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. **GORDON L. ORMESHER, JR., BILLIE JEAN ORMESHER, and John Does 1-10 as occupants of the Premises located at 202 East Foxborough Court, Hayden, ID 83835**, *Defendants*.	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**

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This case is an action for ejectment following non-judicial foreclosure of real property. This matter is before the Court on plaintiff Federal National Mortgage Association's (Fannie Mae) Motion for Judgment on the Pleadings and Motion to Dismiss Counterclaim, and defendants Ormeshers' Motion to Consolidate. Oral argument on these motions was held May 5, 2014.

In this case, Kootenai County Case CV 2013 8096, filed on November 13, 2013, plaintiff Fannie Mae seeks to eject the defendants Gordon Ormesher Jr. and Billie Jean Ormesher from real property located in Kootenai County, Idaho. Post Foreclosure Eviction Complaint for Ejectment and Restitution of Property, p. 7 ¶ VIII. Several weeks

before this instant case was filed, on September 27, 2013, Ormeshers filed a Verified Complaint in Kootenai County Case CV 2013 6956, suing Fannie Mae, Citimortgage, Inc., and Northwest Trustee Services, Inc., in which Ormeshers sought a temporary restraining order cancelling the trustee foreclosure sale scheduled on that same date, September 27, 2013. Verified Complaint, CV 2013 6956, p. 14, ¶ A. That Verified Complaint was filed by Ormeshers at 9:58 a.m., two minutes before 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. Not surprisingly, District Judge Lansing Haynes denied Ormeshers' request for a temporary restraining order, writing:

> DENIED – This file was presented to this 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 satisfy Rule 65(b) requirements for issuance of a Temporary Restraining Order.

Temporary Restraining Order, CV 2013 6956, p. 1.

On May 21, 2009, 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). 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 CITIMORTGAGE, Inc. (Citi), and recorded on November 28, 2012, under Kootenai County Instrument No. 2385657000. *Id.,* p. 2 ¶ 8.

On September 1, 2012, prior to the assignment to Citi, the Ormeshers notified Sydion Financial, LLC that Ormeshers were experiencing a financial hardship. *Id.,* p. 2 ¶ 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, the 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. 2 ¶ 11.

On July 23, 2013, Citi entered into loan modification negotiations with the Ormeshers and scheduled the foreclosure date for August 30, 2013, "offering [the defendant] 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. 3 ¶¶ 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. [The defendants] election to proceed with a HAFA [Home Affordable Foreclosure Alternative] Short Sale as an affordable alternative was pursuant to Fannie Mae regulations and the property was then listed for sale with a relator on or about September 1, 2013." *Id.,* p. 3 ¶ 19; Affidavit of Robyn Shea, p. 1, ¶ 1. The property was listed for sale on September 3, 2013, and two (2) offers were received with a purchase price of $175,000.00. Affidavit of Robyn Shea, p. 2 ¶ 3. The offers were conveyed to Citi and Fannie Mae. Affidavit of Jon Dobson, p. 3 ¶ 20. "Fannie Mae approved the application for a HAFA Short Sale of the Subject Property in early September 2013 and assigned two real estate brokers to provide their evaluation of the maker value thereof who were actively engaged in the act of determining the Broker's Price Option ("BPO") by September 27, 2013, the date of the next scheduled foreclosure sale." Affidavit of Robyn Shea, p. 2 ¶ 5. On September 9, 2013, the

defendants sent HAFA Short Sale documentation to Citi per their request. Affidavit of Jon Dobson, p. 4 ¶ 22. "As of September 26, 2013, all documents paperwork and information required of the [defendants] to qualify them for a HAMP Short Sale [had] been submitted to Fannie Mae and Citi except the BPO." Affidavit of Robyn Shea, p. 2 ¶ 7. 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." *Id*., p. 2 ¶ 8. A representative for the defendants 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 . . . ." Affidavit of Jon Dobson, p. 4 ¶ 27.

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, 2013, "no cash bids [were] made and the auctioneer announced that no credit bid had been presented to him." *Id.,* pp. 1, 3 ¶¶ 1, 17-18. Moreover, Shea further 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*., p. 3 ¶ 20.

In its "Post Foreclosure Eviction Complaint for Ejectment and Restitution of Property", Fannie Mae pleads as follows:

> On September 27, 2013, Northwest Trustee Services, Inc., pursuant to notice and Idaho Code 45-1506 conducted a trustee's sale of the property located at 2025 East Foxborough Court, Hayden, Idaho 83835. Plaintiff

> was the successful bidder at said sale and a Trustee's Deed was issued to plaintiff. A true and correct copy of the Trustee's Deed is attached hereto, and incorporated herein, as "Exhibit A."

