STATE OF IDAHO)
County of KOOTENAI)ss

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CLERK OF DISTRICT COURT

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Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE

STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

FEDERAL NATIONAL MORTGAGE ASSOCIATION, *Plaintiff*, vs. **DAVID NOORDAM,** *Defendant*.	Case No. **CV 2012 7553** **MEMORANDUM DECISION AND ORDER GRANTING THIRD-PARTY DEFENDANT METLIFE'S MOTION FOR SUMMARY JUDGMENT**

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This lawsuit is a post-foreclosure ejectment and restitution action, filed on October 12, 2012, by plaintiff Federal National Mortgage Association (Fannie Mae) against defendant David Noordam. On October 26, 2012, defendant David Noordam (Noordam) answered Fannie Mae's Complaint for Post-Foreclosure Ejectment and Restitution, ahd Noordam and his spouse (Noordams) filed a Counterclaim against Fannie Mae and filed a Third-Party Complaint against third-party defendant MetLife Bank.

This matter is before the Court on third-party defendant MetLife Bank's (MetLife) Motion for Summary Judgment, filed August 8, 2014, seeking dismissal of Third-Party Plaintiff David and Brandy Noordams' (the Noordams) Third-Party Complaint. This case is scheduled for a jury trial to begin October 6, 2014.

On May 9, 2005, the Noordams executed a Note for the benefit of Mountain West Bank in the amount of $439,400.00, for the purchase real property located at 2078 West Grange Avenue, Post Falls, Kootenai County, Idaho. Answer to Complaint for Post-Foreclosure Ejectment and Restitution of Property, Defendants' Counterclaim and Third Party Complaint, p. 5, ¶¶ 7-8, Exhibit A. The Note was secured by a Deed of Trust executed for the benefit of Mountain West Bank on March 20, 2006. *Id.*, p. 5, ¶¶ 8-9, Exhibit B. On March 30, 2006, David Noordam signed a Note for the benefit of First Horizon Loan Corporation, in the amount of $416,998.00. *Id.*, p. 5, ¶ 10, Exhibit C. the Note was secured by a Deed of Trust executed for the benefit of First Horizon Loan Corporation on March 30, 2006. *Id.*, pp. 5-6, ¶ 10, Exhibit D. On December 1, 2011, First Horizon assigned the Deed of Trust to MetLife. *Id.*, p. 6, ¶ 11, Exhibit E. In November 2008, David Noordam fell behind on his payments under the March 20, 2006, Note. *Id.*, p. 6, ¶ 12.

On June 10, 2009, David Noordam and MetLife executed the Home Saver Forbearance Agreement (Forbearance Agreement). Declaration of Matthew Pryll, Exhibit A. It was effective June 4, 2009. *Id.* The Forbearance Agreement provides in pertinent part:

> During the period (the "Deferral Period") commencing on the date of this Agreement and ending on the earlier of: (i) **01/01/2010**; (ii) execution of an agreement with Lender for another resolution of my default under my Loan Documents, for example, a modification, pre-foreclosure sale or deed in lieu pf foreclosure; or (iii) my default under the terms of this Agreement.
>
> I understand and acknowledge that:
>
> A. Foreclosure Activity. The Lender will suspend any scheduled foreclosure sale, provided I continue to meet the obligations under this Agreement. If this Agreement terminates, however, then any pending foreclosure action will not be dismissed and may be

immediately resumed from the point at which it was suspended, and no new notice of default, notice of intent to accelerate, notice of acceleration, or similar notice will be necessary to continue the foreclosure action, all rights to such notices being hereby waived to the extent permitted by Applicable Law;

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C. Additional Assistance. During the Deferral Period, Lender will review my Loan to determine whether addition default resolution assistance can be offered to me. At the end of the Deferral Period either (1) I will be required to recommence my regularly scheduled payments and to make additional payment9s), on terms to be determined by lender, until all past due amounts owed under the Loan documents have been paid in full, (2) I will be required to reinstate my Loan in full, (3) Lender will offer to modify my Loan; (4) Lender will offer me some other form of payment assistance or alternative to foreclosure, on terms to be determined solely by Lender with the approval of investors or insurers on my Loan, or (50 if no feasible alternative can be identified, Lender may commence and continue foreclosure proceedings or exercise other rights and remedies provided Lender under the Loan Documents.

D. No Modification. **I understand that the Agreement is not a forgiveness of payments on my Loan or a modification of the Loan Documents.** I further understand and agree that the Lender is not obligated or bound to make any modification of the Loan Documents or provide any other alternative resolution of my default under the Loan Documents.

