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IN THE SUPREME COURT OF THE STATE OF IDAHO

CMJ PROPERTIES, LLC, an Idaho Limited Liability Company, Plaintiff-Appellant, vs. JP MORGAN CHASE BANK, N.A., a National Banking Association, Defendant-Respondent.	SUPREME COURT NO. 44526 Case No. CV-OC-16-11039

APPELLANT'S REPLY BRIEF

Appeal from the District Court of the Fourth Judicial District
of the State of Idaho, in and for the County of Ada

Honorable Richard D. Greenwood, District Judge, Presiding

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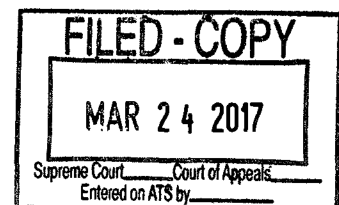


TABLE OF CONTENTS

1. TABLE OF AUTHORITIES 3
2. INTRODUCTION 4
3. ARGUMENT 4
    1. Chase's argument that the stated maturity date persisted despite acceleration ignores accepted definitions of key legal terms 4
    2. CMJ is entitled to the relief sought in spite of Chase's arguments regarding the contractual language 6
        a. Although the contract sets the initial maturity date, acceleration by definition changes the maturity date 6
        b. Contract terms addressing waiver do not change the result 8
        c. Chase's public policy arguments fail and do not change the required result .. 10
        d. So long as the acceleration date occurred more than 5 years prior to CMJ's quiet title action, the specific acceleration date does not matter 11
    3. The district court erred in failing to deem CMJ's factual allegations admitted in light of Chase's default 13
        a. Chase's alleged deficiencies in the Complaint are a red herring 13
        b. Setting aside the entry of default is not a proper subject of this appeal, and should not be ordered 15
    4. CMJ is entitled to attorney fees on appeal. Additionally, even if the Court rules against CMJ, Chase is not entitled to attorney fees on appeal 19
4. CONCLUSION 20

TABLE OF AUTHORITIES

Cases

Ahmad v. Eastpines Terrace Apts., Inc., 200 Md. App. 362 (2011)....9
Campbell v. Kildew, 141 Idaho 640 (2005)....19
Fannie Mae v. Hafer, 158 Idaho 694 (2015)....6
Haggerty v. Williams, 84 Conn. App. 675, 855 A.2d 264 (Conn. App. Ct. 2004)....9
Hamilton v. Alpha Servs., LLC, 158 Idaho 683 (2015)....15
Hammer v. City of Sun Valley, 2016 Ida. LEXIS 418 at *13 (Dec. 21, 2016)....7
Hirtler v. Hirtler, 566 P.2d 1231 (Utah 1977)....9
Hoffer v. Shappard, 160 Idaho 868 (2016)....19
Hoskins v. Howard, 132 Idaho 311 (1998))....5
Miller v. Bd. of Trustees, 132 Idaho 244, 970 P.2d 512 (1998)....15
Robbins v. Cnty. of Blaine, 134 Idaho 113 (2000))....4
Taylor v. McNichols, 149 Idaho 826 (2010)....14
Thomson v. City of Lewiston, 137 Idaho 473 (2002)....7
Trusty v. Ray, 73 Idaho 232 (1952)....4
Walker v. Shoshone County, 112 Idaho 991 (1987)....15

Statutes

House Bill No. 97....19
Idaho Code section 12-121....18, 19
Idaho Code section 45-1515....8
Idaho Code section 5-214A....passim
Idaho Code sections 45-1515....10

Other Authorities

Corbin on Contracts § 9.9 (rev. ed. 1996)....9
Williston on Contracts § 79:110 (4th ed. 2004)....9

Rules

Idaho Appellate Rule 35(a)(4) or 35(b)(4)....15
Idaho Rule of Civil Procedure 8(b)(6)....13, 14, 18
Idaho Rule of Civil Procedure 55(a)(1)....16, 17
Idaho Rule of Civil Procedure 55(b)(2)....18

INTRODUCTION

Chase's Respondent's Brief attempts to make this appeal more complicated than it is. This appeal is about just two things: whether *Trusty v. Ray* is still good law, and whether the terms "acceleration" and "maturity date" can be meaningfully decoupled from each other. Notably, Chase's brief avoids addressing the first of these issues – it fails to cite *Trusty v. Ray* at all and relies heavily on non-authoritative cases from outside the state of Idaho.

