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

GORDON L. ORMESHER, JR. AND BILLIE JEAN ORMESHER, husband and wife, and the community thereof,

Plaintiffs,

vs.

CITIMORTGAGE, INC., a New York Corp., NORTHWEST TRUSTEE SERVICES, INC., an Idaho Corp., and FEDERAL NATIONAL MORTGAGE ASSOCIATION,

Defendants.

Case No. **CV 2013 6956**

MEMORANDUM DECISION AND ORDER ON DEFENDANTS CITIMORTGAGE, INC.'S AND FEDERAL NATIONAL MORTGAGE ASSOCIATION "MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT"

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is before the Court on an I.R.C.P 12(b)(6) motion by the defendants CitiMortgage, Inc. (Citi) and Federal National Mortgage Association (Fannie Mae) (for purposes of this decision, these two defendants are collectively referred to as "Citi") seeking to dismiss the plaintiffs Gordon L. Ormesher and Billie Jean Ormesher's (Ormeshers) Amended Complaint filed on May 13, 2014. Motion to Dismiss Plaintiffs' First Amended Complaint, p. 1.

On May 21, 2009, the Ormeshers borrowed $387,000.00 from Sydion Financial, LLC, for the purchase of real property located at 2025 East Foxborough Court, Hayden, Kootenai County, Idaho (disputed property). Expanded Affidavit of Jon Dobson, p. 2 ¶¶ 6-7. The promissory note was secured by a deed of trust that was recorded in Kootenai County on June 8, 2009, as Instrument No. 2215500000. *Id*., p. 2 ¶ 7. The deed of

trust was assigned to Citi, and recorded on November 28, 2012, under Kootenai County Instrument No. 2385657000. *Id.* p. 2 ¶ 8. As of September 1, 2013, the Ormeshers owed approximately $388,000.00 on the mortgage loan. *Id.,* p. 3 ¶ 17.

On September 1, 2012, prior to the assignment to Citi, the Ormeshers notified Sydion Financial, LLC they were experiencing a financial hardship. *Id.* p. 3 ¶ 9. "[U]nder the general guidelines to HAMP [(Fannie Mae's Home Affordable Mortgage Program) this] placed a duty on the lender [Sydion Financial, LLC] to initiate the process of evaluating the Borrowers for a loan modification to determine if they qualified for an affordable alternative to their Mortgage Loan." *Id.* Instead, Ormeshers allege "Sydion assigned the Mortgage Loan to Citi as the Successor Lender which entity took over the management of the Deed of Trust effectively November 28, 2012." *Id*., p. 3 ¶ 11.

"[Jon Dobson's] office submitted on Borrowers behalf, an application for a trial loan modification under HAMP to Citi which set foreclosure for August 1, 2013." *Id.*, p.3 ¶ 15. Jon Dobson assists "[b]orrowers in applying for an obtaining approval of mortgage loan modifications when they are experiencing financial hardship, including, when their homes are in foreclosure . . . ." *Id.,* p. 2 ¶ 3. On July 23, 2013, Citi entered into loan modification negotiations with the Ormeshers and scheduled the foreclosure date for August 30, 2013, "offering Borrowers [Ormeshers] a trial loan modification for three months with payments to commence September 1, 2013." *Id.,* p. 3 ¶ 16. The Ormeshers determined that option would not work as the loan modification payment would have been impossible for them to meet. *Id.,* p. 4 ¶¶ 18-19. "[T]he Ormeshers then asked Fannie Mae to approve a HAFA Short Sale of the Subject Property and, upon said request, Citi postponed the foreclosure sale date to September 27, 2013.

Borrowers [Ormeshers] election to proceed with a HAFA Short Sale as an affordable alternative was pursuant to Fannie Mae regulations and the property was then listed for sale with a realtor on or about September 1, 2013." *Id.,* p. 4 ¶ 19. The property was listed for sale and two offers were received with a purchase price of $175,000.00. Affidavit of Robyn Shea, p. 2 ¶ 3; Expanded Affidavit of Jon Dobson, p.4 ¶ 20. The offers were conveyed to Citi and Fannie Mae. Expanded Affidavit of Jon Dobson, p. 4 ¶ 20. On September 9, 2013, Ormshers sent HAFA Short Sale documentation to Citi per their request. *Id.,* p. 4 ¶ 22. That same day "realtors from Spokane, Washington selected by Fannie Mae to provide a Broker's Price Opinion ("BPO") inspected the Subject Property and their written report to Fannie Mae was expected within a few days." Affidavit of Robyn Shea, p. 2 ¶ 7. A representative for the Ormeshers contacted Citi in writing on September 23, 2013, requesting it "postpone the September 27, 2013 foreclosure sale so Fannie Mae would be able to obtain the BPO allowing it to make its final determination whether to accept the HAFA Short Sale offering price of $175,000 currently pending to which Citi did not respond . . . ." Expanded Affidavit of Jon Dobson, p. 5 ¶ 27.

According to Robyn Shea, a realtor with Beutler & Associates, Century 21 in Coeur d'Alene, Idaho, "[t]he Servicing Guide Announcement of Fannie Mae that applies to all lenders and servicers, such as CITIMORTGAGE, INC.,, [sic] SVC-2012-19 dated August 22, 2012 in effect as of September 2013, at pages 15 and 16 with respect to HAFA Short Sales prohibits the Servicer, CITIMORTGAGE, from foreclosing while the HAFA Short Sale application is pending and requires that the Servicer '…must make every effort to stop a scheduled foreclosure sale.'" Affidavit of Robyn Shea, p. 3 ¶ 19. The foreclosure sale took place on September 27, 2013, at 10:00 a.m.. *See* Expanded Affidavit of Jon Dobson, p. 5 ¶ 30.

Ormeshers started this instant litigation by filing a Temporary Restraining Order on September 27, 2013, at 11:56 a.m., nearly two hours after the foreclosure sale took place. Judge Lansing Haynes denied Ormeshers' request for a temporary restraining order, stating. "This file was presented to the Court at 11:20 a.m., when the foreclosure sale was scheduled for today at 10:00 a.m. Moreover, the facts alleged in the verified Complaint, Petition and Affidavit of Wesley Hoyt are insufficient to sati9sfy Rule 65(b) requirements for issuance of a Temporary Restraining Order." Temporary Restraining Order, p. 1. A verified Complaint was also filed on September 29, 2013. The "Amended Complaint" filed on April 15, 2014, is not verified.

Citi and Fannie Mae moved to dismiss Ormeshers' Amended Complaint under I.R.C.P. 12(b)(6). Motion to Dismiss Plaintiffs' First Amended Complaint, p. 1. Ormeshers filed a wrongful foreclosure suit against the defendants seeking the following relief:

A. A Permanent Injunction rescinding, cancelling and terminating the Trustee's Deed in this case.
B. Judgment for damages against Citi and Fannie Mae incurred as a result of the breach of contract.
C. Judgment for damages against Citi and Fannie Mae incurred as a result of the breach of the covenant of good faith and fair dealings.
D. Judgment for damages against Citi, Fannie Mae and Northwest incurred as a result of intentional interference with prospective financial advantage.
E. Judgment for damages against Citi and Fannie Mae as a result of the violation of the doctrine of Promissory Estoppel.
F. Judgment for damages against Northwest as a result of breach of fiduciary duty and slander of title.
G. Judgment for damages against Citi, Fannie Mae and Northwest as a result of wrongful foreclosure.
H. Judgment for damages against Citi for fraud by its employees, to include other (punitive) damages if the trial court deems it appropriate, upon a hearing.
I. Judgment for reasonable attorney fees and costs under I.C. § 12-120 & 121.
J. Judgment for reasonable attorney fees and costs under the fraud doctrine in order to make Plaintiffs whole.