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F. Bankruptcy. If, before all past due amounts are paid, I or any party with an interest in the real property which secures my Loan becomes subject to a proceeding in bankruptcy, or if my Loan otherwise is subject to protection under bankruptcy laws, I hereby acknowledge and agree that (1) any continued workout assistance will need to be addressed in the context of the Bankruptcy proceedings, (2) unless expressly prohibited by Applicable Law, Lender, at its option, may terminate this Agreement immediately and automatically, and (3) to the extent allowed by Applicable Law, Lender shall be entitled to immediate and automatic relief from the bankruptcy stay upon my breach of any term or condition of this Agreement, or upon Lender’s termination of this Agreement.

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I. Waiver. Any forbearance by Lender in exercising any right or remedy under this Agreement or as otherwise afforded by

> Applicable Law shall not be a waiver or preclude the exercise of that or any other right or remedy. For example, if Lender decides to accept a partial or untimely payment from me instead of terminating this Agreement as provided herein, Lender shall not be precluded from rejecting a subsequent partial or untimely payment, terminating this Agreement, and commencing or continuing, as the case may be, foreclosure proceedings or taking any other action permitted by law.

Declaration of Matthew Pryll, Exhibit A, pp. 2, 3, ¶¶ 2.A., 2.C., 2.D., 2.F., 2.I. (emphasis in original). The Noordams claim they were offered the modification on their home loan and executed the agreement in July 2009. Answer to Complaint for Post-Foreclosure Ejectment and Restitution of Property, Defendants' Counterclaim and Third Party Complaint, p. 6, ¶ 15. On June 29, 2009, the Noordams filed a petition for bankruptcy. Affidavit of Kevin C. Braley in Support of MetLife Bank's Motion for Summary Judgment, Exhibit A. The Noordams claim "[p]rior to beginning the modification program, NOORDAM informed LENDER that he was in bankruptcy and the agent for LENDER stated that the bankruptcy would not affect their eligibility for the program." Answer to Complaint for Post-Foreclosure Ejectment and Restitution of Property, Defendants' Counterclaim and Third Party Complaint, p. 6, ¶ 17 (capitalization in original). The Forbearance Agreement was not disclosed on Schedule G – Executory Contracts and Unexpired Leases, of the Nordams' petition for bankruptcy. Affidavit of Kevin C. Braley in Support of MetLife Bank's Motion for Summary Judgment, Exhibit A, p. 28.

The Noordams made modified payments, under the terms of the Forbearance Agreement, between August 2009 and January 2010. Answer to Complaint for Post-Foreclosure Ejectment and Restitution of Property, Defendants' Counterclaim and Third Party Complaint, p. 6, ¶¶ 18-19. The temporary modification period expired on January

1, 2010. Affidavit of Kevin C. Braley in Support of MetLife Bank's Motion for Summary Judgment, Exhibit A. In February 2010, MetLife extended the temporary modification period for two months. Answer to Complaint for Post-Foreclosure Ejectment and Restitution of Property, Defendants' Counterclaim and Third Party Complaint, p. 6, ¶ 20. "In late April 2010, NOORDAM received a letter from LENDER stating they were declining the permanent modification based on NOORDAM's [sic] previous bankruptcy filing, despite their knowledge of the bankruptcy before entering into the temporary modification agreement." *Id.*, p. 7, ¶ 22 (capitalization in original).

On May 3, 2012, a Notice of Default on the March 30, 2006, Deed of Trust, was recorded as Kootenai County Instrument No. 2356732000. *Id.*, p. 7, ¶ 23. The Notice of Default and Notice of Trustee Sale was mailed to the Noordams on May 23, 2012. Affidavit of Kevin C. Braley in Support of MetLife Bank's Motion for Summary Judgment, Exhibit G. On June 4, 2012, the Trustee's representative personally served and posted a Notice of Trustee's Sale and Notice of Default at 2078 West Grange Avenue, Post Falls, Idaho. Affidavit of Kevin C. Braley in Support of MetLife Bank's Motion for Summary Judgment, Exhibit E. The Noordams claim they never received copy of the Notice of Trustee's Sale, and only learned of is existence after the foreclosure sale. Answer to Complaint for Post-Foreclosure Ejectment and Restitution of Property, Defendants' Counterclaim and Third Party Complaint, p. 7, ¶ 24. The Notice of Trustee's Sale was also published in the Wednesday edition of the Coeur d'Alene Press for four consecutive weeks between May 30, 2012 and June 20, 2012. Affidavit of Kevin C. Braley in Support of MetLife Bank's Motion for Summary Judgment, Exhibit F.

On September 21, 2012, the Trustee conveyed the real property to MetLife Home Loans. Affidavit of Kevin C. Braley in Support of MetLife Bank's Motion for

Summary Judgment, Exhibit H. The Trustee's Deed was recorded in Kootenai County on September 21, 2012, as Instrument No. 2476114000. *Id.* On September 24, 2012, MetLife deeded the property to Federal National Mortgage Association. Answer to Complaint for Post-Foreclosure Ejectment and Restitution of Property, Defendants' Counterclaim and Third Party Complaint, pp. 7-8, ¶ 28, Exhibit J.

