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Vol 3 of 4

(VOLUME 3)

IN THE

SUPREME COURT

OF THE

STATE OF IDAHO

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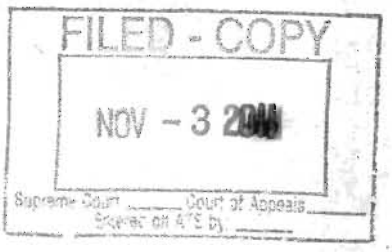

PARKWEST HOMES, LLC, an Idaho limited liability company,

Plaintiff-Appellant,

-vs-

JULIE G. BARNSON, an unmarried woman; and MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., a Delaware corporation, as nominee for HOMECOMINGS FINANCIAL, LLC., aka HOMECOMINGS FINANCIAL NETWORK, INC.,

Defendants,

And

RESIDENTIAL FUNDING REAL ESTATE HOLDINGS, LLC., a Delaware limited Liability company,

Intervenor-Respondent.

Appealed from the District of the Third Judicial District for the State of Idaho, in and for Canyon County

Honorable BRADLY S. FORD, District Judge

Robert B. Burns
MOFFATT THOMAS BARRETT ROCK & FIELDS, CHTD.

Attorney for Appellant

Stephen C. Hardesty, Ryan T. McFarland and Jake D. McGrady
HAWLEY TROXELL ENNIS & HAWLEY LLP.

Attorneys for Respondent

38919

IN THE SUPREME COURT OF THE

STATE OF IDAHO

PARKWEST HOMES, LLC., an Idaho limited liability company, Plaintiff-Appellant, -vs- JULIE G. BARNSON, an unmarried woman; And MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., a Delaware corporation, as nominee for HOMECOMINGS FINANCIAL, LLC. Aka HOMECOMINGS FINANCIAL NETWORK, INC., Defendants, And RESIDENTIAL FUNDING REAL ESTATE HOLDINGS, LLC., a Delaware limited liability company, Intervenor-Respondent.	)	Supreme Court No. 38919-2011

Appeal from the Third Judicial District, Canyon County, Idaho.

HONORABLE BRADLY S. FORD, Presiding

Robert B. Burns, MOFFATT THOMAS BARRETT ROCK & FIELDS, CHTD.

Attorney for Appellant

Stephen C. Hardesty, Ryan T. McFarland and Jake D. McGrady, HAWLEY TROXELL ENNIS & HAWLEY LLP.

Attorneys for Respondent

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FILED
9:45 A.M. P.M.
NOV 17 2010
CANYON COUNTY CLERK
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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

PARKWEST HOMES LLC, an Idaho limited liability company,

Plaintiff,

vs.

JULIE G. BARNSON, an unmarried woman; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., a Delaware corporation, as nominee for Homecomings Financial, LLC (f/k/a Homecomings Financial Network, Inc.), a Delaware limited liability company; and DOES 1-10,

Defendants.

and

RESIDENTIAL FUNDING REAL ESTATE HOLDINGS, LLC, a Delaware limited liability company,

Defendant/Counterclaimant.

Case No. CV 07-8274

RESIDENTIAL FUNDING REAL ESTATE HOLDINGS, LLC'S MOTION FOR SUMMARY JUDGMENT

Defendant/Counterclaimant Residential Funding Real Estate Holdings, LLC ("Residential"), by and through its counsel of record, Hawley Troxell Ennis & Hawley LLP, moves for summary judgment against Plaintiff ParkWest Homes LLC ("ParkWest"), pursuant to Idaho Code Sections 56(b) and 56(c). The basis for summary judgment is that because ParkWest did not commence an action against Residential's predecessor in interest to the property at issue (the "Property") within six months of filing the Mechanic's Lien (the "Lien") at issue in this case as required by Idaho Code section 45-510, the Lien is void as to Residential.

On November 28, 2006, when ParkWest recorded its Lien, Transnation Title was the Trustee under a Deed of Trust (the "Deed of Trust") that ParkWest asserted was junior to ParkWest's Lien. On August 7, 2007 when ParkWest commenced this action to foreclose its Lien, First American Title Insurance Company ("First American") was the Trustee under the Deed of Trust. At the time ParkWest commenced this action, First American was a necessary party to the Lien foreclosure action, and ParkWest was required to name First American as a Defendant under Idaho Code section 45-510 and long standing case law in Idaho and jurisdictions across the Country. ParkWest did not then, and never has, named First American as a Defendant in this case, and therefore, the Lien became void as to First American. When, on July 20, 2009, the Trustee's Deed to the Property was recorded, Residential obtained title to the Property free and clear of the Lien and any claim of ParkWest.

This motion is supported by the accompanying memorandum and Affidavit of Ryan T. McFarland.

DATED THIS 15th day of November, 2010.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By _____
Ryan T. McFarland ISB No. 7347
Attorneys for Defendant/Counterclaimant
Residential Funding Real Estate Holdings, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of November, 2010, I caused to be served a true copy of the foregoing RESIDENTIAL FUNDING REAL ESTATE HOLDINGS, LLC'S MOTION FOR SUMMARY JUDGMENT by the method indicated below, and addressed to each of the following:

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FILED
9:45 A.M. P.M.
NOV 17 2010
CANYON COUNTY CLERK
D. BUTLER, DEPUTY

Attorneys for Defendant/Counterclaimant Residential Funding Real Estate Holdings, LLC

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

PARKWEST HOMES LLC, an Idaho limited liability company,

Plaintiff,

vs.

JULIE G. BARNSON, an unmarried woman; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., a Delaware corporation, as nominee for Homecomings Financial, LLC (f/k/a Homecomings Financial Network, Inc.), a Delaware limited liability company; and DOES 1-10,

Defendants.

and

RESIDENTIAL FUNDING REAL ESTATE HOLDINGS, LLC, a Delaware limited liability company,

Defendant/Intervenor.

Case No. CV 07-8274

MEMORANDUM IN SUPPORT OF RESIDENTIAL FUNDING REAL ESTATE HOLDINGS, LLC'S MOTION FOR SUMMARY JUDGMENT

Residential Funding Real Estate Holdings, LLC ("Residential"), by and through its counsel of record, Hawley Troxell Ennis & Hawley LLP, hereby files this Memorandum in Support of its Motion For Summary Judgment against Plaintiff ParkWest Homes LLC ("ParkWest").

I.
INTRODUCTION

When ParkWest commenced this action over three years ago, it failed to follow firmly-rooted Idaho statute and case law in that ParkWest failed to name all of the parties with an interest in the property at issue (the "Property"). Specifically, ParkWest, though asserting priority over a certain Deed of Trust (the "Deed of Trust"), failed to name the Trustee of the Deed of Trust, the party with the legal interest in the Property, as a party defendant. Instead, ParkWest named only the beneficiary of the Deed of Trust and the property owner as defendants. Under Idaho law, which is consistent with the virtually-universal rule throughout the United States for over 100 years, ParkWest's failure to name the Trustee of the Deed of Trust voided the Lien as to the Trustee, including the Trustee's successor-in-interest, Residential. Because ParkWest failed to name the Trustee of the Deed of Trust, when Residential took title to the Property from that Trustee, Residential took title free and clear of any claim of ParkWest, including ParkWest's mechanic's lien (the "Lien"). For that reason, Residential respectfully requests that this Court enter summary judgment in its favor.

II.
UNDISPUTED FACTS

The facts and procedural history of this over-four-year dispute are set forth in numerous places in the record; the undisputed facts relevant to this instant Motion for Summary Judgment are as follows:

1. On March 15, 2006, ParkWest contracted with Defendant Julie Barnson ("Barnson") to build a home on the Property. See Plaintiff's Supplemental Amended Complaint To Foreclose Lien (the "Complaint") filed in this action, ¶ 6.

2. On November 14, 2006, Barnson caused two Deeds of Trust to be recorded as Instrument Nos. 200690998 and 200690999, official records of Canyon County, Idaho. The first of those, Instrument No. 200690998, is the "Deed of Trust" referred to in this Motion for Summary Judgment. Affidavit Of Ryan T. McFarland In Support Of Residential Funding Real Estate Holdings, LLC's Motion For Summary Judgment ("McFarland Aff."), filed concurrently herewith, ¶ 2, Exh. A.

3. Mortgage Electronic Registration Systems, Inc. was the beneficiary under the Deed of Trust. McFarland Aff., ¶ 2, Exh. A.

4. Transnation Title ("Transnation") was listed as the "Trustee" of the Deed of Trust. McFarland Aff., ¶ 2, Exh. A.

5. Homecomings Financial, LLC (f/k/a Homecomings Financial Network, Inc.) was listed as the "Lender" under the Deed of Trust. McFarland Aff., ¶ 2, Exh. A.

6. On November 28, 2006, ParkWest filed its Lien against the Property as Instrument No. 200694511, Official Records of Canyon County, Idaho. Complaint, ¶ 8.

7. On June 28, 2007, First American Title Insurance Company ("First American") was appointed the Trustee of the First Deed of Trust, by virtue of the Appointment Of Successor Trustee recorded as Instrument No. 2007044840, Official Records of Canyon County, Idaho. McFarland Aff., ¶ 3, Exh. B.

8. On August 7, 2007, ParkWest filed a Verified Complaint To Foreclose Lien commencing the above-captioned action, naming as party defendants only Barnson and

Mortgage Electronic Registration Systems, Inc., as nominee for Homecomings Financial, LLC (f/k/a Homecomings Financial Network, Inc.) ("MERS").

9. ParkWest never named Transnation or First American as a Defendant in this action.

10. On July 20, 2009, First American conveyed the Property to Residential via Trustee's Deed. McFarland Aff., ¶ 4, Exh. C.

III.
STANDARD OF REVIEW

Summary judgment "shall be rendered forthwith 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 a judgment as a matter of law." Idaho Rule of Civil Procedure 56(c). In a motion for summary judgment, the moving party has the burden of establishing the lack of a genuine issue of material fact. *Orthman v. Idaho Power Co.*, 130 Idaho 597, 600, 944 P.2d 1360, 1363 (1997). To meet this burden, the moving party must challenge in its motion and establish through evidence that no issue of material fact exists for an element of the nonmoving party's case. *Smith v. Meridian Joint Sch. Dist. No. 2*, 128 Idaho 714, 719, 918 P.2d 583, 588 (1996). The nonmoving party "may not rest upon the mere allegations or denials of that party's pleadings, but the 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." Idaho Rule of Civil Procedure 56(e).

The nonmoving party must submit more than just conclusory assertions that an issue of material fact exists to establish a genuine issue. *Coghlan v. Beta Theta Pi Fraternity*, 133 Idaho 388, 401, 987 P.2d 300, 313 (1999). "[A] mere scintilla of evidence or only slight doubt as to the facts is not sufficient to create a genuine issue of material fact for purposes of summary

judgment." *Samuel v. Hepworth, Nungester & Lezamiz, Inc.*, 134 Idaho 84, 87, 996 P.2d 303, 306 (2000).

Because there is no genuine issue of fact – i.e., it is undisputed and undisputable that ParkWest failed to name Transnation or First American – the effect of the failure to name the Trustee of the Deed of Trust is purely a question of law and is properly before the Court.

IV.
ARGUMENT

A. ParkWest's Lien Is Void As To All Persons Not Named As Defendants In This Action.

Idaho Code section 45-510 states that:

> No lien provided for in this chapter binds any building, mining claim, improvement or structure for a longer period than six (6) months after the claim has been filed, unless proceedings be commenced in a proper court within that time to enforce such lien . . .

Idaho courts strictly construe this six-month deadline. The lien claimant must commence an action within six months, naming as a party defendant each party whose interest the lien claimant seeks to foreclose; the failure to do so, or the failure to name an interested party within six months of recording the lien, voids the lien as against unnamed parties.

In *Willes v. Palmer*, 78 Idaho 104, 298 P.2d 972 (1956), the plaintiff properly recorded a mechanic's lien to secure an unpaid balance due on a home improvement project. The plaintiff then timely filed an action to foreclose the mechanic's lien; however, the lien claimant only named as a defendant the husband owner of the property and did not name the wife, who co-owned the residence as community property. Nearly thirteen months after the claim of lien was filed, the plaintiff was permitted to amend his complaint by adding the wife as a party defendant.

On appeal, the wife contended that since she was not made a party defendant until after the expiration of the six month period – that "proceedings [had not been] commenced" against her within "six months after the claim ha[d] been filed" – the lien expired as to her interest in the property and could not thereafter be foreclosed against her, even though the action had been brought against her husband, a co-owner of the property. The Idaho Supreme Court agreed, holding:

> We have held that the lien is lost as against the interest of a mortgagee not made a party to an action to foreclose the lien within the six month period. *Western Loan & Building Company v. Gem State Lumber Company*, 32 Idaho 497, 185 P. 554. It was held in that case, and in the cases cited therein, that the period is more than a mere statute of limitations which is waived if not pleaded; that it is a limitation, not alone upon the remedy, but upon the right or liability itself; and that the lien is lost as against the interest of any person not made a party to an action to enforce it within the six month period.
>
> In most jurisdictions having mechanic's liens statutes fixing the time within which the lien may be enforced, the time fixed is regarded as a limitation upon the right as well as upon the remedy, and that the lien is lost if the action is not brought within the specified time. *Crandall v. Irwin*, 139 Ohio St. 253, 39 N.E.2d 608, 139 A.L.R. 895, *Id.*, 139 Ohio St. 463, 40 N.E.2d 933, annotation 139 A.L.R. 903. At page 913 the annotator says:
>
> > "Where the time prescribed by the lien statute for bringing enforcement suits fixes the duration of the right, the lien becomes void for all purposes as to any person not made a party to an enforcement suit within that time."
>
> See also Annotation 75 A.L.R. 695, at page 713.
>
> The action not having been brought against [the wife] within the six month period, the lien as to her interest in the property was wholly lost.

Willes v. Palmer, 78 Idaho at 108. As noted in the dissent, the fact that the wife had notice of both the lien and the foreclosure action did not excuse the lien claimant's failure to name her as a

defendant: "[the] wife[] actually directed the improvements made on the property. There could be no surprise or prejudice." *Id*, 78 Idaho at 111. Still, the Court held that the lien was void as to the wife under Idaho Code section 45-510 because the lien claimant failed to name her as a defendant within six months of the filing of the lien.

Similarly, the Idaho Supreme Court held in *Palmer v. Bradford*, 86 Idaho 395, 401, 388 P.2d 96 (1963) that:

> The statute [Idaho Code section 45-510] creates and limits the duration of the lien. The statute also gives jurisdiction to the court to foreclose or enforce a lien on certain conditions – the filing of a claim of lien, and the commencement of the action within the time specified after such claim is filed. If these things are not done no jurisdiction exists in the court to enforce the lien. When the limit fixed by statute for duration of the lien is past, no lien exists, any more than if it had never been created.

(internal citations omitted). *See also Western Loan & Bldg. Co. v. Gem State Lumber Co.*, 32 Idaho 497, 501, 185 P. 554 (1919) (lien void as against mortgagee when suit not timely filed); *D.W. Standrod & Co. v. Utah Implement-Vehicle Co.*, 223 F. 517, 518 (9th Cir. 1915) (lien is void as against all subsequent encumbrancers who were not made parties to an action to foreclose the lien within six months from the date of the filing thereof); *Continental & Commercial Trust v. Pacific Coast Pipe Co.*, 222 F. 781, 788 (9th Cir. 1915) (holding that the predecessor to Idaho Code section 45-510 requires that a timely foreclosure action must be brought against all of those whose rights, estates, or interests are claimed to be adverse and subordinate; otherwise they could not be added); *Utah Implement-Vehicle Co. v. Bowman*, 209 F. 942, 947-48 (D. Idaho 1913) (where mortgagee of property was not made a party to suit to enforce mechanic's lien within statutory period the lien was of no effect against mortgagee's interest).

Under this long standing and uncontroverted Idaho law, ParkWest's Lien is void as to all persons and entities who claim a right in the Property and who were not named in ParkWest's Lien foreclosure action within six months of the filing of the Lien. As the Trustee of the Deed of Trust, First American held a legal interest in the Property at the time ParkWest commenced this action. Because ParkWest has never named First American as a party defendant, the Lien is void as to First American and all persons who claim under First American, including Residential.

B. First American Was A Necessary Party To ParkWest's Lien Foreclosure Action.

Presumably, ParkWest will argue that because it named MERS, the beneficiary of the Deed of Trust, it "commenced proceedings" sufficient to foreclose its interest as to all persons connected with the Deed of Trust, including First American and now Residential, and that ParkWest was not required to name the Trustee of the Deed of Trust, First American. Such an argument has two fatal flaws: (1) Residential acquired title to the Property from First American, the unnamed party, not MERS, and (2) such an argument is directly contrary to Idaho law and the nearly universal law across the Country.

Idaho Code section 45-1513 states: "A deed of trust or transfer of any interest in real property in trust to secure the performance of any obligation shall be a conveyance of real property." Idaho Code section 45-1502 clearly states that this "conveyance" is a transfer of *legal title* to a *trustee*, not a beneficiary:

> "Trust deed" means a deed executed in conformity with this act and *conveying real property to a trustee* . . .
>
> "Trustee" means a person to whom the legal title to real property is conveyed by trust deed, or his successor in interest.

As the person with the legal interest in the property, the trustee of a deed of trust is a necessary party to a mechanic's lien foreclosure action, and the failure to timely name a trustee means that the mechanic's lien is void as to the trustee and all persons claiming under the trustee.

That a trustee of a deed of trust is a necessary party to a mechanic's lien foreclosure action is, quite literally, hornbook law:

> In a jurisdiction in which a deed of trust or mortgage is effective as a transfer of legal title to the secured party [and Idaho is such a jurisdiction, per 45-1502 and 45-1513], the trustee of a deed of trust recorded before attachment of a mechanic's lien is a necessary party to a suit to enforce the mechanic's lien; if the trustee is not a party to the enforcement suit, the mechanic's lien cannot be enforced. Thus, the court in such a case must have jurisdiction over the person of the trustee before the court can divest the trustee of title.

52 AM. JUR. 2D *Mechanics' Liens* § 369 (2010). Under this rule, any lien or right of foreclosure that ParkWest may have had against First American's interest, even if otherwise valid, has been lost for failing to name First American within the six-month statutory period. First American was a necessary party to this action by ParkWest to foreclose its Lien. As the plain language of Idaho Code sections 45-1502 and 45-1513 instructs, First American held legal title to the Property at the time ParkWest initiated this lawsuit in 2007, and held legal title until it conveyed the Property to Residential in 2009. *See also Defendant A v. Idaho State Bar*, 132 Idaho 662, 665, 978 P.2d 222, 225 (Idaho 1999) ("Legal title to the property is conveyed by the deed of trust to the trustee. ... Only *after* the obligation secured by the deed of trust is satisfied is the deed of trust *re*-conveyed to the grantor."). The Court must, therefore, have jurisdiction over First American or Residential before it can enter a judgment foreclosing on the Property and ordering a judicial sale pursuant to the Lien. Absent such jurisdiction, the Court cannot enter a decree divesting Residential, or its predecessor in interest, First American, of title.

Courts across the country have come to the same conclusion. The Supreme Court of Virginia addressed this precise issue and concluded that because the deed of trust trustee was a necessary party in a proceeding to enforce a mechanic's lien, the failure to name such trustee defeats the enforcement suit. In *Walt Robbins, Inc. v. Damon Corp.*, 232 Va. 43, 348 S.E.2d 223 (1986), the court considered whether a mechanic's lien was unenforceable because it failed to name the deed of trust trustee as a party defendant. The court, on appeal from a chancery commissioner's report, considered and rejected the plaintiff's argument that the trustee was not a necessary party; instead, the court concluded:

> We are of opinion that a trustee in an antecedent deed of trust recorded on unimproved land is a necessary party in a suit to enforce a mechanic's lien on the improvements. Where, as here, a mechanic's lien is to be enforced by judicial sale, title is conveyed to the successful bidder by a special commissioner appointed for that purpose. If legal title is vested in the trustee of an antecedent deed of trust, and the property is to be sold free of the trust lien, the chancellor must have jurisdiction over the person of the trustee before he can enter a decree divesting him of title.
>
> We hold, therefore, that [the] mechanics' liens were not enforceable because the trustees and the beneficiary of the deed of trust were not made parties to the suits to enforce.

Id. 232 Va. at 48. *See also Lunsford v. Wren*, 64 W.Va. 458, 63 S.E. 308, 311 (1908) ("The trustee in a deed of trust, holding the legal title, is a necessary defendant to such suit, and his absence renders the bill fatally defective.").

Although the *Walt Robbins* court only expressly addressed whether a trustee in an antecedent deed of trust was a necessary party, the Supreme Court of Virginia subsequently clarified that its analysis applied with equal force to an interest that arose subsequent to the mechanic's lien. *See James T. Bush Construction Co. v. Patel*, 243 Va. 84, 412 S.E.2d 703 (1992) (rejecting argument that the holder of an interest arising subsequent to a mechanic's lien

is not a necessary party); *Heyward & Lee Construction Co., Inc., v. Sands, Anderson, Marks, & Miller*, 249 Va. 54, 58, 453 S.E.2d 270, 273 (1995) (clarifying that *Bush* court had held that trustee of deed of trust recorded subsequent to the filing of the mechanic's lien but prior to the filing of the enforcement suit was a necessary party). The *Heyward & Lee* court also discussed an earlier ruling in that case in which it had entered judgment for the defendants because a necessary party to an enforcement suit – a trustee of a subsequent deed of trust – had not been joined as a party "in a timely manner, *i.e.*, within six months after the mechanics' liens were filed." *Id.* 249 Va. at 57.

California case law also enforces the rule that the trustee of a deed of trust which otherwise might be junior to a mechanic's lien is a necessary party to a lien foreclosure action. In *Riley v. Peters*, 194 Cal.App.2d 296, 15 Cal.Rptr. 41 (Cal. Ct. App. 1961), the plaintiff/respondent ("Buyer") was, just like Residential here, a purchaser of property at a trustee's sale who thereafter brought, like Residential's counterclaim here, a quiet title action against mechanics' lien claimants who had filed liens and "obtained judgments against the former owners [of] the property." *Id.*, 194 Cal.App.2d at 297. Subsequent to the mechanics' lien claimants' judgments, the trustee of a deed of trust on the property foreclosed and "the trustee executed and delivered to [Buyer] a trustee's deed." *Id.* The mechanic's lien claimants had not joined "either [Buyers] or the trustee under the deed of trust as parties to any of the actions to foreclose their mechanic's liens." *Id.* The California Court framed the issue then before the court, which is the precise issue now before this Court, as follows:

> The parties concede that since appellants had commenced work prior to the recording of the deed of trust, appellants' liens prevail over the deed of trust through which [Buyers] obtained their interest. The sole issue, therefore, may be thus stated: Is commencement of an action against only the owner, and not also against the trustee or the subsequent holder under a deed of trust,

> effective . . . to preserve the lien and to prevail over the rights of interested persons who have not been named as parties?

Id. at 297-298. The California Court concluded that:

> [as to] holders of mechanics' liens on the property, who have failed in their lien foreclosure actions to join as parties the trustee under a deed of trust or to join the subsequent owners under that deed . . . such failure precludes [such mechanics' lien claimants] from claiming priority over such owners.

Id., at 297.

For over one hundred years, courts across the United States have similarly held that a trustee under a deed of trust is a necessary party to a lien foreclosure action. *See Johnson v. Bennett*, 6 Colo.App. 362, 367, 40 P. 847, 849 (Ct. App. 1895) (citing a Colorado statute virtually identical to Idaho Code section 45-510 and holding that "the suit must embrace all persons against whom priority of lien is claimed. . . . To establish a lien as superior to an incumbrance, the *cestui que* trust and the trustee must be made parties within six months"); *Schillinger Fire-Proof Cement & Asphalt Co. v. Arnott*, 14 N.Y.S. 326, 329 (N.Y. Spec. Term 1891) (reversing a judgment foreclosing a mechanic's lien because of the failure of the mechanic's lien claimant to name as a party defendant the "trustee under the mortgage on the premises"); and *Columbia Building & Loan Ass'n. v. Taylor*, 25 Ill.App. 429, (1887) (holding that where the property owner "executed a trust deed . . . to one Philip Maas, as trustee, thereby conveying the legal title in said premises to him," and where the subsequent action for foreclosure brought by a mechanic's lien claimant "made the *cestui que trust*, under the trust deed, a party," the lien claimant "should also have made the trustee, in whom the legal title was vested, a party. The rule is inflexible in such a case as this, that both the trustee and *cestui que trust* should be made parties").

The principle that a court must have jurisdiction over a deed of trust trustee before it can enter a judgment foreclosing on the property is consistent with jurisdictional principles of Idaho law. For example, in *Weyyakin Ranch Property Owners' Ass'n, Inc. v. City of Ketchum*, 127 Idaho 1, 2-3, 896 P.2d 327, 328-29 (1995), the court held that a trial court never obtained jurisdiction over elected city officials where "only the City of Ketchum was named as a party" and the plaintiffs "failed to name the elected officials individually[.]" And in *Collier Carbon & Chemical Corp. v. Castle Butte, Inc.*, 109 Idaho 708, 710, 710 P.2d 618, 620 (Ct. App. 1985), the court found that the trial court "lacked jurisdiction initially to enter such a judgment" against persons where the complaint failed to name persons in their individual capacity as defendants. Likewise here: the failure to name First American as a party defendant deprives this Curt of the power to enter a judgment against First American, or its successor in interest, Residential, and any judgment against First American or Residential would necessarily be void.

C. ParkWest's Lien Is Void As To Residential.

As set forth above, because ParkWest never named the Trustee of the Deed of Trust as a party Defendant, the Lien became void as to the Trustee. Therefore, when the Trustee conveyed the Property to Residential via Trustee's Deed nearly two years after the case was commenced, First American conveyed the Property free and clear of the Lien and of any interest of ParkWest.

Presumably, ParkWest will argue that First American held only a contingent power of sale, and therefore, ParkWest was excused from naming First American and the Lien survives the Trustee's Sale. Such an argument would find no support in Idaho or its sister-states' laws. As set forth above, Idaho case law is clear that the result of a lien claimant's failure to name a defendant in a lien foreclosure action is that the claimant loses its lien against the property in regard to the unnamed party's interest. Further support for this rule can be found in the factually

similar *Bonner Building Supply, Inc. v. Standard Forest Products, Inc.*, 106 Idaho 682, 682 P.2d 635 (Ct. App. 1984). In that case, Standard Forest Products, Inc. ("Standard") purchased the property there at issue via sheriff's sale. *Id.*, 682 P.2d at 637. Subsequently, Bonner Building Supply, Inc. ("Bonner") recorded a mechanic's lien that otherwise would have been superior to Standard's interest. *Id.* Bonner then brought its lien foreclosure action, but "Standard was not made a party to the foreclosure action or the ensuing sale." *Id.* The Court of Appeals held:

> although Bonner was not required to name Standard as a party to the foreclosure action . . . the failure to do so left Standards' interest in the property unaffected by the foreclosure. Because Bonner failed to foreclose against Standard within six months of the filing of the claim of lien, it lost its lien against the property in regard to Standard. For the purpose of this instant case, Bonner's lien was extinguished. Standard's interest in the property should be confirmed by the district court, free of Bonner's lien.

Id., at 639.

A California case, also virtually identical to this one, reaches the same conclusion. In *Sawyer Nurseries v. Galardi*, 181 Cal.App.3d 663, 226 Cal.Rptr. 502 (Cal. Ct. App. 1986), Sawyer Nurseries "provided labor and materials to improve certain real property located in Malibu, California." *Id.*, 181 Cal.App.3d at 665. Approximately six months later, the property owner executed a deed of trust against the property in favor of Cambridge. *Id.*, at 666. Less than two weeks later, Sawyer Nurseries recorded its mechanic's lien. *Id.* Five months later, the property owner filed bankruptcy (as Barnson did in this case). *Id.* Thereafter Cambridge obtained relief from the bankruptcy stay, foreclosed on the property, and recorded a trustee's deed conveying title to the property there at issue. *Id.* at 667. Sawyer Nurseries then filed an action to foreclose its mechanics' lien, some eight months after the bankruptcy court granted Cambridge relief from stay, and 166 days after the recordation of the trustee's deed. *Id.*

In applying California law, which required mechanic's lien claimants to commence an action within 90 days of the recordation of the lien, the California court held that the mechanic's lien foreclosure action was untimely and therefore barred: "once the automatic stay tolling [the mechanic's lien foreclosure statute] terminated, [the lien claimant] was required to act within the . . . statutory time limitation set forth therein on order to protect its mechanic's lien rights." *Id.*, at 671. Notwithstanding the fact that the property owner filed bankruptcy, and notwithstanding the fact that the lien was of record at the time of the execution of the trustee's deed, Sawyer Nurseries was not absolved of its duty to commence its action to foreclose against all interested parties, and Sawyer Nurseries' failure to comply with its duties meant that Cambridge could convey the property via trustee's deed free and clear of Sawyer Nurseries' mechanic's lien.

Similarly, here: nothing excused ParkWest from commencing its foreclosure action against all interested parties. Because ParkWest failed to name First American, First American was able to and did convey the Property, via the Trustee's Deed, free and clear of ParkWest's Lien. That First American held legal title to convey the property upon Barnson's default on the Deed of Trust does not absolve ParkWest of its statutory obligations, nor does it mean that Residential holds less than clear title to the Property. Under the rule articulated in *Bonner Building Supply, Inc. v. Standard Forest Products, Inc.* and elsewhere, ParkWest was not strictly required to name First American or Residential as Defendants in this action, but the failure to do so left First American's interest in the Property unaffected by ParkWest's foreclosure action. ParkWest's lien is extinguished as to First American and Residential, and Residential's interest in the property is free of ParkWest's Lien.