K. Judgment for reasonable attorney fees and costs under the breach of fiduciary duty doctrine in order to make Plaintiffs whole.
L. Judgment and decree of quiet title, returning ownership of the Subject Property to Plaintiffs.
M. Judgment and decree based on declaratory judgment that the Trustee's Deed is invalid and ordering the rescission, cancellation and termination of the same.
N. Judgment for damages incurred by Plaintiff against the defendant Fannie Mae for its negligent supervision of Citi resulting in foreclosure.

Amended Complaint, pp. 30-31. Citi and Fannie Mae argue every cause of action or form of relief claimed by Ormeshers are barred as a matter of law or stated too vaguely to make a claim. Motion to Dismiss Plaintiffs' First Amended Complaint, pp. 1-2.

On May 13, 2014, Citi and Fannie Mae filed "Memorandum in Support of Motion to Dismiss", and "Request for Judicial Notice in Support of Motion to Dismiss First Amended Complaint". On June 4, 2014, they filed a second "Supplement to Request for Judicial Notice in Support of Motion to Dismiss First Amended Complaint."

The defendant Northwest Trustee Services, Inc. (Northwest) seeks to join Citi and Fannie Mae in the motion to dismiss. Defendant Northwest Trustee Services, Inc.'s Motion to Dismiss and Joinder in Defendant CitiMortgage, Inc.'s and Federal National Mortgage Association's Motion to Dismiss, pp.1-2. Northwest indicates that its joinder motion is based upon the Court records as well as the memorandum and judicial notice documents filed separately by the other defendants. *Id.*

In opposition to Citi's motion to dismiss, Ormeshers filed the "Response to Northwest Trustee Services, Inc.'s Motion to Dismiss and Joinder in Defendant CitiMortgage, Inc.'s and Federal National Mortgage Association's Motion to Dismiss" on July 14, 2014. Ormeshers have also submitted a "Request for Judicial Notice in Support of its Response to Northwest Trustee Services, Inc.'s Motion to Dismiss and Joinder in Defendant CitiMortgage, Inc.'s and Federal National Mortgage Association's Motion to Dismiss." Ormeshers specifically request that the Court take notice of the

"Answer and Affirmative Defenses of Plaintiff to Counterclaim for Declaratory Judgment" from Kootenai County District Court Case 2013 CV 8096. Request for Judicial Notice in Support of its Response to Northwest Trustee Services, Inc.'s Motion to Dismiss and Joinder in Defendant CitiMortgage, Inc.'s and Federal National Mortgage Association's Motion to Dismiss, p. 1.

Oral argument on the defendants Citi's and Fannie Mae's Motion to Dismiss Plaintiffs' First Amended Complaint was held on July 24, 2014.

At the outset of the hearing this Court entered its decision on the various requests for this Court to take judicial notice. This Court denied the request of Citi and Fannie Mae to take judicial notice of Exhibit A and B, Fannie Mae's HAMP and HAFA (respectively) guidelines on Fannie Mae's website, because doing so would violate I.R.E. 201. However, much of that information is covered in the Affidavit of Robyn Shea, p. 3 ¶ 19. This Court granted the request of Citi and Fannie Mae to take judicial notice of Exhibit C (certified copy of Deed of Trust executed by Ormeshers and recorded on June 8, 2009, as Instrument No. 221550000, Kootenai County), Exhibit D (certified copy of Notice of Default recorded on March 20, 2013, as Instrument No. 2401686000, Kootenai County), Exhibit E (Notice of Sale, recorded with certified copy of affidavit of mailing on June 4, 2013, as Instrument No. 2413282000, Kootenai County), Exhibit F (certified copy of Affidavit of mailing, affidavit of service/posting and affidavit of publication recorded on June 4, 2013, as Instrument Nos. 2413282000, 2413283000, and 2413284000, Kootenai County) and Exhibit G (certified copy of Trustee's Deed dated October 2, 2013, as Instrument No. 2431444000, Kootenai County). The Court also granted Ormeshers' request to take judicial notice of the Answer and Affirmative Defenses of Plaintiff to Counterclaim for Declaratory Judgment filed by Fannie Mae in Kootenai County District Court Case No. CV 2013 8096 (*Federal*

National Mortgage Assoc. v. Gordon Ormesher, Jr., Billie Jean Ormesher, and Does 1-10 as Occupants of the Premises located at 2025 East Foxborough Court, Hayden, Idaho 83835).

At the conclusion of oral argument, the Court stated it would grant Citi and Fannie Mae's Motion to Dismiss (motion for summary judgment) as to Count Two, Three, Four, Five, Seven, Ten and Eleven of the Ormeshers' Amended Complaint, and the Court also stated it would be writing a decision explaining the reasoning for such decision. For reasons stated below, the Court has reached a different conclusion as to Count Seven and part of Count Ten. At oral argument the Court stated it was taking under advisement the motion to dismiss by City and Fannie Mae (and Northwest) as to as to Count One, Six, Eight and Nine.

A two-day court trial is scheduled in this case for January 7, 2015.

II. STANDARD OF REVIEW.

In considering a motion to dismiss under I.R.C.P. 12(b), the court may examine only those facts that appear in the complaint and any facts that are appropriate for the court to take judicial notice of. *Hellickson v. Jenkins*, 118 Idaho 273, 276, 796 P.2d 150, 153 (Ct. App. 1990). Where matters outside the pleadings are considered by the court, the court must treat the motion to dismiss as a motion for summary judgment. *See Masi v. Seale*, 106 Idaho 561, 562, 682 P.2d 102, 103 (1984); *Hellickson*, 118 Idaho, 273, 276, 796 P.2d 150, 153. This is because the nature of a motion to dismiss changes when the Court considers matters that are outside the pleadings.

> If, on a motion asserting a defense numbered (6) to dismiss for failure to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

I.R.C.P. 12(b)(6)(2012). Affidavits are considered matters outside the pleadings. Similarly, taking judicial notice is considered to be outside the pleadings, as it is a substitute for taking evidence. *Hellickson*, 118 Idaho, 273, 276, 796 P.2d 150, 153. In this case, the plaintiff has requested the Court take judicial notice of the trustee's deed, and the defendants have submitted affidavits in support of their position. Because the Court has taken judicial notice of matters outside the pleadings, the Court will also consider the affidavits filed and treat this as a motion for summary judgment.

Summary judgment is appropriate "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." I.R.C.P. 56(c). Specifically, "[t]he trial court must examine the pleadings to determine what issues are raised in the case. The only issues considered on summary judgment are those raised by the pleadings." *Esser Elec. v. Lost River Ballistics Technologies, Inc.*, 145 Idaho 912, 919, 188 P.3d 854, 861 (2008) (citing *Vanvooren v. Astin,* 141 Idaho 440, 111 P.3d 125 (2005); *Lexington Heights Dev., LLC v. Crandlemire,* 140 Idaho 276, 92 P.3d 526 (2004); *Beco Constr. Co. v. City of Idaho Falls,* 124 Idaho 859, 865 P.2d 950 (1993); *Gardner v. Evans,* 110 Idaho 925, 719 P.2d 1185 (1986)).