On October 26, 2013, the Noordams filed their "Answer to Complaint for Post-Foreclosure Ejectment and Restitution of Property, Defendants' Counterclaim and Third Party Complaint". The Third-Party Complaint brings the following causes of action against MetLife: breach of contract, detrimental reliance, breach of good faith and fair dealing, and violation of the notice requirements under I.C. §§ 45-1505 and 45-1506. On August 8, 2014, MetLife filed the instant Motion for Summary Judgment. It is supported by "MetLife Bank's Memorandum in Support of Motion for Summary Judgment", the "Declaration of Matthew Pryll", and the "Affidavit of Kevin C. Braley in Support of MetLife Bank's Motion for Summary Judgment". On September 4, 2014, the Noordams filed "Defendants' Objection and Reply to Motion for Summary Judgment". It was accompanied by "Defendants' Brief in Support of Objection and Reply to Motion for Summary Judgment", and the "Affidavit of David Noordam in Support of Objection and Reply to Motion for Summary Judgment". On September 11, 2014, MetLife filed "MetLife Bank's Reply Memorandum in Support of Motion for Summary Judgment".

Oral argument is scheduled for September 18, 2014. For the reasons set forth below, the Court should grant MetLife's Motion for Summary Judgment.

II. STANDRD OF REVIEW.

"Summary judgment is appropriate if the pleadings, affidavits, and discovery documents on file with the court . . . demonstrate no material issue of fact such that the moving party is entitled to a judgment as a matter of law." *Brewer v. Washington RSA*

No. 8 Ltd. Partnership, 145 Idaho 735, 738 184 P.3d 860, 863 (2008) (quoting *Badell v. Beeks,* 115 Idaho 101, 102, 765 P.2d 126, 127 (1988) (citing I.R.C.P. 56(c)). The burden of proof is on the moving party to demonstrate the absence of a genuine issue of material fact. *Rouse v. Household Finance Corp.,* 144 Idaho 68, 70, 156 P.3d 569, 571 (2007) (citing *Evans v. Griswold*, 129 Idaho 902, 905, 935 P.2d 165, 168 (1997)). "Once the moving party establishes the absence of a genuine issue of material fact, the burden shifts to the non-moving party," to provide specific facts showing there is a genuine issue for trial. *Kiebert v. Goss*, 144 Idaho 225, 228, 159 P.3d 862, 864 (2007) (citing *Hei v. Holzer,* 139 Idaho 81, 85, 73 P.3d 94, 98 (2003)); *Samuel v. Hepworth, Nungester & Lezamiz, Inc.,* 134 Idaho 84, 87, 996 P.2d 303, 306 (2000).

The non-moving party's case must be anchored in something more than speculation; a mere scintilla of evidence is not enough to create a genuine issue. *Zimmerman v. Volkswagon of America, Inc.*, 128 Idaho 851, 854, 920 P.2d 67, 69 (1996). The non-moving party may not simply rely upon mere allegations in the pleadings, but must set forth in affidavits specific facts showing there is a genuine issue for trial. I.R.C.P. 56(e); *see Rhodehouse v. Stutts*, 125 Idaho 208, 211, 868 P.2d 1224, 1227 (1994). In construing the facts, the court must draw all reasonable factual inferences in favor of the non-moving party. *Mackay v. Four Rivers Packing Co.,* 145 Idaho 408, 410, 179 P.3d 1064, 1066 (2008).

III. ANALYSIS.

A. MetLife Did Not Breach the Forbearance Agreement and MetLife Had No Obligation to Grant Noordams a Permanent Modification.

MetLife contends that contrary to the allegations in the Third Party Complaint, it did not breach the terms of the Forbearance Agreement because the Forbearance Agreement was executed and effective before the Noordams filed for bankruptcy.

MetLife Bank's Memorandum in Support of Motion for Summary Judgment, p. 7. According to MetLife, David Noordam executed the Forbearance Agreement on June 10, 2009, and it was effective June 4, 2009. *Id.* (citing Declaration of Matthew Pryll, Exhibit A). Subsequently, the Noordams filed for bankruptcy on June 29, 2009. *Id.* (citing Affidavit of Kevin C. Braley in Support of MetLife Bank's Motion for Summary Judgment, Exhibit A). There is no dispute as to these dates in June 2009. MetLife contends that since the Forbearance Agreement preceded the filing for bankruptcy, under the terms of the Forbearance Agreement, when the Noordams filed for bankruptcy, MetLife was permitted to exercise any of the remedies provided in the Forbearance Agreement, including termination of the Agreement. *Id.*, pp. 8-9. Moreover, MetLife maintains that contrary to the allegations by the Noordams that they were entitled to a permanent modification of their home loan if they made all of the required payments, the terms of the Forbearance Agreement specifically provides that MetLife was not obligated or bound to make a permanent loan modification. *Id.*, p. 9. As such, MetLife asserts it did not breach of the Forbearance Agreement when it failed to provide the Noordams with a permanent loan modification. *Id.*