This case is not about whether the entry of default was proper, or whether Chase was properly served, or whether on remand the district court should hold an evidentiary hearing. The only critical fact under the relevant statutes is that the debt secured by the deed of trust in this case was accelerated more than five years before CMJ filed to quiet title. Due to Chase's default at the district court, that fact cannot be disputed. This case calls for a straightforward application of the Idaho Code and the Idaho Rules of Civil Procedure. The Court should reverse the district court's order dismissing the case, remand with instructions to enter judgment or default judgment in CMJ's favor, and award CMJ costs and fees on appeal.

ARGUMENT

1. Chase's argument that the stated maturity date persisted despite acceleration ignores accepted definitions of key legal terms.

Chase suggests that CMJ's proposed statutory construction is incorrect because it violates the "cardinal rule of statutory construction that all parts of a statute should be given meaning." Resp't's Br. 7 (quoting *Robbins v. Cnty. of Blaine*, 134 Idaho 113, 120 (2000)). Chase then recites related rules of statutory construction that "a statute must be 'construed so that effect is given to

its provisions, and no part is rendered superfluous or insignificant" and "the statute must be construed as a whole." *Id.* at 7–8 (quoting *Hoskins v. Howard*, 132 Idaho 311, 315 (1998)). Chase appears to take issue with CMJ's intentional decision not to offer argument related to the last sentence of Idaho Code section 5-214A. That sentence provides that "[i]f the obligation or indebtedness secured by such mortgage does not state a maturity date, then the date of the accrual of the cause of action giving rise to the right to foreclose shall be deemed the date of maturity of such obligation or indebtedness." *See I.C. § 5-214A.*

Here, the first page of the Credit Line clearly provides "Maturity Date: 08/09/2037." *R. 20, Compl. Ex. B p. 1.* The second page of the Deed of Trust clearly provides "the Debt is due and payable in full thirty (30) years from the date of this Deed of Trust which is 08/09/2037 (the "Maturity Date")." Therefore, the last sentence of section 5-214A is inapplicable in the present case because the condition it states ("[i]f the obligation or indebtedness secured by such mortgage does not state a maturity date...") is not satisfied on these facts. That statutory sentence presumably exists to ensure that a lender cannot avoid the application of section 5-214A by failing to provide a maturity date as of a date certain. The sentence operates as a gap-filler to ensure that the section encompasses all mortgages. CMJ's choice not to reference that sentence was not an oversight; the sentence simply has no application in this case. Because its condition is not met, omitting the sentence does not render it superfluous or insignificant. The statute is still construed as a whole and all of its parts are given meaning – some of the parts simply do not apply in this case.

2. **CMJ is entitled to the relief sought in spite of Chase's arguments regarding the contractual language.**

   a. **Although the contract sets the initial maturity date, acceleration by definition changes the maturity date.**