The burden of proof is on the moving party to demonstrate the absence of a genuine issue of material fact. *Yoakum v. Hartford Fire Ins. Co.*, 129 Idaho 171, 923 P.2d 416 (1996). "The burden may be met by establishing the absence of evidence on an element that the nonmoving party will be required to prove at trial." *Nelson v. Anderson Lumber Co.*, 140 Idaho 702, 707, 99 P.3d 1092, 1097 (2004) (citing *Dunnick v. Elder*, 126 Idaho 308, 311, 882 P.2d 475, 478 (Ct. App. 1994)).

Liberal construction of the facts in favor of the nonmoving party requires the

court to draw all reasonable factual inferences in favor of the nonmoving party. *See Williams v. Blakley*, 114 Idaho 323, 324, 757 P.2d 186, 187 (1988); *Blake v. Cruz*, 108 Idaho 253, 255, 698 P.2d 315, 317 (1985). "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). An adverse 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. *Id*.; *see Rhodehouse v. Stutts*, 125 Idaho 208, 211, 868 P.2d 1224, 1227 (1994). If reasonable people can reach different conclusions as to the facts, then the motion must be denied. *Ashby v. Hubbard*, 100 Idaho 67, 593 P.2d 402 (1979). When the case will be tried before the court, rather than before a jury, the court "is entitled to arrive at the most probable inferences based upon the undisputed evidence properly before it and grant the summary judgment despite the possibility of conflicting inferences." *Huskinson v. Nelson*, 152 Idaho 547, 550, 272 P.3d 519, 522 (2012) (citing *P.O. Ventures, Inc. v. Loucks Family Irrevocable Trust,* 144 Idaho 233, 237, 159 P.3d 870, 874 (2007)).

III. ANALYSIS OF THE MOTION TO DISMISS (MOTION FOR SUMMARY JUDGMENT).

A. Count One of the Amended Complaint Must Be Dismissed Because a Contractual Relationship Does Not Exist Between the Ormeshers and the Citi/Fannie Mae under the HAMP/HAFA Programs.

Citi and Fannie Mae have moved to dismiss Ormeshers' first count regarding breach of contract and breach of good faith and fair dealing. Memorandum in Support of Motion to Dismiss, p. 5. They argue Ormeshers were ineligible for HAMP or HAFA

programs as a result of their loan originating after January 1, 2009. *Id.* (citing Request for Judicial Notice in Support of Motion to Dismiss First Amended Complaint, Exhibits A and B). Further, they argue that no breach of contract or good faith occurred because the Ormeshers "[d]id not have a contract with Citi regarding a HAMP loan modification." *Id.,* at p. 6. Citi and Fannie Mae assert that if no short sale agreement existed with Citi, then there could similarly be no contract with Fannie Mae as it had no ability to convey the Deed of Trust. *Id.* Finally, Citi and Fannie Mae allege "Idaho law is clear that there is no private right of action to enforce HAMP guidelines." *Id.* (citing *Gilbert v. Bank of America Corp.*, 2012 WL 4470897, at *5 (D. Idaho 2012); *Hoffman v. Bank of America*, 2010 WL 2635773, at *3 (N.D. Cal. 2010).

In response, the Ormeshers argue that they were eligible for HAMP or HAFA and that Citi's assertion of the qualification date for the program rests on a disputed fact. Response to Northwest Trustee Services, Inc.'s Motion to Dismiss and Joinder in Defendant CitiMortgage, Inc.'s and Federal National Mortgage Association's Motion to Dismiss, pp. 3-4. In support of their position, the Ormeshers point to testimony in the record that states there was a modification in the program guidelines regarding eligibility dates. *Id.* (citing Expanded Affidavit of Jon Dobson, ¶¶ 34-35). The eligibility dates for HAMP and HAFA were allegedly modified by "[a] circular letter from the Department of the Treasury." *Id.* No copy of that letter or indication of the actual modified dates has been provided to this Court.

Every contract in Idaho has an implied covenant of good faith and fair dealing. *See Silicon Int'l Ore, LLC v. Monsanto Co.*, 155 Idaho 538, 314 P.3d 593, 607 (2013). Under the implied covenant, it "[r]equires the parties to perform, in good faith, the obligations *required by their agreement*. The implied covenant of good faith and fair

dealing does not create independent obligations, it merely applies to contractual obligations. Thus, before a party can breach this covenant there must be a contract." *Id.* (internal citations omitted) (emphasis in original). Therefore, if a contractual relationship existed between one of the defendants in this case and the Ormeshers, both parties are obligated to carry out that contract in good faith.

This Court has previously found that no contract existed between Fannie Mae and the Ormeshers. *See* Kootenai County District Court Case No. CV 2013 8096 Memorandum Decision and Order: 1) Denying Defendants Ormeshers' Motion to Consolidate; 2) Denying Plaintiff Fannie Mae's Motion for Judgment on the Pleadings, and 3) Granting in Part Plaintiff Fannie Mae's Motion to Dismiss Defendants' Affirmative Defenses and Counterclaims, p. 21. In that case, the Court found that there could be no breach of the covenant of good faith and fair dealing between Fannie Mae and the Ormeshers because:

> Fannie Mae had not yet entered into a contract with the Ormeshers at the time the disputed property was foreclosed upon. Fannie Mae had not yet agreed to accept the Ormershers for a HAMP Short Sale, and had not agreed to accept any offers for the purchase of the disputed property to satisfy the amount owing by the Ormeshers on the then existing mortgage. Without a contractual relationship, there can be no claim for a breach of good faith and fair dealing. As such, the Court dismisses Ormeshers' affirmative defense of "breach of covenant of good faith and fair dealing."

Id. Thus, merely contemplating a future agreement, but not actually entering into a contract, does not imply a covenant of good faith and fair dealing and the first count must be dismissed with regards to defendant Fannie Mae.

Similarly, the only existing contract between Citi and the Ormeshers was the home mortgage. *See* Expanded Affidavit of Jon Dobson, p. 2, ¶ 8. The home mortgage obtained by the Ormeshers was originally issued by Sydion Financial, LLC and secured on May 21, 2009, but was assigned to Citi "[u]nder Kootenai County

Instrument No. 2385657000 recorded November 28, 2012 which also took on the duties of a mortgage loan servicer . . . under Fannie Mae's Home Affordable Mortgage Program . . .which involves the Home Affordable Foreclosure Alternatives program." *Id.* However, according to the Expanded Affidavit of Jon Dobson, the Ormeshers declined the trial loan modification offered by Citi. *Id.,* at p. 4 ¶¶ 18 , 19. While Dobson attests that the trial loan modification was not offered in good faith, the lack of good faith in the offer does not modify the existing contractual relationship between Citi and the Ormeshers because it was not accepted. Summary judgment must be granted in favor of Citi and Fannie Mae, and Ormeshers' Count One is dismissed.

B. Count Two of the Amended Complaint Must Be Dismissed Because There Was No Tortious Interference With A Prospective Economic Advantage.

Citi and Fannie Mae again argue that the Ormeshers could not have qualified for HAMP because of the origin date of their loan, as well as reasserting that there is no private right of action to enforce HAMP. Memorandum in Support of Motion to Dismiss, p. 7. Additionally, they argue that the Ormeshers have not adequately established the elements required for tortious interference with a prospective economic advantage. *Id.*, pp. 7-8. Northwest has joined in the present motion with regard to the tortious interference claim and adopts the argument of the other defendants. Defendant Northwest Trustee Services, Inc.'s Memorandum in Support of Motion to Dismiss and Joinder in Defendant CitiMortgage, Inc.'s and Federal National Mortgage Association's Motion to Dismiss, p. 2.