Post Foreclosure Eviction Complaint for Ejectment and Restitution of Property, p. 6 ¶ VI. Paragraph "f" of the attached Trustee's Deed provides:

> Trustee, on September 27, 2013, at the time and place of sale fixed by the Notice of Sale or by publically proclaimed postponement, sold the Property in one parcel at public auction to the beneficiary, the highest bidder, for the credit bid sum of $397,686.71. The beneficiary then designated Grantee [First National Mortgage Association] to be the grantee under this Trustee's Deed, directing the Trustee to issue the Trustee's Deed to Grantee as grantee. . . .

Id., Exhibit A, p. 2 ¶ (f). On February 7, 2014, Fannie Mae filed the instant Motion for Judgment on the Pleadings and Motion to Dismiss Counterclaims Pursuant to I.R.C.P. 12(b)(6) and 12(c), seeking a writ of ejectment directing the Kootenai Sheriff to return possession of the disputed property to Fannie Mae and dismissing Ormeshers' counterclaims. That motion was accompanied by a "Memorandum in Support of Motion for Judgment on the Pleadings and Motion to Dismiss Counterclaims Pursuant to I.R.C.P. 12(b)(6) and 12(c)" and a "Request for Judicial Notice in Support of Plaintiff's Motion for Judgment on the Pleadings and Motion to Dismiss Counterclaims Pursuant to I.R.C.P. 12(b)(6) and 12(c)". This first request for judicial notice by Fannie Mae asked this Court to take judicial notice of a certified copy of the recorded Trustee's Deed dated October 2, 2013, and recorded on October 4, 2013, as instrument number 2431444000, in the official records of Kootenai County, Idaho. In its Memorandum in Support of Motion for Judgment on the Pleadings and Motion to Dismiss Counterclaims Pursuant to I.R.C.P. 12(b)(6) and 12(c), Fannie Mae notes the following by way of footnote:

> The Complaint in this matter contains an inaccurate factual recitation which states in paragraph VI that Plaintiff was the successful bidder when in fact, the beneficiary under the Deed of Trust was the successful bidder,

> who then designated the Plaintiff to be the Grantee under the Trustee's Deed and directed the Trustee to issue the Trustee's Deed in Plaintiff's name as Grantee. Idaho is a notice pleading state and paragraph VI of the Complaint specifically references, attaches and incorporates the Trustee's Deed which confirms in paragraph (f) that the beneficiary designated the Grantee, to be the Grantee under the Trustee's Deed.

Memorandum in Support of Motion for Judgment on the Pleadings and Motion to Dismiss Counterclaims Pursuant to I.R.C.P. 12(b)(6) and 12(c), p. 3 n. 1. Even to the present date, Fannie Mae has not filed a motion to amend its Complaint. No affidavits have been submitted by Fannie Mae in support of its position that the beneficiary under the deed of trust was the successful bidder, which then designated Fannie Mae as the grantee under that deed of trust. The Ormeshers claim the trustee's sale held on September 27, 2013, was unlawful pursuant to Idaho Code § 45-1506 and the Idaho Deed Trust Act, and as such, Fannie Mae is not entitled to possession of the disputed property. Answer and Counterclaim, pp. 1-3 ¶¶ I, VI, VII.

On April 17, 2014, Ormeshers filed an "Opposition to Motion for Judgment on the Pleadings and Opposition to Motion to Dismiss Counterclaims", and then on April 21, 2014, filed another memorandum entitled "Memorandum of Law in Support of Opposition to Motion for Judgment on the Pleadings and Opposition to Motion to Dismiss Counterclaims."

On May 1, 2014, four days before oral argument, Fannie Mae filed "Plaintiff's Reply in Support of Motion for Judgment on the Pleadings and Motion to Dismiss Counterclaims Pursuant to I.R.C.P. 12(b)(6) and 12(c)." On that same date, Fannie Mae also filed two requests for judicial notice. In Fannie Mae's "Request for Judicial Notice Regarding Plaintiff's Reply in Support of its Motion for Judgment on the Pleadings and Motion to Dismiss Counterclaims", filed at 9:41 a.m., on that date, Fannie Mae asked this Court to take judicial notice of "…U.S. Treasury Department

Supplemental Directive 09-09 Revised, dated March 26, 2010." In Fannie Mae's "Request for Judicial Notice Regarding Plaintiff's Reply in Support of its Motion for Judgment on the Pleadings and Motion to Dismiss Counterclaims", filed at 4:20 p.m., on that date, Fannie Mae asked this Court to take judicial notice of Fannie Mae's "servicing guidelines and eligibility requirements for HAMP" and "servicing guideline…that in order to be considered for HAFA, the borrower must first be evaluated and, thus, qualify for HAMP." All requests for judicial notice made by Fannie Mae are appropriate, Ormeshers have not objected to any of these requests; accordingly, all requests for judicial notice are granted.