V.
CONCLUSION

For the reasons stated herein, Residential respectfully requests that this Court enter summary judgment in favor of Residential.

DATED THIS 15th day of November, 2010.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By _____
Ryan T. McFarland ISB No. 7347
Attorneys for Defendant/Counterclaimant
Residential Funding Real Estate Holdings, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of November, 2010, I caused to be served a true copy of the foregoing MEMORANDUM IN SUPPORT OF RESIDENTIAL FUNDING REAL ESTATE HOLDINGS, LLC'S MOTION FOR SUMMARY JUDGMENT by the method indicated below, and addressed to each of the following:

Robert B. Burns
MOFFATT, THOMAS, BARRETT, ROCK
& FIELDS, CHARTERED
101 S. Capitol Blvd., 10th Floor
P.O. Box 829
Boise, ID 83701
[Attorneys for Plaintiff]

X U.S. Mail, Postage Prepaid
____ Hand Delivered
____ Overnight Mail
____ E-mail
____ Telecopy

David E. Wishney
Attorney at Law
300 W. Myrtle Street, Suite 200
P.O. Box 837
Boise, ID 83701-0837
[Attorney for Defendant Julie G. Barnson]

X U.S. Mail, Postage Prepaid
____ Hand Delivered
____ Overnight Mail
____ E-mail
____ Telecopy

Ryan T. McFarland

ORIGINAL

FILED
9:45 A.M. P.M.
NOV 17 2010
CANYON COUNTY CLERK
D. BUTLER, DEPUTY

Stephen C. Hardesty ISB No. 4214
Ryan T. McFarland ISB No. 7347
HAWLEY TROXELL ENNIS & HAWLEY LLP
877 Main Street, Suite 1000
P.O. Box 1617
Boise, ID 83701-1617
Telephone: (208) 344-6000
Facsimile: (208) 954-5236
Email: shardesty@hawleytroxell.com
rmcfarland@hawleytroxell.com

Attorneys for Defendant/Counterclaimant Residential Funding Real Estate Holdings, LLC

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

PARKWEST HOMES LLC, an Idaho limited liability company, Plaintiff, vs. JULIE G. BARNSON, an unmarried woman; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., a Delaware corporation, as nominee for Homecomings Financial, LLC (f/k/a Homecomings Financial Network, Inc.), a Delaware limited liability company; and DOES 1-10, Defendants. and RESIDENTIAL FUNDING REAL ESTATE HOLDINGS, LLC, a Delaware limited liability company, Defendant/Counterclaimant.	Case No. CV 07-8274 AFFIDAVIT OF RYAN T. MCFARLAND IN SUPPORT OF RESIDENTIAL FUNDING REAL ESTATE HOLDINGS, LLC'S MOTION FOR SUMMARY JUDGMENT

Ryan T. McFarland, being first duly sworn upon oath, deposes and says:

1. I am counsel for Defendant/Counterclaimant Residential Funding Real Estate Holdings, LLC ("Residential") in the foregoing action and make this affidavit on my own personal knowledge.

2. Attached hereto as Exhibit A is a certified copy of a Deed of Trust (the "Deed of Trust") recorded by Defendant Julie G. Barnson ("Barnson") against the property at issue in this case (the "Property") on November 14, 2006, as Instrument No. 200690998, official records of Canyon County, Idaho.

3. Attached hereto as Exhibit B is a certified copy of the Appointment Of Successor Trustee, by which First American Title Insurance Company ("First American") became the Trustee of the Deed of Trust, recorded June 28, 2007, as Instrument No. 2007044840, Official Records of Canyon County, Idaho.

4. Attached hereto as Exhibit C is a certified copy of the Trustee's Deed by which First American conveyed the Property to Residential, recorded July 20, 2009 as Instrument No. 2009036841, Official Records of Canyon County, Idaho.

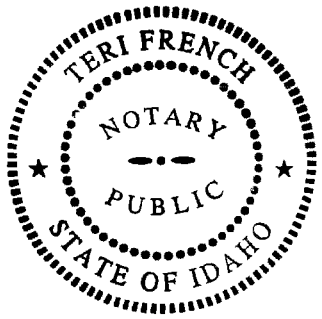
5. Further your affiant sayeth naught.

Ryan T. McFarland

STATE OF IDAHO)
) ss.
County of Ada)

I, Teri French, a Notary Public, do hereby certify that on this 15th day of November, 2010, personally appeared before me Ryan T. McFarland, who, being by me first duly sworn, declared that he is an attorney of record for Defendant/Counterclaimant Residential Funding Real Estate Holdings, LLC in the foregoing action, that he signed the foregoing document as an attorney for Residential Funding Real Estate Holdings, LLC, and that the statements therein contained are true.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.



Teri French

Notary Public for Idaho
Residing at Boise, Idaho
My commission expires June 27, 2014

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of November, 2010, I caused to be served a true copy of the foregoing AFFIDAVIT OF RYAN T. MCFARLAND IN SUPPORT OF RESIDENTIAL FUNDING REAL ESTATE HOLDINGS, LLC'S MOTION FOR SUMMARY JUDGMENT by the method indicated below, and addressed to each of the following:

Robert B. Burns
MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED
101 S. Capitol Blvd., 10th Floor
P.O. Box 829
Boise, ID 83701
[Attorneys for Plaintiff]

X U.S. Mail, Postage Prepaid
____ Hand Delivered
____ Overnight Mail
____ E-mail
____ Telecopy

David E. Wishney
Attorney at Law
300 W. Myrtle Street, Suite 200
P.O. Box 837
Boise, ID 83701-0837
[Attorney for Defendant Julie G. Barnson]

X U.S. Mail, Postage Prepaid
____ Hand Delivered
____ Overnight Mail
____ E-mail
____ Telecopy

Ryan T. McFarland

23

2005090598

RECORDED

2006 NOV 14 PM 1:20

Return To: Homecomings Financial
One Meridian Crossing, Ste. 100
Minneapolis MN 55423
Loan Number: 047-147610-1

REQUEST TRANSNATION TITLE
TYPE INTO FEE 69.00

Prepared By: Homecomings Financial
1687 114th Ave. SE, Suite 100
Bellevue, WA 98004

STATE OF IDAHO COUNTY RECORDER COUNTY OF CANYON

State of Idaho } ss.
County of Canyon
I hereby certify that the foregoing instrument is a true and correct copy of the original as the same appears in this office.
DATED 11/8/10
William H. Hurst, Clerk of the District Court and Ex Officio Recorder.
By _____ Deputy

016000515600CGC

[Space Above This Line For Recording Data]

DEED OF TRUST

MIN 100062604714761014

DEFINITIONS

Words used in multiple sections of this document are defined below and other words are defined in Sections 3, 11, 13, 18, 20 and 21. Certain rules regarding the usage of words used in this document are also provided in Section 16.

(A) "Security Instrument" means this document, which is dated NOVEMBER 10TH, 2006, together with all Riders to this document.
(B) "Borrower" is
JULIE G. BARNSON, AN UNMARRIED WOMAN

Borrower is the trustor under this Security Instrument.
(C) "Lender" is HOMECOMINGS FINANCIAL, LLC (F/K/A HOMECOMINGS FINANCIAL NETWORK, INC.)
Lender is a LIMITED LIABILITY COMPANY
organized and existing under the laws of DELAWARE

Lender's address is 1687 114TH AVE., SE, SUITE 100
BELLEVUE, WA 98004
(D) "Trustee" is TRANSNATION TITLE

(E) "MERS" is Mortgage Electronic Registration Systems, Inc. MERS is a separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns. **MERS is the beneficiary under this Security Instrument.** 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.
(F) "Note" means the promissory note signed by Borrower and dated NOVEMBER 10TH, 2006 . The Note states that Borrower owes Lender THREE HUNDRED THIRTY SEVEN THOUSAND SIX HUNDRED AND NO/100 Dollars (U.S. $ 337,600.00) plus interest. Borrower has promised to pay this debt in regular Periodic Payments and to pay the debt in full not later than DECEMBER 1ST, 2036 .
(G) "Property" means the property that is described below under the heading "Transfer of Rights in the Property."
(H) "Loan" means the debt evidenced by the Note, plus interest, any prepayment charges and late charges due under the Note, and all sums due under this Security Instrument, plus interest.
(I) "Riders" means all Riders to this Security Instrument that are executed by Borrower. The following Riders are to be executed by Borrower [check box as applicable]:

[X] Adjustable Rate Rider	[ ] Condominium Rider	[X] Second Home Rider
[ ] Balloon Rider	[ ] Planned Unit Development Rider	[ ] 1-4 Family Rider
[ ] VA Rider	[ ] Biweekly Payment Rider	[ ] Other(s) [specify]

(J) "Applicable Law" means all controlling applicable federal, state and local statutes, regulations, ordinances and administrative rules and orders (that have the effect of law) as well as all applicable final, non-appealable judicial opinions.
(K) "Community Association Dues, Fees, and Assessments" means all dues, fees, assessments and other charges that are imposed on Borrower or the Property by a condominium association, homeowners association or similar organization.
(L) "Electronic Funds Transfer" means any transfer of funds, other than a transaction originated by check, draft, or similar paper instrument, which is initiated through an electronic terminal, telephonic instrument, computer, or magnetic tape so as to order, instruct, or authorize a financial institution to debit or credit an account. Such term includes, but is not limited to, point-of-sale transfers, automated teller machine transactions, transfers initiated by telephone, wire transfers, and automated clearinghouse transfers.
(M) "Escrow Items" means those items that are described in Section 3.
(N) "Miscellaneous Proceeds" means any compensation, settlement, award of damages, or proceeds paid by any third party (other than insurance proceeds paid under the coverages described in Section 5) for: (i) damage to, or destruction of, the Property; (ii) condemnation or other taking of all or any part of the Property; (iii) conveyance in lieu of condemnation; or (iv) misrepresentations of, or omissions as to, the value and/or condition of the Property.
(O) "Mortgage Insurance" means insurance protecting Lender against the nonpayment of, or default on, the Loan.
(P) "Periodic Payment" means the regularly scheduled amount due for (i) principal and interest under the Note, plus (ii) any amounts under Section 3 of this Security Instrument.

(Q) "**RESPA**" means the Real Estate Settlement Procedures Act (12 U.S.C. Section 2601 et seq.) and its implementing regulation, Regulation X (24 C.F.R. Part 3500), as they might be amended from time to time, or any additional or successor legislation or regulation that governs the same subject matter. As used in this Security Instrument, "RESPA" refers to all requirements and restrictions that are imposed in regard to a "federally related mortgage loan" even if the Loan does not qualify as a "federally related mortgage loan" under RESPA.

(R) "**Successor in Interest of Borrower**" means any party that has taken title to the Property, whether or not that party has assumed Borrower's obligations under the Note and/or this Security Instrument.

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 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 following described property located in the COUNTY [Type of Recording Jurisdiction]
of CANYON [Name of Recording Jurisdiction] :
LOT 11 IN BLOCK 1 OF RIVERBEND SUBDIVISION, CANYON COUNTY, IDAHO, ACCORDING TO THE OFFICIAL PLAT THEREOF, FILED IN BOOK 34 OF PLATS, AT PAGE 2, RECORDS OF SAID COUNTY.

Parcel ID Number: 6R074790010040 which currently has the address of
28123 SILO WAY , [Street]
WILDER [City], Idaho 83676 [Zip Code]
("Property Address"):

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 the Property; and to take any action required of Lender including, but not limited to, releasing and canceling this Security Instrument.

BORROWER COVENANTS that Borrower is lawfully seised of the estate hereby conveyed and has the right to grant and convey the Property and that the Property is unencumbered, except for encumbrances of record. Borrower warrants and will defend generally the title to the Property against all claims and demands, subject to any encumbrances of record.

THIS SECURITY INSTRUMENT combines uniform covenants for national use and non-uniform covenants with limited variations by jurisdiction to constitute a uniform security instrument covering real property.

UNIFORM COVENANTS. Borrower and Lender covenant and agree as follows:

1. Payment of Principal, Interest, Escrow Items, Prepayment Charges, and Late Charges. Borrower shall pay when due the principal of, and interest on, the debt evidenced by the Note and any prepayment charges and late charges due under the Note. Borrower shall also pay funds for Escrow Items pursuant to Section 3. Payments due under the Note and this Security Instrument shall be made in U.S. currency. However, if any check or other instrument received by Lender as payment under the Note or this Security Instrument is returned to Lender unpaid, Lender may require that any or all subsequent payments due under the Note and this Security Instrument be made in one or more of the following forms, as selected by Lender: (a) cash; (b) money order; (c) certified check, bank check, treasurer's check or cashier's check, provided any such check is drawn upon an institution whose deposits are insured by a federal agency, instrumentality, or entity; or (d) Electronic Funds Transfer.

Payments are deemed received by Lender when received at the location designated in the Note or at such other location as may be designated by Lender in accordance with the notice provisions in Section 15. Lender may return any payment or partial payment if the payment or partial payments are insufficient to bring the Loan current. Lender may accept any payment or partial payment insufficient to bring the Loan current, without waiver of any rights hereunder or prejudice to its rights to refuse such payment or partial payments in the future, but Lender is not obligated to apply such payments at the time such payments are accepted. If each Periodic Payment is applied as of its scheduled due date, then Lender need not pay interest on unapplied funds. Lender may hold such unapplied funds until Borrower makes payment to bring the Loan current. If Borrower does not do so within a reasonable period of time, Lender shall either apply such funds or return them to Borrower. If not applied earlier, such funds will be applied to the outstanding principal balance under the Note immediately prior to foreclosure. No offset or claim which Borrower might have now or in the future against Lender shall relieve Borrower from making payments due under the Note and this Security Instrument or performing the covenants and agreements secured by this Security Instrument.

2. Application of Payments or Proceeds. Except as otherwise described in this Section 2, all payments accepted and applied by Lender shall be applied in the following order of priority: (a) interest due under the Note; (b) principal due under the Note; (c) amounts due under Section 3. Such payments shall be applied to each Periodic Payment in the order in which it became due. Any remaining amounts shall be applied first to late charges, second to any other amounts due under this Security Instrument, and then to reduce the principal balance of the Note.

If Lender receives a payment from Borrower for a delinquent Periodic Payment which includes a sufficient amount to pay any late charge due, the payment may be applied to the delinquent payment and the late charge. If more than one Periodic Payment is outstanding, Lender may apply any payment received from Borrower to the repayment of the Periodic Payments if, and to the extent that, each payment can be paid in full. To the extent that any excess exists after the payment is applied to the full payment of one or more Periodic Payments, such excess may be applied to any late charges due. Voluntary prepayments shall be applied first to any prepayment charges and then as described in the Note.

Any application of payments, insurance proceeds, or Miscellaneous Proceeds to principal due under the Note shall not extend or postpone the due date, or change the amount, of the Periodic Payments.

3. Funds for Escrow Items. Borrower shall pay to Lender on the day Periodic Payments are due under the Note, until the Note is paid in full, a sum (the "Funds") to provide for payment of amounts due for: (a) taxes and assessments and other items which can attain priority over this Security Instrument as a lien or encumbrance on the Property; (b) leasehold payments or ground rents on the Property, if any; (c) premiums for any and all insurance required by Lender under Section 5; and (d) Mortgage Insurance premiums, if any, or any sums payable by Borrower to Lender in lieu of the payment of Mortgage Insurance premiums in accordance with the provisions of Section 10. These items are called "Escrow Items." At origination or at any time during the term of the Loan, Lender may require that Community Association Dues, Fees, and Assessments, if any, be escrowed by Borrower, and such dues, fees and assessments shall be an Escrow Item. Borrower shall promptly furnish to Lender all notices of amounts to

be paid under this Section. Borrower shall pay Lender the Funds for Escrow Items unless Lender waives Borrower's obligation to pay the Funds for any or all Escrow Items. Lender may waive Borrower's obligation to pay to Lender Funds for any or all Escrow Items at any time. Any such waiver may only be in writing. In the event of such waiver, Borrower shall pay directly, when and where payable, the amounts due for any Escrow Items for which payment of Funds has been waived by Lender and, if Lender requires, shall furnish to Lender receipts evidencing such payment within such time period as Lender may require. Borrower's obligation to make such payments and to provide receipts shall for all purposes be deemed to be a covenant and agreement contained in this Security Instrument, as the phrase "covenant and agreement" is used in Section 9. If Borrower is obligated to pay Escrow Items directly, pursuant to a waiver, and Borrower fails to pay the amount due for an Escrow Item, Lender may exercise its rights under Section 9 and pay such amount and Borrower shall then be obligated under Section 9 to repay to Lender any such amount. Lender may revoke the waiver as to any or all Escrow Items at any time by a notice given in accordance with Section 15 and, upon such revocation, Borrower shall pay to Lender all Funds, and in such amounts, that are then required under this Section 3.

Lender may, at any time, collect and hold Funds in an amount (a) sufficient to permit Lender to apply the Funds at the time specified under RESPA, and (b) not to exceed the maximum amount a lender can require under RESPA. Lender shall estimate the amount of Funds due on the basis of current data and reasonable estimates of expenditures of future Escrow Items or otherwise in accordance with Applicable Law.

The Funds shall be held in an institution whose deposits are insured by a federal agency, instrumentality, or entity (including Lender, if Lender is an institution whose deposits are so insured) or in any Federal Home Loan Bank. Lender shall apply the Funds to pay the Escrow Items no later than the time specified under RESPA. Lender shall not charge Borrower for holding and applying the Funds, annually analyzing the escrow account, or verifying the Escrow Items, unless Lender pays Borrower interest on the Funds and Applicable Law permits Lender to make such a charge. Unless an agreement is made in writing or Applicable Law requires interest to be paid on the Funds, Lender shall not be required to pay Borrower any interest or earnings on the Funds. Borrower and Lender can agree in writing, however, that interest shall be paid on the Funds. Lender shall give to Borrower, without charge, an annual accounting of the Funds as required by RESPA.

If there is a surplus of Funds held in escrow, as defined under RESPA, Lender shall account to Borrower for the excess funds in accordance with RESPA. If there is a shortage of Funds held in escrow, as defined under RESPA, Lender shall notify Borrower as required by RESPA, and Borrower shall pay to Lender the amount necessary to make up the shortage in accordance with RESPA, but in no more than 12 monthly payments. If there is a deficiency of Funds held in escrow, as defined under RESPA, Lender shall notify Borrower as required by RESPA, and Borrower shall pay to Lender the amount necessary to make up the deficiency in accordance with RESPA, but in no more than 12 monthly payments.

Upon payment in full of all sums secured by this Security Instrument, Lender shall promptly refund to Borrower any Funds held by Lender.

4. Charges; Liens. Borrower shall pay all taxes, assessments, charges, fines, and impositions attributable to the Property which can attain priority over this Security Instrument, leasehold payments or ground rents on the Property, if any, and Community Association Dues, Fees, and Assessments, if any. To the extent that these items are Escrow Items, Borrower shall pay them in the manner provided in Section 3.

Borrower shall promptly discharge any lien which has priority over this Security Instrument unless Borrower: (a) agrees in writing to the payment of the obligation secured by the lien in a manner acceptable to Lender, but only so long as Borrower is performing such agreement; (b) contests the lien in good faith by, or defends against enforcement of the lien in, legal proceedings which in Lender's opinion operate to prevent the enforcement of the lien while those proceedings are pending, but only until such proceedings are concluded; or (c) secures from the holder of the lien an agreement satisfactory to Lender subordinating the lien to this Security Instrument. If Lender determines that any part of the Property is subject to a lien which can attain priority over this Security Instrument, Lender may give Borrower a notice identifying the

lien. Within 10 days of the date on which that notice is given, Borrower shall satisfy the lien or take one or more of the actions set forth above in this Section 4.

Lender may require Borrower to pay a one-time charge for a real estate tax verification and/or reporting service used by Lender in connection with this Loan.

5. Property Insurance. Borrower shall keep the improvements now existing or hereafter erected on the Property insured against loss by fire, hazards included within the term "extended coverage," and any other hazards including, but not limited to, earthquakes and floods, for which Lender requires insurance. This insurance shall be maintained in the amounts (including deductible levels) and for the periods that Lender requires. What Lender requires pursuant to the preceding sentences can change during the term of the Loan. The insurance carrier providing the insurance shall be chosen by Borrower subject to Lender's right to disapprove Borrower's choice, which right shall not be exercised unreasonably. Lender may require Borrower to pay, in connection with this Loan, either: (a) a one-time charge for flood zone determination, certification and tracking services; or (b) a one-time charge for flood zone determination and certification services and subsequent charges each time remappings or similar changes occur which reasonably might affect such determination or certification. Borrower shall also be responsible for the payment of any fees imposed by the Federal Emergency Management Agency in connection with the review of any flood zone determination resulting from an objection by Borrower.

If Borrower fails to maintain any of the coverages described above, Lender may obtain insurance coverage, at Lender's option and Borrower's expense. Lender is under no obligation to purchase any particular type or amount of coverage. Therefore, such coverage shall cover Lender, but might or might not protect Borrower, Borrower's equity in the Property, or the contents of the Property, against any risk, hazard or liability and might provide greater or lesser coverage than was previously in effect. Borrower acknowledges that the cost of the insurance coverage so obtained might significantly exceed the cost of insurance that Borrower could have obtained. Any amounts disbursed by Lender under this Section 5 shall become additional debt of Borrower secured by this Security Instrument. These amounts shall bear interest at the Note rate from the date of disbursement and shall be payable, with such interest, upon notice from Lender to Borrower requesting payment.

All insurance policies required by Lender and renewals of such policies shall be subject to Lender's right to disapprove such policies, shall include a standard mortgage clause, and shall name Lender as mortgagee and/or as an additional loss payee. Lender shall have the right to hold the policies and renewal certificates. If Lender requires, Borrower shall promptly give to Lender all receipts of paid premiums and renewal notices. If Borrower obtains any form of insurance coverage, not otherwise required by Lender, for damage to, or destruction of, the Property, such policy shall include a standard mortgage clause and shall name Lender as mortgagee and/or as an additional loss payee.

In the event of loss, Borrower shall give prompt notice to the insurance carrier and Lender. Lender may make proof of loss if not made promptly by Borrower. Unless Lender and Borrower otherwise agree in writing, any insurance proceeds, whether or not the underlying insurance was required by Lender, shall be applied to restoration or repair of the Property, if the restoration or repair is economically feasible and Lender's security is not lessened. During such repair and restoration period, Lender shall have the right to hold such insurance proceeds until Lender has had an opportunity to inspect such Property to ensure the work has been completed to Lender's satisfaction, provided that such inspection shall be undertaken promptly. Lender may disburse proceeds for the repairs and restoration in a single payment or in a series of progress payments as the work is completed. Unless an agreement is made in writing or Applicable Law requires interest to be paid on such insurance proceeds, Lender shall not be required to pay Borrower any interest or earnings on such proceeds. Fees for public adjusters, or other third parties, retained by Borrower shall not be paid out of the insurance proceeds and shall be the sole obligation of Borrower. If the restoration or repair is not economically feasible or Lender's security would be lessened, the insurance proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with

the excess, if any, paid to Borrower. Such insurance proceeds shall be applied in the order provided for in Section 2.

If Borrower abandons the Property, Lender may file, negotiate and settle any available insurance claim and related matters. If Borrower does not respond within 30 days to a notice from Lender that the insurance carrier has offered to settle a claim, then Lender may negotiate and settle the claim. The 30-day period will begin when the notice is given. In either event, or if Lender acquires the Property under Section 22 or otherwise, Borrower hereby assigns to Lender (a) Borrower's rights to any insurance proceeds in an amount not to exceed the amounts unpaid under the Note or this Security Instrument, and (b) any other of Borrower's rights (other than the right to any refund of unearned premiums paid by Borrower) under all insurance policies covering the Property, insofar as such rights are applicable to the coverage of the Property. Lender may use the insurance proceeds either to repair or restore the Property or to pay amounts unpaid under the Note or this Security Instrument, whether or not then due.

6. Occupancy. Borrower shall occupy, establish, and use the Property as Borrower's principal residence within 60 days after the execution of this Security Instrument and shall continue to occupy the Property as Borrower's principal residence for at least one year after the date of occupancy, unless Lender otherwise agrees in writing, which consent shall not be unreasonably withheld, or unless extenuating circumstances exist which are beyond Borrower's control.

7. Preservation, Maintenance and Protection of the Property; Inspections. Borrower shall not destroy, damage or impair the Property, allow the Property to deteriorate or commit waste on the Property. Whether or not Borrower is residing in the Property, Borrower shall maintain the Property in order to prevent the Property from deteriorating or decreasing in value due to its condition. Unless it is determined pursuant to Section 5 that repair or restoration is not economically feasible, Borrower shall promptly repair the Property if damaged to avoid further deterioration or damage. If insurance or condemnation proceeds are paid in connection with damage to, or the taking of, the Property, Borrower shall be responsible for repairing or restoring the Property only if Lender has released proceeds for such purposes. Lender may disburse proceeds for the repairs and restoration in a single payment or in a series of progress payments as the work is completed. If the insurance or condemnation proceeds are not sufficient to repair or restore the Property, Borrower is not relieved of Borrower's obligation for the completion of such repair or restoration.

Lender or its agent may make reasonable entries upon and inspections of the Property. If it has reasonable cause, Lender may inspect the interior of the improvements on the Property. Lender shall give Borrower notice at the time of or prior to such an interior inspection specifying such reasonable cause.

8. Borrower's Loan Application. Borrower shall be in default if, during the Loan application process, Borrower or any persons or entities acting at the direction of Borrower or with Borrower's knowledge or consent gave materially false, misleading, or inaccurate information or statements to Lender (or failed to provide Lender with material information) in connection with the Loan. Material representations include, but are not limited to, representations concerning Borrower's occupancy of the Property as Borrower's principal residence.

9. Protection of Lender's Interest in the Property and Rights Under this Security Instrument. If (a) Borrower fails to perform the covenants and agreements contained in this Security Instrument, (b) there is a legal proceeding that might significantly affect Lender's interest in the Property and/or rights under this Security Instrument (such as a proceeding in bankruptcy, probate, for condemnation or forfeiture, for enforcement of a lien which may attain priority over this Security Instrument or to enforce laws or regulations), or (c) Borrower has abandoned the Property, then Lender may do and pay for whatever is reasonable or appropriate to protect Lender's interest in the Property and rights under this Security Instrument, including protecting and/or assessing the value of the Property, and securing and/or repairing the Property. Lender's actions can include, but are not limited to: (a) paying any sums secured by a lien which has priority over this Security Instrument; (b) appearing in court; and (c) paying reasonable

attorneys' fees to protect its interest in the Property and/or rights under this Security Instrument, including its secured position in a bankruptcy proceeding. Securing the Property includes, but is not limited to, entering the Property to make repairs, change locks, replace or board up doors and windows, drain water from pipes, eliminate building or other code violations or dangerous conditions, and have utilities turned on or off. Although Lender may take action under this Section 9, Lender does not have to do so and is not under any duty or obligation to do so. It is agreed that Lender incurs no liability for not taking any or all actions authorized under this Section 9.

Any amounts disbursed by Lender under this Section 9 shall become additional debt of Borrower secured by this Security Instrument. These amounts shall bear interest at the Note rate from the date of disbursement and shall be payable, with such interest, upon notice from Lender to Borrower requesting payment.

If this Security Instrument is on a leasehold, Borrower shall comply with all the provisions of the lease. If Borrower acquires fee title to the Property, the leasehold and the fee title shall not merge unless Lender agrees to the merger in writing.

10. Mortgage Insurance. If Lender required Mortgage Insurance as a condition of making the Loan, Borrower shall pay the premiums required to maintain the Mortgage Insurance in effect. If, for any reason, the Mortgage Insurance coverage required by Lender ceases to be available from the mortgage insurer that previously provided such insurance and Borrower was required to make separately designated payments toward the premiums for Mortgage Insurance, Borrower shall pay the premiums required to obtain coverage substantially equivalent to the Mortgage Insurance previously in effect, at a cost substantially equivalent to the cost to Borrower of the Mortgage Insurance previously in effect, from an alternate mortgage insurer selected by Lender. If substantially equivalent Mortgage Insurance coverage is not available, Borrower shall continue to pay to Lender the amount of the separately designated payments that were due when the insurance coverage ceased to be in effect. Lender will accept, use and retain these payments as a non-refundable loss reserve in lieu of Mortgage Insurance. Such loss reserve shall be non-refundable, notwithstanding the fact that the Loan is ultimately paid in full, and Lender shall not be required to pay Borrower any interest or earnings on such loss reserve. Lender can no longer require loss reserve payments if Mortgage Insurance coverage (in the amount and for the period that Lender requires) provided by an insurer selected by Lender again becomes available, is obtained, and Lender requires separately designated payments toward the premiums for Mortgage Insurance. If Lender required Mortgage Insurance as a condition of making the Loan and Borrower was required to make separately designated payments toward the premiums for Mortgage Insurance, Borrower shall pay the premiums required to maintain Mortgage Insurance in effect, or to provide a non-refundable loss reserve, until Lender's requirement for Mortgage Insurance ends in accordance with any written agreement between Borrower and Lender providing for such termination or until termination is required by Applicable Law. Nothing in this Section 10 affects Borrower's obligation to pay interest at the rate provided in the Note.