The Ormeshers have not specifically responded to the arguments made by these defendants regarding the tort of tortious interference with a prospective economic advantage. Neither have Ormeshers responded to the argument that no private right of action exists to enforce HAMP guidelines. As discussed above, the Ormeshers have

provided testimony that contradicts the assertion that only loans originating after January 1, 2009, are eligible for HAMP.

Here, the elements of tortious interference with a prospective economic advantage have not been established. The required elements are:

> (1) the existence of a valid economic expectancy, (2) knowledge of the expectancy on the part of the interferer, (3) intentional interference inducing termination of the expectancy, (4) the interference was wrongful by some measure beyond the fact of the interference itself, and (5) resulting damage to the plaintiff whose expectancy has been disrupted.

Cantwell v. City of Boise, 146 Idaho 127, 138, 191 P.3d 205, 216 (2008). The Idaho Supreme Court noted that, "[i]n a recent case, this Court denied a claim for tortious interference with contract because the plaintiff failed to establish the alleged interferer was a third party to the contractual relationship." *Id.* "The actions of an agent are the actions of the corporation." *Id.* (citing *Ostrander v. Farm Bureau Mut. Ins. Co. of Idaho*, 123 Idaho 650, 654, 851 P.2d 946, 950 (1993)). A general rule exists "[t]hat a party cannot tortiously interfere with its own contract." *BECO Const. Co. v. J-U-B Engineers, Inc.*, 145 Idaho 719, 724, 184 P.3d 844, 849 (2008). Thus, for there to be tortious interference with a prospective economic advantage there must be a contract and a third party interferer.

In this case, there cannot have been tortious interference by either Citi or Fannie Mae. As this Court has previously found in Kootenai County District Court Case No. CV 2013 8096, there was no contract between the Ormeshers and Fannie Mae. *See* Kootenai County District Court Case No. CV 2013 8096 Memorandum Decision and Order: 1) Denying Defendants Ormeshers' Motion to Consolidate; 2) Denying Plaintiff Fannie Mae's Motion for Judgment on the Pleadings, and 3) Granting in Part and Denying in Part Plaintiff Fannie Mae's Motion to Dismiss Defendants' Affirmative

Defenses and Counterclaims, p. 21. If there is no contract between Fannie Mae and the Ormeshers, it is not possible for Citi to have interfered. Further, it cannot be said that there was interference with the contract between Citi and the Ormershers because the named employees of Citi in the record are the agents of the corporation, and a general rule exists that a party cannot interfere with its own contract.

Therefore, the motion for summary judgment must be granted in favor of Citi and Fannie Mae (as well as Northwest) regarding tortious interference for both Citi and Fannie Mae, and Ormeshers' Count Two is dismissed as to all defendants.

C. Count Three of the Amended Complaint Must Be Dismissed Because Ormeshers Failed to Plead the Claim of Fraud With Particularity.

Citi and Fannie Mae argue the Amended Complaint fails to plead the cause of action for fraud with particularity. Memorandum in Support of Motion to Dismiss, p. 10. Specifically, they claim "Plaintiffs fail to allege how the employees' actions were intended to cause harm or how their actions were material as to cause of injury to Plaintiffs." *Id.* In the Amended Complaint, the plaintiffs allege their fraud claim as follows:

> 123. Citi represented that it would participate in both the HAMP and HAFA programs for Plaintiffs' benefit, which also provided a benefit to City.
>
> 124. The employees of Citi, Aisha Barrett and Thomas Bogusky committed fraud as outlined above and by pretending that they did not have a Third Party Authorization in their file when they did, for which Citi is vicariously liable under the doctrine of respondeat superior because Citi benefited from that fraud by foreclosing on Plaintiffs' property and was able to Purchase Plaintiffs [sic] property with a credit bid at the foreclosure sale according to the allegations in the Trustee's Deed, ¶ (f).
>
> 125. The fraud by the employees of Citi caused injury and damage to Plaintiffs.
>
> 126. As a result of the fraud by these Defendants, Plaintiffs have suffered injury, damages and losses from the loss of the buyers in the HAFA Short Sale, and the tax advantage debt forgiveness in an amount that will be proven at trial but which cannot be pled in the ad danmun clause[.]

Amended Complaint, p. 24 ¶¶ 123-26. Citi and Fannie Mae claim this language does not demonstrate how "Defendant is liable for fraud when its employees were simply trying to verify authorization in order to communicate with a third party representing Plaintiffs." Memorandum in Support of Motion to Dismiss, p. 10. The Ormeshers do not respond to these claims.

Idaho Rule of Civil Procedure 9(b) requires that fraud be pled with particularity. IRCP 9(b). "The party alleging fraud must support the existence of each of the elements of the cause of action for fraud by pleading with particularity the factual circumstances constituting fraud." *G & M Farms v. Funk Irrigation Co.,* 119 Idaho 514, 518, 808 P.2d 851, 855 (1991). A party must establish nine elements to prove a claim of fraud: (1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) his intent that it should be acted on by the person and in the manner reasonably contemplated; (6) the hearer's ignorance of its falsity; (7) his reliance on the truth; (8) his right to rely thereon; (9) his consequent and proximate injury. *Dengler v. Hazel Blessinger Family Trust*, 141 Idaho 123, 127, 106 P.3d 449, 453 (2005) (citing *Samuel v. Hepworth, Nungester & Lezamiz, Inc.,* 134 Idaho 84, 89, 996 P.2d 303, 308 (2000)).

The Court dismisses the fraud claim in this case. The Ormeshers simply do not plead that any false representations by the defendants or their agents were relied upon by the plaintiffs. Rather, they plead that employees of Citi were "pretending that they did not have a Third Party Authorization in their file when they did". The Ormeshers provided the Third Party Authorization to Citi. As established by the Affidavit of Jon Dobson:

> Commencing September 23, 2013, employees of CITIMORTGAGE, including Thomas Bogusky and Aisha Barrett informed personnel from my

> office that they did not have a copy a Third Party Authorization from the Borrowers so that they refused to discuss the status of the Borrowers HAFA Short Sale. **An additional copy of said authorization was immediately faxed over to them**, which document had been [in] the CITIMORTGAGE file for over 60 days and other CITIMORTGAGE employees had acted upon that authorization received previously in order to communicate with personnel from my office. . . .

Affidavit of Jon Dobson, p. 4 ¶ 26 (emphasis added). To establish a claim of fraud, the Ormeshers needed to have been ignorant of the falsity of a claim. The Ormeshers were not ignorant of any false statements made by Citi or their agents about the Third Party Authorization. Having failed to satisfy each of the elements of fraud, the fraud claim is rendered factually defective.

As such, the Court grants summary judgment on this issue and dismisses the Ormeshers' fraud claim in Count Three.

D. Count Four of the Amended Complaint Must Be Dismissed Because the Ormeshers Have Failed to Show Any Negligent Conduct on the Part of Citi in the Supervision of its Employees.

In the Amended Complaint, Ormeshers allege negligent supervision as follows:

> 129. Citi was aware of the acts of omissions of its employees.
>
> 130. Citi was negligent in supervising its employees and negligent in preventing them from lying to representatives of Plaintiffs.
>
> 131. City has a duty to prevent its employees from committing fraud and lying to its customers such as applicants for Fannie Mae sponsored debt relief programs.
>
> 132. Citi's failure to properly supervise its employees was [a] failure to grant that postponement of the September 27, 2013 foreclosure caused Plaintiffs to incur injury, losses and damages in an amount that will be proven at trial but which cannot be pled in the ad danmun clause.