Chase argues that "the actions of the parties cannot modify defined contractual terms." *Resp't's Br. 9.* This argument misunderstands the nature of the issues before the Court. It is true here that "maturity date" is a contractually-defined term. But that term is defined in part as the date "the Debt is due and payable in full." *R. 10, Compl. Ex. A p. 2.* CMJ does not dispute that contracting parties can redefine commonly-used words as they see fit. But if a party truly intends to abrogate a well-understood definition, the common-use definition should be clearly disclaimed. In the documents at issue here, it is not at all clear that there was any meeting of the minds regarding redefining the commonly-used term "maturity date." At best the definition of "maturity date" in the contract is ambiguous. "Ambiguities in a contract of adhesion should be construed against the drafter." *Fannie Mae v. Hafer*, 158 Idaho 694, 702 (2015). "A contract of adhesion is an agreement between two parties of unequal bargaining strength, expressed in the language of a standardized contract, written by the more powerful bargainer to meet its own needs, and offered to the weaker party on a 'take-it-or-leave-it basis.'" *Id.* Because Chase's predecessor-in-interest Washington Mutual drafted the adhesion contract here, any ambiguity should be resolved in CMJ's favor. More to the point, Chase's argument is merely a post-hoc attempt to avoid the natural consequence of the fact that "accelerate" and "maturity date" are tightly coupled terms that cannot meaningfully be separated. *See* Appellant's Br. 10–12.

Moreover, "maturity date" is a term used in the applicable statute. Regardless of how the contract defined or used the term, for purposes of applying section 5-214A the term must be given its "plain, obvious, and rational meaning." *Hammer v. City of Sun Valley*, 2016 Ida. LEXIS 418 (Dec. 21, 2016) at *13 (*citing Thomson v. City of Lewiston*, 137 Idaho 473, 478 (2002)). Unambiguous statutes are applied as written. *Id.* "A statute is ambiguous where the language is capable of more than one reasonable construction.... If the statute is ambiguous, then it must be construed to mean what the legislature intended for it to mean.... To determine that intent, [courts] examine not only the literal words of the statute, but also the reasonableness of proposed constructions, the public policy behind the statute, and its legislative history." *Id.* at 13–15 (internal quotation marks and citations omitted). Notably absent from the list of how courts construe statutes is an evaluation of what the parties or their contract suggest a statutory term means. In any case, section 5-214A is not ambiguous. As detailed at length in CMJ's Appellant's Brief, "maturity date" is well-defined and well-understood to mean the actual date payment of a debt is due in full. The fact that the present maturity date differs from the original maturity date is a function of the acceleration clause – not the maturity date definition. As detailed in CMJ's Appellant's Brief, the acceleration clause is meant to specifically change the maturity date – otherwise what is it that is being accelerated? Here, the maturity date was accelerated to a point more than five (5) years prior to the filing of CMJ's quiet title claim.

b. <u>Contract terms addressing waiver do not change the result.</u>

Chase insists that under the contract documents, CMJ waived the statute of limitations and Chase's decision to delay foreclosing does not result in a waiver of its right to do so. *Resp't's Br. 10–11.* Neither of these arguments are applicable here.

CMJ does not dispute that the Credit Line includes language purporting to waive the statute of limitations. However, that language is inapplicable to the matter at issue for several reasons. Statutes of limitations procedurally operate as affirmative defenses, but CMJ is not a defendant in this action and therefore any purported waiver of a statute of limitations defense is not relevant. Moreover, the purported waiver of statute of limitations appears in the Credit Line but does not appear in the Deed of Trust.[1] To the extent any statute of limitations is relevant at all, it is only relevant with respect to the Deed of Trust and only for the purpose of evaluating whether the statute of limitations for Chase to foreclose the Deed of Trust has lapsed, per Idaho Code section 45-1515 and 5-214A. Any waiver of a statute of limitations on the Credit Line has no impact on the statute of limitations to foreclose the Deed of Trust. Further, CMJ is not a party to the Credit Line and did not itself make any such waiver. The purported waiver was made by Cory Jakobson, not CMJ.[2] Finally, it is not clear under Idaho law that a statute of limitations may be waived prospectively.

---

[1] The language in the Credit Line provides: "You waive any statutes of limitations...of this Agreement"; elsewhere the Credit Line defines "Agreement" as "This WaMu Mortgage Plus(TM) Agreement and Disclosure" without referencing the Deed of Trust. *R. 20, Compl. Ex. B p. 1.*

[2] Of course, any statute of limitation issues became inapplicable after Cory Jakobson was granted a discharge in his bankruptcy case.