Mortgage Insurance reimburses Lender (or any entity that purchases the Note) for certain losses it may incur if Borrower does not repay the Loan as agreed. Borrower is not a party to the Mortgage Insurance.

Mortgage insurers evaluate their total risk on all such insurance in force from time to time, and may enter into agreements with other parties that share or modify their risk, or reduce losses. These agreements are on terms and conditions that are satisfactory to the mortgage insurer and the other party (or parties) to these agreements. These agreements may require the mortgage insurer to make payments using any source of funds that the mortgage insurer may have available (which may include funds obtained from Mortgage Insurance premiums).

As a result of these agreements, Lender, any purchaser of the Note, another insurer, any reinsurer, any other entity, or any affiliate of any of the foregoing, may receive (directly or indirectly) amounts that derive from (or might be characterized as) a portion of Borrower's payments for Mortgage Insurance, in exchange for sharing or modifying the mortgage insurer's risk, or reducing losses. If such agreement provides that an affiliate of Lender takes a share of the insurer's risk in exchange for a share of the premiums paid to the insurer, the arrangement is often termed "captive reinsurance." Further:

(a) Any such agreements will not affect the amounts that Borrower has agreed to pay for Mortgage Insurance, or any other terms of the Loan. Such agreements will not increase the amount Borrower will owe for Mortgage Insurance, and they will not entitle Borrower to any refund.

(b) Any such agreements will not affect the rights Borrower has - if any - with respect to the Mortgage Insurance under the Homeowners Protection Act of 1998 or any other law. These rights may include the right to receive certain disclosures, to request and obtain cancellation of the Mortgage Insurance, to have the Mortgage Insurance terminated automatically, and/or to receive a refund of any Mortgage Insurance premiums that were unearned at the time of such cancellation or termination.

11. Assignment of Miscellaneous Proceeds; Forfeiture. All Miscellaneous Proceeds are hereby assigned to and shall be paid to Lender.

If the Property is damaged, such Miscellaneous Proceeds shall be applied to restoration or repair of the Property, if the restoration or repair is economically feasible and Lender's security is not lessened. During such repair and restoration period, Lender shall have the right to hold such Miscellaneous Proceeds until Lender has had an opportunity to inspect such Property to ensure the work has been completed to Lender's satisfaction, provided that such inspection shall be undertaken promptly. Lender may pay for the repairs and restoration in a single disbursement or in a series of progress payments as the work is completed. Unless an agreement is made in writing or Applicable Law requires interest to be paid on such Miscellaneous Proceeds, Lender shall not be required to pay Borrower any interest or earnings on such Miscellaneous Proceeds. If the restoration or repair is not economically feasible or Lender's security would be lessened, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower. Such Miscellaneous Proceeds shall be applied in the order provided for in Section 2.

In the event of a total taking, destruction, or loss in value of the Property, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower.

In the event of a partial taking, destruction, or loss in value of the Property in which the fair market value of the Property immediately before the partial taking, destruction, or loss in value is equal to or greater than the amount of the sums secured by this Security Instrument immediately before the partial taking, destruction, or loss in value, unless Borrower and Lender otherwise agree in writing, the sums secured by this Security Instrument shall be reduced by the amount of the Miscellaneous Proceeds multiplied by the following fraction: (a) the total amount of the sums secured immediately before the partial taking, destruction, or loss in value divided by (b) the fair market value of the Property immediately before the partial taking, destruction, or loss in value. Any balance shall be paid to Borrower.

In the event of a partial taking, destruction, or loss in value of the Property in which the fair market value of the Property immediately before the partial taking, destruction, or loss in value is less than the amount of the sums secured immediately before the partial taking, destruction, or loss in value, unless Borrower and Lender otherwise agree in writing, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument whether or not the sums are then due.

If the Property is abandoned by Borrower, or if, after notice by Lender to Borrower that the Opposing Party (as defined in the next sentence) offers to make an award to settle a claim for damages, Borrower fails to respond to Lender within 30 days after the date the notice is given, Lender is authorized to collect and apply the Miscellaneous Proceeds either to restoration or repair of the Property or to the sums secured by this Security Instrument, whether or not then due. "Opposing Party" means the third party that owes Borrower Miscellaneous Proceeds or the party against whom Borrower has a right of action in regard to Miscellaneous Proceeds.

Borrower shall be in default if any action or proceeding, whether civil or criminal, is begun that, in Lender's judgment, could result in forfeiture of the Property or other material impairment of Lender's interest in the Property or rights under this Security Instrument. Borrower can cure such a default and, if acceleration has occurred, reinstate as provided in Section 19, by causing the action or proceeding to be dismissed with a ruling that, in Lender's judgment, precludes forfeiture of the Property or other material impairment of Lender's interest in the Property or rights under this Security Instrument. The proceeds of any award or claim for damages that are attributable to the impairment of Lender's interest in the Property are hereby assigned and shall be paid to Lender.

All Miscellaneous Proceeds that are not applied to restoration or repair of the Property shall be applied in the order provided for in Section 2.

12. Borrower Not Released; Forbearance By Lender Not a Waiver. Extension of the time for payment or modification of amortization of the sums secured by this Security Instrument granted by Lender to Borrower or any Successor in Interest of Borrower shall not operate to release the liability of Borrower or any Successors in Interest of Borrower. Lender shall not be required to commence proceedings against any Successor in Interest of Borrower or to refuse to extend time for payment or otherwise modify amortization of the sums secured by this Security Instrument by reason of any demand made by the original Borrower or any Successors in Interest of Borrower. Any forbearance by Lender in exercising any right or remedy including, without limitation, Lender's acceptance of payments from third persons, entities or Successors in Interest of Borrower or in amounts less than the amount then due, shall not be a waiver of or preclude the exercise of any right or remedy.

13. Joint and Several Liability; Co-signers; Successors and Assigns Bound. Borrower covenants and agrees that Borrower's obligations and liability shall be joint and several. However, any Borrower who co-signs this Security Instrument but does not execute the Note (a "co-signer"): (a) is co-signing this Security Instrument only to mortgage, grant and convey the co-signer's interest in the Property under the terms of this Security Instrument; (b) is not personally obligated to pay the sums secured by this Security Instrument; and (c) agrees that Lender and any other Borrower can agree to extend, modify, forbear or make any accommodations with regard to the terms of this Security Instrument or the Note without the co-signer's consent.

Subject to the provisions of Section 18, any Successor in Interest of Borrower who assumes Borrower's obligations under this Security Instrument in writing, and is approved by Lender, shall obtain all of Borrower's rights and benefits under this Security Instrument. Borrower shall not be released from Borrower's obligations and liability under this Security Instrument unless Lender agrees to such release in writing. The covenants and agreements of this Security Instrument shall bind (except as provided in Section 20) and benefit the successors and assigns of Lender.

14. Loan Charges. Lender may charge Borrower fees for services performed in connection with Borrower's default, for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument, including, but not limited to, attorneys' fees, property inspection and valuation fees. In regard to any other fees, the absence of express authority in this Security Instrument to charge a specific fee to Borrower shall not be construed as a prohibition on the charging of such fee. Lender may not charge fees that are expressly prohibited by this Security Instrument or by Applicable Law.

If the Loan is subject to a law which sets maximum loan charges, and that law is finally interpreted so that the interest or other loan charges collected or to be collected in connection with the Loan exceed the permitted limits, then: (a) any such loan charge shall be reduced by the amount necessary to reduce the charge to the permitted limit; and (b) any sums already collected from Borrower which exceeded permitted limits will be refunded to Borrower. Lender may choose to make this refund by reducing the principal owed under the Note or by making a direct payment to Borrower. If a refund reduces principal, the reduction will be treated as a partial prepayment without any prepayment charge (whether or not a prepayment charge is provided for under the Note). Borrower's acceptance of any such refund made by direct payment to Borrower will constitute a waiver of any right of action Borrower might have arising out of such overcharge.

15. Notices. All notices given by Borrower or Lender in connection with this Security Instrument must be in writing. Any notice to Borrower in connection with this Security Instrument shall be deemed to have been given to Borrower when mailed by first class mail or when actually delivered to Borrower's notice address if sent by other means. Notice to any one Borrower shall constitute notice to all Borrowers unless Applicable Law expressly requires otherwise. The notice address shall be the Property Address unless Borrower has designated a substitute notice address by notice to Lender. Borrower shall promptly notify Lender of Borrower's change of address. If Lender specifies a procedure for reporting Borrower's change of address, then Borrower shall only report a change of address through that specified procedure. There may be only one designated notice address under this Security Instrument at any one time. Any notice to Lender shall be given by delivering it or by mailing it by first class mail to Lender's address stated herein unless Lender has designated another address by notice to Borrower. Any notice in connection with this Security Instrument shall not be deemed to have been given to Lender until actually received by Lender. If any notice required by this Security Instrument is also required under Applicable Law, the Applicable Law requirement will satisfy the corresponding requirement under this Security Instrument.

16. Governing Law; Severability; Rules of Construction. This Security Instrument shall be governed by federal law and the law of the jurisdiction in which the Property is located. All rights and obligations contained in this Security Instrument are subject to any requirements and limitations of Applicable Law. Applicable Law might explicitly or implicitly allow the parties to agree by contract or it might be silent, but such silence shall not be construed as a prohibition against agreement by contract. In the event that any provision or clause of this Security Instrument or the Note conflicts with Applicable Law, such conflict shall not affect other provisions of this Security Instrument or the Note which can be given effect without the conflicting provision.

As used in this Security Instrument: (a) words of the masculine gender shall mean and include corresponding neuter words or words of the feminine gender; (b) words in the singular shall mean and include the plural and vice versa; and (c) the word "may" gives sole discretion without any obligation to take any action.

17. Borrower's Copy. Borrower shall be given one copy of the Note and of this Security Instrument.

18. Transfer of the Property or a Beneficial Interest in Borrower. As used in this Section 18, "Interest in the Property" means any legal or beneficial interest in the Property, including, but not limited to, those beneficial interests transferred in a bond for deed, contract for deed, installment sales contract or escrow agreement, the intent of which is the transfer of title by Borrower at a future date to a purchaser.

If all or any part of the Property or any Interest in the Property is sold or transferred (or if Borrower is not a natural person and a beneficial interest in Borrower is sold or transferred) without Lender's prior written consent, Lender may require immediate payment in full of all sums secured by this Security Instrument. However, this option shall not be exercised by Lender if such exercise is prohibited by Applicable Law.

If Lender exercises this option, Lender shall give Borrower notice of acceleration. The notice shall provide a period of not less than 30 days from the date the notice is given in accordance with Section 15 within which Borrower must pay all sums secured by this Security Instrument. If Borrower fails to pay these sums prior to the expiration of this period, Lender may invoke any remedies permitted by this Security Instrument without further notice or demand on Borrower.

19. Borrower's Right to Reinstate After Acceleration. If Borrower meets certain conditions, Borrower shall have the right to have enforcement of this Security Instrument discontinued at any time prior to the earliest of: (a) five days before sale of the Property pursuant to any power of sale contained in this Security Instrument; (b) such other period as Applicable Law might specify for the termination of Borrower's right to reinstate; or (c) entry of a judgment enforcing this Security Instrument. Those conditions are that Borrower: (a) pays Lender all sums which then would be due under this Security Instrument and the Note as if no acceleration had occurred; (b) cures any default of any other covenants or agreements; (c) pays all expenses incurred in enforcing this Security Instrument, including, but not limited to, reasonable attorneys' fees, property inspection and valuation fees, and other fees incurred for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument; and (d) takes such action as Lender may reasonably require to assure that Lender's interest in the Property and rights under this Security Instrument, and Borrower's obligation to pay the sums secured by this Security Instrument, shall continue unchanged. Lender may require that Borrower pay such reinstatement sums and expenses in one or more of the following forms, as selected by Lender: (a) cash; (b) money order; (c) certified check, bank check, treasurer's check or cashier's check, provided any such check is drawn upon an institution whose deposits are insured by a federal agency, instrumentality or entity; or (d) Electronic Funds Transfer. Upon reinstatement by Borrower, this Security Instrument and obligations secured hereby shall remain fully effective as if no acceleration had occurred. However, this right to reinstate shall not apply in the case of acceleration under Section 18.

20. Sale of Note; Change of Loan Servicer; Notice of Grievance. The 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. A sale might result in a change in the entity (known as the "Loan Servicer") that collects Periodic Payments due under the Note and this Security Instrument and performs other mortgage loan servicing obligations under the Note, this Security Instrument, and Applicable Law. There also might be one or more changes of the Loan Servicer unrelated to a sale of the Note. If there is a change of the Loan Servicer, Borrower will be given written notice of the change which will state the name and address of the new Loan Servicer, the address to which payments should be made and any other information RESPA

requires in connection with a notice of transfer of servicing. If the Note is sold and thereafter the Loan is serviced by a Loan Servicer other than the purchaser of the Note, the mortgage loan servicing obligations to Borrower will remain with the Loan Servicer or be transferred to a successor Loan Servicer and are not assumed by the Note purchaser unless otherwise provided by the Note purchaser.

Neither Borrower nor Lender may commence, join, or be joined to any judicial action (as either an individual litigant or the member of a class) that arises from the other party's actions pursuant to this Security Instrument or that alleges that the other party has breached any provision of, or any duty owed by reason of, this Security Instrument, until such Borrower or Lender has notified the other party (with such notice given in compliance with the requirements of Section 15) of such alleged breach and afforded the other party hereto a reasonable period after the giving of such notice to take corrective action. If Applicable Law provides a time period which must elapse before certain action can be taken, that time period will be deemed to be reasonable for purposes of this paragraph. The notice of acceleration and opportunity to cure given to Borrower pursuant to Section 22 and the notice of acceleration given to Borrower pursuant to Section 18 shall be deemed to satisfy the notice and opportunity to take corrective action provisions of this Section 20.

21. Hazardous Substances. As used in this Section 21: (a) "Hazardous Substances" are those substances defined as toxic or hazardous substances, pollutants, or wastes by Environmental Law and the following substances: gasoline, kerosene, other flammable or toxic petroleum products, toxic pesticides and herbicides, volatile solvents, materials containing asbestos or formaldehyde, and radioactive materials; (b) "Environmental Law" means federal laws and laws of the jurisdiction where the Property is located that relate to health, safety or environmental protection; (c) "Environmental Cleanup" includes any response action, remedial action, or removal action, as defined in Environmental Law; and (d) an "Environmental Condition" means a condition that can cause, contribute to, or otherwise trigger an Environmental Cleanup.

Borrower shall not cause or permit the presence, use, disposal, storage, or release of any Hazardous Substances, or threaten to release any Hazardous Substances, on or in the Property. Borrower shall not do, nor allow anyone else to do, anything affecting the Property (a) that is in violation of any Environmental Law, (b) which creates an Environmental Condition, or (c) which, due to the presence, use, or release of a Hazardous Substance, creates a condition that adversely affects the value of the Property. The preceding two sentences shall not apply to the presence, use, or storage on the Property of small quantities of Hazardous Substances that are generally recognized to be appropriate to normal residential uses and to maintenance of the Property (including, but not limited to, hazardous substances in consumer products).

Borrower shall promptly give Lender written notice of (a) any investigation, claim, demand, lawsuit or other action by any governmental or regulatory agency or private party involving the Property and any Hazardous Substance or Environmental Law of which Borrower has actual knowledge, (b) any Environmental Condition, including but not limited to, any spilling, leaking, discharge, release or threat of release of any Hazardous Substance, and (c) any condition caused by the presence, use or release of a Hazardous Substance which adversely affects the value of the Property. If Borrower learns, or is notified by any governmental or regulatory authority, or any private party, that any removal or other remediation of any Hazardous Substance affecting the Property is necessary, Borrower shall promptly take all necessary remedial actions in accordance with Environmental Law. Nothing herein shall create any obligation on Lender for an Environmental Cleanup.

NON-UNIFORM COVENANTS. Borrower and Lender further covenant and agree as follows:

22. Acceleration; Remedies. Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument (but not prior to acceleration under Section 18 unless Applicable Law provides otherwise). The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (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. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to bring a court action to assert the non-existence of a default or any other defense of Borrower to acceleration and sale. If the default is not cured on or before the date specified in the notice, Lender at its option may require immediate payment in full of all sums secured by this Security Instrument without further demand and may invoke the power of sale and any other remedies permitted by Applicable Law. Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this Section 22, including, but not limited to, reasonable attorneys' fees and costs of title evidence.

If Lender invokes the power of sale, Lender shall execute or cause Trustee to execute written notice of the occurrence of an event of default and of Lender's election to cause the Property to be sold, and shall cause such notice to be recorded in each county in which any part of the Property is located. Lender or Trustee shall mail copies of the notice as prescribed by Applicable Law to Borrower and to other persons prescribed by Applicable Law. Trustee shall give public notice of sale to the persons and in the manner prescribed by Applicable Law. After the time required by Applicable Law, Trustee, without demand on Borrower, shall sell the Property at public auction to the highest bidder at the time and place and under the terms designated in the notice of sale in one or more parcels and in any order Trustee determines. Trustee may postpone sale of all or any parcel of the Property by public announcement at the time and place of any previously scheduled sale. Lender or its designee may purchase the Property at any sale.

Trustee shall deliver to the purchaser Trustee's deed conveying the Property without any covenant or warranty, expressed or implied. The recitals in the Trustee's deed shall be prima facie evidence of the truth of the statements made therein. Trustee shall apply the proceeds of the sale in the following order: (a) to all expenses of the sale, including, but not limited to, reasonable Trustee's and attorneys' fees; (b) to all sums secured by this Security Instrument; and (c) any excess to the person or persons legally entitled to it.

23. Reconveyance. Upon payment of all sums secured by this Security Instrument, Lender shall request Trustee to reconvey the Property and shall surrender this Security Instrument and all notes evidencing debt secured by this Security Instrument to Trustee. Trustee shall reconvey the Property without warranty to the person or persons legally entitled to it. Such person or persons shall pay any recordation costs. Lender may charge such person or persons a fee for reconveying the Property, but only if the fee is paid to a third party (such as the Trustee) for services rendered and the charging of the fee is permitted under Applicable Law.

24. Substitute Trustee. Lender may, for any reason or cause, from time to time remove Trustee and appoint a successor trustee to any Trustee appointed hereunder. Without conveyance of the Property, the successor trustee shall succeed to all the title, power and duties conferred upon Trustee herein and by Applicable Law.

25. Area and Location of Property. Either the Property is not more than 40 acres in area or the Property is located within an incorporated city or village.

BY SIGNING BELOW, Borrower accepts and agrees to the terms and covenants contained in this Security Instrument and in any Rider executed by Borrower and recorded with it.

Witnesses:

_____	Julie G. Barnson (Seal) -Borrower
	JULIE G. BARNSON
_____	_____ (Seal) -Borrower
_____ (Seal) -Borrower	_____ (Seal) -Borrower
_____ (Seal) -Borrower	_____ (Seal) -Borrower
_____ (Seal) -Borrower	_____ (Seal) -Borrower

STATE OF IDAHO, ADA County ss:

On this 13 day of November 2006, before me, Catherine Clark a Notary Public in and for said county and state, personally appeared JULIE G. BARNSON, ~~AN UNMARRIED WOMAN~~

known or proved to me to be the person(s) who executed the foregoing instrument, and acknowledged to me that he/she/they executed the same.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

CATHERINE CLARK
NOTARY PUBLIC
STATE OF IDAHO

Notary Public residing at:

Commission Expires 10-5-07
Residing in Eagle, Idaho

ADJUSTABLE RATE RIDER
Payment Option

THIS ADJUSTABLE RATE RIDER is made this 10TH day of NOVEMBER, 2006 , and is incorporated into and shall be deemed to amend and supplement the Mortgage, Deed of Trust, or Security Deed (the "Security Instrument") of the same date given by the undersigned ("Borrower") to secure Borrower's Adjustable Rate Note (the "Note") to HOMECOMINGS FINANCIAL, LLC (F/K/A HOMECOMINGS FINANCIAL NETWORK, INC.)

("Lender") of the same date and covering the property described in the Security Instrument and located at:

28123 SILO WAY
WILDER, ID 83676

[Property Address]

THE NOTE CONTAINS PROVISIONS THAT WILL CHANGE THE INTEREST RATE AND THE MONTHLY PAYMENT. THERE MAY BE A LIMIT ON THE AMOUNT THAT THE MONTHLY PAYMENT CAN INCREASE OR DECREASE. THE PRINCIPAL AMOUNT TO REPAY COULD BE GREATER THAN THE AMOUNT ORIGINALLY BORROWED, BUT NOT MORE THAN THE LIMIT STATED IN THE NOTE.

ADDITIONAL COVENANTS. In addition to the covenants and agreements made in the Security Instrument, Borrower and Lender further covenant and agree as follows:

Lender or anyone who takes the Note by transfer and who is entitled to receive payments under the Note is called the "Note Holder."

A. INTEREST RATE AND MONTHLY PAYMENT CHANGES

The Note provides for changes in the interest rate and the monthly payments, as follows:

2. INTEREST

(A) Interest Rate

Interest will be charged on unpaid Principal until the full amount of Principal has been paid. I will initially pay interest at a yearly rate of 1.0000 %. The interest rate I will pay may change.

The interest rate required by this Section 2 is the rate I will pay both before and after any default described in Section 7(B) of the Note.

(B) Interest Rate Change Dates

The interest rate I will pay may change on the first day of JANUARY, 2007 , and on that day every month thereafter. Each date on which my interest rate could change is

called an "Interest Rate Change Date." The new rate of interest will become effective on each Interest Rate Change Date. Although the interest rate may change monthly, my monthly payment will be recalculated in accordance with Section 3.

(C) Interest Rate Limit

My interest rate will never be greater than 9.9500 %.

(D) Index

Beginning with the first Interest Rate Change Date, my adjustable interest rate will be based on an Index. The "Index" is the "Twelve-Month Average" of the annual yields on actively traded United States Treasury Securities adjusted to a constant maturity of one year as published by the Federal Reserve Board in the Federal Reserve Statistical Release entitled "Selected Interest Rates (h.15)" (the "Monthly Yields"). The Twelve Month Average is determined by adding together the Monthly Yields for the most recently available twelve months and dividing by 12. The most recent Index figure available as of the date 15 days before each Interest Rate Change Date is called the "Current Index."

If the Index is no longer available, the Note Holder will choose a new index that is based upon comparable information. The Note Holder will give me notice of this choice.

(E) Calculation of Interest Rate Changes

Before each Interest Rate Change Date, the Note Holder will calculate my new interest rate by adding THREE AND ONE FOURTH percentage point(s) (3.2500 %) to the Current Index. The Note Holder will then round the result of this addition to the nearest one-eighth of one percentage point (0.125%). Subject to the limit stated in Section 2(C) above, the result of this addition will be my new interest rate until the next Interest Rate Change Date.

3. PAYMENTS

(A) Time and Place of Payments

I will make a payment every month.

I will make my monthly payments on the first day of each month beginning on JANUARY 1ST, 2007 . I will make these payments every month until I have paid all the Principal and interest and any other charges that I may owe under the Note. Each monthly payment will be applied as of its scheduled due date and will be applied to interest before Principal. If, on DECEMBER 1ST, 2036 , I still owe amounts under the Note, I will pay those amounts in full on that date, which is called the "Maturity Date."

Initials: 

I will make my monthly payments at 1687 114TH AVE., SE, SUITE 100, BELLEVUE, WA 98004
or at a different place if required by the Note Holder.

(B) Minimum Payment; Amount of My Initial Monthly Payments

My "Minimum Payment" is the minimum amount the Note Holder will accept for my monthly payment, which the Note Holder will determine in accordance with this Section 3(B), or Section 3(D), 3(F) or 3(G), below, as applicable.

Each of my initial Minimum Payments will be in the amount of U.S. $ 1,085.86 , until a new Minimum Payment is required as provided below.

(C) Payment Change Dates

My Minimum Payment may change as required by Section 3(D) below beginning on the first day of JANUARY, 2008 , and on that day every 12th month thereafter. Each of these dates is called a "Payment Change Date." My Minimum Payment also will change at any time Section 3(F) or 3(G) below requires me to pay a different amount.

I will pay at least the amount of my new Minimum Payment each month beginning on each Payment Change Date or as provided in Section 3(F) or 3(G) below.

(D) Calculation of Monthly Payment Changes

Before each Payment Change Date, the Note Holder will calculate the amount of the monthly payment that would be sufficient to repay the unpaid Principal that I am expected to owe at the Payment Change Date in full on the Maturity Date in substantially equal installments at the interest rate effective during the month preceding the Payment Change Date. The result of this calculation is called the "Full Payment."

Unless Section 3(F) or 3(G) below requires me to pay a different amount, my new Minimum Payment that will be effective on a Payment Change Date will be in the amount of the Full Payment, except that my new Minimum Payment will be limited to an amount that will not be more than 7.5% greater than the amount of my last Minimum Payment due before the Payment Change Date (this limitation is called the "Payment Change Cap"). The Payment Change Cap applies only to the Principal and interest payment and does not apply to any escrow payments the Note Holder may require under the Security Instrument.

(E) Additions to My Unpaid Principal

My monthly payment could be less than or greater than the amount of the interest portion of the monthly payment that would be sufficient to repay the unpaid Principal I owe at the monthly payment date in full on the Maturity Date in substantially equal payments. For each month that my monthly payment is less than the interest portion, the Note Holder will subtract the amount of my monthly payment from the amount of the interest portion and will add the difference to my unpaid Principal. The Note Holder also will add interest on the amount of this difference to my unpaid Principal each month. The interest rate on the interest added to Principal will be the rate required by Section 2 above. For each month that my monthly payment is greater than the interest portion, the Note Holder will apply the payment as provided in Section 3(A).

Initials: 

(F) Limit on My Unpaid Principal; Increased Monthly Payment

My unpaid Principal may never exceed a maximum amount equal to 115% of the Principal amount I originally borrowed. Because of my paying only limited monthly payments, the addition of unpaid interest to my unpaid Principal under Section 3(E) above could cause my unpaid Principal to exceed that maximum amount when interest rates increase. In that event, on the date that my paying my monthly payment would cause me to exceed that limit, I will instead pay a new monthly payment in an amount that would be sufficient to repay my then unpaid Principal in full on the Maturity Date in substantially equal installments at the interest rate effective during the preceding month, regardless of the Payment Change Cap. This amount will be my new Minimum Payment. This means that my Minimum Payment may change more frequently than annually. This new Minimum Payment amount will remain in effect until at least the next regular Payment Change Date, unless another recalculation of my Minimum Payment is required by this Section prior to such Payment Change Date.

(G) Required Full Payment

Regardless of the Payment Change Cap, on the TENTH Payment Change Date and on each succeeding fifth Payment Change Date thereafter, I will begin paying the Full Payment as my Minimum Payment until my monthly payment changes again. I also will begin paying at least the Full Payment as my Minimum Payment on the final Payment Change Date.

(H) Payment Options

After the first Interest Rate Change Date, each month the Note Holder may provide me with up to three additional payment options (in addition to the Minimum Payment) that are greater than the Minimum Payment, which are called "Payment Options." I may be given the following Payment Options:

(i) **Interest Only Payment:** the amount that would pay the interest portion of the monthly payment at the current interest rate. The Principal balance will not be decreased by this Payment Option.

(ii) **Fully Amortized Payment:** the amount necessary to pay the loan off (including all Principal and interest) at the Maturity Date in substantially equal installments. This Payment Option is calculated on the assumption that the current interest rate will remain in effect until the loan is paid in full, however, the current interest rate may in fact change every month.

(iii) **15 Year Amortized Payment:** the amount necessary to pay the loan off (including all Principal and interest) within a fifteen (15) year period from the first payment due date in substantially equal installments. This Payment Option is calculated on the assumption that the current rate will remain in effect until the loan is paid in full, however, the current interest rate may in fact change every month.

Payment Options will only be available if they are greater than the Minimum Payment.

(I) Failure to Make Adjustments

If for any reason the Note Holder fails to make an adjustment to the interest rate or payment amount as described herein, regardless of any notice requirement, I agree the Note Holder may, upon discovery of such failure, then make the adjustment as if they had been made on time. I also agree not to hold the Note Holder responsible for any damages to me

Initials: _____

that may result from the Note Holder's failure to make the adjustment and to let the Note Holder, at its option, apply any excess monies that I may have paid to partial Prepayment of unpaid Principal.

4. NOTICE OF CHANGES

The Note Holder will deliver or mail to me a notice of any changes in the amount of my monthly payment before the effective date of any change. The notice will include information required by law to be given to me and also the title and telephone number of a person who will answer any question I may have regarding the notice.

B. TRANSFER OF THE PROPERTY OR A BENEFICIAL INTEREST IN BORROWER

Uniform Covenant 18 of the Security Instrument is amended to read as follows:

Transfer of the Property or a Beneficial Interest in Borrower. As used in this Section 18, "Interest in the Property" means any legal or beneficial interest in the Property, including, but not limited to, those beneficial interests transferred in a bond for deed, contract for deed, installment sales contract or escrow agreement, the intent of which is the transfer of title by Borrower at a future date to a purchaser.