Amended Complaint, p. 25 ¶¶ 129-32. In response, Citi claims Ormeshers cannot prove that the employees' conduct was tortious. Memorandum in Support of Motion to Dismiss, p .12. Citi contends its employees had duties under federal law to protect the

financial privacy of its borrowers and prevent the disclosure of protected information to unauthorized third parties. *Id.* As such, Citi maintains that "[s]ince Plaintiffs' allegations do not and cannot establish tortious conduct by the Citi employees, Plaintiffs cannot establish the foreseeability of the conduct." *Id.* Ormeshers do not respond to these claims.

"Negligence requires the [Ormeshers] to show that [Citi] owed them a legal duty to conform to a certain standard of conduct; a breach of that duty; a causal connection between [Citi]'s allegedly negligent conduct and [the Ormeshers'] injury; and damages." *Podolan v. Idaho Legal Aid Servs., Inc.*, 123 Idaho 937, 945, 854 P.2d 280, 288 (Ct. App. 1993) (citing *Black Canyon Racquetball v. First National Bank,* 119 Idaho 171, 175–76, 804 P.2d 900, 904 (1991)). A duty arises in the setting of negligent supervision based on the supervisor's special relationship with the supervised individual, not the injured party. 123 Idaho 937, 945-46, 854 P.2d 280, 288-89 (citing *Sterling v. Bloom,* 111 Idaho 211, 225, 723 P.2d 755, 769 (1986); *Litchfield v. Nelson,* 122 Idaho 416, 420, 835 P.2d 651, 655 (Ct. App. 1992)). "The duty requires the supervisor who knows of the supervisee's dangerous propensities to control the supervisee so he will not injure third persons." *Id.* The RESTATEMENT (SECOND) OF TORTS § 319 has been applied by the Idaho Supreme Court to cases of negligent supervision. *Sterling,* 111 Idaho 211, 226, 723 P.2d 755, 770. It provides: "One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm." RESTATEMENT (SECOND) OF TORTS § 319 (1965). The Idaho Supreme Court has expanded negligent supervision to cases beyond those where the injury results from bodily harm.

Oppenheimer Industries, Inc. v. Johnson Cattle Co., Inc., 112 Idaho 423, 431, 732 P.2d 661, 669 (1986). In *Oppenheimer Industries,* the Idaho Supreme Court imputed negligence of a brand inspector to the State Brand Board for property loss that occurred when stolen cattle was allowed to be sold because the state deputy brand inspector had inspected the cattle prior to the sale and noticed two brands on the cattle and the state deputy brand inspector had the authority and duty to insure that the brand inspector had not fraudulently rebranded someone else's cattle. *Id.*

In this case, there is no evidence that Citi should have known or should have likely known that any employees were allegedly "committing fraud and lying" as alleged by the Ormeshers in the Amended Complaint. *See* Amended Complaint, p. 24 ¶ 131. There is no evidence that the employees Ormeshers accuse of lying and committing fraud had ever been the subject of any disciplinary proceeding, that they had been accused of conduct like this in the past, or that Citi should have known of their actions. There is no evidence that any of their work performance ever created a cause for concern by their supervisors. There is no evidence that any supervisor at Citi knew any past conduct by the supervisees could injure a third party.

As stated above, the allegation of fraud has not been established by the Ormeshers. But even if it had, Ormeshers have failed to show any negligent conduct on the part of Citi in the supervision of its employees. As such, the Court grants summary judgment on this issue, dismissing Count Four, the negligent supervision of employees claim.

E. Count Five of the Amended Complaint Must be Dismissed Because Promissory Estoppel is Inapplicable.

Citi argues that the claim of promissory estoppel should be dismissed. Memorandum in Support of Motion to Dismiss, p. 13. Specifically, Citi and Fannie Mae

again argue that the Ormeshers did not qualify for HAMP and that there is no private right of action to enforce HAMP provision. *Id.* They argue that the only alleged promise in this case was "[t]hat Citi made a promise to comply with Fannie Mae's regulations." *Id.*

The Ormeshers have not directly responded to the arguments made by Citi. As mentioned above, there is a genuine dispute as to whether the Ormeshers could have qualified for HAMP.

Here, there is no valid claim for promissory estoppel. As this Court previously wrote in its order regarding the post-foreclosure proceedings in Kootenai County District Case No. CV 2013 8096 involving the same parties:

> "The doctrine of promissory estoppel can be invoked when '[a] promise which the promisor should reasonably expect to induce action or forebearance on the part of the promisee or a third person and which does induce such action or forebearance is binding if injustice can be avoided only by enforcement of the promise.'" *Bank of Commerce v. Jefferson Enterprises, LLC,* 154 Idaho 824, 835, 303 P.3d 183, 194(2013) (citing *Smith v. Boise Kenworth Sales, Inc.,* 102 Idaho 63, 67–68, 625 P.2d 417, 421–22 (1981) (quoting Restatement (Second) of Contracts § 90(1) (1973)). "To prevail on a promissory estoppel claim, a party must prove the existence of all four elements of promissory estoppel: (1) reliance upon a specific promise; (2) substantial economic loss to the promisee as a result of such reliance; (3) the loss to the promisee was or should have been foreseeable by the promisor; and (4) the promisee's reliance on the promise must have been reasonable." *Zollinger v. Carrol,* 137 Idaho 397, 399, 49 P.3d 402, 404 (2002) (citing *Black Canyon Racquetball Club, Inc. v. Idaho First Nat'l Bank, N.A.,* 119 Idaho 171, 182, 804 P.2d 900, 911 (1991)).
>
> There is no evidence before the Court that the Ormeshers were specifically promised they would be accepted for a HAMP Short Sale or that the pending offers for the purchase of the disputed property would have been accepted. Rather, the evidence demonstrates Fannie Mae had not yet agreed to accept the Ormeshers for a HAMP Short Sale and had not yet agreed to accept any offers for the purchase of the disputed property to satisfy the amount owing by the Ormeshers on the then existing mortgage as the BPO had not yet been provided to Fannie Mae at the time of the trustee's sale. Without a specific promise, there can be no claim for promissory estoppel. As such, the Court dismisses Ormeshers' affirmative defense of promissory estoppel.

Kootenai County District Court Case No. CV 2013 8096, Memorandum Decision and Order: 1) Denying Defendants Ormeshers' Motion to Consolidate; 2) Denying Plaintiff Fannie Mae's Motion for Judgment on the Pleadings, and 3) Granting in Part Plaintiff Fannie Mae's Motion to Dismiss Defendants' Affirmative Defenses and Counterclaims, p. 21-22. In the instant case there is also the absence of a specific promise to allow a HAMP Short Sale or to further postpone foreclosure.

As a result, the Court dismisses Count Five regarding promissory estoppel for all defendants involved.

F. Dismissal of Count Seven for Wrongful Foreclosure Must Be Denied as the Court *Sua Sponte* Considers Affidavits Filed in Kootenai County District Court Case CV 2013 8096.