According to the Noordams' brief, they filed for bankruptcy in June 2009. Defendants' Brief in Support of Objection and Reply to Motion for Summary Judgment, p. 3. No date in June is give by Noordams in their briefing. The Court finds this to be an intentionally deceptive argument made to the Court as the undisputed fact is Noordam filed bankruptcy on June 29, 2009, well after the Noordams signed the Forbearance Agreement on June 10, 2009. Obliquely arguing that bankruptcy was filed some time in June 2009 shows a lack of candor by Noordams' counsel. In July 2009, Noordams claim MetLife offered them a modification on their home loan and the parties

entered into an agreement that temporarily modified their monthly loan payments. *Id.* They maintain MetLife had knowledge of their bankruptcy before the parties entered into the temporary modification agreement and MetLife continued to accept payments from the Noordams during the pendency of the bankruptcy. *Id.* The Noordams further claim Section 2.D. of the Forbearance Agreement, which provides for termination of the Forbearance Agreement upon any bankruptcy filing, is an ipso facto clause that is prohibited under 11 U.S.C. § 541(c) and 11 U.S.C. § 365(e)(1). *Id.*, p. 4. Moreover, they allege MetLife was "aware of [David Noordam's] bankruptcy filing, yet continued to accept the payments tendered during the course of the bankruptcy with no notification to [David Noordam] that the modification agreement was no longer in effect." *Id.*, p. 5. By accepting payments during the Noordam's bankruptcy, they claim MetLife explicitly waived Section 2.D. of the Forbearance Agreement. *Id.*, p. 6. The Noordams further claim under paragraph 1 and paragraph 2.C. of the Forbearance Agreement, MetLife was obligated to enter into permanent modification. *Id.*, p. 6.

In response, MetLife argues that even though the Forbearance Agreement was executed and effective prior to the Noordams filing for bankruptcy, the Noordams failed to disclose the Forbearance Agreement in their bankruptcy schedules. MetLife Bank's Reply Memorandum in Support of Motion for Summary Judgment, p. 5. By failing to include the Forbearance Agreement in the bankruptcy schedule, MetLife argues "under the applicable law, the Forbearance Agreement 'rode through' the Noordams' bankruptcy case and the parties' interests in the Forbearance Agreement were preserved, and not subject to the Bankruptcy Code." *Id.* As such, MetLife argues the Bankruptcy Code cannot prohibit the termination clause in the Forbearance Agreement because the Noordams failed to bring the Agreement under the purview of the

Bankruptcy Code by not disclosing the Agreement as part of their bankruptcy estate. *Id.*, p. 6.

The Court agrees with MetLife. It is clear from the evidence presented, the Forbearance Agreement, which was effective June 4, 2009, was executed by David Noordam on June 10, 2009. It is also clear from the evidence the Noordams' bankruptcy petition was filed on June 29, 2009, after the Forbearance Agreement was executed by David Noordam. While the Noordams argue they had a conversation with MetLife prior to filing bankruptcy and prior to executing the Forbearance Agreement, and claim MetLife told him "the modification would not affect [his] bankruptcy because [he] would be saving and asset", this evidence is inadmissible and is not considered by the Court. Affidavit of David Noordam in Support of Objection and Reply to Motion for Summary Judgment, p. 3, ¶ 9.

Contract interpretation begins with the document's language. *Potlatch Educ. Ass'n v. Potlatch Sch. Dist. No. 285*, 148 Idaho 630, 633, 226 P.3d 1277, 1280 (2010) (citing *Cristo Viene Pentecostal Church v. Paz,* 144 Idaho 304, 308, 160 P.3d 743, 747 (2007)). Contracts that are unambiguous are given their plain meaning. *Id.* "The purpose of interpreting a contract is to determine the intent of the contracting parties at the time the contract was entered." *Id.* Intent of the parties is determined from the contract as a whole. *Id.* (citing *Daugharty v. Post Falls Highway Dist.*, 134 Idaho 731, 735, 9 P.3d 534, 538 (2000)). The interpretation of a clear and unambiguous contract is a question of law. *Lamprech v. Jordan, LLC*, 139 Idaho 182, 185, 75 P.3d 743, 746 (2003) (citing *Iron Eagle Dev't, L.L.C. v. Quality Design Systems, Inc.*, 138 Idaho 487, 491, 65 P.3d 509, 513 (2003)). "'When a written instrument is complete on its face and is unambiguous, extrinsic evidence of prior or contemporaneous representations or