If all or any part of the Property or any Interest in the Property is sold or transferred (or if Borrower is not a natural person and a beneficial interest in Borrower is sold or transferred) without Lender's prior written consent, Lender may require immediate payment in full of all sums secured by this Security Instrument. However, this option shall not be exercised by Lender if such exercise is prohibited by Applicable Law. Lender also shall not exercise this option if: (a) Borrower causes to be submitted to Lender information required by Lender to evaluate the intended transferee as if a new loan were being made to the transferee; and (b) Lender reasonably determines that Lender's security will not be impaired by the loan assumption and that the risk of a breach of any covenant or agreement in this Security Instrument is acceptable to Lender.

To the extent permitted by Applicable Law, Lender may charge a reasonable fee as a condition to Lender's consent to the loan assumption. Lender also may require the transferee to sign an assumption agreement that is acceptable to Lender and that obligates the transferee to keep all the promises and agreements made in the Note and in this Security Instrument. Borrower will continue to be obligated under the Note and this Security Instrument unless Lender releases Borrower in writing.

If Lender exercises the option to require immediate payment in full, Lender shall give Borrower notice of acceleration. The notice shall provide a period of not less than 30 days from the date the notice is given in accordance with Section 15 within which Borrower must pay all sums secured by this Security Instrument. If Borrower fails to pay these sums prior to the expiration of this period, Lender may invoke any remedies permitted by this Security Instrument without further notice or demand on Borrower.

Initials: 

BY SIGNING BELOW, Borrower accepts and agrees to the terms and covenants contained in this Adjustable Rate Rider.

Julie G. Barnson (Seal) -Borrower

JULIE G. BARNSON

_____ (Seal) -Borrower

_____ (Seal) -Borrower

_____ (Seal) -Borrower

_____ (Seal) -Borrower

_____ (Seal) -Borrower

_____ (Seal) -Borrower

_____ (Seal) -Borrower

_____ (Seal) -Borrower

SECOND HOME RIDER

THIS SECOND HOME RIDER is made this 10TH day of NOVEMBER, 2006, and is incorporated into and shall be deemed to amend and supplement the Mortgage, Deed of Trust, or Security Deed (the "Security Instrument") of the same date given by the undersigned (the "Borrower" whether there are one or more persons undersigned) to secure Borrower's Note to

HOMECOMINGS FINANCIAL, LLC (F/K/A HOMECOMINGS FINANCIAL NETWORK, INC.)

(the "Lender") of the same date and covering the Property described in the Security Instrument (the "Property"), which is located at:

28123 SILO WAY
WILDER, ID 83676

[Property Address]

In addition to the covenants and agreements made in the Security Instrument, Borrower and Lender further covenant and agree that Sections 6 and 8 of the Security Instrument are deleted and are replaced by the following:

6. Occupancy. Borrower shall occupy, and shall only use, the Property as Borrower's second home. Borrower shall keep the Property available for Borrower's exclusive use and enjoyment at all times, and shall not subject the Property to any timesharing or other shared ownership arrangement or to any rental pool or agreement that requires Borrower either to rent the Property or give a management firm or any other person any control over the occupancy or use of the Property.

8. Borrower's Loan Application. Borrower shall be in default if, during the Loan application process, Borrower or any persons or entities acting at the direction of Borrower or with Borrower's knowledge or consent gave materially false, misleading, or inaccurate information or statements to Lender (or failed to provide Lender with material information) in connection with the Loan. Material representations include, but are not limited to, representations concerning Borrower's occupancy of the Property as Borrower's second home.

BY SIGNING BELOW, Borrower accepts and agrees to the terms and covenants contained in this Second Home Rider.

Julie G. Barnson (Seal) -Borrower

JULIE G. BARNSON

_____ (Seal) -Borrower

_____ (Seal) -Borrower

_____ (Seal) -Borrower

_____ (Seal) -Borrower

_____ (Seal) -Borrower

_____ (Seal) -Borrower

A

When Recorded Mail to:

EXECUTIVE TRUSTEE SERVICES, LLC.
15455 SAN FERNANDO MISSION BLVD
SUITE #208
MISSION HILLS, CA 91345

PIONEER TITLE COMPANY
REQUEST
TYPE FEE 3

2007 JUN 28 PM 1 56
WILLIAM H. HURST
CANYON CNTY RECORDER
BY

RECORDED

2007044840

529817g/2007367 Space Above This Line For Recorder's Use

T.S. No. **HC-105738-C**
Loan No. **7471476101**

APPOINTMENT OF SUCCESSOR TRUSTEE

KNOW ALL MEN BY THESE PRESENTS:

Are the grantor(s) JULIE G. BARNSON, AN UNMARRIED WOMAN and TRANSNATION TITLE is the trustee, and "MERS" MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., SOLELY AS NOMINEE FOR LENDER HOMECOMINGS FINANCIAL, LLC (FKA HOMECOMINGS FINANCIAL NETWORK, INC.) is the beneficiary under that certain Deed of Trust dated 11/10/2006, and recorded on 11/14/2006, Book , Page , as Instrument No. 200690998, and re-recorded , records of Canyon County, Idaho.

The undersigned, who is the present beneficiary under said Deed of Trust desires to appoint a new trustee in the place and instead of the original trustee named above;

NOW, THEREFORE, in view of the premises, the undersigned hereby appoints **FIRST AMERICAN TITLE INSURANCE COMPANY** c/o Executive Trustee Services, Inc. 15455 San Fernando Mission Blvd., Suite 208 Mission Hills, Ca 91345, as successor trustee under said Deed of Trust, to have all the powers of said original trustee, effective forthwith.

IN WITNESS WHEREOF, the undersigned beneficiary has hereunto set his hand; if the undersigned is a corporation, it has caused its corporate name to be signed and affixed hereunto by its duly authorized officer(s).

Dated: June 26, 2007

MORTGAGE ELECTRONIC REGISTRATION SYSTEM, INC.

ELIZABETH YERANOSIAN, ASSISTANT SECRETARY

State of California
County of Los Angeles }SS

On 6/26/2007 before me, the undersigned, Dee C. Ortega a Notary Public in and for said State, personally appeared Elizabeth Yeranosian personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed and sworn to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s) acted, executed the instrument.
WITNESS my hand and official seal.

Signature
Dee C. Ortega

DEE C. ORTEGA
Commission # 1672751
Notary Public - California
Los Angeles County
My Comm. Expires Jun 5, 2010

State of Idaho } ss.
County of Canyon
I hereby certify that the foregoing instrument is a true and correct copy of the original as the same appears in this office.
DATED 11/8/10

William H. Hurst, Clerk of the District Court and Ex Officio Recorder.

By Deputy

STATE OF IDAHO COUNTY RECORDER COUNTY OF CANYON

20080895

Recording Requested By:

And When Recorded Mail To:
Executive Trustee Services, LLC
2255 North Ontario Street, Suite 400
Burbank, California 91504-3120

Loan No.: **7471476101**
T.S. No.: **ID-167373-C**
APN: **R37214103 0**

PIONEER TITLE COMPANY
REQUEST
TYPE Road FEE 6.00

2009 JUL 20 PM 1 57
WILLIAM H. HURST
CANYON CNTY RECORDER
BY Tina Brown
RECORDED

2009036841

TRUSTEE'S DEED

FIRST AMERICAN TITLE INSURANCE COMPANY (herein called Trustee) as Successor Trustee under the Deed of Trust hereinafter particularly described, does hereby Bargain, Sell and Convey, without warranty, to **RESIDENTIAL FUNDING REAL ESTATE HOLDINGS, LLC,** herein called Grantee whose current address is: c/o GMAC Mortgage Corporation, 500 Enterprise Road, Suite 150, Horsham, PA 19044 all of the real property situated in the County of Canyon, state of Idaho described as follows:

LOT 4 IN BLOCK 1 OF RIVERBEND SUBDIVISION, CANYON COUNTY, IDAHO, ACCORDING TO THE OFFICIAL PLAT THEREOF, FILED IN BOOK 34 OF PLATS, AT PACE 2, RECORDS OF SAID COUNTY.

This conveyance is made pursuant to the powers conferred upon Trustee by the Deed of Trust between JULIE G. BARNSON, AN UNMARRIED WOMAN, as Grantor, and TRANSNATION TITLE, as Trustee, and MORTGAGE ELECTRONIC REGISTRATION SYSTEMS,INC.,("MERS") AS NOMINEE FOR HOMECOMINGS FINANCIAL, LLC (F/K/A HOMECOMINGS FINANCIAL NETWORK, INC.), as Beneficiary, dated 11/10/2006, recorded 11/14/2006, as instrument No. 200690998, Book Page , and re-recorded , mortgage records of Canyon County, Idaho, and after the fulfillment of the conditions specified in said Deed of Trust authorizing this conveyance as follows:

(1). Default occurred in the obligations for which such deed of trust was given as security and the beneficiary made demand upon the said trustee to sell property pursuant to the terms of said deed of trust. Notice of Default was recorded 2/26/2009, as Instrument No. 2009-009415, Book , Page , mortgage records of Canyon County, Idaho and in the office of each County in which the property described in said deed of trust, or any part thereof, is situated, the nature of such default being as set forth in said Notice of Default. Such default still existed at the time of sale.

(2). After recording of said Notice of Default, trustee gave notice of the time and place of the sale of said property by registered or certified mail, by personal service upon the occupants of said premises and by publishing in a conspicuous place on said premises and by publishing in a newspaper of general circulation in each of the counties in which the property is situated as more fully appears in affidavits recorded at least 20 days prior to the date of sale as Instrument No. **2009029759**, Instrument No. **2009029760**, and Instrument No. **2009029761** Mortgage records of Canyon County, Idaho.

ID-167373-C
7471476101

(3). The provisions, recitals and contents of the Notice of Default referred to in paragraph (1) supra and of the Affidavits referred to in paragraph (2) supra shall be and they are hereby incorporated herein and made an integral part hereof for all purposes as though set forth herein at length.

(4). All requirements of law regarding the mailing, personal service, posting, publication and recording of the notice of default, and Notice of Sale and for all other notices have been complied with.

(5). Not less than 120 days elapsed between the giving of Notice of Sale by registered or certified mail and the sale of the property.

(6). Trustee, at the time and place of sale fixed by said Notice, at public auction, in one parcel, struck off to Grantee, being the highest bidder thereof, the property herein described for the sum of **$199,556.36**, subject however to all prior liens and encumbrances. No person or corporation offered to take any part of said property less than the whole thereof for the amount of principal, interest, and advanced costs.

Dated: 7/9/2009

FIRST AMERICAN TITLE INSURANCE COMPANY

MARIA DELATORRE, ASST SEC

State of CA)
County of Orange)

On 7-10-09 before me, Laura A. Kennedy, a Notary Public personally appeared, MARIA DE LA TORRE who proved to me on the basis of satisfactory evidence to the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.
I certify under penalty of perjury under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal

SIGNATURE

LAURA A. KENNEDY
Commission # 1819999
Notary Public - California
Orange County
My Comm. Expires Oct 27, 2012

State of Idaho } ss.
County of Canyon
I hereby certify that the foregoing instrument is a true and correct copy of the original as the same appears in this office.
DATED 11/18/10
William H. Hurst, Clerk of the District Court and Ex-Officio Recorder.
By Deputy

STATE OF IDAHO COUNTY RECORDER COUNTY OF CANYON

12/9 F

FILED
1135 A.M. P.M
NOV 30 2010
CANYON COUNTY CLERK
J HEIDEMAN, DEPUTY

Robert B. Burns, ISB No. 3744
MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED
101 S. Capitol Blvd., 10th Floor
Post Office Box 829
Boise, Idaho 83701
Telephone (208) 345-2000
Facsimile (208) 385-5384
rbb@moffatt.com
23095.0001

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

PARKWEST HOMES LLC, an Idaho limited liability company,

Plaintiff,

vs.

JULIE G. BARNSON, an unmarried woman; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., a Delaware corporation, as nominee for Homecomings Financial, LLC (f/k/a Homecomings Financial Network, Inc.), a Delaware limited liability company; and DOES 1-10;

Defendants,

and

RESIDENTIAL FUNDING REAL ESTATE HOLDINGS, LLC, a Delaware limited liability company,

Defendant/Intervenor.

Case No. CV 07-8274

ANSWER TO COUNTERCLAIM IN INTERVENTION

Plaintiff ParkWest Homes LLC (ParkWest), in answer to the Counterclaim in Intervention, dated November 12, 2010 (the "Counterclaim"), filed in this action by Defendant/ Intervenor Residential Funding Real Estate Holdings, LLC ("Residential"), denies each and every allegation not expressly admitted hereinbelow.

ANSWER

1. ParkWest admits the averments in paragraphs 1-11, inclusively, and 13 of the Counterclaim.

2. In response to paragraph 12 of the Counterclaim, ParkWest admits that an actual controversy has arisen and now exists between Residential and ParkWest concerning their respective rights in and to the property at issue and that ParkWest contends its lien arising out of the "Mechanic's Lien" recorded on November 28, 2006, as Instrument No. 200694511, Official Records of Canyon County, Idaho, is both (a) valid for work or labor ParkWest provided and materials it supplied during the time it was a duly registered contractor under applicable Idaho law, and (b) senior and superior to the interest in the property at issue held by Residential.

3. ParkWest denies the averments in paragraph 14 of the Counterclaim.

AFFIRMATIVE DEFENSES

4. Residential has failed to state a claim upon which relief can be granted.

5. Because Residential had actual and/or constructive notice of ParkWest's Mechanic's Lien as of the date of the Trustee's Deed recorded July 20, 2009, as Instrument No. 2009036841, Official Records of Canyon County, Idaho, Residential's interest in the property at issue is subject to (a) the senior and superior rights of ParkWest in said property, and (b) the "law of the case" established by the decision in *ParkWest Homes LLC v. Barnson*, 149

Idaho 603, 238 P.3d 203 (2010), including all matters that were embraced by the judgment from which the first appeal was taken but not raised in that appeal.

ATTORNEY FEES

6. ParkWest has been required to engage legal counsel to defend against the claims asserted by Residential in its Counterclaim and is therefore entitled to recover its reasonable attorney's fees incurred in the defense of this action pursuant to Idaho Code Sections 45-513, 12-120, and/or 12-121.

PRAYER

WHEREFORE, ParkWest prays for judgment as follows:

1. that the Counterclaim be dismissed with prejudice and Residential take nothing thereby;

2. for an award of ParkWest's reasonable attorney's fees and costs; and

3. for such other and further relief as the Court may determine to be just and proper.

DATED this 29th day of November 2010.

MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED

By _____
Robert B. Burns – Of the Firm
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of November 2010, I caused a true and correct copy of the foregoing **ANSWER TO COUNTERCLAIM IN INTERVENTION** to be served by the method indicated below, and addressed to the following:

Stephen C. Hardesty
Ryan T. McFarland
HAWLEY TROXELL ENNIS & HAWLEY LLP
877 W. Main St., Ste. 1000
P.O. Box 1617
Boise, ID 83701-1617
Facsimile (208) 954-5223 and (208) 954-5236

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

Robert B. Burns

DC

FILED
A.M. 4:55 P.M.

DEC 02 2010

CANYON COUNTY CLERK
B RAYNE, DEPUTY

ORIGINAL

Stephen C. Hardesty ISB No. 4214
Ryan T. McFarland ISB No. 7347
HAWLEY TROXELL ENNIS & HAWLEY LLP
877 Main Street, Suite 1000
P.O. Box 1617
Boise, ID 83701-1617
Telephone: (208) 344-6000
Facsimile: (208) 954-5236
Email: shardesty@hawleytroxell.com
rmcfarland@hawleytroxell.com

Attorneys for Defendant Mortgage Electronic Registration Systems, Inc, as nominee for Homecomings Financial, LLC (f/k/a Homecomings Financial Network, Inc.)

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

PARKWEST HOMES LLC, an Idaho limited liability company, Plaintiff, vs. JULIE G. BARNSON, an unmarried woman; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., a Delaware corporation, as nominee for Homecomings Financial, LLC (f/k/a Homecomings Financial Network, Inc.), a Delaware limited liability company; and DOES 1-10, Defendants and RESIDENTIAL FUNDING REAL ESTATE HOLDINGS, LLC, a Delaware limited liability company, Defendant/Counterclaimant.	Case No. CV 07-8274 AFFIDAVIT OF RYAN T. MCFARLAND IN SUPPORT OF OPPOSITION TO MOTION TO COMPEL

Ryan T. McFarland, being first duly sworn upon oath, deposes and says:

1. I am counsel for Defendant Mortgage Electronic Registration Systems, Inc, as nominee for Homecomings Financial, LLC (f/k/a Homecomings Financial Network, Inc.) ("MERS") in the foregoing action and make this affidavit on my own personal knowledge.

2. Attached hereto as Exhibit A is a true and correct copy of the Adjustable Rate Note secured by the first MERS Deed of Trust at issue in this action. The initial interest rate on that Note is listed as 1.0%, which became variable at 3.25% above the twelve-month average of the annual yields on United States Treasury Securities, effective January 2007. The initial monthly payment on that Note was $1,085.86.

3. Attached hereto as Exhibit B is a true and correct of the Note secured by the second MERS Deed of Trust at issue in this action. The monthly payments on that Note were $439.77.

4. Attached hereto as Exhibit C is a true and correct copy of ParkWest Homes LLC's 2010 Annual Report which I accessed via the Idaho Secretary of State's website on December 1, 2010. The Report lists David Zawadzki as a member of ParkWest, and it lists the address of the property at issue in this case (the "Property") as ParkWest's mailing address.

5. Attached hereto as Exhibit D is a true and correct copy of the Amended Complaint For Possession Of Real Property And For Ejectment filed by Residential against Julie G. Barnson and David Zawadzki in The District Court Of The Third Judicial District Of The State Of Idaho, In And For The County Of Canyon, Case No. CV-2009-0011397-C. That action was originally commenced on October 28, 2009.

6. Attached hereto as Exhibit E is a true and correct copy of a letter sent to me by counsel for ParkWest Homes LLC ("ParkWest") on October 13, 2010.

7. Attached hereto as Exhibit F is a true and correct copy of a series of e-mail exchanges between me and counsel for ParkWest in October and November 2010.

8. Attached hereto as Exhibit G is a true and correct copy of a November 4, 2010 e-mail exchange between me and counsel for ParkWest.

9. Attached hereto as Exhibit H is a true and correct copy of an e-mail exchange between me and counsel for ParkWest in October and November 2010

10. Further your affiant sayeth naught.

Ryan T. McFarland

STATE OF IDAHO)
) ss.
County of Ada)

I, Teri French, a Notary Public, do hereby certify that on this 1st day of December, 2010, personally appeared before me Ryan T. McFarland, who, being by me first duly sworn, declared that he is an attorney of record for Defendant Mortgage Electronic Registration Systems, Inc, as nominee for Homecomings Financial, LLC (f/k/a Homecomings Financial Network, Inc.) in the foregoing action, that he signed the foregoing document as an attorney for Defendant Mortgage Electronic Registration Systems, Inc, as nominee for Homecomings Financial, LLC (f/k/a Homecomings Financial Network, Inc.), and that the statements therein contained are true.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

TERI FRENCH NOTARY PUBLIC STATE OF IDAHO

Notary Public for Idaho
Residing at Boise, Idaho
My commission expires June 27, 2014

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of December, 2010, I caused to be served a true copy of the foregoing AFFIDAVIT OF RYAN T. MCFARLAND IN SUPPORT OF OPPOSITION TO MOTION TO COMPEL by the method indicated below, and addressed to each of the following:

Robert B. Burns
MOFFATT, THOMAS, BARRETT, ROCK
& FIELDS, CHARTERED
101 S. Capitol Blvd., 10th Floor
P.O. Box 829
Boise, ID 83701
[Attorneys for Plaintiff]

____ U.S. Mail, Postage Prepaid
✓ Hand Delivered
____ Overnight Mail
____ E-mail
____ Telecopy

David E. Wishney
Attorney at Law
300 W. Myrtle Street, Suite 200
P.O. Box 837
Boise, ID 83701-0837
[Attorney for Defendant Julie G. Barnson]

✓ U.S. Mail, Postage Prepaid
____ Hand Delivered
____ Overnight Mail
____ E-mail
____ Telecopy

for
Ryan T. McFarland

ADJUSTABLE RATE NOTE

Payment Option

THIS NOTE CONTAINS PROVISIONS THAT WILL CHANGE THE INTEREST RATE AND THE MONTHLY PAYMENT. THERE MAY BE A LIMIT ON THE AMOUNT THAT THE MONTHLY PAYMENT CAN INCREASE OR DECREASE. THE PRINCIPAL AMOUNT TO REPAY COULD BE GREATER THAN THE AMOUNT ORIGINALLY BORROWED, BUT NOT MORE THAN THE LIMIT STATED IN THIS NOTE.

NOVEMBER 10TH, 2006 [Date] | MERIDIAN [City] | IDAHO [State]

28123 SILO WAY, WILDER, ID 83676 [Property Address]

1. BORROWER'S PROMISE TO PAY

In return for a loan that I have received, I promise to pay U.S. $ 337,600.00 (this is called "Principal"), plus interest, to the order of Lender. The Principal amount may increase as provided in this Note. Lender is HOMECOMINGS FINANCIAL, LLC (F/K/A HOMECOMINGS FINANCIAL NETWORK, INC.)

I will make all payments under this Note in the form of cash, check or money order.

I understand that Lender may transfer this Note. Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the "Note Holder."

2. INTEREST

(A) Interest Rate

Interest will be charged on unpaid Principal until the full amount of Principal has been paid. I will initially pay interest at a yearly rate of 1.0000 %. The interest rate I will pay may change.

The interest rate required by this Section 2 is the rate I will pay both before and after any default described in Section 7(B) of this Note.

(B) Interest Rate Change Dates

The interest rate I will pay may change on the first day of JANUARY, 2007 , and on that day every month thereafter. Each date on which my interest rate could change is called an "Interest Rate Change Date." The new rate of interest will become effective on each Interest Rate Change Date. Although the interest rate may change monthly, my monthly payment will be recalculated in accordance with Section 3.

(C) Interest Rate Limit

My interest rate will never be greater than 9.9500 %.

(D) Index

Beginning with the first Interest Rate Change Date, my adjustable interest rate will be based on an Index. The "Index" is the "Twelve-Month Average" of the annual yields on actively traded United States Treasury Securities adjusted to a constant maturity of one year as published by the Federal Reserve Board in the Federal Reserve Statistical Release entitled "Selected Interest Rates (h.15)" (the "Monthly Yields"). The Twelve Month Average is determined by adding together the Monthly Yields for the most recently available twelve months and dividing by 12. The most recent Index figure available as of the date 15 days before each Interest Rate Change Date is called the "Current Index."

If the Index is no longer available, the Note Holder will choose a new index that is based upon comparable information. The Note Holder will give me notice of this choice.

(E) Calculation of Interest Rate Changes

Before each Interest Rate Change Date, the Note Holder will calculate my new interest rate by adding THREE AND ONE FOURTH percentage point(s) (3.2500 %) to the Current Index. The Note Holder will then round the result of this addition to the nearest one-eighth of one percentage point (0.125%). Subject to the limit stated in Section 2(C) above, the result of this addition will be my new interest rate until the next Interest Rate Change Date.

3. PAYMENTS

(A) Time and Place of Payments

I will make a payment every month.

I will make my monthly payments on the first day of each month beginning on JANUARY 1ST, 2007 . I will make these payments every month until I have paid all the Principal and interest and any other charges that I may owe under this Note. Each monthly payment will be applied as of its scheduled due date and will be applied to interest before Principal. If, on DECEMBER 1ST, 2036 , I still owe amounts under this Note, I will pay those amounts in full on that date, which is called the "Maturity Date."

I will make my monthly payments at 1687 114TH AVE., SE, SUITE 100, BELLEVUE, WA 98004 or at a different place if required by the Note Holder.

(B) Minimum Payment; Amount of My Initial Monthly Payments

My "Minimum Payment" is the minimum amount the Note Holder will accept for my monthly payment, which the Note Holder will determine in accordance with this Section 3(B), or Section 3(D), 3(F) or 3(G), below, as applicable.

Each of my initial Minimum Payments will be in the amount of U.S. $ 1,085.86 , until a new Minimum Payment is required as provided below.

(C) Payment Change Dates

My Minimum Payment may change as required by Section 3(D) below beginning on the first day of JANUARY, 2008 , and on that day every 12th month thereafter. Each of these dates is called a "Payment Change Date." My Minimum Payment also will change at any time Section 3(F) or 3(G) below requires me to pay a different amount.

I will pay at least the amount of my new Minimum Payment each month beginning on each Payment Change Date or as provided in Section 3(F) or 3(G) below.

(D) Calculation of Monthly Payment Changes

Before each Payment Change Date, the Note Holder will calculate the amount of the monthly payment that would be sufficient to repay the unpaid Principal that I am expected to owe at the Payment Change Date in full on the Maturity Date in substantially equal installments at the interest rate effective during the month preceding the Payment Change Date. The result of this calculation is called the "Full Payment."

Unless Section 3(F) or 3(G) below requires me to pay a different amount, my new Minimum Payment that will be effective on a Payment Change Date will be in the amount of the Full Payment, except that my new Minimum Payment will be limited to an amount that will not be more than 7.5% greater than the amount of my last Minimum Payment due before the Payment Change Date (this limitation is called the "Payment Change Cap"). The Payment Change Cap applies only to the Principal and interest payment and does not apply to any escrow payments the Note Holder may require under the Security Instrument (as defined in Section 11 of this Note, below).

(E) Additions to My Unpaid Principal

My monthly payment could be less than or greater than the amount of the interest portion of the monthly payment that would be sufficient to repay the unpaid Principal I owe at the monthly payment date in full on the Maturity Date in substantially equal payments. For each month that my monthly payment is less than the interest portion, the Note Holder will subtract the amount of my monthly payment from the amount of the interest portion and will add the difference to my unpaid Principal. The Note Holder also will add interest on the amount of this difference to my unpaid Principal each month. The interest rate on the interest added to Principal will be the rate required by Section 2 above. For each month that my monthly payment is greater than the interest portion, the Note Holder will apply the payment as provided in Section 3(A).

(F) Limit on My Unpaid Principal; Increased Monthly Payment

My unpaid Principal may never exceed a maximum amount equal to 115% of the Principal amount I originally borrowed. Because of my paying only limited monthly payments, the addition of unpaid interest to my unpaid Principal under Section 3(E) above could cause my unpaid Principal to exceed that maximum amount when interest rates increase. In that event, on the date that my paying my monthly payment would cause me to exceed that limit, I will instead pay a new monthly payment in an amount that would be sufficient to repay my then unpaid Principal in full on the Maturity Date in substantially equal installments at the interest rate effective during the preceding month, regardless of the Payment Change Cap. This amount will be my new Minimum Payment. This means that my Minimum Payment may change more frequently than annually. This new Minimum Payment amount will remain in effect until at least the next regular Payment Change Date, unless another recalculation of my Minimum Payment is required by this Section prior to such Payment Change Date.

(G) Required Full Payment

Regardless of the Payment Change Cap, on the TENTH Payment Change Date and on each succeeding fifth Payment Change Date thereafter, I will begin paying the Full Payment as my Minimum Payment until my monthly payment changes again. I also will begin paying at least the Full Payment as my Minimum Payment on the final Payment Change Date.

(H) Payment Options

After the first Interest Rate Change Date, each month the Note Holder may provide me with up to three additional payment options (in addition to the Minimum Payment) that are greater than the Minimum Payment, which are called "Payment Options." I may be given the following Payment Options:

(i) **Interest Only Payment:** the amount that would pay the interest portion of the monthly payment at the current interest rate. The Principal balance will not be decreased by this Payment Option.

(ii) **Fully Amortized Payment:** the amount necessary to pay the loan off (including all Principal and interest) at the Maturity Date in substantially equal installments. This Payment Option is calculated on the assumption that the current interest rate will remain in effect until the loan is paid in full, however, the current interest rate may in fact change every month.

(iii) **15 Year Amortized Payment:** the amount necessary to pay the loan off (including all Principal and interest) within a fifteen (15) year period from the first payment due date in substantially equal installments. This Payment Option is calculated on the assumption that the current rate will remain in effect until the loan is paid in full, however, the current interest rate may in fact change every month.

Payment Options will only be available if they are greater than the Minimum Payment.

(I) Failure to Make Adjustments

If for any reason the Note Holder fails to make an adjustment to the interest rate or payment amount as described in this Note, regardless of any notice requirement, I agree the Note Holder may, upon discovery of such failure, then make the adjustment as if they had been made on time. I also agree not to hold the Note Holder responsible for any damages to me that may result from the Note Holder's failure to make the adjustment and to let the Note Holder, at its option, apply any excess monies that I may have paid to partial Prepayment of unpaid Principal.

4. NOTICE OF CHANGES

The Note Holder will deliver or mail to me a notice of any changes in the amount of my monthly payment before the effective date of any change. The notice will include information required by law to be given to me and also the title and telephone number of a person who will answer any question I may have regarding the notice.

5. BORROWER'S RIGHT TO PREPAY

I have the right to make payments of Principal at any time before they are due. A payment of Principal only is known as a "Prepayment." When I make a Prepayment, I will tell the Note Holder in writing that I am doing so. I may not designate a payment as a Prepayment if I have not made all the monthly payments due under this Note.

I may make a full Prepayment or partial Prepayments without paying any Prepayment charge. The Note Holder will use my Prepayments to reduce the amount of Principal that I owe under this Note. However, the Note Holder may apply my Prepayment to the accrued and unpaid interest on the Prepayment amount before applying my Prepayment to reduce the Principal amount of this Note. If I make a partial Prepayment, there will be no changes in the due dates of my monthly payments unless the Note Holder agrees in writing to those changes. My partial Prepayment may reduce the amount of my monthly payments after the first Payment Change Date following my partial Prepayment. However, any reduction due to my partial Prepayment may be offset by an interest rate increase.