On April 14, 2014, Ormeshers filed in this case (CV 2013 8096) "Motion to Consolidate Cases", seeking an order from this Court to consolidate this case (CV 2013 8096) with Kootenai County Case No. CV 2013 6956. On April 28, 2014, Fannie Mae filed "Plaintiff's Memorandum in Opposition to Motion to Consolidate." In the other case, CV 2013 6956, counsel for Ormeshers on April 18, 2014, filed a "Motion to Shorten Time on Motion to Consolidate" and "Notice of Hearing on Motion to Consolidate", but oddly, did not actually file a Motion to Consolidate in that case. On April 28, 2014, Northwest Trustee Services, Inc., defendant in CV 2013 6956, filed "Defendant Northwest Trustee Services, Inc.'s Memorandum in Opposition to Motion to Consolidate Cases".

II. STANDARD OF REVIEW.

A. Motion to Consolidate.

Idaho Rule of Civil Procedure 42(a) provides that when actions involving common questions of law or fact are pending before a court, the court "may" order the actions consolidated. As such, the motion is committed to the Court's discretion. Appellate review of that decision will thus be based on whether the trial court abused

that discretion. *Reuth v. State,* 103 Idaho 744, 644 P.2d 1333 (1982).

B. Motion for Judgment on the Pleadings.

Idaho Rule of Civil Procedure 12(c) governs motions for judgment on the pleadings. It provides:

> After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If on a motion for judgment on the pleadings, matters outside the pleadings 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(c).

Similarly, in considering a motion to dismiss under Idaho Rule of Civil Procedure 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 at 276, 796 P.2d at 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 at 276, 796 P.2d at 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. As such, the Court considers matters outside the pleadings and treats 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 non-moving party requires the court to draw all reasonable factual inferences in favor of the non-moving 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 ORMESHERS' MOTION TO CONSOLIDATE.

The Court is convinced Ormeshers' Motion to Consolidate must be denied. As mentioned above, the temporary restraining order Ormeshers sought in CV 2013 6956 was denied on September 27, 2013, by District Judge Lansing Haynes. That case was filed by Ormeshers and named as defendants: Citimortgage, Inc.; Northwest Trustee Services, Inc.; Sydion Financial, LLC; and First American Title Company. Fannie Mae was not named at the time the suit was filed by Ormeshers.

Following the denial of Ormeshers request for a temporary restraining order, Ormeshers *did absolutely nothing in that case*, including effectuating service on any

defendant. It wasn't until April 15, 2014, weeks after the time allowed for service on a party under I.R.C.P. 4(a)(2) had expired, when Ormeshers filed their Amended Complaint in that case, now adding Fannie Mae as a party defendant.

In that case, Citi and Fannie Mae have filed a Motion to Dismiss which is scheduled to be heard on July 24, 2014. At best, Ormeshers' motion to consolidate is premature. At worst, Ormershers' motion to consolidate is a nullity, given Ormeshers' failure to satisfy I.R.C.P. 4(a)(2).

Fannie Mae argues the present case is the post-foreclosure eviction proceeding, and the other case concerns pre-foreclosure allegations. Plaintiff's Memorandum in Opposition to Motion to Consolidate, pp. 3-4. Fannie Mae also argues consolidation of the matters may delay the present eviction proceedings. *Id.,* pp. 4-5. Fannie Mae also argues Idaho law supports the finality of the Trustee's Deed, and the Trustee's Sale terminated all interest Ormeshers had in the property, so eviction of Ormeshers should proceed quickly. *Id.,* pp. 5-6. This Court finds the present case which is a post-foreclosure eviction proceeding has insufficient common issues of fact or law as compared to the pre-foreclosure allegations of the other case. Ormeshers' motion to consolidate must be denied.

IV. ANALYSIS OF FANNIE MAE'S MOTION FOR JUDGMENT ON THE PLEADINGS.

A. Fannie Mae is Not Entitled to the Relief Requested in its Complaint Based on the Language of the Complaint as Written and the Genuine Issue of Material Fact Regarding the Trustee's Sale.