Although Idaho appellate courts have apparently not addressed this issue, it has been considered by other states and by legal scholars:

> According to Williston on Contracts, most jurisdictions that have ruled on this issue hold that such waivers are void:
>
> > Although in certain states it has been held that a contract not to plead the statute of limitations whenever made may be binding indefinitely, the great and substantial majority of jurisdictions hold that such a promise is definitely in contravention of the public policy of the statute and will not, in consequence, be enforced.
> >
> > ....
> >
> > When thus interpreted, that is, as a promise never to plead the statute it is immaterial when the promise is made, because, by the general rule, such a promise is illegal whether made before or after maturity of the debt.
>
> 31 Williston on Contracts § 79:110 (4th ed. 2004) (footnotes omitted); accord 3 Corbin on Contracts § 9.9 (rev. ed. 1996) ("A promise not to plead the statute of limitations as a defense, or a promise to waive completely the benefit of it, are generally contrary to public policy particularly if made by contract in advance."); *Haggerty v. Williams*, 84 Conn. App. 675, 855 A.2d 264, 268 (Conn. App. Ct. 2004) ("'[A] stipulation contained in a written instrument, waiving the defense of the statute of limitations permanently, as to any breach of contract that might occur in the future, is void and unenforceable as contrary to public policy.'" (Quoting *Hirtler v. Hirtler*, 566 P.2d 1231, 1231 (Utah 1977)).
>
> As the Connecticut Court of Appeals noted, recognizing permanent waivers would lead to their routine insertion and ultimately eviscerate the statute of limitations. *Haggerty*, 855 A.2d at 269. This concern was expressed by the trial judge in his oral opinion:
>
> > I think that [a perpetual waiver of limitations] would be [] against public policy. And I think there's a good reason for that. If you could perpetually waive the statute of limitations then every note would automatically have a clause in it with a perpetual waiver of the statute of limitations and we'd be back where we started from. And I think that that is just simply not the law.

Ahmad v. Eastpines Terrace Apts., Inc., 200 Md. App. 362, 374–376 (2011). Thus, to the extent the purported waiver appears to operate prospectively, it should be deemed void and unenforceable as against public policy.

Chase also quotes a section of the Credit Line providing that "[t]o the extent permitted by law, we may delay or waive the enforcement of any of our rights under this Agreement without losing that right or any other right...." *R. 25, Compl. Ex. B p. 6.* The key part of this paragraph is the initial clause, "[t]o the extent permitted by law." The law, namely Idaho Code sections 45-1515 and 5-214A, only permitted Chase to delay enforcing its right to foreclose for up to five years from the maturity date. An attempt to contractually agree that such a statute does not apply has no effect. Further, and once again, the reservation of rights here applies to the Credit Line but not the Deed of Trust. It is the Deed of Trust that is more properly the subject of the instant action, and that document includes no such reservation of rights. Nor may the reservation in the Credit Line reasonably be read to apply to the Deed of Trust in light of the Credit Line's definition of "Agreement."

c. Chase's public policy arguments fail and do not change the required result.

Chase argues that CMJ's interpretation "underestimates [the] importance of the public notice requirements created by the maturity date contained in the loan documents." *Resp't's Br. 12-13.* First, Idaho Code section 5-214A is not concerned with providing notice to unrelated third parties. Second, even if the notice of the maturity date is important, the public also has notice that the maturity date may be accelerated upon certain events. Lastly, for loans such as this where no

payments have been made for a number of years, a maturity date of record does not provide a good indicator of quality of risk. Chase's purported public policy arguments are not availing.