negotiations are inadmissible to contradict, vary, alter, add to, or detract from the instrument's terms.' Only when a document is ambiguous is parol evidence admissible to discover the drafter's intent." *Id.* *Buku Properties, LLC v. Clark*, 153 Idaho 828, 834, 291 P.3d 1027, 1033 (2012) (internal citations omitted). "If a contract is found ambiguous, its interpretation is a question of fact." *Lamprech*, 139 Idaho at 185, 75 P.3d at 746. However, the determination that "a contract is ambiguous is a question of law." *Id.* (citing *Boel v. Steward Title Guar. Co.*, 137 Idaho 9, 13, 43 P.3d 768, 772 (2002)). A contract that is reasonably subject to conflicting interpretations is ambiguous. *Id.* (citing *Lewis v. CEDU Educ. Serv., Inc.*, 135 Idaho 139, 144, 15 P.3d 1147, 1152 (2000)).

The Court finds the Forbearance Agreement is clear and unambiguous. Since the Forbearance Agreement is complete on its face, any extrinsic evidence offered by the Noordams is inadmissible and cannot be considered by this Court when interpreting the terms actually set forth in the document. There is no genuine issue of material fact that the Forbearance Agreement was executed by David Noordam on June 10, 2009, or that the petition for bankruptcy was subsequently filed on June 29, 2009.

The Forbearance Agreement provides in pertinent part:

> F. <u>Bankruptcy.</u> **If, before all past due amounts are paid, I or any party with an interest in the real property which secures my Loan becomes subject to a proceeding in bankruptcy**, or if my Loan otherwise is subject to protection under bankruptcy laws, I hereby acknowledge and agree that (1) any continued workout assistance will need to be addressed in the context of the Bankruptcy proceedings, (2) unless expressly prohibited by Applicable Law, **Lender, at its option, may terminate this Agreement immediately and automatically**, and (3) to the extent allowed by Applicable Law, Lender shall be entitled to immediate and automatic relief from the bankruptcy stay upon my breach of any term or condition of this Agreement, or upon Lender's termination of this Agreement.

Declaration of Matthew Pryll, Exhibit A, pp. 3, ¶ 2.F. (emphasis added). This provision permitted MetLife to terminate the Forbearance Agreement upon the initiation of a proceeding in bankruptcy.

It is also clear from the evidence that the Noordams elected to petition for bankruptcy after David Noordam executed the Forbearance Agreement. However, the Noordams failed to disclose the Forbearance Agreement on Schedule G – Executory Contracts and Unexpired Leases, in their petition for bankruptcy. Affidavit of Kevin C. Braley in Support of MetLife Bank's Motion for Summary Judgment, Exhibit A, p. 28. Rather, the Noordams checked the box that states, "Check this box if debtor has no executory contracts or unexpired leases." *Id.*

According to Black's Law Dictionary, an "executory contract" in a bankruptcy proceeding is "[a] contract under which debtor and nondebtor each have underperformed obligations and the debtor, if it ceased further performance, would have no right of the other party's performance." Black's Law Dictionary, p. 321 (7th ed. 1999). 11 U.S.C. § 365 governs treatment of executory contracts under the Bankruptcy Code and provides in pertinent part, "the trustee, subject to the court's approval, *may* assume or reject any executory contract or unexpired lease of the debtor." 11 U.S.C. § 365(a) (emphasis added). "[W]hen a debtor neither assumes nor rejects an executory contract, it is said to 'ride through' the bankruptcy 'as though the bankruptcy had not happened.'" *In re JZ, LLC*, 357 B.R. 816, 821 (Bankr. D. Idaho 2006) (quoting *In re Texaco Inc.,* 254 B.R. 536, 557 (Bankr. S.D.N.Y.2000)).

> The ride-through doctrine is simply the traditional manner in which the courts deal with executory contracts, that for some reason were not assumed or rejected pursuant to § 365 prior to or at confirmation ... When an executory contract is not addressed by the debtor in a Chapter 11 plan or by separate motion, the doctrine applies and the contract becomes binding on the reorganized debtor. In this manner, the contract is

> unaffected by the bankruptcy and the interests of both parties to the contract are preserved.

Id. (quoting *In re Hernandez,* 287 B.R. 795, 801 (Bankr. D.Ariz. 2002)).

The Noordams are correct in that 11 U.S.C. § 365(e)(1)(B) provides:

> (e)(1) Notwithstanding a provision in an executory contract or unexpired lease, or in applicable law, an executory contract or unexpired lease of the debtor may not be terminated or modified, and any right or obligation under such contract or lease may not be terminated or modified, at any time after the commencement of the case solely because of a provision in such contract or lease that is conditioned on—
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> ***
>
> (B) the commencement of a case under this title . . . .