6. LOAN CHARGES

If a law, which applies to this loan and which sets maximum loan charges, is finally interpreted so that the interest or other loan charges collected or to be collected in connection with this loan exceed the permitted limits, then: (a) any such loan charge shall be reduced by the amount necessary to reduce the charge to the permitted limit; and (b) any sums already collected from me that exceeded permitted limits will be refunded to me. The Note Holder may choose to make this refund by reducing the Principal I owe under this Note or by making a direct payment to me. If a refund reduces Principal, the reduction will be treated as a partial Prepayment.

7. BORROWER'S FAILURE TO PAY AS REQUIRED

(A) Late Charges for Overdue Payments

If the Note Holder has not received at least the full amount of any Minimum Payment by the end of 15 calendar days after the date it is due, I will pay a late charge to the Note Holder. The amount of the charge will be 5.0000 % of my overdue Minimum Payment. I will pay this late charge promptly but only once on each late payment.

(B) Default

If I do not pay at least the full amount of each Minimum Payment on the date it is due, I will be in default.

(C) Notice of Default

If I am in default, the Note Holder may send me a written notice telling me that if I do not pay the overdue amount by a certain date, the Note Holder may require me to pay immediately the full amount of Principal that has not been paid and all the interest that I owe on that amount. That date must be at least 30 days after the date on which the notice is mailed to me or delivered by other means.

(D) No Waiver By Note Holder

Even if, at a time when I am in default, the Note Holder does not require me to pay immediately in full as described above, the Note Holder will still have the right to do so if I am in default at a later time.

(E) Payment of Note Holder's Costs and Expenses

If the Note Holder has required me to pay immediately in full as described above, the Note Holder will have the right to be paid back by me for all of its costs and expenses in enforcing this Note to the extent not prohibited by applicable law. These expenses include, for example, reasonable attorneys' fees.

8. GIVING OF NOTICES

Unless applicable law requires a different method, any notice that must be given to me under this Note will be given by delivering it or by mailing it by first class mail to me at the Property Address above or at a different address if I give the Note Holder a notice of my different address.

Unless the Note Holder requires a different method, any notice that must be given to the Note Holder under this Note will be given by mailing it by first class mail to the Note Holder at the address stated in Section 3(A) above or at a different address if I am given a notice of that different address.

9. OBLIGATIONS OF PERSONS UNDER THIS NOTE

If more than one person signs this Note, each person is fully and personally obligated to keep all the promises made in this Note, including the promise to pay the full amount owed. Any person who is a guarantor, surety or endorser of this Note is also obligated to do these things. Any person who takes over these obligations, including the obligations of a guarantor, surety or endorser of this Note, is also obligated to keep all the promises made in this Note. The Note Holder may enforce its rights under this Note against each person individually or against all of us together. This means that any one of us may be required to pay all the amounts owed under this Note.

10. WAIVERS

I and any other person who has obligations under this Note waive the rights of Presentment and Notice of Dishonor. "Presentment" means the right to require the Note Holder to demand payment of amounts due. "Notice of Dishonor" means the right to require the Note Holder to give notice to other persons that amounts due have not been paid.

11. SECURED NOTE

In addition to the protections given to the Note Holder under this Note, a Mortgage, Deed of Trust, or Security Deed (the "Security Instrument"), dated the same date as this Note, protects the Note Holder from possible losses that might result if I do not keep the promises that I make in this Note. That Security Instrument describes how and under what conditions I may be required to make immediate payment in full of all amounts I owe under this Note. Some of these conditions read as follows:

Transfer of the Property or a Beneficial Interest in Borrower. As used in this Section 18, "Interest in the Property" means any legal or beneficial interest in the Property, including, but not limited to, those beneficial interests transferred in a bond for deed, contract for deed, installment sales contract or escrow agreement, the intent of which is the transfer of title by Borrower at a future date to a purchaser.

If all or any part of the Property or any Interest in the Property is sold or transferred (or if Borrower is not a natural person and a beneficial interest in Borrower is sold or transferred) without Lender's prior written consent, Lender may require immediate payment in full of all sums secured by this Security Instrument. However, this option shall not be exercised by Lender if such exercise is prohibited by Applicable Law. Lender also shall not exercise this option if: (a) Borrower causes to be submitted to Lender information required by Lender to evaluate the intended transferee as if a new loan were being made to the transferee; and (b) Lender reasonably determines that Lender's security will not be impaired by the loan assumption and that the risk of a breach of any covenant or agreement in this Security Instrument is acceptable to Lender.

To the extent permitted by Applicable Law, Lender may charge a reasonable fee as a condition to Lender's consent to the loan assumption. Lender also may require the transferee to sign an assumption agreement that is acceptable to Lender and that obligates the transferee to keep all the promises and agreements made in the Note and in this Security Instrument. Borrower will continue to be obligated under the Note and this Security Instrument unless Lender releases Borrower in writing.

If Lender exercises the option to require immediate payment in full, Lender shall give Borrower notice of acceleration. The notice shall provide a period of not less than 30 days from the date the notice is given in accordance with Section 15 within which Borrower must pay all sums secured by this Security Instrument. If Borrower fails to pay these sums prior to the expiration of this period, Lender may invoke any remedies permitted by this Security Instrument without further notice or demand on Borrower.

WITNESS THE HAND(S) AND SEAL(S) OF THE UNDERSIGNED.

Julie G. Barnson (Seal)
JULIE G. BARNSON -Borrower

_____ (Seal)
-Borrower

_____ (Seal)
-Borrower

_____ (Seal)
-Borrower

_____ (Seal)
-Borrower

_____ (Seal)
-Borrower

_____ (Seal)
-Borrower

[Sign Original Only]

Without Recourse
Pay to the Order of

Yemane B. Mebrahtu
Yemane B. Mebrahtu
Assistant Secretary
Homecomings Financial, LLC
A Delaware Corporation

NOTE

NOVEMBER 10TH, 2006 (Date) MERIDIAN (City), Idaho

28123 SILO WAY (Property Address) WILDER (City) ID (State) 83676 (ZIP Code)

1. DEFINITIONS

The headings at the beginning of each section are for convenience only and are not to be used in interpreting the text of the section. "☒" means the terms that apply to this loan. "I," "me" or "my" means each Borrower who signs this note and each other person or legal entity (including guarantors, endorsers, and sureties) who agrees to pay this note (together referred to as "us"). The Lender is HOMECOMINGS FINANCIAL, LLC (F/K/A HOMECOMINGS FINANCIAL NETWORK, INC.) "You" or "your" means the Lender and its successors and assigns.

2. BORROWER'S PROMISE TO PAY

For value received, I promise to pay to you, or your order, the PRINCIPAL sum of FORTY TWO THOUSAND TWO HUNDRED AND NO/100 Dollars $ 42,200.00 , plus interest. No additional advances are contemplated under this Note.

3. INTEREST

I agree to pay interest on the outstanding principal balance at the rate of 12.1750 % per year until the full amount of principal has been paid. Interest accrues on the principal remaining unpaid from time to time, until paid in full. The interest rate and other charges on this loan will never exceed the highest rate or charge allowed by law for this loan.

ACCRUAL METHOD: Interest will be calculated on a 30/360 basis. For interest calculation, the accrual method will determine the number of days in a year. If no accrual method is stated, then you may use any reasonable accrual method for calculating interest.

4. PAYMENTS

I agree to pay this note in monthly payments. I will make my monthly payment on the FIRST day of each month beginning on JANUARY 1ST, 2007 . The monthly payment will be $ 439.77 . I will make these payments every month until I have paid all of the principal and interest and any other charges described below that I may owe under this note or until my balloon payment is due, if a balloon payment is indicated below. Unless otherwise required by law, each payment I make on this loan will be applied first to any charges I owe other than principal and interest, then to interest that is due, and finally to principal. The final payment of the entire unpaid balance of principal and interest will be due DECEMBER 1ST, 2021, which is called the "Maturity Date."

The actual amount of my final payment will depend on my payment record. If any payment due under this loan does not equal or exceed the amount of interest due, you may, at your option, increase the amount of the payment due and all future payments to an amount that will pay off this loan in equal payments over the remaining term of this loan, subject to any balloon payment indicated below.

I will make my monthly payments at P.O. BOX 808024, PETALUMA, CA 94954 or at a different place if required by you.

I have the right to make payments of principal at any time before they are due. A payment of principal only is known as a "prepayment." When I make a prepayment, I will tell you in writing that I am doing so. I may make a full prepayment or partial prepayments without paying any prepayment penalty. You will use all of my prepayments to reduce the amount of principal that I owe under this note. I must still make each later payment in the original amount as it becomes due until this note is paid in full.

☒ BALLOON PAYMENT. If any scheduled payment of a consumer loan (other than one primarily for an agricultural purpose or one secured by a first lien on real property) is more than twice as large as the average of earlier scheduled payments, I have the right to refinance that payment without penalty at the time it is due, and on terms no less favorable than this original transaction. This right does not apply: (1) to the extent that the payment schedule has been adjusted to my seasonal or irregular income or obligations; (2) if the collateral is a second deed of trust or mortgage on a 1 to 4 family dwelling occupied by me; (3) at the time of the balloon payment you offer me the other options required by rule of the Administrator of the Idaho Credit Code; or (4) this transaction qualifies as an alternative mortgage transaction under federal law.

LATE CHARGE: I agree to pay a late charge on the portion of any payment made more than 15 calendar days after it is due equal to 5% of the unpaid amount, or $15.00, whichever is greater. I will pay this late charge only once on each late payment. No late charge will be assessed on any payment when the only delinquency is due to late fees assessed on earlier payments and the payment is otherwise a full payment.

5. SECURITY

My obligations under this note are separately secured by a Deed of Trust dated the same date as this note.

Any present or future agreement securing any other debt I owe you also will secure the payment of this loan. However, property securing another debt will not secure this loan if such property is: (1) my principal dwelling and you fail to provide any required notice of right of rescission; (2) household goods; (3) land and the principal amount of this loan is one thousand dollars or less; or (4) real property that you have a secured interest in by first mortgage or first deed of trust.

6. APPLICABLE LAW: This note and any agreement securing this note will be governed by the laws of the state of Idaho. The fact that any part of this note cannot be enforced will not affect the rest of this note. Any change to this note or any agreement securing this note must be in writing and signed by you and me.
7. COMMISSIONS: I understand and agree that you (or your affiliate) will earn commissions or fees on any insurance products, and may earn such fees on other services, that I buy through you or your affiliate.
8. PAYMENTS BY LENDER: If you are authorized to pay, on my behalf, charges I am obligated to pay (such as property insurance premiums), then you may treat those payments made by you as advances and add them to the unpaid principal under this note, or you may demand immediate payment of the charges.
9. REAL ESTATE OR RESIDENCE SECURITY: If this note is secured by real estate or a residence that is personal property, the existence of a default and your remedies for such a default will be determined by applicable law, by the terms of any separate instrument creating the security interest and, to the extent not prohibited by law and not contrary to the terms of the separate security instrument, by this agreement.
10. ASSUMPTION: This note and any document securing it cannot be assumed by someone buying the secured property from me. This will be true unless you agree in writing to the contrary. Without such an agreement, if I try to transfer any interest in the property securing this note, I will be in default on this loan. You may proceed against me under any due on sale clause in the security agreement, which is incorporated by reference.
11. DEFAULT: Subject to any limitations in the "REAL ESTATE OR RESIDENCE SECURITY" paragraph above, I will be in default on this note if any of the following occur:
(1) I fail to make a payment as required by this loan; or
(2) You believe that the prospect of receiving payment or performance from me or of realizing on the Property is significantly impaired.
12. REMEDIES: Subject to the limitations of any applicable right to cure and any limitations in the "REAL ESTATE OR RESIDENCE SECURITY" paragraph above, if I am in default on this loan or any agreement securing this loan, you may:
(1) Make unpaid principal, earned interest and all other agreed charges I owe you under this loan immediately due;
(2) Demand more security or new parties obligated to pay this loan (or both) in return for not using any other remedy;
(3) Make a claim for any and all insurance benefits or refunds that may be available on my default;
(4) Use any remedy you have under state or federal law; and
(5) Use any remedy given to you in any agreement securing this loan.
By choosing any one or more of these remedies you do not give up your right to use another remedy later. By deciding not to use any remedy should I be in default, you do not give up your right to consider the event a default if it happens again.
13. COLLECTION COSTS AND ATTORNEY'S FEES: I agree to pay you all reasonable costs you incur to collect this debt or realize on any security. Unless prohibited by law, this includes reasonable attorney's fees you incur after my default, provided the attorney is not your salaried employee. This provision also shall apply if I file a petition or any other claim for relief under any bankruptcy rule or law of the United States, or if such petition or other claim for relief is filed against me by another.
14. WAIVER: I waive (to the extent permitted by law) demand, presentment, protest, notice of dishonor and notice of protest.
15. OBLIGATIONS INDEPENDENT: I understand that my obligation to pay all of the amounts owed under this loan is independent of the obligation of any other person who has also agreed to pay it. You may, without notice, release me or any of us, give up any right you may have against any of us, extend new credit to any of us, or renew or change this note one or more times and for any term, and I will still be obligated to pay this loan. You may, without notice, fail to perfect your security interest in, impair, or release any security and I will still be obligated to pay this loan.
16. CREDIT INFORMATION: I agree that from time to time you may receive credit information about me from others, including other lenders and credit reporting agencies. I agree that you may furnish on a regular basis credit and experience information regarding my loan to others seeking such information. To the extent permitted by law, I agree that you will not be liable for any claim arising from the use of information provided to you by others or for providing such information to others. I will give you any financial statements or information that you feel is necessary. All financial statements and information I give you will be correct and complete.
17. PURCHASE MONEY LOAN: If this is a purchase money loan, you may include the name of the seller on the check or draft for this loan.
18. RETURNED CHECK CHARGE: If any payment on this note is made with a check that is returned or dishonored, I agree to pay you a $20.00 fee.

SIGNATURES: I AGREE TO THE TERMS OF THIS NOTE. I have received a copy of this note.

Julie O. Barnson 11-13-06

Date JULIE O. BARNSON -Borrower Date -Borrower

Date -Borrower Date -Borrower

(Sign Original Only)

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No. **W 32267**	**Due no later than Jul 31, 2010** **Annual Report Form**	2. Registered Agent and Address **(NO PO BOX)**
Return to: SECRETARY OF STATE 700 WEST JEFFERSON PO BOX 83720 BOISE, ID 83720-0080 **NO FILING FEE IF RECEIVED BY DUE DATE**	**1. Mailing Address: Correct in this box if needed.** PARKWEST HOMES LLC DAVID M ZAWADZKI 28123 SILO WAY WILDER ID 83676	JEFFREY ZAWADZKI 2527 SHERIDAN AVE NAMPA ID 83686 3. New Registered Agent Signature:*

4. Limited Liability Companies: Enter Names and Addresses of at least one Member or Manager.

Office Held	Name	Street or PO Address	City	State	Country	Postal Code
MEMBER	DAVID ZAWADZKI	8773 QUAIL RIDGE DR	NAMPA	ID	USA	83686

5. Organized Under the Laws of:	6. Annual Report must be signed.*	
ID **W 32267**	Signature: David Zawadzki	Date: 07/22/2010
	Name (type or print): David Zawadzki	Title: Member
Processed 07/22/2010	* Electronically provided signatures are accepted as original signatures.	

F I L E D
A.M. 10 P.M.
FEB 19 2010
CANYON COUNTY CLERK
T. CRAWFORD, DEPUTY

LAUREL I. HANDLEY (ID BN 7651)
PITE DUNCAN, LLP
4375 Jutland Drive
Suite 200; P.O. Box 17934
San Diego, CA 92177-0934
Telephone: (858) 750-7600
Facsimile: (619) 590-1385
E-mail: lhandley@piteduncan.com

Attorneys for Plaintiff Residential Funding Real Estate Holdings, LLC, its successors and/or assigns

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

RESIDENTIAL FUNDING REAL ESTATE HOLDINGS, LLC, its successors and/or assigns Plaintiff, v. JULIE G. BARNSON, DAVID ZAWADZKI and DOES II through X, inclusive, Defendant.	Case No. CV09-11397 AMENDED COMPLAINT FOR POSSESSION OF REAL PROPERTY AND FOR EJECTMENT Fee Amount: $88.00 Fee Category: G3

COMES NOW Plaintiff, Residential Funding Real Estate Holdings, LLC, its successors and/or assigns, by and through its attorney of record, Laurel I. Handley, and as and for a complaint against Defendants, Julie G. Barnson, David Zawadzki, alleges:

/./.

/./.

/./. I.

Plaintiff is the owner of certain real property located at 28123 Silo Way, Wilder, ID 83676 ("Property"). Plaintiff purchased the Property at a trustee's sale and a Trustee's Deed was issued on July 9, 2009. Ten days have elapsed since the date of the trustee's sale and Plaintiff is entitled to possession of the Property pursuant to Idaho Code § 45-1506. Plaintiff is, as a result of the trustee's sale, the rightful owner thereof. Attached hereto as **Exhibit A** is a copy of the Trustee's Deed by which Plaintiff took title to the premises.

Defendants remains in possession of the Property and is deemed a tenant at sufferance. A demand letter has been sent to Defendants, a copy of which is attached hereto as **Exhibit B**, requiring that Defendants vacate the Property. Although Plaintiff was entitled to possession 10 days after the trustee's sale, Plaintiff gave Defendants additional time to vacate the Property. However, Defendants have failed to comply with the terms of the demand letter and has failed to surrender possession of the Property to Plaintiff.

II.

After filing the initial complaint in this matter, Plaintiff became aware that Defendant David Zawadzki is also an occupant and in possession of the Property. Plaintiff has amended the complaint to name Defendant David Zawadzki as Doe I. Plaintiff alleges that in addition to the known Defendants, the parties sued herein as fictitious Defendants are claiming an interest in the real property described in this Complaint through possession or otherwise. The names, capacities and relationships will be alleged by amendment to this Complaint when the same are known.

/./.

/./.

/./.

III.

Pursuant to Idaho Code § 12-120, Defendant(s) are responsible for all attorneys' fees in the sum of $375, filing fee in the amount of $88, and service of process of $110, and if this matter is contested, such amount shall be set by the Court.

WHEREFORE, Plaintiff prays for judgment as follows:

1. That Defendants be declared to be in unlawful of the Property;

2. That Defendants be ordered to relinquish possession of the Property to Plaintiff;

3. That a writ of assistance or writ of possession be issued by the Court;

4. That Defendants be ordered to pay attorneys' fees in the amount of $375 if this matter be uncontested, and if contested, such amount shall be set by the Court, and all costs incurred in this action; and

5. For such other and further relief as the Court deems proper.

Dated: 2/17/10

PITE DUNCAN, LLP

By: _____
Laurel I. Handley
Attorney for Plaintiff Residential Funding Real Estate Holdings, LLC

20080894

Recording Requested By:

And When Recorded Mail To:
Executive Trustee Services, LLC
2255 North Ontario Street, Suite 400
Burbank, California 91504-3120

Loan No.: **7471476101**
T.S. No.: **ID-167373-C**
APN: **R37214103 0**

PIONEER TITLE COMPANY
REQUEST
TYPE Pod FEE 6.00

2009 JUL 20 PM 1 57
WILLIAM H. HURST
CANYON CNTY RECORDER
BY Tma Brown
RECORDED

200903684 1

TRUSTEE'S DEED

FIRST AMERICAN TITLE INSURANCE COMPANY (herein called Trustee) as Successor Trustee under the Deed of Trust hereinafter particularly described, does hereby Bargain, Sell and Convey, without warranty, to **RESIDENTIAL FUNDING REAL ESTATE HOLDINGS, LLC**, herein called Grantee whose current address is: c/o GMAC Mortgage Corporation, 500 Enterprise Road, Suite 150, Horsham, PA 19044 all of the real property situated in the County of Canyon, state of Idaho described as follows:

LOT 4 IN BLOCK 1 OF RIVERBEND SUBDIVISION, CANYON COUNTY, IDAHO, ACCORDING TO THE OFFICIAL PLAT THEREOF, FILED IN BOOK 34 OF PLATS, AT PACE 2, RECORDS OF SAID COUNTY.

This conveyance is made pursuant to the powers conferred upon Trustee by the Deed of Trust between JULIE G. BARNSON, AN UNMARRIED WOMAN, as Grantor, and TRANSNATION TITLE, as Trustee, and MORTGAGE ELECTRONIC REGISTRATION SYSTEMS,INC.,("MERS") AS NOMINEE FOR HOMECOMINGS FINANCIAL, LLC (F/K/A HOMECOMINGS FINANCIAL NETWORK, INC.), as Beneficiary, dated 11/10/2006, recorded 11/14/2006, as instrument No. 200690998, Book Page , and re-recorded , mortgage records of Canyon County, Idaho, and after the fulfillment of the conditions specified in said Deed of Trust authorizing this conveyance as follows:

(1). Default occurred in the obligations for which such deed of trust was given as security and the beneficiary made demand upon the said trustee to sell property pursuant to the terms of said deed of trust. Notice of Default was recorded 2/26/2009, as Instrument No. 2009-009415, Book , Page , mortgage records of Canyon County, Idaho and in the office of each County in which the property described in said deed of trust, or any part thereof, is situated, the nature of such default being as set forth in said Notice of Default. Such default still existed at the time of sale.

(2). After recording of said Notice of Default, trustee gave notice of the time and place of the sale of said property by registered or certified mail, by personal service upon the occupants of said premises and by publishing in a conspicuous place on said premises and by publishing in a newspaper of general circulation in each of the counties in which the property is situated as more fully appears in affidavits recorded at least 20 days prior to the date of sale as Instrument No. 2009029759, Instrument No. 2009029760, and Instrument No. 2009029761 Mortgage records of Canyon County, Idaho.

EXHIBIT A

ID-167373-C
7471476101

(3). The provisions, recitals and contents of the Notice of Default referred to in paragraph (1) supra and of the Affidavits referred to in paragraph (2) supra shall be and they are hereby incorporated herein and made an integral part hereof for all purposes as though set forth herein at length.

(4). All requirements of law regarding the mailing, personal service, posting, publication and recording of the notice of default, and Notice of Sale and for all other notices have been complied with.

(5). Not less than 120 days elapsed between the giving of Notice of Sale by registered or certified mail and the sale of the property.

(6). Trustee, at the time and place of sale fixed by said Notice, at public auction, in one parcel, struck off to Grantee, being the highest bidder thereof, the property herein described for the sum of $199,556.36, subject however to all prior liens and encumbrances. No person or corporation offered to take any part of said property less than the whole thereof for the amount of principal, interest, and advanced costs.

Dated: 7/9/2009

FIRST AMERICAN TITLE INSURANCE COMPANY

MARIA DELATORRE, ASST SEC

State of CA)
County of Orange)

On 7-10-09 before me, Laura A. Kennedy, a Notary Public personally appeared, MARIA DE LA TORRE who proved to me on the basis of satisfactory evidence to the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.
I certify under penalty of perjury under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal

SIGNATURE

LAURA A. KENNEDY
Commission # 1819999
Notary Public - California
Orange County
My Comm. Expires Oct 27, 2012

PITE
DUNCAN
LLP

San Diego

Steven W. Pite *CA/NV/WA*
John D. Duncan *CA/TX/WA*
Peter J. Salmon
CA/ID/UT/WA
David E. McAllister
AZ/CA/HI/OR/UT/WA

Rochelle L. Stanford
AZ/CA/OR/WA
Josephine E. Salmon
AK/AZ/CA/NY
Laurel I. Handley
AZ/CA/ID/NV
Daniel R. Gamez *CA/TX*
Eddie R. Jimenez *CA/NV/TX*
Susan L. Petit *AK/CA/WA*
Douglas A. Toleno *AZ/CA*
Cuong M. Nguyen *CA/NV*
Casper J. Rankin *CA/OR*
Charles A. Correia *CA*
Melodie A. Whitson *CA*
Brian A. Paino *CA/TX/VA*
Christopher M. McDermott
CA
Jillian A. Benbow *CA*
Thomas N. Abbott *CA*
Tracy D. Mabry *TX*
Drew A. Callahan *CA*
Natalie T. Nguyen *CA*
Caroline M. Robert *CA*
Genail M. Anderson *CA*
Ellen Cha *CA/MN*
Jose A. Garcia *CA*
Erin L. Laney *CA*
Angela M. Fontanini *CA*
Jacque A. Gruber *CA/NV*
John B. Acierno *CA*
William L. Partridge *CA*
Christopher L. Peterson*CA*
Katie L. Johnson*CA*

Mailing - Bankruptcy
1375 Jutland Drive, Suite 200
P.O. Box 17933
San Diego, CA 92177-0933

Mailing - Eviction
1375 Jutland Drive, Suite 200
P.O. Box 17934
San Diego, CA 92177-0934

Ph: (858) 750-7600
Fax: (619) 590-1385

Orange County
Kerry W. Franich *CA/NV*
Elana J. Moeder *CA*
Bryan T. Brown *CO/TX*
Michael J. Fox *CA*
1820 E. First St., Ste. 420
Santa Ana, CA 92705
Ph: (714) 285-2633
Fax: (714) 285-2668

Arizona Office
Charles L. Firestein
Phoenix, AZ

Hawaii Office
David B. Rosen
Honolulu, HI

Washington Office
Seattle, WA

Texas Office
William P. Weaver, Jr.
San Antonio, TX

July 14, 2009

DEMAND FOR POSSESSION

JULIE G. BARNSON
and All Occupants of the Premises
28123 SILO WAY
WILDER, ID 83676

Re: Demand for Possession of Real Property Located at 28123 Silo Way, Wilder, ID 83676;
Our File No.: 000001-1121560

Dear Julie G. Barnson:

As you may be aware, a foreclosure sale of the property referenced above occurred on . The purchaser of the property is currently entitled to possession of the property pursuant to Idaho Code §45-1506(11).

DEMAND IS HEREBY MADE for possession of the property which is commonly known as ADDRESS OF PROPERTY HERE.

Please vacate the property within fifteen (15) days of the date of this letter if (i) you are the original owner or a successor owner of the property, or (ii) within ninety (90) days after service on you of this Notice in the event you are a tenant or subtenant of the property, and not one of the owners of the property. If you fail to do so, a lawsuit will be brought against you for possession of the property. As part of the lawsuit, we will ask the court to order payment of all attorney fees and costs incurred in pursuing this matter.

If you would like to arrange a move-out date, please contact our office at (858) 750-7600. Thank you for your cooperation.

Sincerely,

Arianna L. Black

EXHIBIT 8

Moffatt Thomas
MOFFATT THOMAS BARRETT ROCK & FIELDS, CHTD.

Boise
Idaho Falls
Pocatello
Twin Falls

John W. Barrett
Richard C. Fields
John S. Simko
John C. Ward
D. James Manning
David B. Lincoln
Gary T. Dance
Larry C. Hunter
Randall A. Peterman
Mark S. Prusynski
Stephen R. Thomas
Glenna M. Christensen
Gerald T. Husch
Scott L. Campbell
Robert B. Burns
Michael E. Thomas
Patricia M. Olsson

Christine E. Nicholas
Bradley J Williams
Lee Radford
Michael O. Roe
Nancy J. Garrett
David S. Jensen
James L. Martin
C. Clayton Gill
Michael W. McGreaham
David P. Gardner
Julian E. Gabiola
Tara Martens
Kimberly D. Evans Ross
Jon A. Stenquist
Mark C. Peterson
Tyler J. Anderson
Jason G. Murray

Andrew J. Waldera
Dylan B. Lawrence
Rebecca A. Rainey
Paul D. McFarlane
Tyler J. Henderson
C. Edward Cather III
Benjamin C. Ritchie
Noah G. Hillen
Matthew J. McGee
David J. Dance
Mindy M. Willman

Robert E. Bakes, *of counsel*

Willis C. Moffatt, 1907-1980
Eugene C. Thomas, 1931-2010
Kirk R. Helvie, 1956-2003

US Bank Plaza Building
101 S Capitol Blvd 10th Fl
PO Box 829
Boise Idaho 83701 0829

208 345 2000
800 422 2889
208 385 5384 Fax
www.moffatt.com

October 13, 2010

Ryan T. McFarland
Hawley Troxell Ennis & Hawley, LLP
877 W. Main St., Suite 1000
P.O. Box 1617
Boise, ID 83701

Re: ParkWest Homes LLC v. MERS (Case No. CV 07-8274)
MTBR&F File No. 23095.0001

Dear Ryan:

My client provided me last week with copies of a recorded deed and related documentation establishing that the residence at issue in the referenced lawsuit was sold last year by trustee's sale to Residential Funding Real Estate Holdings, LLC ("Residential Funding"). Pursuant to Idaho Code Section 45-1508, such sale foreclosed and terminated all interest in the property covered by the deeds of trust in which MERS claims an interest. *In re Wiebe*, 353 B.R. 906, 912 (Bankr. D. Idaho 2006).