Chase next suggests that CMJ's interpretation "seeks to undermine the statute by introducing a floating statute of limitations that is based entirely upon the actions of the parties, which will only serve to create confusion (and litigation) for courts, lenders, borrowers, and third parties." *Resp't's Br. 13.* This is a very broad statement. The proposition that acceleration changes the date on which the statute of limitations begins to run is a simple proposition that is consistent with the most natural reading of the statute. By contrast, Chase's suggestion to sever the enduring and well-understood relationship between acceleration and maturity is the interpretation that would add confusion and remove clarity. Further, "floating" statutes of limitation are common in any contract scenario – a breach of a contract may be cured, or there may be continuing breaches of a contract (thus constantly resetting a statute of limitations for breach of the contract).

d. So long as the acceleration date occurred more than 5 years prior to CMJ's quiet title action, the specific acceleration date does not matter.

Chase points out, correctly, that there are multiple events of default that CMJ could have argued accelerated the maturity date. *Respt's Br. 13–14.* Chase seems to take issue with the fact that CMJ did not argue that Jakobson's violation of the "Due on Sale" provision in the Deed of Trust accelerated the maturity date in 2007. *Id.* at 14. But this intentionally ignores that CMJ's allegations in its Complaint and its arguments on appeal clearly claim that acceleration occurred "*no later than* April 6, 2011." *R. 7, Compl. ¶ 21; Appellant's Br. 7* (emphasis added). CMJ's

Complaint was filed on June 17, 2016. *R. 4, Compl. p. 1.* Because Idaho Code section 5-214A requires foreclosure within five years, CMJ's burden was merely to prove that the statute began to run at any time prior to June 17, 2011. CMJ adequately alleged that the maturity date was changed no later than April 6, 2011, and Chase's failure to timely appear and answer requires this allegation to be admitted. Further, Chase's argument appears to further admit that acceleration occurred prior to required date – June 17, 2011. CMJ therefore met its burden. Nonetheless, CMJ agrees that it could have argued that acceleration occurred as early as 2007 when Jakobson transferred the property to CMJ.

More importantly, Chase misconstrues CMJ's argument by suggesting that CMJ is representing that "any event of default serves to reset the maturity date for statute of limitation purposes." *Resp't's Br. 14.* This is not CMJ's argument. CMJ's argument is that any *acceleration* resets the maturity date, as it must based on both the common sense and legal definitions of those terms. Some loan documents provide for automatic acceleration on certain events of default by using mandatory language such as "shall" rather than permissive language such as "at the Beneficiary's option." If lenders are concerned that automatic acceleration of a maturity date might limit their period to foreclose, then their loan documents should be written with permissive rather than mandatory language. Here, the "Due on Sale" provision in the Deed of Trust provides that "... the entire Debt *shall* become immediately due and payable in full upon sale or other transfer of the Property." *R. 11, Compl. Ex. A p. 3* (emphasis added). Further, the Credit Line provides that, upon Chase's termination of the Credit Line (which actually occurred), "the entire outstanding balance of the Credit Line ... *will be* immediately due and payable without prior notice

.. and you agree to pay immediately such amount plus any other amounts due under this Agreement." *R. 25, Compl. Ex. B, p. 6* (emphasis added). Thus, both events of default identified by the parties (the Credit Line clause identified by CMJ, and the Due on Sale provision identified by Chase) *required* immediate acceleration of the maturity date. .

3. <u>The district court erred in failing to deem CMJ's factual allegations admitted in light of Chase's default.</u>

Chase makes several arguments regarding the district court's entry of default against Chase. As an initial matter, Chase's brief includes a section heading stating that "The Lower Court Properly Denied the Appellant's Application for Default." *Resp't's Br. 15.* Setting aside, for a moment, the merits of that position - this heading is factually incorrect. The district court here <u>granted</u> CMJ's motion for entry of default, but it <u>denied</u> CMJ's motion for entry of default judgment. It may be that Chase merely omitted the word "judgment" from the end of its section heading.

a. <u>Chase's alleged deficiencies in the Complaint are a red herring.</u>

Chase argues that the district court correctly deemed the maturity date a question of law rather than fact. *Resp't's Br. 16.* Ultimately Chase concludes that "CMJ's Complaint failed to state a legitimate cause of action because an acceleration is not a maturity date for statute of limitations purposes." *Id.* at 17. For the reasons outlined in CMJ's Appellant's Brief and elsewhere in this Reply Brief, while CMJ recognizes that maturity date and acceleration does not mean the same thing - acceleration and maturity date are inextricably linked and Chase's argument must fail.