11 U.S.C. § 365(e)(1)(B). However, this provision of the Bankruptcy Code does not apply to all executory contracts, but rather those executory contracts that fall within the purview of the Bankruptcy Code. The burden is on the debtor to "prepare schedules carefully, completely, and accurately." *Cusano v. Klein*, 264 F.3d 936, 945-46 (9th Cir. 2001) (citing *In re Mohring,* 142 B.R. 389, 394 (Bankr. E.D.Cal.1992); *accord In re Jones,* 134 B.R. 274, 279 (N.D.Ill.1991); *In re Baumgartner,* 57 B.R. 513, 516 (Bankr. N.D.Ohio 1986); *In re Mazzola,* 4 B.R. 179, 182 (Bankr. D.Mass.1980)). In this case, the Forbearance Agreement did not become part of the bankruptcy petition because the Noordams did not disclose it on Schedule G of their petition. As such, the Court should find 11 U.S.C. § 365 is inapplicable to the instant action and MetLife was within its rights under the Forbearance Agreement to terminate the Agreement.

Moreover, the plain language of the Forbearance Agreement does not require MetLife to grant the Noordams a permanent modification. Section 2.D. of the Forbearance Agreement provides:

> D. No Modification. **I understand that the Agreement is not a forgiveness of payments on my Loan or a modification of the Loan Documents.** I further understand and agree that the Lender

> is not obligated or bound to make any modification of the Loan Documents or provide any other alternative resolution of my default under the Loan Documents.

Declaration of Matthew Pryll, Exhibit A, p. 3, ¶ 2.D. (emphasis in original). This provision specifically provides that MetLife is not obligated or bound to make a permanent loan modification. As such, the Court should find MetLife did not breach the Forbearance Agreement when it failed to provide the Noordams with a permanent loan modification.

For the reasons set forth above, the Court finds MetLife did not breach the Forbearance Agreement.

B. Proper Notice was Given to Noordam Under I.C. §§ 45-1505 and 45-1506.

In Count VI of the Third-Party Complaint, the Noordams allege MetLife violated Idaho Code § 45-1506 by failing to "give notice of default and/or the scheduling of the foreclosure sale to NOORDAM, causing NOORDAM to be unaware of said default and/or the sale and unable to cure the default and prevent the ultimate sale and transfer of the subject property to FANNIE MAE." Answer to Complaint for Post-Foreclosure Ejectment and Restitution of Property, Defendants' Counterclaim and Third party Complaint, p. 10 ¶ 54 (capitalization in original).

MetLife claims this cause of action "must fail because there is no private right of action in the statute beyond the express remedies provided therein." MetLife Bank's Memorandum in Support of Motion for Summary Judgment, p. 9. As I.C. §§ 45-1505 and 45-1506 do not mention a private remedy, MetLife contends any of Noordams' alleged violations that MetLife failed to provide notice under Chapter 15 does not entitle the Noordams to damages. *Id.* pp. 9-10. However, even if the Noordams were entitled to damages under Chapter 15, MetLife argues the Trustee complied with the

requirements set forth under Idaho Code §§ 45-1505 and 45-1506 by mailing, publishing and personally serving notice of the non-judicial foreclosure to the Noordams. *Id.*, pp. 11-13.

In response, the Noordams argue the cases cited by MetLife do not actually stand for the proposition MetLife makes in support of MetLife's position that I.C. §§ 45-1505 and 45-1506 do not provide for a private right of action. Defendants' Brief in Support of Objection and Reply to Motion for Summary Judgment, p. 7. Moreover, in his affidavit David Noordam attests he was not served "any documents as to the foreclosure sale, Notice of Default or Notice of Sale by lender." Affidavit of David Noordam in Support of Objection and Reply to Motion for Summary Judgment, p. 5, ¶ 22.

Chapter 15 Title 45 Idaho Code governs foreclosure of trust deeds. Idaho Code § 45-1505 provides that a trustee may foreclose by advertisement and sale if: (1) the deed is recorded in the mortgage records in the county where the property is situated; (2) there is a default by the grantor; (3) the trustee or beneficiary filed a notice of default in the office of the recorder in the county where the trust property is situated "identifying the deed of trust by stating the name or names of the trustor or trustors and giving the book and page where the same is recorded, or a description of the trust property, and containing a statement that a breach of the obligation for which the transfer in trust is security has occurred, and setting forth the nature of such breach and his election to sell or cause to be sold such property to satisfy such obligation"; and (4) the trustee or beneficiary has mailed a copy of the notice to any person requesting such notice. I.C. § 45-1505.

For the first time, at oral argument, the Noordams argued MetLife filed to comply with Idaho Code § 45-1505(3), that such subsection must be "strictly complied with" (as

argued by Noordams' counsel), and as such, a genuine issue of material fact exists about notice. Counsel for Noordams stated at oral argument this was now their "main argument."

Making such argument for the first time at oral argument violates I.R.C.P. 56(c). However, at oral argument, counsel for MetLife refused the offer by the Court for additional time to brief issues raised by Noordams for the first time at oral argument.