Although a party to a suit may under many circumstances continue to represent the interests of a successor by virtue of I.R.C.P. 25(c), Rule 25(c) appears not to apply where there is a sale of assets by public sale. *See R.J. Enstrom Corp. v. Interceptor Corp.*, 555 F.2d 277, 280-81 (1997) (affirming trial court's determination that a secured creditor's public sale under the UCC was not a transfer of interest for purposes of Rule 25(c)). Accordingly, absent an acceptable consent by Residential Funding to MERS representing Residential Funding as its nominee in the present lawsuit, I intend to promptly file a motion for summary judgment against MERS based on the referenced trustee's sale. *See Carrington v. Crandall*, 63 Idaho 651, 657 (1942) ("appellant, having parted with all his interest in and to the land and water right, having failed and refused to apply for an order of substitution of the proper party to the action, and his transferee having made no application, or otherwise indicating that the proceedings be continued in the name of appellant, was no longer in a position to maintain the action"). Any consent of Residential Funding should be in writing, be signed by an authorized officer of Residential Funding, and expressly state that Residential Funding (i) is the current owner of the

real property at issue in this lawsuit (Case No. CV 07-8274), (ii) designates MERS to be its nominee in this lawsuit, (iii) waives its right to intervene in this lawsuit, and (iv) acknowledges and agrees that it will be bound by the terms of any judgment entered against MERS in this lawsuit. Please promptly confirm whether you intend to provide, and believe you are in a position to provide, a consent of Residential Funding on the foregoing terms.

Additionally, please note that, absent your prompt confirmation that you intend to provide the requested written consent of Residential Funding just described, I intend to file next week a motion for a protective order and a motion to quash with respect to the deposition notices and subpoenas you served me with last week. Conversely, if you will promptly provide me with the requested confirmation, I will accept service of your subpoena on behalf of David Zawadzki, as you requested yesterday, so that your depositions of ParkWest Homes and Zawadzki can go forward as noticed.

Finally, although I have enclosed with this letter both my client's second set of discovery requests on MERS and a 30(b)(6) deposition notice of MERS, please note that I am willing to vacate the noticed deposition on the condition that MERS provides unqualified admissions to Requests for Admission Nos. 5 through 24, inclusively.

I look forward to hearing from you soon.

Very truly yours,

Robert Burns

RBB/kdp

Enclosures

cc: David Zawadzki, w/encls.

Durann Parra

From: Ryan McFarland [rmcfarland@hawleytroxell.com]
Sent: Monday, November 01, 2010 10:58 AM
To: Bob Burns
Cc: Stephen C. Hardesty
Subject: RE: ParkWest Homes v. MERS [DMSMSG1.FID352497]
Attachments: DOC.PDF; Stipulation to Intervene.pdf; Order to Intervene.pdf

Bob:

Please see the attached Stipulation. If it is acceptable, please sign and return and I will file it with the Court. Of course, if you have any questions or changes please don't hesitate to contact me.

In light of the intervention of Residential as the real party in interest, does it make sense to dismiss MERS/Homecomings?

Thanks,
Ryan

Ryan T. McFarland
Attorney
877 Main Street, Suite 1000
P.O. Box 1617
Boise, ID 83701-1617
direct 208.388.4909
fax 208.954.5236
web hawleytroxell.com

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Attorneys and Counselors

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From: Bob Burns [mailto:RBB@moffatt.com]
Sent: Friday, October 29, 2010 4:13 PM
To: Ryan McFarland
Cc: David Zawadzki
Subject: RE: ParkWest Homes v. MERS [DMSMSG1.FID352497]

Thanks for the confirmation, Ryan. Bob

From: Ryan McFarland [mailto:rmcfarland@hawleytroxell.com]
Sent: Friday, October 29, 2010 4:11 PM
To: Bob Burns
Cc: Stephen C. Hardesty
Subject: RE: ParkWest Homes v. MERS [DMSMSG1.FID352497]

Bob:

I will try to get that stipulation to you early next week.

Thanks,
Ryan

Ryan T. McFarland
Attorney
877 Main Street, Suite 1000
P.O. Box 1617
Boise, ID 83701-1617
direct 208.388.4909
fax 208.954.5236
web hawleytroxell.com

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From: Ryan McFarland [mailto:rmcfarland@hawleytroxell.com]
Sent: Wednesday, October 27, 2010 3:10 PM
To: Bob Burns
Cc: Stephen C. Hardesty
Subject: RE: ParkWest Homes v. MERS [DMSMSG1.FID352497]

Bob:

Agreed. Thanks.

Ryan

Ryan T. McFarland
Attorney
877 Main Street, Suite 1000
P.O. Box 1617
Boise, ID 83701-1617
direct 208.388.4909
fax 208.954.5236
web hawleytroxell.com

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From: Bob Burns [mailto:RBB@moffatt.com]
Sent: Wednesday, October 27, 2010 2:41 PM
To: Ryan McFarland
Cc: David Zawadzki
Subject: RE: ParkWest Homes v. MERS [DMSMSG1.FID352497]

Ryan, this e-mail will confirm our agreement of a few minutes ago vacating all noticed depositions in this action

and the due date for MERS' answers and responses to Plaintiff's Second Set of Requests for Admission, Interrogatories, and Requests for Production of Document, with the understanding that either of us may reset our respective depositions and/or the due date for MERS' answers and responses upon not less than ten days written notice to the other. As we discussed, the purpose of this agreement is to give you time to prepare a stipulated motion for the intervention in this action of Residential Funding Real Estate Holdings, LLC, as the purchaser of the subject property by trustee's sale. I look forward to receiving your proposed form of the stipulated motion sometime this week. Please advise immediately if the foregoing does not accurately set forth our agreement, so that I might timely complete and file, if necessary, the plaintiff's motions for summary judgment and for a protective order staying any discovery by MERS in this action. Bob

Robert B. Burns
Moffatt, Thomas, Barrett, Rock & Fields, Chtd.
101 S. Capitol Blvd., 10th Floor
P. O. Box 829
Boise, ID 83701-0829
208-345-2000
800-422-2889
208-385-5412 (direct)
208-385-5384 (fax)
rbb@moffatt.com

From: Ryan McFarland [mailto:rmcfarland@hawleytroxell.com]
Sent: Tuesday, October 26, 2010 2:47 PM
To: Bob Burns
Cc: Stephen C. Hardesty
Subject: RE: ParkWest Homes v. MERS [DMSMSG1.FID352497]

Bob:

My client is still evaluating how to proceed. For now, we intend to proceed with ParkWest Homes' deposition as noticed. Will you accept service of the subpoena on David Zawadzki and agree that his deposition may be taken concurrently with ParkWest's?

Ryan

Ryan T. McFarland
Attorney
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direct 208.388.4909
fax 208.954.5236
web hawleytroxell.com

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Attorneys and Counselors

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From: Bob Burns [mailto:RBB@moffatt.com]
Sent: Monday, October 25, 2010 7:27 PM
To: Ryan McFarland

Cc: David Zawadzki
Subject: RE: ParkWest Homes v. MERS [DMSMSG1.FID352497]

Ryan, can you please provide me with an update on where things stand concerning the consent or substitution of Residential Funding Real Estate Holdings, LLC, as discussed in my letter to you of October 13. Also, could you please provide me with any authority you have holding (or supporting your contention) that a trustee's sale or foreclosure constitutes a "transfer of interest" under IRCP 25(c). Thanks. Bob

Robert B. Burns
Moffatt, Thomas, Barrett, Rock & Fields, Chtd.
101 S. Capitol Blvd., 10th Floor
P. O. Box 829
Boise, ID 83701-0829
208-345-2000
800-422-2889
208-385-5412 (direct)
208-385-5384 (fax)
rbb@moffatt.com

From: Bob Burns
Sent: Friday, October 15, 2010 4:10 PM
To: 'Ryan McFarland'
Subject: RE: ParkWest Homes v. MERS [DMSMSG1.FID352497]

Sure, Ryan, let me know as soon as you know. Bob

From: Ryan McFarland [mailto:rmcfarland@hawleytroxell.com]
Sent: Friday, October 15, 2010 4:02 PM
To: Bob Burns
Cc: Stephen C. Hardesty
Subject: RE: ParkWest Homes v. MERS [DMSMSG1.FID352497]

Bob:

I have reviewed your letter and forwarded to my client. We are evaluating how to respond. Initially, I point out that we have successfully briefed Rule 25 before and it simply does not require dismissal - I do not believe you can obtain summary judgment based on the transfer of interest. Also, please be advised that the MERS employee with personal knowledge of this case is in Texas, so we will need to travel to Texas to depose MERS.

Notwithstanding the foregoing, I agree that the transfer of interest in light of the foreclosure should be dealt with. Please allow my clients an additional week to respond to your demand.

Sincerely,
Ryan

Ryan T. McFarland
Attorney
877 Main Street, Suite 1000
P.O. Box 1617
Boise, ID 83701-1617
direct 208.388.4909
fax 208.954.5236
web hawleytroxell.com

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From: Bob Burns [mailto:RBB@moffatt.com]
Sent: Wednesday, October 13, 2010 9:43 AM
To: Ryan McFarland
Subject: RE: ParkWest Homes v. MERS [DMSMSG1.FID352497]

Ryan, please review the attached letter (the original with the referenced attachments will be hand delivered to you later today) and then give me a call to discuss. Bob

From: Ryan McFarland [mailto:rmcfarland@hawleytroxell.com]
Sent: Tuesday, October 12, 2010 11:44 AM
To: Bob Burns
Cc: Stephen C. Hardesty
Subject: RE: ParkWest Homes v. MERS [DMSMSG1.FID352497]

Bob:

I have recently hand-delivered to you a number of things, including a check for the payment of costs on appeal, MERS' Answer, the signed scheduling stipulation, notices of deposition of David Zawadzki, ParkWest Homes, and Julie Barnson, and notices of subpoenas to Zawadzki and Barnson. Will you accept service of the subpoena on Zawadzki? I have attached both an acceptance of service and the subpoena here. Please advise.

Thanks,
Ryan

Ryan T. McFarland
Attorney
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Boise, ID 83701-1617
direct 208.388.4909
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From: Ryan McFarland [mailto:rmcfarland@hawleytroxell.com]
Sent: Friday, October 01, 2010 11:08 AM
To: Bob Burns
Cc: Stephen C. Hardesty
Subject: RE: ParkWest Homes v. MERS [DMSMSG1.FID352497]

Bob:

Durann Parra

From: Bob Burns [RBB@moffatt.com]
Sent: Thursday, November 04, 2010 12:12 PM
To: Ryan McFarland
Cc: Stephen C. Hardesty; David Zawadzki
Subject: RE: ParkWest Homes v. Residential [DMSMSG1.FID352497]

Ryan, I prefer that we pursue your final alternative. Accordingly, in accordance with our prior agreement, ten days notice is hereby given that MERS' answers and responses to Plaintiff's Second Set of Requests for Admission, Interrogatories, and Requests for Production of Documents (originally due on 11/12/10) are now due on or before Monday, November 15, 2010.

Also, before wasting more time and money on preparing your MSJ, you might consider the holding in Long v. Williams, 105 Idaho 585, 586 (1983) (a "deed of trust conveys to the trustee nothing more than a power of sale, capable of exercise upon the occurrence of certain contingencies (such as default in payment) and leaves in the trustor a legal estate comprised of all incidents of ownership...."). In any event, if you file your motion we will contest it and add our fees on to the already sizable tab that is accumulating for payment when the property is foreclosed. Bob

Robert B. Burns
Moffatt, Thomas, Barrett, Rock & Fields, Chtd.
101 S. Capitol Blvd., 10th Floor
P. O. Box 829
Boise, ID 83701-0829
208-345-2000
800-422-2889
208-385-5412 (direct)
208-385-5384 (fax)
rbb@moffatt.com

From: Ryan McFarland [mailto:rmcfarland@hawleytroxell.com]
Sent: Thursday, November 04, 2010 8:54 AM
To: Bob Burns
Cc: Stephen C. Hardesty
Subject: FW: ParkWest Homes v. Residential [DMSMSG1.FID352497]

Bob:

I just left you a voice mail message about this matter. Please call or e-mail at your convenience.

As you can probably surmise from the Answer/Counterclaim of Residential, we are prepared to ask the Court to rule that, as a matter of law, ParkWest's lien is void as to Residential, based on ParkWest's failure to name the Trustee of the Deed of Trust as a Defendant. That Motion would not require any discovery.

The purpose of my e-mail is to ask you whether it makes sense to hold off on discovery to save attorneys fees and costs pending the resolution of that legal issue. If so, that would require that we stipulate to extend the trial date and discovery deadlines. I am cognizant of your concern that we not prolong this case unnecessarily, so to address that concern I am willing to agree on a schedule for filing the Motion for Summary Judgment and for re-commencing discovery after the Court's decision. I am thinking that I could have a Motion for Summary Judgment filed by December 1, 2010, and could take the depositions of ParkWest Homes and David Zawadzki within 30 days of a decision on our Motion or Summary Judgment.

Alternatively, I am prepared to re-notice the depositions of ParkWest Homes and David Zawadzki and we can conduct discovery while we litigate the legal issues referenced above. If you prefer this alternative, please advise if you are willing to accept service of a subpoena for David Zawadzki and of ParkWest's and Zawadzki's available deposition dates in November.

Finally, please advise if your client has any interest in making another effort to settle this dispute.

Thanks,
Ryan

Ryan T. McFarland
Attorney
877 Main Street, Suite 1000
P.O. Box 1617
Boise, ID 83701-1617
direct 208.388.4909
fax 208.954.5236
web hawleytroxell.com

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Attorneys and Counselors

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NOTICE: To comply with certain U.S. Treasury regulations, we inform you that, unless expressly stated otherwise, any U.S. federal tax advice contained in this e-mail, including attachments, is not intended or written to be used, and cannot be used, by any person for the purpose of avoiding any penalties that may be imposed by the Internal Revenue Service.

Durann Parra

From: Ryan McFarland
Sent: Monday, November 15, 2010 3:12 PM
To: 'Bob Burns'
Cc: Stephen C. Hardesty
Subject: RE: ParkWest Homes v. MERS [DMSMSG1.FID352497]

Bob:

Rule 25 allows the "action [to] be continued . . . against the original party," MERS. *Engstrom* stands for just that principle. Like in *Engstrom,* Residential is not "a continuation of" MERS or Homecomings. Therefore, like in *Engstrom* it would have been inappropriate for the court to join Residential as a Defendant, over Residential's objection, because the Court does not have jurisdiction to enforce ParkWest's lien against Residential: ParkWest failed to timely name First American as a Defendant, and ParkWest's lien expired under I.C. 45-510. So did any jurisdiction to enforce the lien against First American or its successor, Residential. Residential has intervened, pursuant to ParkWest's stipulation, to ensure that its rights are not affected by any action the Court may take with respect to MERS.

If ParkWest still had a claim against MERS, then the right result under *Engstrom* would be for the action to continue as against MERS (the *Engstrom* plaintiff brought an action "to recover property damage" against the defendant for the defendant's negligence, a claim that survived the public sale of the defendant's corporate assets); however, as MERS no loner has an interest in the property, ParkWest no longer has a claim against MERS.

Ryan

Ryan T. McFarland
Attorney
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HAWLEY TROXELL
Attorneys and Counselors

This e-mail message from the law firm of Hawley Troxell Ennis & Hawley, LLP is intended only for named recipients. It contains information that may be confidential, privileged, attorney work product, or otherwise exempt from disclosure under applicable law. If you have received this message in error, are not a named recipient, or are not the employee or agent responsible for delivering this message to a named recipient, be advised that any review, disclosure, use, dissemination, distribution, or reproduction of this message or its contents is strictly prohibited. Please notify us immediately at 208.344.6000 if you have received this message in error, and delete the message.

From: Bob Burns [mailto:RBB@moffatt.com]
Sent: Monday, November 15, 2010 10:11 AM
To: Ryan McFarland
Cc: Stephen C. Hardesty; David Zawadzki
Subject: RE: ParkWest Homes v. MERS [DMSMSG1.FID352497]

Thank you for your prompt response, Ryan. Before I respond to your below proposal, and in light of R. J. Enstrom Corp. v. Interceptor Corp., 555 F.2d 277, 281 (10th Cir. 1977), could you please provide me with any authority that you may have holding (or even suggesting) that a trustee's sale constitutes a transfer of interest for purposes of Rule 25(c). In addition, could you please provide me with any authority you may

have holding or suggesting that a beneficiary under a deed of trust (or a mortgagee under a mortgage) continues to hold an interest in property after the property is sold at a trustee's sale (or public sale). Please understand that ParkWest intends to proceed as I've outlined below absent your providing this requested authority. Bob

---

From: Ryan McFarland [mailto:rmcfarland@hawleytroxell.com]
Sent: Monday, November 15, 2010 9:48 AM
To: Bob Burns
Cc: Stephen C. Hardesty
Subject: RE: ParkWest Homes v. MERS [DMSMSG1.FID352497]

Bob:

Thanks your e-mail. In response to your allegations, I direct you to Idaho Rule of Civil Procedure 25(c) which vindicates "MERS conduct [in this litigation] after the the July 9, 2009, trustee's sale of the subject property."

We cannot agree with your demands numbered (1) and (2) below. You remain free to ask those same questions of Residential, and in fact, you have asked several of them in Plaintiff's First Set Of Requests For Admission, Interrogatories, And Requests For Production Of Documents To Defendant/Intervenor.

We do believe that we can structure a stipulated judgment in such a way as to save your clients and Residential the cost of litigating Residential's Motion to Dismiss. Please prepare a proposed stipulation that we can discuss with our clients.

Sincerely,
Ryan

Ryan T. McFarland
Attorney
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HAWLEY TROXELL
Attorneys and Counselors

This e-mail message from the law firm of Hawley Troxell Ennis & Hawley, LLP is intended only for named recipients. It contains information that may be confidential, privileged, attorney work product, or otherwise exempt from disclosure under applicable law. If you have received this message in error, are not a named recipient, or are not the employee or agent responsible for delivering this message to a named recipient, be advised that any review, disclosure, use, dissemination, distribution, or reproduction of this message or its contents is strictly prohibited. Please notify us immediately at 208.344.6000 if you have received this message in error, and delete the message.

From: Bob Burns [mailto:RBB@moffatt.com]
Sent: Friday, November 12, 2010 4:39 PM
To: Ryan McFarland
Cc: Stephen C. Hardesty; David Zawadzki
Subject: RE: ParkWest Homes v. MERS [DMSMSG1.FID352497]

Ryan, I received today and reviewed your motions for a protective order and to dismiss MERS. Please note that I plan on filing both a motion to compel and an opposition to your motion to dismiss, together with seeking an award of attorney fees and sanctions, unless we can get something promptly worked out. The basis for

my motions would be grounded in MERS' conduct after the July 9, 2009, trustee's sale of the subject property, including MERS' opposition to the then-pending appeal (see, e.g., the representation on page 1 of Respondent's Brief that "MERS holds deeds of trust of unquestioned validity covering the property at issue in this case..."), MERS' filing an answer last month claiming an interest in the property in question (see, e.g., the allegation in paragraph 3 that MERS "claims an interest" in the subject property), and MERS' scheduling depositions and otherwise prosecuting a defense of its claimed interest in property that it now admits it has held no interest in since the trustee's sale last year. My suggested resolution to this unfortunate situation is as follows:

1. MERS would provide unqualified admissions to ParkWest's pending RFAs 14 through 24;

2. Residential Funding would stipulate that the exhibits referenced in the foregoing RFAs (i.e., Exhibits G-L) are admissible into evidence at trial; and

3. ParkWest and MERS would stipulate to the entry of judgment against MERS establishing that MERS has no continuing interest in the subject property.

Provided we can get all this resolved next week, MERS can go about its way without responding to ParkWest's additional pending discovery (including avoiding deposition), and I will not pursue a claim for attorney fees or sanctions under either Idaho Code 12-121 or Rule 11. Please advise not later than the close of business next Monday (November 15) if your clients are willing to pursue my proposed resolution, as otherwise I will need to proceed with preparing my motion and opposition. I look forward to hearing from you soon. Bob

Robert B. Burns
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101 S. Capitol Blvd., 10th Floor
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800-422-2889
208-385-5412 (direct)
208-385-5384 (fax)
rbb@moffatt.com

From: Bob Burns
Sent: Wednesday, October 13, 2010 9:43 AM
To: 'Ryan McFarland'
Subject: RE: ParkWest Homes v. MERS [DMSMSG1.FID352497]

Ryan, please review the attached letter (the original with the referenced attachments will be hand delivered to you later today) and then give me a call to discuss. Bob

---

From: Ryan McFarland [mailto:rmcfarland@hawleytroxell.com]
Sent: Tuesday, October 12, 2010 11:44 AM
To: Bob Burns
Cc: Stephen C. Hardesty
Subject: RE: ParkWest Homes v. MERS [DMSMSG1.FID352497]

Bob:

I have recently hand-delivered to you a number of things, including a check for the payment of costs on appeal, MERS' Answer, the signed scheduling stipulation, notices of deposition of David Zawadzki, ParkWest Homes, and Julie Barnson, and notices of subpoenas to Zawadzki and Barnson. Will you accept service of the subpoena on Zawadzki? I have attached both an acceptance of service and the subpoena here. Please advise.

Thanks,

1/13 F

Robert B. Burns, ISB No. 3744
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23095.0001

Attorneys for Plaintiff

FILED
A.M. 2:40 P.M.
DEC 27 2010
CANYON COUNTY CLERK
J HEIDEMAN, DEPUTY

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

PARKWEST HOMES LLC, an Idaho limited liability company,

Plaintiff,

vs.

JULIE G. BARNSON, an unmarried woman; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., a Delaware corporation, as nominee for Homecomings Financial, LLC (f/k/a Homecomings Financial Network, Inc.), a Delaware limited liability company; and DOES 1-10;

Defendants,

and

RESIDENTIAL FUNDING REAL ESTATE HOLDINGS, LLC, a Delaware limited liability company,

Defendant/Intervenor.

Case No. CV 07-8274

MEMORANDUM IN OPPOSITION TO RESIDENTIAL FUNDING REAL ESTATE HOLDINGS, LLC'S MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

The present action was filed on August 7, 2007, by Plaintiff ParkWest Homes LLC ("ParkWest") to enforce its mechanic's lien in certain Canyon County real property (the "Property") then owned by Defendant Julie G. Barnson and with respect to which Defendant Mortgage Electronic Registration Systems, Inc. ("MERS") was the designated beneficiary under two recorded deeds of trust.

After MERS was granted summary judgment against ParkWest, and pending ParkWest's successful appeal of the judgment, MERS conveyed the Property to Defendant Residential Funding Real Estate Holdings, LLC ("Residential") in July 2009 by a trustee's sale and deed effected by MERS' designated trustee, First American Title Insurance Company ("First American"). Wholly ignoring the Supreme Court's decision in the prior appeal in this lawsuit and the application of the "law of the case" doctrine, Residential now moves for summary judgment on the grounds that First American was not named as a defendant. However, nowhere is it contended by anybody that First American held any interest in the Property at any time other than in its capacity as MERS' trustee. And in this regard, the Supreme Court has established that, under Idaho law, a deed of trust conveys nothing more to a trustee than a power of sale. *Long v. Williams*, 105 Idaho 585, 586, 671 P.2d 1048, 1049 (1983) ("We hold that the deed of trust conveys nothing more than a power of sale . . .").

Based on the points and authorities discussed below, Residential's motion for summary judgment based on First American not having been sued should be denied in all respects.

II. ADDITIONAL MATERIAL FACTS

In addition to the "Undisputed Facts" set forth in the Memorandum in Support of Residential Funding Real Estate Holdings, LLC's Motion for Summary Judgment ("Memorandum"), filed November 17, 2010, the following facts are material to the resolution of Residential's pending motion:

1. ParkWest was registered as a contractor by the State of Idaho on May 2, 2006, and commenced construction of improvements on the Property on May 18, 2006, which was six months before MERS' two deeds of trust were recorded. Affidavit of David Zawadzki, filed November 10, 2008, ¶ 3.

2. Upon filing this lawsuit ParkWest caused a lis pendens to be recorded against the Property by the Canyon County Recorder as Instrument No. 2007055927 on August 13, 2007, which was two years before Residential acquired an interest in the Property, and caused an amended lis pendens to be recorded as Instrument No. 2007062387 on September 13, 2007.[1]

3. As expressly held by the Supreme Court in the prior appeal in this lawsuit, *ParkWest Homes LLC v. Barnson*, 149 Idaho 603, 238 P.3d 203 (2010) [hereinafter "*Barnson*"],[2] (a) ParkWest's "lien was valid for labor and materials supplied after [ParkWest] registered" as a

---

[1] The court is requested to take judicial notice of ParkWest's two recorded lis pendens attached hereto as **Exhibit A**, pursuant to I.R.E. 201.

[2] The court is requested to take judicial notice of the marked excerpts from the cited opinion attached hereto as **Exhibit B**, pursuant to I.R.E. 201.

contractor, and (b) "ParkWest is entitled to a lien for work or labor it provided and materials it supplied during the time it was duly registered."[3] *Id.* at 604 & 608, 238 P.3d at 204 & 208.

III. ARGUMENT

A. Residential Is Bound by the Supreme Court's Prior Determination That ParkWest's Mechanic's Lien Is Valid.

The basis for Residential's pending motion is "that because ParkWest did not commence an action against Residential's predecessor in interest to the property at issue . . . within six months of filing the Mechanic's Lien (the "Lien") at issue in this case as required by

---

[3] Pursuant to established Idaho precedent, the foregoing determinations now constitute the law of the case and are not subject to further challenge in this litigation. *See Hawley v. Green*, 124 Idaho 385, 392, 860 P.2d 1, 8 (Ct. App. 1993):

> In *Capps v. Wood*, 117 Idaho 614, 790 P.2d 395 (Ct.App.1990) (*Capps II*), we dealt with a similar timeliness issue. In that quiet title case, the Capps failed to raise the issue of an alleged settlement agreement initially and in the first appeal, *Capps v. Wood*, 110 Idaho 778, 718 P.2d 1216 (1986) (*Capps I*). The Capps raised the issue before the district court on remand from the Supreme Court's reversal of summary judgment for the defendants in *Capps I*. In *Capps II*, we held that the settlement agreement issue was not viable because "under the 'law of the case' principle, on a second or subsequent appeal the courts generally will not consider errors which arose prior to the first appeal and which might have been raised as issues in the earlier appeal." *Capps II*, 117 Idaho at 618, 790 P.2d at 399; *see also Red Bluff Mines, Inc. v. Indus. Com'n of Ariz.*, 144 Ariz. 199, 696 P.2d 1348, 1353 (Ct.App.1984) (question that could have been raised on earlier appeal in workers' compensation case but was not, cannot be considered on second appeal). Hawley has not shown why the equitable estoppel issue was not raised in the district court prior to *Hawley I*, or stated differently, she has not pointed to any new or additional fact or circumstance arising after the remand order which gave rise to the estoppel issue. Because the estoppel argument was clearly available to Hawley prior to *Hawley I*, we will not address the issue.

Accord Taylor v. Maile, 146 Idaho 705, 709-10, 201 P.3d 1282, 1286-87 (2009).

Idaho Code section 45-510, the Lien is void as to Residential." Motion[4] 2. But, of course, contrary to Residential's contention, the Supreme Court expressly ruled the Lien to be valid in *Barnson*. And based on the authorities cited in note 3, *supra*, that determination constitutes the law of the case.

Although the term "law of the case" is not even mentioned by Residential in its Memorandum, Residential has previously argued to this court that the doctrine does not prevent litigation of lien-validity issues that were not raised on appeal in *Barnson*, citing as support the opinion in *Idaho Power Co. v. Cogeneration, Inc.*, 134 Idaho 738, 9 P.3d 1204 (2000) [hereinafter *Cogeneration II*]. Residential's argument that the decision in *Cogeneration II* somehow supports an exception to the doctrine is meritless.

Thus, in the first appeal in that lawsuit, the Supreme Court articulated the dispositive issue on appeal and the court's holding as follows:

> The dispositive issue in this appeal is the validity and effect of IPUC's order that Cogeneration post the second security installment. Idaho Power contends that Cogeneration cannot sustain a force majeure defense in the face of IPUC's order to post the security "for the public interest." We disagree.
>
> * * *
>
> For these reasons, the trial court should not have granted partial summary judgment but should have allowed Cogeneration to litigate whether an event of force majeure protected it from default in posting the second security installment on January 1, 1994.

Idaho Power Co. v. Cogeneration, Inc., 129 Idaho 46, 49, 921 P.2d 746, 749 (1996) [hereinafter *Cogeneration I*]. Or in sum, the express purpose of the Supreme Court's reversal and remand in

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[4] Residential Funding Real Estate Holdings, LLC's Motion for Summary Judgment, filed November 17, 2010.

Cogeneration I was to allow the defendant to litigate the issue of force majeure before the trial court.

Nevertheless, the defendant argued in *Cogeneration II* that the very issue the Supreme Court remanded to be litigated—i.e., whether an event of force majeure protected the defendant—was subsumed and established by the decision in *Cogeneration I* and was not therefore subject to litigation. Not surprisingly, both the trial court and Supreme Court rejected this remarkably disingenuous contention. *Cogeneration II*, 134 Idaho at 747, 9 P.3d at 1213. Accordingly, the decision in *Cogeneration II* in no way undercuts the rule established by the cases cited in Note 3, *supra,* proscribing the litigation of new arguments that could have earlier been raised challenging the validity of ParkWest's Lien.