Citi and Fannie Mae contend that the Ormeshers' interest in the property was lawfully terminated at the Trustee's Sale on September 27, 2013. Memorandum in Support of Motion to Dismiss, p. 15. They maintain that the "Trustee's Deed specifies that the beneficiary (Citi) submitted the highest bid at sale and directed the vesting in Fannie Mae." Memorandum in Support of Motion to Dismiss, p. 14. The Trustee's Deed was then recorded in Kootenai County on October 4, 2013, as Instrument No. 2431444000. Request for Judicial Notice in Support of Motion to Dismiss First Amended Complaint, Exhibit G. Citi and Fannie Mae contend, "the issuance of the Trustee's Deed carries the *prima facie* showing of compliance with Idaho's non-judicial foreclosure statutes." Memorandum in Support of Motion to Dismiss, p. 14. Moreover, Citi claims that having recorded the Trustee's Deed, they can rely upon "[t]he statutory presumptions created under Idaho Code § 45-1510 [, which] support[s] dismissal of this cause of action." *Id*., at pp. 14-15. Idaho Code § 45-1510(1) provides:

> 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). Moreover, 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 October 4, 2013, as Instrument No. 2431444000. Pursuant to I.C. § 45-1510(1), that is prima facie evidence of the truth of the recitals contained in the deed and the affidavits required under I.C. § 45-1506(7). 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). The Trustee's Deed specifically provides:

> (b) After the Notice of Default was recorded, the Trustee provided a notice of trustee's sale ("Notice of Sale") giving notice of the time and place of the trustee's sale by i) mailing . . . ii) personal service and/or posting . . . and iii) by publishing in a newspaper of general circulation in

> each of the counties in which the Property is situated. Affidavits of mailing, service/posting and publication ('Affidavits") were recorded in each county where the Property is situated at least 20 days prior to the trustee's sale as Instrument No. 2413282000, 2413283000, 2413284000, 24113285000, Mortgage Records of Kootenai County, Idaho.

Request for Judicial Notice in Support of Motion to Dismiss First Amended Complaint, Exhibit G.

The Ormeshers have failed to provide the Court with evidence of a defect with the Trustee's Sale in this case. While evidence was provided in Kootenai County District Court Case No. CV 2013 8096 by way of the Affidavit of Robyn Shea, the Ormeshers have not provided that evidence in this case, nor have they asked the Court to take judicial notice of that evidence. The Affidavit of Robyn Shea provided to the Court in the instant case does not include testimony about the events that occurred at the Trustee's Sale. If the Court did not sua sponte decide to take judicial notice of the evidence provided by the Ormeshers in Kootenai County District Court Case No. CV 2013 8096, the Court would have to find in favor of Citi and Fannie Mae and dismiss Count Seven of the Amended Complaint.

However, under I.R.E. 201(c), it is within this Court's discretion to take judicial notice of the evidence from Kootenai County District Court Case No. CV 2013 8096. The Court exercises that discretion. Thus, the following analysis applies.

Citi and Fannie Mae argue that the Ormeshers cannot support a wrongful foreclosure claim. Memorandum in Support of Motion to Dismiss, p. 16. They argue that the Ormeshers have based their claim on an alleged conspiracy between Citi, Fannie Mae, and Northwest despite absence of any evidence of an agreement to accomplish an unlawful objective. *Id.,* pp. 13-14. Additionally, they argue that the alleged defects in the "[n]onjudicial foreclosure notices cannot support a claim for relief because matters subject to judicial notice establish the propriety of the notices." *Id.,* p.

14. Moreover, they argue that the conveyance of the property in question to Fannie Mae cannot contravene the Idaho Trust Deeds Act because such conveyances are supported by Idaho precedent. *Id.* (citing *Hobson v. Wells Fargo Bank, N.A.*, 2012 WL 505917 (D. Idaho 2012).

Northwest joins in the motion to dismiss Count Seven, arguing that the Ormeshers lack standing to contest the trustee's sale because the Ormeshers attended the sale in person. Defendant Northwest Trustee Services, Inc.'s Memorandum in Support of Motion to Dismiss and Joinder in Defendant CitiMortgage, Inc.'s and Federal National Mortgage Association's Motion to Dismiss, p. 6. Further, Northwest argues that any interest the Ormeshers may have had in the property was terminated after the trustee's sale. *Id.* Finally, Northwest asserts that the only way the Ormeshers can invalidate the sale of the Trustee's Deed is by showing defective notice, which they allegedly cannot do because of their own attendance at the auction. *Id.,* p. 7.

In response, Ormeshers argue that no foreclosure sale took place, effectively asserting that notice was flawed as a result. *See* Response to Northwest Trustee Services, Inc.'s Motion to Dismiss and Joinder in Defendant CitiMortgage, Inc.'s and Federal National Mortgage Association's Motion to Dismiss, p. 5. Specifically, the Ormeshers point to affidavit testimony that no cash or credit bid offer was given at the auction. *Id.* Moreover, Ormeshers argue that the defendants' "[r]eliance upon the legal doctrine of 'reversion' to circumvent the foreclosure sale process is not permitted or prescribed by the Idaho Trust Deed Act." *Id.* Any presumption of validity of a recorded trustee's deed is thus said to be a rebuttal presumption. *Id.,* pp. 6-7.

In this case, a genuine issue of material fact remains regarding the validity of the trustee's deed. As this Court noted in a related action, Kootenai County District Court

Case No. CV 2013 8096, "It is clear from the Affidavit of Robyn Shea, which was submitted to this Court on behalf of Ormeshers, that Ormeshers knew Citi initiated the foreclosure proceedings." In that action, the Court dismissed the affirmative defense of wrongful foreclosure because Citi had not been named as a party. Kootenai County District Court Case No. CV 2013 8096 Memorandum Decision and Order: 1) Denying Defendants Ormeshers' Motion to Consolidate; 2) Denying Plaintiff Fannie Mae's Motion for Judgment on the Pleadings; and 3) Granting in Part Plaintiff Fannie Mae's Motion to Dismiss Defendants' Affirmative Defenses and Counterclaims, pp. 20-21. Here, however, Citi is a named party.

Further, this Court has already recognized a potential defect in the trustee's sale. *Id.,* p. 17. Indicating that there were potential issues both with the trustee's sale and the claim that Fannie Mae was a purchaser in good faith, this Court found that:

> Fannie Mae has failed to provide this Court with any evidence that the trustee's sale complied with I.C. § 45-1506 or that it is a bona fide purchaser in good faith. The Ormeshers have filed an affidavit of Robyn Shea which states the foreclosure sale took place on September 27, 2013, at 10:00 a.m. Pacific Daylight Savings time at 451 Government Way, Coeur d'Alene Idaho, as originally scheduled. Affidavit of Robyn Shea, p. 3 ¶ 17. According to Robyn Shea, a realtor with Beutler & Associates, Century 21 in Coeur d'Alene, Idaho, who was in attendance at the foreclosure sale auction on September 27, 12013, "no cash bids [were] made and the auctioneer announced that no credit bid had been presented to him." *Id.* at pp. 1, 3 ¶¶ 1, 17-18. Moreover, Shea contends "[n]o one at the Event of September 27, 2013 offered to purchase the Subject Property on behalf of Citi by a credit bid or otherwise." *Id.* at p. 3 ¶ 20.
>
> ***
>
> The burden is on Fannie Mae to establish that I.C. § 45-1506 was complied with, and if it was not complied with, that Fannie Mae is a purchaser in good faith. The affidavit of Robyn Shea creates a genuine issue of material fact whether I.C. § 45-1506 was complied with by the original grantor. Fannie Mae has failed to provide evidence that it is a purchaser in good faith who did not have notice of the potential defect with the grantor's compliance with I.C. § 45-1506.

Id., p. 15-16. The present filings appear to suffer from the same defect in Kootenai

County District Court Case No. CV 2013 8096 in that the defendants have argued that "[t]he Trustee's Deed specifies that the beneficiary (Citi) submitted the highest bid at sale and directed the vesting in Fannie Mae." Memorandum in Support of Motion to Dismiss, p. 14. The affidavit testimony filed in Kootenai County District Court Case No. CV 2013 8096 directly conflicts with the assertion that a bid was even submitted, thus a genuine issue of material fact remains for trial. Further, a genuine question remains as to whether Fannie Mae could be a purchaser in good faith due to its alleged knowledge of the potential defect.