Noordams now claim there are deficiencies with the Notice of Default, Exhibit G to the Affidavit of Kevin Braley. Specifically, Noordams now argue the font is not the appropriate size and the document does not contain the following language, as required by Idaho Code § 45-1505(3):

NOTICE REQUIRED BY IDAHO LAW

> Mortgage foreclosure is a legal proceeding where a lender terminates a borrower's interest in property to satisfy unpaid debt secured by the property. This can mean that when a homeowner gets behind on his or her mortgage payments, the lender forces a sale of the home on which the mortgage loan is based. Some individuals or businesses may say they can "save" your home from foreclosure. You should be cautious about such claims. It is important that you understand all the terms of a plan to "rescue" you from mortgage foreclosure and how it will affect you. It may result in your losing valuable equity that you may have in your home. If possible, you should consult with an attorney or financial professional to find out what other options you may have. Do not delay seeking advice, because the longer you wait, the fewer options you may have.
>
> Under Idaho law, you have five (5) days to rescind or undo certain contracts or agreements that relate to transferring interests in property or money in a foreclosure situation. An attorney or financial professional can tell you more about this option."

I.C. § 45-1505(3). Idaho Code § 45-1505(3) requires this language be set forth "…on a separate sheet of paper…", that it be "…in twelve (12) point boldface type…", and be

included in with the notice of default mailed to any individual who has an ownership interest in the property to be foreclosed.

There are a plethora of problems with Noordams' argument. The first is absolutely fatal to Noordams' new, "main" argument in opposition to MetLife's motion for summary judgment.

First, Exhibit G to the Affidavit of Kevin Braley shows that the "Notice Required by Idaho Law" set forth in I.C. § 45-1505(3), as depicted in the two paragraphs above, was included in the materials mailed to David Noordam, his spouse and others. Affidavit of Kevin Braley, Exhibie G, p. 3. Noordams have produced absolutely no evidence that such notice was not in "…in twelve (12) point boldface type…" All Noordams have done is at oral argument *speculate* that it *isn't* in twelve point boldface type. If this is Noordam's defense to MetLife's motion for summary judgment, it is Noordam's burden to support that defense with admissible evidence. I.R.C.P. 56(d). Noordams have failed to do so. A non-moving defendant has the burden of supporting a claimed affirmative defense on a motion for summary judgment. *Chandler v. Hayden,* 147 Idaho 765, 215 P.3d 485 (2009). Lay opinion is simply inadmissible. *Puckett v. Oakfabco, Inc.,* 132 Idaho 816, 979 P.2d 1174 (1999); *Evans v. Twin Falls County,* 118 Idaho 210, 796 Pl.2d. 87 (1990). A court cannot hypothecate facts which are abhsent from the record cognizable under this rule. Shacocass, Inc. v. Arrington Constru. Co., 116Idhao 460, 776 P.2d 469 (Ct.App. 1989).

Second, even if this language were not in boldface or were not in twelve point type, this Court specifically finds there is no private right of action against MetLife for any such violation of I.C. § 45-1505. As noted by MetLife, "…there is no other indication that the Idaho legislature intended to provide a private remedy for alleged violations of Chapter 15, except for the exclusive remedies provided in the Chapter."

MetLife Bank's Memorandum in Support of Motion for Summary Judgment, pp. 9-10, citing *Spencer v. Jameson,* 147 Idaho 497, 506, 211 P.3d 106, 115 (2009). MetLife has attached an Ada County District Court opinion by the Honorable Timothy Hansen, in Ada County Case No. CV-OC-1011032, *Rife v. CitiMortgage, Inc. et al.* This Court has read that opinion and finds the conclusion that her is no private right of action for damages under I.C. § 45-1505 and § 45-1506. While such opinion is not binding on this Court, this Court finds the opinion persuasive and adopts that finding as a matter of law.

Third, while the Court agrees this language is required when foreclosing by advertisement and sale, there is no evidence before this Court that MetLife foreclosed on the Noordams property by advertisement and sale. As such, this section is inapplicable to the instant action.

Idaho Code § 45-1506 is the relevant provision of Chapter 15 Title 45 Idaho Code. It governs notice of sale and requires, among other things, publication of the notice in a newspaper of general circulation. Idaho Code § 45-1506(7) specifically states:

> An affidavit of mailing notice of sale and an affidavit of posting, when required, and publication of notice of sale as required by subsection (6) of this section shall be recorded in the mortgage records in the counties in which the property described in the deed is situated at least twenty (20) days prior to the date of sale.

I.C. § 45-1506(7). Moreover, Idaho Code § 45-1510(1) provides that:

> When the trustee's deed is recorded in the deed records of the county where the property described in the deed is located, the recitals contained in the deed and in the affidavits required under section 45-1506 (7), Idaho Code, shall be prima facie evidence in any court of the truth of the recitals and the affidavits. However, the recitals and affidavits are conclusive in favor of a purchaser in good faith for value or any successor in interest thereof. For purposes of this section, the trustee's deed shall be deemed

effective as of the date and time on which the sale was held if such deed is recorded within fifteen (15) days after the date of sale or the first business day following the fifteenth day if the county recorder of the county in which the property is located is closed on the fifteenth day.

