fees and costs and deny Defendant's claims for attorney fees and costs.

As Baughmans have set forward and in its previous opening brief, this Court should remand the matter to District Court to set aside the Memorandum Decision and Order Re: Summary Judgment and the Judgment and Amended Judgment as it was error not to grant Baughman's motion for summary judgment and deny Defendants. Further, if this Court is not able to find the forgoing, to remand the matter with instructions to set aside the findings of the District Court and judgments and to set the matter for further proceedings-jury trial.

DATED this 26th day of August, 2016.

MADSEN LAW OFFICES, P.C.
Attorney for Appellants

By: _____
HENRY D. MADSEN

CERTIFICATE OF SERVICE

I certify that on this 26 day of August, 2016, I caused a true and correct copy of this entire document to be served, by the method indicated below, and addressed to the following:

Amber N. Dina
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601 W. Bannock St.
PO Box 2720
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[√] Via Facsimile to: (208) 388-1300
And U.S. Mail

By: MADSEN LAW OFFICES, PC