Next Chase argues that CMJ is not entitled to the relief it seeks because its Complaint lacks foundation. *Id.* Chase points to the record's lack of a deed conveying the subject real property to CMJ and lack of evidence that Jakobson stopped paying on the Credit Line. *Id.* at 17–18. This argument misunderstands Idaho Rule of Civil Procedure 8(b)(6) and the effect of failing to deny an allegation. Idaho's pleading requirements mandate that "[a] pleading that states a claim for relief must contain ... a short and plain statement of the claim showing that the pleader is entitled to relief." *I.R.C.P. 8(a)(2).* It is a long-standing principle that a claim for relief need not include or attach all of the evidence necessary to prove the allegations made; the purpose of a complaint is merely to "put[] the adverse party on notice of the claims brought against it." *Taylor v. McNichols*, 149 Idaho 826, 843-844 (2010). The purpose is not to require a complaining party to disclose all evidence sufficient to prove its allegations; otherwise there would be no need for the discovery process. More importantly, requiring a party to provide all proof of its allegations with its initial pleadings would eviscerate our justice system by eliminating the concept of, or need for, a civil trial. Very few cases could ever be brought and sustained if such were the standard.

In light of the applicable pleading standard, CMJ was under no duty to offer, in its Complaint or other initial pleadings, the evidence that Chase suggests was required. The very point of Rule 8(b)(6) is to ensure that when a party fails to appear and properly deny factual allegations that those allegations are then deemed admitted. This case presents an opportunity to reaffirm and apply that rule in its straightforward and customary manner. Chase is attempting to use these arguments as a red herring to divert attention from the fact that it failed to respond to CMJ's complaint.

b. Setting aside the entry of default is not a proper subject of this appeal, and should not be ordered.

Chase further argues that if the Court agrees with CMJ, "the proper remedy is to set aside the entry of default and remand the case for further proceedings." *Resp't's Br. 18.* Chase suggests that procedural deficiencies with service and with the entry of default require that the entry of default be set aside. *Id.* However, CMJ waived these issues by failing to cross-appeal.

> In Idaho, a timely notice of appeal or cross-appeal is a jurisdictional prerequisite to challenge a determination made by a lower court. Failure to timely file such a notice shall cause automatic dismissal of the issue on appeal." *Miller v. Bd. of Trustees*, 132 Idaho 244, 248, 970 P.2d 512, 516 (1998) (internal quotation marks omitted). Though Hamilton's dependents seek to modify the decision below, they failed to file a necessary cross-appeal.

Hamilton v. Alpha Servs., LLC, 158 Idaho 683, 693 (2015). Additionally, "a cross-appeal is required only when the respondent seeks to change or add to the relief afforded below, but not when it merely seeks to sustain a judgment for reasons presented at trial which were not relied upon by the trial judge but should have been." *Walker v. Shoshone County*, 112 Idaho 991, 993 (1987). Here, Chase seeks to change the relief afforded below by setting aside the entry of default. But Chase failed to cross-appeal and so cannot raise that issue. Nor is the issue of the entry of default a "subsidiary issue fairly comprised" in the issues CMJ raised, so Chase cannot raise it via CMJ's appeal under Idaho Appellate Rule 35(a)(4) or 35(b)(4). Accordingly, CMJ is entitled to have the Court refuse to consider Chase's arguments that the entry of default was improper or that Chase was improperly served.