"An action for 'ejectment requires proof of (1) ownership, (2) possession by the defendants, and (3) refusal of the defendants to surrender possession." *PHH Mortg. Services Corp. v. Perreira*, 146 Idaho 631, 637, 200 P.3d 1180, 1186 (2009) (citing *Ada*

County Hwy. Dist. V. Total Success Investments, LLC, 145 Idaho 360, 369, 179 P.3d 323, 332 (2008)).

Fannie Mae claims it is the owner of record of the disputed property. Memorandum in Support of Motion for Judgment on the Pleadings and Motion to Dismiss Counterclaims Pursuant to I.R.C.P. 12(b)(6) and 12(c), pp. 3-4. It maintains it obtained title to the disputed property as the grantee for the beneficiary of record to the Trustee's Deed, following a trustee's sale on September 27, 2013. *Id.,* p. 2. The Trustee's Deed was then recorded in the deed of records for Kootenai County as Instrument No. 2431444000 on October 4, 2013. *Id.,* p. 7. Fannie Mae contends "[t]he issuance of the trustee's deed carries the *prima facie* showing of compliance by with Idaho's non-judicial foreclosure statutes. The statutory presumptions created under Idaho Code § 45-1510 entitle Plaintiff to the relief sought as a matter of law." *Id*.

In turn, Ormeshers argue Fannie Mae's claim over the disputed property is based on an invalid Trustee's Deed, which at a minimum, creates a genuine issue of material fact. Opposition to Motion for Judgment on the Pleadings and Opposition to Motion to Dismiss Counterclaims, p. 3. Ormeshers maintain that under Idaho law, if Fannie Mae does not have a valid claim of ownership over the disputed property, Fannie Mae lacks standing, and the court must dismiss its Complaint. *Id.,* p. 4. Based on the Affidavit of Robyn Shea, who was present at the September 27, 2013, trustee's sale, Ormeshers maintain the Trustee's Deed was not given in exchange for a credit bid at that time. *Id.* Ormeshers claim no bids were presented to the auctioneer at that time. *Id.* Ormeshers assert the burden is on Fannie Mae under Idaho's Deed of Trust Act to demonstrate the Trustee's Deed was given in exchange for a credit bid at a properly noticed public auction in accordance with Idaho Code § 45-1506. *Id.* A sale

that occurred otherwise would violate Idaho's Deed of Trust Act and would invalidate the sale. *Id.,* pp.3-4. Moreover, Ormeshers contend that since the Complaint is defective, as admitted by Fannie Mae in footnote 1 of its Memorandum in Support of Motion for Judgment on the Pleadings and Motion to Dismiss Counterclaims Pursuant to I.R.C.P. 12(b)(6) and 12(c), no judgment can be entered based on that pleading. *Id*., p. 4.

In response, Fannie Mae maintains that "[d]espite the erroneous statement that Plaintiff was [the] successful bidder at the Trustee's Sale as Defendants set forth on page 4 of the complaint, the complaint clearly supports a cause of action for claim of ejectment and possession." Plaintiff's Reply in Support of Motion for Judgment on the Pleadings and Motion to Dismiss, p. 7. Fannie Mae claims that under Idaho Rule of Civil Procedure 8(a)(1), the Complaint as written provides a "short and plain statement of the claim showing that the pleader is entitled to relief" and further argues that "the specific incorporation of the Trustee's Deed into and attached to the complaint, overrides any technical mis-wording such that Defendant is on notice of the basis of Plaintiff's claim." *Id.*

Idaho Rule of Civil Procedure 8 "requires a simple, concise, and direct statement fairly apprising the defendant of the claim and the grounds upon which it rests." *Farrell v. Brown*, 111 Idaho 1027, 1032, 729 P.2d 1090, 1095 (Ct. App. 1986) (citing *Conley v. Gibson,* 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957); 5 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE: *Civil* § 1202 (1969)). "Notice must be clear, definite, explicit and unambiguous. A notice is not clear unless its meaning can be apprehended without explanation or argument. However, mere irregularities or immaterial defects do not nullify notice so long as they do not mislead." *Id.* (internal

citations omitted). "Whether sufficient notice was given is a question of law where the determination turns on the construction of a written instrument. *Id.* (citing *New Pueblo Constructors, Inc. v. State,* 144 Ariz. 113, 696 P.2d 203 (1984), modified 144 Ariz. 95, 696 P.2d 185 (1985); 58 AM.JUR.2d *Notice* § 33 (1971)). "The key issue in determining the validity of a complaint is whether the adverse party is put on notice of the claims brought against it. A cause of action not raised in a party's pleadings may not be considered on summary judgment nor may it be considered for the first time on appeal." *Brown v. City of Pocatello*, 148 Idaho 802, 807, 229 P.3d 1164, 1169 (2010) (internal citations and quotations omitted).