Moreover, because Residential acquired its interest in the Property after ParkWest recorded its lis pendens, Residential is bound by the Supreme Court's determination in *Barnson.*

The "lis pendens" doctrine is summarized in *Sartain v. Fidelity Financial Services, Inc.*, 116 Idaho 269, 775 P.2d 161 (Ct. App. 1989), as follows:

> The doctrine of lis pendens refers to the common law principle that when a third party—with actual or constructive notice of a pending action involving real property—acquires an interest in that real property from a party to the action, then the third party takes subject to the rights of the parties in the action as finally determined by the judgment or decree.

Id. at 272, 775 P.2d at 164 (multiple citations omitted). And as further explained in *Corpus Juris Secundum*, the doctrine applies equally to a purchaser acquiring its interest pendente lite as to a purchaser acquiring its interest after the entry of final judgment:

> A properly filed lis pendens binds subsequent purchasers or encumbrancers to all proceedings evolving from the litigation. Thus a person whose conveyance is recorded after the filing of a

> notice of pendency is bound by all proceedings taken in the action after such filing.

54 C.J.S. *Lis Pendens* § 46 (2005) (footnotes omitted).

Accordingly, Residential is bound by the Supreme Court's prior determination in *Barnson* that ParkWest's Lien is valid by application of the doctrines of law of the case and lis pendens.

B. Residential's Contention That ParkWest's Lien Is Void as to Residential Is Contrary to Idaho Law.

Needless to say, if counsel for Residential actually believed ParkWest was required to name MERS' trustee as a party in order to enforce ParkWest's Lien, opposing counsel would have raised the issue in support of the first motion for summary judgment they filed. The reasons opposing counsel were right in not then making the arguments they now present to the court are discussed below.

ParkWest does not dispute Residential's initial argument that ParkWest's Lien was lost with respect to any unnamed party's interest in the Property. *See* Memorandum 13 (". . . Idaho case law is clear that the result of a lien claimant's failure to name a defendant in a lien foreclosure action is that the claimant loses its lien against the property in regard to the unnamed party's interest."). This is without doubt the law in Idaho. *See, e.g., Bonner Building Supply, Inc. v. Standard Forest Products, Inc.*, 106 Idaho 682, 686, 682 P.2d 635, 639 (Ct. App. 1984) [hereinafter *Standard*] (plaintiff's failure to name defendant Standard as a defendant "left Standard's interest in the property unaffected by the foreclosure."). However, to say ParkWest's Lien was lost as to First American's interest in the Property is but the beginning of the inquiry,

as (i) precisely what interest in the Property First American once held must next be determined,[5] followed by a determination of (ii) the legal effect of ParkWest not foreclosing on such interest.

Residential argues with respect to the first of these issues that MERS' deeds of trust conveyed legal title to First American, citing Idaho Code Section 45-1502 and the decision in *Defendant A v. Idaho State Bar*, 132 Idaho 662, 665, 978 P.2d 222, 225 (1999). Again ParkWest does not dispute Residential's argument, at least up to this point. However, the extremely limited extent of First American's interest under Idaho law has been wholly ignored by Residential—which interest was defined in the case relied upon for the holding in *Defendant A*: *Long v. Williams*, *supra*, 105 Idaho at 586, 671 P.2d at 1049 ("We hold that the deed of trust conveys to the trustee nothing more than a power of sale . . ."). Or as explained in *Willis v. Realty Country, Inc.*, 121 Idaho 312, 824 P.2d 887 (Ct. App. 1991):

> Under Idaho law, a deed of trust is a mortgage with a power of sale; the legal title is conveyed to the trustee solely for the purpose of security. The deed of trust leaves in the grantor a legal estate which entitles the grantor to possession of the property and all incidents of ownership; the exception to this is the trustee's power to sell the property in the event of the grantor's default on the underlying obligation.

Id. at 314 n.2, 824 P.2d at 889 (citing *Long v. Williams*). Thus, the *only* interest held by First American and "lost" to ParkWest was the power of sale under the two MERS' deeds of trust, with *all* other interests in the Property being held by the defendants named in this action.

In light of its manifest problem under Idaho law, Residential cites to precedent from other states to answer the ultimate question: the legal effect of ParkWest not foreclosing on First American's power of sale established under the two MERS' deeds of trust. The decisions

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[5] First American, of course, no longer holds any interest in the Property as a result of the trustee's deed it delivered to Residential. Memorandum 4 (Undisputed Fact No. 10).

of courts in foreign states, however, are rendered inapplicable to Idaho as a result of Idaho Code Section 45-1302. *See Standard*, 106 Idaho at 685, 682 P.2d at 638 ("no statute mandates the joinder of specific parties to a lien foreclosure action. In fact, I.C. § 45-1302 indicates to the contrary.").[6]

Indeed, not only does the Idaho authority quoted and relied upon by Residential establish that First American was *not* a necessary party to this action, but Residential ultimately admits this fact after arguing just the opposite for six pages. *Compare* Memorandum part IV.B, at p. 8 ("**First American Was A Necessary Party To ParkWest's Lien Foreclosure Action.**") (bolding in original), *with* Memorandum 15 ("Under the rule articulated in *Bonner Building Supply, Inc. v. Standard Forest Products, Inc.* and elsewhere, ParkWest was not strictly required to name First American or Residential as Defendants in this action, but the failure to do so left First American's interest in the Property unaffected by ParkWest's foreclosure action."). ParkWest fully concurs with Residential's immediately foregoing summary of Idaho law, as established by the decision in *Standard*.

---

[6] Idaho Code Section 45-1302 was amended this year to provide as follows:

> In any suit brought to foreclose a mortgage or lien upon real property or a lien on or security interest in personal property, the plaintiff, cross-complainant or plaintiff in intervention *may* make as party defendant in the same cause of action, any person having, claiming, or appearing to have or to claim any title, estate, or interest in or to any part of the real or personal property involved therein, and the court shall, in addition to granting relief in the foreclosure action, determine the title, estate or interest of all parties thereto in the same manner and to the same extent and effect as in the action to quiet title.

(Emphasis added.) The amendment did not alter the permissive character of the statute, as held in *Standard*.

Accordingly, based on the established law of Idaho that a deed of trust conveys to a trustee nothing more than a power of sale, the *only* interest held by First American and "lost" to ParkWest was the power of sale itself. And based on the lis pendens recorded against the Property long before Residential's purchase, Residential's interest in the Property can be no greater than that of the other defendants in this lawsuit, Julie Barnson and MERS.

IV. CONCLUSION

For the foregoing reasons, Residential's motion for summary judgment should be denied in all respects.

DATED this 23rd day of December 2010.

MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED

By _____
Robert B. Burns – Of the Firm
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of December 2010, I caused a true and correct copy of the foregoing **MEMORANDUM IN OPPOSITION TO RESIDENTIAL FUNDING REAL ESTATE HOLDINGS, LLC'S MOTION FOR SUMMARY JUDGMENT** to be served by the method indicated below, and addressed to the following:

Stephen C. Hardesty
Ryan T. McFarland
HAWLEY TROXELL ENNIS & HAWLEY LLP
877 W. Main St., Ste. 1000
P.O. Box 1617
Boise, ID 83701-1617
Facsimile (208) 954-5223 and (208) 954-5236

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

Robert B. Burns

2007055927

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WILLIAM H. HURST
CANYON CNTY RECORDER
BY

REQUEST Moffatt Thomas
TYPE Lis Pendens FEE 6

Robert B. Burns, ISB No. 3744
MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED
101 S. Capitol Blvd., 10th Floor
Post Office Box 829
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Telephone (208) 345-2000
Facsimile (208) 385-5384
rbb@moffatt.com
23-095.1

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

PARKWEST HOMES LLC, an Idaho limited liability company,

Plaintiff,

vs.

JULIE G. BARNSON, an unmarried woman; BLACK HAWKE CONSTRUCTION LENDING, LLC, an Idaho limited liability company; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., a Delaware limited liability company; and DOES 1-10;

Defendant.

Case No. CV 07-8274

LIS PENDENS

NOTICE IS HEREBY GIVEN that an action was commenced on August 7, 2007, in the above-entitled court by Plaintiff ParkWest Homes LLC against Defendants Julie G. Barnson, Black Hawke Construction Lending, LLC, and Mortgage Electronic Registration Systems, Inc. seeking foreclosure of a mechanic's lien in Plaintiff's favor on the real property

located in Canyon County, Idaho, having a street address of 28123 Silo Way, Wilder, Idaho, and more particularly described as follows:

Lot 4 in Block 1 of Riverbend Subdivision, according to the official plat thereof, filed in Book 34 of Plats at Page 2, Official Records of Canyon County, Idaho.

DATED this 8th day of August 2007.

MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED

By _____
Robert B. Burns – Of the Firm
Attorneys for Plaintiff

STATE OF IDAHO)
) ss.
County of Ada)

On this 8th day of August 2007, before me a Notary Public in and for said State, personally appeared **ROBERT B. BURNS**, known or identified to me (or proved to me on the oath of _____), to be the person whose name is subscribed to the within instrument, and who acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

KARLYN D. PARKER NOTARY PUBLIC STATE OF IDAHO

_____
NOTARY PUBLIC FOR IDAHO
Residing at Boise, Idaho
My Commission Expires 5/26/09

RECORDED

2007 SEP 13 AM 9 36
WILLIAM H. HURST
CANYON CNTY RECORDER
BY
REQUEST Moffatt Thomas
TYPE Stevens FEE 9-

Robert B. Burns, ISB No. 3744
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rbb@moffatt.com
23-095.1

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

PARKWEST HOMES LLC, an Idaho limited liability company, Plaintiff, vs. JULIE G. BARNSON, an unmarried woman; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., a Delaware corporation, as nominee for Homecomings Financial, LLC (f/k/a Homecomings Financial Network, Inc.), a Delaware limited liability company; and DOES 1-10; Defendants.	Case No. CV 07-8274 **AMENDED LIS PENDENS**

NOTICE IS HEREBY GIVEN that an action was commenced on August 7, 2007, in the above-entitled court by Plaintiff ParkWest Homes LLC against Defendants Julie G.

Barnson and Mortgage Electronic Registration Systems, Inc. seeking foreclosure of a mechanic's lien in Plaintiff's favor on the real property located in Canyon County, Idaho, having a street address of 28123 Silo Way, Wilder, Idaho, and more particularly described as follows:

> Lot 4 in Block 1 of Riverbend Subdivision, according to the official plat thereof, filed in Book 34 of Plats at Page 2, Official Records of Canyon County, Idaho.

This Amended Lis Pendens is made in amendment of that certain Lis Pendens recorded by the Canyon County Recorder as Instrument No. 2007055927 on August 13, 2007.

DATED this 11th day of September 2007.

MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED

By _____
Robert B. Burns – Of the Firm
Attorneys for Plaintiff

STATE OF IDAHO)
) ss.
County of Ada)

On this 11th day of September 2007, before me a Notary Public in and for said State, personally appeared **ROBERT B. BURNS**, known or identified to me (or proved to me on the oath of _____), to be the person whose name is subscribed to the within instrument, and who acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

KARLYN D. PARKER NOTARY PUBLIC STATE OF IDAHO

_____
NOTARY PUBLIC FOR IDAHO
Residing at Boise, Idaho
My Commission Expires 5/26/09

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11th day of September 2007, I caused a true and correct copy of the foregoing **AMENDED LIS PENDENS** to be served by the method indicated below, and addressed to the following:

David E. Wishney
ATTORNEY AND COUNSELOR AT LAW
300 West Myrtle, Suite 200
Post Office Box 837
Boise, Idaho 83701
Facsimile (208) 342-5749

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

Robert B. Burns

C

Supreme Court of Idaho,
Boise, June 2010 Term.
PARKWEST HOMES LLC, an Idaho limited liability company, Plaintiff-Appellant,
v.
Julie G. BARNSON, an unmarried woman; Mortgage Electronic Registration Systems, Inc., a Delaware corporation, as nominee for Homecomings Financial, LLC (f/k/a Homecomings Financial Network, Inc.,) a Delaware limited liability company; and Does 1-10, Defendants-Respondents.
No. 36246-2009.

June 25, 2010.

Background: Home builder brought action to foreclose on mechanics lien. The Third Judicial District Court, Canyon County, Gordon W. Petrie, J., dismissed complaint on grounds that mechanics' lien was void, and entered judgment in mortgagee's favor on finding that mortgagee's deeds of trust were superior to mechanics' lien. Builder appealed.

Holdings: The Supreme Court, Eismann, C.J., held that:
(1) mechanics' lien statute did not require builder to state in claim of lien that it had deducted offsets and credits;
(2) mechanics' lien was not invalid for builder's failure to state that he believed claim to be "just";
(3) claim of lien substantially complied with verification requirement;
(4) district court had duty to sua sponte raise issue of legality of construction contract;
(5) builder was entitled to enforce mechanics' lien to extent of claim for labor and materials supplied following registration under Construction Act; and
(6) mortgagee was not entitled to award of attorney fees on builder's appeal.

Vacated; remanded.

West Headnotes

[1] Mechanics' Liens 257 ⚿5

257 Mechanics' Liens
257I Nature, Grounds, and Subject-Matter in General
257k5 k. Construction of lien laws in general. Most Cited Cases

Mechanics' Liens 257 ⚿116

257 Mechanics' Liens
257III Proceedings to Perfect
257k116 k. Nature and form in general. Most Cited Cases
The mechanic's lien statutes are liberally construed in favor of those to whom the lien is granted, and to create a valid lien the claimant must substantially comply with the statutory requirements. West's I.C.A. § 45-501 et seq.

[2] Mechanics' Liens 257 ⚿148

257 Mechanics' Liens
257III Proceedings to Perfect
257k133 Form and Contents of Claim or Statement
257k148 k. Statement as to credits and offsets. Most Cited Cases
Mechanics lien statute requiring that claim of lien contain statement of claimant's demand, "after deducting all just credits and offset" did not require home builder to actually state in claim that it had deducted offsets and credits. West's I.C.A. § 45-507(3).

[3] Mechanics' Liens 257 ⚿148

257 Mechanics' Liens
257III Proceedings to Perfect
257k133 Form and Contents of Claim or Statement
257k148 k. Statement as to credits and offsets. Most Cited Cases
The mechanics' lien claimant is required to deduct all just credits and offsets when determining the amount of the claim, but is not required to allege that such deduc-

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pursued below. Most Cited Cases
Home builder was not entitled to appellate review of claim that construction contract with customer, executed when builder was not registered under Construction Act, was ratified by subsequent registration, where claim was not presented to trial court. West's I.C.A. § 54-5204.

[11] Licenses 238 ⇐39.43(1)

238 Licenses
238I For Occupations and Privileges
238k38.5 Rights and Remedies of Unlicensed or Unauthorized Persons and of Persons Dealing with Them in General
238k39.43 Contractors
238k39.43(1) k. In general. Most Cited Cases
Although home builder was not entitled to compensation for labor and materials supplied during period of time that it was not registered under Construction Act, it was entitled to enforce mechanics' lien to extent of claim for labor and materials supplied following registration. West's I.C.A. § 54-5208.

[12] Licenses 238 ⇐11(5)

238 Licenses
238I For Occupations and Privileges
238k10 Subjects of License or Tax
238k11 Occupations and Employments in General
238k11(5) k. Contractors. Most Cited Cases
Although work done by a contractor while unregistered under the Construction Act is illegal, work done after it is registered is certainly legal. West's I.C.A. § 54-5208.

[13] Licenses 238 ⇐39.43(1)

238 Licenses
238I For Occupations and Privileges
238k38.5 Rights and Remedies of Unlicensed or Unauthorized Persons and of Persons Dealing with Them in General
238k39.43 Contractors
238k39.43(1) k. In general. Most Cited Cases
In order to bring an action to collect compensation for work or labor performed and materials supplied in a construction project, the contractor must allege and prove that he was a duly registered contractor under the Contractor Act or exempt from registration at all times during the performance of such act or contract. West's I.C.A. § 54-5208.

[14] Mortgages 266 ⇐186(6)

266 Mortgages
266III Construction and Operation
266III(D) Lien and Priority
266k186 Proceedings to Determine and Establish Rights
266k186(6) k. Hearing and determination. Most Cited Cases
Mortgagee was not entitled to award of attorney fees on home builder's appeal from determination that builder's mechanics' lien was not superior to deed of trust recorded by mortgagee, where mortgagee was not prevailing party on appeal. West's I.C.A. § 12-121.
***204** Moffatt, Thomas, Barrett, Rock & Fields, Chartered, Boise, for appellant. Robert B. Burns argued.

Hawley Troxell Ennis & Hawley LLP, Boise, for respondent Mortgage Electronic Registration Systems, Inc. Ryan T. McFarland argued.

EISMANN, Chief Justice.

This is an appeal from a judgment dismissing an action to foreclose a mechanic's lien because: (a) the notice of lien did not substantially comply with the requirements of Idaho Code § 45-507, and (b) the construction contract was void because the contractor had not registered under the Idaho Contractor Registration Act before it negotiated and signed the contract. We hold that the claim of lien substantially complied with Idaho Code § 45-507 and that the lien was valid for labor and materials supplied after the contractor registered. We therefore vacate the judgment of the district court and remand this case for further proceedings.

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within this state without being registered as required in this chapter." Idaho Code § 54-5204. MERS relies upon *Barry v. Pacific West Construction, Inc.*, 140 Idaho 827, 832, 103 P.3d 440, 445 (2004), in which this Court *sua sponte* held a contract between the general contractor and a subcontractor on a public works project was void for the failure of the subcontractor to have a public works license as required by law and urges the same result here.

ParkWest contends that the district court erred in *sua sponte* raising the issue of the illegality of the construction contract. The district court did not err in *sua sponte* raising that issue. In *Barry* we held that "this Court has a duty to raise the issue of illegality," *id.*, and the district court had the same duty.

[10] ParkWest does not challenge the district court's holding that the construction contract was void because ParkWest was not registered at the time it signed the contract. Rather, it argues that after it registered on May 2, 2006, Barnson ratified the construction contract. That issue was not presented to the district court, and so we will not consider it on appeal. *Lopez v. Farm Bureau Mut. Ins. Co. of Idaho,* 148 Idaho 515, 519, 224 P.3d 1104, 1108 (2010). Had ParkWest wanted the district court to consider that issue before the appeal, ParkWest could have filed a motion for reconsideration.

[11] The district court also implicitly held that ParkWest's lien was void because its construction contract was void. Citing Idaho Code § 54-5208, MERS agrees. That statute states, insofar as is relevant, "A contractor who is not registered as set forth in this chapter, unless otherwise exempt, shall be denied and shall be deemed to have conclusively waived any right to place a lien upon real property as provided for in chapter 5, title 45, Idaho Code." This statute does not invalidate or waive ParkWest's lien.

[12] A mechanic's lien is granted for "the work or labor done ... or materials furnished." Idaho Code § 45-501. It is not granted simply for entering into a construction contract. Idaho Code § 54-5208 is written in the present tense. It states, "A contractor who *is not registered* as set forth in this chapter...." (Emphasis added). Thus, the contractor is denied a lien for work or labor done or materials furnished in the construction during the period that the contractor is not registered. Although work done by ParkWest while unregistered was illegal, work done after it registered was certainly legal. *See Farrell v. Whiteman,* 146 Idaho 604, 611, 200 P.3d 1153, 1160 (2009) (work performed while an architect was unlicensed was illegal, but work performed after he was licensed was legal). This construction is consistent with Idaho Code § 54-5217(2) (emphasis added) which provides:

> No person engaged in the business or acting in the capacity of a contractor, unless otherwise exempt, may bring or maintain any action in any court of this state for the collection of compensation for the performance of any act or contract for which registration is required by this chapter without alleging and proving that he was a duly registered contractor, or that he was otherwise exempt as provided for in this chapter, *at all times during the performance of such act or contract.*

[13] In order to bring an action to collect compensation for work or labor performed and materials supplied in a construction project, the contractor must allege and prove that he was a duly registered contractor or exempt from registration "at all times during the performance of such act or contract." Thus, ParkWest is entitled to a lien for work or labor it provided and materials it supplied during the time that it was duly registered. To hold otherwise would mean that a contractor who violated the Act would be forever barred from obtaining a mechanic's lien.

***209** In this case, the uncontroverted evidence was that ParkWest was registered under the Contractor Act at all times during the period that it furnished work or labor or supplied materials in constructing Barnson's house. Therefore, it is entitled to a lien on the property.

C. Did the District Court Err in Holding that ParkWest Did Not Allege a Claim for Unjust Enrichment?

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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

PARKWEST HOMES LLC, an Idaho limited liability company,

Plaintiff,

vs.

JULIE G. BARNSON, an unmarried woman; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., a Delaware corporation, as nominee for Homecomings Financial, LLC (f/k/a Homecomings Financial Network, Inc.), a Delaware limited liability company; and DOES 1-10,

Defendants.

and

RESIDENTIAL FUNDING REAL ESTATE HOLDINGS, LLC, a Delaware limited liability company,

Defendant/Intervenor.

Case No. CV 07-8274

REPLY MEMORANDUM IN SUPPORT OF RESIDENTIAL FUNDING REAL ESTATE HOLDINGS, LLC'S MOTION FOR SUMMARY JUDGMENT

Residential Funding Real Estate Holdings, LLC ("Residential"), by and through its counsel of record, Hawley Troxell Ennis & Hawley LLP, hereby files this Reply Memorandum in Support of its Motion For Summary Judgment against Plaintiff ParkWest Homes LLC ("ParkWest").

I.
INTRODUCTION

Residential owns the property at issue in this case (the "Property") free and clear of ParkWest Homes LLC's ("ParkWest") mechanic's lien (the "Lien") because Residential acquired the Property from First American Title Insurance Company ("First American"), who held legal title to the Property free and clear of the Lien. When ParkWest filed this instant lawsuit, it did not name First American as a Defendant – under Idaho Code section 45-507, "proceedings [were not] commenced" against First American "to enforce [the L]ien"– and therefore, the Lien expired as to First American. More than two years later, when First American exercised its power of sale, it conveyed the Property free and clear of the Lien to Residential. The rule that a lien is void as to all parties having an interest in the property but not named in a lien enforcement action is a fundamental tenant of Idaho's mechanic's lien law. The application of that principal here – that a lien is lost as to a deed of trust if the trustee is not named as a party – is literally hornbook law, adhered to universally by states throughout the country who have considered the question. Therefore, Residential respectfully requests that this Court enter summary judgment in its favor.

II.
ARGUMENT

A. Residential Established Its Right To Summary Judgment.

Residential has established its right to summary judgment as follows:

- First, Residential set forth these underlying facts, which are not in dispute: on November 14, 2006, Julie Barnson ("Barnson"), the owner of the Property, caused two Deeds of Trust to be recorded against the Property, both of which listed Mortgage Electronic Registration Systems, Inc. ("MERS") as the beneficiary, Transnation Title ("Transnation") as the "Trustee," and Homecomings Financial, LLC (f/k/a Homecomings Financial Network, Inc.) as the "Lender;" two weeks later, ParkWest recorded its Lien against the Property; on June 28, 2007, First American was appointed as the Trustee of the first Deed of Trust; on August 7, 2007, ParkWest commenced this action against only Barnson and MERS – ParkWest never named Transnation or First American as defendants in this action; and on July 20, 2009, First American conveyed the Property to Residential via Trustee's Deed. As ParkWest does not dispute these facts, only the legal consequence of them, this case is ripe for summary judgment.

- Next, Residential set forth Idaho Code section 45-510, which provides that six months after a mechanic's lien is filed it becomes void unless "proceedings be commenced in a proper court within that time to enforce such lien."

- Residential set forth the ample Idaho case law strictly construing that six-month deadline. Perhaps the most striking example is *Willes v. Palmer*, 78 Idaho 104, 298 P.2d 972 (1956), in which the lien claimant properly recorded its mechanic's lien against a home owned by husband and wife and timely filed an enforcement action, but named only husband as a defendant. The Idaho Supreme Court held that the six month time frame in which to foreclose a lien "is more than a mere statute of limitations which is waived if not pleaded; that it is a limitation . . . upon the right or liability itself; and that the lien is lost as against the interest of any person not made a party to an action to enforce it within the six month period." Because the wife was not named as a defendant, "The action [was] not . . . brought against [the wife] within the six month period, [and therefore] the lien as to her interest in the property was wholly lost."

- Other Idaho decisions strictly enforcing the requirement that all persons with an interest in the liened property be named within six months include *Palmer v. Bradford*, 86 Idaho 395, 401, 388 P.2d 96 (1963) (holding that if Idaho Code section 45-510 is not complied with "no jurisdiction exists in the court to enforce the lien. When the limit fixed by statute for duration of the lien is past, no lien exists, any more than if it had never been created"). *See also Western Loan & Bldg. Co. v. Gem State Lumber Co.*, 32 Idaho 497, 501, 185 P. 554 (1919); *D.W. Standrod & Co. v. Utah Implement-Vehicle Co.*, 223 F. 517, 518 (9th Cir. 1915); *Continental & Commercial Trust v. Pacific Coast Pipe Co.*, 222 F. 781, 788 (9th Cir. 1915); *and Utah Implement-Vehicle Co. v. Bowman*, 209 F. 942, 947-48 (D. Idaho 1913).

- Next, Residential set forth Idaho Code sections 45-1202 and 45-1513, which make clear that a deed of trust is a conveyance of legal title to the trustee of the deed of trust.

- Next, Residential set forth the hornbook law that

> In a jurisdiction in which a deed of trust or mortgage is effective as a transfer of legal title to the secured party, the trustee of a deed of trust recorded before attachment of a mechanic's lien is a necessary party to a suit to enforce the mechanic's lien; if the trustee is not a party to the enforcement suit, the mechanic's lien cannot be enforced. Thus, the court in such a case must have jurisdiction over the person of the trustee before the court can divest the trustee of title.

52 AM. JUR. 2D *Mechanics' Liens* § 369 (2010).

- Next, Residential cited to decisions from courts throughout the country that have held that a mechanic's lien is void as to persons who take title to property via a trustee of a deed of trust. *See Heyward & Lee Construction Co., Inc., v. Sands, Anderson, Marks, & Miller*, 249 Va. 54, 58, 453 S.E.2d 270, 273 (1995); *Walt Robbins, Inc. v. Damon Corp.*, 232 Va. 43, 348 S.E.2d 223 (1986); *Riley v. Peters*, 194 Cal.App.2d 296, 15 Cal.Rptr. 41 (Cal. Ct. App. 1961); *Lunsford v. Wren*, 64 W.Va. 458, 63 S.E. 308, 311 (1908); *Johnson v. Bennett*, 6 Colo.App. 362,

367, 40 P. 847, 849 (Ct. App. 1895); *Schillinger Fire-Proof Cement & Asphalt Co. v. Arnott*, 14 N.Y.S. 326, 329 (N.Y. Spec. Term 1891); and *Columbia Building & Loan Ass'n. v. Taylor*, 25 Ill.App. 429 (1887).

- Residential then showed that these sister-state decisions are in harmony with the jurisdictional principle adhered to in Idaho. *See Weyyakin Ranch Property Owners' Ass'n, Inc. v. City of Ketchum*, 127 Idaho 1, 2-3, 896 P.2d 327, 328-29 (1995) (holding that the trial court never obtained jurisdiction over elected city officials where the plaintiffs "failed to name the elected officials individually"); *Collier Carbon & Chemical Corp. v. Castle Butte, Inc.*, 109 Idaho 708, 710, 710 P.2d 618, 620 (Ct. App. 1985) (holding that the trial court "lacked jurisdiction initially to enter . . . judgment" against persons who were not named as defendants in their individual capacity in the complaint).

- Finally, Residential cited the Court to two additional factually-similar cases: *Bonner Building Supply, Inc. v. Standard Forest Products, Inc.*, 106 Idaho 682, 682 P.2d 635 (Ct. App. 1984) (discussed in greater detail below), and *Sawyer Nurseries v. Galardi*, 181 Cal.App.3d 663, 226 Cal.Rptr. 502 (Cal. Ct. App. 1986) (holding that notwithstanding that the trustee and beneficiary of a deed of trust, as well as the purchaser of the property at trustee's sale had notice of the mechanic's lien, the lien claimant's failure to timely commence its foreclosure action meant that the purchaser took title free and clear of the mechanic's lien).

B. ParkWest Has Not Provided The Court Any Basis For Denying Summary Judgment To Residential.

In response to Residential's Motion for Summary Judgment, ParkWest has failed to adequately justify its failure to name First American as a defendant. ParkWest makes four arguments in opposition, which are addressed as follows:

ParkWest argues that *the Supreme Court decision issued in this case validates ParkWest's Lien.* This argument is insufficient to allow ParkWest to prevail against Residential for two reasons. First, ParkWest reads – and would have this Court read – the Supreme Court decision too broadly. The only issues before the Supreme Court were:

> (1) Did the district court err in holding that ParkWest's claim of lien did not substantially comply with Idaho Code § 45-507?
>
> (2) Did the district court err in holding that ParkWest's claimed lien was unenforceable because the construction contract was void for failure to comply with the Contractor's Act?
>
> (3) Did the district court err in holding that ParkWest did not plead a claim for unjust enrichment?
>
> (4) Is MERS entitled to an award of attorney fees on appeal?

ParkWest Homes LLC v. Barnson, 238 P.3d 203, 205 (Idaho 2010). The Supreme Court's decision must be interpreted in light of those issues, as no other issues were before the Court.