As such, the present motion to dismiss Count Seven regarding wrongful foreclosure must be denied.

G. The Motion to Dismiss Count Eight and Nine Are Denied Because a Permanent Injunction and Award of Attorney's Fees are Issues for Trial.

Citi and Fannie Mae argue that an affirmative or permanent injunction would be improper. Memorandum in Support of Motion to Dismiss, p. 16. Specifically, they argue "Rule 65(e)(1) of the Idaho Rules of Civil Procedure provides for injunctive relief only when the party seeking the injunction demonstrates an entitlement to the relief sought in the complaint. Further, attorney's fees are an item of costs recoverable only when a party can establish a contractual or statutory basis for their award." *Id.*

The Ormeshers have not responded to the defendants in their reply memorandum regarding Counts Eight and Nine. However, in the Amended Complaint under the eighth claim for relief, the Ormeshers stated:

> 160. Plaintiffs seek rescission, cancellation and termination of the Trustee's Deed which is either void *ab initio* or voidable for the reasons cited above.
>
> 161. Plaintiffs seek a permanent injunction and order of Court requiring Northwest, Fannie Mae and Citi to rescind the Trustee's Deed.

Amended Complaint, pp. 28-29, ¶¶ 160-61. "The decision to grant injunctive relief rests

with the sound discretion of the trial court." *Savage Lateral Ditch Water Users Ass'n v. Pulley*, 125 Idaho 237, 242, 869 P.2d 988, 992 (1984) (citing *O'Boskey v. First Fed. Savs. & Loan Ass'n,* 112 Idaho 1002, 1007, 739 P.2d 301, 305 (1987); *Harris v. Cassia County,* 106 Idaho 513, 517, 681 P.2d 988, 992 (1984)). This Court has previously found that "[t]he requirements for the issuance of a permanent injunction are 'the likelihood of substantial and immediate irreparable injury and the inadequacy of remedies at law.'" *Jacklin Land Co. v. Blue Dog RV, Inc.*, CV 2008 6742, 2009 WL 3287578 (Idaho Dist. Sept. 14, 2009) (quoting *American-Arab Anti-Discrimination Comm. V. Reno*, 70 F.3d 1045, 1066-67 (9th Cir. 1995)). Citi and Fannie Mae have cited I.R.C.P. 65(e) for the proposition that the complaint must demonstrate an entitlement to injunctive relief. Here, however, the Ormeshers have actually sought permanent injunctive relief, making Rule 65(e) inapplicable.

Additionally, in the Amended Complaint regarding the ninth claim for relief, the Ormeshers alleged:

> 163. Plaintiffs have incurred attorney fees are entitled to a [sic] recover them under I.C. § 12-120 and 121, under the doctrine of fraud, and under the Deed of Trust as the prevailing party.
> 164. Plaintiffs seek attorney fees against Northwest under the doctrine of breach of fiduciary duty in order to be made whole.
>
> 165. Plaintiffs seek attorney fees against Citi under the doctrine of fraud in order to be made whole.

Amended Complaint, p. 29, ¶¶ 163-165. Thus, Ormeshers have identified methods by which they may seek attorney fees if they are the prevailing party at trial.

Because Citi and Fannie Mae have cited no proper authority for the proposition that the entitlement for a permanent injunction must be demonstrated in the complaint and have cited to an inapplicable rule of civil procedure regarding preliminary injunctive relief, the motion to dismiss Counts Eight and Nine must be denied at this time.

H. Count Ten of the Amended Complaint Must Be Dismissed in Part Because the Plaintiffs Cannot Demonstrate the Ability to Tender Full Payment or that Full Payment was Tendered for the Mortgage Loan.

The Amended Complaint alleges that declaratory judgment should be granted as to the validity of the Trustee's Deed and asserts that:

> 169. Plaintiff tendered to Citi full payment or deemed full payment of the mortgage loan through the HAFA Short sale.
>
> 170. Plaintiffs seek a declaratory judgment as to the title to the Subject Property and to quiet title in the name of Plaintiff's for the reasons set forth above.

Amended Complaint, p. 29, ¶¶ 169-170. Thus, in the Amended Complaint the Ormeshers have appeared to *argue* that they either tendered full payment or offered to tender full payment for the subject property, entitling them to have title quieted in their name. And at this point, by citing to their Amended Complaint, all Ormeshers are doing is *arguing*. Ormeshers' Amended Complaint is signed only by their attorney, Wesley Hoyt. Ormeshers' Amended Complaint is not "verified." Thus, it has absolutely no evidentiary value at summary judgment. *Camp v. Jimenez,* 107 Idaho 878, 693 P.2d 1080 (Ct.App. 1984). And argument alone is not sufficient to survive summary judgment. *State ex rel. Department of Labor & Industries. Servs. V. Hill,* 118 Idaho 278, 796 P.2d 155 (Ct.App. 1990). At oral argument, counsel for Ormeshers argued that the Ormeshers had plead tender in paragraphs 74 and 169 of their Amended Complaint. But at this juncture, which is a motion to dismiss turned into a motion for summary judgment, mere unverified allegations are not sufficient. Ormeshers have produced no admissible evidence to create an issue of material fact as to tender. The Court notes the original Complaint filed by Ormeshers is verified, but it makes no mention of tender.

Citi and Fannie Mae have moved to dismiss Count Ten both as to the request for declaratory judgment and to quiet title. Memorandum in Support of Motion to Dismiss,

p. 16. They argue that declaratory judgment regarding the Trustee's Deed should be dismissed because "Idaho law supports the finality of a Trustee's Deed such that Plaintiffs should be barred from bringing this cause of action." *Id.,* p. 17 (directing the Court to consider the arguments made regarding wrongful foreclosure). Further, they argue that title may not be quieted in favor of the Ormeshers because Idaho law prevents title being quieted against a mortgagee without paying the debt owed. *Id.* Finally, they argue that absent an ability or willingness to tender the entire outstanding balance due on the mortgage loan, a quiet title claim cannot succeed. *Id.,* p. 18.

Here, as discussed above, there exists a genuine issue of material fact as to whether the Trustee's Deed and related sale were completed according to statutory requirements. As the Court takes judicial notice of the evidence provided by the Ormeshers in Kootenai County District Court Case No. CV 2013 8096, it is not appropriate to dismiss the claim for declaratory relief regarding the validity of the title at this time. However, there exists no genuine issue of material fact regarding the request that title be quieted in favor of the Ormeshers, and the motion to dismiss should be granted in regards to that portion of Count Ten.

"A plaintiff must allege he can and will satisfy the remaining balance on the debt obligation in order to have a court quiet title in his favor in Idaho." *Gilbert v. Bank of America Corp.*, 2012 WL 4470897, *4 (D. Idaho 2012) (citing *Trusty v. Ray*, 73 Idaho 232, 236, 249 P.2d 814, 817 (1952). "A mortgagor cannot without paying his debt quiet title as against the mortgagee . . . ." *Gerken v. Davidson Grocery Co.*, 50 Idaho 315, __, 296 P. 192 (1931). The Ormeshers have alleged in their Amended Complaint that payment was tendered through the HAFA Short Sale; however, the short sale never took place so it is impossible for the debt to have been satisfied. No ability or

willingness to satisfy the entire debt amount has been proffered by the Ormeshers.

As such, the motion to dismiss Count Ten should be granted with respect to the request to quiet title in favor of the Ormeshers, and denied as to the request for declaratory relief.