> In this case the Complaint specifically provides as follows:
>
> > On September 27, 2013, Northwest Trustee Services, Inc., pursuant to notice and Idaho Code 45-1506 conducted a trustee's sale of the property located at 2025 East Foxborough Court, Hayden, Idaho 83835. Plaintiff was the successful bidder at said sale and a Trustee's Deed was issued to plaintiff. A true and correct copy of the Trustee's Deed is attached hereto, and incorporated herein, as "Exhibit A."

Post Foreclosure Eviction Complaint for Ejectment and Restitution of Property, p. 6 ¶ VI. In its Memorandum in Support of Motion for Judgment on the Pleadings and Motion to Dismiss Counterclaims Pursuant to I.R.C.P. 12(b)(6) and 12(c), Fannie Mae attempts to correct the misstatement in its pleading by adding a footnote that states:

> The Complaint in this matter contains an inaccurate factual recitation which states in paragraph VI that Plaintiff was the successful bidder when in fact, the beneficiary under the Deed of Trust was the successful bidder, who then designated the Plaintiff to be the Grantee under the Trustee's Deed and directed the Trustee to issue the Trustee's Deed in Plaintiff's name as Grantee. Idaho is a notice pleading state and paragraph VI of the Complaint specifically references, attaches and incorporates the Trustee's Deed which confirms in paragraph (f) that the beneficiary designated the Grantee, to be the Grantee under the Trustee's Deed.

Memorandum in Support of Motion for Judgment on the Pleadings and Motion to Dismiss Counterclaims Pursuant to I.R.C.P. 12(b)(6) and 12(c), p. 3 n. 1. By Fannie

Mae's own admission, the pleadings in this case contain false statements of fact. Fannie Mae seeks a judgment on those pleadings. Fannie Mae has made no attempt to correct those pleadings, but rather simply mentions the error by way of footnote. "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 issue before this Court turns entirely on this point of fact. As Fannie Mae's Post Foreclosure Eviction Complaint for Ejectment and Restitution of Property is written, the Court simply cannot find in favor of Fannie Mae on this issue and grant the request it seeks in its motion for judgment on the pleadings. Fannie Mae seeks judgment on the pleadings and Fannie Mae's pleadings contain an important factual error which cannot be corrected by a footnote.

Even if the pleadings were factually accurate, a genuine issue of material fact exists about whether the trustee's sale of the disputed property was conducted pursuant to I.C. § 45-1506, and whether Fannie Mae is a purchaser in good faith. Among other things, I.C. § 45-1506 requires that "[t]he sale [ ] be held on the date and at the time and place designated in the notice of sale . . . ." I.C. § 45-1506(8). "[T]he sale is final once the trustee accepts the bid as payment in full unless there are issues surrounding notice of the sale." *Spencer* v. *Jameson,* 147 Idaho 497, 504, 211 P.3d 106, 113 (2009).

However, "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. Idaho Code § 45-1510 further 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. . . in favor of a purchaser in good faith for value or any successor in interest thereof.

I.C. § 45-1510 (1). "[S]tatus as a bona fide purchaser or a purchaser in good faith, at least in the context of a nonjudicial foreclosure sale, is generally not available where a purchaser is on inquiry notice of a potential defect of statutory notice provisions. *Federal Home Loan Mortg. Corp. v. Appel*, 143 Idaho 42, 47, 137 P.3d 429, 434 (2006).

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.

Fannie Mae contends Shea's assertions do not establish "that CitiMortgage, failed to proclaim an opening bid for the sale." Plaintiff's Reply In Support of Motion for Judgment on the Pleadings, p. 4. Fannie Mae argues the affidavits of Robyn Shea and Gordon Ormesher, "coupled with the recitations in the Trustee's Deed of a credit by the

beneficiary, establish that: a trustee's sale took place regarding the Subject property on September 27, 2013; and, no bids were received at the sale after announcement of the opening bid." *Id.* Fannie Mae maintains that barring any issues surrounding the notice of the sale, the sale was final once the trustee accepted the bid as payment in full and as the successor in interest, the plaintiff is entitled to the relief it requests. *Id.*

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.

For the above stated reasons, the Court denies Fannie Mae's motion for judgment on the pleadings.