Notwithstanding Chase's failure to preserve those issues for appeal, neither issue should be granted by this Court. CMJ filed its Complaint and Summons on June 17, 2016, and an

Affidavit of Service on June 24, 2016. *R. 2*. There was no other case activity before CMJ filed its Motion for Entry of Default and Default Judgment against [Chase] on July 27, 2016, supported by an affidavit of counsel filed the same day. *R. 2*. Chase filed its first appearance in the case, a Notice of Appearance, and an Objection a week later, on August 3, 2016. *R. 2*. The district court signed the order for entry of default that same day (August 3, 2016), but did not file it until August 16, 2016, the same day it entered its order and judgment dismissing CMJ's claims. *R. 2–3, 42*.

Idaho Rule of Civil Procedure 55(a)(1) provides that "[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the court must order entry of the party's default. If a party has appeared in the action, that party must be served with 3 days' written notice of the application for entry of default before default may be entered." *I.R.C.P. 55(a)(1)*. CMJ properly moved for entry of default after Chase failed to appear within its required time. CMJ was not obligated to provide three days' written notice of its application for entry of default to Chase because Chase had not appeared in the matter. In fact, CMJ was entitled to an entry of default the moment it filed its application; the Rule provides that under the proper circumstances, "the court *must* order entry of the party's default." (emphasis added). By coincidence, Chase happened to file its notice of appearance before the district court actually entered its default. CMJ was entitled to an entry of default even after Chase had appeared, because Chase's appearance occurred more than three days after CMJ's motion. That is, even if CMJ had served a three-day written notice on Chase on July 27, 2016, the fact that Chase did not appear until a full seven days later means that CMJ still would

have been able to move for entry of default before Chase first appeared.[3] Rule 55(a)(1) is a simple and straightforward rule that would be made much more complex if Chase's late-filed notice of appearance were allowed to reset the Rule's operation when default had already been requested. Indeed, allowing Chase to derail the entry of default on these facts might encourage future parties who have not timely appeared or defended to wait to file a notice of appearance strategically just to add confusion to the process.

Chase also argues that it was improperly served. *Resp't's Br. 20–21.* However, Chase cites exclusively to federal law regarding service of process, without citing any Idaho authority. In addition to failing to properly preserve or raise this issue on cross-appeal, Chase has failed to make any argument based on Idaho law that service was improper. This alone is reason enough to reject Chase's contentions on this issue. Indeed, it is nearly the only basis on which this issue can be decided. The record fails to include the Affidavit of Service referenced in the docket; the only relevant record evidence appears in an affidavit filed by counsel for CMJ, affirming that "the Defendants JP Morgan Chase Bank, N.A. were served by a process server on June 21, 2016, with a Summons and Complaint in the above-entitled matter. See Affidavit of Service filed on or about June 24, 2016." *R. 33, ¶ 2.* If Chase intended to challenge the entry of default on grounds of improper service, it should have cross-appealed to raise that issue. At the very least, it should have ensured that the Affidavit of Service was included in the clerk's record on appeal so that the Court could specifically consider that issue. Its failure to do either of things precludes the Court's

[3] Of course, CMJ was not obligated to serve such a notice because Chase had not yet appeared.

consideration of this issue. Of course, the fact that Chase ultimately did appear in this action at the district court means that regardless of how service was ultimately provided, Chase did get notice of the action in time to appear.

Next, Chase asserts that the entry of default should be set aside because it is "incongruent" with the district court's order denying CMJ's application for default judgment. *Resp't's Br. 21.* Chase does not support this assertion with argument. By the plain language of Rule 55(a)(1), CMJ was entitled to an entry of default: "When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the court *must* order entry of the party's default." (emphasis added). There is no incongruency where an entry of default does not subsequently lead to an entry of default judgment and there is no basis here for setting aside the entry of default.

Chase also argues that on remand, the district court should hold a hearing where CMJ would be required to prove its allegations with evidence. *Resp't's Br. 21.* This argument is based on the authority granted to the district court in Rule 55(b)(2) to "conduct hearings or make referrals when, to enter or effectuate judgment, it needs to ... (C) establish the truth of any allegation by evidence; or (D) investigate any other matter." Here, there is simply no need for an evidentiary hearing. The factual allegations in CMJ's Complaint must be deemed admitted under Rule 8(b)(6). Further, Chase does not appear to reasonably dispute the factual allegations made in the Complaint. Even if the Court were to rule that the issue of the maturity date is a legal rather than a factual issue, the Court can and should resolve that question here, in this appeal. This matter should be resolved firmly and finally at this stage.