As set forth in the concurrently-filed Motion in Limine, the "law of the case" doctrine does not prevent litigation of issues that were not before the Supreme Court. *In Idaho Power Co. v. Cogeneration, Inc.*, 134 Idaho 738, 9 P.3d 1204 (2000) (*Cogeneration II*), Cogeneration argued that the district court erred when, on summary judgment following remand from *Cogeneration I*, the district court refused to recognize a statement regarding *force majeure* made by the Supreme Court in the *Cogeneration I* decision; instead, the district court had ruled that the *force majeure* issue had not been before the Supreme Court on *Cogeneration I*, and therefore that the Supreme Court statement on *force majeure* was dictum and *force majeure* could be litigated by the trial Court. In its *Cogeneration II* decision, the Supreme Court agreed with the district court:

> We agree that the issue . . . was not foreclosed by our opinion in *Cogeneration I*. The district court correctly perceived the relevant portion of our opinion in *Cogeneration I* as dictum since the issue

> . . . was not an issue properly before the Court at that time and was not essential to the ultimate disposition of that case. Therefore, we hold that the district court did not err in its interpretation or application of our ruling in *Cogeneration I.*

Id. As the Supreme Court itself recognized in its *ParkWest* opinion, the Supreme Court cannot consider issues on appeal that were not presented to the district court. *ParkWest v. Barnson*, 149 Idaho 603, 608, 238 P.3d 203, 208 (2010). In this case, issues concerning the validity of the lien outside the context of the verification and "statement of demand" requirements of Idaho Code section 45-507 and the Idaho Contractor Registration Act have never been before the Court[1], and thus any statement made by the Supreme Court on extraneous issues were not "necessary to the decision," and MERS may rightfully argue these issues at or before trial.

---

[1] Such issues include, without limitation:

(i) Whether the nature of the relationship between Barnson and ParkWest gives rise to the lien. There is good evidence which will be submitted at trial (if necessary) that Barnson and David Zawadzki ("Zawadzki"), the principal behind ParkWest, entered into a business partnership wherein Barnson obtained a construction loan to purchase the residential lot and to pay for the construction of the property, Zawadzki/ParkWest performed the labor, and the parties intended to sell the home and split the profits. The "construction contract" was thus not the true expression of the parties' arrangement, but a mere formality required by the construction lender. Such a partnership arrangement, which has never before been presented to this Court in this case, would not entitle ParkWest to a mechanic's lien. *See Russell Damrell v. Margaret A. Creager*, 42 Colo. App. 281, 599 P.2d 262 (Ct. App. 1979).

(ii) Whether ParkWest's admitted failure to comply with Idaho's pre-contract disclosures requirement means that, under Idaho Code sections 45-525 and 48-608, ParkWest is not entitled to any recovery in this case.

(iii) Whether or not ParkWest has already been paid in full for the reasonable value of the materials and services provided by ParkWest, from the proceeds of the construction loan, and other in-kind and cash payments from Barnson.

(iv) The interest priority and applicability of Idaho Code section 45-510 as articulated herein;

(v) Whether the work performed by ParkWest gives rise to a lien;

(vi) Moreover, ParkWest must also establish that it complied with all other elements of Idaho Code section 45-507 that have not been before any court, including that the Lien was filed within 90 days after completion of labor and services, that the Lien correctly identified the name of the owner and the person by which ParkWest was employed, that the Lien contains a description of the Property sufficient for identification, and that notice was properly given as required by section 45-507(5).

Also, ParkWest misconstrues the Court's holding in ParkWest. The Court specifically held:

> We hold that the claim of lien substantially complied with Idaho Code § 45-507 and that the lien was valid for labor and materials supplied after the contractor registered.

ParkWest, 149 Idaho at 603, 238 P.3d at 203. The sentence contains dependent clauses: given the limited issues before the Court, the Court held that only that the lien was facially valid under Idaho Code section 45-507 (as to the verification and "statement of demand" requirements). It is nonsensical to suggest that the Court was holding that the lien was also valid for every other purpose—such as validity under Idaho Code section 45-510 and those identified above—when the Court's own opinion held that it was not addressing issues that were not presented to the district court. Neither party has yet asked the district court to decide any lien issues outside of the verification and "statement of demand" requirements of Idaho Code section 45-507 and the Idaho Contractor Registration Act, and thus to interpret *ParkWest* to resolve additional issues is an unreasonable and unlawful construction of the case.

ParkWest cites to *Hawley v. Green*, 124 Idaho 385, 860 P.2d 1 (Ct. App. 1993) (*Hawley II*). *Hawley II* is inapplicable to this case because it is procedurally opposite from this instant case. In *Hawley*, the Plaintiff brought a medical malpractice action against her doctors. The doctors, defendants there as MERS and Residential are here, obtained a grant of summary judgment on statute of limitations grounds. *Id.* 860 P.2d at 2. Hawley, the Plaintiff there as ParkWest is here, appealed, as ParkWest did in this case. The Supreme Court found an issue of fact and remanded the case. *Id.* at 6. On remand, the district court ultimately granted summary judgment a second time to the doctors on statute of limitations grounds. *Id.* at 3. On the second appeal, Hawley raised equitable estoppel as a defense to the statute of limitations claim. *Id.* at 7. The Supreme Court found that Hawley, the *appellant* should have raised equitable estoppel as a

defense to a statute of limitations claim at the trial court level prior to the first appeal, and therefore, was barred from raising it on the second appeal:

> Hawley has not shown why the equitable estoppel issue was not raised in the district court prior to *Hawley I*, or stated differently, she had not pointed to any new or additional fact or circumstance arising after the remand order which gave rise to the estoppel issue. Because the estoppel argument was clearly available to Hawley prior to *Hawley I*, we will not address the issue.

Id. at 8. In *Hawley II*, the plaintiff-*appellant* was barred from raising, on a second appeal, issues that the *appellant* should have raised previously. *Hawley II* does not stand for the proposition that a defendant-*respondent* is barred, on remand, from raising issues that have never been brought before the Court by either party.

Similarly, ParkWest's reliance on *Taylor v. Maile*, 146 Idaho 705, 201 P.3d 1282 (2009) does not support ParkWest's expansive reading of the Supreme Court's decision entered previously. In *Taylor*, the plaintiff Taylor brought suit against Maile and shortly thereafter the district court granted Maile's motion to dismiss for lack of standing. Taylor appealed, and the Supreme Court reversed in part. On remand, the district court granted Taylor's motion for summary judgment. Maile subsequently appealed, challenging for a second time Taylor's standing. The Supreme Court identified two kinds of issues that cannot be re-litigated under the "law of the case" doctrine:

> The 'law of the case' doctrine provides that when 'the Supreme Court, in deciding a case presented states in its opinion a principle or rule of law necessary to the decision, such pronouncement becomes the law of the case, and must be adhered to throughout its subsequent progress, both in the trial court and upon subsequent appeal. The "law of the case" doctrine also prevents consideration on a subsequent appeal of alleged errors that might have been, but were not, raised in the earlier appeal.'

Id. 201 P.3d at 1286 (internal citations omitted). Thus, where an issue has already been before the Court, or where the appellant in the first appeal should have raised the issue, it cannot be re-

litigated. On the other hand, the *Taylor* Court expressly stated that issues and facts that were "not part of the record during the first appeal [and] could not have been raised [during the first appeal] should thus [be] reexamine[d]." *Id.* at 1287. As applied to this instant case, *Taylor* stands for the proposition that the only issues barred from now being litigated are those that were before the Supreme Court (e.g., the facial validity of the Lien as to the verification and "statement of demand" requirements of Idaho Code section 45-507 and the Idaho Contractor's Registration Act) and issues that ParkWest, as the appellant, should have raised. Additional issues concerning the validity of the Lien – such as those identified herein – "could not have been raised [during the first appeal]" because they had not been presented to or decided by this Court, and therefore they may properly be brought now.

Secondly, even if this Court is willing to read the Supreme Court decision as broadly as ParkWest does, a grant of summary judgment in favor of Residential is not inconsistent with such a reading. That is, this Court can decide that the Lien is valid against MERS' beneficial interest in the Property (though MERS no longer has such an interest), and Barnson's interest in the Property (a judgment against Barnson's interest has already been entered), and rule, in accordance with Idaho law, that the Lien expired as against First American's interest and is consequently void as to Residential's interest. That was, in fact, precisely the result in *Bonner Bldg. Supply v. Standard Forest Prods.*, 106 Idaho 682, 682 P.2d 635 (Idaho Ct. App. 1984), where Bonner filed a mechanic's lien, the property was then sold to Standard at a sheriff's sale, and then Bonner brought a mechanic's lien foreclosure action against the former property owners but failed to name Standard as a defendant. *Id.* 682 P.2d at 636-37. Bonner obtained a judgment against the named defendants (*Id.* at 637), but the Supreme Court held:

> Because Bonner failed to foreclose against Standard within six months of the filing of its claim of lien, it lost its lien against the property in regard to Standard. . . . Bonner's lien was extinguished

> [as to Standard]. Standard's interest in the property should be confirmed by the district court, free of Bonner's lien.

Id. at 639.

Relatedly, ParkWest argues that *Residential is bound by the Supreme Court's decision because ParkWest recorded a lis pendens.* The analysis here is the same: even if this Court reads the Supreme Court's decision as ParkWest does, i.e., as holding that ParkWest's Lien is valid for all purposes, that Lien is still only valid as to the named parties. Idaho Code section 5-505, Idaho's lis pendens statute, makes clear that a lis pendens provides notice only that there is an action pending between the named parties:

> In an action affecting the title or the right of possession of real property, the plaintiff at the time of filing the complaint . . . may file for record with the recorder of the county in which the property or some part thereof is situated, a notice of the pendency of the action, containing the names of the parties, the object of the action or defense, and a description of the property in that county affected thereby. From the time of filing such notice for record only shall a purchaser or incumbrancer of the property affected thereby be deemed to have constructive notice of the pendency of the action, ***and only of its pendency against parties designated by their real names***.

(emphasis added). Under the language of the statute, the lis pendens gives notice only of the pendency of the lawsuit as against the named parties. ParkWest's lis pendens thus gave Residential constructive notice only that ParkWest had commenced an action against Barnson and MERS, not First American from whom Residential acquired title to the Property. In fact, as Residential acquired the Property more than six months after the lawsuit had commenced, Residential could have safely assumed that the Lien had expired as to First American and that Residential could take title from First American free and clear of the Lien.

The case cited by ParkWest to support this "lis pendens" argument – in fact, the very language quoted by ParkWest – supports a finding that Residential takes title subject only to the rights of the parties to the lawsuit:

> The doctrine of lis pendens refers to the common law principal that when a third party – with actual or constructive notice of a pending action involving real property – acquires an interest in that real property ***from a party to the action, then the third party takes subject to the rights of the parties in the action*** as finally determined by the judgment or decree.

Sartain v. Fidelity Fin. Servs., Inc., 116 Idaho 269, 272, 775 P.2d 161, 164 (Ct. App. 1989) (emphasis added). Thus, Residential can only be said to have taken title subject to the Court's determination of the rights of Barnson and MERS; however, Residential's title does not derive from these parties, but from First American, against whom the Lien is void. Neither *Sartain* nor any other case holds that the filing of a lis pendens is an adequate substitute for naming as defendants all parties with an interest in the liened property.

A "lis pendens does not purport, by itself, to establish or to change anyone's legal rights. [The filing of a lis pendens] does not mean that any underlying legal rights have been altered." *Jerry J. Joseph C.L.U. Insurance Assoc., Inc. v. Vaught*, 117 Idaho 555, 557, 789 P.2d 1146, 1148 (Ct. App. 1990). Idaho courts have never held that a lis pendens was sufficient to bind purchasers where the lien had expired under Idaho Code section 45-510. In *Palmer v. Bradford*, 86 Idaho 395, 388 P.2d 96 (1963), the Supreme Court took note of the fact that the lien claimant had "caused a lis pendens to be regularly filed." *Id.*, at 388 P.2d at 98. Nevertheless, the Court held that because "No proceedings of any kind were commenced by appellants to enforce their lien within six months . . . the lien therefore became unenforceable and is not entitled to priority over respondents' mortgage lien" (*Id.*, 399 P.2d at 99-100), notwithstanding the fact that a lis pendens had been recorded.

The Supreme Court decision in this case simply does not state that the Lien is senior to Residential's interest, or that it is senior to the interest of First American, Residential's predecessor in interest. In fact, the Supreme Court decision makes no ruling as to lien priority at all (as that issue, along with a host of others, was simply not before the Court).

Next, ParkWest argues that *the only interest held by First American and lost to ParkWest was the power of sale under the MERS' deeds of trust.* It is unclear how this argument logically excuses ParkWest's obligation to name the trustee of the deed of trust as a defendant. Even if ParkWest's argument is accepted at face value, the reality is that by not timely commencing proceedings against First American to foreclose First American's power of sale, ParkWest lost the ability to do so; in consequence, when First American exercised its power of sale – which it was entitled to do following Barnson's default under the Deed of Trust[2] – it did so free and clear of ParkWest's Lien, and Residential now owns the Property free and clear of ParkWest's Lien.

Finally, ParkWest appears to argue that *making First American a party to its lien foreclosure action was not required under Idaho Code section 45-1302 and* Bonner Bldg. Supply. The problem with this argument, for ParkWest, is that while *Bonner Building Supply* does stand for the proposition that under Idaho Code section 45-1302 naming parties to a lien foreclosure action is optional, the upshot is that the interest of any unnamed party in the

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[2] *Long v. Williams*, 105 Idaho 585, 671 P.2d 1048 (1983), cited by ParkWest, indicates that the latent power of sale becomes actual following the borrower's default, at which point all incidents of ownership are divested from the borrower and inhere in the trustee:

> The legal estate thus left in the trustor or his successors entitles them to the possession of the property ***until their rights have been fully divested by a conveyance made by the trustees in the lawful execution of their trust,*** and entitles them to exercise all of the ordinary incidents of ownership, in regard to the property, ***subject always, of course, to the execution of the trust.***

Id. 671 P.2d at 1050 (internal citations and quotations omitted) (emphasis added).

foreclosed property is "unaffected by the foreclosure," and the lien is "lost . . . against the property in regard to" such unnamed parties:

> Notwithstanding the option apparently created by the language of I.C. § 45-1302, we conclude that . . . [i]f I.C. § 45-1302 were applied so as to terminate the rights of other parties having an interest in the property, where they were not named in a lien foreclosure action simply at the election of the foreclosing claimant, issues of a constitutional dimension could arise. In such a case, holders of other recorded interests in the property could be deprived of valuable property interests without notice and opportunity to be heard – a deprivation of due process. We conclude that I.C. § 45-1302 should not be so applied. A statute must be construed to preserve its constitutionality. We thus . . . hold that I.C. § 45-1302 does not enable a materialman to foreclose a lien as against other interested parties without giving them notice of the proceedings.
>
> Therefore, ***although Bonner was not required to name Standard as a party to the foreclosure action***, under a literal reading of I.C. § 45-1302, ***the failure to do so left Standard's interest in the property unaffected by the foreclosure. Because Bonner failed to foreclose against Standard within six months of the filing of its claim of lien, it lost its lien against the property in regard to Standard. For the purpose of the instant case, Bonner's lien was extinguished. Standard's interest in the property should be confirmed by the district court, free of Bonner's lien***.

Bonner Bldg. Supply 106 Idaho at 686 (internal citations omitted) (emphasis added). *Bonner Bldg. Supply* should control this case: the failure of ParkWest to name First American as a party means that ParkWest's Lien was lost to First American, First American's interest in the Property was free of ParkWest's Lien, and First American conveyed the Property free and clear of ParkWest's Lien.

III.
CONCLUSION

For the reasons stated herein and in Residential's Memorandum in Support of Motion for Summary Judgment, Residential respectfully requests that this Court enter summary judgment in favor of Residential.

RESPECTFULLY SUBMITTED THIS 4th day of January, 2011.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By _____
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Attorneys for Defendant/Counterclaimant
Residential Funding Real Estate Holdings, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of January, 2011, I caused to be served a true copy of the foregoing REPLY MEMORANDUM IN SUPPORT OF RESIDENTIAL FUNDING REAL ESTATE HOLDINGS, LLC'S MOTION FOR SUMMARY JUDGMENT by the method indicated below, and addressed to each of the following:

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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

PARKWEST HOMES LLC, an Idaho limited liability company, Plaintiff, vs. JULIE G. BARNSON, an unmarried woman; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., a Delaware corporation, as nominee for Homecomings Financial, LLC (f/k/a Homecomings Financial Network, Inc.), a Delaware limited liability company; and DOES 1-10, Defendants and RESIDENTIAL FUNDING REAL ESTATE HOLDINGS, LLC, a Delaware limited liability company, Defendant/Counterclaimant.	Case No. CV 07-8274 MEMORANDUM IN SUPPORT OF MOTION IN LIMINE

I.
INTRODUCTION

Defendant Residential Funding Real Estate Holdings, LLC, ("Residential") by and through its counsel of record, Hawley Troxell Ennis & Hawley LLP, respectfully submits this memorandum in support of its motion in limine requesting that this Court declare that ParkWest Homes, LLC ("ParkWest") is required to prove up the validity of its mechanic's lien (the "Lien") as to each element not addressed by this Court or the Supreme Court, and allow Residential to raise any defenses to the Lien not addressed by this Court or the Supreme Court. Additionally, Residential respectfully moves this Court for an order in limine excluding ParkWest from using its contract (the "Contract") with Julie Barnson ("Barnson") as evidence of the value of ParkWest's Lien as this Court has already conclusively determined that the Contract is "void as an illegal contract."

II.
BACKGROUND FACTS

Given the breadth of recent activity in this case, the Court is well familiar with the factual and procedural background of this action, and the Defendants will not reiterate it here. Instead, the Defendants will provide a short recitation of the few key facts that are pertinent to this motion.

1. On October 2, 2008, Defendant Mortgage Electronic Registration Services, Inc. ("MERS") filed a motion for summary judgment with this Court contending that ParkWest's lien was void because (i) the claim of lien did not substantially comply with the verification requirement of Idaho Code section 45-507(4) and (ii) ParkWest was not registered under the Idaho Contractor Registration Act when it entered into the construction contract.

2. On January 6, 2009, this Court granted MERS' motion for summary judgment, and entered judgment in favor of MERS on January 26, 2009. This Court specifically ruled that (i) the Lien "fails to contain any verification" that would comply with Idaho Code section 45-507(4), (ii) the lien does not substantially comply with Idaho Code section 45-507(3)(a) because "there exists no 'statement of [ParkWest's] demand, after deducting all just credits and offsets,'" and (iii) the Contract was "void as an illegal contract."

3. ParkWest appealed this Court's decision to the Idaho Supreme Court. On appeal, the Idaho Supreme Court reversed, holding that (i) ParkWest substantially complied with Idaho Code section 45-507 and (ii) ParkWest did not lose its lien rights under the Idaho Contractor Registration Act. However, the Supreme Court specifically noted that ParkWest did not challenge this Court's "holding that the construction contract was void because ParkWest was not registered at the time it signed the contract."

III.
ANALYSIS

A. Motion in Limine Permitting Evidence in the Trial Concerning the Validity of ParkWest's Lien.

The Defendants are entitled to argue any lien-validity issues that have not previously been decided in this case. The "law of the case" doctrine does not compel a different result. The "law of the case" doctrine provides that:

> when "the Supreme Court, in deciding a case presented states in its opinion a principle or rule of law necessary to the decision, such pronouncement becomes the law of the case, and must be adhered to throughout its subsequent progress, both in the trial court and upon subsequent appeal." The "law of the case" doctrine also prevents consideration on a subsequent appeal of alleged errors that might have been, but were not, raised in the earlier appeal.

Taylor v. Maile, 146 Idaho 705, 709, 201 P.3d 1282, 1286 (2009) (citations omitted). Consequently, the "law of the case" doctrine prevents relitigation in two contexts—(1) where issues were fully decided in a previous appeal; and (2) where issues should have been, but were not, raised in the earlier appeal.

1. The "Law of the Case" Doctrine Does Not Prevent Future Litigation of Lien-Validity Issues That Were Not Before the Court in *ParkWest*.

Lien-validity issues other than those specifically decided by this Court in MERS' January 6, 2009, Motion for Summary Judgment and the appeal to the Idaho Supreme Court in *ParkWest Homes LLC v. Barnson*, 149 Idaho 603, 238 P.3d 203 (2010), are relevant and may properly be litigated in the trial of this matter. Specifically, the only issues before the Supreme Court were:

> (1) Did the district court err in holding that ParkWest's claim of lien did not substantially comply with Idaho Code § 45-507?
>
> (2) Did the district court err in holding that ParkWest's claimed lien was unenforceable because the construction contract was void for failure to comply with the Contractor's Act?
>
> (3) Did the district court err in holding that ParkWest did not plead a claim for unjust enrichment?
>
> (4) Is MERS entitled to an award of attorney fees on appeal?

Id. at 605, 238 P.3d at 205. As recognized by the Supreme Court in its opinion in this case, the Court could not consider issues on appeal that were not presented to the district court. *Id.* at 608, 238 P.3d at 208 ("That issue was not presented to the district court, and so we will not consider it on appeal."). In concluding that (i) ParkWest substantially complied with Idaho Code section 45-507 and (ii) ParkWest complied with the Idaho Contractor Registration Act, the Idaho Supreme Court held that "the claim of lien substantially complied with Idaho Code § 45-507 and that the lien was valid for labor and materials supplied after the contractor registered." *Id.* at 604, 238 P.3d at 204. Additionally, the Court held that "ParkWest is entitled to a lien for work or labor it

provided and materials it supplied during the time that it was duly registered." *Id.* at 608, 238 P.3d at 208. This statement must be interpreted in light of the narrow issues before the Court.

In *Idaho Power Co. v. Cogeneration, Inc.*, 134 Idaho 738, 9 P.3d 1204 (2000) (*Cogeneration II*), Cogeneration argued that the district court erred when, on summary judgment following remand from *Cogeneration I*, the district court refused to recognize a statement regarding *force majeure* made by the Supreme Court in the *Cogeneration I* decision; instead, the district court had ruled that the *force majeure* issue had not been before the Supreme Court on *Cogeneration I*, and therefore that the Supreme Court statement on *force majeure* was dictum and *force majeure* could be litigated by the trial Court. In its *Cogeneration II* decision, the Supreme Court agreed with the district court:

> We agree that the issue . . . was not foreclosed by our opinion in *Cogeneration I*. The district court correctly perceived the relevant portion of our opinion in *Cogeneration I* as dictum since the issue . . . was not an issue properly before the Court at that time and was not essential to the ultimate disposition of that case. Therefore, we hold that the district court did not err in its interpretation or application of our ruling in *Cogeneration I*.

Id. at 746, 9 P.3d at 1212. In this case, issues[1] concerning the validity of the lien outside the context of the verification and statement of demand requirements of Idaho Code section 45-

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[1] Such issues include, without limitation:

(i) Whether the nature of the relationship between Barnson and ParkWest gives rise to the lien. There is good evidence which will be submitted at trial (if necessary) that Barnson and David Zawadzki ("Zawadzki"), the principal behind ParkWest, entered into a business partnership wherein Barnson obtained a construction loan to purchase the residential lot and to pay for the construction of the property, Zawadzki/ParkWest performed the labor, and the parties intended to sell the home and split the profits. The "construction contract" was thus not the true expression of the parties' arrangement, but a mere formality required by the construction lender. Such a partnership arrangement, which has never before been presented to this Court in this case, would not entitle ParkWest to a mechanic's lien. *See Russell Damrell v. Margaret A. Creager*, 42 Colo. App. 281, 599 P.2d 262 (Ct. App. 1979).

(ii) Whether ParkWest's admitted failure to comply with Idaho's pre-contract disclosures requirement means that, under Idaho Code sections 45-525 and 48-608, ParkWest is not entitled to any recovery in this case.

507(3)(a) and 45-507(4) and the Idaho Contractor Registration Act have never been before the Court, and thus any statement made by the Supreme Court on extraneous issues were not "necessary to the decision," and Residential may rightfully argue these issues at or before trial.

The "law of the case" doctrine simply follows common sense: if the issue was litigated in or prior to the first appeal, it cannot be re-litigated in a subsequent appeal. If the issue was not litigated in or prior to the first appeal, it may be litigated for the first time following remand from the first appeal. The United States Supreme Court has held that "the phrase, law of the case, as applied to the effect of previous orders on the later action of the court rendering them in the same case, merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power." *Messenger v. Anderson*, 225 U.S. 436, 444 (1912). There are a host of issues in this case that have never been litigated and which Residential should be permitted to argue.

2. The "Law of the Case" Doctrine Does Not Prevent Future Litigation of Lien-Validity Issues Because Those Issues Could Not Have Been Raised in the Earlier Appeal.

Additionally, as noted above, the "law of the case" doctrine prevents relitigation of issues that might have been, but were not, raised in the earlier appeal. *Taylor*, 146 Idaho at 709, 201

(iii) Whether or not ParkWest has already been paid in full for the reasonable value of the materials and services provided by ParkWest from the proceeds of the construction loan and other in-kind and cash payments from Barnson.

(iv) The interest priority and applicability of Idaho Code section 45-510 as articulated herein;

(v) Whether the work performed by ParkWest gives rise to a lien;

(vi) Moreover, ParkWest must also establish that it complied with all other elements of Idaho Code section 45-507 that have not been before any court, including that the Lien was filed within 90 days after completion of labor and services, that the Lien correctly identified the name of the owner and the person by which ParkWest was employed, that the Lien contains a description of the Property sufficient for identification, and that notice was properly given as required by section 45-507(5).

P.3d at 1286. The doctrine, similar to res judicata, is meant to "discourage[] piecemeal appeals." *Capps v. Wood*, 117 Idaho 614, 618, 790 P.2d 395, 399 (Ct. App. 1990). Importantly, this element of the doctrine only applies to the *appellant* in the first appeal, and is inapplicable in this case. Thus, if an *appellant* could have raised issues in the first appeal, but did not, the "law of the case" doctrine will prevent the litigation of those issues in the subsequent appeal.

For example, in *Hawley v. Green*, 124 Idaho 385, 860 P.2d 1 (Ct. App. 1993) (*Hawley II*), the Plaintiff brought a medical malpractice action against her doctors. The doctors, (defendants there as MERS and Residential are here) obtained a grant of summary judgment on statute of limitations grounds. *Id.* at 386, 860 P.2d at 2. Plaintiff Hawley (as ParkWest is here) appealed. The Supreme Court found an issue of fact and remanded the case. *Id.* On remand, the district court ultimately granted summary judgment a second time to the doctors on statute of limitations grounds. *Id.* On the second appeal, Hawley raised equitable estoppel as a defense to the statute of limitations claim. *Id.* The Supreme Court found that Hawley, as the *appellant*, should have raised equitable estoppel as a defense to a statute of limitations claim at the trial court level prior to the first appeal, and therefore, was barred from raising it on the second appeal:

> Hawley has not shown why the equitable estoppel issue was not raised in the district court prior to *Hawley I*, or stated differently, she had not pointed to any new or additional fact or circumstance arising after the remand order which gave rise to the estoppel issue. Because the estoppel argument was clearly available to Hawley prior to *Hawley I*, we will not address the issue.

Id. at 392, 860 P.2d at 8. Consequently, the case stands for the proposition that the *appellant* may be barred from raising, on a second appeal, issues that the *appellant* should have raised previously. *Accord Taylor v. Maile*, 146 Idaho 705, 201 P.3d 1282 (2009) (finding that where an issue has already been before the Court on appeal, or where the *appellant* in the first appeal

should have raised the issue, the issue cannot be relitigated). Residential, the respondent in the appeal in this case, is not barred from raising additional issues related to the validity of ParkWest's Lien.

B. Motion in Limine Excluding Evidence in the Trial Concerning the Validity of the Contract.

The "law of the case" doctrine does bar ParkWest from using its Contract with Julie Barnson to establish the amount of its Lien. In the Memorandum Decision on Defendant Mortgage Electronic Systems, Inc.'s Motion for Summary Judgment, this Court held that "the contract between PARKWEST and BARNSON [is] void as an illegal contract." Though it had every opportunity to do so, ParkWest did not appeal this Court's finding. Indeed, the Supreme Court expressly held that "ParkWest does not challenge the district court's holding that the construction contract was void because ParkWest was not registered at the time it signed the contract." *Barnson*, 149 Idaho at 608, 238 P.3d at 208.

Moreover, the California rule is that "the amount of the lien is limited to the "reasonable value of the labor, services, equipment, or materials furnished or for the price agreed upon by the claimant and the person with whom he or she contracted, whichever is less." *T.O. IX, LLC v. Superior Court*, 165 Cal. App. 4th 140, 144-45 (Cal. Ct. App. 2008). Thus, even if the Contract was not void and illegal, the Contract may not provide the basis for the Lien: ParkWest has not proved, for example, that it has fully performed the Contract.

This Court should not allow the Contract to form the basis of the valuation of the Lien. In short, the value of the Lien must be determined independent of the Contract.

IV.
CONCLUSION

Because other lien-validity issues are relevant and are not precluded by the "law of the case" doctrine, this Court should grant the Defendant's Motion in Limine, allowing the parties to litigate the lien-validity issues that were not before this Court or before the Supreme Court. Additionally, this Court should also exclude the use of the Contract as a basis for establishing the amount of ParkWest's Lien.

DATED THIS 4th day of January, 2011.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By _____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of November, 2010, I caused to be served a true copy of the foregoing MEMORANDUM IN SUPPORT OF MOTION IN LIMINE by the method indicated below, and addressed to each of the following:

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