B. Ormeshers' Affirmative Defenses.

The Ormeshers' Answer and Counterclaim sets forth seven affirmative defenses: accord and satisfaction; wrongful foreclosure; breach of the covenant of good faith and fair dealings; promissory estoppel; illegality; lack of standing; and lack of jurisdiction. Answer and Counterclaim pp. 3-6 ¶¶ XII-XV. Fannie Mae maintains "all of [the affirmative defenses] take issue with the underlying foreclosure and all of [the affirmative defenses] fail to appreciate that the Trustee's Deed was only issued in the Plaintiff's name as Grantee at the specific instruction of the beneficiary, being the highest bidder at the sale." Memorandum in Support of Motion for Judgment on the Pleadings and Motion to Dismiss Counterclaim Pursuant to I.R.C.P. 12(b) and 12(c), p. 8. As such, Fannie Mae was not involved in the foreclosure of the Deed of Trust, HAFA

and/or HAMP discussions, short sale negotiations and, thus, Fannie Mae could not have violated the Idaho Uniform Commercial Code or the Idaho Deed of Trust Act. *Id.*

It does not appear that Ormeshers specifically respond to these arguments in either the Opposition to Motion for Judgment on the Pleadings and Opposition to Motion to Dismiss Counterclaim or the Memorandum of Law in Support of Opposition to Motion for Judgment on the Pleadings and Motion to Dismiss Counterclaim. However, Ormeshers do note that the plaintiff, Federal National Mortgage Association, is also known as Fannie Mae, and the material fact improperly pled in the Complaint that the plaintiff seeks to correct by way of footnote in the memorandum submitted to this Court was relied upon by the defendants in submitting their Answer and Counterclaim. Opposition to Motion for Judgment on the Pleadings and Opposition to Motion to Dismiss Counterclaims, pp. 1, 4.

Each of Ormeshers' Affirmative Defenses are discussed in turn below.

1. Accord and Satisfaction.

"Accord and satisfaction is a method of discharging a contract or cause of action, [w]hereby the parties agree to give and accept something in settlement of the claim or demand of the one against the other, and perform such agreement, the 'accord' being the agreement and the 'satisfaction' its execution or performance." *Strother v. Strother*, 136 Idaho 864, 867, 41 P.3d 750, 753 (Ct. App. 2002) (quoting *Fairchild v. Mathews,* 91 Idaho 1, 4, 415 P.2d 43, 46 (1966). *See also Holley v. Holley,* 128 Idaho 503, 507, 915 P.2d 733, 737 (Ct. App.1996)). "Since an accord and satisfaction is basically the substitution of one contract for another, the debtor must prove that the creditor 'definitely assented' to the new arrangement." *Beard v. George*, 135 Idaho 685, 689, 23 P.3d 147, 151 (2001) (citing *Nelson v. Armstrong,* 99 Idaho 422, 582 P.2d 1100

(1978)). "[T]here must be an offer in full satisfaction of the obligation, accompanied by such acts and declarations as amount to a condition that if it is accepted, it is to be in full satisfaction, and the condition must be such that the party to whom the offer is made is bound to understand that if he accepts it, he does so subject to the conditions imposed." *Nordling v. Whelchel Mines Co.,* 90 Idaho 213, 218, 409 P.2d 398, 401-02 (1965) (quoting 1 Am.Jur.2d, Accord and Satisfaction, § 1, p. 301).

Fannie Mae denies ever contracting with the Ormeshers defendants regarding a Short Sale. Plaintiff's Reply in Support of Motion for Judgment on the Pleadings and Motion to Dismiss, p. 5. Fannie Mae contends the Ormeshers' mortgage was not eligible for HAMP/HAFA programs as their loan did not originate prior to January 1, 2009. *Id.,* pp. 5-6. But even if Ormeshers had such an agreement, Fannie Mae contends "…there is no private right of action available to the Defendant under the law to enforce HAMP/HAFA." *Id.,* p. 5. In its Answer and Counterclaim, in support of its affirmative defense for accord and satisfaction, Ormeshers allege, "Plaintiff should have supported the property being sold to one of said buyer bidders which would have resolved the debt and any deficiency in Defendants' favor." Answer and Counterclaim, p. 4. However, the Affidavit of Jon Dobson, submitted to this Court by the Ormeshers, attests that the foreclosure occurred before Fannie Mae had an opportunity to obtain the BPO reports. Affidavit of Jon Dobson, p. 4 ¶ 28. Moreover, the Affidavit of Robyn Shea further provides that "[o]n September 26, 2013, all documents, paperwork and information required of the [defendants] **to qualify them for a HAMP Short Sale** [had] been submitted to Fannie Mae and Citi except the BPO." Affidavit of Robyn Shea, p. 2 ¶ 7 (emphasis added). That is evidence that the parties had not yet entered into an agreement. Fannie Mae had not yet agreed to accept the Ormeshers 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 defendants on the then-existing mortgage. As such, the Court finds in favor of Fannie Mae on this issue. Ormeshers' affirmative defense of "accord and satisfaction" must be dismissed.