4. <u>CMJ is entitled to attorney fees on appeal. Additionally, even if the Court rules against CMJ, Chase is not entitled to attorney fees on appeal.</u>

The parties' briefing for this appeal has occurred contemporaneously with the Idaho Legislature's reconsideration of the applicable standard to determine when attorney fees are appropriate under Idaho Code section 12-121. At the time of this writing, the Legislature has passed and the Governor has approved an updated version of section 12-121, effective March 1, 2017, restoring the status quo prior to the *Hoffer v. Shappard* opinion. Accordingly, the applicable standard is whether "the case was brought, pursued or defended frivolously, unreasonably or without foundation." *H.B. No. 97.*

Chase offers circular logic to address CMJ's claim for attorney fees: "Chase asserts that it should prevail on this appeal, so it has not defended this appeal frivolously, unreasonably, or without foundation." *Resp't's Br. 23.* If merely asserting that one should prevail were enough to avoid liability for attorney fees under section 12-121, then the statute would never be invoked because every litigant would make the same assertion.

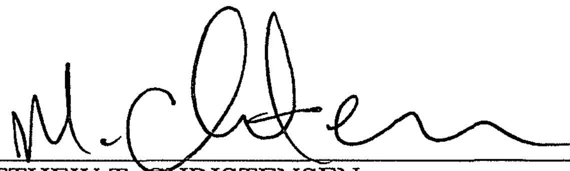
The Court should grant CMJ its requested relief on appeal, which would make it the prevailing party. The Court should further award CMJ attorney fees on appeal because Chase's primary argument on the key legal issue is that "acceleration" and "maturity date" are concepts that can be meaningfully distinguished and decoupled from each other. That is simply not so, and it is frivolous and unreasonable to suggest otherwise. Accordingly, CMJ is entitled to its attorney fees on appeal.

If the Court instead upholds the district court's order, CMJ should not be liable for Chase's attorney fees on appeal. Where an appellant brings a novel legal question to the Court, attorney fees should not be granted against the party under section 12-121. *Campbell v. Kildew*, 141 Idaho 640, 651 (2005). Here, CMJ raised novel issues of law with respect to Idaho Code sections 6-411 and 6-413, where there is almost no jurisprudence. It also raised a novel legal issue in questioning the continuing viability of *Trusty v. Ray*, 73 Idaho 232 (1952). Inviting the Court to clarify the applicability of untested provisions of Idaho Code or of decades-old precedent is not frivolous and should not serve as a basis for an adverse award of attorney fees. Chase's request for attorney fees should be denied.

CONCLUSION

For the foregoing reasons, CMJ respectfully requests that the Court reverse the district court's order dismissing the case, remand with instructions to enter judgment in CMJ's favor, and award CMJ costs and fees on appeal.

DATED this 24th day of March, 2017.



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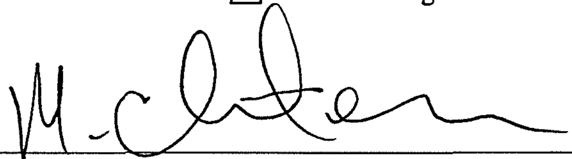
CMJ Properties, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of March, 2017, I caused to be served two true copies of the foregoing APPELLANT'S BRIEF, by the method indicated below, and addressed to those parties marked served below:

Served	Party	Counsel	Means of Service
☒	Defendant/Appellee	Jon A. Stenquist MOFFATT THOMAS PO Box 51505 Idaho Falls, Idaho 83405 (208) 522-5111	☒ U.S. Mail, Postage Paid ☒ Fax ☐ iCourt efiling



Matthew T. Christensen