I. Count Eleven of the Amended Complaint Must be Dismissed Because Ormeshers Fail to Show Fannie Mae is Required to Supervise Citi.

In the Amended Complaint, Ormeshers allege Fannie Mae negligently supervised Citi as follows:

> 172. Fannie Mae had a duty to supervise Plaintiff's HAFA Short Sale to Plaintiffs.
>
> ***
>
> 175. Fannie Mae was negligent in failing to fulfill its duty to supervise Citi with respect to Plaintiff's HAFA Short Sale and allowed Citi and its employees to willfully defeat Plaintiff's attempts to postpone the September 27, 2013 foreclosure sale, when Fannie Mae knew Citi was not acting in good faith.
>
> ***
>
> 177. As a result of Fannie Mae's negligent supervision of Citi [sic] should be held liable to Plaintiffs for the injury, damages and losses suffered by Plaintiffs in an amount that will be proven at trial but which cannot be pled in this ad danmun clause.

Amended Complaint, pp. 29-30 ¶¶ 172, 175, 177. In response, Citi and Fannie Mae claim Fannie Mae had no duty to supervise Citi. Memorandum in Support of Motion to Dismiss, p. 18. Moreover, they contend "there is no private right to a cause of action to enforce HAMP/HAFA provisions under [the] law. *Id.* Ormeshers do not respond to these claims, nor do they provide any authority showing Fannie Mae has a duty to supervise Citi or a like entity under the HAMP/HAFA program.

"HAMP guidelines have no private right of action." *Gilbert v. Bank of Am. Corp*., No. 1:11-CV-00272-BLW, 2012 WL 4470897 (D. Idaho Sept. 26, 2012) (citing *Vida v. OneWest,* No. 2010 WL 5148473, at *3–4 (D. Or. 2010); *see also Escobedo v. Countrywide,* No. 2009 WL 4981618, at *3 (S.D. Cal. 2009)). However, even if they

did, the Ormeshers have failed to establish that Fannie Mae had a duty to supervise Citi. As stated above, "Negligence requires the [Ormeshers] to show that [Fannie Mae] owed them a legal duty to conform to a certain standard of conduct; a breach of that duty; a causal connection between [Fannie Mae]'s allegedly negligent conduct and [the Ormeshers'] injury; and damages." *Podolan v. Idaho Legal Aid Servs., Inc.*, 123 Idaho 937, 945, 854 P.2d 280, 288 (Ct. App. 1993) (citing *Black Canyon Racquetball v. First National Bank,* 119 Idaho 171, 175–76, 804 P.2d 900, 904 (1991)). A duty arises in the setting of negligent supervision based on the supervisor's special relationship with the supervised individual, not the injured party. *Id.,* at 945-46, 854 P.2d at 288-89 (citing *Sterling v. Bloom,* 111 Idaho 211, 225, 723 P.2d 755, 769 (1986); *Litchfield v. Nelson,* 122 Idaho 416, 420, 835 P.2d 651, 655 (Ct. App. 1992)). There is no evidence that Fannie Mae is a supervisor of Citi. The fact that Citi participates in the HAMP/HAFA programs, does not make it a supervised entity of Fannie Mae. Without authority to the contrary, the Court must dismiss the negligent supervision found in Count Eleven and grant Citi and Fannie Mae summary judgment on this issue.

J. Ormeshers' Count Six, Claim of Breach of Fiduciary Duty and Slander of Title Against Defendant Northwest Trustee Services, Inc, (Northwest) Must be Dismissed Because Northwest Owes No Fiduciary Duty and Ormshers Failed to Plead Requisite Elements for Slander of Title.

Count Six of the Amended Complaint is Ormeshers' claim of "Breach of Fiduciary Duty and Slander of Title" and is a claim made by Ormeshers only against defendant Northwest. Amended Complaint, pp. 26-27, ¶ 139-150. Accordingly, Citi and Fannie Mae did not address Count Six in their motion to dismiss (now motion for summary judgment). Northwest filed "Defendant Northwest Trustee Services, Inc.'s Motion to Dismiss and Joinder in Defendant Citimortgage, Inc.'s and Federal National Mortgage

Association's Motion to Dismiss" and "Defendant Northwest Trustee Services, Inc.'s Memorandum in Support of Motion to Dismiss and Joinder in Defendant Citimortgage, Inc.'s and Federal National Mortgage Association's Motion to Dismiss." Northwest claims it owes Ormeshers no fiduciary duty and claims Ormershers failed to plead the requisite elements for slander of title. Defendant Northwest Trustee Services, Inc.'s Memorandum in Support of Motion to Dismiss and Joinder in Defendant Citimortgage, Inc.'s and Federal National Mortgage Association's Motion to Dismiss, pp. 2-8. Ormeshers failed to address these claims in their "Response to Northwest Trustee Services, Inc.'s Motion to Dismiss and Joinder in Defendant Citimortgage, Inc.'s and Federal National Mortgage Associations Motion to Dismiss." This Court agrees with Northwest. "A foreclosure trustee has no fiduciary duty to the borrower, since 'a trustee in a non-judicial foreclosure is 'not a true trustee with fiduciary duties, but rather a common agent for the trustor and beneficiary.'" *Burton v. Ciountrywide Bank, FSB*, 2012 WL 976151 at *6 (D.Idaho 2012), citations omitted, Defendant Northwest Trustee Services, Inc.'s Memorandum in Support of Motion to Dismiss and Joinder in Defendant Citimortgage, Inc.'s and Federal National Mortgage Association's Motion to Dismiss, p. 3. This Court agrees with Northwest, that under *Burton*, "…[Ormeshers] cannot and have not plead any facts supporting a fiduciary duty between [Northwest], the foreclosure trustee, and [Ormeshers], and they've certainly not pled facts supporting such a rare circumstance where such a duty would exist." *Id.*, p. 4.

This Court also agrees with Northwest that Ormeshers have completely failed to allege the necessary elements to support a claim for slander of title. *Id.*, pp. 4-6.

Ormeshers' Sixth Claim for Relief of Breach of Fiduciary Duty and Slander of Title Against Northwest is Dismissed and Summary Judgment is granted on that Sixth Claim for relief.

IV. CONCLUSION.

For the reasons set forth above, the Court should grant the motion in part and deny the motion in part.

IT IS HEREBY ORDERED the motion to dismiss (now a motion for summary judgment) is GRANTED in favor of defendants Citi, Fannie Mae and Northwest, against the Ormeshers; Ormeshers' claims in Count One, Count Two, Count Three, Count Four, Count Five, Count Ten (regarding the quiet title claim) and Count Eleven of the First Amended Complaint are DISMISSED.

IT IS FURTHER ORDERED the motion to dismiss (now a motion for summary judgment) is GRANTED in favor of defendant Northwest, against the Ormeshers, and Ormeshers' Sixth Claim for Relief of Breach of Fiduciary Duty and Slander of Title Against Northwest is DISMISSED.

IT IS FURTHER ORDERED the motion to dismiss (now a motion for summary judgment) of defendants Citi, Fannie Mae and Northwest, against the Ormeshers, is DENIED as to Ormeshers' claims in Count Seven, Count Eight, Count Nine and Count Ten (regarding declaratory relief).

Entered this 30th day of July, 2014.

_____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of July, 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 #
Wesley W. Hoyt	888 865 3775	Derrick O'Neal and Lewis Stoddard	208 854 3998
Peter J. Salmon and Elisa S. Magnuson	208 412 2789		

_____
Jeanne Clausen, Deputy Clerk