2. Wrongful Foreclosure.

In Ormeshers' Answer and Counterclaim, in support of its defense of wrongful foreclosure, Ormeshers allege, "Plaintiff did not own the promissory note by indorsement [sic] at the time of the Event of September 27, 2013 it calls a foreclosure and thus did not have the right to foreclosure which violates at the UCC Act of Idaho; did not hold an assignment of Deed of Trust that was recorded in the real estate records of Kootenai County, Idaho prior to giving notice of default of the loan which is in violation of I.C. § 45-1505(1); and otherwise did not give proper notifications of trustee's sale as provided by Idaho law." Answer and Counterclaim, p. 5.

It is undisputed by the parties that Fannie Mae was not the entity that foreclosed on the disputed property. Fannie Mae maintains this position throughout its submissions to the Court. *See* Memorandum in Support of Motion for Judgment on the Pleadings and Motion to Dismiss Counterclaims Pursuant to I.R.C.P. 12(b)(6) and 12(c); Plaintiff's reply in Support of Motion for Judgment on the Pleadings and Motion to Dismiss. It is also 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. Specifically she attests:

> I asked Jon Dobson of the Boise, Idaho law firm of Brown & Patrick, who is the legal representative of the Homeowners in the HAFA Short Sale process to communicate with Citi and notify them that under Fannie Mae regulations that the Ormesher's [sic] wanted a 90 day postponement of the September 27, 2013 foreclosure and to inform them that they are required to postpone the foreclosure sale of the Subject Property until Fannie Mae has an opportunity to complete its evaluation of the offers for sale . . . .

Affidavit of Robyn Shea, p. 3 ¶ 15. Clearly Citi was the party that foreclosed on the disputed property. While Ormeshers have made a motion to consolidate this case with CV-2013-6956, in which Citi is a party, at this time they are not a party to this lawsuit. As there is no dispute that Fannie Mae did not initiate the foreclosure proceedings, the Court dismisses Ormeshers' affirmative defense of "wrongful foreclosure."

3. Breach of Covenant of Good Faith and Fair Dealing.

> In every contract there is an implied covenant of good faith and fair dealing, which requires 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.

Silicon Int'l Ore, LLC v. Monsanto Co., 155 Idaho 538, 314 P.3d 593, 607 (2013) (internal citations omitted) (emphasis in original)). As stated above, 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 Ormeshers 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."

4. Promissory Estoppel.

"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.

5. Illegality, Lack of Standing and Lack of Jurisdiction.

In Ormeshers' Answer and Counterclaim, in support of its defense of illegality, Ormeshers allege "[t]he actions of the Plaintiffs were illegal and [it] should not be permitted to profit from them." Answer and Counterclaim, p. 6. It further alleges "[b]ecause Plaintiff does not have a legal or lawful interest in the Subject Property it has no standing to maintain this lawsuit for eviction . . . . [and b]ecause Plaintiff does not

have a legal or lawful interest in the Subject Property the Court has no jurisdiction to award Plaintiff the eviction relief sought . . . ." *Id*.

As stated above, there is a genuine issue of material fact that I.C. § 45-1506 was complied with by the original grantor. Without Fannie Mae providing evidence that it is a purchaser in good faith who did not have notice of the potential defect with the grantor's compliance with Idaho Code § 45-1506, a genuine issue of material fact exists as to whether the Trustee's Deed is valid. As such, the Court denies Fannie Mae's motion on these issues.

C. Ormeshers' Counterclaims.

Fannie Mae seeks dismissal of both of Ormeshers' counterclaims. In response, Ormeshers merely argue "[t]he basic facts surrounding these counterclaims have been proven by Affidavit..." Memorandum in Support of Opposition to Motion for Judgment on the Pleadings and Motion to Dismiss Counterclaim, p. 9. Ormeshers do not direct the Court to specific facts or statements contained within the affidavits, nor do Ormeshers make specific arguments in response to Fannie Mae's claims.

Each of the Counterclaims are discussed in turn below.