I.C. § 45-1510 (1).

The effect of the Trustee's Sale is established under Idaho Code § 45-1508, which provides:

> A sale made by a trustee under this act shall foreclose and terminate all interest in the property covered by the trust deed of all persons to whom notice is given under section 45-1506, Idaho Code, and of any other person claiming by, through or under such persons and such persons shall have no right to redeem the property from the purchaser at the trustee's sale. The failure to give notice to any of such persons by mailing, personal service, posting or publication in accordance with section 45-1506, Idaho Code, shall not affect the validity of the sale as to persons so notified nor as to any such persons having actual knowledge of the sale. Furthermore, any failure to comply with the provisions of section 45-1506, Idaho Code, shall not affect the validity of a sale in favor of a purchaser in good faith for value at or after such sale, or any successor in interest thereof.

I.C. § 45-1508.

In this case, the Trustee's Deed was recorded in Kootenai County, the county where the property is located, on September 21, 2012, as Instrument No. 2476224000. Affidavit of Kevin C. Braley in Support of MetLife Bank's Moyion for Summary Judgment, Exhibit H. Pursuant to Idaho Code § 45-1510(1), that is prima facie evidence of the truth of the recitals contained in the deed and the affidavits required under Idaho Code § 45-1506(7).

The Trustee's Deed specifically provides:

> (a) 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 said property pursuant to the terms of said Deed of Trust. Notice of default was recorded as Instrument No. 2356732000, Kootenai County

> Mortgage Records and in the office of the Recorder of each other 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.
>
> (b) After recordation of said Notice of Default [Kootenai County Instrument No. 2356732000], 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 real property, by posting in a conspicuous place on said property 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 date of sale as Instrument No(s): 2368010000, 2368011000, 2368012000, 2368013000, 2368014000, Kootenai County, Idaho Mortgage Records. In accordance with Idaho Code 45-1505, additional notice alerting delinquent homeowners of foreclosure rescue schemes was duly presented.

Id.

MetLife has provided this Court with evidence through affidavits of compliance with Idaho Code §§ 45-1505 and 45-1506. This shifts the burden to the Noordams, to show through affidavit or otherwise there remains a genuine issue of fact on this claim. The Noordams have failed to provide the Court with any evidence of a defect with the Trustee's Sale in this case. Rather, in his affidavit David Noordam attests he was not served "any documents as to the foreclosure sale, Notice of Default or Notice of Sale by lender." Affidavit of David Noordam in Support of Objection and Reply to Motion for Summary Judgment, p. 5, ¶ 22. However, the Affidavit of Posting and Service specifically states the Notice of trustee's Sale and Notice of Default was personally served, "on an adult occupant of the premises described in the **Notice of Sale** by delivering to and leaving with: **Adult Female Occupant Residing thereat**." Affidavit of Kevin C. Braley in Support of MetLife Bank's Motion for Summary Judgment, Exhibit E (emphasis in original). The affidavit is dated June 5, 2012. *Id.* No evidence has been submitted by the Noordams that a female did not reside at their residence at that time

or that a female resident was not present to accept receipt. Rather David Noordam attests that he personally was not served. *See* Affidavit of David Noordam in Support of Objection and Reply to Motion for Summary Judgment, p. 5, ¶ 22. Even drawing all reasonable inferences in favor of the Noordams, based on the evidence presented by MetLife, that statement alone is not enough to create a genuine issue of material fact. Having failed to meet their burden, the Court grants MetLife summary judgment.

IV. CONCLUSION AND ORDER.

For the reasons stated above, the Court grants MetLife's Motion for Summary Judgment. Noordam's Third-Party Complaint against Met-Life is dismissed. As to the Third-Party Complaint, MetLife is the prevailing party for purposes of costs and fees under I.C. § 12-120(3) and I.R.C.P. 54(d)(1).

IT IS HEREBY ORDERED MetLife's Motion for Summary Judgment is GRANTED.

IT IS FURTHER ORDERED Noordam's Third-Party Complaint against Met-Life is DISMISSED with prejudice.

IT IS FURTHER ORDERED as to Noordams' Third-Party Complaint, MetLife is the prevailing party for purposes of costs and fees under I.C. § 12-120(3) and I.R.C.P. 54(d)(1).

Entered this 19th day of September, 2014.

____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _______ day of September, 2014, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

Lawyer	Fax #	Lawyer	Fax #
Jeffrey R. Christenson	208-342-4657	Henry Madsen	664-6258
Kevin C. Braley	208-343-8869		

____
Deputy Clerk