1. Declaratory Judgment.

"Action for declaratory judgment may invoke either remedial or preventive relief, and may relate to a right that has been breached or is yet in dispute, or status that is undisturbed but endangered, but generally cannot be maintained unless involving some specific adversary question or contention based on existing state of facts." *Wood v. Class A. Sch. Dist. No. 25*, 78 Idaho 75, 78, 298 P.2d 383, 385 (1956) (citing *State ex rel. Miller v. State Board of Education*, 56 Idaho 210, syl. 5, 52 P.2d 141 (1935); *Ayers v. General Hospital*, 67 Idaho 430, 182 P.2d 958 (1947)). A "court may refuse to render

or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding." I.C. § 10-1206. "This act is declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations, and is to be liberally construed and administered." I.C. § 10-1212.

Ormeshers seek an order declaring the September 27, 2013, Trustee's Sale wrongful and the Trustee's Deed subsequently void to pass title. Answer and Counterclaim, p. 8 ¶ 10. Ormeshers base this request on the misstatement of fact by Fannie Mae in its Complaint that it submitted a credit bid, and alleges Fannie Mae was not entitled to make a credit bid. As Fannie Mae has mentioned by way of footnote in its Memorandum in Support of Motion for Judgment on the Pleadings and Motion to Dismiss Counterclaims Pursuant to I.R.C.P. 12(b)(6) and 12(c) that it did not make a credit bid, but was rather made the grantee of the Trustee's Deed after a credit bid was submitted by the grantor, it is unnecessary for the Court to address whether Fannie Mae could have submitted a credit bid.

As stated above there is a genuine issue of material fact that I.C. § 45-1506 was complied with by the original grantor. Without Fannie Mae providing 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, a genuine issue of material fact exists as to whether the Trustee's Deed is valid. Fannie Mae requests this Court dismiss the Ormeshers' request for declaratory judgment that the Trustee's Deed is void. Without more information, the Court is unable to do so at this time. As such, the Court must deny Fannie Mae's motion on this issue.

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2. Breach of Contract, Specific Performance and Damages.

Ormeshers' second counterclaim is a restatement of its affirmative defense for breach of the implied covenant of good faith and fair dealings. Answer and Counterclaim, p. 8 ¶ 14. It alleges that the parties had an agreement to sell the disputed property via HAFA Short Sale. *Id*. at p. 8 ¶ 12. As stated above, based on the evidence submitted by the defendants, Fannie Mae had not yet agreed to accept the defendants 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 Ormeshers on the then-existing mortgage. The Affidavit of Jon Dobson, submitted to this Court by the Ormeshers, attests that the foreclosure occurred before Fannie Mae had an opportunity to obtain the BPO reports. Affidavit of Jon Dobson, p. 4 ¶ 28. Moreover, the Affidavit of Robyn Shea further provides that "[o]n September 26, 2013, all documents, paperwork and information required of the [defendants] **to qualify them for a HAMP Short Sale** [had] been submitted to Fannie Mae and Citi except the BPO." Affidavit of Robyn Shea, p. 2 ¶ 7 (emphasis added). Without a contractual relationship, there can be no claim for a breach of contract.

For the above stated reasons, the Court grants Fannie Mae's motion on this issue and dismisses Ormeshers' second counterclaim for Breach of Contract, Specific Performance and Damages.

V. CONCLUSION AND ORDER.

For the reasons stated above, the Court denies Fannie Mae's motion for judgment on the pleadings and grants in part and denies in part Fannie Mae's motion to dismiss counterclaims.

IT IS HEREBY ORDERED Ormeshers' motion to consolidate is DENIED.

IT IS FURTHER ORDERED Fannie Mae's motion for judgment on the pleadings is

DENIED.

IT IS FURTHER ORDERED Fannie Mae's motion to dismiss Ormeshers' affirmative defenses of: "accord and satisfaction"; "wrongful foreclosure"; "breach of the covenant of good faith and fair dealings"; "promissory estoppel" is GRANTED.

IT IS FURTHER ORDERED Fannie Mae's motion to dismiss Ormeshers' affirmative defense of: "illegality; lack of standing; and lack of jurisdiction" is DENIED.

IT IS FURTHER ORDERED Fannie Mae's motion to dismiss Ormeshers' counterclaim of "breach of the covenant of good faith and fair dealings" is GRANTED.

IT IS FURTHER ORDERED Fannie Mae's motion to dismiss Ormeshers' counterclaim of "declaratory judgment" is DENIED.

Entered this 20th day of May, 2014.

_____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of May, 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 #
Elisa S Magnuson/ Peter J. Salmon	619-326-2430	Wesley W Hoyt	888-865-3775
Derrick O'Neal/Lewis Stoddard	208 854-3998		

_____
Jeanne Clausen, Deputy Clerk